Neutral Citation Number: [2009] EWCA Civ 1397
Case No: A3/2009/0856 and 1064
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mrs Justice Gloster
[2009] EWHC 196 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

17/12/2009
B e f o r e :
LORD JUSTICE WALLER
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE CARNWATH
and
LORD JUSTICE MOORE-BICK

_____
Between:

National Navigation Co
Respondent
- and -
Endesa Generacion SA
Appellant

_____
Vasanti Selvaratnam QC and Tom Whitehead (instructed by Messrs Ince & Co) for the Respondent
Richard Lord QC and Richard Blakeley (instructed by Messrs Thomas Cooper) for the Appellant
Hearing dates : 3rd - 5th November 2009

_____
HTML VERSION OF JUDGMENT

_____

Lord Justice Waller :
Introduction
The main point on this appeal is whether a judgment of a fellow member state of the European Union ruling against a stay of proceedings on the basis that an arbitration clause was not incorporated in the contract can be relied on as creating an issue estoppel so as to prevent the English court deciding the point differently. The broad picture is as follows. The appellant,

Endesa, commenced proceedings in the Mercantile Court of Almeria in Spain in order to arrest a vessel and claim damages for late delivery under a bill of lading for discharging a cargo of coal at a port some way short of the contractual point of discharge. The respondents, NNC, commenced proceedings in the Commercial Court in London without reference to any arbitration clause claiming a declaration of non-liability. NNC however sought a stay from the Almeria court on the grounds that there was an arbitration clause incorporated by reference to a charter party in the bill of lading, alternatively on the grounds that the Commercial Court in London was first seised. The Almeria court ruled (so Endesa alleges) that no arbitration clause was incorporated into the contract, refused to decline jurisdiction on that basis, but stayed proceedings pending the Commercial Court in London establishing its position as the court first seised.

NNC commenced an arbitration and also arbitration proceedings in London (the Arbitration proceedings). By the Arbitration proceedings they sought to establish English law as the putative proper law of the bill of lading and they sought a declaration that the arbitration clause was as a matter of English law incorporated into the bill of lading and further sought an anti-suit injunction seeking to prevent Endesa pursuing any claim other than via arbitration. Endesa's response was to assert that the judgment of the Almeria court was binding on the English Court under Article 33 of Council Regulation (EC) 44/2001 (the regulation) so as to preclude the English court from deciding that question a different way.

Gloster J ruled by a judgment handed down on 1st April 2009 that the judgment of the Almeria court was a judgment within the regulation but not binding in the Arbitration proceedings, on the basis that those proceedings were not covered by the regulation being excluded by Article 1(2)(d). Gloster J granted a declaration to the effect that as a matter of English law, its putative applicable law, the bill of lading did contain an arbitration clause.

Endesa appeal from that judgment accepting that if she was not bound by the Almeria court judgment, the judge was correct as to putative proper law and indeed correct as a matter of English law on the issue whether the arbitration clause was incorporated.

Although there is an issue in the Court of Appeal (and it would seem not before the judge) as to precisely what the Almeria court decided, the critical issue on the appeal is whether the judgment of the Almeria court is a judgment to which the regulation applies and whether it gives rise to an issue estoppel in the Commercial Court in London in the Arbitration proceedings.

The judge's task was made more difficult by the fact that, after preparing her judgment in draft, the European Court of Justice (the ECJ) handed down its decision in *The Front Comor* [2009] 1 Ll Rep 413. It became common ground that following that decision there could be no question of the Commercial Court granting an injunction. What remained in issue was whether a judgment of the Almeria court was a judgment within the regulation and enforceable as such. The judge accepted that the ECJ in that case had ruled that a decision taken as to the applicability of an arbitration clause in the course of proceedings which did fall within the regulation, was a regulation judgment and that thus the Almeria judgment was a regulation judgment. But she held it was not binding in proceedings which were themselves excluded from the regulation, as she held the Arbitration proceedings were.

Endesa, through Mr Richard Lord QC, seek to uphold the judge's view that the Almeria judgment was a judgment to which the regulation applied, and argue that there was no basis for holding that such a judgment was not binding in England, whatever the nature of the proceedings. NNC by a respondents' notice seek to argue that the Almeria judgment, at least in so far as it ruled on the incorporation of the arbitration clause, was excluded from recognition under the regulation,

and otherwise to uphold the judge.

The facts and procedural history in more detail

The facts and much of the procedural history are set out fully in the judge's judgment. It is possible to summarise them as follows:-

i) NNC are the owners of a vessel "Wadi Sudr". Endesa maintain they have a claim to damages as consignees of a bill of lading for discharge of a cargo of coal at a port way short of the contractual port of discharge. On the morning of 23rd January 2008, Endesa made an application to the Almeria Mercantile Court in Spain (the Almeria Court) for the arrest of the "Wadi Sudr" in order to secure its claims under the bill of lading.

ii) On the afternoon of 23rd January 2008, NNC commenced an action (folio 64) in the Commercial Court in London (the Commercial Court action) by which it sought a declaration of non-liability under the bill of lading and asserted that by the terms of the bill of lading jurisdiction was agreed to be London. It made no assertion that there was an arbitration clause contained in that contract. At this stage NNC had no copy of any voyage charter referred to in the bill of lading.

iii) On 22nd February 2008, Endesa served its substantive claim in the Almeria Court.

iv) On 19th March 2008, NNC lodged submissions with the Almeria court challenging its jurisdiction relying on the fact that the Commercial Court action had been commenced in London but also "petitioning" the court "on the grounds the court does not have jurisdiction because the question is subject to arbitration in London."

v) On 30th April 2008 Endesa responded to NNC's submissions in the Almeria court asserting (a) that NNC had not disclosed a charter party incorporated into the bill of lading which incorporated an arbitration clause;(b) that because NNC and Endesa were not direct parties under the charter party containing the London arbitration clause under Spanish law there was no binding arbitration clause; (c) NNC had waived any right to rely on the arbitration clause by commencing the Commercial Court action; and (d) the Almeria Court was the court first seised.

vi) On 14th April 2008 Endesa acknowledged service of the Commercial Court action and gave notice disputing jurisdiction.

vii) On 2nd June 2008 NNC applied to the Almeria court for a stay of its proceedings on the grounds that the Commercial Court was the court first seised by virtue of the Commercial Court action.

viii) On 10th June 2008 NNC commenced proceedings in London in order to obtain copies of the voyage charter. This application was supported by a witness statement of Mr Askins acting for NNC giving notice that NNC intended to apply to amend the claim form in the Commercial Court action to seek declarations that the London arbitration clause contained in the voyage charter was binding on Endesa. This statement demonstrated that his knowledge that the charter party contained such a clause was provided to him by a Mr Alegre prior to Endesa's arrest of the vessel in January 2008 i.e. prior to the commencement of the Commercial Court action.

ix) On 3rd July 2008 NNC commenced arbitration in London against Endesa under the bill of lading provisionally appointing Michael Baker-Harber as its arbitrator.

x) On 8th July 2008 NNC commenced the Arbitration proceedings in the Commercial Court in London seeking various forms of relief: (i) disclosure of the voyage charter;(ii) a declaration that the arbitration clause in the voyage charter was validly incorporated into the bill of lading; (iii) an injunction to restrain Endesa proceeding with claims under the bill of lading other than by way of London arbitration. These claims were made "in the alternative to the relief claimed in the

Commercial Court action".
xi) On 15th July 2008 Flaux J granted permission to serve the Arbitration proceedings out of the jurisdiction and ultimately on 31st July allowed that service to be made on Thomas Cooper, solicitors for Endesa, and he abridged time limits.
xii) On 7th August 2008 the Commercial Court in London listed the applications in the Commercial Court action for hearing on 29th October 2008. On 8th September 2008 the Almeria court handed down a judgment. A belated attempt had been made by NNC to seek an anti-suit injunction before the handing down but the Commercial Court in London was not prepared to list the matter until 29th October 2008 with the applications in the Commercial Court action.
xiii) The Almeria court ruled in essence (a) that under Spanish law the arbitration clause in the voyage charter had not been incorporated into the bill of lading; and (b) that by commencing the Commercial Court action NNC had waived reliance on any arbitration clause. It however granted a stay pursuant to Article 27 of the regulation until the Commercial Court ruled as to whether it was competent and thus seised of the action between NNC and Endesa.
xiv) On 30th September 2008 NNC submitted an appeal of the Almeria court judgment inviting it to review its decision to refuse to reject jurisdiction because of the existence of an arbitration clause.
xv) By a witness statement dated 16th October 2008 served shortly before the hearing before Gloster J, NNC gave notice of its intention to apply to amend in the Arbitration proceedings and more relevantly of its intention to pursue in the Commercial Court action by process of serving particulars of claim, a position inconsistent in one material respect with its position in the Arbitration proceedings and for which it was being suggested it need no permission to amend. The draft particulars sought declarations that the London arbitration clause was incorporated into the bill of lading; damages for breach of that clause; a declaration that the court had jurisdiction under Article 5 of the regulation [this, as we shall see, is quite inconsistent with the position taken up in the Arbitration proceedings]; a declaration that NNC had no liability which Endesa might bring in breach of the arbitration provision; and an anti-suit injunction.
xvi) The hearing before Gloster J took place between 29th October and 3rd November 2008, following which she reserved her judgment.
xvii) On 3rd December 2008 the Almeria court delivered its judgment on NNC's appeal. NNC had only supplied the Spanish court with a copy of the voyage charter on which it relied immediately prior to the handing down of this judgment. It would seem that the court did not take the terms of the voyage charter into account before the hand down. But it later ruled on 29th December 2008 that it made no difference to its judgment and that the document should be placed on the judicial file and available to NNC on any appeal.
xviii) The reason why NNC only supplied the voyage charter so late was because NNC only obtained a copy of the same from Endesa's supplier Carboex SA, an associated company of Endesa on 2nd October 2008 (following an earlier ruling by Andrew Smith J on 17th July 2008) and only then on terms that it would only use the same in the English proceedings. NNC only obtained the same free from such undertaking on 25th November 2008 by virtue of an order made by Gloster J herself on 21st November 2008 after completion of the hearing before her. By that order she ordered Endesa to disclose the voyage charter, gave permission of the English court for its use in Spain, but left it to the Spanish court to rule whether it should receive it. The parties made further written submissions to Gloster J concerning disclosure after the hearing because it was only as a result of a question raised by the judge during the hearing that NNC obtained a

translation of the supply agreement which when obtained contained a reference to the price of "demurrage/dispatch" being indicated in the "corresponding charter party". NNC submitted to the judge that this supported the submission NNC had been making that Endesa were aware of the terms of the voyage charter; and was something which contradicted the impression NNC said was being given to the Spanish court that there was no document with an arbitration clause in it.
xix) The judgment of the Almeria court of 3rd December 2008 would appear to have ruled (and there is some dispute as to what it ruled) that NNC had waived arbitration by commencing the Commercial Court action, that NNC should not be allowed to rely on the arbitration clause at the same time as seeking a stay under Article 27 on the basis the English court was first seised; and that the first court was correct in its view as to whether the arbitration clause was incorporated but adding that English law had not been adequately asserted on that question. It also said that a London court might take a different view and would not be bound. A copy of this judgment was supplied to Gloster J and she did not invite further submissions on it.
xx) Gloster J circulated a draft of her judgment on 9th February 2009 for handing down on 13th February. By that judgment she would have dismissed the Commercial Court action, granted the declarations being sought in the Arbitration action and granted an injunction to prevent Endesa continuing the proceedings other than by London Arbitration.
xxi) But on 10th February 2009 the ECJ handed down its judgment in *The Front Comor*. On any view that decision precluded the granting of any injunction, and the question was whether it had gone any further than that. On that issue the judge heard further oral argument and ultimately handed down the judgment, the subject of this appeal, on 1st April 2009.
The regulation
I have appended to this judgment what appear to me to be the relevant provisions of the regulation, in the context of which all aspects of the issues before the court have to be resolved.
What have the Spanish courts decided and what points are open to NNC on the judgments themselves?
The judgment of 3rd December 2008 of the Spanish court was handed down after the hearing before Gloster J and before she had delivered judgment. Miss Selvaratnam QC sought to address an argument before us as to whether the 3rd December judgment was a judgment of a competent court making a final ruling on the question whether the arbitration clause was incorporated, and whether thus there could be any question of the ruling being *res judicata*. She placed particular reliance on the following passage in the judgment of 3rd December dealing with the fact that the Spanish Court had originally rejected the arbitration plea because the proceedings in England were court proceedings not arbitration.
"The final ruling reached in the aforementioned foreign court [i.e. the English Court my insertion] will apply, although there are two possibilities in that regard. One possibility is that the court does not accept the arbitration clause – and in that case the magistrate judge herein will refuse jurisdiction in favour of the English court – and the other is that it does. In the latter scenario this court may indeed proceed, given that in the event the exception of submission to arbitration is rejected, then it must consequently act in accordance with the principle of the binding nature of judicial rulings (Art. 267 Spanish Law of Judicial Proceedings)..."
Thus Miss Selvaratnam submitted by its own terms the Spanish judgment contemplated the possibility that the High Court might conclude that there was a valid and binding arbitration agreement between the parties, and she submitted that nothing in the Spanish judgment was intended to prevent the High Court from reaching such a conclusion. Furthermore she pointed out

in the context of the Spanish court staying its proceedings pending the High Court in London ruling on its own competence in the Commercial Court action, that the Spanish Judgment was expressly stated to be:-

"...without prejudice to the fact that these points do not bind the London court which may well decide the opposite – either in the manner set out by Mr Askins or in any other manner – and in that case this judicial body will be obligated to act in accordance with Article 27 of Regulation 44/2001".

Miss Selvaratnam sought, I believe, to make two points. First she submitted the Spanish court did not intend to preclude the English High Court from finding there was a binding arbitration clause and that, she submitted, was relevant to whether the Spanish court decisions were *res judicata*. Second, she submitted, that any decision of the Spanish court was conditional and that the Spanish court would only ultimately decide the point on the arbitration clause if the English court held it was not first seised, and the stay in Spain was lifted. The latter point, if correct, would mean that at the stage when Gloster J ruled on the matter, there was no decision of the Almeria court, i.e. a competent court on the incorporation of the arbitration clause. That would allow Gloster J to rule as she did and provide a judgment of the English court that could be relied on either as an answer to any judgment that might be given by the Almeria court or as a foundation for a claim for damages for breach of the arbitration clause.

We raised with Miss Selvaratnam whether these points were taken in her grounds of appeal and whether indeed she had permission to appeal on them. Furthermore it seemed clear from Gloster J's judgment that these points were not taken before her [see for example paragraph 76 of her judgment].

Miss Selvaratnam explained first that there had been little opportunity to raise the matter before the judge because the 3rd December decision was handed down while judgment was reserved. She furthermore suggested that the points were taken in the respondents' skeleton on which Longmore LJ granted permission to appeal and thus that she had permission.

It seems to me that since the parties went back before the judge to deal with *The Front Comor* it is difficult to contend that there was not an opportunity to address the judge on the points. Furthermore since there is no sign of this point in the grounds of appeal, technically I do not think it can be said that NNC have permission to appeal on these points.

But it would not be satisfactory to rest a decision solely on technicalities in a case of this kind. The points were clearly taken in an addendum to the respondents' skeleton dated 29th October 2009 and I did not understand Mr Lord for Endesa to object with any force to the points being argued. It is right in my view that we should deal with them and consider whether they are points with any validity on which permission to appeal should be given.

In my view the points made are unsound. Miss Selvaratnam would seem to suggest that it is only the judgment of 3rd December which provides her with the arguments. It is thus worth examining first what the position was after delivery of the first Spanish judgment which ruled that the arbitration clause was not incorporated and only stayed the proceedings on the basis that the English court might by virtue of the Commercial Court action be the court first seised. Does the fact that the proceedings were stayed by that judgment render the judgment itself in any way conditional? We have no evidence as to the view a Spanish court would take but I cannot see why a judgment delivered is anything other than just that. If it rules that a stay should be granted it is not only a valid judgment so ruling but a valid judgment for anything else it actually decides. In this case that judgment, in my view, decided that as matter of Spanish law there was no

arbitration clause and/or that NNC were precluded from reliance on it and refused to decline jurisdiction on that basis, but it ruled that it would grant a stay in compliance with its obligation to do so under Article 27.

The first court would not know what view the English court would take as to the binding nature of any decision of the Spanish court and made no comment on that.

What then of the 3rd December judgment? That again as it seems to me was a judgment on which reliance could be placed as from the moment it was delivered. There was nothing conditional about the judgment. So far as a stay was concerned it was upholding the first decision that there should be a stay. It furthermore was upholding the first judgment on the question whether as a matter of Spanish law the arbitration clause was incorporated. It made clear why it had not applied English law. In the first passage of the judgment quoted above, the Spanish court is not saying if the English court were to decide that the arbitration clause was incorporated, the Spanish court will abide by that: it was saying precisely the opposite.

The fact that the Spanish court was of the view that an English court might still feel free to decide the issue as to whether an arbitration clause was incorporated into the contract seems to me of no consequence. At the time the Spanish court made that observation i.e. before the decision of the ECJ in *The Front Comor* it might have thought that a decision on the incorporation of an arbitration clause was outside the regulation and thus one by which the English court would not be bound, in the same way as the Spanish court thought it would not be bound by an English court decision on incorporation, but the question whether that is right or not is the very question which we must decide.

In my view Miss Selvaratnam's argument that the Spanish judgments had not decided that the arbitration clause was not incorporated even if open to her would fail.

The Commercial Court action and permission to appeal

Gloster J dismissed the commercial court action and we dismissed the application for permission to appeal that ruling at the hearing of the appeal. It is convenient to give reasons for doing so and to dispose of this aspect before dealing with points that arise in the Arbitration proceedings.

Miss Selvaratnam for NNC was seeking to keep this action alive only as an alternative to her submissions in the Arbitration proceedings. The desire to do so flowed as I understood it from assistance that NNC would seek to gain from the fact that if she can keep this action alive and properly served, the English court would at least be first seised, and the Spanish action would remain stayed.

I have my doubts as to whether even if NNC could have kept this action alive on the basis they now wish, that would gain them anything. In the Arbitration proceedings they argue that the proceedings are outside the regulation by virtue of the arbitration exclusion, Article 1(2)(d). In the Commercial Court action they now wish to amend their claim and argue that a claim for breach of an arbitration agreement falls within the regulation, Article 5(1). The question (as it at present seems to me) would still arise in that action as it does in the Arbitration proceedings, whether the judgment of the Spanish court that there was no arbitration agreement was binding on the judge who had to consider whether there was an arbitration clause. If it was binding in the Arbitration proceedings, I am at present unclear why it would not also be binding in the Commercial Court action. I do not see how the fact that the English court might be the court first seised assists NNC. But be all that as it may, there is good reason why Gloster J was right in dismissing this action and why permission to appeal should be refused.

NNC commenced the Commercial Court action and sought to serve the proceedings without

leave of the court on the basis that there was a clause in the contract giving the English court jurisdiction. That plea was made at a time when Mr Askins, solicitor acting for NNC, did not have the relevant voyage charter. But his information was that the voyage charter contained a London arbitration clause not as was pleaded in the Commercial Court action that there was a term providing for the English court to have jurisdiction [see paragraph 8(ii) above]. To allow NNC to amend in order to make the case that they deliberately did not make and indeed which is inconsistent with the case that they first made in order to enable them to preserve a first seised status is to my mind simply unacceptable. This was the view of Longmore LJ when refusing permission on paper, and I agree.

Miss Selvaratnam sought to persuade us that even if we took that view and were inclined to dismiss the application for permission to appeal on that basis, we should hear the argument based on the draft particulars of claim. She submitted that if NNC were to lose the appeal in the Arbitration proceedings (because we decided that the judgment of the Spanish court was an enforceable regulation judgment), an important point might arise for the future as to whether a claim for breach of an arbitration agreement might not also be proceedings within the regulation capable of being made under Article 5(1).

I would think that Gloster J's view as to the merits of that argument are likely to be right, but in agreement with Longmore LJ, it would not in my view be right to give permission to appeal so as to explore those arguments in a case where the point had not been properly taken at the outset.

Position at this stage

It is convenient to take stock. It follows that the position before Gloster J handed down her judgment was that (i) there was no decision of the English court relating to the incorporation of an arbitration clause into the contract; (ii) there were two judgments of the Almeria court in which, after argument from both sides, one judgment had decided, and the other confirmed the decision, that the arbitration clause relied on by NNC had not been incorporated into the contract; (iii) as a matter of English common law the issue whether there was an arbitration clause in the contract would have been *res judicata* as between NNC and Endesa and thus a judgment to which the English court would be bound to give effect (subject possibly to an argument on public policy which I will leave on one side at this stage); (iv) NNC's only escape from that position could be by virtue of section 32(1) and (3) of the Civil Jurisdiction and Judgments Act 1982, but that escape would not be available if section 33(4) applied, and the judgment was one to which Article 33 of the regulation applied.

It is convenient to set out section 32 at this stage:-

"32 Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes

(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if—

(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and

(b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and

(c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.

(2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that

subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.
(3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2).
(4) Nothing in subsection (1) shall affect the recognition or enforcement in the United Kingdom of—
(a) a judgment which is required to be recognised or enforced there under the 1968 Convention [or the Lugano Convention][or the Regulation];
(b) a judgment to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies by virtue of section 4 of the Carriage of Goods by Road Act 1965, section 17(4) of the Nuclear Installations Act 1965, . . . [section 6 of the International Transport Conventions Act 1983], section 5 of the Carriage of Passengers by Road Act 1974 or [section 177(4) of the Merchant Shipping Act 1995]"
It was common ground, as found by the judge at paragraph 87 of her judgment, that, if the Spanish judgments were not required to be recognised under the regulation, Endesa could not in the light of section 32(3) rely on the ordinary principles of *res judicata*.
The judge's conclusion was that the judgments did fall within the regulation on the basis of the decision in *The Front Comor* but she held (a) that an English court was not required to recognise them by virtue of Article 33(1) in the Arbitration proceedings, since those proceedings were outside the scope of the regulation by virtue of Article 1(2)(d); (b) that to grant a declaration was not an interference with the jurisdiction of the court of another member state; and (c) that, even if that conclusion were wrong, the judgments were not enforceable on the grounds of public policy.
Were the judgments of the Almeria court within the regulation?
NNC by their respondents' notice seek to challenge the judge's view that the Spanish Judgments were regulation judgments, and that is obviously the first question to deal with. NNC accept that the proceedings brought in the Almeria court claiming damages for breach of the bill of lading would come within the regulation. The question is whether a judgment which is not on the merits but which is ruling that an arbitration clause has not been incorporated and that proceedings should not be declined for that reason is a judgment which must be recognised and enforced under Chapter III of the regulation.
The difficulty for Miss Selvaratnam is the decision of the ECJ in *The Front Comor*. In that case the English court had ruled on the validity of an arbitration clause and it had granted a declaration of the clause's validity. It had also consistent with English authorities at that time granted an anti-suit injunction to restrain proceedings in a court in Syracuse. The House of Lords referred one question to the ECJ, i.e. whether it was consistent with the regulation for a court of a member state to make an order to restrain a person from commencing or continuing proceedings in another member state on the grounds that such proceedings are in breach of an arbitration clause. The question whether the granting of a declaration already granted by the English court was consistent or not with that regulation was not referred. The Advocate General handed down an opinion on 4th September 2008. I will not set out many passages from that opinion since it is the court's decision which is of most relevance but the essence of the Advocate General's opinion was as follows.

The proceedings in Syracuse were proceedings to which the regulation applied. It is the subject matter of the proceedings which dictates whether the proceedings are within or without the regulation. A preliminary issue in such proceedings does not change the nature of the proceedings and the Advocate General relied on the decision of the ECJ in *Marc Rich & Co AG v Societa Italiana Impianti pA* Case C-190/89 [1991] ECR I-3855 (*Marc Rich*). The summary of the Advocate General's view in the *Front Comor* is in paragraph 54 where she says:-

"The existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seised must address when examining whether it has jurisdiction. Even if the view were taken that that issue fell within the ambit of arbitration, as a preliminary issue it could not change the classification of the proceedings, the subject matter of which falls within the scope of the Regulation. It can be left undecided here how proceedings which concern similar findings in the main case should be evaluated."

It seems to me that the Advocate General in that paragraph is advising that a judgment on a preliminary issue in proceedings within the regulation will be a judgment within the regulation, even if, when looked at in isolation, the subject of the preliminary issue fell within the ambit of arbitration. That is consistent with the decision in *Marc Rich* on which the Advocate General was relying. In *Marc Rich* the argument was that a preliminary issue as to the existence of an arbitration clause came within the regulation, although the subject matter of the proceedings was arbitration. In other words the argument was the mirror image of the argument being addressed in *The Front Comor.* That argument was rejected by Advocate General Darmon and by the ECJ. It was the scope and main subject of the proceedings which dictated whether they were within or without the regulation – in *Marc Rich* that resulted in them being without, and in *The Front Comor* the result was that they were within.

Miss Selvaratnam sought to argue that the last sentence of paragraph 54 left open the question as to how the judgment on any preliminary issue was to be treated. That sentence is difficult to understand and we wondered in the course of the hearing whether we had an accurate translation of the Advocate General's words. Other translations (the French and the German produced during the hearing before us) seemed to support the view that what the Advocate General was saying in the last sentence was that it was unnecessary to say more about preliminary issues in proceedings, where arbitration was the main subject matter of the proceedings. That would be more consistent with the first two sentences, and would accord with my view of what she was intending to say.

The Advocate General was also of the view that one reason why an anti-suit injunction should not be granted was because a person who took the view that he was not bound by an arbitration clause could not be barred from access to the courts having jurisdiction under the regulation. That seems to be a separate point but in its context the Advocate General recognised that the result might be that there could be two sets of proceedings which might reach divergent decisions [see paragraph 70]. In that case that recognition flowed from the fact that the English court had already granted a declaration but that would be in proceedings where the main object of the proceedings were arbitration and where thus the judgment of the English court fell outside the regulation. The Syracuse court would thus not be bound under the regulation by the judgment of the English court and would be free to decide the issue of whether there was an arbitration clause for itself.

I would suggest that, at least by implication if not expressly, one can say that it was the Advocate General's opinion (i) that it was not an interference with the jurisdiction of a member state for one court at the seat of the arbitration to grant a declaration as had occurred in that case; (ii) that

since that would not be binding on another court where proceedings within the regulation had been commenced, there could be inconsistent decisions; but (iii) a judgment in a member state in proceedings within the regulation on the incorporation of an arbitration clause would be a regulation judgment.

The essence of the court's judgment was contained in paragraphs 24 to 26:-

"24. However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.

25. It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.

26. In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope."

I have no doubt that the court was agreeing with the Advocate General in saying that a preliminary ruling as to the applicability of an arbitration clause in proceedings in which the main subject of the proceedings was within the regulations was itself to be categorised as within the regulations.

It may be thought to be unsatisfactory that what appears to be contemplated is the possibility of inconsistent judgments as between member states. Perhaps even more unsatisfactory would appear to be the result which leaves the court in member state A where the proceedings on the merits have been commenced free to ignore a judgment in arbitration proceedings in state B the seat of the arbitration, but if a preliminary ruling can be obtained early enough in state A, the courts in state B are bound by the result of the preliminary ruling in state A.

Miss Selvaratnam, supported by her junior Mr Thomas Whitehead, sought to argue that it was unnecessary to reach that unsatisfactory result. They argued that the question as to the effect of a judgment on a preliminary ruling was not before the ECJ, and if it had been the ECJ would at least have recognised the lack of reciprocity and would not have reached the unsatisfactory conclusion postulated. The question the ECJ was asked she submitted related simply to anti-suit injunctions. So far as enforcement of judgments was concerned she argued that Article 48 supplied the answer. That Article provides as follows:-

"Where a foreign judgment has been given in respect of several matters and the declaration of

enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them."

She argued that judgments can be severable and if a judgment dealt with more than one point and in part was dealing with a point outside the regulation Article 48 left it open to the courts of another member state not to recognise the aspect falling outside. She referred us to *Van den Boogaard v Laumen* [1997] QB 759.

Mr Whitehead, when he followed, put the point in this way. He said that when one looked at the regulation it was dealing with various aspects – Scope Chapter 1 was of general application; Chapter II was dealing with jurisdiction and proceedings in that context; and Chapter III was dealing with judgments and the enforcement thereof. His argument was that in considering the extent to which judgments were enforceable one should not look to see whether the proceedings were within the regulation, that being relevant to jurisdiction. At the time when the court had to consider the enforcement of a judgment, the court should look at what was being enforced under the judgment. If that fell outside the regulation then the court would not enforce it.

Applying the above arguments to this case Miss Selvaratnam and Mr Whitehead submitted what was being enforced by Endesa was a ruling on the incorporation of an arbitration clause. That was "arbitration" and outside the regulation.

The arguments are seductive because they would at least eliminate the lack of reciprocity, but the difficulty is that they seem to me to be contrary to the ruling of the ECJ and they do not marry with section 32 of the Civil Jurisdiction and Judgments Act. The ruling of the ECJ seems to me to be that a judgment on a preliminary ruling is a judgment within the regulation if it takes place in proceedings the main scope of which brings them within the regulation. Furthermore a decision on whether an arbitration clause is incorporated into a contract will, in most instances, be very closely tied up with the merits of a contractual dispute where a court must first ascertain what the terms of a contract are. It is the judgment on incorporation and the terms of the contract which is a regulation judgment and to which Article 33 applies. It is to that judgment which section 32(4) applies in its entirety. This was the judge's view and I agree with it.

The next question is whether the judge was right in holding that, because the Arbitration proceedings fell outside the regulation, a regulation judgment would not be binding in those proceedings. This was a point that the judge took for herself. She placed reliance on the Court of Appeal decision in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67 (*Through Transport)* which she thought supported the view that a decision of a court of a member state, taken in proceedings where the main scope brought them within the regulation, on the applicability of an arbitration provision, was not binding even if the judgment was a regulation judgment.

The position in *Through Transport* was that there was a decision of a court of a member state [Finland] in proceedings within the regulation on the question whether there should be a stay for arbitration. It is important to identify what, if any, issue the Finnish court decided. Simplifying the position as far as possible, Through Transport was a mutual insurance association whose club rules contained an arbitration provision in very wide terms. New India were the assignees of a claim against a club member who had become bankrupt. New India commenced proceedings in the Finnish court pursuant to a statutory right under Finnish law which entitled a claimant to sue an insurance company direct where the alleged wrongdoer had gone bankrupt. Through Transport challenged the jurisdiction of the Finnish court. That court held it had jurisdiction under the regulation because claims against insurers could be brought in the country where the harmful

event occurred and held that New India was not a party to the contract of insurance and that New India's claim was not derived from the club member (on the basis presumably that it derived from the statutory right under the Finnish statute), and thus New India was not bound by the arbitration clause. [See paragraph 14 of Clarke LJ's judgment].

The issues which the Court of Appeal resolved were (i) whether the English court should decline jurisdiction leaving the question whether "the arbitration exception applies" to the court first seised. They ruled that a court second seised was entitled to consider that question in reliance on the reasoning of the Advocate General and the ECJ in *Marc Rich* [see paragraph 37] and (ii) that because the English proceedings were ones to which the regulation did not apply the English court had jurisdiction to decide whether the arbitration clause applied [see paragraph 49]. It is in the above context there followed the paragraphs of the judgment relied on by the judge which state as follows:-

"50. A number of other questions which might arise under the Regulation were touched on in argument. In particular, there was some debate on the question whether the judgment of the District court of Kotka is entitled to recognition under Article 33. However, we do not think that this question arises for decision at present. As we understand it, the judgment obtained to date is simply to the effect that that court has jurisdiction to entertain a claim by new India under the Finnish Act. That was essentially a matter for that court in proceedings which seem to us to be within the Regulation. Whether that judgment is entitled to recognition or not does not seem to us to be relevant to the question whether the judge was correct to grant the declarations or injunction which he did.

51. The fact that arbitration is excluded from the Convention means that from time to time there are likely to be conflicting judgments in different member states and it is therefore possible that questions of recognition and enforcement of conflicting judgments may arise in the future in a case like this. In our opinion such questions are best left for decision when and if they arise."

What the Finnish court had decided was that the Finnish statute provided the basis for the claim in Finland and thus the arbitration clause had no application. So far as the English court was concerned, the issue was whether that was a correct characterisation of New India's claim. The Court of Appeal (in agreement with Moore-Bick J (as he then was)) confirmed that, under English conflict of laws, issues of characterisation are to be resolved by applying principles of English law [see paragraph 55] and that Moore-Bick J had been correct in his characterisation and in holding New India bound by the arbitration clause but only in the sense of the club being entitled to raise the same as a defence. The court found that New India was not a party to the contract containing the arbitration clause and was thus not in breach of contract in commencing proceedings in Finland [see paragraph 65]. It thus held that since New India were pursuing a claim which, under Finnish statute, it was entitled to do, it was not a case where an injunction should be granted [see paragraph 96].

On the issue whether New India were parties to a contract containing an arbitration clause the English court and the Finnish court were not in disagreement. Thus, this was not a case where an issue as to incorporation had been decided under a regulation judgment and where any consideration had to be given as to whether an issue estoppel had arisen on that issue. The question whether the ruling of the Finnish court was *res judicata* on any issue for decision by the English court simply did not arise in that case and, if it had, the court could not simply have said the question of its binding nature did not arise for decision at that stage.

It is also interesting to test the judge's view against the reasoning of Staughton J (as he then was)

in *Tracomin SA v Sudan Oil Seeds Ltd* [1983] 1 Ll Rep 560. [His reasoning was undisturbed by the Court of Appeal [1983] 1W.L.R. 1026.] In that case the Swiss court held that an arbitration clause had not been incorporated, although by its applicable law, English law, the English court would have held otherwise. The judge held that the sellers had voluntarily appeared and argued the point and indeed appealed in Switzerland and the Swiss court had a jurisdiction that would be recognised by the English court. He held it was clear beyond doubt that the Swiss Court had held that the arbitration clause was not incorporated and the decision on that issue qualified for issue estoppel. He held the judgment on that issue was final and conclusive on the merits. He held that the fact that the decision was based on Swiss law (as opposed to the applicable law English law) was no obstacle. [The similarity with the facts of the instant appeal is striking.] The judge would have held the sellers estopped from challenging the question of incorporation but for the coming into force of the Civil Jurisdiction and Judgments Act 1982 and the application of section 32(1) and (3) and section 33. He did not of course have to consider section 32(4) as it has been necessary to do in this case.

If Gloster J is right in her conclusion that a registered judgment simply does not have to be recognised in proceedings excluded from the regulation, somehow all the findings in relation to issue estoppel, which would apply in a case where a court of a non-member country had decided the point of incorporation but for section 32, do not apply by virtue of section 32(4) applying, whereas one would have thought the object of section 32(4) was actually to make them apply in the case where a judgment of a member state was registerable.

Miss Selvaratnam sought to support the judge's view by reference to *CMA CGM SA v Hyundai Mipe Dockyard Co Ltd* [2008] EWHC 2791, a decision of Burton J and his view as to whether arbitrators were bound to recognise a judgment within the regulation from the court of a member state. Burton J said this:-

"41. Resolution of this point in HMD's favour means that CMA's appeal fails in any event. The issue of the Judgments Regulation was argued before me. On further consideration, as this appeal is now resolved in favour of HMD, I shall do no more than indicate that I am not persuaded that the Arbitrators were wrong in relation to the issue of the inapplicability of the Judgments Regulation.

42. They rested their conclusion upon Article 1, which in material part reads as follow:

"*1(1) This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.*

*2. The Regulation shall not apply to: ...*

*(d) arbitration.*"

43. The Arbitrators referred to a number of authorities, and in particular The Atlantic Emperor [1992] 1 Lloyd's Rep 342 and The Front Comor [2007] 1 Lloyd's Rep 391, to emphasise that this provision means not only that UK courts are not required to recognise arbitration awards (there being of course other international conventions for that specific purpose) but also proceedings ancillary to arbitration: and the conclusion by the Arbitrators was that this was, on a true and proper construction of the Regulation, intended to be reciprocal, i.e. not only were UK courts not required to recognise foreign arbitral awards, but UK arbitrators were not required to recognise foreign judgments, the Convention thus not "*apply(ing) to arbitration*" at all.

44. In support of that proposition, the Arbitrators, and in his submission Mr Butcher, referred also to Articles 32 and 33 of the Regulation, which are both at the outset of Chapter III, the

specific chapter relating to Recognition and Enforcement:
"*32. For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a degree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.*
*33. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.*"
45. The argument runs as follows. It is plain that in Article 32 the reference to a tribunal is to a "*tribunal of a Member State*", not a tribunal in a Member State, i.e. not an arbitration tribunal: this construction is confirmed by the view of the authors of Layton and Mercer European Civil Practice (2nd Ed) at Vol I para 25.006. Thus, it is submitted, if *tribunal* in Article 32 does not include an arbitration tribunal for the purpose of recognition by a UK court, so the word *tribunal* in Article 1.1 is also not a reference to an arbitration tribunal, such that for that reason also the Regulation does not apply to arbitration tribunals, who are thus not obliged to recognise foreign judgments.
46. It is plainly right that, if the Judgments Regulation does not apply to an arbitration tribunal, then arbitration tribunals are not obliged to recognise foreign judgments, even if UK courts are so obliged, and to that extent the Arbitrators were right not to be persuaded by the beguiling argument that arbitrators are applying English law, and if English law requires recognition of a foreign judgment then the arbitrators must recognise the foreign judgment. This argument does not differentiate between substantive and procedural law. Of course arbitrators will apply English law, but they would not then be bound by the procedural requirement, if it be imposed only on a court, to recognise a foreign judgment, estopping it from considering the facts underlying that judgment."
Miss Selvaratnam submitted that since Gloster J was exercising a jurisdiction by virtue of the arbitrators giving NNC permission to seek a ruling under section 32 of the Arbitration Act 1996, the above reasoning of Burton J should apply to the court standing in the place of the arbitrators so as to decide jurisdiction.
I confess to having some difficulty with the reasoning of Burton J, since it would seem to me that arbitrators bound to apply English law would have to consider under ordinary principles of English law whether a judgment gave rise to an issue estoppel. But whether that is right or not, Burton J recognised that an English court was certainly bound by a regulation judgment and in my view it cannot make any difference that the court is acting under section 32 of the Arbitration Act.
Finally on this aspect, it seems to me that the judge's conclusion is contrary to the judgment of the ECJ in *The Front Comor.* It is true that prior to that judgment the question whether the ruling of the court of a member state in proceedings within the regulation as to the applicability of an arbitration clause was not clear. It was dealt with by Advocate General Darmon in *Marc Rich* but slightly inconclusively. He said this:-
"43. In the Commissioner's view, the key to the difficulty is provided by the following passage from the Evrigenis and Kerameus Report:
'However, the verification, as an incidental question, of validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the Court before which he is being sued pursuant to the Convention, must be considered as falling within its scope'.
44. Let me say at the outset that I would have very serious doubts as to the correctness of that

statement if it meant that it is the Convention which confers on a court seised of a main action within the scope of the Convention jurisdiction to deal with an incidental issue falling outside the Convention. That is a matter for the *lex fori* of the court seised and not a matter to be determined by the Convention. As Messrs Gothot and Holleaux state:

'In fact, the Convention does not operate in that respect: it is a matter for the general law of the court seised concerning jurisdiction and procedure to decide whether an incidental issue of that kind must be treated merely as a preliminary or pre-trial issue'.

45. It therefore seems to me preferable to take the view that the authors of the report in fact intended to refer to the application of the Convention to recognition and enforcement of a judgment which disposes of a dispute within the scope of the Convention after giving a decision on the validity of an arbitration agreement. As we have seen, that question was raised during the negotiations prior to the accession of the United Kingdom. In my view, the question remains open and in any event is not pertinent to the dispute before the national court."

It is however the view of Evrigenis and Kerameus referred to above that the ECJ in *The Front Comor* approved in paragraph 26 above.

In my view accordingly the judge sought to gain more from the two paragraphs in *Through Transport,* quoted by her, than she was entitled to do. Those paragraphs were dealing with a ruling of the Finnish court which could not give rise to a relevant issue estoppel. A regulation judgment can however give rise to an issue estoppel as much in Arbitration proceedings excluded from the regulation as in any other proceedings in an English court.

Public Policy

What the judge said on this aspect was unnecessary for her decision and the view expressed was expressed with "some degree of hesitation". It was founded on certain obiter observations of mine in *Philip Alexander and Securities and Futures Limited v Bamberger and others* [1997] IL Pr 17 *("Bamberger")*. She was of the view that if she were wrong in the views expressed as to whether the Almeria judgments, although they were regulation judgments, need not be recognised in the Arbitration proceedings, then she would hold that she was entitled not to recognise the same on the grounds they "were manifestly contrary to public policy".

*Bamberger* was decided in a very different context and in a pre-*Front Comor* era. In making the observations I did I was dealing with circumstances in which it was clear there was an arbitration clause and a position in which the English court would have granted an injunction to prevent continuation of proceedings abroad. In the instant case Endesa were contesting the incorporation of the arbitration clause and it is no longer permissible for the English court to grant an injunction.

It seems to me that if, following *The Front Comor,* Endesa were entitled to challenge the incorporation of the arbitration clause into the bill of lading in the Almeria Mercantile Court and, if the English court is bound to recognise the decision of the Almeria court, there is simply no room for any argument that in some way public policy is being infringed. The English court in such circumstances is not entitled to examine for itself whether the clause is incorporated and that is the end of the matter.

Might it make any difference if the English court had already granted a declaration that an arbitration clause was incorporated before the court of a member state considers whether to grant a stay? If in such circumstances a stay were refused by the court of a member state then the question might arise as to whether the English court should recognise the judgment but I doubt whether public policy would need to be invoked or indeed could be invoked. In such a case the

claimant in England could proceed with the arbitration in England so as to obtain a judgment in England; if that were inconsistent with the judgment obtained in the member state then that would provide an answer on its own [see Article 34(3)].

In any event in *Krombach v Bamberski* Case C-116/02[2000] ECR 1-01935 para 20 the ECJ held:-

"[The ECJ is] required to review the limits within which the courts of a Contracting State may have recourse to [the concept of public policy] for the purpose of refusing recognition of a judgment emanating from another Contracting State . . .

Recourse to the public-policy clause in [Article 34(1)] . . . can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order."

I doubt whether the English court would now say, even in circumstances where a declaration had been obtained from the English court, that a litigant seeking to obtain a different result in the courts of a member state was infringing "some fundamental principle"

So far as this appeal is concerned, (as I have said) once one reaches the position that the English court is bound by the decision that no arbitration clause was incorporated into the bill of lading, that precludes any re-examination of that question and precludes any argument on the grounds of public policy.

I would accordingly allow the appeal, and dismiss the Arbitration proceedings.

Since I completed this judgment in draft I have had drawn to my attention certain paragraphs in the new 5th Edition of Briggs and Rees' Civil Jurisdiction and Judgments. In considering the very issues raised by this appeal, considerable reliance is placed by them on the decision of the ECJ in *Hoffmann v Krieg* 145/86, [1988] ECR 654 an authority relied on by Miss Selvaratnam during her submissions. That case was not concerned with any question as to whether a decision of one court was *res judicata* in proceedings in another court. It was concerned with how a judgment of the German court ordering maintenance on the basis that a couple were still married, was to be reconciled in the courts of Holland with a judgment of a court in Holland that granted the couple a divorce. I cannot for my part see any analogy with the question with which this case is concerned, i.e. whether a decision that there is no arbitration clause which would, but for section 32 (3) of the 1982 Act, be *res judicata,* and whether it loses the protection of section 32(3) by virtue of section 32(4).

The other points which Briggs and Rees take in paragraph 7.08 are essentially points argued by Miss Selvaratnam. Dealing with them briefly; (1) I do not think it is possible particularly in the light of *The Front Comor* to categorise the application to stay made in proceedings the main subject matter of which is within the regulation in Spain as distinct proceedings outside the regulation; (2) The United Kingdom's obligation under the New York convention to give effect to arbitration agreements does not as it seems to me require the English court not to be bound by a decision of a court of a fellow member state and co-signatory of the New York Convention that there was no arbitration clause; (3) For the reasons I have given, I do not think a preliminary decision in proceedings within the regulation that there was no arbitration clause is severable; (4)

It is true that the Advocate General in *The Front Comor* foresaw the possibility of inconsistent judgments but that was in a case where the English court had already ruled in Arbitration proceedings (outside the regulation) that there was a valid arbitration clause, a decision by which the Sicilian Court would not be bound; it does not follow that the ECJ would encourage inconsistent decisions and where the court dealing with the case on the merits has ruled 'no arbitration clause' before an English court is asked to consider that question, the ECJ would be likely to encourage the notion that another member state should be bound by that decision. Section 32(4) simply leads to that result.
Lord Justice Carnwath :
I agree that the appeal should be allowed for the reasons given in both judgments (between which, subject to some differences of emphasis, I detect no material disagreement on the issues necessary to the determination of this case).
Lord Justice Moore-Bick :

*Background*
The circumstances giving rise to this appeal have been described in some detail by Waller L.J., whose account I gratefully adopt. I do not propose to cover the same ground in this judgment, but I think that it is worth drawing attention to what I consider to be the essential facts that have given rise to the dispute.
In January 2008 the vessel *'Wadi Sudr'* discharged a cargo of coal at Carboneras some way short of the contractual port of discharge stated in the bill of lading under which it was being carried. A dispute quickly arose between the appellant, Endesa Generacion SA ("Endesa"), the holder of the bill of lading and the respondent, National Navigation Co ("NNC"), the owners of the vessel. On 23rd January Endesa applied for a warrant to arrest the vessel, an obvious course for it to take since the vessel was still in Spanish waters and amenable to the jurisdiction of the Spanish courts.
On 23rd January 2008 NNC started proceedings in the Commercial Court (Folio 64) seeking a declaration that it was under no liability to Endesa arising out of its failure to discharge the cargo at the contractual destination. The claim form was indorsed with a certificate that the requirements for service out of the jurisdiction without the permission of the court were satisfied. It follows that NNC did not at that stage seek to have the dispute determined in arbitration.
On 25th January 2008 the court at Almería made an order for the arrest of the vessel which was executed later the same day. The court thereby became seised of the substantive claim by Endesa against NNC. On 19th March 2008 NNC began proceedings challenging the jurisdiction of the Spanish court on the grounds that the dispute was subject to an agreement providing for arbitration in London.
On 14th April 2008 Endesa acknowledged service of the claim form in the Commercial Court action and when doing so gave notice that it intended to dispute the court's jurisdiction. Accordingly, on 2nd June 2008 NNC applied to the Spanish court for a stay of the proceedings on the grounds that the Commercial Court was first seised of the substantive dispute between the parties. The proceedings in Spain led in due course to a decision by the Spanish court that there was no arbitration agreement between the parties but that the proceedings should be stayed in accordance with Article 27 of Council Regulation (EC) No. 44/2001("the Regulation") pending a decision by the Commercial Court as to its jurisdiction. On 3rd December 2008 the Spanish court affirmed its decision following a review at the request of NNC.

In the meantime there had been two further developments. First, on 3rd July NNC had commenced arbitration in London seeking a declaration of non-liability. Second, on 8th July 2008 NNC had also commenced a second action in the Commercial Court (Folio 667) seeking (among other things) a declaration that its dispute with Endesa was subject to an arbitration agreement and an injunction to restrain Endesa from proceeding with its claim otherwise than by way of arbitration.

*Commercial Court action Folio 667*

The central issue in these proceedings is whether the judgment of the Spanish court declaring that there was no binding arbitration agreement between NNC and Endesa covering the dispute in relation to the cargo carried on *The 'Wadi Sudr'* is to be recognised and given effect in England. I agree with Waller L.J. that the starting point for the discussion must therefore be the decision of the Spanish court.

The original decision of 31st July 2008 recites that on 19th March 2008 NNC had asked the court to decline jurisdiction on the grounds that the dispute was subject to arbitration in London. That application was rejected on the grounds that NNC had waived any right to arbitrate by commencing proceedings in London (paragraph 1 of the Reasons) and because the arbitration agreement on which NNC sought to rely was not sufficiently expressed in the bill of lading (paragraphs 2-4) and was not therefore binding on the parties. The court then referred to the stay of proceedings sought by NNC on 2nd June 2008 under Article 27 of the Regulation. It recognised that the proceedings in Folio 667 concerned the same subject matter as those before it and therefore stayed its own proceedings pending a decision by the English court on its own jurisdiction.

On reconsideration at the request of NNC the court reaffirmed its original reasoning. It refers in paragraph 4 of the judgment to evidence that had been placed before it of the approach of English law to the commencement of substantive proceedings before the courts and their effect on a party's ability to pursue a claim by arbitration. The court noted that there might be differences between the approaches of the English and Spanish courts in that respect, but held that it was for the English court in the first instance to decide whether to exercise jurisdiction itself or allow NNC to pursue a claim in arbitration. That discussion provided the context in which the court made the observation, on which Miss Selvaratnam Q.C. so heavily relied, that its decision was "without prejudice to the fact that these points do not bind the London court which may well decide the opposite . . ."

Miss Selvaratnam submitted that the decision of the Spanish court as a whole was no more than provisional in nature, being conditional upon a decision of the Commercial Court, as the court first seised, whether it was entitled to exercise jurisdiction in respect of the dispute. In other words, it amounted to no more than an indication by the Spanish court of how it would decide the question of its own jurisdiction if and when the stay were lifted. That was said to follow from the fact that the court stayed the proceedings and was said to be reinforced by the express statement that its decision was not intended to and did not bind the court in London.

In my view that interpretation of the Spanish court's judgment is untenable and indeed illogical. It is clear from the nature of the applications made by NNC in Spain, the order in which they were made and the summary of the arguments that is to be found in the judgment itself that NNC's primary case was that the court should decline to exercise jurisdiction altogether because the parties had agreed to submit the dispute to arbitration. It seems clear that if NNC had established the existence of an arbitration agreement the court would have declined jurisdiction and the

action would have stopped there. It may have been necessary for the Spanish court, applying its own procedure, to determine that application before taking any other step, but whether that is so or nor, it is clear that NNC did not seek a stay at the outset, preferring, for whatever reason to invite the court to deal with the existence of the arbitration agreement first. Had NNC been successful, there would have been no need for the court to stay the proceedings under Article 27 because they could not have continued in any event. It was only once the court had decided that NNC had failed to show that the parties had agreed to refer the dispute to arbitration, with the result that the court could assume jurisdiction (subject only to the prior claim of the Commercial Court), that it became necessary to impose a stay pending a decision by the Commercial Court whether to exercise jurisdiction as the court first seised.

That being so, I have no doubt that the judgment of the Spanish court is to be understood as embodying a decision on the merits that no enforceable arbitration agreement existed between NNC and Endesa in relation to the subject matter of the proceedings before it.

*Are the English courts bound to recognise the judgment of the Spanish court under Regulation 44?*

*(a) The general principles*

Article 33(1) of the Regulation provides:

"1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.",

but the scope of the Regulation as a whole is limited by Article 1 which provides:

"1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

. . .

(d) arbitration."

It follows that an English court is not obliged to recognise the judgment of the Spanish court if it relates to arbitration within the meaning of the Regulation.

The scope of the exception from the Regulation of matters relating to arbitration, which has been a matter of debate over the years, has in my view now been settled by the decisions of the European Court of Justice in *Marc Rich and Co. AG v Società Italiana Impianti PA (The 'Atlantic Emperor')* (C-190/89) [1991] E.C.R. 1-3855 and *Allianz S.p.A. v West Tankers Inc (The 'Front Comor')* (C-185/07) [2009] 3 W.L.R. 696.

In *Marc Rich* the claimant applied to the Commercial Court for the appointment of an arbitrator on behalf of the defendant, Impianti, which had failed to appoint an arbitrator on the grounds that there was no agreement to arbitrate. The real dispute, therefore, was whether an arbitration agreement existed between the parties. Impianti said that dispute fell *within* the Brussels Convention and should be determined in Italy. Marc Rich said it fell *outside* the Convention. Advocate General Darmon pointed out in paragraph 25 of his opinion that the existence of an arbitration agreement had to be established before the court could exercise its jurisdiction to appoint an arbitrator. In that sense the existence of an arbitration agreement was a preliminary issue. He referred in paragraph 26 to the distinction between a preliminary issue and the main issue in the proceedings which is said to be familiar to continental lawyers. The German government, basing itself on the Jenard Report, submitted that matters fall outside the Convention only if they constitute the principal subject matter of the proceedings – in that case the appointment of an arbitrator.

Subject to one matter, Advocate General Darmon thought that the position was clear: the Convention did not apply to the principal subject matter of the proceedings in that case because they were concerned with a matter directly relating to arbitration – the appointment of an arbitrator. He considered it to be well-established that if the principal issue in the proceedings falls outside the scope of the Convention, any proceedings relating to a preliminary issue are not governed by the Convention, even if the subject matter of that preliminary issue would fall within it if viewed in isolation. In paragraph 32 he referred to a commentary on the Convention in which it is said that, if the principal subject matter falls outside the Convention, so does the incidental issue and that in those circumstances the judgment cannot benefit from the conditions laid down on the Convention concerning recognition and enforcement. He therefore concluded in paragraph 33 that if the principal subject matter falls outside the Convention, it cannot be brought within it by the preliminary matter, even if that matter would otherwise fall within it. In his view, therefore, it was unnecessary for the court to decide whether the dispute about the existence of an agreement to arbitrate fell within or outside the Convention because the principal matter in issue fell outside it. In the alternative, however, he expressed the view that in any event a dispute about the existence of an arbitration agreement fell outside the Convention.

Pausing there, I think it is reasonably clear that Advocate General Darmon thought that the better view was that the nature of the substantive proceedings (in that case the appointment of an arbitrator) determines the question whether the preliminary issue (the existence of an arbitration agreement) fell within or outside the Convention. However, if the question were to be determined by reference to the nature of the preliminary issue itself, he considered that it should be regarded as falling outside the Convention. That is consistent with the reasons he gives in paragraph 88 and 92 of his Opinion for rejecting an argument to the effect that the nature of the substantive proceedings in Italy were such as to bring the proceedings in the English court within the scope of the Convention. As he observed in paragraph 40, therefore, whichever course was adopted, the matter fell outside the Convention.

In paragraphs 41-104 of his opinion Advocate General Darmon considered various arguments put forward by different parties, including the Commission, some in favour of a very broad and some in favour of a very narrow interpretation of Article 1(4). I do not think there is anything to be gained by summarising his responses to them. Suffice it to say that he rejected them all and that nothing he said in the course of doing so casts any doubt on what he considered to be the true principles which he had identified in the earlier part of his opinion.

The court itself considered first whether proceedings for the appointment of an arbitrator fell within the Convention. In paragraph 9 of its judgment it held that the appointment of an arbitrator by a national court is a measure adopted by the state as part of the process of setting arbitration proceedings in motion. It therefore comes within the sphere of arbitration and is thus covered by the exclusion contained in Article 1(4) of the Convention. The second question the court considered was whether a preliminary issue concerning the existence or validity of an arbitration agreement affected the application of the Convention to the dispute in question. It held that it did not. In paragraph 26 and 27 it said:

"26. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the Court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.

27. It would also be contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention (see judgment in Case 38/81, *Effer v. Kantner* [1982] ECR 825, paragraph 6) for the applicability of the exclusion laid down in art. 1(4) of the Convention to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties."

The case before the court concerned proceedings in which the principal issue was held to fall outside the Convention, but the reasoning holds good for a case in which the principal issue falls within it. In such a case the applicability of the Convention (now the Regulation) cannot depend on the nature of any preliminary issue. Paragraph 26 therefore applies in such a case mutatis mutandis.

In my view, both the opinion of Advocate General Darmon and the judgment of the court itself in that case support the following conclusions: (a) that when deciding whether the Regulation applies it is necessary to examine the nature of the proceedings rather than individual issues to which they give rise; (b) whether the Regulation applies depends on the essential subject matter of the dispute; (c) the essential subject matter of the dispute is not determined by the nature of a preliminary issue, even if the nature of that issue differs from that of the principal dispute; and (d) that therefore some issues which, viewed in isolation, would fall outside the Regulation may, if they arise as a preliminary issue, have to be treated as falling within the Regulation and vice versa.

Finally, it is necessary to mention that one finds nothing in either the opinion of the Advocate General or the judgment of the court to suggest that whether a judgment falls within the Regulation depends on anything other than whether the proceedings themselves did so. It may be said that the court in that case was not directly concerned with the question of recognition, but in fact the only purpose of obtaining a decision on whether the proceedings fell within the Convention was to determine whether the Italian court should decide the substantive dispute and thus whether its judgment would have to be recognised as one falling within the Convention. The question of recognition was therefore clearly present in the background. Quite apart from that, however, if the principal issue is such that the proceedings are to be treated as falling within the Regulation, it would be highly anomalous if a judgment given in those proceedings did not also fall within it.

In *Van Uden Maritime B.V. v Kommanditgesellschaft in firma Deco-Line* (C-391/95) [1999] Q.B. 1225 Advocate General Léger took the same view, basing himself on the Jenard and Schlosser reports.

In paragraph 39 of her opinion in *The 'Front Comor'* Advocate General Kokott noted the divergence between the Anglo-Saxon and continental European views of the scope of the arbitration exception in Article 1(4) of the Convention, the latter turning on the nature of the substantive subject matter of the proceedings (paragraph 44). She noted that in paragraph 26 of its judgment in *Marc Rich* the court had taken up the distinction between the subject matter of the proceedings and preliminary issues and said in paragraphs 52-54:

"52. As the court confirmed in its judgment in the *Van Uden* case, whether or not proceedings fall within the scope of the Convention or Regulation No 44/2001 must therefore be determined from the substantive subject matter of the dispute.

53. In the dispute before the court in Syracuse, the defendants are claiming damages by right of subrogation for loss caused to the insured party, Erg Petroli, following a collision between *Front Comor* and the jetty. The subject matter is therefore a claim in tort (possibly also in contract) for

damages, which falls within the scope of Regulation No. 44/2001, and not arbitration.
54. The existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seised must address when examining whether it has jurisdiction. Even if the view were taken that that issue fell within the ambit of arbitration, it could not change the classification of the proceedings, the subject matter of which falls within the scope of the Regulation. It can be left undecided here how proceedings which concern similar findings in the main case should be evaluated."
The final sentence of paragraph 54 is a little difficult to understand, but an examination of the French text (" . . . une procédure qui porte au fond sur ces matières") suggests that the Advocate General had in mind a case in which the existence of an arbitration agreement is the principal subject of the proceedings.
I think it is clear from these passages that Advocate General Kokott was adopting the principle to be derived from *Marc Rich* and *Van Uden* that the proceedings are to be characterised as a whole and that whether they fall within or outside the Regulation depends on the essential nature of the substantive dispute and the rights which the proceedings are brought to protect. It follows that proceedings involving the determination of a dispute as to the existence of an arbitration agreement will fall outside or within the Regulation depending on whether that represents the principal subject matter of the proceedings (as it would if proceedings were brought for a declaration that there is, or is not, such an agreement between the parties) or an issue that is merely ancillary to the determination of a substantive dispute that itself falls within the scope of the Regulation (as where, in a claim for breach of contract or tort, jurisdiction is disputed on that ground).
Finally, I come to the judgment of the court itself in *The 'Front Comor'*. Three paragraphs, 22, 26 and 27, are of particular importance. The court said:
"22. In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings (*Rich*, paragraph 26). More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (*Van Uden*, paragraph 33).
. . .
26. In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.
27. It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, *including the question of the validity of that agreement,* comes within the scope of Regulation No 44/2001 and

that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation." (My emphasis).

In my view there is no real doubt that in these paragraphs the court was adopting for the purposes of deciding whether proceedings fall within the Regulation the principle of looking to the nature of the principal subject matter of the proceedings. That seems to me to be quite clear simply from the terms of paragraphs 26 and 27 themselves, but I do not think that should come as any surprise or that it should be regarded as involving a departure from the previous position. I do not think that there can be much doubt, particularly having regard to paragraph 22, that the court was adopting and applying the principles to be found in the earlier cases and expounded by the Advocate General in her opinion. In my view, therefore, Mr. Lord Q.C. was right to submit that the court's decision in *The 'Front Comor'* is no more than the latest step in a consistent line of authority.

Miss Selvaratnam submitted, however, that the court was not concerned in that case with questions of recognition and that therefore not only were we not bound by the decision, but we were free to reach a different conclusion on the question whether the judgment given by the Spanish court falls within the Regulation. It is quite true that in *The 'Front Comor'* the court was not directly concerned with a question of recognition; indeed at the time of the judgment no decision had yet been made by the court in Syracuse. However, if automatic recognition under Article 33 depends on whether the judgment in question was given in proceedings falling within the Regulation (a question to which I shall return in a moment), whether a judgment must be recognised necessarily depends on the application of the principles enunciated in that case and earlier authorities. I do not think, therefore, that the court's decision can be distinguished on that ground. Nor do I consider that we can properly treat paragraphs 26 and 27 of the judgment as mere obiter dicta to be applied only insofar as we find them persuasive. In my view they contain a clear statement of principle, consistent with earlier decisions of the court, which represents the current state of the law. The judge was therefore right in my view to treat them as binding and we must do the same.

Mr. Whitehead submitted that Article 32 read together with Article 1(2) requires the court when considering whether to recognise a judgment of a court of another Member State to determine whether the nature of the operative part of the judgment is such as to bring it within the scope of the Regulation. Thus a judgment which determines that there is or is not an arbitration agreement between the parties falls outside the Regulation, whatever else the judgment may also determine, since the Regulation does not apply to arbitration matters. This submission raises the question to which I adverted earlier, namely, whether judgments are to be characterised by reference to the nature of the proceedings in which they are given or by their particular content; and if the latter, whether only that part which falls within the scope of the Regulation is to be recognised under Art. 33.

The Regulation itself contemplates that a single judgment may deal with matters, some of which fall within and some outside its scope. Article 48 provides as follows:

"1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a judgment."

In *Van den Boogaard v Laumen* (C-220/95) [1997] Q.B. 759 the English court following the grant of a divorce ordered the husband to transfer certain property to the wife for the purposes of

achieving a "clean break" between the parties. When the wife sought to enforce the agreement in the Netherlands a question arose whether the judgment related to maintenance (in which case it would fall within the scope of the Regulation) or to rights in property arising out of a matrimonial relationship (in which case it would not). The court held that because on divorce the English court could regulate both rights of property arising out of matrimonial relationships and matters of maintenance, it was necessary for the court in the Netherlands to distinguish between the different aspects of the decision. A judgment which relates to matters falling both within and outside the Regulation may be enforced in part if the necessary distinction can be clearly drawn. Miss Selvaratnam submitted that the present case fell within that principle: the part of the Spanish court's decision that granted a stay under Article 27 must be recognised under Article 48, whereas the part that related to the existence of an arbitration agreement need not. In my view that submission is too wide, however, since it would inevitably lead to the conclusion that the court's judgment on a preliminary issue could be viewed in isolation from the principal subject matter of the proceedings for the purposes of recognition and enforcement. It is in reality another way of expressing Mr. Whitehead's submission that the operative part of the judgment must be viewed in isolation and characterised by the nature of the matter with which it is concerned, but that would be contrary to the decisions in *Marc Rich* and *The 'Front Comor'*. In my view, the proceedings can be treated as relating to two or more different subject matters and the consequent judgment as falling partly within and partly outside the scope of the Regulation only in cases where they embrace more than one principal subject matter, so that the determination of one is not a step on the way to the determination of another and cannot therefore be classed as a preliminary issue. In the present case it was necessary for the Spanish court to determine whether an arbitration agreement existed as a step on the way to determining the substantive dispute between the parties. It was therefore a preliminary issue within the principle enunciated in the cases to which I have referred and therefore the proceedings relating to it take their character from the substantive issue. Article 48 therefore has no application in this case.

The substance of the claim made by Endesa in Spain was to recover damages for breach of contract. It follows that the matter before the Spanish court was a civil or commercial matter and that in principle the judgment must be recognised under Article 33(1) of the Regulation. The judge accepted that in the light of the decision of the European Court of Justice in *The 'Front Comor'* the judgment of the Spanish court in this case was to be characterised as falling within the scope of the Regulation, but held that she was not obliged to recognise it in the proceedings in Folio 667 because the subject matter of those proceedings was arbitration. On that basis she held that the Regulation "simply does not apply to the conduct of those proceedings". In reaching that conclusion she relied on the decision of this court in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co. Ltd* [2005] 1 Lloyd's Rep. 67.

*(b) Recognition in Folio 667*

The judge's analysis was supported and adopted by Miss Selvaratnam, who sought support from some dicta of Burton J. in *CMA CGM S.A. v Hyundai Mipo Dockyard Co. Ltd* [2008] EWHC 2792. Mr. Lord, on the other hand, submitted that the terms of Article 33 apply to the judgment itself and that the obligation to recognise judgments of the courts of other Member States is not qualified by reference to the nature of the proceedings in which recognition is sought. It was open to Endesa, he said, to apply at any time to have the Spanish judgment registered in England under a process that is automatic, subject only to the provisions of Article 34. Once registered, the judgment would have the same force as a judgment of the High Court and could not be ignored

in proceedings relating to arbitration any more than any other kind of proceedings.
One of the purposes behind the Brussels Convention, and now the Regulation, was to facilitate the free movement of judgments of the courts of Member States in relation to matters falling within its scope: *Krombach v Bamberski* (C-7/98) [2000] E.C.R. 1-01935. It is consistent with that purpose that recognition should depend on whether the judgment was given in proceedings falling within the Regulation, rather than by reference to the nature of the proceedings in which a party seeks to rely on it. Moreover, there is nothing in Chapter III of the Regulation to indicate that recognition depends on the nature of the proceedings currently before the court. Recognition as such is not defined in the Regulation and unlike enforcement, which is dealt with in Articles 38 to 52, is not subject to any procedural requirements or preconditions. In my view it means no more than accepting the judgment as an effective decision of the court in question and thus as conferring on it the same authority as would be accorded to it in the Member State in which it was given: see *Hoffmann v Krieg* (C-145/86) [1988] E.C.R. 645.
Against that background the notion that the court is obliged to recognise a foreign judgment in one set of proceedings but not another strikes me as surprising, if not anomalous. The argument in favour of such a conclusion is that decisions of the courts of Member States in proceedings falling within the Regulation were intended to be portable for some purposes but not others, but that is to give primacy to the nature of the subsequent proceedings rather than the nature of the proceedings in which the judgment was given.
Some support for that view can, however, be found in the latest (5th) edition of *Civil Jurisdiction and Judgments* (Briggs, ed. Rees), paragraphs 2.41-2.42 and elsewhere, to which our attention has been drawn. The authors there argue that a judgment given by a court in another Member State in a civil or commercial matter need not be recognised in later proceedings which themselves fall outside the scope of the Regulation. In other words, that the exception in Article 1(2)(d) has the effect not only of excluding from the operation of Article 33(1) judgments given in relation to matters falling outside the Regulation, but also of excluding the operation of Article 33(1) in any proceedings falling outside its scope. Thus, in proceedings falling outside the Regulation a judgment given in earlier proceedings between the same parties in relation to a civil or commercial matter would not be entitled to automatic recognition under Article 33(1) for the purposes of giving rise to estoppel by record. That is said to follow from the decision in *Hoffmann v Krieg*.
There were strong arguments for excluding from the scope of the Convention (and now the Regulation) proceedings brought in support of arbitration, particularly having regard to the pre-eminent role that is played by the courts of the state in which the arbitration has its seat, and there were no doubt similarly strong arguments for excluding the other matters now falling within Article 1(2). Having said that, however, there is no obvious reason why a judgment of a court of another Member State in a civil or commercial matter between the same parties should not be entitled to automatic recognition in subsequent proceedings of any kind, assuming it to be relevant. On the contrary, if the judgment takes its character from the nature of the proceedings in which it was given, as I think it must, there is every reason to expect that it should be recognised if those proceedings fall within the scope of the Regulation.
Miss Selvaratnam referred in the course of her argument to *Hoffmann v Krieg.* The case was concerned with an order for maintenance made by a German court in favour of a wife against her husband following their separation. The proceedings in which it was made did not fall within Article 1(1) of the Convention and were thus not excluded from its scope. In principle, therefore,

the order was entitled to automatic recognition in other Member States under Article 26 (now Article 33). The husband, who had settled in the Netherlands, subsequently obtained a divorce from the Dutch courts. He then applied to the German court to discharge the maintenance order, but his application was dismissed (though the amount of the order was reduced) because the divorce had not then been recognised by the German courts. (The Dutch decree did not fall within the scope of the Convention, since divorce proceedings concern status; it was therefore not entitled to automatic recognition in Germany.) When the wife sought to enforce the maintenance order in the Netherlands the question arose whether it could be enforced there notwithstanding the decree of divorce.

Advocate General Darmon approached the matter in terms of the reconcilability of the two judgments and the need to subordinate the enforcement of a foreign judgment to the effect of a national judgment. The court held that the maintenance order presupposed the existence of the marriage and that since in the view of Dutch law the parties had ceased to be married, the Dutch courts were no longer obliged to give effect to it.

The court itself identified the question for decision as follows (judgment, paragraph 12):

" . . . whether a foreign judgment whose enforcement has been ordered in a Contracting State pursuant to Article 31 of the Convention must continue to be enforced in all cases in which it would still be enforceable in the State in which it was given even when, under the law of the State in which enforcement is sought, the judgment ceases to be enforceable for reasons which lie outside the scope of the Convention."

It observed that the maintenance order necessarily presupposed the existence of a matrimonial relationship and that therefore it was necessary to consider whether the dissolution of that matrimonial relationship by a decree of divorce granted by a court of the Member State in which enforcement was sought could prevent the enforcement of the foreign judgment even when that judgment remained enforceable in the State in which it was given, the decree of divorce not having been recognised there. Having noted that the Convention did not apply to status, the court observed that it also contained no rule requiring the courts of the State in which enforcement was sought to make the effects of a national decree of divorce conditional on its recognition in the State in which the foreign maintenance order was made. Moreover, it also pointed out that Article 27(4) (which has no equivalent in the Regulation) specifically excluded the recognition of a foreign judgment which was inconsistent with a rule of the private international law of the State in which recognition was sought relating to the status of natural persons. As a result it held that the Dutch courts were entitled to proceed on the basis that the foundation for the maintenance order had fallen away.

I do not think that the decision in *Hoffmann v Krieg* supports the broad proposition that a judgment in a civil or commercial matter is not entitled to automatic recognition in proceedings before a court of another Member State which fall outside the Regulation. The important question for present purposes, however, is whether it supports the narrower proposition that a judgment in a civil or commercial matter which also relates incidentally to an excluded matter need not be recognised in proceedings in another Member State relating principally to that excluded matter. I do not think it does. The court proceeded on the basis that the German maintenance order was entitled to recognition and had been recognised in the Netherlands. The question was simply whether it could be enforced despite an inconsistent decision of the national court which was not itself recognised (and did not qualify for automatic recognition) in the Member State where that order had been made. There was no discussion of the effect of

recognition as giving rise to estoppel by record, which is the question that we have to decide, and the judgment does not contain any clear indication of how that question should be decided. The terms of Articles 1 and 27(4) were regarded by the court as supporting the conclusion that enforcement of the maintenance order did not take precedence in the Netherlands over the decree of divorce, but I do not think that one can draw any wider principle than that from the decision.
Before leaving this part of the case it is worth pausing for a moment to consider what was said on the question of recognition in *CMA CGM S.A. v Hyundai Mipo Dockyard Co. Ltd*. The case came before the court by way of an appeal against an arbitration award. The argument that had commended itself to the arbitrators was that if the word "tribunal" in Article 32 does not include an arbitration tribunal (as it plainly does not), so the word "tribunal" in Article 1.1 does not include an arbitration tribunal. Accordingly, the Regulation does not apply to arbitration tribunals, which are therefore not obliged to recognise judgments of courts of Member States.
The judge dealt with the matter in the following way in paragraph 46 of his judgment:
"It is plainly right that, if the Judgments Regulation does not apply to an arbitration tribunal, then arbitration tribunals are not obliged to recognise foreign judgments, even if UK courts are so obliged, and to that extent the Arbitrators were right not to be persuaded by the beguiling argument that arbitrators are applying English law, and if English law requires recognition of a foreign judgment then the arbitrators must recognise the foreign judgment. This argument does not differentiate between substantive and procedural law. Of course arbitrators will apply English law, but they would not then be bound by the procedural requirement, if it be imposed only on a court, to recognise a foreign judgment, estopping it from considering the facts underlying that judgment."
Miss Selvaratnam relied on that passage and submitted that, since in this case Gloster J. was determining the jurisdiction of the tribunal with its permission under section 32 of the Arbitration Act 1996, the same principles must apply.
I am unable to accept that submission for two reasons. It is quite true that the Regulation itself does not apply to arbitral tribunals and that arbitrators are not therefore bound *by the Regulations themselves* to recognise judgments of the courts of Member States of the EU, but it does not follow that foreign judgments, whether of the courts of Member States or other countries, can be disregarded in arbitration proceedings. A judgment of a foreign court which is regarded under English of conflicts of laws rules as having jurisdiction and which is final and conclusive on the merits is entitled to recognition at common law: see *Dicey and Morris and Collins, The Conflict of Laws*, 14th ed. paragraphs 14-027 - 14-029. It follows, therefore, that arbitrators applying English law are bound to give effect to that rule. There is nothing new in this; it has long been recognised that a judgment of a foreign court can give rise to estoppel by res judicata – see, for example, *The Sennar (No. 2)* [1985] 1 W.L.R. 490 – and the principle is routinely applied in arbitration proceedings.
Quite apart from that, however, even if the arbitrators in this case were entitled to disregard the Spanish judgment, I do not think that the court can properly do so, since Article 33(1) of the Regulation imposes a legal duty on Member States to recognise judgments given by the courts of other Member States, subject only to the terms of the Regulation itself. The fact that in this case the arbitrators had given their permission to the court's hearing an application under section 32(1) of the Arbitration Act cannot affect the court's duty to recognise the judgment of the Spanish court, nor can it affect Endesa's right to rely on it as giving rise to an issue estoppel.
The judge found some support for her conclusion in the judgment of this court in the *Through*

*Transport* case, but in my view some of the comments made in that case must be read with caution in the light of the decision in *The 'Front Comor'*. In *Through Transport* the Finnish court had held that New India was not bound by the arbitration agreement in the Club's rules because the claim was made under the Finish statute, not under the contract of insurance. In proceedings in this country, however, it was for the English court applying the English conflict of laws rules to determine the nature of the issues that arose for decision in those proceedings. At first instance I held that that the issue whether New India was bound by the arbitration agreement was to be characterised as one of obligation and that decision was upheld on appeal. That meant that it was necessary to identify the terms of the obligation, in particular whether they included an agreement to arbitrate. New India did not suggest before me that the decision of the Finnish court should be recognised and treated as binding for any purpose, although it did argue that the proceedings in this country should be stayed because the Finnish court was first seised of the issue relating to the applicability of the arbitration clause. However, it was accepted that the issue fell within Article 1(2)(d) of the Regulation and that there were therefore no grounds for imposing a stay under Article 27 pending a decision on the merits in Finland.

The judge in this case found support for her conclusion in paragraphs 50 and 51 of the judgment of the Court of Appeal, but it is worth noting that when in paragraph 49 the court observed that the Regulation had no application to the claims brought in the English proceedings it was dealing with New India's argument that the court should decline jurisdiction or stay the proceedings *under the Regulation*. The court made it clear that although the question whether the judgment of the Finnish court was entitled to recognition under Article 33 had been discussed in argument, it did not arise for decision because it related only to whether the court had jurisdiction to entertain a claim under the statutory provisions. It does not appear that New India sought to argue that the Finnish judgment should be recognised as binding on the parties in some other respect. In my view there is nothing in these comments to support the conclusion that a foreign judgment given in civil or commercial proceedings does not have to be recognised in subsequent arbitration proceedings. To the extent that the decision of the Finnish court was to the effect that there was no relevant arbitration agreement between the parties, the comments in paragraph 50 of the judgment must now be read in the light of the decision in *The 'Front Comor'*.

In paragraphs 88-90 of his opinion in *Marc Rich*, to which the judge also referred, Advocate General Darmon was dealing with the argument put forward by Professor Jenard (see paragraph 86) that if a court with jurisdiction to deal with a dispute falling within the scope of the Convention was already seised of that dispute and had to determine as an incidental issue the existence of an arbitration agreement, that was sufficient to bring that issue within the scope of the Convention for all purposes, even when raised as the principal subject matter of separate proceedings in another Member State. Not surprisingly, perhaps, in paragraph 90 he roundly rejected that suggestion as being contrary to principle, but I do not think that it has any bearing on the question we have to decide.

The fact that, subject to Article 34 of the Regulation, the judgment of the Spanish court could be registered in England subject to minimal formalities and would then have to be recognised for all purposes points strongly in favour of the conclusion that judgments given in proceedings falling within the scope of the Regulation must be recognised for all purposes in Member States. In my view that is consistent both with the language of Article 33 and the wider purpose of the Regulation. In my view, therefore, the judge was wrong to hold that the judgment of the Spanish court did not have to be recognised in the proceedings in Folio 667.

*(c) Public policy*

Article 34 provides that a judgment shall not be recognised if recognition is manifestly contrary to the public policy of the Member State in which recognition is sought. The judge held, albeit with some degree of hesitation, that it would be manifestly contrary to the public policy of the United Kingdom to recognise the Spanish court's judgment that there was no arbitration agreement between the parties. The principal grounds for her conclusion were (a) that it would be contrary to English public policy to recognise a judgment obtained in breach of an arbitration agreement that was valid by its proper law; (b) that the court has a clear obligation to give effect to an arbitration agreement that is valid in accordance with its proper law; and (c) that (on the assumption that there was in existence a binding arbitration agreement) Endesa was in breach of contract in not agreeing to submit the dispute to arbitration.

In my view these are essentially three different ways of putting the same point, namely, that at common law it is contrary to public policy to recognise a foreign judgment given in proceedings which, in the eyes of English law, have been pursued in contravention of a valid arbitration agreement. Important though arbitration agreements undoubtedly are, I think that puts the matter rather too high. It is not, I think, contrary to public policy to recognise a judgment of a foreign court of competent jurisdiction simply on the grounds that an English court would have come to a different decision. For example, if a foreign court purporting to apply English law to a contract with the aid of expert witnesses were to reach a conclusion that an English court would think wrong, it would not be contrary to public policy to enforce the judgment and it is difficult to see why for this purpose arbitration agreements should be given a status above that of other obligations. Whether a foreign judgment will be recognised depends primarily on whether under English conflict of laws rules the court in question is regarded as having jurisdiction over the parties. In my view the question whether the courts of this country should recognise a foreign judgment given in proceedings taken in breach of an arbitration agreement is also essentially one of jurisdiction. There is apparently no common law authority on the point (see *Dicey, Morris & Collins*, paragraph 14-091), but if the court in question is regarded as being of competent jurisdiction (for example, because both parties were resident within the territorial area of its jurisdiction) I do not think that it would be contrary to public policy to recognise the judgment, even if an English court would have held that the parties had agreed to refer the dispute to arbitration. Different considerations might arise if the judgment had been obtained through conscious wrongdoing, for example by pursuing proceedings in defiance of an injunction, but that is not this case.

It may be partly for these reasons that it was considered desirable to make specific provision in section 32 of the Civil Jurisdiction and Judgments Act 1982 in respect of the recognition of foreign judgments made in proceedings brought contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country. These provisions protect both exclusive jurisdiction clauses and arbitration clauses and the ordinary rules relating to the recognition of foreign judgments are excluded by subsection (3). Provisions of that kind would not be required at all if there were a clearly established rule of public policy that foreign judgments obtained contrary to arbitration agreements were not to be enforced in this country. Moreover, by virtue of subsection (4) subsection (1) does not prevent the recognition or enforcement of judgments of the courts of other Member States of the European Union. In the face of that specific exception it is difficult to see how a simple failure on the part of a court in another Member State to give effect to an arbitration agreement could

justify a refusal to recognise and enforce its judgment on the grounds of public policy.
Miss Selvaratnam submitted that to recognise a judgment given in proceedings brought contrary to an arbitration clause would place this country in breach of its obligations under the New York Convention. This argument appears to have held some attraction for the judge, but I am unable to accept it. It is quite true that the United Kingdom as a party to the Convention has an obligation to recognise and enforce arbitration agreements where they exist, but it does not follow that the courts of this country have a duty to examine the question for themselves whenever it is alleged that the parties have entered into an agreement of that kind. Whether they have done so in any given case is a question which, for the purposes of the New York Convention, may be determined by any court of competent jurisdiction, there being nothing in the Convention itself which precludes the application of established rules of estoppel by record.
However, it is unnecessary to pursue these lines of enquiry because the European Court of Justice has provided authoritative guidance in the case of *Krombach v Bamberski* on the principles that apply to the operation of Article 34. In that case the claimant, Mr. Krombach, was indicted in France in connection with the death of the defendant's daughter. He failed to appear at the hearing, was treated as being in contempt of court and as a result was tried in his absence and denied legal representation. A civil claim for damages by the girl's father had been attached to the proceedings and Mr. Krombach was ordered to pay FF350,000 in damages and costs. When Mr. Bamberski sought to enforce the judgment in Germany Mr. Krombach argued that to enforce the judgment would be contrary to public policy because he had not been given a proper opportunity to defend himself.
In its judgment the court said:
"36. By disallowing any review of a foreign judgment as to its substance, Article 29 and the third paragraph of Article 34 of the Convention prohibit the court of the State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute. Similarly, the court of the State in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the State of origin.
37. Recourse to the public-policy clause in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute *a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order*.
38. With regard to the right to be defended, to which the question submitted to the Court refers, this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States." (My emphasis.)
These paragraphs are important for two reasons: first, because they make it clear that public policy may not be invoked on the grounds that the foreign court has reached a decision which the court of the recognising or enforcing state thinks is wrong (this ties in with the point made earlier); second, because it makes it clear that a judgment can properly be refused recognition or

enforcement on public policy grounds only in cases where recognition would be inconsistent with a fundamental principle of the legal order of the enforcing Member State.
It is unnecessary for the purposes of this case to consider the scope of this principle which the court clearly intended should apply in only a very narrow class of cases. In my view, however much importance is attached to arbitration, or even to the principle that contracts are to be performed, it cannot be said that the failure on the part of the Spanish court in good faith to give effect in this case to an arbitration agreement imperfectly spelled out in the bill of lading (but in the eyes of English law sufficiently incorporated by reference) would involve a manifest breach of a rule of law regarded as essential in the legal order of the United Kingdom or of a right recognised as being fundamental within that legal order.
In those circumstances I do not think it helpful to spend time considering the judgments in *Philip Alexander Securities and Futures Limited v Bamberger and Others* [1997] I.L.Pr. 73 on which the judge relied. The facts of that case were very different from those of the present case and the courts did not have the benefit of the more recent decisions of the European Court of Justice to guide them.
For these reasons I have reached the conclusion that the court in Folio 667 was not entitled to refuse recognition of the Spanish court's judgment and that the judge ought to have refused the declaration sought in Folio 667. I agree, therefore, that the appeal should be allowed.
*Commercial Court action Folio 64*
The judge dismissed the action Folio 64 on the grounds that, since the parties had not agreed that the High Court was to have jurisdiction to determine disputes arising under the bill of lading, there was no basis on which it could properly assert jurisdiction. Miss Selvaratnam sought to persuade the judge that the court could properly assert jurisdiction over Endesa under Article 5(1) of the Regulation and she sought permission to amend NNC's pleadings to raise that additional claim. However, the judge considered such a claim to be unsustainable, dismissed the application to amend and struck out the proceedings. She refused leave to appeal, as did the single Lord Justice who considered NNC's application on paper.
Before us Miss Selvaratnam sought once more to argue that the court was entitled to assert jurisdiction under Article 5(1). In the view of this court, however, that argument could not succeed and we therefore refused permission to appeal against the judge's decision for reasons to be given at a later date.
Article 5(1) provides as follows:
"A person domiciled in a Member State may, in another Member State, be sued:
1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;"
Miss Selvaratnam submitted that the court could exercise jurisdiction in this case because Endesa was in breach of an agreement to arbitrate, the place of performance of which was London. As Mr. Lord pointed out, however, the first difficulty facing NNC was that it was forced to submit that a claim for damages for breach of an agreement to arbitrate falls within the scope of the Regulation, contrary to its submissions in Folio 667. That might not matter too much if the argument were well-founded, but in my view it is not. If one asks what is the nature of the right which the proceedings were brought to protect (see paragraph 22 of the judgment in *The 'Front Comor'*), the answer must be that they were brought to protect the right to have the dispute determined by arbitration. However, it is clear that in *Marc Rich* proceedings to determine whether an arbitration agreement existed between the parties were regarded by Advocate General

Darmon as falling outside the scope of the Convention. If that is so, it is difficult to see why a claim for damages for breach of such an agreement should not do so as well. Moreover, I agree with Waller L.J. that it would not be right to allow NNC to amend its claim in such a radical manner simply in an attempt to ensure that the Commercial Court retains its position as the court first seised, nor do I think that there would be any point in doing so. NNC could not proceed with its substantive claim in England because there was no basis on which the court could assume jurisdiction over Endesa in respect of it. Equally, a claim for breach of an arbitration agreement would be doomed to failure because the judgment of the Spanish court that there was no such agreement in existence between the parties would have to be recognised: see section 32(4) of the Civil Judgments and Jurisdiction Act. For all these reasons it would not have been right to give permission to make the amendment sought by NNC.

APPENDIX

Council Regulation (EC) No 44/2001
of 22 December 2000
on jurisdiction and the recognition and enforcement
of judgments in civil and commercial matters

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

(10) For the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State.

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.

(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to

raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.
(25) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

## CHAPTER I

## SCOPE

### Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
2. The Regulation shall not apply to:
(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
(c) social security;
(d) arbitration.
3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.

## CHAPTER II

## JURISDICTION

### Section 1

### General provisions

### Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

### Article 3

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.
2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

### Article 4

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.
2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

### Section 2

### Special jurisdiction

### Article 5

A person domiciled in a Member State may, in another Member State, be sued:
1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,
(c) if subparagraph (b) does not apply then subparagraph (a) applies;
2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;
3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;
4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;
5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;
6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;
7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:
(a) has been arrested to secure such payment, or
(b) could have been so arrested, but bail or other security has been given;
provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.
Prorogation of jurisdiction
Article 23
1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:
(a) in writing or evidenced in writing; or
(b) in a form which accords with practices which the parties have established between themselves; or
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".
3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the

court or courts chosen have declined jurisdiction.
4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.
5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 24

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

Lis pendens - related actions

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

For the purposes of this Section, a court shall be deemed to be seised:
1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or
2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

CHAPTER III

RECOGNITION AND ENFORCEMENT

Article 32

For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal

of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1

Recognition

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 37

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal.

Section 2

Enforcement

Article 38

1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 41

The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 48

1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

Article 53

1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

---