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Case No: 2003 Folio 894 (Admrlty); Case No: 2004 Folio 104 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT and ADMIRALTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
27th May 2004

B e f o r e :
THE HONOURABLE MR. JUSTICE MOORE-BICK

Between:
(1) ATLANSKA PLOVIDBA
(2) ATLANTIC CONBULK SHIPPING COMPANY

Claimants

- and -

CONSIGNACIONES ASTURIANAS S.A.
Defendant

Mr. Nicholas Hamblen Q.C. and Mr. Julian Kenny (instructed by Holman Fenwick & Willan) for the claimants
Mr. Richard Lord Q.C. (instructed by Thomas Cooper & Stibbard) for the defendant

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HTML VERSION OF JUDGMENT

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Mr. Justice Moore-Bick :

There are two applications before the court in related proceedings arising out of events that occurred in Spain in the autumn of 2003. The first is an application by the defendant in Admiralty action 2003 Folio 894 for an order setting aside service or alternatively staying the proceedings on the grounds that the court does not have jurisdiction to entertain the claim. The second is an application by the claimant under section 18 of the Arbitration Act 1996 for the appointment of an arbitrator to determine the dispute that has arisen between the parties.

Both sets of proceedings arise out of the carriage of a Gottwald crane from Gijon to Aviles on board the vessel Lapad in September 2003. On 19th September Anglo Adriatic Shipping Services Ltd acting as agents for the first claimant entered into a contract with the defendant for the carriage of the crane on the terms of a 'Conelinebooking' booking note with some additional clauses. The printed terms of the booking note contained an 'Identity of Carrier' clause which provided that the contract was to take effect with the owner of the vessel and for that reason the second claimant was joined as a party to the proceedings. However, for present purposes nothing turns on the correct identity of the carrier and, having explained why both claimants are involved in the proceedings, I shall in future simply refer to them as "the claimants" without distinguishing between them.

The crane was loaded on board the vessel at Gijon on 29th September for carriage on deck to Aviles. A bill of lading was issued recording that the cargo had been shipped on deck without liability for loss or damage howsoever caused. The vessel reached Aviles on 30th September but unfortunately in the course of discharge the crane toppled from the deck of the Lapad into the harbour. As a result the driver of the crane was killed and damage was caused to another vessel, the Aramo, as well as to the Lapad herself. The crane caused an obstruction in the harbour which prevented both vessels leaving Aviles on schedule.

Immediately following the accident a judicial investigation was opened in Aviles in accordance with Spanish criminal procedure to enquire into the circumstances in which it had occurred with a view to considering whether there were grounds for a prosecution. On 6th October 2003 the defendant applied for the master of the Lapad to be interviewed by the investigating judge and as a result it became involved in the proceedings. On 7th October the master indicated that he would be represented for the purposes of the

investigation and the claimants thereby became involved in it as well.
It will be for the investigating judge to decide whether there is a case to go to trial. If he is satisfied that there is, he will direct that a trial take place. At any such trial the judge will be primarily concerned to decide whether the accused committed the offences with which they are charged, but he will also have jurisdiction to determine civil claims against anyone found to have committed a criminal offence insofar as those claims arise out of the facts supporting the convictions. To that extent, therefore, the trial will have a hybrid character.
With that in mind, perhaps, the claimants started proceedings in the Admiralty Court on 10th October 2003 seeking declarations that they were not liable to the defendants, or indeed anyone else, in respect of loss or damage sustained as a result of the accident. At that stage they were clearly under the impression that their relationship with the defendant was governed by the bill of lading which stated on its face that it incorporated all the terms and conditions of the booking note. Clause 3 of the terms printed on the reverse of the booking note, as modified by a typed amendment, provided for all disputes arising under it to be decided in London according to English law.
The claimants served the claim form on the defendants in Spain on the basis that the contract between them contained an exclusive jurisdiction clause in favour of the English courts. That led directly to the first of the two applications now before me. The defendant challenged the court's jurisdiction on the grounds that the general words in the bill of lading were not apt to incorporate the jurisdiction clause in the booking note and also on the grounds that the Spanish court was already seised of the same issues. At that stage it does not seem to have occurred to the defendant, any more than it had to the claimants, that the contract might be contained in the booking note rather than the bill of lading.
The booking note contained a number of additional typed clauses, one of which, clause 17, provided for any dispute arising under it to be referred to arbitration in London. On 24th December 2003 the claimants' solicitors wrote to the defendant's solicitors in the following terms:

> "Your clients' case . . . . . is that no Jurisdiction clause has been incorporated into the bill of lading. From this it must follow that, given that there are the same parties to the bill of lading and the booking note, and that in the booking note the parties have applied their mind to questions of jurisdiction, the arbitration provisions of clause 17 of the Additional Heavy Lift Clauses which form part of the booking note are incorporated into the bill of lading.
>
> Accordingly, our clients Atlanska Plovidba and Atlantic Conbulk Shipping Company hereby give notice that they refer all disputes arising under the bill of lading concerning the carriage of and damage to the Gottwald crane to arbitration in London. The arbitration clause provides for the appointment of a sole arbitrator. Our clients would be willing to agree one of the following to act as sole arbitrator . . . . . .

By this notice our clients call upon Consignaciones Asturianas S.A. to join in the appointment of a sole arbitrator within twenty eight days, failing which our clients will make the necessary application to court under section 18 Arbitration Act 1996 for the appointment of a sole arbitrator."

On 21st January 2004 the defendant's solicitors replied as follows:

"We refer to your message purporting to claim arbitration in relation to the matters involved in the above court proceedings [i.e. 2003 Folio 894]. Please be advised that our clients do not consider that there is any valid arbitration agreement between our respective clients and we would ask you to explain on what basis your clients consider there is such an agreement. . . . . . "

That led to the second of the two applications now before me, namely, the claimants' application under section 18 of the Arbitration Act 1996 for the appointment of an arbitrator.

The defendant's application to set aside service of the Admiralty proceedings

It is convenient to deal first with the defendant's application to set aside service of the claim form in claim 2003 Folio 894. It is now recognised by both parties that their respective rights and obligations in relation to the carriage of the crane are governed by the booking note, not the bill of lading, in accordance with the principles set out in President of India v Metcalfe Shipping Co Ltd (The 'Dunelmia') [1970] 1 Q.B. 289. Although printed clause 3 of the booking note provides for disputes to be decided in London in accordance with English law, that is subject to the agreement to arbitrate contained in additional clause 17. Mr. Hamblen Q.C. therefore very properly accepted that there is no agreement between the parties to submit to the jurisdiction of the English courts and that since the defendant is domiciled in Spain, service must be set aside. The defendant's application must therefore succeed.

The claimants' application for the appointment of an arbitrator

(a) Jurisdiction

Section 18 of the Arbitration Act 1996 provides as follows:

"(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. . . . .

(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.

(3) Those powers are — . . . . . to make any necessary appointments itself."

It is clear that the court's jurisdiction to exercise its powers under section 18 depends on two things: a failure of the contractual procedure for the appointment of the tribunal and the absence of agreement between the parties on the steps to be taken as a result. Mr. Lord Q.C. submitted that in the present case the first of those requirements had not been satisfied because at

the time when the arbitration claim form was issued the claimants had not given an effective notice of arbitration so that the procedure for appointing the arbitrator had not been set in motion. In the event his clients decided not to press that point, but, since it was fully argued on both sides and since it raises some potentially important questions, I think it right to express my view on it.

It goes without saying that the first thing of which the court must be satisfied on an application of this kind is that the parties have entered into an arbitration agreement falling within the scope of the Act. Clause 17 of the booking note read as follows:

> "Any dispute arising under this Booking Note to be referred to Arbitration in London according to Arbitration Act 1979."

Since the defendant itself relied on the fact that the contract for the carriage of the crane was contained in or evidenced by the booking note in support of its application to set aside service of the Admiralty proceedings, it is surprising having regard to the terms of clause 17 that the existence of an arbitration agreement between the parties was not conceded. Nonetheless, it was not. However, Mr. Lord did not feel able to advance any submission to the contrary and I have no hesitation in holding that the clause contains an agreement in writing within the terms of section 5 of the Arbitration Act 1996 to refer disputes arising under the contract to arbitration in London.

By virtue of section 15(3) of the Act, where the parties have not agreed as to the number of arbitrators the tribunal is to consist of a sole arbitrator and in such a case the parties are required by section 16(3) to make a joint appointment of an arbitrator not later than 28 days after the service of a request in writing by either party to do so. The next question to be considered, therefore, is whether the claimants made any such request, and if so, when.

Mr. Hamblen submitted that the claimants' solicitors' letter of 24th December 2003 was sufficient to satisfy the requirements of section 16(3). Mr. Lord, however, submitted that it was not because it referred to disputes arising under the bill of lading, whereas in fact the dispute arose under the booking note.

Section 16 refers simply to "a request in writing to do so", that is, to join in the appointment of an arbitrator, and similar language is to be found in section 14 of the Act which deals with the commencement of arbitration. Although the parties are free to agree when arbitral proceedings are to be regarded as having been commenced, and therefore what formalities are to be observed for that purpose, in the absence of any such agreement all that is required in a case such as the present is a notice in writing requiring the other party to agree to the appointment of an arbitrator in respect of the matter in dispute: see section 14. Arbitration is widely used by commercial parties, often acting without the benefit of legal advice, and there are good reasons, therefore, for concentrating on the substance of their communications rather than the form. If a notice of arbitration is to be effective, it must

identify the dispute to which it relates with sufficient particularity and must also make it clear that the person giving it is intending to refer the dispute to arbitration, not merely threatening to do so if his demands are not met. Apart from that, however, I see no need for any further requirements. Whether any particular document meets those requirements will depend on its terms which must be understood in the context in which it was written. The weight of authority supports a broad and flexible approach to this question: see Vosnoc Ltd v Trans Global Projects Ltd [1998] 1 W.L.R. 101, Allianz Versicherungs-Aktiengesellschaft v Fortuna Inc. (The 'Baltic Universal') [1999] 1 W.L.R. 2117, Charles M. Willie & Co. (Shipping) Ltd v Ocean Laser Shipping Ltd (The 'Smaro') [1999] 1 Lloyd's Rep. 225, (all decisions on the former section 34(3)(a) of the Limitation Act 1980) and Seabridge Shipping AB v A. C. Orssleff's Efef's A/S [1999] 2 Lloyd's Rep. 685 (a decision on section 14 of the Arbitration Act 1996 itself).

At the time when the claimants' solicitors wrote their letter of 24th December 2003 there was only one dispute between the parties, namely, the dispute relating to the carriage of the crane on the Lapad from Gijon to Aviles. Mr. Lord accepted that if the claimants had written to the defendant simply saying "We call on you to agree to the appointment of an arbitrator to resolve all disputes between us arising out of the carriage of the crane on the Lapad from Gijon to Aviles" that would have been a valid notice of arbitration and also an effective notice for the purposes of section 16(3). He submitted, however, that because they purported to give notice referring to arbitration disputes arising under the bill of lading, the letter was wholly ineffective.

I fully accept that in many cases it is important when giving notice of arbitration to identify correctly the contract under which the dispute arises. For example, where disputes have arisen under two contracts concurrently a failure to do so may render the notice uncertain. However, if one party to an arbitration agreement sends a written notice to the other which makes it clear that he is seeking to invoke that agreement to determine an existing dispute between them, the court should in my view be slow to hold that it is ineffective simply because the sender has identified the wrong document as containing or evidencing their contract if the dispute is otherwise sufficiently identified. In the present case the claimants' solicitors pointed out in their letter of 24th December 2003 that the parties had applied their minds to the question of jurisdiction and had agreed in clause 17 of the booking note to refer disputes relating to the carriage of the crane to arbitration. As a result there could have been no doubt about the arbitration agreement they were seeking to invoke, nor, given the history of the matter, could there have been any doubt about which dispute they were seeking to refer. By referring to the bill of lading the solicitors were no doubt indicating that it was in their view the operative contractual document, but it is equally clear from what had gone before that they were also asserting that the dispute fell within the arbitration agreement in the booking note. In these circumstances I would hold that the letter was an effective notice to

the defendant to join in the appointment of an arbitrator to determine disputes relating to the carriage of the crane. On 21st January 2004 the defendant's solicitors declined to do so on the grounds that they did not consider there to be any valid arbitration agreement between the parties and accordingly the conditions necessary for the exercise of the court's jurisdiction were satisfied at that stage.

However, if I am wrong about that, it must follow that the court had no jurisdiction to appoint an arbitrator at the time the arbitration claim form was issued on 6th February 2004. As a result of further correspondence between them the defendant's solicitors wrote to the claimants' solicitors on 24th February making it clear that they did not consider that bill of lading to contain or evidence any contract between the parties or that any notice of arbitration had been given in respect of disputes other than those arising under the bill of lading. Accordingly, on 9th March the claimants' solicitors sent a letter by fax to the defendant's solicitors referring to arbitration all disputes arising under the booking note. No response to that letter was forthcoming.

Despite the service of that second notice of arbitration and his client's failure to respond to it, Mr. Lord submitted that the court still had no jurisdiction to exercise its powers under section 18 because the necessary conditions had not existed when the arbitration claim form was issued. In the light of the decision of the Court of Appeal in Hendry v Chartsearch [1998] CLC 1382, however, he did accept that the court could give the claimants permission to amend the arbitration claim form to rely on a ground of claim that had come into existence since it was issued and that that would cure the defect. (He also accepted that the defendant would suffer no prejudice in that event.) Given that concession, it is ironical that the terms in which the arbitration claim form was originally issued are apt to cover the present situation without the need for any amendment. That merely serves to highlight the artificiality of the defendant's stance.

The decision in Hendry v Chartsearch was based on the wide discretion to allow amendments to pleadings given by the Rules of the Supreme Court and the scope of the court's discretion under the Civil Procedure Rules is no less wide. In that case the plaintiff sought to enforce an obligation as assignee, but since the assignment had not occurred at the date of the writ, there was no cause of action then in existence on which he could rely. Although under the rules the amendment related back to the date of the writ, nothing could be done to alter the fact that at the date of the writ the events on which the plaintiff relied in support of his claim had not occurred. Nonetheless, leave was given to make the amendment on the footing that once the facts had been pleaded the court could determine the issues to which they gave rise.

In my view it is important to distinguish between the court's jurisdiction to determine issues or grant relief and the procedural requirements which must be satisfied by a claimant before he can ask the court to act. The decision in Hendry v Chartsearch reflects that distinction. It is quite true (on this

assumption) that at the time the claimants issued their arbitration claim form the court did not have the power to make the order they sought and if the application had come on for hearing before 7th April 2004 it could not have succeeded. By the time it did come on, however, events had moved on and the conditions required for the exercise of the jurisdiction had been satisfied. In my view the court could then properly grant the relief sought on the basis of the original claim form. If the claim form required amendment to ensure that it properly reflected the grounds of claim, permission to make that amendment could be given, but that was not essential to the existence of the court's jurisdiction. In the event, the claim form does not require amendment to reflect the facts on which the court is being asked to act, and therefore permission to amend is unnecessary.

(b) Discretion

Mr. Lord submitted that the court has an unfettered discretion under section 18 of the Arbitration Act to appoint or refuse to appoint an arbitrator, subject only to the need to act judicially. Certainly, section 18 itself does not lay down any principles that might limit the scope of the court's discretion (although section 19 requires it to have due regard to any agreement between the parties as to the qualifications required of the arbitrators) and in Frota Oceanica Brasileira S.A. v Steamship Mutual Underwriting Association (Bermuda) Ltd (The 'Frotanorte') [1996] 2 Lloyd's Rep. 461 the Court of Appeal held that the discretion conferred by section 10 of the former Arbitration Act 1950 was indeed unfettered. However, is it important in my view to have proper regard to the nature of the arbitral process and in particular to the greater recognition now accorded to the principle of party autonomy which is explicitly recognised for the first time in section 1(b) of the 1996 Act. Respect for this principle and the desirability of holding the parties to their agreement together provide strong grounds for exercising the court's discretion in favour of constituting the tribunal except in the small number of cases in which it can be seen that the arbitral process cannot result in a fair resolution of the dispute. In R. Durtnell and Sons Ltd v The Secretary of State for Trade and Industry [2001] 1 Lloyd's Rep. 275 Judge Toulmin C.M.G., Q.C. held, having regard to section 1 of the Act, that an application under section 18 should be refused if the court considers that it is impossible to obtain a fair resolution of the dispute by an impartial tribunal without unnecessary delay or expense. While I agree that the court should refrain from making an appointment if it is satisfied that the resulting tribunal would not be impartial or that for some other reason the proceedings could not lead to a fair resolution of the dispute, I think that the court should be slow to concern itself with questions of delay or expense. As sections 15 and 68 of the Act make clear, the parties are free to decide for themselves the constitution of the tribunal and the procedure to be followed. Sometimes this results in greater delay or expense than would be incurred if the dispute were resolved by litigation, but that does not provide sufficient grounds in my view for refusing to constitute

the tribunal. Whereas the ability to reach a fair resolution of the dispute goes to the heart of the arbitral process, delay and expense do not, unless they are so serious as to undermine that fundamental requirement.

In this context it is relevant to refer to two recent authorities in which the court has had regard to the particular nature of international arbitration agreements when considering whether to grant an injunction to restrain proceedings abroad. In Toepfer International G.m.b.H. v Société Cargill France [1997] 2 Lloyd's Rep. 98 Colman J. held that when considering whether to grant such an injunction in support of an agreement to arbitrate the court should not have regard to any matters other than those that would provide grounds for refusing a stay under what is now section 9 of the 1996 Act. That view was endorsed by David Steel J. in Welex A.G. v Rosa Maritime Ltd (The 'Epsilon Rosa') (No. 2) [2002] 2 Lloyd's Rep. 701. Mr. Hamblen submitted that by parity of reasoning the court should not refuse to appoint an arbitrator, and thereby refuse to enforce the arbitration agreement, unless it is satisfied that the circumstances are such as to fall within section 9(4), i.e. that the arbitration agreement is null and void, inoperative, or incapable of being performed.

In my view there is considerable force in that argument, but as Mr. Lord pointed out, the discretion conferred on the court by section 18 is not expressly limited by reference to the circumstances set out in section 9. In my view that must have been deliberate and the draughtsman of the Act must have contemplated that there might be other circumstances in which the court would be justified in declining to act. However, I think that the court ought normally to exercise its discretion in favour of constituting the parties' agreed tribunal unless it is satisfied that the arbitral process cannot lead to a just resolution of the dispute. Once the tribunal has been constituted the course of the proceedings is essentially a matter for the parties and the tribunal itself.

I have dealt with this aspect of the matter at some length because the main ground on which the defendant resists the appointment of an arbitrator in the present case is that it would lead to unnecessary inconvenience and expense. In substance its argument is this: the proceedings in Spain will inevitably run to their conclusion; if, as seems likely, there is a trial, it is also likely that the claimants will be defendants; the judge will conduct a full investigation on the basis of which he will make findings of fact; if he finds anyone guilty of a criminal offence he will be able to entertain civil claims against that person and give whatever remedy is appropriate; the defendant can and will seek a civil remedy against the claimants in those proceedings; accordingly, to carry out a concurrent investigation into the same events in the context of an arbitration would be a waste of time and money and would give rise to a risk of inconsistent findings. Moreover, other parties are involved in the proceedings in Spain, such as the estate of the deceased crane driver, who are not parties to the arbitration agreement. Accordingly, the court should refuse to appoint an arbitrator, or should at least adjourn the

application until the Spanish proceedings have reached their conclusion.
An agreement to arbitrate has many similarities to an exclusive jurisdiction clause. In each case the parties have agreed upon their chosen tribunal and the location of any proceedings. The most authoritative statement of the proper approach to exclusive jurisdiction agreements is now to be found in the speech of Lord Bingham in Donohue v Armco Inc. [2001] UKHL 64; [2002] 1 Lloyds Rep. 425. One starts from the proposition that the court will ordinarily exercise its discretion by making whatever order is appropriate in the circumstances to secure compliance with the contract unless the other party can show strong reasons why it should not do so. It is clear from this and other cases, as Mr. Lord accepted, that factors which might ordinarily influence the court when considering the question of forum conveniens are of little or no relevance where an exclusive jurisdiction clause is concerned. This principle applies equally to arbitration agreements and with even greater force to international arbitration agreements falling within the scope of the New York Convention for the reasons stated by Colman J. in Toepfer International G.m.b.H. v Société Cargill France. The parties have chosen their tribunal and the place of arbitration and neither of them can be heard to say that the agreement should not be enforced because it would be more appropriate, as things have turned out, to resolve the dispute in another manner or in another place. It follows that no significant weight can be attached to the fact that the incident occurred in Spain or that the evidence relating to it is located there.
The fact that proceedings raising the same issues have already been commenced in another jurisdiction has not ordinarily been regarded as a strong reason for declining to make an order giving effect to an exclusive jurisdiction clause despite the inherent undesirability of multiple proceedings: see Akai Pty. Ltd v People's Insurance Co. Ltd [1998] 1 Lloyd's Rep. 90, Mercury Communications Ltd v Communication Telesystems International [1999] 2 All E.R. (Comm) 33 and (a case involving a non-exclusive English jurisdiction clause) and Import Export Metro Ltd v Compania Sud Americana de Vapores S.A. [2003] EWHC 11 (Comm); [2003] 1 Lloyd's Rep. 405 in which Gross J. reviewed a number of authorities relating to the grant of anti-suit injunctions in support of exclusive jurisdiction clauses and sought to summarise the principles to be deduced from them. If it were otherwise, one party could deprive the other of the benefit of the agreement simply by bringing proceedings in the forum of his own choice. Moreover, in the case of arbitration agreements falling within the New York Convention multiplicity of proceedings and the attendant risk of inconsistent decisions is not a ground for refusing to grant a stay.
When considering the implications of the proceedings currently under way in Spain in relation to the present matter it is necessary to bear a number of things in mind. The first is that they are still at the investigatory stage. Having completed his enquiries the judge conducting the investigation will decide whether anyone should be prosecuted in respect of an alleged offence and only if he does so will the matter go to trial. That decision has not yet

been made and it therefore remains uncertain whether there will be any trial and, if there is, who the defendants will be or what charges will be brought against them. The second matter of importance is that the claim which the defendant seeks to make against the claimants in respect of the damage to the crane will only be determined by the court if the defendant so requests. In other words, it is entirely a matter for the defendant whether it chooses to pursue its claim in the criminal proceedings or not. It can, if it wishes, withdraw its claim for compensation in order to pursue it in other proceedings. Finally it is necessary to bear in mind that the court at any criminal trial will not deal with any civil claims against the claimants unless they are convicted of an offence.

In my view the existence of the Spanish proceedings does not provide sufficient grounds for declining to constitute the parties' chosen tribunal. Although they have taken steps to protect their position in the investigation, the claimants have not submitted to the jurisdiction for the purposes of enabling civil claims to be brought against them. It is still not certain that there will be a trial in Spain, but even if one assumes that there will, the fact that criminal proceedings arising out of the same events are pending abroad is no reason to deprive the parties of their agreement to refer the dispute between them to arbitration. The fact that the defendant can choose not to advance his claim in those proceedings merely emphasises the fact that there is no necessary connection between them. It also serves to demonstrate, contrary to Mr. Lord's submission, that there is no policy in Spanish law that civil claims should be determined in the context of a criminal trial, although even if there were, I do not think that ought to weigh heavily with the court in a case of this kind. Moreover, it is by no means clear that the Spanish court will not itself stay the defendant's claim for the purposes of arbitration. It is clear from the reasons given by the court for refusing to set aside an ex parte order against the claimants for the provision of security for claims against them that the proceedings had not reached the stage at which the court would consider matters of that kind. Far from having been decided against the claimants, the matter has yet to be considered.

Finally Mr. Lord drew my attention to paragraph 27 of Lord Bingham's speech in Donohue v Armco in which he noted that the court may well decline to grant an injunction or stay in support of an exclusive jurisdiction clause where the interests of parties other than those bound by the clause are involved or where grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions. He submitted that considerations of this kind existed in the present case because parties other than the claimants and the defendant are involved in the Spanish proceedings.

Although it is still uncertain whether there will be a prosecution in Spain, and if so, who will be the accused, I think it is right to proceed for present purposes on the assumption that there is at least a distinct possibility that criminal proceedings will be brought against one or other of the claimants and

that those who represent the estate of the crane driver, and perhaps others also, will seek to make a claim for compensation in the event of a conviction. It seems rather less likely at the moment that the defendant will also be prosecuted, but, if it is, I think one must assume that a claim will be made against it as well. However, I do not think that this weighs strongly in favour of declining to appoint an arbitrator. In the case of an exclusive jurisdiction agreement the court always has a discretion whether to make an order designed to secure compliance with it and there may be cases in which the involvement of other parties or the existence of multiple disputes, not all of which fall within the clause, provide strong grounds for declining to do so. However, neither of these considerations apply in this case. The position here is really no different from that which would have arisen if there had been no criminal investigation and those parties who wish to pursue claims had simply commenced civil proceedings against the claimants or the defendant in Spain or elsewhere. Their ability to pursue those claims will be unaffected by the manner in which any disputes between the claimants and the defendant may be resolved. There is, inevitably, a risk that inconsistent findings of fact may be made by different tribunals, but not as between the claimants and the defendant. Nor has it been suggested that any of the claims the defendant may wish to make against the claimants in relation to the accident fall outside the terms of the arbitration clause. However, the court is here concerned not with an excusive jurisdiction clause but with an international arbitration clause. If the defendant sought to pursue a claim that fell within the arbitration agreement in Spain, the court would be bound to grant a stay under the New York Convention. In these circumstances it would be contrary to the spirit of the Convention for this court to refuse to exercise its power to appoint an arbitrator.

In these circumstances I have no doubt that I should exercise my discretion in favour of appointing an arbitrator in accordance with the claimants' application. It will then be for the arbitrator, no doubt with assistance of the parties, to decide how the proceedings should be conducted having regard, among other things, to the existence of the proceedings in Spain. I will hear any submission the parties may wish to make about the identity of the proposed arbitrator.