The London Explorer, [1971] 1 Lloyd's Rep. 523) of the "legitimate last voyage". For example, in the case of *The Dione*, [1975] 1 Lloyd's Rep. 115, to which Lord Denning, M.R., has referred, the Court seems to have assumed without, as far as one can tell, the point having been argued, that the last voyage to be considered in asking the question whether it was legitimate or not, was the round trip from Europe to the River Plate, calling at a number of ports, and back to a port within the redelivery range.

In some cases I can well see that nice and difficult questions might arise as to what was properly to be regarded as the last voyage. I should suppose that that question, if raised, would be a mixed question of fact and law, and perhaps predominantly a question of fact. But in the instant case it seems to me to be clear beyond a peradventure that the arbitrators were right to have regard to the voyage which began when the *Democritos* was sent from Punta Arenas to Port Arthur in Texas in order to load her last cargo. I cannot see that there would be any earlier point in time to which one could conceivably have regard on the facts of this case and sensibly say that the last voyage began at that earlier point. I agree that the appeal should be dismissed.

[*Order: Appeal dismissed, with costs; leave to appeal to House of Lords refused.*]

COURT OF APPEAL

Apr. 2, 5, 6, 7 and 8, 1976

NOVA (JERSEY) KNIT LTD.
v.
KANNGARN SPINNEREY G.M.B.H.

Before Lord DENNING, M.R.,
Lord Justice STEPHENSON and
Lord Justice BRIDGE

Arbitration—Stay of proceedings—Dishonoured bills of exchange—Arbitration in Germany—Action in England—Whether English action should be stayed—Whether claims on bills of exchange should be decided by arbitration—Arbitration Act, 1950, s. 4—Arbitration Act, 1975, s. 1 (1).

In 1970, the English plaintiffs and the German defendants entered into a partnership agreement whereby the plaintiffs were to supply the defendants with knitting machines for the partnership operations in Germany. The agreement provided (inter alia) that:

> All disputes arising from the partnership relationship . . . shall be decided by the Arbitration Tribunal provided for in a separate document . . .

Further by the separate document dated Mar. 20, it was provided that

> . . . An Arbitration Tribunal shall resolve upon all disputes between the partnership and the partners or among the partners arising from the partnership relationship or to which such relationship shall give rise.

In December, 1972, the plaintiffs sold 12 machines to the defendants and received 24 bills of exchange, for a total value of £173,558, maturing at dates between March, 1973, and December, 1975. The defendants honoured the first six bills but refused to honour the bills which fell due in December, 1973, and thereafter, on the ground that the bills had been obtained by fraud or some other means constituting a criminal offence in both Germany and England.

In pursuance of the arbitration clause, the defendants commenced arbitration proceedings in Germany and in February, 1975, the arbitrators made an interim award holding that the arbitration proceedings were to be construed by German law; that they covered all the disputes including the claims on the bills of exchange and that they (the Arbitrators) would deal with them in the course of the arbitration.

In November, 1974, the plaintiffs issued a writ for service out of the jurisdiction on

the defendants claiming payment of the bills of exchange which had matured between December, 1973, and July, 1974.

The defendants entered a conditional appearance in the English action and applied for an order that the action be stayed and that the claims on the bills be dealt with in the German arbitration.

———*Held*, by BRISTOW, J., that the Master's refusal to order a stay under s. 4 of the Arbitration Act, 1950, would be upheld.

On appeal by the defendants,

———*Held*, by C.A. (Lord DENNING, M.R., STEPHENSON and BRIDGE, L.JJ.), that (1) under s. 1 (1) of the Arbitration Act, 1975, the Court was bound to stay proceedings if there was any dispute about any matter agreed to be referred (*see* p. 158, col. 2);

(2) there was a dispute as to whether or not the bills should be paid and if the arbitration clause covered such disputes it had to be referred to arbitration even if the claim was on bills of exchange (*see* p. 159, cols. 1 and 2; p. 162, cols. 1 and 2);

(3) the arbitration clause embraced the matters which the defendants sought to set up and any claims against the defendants by the plaintiffs on the bills of exchange, all being claims arising out of the partnership relationship (*see* p. 160, col. 1; p. 162, col. 2; p. 163, col. 2);

(4) in the circumstances the English action on the bills would be stayed and the whole matter dealt with by the arbitrators in Germany (*see* p. 161, col. 1; p. 162, col. 2).

Appeal allowed.

The following cases were referred to in the judgments:

Agra and Mastermans Bank v. Leighton, (1866) L.R. 3 Ex. 56;

Barclays Bank Ltd. v. Aschaffenburger Zellstoffwerke A.G., (C.A.) [1967] 1 Lloyd's Rep. 387;

Brown, Shipley & Co. Ltd. v. Alicia Hosiery Ltd., (C.A.) [1966] 1 Lloyd's Rep. 668;

Henriksens Rederi A/S v. T.H.Z. Rolimpex, (C.A.) [1973] 2 Lloyd's Rep. 333; [1974] 2 Q.B. 233;

Lamont (James) & Co. Ltd. v. Hyland Ltd., (C.A.) [1950] 1 K.B. 585;

Russell v. Pellegrini, (1856) 6 E. & B. 1020;

Sena of Bond Street Ltd. v. Avalon Promotions Ltd., (C.A.) [1972] 2 Q.B. 325;

Seligmann v. Le Boutillier, (1866) L.R. 1 C.P. 681;

Warwick v. Nairn, (1855) L.R. 10 Ex. 762.

This was an appeal by the defendants, Kanngarn Spinnerey G.m.b.H., a German company, from the decision of Mr. Justice Bristow upholding the Master's refusal to stay an English action brought by the plaintiffs, Nova (Jersey) Knit Ltd., in respect of six bills of exchange which had been dishonoured by the defendants. The defendants had begun arbitration proceedings in Germany, and wanted all the questions to be settled in those proceedings.

The defendants submitted that the grounds of this appeal were that:—

(1) The learned Judge was wrong in holding that the submission to arbitration contained in the partnership agreement dated 20th January 1970 and/or the arbitration agreement dated 20th March 1972 did not cover disputes between the partners signing such agreements.

(2) The learned Judge was wrong in regarding Clause 18 of the said partnership agreement as evincing an unambiguous intention to cover disputes between the partnership firm on the one hand and one or more of the partners on the other hand, to the exclusion of disputes between partners.

(3) The learned Judge was wrong to treat subsequent conduct as being an admissible guide in the construction of a commercial agreement under German law only in circumstances where the agreement by itself would fall to be regarded as ambiguous.

(4) The learned Judge ought to have construed the partnership agreement dated 20th January 1970 in the light of (a) the arbitration agreement dated 20th March 1972; (b) the absence of any suggestion prior to the commencement of these proceedings that the said arbitration agreement contained any error; and ought to have held that the partners by the said submission to arbitration had unambiguously agreed to submit disputes between partners to arbitration, as well as disputes between the firm itself and one or more partners.

(5) Alternatively the learned Judge should have treated the arbitration agreement dated 20th March 1972 as varying or expanding the nature of the disputes subject to submission to arbitration, in such a way as to

render subject to arbitration disputes between partners.

(6) The learned Judge ought, on the evidence of fact and of law, to have recognised (a) the existence of a partnership relationship involving partnership duties of good faith and/or (b) the application of the said submission to arbitration as between the Plaintiffs and Defendants at all material times prior to, as well as after 28th February 1973.

(7) The learned Judge was wrong in treating German law as prohibiting the recognition of the existence of such a relationship, and of the application of the said submission to arbitration, as between the Plaintiffs and Defendants.

(8) In so far as the evidence of Professor Heldrich and of Dr. Jaques herein differs, the learned Judge was wrong to prefer the latter and/or ought to have preferred the former as more authoritative under German law and/or more persuasive.

(9) The learned Judge ought to have held that the matters in dispute herein between the parties have been or have been agreed to be submitted to arbitration in Munich, and that the present proceedings should be stayed accordingly."

The plaintiffs contended that the order of the learned Judge should be affirmed on the following additional grounds:

"(1) There is no dispute between the parties within the meaning of section 4(2) of the Arbitration Act. 1950, the Plaintiffs' claim not being susceptible of *bona fida* dispute.

(2) If (contrary to the Plaintiffs' primary contention) there is a dispute between the parties, such dispute does not arise from (nor was it occasioned by) the partnership relationship referred to in the arbitration clause.

(3) On its true construction the arbitration clause does not extend to claims on bills of exchange."

Mr. John Wilmers, Q.C., and Mr. Jonathan Mance (instructed by Messrs. Herbert Oppenheimer, Nathan and Vandyk) for the appellant defendants; Sir John Foster, Q.C., and Mr. David Donaldson (instructed by Messrs. Herbert Smith & Co.) for the respondent plaintiffs.

The further facts are stated in the judgment of Lord Denning, M.R.

JUDGMENT

Lord DENNING, M.R.: Two companies are locked in combat, one English, the other German. Both are manufacturers of knitted garments.

In 1970, they became associated in a joint venture in Germany as partners. The English company supplied machines for the partnership operations in Germany which was at a place called Bietigheim. But in 1973, the joint venture collapsed. The German company put the blame on the English company, and in particular on a Mr. Paul Burg, who was closely connected with the English company.

In April, 1974, the German company in pursuance of the partnership agreement, started an arbitration in Germany, claiming over 2,000,000 Deutsche Marks from the English company. Pleadings were exchanged in that arbitration. But six months later, in November, 1974, the English company retaliated. They started an action in England claiming moneys due on bills of exchange. The German company now ask that the action in England be stayed and that the claim on the bills be dealt with in the German arbitration. On this one question, simply whether or not there should be a stay, we have spent the last five days. Much money has been spent on English lawyers and on German lawyers, much paper has been read and reread simply on this preliminary point of a stay without getting to grips with the real dispute. It is nothing to be proud of.

In outline the facts are these: In December, 1972, the English knitting company sold 12 machines to the German knitting company, and in return received 24 bills of exchange for sums totalling in sterling £173,558. These were sterling bills drawn in London by the English knitting company on the German knitting company and accepted by the German knitting company payable at Barclays Bank in Fenchurch Street in London, and maturing at dates running from March, 1973, to December, 1975. The first six bills maturing between March, 1973, and September, 1973, were all duly honoured. But the German company refused to pay the bills which fell due in December, 1973, and thereafter. On Dec. 21, 1973, their solicitor wrote to the English company giving their reasons. They said that, owing to the manipulations of Mr. Paul Burg, they had suffered big losses. They claimed to set off their losses against the bills of exchange. About March, 1974,

the German company wrote to Barclays Bank giving their reasons. They said that they knew that in English law as in German law, bills of exchange were enforced much more readily than other debts, but in this case the bills were obtained by fraud or some other means constituting a criminal offence in both Germany and England; and they wanted all questions decided in overall proceedings.

It is significant that, when these differences arose, it was the German company who first took proceedings. In April, 1974, they launched an arbitration in Germany in pursuance of an arbitration clause in the partnership agreement between the parties. Each side appointed an arbitrator. The English company appointed a very respected German lawyer, Dr. E. J. Cohn. The two arbitrators appointed an umpire, a German lawyer of high repute. Pleadings were exchanged. In them issues were raised about the 12 knitting machines. The German company said that under the contract, all the 12 machines should have been brand new machines; but the English company only delivered six new machines. The remaining six were second hand which had already been used by the English company for some nine months. The German company also raised in the arbitration all their allegations about the manipulations of Mr. Paul Burg which had caused them great loss. It was not for some months that the English company issued a writ in England. In November, 1974, the English company issued a writ for service out of the jurisdiction on the Germany company. They claimed in the first part of their writ payment of the six bills which matured between December, 1973, and July, 1974, up to the date of the writ; £44,544 and interest. In the second part of their writ they claimed damages for a libel in the letter which the defendant company wrote to Barclays Bank when they refused to pay the bills.

Before that writ was served, there was a preliminary hearing before the arbitrators in Germany. In February, 1975, the German arbitrators gave a ruling as to their jurisdiction. They made an interim award in which they held that the arbitration proceedings were to be construed by German law; that they covered all the disputes, including the claims on the bills of exchange, and that they would deal with them in the course of the arbitration.

The German company desire the arbitrators in Germany to deal with everything. So they have entered a conditional appearance in the English action and have applied to stay the English proceedings on the bills. In answer the English company say that the bills of exchange are not covered by the arbitration clause in the partnership agreement. Every bill of exchange is, they say, a separate contract governed by English law and can be sued on here, and not sent to arbitration. The law on this point is now governed by s. 1 of the Arbitration Act, 1975. Under that section the Court is bound to stay proceedings if there is any dispute about any matter agreed to be referred. Under the old s. 4 (1) of the Arbitration Act, 1950, the Court used to have a discretion whether to stay or not. But in the new 1975 Act, following the New York Convention, the Court has no discretion, it is bound to send the dispute to arbitration if it is a dispute with regard to any matter agreed to be referred. The Master and the Judge both refused to stay the English action so far as the bills of exchange were concerned. Now the German company appeal from that decision. We expedited the appeal so that the German arbitrators should know whether to consider the claim on the bills of exchange or not.

Sir John Foster, on behalf of the English company, says that there is no dispute on these bills of exchange. The only dispute, he says, is about this cross-claim about the machines and so forth. He prays in aid the long line of cases whereby in English law a bill of exchange is treated as equivalent to cash. If bills are given for goods supplied it is no answer for the buyer to say that there are defects in the goods. The buyer must honour the bills of exchange: and then bring a separate action, if he likes, for the defects in the goods. That principle is established by cases such as *James Lamont and Co. Ltd. v. Hyland Ltd.*, [1950] 1 K.B. 585; *Brown, Shipley & Co. Ltd. v. Alicia Hosiery Ltd.*, [1966] 1 Lloyd's Rep. 668; *Barclays Bank Ltd. v. Aschaffenburger Zellstoffwerke A.G.*, [1967] 1 Lloyd's Rep. 387; *Saga of Bond Street Ltd. v. Avalon Promotions Ltd.*, [1972] 2 Q.B. 325 at pp. 327-328. None of those cases, however, consider the position when the contract of sale contains an arbitration clause. In many contracts there are provisions under which bills of exchange are given payable at future dates for the goods, but there is an arbitration clause under which any dispute arising out of the transaction is to be referred to arbitration. Is the seller then entitled to sue upon the

bills and let the defects only go to arbitration? Or ought not everything, bills and all, to go to arbitration, at any rate when the bills have not been negotiated?

This is a troublesome point but I think we can in this Court get help from the decision in *Russell v. Pellegrini*, in (1856) best reported in 6 E. & B. 1020. It was not a claim under a bill of exchange but a claim for freight due under a charter. Yet freight is like a bill of exchange in this respect that the shipowner is entitled to be paid down in cash. The charterer is not entitled to hold up payment pending a cross-claim. See *Henriksens Rederi A/S v. T.H.Z. Rolimpex*, [1973] 2 Lloyd's Rep. 333; [1974] 1 Q.B. 233. Now in *Russell v. Pellegrini* there was a claim by the shipowner for freight with a cross-claim by the charterer saying that the ship was not seaworthy. But there was an arbitration clause saying that, should any difference of opinion arise between the parties to this contract, the same shall be referred for arbitration. The shipowner said there was no dispute as to the claim for freight and it ought not to go to arbitration. But the Court rejected that argument. Lord Campbell, C.J., said at p. 1026:

> Though there is no dispute that the monthly hire is due at law yet it appears there is a bona fide cross-claim for damages; and though these could not be set off against a demand for monthly hire it must have been in the contemplation of the parties to this agreement that in such a case the reference [—that is the reference to arbitration—] should include everything.

That case was followed in 1866 by *Seligmann v. Le Boutillier*, L.R. 1 C.P. 681, by a very strong Court. It shows that both the claim for freight and the cross-claim for damages must all go to arbitration. But Sir John Foster says that that does not apply to bills of exchange. Freight is not negotiable whereas bills of exchange are. So bills of exchange should be governed by a different principle. I am afraid I cannot agree with him. The Courts in those cases were interpreting words very similar to those which we have in the Arbitration Act, 1975. There is, I think, a dispute as to the liability on the bills. The dispute is whether or not the bills should be paid having regard to the cross-claims that exist. Furthermore it arises between two persons who are partners. In our English law if there are cross-claims between partners, one partner cannot get judgment straight off against the other. There must be an account of the dealings between them. On this point therefore, I would hold that there is a dispute, and if it is with regard to a matter agreed to be referred, it must be referred to arbitration, even though the claim is on bills of exchange. But is it on a matter agreed to be referred? Here we come to German law. Does the arbitration clause cover this matter? It is interpreted according to German law. The parties have put before us—as they did before the Judge below—very careful and learned expositions of the German law. The English company rely on Dr. Jaques, who is an expert in English law practising in London. The German company rely on Professor Heldrich, who is a distinguished German lawyer practising in Munich. He is the Dean of the Faculty of Law of the University of Munich.

I will try and summarize as much as I can, but I hope not at too great length, the position in regard to the German arbitration and arbitration clause. It is a complicated story. It was not a simple partnership between the English company and the German company. It was a German partnership quite unlike an English partnership. The German partnership was a legal entity separate from the individual partners. The partners were (1) the English company, (2) a trustee for the German company and (3) a specially formed German company G.m.b.H., which was wholly owned by the English company and the German company. The partnership agreement is dated Jan. 20, 1970. It contained an arbitration clause which was to govern the matter. One translation of it reads:

> Arbitration agreement. All disputes arising from the partnership relationship or occasioned by the partnership relationship between the partnership and the partners shall be decided by the Arbitration Tribunal provided for in a separate document.

One other translation is that instead of "occasioned by" the words "in connection with", but that does not seem to me to make any difference.

That clause was contemplated in a separate document. This was made on Mar. 20, 1972. In the preamble there was this recital, which is said to throw a good deal of light on that first agreement:

> On 20.1.1970 a limited partnership agreement was entered into between the undersigned. In accordance with article

> 18 of this agreement an Arbitration Tribunal shall resolve upon all disputes between the partnership and the partners or among the partners arising from the partnership relationship or to which such relationship shall give rise. Accordingly the partners make the following agreement.

Now I come to the rival arguments. The expert for the English company said that the only disputes covered by the arbitration clause were those which existed between the partnership on the one hand and the partners on the other: and that it did not cover disputes which arose between the partners as between themselves. The Judge accepted that view. He held that those words in the 1972 addendum about "or among the partners" must be a draftsman's error. The expert for the German company said that the 1972 addendum could be used to show the intention of the parties, or it could be a contractual variation of it, or subsequent conduct throwing light upon it. I must say that I agree with the expert for the German company. I see no evidence of a draftsman's error. Our task is to decide according to German law. I unhesitatingly hold that this agreement does cover disputes between the partners themselves.

The next point is that the dispute has to "arise from the partnership relationship". In a German code there is a section which provides that

> . . . an arbitration agreement relating to future disputes shall have no legal effect unless it relates to a named legal relationship and the disputes arising therefrom.

The experts were at difference upon that point. The expert for the German company says that all that is necessary is a clearly delineated legal relationship; and that, so long as that relationship is defined the parties can contract as widely or as narrowly as they wish. They can contract that any disputes whatever arising from the partnership are to be submitted to arbitration. That seems to me a sensible view. If the clause is wide enough to cover the particular disputes then they come within the arbitration.

It is next said, however, that in 1970 the partners in this partnership agreement did not include the German company. The partners then were only the English company, and the trustee for the German company and the G.m.b.H. The partners did not include the German company itself until February, 1973, when there was assignment by the trustee of the German company to the German company itself. But the bills of exchange were given before this assignment and the like. The answer is, however, as I understand it, that in German law, in the initial partnership, the trustee was only a nominee for the German company. The expert for the German company said that the Court can look to see who is the real party concerned. He says that the German company,

> . . . With their undertaking to provide the partnership with premises, machines and financial assistance . . . assumed one of the principal partnership tasks. The conclusion is that the German company were granted internally the status of a partner with all attendant rights and duties.

In those circumstances he says that the German company could be considered as a party, at all events after the assignment was taken. That seems to me good sense. I would hold that the partnership agreement includes now and applies to the German company which was always the real beneficiary.

Now to another point. The English company say that, even German law gives bills of exchange priority in the Courts. Summary proceedings are available whereby judgment can be obtained upon bills of exchange, particularly in Hamburg. The German Courts do not allow cross-claims to be made to avoid or delay payment of bills of exchange. There are two cases which have been referred to by the experts. One in 1909, and one in 1924. They appear to be in conflict but the expert for the German company gives this explanation:

> The apparent contradiction between these judgments is thus to be resolved: if partners submit themselves to an arbitration clause, this happens on the understanding that the settlement of disputes among themselves by a Court freely chosen by them does better justice to their particular corporate relations. That is why greater importance is attached to an arbitration clause agreed by a partnership contract than to an arbitration agreement concluded merely on the occasion of an exchange relationship, as for example a sale.

That again to me seems to be good sense. I think that we in England would take the same sort of view. As between partners, we would not allow one party to sue on a bill of exchange against the other if there was

a cross-claim dispute between them in regard to the partnership agreement. So here again I am afraid I would rely on Professor Heldrich in preference to Dr. Jaques.

I admire greatly the care and skill with which the German lawyers on each side have presented the case for the consideration of the Court: but for myself, coming to the matter afresh, I prefer to accept the view of Professor Heldrich rather than Dr. Jaques. This means that the partnership agreement applies in this case and the partnership tribunal already existing in German, already having (as it has held) jurisdiction to deal with the whole matters, it is in my view seized of the whole matter. It can deal with it. It is right that this English claim on the bills of exchange should be stayed and the whole matter dealt with by the arbitrators and umpire in Germany. I would allow the appeal accordingly.

Lord Justice STEPHENSON: I entirely agree and add only a little of my own out of deference to the arguments of Sir John Foster and because we are differing from the learned Judge who dealt with the case with just as much care as the German lawyers.

On Sir John's first point by which he sought to bring the appeal to an abrupt conclusion he relied on authorities which are cited in the current 13th ed. of Chalmers on Bills of Exchange, at p. 104 as authority for the proposition that

> . . . partial failure of consideration is a defence pro tanto against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise.

Those cases were *Day v. Nix*, *Warwick v. Nairn*, (1855) L.R. 10 Ex. 762; and *Agra and Masterman's Bank v. Leighton*, (1866) L.R. 3 Ex. 56. He also relied on the later authorities in this Court to which my Lord has referred. I would not wish to do anything to weaken the negotiability of negotiable instruments or the importance of bills of exchange being treated and relied on as equivalent to cash. But it does seem to me that the very question which we have to decide on this point was decided in *Russell v. Pellegrini*, (1856) 6 E. & B. 1020, and for reasons which commend themselves to me; and that the only way in which we could uphold Sir John's point is if we were either to treat that case as wrongly decided (and the case of *Seligmann v. Le Boutillier*, (1866) L.R. 1 C.P. 681 that followed it) or to distinguish claims on bills of exchange from claims for freight. The more I study the different reports of *Russell's* case the harder I find it to resist the commonsense behind them, and to resist applying what is said by the Judges in that case to this one.

In the Law Journal Report Mr. Justice Coleridge is reported as beginning his judgment by saying that the clause of the statute (that is s. 11 of the Common Law Procedure Act, 1854), ought to receive a large and liberal interpretation. Although those words do not appear in the report of his judgment in 6 Ellis and Blackburn, it is quite plain from all the reports of that case which I have looked at that that is what the Court decided should be done. It is also plain from observations Lord Campbell made in the course of the argument in the Ellis and Blackburn report at p. 1025 that the Court were alive to the possibility that such a wide interpretation of the section's statutory provision then governing references to arbitration and stays of action might be abused. Lord Campbell, C.J., said,

> It may be said that your construction of the Act gives a premium on getting up cross-claims for the purpose of enforcing a reference.

Nonetheless the Court in that case decided that although in a sense there did not appear to be a difference (and that was the word in the 1854 Act) which had been agreed to be referred, because there was no defence as such to the claim for freight, yet looking at the sense of the thing and construing the Act broadly, everything, undisputed claim and bona fide cross-claim for unliquidated damages, ought to be referred.

It is not in my judgment any answer to say, as Sir John does, that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, in the words of s. 1 (1) of the Arbitration Act, 1975, because there is no defence in law to the claim being made in the legal proceedings which have been commenced by the plaintiffs. A triable issue under R.S.C., O. 14 is not the same thing as a dispute within the words of that section. That seems to me to be established by *Russell v. Pellegrini*. I can find no material difference between the wording of that section of the Arbitration Act and the wording of s. 11 of the Common Law Procedure Act, 1854.

I would not myself like to dispose of Sir John's point by deciding that there is in fact a defence of fraud raised to the claim on the bills. It would, I think, have been much better (I say no more about it than this) if some such allegation as was made by the partnership in the arbitration proceedings in Munich had found its place in some affidavit sworn on behalf of the defendants in these proceedings. In the absence of such an allegation in plain terms in any affidavit I would treat the plaintiffs' claim on the bills not as one in which there was a defence and a triable issue but as one to which there is no defence but nevertheless a dispute. For these reasons I agree that that first point falls.

On the question whether the German arbitration clause covers the differences or disputes which arise on the bills of exchange and on these machines I am in entire agreement with my Lord's judgment. I find it extremely difficult to say what exactly the arbitration clause does mean, and that I think arises not only from my own imperfect acquaintance with the German language but from the fact that two eminent German lawyers, presumably perfectly acquainted with their own language, have come to opposite conclusions about its meaning. But as it seems to me we are relieved of the difficult task of saying what it meant in its original form by the explanation of it given in the recital to the agreement of Mar. 20, 1972. On this point I regret to have to differ from the learned Judge, but I find it impossible to hold that the addition of the four German words to which our attention has been called in the preamble or recital to that agreement can have been a draftsman's error. I would require some evidence as to who drafted the document and how he came to make the error, or that he did make the error, before I could draw that inference from the insertion of these four words in a document, admittedly the separate document referred to in the agreement of Jan. 20, 1970, whose 18th article we have to construe, and signed by the parties to the agreement. If it is not a draftsman's error we can look at it either as an aid to the construction of an ambiguous art. 18 or as providing a variation or a contractual extension of it, as it is put by Professor Heldrich; but whichever way we look at it it seems to me that it disposes of the learned Judge's view and removes one obstacle to allowing this appeal.

As far as the provision of art. 1026 of the German Civil Procedure Code goes, I have nothing to add to what my Lord has said. The point appears to have been imperfectly appreciated by the learned Judge, who may have confused it with the validity of the arbitration clause. Once the point is understood, it seems to me for the reasons given by my Lord that this article does clearly cover an agreement to refer disputes arising from the partnership relationship. Again I agree that the internal recognition of the defendants as the real partner by the plaintiffs is the governing matter in disposing of the next point. I find the opinion given by Professor Heldrich on that matter wholly convincing.

The last point, whether in fact on its true construction according to German law the clause does cover a dispute about bills of exchange, is the only one on which I find any difficulty in preferring the opinion of Professor Heldrich to the opinion of Dr. Jaques. It is obviously not an easy matter. A study of the German cases, particularly the 1909 and 1924 cases on which these two eminent lawyers reached opposite conclusions, has left me in some doubt, but on the whole I have come to the conclusion that again the view of Professor Heldrich on this point should be preferred.

The result of allowing the appeal, as I agree that we should, and staying the action does seem to me to be sensible, and it also seems to me eminently desirable that all these questions which are in issue between these parties should be dealt with by the Court which has already started to deal with them in Germany. For these reasons I agree that this appeal should be allowed.

Lord Justice BRIDGE: I agree with both judgments and I too shall seek to express as shortly as I may the few observations of my own which I add in deference to the learned Judge from whom we are differing and to the careful arguments of Sir John Foster.

The appellant defendants, sued upon bills of exchange, claim to be entitled as of right to a stay of the proceedings pursuant to s. 1 (1) of the Arbitration Act, 1975. That section, so far as material, provides that

> . . . if any party to an arbitration agreement to which this section applies . . . commences any legal proceedings in any court against any other party to the agreement . . . in respect of any matter agreed to be referred [—that party may

> apply to the court to stay the proceedings—] and the court . . . shall make an order staying the proceedings, unless satisfied . . . that there is not in fact any dispute between the parties with regard to the matter to be referred.

Here it is common ground that the defendants are a party to an arbitration agreement with the plaintiffs, at all events since February, 1973, when they became by assignment full members—if I may use that expression—of the German partnership. The two questions accordingly which arise under s. 1 (1) are: first, is the plaintiffs' claim against the defendants as acceptors of the bills of exchange sued upon a claim "in respect of any matter agreed to be referred"? Secondly, if it is, should the Court be satisfied

> . . . that there is not in fact any dispute between the parties with regard to the matter agreed to be referred?

The first question is the question which falls to be answered in accordance with German law, or perhaps more accurately in part as a matter of construction of the German contract which embodies the arbitration agreement and in part as a pure question of German law.

It is unfortunate, as it seems to me, that the learned Judge at first instance, and we here, should be put to the necessity of having to decide the question of foreign law on conflicting affidavits between the experts called on either side. Foreign law is of course a question of fact when it has to be decided in our Courts, and it is always unhappy for a Court to have to decide a disputed issue of fact on affidavit evidence which has not been tested by cross-examination. Unfortunately the evidence here could not be tested by cross-examination because the plaintiffs' expert whom the defendants desired to cross-examine was ill and not available. It is not a novel situation to find lawyers of any nationality expressing opposed opinions. In the absence of cross-examination, and since the matter does have to be dealt with by affidavit, one of the incidental consequences is that we are in as good a position to reach a conclusion as to how the dispute should be resolved as was the learned Judge.

The learned Judge expressed the conclusion that in general he preferred the evidence of Dr. Jaques, the plaintiffs' expert, to that of Professor Heldrich, the defendants' expert, because he found that Dr. Jaques' citation from and treatment of authority seemed to be more thorough and his comments the more persuasive. With respect, after the very thorough examination and analysis to which the evidence of both German lawyers has been subjected in this Court I have reached a contrary conclusion. In general I find the opinion of Professor Heldrich more convincing, perhaps because his exposition of the general principles underlying particular questions of law to be decided is, as it seems to me, more lucid and also the principles, as he asserts them, accord the more readily with my notions of what one would expect to find in a rational system of law in a civilized country. Having said that, I need add little further with respect to the three issues of German law which arise: was the arbitration agreement an agreement which covered disputes among the partners inter se; did the disputes in question arise out of the partnership relationship; and did the arbitration clause cover disputes on bills of exchange.

I will only add with respect to those matters to what has been said by my Lords and to the statement that I prefer Professor Heldrich to Dr. Jaques that, on the one issue on which we are differing from the learned Judge, it does seem to me that the supplementary agreement which the parties concluded on Mar. 20, 1972, is really decisive. There is a clear recital that the original arbitration clause was to embrace disputes among partners, and it seems to me quite impossible to dismiss that or to deprive it of contractual effect by pointing to the form of the document, as Sir John does in his argument, or by concluding without any evidence to support the conclusion, as the learned Judge did, that this was a mere draftsman's error which the five persons who signed this supplementary agreement all, for some inexplicable reason, overlooked.

Accordingly I approach what my Lords treated as the first point but which I am treating as the last point on the basis that there was an arbitration agreement between the parties which embraced the matters of crossclaim which the defendants seek to set up and any claims against the defendants by the plaintiffs on bills of exchange, all being claims arising out of the partnership relationship.

I further approach the final question which is the question of English law assuming, without finding, that nothing in the crossclaims amounts to an allegation that the bills of exchange sued upon were obtained by fraud. On those assumptions

there is, on the face of it, no defence to the plaintiffs' claims on the bills, in the sense that if there were no arbitration agreement the plaintiffs could seek judgment on the bills under R.S.C., O. 14. They would certainly be entitled to it and it is doubtful in the extreme whether the defendants would even be entitled to any stay of execution by virtue of the pending crossclaims. But does that state of law disentitle the defendants to a stay of execution pursuant to the arbitration clause and s. 1 (1) of the Act of 1975? That in turn depends on whether in these circumstances one must say that the Court should be

> . . . satisfied that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.

This is the point which to my mind—and here I am in wholehearted agreement with the opinion expressed by Lord Justice Stephenson—the Court of Exchequer fairly and squarely decided in the case of *Russell v. Pellegrini*, (1856) 6 E. & B. 1020, and affirmed in the later case of *Seligmann v. Le Boutillier*, (1866) L.R. 1 C.P. 681. The judgments of their Lordships, particularly as reported in 6 E. & B., show that all the members of the Court approached the issue there, viz: whether the charterers' cross-claim for damages entitled them to a stay of the shipowner's action claiming freight, on the footing that at law there was no defence to the shipowner's claim for freight; in other words on the footing that at law the shipowner's claim for freight due stood fairly and squarely on all fours with a claim on a bill of exchange to which none of the recognized defences to claims on bills of exchange was available. Under the language of the relevant statute, s. 11 of the Common Law Procedure Act, 1854, the question to be answered was whether the claim was " in respect of a matter agreed to be referred ". But the reference in the relevant arbitration agreement in that case was of " differences " between the parties. Accordingly the question was: Is there a difference between the parties when there is a claim for freight by the shipowner, to which there is no defence in law, met by a crossclaim for damages by the charterer for unliquidated damages? All members of the Court answered that question affirmatively, even though Mr. Justice Wightman reached a conclusion in agreement with his brethren with some hesitation. I see no basis on which one could rationally distinguish that decision on the footing that there was a relevant distinction in principle to be made between a claim for freight under a charter-party and a c upon a bill of exchange.

That being so the only remaining c tions are whether the modern legisl differs in any material respect from Act with which the Court was conce in the *Russell* case, or whether we sh say, assuming that we are at liberty t so, that *Russell's* case was wrongly deci I can see no material distinction betw the Act of 1975 and the Act of 1854 in regard; nor have I the slightest inclinat even assuming it was open to us to do to overrule *Russell v. Pellegrini*. If it as their Lordships thought in that case, ri to give the statute of 1854 a large liberal construction, in my judgment it i fortiori, right to do so when constru s. 1 (1) of the Act of 1975, bearing in m that this is an Act to give effect in domestic law to the New York Convent on the Recognition and Enforcement Foreign Arbitral Awards adopted by United Nations Conference on Internatio Commercial Arbitration on June 10, 19 For those reasons I agree that the app should be allowed.

[Appeal allowed and the order made t all further proceedings in the action stayed in regard to the claims in pars. 1 a 2, pursuant to s. 1 (1) of the Arbitrati Act, 1975, with costs in the Court Appeal, in the Court below before M Justice Bristow and the Master. Leave appeal to the House of Lords refused. T respondents notice dismissed with cost