In the Supreme Court of Bermuda

CIVIL JURISDICTION 1993 No. 381

1. SKANDIA INTERNATIONAL INSURANCE COMPANY ("Skandia")
and
2. MERCANTILE AND GENERAL REINSURANCE COMPANY ("MG Re")
and
3. GERLING-KONZERN GLOBALE RUECKVERSICHERUNGS-GESELLSCHAFT ("Gerling")
and
4. UNION RUECKVERSICHERUNGS-GESELLSCHAFT ("Union")
and
5. ASSICURAZIONI GENERALI SpA ("Assicurazioni")
and
6. HANNOVER RUECKVERSICHERUNGS-ARTIENGESELLSCHAFT ("Hannover")
and
7. MUENCHENER RUECKVERSICHERUNGS-GESELLSCHAFT ("Munchener")

Plaintiffs

-v-

AL AMANA INSURANCE AND REINSURANCE COMPANY LIMITED ("AL AMANA")

Defendant

Mr. V.V. Veeder Q.C. and Mr. J. Woloniecki for the Plaintiffs
Mr. M. Beloff Q.C. and Mr. N. Hargun for the Defendant

JUDGMENT

This is a summons by the Plaintiffs seeking an interlocutory injunction to restrain the Defendant from continuing with legal proceedings brought by the Defendant against the Plaintiffs in Kuwait on the ground that the Defendant had agreed to submit the disputes to arbitration.

FACTUAL BACKGROUND

Alghanim Industries ("Alghanim") is a substantial Kuwaiti company, which engages (directly and via associated companies) in a wide range of industrial and service businesses. It and its associated companies have at all times owned extensive property in Kuwait. One such company is the Defendant, Al Amana, a captive insurer.

Al Amana is an exempted company incorporated under the laws of Bermuda and complies with Bermuda's Companies and Insurance legislation. It is a captive insurance company wholly owned by Alghanim and operates from the Alghanim office in Kuwait.

Although it is Alghanim's captive, Al Amana is not licensed to write direct insurance business in Kuwait. Accordingly, Alghanim's insurance business is written directly by other insurers, which are licensed. In general (and as happened in this case), that direct business is ceded in whole or in part to Al Amana as reinsurer.

Arabia Insurance Company Ltd. is a Lebanese company, with a regional office in Amman, Jordan and a branch office in Kuwait, licensed to write insurance business in Kuwait.

The insurance contract underlying this action is an all risks property and business interruption insurance written by Arabia in favour of Alghania, covering real and personal property of Alghanim and its associated companies located in Kuwait, for the period 1 May - 31 December 1990. The sum insured was KD 96,155,000.

Risk and premium (subject to an overrider commission) were ceded as to 100% by Arabia to Al Amana pursuant to a reinsurance "guarantee" dated 28 May 1990.

By letter dated 31 May 1990, Arabia delegated to Al Amana full authority to administer the underlying policy, including receiving notice of and processing claims and all similar and related actions.

The Plaintiffs are various European insurance and reinsurance companies each of whom at various times between 1987 and 1990 reinsured Al Amana pursuant to Property All Risks Treaty Reinsurance Agreements ("the Treaty Reinsurances"). Al Amana ceded 55.7% of the business to the Plaintiffs in varying proportions under property quota share/first surplus retrocession treaties. The quota share/first surplus treaties were for all material purposes in similar terms to that signed by the First Plaintiff ("Skandia").

Additionally, Al Amana ceded 39.7% of the business under three facultative retrocessions. Two of the facultative retrocessions were respectively with Skandia and the Third Plaintiff("Gerling"). Skandia reinsured Al Amana for the period 12 months from 1st January, 1989 and 11 months from 1st February, 1990 and Gerling reinsured Al Amana for the period 11 months from 1st February, 1990 pursuant to Property All Risks Facultative Reinsurance Agreements ("the Facultative Reinsurances"). No wording was produced.

The Facultative Reinsurance incorporated by reference in respect of cover ("as per wording attached") the standard terms and conditions of the underlying policies provided to M/S Alghanim Industries Inc. and/or Yusuf Ahmed Alghanim and Sons W.L.L. and/or Associated Companies ("Alghanim") for the periods 1st January to 31st December, 1989 and 1st February to 31st December, 1990 ("the Underlying Policies").

Article 10 of the Treaty Reinsurance provides for arbitration of disputes or differences between the parties being "arbitration agreements" within the meaning of the Bermuda International Conciliation and Arbitration Act 1993 (hereinafter referred to as "the 1993 Act").

Condition 4 of the Underlying Policies likewise provides for such arbitration. Skandia and Gerling claim but Al Amana deny, that Condition 4 was incorporated into the Facultative Reinsurance.

Al Amana retained only 4.6% of the risk.

Each of the underlying insurance contract written by Arabia, the reinsurance written by Al Amana (by incorporation of original terms) and the property quota share/first surplus treaties contains a war risks exclusions in similar terms. The facultative retrocession may contain a similar exclusion by incorporation of underlying terms.

In August, 1990 Kuwait was invaded by Iraq. In the aftermath of the Iraqi invasion, Alghanim suffered massive property damage in Kuwait. Alghanim's case is that the major part of (if not all) this damage resulted not from military action by the Iraqi forces, but from looting, arson and destruction by the civilian populace. This is in issue. According to Alghanim's most recently adjusted figure, its losses are of the order of KD68,860,330 (approximately US$230,000,000). The Plaintiffs have disputed the claim by reference to war risks exclusion as hereinafter appears.

On 25 October, 17 December, 1990 Alghanim advised Al Amana of the damage and loss incurred.

By fax dated 28 December 1990, Al Amana notified Skandia of Alghanim's claims and asked for views on how the claim should be handled.

On January 4, 1991 Skandia responded by asserting that the claims were excluded from coverage under the "treaty" (presumably the quota share/first surplus treaty) and refused to comment on the subject of

claims handling.

On 24 January, 1991, Al Amana explained its view that the losses were not excluded.

On 31 January 1991, Skandia again responded, repeating that the losses were excluded, and refusing any involvement, even to the extent of offering suggestions, in the claims handling process.

On February 1991 Al Amana sent a fax to Skandia enclosing a letter written on 25 January 1991. Alghanim had written to Al Amana recognising the difficulties in adjusting its loss, but pointing out that quick settlement was essential to resumption of its business operations.

By fax dated 5 March, 1991 Al Amana sought a final indication of Skandia's position.

By letter dated 11 March, 1991 Skandia responded, expanding upon the comments made previously.

Further correspondence to similar effect followed. On 30 July 1991 Alghanim provided Al Amana with a copy of a damage assessment survey, Skandia were informed of this fact by Al Amana and invited to inspect the survey by letter, dated 31 July 1991. On 12th August 1991 Skandia replied by again denying coverage.

Similar responses were received from the Fourth Plaintiff ("Union Re") (faxes dated 7 January and 4 February 1991,) and Gerling (letter dated 12 March 1991.

On 18 December 1991, Alghanim sent a letter before action to Al Amana.

By fax dated 19 December 1991, Al Amana passed on Alghanim's letter to Skandia, suggesting a meeting of all reinsurers in Kuwait.

By fax dated 30 December 1991 (Messrs. Barlow Lyde and Gilbert ("BLG") sent on behalf of Skandia, Mercantile and General, Hannover Re and Union Re declined a meeting, sought further information, and re-iterated their clients' denial of liability.

KUWAITI PROCEEDINGS

Alghanim issued proceedings against Arabia and Al Amana in the Kuwaiti Commercial Court of First Instance (Fifth Circuit) on 30 December, 1991 (hereinafter referred to as "the main action").

Al Amana applied to join by way of third party proceedings, inter

alios, the Plaintiffs pursuant to Article 86 of the Kuwaiti Civil and Commercial Code of Procedure on 3 May, 1992. There is an issue on the extent to which such proceedings are connected with the main action.

A hearing of Al Amana's application took place on 27 June, 1992, which was attended by Alghanim, Arabia, Union Re, Hannover Re and Nasco Karaoglan ("Nasco", brokers who placed Al Amana's outward facultative protection). A further hearing was fixed for 24 October 1992 to allow time for service on Al Amana's other retrocessionaires.

There were further hearings on 24 October and 26 December 1992, but on each occasion a full hearing was adjourned pending service on Gerling, Mercantile and General and the Seventh Plaintiff ("Munich Re").

On 17 April 1993, a further hearing was adjourned for the same reason. At that hearing Arabia submitted a defence on the merits to Alghanim's claims.

On 15 May 1993, a further hearing took place at which all parties were represented. The Plaintiffs were all represented by one lawyer, who made oral submissions asserting two defences: lack of jurisdiction based upon the arbitration clauses and a defence on the merits as a result of the war risks exclusions. A copy of the quota share/first surplus treaty signed by Mercantile and General was submitted to the Court on behalf of the Plaintiffs (in the present action). The hearing was adjourned until 11 September 1993. There is an issue as to the significance of the Plaintiffs submission of non-liability based on the war risks exclusion. In particular the Plaintiffs deny that any submission to the jurisdiction of the Kuwaiti courts was involved therein.

On 11 September 1993, the Kuwaiti Court authorised Alghanim to join Al Amana's retrocessionaires as parties, to amend their original pleading and to serve on the retrocessionaires a suitable summons.

It is Al Amana's case, therefore, that the Plaintiffs, in addition to being third parties to the Kuwaiti proceedings by virtue of Al Amana's application under Article 86, are also parties to the action originally brought by Alghanim. This is in issue. It is also in issue as to what the Plaintiffs may be permitted to do in the main action by reason of the Order made on 11 September 1993.

The Kuwaiti Court decided to adjourn a further hearing in Kuwait

until 6 November 1993, in order to allow the appropriate summons to be served on the Plaintiffs and to allow the retrocessionaires to present their Powers of Attorney.

At the hearing on the 6 November 1993 all parties attended and submitted their Powers of Attorney except Assicurazioni. Al Amana submitted its defence which includes the war risks exclusion clause.

On 11 December 1993 Alghanim filed a Reply and a file of relevant documents.

The next hearing in Kuwait is scheduled for 29 January, 1994.

ARBITRATION (TREATY) - PRELIMINARY

The Plaintiffs have served Notices of Arbitration upon the Defendant on 10 and 13 August, 1993.

On 3 September 1993, BLG wrote to Al Amana advising them that they had appointed Mr. Bryan Kellett as arbitrator on behalf of the treaty reinsurers pursuant to Article 10 of the Treaty wordings and inviting Al Amana to provide the name of their arbitrator by 7 September.

On 6 September, 1993, Messrs. Ince & Co. (solicitors for Al Amana) ("Inces") wrote to BLG indicating that since the reinsurers had raised the issue of arbitration proceedings before both the Kuwaiti and Bermuda courts, it was premature and inappropriate to appoint an arbitrator. Nevertheless, Inces specifically requested BLG to inform them if they intended to approach the ICC in connection with the appointment of an arbitrator.

On 10 September, 1993 BLG wrote to the Secretary General of the ICC ("SGICC") requesting them to appoint an abitrator on Al Amana's behalf as per the provisions of Article 10(2) of the Treaty wording.

Until 27 September, 1993 Inces were not provided with a copy of that letter (despite their letter of 6 September). Accordingly, on that day they wrote to the SGICC explaining why they considered it to be premature and inappropriate to give consideration to the appointment of an arbitrator; namely, on the basis that the issue of arbitration vel non was presently before both the Bermuda and Kuwaiti courts. Inces indicated in their letter that they would write more fully in connection with the background issues involved in the dispute.

On 7 October Inces wrote further to SGICC.

By letters dated 8 and 11 October, 1993, the ICC indicated to both parties that despite Inces' arguments to the contrary they had appointed Mr. Gordon Hickmott as arbitrator on behalf of Al Amana.

ARBITRATION (FACULTATIVE) - PRELIMINARY

In a letter dated 9 August, 1993, BLG had informed Al Amana that they had appointed Mr. John Thomas QC as arbitrator. In a letter of 7 October 1993 Inces indicated that that appointment was of no effect for the following two reasons:

(a) it being common ground that the facultative retrocessions did not include an arbitration clause, there was no incorporation of an arbitration clause in these circumstances;

(b) the arbitration clause in the underlying policy was in any event invalid under Kuwaiti law by reason of Article 782 of the Kuwaiti Civil Code.

Accordingly, Inces declined to appoint an arbitrator on Al Amana's behalf.

On 18 October 1993, BLG again wrote to Inces inviting them to appoint an arbitrator on behalf of Al Amana under the facultative retrocession.

On 4 November 1993 BLG wrote to Inces advising them that they had proceeded to appoint a sole arbitrator under the facultative retrocessions, namely the Hon. Mr. Justice DaCosta, having indicated that they had withdrawn their nominee, John Thomas QC, on the basis that his appointment as sole arbitrator would be inappropriate.

On 23 November, 1993, Conyers, Dill & Pearman (CD&P) wrote, on behalf of Al Amana to the Hon. Mr. Justice DaCosta with a full outline of the background issues involved in this dispute. This letter again stated that it was Al Amana's view that there was no arbitration agreement between themselves and the facultative retrocessionaires and that further there was no arbitrable dispute. In particular, CD&P advised the Hon. Mr. Justice daCosta of the proceedings which had been brought in Bermuda by the facultative retrocessionaires.

On 26 November, 1993, Hon. Mr. Justice DaCosta wrote to CD&P declining to act as sole arbitrator under the circumstances outlined to

him by CD&P.

On 9 December 1993 BLG wrote to S.H. Froomkin, QC requesting whether he would be prepared to accept appointment as a sole arbitrator.

By a letter dated 10 December 1993, Mr. Froomkin accepted the appointment as sole arbitrator. By a letter dated 13 December, 1993 BLG notified Inces of this.

A preliminary meeting had been fixed for 8 January 1994. Mr. Froomkin by letter of 30 December 1993 wrote to Al Amana to provide him with its defence.

Mr. Froomkin by letter dated 6 January 1994 accepted that any attendance by Al Amana on 8 January 1994 or any participation by Al Amana in any argument on the jurisdictional issue would be without prejudice to Al Amana's contention that there was no arbitration agreement between the parties nor would such letter, attendance or participation be construed by the arbitrator as a waiver of Al Amana's position.

PRESENT POSITION

In the Kuwaiti proceedings, the Plaintiffs have contested the jurisdiction of the Kuwaiti courts on the basis that Al Amana had agreed to submit such disputes to arbitration although they now assert that the Kuwaiti court may not determine the stay application until judgment is given in relation to the issues in the main action.

SUPREME COURT'S JURISDICTION

I think that it is undisputed by counsel for the parties that this Court has jurisdiction to restrain foreign legal proceedings brought in breach of an arbitration agreement, both under its inherent jurisdiction and by virtue of section 19(c) of Bermuda's Supreme Court Act 1905 (Title 8 Item 1) the relevant portion of which provides that ".....an injunction may be granted.....by an interlocutory order of the court in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just.....".

It is to be observed that section 19(c) of the Supreme Court Act 1905 corresponds to section 37(1) of the Supreme Court Act 1981 of the United Kingdom, the relevant portion of the section reads:

"The High Court may by order (whether interlocutory or final) grant an injunction.....in all cases in which it appears to the court to be just and convenient to do so."

It seems that the jurisdiction of the English High Court to grant an interlocutory or final injunction was established by the English Court of Appeal in Pena Copper Mines Ltd v Rio Tinto Company Ltd [1911 - 13] All E.R. 209. At 212 Cozens-Hardy, M.R. stated:

" It is beyond all doubt that this Court has jurisdiction to restrain the Rio Tinto Co. from commencing or continuing proceedings in a foreign court if those proceedings are in breach of contract. And I would also mention here, in order that it may not be supposed that I have forgotten it because it does not apply to the circumstances of this case, that the same remark applies in regard to jurisdiction if in the absence of any breach of contract the proceedings are vexatious. But to contend that as regards any breach of a clear contract made between the plaintiffs and the defendants the court cannot restrain the defendants - who have contracted that they will not sue in a foreign court - from so suing is a proposition to which I think no sanction ought to be given by this court and which is certainly quite unwarranted by any authority that I am aware of."

More recent judicial support for the proposition that the Court has jurisdiction to grant injunctive relief generally in support of an arbitration (whether within or without the jurisdiction) is to be found in the highly persuasive decision of the House of Lords in Channel Tunnel Group Ltd v Balfour Beatty Ltd [1993] 1 All E.R. 664. At 684 and 685 Lord Mustill said:

' Although the words of s 37(1) and its forebears are very wide it is firmly established by a long history of judicial self-denial that they are not to be taken at their face value and that their

application is subject to severe constraints. This process has culminated in a chain of decisions in your Lordships' House: see Siskina (cargo owners) v Distos Cia Naviera SA, The Siskina [1977] 3 All E.R. 803, [1979] A.C. 210, Castanho v Brown & Root (U.K.) Ltd. [1981] 1 All E.R. 143, [1981] A.C. 557, British Airways Board v Laker Airways Ltd. [1984] 3 All E.R. 89, [1985] A.C. 58 and South Carolina Insurance Co v Assuranti Naatschappij de Zeven Provincien' NV [1986] 3 All E.R. 487, [1987] A.C. 24. These are too well known to need rehearsal, and it is sufficient for present purposes to quote from the speech of Lord Brandon of Oakbrook in the South Carolina case [1986] 3 All E.R. 487 at 495 - 496, [1987] A.C. 24 at 39-40:

" The first basic principle is that the power of the High Court to grant injunctions is a statutory power conferred on it by s 37 (1) of the Supreme Court Act 1981, which provides: "The High Court may by order (whether interlocutory or final) grant an injunction.....in all cases in which it appears to the court to be just and convenient to do so." That provision is similar to earlier provisions (Consolidation) Act 1925 and s 25(8) of the Supreme Court of Judicature Act 1873. The second basic principle is that, although the terms of s 37(1) of the 1981 Act and its predecessors are very wide, the power conferred by them has been circumscribed by judicial authority dating back many years. The nature of the limitations to which the power is subject has been considered in a number of recent cases in your Lordships' House:Siskina (cargo owners) v Distos Cia Naviera SA., The Siskina [1977] 3 Al E.R. 803,. [1979] A.C. 210, Castanho v Brown & Root (U.K.) Ltd. [1981] 1 All E.R. 143, [1981] A.C. 557 and British

Airways Board v Laker Airways Ltd [1984] 3 All E.R. 39, [1985] A.C. 58. The effect of these authorities, so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunction is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable. The third basic principle is that among the forms of injunction which the High Court has power to grant is an injunction granted to one party to an action to restrain the other party to it from beginning, or if he has begun from continuing, proceedings against the former in a foreign court. Such jurisdiction is, however, to be exercised with caution because it involves direct interference with the process of the foreign court concerned.'

EXERCISE OF COURT'S DISCRETIONARY POWER TO RESTRAIN

Both sides accept that the Court's discretionary power to restrain a party from commencing or pursuing legal proceedings in a foreign court is stated authoratively in Dicey and Morris Conflict of Laws (Twelfth ed. 1993) at pages 408 - 419 and in Castanho v Brown and Root [1981] A.C. 557 ("Castanho") at 572f - 575c, British Airways Board v Laker [1985] A.C. 58 ("BAB") at 81 e - g to 95 a - b, South Carolina Insurance v Haatsshappi [1987] A.C. 24, ("South Carolina") 40 d to e and Societe Nationale Industrielle AeroSpatiale v Lee [1987] 1 A.C. 871, ("Aerospatiale") at 892A - 897A, a decision of the Privy Council which is binding. Certain basic principles emerge on which the Court may exercise its power from the cases set out hereunder.

The Court can exercise its power where it is appropriate to avoid

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injustice. In the Castanho case at 573, Lord Scarman said:

"Caution in the exercise of the jurisdiction is certainly needed : but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice."

In the Aerospatiale case at 892A Lord Goff delivering the judgment of the Board said:

"The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history stretching back at least as far as the early 19th century. From an early stage, certain basic principles emerged which are now beyond dispute. First the jurisdiction is to be exercised when the "ends of justice" require it: (See Bushby v Munday (1821) 5 Madd. 297, 307, per Sir John Leach V. - c.); Carron Iron Co. v Maclaren (1855) 5 H.L. Cas. 416, 453, per Lord St. Leonards (in a dissenting speech, the force of which was however recognised by Lord Brougham, at p. 459). This fundamental principle has been reasserted in recent years, notably by Lord Scarman in Casthano v Brown & Root (U.K.) Ltd. [1981] A.C. 557 and by Lord Diplock in British Airways Board v Laker Airways Ltd. [1985] A.C. 58, 81. Second where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.....

Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy: e.g. In re North

Carolina Estate Co. Ltd. (1889) 5 T.L.R. 328, per Chitty J. Fourth, it has been emphasised on many occasions that, since such an order, indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution : see e.g., Cohen v Rothfield [1919] 1 K.B. 410, 413, per Scrutton L.J., and in more recent times, Castanho v Brown & Root (U.K.) Ltd. [1981] A.C. 557, 573, per Lord Scarman. All of this is, their Lordships think, uncontroversial; but it has to be recognised that it does not provide very much guidance to judges at first instance who have to decide whether or not to exercise the jurisdiction in any particular case."

The Court may exercise such power where a party has sought to institute or pursue proceedings in a foreign court in breach of an arbitration agreement. The Pena Copper Mines, Ltd. v Rio Tinto Co. Ltd. [1911 - 13] All E.R. 209 at 212 Cozens - Hardy M.R.

The "Maria Gorthon" [1976] 2 LLR 720 at 723 Mocatta, J.

In the "Lisboa" [1980] 2 LLR 546 at 549, Lord Denning M.R. said:

"In the present case we are concerned with a clause giving exclusive jurisdiction to the courts of this country. It is similar to an arbitration in London. If one of the parties breaks that clause and brings proceedings in the Courts of a foreign country, then the Courts of this country have jurisdiction to restrain him from continuing those proceedings - if he is a British subject resident here, see Pena Copper Mines Ltd. v Rio Tinto Co. Ltd., (1912) 105 L.T. 846; Ellerman v Read, [1928] 2 K.B. 145; or if he has sufficient connections with this country as to be within the reach of our Courts, see The Tropaioforos [1962] 2 Lloyd's Rep. 410. This jurisdiction is, however, to be exercised with great caution so as to avoid the appearance of undue inter-

ference with another Court, see Castanho v Brown [1980] 2 Lloyd's Rep. 423; [1980] 1 W.L.R. 833 at pp. 438 and 856."

In Tracomin S.A. v Sudan Oil [1983] 2 LLR. 624 at 626, Sir John Donaldson, M.R. said:

"The learned Judge held that he had jurisdiction to grant such an injunction," and on the authority of Pena Copper Mines Ltd. v Rio Tinto Co. Ltd., (1911) 105 L.T. 846 he was plainly right so to hold, and indeed it is not challenged in this Court that he had the jurisdiction to do so. The basis of that jurisdiction, which all the cases stress should be used sparingly, is that notwithstanding that Tracomin are a foreign national not carrying on business within the jurisdiction of this Court, the fact that they have agreed to submit disputes to English arbitration amounts either to a sufficient submission to the English Courts or, alternatively, the creation of a sufficiently close nexus between them and the jurisdiction of the English Courts to entitle us to exercise that jurisdiction."

In the "Golden Anne" [1985] 2 LLR [1984] 489, at 498 Lloyd, J. said:

" The jurisdiction of the Court to grant an injunction to restrain a party from proceeding in a foreign Court has recently re-affirmed by the Court of Appeal in Tracomin S.A. v Sudan Oil Seeds Co. Ltd. [1983] 2 Lloyd's Rep. 384; [1983] 1 W.L.R. 1026. In an even more recent decision, British Airways Board v. Laker Airways Ltd. [1983] 3 W.L.R. 544, the Court of Appeal has granted relief in mandatory form. In both cases it was emphasised that the jurisdiction is one which should be exercised with extreme caution. The question I ask myself, therefore, is whether justice in this case now

demands that, I should grant the mandatory injunction for which World Pride asks. I have come to the conclusion that I should not."

"No doubt the jurisdiction is to be exercised with caution per Lord Scarman in Castanho v Brown & Root [1981] A.C. 557 at 573. (H.L.(E)) [1981] A.C. 557 at 573.

In BAB [1985] 1 A.C. 58 at 95E, Lord Scarman said:

"The approach has to be cautious because an injunction restraining a person within the jurisdiction of the English court from pursuing a remedy in a foreign court where, if he proves the necessary facts, he has a cause of action is, however disguised and indirect, an interference with the process of justice in that foreign court. Caution is needed even in a "forum conviens" case, i.e., a case in which a remedy is available in the English as well as in the foreign court. Caution is clearly very necessary where there is no remedy in the English court in respect of the cause of action which, if the facts be proved, is recognised and enforceable by the foreign court."

South Carolina Insurance Co. v Assurantie N.V. (H.L.(E)) [1987] A.C. 24 at 40D Lord Brandon of Oakbrook.

In Aerospatiale [1987] 1 A.C. 871 at 892 Lord Goff delivering the judgment of the Privy Council said:

" Fourth, it has been emphasised on many occasions that, since such an order, indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution".

The jurisdiction which is to be exercised with caution also applies to a case where the ground relied on for seeking such an injunction is that the foreign proceedings have been instituted in breach of a "clause giving exclusive jurisdiction to the Court of this country" or in breach of an arbitration agreement. The "Lisboa" [1980] 2 LLR 546 at 549, Tracomin S.A. v Sudan Oil Seeds Co. Ltd. [1983] 2 LLR 624, at 626, Russell on the Law of Arbitration (Twentieth Ed. 1982) at p. 297.

"This.....jurisdiction will not be exercised where the foreign action is properly brought for the protection of the rights of the party concerned". Russell on the Law of Arbitration (Twentieth Ed. 1982) at p. 297.

" Furthermore, a party who seeks by one proceeding or another in this country to restrain foreign litigation in favour of an arbitration clause should be careful not to take any step in the foreign litigation thereby submitting to the jurisdiction of the foreign court". Russell on the Law of Arbitration (Twentieth Ed. 1982) at p. 297.

In the "Maria Gorthon" [1976] 2 LLR 720 Mocatta J. said at 728:

"For these various reasons, that is to say, the passage of time, the expenditure incurred by all parties and the active steps taken by the owners in the American proceedings both before and after the judgment given against them on their motion to stay on July 29, I take the view that it would be better to allow this matter to proceed in the United States Courts.".

SUBMISSIONS BY COUNSEL

It appears that in ancillary legal proceedings commenced on 3 May 1992 in the Kuwaiti Courts, the Defendant claimed against the Plaintiffs as its Reinsurers. From the outset the Plaintiffs challenged the competence of the Kuwaiti Courts under the 1958 New York Arbitration Convention (to which Kuwait is a party). On 6 November 1993, the Defendant disputed the Plaintiffs' challenge to the competence of the Kuwaiti Courts.

Mr. Beloff for the Defendant submitted that the injunction sought should not be granted on the ground that -

(a) the Kuwaiti Court was the natural forum in which the Plaintiffs ought to seek a stay of the proceedings therein the basis relied on namely that Al Amana had agreed to have disputes as to the plaintiffs liability to them qua retro-cessionaires resolved by arbitration;

(b) the Plaintiffs had in fact raised the issue of the arbitration clauses before the Kuwaiti Court;

(c) it was contrary to principle for a court to grant an injunction restraining foreign proceedings where an application was already pending to stay those proceedings. Lloyd J. in World Pride Shipping Ltd v Daiichi Chuo Kisen Kaisha [1984] 2 LLR 489 p. 498,

(d) it was wrong as a matter of principle for a party to seek a ruling from a court in one jurisdiction and simultaneously to seek to obtain an injunction restraining the continuation of those foreign proceedings; such a course of conduct amounted to abuse of process;

(e) the effect of the grant of an injunction by the Bermuda court would be to pre-empt the consideration of the stay application by the Kuwaiti court and that it would be contrary to principles of comity for this court to seek to pre-empt a foreign court in circumstances where the foreign court was already seised of the issue.

Mr. Weeder for the Plaintiffs contended that the Kuwaiti Court was not a competent jurisdiction and should be disregarded as a natural forum, that the Plaintiffs by challenging the jurisdiction of the Kuwaiti Court did not submit to its jurisdiction and that there was no evidence that the Plaintiff submitted to the jurisdiction of Kuwaiti Court as borne out by the affirmation of Al Sarraf of 20 December 1993.

PLAINTIFF'S APPEARANCE BEFORE KUWAITI COURT

Paragraphs 4, 5 6, and 7 of Mr. Al Sarraf's affirmation read as follows:

"Submission to the Kuwaiti Jurisdiction

4. Mr. Gharabally appears to suggest in his Affidavit that the Plaintiffs have by the steps they have taken to date in the legal proceedings brought against them by the Defendant in the Kuwaiti Commercial Court of First Instance (Fifth Circuit) ("the Kuwaiti proceedings"), submitted to the jurisdiction of the Kuwaiti Court. I entirely refute this suggestion. The posi-

tion of the Plaintiffs in the Kuwaiti proceedings is clear. They are challenging the jurisdiction of the Kuwaiti Court. Any reference which they have made to date in the Kuwaiti court to the contracts between them and the Defendant has been made clearly in the context of their overall challenge of the Kuwaiti court's jurisdiction.

5. At paragraph 11 of his Affidavit Mr. Gharbally refers to a covering note submitted to the Kuwaiti court by the Plaintiffs with a documents file containing one of the reinsurance treaties. The purpose of submitting these documents to the Kuwaiti Court was to provide them with a copy of one of the contracts containing arbitration clause upon which the Plaintiffs rely in seeking to stay the Kuwaiti proceedings. There is no sense in which the reference to the perils exclusion clause in that covering note (a copy of which is to be found at "HAS 1") will be taken by the Kuwaiti Court to constitute a submission to its jurisdiction.

Obligation of the Kuwaiti court to refer this dispute to arbitration

6. I believe that it may be of assistance if I were to explain that in complying with the 1958 New York Convention on the recognition and enforcement of Foreign Arbitral Awards (to which Kuwait is signatory), the Kuwaiti Court have (by article 2 of the Convention) a dual obligation. If a valid arbitration clause is established to exist, the Kuwaiti Court is first obliged to decline jurisdiction and, secondly, it has a positive obligation to refer any dispute to arbitration.

Timetable of Kuwaiti Proceedings

7. I take issue with Mr. Gharabally's explanation of the "indivisibility" of the main and collateral actions before the Kuwaiti Court. As matters

currently stand, those two actions have not been consolidated and stand on their own. The Kuwaiti Court does, however, have discretion in determining whether the Plaintiffs' application to stay the Kuwaiti proceedings as against them will be determined as a separate and discreet issue prior to the substantive dispute being determined or whether it will rule on all issues (including the Plaintiffs' stay application) at the same time. It is conceivable that the Kuwaiti Court will not determine the Plaintiffs' stay application until judgment is given in relation to the issues arising in the main action. If this is the case, then the Plaintiffs could be required to wait for up to three years for determination of the Plaintiff's stay application. In any event, a determination of the Plaintiffs' stay application alone could take anything up to one year Neither of these estimates take into account the possibility of appeal in Kuwait. It is, as a result impossible at present to predict precisely how the Kuwaiti Court will handle the main and collateral actions."

I think that it can be inferred from that affirmation that the Plaintiffs have challenged the jurisdiction of the Kuwaiti Court, have raised the issue of the arbitration clauses before the Kuwaiti Court, have applied to the Kuwaiti Court to stay the proceedings as against the Defendant, are seeking to rely on the arbitration clauses to stay the Kuwaiti proceedings. Moreover, it seems that the Plaintiff's application to stay the Kuwaiti proceedings are pending before the Kuwaiti Court. Furthermore it is undisputed that Kuwait is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 10 July 1958) in which Article 11(3) provides as follows:

"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning

of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed.".

The Convention is given effect in Kuwait in Law No. 10 of 1978, dated 26 March 1978. This was stated in paragraph 26 of the affidavit of Mr. Rogan dated 4 October 1993.

Since the Plaintiffs have made an application to the Kuwaiti Court to stay the Kuwaiti proceedings as against the Defendant would it not be better on ground of judicial comity not to restrain the Defendant in prosecuting his claim against the Plaintiffs in the Kuwaiti Court until the Kuwaiti Court had decided whether or not it had jurisdiction?

In World Pride Shipping Ltd. v Daiichi Chuo Kisen Kaisha [1984] 2 LLR 489 proceedings had been commenced in the U.S. courts concurrently with the initiation of arbitration procedures and actions were brought in the U.S. for a stay and in England for an injunction. Lloyd J. refused the injunction. At 498 Lloyd J. said:

> " The jurisdiction of the Court to grant an injunction to restrain a party from proceeding in a foreign Court has recently been re-affirmed by the Court of Appeal in Tracomin S.A. v. Sudan Oil Seeds Co. Ltd. [1983] 2 Lloyd's Rep. 384; [1983] 1 W.L.R. 1026. In an even recent decision, British Airways Board v. Laker Airways Ltd. [1983] 3 W.L.R. 544, the Court of Appeal has granted relief in mandatory form. In both case it was emphasised that the jurisdiction is one which should be exercised with extreme caution. The question I ask myself, therefore, is whether justice in this case now demands that I should grant the mandatory injunction for which World Pride asks. I have come to the conclusion that I should not.
>
> The crucial difference between the present case and Tracomin the Swiss Court had already refused a stay pursuant to the arbitration clause. Accordingly there was no way in which the English court could seek to

compel the buyers to honour the arbitration agreement except by granting an injunction. In the present case, by contrast, the American court has not yet ruled on the joint motion for continuance. The matter is still open. It seems to me that in those circumstances it would be much better that the District Court should itself rule on the motion for continuance and, if it thinks fit, stay all further proceedings on World Pride's cross-claim, in the light of the judgment I have given upholding the validity of Mr. Eckersley's appointment as arbitrator, rather than that I should seek to pre-empt, and perhaps even seem to dictate the decision of a foreign Court. It may be said that having answered the first four questions in favour of World Pride consistency and logic require me to go one step further and answer the fifth question also in their favour. But consistency must yield to caution and logic to the requirements of judicial comity, by which I mean only the mutual respect due between those who, as Sir John Donaldson, M.R. has said, "labour in adjoining judicial vineyards". I recognize that the District court may refuse a stay; in which case the unfortunate result will follow that if Daiichi's motion for summary judgment is rejected, there will be concurrent proceedings on both sides of the Atlantic. Obviously I hope that that will not happen. But to my mind it is better to run that risk, rather than grant an injunction which will, in effect, operate as a stay of the Florida proceedings. That That is a function which belongs properly to the District Court, and may still, I hope be exercised by that Court.

This Court should not appear to usurp that function, except as a last resort.

For the reasons I have given, I would refuse World

Pride's application for an injunction....."

But account should be taken of Lord Goff's statement in Aerospatiale [1987] 1 A.C. 871 when delivering the opinion of the Privy Council which is binding on this Court. He stated that jurisdiction to stay foreign proceedings was to be exercised with caution and normally confined to cases where the foreign proceedings were either vexatious or oppressive. At 896 Lord Goff stated:

> *" In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him."*

At 899 he continued:

> *" The mere fact that the courts of Brunei provide the natural forum for the action is, for reasons already given, not enough of itself to justify the grant of an injunction. An injunction will only be granted to prevent injustice, and, in the context of a case such as the present, that means that the Texas proceedings must be shown in the circumstances to be vexatious or oppressive."*

Are the Kuwaiti proceedings vexatious or oppressive?

In Continental Bank N.A. and Aeakos Compania Naviera S.A. and others T.L.R. 26th November 1993 (C.A.) the central question was whether the Continental Bank was entitled by virtue of an exclusive jurisdiction agreement to an injunction restraining a group of borrowers and guarantors from bringing legal proceedings against the Bank in Greece. The agreement under the European Community's Brussels Convention on Jurisdiction and Judgments conferred exclusive jurisdiction on the English Courts.

The Court granted an injunction restraining the party concerned from pursuing the Greek proceedings even though the Greek Court was also bound to apply the Brussels Convention. The Court found that the party concerned was in breach of an exclusive jurisdiction agreement and that the continuance of the Greek proceedings amounted to vexatious and oppressive conduct and that a claim for damages for breach of contract would be a relatively ineffective remedy.

In that case Steyn L.J. said:

" On the supposition that Articles 21 and 22 of the Brussels Convention are inapplicable, the Appellants seek to invoke the inherent power of the court to stay the English proceedings. They argue that the judge should have granted a stay until the Greek court had decided whether or not it had jurisdiction. In any event, the Appellants submit that, even if a stay was inappropriate, the judge ought not to have granted an injunction. They draw attention to the fact that, although a stay involves the regulation of English legal proceedings, an injunction restraining foreign legal proceedings involves indirect interference in the procedure of a foreign court. Accordingly, the Appellants submit, a court invited to grant such an injunction ought to proceed with great caution and ought to grant such an injunction only if the ends of justice require it. See Societe Aerospatiale v Lee Kui Jak [1987] AC 871, at 891F-897A.

Miss Dohman emphasised that the Greek court is the court first seized with the substantive action. She

said that it would be wrong for the English court to decide that the Greek court does not have jurisdiction. The question whether the Greek court has jurisdiction ought to be left to the Greek court. The English courts ought to trust the Greek court. The injunction will operate as an indirect interference with the workings of a Community Court. Such an injunction should only be granted if the pursuit of the remedy in the foreign court would be vexatious and oppressive. That test is not satisfied. For these reasons, Miss Dohman submitted, the judge erred in not staying the English action, but, in any event, she said, he plainly erred in exercising his discretion in favour of the granting of an injunction.....

.....

In our view the decisive matter is that the Bank applied for the injunction to restrain the Appellants' clear breach of the contract. In the circumstances a claim for damages for breach of contract would be a relatively ineffective remedy for the Appellants' breach of contract. If the injunction is set aside, the Appellants will persist in their breach of contract, and the Banks legal rights as enshrined in the jurisdiction agreements will prove to be valueless. Given the total absence of special countervailing factors, this is the paradigm case for the grant of an injunction restraining a party from acting in breach of an exclusive jurisdiction agreement. In our judgment the continuance of the Greek proceedings amounts to vexatious and oppressive conduct on the part of the Appellants. The judge exercised his discretion properly."

In the Continental Bank case there are certain similarities as in the present case. The issue in that case concerned the breach of an exclusive jurisdiction agreement - the issue in this case is the breach of an arbitration agreement which is an exclusive jurisdiction agreement.

The Greek Court was bound to apply the Brussels Convention as is the Kuwaiti Court bound to apply the New York Convention. The matter is first brought before the Greek Court - in the present case the matter is first brought before the Kuwaiti Court. The Greek Court was to decide whether or not it had jurisdiction and likewise the Kuwaiti Court is to decide.

The question concerning the indirect interference with the workings of a Community Court if an injunction were granted was raised before the Court, the question of proceeding with great caution before granting an injunction was put before the Court, as well as the granting of an injunction only if the ends of justice required it and the granting of an injunction if the pursuit of a remedy in a foreign court would be vexatious and oppressive - like questions are before this Court.

Thus, on the assumption that the Defendant breached the arbitration agreement, which is an exclusive jurisdiction agreement, by the prosecution and the continuance of Kuwaiti proceedings that I think amounts to vexatious and oppressive conduct on the part of the Defendant.

But are there Arbitration agreements and if so are they breached by the Defendant?

ARBITRATION AGREEMENTS

Next to consider is whether there are arbitration agreements between the parties. It appears from the evidence that there are two forms of written arbitration agreements between the parties - Article 10 of the Proportional Treaty and General Condition 4 of the Facultative Reinsurance.

Article 10 of the Proportional Treaty reads as follows:

"(1) Disputes arising out of this Agreement or differences concerning the validity of this Agreement shall be submitted to the decision of a court of arbitration, consisting of three members, which shall meet at the seat of the defendant party.

(2) The members of the court of arbitration shall be active or retired executives of insurance companies or reinsurance companies.

(3) Each party shall nominate one arbitrator. In the event of one party failing to appoint an arbitra-

tor within four weeks after being required by the other party to do so, the second arbitrator shall be nominated by the Secretary General of the Court of Arbitration of the International Chamber of Commerce. Before entering upon the reference the arbitrators shall nominate an umpire. If the arbitrators fail to agree upon an umpire within 4 (four) weeks of their appointment, the umpire shall be nominated by the Secretary General of the Court of Arbitration of the International Chamber of Commerce.

(4) The arbitrators shall make their award in accordance with the usages and customs of reinsurance practice and are relieved from all legal formalities. They shall make their decision within four months of the appointment of the umpire.

(5) The decision of the court of arbitration shall not be subject to appeal.

(6) The costs of arbitration shall be paid as the court of arbitration may direct.

(7) Actions for payment of admitted balances shall come under the jurisdiction of the ordinary courts."

General Condition 4 of the Facultative Reinsurance reads as follows:

" ARBITRATION. If any difference arises as to the amount of any loss or damage, such differences shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party.

In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole

arbitrator; and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference, and who shall sit with the arbitrators and preside at their meetings.

The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators or umpire respectively; and in the event of the death of an arbitrator or umpire, another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed.

The costs of the reference and of the award shall be at the discretion of the arbitrator, arbitrators or umpire making the award, and it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained.

If the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

As to form it appears that both insurance agreements satisfy the conditions of section 2 of the 1993 Act and Article 7(1) of the Model Law as set out in Schedule 2 to that Act and Article II(2) of the New York Arbitration Convention as set out in Schedule 3 to that Act.

In August 1993 the Seven Plaintiffs commenced two separate arbitrations in Bermuda under Article 10 and General Condition 4

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respectively of the Treaty Arbitration and the Facultative Arbitration. Both arbitrations were commenced after the operative date of the 1993 Act, that is 29 June 1993 and by virtue of section 38 of the 1993 Act, that Act applies to the two Arbitrations notwithstanding that the arbitration agreements were made before the commencement of the 1993 Act.

As regards the "Treaty" Arbitration, all Seven Plaintiffs are Claimants in the Treaty Arbitration. Their respective Notices to Arbitration were dated 9 August 1993. The three arbitrators are Messrs. Gumbel (umpire), Kellett and Hickmott; these Plaintiffs have served Points of Claim on 23 December 1993; and the first procedural hearing of this arbitration has been fixed for 14 January 1994. The umpire (Mr. Gumbel) was appointed on 6 December 1993 and in the premises the contractual time-limit of four months under Article 10(4) of the Treaty for making the award will expire on 5 April 1994.

As regards the "Facultative" Arbitration, the First and Third Plaintiff (Skandia and Gerling) are Claimants in the Facultative Arbitration. Their respective Notices to Arbitration were dated 9 August 1993. The sole arbitrator is Mr. Froomkin Q.C. These Plaintiffs served Points of Claim on 23 December 1993 and the first procedural hearing of this arbitration had been fixed for 8 January 1994. I think that from a prima assessment of the evidence it can be inferred that there exists arbitration agreements.

THE NATURAL FORUM

Mr. Beloff for the Defendant submitted that the Kuwaiti Court was the natural forum in which the Plaintiffs ought to seek a stay of the proceedings therein on the basis relied on namely that the Defendant had agreed to have disputes as to the Plaintiffs liability to them qua retrocessionaires resolved by arbitration.

He also submitted that Kuwait was the Defendant's commercial seat. Mr. Veeder for the Plaintiffs argued that Bermuda, being the Defendant's seat, was identified by Article 10(1) as the agreed place of the Treaty Arbitration under Article 20(1) of the Model Law and in respect of the Facultative Reinsurance, Bermuda was the natural forum for the Defendant, being its seat and the domicile of the sole arbitrator, being a Bermuda resident in Bermuda with the same consequence, subject to any

further decision of the sole arbitrator under Article 20(1) of the Model Law.

From the evidence it appears that the Defendant is a company incorporated in Bermuda under the Companies Act 1981 and it is also registered as an insurer under the Insurance Act 1978. Its business is regulated under both Acts by the Registrar of Companies. The Defendant must comply with the provisions of both legislation. As an insurance company it must have a principal representative resident in Bermuda who is either a registered insurance manager or a person otherwise approved by the Minister of Finance upon certain events relating to the financial position of the company. As a creature of Bermuda legislation it is subject to such legislation and in consequence it has a substantial legal connection to Bermuda. Such a corporate body was considered in National Iranian Oil Company v Ashland Overseas Trading Ltd., Bermuda Civil Appeal No. 15 of 1987, 20 July 1988. In that case DaCosta J.A. said:

> " It is trite observation that an exempt company incorporated under the provisions of the Exempted Company Act, 1950 is a local statutory creature. In order to find out what the statutory creature is and what it is meant to do one must look at the statute only.....whilst most of its business activities are carried on abroad, it does have power to carry on certain specified business activities in Bermuda. It may for example transact banking business in Bermuda so far as may be necessary for the carrying on of the business of the company exterior to Bermuda..... it is firmly anchored in Bermuda though its activities may reach out to the ends of the earth."

On the other hand the Defendant is not authorised to conduct insurance or reinsurance business or any other kind of business in or from Kuwait nor can the Defendant lawfully maintain any office or employees in Kuwait. The Plaintiffs are all European companies. They are not incorporated in Kuwait and have no presence in Kuwait.

In light of the above I am of view that the Defendant's seat lies

in Bermuda, the place of its incorporation, registration and regulation. Hence Bermuda being the Defendant's seat was identified by Article 10(1) of the Proportional Treaty as the agreed place of that Treaty Arbitration under Article 20(1) of the Model Law as set out in Schedule 2 to the 1993 Act.

As regards the Facultative Reinsurance I agree with the argument of Mr. Veeder and hold that Bermuda is the natural forum for the Defendant.

PLAINTIFF'S CHALLENGE TO JURISDICTION OF KUWAITI COURT

The Plaintiffs have from the outset challenged the competence of the Kuwaiti Courts under the 1958 New York Convention. Mr. Veeder for the Plaintiffs denied that by doing so they submitted to the jurisdiction of the Kuwaiti Court. I think that such a position taken by the Plaintiffs finds support in Marc Rich & Co. A.G. v Societa Italiana Impianti P.A. (No. 2) [1992] 1 LLR 624. Neil L.J. said at 633:

> " I turn therefore to the question whether Marc Rich submitted to the jurisdiction of the Italian Courts at a time and in a manner which prevents them relying on s. 32 because of the non-fulfilment of condition (c).
>
> In my judgment it is important that s. 33 should not be construed too narrowly. It may well be that it was not necessary for Marc Rich to lodge an alternative defence on the merits in October, 1988, but they made it abundantly clear in the pleading that the primary purpose of the document was to challenge the jurisdiction of the Genoa Court. I am prepared to assume that the first defence did not amount to a submission.
>
> As I understand that paragraph, coupled with the answer which was given formally on p. 1689 in par. 2, the Court is there saying that provided the defendant makes it clear in his first defence rather than in some subsequent defence that he is contesting the jurisdiction, that will not amount to a submission

even though there is some additional material which constitutes a plea to the merits of the case. That seems to be an additional reason for interpreting s. 33 in a broad sense.

The second defence, however, which was lodged in May 1991, is another matter. It seems to me that this pleading was a plain and unequivocal submission to the jurisdiction of the Italian Court to deal with the merits of the claim. Though not asking for damages Marc Rich were seeking the rejection of the declaratory relief claimed by Impianti. The matter was put beyond doubt by the lodging of documents to support the case for Marc Rich.

What then was the effect of that submission on the earlier judgment of the Corte di Cassazione? It was said that the submission was at most only a submission to a trial of the merits. It was not and could not be a retrospective submission to the trial of the issue of jurisdiction.

Counsel were unable to refer us to any authority on this point. Nevertheless the answer to the question seems to me to be quite clear. Once Marc Rich had submitted to the jurisdiction of the Italian Courts to try the merits of the case, the submission covered the whole proceedings. After submission Marc Rich could no longer have disputed any earlier interlocutory orders in the proceedings. Nor could they any longer challenge the validity or competence of any earlier decision in those proceedings.

It follows that in my view the judgment of the Corte di Cassazione was the judgment of a competent Court. Marc Rich must be regarded as having submitted to the jurisdiction of that court."

I do not think that the fact that the Plaintiffs raising of the

issue of the arbitration clauses in their first defence before the Kuwaiti Court in any indicated that the Plaintiffs had submitted to the Court's jurisdiction.

ARBITRABLE DISPUTE

Since it is inferred above that there exists arbitration agreements is there an arbitrable dispute? From the evidence it can be inferred that disputes under both the Treaty and Facultative Reinsurance have arisen between the Plaintiffs and the Defendant. The Defendant notified the Plaintiffs from time to time of Alghanim's claims to which the Plaintiffs responded by asserting that the claims were excluded from coverage and hence they were not legally liable. The width and scope of the words "disputes" or "differences" in an arbitration clause were considered in Hayter v Nelson [1990] 2 LLR 265. At 268 Saville J. said:

> " For example, in Ellis Mechanical Services Ltd. v. Wates Constructions Ltd., [1978] 1 Lloyd's Rep. 33 at p. 37, Lord Justice Bridge, as he then was, said this:
>
> To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the court that at least £X is due from the defendant to the plaintiff? If it is, the judgment should be given for the plaintiff for that sum, whatever X may be, and in a case where, as here, there is an Arbitration clause the remainder in dispute should go to arbitration. The reason why arbitration should not be extended to cover the area of the £X is indeed because there is no issue, or difference, referable to arbitration in respect of that amount.
>
> To the extent that such observations are intended to define what is or is not a dispute or difference within the meaning of an arbitration clause of the kind under consideration. I am respectfully unable to agree with them - more importantly they seem to me

to be in conflict with the decision of the Court of Appeal in Ellerine Brothers (Pty.) Ltd. v. Klinger, [1982] 1 W.L.R. 1375. In my view, to treat the word "disputes" or the word "differences" in the context of an ordinary arbitration clause as bearing such a meaning leads not only to absurdity, but also involves giving those words a meaning which (though doubtless one the words are capable of bearing) in context is difficult to support.

The proposition must be that if a claim is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected - as indeed they were rejected by Mr. Justice Kerr (as he then was) in The M.Eregli, [1981] 2 Lloyd's Rep. 169, in terms approved by Lords Justices Templeman and Fox in Ellerine v. Klinger (sup.). As Lord Justice Templeman put it (at p. 1383):-

There is a dispute until the defendant admits that the sum is due and payable.

In my judgment in this context neither the word "disputes" nor the word "differences" is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat

Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

In my view this ordinary meaning of the word "disputes" or the word "differences" should be given to those words in arbitration clauses. It is sometimes suggested that since arbitrations provide great scope for a defendant to delay paying sums which are indisputably due, the Court should endeavour to avoid that consequence by construing these words in arbitration clauses so as to exclude all such cases....

....."

Applying the width and scope of the meaning of the words "disputes" and "differences" to the facts of this case I think that there are arbitrable disputes under both the Treaty and the Facultative Reinsurance.

FACULTATIVE REINSURANCE - INCORPORATION BY REFERENCE

The Defendant has accepted that by Article 7(2) of the Model Law it was possible to incorporate an arbitration clause by reference to another document provided that "the reference is such as to make that clause part of the contract". The Defendant submitted that as a matter of construction of the document relied upon there was no effective incorporation of the arbitration clause contained in the primary insurance policy. Reliance was placed in a telex from NASCO dated 23 January, 1990 setting out the details of reinsurance. The relevant part provides -

"Cover: all risks of physical loss or damage and LOP therefrom as per wording attached".

The first and third Plaintiffs submitted that the above reference to "Cover" was sufficient to incorporate the entirety of the primary

insurance policy including the general conditions set out therein.

The Defendant submitted that the above reference simply incorporated the description of the risks in respect of which reinsurance was effected for as a matter of plain construction of the words it did not incorporate the entirety of the policy and the description "Cover" was wholly inadequate to incorporate the arbitration clause contained in another document.

I think that a scanning of Article 7(2) of the Model Law is necessary and desirable. The relevant portion of that Article provides:

"..... .

The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

By virtue of section 24 of the 1993 Act for the purpose of interpreting the Model Law reference may be made of the travaux preparatoires.

The travaux preparatoires of the Model Law show that it is not necessary for an explicit reference to be made in the contractual documents to the arbitration clause and that general words of incorporation suffice under Article 7 of the Model Law.

In Holtzmann & Neuhaus, Guide to the UNICTRAL MODEL LAW (1989) at pages 263 and 264 it is stated:

" 4. Reference in a written contract to a document containing an arbitration clause, if the reference makes the clause part of the contract. This sentence was added to make clear that when an arbitration clause is not contained in a written contract but rather in a document referred to therein - such as general conditions of contract or another contract - the arbitration agreement may be deemed to be "in writing." The contract containing the reference must be in writing. This probably means that it must meet the requirements contained in the second sentence of the

paragraph. That is, the contract probably must be either signed or contained in an exchange of letters, telexes, etc. Otherwise, as already noted, the parties could, merely by placing the arbitration clause in a separate document, avoid the requirement of a written assent from each party.

The meaning of the requirement that "the reference [be] such as to make [the arbitration] clause a part of the contract" may raise questions. The Working Group made clear that it did not mean the contract had to make explicit reference to the arbitration clause itself. The requirement was adopted as a middle ground between two positions: one view was that the text of the arbitration agreement had to "be before both parties" in order to bind them; another view was that only a "reference" in the contract to general conditions or other documents containing the arbitration clause was enough. The language adopted appears to mean that the general conditions, prior contract or other document must have been intended to be incorporated into the contract, and not merely referred to in, for example, a "whereas" clause or as background to the agreement".

At page 285 it is stated:

" FIFTH WORKING GROUP REPORT

A/CN 9/246 (6 MARCH 1984)

.....

Article 7

17. The test of article 7 as considered by the Working Group was as follows:

[same as Fourth Draft, supra].

18. The Working Group adopted that article.

19. The Working Group was agreed that the last part of the last sentence of paragraph (2) should not be understood as requiring an explicit reference to the arbi-

tration clause contained in a document referred to".

In Berger, International Economic Arbitration (1993) at pages 152 and 153 is stated:

" The wording of the ML is misleading in that Art. 7 Sec. 2 3rd sentence requires a reference which makes 'that clause' part of the contract. This does not mean, however, that the ML always requires a specific reference to the arbitration clause contained in some other document. Such a view would not conform with modern commercial practice where parties to commercial contracts usually refer to other legal texts as such rather than to individual clauses like arbitration agreements contained therein in order to avoid loss of time and unnecessary double references. The formula employed in the ML has to be viewed against the proper function of the formal validity rule. The reference to the document containing the arbitration agreement has to be of a kind which ensures that the parties are aware of the fact that they oust the jurisdiction of the competent courts. To meet these requirements, the almost unanimous international doctrine requires that the other party is already in possession of the contract conditions or that the other party is put in a position to check the reference, for example where the conditions are set out on the reverse side of the contract or attached to it or, alternatively, that dispute settlement through arbitration is customary in that particular business".

Nevertheless it appears that by Article 16 of the Model Law, the arbitration tribunal, and not the Court, is first to decide matters of jurisdiction, including any dispute about the existence, validity and scope of the arbitration agreement invoked by the claimant. Furthermore, it seems that the role of the local court in determining disputes as to the arbitrators' jurisdiction is by virtue of Article 16(3) of the Model Law strictly confined to intervention by way of appeal from the arbitration tribunal's determination in favour of its jurisdiction.

For instance in Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co. Ltd. [1992] 1 H.K.L.R. 40 at 51 and 52 Kaplan J said:

" Returning to the Model Law at pp. 74-5 Aron Broches in his commentary on Article 16(1) summarises the position as to competence and separability in the following useful passage:

"4. The concept of 'competence-competence' concerns the degree to which an arbitral tribunal may rule on its own jurisdiction as defined by the arbitration agreement. It does not imply the power of an arbitral tribunal to take a final and binding decision as to its jurisdiction. It rather denotes a tribunal's power to adopt an initial ruling as to its own jurisdiction. The issue is not the finality of the arbitrators' decision on their jurisdiction and the consequent ouster of the jurisdiction of the courts, but rather the time at which the conditions under which the courts may play their role as the final authority on the question of arbitral jurisdiction. It is therefore an issue which is to be resolved on the basis of practical rather than doctrinal considerations. The basic problem is how to reconcile the realization of the objectives of commercial arbitration, which would be defeated if an arbitral tribunal would have to suspend or terminate its proceedings each time a party pleaded invalidity of the arbitration agreement, with an effective measure of court supervision to ensure that the arbitral tribunal does not finally confer on itself a jurisdiction which by reason of the consensual nature of arbitration can only derive from the agreement of the parties.

5. The power to investigate its own jurisdiction is inherent in the appointment of an arbitral tribunal and is now generally accepted. Notwithstanding its essential role in the discharge of an arbitral tribunal's

task, it has in the past not been explicitly stated. The tendency over the last few decades has, however, been to set this power of arbitral tribunals forth in express terms. The explicit recognition of competence-competence in the Model Law in accordance with this tendency and lends it additional authority.

6. The second principle enunciated in paragraph (1) is 'separability'. It must be carefully distinguished from 'competence-competence'. While the latter, as we have just seen recognizes the power of an arbitrator to rule, at least initially, on his own jurisdiction, separability of the arbitration clause is intended to have the effect that if an arbitrator who has been validly appointed and who stays within the limits of the jurisdiction conferred upon him by the arbitration clause concludes that the contract in which the arbitration clause is contained is invalid, he does not thereby lose his jurisdiction. This concept which is relatively new has been accepted by judicial decisions or by doctrine in a large number of countries. It has, however, not been universally accepted and with few exceptions it has not been enacted as statutory law anywhere, otherwise than through adoption of the Model Law, of which the Canadian legislation is an example. There is, moreover, no evidence that it has the same meaning and effect in the countries and among the authors which has accepted it. Nor has its precise meaning been defined in Art. 16 or in the discussions leading to its adoption.

Mr. Davidson invited me to rule on the issue as to whether there was in fact a binding agreement between the parties. Tempting as it was to dispose of the matter on the affidavits, to adopt such a course would have been to turn Article 16 on its head. What should happen is this: I should appoint an arbitrator. The two appointed arbitra-

tors will then appoint the third to make up the tribunal of three. If the defendants wish to rely on the point that they never entered into an agreement at all, then they must do so "not later than the submission of the Statement of Defence". The Tribunal may rule on this point as a preliminary issue or as part of an award on the merits. If done by way of preliminary question and if in favour of the plaintiffs the defendants will then have 30 days in which to invite this court to decide the question. Such decision of this court is final. It should be noted that the arbitration can continue whilst a request is pending to the court. In Hong Kong this will not be as an important provisions as elsewhere because of the speed with which parties will be able to come before this court.

If the Tribunal makes an award on the merits, which clearly would encompass a finding that they had jurisdiction to do so, then the defendants will have an opportunity to apply to set the award aside under Article 34 if they can establish that the agreement is not valid under Hong Kong Law".

In Gaillard, International Council for Commercial Arbitration, Congress Series No. 5 (1990) at pages 163 and 164 it is stated:

"1. The Principle of "Competence-Competence"

The fundamental principle which prevents a party from delaying or disrupting the arbitration simply by claiming the non-competence of the arbitral tribunal is the "competence-competence" principle, which gives the arbitrators the power to rule on their own jurisdiction.

This is undoubtedly one of the most sensitive problems in arbitration law. Even though most modern legislation in civil law States endorses the "competence-competence" principle to at least some extent, this appearance of unanimity conceals some very considerable differences as to its meaning and scope.

.....

The principle of "competence-competence" does not mean, as its detractors sometimes erroneously suggest, that arbitrators have the last word on their own competence. Rather, the standard merely requires that they be the first to rule on the question. Neither the arbitrators' findings of fact nor of law concerning their own competence in any way bind the judges competent to hear actions for annulment of the award or disputes concerning its performance. The fundamental purpose of the rule concerns timing; i.e., to prevent prior disputes over the competence of the arbitrators, which may be legitimate but are often groundless, from unduly delaying the arbitration.

However, the rule also applies to national courts, in two different situations. First, the "competence-competence" principle prohibits national courts from ruling on a challenge to the competence of the arbitrators until the arbitrators have themselves ruled on this issue in an arbitration award. This is the essence of the rule. It resolves the logical quandry, well highlighted by V.V. VEEDER, in which the competence of the arbitrator and the competence of the judge are mutually exclusive, by allowing the arbitrator to rule first. At least in its purest conception, such as in French law, national courts therefore may not rule on the question until the arbitrators themselves have had the opportunity to do so. It should be stressed again that the purpose of this measure, whose effect is purely chronological and not hierarchical, is not to impose the findings of the arbitrators on the judge. Rather, it simply seeks to avoid groundless litigation over the competence of the arbitral tribunal from paralyzing the arbitration.

It no doubt could be argued that allowing the

arbitrators to proceed regardless of any challenge to their competence brought before a national court would accomplish the same result. But it would be unrealistic to believe that such challenges would not disrupt the arbitration. By bringing a challenge before the national courts, the party hostile to the arbitration necessarily forces the attention of his opponent and of the arbitrators away from the arbitration and requires them to concentrate on the national courts, at least until the challenge is settled. It is naive to imagine that the arbitration will go forward while elsewhere a judge, who is not even required to hear the arbitrator's own reasons for upholding or rejecting their competence, will determine the question. It must be remembered that it is concern over the disruption of the arbitration which lies at the heart of the rule; because of it the arbitrators, empowered to rule on their own competence, can rule freely on every contention raised by the parties on this point, subject only to the subsequent determination by the judge entrusted with ruling on the regularity of the award as to the control of a valid arbitration agreement. This freedom from interference, much more than the fact that arbitrators are allowed to continue their work, is the real meaning and effectiveness of the principle of "competence-competence."

Secondly, and correlatively, this "competence-competence" principle governs the judge's conduct when hearing an action brought by parties who appear to be bound by an arbitration agreement. Without examining the merits of the action and without even examining the issue of competence except to establish prima facie the existence of an arbitration agreement, the rule requires the judge to send the parties back before the arbitrators, so that the arbitrators can first rule on the question of their competence. The principle of "competence-competence"

mandates that the judge make only a prima facie assessment of the existence of the arbitration agreement. The court may not rule on the merits of the parties claims concerning competence."

I think that in light of the foregoing the construction of the words of the document cannot be on the "literal rule" basis. It has to take into account the "travaux preparatoires" that shed light on Article 7 of the Model Law. Thus I do not think that the "plain construction of words" approach is applicable. Hence I do not accept Mr. Beloff's submissions. In any case in my view the matters raised by the Defendant in his submissions are matters that relate to the existence, validity and scope of an arbitration agreement and are matters for the arbitral tribunal first.

CONCLUSION

It follows that I grant the relief sought by the Plaintiffs. In my judgment there is a clear bargain between the parties that any dispute should be determined in one way only - namely, by reference to arbitration being a condition precedent to any liability of either party and the prosecution of the Kuwaiti proceedings amounts to vexatious and oppressive conduct by the Defendant.

I will hear counsel on costs.

Dated this 21st day of January 1994.

Vincent W. Meerabux

Acting Puisne Judge