lucidly points out in *The Despina R.*, at pp. 625 and 610, if there has been any drop in the value of the plaintiffs' currency between the date of the breach and the date of the payment, this solution means that the plaintiffs are only suffering the effect of such changes in the internal value of their own currency.

For these various reasons I have no doubt that the arbitrators were right in the conclusions which they reached. Speaking for myself, I consider it unnecessary and inadvisable to try and lay down any rule of general application. Each case will have different features, Financial situations are for ever changing. It may be that at present the plaintiffs' currency of account will seem in most cases to offer the most attractive solution. That is a question which can safely be left to arbitrators to decide in the particular circumstances of the case they are considering.

I would allow the appeal.

QUEEN'S BENCH DIVISION (ADMIRALTY COURT)

Dec. 12, 13, 14, 16, 20 and 21, 1977, Jan. 13, 1978

THE "RENA K"

Before Mr. Justice BRANDON

Admiralty practice—Action in rem—Arbitration clause incorporated into bills of lading—Damage to cargo—Ship arrested—Whether dispute should be referred to arbitration—Whether owners entitled to unconditional release of ship—Whether cargo-owners entitled to a "Mareva" injunction—Whether action should be stayed—Arbitration Act, 1975, s. 1(1).

By a charter-party dated Apr. 13, 1977, the owners let their ship *Rena K* to the charterers for the carriage of a cargo of 11,150 tonnes of sugar from Port Louis in Mauritius to Liverpool during May, June and July, 1977. The charter provided inter alia:

> Any disputes which may arise under this charter to be settled by Arbitration in London.

Two bills of lading were issued in respect of the sugar, both containing a similar clause which stated:

> All terms, clauses, conditions and exceptions including the Arbitration Clause, the Negligence Clause and the Cesser Clause of the Charter-Party dated London 13 April 1977 are hereby incorporated.

Rena K left Port Louis on May 17, 1977. On May 20, there was an entry of sea water into her No. 4 hold. As a result of this, a quantity of 2440 tonnes of sugar in that space was ruined and was jettisoned.

On June 24, the cargo-owners began an action in rem and personam, the writ being endorsed with a claim for damages of £549,000 for breach of contract and duty in and about the carriage of the cargo.

On July 11, 1977, *Rena K* arrived at Liverpool and discharge of her cargo began on July 24 or 25. On July 25, the cargo-owners applied ex parte for a *Mareva* injunction restraining the owners from dealing with moneys payable to their bankers in London in respect of freight due under the charter. An interim injunction effective for 28 days or until further order was granted, and on July 27, the *Rena K* was arrested.

On July 28, the owners entered an appearance and by notice of motion asked that the action be stayed on the ground that the dispute which it related was one which the parties had agreed to refer to arbitration and s. 1(1) of the Arbitration Act, 1975, provided inter alia:

> 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, any party to the proceedings may at any time after appearance and before delivering any pleading or taking any other steps in the proceedings apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

And (2) that along with and consequent on such stay, for the release of the *Rena K* from arrest.

The ship was entered in the P. and I. Club (the club), and the owners' calls having been paid up to date, they (the owners) were entitled, subject to the relevant rules, to be indemnified by the club in respect of liability for loss of or damage to cargo carried in the ship. Rule 6 provided that unless the committee otherwise decided, the club was not obliged to indemnify a member in respect of a liability unless and until the member had first discharged the liability out of money belonging to him absolutely and not by way of loan or otherwise. Rule 8(k) provided that the club might whenever it thought fit reduce the amount of a member's claim on the ground that he had not taken such steps to protect his interest as he would have done if the ship had not been entered for protection and indemnity.

On July 27, an agreement was reached between the cargo-owners on the one hand and the owners and their club on the other, whereby *Rena K* was to be released from arrest and the club would put up security for the claim on behalf of the owners in the form of a letter of undertaking in the sum of £390,000 (the value of the ship). That letter was to be cancelled and returned to the club if the Court subsequently decided that (1) the owners were entitled to a stay; (2) as a result of such a stay the *Rena K* was to be unconditionally released and (3) the cargo-owners were not entitled, by way of alternative security for their claim, to a *Mareva* injunction.

On Dec. 8, 1977, the owners and the club, by an originating summons asked the Court to determine whether by virtue of the agreement, the club was entitled to the cancellation and return to them of the letter of undertaking in the sum of £390,000 given by them pursuant to it.

The issues for decision of the Court were: (1) Was the dispute to which the cargo-owners' action related one which the parties had agreed should be referred to arbitration? (2) If so were the owners entitled as at July 28, 1977, to a stay? (3) If so were the owners also entitled as at July 28, 1977, along with and consequent on such stay to the unconditional release of the ship from arrest? (4) If so were the cargo-owners entitled as at July 28, by way of alternative security for their claim to a *Mareva* injunction in respect of the ship?

Held, by Q.B. (Adm. Ct.) (BRANDON, J.), that (1) the addition of the words "including the Arbitration clause", in the bills of lading, meant that the parties to the bills intended the provisions of the arbitration clause in the charter-party to apply in principle to disputes arising under the bills (*see* p. 551, col. 1); and on the true construction of the bills of lading the provisions for arbitration contained in the arbitration clause of the charter were brought into the bills of lading and made applicable to disputes arising under them (*see* p. 551, col. 1); therefore the dispute was one which the parties had, by the terms of the bills of lading, agreed to refer to arbitration (*see* p. 551, col. 2);

(2) the words "incapable of being performed" in s. 1(1) of the Arbitration Act, 1975, ought to be construed as referring only to the question whether an arbitration agreement was capable of being performed up to the stage when it resulted in an award (*see* p. 552, col. 2); and the fact that one of the parties to the agreement would be incapable of satisfying the award if it should be made against him did not make such agreement "incapable of being performed" within the meaning of the section (*see* p. 553, col. 1);

(3) if the cargo-owners were to succeed in an arbitration and obtain an award in respect of the full amount of their claim, the owners would be incapable of satisfying out of their own resources alone, more than a part of the amount of the award in that the owners' only asset was the ship (*see* p. 553, col. 2); however, the evidence clearly showed that there was a clear possibility that the owners' club would have satisfied the award direct on their member's behalf and the cargo-owners were unable to eliminate that possibility (*see* p. 554, col. 1);

(4) question 2 would therefore be answered by holding that the owners were entitled as at July 28, 1977, to a stay of the cargo-owners' action under s. 1(1) of the Act (*see* p. 554, col. 1);

(5) there was nothing in s. 1(1) of the Act which obliged the Court whenever it granted a stay of an action in rem in which security had been obtained, to make an order for the unconditional release of that security (*see* p. 559, col. 2); and it was a matter for the discretion of the Court what order it should make with regard to such security (*see* p. 559, col. 2); in the circumstances, if an award should be made against the owners and they should be able to satisfy it the cargo-owners would be entitled to have the stay of the action removed and to proceed to a judgment in rem on it (*see* p. 560, col. 2); a cause of action in rem did not become merged in an arbitration award (*see* p. 560, col. 2); and the owners were not entitled as at July 28, 1977, along with and consequent on the stay of the action to an unconditional release of the ship from arrest (*see* p. 560, col. 2; p. 561, col. 1);

The Cap Bon, [1967] 1 Lloyd's Rep. 543, and *The Golden Trader*, [1974] 1 Lloyd's Rep. 378, considered.

(6) if the owners had been entitled to the unconditional release of the ship, there was no reason why [illegible] procedure should not have been available to provide the cargo-owners with security for the payment of any award which they might obtain in the arbitration (*see* p. 561, col. 1); under s. 12(6)(f) and (h) of the Arbitration Act, 1950, the Court had power to

grant a *Mareva* injunction for the purpose of, and in relation to, an arbitration which had not yet commenced (*see* p. 562, col. 1) and if it had been necessary to decide whether a *Mareva* injunction should be granted, the Court would have exercised its discretion and granted the injunction but subject to a term providing for the arbitration to be commenced within a specified time (*see* p. 563, col. 1); and question (4) would be answered in the affirmative (*see* p. 563, col. 1);

(7) the result of the answers to questions (1) and (2) was that on the owners' application in the cargo-owners' action there would be an order for a stay of the action (*see* p. 563, col. 2); the result of the answer to question (3) or if that was wrong, of the answer to question (4) was that on the originating summons, issued by the owners and the club, there would be a declaration that the club was not entitled to the return and cancellation of its letter of undertaking (*see* p. 563, col. 2).

Action stayed.

The following cases were referred to in the judgment:

Annefield, The, (C.A.) [1971] 1 Lloyd's Rep. 1; [1971] P. 168;

Athenee, The, (1922) 11 Ll.L. Rep. 6;

Atlantic Star, The, (H.L.) 2 Lloyd's Rep. 197; [1974] A.C. 436;

Bengal, The, (1859) Swab. 468;

Bremer Oeltransport G.m.b.H. v. Drewry, (C.A.) (1933) 45 Ll.L. Rep. 133; [1933] 1 K.B. 753;

Cap Bon, The, [1967] 1 Lloyd's Rep. 543;

Celia, The, (1888) 13 P.D. 82;

Eleftheria, The, [1969] 1 Lloyd's Rep. 237; [1970] P. 94;

Fehmarn, The, [1957] 1 Lloyd's Rep. 511; [1957] 1 W.L.R. 815; (C.A.) [1957] 2 Lloyd's Rep. 551; [1958] 1 W.L.R. 159;

Foresta Romana S.A. v. *Georges Mabro* (Owners), (1940) 66 Ll.L. Rep. 139;

Gascoyne v. Edwards, (1826) 1 Y & Y. 19;

Golden Trader, The, [1974] 1 Lloyd's Rep. 378; [1975] Q.B. 348;

Hamilton v. Mackie & Sons Ltd., (1889) 5 T.L.R. 677;

John and Mary, The, (1859) Swab. 471;

Makefjell, The, [1975] 1 Lloyd's Rep. 528; (C.A.) [1976] 2 Lloyd's Rep. 29;

Merak, The, (C.A.) [1964] 2 Lloyd's Rep. 527; [1965] P. 223;

Njegos, The, (1935) 53 Ll.L. Rep. 286; (1936) P. 90;

Phonizien, The, [1966] 1 Lloyd's Rep. 150;

Rasu Maritima S.A. v. Pertamina, (C.A.) [1977] 2 Lloyd's Rep. 397; [1977] 3 W.L.R. 518;

Sirkina, The (H.L.) [1978] 1 Lloyd's Rep. 1; [1977] 3 W.L.R. 818;

Sylph, The, (1867) L.R. 2 A. & E. 24;

Thomas (T.W.) & Co. Ltd. v. Portsea S.S. Co. Ltd., [1912] A.C. 1;

Yeo v. Tatem (*The Orient*) (1871) L.R. 3 P.C. 696.

This was an application by the defendants, Black Lion Shipping Co. S.A., the owners of the vessel *Rena K*, for an order that the action in rem brought by the plaintiffs, the charterers, The Mauritius Sugar Syndicate, the cargo-owners, Tate & Lyle Refineries Ltd., and the charterers' agents, Emcar Ltd. and Adam & Co. Ltd., who shipped and issued the bills of lading in respect of the cargo of sugar be stayed on the grounds that the dispute to which it related was one which the parties had agreed to refer to arbitration and that along with and consequent upon such stay for the release of *Rena K* which had been arrested by the plaintiffs (the cargo-owners).

About 2240 tonnes of sugar had been ruined by the entry of sea water into the No. 4 hold of the *Rena K* and the plaintiff had brought an action claiming £549,000 in damages.

Mr. David Grace (instructed by Messrs. Ince & Co.) for the plaintiffs (the cargo-owners), Mr. M. N. Howard (instructed by Messrs. Hill Dickinson & Co.) for the defendant owners.

The further facts are stated in the judgment of Mr. Justice Brandon.

Judgment was reserved.

Friday, Feb. 17, 1978

JUDGMENT

Mr. Justice BRANDON: These proceedings arise out of the carriage of a cargo of about 11,150 tonnes of sugar from Port Louis, Mauritius, to Liverpool in the Greek ship *Rena K* during May, June and July, 1977.

The sugar concerned was sold by The Mauritius Sugar Syndicate to Tate & Lyle Refineries Ltd. on c.i.f. terms. The ship was chartered for the carriage by The Mauritius Sugar Syndicate from her owners, Black Lion Shipping Co., S.A., under a voyage charter-party dated London Apr. 13, 1977. The latter is

a Panamanian company managed and controlled from Greece.

The cargo was shipped for The Mauritius Sugar Syndicate by two agents of theirs, Emcar Ltd. and Adam & Co. Ltd., and two bills of lading were issued in respect of such shipment. One bill of lading was on Emcar Ltd's. form and the other on Adam & Co. Ltd's. form. In either case the agent was named as shipper in the bill of lading although acting as agent only.

The *Rena K* left St. Louis on May 17, 1977. On May 20 there was an entry of sea water into ' ' No. 4 hold. As a result of this a quantity of out 2440 tonnes of sugar in that space was ruined. Later, after the *Rena K* had proceeded to Durban for examination and temporary repairs, the whole of the ruined sugar was jettisoned.

On June 24, 1977, while the voyage was still in progress, The Mauritius Sugar Syndicate, Tate & Lyle Refineries Ltd., Emcar Ltd., and Adam & Co. Ltd., began an action in this Court both in rem against the *Rena K* and in personam against Black Lion Shipping Co. S.A. The claim endorsed on the writ was for damages for breach of contract and duty in and about the carriage of the cargo. The amount claimed is said by the plaintiffs to be £549,000 with interest and costs, that figure being calculated on the basis of a total loss of 2440 tonnes of sugar with a sound arrived value of £225 per tonne.

On July 11, 1977, the *Rena K* arrived at Liverpool, and on July 24 or 25 discharge of the rest of her cargo began. On July 25 the plaintiffs applied ex parte for a *Mareva* injunction restraining the defendants from dealing with moneys payable to their bankers in London in respect of freight due under the charter-party. An interim injunction effective for 28 days or until further order was granted, with liberty to the defendants to apply on short notice to vary or discharge the order.

On July 27, 1977, the writ, in so far as it was in rem, was served on the *Rena K* and she was arrested in the action. At the same time solicitors acting for the defendants accepted service of the writ in so far as it was in personam. On July 28 the defendants entered an appearance in the action, and on the same day they issued a notice of motion asking, firstly, for a stay of the action on the ground that the dispute to which it related was one which the parties had agreed to refer to arbitration, and, secondly, along with and consequent on such stay, for the release of the *Rena K* from arrest.

It was then the last day but one of the Trinity sittings, and there was insufficient time for the questions raised by the notice of motion to be adequately argued and decided. In these circumstances an agreement was reached between the plaintiffs on the one hand and the defendants and their P. and I. Club (the London Steamship Owners' Mutual Insurance Association Ltd.) on the other hand, which would allow the *Rena K* to be released while preserving for the plaintiffs all such rights as they might at that stage have had to retain security for their claim by keeping the *Rena K* under arrest, or, if such arrest was not maintainable, by obtaining comparable security in the form of a *Mareva* injunction relating to the ship which they would in that event have applied for in the alternative.

The principal terms of the agreement to which I have referred are contained in a telex from Messrs. Ince & Co., the solicitors for the plaintiffs, to Messrs. Hill Dickinson & Co., the solicitors for the defendants, dated July 27, 1977, and can be summarised as follows:—

(a) That the P. and I. Club should put up security for the claim on behalf of the defendants in the form of a letter of undertaking in the sum of £390,000.

(b) That this letter of undertaking should be cancelled and returned by the plaintiffs to the P. and I. Club if the Court should subsequently decide that as at July 28, 1977:—

(1) the defendants were entitled to a stay of the action on the ground that there was an agreement to refer the dispute to which it related to arbitration;

(2) as a consequence of such stay the defendants were further entitled to the unconditional release of the *Rena K* from arrest; and

(3) the plaintiffs were not entitled, by way of alternative security for their claim, to a *Mareva* injunction restraining the defendants from removing the *Rena K* from the jurisdiction.

(c) That the *Rena K* should meanwhile be released from arrest.

The sum of £390,000 referred to in term (a) above was based on the estimated value of the *Rena K* in the condition in which she was at that time.

In accordance with that agreement the P. and I. Club put up security in the form of a letter of undertaking in the sum of £390,000 and the *Rena K* was released from arrest. A consent order was further made adjourning the hearing of the defendants' application for a stay to Dec. 12, 1977.

On Dec. 8, 1977, a further proceeding was begun by originating summons in which Black

Lion Shipping Co. S.A. and the London Steamship Owners' Mutual Insurance Association Ltd. were named as plaintiffs and The Mauritius Sugar Syndicate, Tate & Lyle Refineries Ltd., Emcar Ltd. and Adam & Co. Ltd. as defendants. In that originating summons, as subsequently amended, the plaintiffs ask the Court to determine in effect whether, by virtue of the agreement which I summarised above, the P. and I. Club is entitled to the cancellation and return to them of the letter of undertaking in the sum of £390,000 given by them pursuant to it.

On Dec. 9, 1977, the four defendants to the originating summons entered an appearance to it, and it was agreed by all the parties concerned that the originating summons should be heard at the same time as the adjourned application for a stay in the original action.

As I have indicated above, four persons, The Mauritius Sugar Syndicate, Tate & Lyle Refineries Ltd., Emcar Ltd. and Adam & Co. Ltd., were named as plaintiffs in the original action and again as defendants in the further proceedings begun by originating summons. It is, however, common ground that the title to sue for substantial damages in respect of the cargo which was lost is vested in Tate & Lyle Refineries Ltd., and in them alone, as endorsees of the two bills of lading to which I referred earlier, and that the existence of the other three plaintiffs can, therefore, for all practical purposes be disregarded. It is further common ground that, in these circumstances, the relevant terms of carriage for the purposes of the claim are those contained in those bills of lading.

In the rest of this judgment I shall refer to the effective plaintiffs, Tate & Lyle Refineries Ltd., as the cargo-owners, to Black Lion Shipping Co. S.A. as the shipowners, to London Steamship Owners' Mutual Insurance Association Ltd. as the club, and to the *Rena K* as the ship.

Before I state and examine the various questions which arise in this matter, I think it is right to say something about the nature and strength of the prima facie case which the cargo-owners have shown in respect of their claim.

There was put in evidence a report of T. R. Little & Co. dated June 13, 1977, of a survey made by them of the ship at Durban on June 1, 1977, and following days. According to that report the ingress of sea water into No. 4 hold resulted from defects in the hull of the ship of such a character that they must have been in existence at the commencement of the voyage and have made her unseaworthy at that time. Since the carriage of the cargo was on Hague Rule terms, it would be for the shipowners, in order to resist the cargo-owners' claim successfully, to show that, although the ship was unseaworthy, they had exercised due diligence to make her seaworthy. While the possibility of the shipowners' discharging the burden of proof which would be on them in this respect cannot be excluded, the inference which I draw from the survey report is, to put the matter no higher, that they would be likely to have considerable difficulty in doing so.

In these circumstances I am of opinion that the cargo-owners have shown a very strong prima facie case on the merits in support of their claim.

Four main questions were argued before me as follows:—

(1) Is the dispute to which the cargo-owners' action relates one which the parties have agreed should be referred to arbitration?

(2) If so, were the shipowners entitled, as at July 28, 1977, to a stay of the action?

(3) If so, were the shipowners also entitled, as at July 28, 1977, along with and consequent on such stay, to the unconditional release of the ship from arrest?

(4) If so, were the cargo-owners entitled, as at July 28, 1977, by way of alternative security for their claim, to a *Mareva* injunction in respect of the ship?

I shall examine each of these four questions in turn.

(1) Is the dispute to which the cargo-owners' action relates one which the parties have agreed should be referred to arbitration?

The charter-party between The Mauritius Sugar Syndicate and the shipowners dated Apr. 13, 1977, to which I referred earlier, contains at lines 94-96 the following provision:—

> Arbitration: Any dispute which may arise under this Charter to be settled by arbitration in London, each party appointing an arbitrator, and should they be unable to agree, the decision of an umpire selected by them to be final. The arbitrators and umpire all to be commercial men. This submission may be made a rule of the High Court of Justice in England by either party.

The bill of lading on Emcar Ltd's. form, which has terms printed or typed on both its face and its reverse side, contains several references to the charter-party.

On the main part of the face of the bill of lading there appear words acknowledging the shipment of the goods at the port of loading and providing for their delivery at the port of discharge to order. Then there follow, mainly in print but partly in type, these two sentences:

Freight for the said goods to be paid as laid down in Charter Party.

All conditions of the Charter Party dated 13th April, 1977, including exception clause, incorporated in the Bill of Lading.

On the left hand side of the face of the bill of lading these words appear again in type: "Freight payable as laid down in Charter Party".

On the reverse side of the bill of lading there are a number of standard printed clauses, some of which, as appear from their terms, are designed for inclusion in a charter-party rather than in a bill of lading. Right at the end, following this series of standard clauses, comes the following further printed clause:

All other terms, conditions, clauses and exceptions including the Arbitration Clause as well as the Negligence Clause and Cesser Clause as per Charter Party. In case of conflict between the terms of the Charter Party and those of the Bill of Lading, the former shall prevail.

The bill of lading on Adam & Co. Ltd's. form, which has terms printed or typed on its face only, also contains several similar references to the charter-party.

There are two references, one in the main part of the bill of lading about a third of the way down, and the other on the left hand side about half way down, to freight being paid or payable "as laid down in Charter Party dated London 13 April 1977".

In addition there is a clause on the left hand side of the bill of lading towards the top which reads:

All terms, clauses, conditions and exceptions including the Arbitration Clause, the Negligence Clause and the Cesser Clause of the Charter Party dated London 13 April 1977 are hereby incorporated.

This clause is all in print except for the date of the charter-party which is typed.

Those being the relevant terms of the charter-party and the two bills of lading, the problem of construction which arises is this. Both bills of lading contain clauses incorporating all the terms, clauses, conditions and exceptions of the charter-party, including, by express description, the arbitration clause contained in the latter contract. That clause itself however, by its own terms relates only to disputes arising under the charter-party. What then is the effect, if any, of its incorporation?

For the cargo-owners it was contended that the incorporation had no effect at all because, when the arbitration clause was read into the bills of lading, it did not by its terms apply to disputes arising under them, but only to disputes arising under the charter-party. Nor, it was further argued, was there any justification for manipulating or adapting the wording of the clause, when read into the bills of lading, so as to make it apply to disputes arising under the bills of lading instead of disputes arising under the charter-party.

For the shipowners, on the other hand, it was contended that the fact that the arbitration clause was expressly incorporated by description showed clearly that the parties to the bills of lading intended the provisions of that clause to apply in principle to disputes arising under the bills of lading. It followed, so the argument went on, that some manipulation or adaptation of the wording of the clause, when read into the bills of lading, was justified in order to give effect to that clearly shown intention.

A long series of authorities has established that, where a charter-party contains an arbitration clause providing for arbitration of disputes arising under it, general words in a bill of lading incorporating into it all the terms and conditions, or all the terms, conditions and clauses, of such charter-party, are not sufficient to bring such arbitration clause into the bill of lading so as to make its provisions applicable to disputes arising under that document. *Hamilton v. Mackie & Sons Ltd.*, (1889) 5 T.L.R. 677; *Thomas (T.W.) & Co. Ltd. v. Portsea S.S. Co. Ltd.*, [1912] A.C. 1; *The Njegos*, (1935) 53 Ll.L. Rep. 286; [1936] P. 90; *The Phonizien*, [1966] 1 Lloyd's Rep. 150; *The Annefield*, [1971] 1 Lloyd's Rep. 1; [1971] P. 168.

By contrast it has been held that, where an arbitration clause in a charter-party provides for arbitration of disputes arising not only under the charter-party itself but also under any bill of lading issued pursuant to it, general words of incorporation in such a bill of lading of the kind referred to above, are sufficient to bring in the arbitration clause so as to make it applicable to disputes arising under that bill of lading: *The Merak*, [1964] 2 Lloyd's Rep. 527; [1965] P. 223.

In the authorities mentioned above a distinction has been drawn between clauses in the relevant charter-party which are directly germane to the shipment, carriage and delivery of the goods covered by the bill of lading and other clauses which are not directly germane to such matters.

Referring to this distinction, Lord Denning M.R., said in *The Annefield* (sup.) at pp. 4 and 184:—

. . . I would say that a clause which is directly germane to the subject-matter of the bill of lading (that is, to the shipment, carriage and

delivery of goods) can and should be incorporated into the bill of lading contract, even though it may involve a degree of manipulation of the words in order to fit exactly the bill of lading. But if the clause is one which is not thus directly germane, it should not be incorporated into the bill of lading contract unless it is done explicitly in clear words either in the bill of lading or in the charter-party.

Counsel for the cargo-owners argued, on the basis of these authorities, that an arbitration clause in a charter-party, being a clause which was not directly germane to the shipment, carriage and delivery of the goods, could never be brought into a bill of lading and made applicable to disputes arising under that document, if it was necessary to manipulate the wording of the clause in order to achieve that end. He contended that it made no difference, for this purpose, whether the words of incorporation contained in the bill of lading were general words without any specific reference to the arbitration clause in the charter-party, as in all the authorities relied on, or general words to which a specific reference to such clause was added, as in the present case.

I cannot accept this last contention. It was an essential element in the facts of the cases referred to that the words of incorporation in the bill of lading were general words without specific reference to the arbitration clause in the charter-party; the conclusions reached on the questions of construction involved depended entirely on that circumstance; and the judgments of the Judges who decided the cases must be read and understood in the light of it.

The present case is, in my view, clearly distinguishable, in that there are added to the usual general words of incorporation in the two bills of lading the further specific words "including the arbitration clause". The addition of these words must, as it seems to me, mean that the parties to the bills of lading intended the provisions of the arbitration clause in the charter-party to apply in principle to disputes arising under the bills of lading; and, if it is necessary, as it obviously is, to manipulate or adapt part of the wording of that clause in order to give effect to that intention, then I am clearly of opinion that this should be done.

For the reasons which I have given I prefer the argument for the shipowners to that for the cargo-owners on this part of the case. I hold that, on the true construction of the bills of lading, the provisions for arbitration contained in the arbitration clause of the charter-party were brought into the bills of lading and made applicable to disputes arising under them.

The cargo-owners' claim in the action is brought under the bills of lading, so that the dispute to which the action relates is a dispute arising under those documents. It follows, on the view which I have expresed above, that the dispute is one which the parties have, by the terms of the bills of lading, agreed to refer to arbitration.

(2) If the dispute to which the action relates is one which the parties have agreed to refer to arbitration, were the shipowners entitled, as at July 28, 1977, to a stay of the action?

Section 1 of the Arbitration Act, 1975, which came into operation on Dec. 23, 1975, provides so far as material:

> 1. — (1) 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, any party to the proceedings may at any time after appearance, and before delivering any pleading or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.
>
> (2) This section applies to any arbitration agreement which is not a domestic arbitration agreement; and neither section 4(1) of the Arbitration Act, 1950, nor section 4 of the Arbitration Act (Northern Ireland), 1937, shall apply to an arbitration agreement to which this section applies.
>
> (3) . . .
>
> (4) In this section "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither—
>
> (a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom; nor
>
> (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom;
>
> is a party at the time the proceedings are commenced.

On the basis of the Court's answer to question (1), it was conceded for the cargo-owners that, since the shipowners were a body corporate incorporated in Panama, and since

also their central-management and control were exercised in Greece, the arbitration agreement concerned was not a domestic arbitration agreement within s. 3(1) above, and that s. 1(1) was accordingly applicable to the case.

At the commencement of the hearing before me it was further conceded for the cargo-owners that, since s. 1(1) applied to the case, the Court was bound to make an order staying their action. Subsequently, however, this further concession was, with the leave of the Court, withdrawn, and it was contended instead for the cargo-owners that an order staying the action should be refused on the ground that the shipowners did not have the financial resources with which to satisfy an award against them if made, and that the arbitration agreement was therefore "incapable of being performed" within the meaning of that expression as used in s. 1(1). This contention was, not surprisingly, strongly disputed on behalf of the shipowners.

This contention for the cargo-owners raises two questions. The first question is one of law. It is whether an arbitration agreement is "incapable of being performed" within the meaning of s. 1(1) of the 1975 Act if the financial position of one of the parties to it is such that, in the event of an award being made against him in an arbitration held pursuant to the agreement, he would not be able to pay the amount of the award. The second question is one of fact. It is whether the financial position of the shipowners in this case is such that, if the cargo-owners were to succeed in an arbitration against them and obtain an award in respect of their claim, the shipowners would be unable to satisfy such award.

So far as the first question, that of law, is concerned the argument for the cargo-owners was as follows.

Any person who enters into an arbitration agreement impliedly undertakes that he will pay any award made against him in an arbitration held pursuant to such agreement. *Bremer Oeltransport G.m.b.H. v. Drewry*, (1933) 45 Ll.L.Rep. 133; [1933] 1 K.B. 753. Performance of an arbitration agreement involves, therefore, not only the appointment of an arbitral tribunal in accordance with such agreement; the conduct before that tribunal of such proceedings as may be appropriate; and, following such proceedings, an adjudication by the tribunal on the matters referred to it and the issue of an award. Performance of an arbitration agreement involves also, as an essential element in the whole process, the payment of the amount of the award by the party against whom it is made.

That being so, where a claim by "A" against "B" is the subject-matter of an arbitration agreement, and it is shown that, in the event of "A" succeeding in an arbitration held pursuant to such agreement and obtaining an award in respect of his claim against "B", "B" will not be able, by reason of his impecuniosity, to pay the amount of the award, then the arbitration agreement concerned is, in that essential respect, incapable of being performed, and should be so treated for the purposes of s.1(1) of the 1975 Act.

In considering whether this argument is sound or not it is necessary to have regard to the background and purpose of the 1975 Act.

The Act was passed to give effect to the New York Convention on the Recognition and Enforcement of Arbitral Awards. It is an essential preliminary to the recognition and enforcement of arbitral awards that the arbitration agreements capable of resulting in such awards being made should themselves first be recognised and enforced. Section 1 of the 1975 Act, giving effect to par. 3 of art. II of the Convention, compels the recognition and enforcement of Convention (i.e. non-domestic) arbitration agreements by requiring a Court, except in certain specified cases, to stay any legal proceedings brought in respect of a matter referred to arbitration under such an agreement. Sections 2, 3 and 4 of the 1975 Act, giving effect to arts. III, IV and V of the Convention, go on to deal with the recognition and enforcement of the awards themselves after they have been made.

The exceptional cases in which the Court is not bound to recognise and enforce a Convention arbitration agreement by granting a stay of legal proceedings are defined in s. 1(1) of the 1975 Act as those in which the Court is satisfied that the arbitration agreement concerned is "null and void, inoperative or incapable of being performed", or that:

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

The whole of the expression "null and void, inoperative or incapable of being performed", as so used, is taken directly from par. 3 of art. II of the Convention.

It follows from what is said above that the context in which the words "incapable of being performed" are used is the context of the recognition and enforcement of arbitration agreements which, if valid and effective, will result in awards being made; and not the context of the recognition and enforcement of such awards themselves after they have been made. Having regard to that context it appears to me that "incapable of being performed" should be construed as referring only to the question whether an arbitration

agreement is capable of being performed up to the stage when it results in an award; and should not be construed as extending to the question whether, once an award has been made, the party against whom it is made will be capable of satisfying it.

There is the further point that, even if the words "incapable of being performed" were given the extended meaning discussed above, the fact that, if an award were made against one party, he would be incapable of satisfying it, would not necessarily mean that the arbitration agreement was incapable of being performed. This is because the arbitration might also result in the award being made against the other party, in which case the incapacity concerned would be irrelevant.

For the reasons which I have given I decide this first point of law against the cargo-owners. I hold that the fact that one of the parties to an arbitration agreement would be incapable of satisfying an award if it should be made against him does not make such agreement "incapable of being performed" within the meaning of s. 1(1) of the 1975 Act.

Since I may be wrong on the point of construction, however, I shall go on to consider whether it is in this case shown that, if an award were to be made against the shipowners, they would be incapable of satisfying it. This involves consideration of the financial position of the shipowners, including their rights as members of the club, a subject which will in any case be highly material in relation to questions (3) and (4) later.

I shall consider first the financial position of the shipowners apart from such rights as they may have as members of the club.

They are, as I indicated earlier, a company incorporated in Panama whose central management and control are exercised in Greece. Their only asset, apart from the charter-party freight in respect of which a *Mareva* injunction was granted earlier, and possibly also some further moneys payable to them by way of demurrage under the same charter-party, is the ship herself. That, at any rate, is the inference which I feel bound to draw in the absence of any evidence from the shipowners themselves to the contrary.

I understand that separate security representing the freight, and possibly also the demurrage, has been provided unconditionally by the club, and that the amount of such security is about £75,000. There was, however, no clear evidence about these matters before me, and the actual figure may be a little different.

The ship, according to affidavit evidence from the managers of the club, A. Bilbrough & Co. Ltd., is at present laid up in Greece. There is no evidence about her present value, but, since she has been laid up for a considerable period of time without permanent repairs being done to her, I infer that it is substantially less than the £390,000 at which she was valued in July, 1977.

If the cargo-owners were to succeed fully in an arbitration in respect of their claim, the amount of the award, including interest and costs, would be likely to be about £700,000. It is clear that, even after allowing for part of such award being met out of the separate security representing the freight and possibly also the demurrage, realisation by the shipowners of their only other asset in the form of the ship would provide a fund quite insufficient to satisfy the balance of the award.

The conclusion to which I feel bound to come, therefore, is that, if the cargo-owners were to succeed in an arbitration and obtain an award in respect of the full amount of their claim, the shipowners would be incapable, out of their own resources alone, of satisfying more than a part, probably less than half, of the amount of the award. This proportion would, moreover, be much decreased if the shipowners, between now and the time when the award became payable, sold the ship and disposed of the proceeds in one way or other.

The question then arises whether the award would be satisfied by the club on the shipowners' behalf. The ship was entered in the club at the material time and the shipowners' calls had been paid up to date. They were therefore entitled, subject to the relevant rules of the club, to be indemnified by the club in respect of liability for loss of or damage to cargo carried in the ship.

The relevant rules, however, which come under the heading "Class 5. The Protection and Indemnity Rules", include nos. 6 and 8(k). Rule 6 provides that, unless the committee otherwise decides, the club is not obliged to indemnify a member in respect of a liability unless and until the member has himself first discharged the liability out of moneys belonging to him absolutely and not by way of loan or otherwise. Rule 8(k) provides that the club may, whenever it thinks fit, reduce the amount of a member's claim on the ground that he has not taken such steps to protect his interests as he would have done if the ship had not been entered for protection and indemnity.

The affidavit from the club's managers, A. Bilbrough & Co. Ltd., to which I referred earlier, contained evidence about the way in which rr. 6 and 8(k) mentioned above are applied in practice. As regards r. 6 the evidence

amounts to this, that in the case of large claims like that involved in the present case, the committee often agree to a member's request that the club should pay the claimant direct without insisting on the member discharging the claim out of his own resources first. No indication is however given by the deponent as to the criteria by which the committee makes its decisions on these matters.

As regards r. 8(k) the evidence is that the committee very seldom exercises its powers under this rule, even though there may be circumstances which would justify it in doing

The result of the above is that the question whether, if the shipowners could not pay the award or a large part of it themselves from their own resources, the club would pay it directly on their behalf, is left entirely open. The shipowners have no legal right to insist on the club doing so, and the club has an unfettered discretion, exercised on principles revealed in evidence, to decline to do so. On the other hand the club often does agree to decline to make such payments, and it is at least possible that it would do so in this case.

The burden of proof on the question whether, if the cargo-owners were to succeed in an arbitration and obtain an award in respect of the whole of their claim, the shipowners would be incapable of satisfying the award, lies, in my view, on the cargo-owners. So far as satisfaction of the award, except in part, out of the shipowners' own resources is concerned, I consider that the cargo-owners have discharged that burden of proof. So far as satisfaction of the award in full by the club on the shipowners' behalf is concerned, however, I consider that the cargo-owners have not discharged the burden, because the evidence shows a clear possibility that the club would satisfy the award direct on their member's behalf and the cargo-owners are unable to eliminate that possibility.

The result of the conclusions to which I have come on the matters discussed above is that the contention for the cargo-owners, that the Court should in this case refuse a stay under s. 1(1) of the 1975 Act on the ground that the arbitration agreement is incapable of being performed, fails both on the law and the facts.

It follows that I answer question (2) by holding that the shipowners were, as at July 28, 1977, entitled under that sub-section to a stay of the cargo-owners' action.

(3) If the shipowners were, as at July 28, 1977, entitled to a stay of the cargo-owners' action, were they also entitled, along with and consequent on such stay, to the unconditional release of the ship from arrest?

It was contended for the shipowners that, whenever an action in rem in which a ship is under arrest is stayed under s. 1(1) of the 1975 Act, an order for the unconditional release of the ship from arrest must also be made, and that the Court has no discretion, whatever the circumstances of any particular case, to refuse such order.

In support of this contention Counsel for the shipowners relied on two comparatively recent cases decided by me in this Court which he said were together conclusive of the matter. These were *The Cap Bon*, [1967] 1 Lloyd's Rep. 543 and *The Golden Trader*, [1974] 1 Lloyd's Rep. 378; [1975] Q.B. 348.

In *The Cap Bon* there was a claim by charterers against shipowners for damage to cargo carried under a charter-party containing a London arbitration clause. The charterers began two proceedings against the shipowners in respect of the claim: firstly, an action in rem in the Liverpool District Registry, in which they arrested the ship concerned, and in which the shipowners, having appeared, gave bail in order to obtain her release; and, secondly, arbitration proceedings under the arbitration clause in the charter-party. The charterers did not proceed with the action but were ready and willing to proceed with the arbitration, their plan being that, if and when they obtained an award in their favour in the arbitration, they would be able to enforce it against the bail in the action. The shipowners applied by summons to the district registrar for an order that the action either be proceeded with by the charterers or else be dismissed and the bail given in it released. The district registrar refused the order sought, but on appeal I took a different view and made an order that, unless the charterers proceeded with the action by serving a statement of claim within 21 days, the action should stand dismissed and the bail bond should be cancelled.

My decision was based on two propositions of law, one positive and one negative, which I considered flowed from the nature and form of the provisions in the Administration of Justice Act, 1956, by which jurisdiction in rem is conferred on the Admiralty Court. The first and positive proposition is that the purpose of arresting a ship in an action in rem is to provide the plaintiff with security for the payment of any judgment which he may obtain in such action, or of any sum which may become payable to him under a settlement of such action. The second and negative proposition is that it is not the purpose of arresting a ship in an action in rem to provide the plaintiff with security for payment of an award which he may obtain in an arbitration of the same claim as that raised in the action, and the Court

therefore has no jurisdiction to arrest a ship, or keep her under arrest, for such other purpose.

On the basis of these propositions I held that the charterers' plan was misconceived, in that they could never enforce any award which they might obtain in the arbitration against the bail given in the action. That being so, I thought that the charterers should be compelled to choose between the two courses available to them: either pursuing their claim in the action with the advantage of the security obtained by them in it; or pursuing their claim in the arbitration without that advantage.

It is to be observed that this was not a case where a defendant to an action was seeking to have it stayed, either because he preferred to arbitrate or because he wished to have the security which he had been compelled to give released. It was rather a case in which one party, who was asserting a claim against another party, had set on foot at the same time two separate proceedings in respect of such claim, one an action in rem and the other an arbitration. He wished, however, to have the claim decided in the arbitration, and was only using the action as a means of obtaining security for the award which he hoped to obtain in the former proceeding. The other party contended that he was not entitled, as a matter of law, to do that, and I upheld that contention.

In *The Golden Trader*, the facts were in many respects similar to those in the present case. A ship had been chartered by Dutch charterers from shipowners residing and carrying on business in Eire. The charterers had a claim against the shipowners for alleged breaches of the charter-party. The charterers began an action in rem against the ship in this Court in respect of their claim and arrested her in that action. The shipowners then applied, firstly, for a stay of the action on the ground that the dispute to which it related was covered by the arbitration clause in the charter-party, and, secondly, along with and consequent on such stay, for the release of the ship from arrest.

The 1975 Act had not yet been passed at that time, and the application for a stay had to be decided under s. 4 of the Arbitration Act, 1950, which dealt separately in two sub-sections with non-protocol cases on the one hand and protocol cases on the other. So far as non-protocol cases are concerned, s. 4(1) gave the Court, subject to certain specified conditions, a discretionary power to stay an action relating to a matter agreed to be referred to arbitration. So far as protocol cases are concerned, s. 4(2) imposed on the Court, again subject to certain specified conditions, a mandatory duty to stay an action relating to a matter agreed to be so referred.

Section 28 of the 1950 Act further drew a distinction, so far as attaching terms to orders for a stay is concerned, between discretionary orders in non-protocol cases made under s. 4(1), and mandatory orders in protocol cases made under s. 4(2). The effect of the distinction was that the Court had power to attach terms as to costs or other matters to orders made under s. 4(1), but had no power to do so in the case of orders made under s. 4(2).

I pointed out in my judgment in *The Golden Trader* that, although the question for decision in that case arose on a stay granted under s. 4(2) of the 1950 Act, it was part of a larger problem which arose whenever an action in rem, in which the property proceeded against had been arrested, or bail or other security had been given to prevent or obtain release from arrest, was subsequently stayed on the ground that the dispute ought properly to be decided by another tribunal. The same problem arose in three other kinds of case, which I described shortly for convenience as "non-protocol arbitration cases", "foreign jurisdiction clause cases" and "vexation cases" respectively: it was what to do with the security when the action was stayed.

I went on to say that there were, in principle, three ways in which this problem, which arose in these three other kinds of case also, could be dealt with. The first method was for the Court to retain the security to satisfy any judgment or award of the other tribunal. I called this "the retention method", and pointed out that it was the method contemplated by the International Convention for the Arrest of Seagoing Ships, 1952 ("the Brussels Arrest Convention") to which the United Kingdom was a party (see art. 7, pars. 1-4). The second method was for the Court to release the security, but only subject to a term that the defendants provided other equivalent security outside the Court to satisfy the judgment or award of the other tribunal. I called this "the alternative security method", and gave examples of its use in foreign jurisdiction clause cases: *The Eleftheria*, [1969] 1 Lloyd's Rep. 237; [1970] P. 94 and in vexation cases: *The Atlantic Star*, [1973] 2 Lloyd's Rep. 197; [1974] A.C. 436. It appeared to me then that the alternative security method could also be used in non-protocol arbitration cases (i.e. cases under s. 4(1) of the 1950 Act), where the grant of a stay, as in foreign jurisdiction clause cases and vexation cases, was discretionary and not mandatory. I still think that, although the cases concerned should now, as a result of the 1975 Act, be renamed "[illegible] arbitration cases".

It was common ground in *The Golden Trader* that the case was a protocol case to which s. 4(2) rather than s. 4(1) of the 1950 Act applied. If

the decision in *The Cap Bon* was correct, the Court had no jurisdiction to use the retention method of dealing with the security; and, since it was a protocol case under s. 4(2), s. 28 meant that the alternative security method, in the form of attaching a term to the order for a stay, was not available either.

In this situation it would have been open to Counsel for the charterers to invite me to treat my earlier decision in *The Cap Bon*, that the Court had no jurisdiction to use the retention method as wrong and to depart from it. He did not, however, do this, but accepted that *The Cap Bon* had been correctly decided and sought to resist the shipowners' application for the release of the ship on other grounds.

His contention was that, although the Court was bound to make an unconditional order for a stay, it was not also bound to make at the same time an order for the release of the ship. His main ground for this contention was that the stay was not final, and that the security therefore could and should be retained by the Court to cater for the possibility of the stay later being removed and the action then proceeding to judgment. This argument did not conflict with the decision in *The Cap Bon*, for what was being suggested was not retention of the security for the inadmissible purpose of satisfying an award in the arbitration, but retention of the security for the proper purpose of satisfying a judgment in the action which might still, in certain hypothetical events, be obtained by the charterers.

Counsel for the charterers relied on a second and alternative ground for the Court not releasing the ship. This was that, once the charterers had begun an arbitration, they would be entitled to apply to the Court under s. 12(6)(f) of the 1950 Act for an order securing the amount in dispute, and the Court would have power, on such application, to order the arrest of the ship in order to provide such security. In these circumstances the existing arrest should be maintained at least until the charterers had had an opportunity of making such application and the Court had adjudicated one way or the other upon it.

A further possibility was canvassed in argument, at my suggestion if I remember correctly. This was that, if the Court would be justified, on the first ground relied on by Counsel for the charterers, in refusing an order for the release of the ship, it might also be justified in making such order for release but attaching to it a term with regard to the provision of alternative security. That would involve using, in effect, the alternative security method of dealing with the problem, but employing slightly different procedural means, which did not conflict with s. 28 of the 1950 Act, for the purpose.

The conclusion with regard to these matters which I reached were as follows:

(1) That the Court had no jurisdiction to keep the ship under arrest in order to provide the charterers with security for an award in the arbitration. It only had jurisdiction to keep her under arrest in order to provide security for a judgment or settlement in the action. This conclusion accorded with my earlier decision in *The Cap Bon*, which was not, as I have said, challenged by Counsel for the charterers, and which appeared to me in any event to derive support from the approach adopted in three earlier cases which I examined: *The Athenee*, (1922) 11 Ll.L.Rep. 6; *Foresta Romana S.A. v. Georges Mabro (Owners)*, (1940) 66 Ll.L. Rep. 139; and *The Fehmarn*, [1957] 1 Lloyd's Rep. 511; [1957] 1 W.L.R. 815; [1957] 2 Lloyd's Rep. 551; [1958] 1 W.L.R. 159.

(2) That a stay of the action, not being final, could later be removed for good cause, in which case the action could still proceed to judgment or settlement.

(3) That good cause for removal of the stay might arise if the arbitration subsequently (in the words of s. 4 (2) of the 1950 Act) became inoperative or could not proceed. There was, however, no evidence of there being more than a remote possibility of events of that kind supervening in that case. The Court would not, therefore, be justified in keeping the ship under arrest in order to cater for the possibility of the stay being removed and the action proceeding by reason of such supervening events.

(4) That failure by the shipowners to satisfy any award which the charterers might later obtain in the arbitration would not necessarily be good cause for the removal of the stay. In the event of such failure the charterers would be entitled either to enforce the award as a judgment under s. 26 of the 1950 Act, or to sue for breach of the arbitration agreement (see *Bremer Oeltransport G.m.b.H. v. Drewry*, (1933) 45 Ll.L. Rep. 133; [1933] 1 K.B. 753 to which I referred earlier). There was no evidence before the Court to suggest that the shipowners, if an award were to be made against them, would not pay under it. The Court would not, therefore, be justified in keeping the ship under arrest in order to cater for the possibility of the stay being removed and the action proceeding by reason of the shipowners not paying under an award.

(5) That s. 12(6)(f) of the 1950 Act did not give the Court power to arrest a ship, or to keep her under arrest, in order to provide security for the claim of a claimant in an arbitration. The

argument for the charterers based on that provision accordingly failed.

(6) That since, in all probability at least, the stay would be final and there would be no judgment or settlement in the action to be satisfied, the Court should make an unconditional order for the release of the ship, and should not qualify such order by attaching to it a term with regard to the provision of alternative security.

In *The Golden Trader* the question of stay was, as I explained, governed by s. 4(2) of the 1950 Act. That sub-section was repealed by the 1975 Act and replaced by the provisions of s. 1 of the latter Act which I set out earlier. The 1975 Act further repealed the proviso to s. 28 of the 1950 Act, which had prohibited the attachment of any terms as to costs or other matters to orders made under s. 4(2).

It might perhaps have been contended in the present case that, since the 1975 Act contained no express prohibition against attaching terms as to costs or other matters to orders for a stay under s. 1(1) of that Act, the Court had a discretion to do so. Counsel for the cargo-owners, however, did not argue that this was so, but accepted that orders for a stay made under s. 1(1) of the 1975 Act, like orders for a stay made under s. 4(2) of the 1950 Act, had to be unconditional, that is to say without any terms of any kind attached to them.

I think that this concession was rightly made for, where a statute requires the Court, in a specified situation, to make an order of a particular kind, the Court can, in general, only attach terms to such order if the statute gives it express power to do so. The situation under the 1950 Act was that s. 28 expressly gave the Court power to attach terms to various kinds of orders, including orders made under s. 4(1), while providing that the Court should not have the same power in relation to orders made under s. 4(2). The situation under the 1975 Act is that no power to attach terms to orders for a stay is expressly given, and I do not think that any such power can be implied.

Counsel for the shipowners contended, as I indicated earlier, that the question whether, upon a stay being granted, the ship should be unconditionally released, was concluded in the shipowners' favour by the previous decisions of this Court in *The Cap Bon* and *The Golden Trader*. Counsel for the cargo-owners did not accept that this was so, because the present case was, he said, distinguishable from *The Golden Trader*. If he was wrong about that, however, he fell back on the submission that the two cases were wrongly decided and ought not to be followed.

In considering these matters it is, I think, necessary to distinguish between two aspects of the problem. The first aspect is whether the view which I expressed in *The Cap Bon* and followed in *The Golden Trader*, that the Court has no jurisdiction to arrest a ship, or keep her under arrest, in order to provide a plaintiff with security for payment of an arbitration award, as distinct from payment of a judgment or settlement in the action in rem concerned, is correct or not. The second aspect is whether, assuming that view to be correct, the Court nevertheless has a discretion, when it grants a mandatory stay under the 1975 Act of an action in rem in which a ship has been arrested, to refuse to release the ship from arrest unless alternative security for payment of an award in the arbitration is provided; or, to put the same thing in a different way, to attach to any order made for the release of the ship, as distinct from the order for the stay of the action, a term relating to the provision of such alternative security.

I shall refer to these two aspects of the problem as the jurisdiction point and the discretion point respectively.

The jurisdiction point

The conclusion on the jurisdiction point which I reached in *The Cap Bon* and followed in *The Golden Trader* was, from the point of view of what I believe that the law on the matter ought to be, as distinct from what I felt obliged to hold that it was, an unsatisfactory conclusion.

I say this for two reasons. The first reason is that I think that, quite apart from any International Convention relating to the matter to which the United Kingdom is a party, the Court should have power, when it grants a stay, on the ground that the dispute should be decided by another tribunal, of an action in rem in which security has been obtained, to retain such security to satisfy any judgment or award of the other tribunal. When the grant of a stay is discretionary, as in domestic arbitration cases, foreign jurisdiction clause cases and vexation cases, the Court can get round the lack of such power, and has in practice got round it, by using the alternative security method. It would, however, be more satisfactory, in my view, even in those cases, to use the retention method, which is both more simple and direct, and which is, I believe, commonly used in other jurisdictions.

The second reason is that art. 7 of the Brussels Arrest Convention, to which the United Kingdom is a party, provides that a Court, which stays an action on the ground that the dispute should be decided by another tribunal, will have power to retain any security

obtained in the action for the purposes mentioned above. I drew attention to this fact, as I said earlier, in the course of my judgment in *The Golden Trader*. I further thought it right to point out at the end of my judgment in that case that, if the view on the jurisdiction point which I had formed was correct, this Court did not have the power which the Convention contemplated that it would have, and this was a situation which could not be regarded as satisfactory and which it would be desirable for Parliament to remedy.

I have said that Counsel for the cargo-owners submitted, by way of alternative argument in support of his case, that the opinion on the jurisdiction point which I formed in *The Cap Bon* and followed in *The Golden Trader* was wrong. In view of that submission I have reconsidered carefully the reasons which led me to form that opinion, and it will be apparent, from the observations which I have made above, that I should be in no way reluctant to change it if I were persuaded that it would be right to do so. Having re-examined the whole question, however, I remain of the same opinion that, without some statutory authority which does not unfortunately at present exist (although it could, of course, easily be given), the Court has no jurisdiction to use the retention method, that is to say to retain security not for the purpose of satisfying a judgment or settlement in the action in which the security has been given, but to satisfy the judgment or award of another tribunal.

The discretion point

There was a controversy before me as to what *The Golden Trader* actually decided. For the shipowners it was said that it decided that, in every case where the Court grants a mandatory stay of an action in rem in which the ship proceeded against has been arrested, it is bound also to make an unconditional order for the release of the ship. If the case decided that, and decided it correctly, then it follows that the shipowners in this case were entitled, as at July 28, 1977, along with a stay of the cargo-owners' action, to an unconditional order for the release of the ship.

For the cargo-owners it was said that the decision in *The Golden Trader*, that the shipowners were entitled to an unconditional order for the release of the ship, was related to the finding made by the Court in that case, that in all probability the stay would be final and that there would therefore be no judgment in the action to be satisfied. In these circumstances, the decision left open the question whether, in other cases where it was shown that the stay might well not be final and there might well therefore still be a judgment in the action to be satisfied, the Court might not be justified in keeping the ship under arrest or only releasing her subject to a term for the provision of alternative security. Alternatively, if the case laid down the general rule which the shipowners said it did, it was to this extent at least wrong.

The relevant passage in my judgment in *The Golden Trader*, which is at pp. 385 and 359-60 reads as follows:

> In theory I do not see why, if it is appropriate to use the alternative security method in non-protocol arbitration cases, foreign jurisdiction clause cases and vexation cases, where the grant of a stay is discretionary, it should not also be appropriate to use it in protocol arbitration cases, where the grant of a stay is mandatory, even if the procedure employed for the purpose has to be slightly different. On further examination of the point, however, I think that protocol arbitration cases must, in this respect, be treated differently.
>
> Counsel for the defendants argued that to attach a term for the provision of alternative security to the order for release, while not offending against the letter of section 28 of the Act of 1950, would offend against its spirit. While this may be the right way to put the matter, I should prefer to put it differently as follows. The starting point, if *The Cap Bon*, [1967] 1 Lloyd's Rep. 543 is right, is that the Court can only retain the security to satisfy a judgment or compromise in the action itself. It follows that, if the court stays the action, so that there will, in all probability at least, be no judgment or compromise in the action to be satisfied, it must then release the security. Putting it shortly, if there is a stay, there must, as a necessary consequence, be a release. In cases where the grant of a stay is discretionary, the Court can refuse a stay unless alternative security is provided. The defendant then has to choose between having a stay subject to a term for the provision of such security and not having a stay at all. If he chooses the former, then, subject to his compliance with the term, he gets both a stay and a release; if he chooses the latter, he gets neither. By contrast, in protocol arbitration cases, where the grant of a stay is mandatory, the Court cannot refuse a stay unless alternative security is provided. It is bound to grant a stay in any event and a release is a necessary consequence, so it is bound also to grant a release.

[—The underlining of the words:—". . . so that there will, in all probability at least, be no

judgment or compromise to be satisfied" is mine.]

I can well understand this passage being read as meaning that, in all cases where the stay of an action in rem is mandatory, the security obtained in it must be unconditionally released. It was, however, not necessary for me to go so far as that in order to decide the case before me, and the words underlined show that my views were being expressed in relation to a case in which in all probability the stay of the action would be final and there would therefore be no judgment in the action to be satisfied. In these circumstances I think that Counsel for the cargo-owners was right in saying either that the case left open the question as to what order should be made in other cases in which it was shown that the stay might well not be final and that there might well therefore still be a judgment in the action to be satisfied; or alternatively that, if the case did not leave that question open, it ought to have done so and was to that extent wrong.

On the footing that the question is an open one, it was suggested for the shipowners that a party to an arbitration agreement should be treated as having, by entering into such an agreement, abandoned the rights which he would otherwise have had to security for any claim covered by the agreement.

I do not accept this proposition at all. The choice of forum for the determination of the merits of a dispute is one thing. The right to security in respect of maritime claims under the Admiralty law of this country is another. This distinction has been recognised and given effect to by the way in which the Court has exercised its discretion in foreign jurisdiction clause cases and vexation cases, in which it has either treated the plaintiff's right to security as a material factor in refusing a stay: *The Athenee* and *The Fehmarn* above, or else has only granted a stay subject to a term for the provision of alternative security: *The Eleftheria* and *The Atlantic Star* above, and more recently *The Makefjell*, [1975] 1 Lloyd's Rep. 528; [1976] 2 Lloyd's Rep. 29.

If this distinction between choice of forum on the one hand and right to security on the other is recognised and given effect to in foreign jurisdiction clause cases and vexation cases, I cannot see any good reason why it should not equally be recognised and given effect to in arbitration cases, whether the grant of a stay is discretionary under s. 4(1) of the 1950 Act, or, as in the present case, mandatory under s. 1(1) of the 1975 Act.

I would stress again in this connection also that the distinction in question is clearly recognised and given effect to by the Brussels Arrest Convention.

The process by which property, which has been lawfully arrested in an action in rem, can be released at the instance of the party interested in it, is the making by the Court of an order for the issue of a release under R.S.C., O. 75, r. 13(4). That rule provides, so far as material:—

> A release may be issued at the instance of a party interested in the property under arrest if the Court so orders . . .

That rule, as I understand it, gives the Court a discretion, when an application for an order for the issue of a release is made, whether to make such order or not. The discretion so given is, so far as the terms of the rule go, unfettered, but it must, like any other discretion, be exercised judicially.

There is nothing in s. 1(1) of the 1975 Act which obliges the Court, whenever it grants a stay of an action in rem in which security has been obtained, to make an order for the unconditional release of such security. Nor did s. 4(2) of the 1950 Act, now repealed, impose any such obligation. That being so, I think that it is a matter for the discretion of the Court, acting under the rule referred to above, what order it should make with regard to such security, and that the way in which it exercises that discretion must depend on the circumstances in each particular case.

If, on the one hand, the case is one where in all probability the stay will be final and there will therefore never be any judgment in the action to be satisfied, the Court should exercise its discretion by releasing the security unconditionally, as was done in *The Golden Trader*. If, on the other hand, the case is one where the stay may well not be final and there may well therefore still be a judgment in the action to be satisfied, the Court should exercise its discretion either by refusing to release the security at all, or by only releasing it subject to a term that the defendants shall provide alternative security for payment of any award in the arbitration.

On this view of the law it is necessary to consider, in relation to the facts of this particular case, whether in all probability the stay will be final and there will therefore never be any judgment in the action to be satisfied, or whether the stay may well not be final and there may well therefore still be a judgment in the action to be satisfied.

It is in this respect that Counsel for the cargo-owners contended that the present case was clearly distinguishable from *The Golden Trader*. There was, he said, ample evidence to show that, if the cargo-owners obtained an award in respect of the full amount of their

claim, the shipowners might well be unable to satisfy it, even if all available steps to enforce the award were taken. In that event the cargo-owners would be entitled to have the stay of the action removed and to obtain a judgment in rem against the shipowners in it. That judgment would, however, be worthless unless there were security still available against which it could be satisfied. Justice to the cargo-owners therefore demanded that the Court should either, as at July 28, 1977, have kept the ship under arrest to serve as such security, or alternatively should only have released her subject to a term that the shipowners provided alternative security to satisfy an award in the arbitration.

Counsel for the shipowners contended that it was wrong to suggest that, if an award should be made against the shipowners and they should be unable to satisfy it, the cargo-owners would then be in a position to have the stay of the action removed and to obtain a judgment in rem in it. It was wrong, he said, because, once an award was made, the cargo-owners' cause of action would become merged in the award and would therefore no longer be available to them for prosecution in the action. In these circumstances the whole argument for the cargo-owners broke down, and the whole basis for keeping the ship under arrest, or only releasing her subject to a term for the provision of alternative security, disappeared.

This contention involves a consideration of the law of merger in relation, firstly, to arbitral awards, and, secondly, to causes of action in rem. I am prepared to assume, without finally deciding, that, just as a cause of action in personam which is adjudicated upon by an English Court merges in the judgment of that Court, so also a similar cause of action which is adjudicated upon by an English arbitral tribunal merges in the award of that tribunal. That is the view which is expressed in Spencer-Bower and Turner on Res Judicata, 2nd ed., 1969, at p. 362, and it appears to be supported at least by *Gascoyne v. Edwards*, (1826) 1 Y. & Y. 19, and possibly also by certain other cases to which I was referred.

It has, however, been held that a cause of action in rem, being of a different character from a cause of action in personam, does not merge in a judgment in personam, but remains available to the person who has it so long as, and to the extent that, such judgment remains unsatisfied. *The Bengal*, (1859) Swab. 468; *The John and Mary*, (1859) Swab. 471; *The Cella*, (1888) 13 P.D. 82. See also *The Sylph*, (1867) L.R. 2 A. & E. 24 (although this may have turned partly on an express reservation made in the submission to arbitration concerned) and *Yeo v. Tatem (The Orient)*, (1871) L.R. 3 P.C. 696. The situation must, in my view, be the same in the case of an arbitral award, which is likewise based on a cause of action in personam.

It was argued for the shipowners that this exception to the general rule of merger applied only when the cause of action in rem was founded on a maritime lien, which the cargo-owners' claim in the present case is not. The first two cases referred to above, *The Bengal* and *The John and Mary*, were certainly maritime lien cases, the claim in the former being for wages and in the latter for damage by collision. But the observations of Sir James Hannan, P., in the third case, *The Cella*, at p. 85 related to a claim for repairs and necessaries made under s. 4 of the Admiralty Court Act, 1861, in respect of which the plaintiff had no maritime lien, but only, like the cargo-owners in the present case, a statutory right of action in rem. I cannot see any good reason in principle for distinguishing in this respect between a cause of action founded on a maritime lien and one founded on a statutory right in rem. It appears to me, therefore, both on principle and authority, that the distinction suggested is not a valid one.

The result is that I accept the argument of Counsel for the cargo-owners that, if an award should be made against the shipowners and they should be unable to satisfy it, the cargo-owners would be entitled to have the stay of the action removed and to proceed to a judgment in rem in it.

I examined earlier, in relation to question (2), the financial situation of the shipowners and the position of the club in the matter. As a result of that examination I have no hesitation in concluding that this is a case in which, if the cargo-owners should obtain an award in respect of the full amount of their claim, the shipowners might well be unable to satisfy it, either themselves or through the medium of the club. It follows, on my view that a cause of action in rem does not, as a matter of law, become merged in an arbitral award, that this is a case where the stay might well not be final and there might well therefore still be a judgment in the action to be satisfied.

In these circumstances, applying the principles for the exercise of the Court's discretion which I concluded earlier were the right principles to apply, I consider that the Court ought in this case to have exercised its discretion, as at July 28, 1977, by either keeping the ship under arrest or by only releasing her subject to a term for the provision of alternative security.

It follows that I answer question (3) by saying that the shipowners were not entitled, as at July 28, 1977, along with and consequent on the

stay of the action, to the unconditional release of the ship from arrest.

(4) If, as at July 28, 1977, the shipowners were entitled to the unconditional release of the ship from arrest, were the cargo-owners then entitled, by way of alternative security for their claim, to a Mareva injunction in respect of the ship?

This further question only arises if I am wrong on question (3).

The power of the High Court to grant *Mareva* injunctions under s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, has been established by a series of recent decisions of the Court of Appeal culminating in *Rasu Maritima v. Pertamina*, [1977] 2 Lloyd's Rep. 397; [1977] 3 W.L.R. 518. Further the House of Lords, while reserving the question of the correctness of these decisions, was prepared to assume the existence of the power, in principle, for the purpose of its decision in *The Siskina*, [1975] 1 Lloyd's Rep. 1; [1977] 3 W.L.R. 818.

A *Mareva* injunction is granted in a case where a plaintiff has brought an action here against a foreign defendant, and the latter has moneys or chattels within the jurisdiction which, if he were not prevented from doing so, he would be free to remove out of the jurisdiction before the plaintiff could bring the action to trial, and, if successful, obtain and enforce a judgment against him.

The injunction takes the form of an order restraining the defendant, by himself his servants or agents, from selling, disposing of or otherwise dealing with such moneys or chattels or from removing them out of the jurisdiction, usually until further order. Its purpose is to ensure that, if the plaintiff succeeds in the action, there will be property of the defendant available here out of which the judgment which the plaintiff obtains in it can be satisfied.

On the footing that the procedure is available to provide a plaintiff, in a case where no question of arbitration arises, with security for any judgment which he may obtain in an action, I see no good reason in principle why it should not also be available to provide a plaintiff, whose action is being stayed on the application of a defendant in order that the claim may be decided by arbitration in accordance with an arbitration agreement between them, with security for the payment of any award which the plaintiff may obtain in the arbitration. I have further been informed by Counsel that the Commercial Court has granted injunctions on this extended basis in a number of unreported cases.

I doubt whether specific statutory authority, beyond the general authority conferred on the Court by s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, is required to justify this extension of the *Mareva* injunction procedure. If such specific authority is required, however, I think that it is to be found in s. 12(6) of the 1950 Act, which provides so far as material:—

> The High Court shall have, for the purpose of and in relation to a reference, the same powers of making orders in respect of—(f) securing the amount in dispute in the reference; . . . (h) interim injunctions . . . as it has for the purpose of and in relation to an action:

As I mentioned earlier, it was argued for the charterers in *The Golden Trader* that s. 12(6)(f) above gave the Court power to arrest a ship in order to secure the amount in dispute in an arbitration once such arbitration had been commenced. Counsel for the cargo-owners in the present case went a stage further and argued that the provision gave the Court power to do this not only once the arbitration concerned had been commenced but also in anticipation of its commencement.

I was unable to accept the basic argument with regard to s. 12(6)(f) put forward for the charterers in *The Golden Trader*, because it appeared to me that, on the true construction of that provision, it did not cover the arresting of a ship, or the keeping of a ship under arrest, in the exercise of the Court's jurisdiction in rem at all. The provision refers to the power of "making orders in respect of securing the amount in dispute". This did not seem to me to be appropriate language to describe the process of arrest in an action in rem, because such arrest does not result from the making of any order by the Court, but from the party concerned himself causing a warrant of arrest to be issued under R.S.C., O. 75, r. 5, subject to the requirements of that rule. The matters to which I thought the provision did relate were the Court's powers of securing amounts in dispute in various other ways, for instance by making orders under R.S.C., O. 29, r. 2(3) and r. 6.

I still think that s. 12(6)(f) does not cover the arresting of a ship, or the keeping of a ship under arrest, in the exercise of the Court's jurisdiction in rem. It follows that I am equally unable to accept the extended argument as to the effect of that provision put forward for the cargo-owners in the present case. The point involved in the extension itself, however, is a separate one, and I shall return to it shortly.

Although I cannot accept the reasons which I have given, accepting that s. 12(6)(f) covers the arresting of a ship, or the keeping of a ship under arrest, it appears to me that both s. 12(6)(f) and s. 12(6)(h) cover the granting of a

Mareva injunction, and so give the Court the same power to grant such an injunction for the purpose of and in relation to an arbitration as it has for the purpose of and in relation to an action or matter in the Court.

As to the question whether the Court can exercise such power not only once the arbitration concerned has been commenced but also in anticipation of its commencement, it is to be observed that R.S.C., O. 29, r. 1(3), gives the Court power to grant interim injunctions, for the purpose of and in relation to an action or matter in the Court, before the writ or originating summons by which the cause or matter is to be begun has been issued, and, in such cases, to impose terms providing for the issue of the writ or originating summons, together with such other terms as it thinks fit.

It follows, in my view, that the Court has power under s. 12(6)(f) and (h) to grant a *Mareva* injunction for the purpose of and in relation to an arbitration which has not yet been commenced, and to do so subject to a term providing for the arbitration to be commenced within a specified time, together with such other terms, if any, as it thinks fit.

Various arguments were advanced for the shipowners against the application of the procedure of *Mareva* injunctions to ships. Firstly, it was said that, because the Administration of Justice Act, 1956, provided for the arrest of ships in Admiralty actions in rem, it impliedly excluded ships from the categories of chattels in respect of which a *Mareva* injunction could be granted under s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925. If that were not so, it was said, a plaintiff with a maritime claim might obtain a *Mareva* injunction in respect of two or more ships, or proceed in rem against one ship and obtain a *Mareva* injunction in respect of one or more other ships, and by these means obtain security for a larger amount than he could by proceeding in rem against a single ship (which was all he was allowed to do) under the 1956 Act.

Secondly, it was said that, if a plaintiff was in the difficulty that he was not entitled, in a case like the present one, to ensure security for his claim by having a ship kept under arrest in the exercise of the Court's jurisdiction in rem, he should not be allowed to get round that difficulty, and achieve substantially the same result, by obtaining a *Mareva* injunction relating to the same ship.

Thirdly, it was said that the grant of a *Mareva* injunction in respect of a ship gave rise, or might well give rise, to a number of inconveniences. The ship would not be in the custody of the Admiralty Marshal, so that the control and effective enforcement of her detention provided by such custody would not be available. The detention of the ship might further create an obstruction in a port or elsewhere to the prejudice of a port authority or other third parties.

I do not find these arguments at all convincing. As regards the first and second arguments, it is to be observed that the shipowners entered an unconditional appearance to the cargo-owners' action, so that it is not only an action in rem against the ship but also an action in personam against them. The rights given to the plaintiffs by the Supreme Court of Judicature (Consolidation) Act, 1925, and the Administration of Justice Act, 1956, are cumulative, not alternative; see particularly s. 43 of the 1925 Act. That being so, I cannot see why the circumstance that the cargo-owners cannot (if it be the case) maintain security for their claim by having the ship kept under arrest by the Court in the exercise of its jurisdiction in rem should be a reason why they should not be entitled to obtain alternative security for their claim by means of a *Mareva* injunction relating to the ship granted by the Court in the exercise of its jurisdiction in personam. On the contrary, the fact that they are unable, in their efforts to ensure security for their claim, to use one of the two methods potentially available for the purpose, seems to me to afford a very good reason why they should be permitted to use the other.

The questions of a plaintiff obtaining a *Mareva* injunction in respect of several ships, or of combining an arrest of one ship in proceedings in rem with the obtaining of a *Mareva* injunction in respect of one or more other ships in proceedings in personam, do not arise for consideration in this case. I would, however, just say that the prospect of a plaintiff being able to obtain several kinds of security cumulatively in respect of the same claim, if the size of such claim justifies it, is not one which fills me with any consternation or dismay.

As regards the third argument, I do not think that the fact that the ship will not be in the custody of the Admiralty Marshal is of any particular significance. The Court grants injunctions in the expectation that they will be obeyed, not disobeyed, and a *Mareva* injunction relating to a ship does not differ in principle, so far as enforcement is concerned, from a similar injunction in respect of any other moveable chattel. As to third parties, if they should be adversely affected by the injunction, I think that they would be entitled to intervene in the proceedings in order to protect their interests.

The result is that I approach this matter on

the basis that the Court had power, as at July 28, 1977, to grant a *Mareva* injunction in this case, and that the only question is whether, in the words of s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, it would have appeared to the Court just and convenient to do so. That would have been a matter for the discretion of the Court, having regard to the particular circumstances of the case.

Considering the matter as at July 28, 1977, there were two strong points in favour of granting a *Mareva* injunction. The first point was that the cargo-owners had a very strong prima facie case in support of their claim. The second point was that, if an injunction were not granted, the cargo-owners, assuming that they obtained an award, might well be unable to recover more than a comparatively small part of it. I have explained earlier why each of these matters should be so and do not need to do so again here.

There was one apparently strong point against granting an injunction. It was that the ship was a trading asset, and that, if the shipowners were compelled by an injunction to keep her here, they would lose the benefit of trading her. The strength of the point is, however, apparent only, for we now know that, since the ship was released, the shipowners have not used her for trading but have laid her up in Greece without carrying out permanent repairs to her. It may be said that this circumstance could not have been known in advance as at July 28, 1977. The intentions of the shipowners at that time would, however, have had to be investigated, and it would have been for them to prove that they intended to continue trading the ship. They adduced no evidence to show that, whatever it is now known in fact happened, it was then their intention to do so.

In any case there is a certain artificiality about the concept that, if a *Mareva* injunction had been granted, the ship would have remained here, for it is obvious from what in fact happened that the club would have given a letter of undertaking rather than have allowed their member's ship to be detained here indefinitely.

Having considered all the relevant circumstances of the case, including particularly the main points discussed above, I should on July 28, 1977, if it had been necessary for me to decide whether to grant a *Mareva* injunction or not, have exercised my discretion by granting such injunction, subject, I think, to a term providing for the arbitration to be commenced within a specified time.

It follows that I answer question (4) in the affirmative.

I have now examined and answered each of the four main questions which were argued before me. The result of my answers to questions (1) and (2) is that, on the shipowners' adjourned application in the cargo-owners' action, there must be an order for a stay of the action. The result of my answer to question (3), or, if that is wrong, of my answer to question (4), is that, on the originating summons issued by the shipowners and the club, there must be a declaration that the club is not entitled to the return and cancellation of its letter of undertaking.