Digest of cases included in this part

[1984] All England Law Reports

The table of cases reported in part 13 and the noter-up for this part appear inside the back cover

YCA II/NYC/UK 19

The Tuyuti

a

COURT OF APPEAL, CIVIL DIVISION
ACKNER AND ROBERT GOFF LJJ
5, 6 APRIL 1984

b *Admiralty – Jurisdiction – Action in rem – Arrest of ship – Stay of proceedings – Arbitration agreement – Court bound to grant stay – Whether court permitted to order arrest of ship or to continue arrest already obtained – Whether security obtained by arrest constituting security in arbitration or in possible future action in rem – Arbitration Act 1975, s 1(1).*

Arbitration – Stay of court proceedings – Power of court to order stay – Whether power limited to cases where court seised of matter after arbitration agreement made – Arbitration Act 1975,
c *s 1(1).*

The plaintiffs were the owners of cargo shipped on the defendants' ship under bills of lading which included a London arbitration clause. Part of the cargo was off-loaded in Spain and the remainder was discharged at Rotterdam. The cargo owners complained that the cargo was discharged in a damaged condition. In January 1984 they issued a writ
d in rem in the Admiralty Court claiming damages for breach of the contract of carriage for the cargo, and on the same day they obtained a warrant for the arrest of the ship. The ship was not in the jurisdiction and the writ was not served nor was the ship arrested. On 17 February, in order to protect themselves under the time provisions in the arbitration clause, the cargo owners nominated an arbitrator. On 27 February the shipowners nominated an arbitrator and on 2 March they applied under s 1(1)[a] of the Arbitration Act
e 1975 for a stay of the cargo owners' action in rem and an order setting aside the warrant of arrest. The judge granted the stay of action and ordered a stay of execution of the warrant of arrest. The cargo owners appealed against the order staying execution of the warrant of arrest. On the appeal the shipowners contended that when the court stayed proceedings under s 1(1) of the 1975 Act it was required to stay the whole proceedings, including execution of any warrant of arrest. They also contended that the effect of
f permitting the security which would be obtained by the arrest of the ship to be retained in case the arbitration foundered if an award in favour of the cargo owners was not satisfied would be to permit the security to be obtained for the purpose of the arbitration, which was an impermissible exercise of the court's jurisdiction in rem.

Held – Where a defendant to an action in rem applied to the court to stay the action
g under s 1(1) of the 1975 Act pending submission to arbitration the court was entitled, when granting the stay, to order the arrest of the defendant's ship or to continue any arrest already obtained if it was shown by the plaintiff that any arbitration award in his favour was unlikely to be satisfied by the defendant. In arresting or continuing the arrest of the ship as security, the security was being administered not in relation to the arbitration proceedings but in relation to a possible judgment in the action in rem. Since
h there was clear evidence that the shipowners might well be unable to satisfy any arbitration award in favour of the cargo owners, the appeal would be allowed and the judge's order reversed in so far as it imposed a stay on the execution of the warrant of arrest (see p 549 *e f*, p 552 g to *j*, p 553 g to *j*, p 554 *h j* and p 555 *h j*, post).

The Rena K [1979] 1 All ER 397 applied.

The Andria [1984] 1 All ER 1126 considered.

j Per curiam. The court's power to order a stay of legal proceedings under s 1(1) of the 1975 Act pending arbitration is not limited to cases where the court becomes seised of the action or matter only after the parties have made an arbitration agreement (see p 555 *c d* and g to *j*, post).

Notes

For stay of court proceedings pending arbitration, see 2 Halsbury's Laws (4th edn) para 555 and 37 ibid para 440, and for cases on the subject, see 3 I ... st (Reissue) 70–76, 360–390.

For the jurisdiction in rem, see 1 Halsbury's Laws (4th edn) paras 305, 311, and for cases on the subject, see 1(1) Digest (Reissue) 219–223, 1240–1251.

For warrant of arrest of a ship, see 1 Halsbury's Laws (4th edn) paras 366–368, and for cases on the subject, see 1(1) Digest (Reissue) 294–295, 1759–1770.

For the Arbitration Act 1975, s 1, see 45 Halsbury's Statutes (3rd edn) 33.

As from a day to be appointed s 26 of the Civil Jurisdiction and Judgments Act 1982 will enable the court on staying or dismissing Admiralty proceedings on the ground, inter alia, that the dispute should be submitted to arbitration to retain an arrested ship (or any bail or security given instead) as security for the satisfaction of any award given in the arbitration.

Cases referred to in judgments

Andria, The [1984] 1 All ER 1126, [1984] 2 WLR 570, CA.
Cap Bon, The [1967] 1 Lloyd's Rep 543.
Golden Trader, The, Danemar Scheepvaart Maatschappij BV v Golden Trader (owners) [1974] 2 All ER 686, [1975] QB 348, [1974] 3 WLR 16.
Jade, The, The Eschersheim, Erkowit (owners) v Jade (owners), Erkowit (cargo owners) v Eschersheim (owners) [1976] 1 All ER 920, [1976] 1 WLR 430, HL.
Paczy v Haendler & Natermann GmbH [1981] 1 Lloyd's Rep 302, CA.
Rena K, The [1979] 1 All ER 397, [1979] QB 377, [1978] 3 WLR 431.

Application and interlocutory appeal

The plaintiffs, the owners of cargo lately laden on board the ship Tuyuti, applied for leave to appeal and if granted appealed against the order of Sheen J on 29 March 1984 whereby he ordered that all further proceedings in the cargo owners' action in rem against the Tuyuti be stayed pursuant to s 1 of the Arbitration Act 1975 and that there be a stay of execution of the warrant of arrest of the Tuyuti. The facts are set out in the judgment of Robert Goff LJ.

Richard Aikens for the cargo owners.
Nigel Teare for the shipowners.

ROBERT GOFF LJ (delivering the first judgment at the invitation of Ackner LJ). There is before the court a renewed application by the plaintiffs for leave to appeal from an order by Sheen J dated 20 March 1984 under which, on the defendants' application, he stayed all further proceedings in the action pursuant to s 1 of the Arbitration Act 1975 and further ordered that there be a stay of execution of the warrant of arrest issued in the action until further order. He refused leave to appeal.

For reasons which I shall explain in a moment, the plaintiffs' application for leave to appeal against the order of a stay under s 1 of the 1975 Act is restricted to one limited point. It is against the order staying the execution of the warrant of arrest that their application is primarily directed. They appeared before Ackner LJ a day or two ago and he then adjourned the matter for consideration by this court. We heard submissions yesterday, for which we are much indebted, and we decided to give judgment immediately because the relevant vessel is due to enter the jurisdiction of the court in the next few days, and so the question whether the warrant of arrest should be subject to a stay of execution has assumed some urgency.

The matter arises as follows. The plaintiffs were the owners of cargo shipped on the defendants' ship Tuyuti (which I shall refer to as 'the vessel') at Montevideo, in Uruguay, in December 1982. I shall refer to the plaintiffs as 'the cargo owners' and to the defendants as 'the shipowners'. The cargo was a general cargo. We are concerned in the present case quantity of screws loaded in two containers shipped under a single bill of lading, destined with a quantity of wool shipped under 38 bills of lading destined for Liverpool, and a for Rotterdam. The cargo owners claim that the wool, part of which was off-loaded in Spain and the remain... discharged at Rotterdam, was discharged in a damaged condition, and that th... amage was due to the unseaworthiness of the vessel, arising from the state of the hatch covers and the adjacent stowage in the holds of other cargo which was spontaneously combustible. The containers of screws were lost overboard in a storm.

The cargo owners' claim in respect of the damage to the wool amounts to about $US450,000 and for the loss of the screws to about $US40,000. Each of the bills of lading under which the wool was shipped was in the same form and contained a clause paramount (cl 2) and a so-called jurisdiction clause (cl 3) which provided that the bill of lading should be governed by English law and included a London arbitration clause. The bill of lading under which the screws were shipped contained no arbitration clause, but contained an exclusive jurisdiction clause under which disputes were to be referred to a court in the country where the carrier had his principal place of business, which was Uruguay, and that the proper law of the contract was the law of Uruguay.

The wool cargo was discharged in January 1983. The one-year time limit, with extensions, was due to expire on 17 February 1984. On 31 January 1984 the cargo owners issued their writ in the action, and on the same day the cargo owners' solicitors obtained a warrant for the arrest of the vessel. She has not yet come within the jurisdiction of the Admiralty Court, and so the writ has not been served, nor has the vessel been arrested. However, solicitors acting on behalf of the shipowners discovered that the writ had been issued. They then voluntarily filed an acknowledgment of service on behalf of the shipowners, although no writ had been served. Their purpose in so doing I shall explain in a moment.

On 17 February 1984, in order to protect the time position having regard to the arbitration clause in the wool bills of lading, the cargo owners' solicitors nominated an arbitrator. The appointment was expressed to be in respect of both the wool bills of lading and the screws bill of lading, and was also expressed to be without prejudice to, inter alia, cargo claimant's rights to arrest any of the shipowners' vessels. On 27 February the shipowners' solicitors responded, nominating an arbitrator both under the wool bills of lading and under the screws bill of lading.

On 2 March the shipowners issued a notice of motion, asking for a stay of proceedings. This was served on 13 March. Argument took place before Sheen J on 20–23 March and, as I have recorded, he delivered his judgment on 29 March. The shipowners applied for a stay of proceedings under s 1 of the Arbitration Act 1975 and, if necessary, an order setting aside the warrant of arrest. It is common ground between the parties that the wool bills of lading contained a non-domestic arbitration agreement, to which s 1 of the 1975 Act applied. The screws bill of lading contained no such agreement. Even so, by virtue of the nomination of the parties' arbitrators, there has come into existence an ad hoc arbitration agreement in respect of the dispute which has arisen under the screws bill of lading, though there is a dispute whether s 1 of the 1975 Act applies in the circumstances of the present case.

It will, I think, be helpful if at this stage I set out the provisions of s 1(1) and (2) of the 1975 Act:

> 'Staying court proceedings where party proves arbitration agreements.—(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings ... 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.'

I need not refer to sub-ss (3) and (4).

The shipowners' application for a stay was made under that section. I must now explain the purpose of the shipowners in entering a voluntary acknowledgment of service. This was to make what has been called a 'pre-emptive strike'. Their purpose was to put themselves in a position to make an application for a stay of proceedings under s 1 of the 1975 Act before their vessel arrived within the jurisdiction of the court, so that they could obtain an order which would effectively freeze the warrant of arrest before the vessel was arrested. For the cargo owners counsel has conceded, rightly in my opinion, that the effect of the Rules of the Supreme Court (in particular Ord 20, r 10, Ord 10, r 1(5) and Ord 75, rr 1, 3 and 8) is that the shipowners did by this step put themselves in the position of defendants to an action in personam in which proceedings are deemed to have been served, and so they did, by acknowledging service, enable themselves to make an application under s 1 of the 1975 Act.

Moreover, if the decision of the judge is right, the shipowners' pre-emptive strike has been successful. Before the judge the following issues arose. The first issue was whether he should grant a mandatory stay of the proceedings. As to that, counsel for the cargo owners submitted to the judge, first, that no stay should be granted in respect of the claim under the wool bills of lading because on the evidence the shipowners were in such financial difficulty that they were unable to satisfy any arbitration award which might be made against them, with the effect that the arbitration agreement was incapable of being performed within those words in s 1 of the 1975 Act and, second, that, as regards the screws bill of lading, s 1 of the 1975 Act was not applicable because proceedings were commenced before the parties entered into the ad hoc arbitration agreement. The judge rejected the first of these submissions and counsel has not sought to pursue the point before this court. The judge also rejected the second submission on the ground that on the form of indorsement on this particular writ it was not possible to distinguish the claim of one plaintiff from the claim of another. So the result was that the judge granted a stay of proceedings in respect of all claims under s 1 of the 1975 Act.

He then proceeded to consider the position as regards the warrant of arrest. The judge rejected an argument of the shipowners that the effect of an order for a stay of proceedings was that the warrant could not be executed, and so the question then arose whether an order should be made staying the execution of the warrant. For the cargo owners counsel advanced two reasons why no such order should be made. His first submission was that the court has power under s 12(6)(*f*) of the Arbitration Act 1950 to permit or order the arrest of a ship for the purpose of obtaining security in an arbitration. His second submission was that the court has power to permit or order the arrest of the ship on the evidence before it to secure a judgment in the action on the principles stated by Brandon J in *The Rena K* [1979] 1 All ER 397, [1979] QB 377, because it appeared that the shipowners might well be unable to satisfy an arbitration award and, in that event, the cargo owners might find it necessary to invoke the residual jurisdiction of the Admiralty Court to lift the stay and allow the action in rem to proceed. The judge rejected both these submissions, and so ordered a stay of execution of the warrant of arrest. The pre-emptive strike, therefore, succeeded.

The cargo owners, in seeking leave to appeal, submit that the judge was wrong in rejecting each of these two submission. The first of the two submissions I can deal with briefly. Section 12(6) of the 1950 Act provides, so far as material, as follows:

> 'The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of . . . (*f*) securing the amount in dispute in the reference . . . as it has for the purpose of and in relation to an action or matter in the High Court . . .'

The submission of counsel for the cargo owners before the judge, which he repeated before us, was that power to issue a warrant of arrest under which the Admiralty Marshal is commanded to execute the warrant by arresting the ship constitutes a power of the High Court of making an order securing the amount in dispute within this subsection. A similar submission was considered on two occasions by Brandon J, first in *The Golden Trader, Danemar Scheepvaart Maatschappij BV v Golden Trader (owners)* [1974] 2 All ER 686 at 695, [1975] QB 348 at 358 and second in *The Rena K* [1979] 1 All ER 397 at 418, [1979] QB 377 at 408. On each occasion the submission was rejected by him.

I turn straight to *The Rena K*, where Brandon J had this to say:

> '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 RSC Ord 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 RSC Ord 29, rr 2(3) and 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.'

This reasoning was followed and applied by the judge in the present case, and I find myself to be in agreement with him. I must confess that it would not have occurred to me to describe the jurisdiction to issue a warrant of arrest as a power of the court of making an order securing the amount in dispute. I would describe it as a power to issue a warrant, the warrant being rather an instruction to the marshal than an order in the sense in which the latter word is usually used in interlocutory orders of the court, especially having regard to the orders listed in paras (*a*) to (*h*) of s 12(6), relating to such matters as security for costs, discovery and so on. I agree with Brandon J that s 12(6)(*f*) relates to the court's powers under such rules as Ord 29, rr 2(3) and 6, and that it does not, on its true construction, refer to the jurisdiction to issue a warrant of arrest. I can see no ground for interfering with the judge's decision on this point.

I turn then to the central point in the case, which is concerned with the principle enunciated by Brandon J in *The Rena K*. The question of the Admiralty Court's jurisdiction to arrest a ship or to continue such an arrest in relation to arbitration proceedings was recently considered by this court in *The Andria* [1984] 1 All ER 1126, [1984] 2 WLR 570. It may help to put the principle in *The Rena K* in its context if I first refer to the judgment in *The Andria*. In that case it was held that, although the only prerequisite to the court's jurisdiction to issue a warrant for arrest is that a writ must have been issued in an action in rem, nevertheless the court should not exercise that jurisdiction for the purpose of providing security for an award which may be made in arbitration proceedings. The relevant passage in the judgment of the court in *The Andria* [1984] 1 All ER 1126 at 1134–1135, [1984] 2 WLR 570 at 579–580 reads as follows:

> 'The mere fact that the dispute between the parties falls within the scope of an arbitration agreement entered into between them does not [illegible] preclude one of them from bringing an action. Accordingly, the mere existence of an arbitration agreement will not of itself prevent a party from issuing a writ, or serving the writ and (in the case of an action in rem), procuring the arrest of the ship, or otherwise proceeding with the action. But the arbitration agreement can, of [illegible] have certain consequences. For example, if an action is begun, the other

party may apply for a stay of proceedings. Generally speaking, the court's power to grant a stay in such a case is discretionary; though of course in cases falling within s 1 of the Arbitration Act 1975 the court is bound to grant a stay. Again, if a party actively pursues proceedings in respect of the same claim both in the court and in arbitration, his so proceeding may be regarded as vexatious and an abuse of the process of the court; if so, the court may, in the exercise of its inherent power, require him to elect in which forum he will pursue his claim: see *The Cap Bon* [1967] 1 Lloyd's Rep 543. Next, let it be supposed that, before the court has granted a stay of proceedings under the Arbitration Acts, the plaintiff has obtained security by the arrest of a ship in an action in rem. If the stay is granted in the exercise of its discretionary power under s 4 of the Arbitration Act 1950, the court may require, as a condition of granting a stay, that alternative security should be made available to secure an award made in the arbitration proceedings: see *The Golden Trader*. If a mandatory stay is granted under s 1 of the Arbitration Act 1975, no such term can be imposed. But it has been held by Brandon J that, where it is shown by the plaintiff that an arbitration award in his favour is unlikely to be satisfied by the defendant, the security available in the action in rem may be ordered to stand so that, if the plaintiff may have thereafter to pursue the action in rem (possibly using an unsatisfied arbitration award for the purpose of an issue estoppel) the security will remain available in that action: see *The Rena K*. (We have not had to consider the principle in that case, and we have not heard arguments on the point; however, we proceed on the basis that that principle is sound.) However, on the law as it stands at present, the court's jurisdiction to arrest a ship in an action in rem should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings, eg arbitration proceedings. The time may well come when the law on this point may be changed: see s 26 of the Civil Jurisdiction and Judgments Act 1982, which has however not yet been brought into force. But that is not yet the law. It follows that, if a plaintiff invokes the jurisdiction of the court to obtain the arrest of a ship as security for an award in arbitration proceedings, the court should not issue a warrant of arrest.'

It is the principle in *The Rena K*, summarised in the passage I have just read, which the cargo owners have invoked in the present case. In *The Andria* this court declined to express any opinion on the soundness of that principle, which had not been considered in argument before it. It is necessary to turn to *The Rena K* itself to find a statement of that principle, and the basis on which it was formulated. Brandon J there drew a distinction between the choice of forum for the determination of the merits of the dispute and the right to security in respect of maritime claims under the Admiralty law of this country, and pointed out that this distinction had been recognised and given effect to by the way in which the court had exercised its jurisdiction in relation to foreign jurisdiction clauses and in vexation cases. He continued ([1979] 1 All ER 397 at 415, [1979] QB 377 at 404–405):

> '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 (TS 47 (1960); Cmnd 1128). 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 RSC Ord 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 of 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.'

Brandon J then proceeded to consider and reject an argument that the power to lift the stay of the action could not be exercised once an arbitration award had been made because, once an award was made, the cause of action would become merged in the award and, therefore, would no longer be available for prosecution in the action. He concluded, however, that no such merger would take place where the cause of action was in rem. He then concluded the relevant passage in his judgment as follows, addressing himself to the facts of the case before him ([1979] 1 All ER 397 at 417, [1979] QB 377 at 406):

> '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 . . . 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 that 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 28th July 1977, by either keeping the ship under arrest or by only releasing her subject to a term for the provision of alternative security.'

On the basis of that principle, counsel for the cargo owners submitted to the judge in the present case that, having regard to the evidence before the court relating to the financial situation of the shipowners, they might well be unable to satisfy an award in the pending arbitration and, therefore, it would not be appropriate for the judge in the exercise of his discretion, to stay the execution of the warrant of arrest. The ship could be arrested to provide security to enable a judgment in the action to be satisfied, if the stay of the proceedings were thereafter to be lifted and the cargo owners were to obtain such a judgment in the action. The judge's reaction to that submission was as

follows. He quoted a passage from this court's judgment in *The Andria* [1984] 1 All ER 1126 at 1134–1135, [1984] 2 WLR 570 at 579–580 which I have already set out in this judgment, and he then continued:

> 'In *The Rena K* Brandon J pointed out that a claimant who obtains an award in an arbitration is not prevented from pursuing his remedy in an action in rem. It was for this reason that the judge found it possible to hold that the security obtained by the arrest of *The Rena K* could be retained in case the plaintiffs' award in the arbitration remained unsatisfied. In that event the plaintiffs would seek to persuade the court to lift the stay in the action. In *The Andria* the Court of Appeal did not have to consider whether the course taken by Brandon J in *The Rena K* was justified in principle. Mr Macdonald [counsel for the shipowners] invited me to say that I would not follow that decision because it was wrong in principle. I do not have to decide that point because in the light of the passage quoted above from the judgment of the Court of Appeal in *The Andria* there can be no doubt that the court's jurisdiction to arrest a ship in an action in rem will not be exercised for the purpose of providing security for an award in arbitration proceedings until s 26 of the Civil Jurisdiction and Judgments Act 1982 is brought into force. I can only express the hope that that section will soon come into force. For these reasons I order that this action be stayed and that there be a stay of execution of the warrant of arrest until further order.'

With all respect to the judge, however, it was not being suggested to him by the cargo owners at this stage of their argument that it would be appropriate, on the principle in *The Rena K*, for the court's jurisdiction to arrest to be exercised for the purpose of providing security for an award in arbitration proceedings. That had been their submission based on s 12(6)(*f*) of the 1950 Act, but the whole point of the principle of *The Rena K* invoked by the cargo owners was that security is provided not for an arbitration award but for judgment in the action in rem itself, if the stay of the action should subsequently be lifted after failure by the shipowners to satisfy an award in the arbitration.

Before the court, counsel for the shipowners repeated the submission made before the judge by Mr Macdonald that the principle in *The Rena K* was wrong and ought not to be followed. But he put in the forefront of his argument a submission that the decision of the judge should be supported on a different ground. This submission was founded on the wording of s 1(1) of the 1975 Act. Under that subsection in the circumstances there specified it is provided that the court 'shall make an order staying the proceedings'. This meant, submitted counsel, the whole proceedings. The warrant of arrest is the creature of the action itself. If the proceedings have to be stayed, there can be no further steps taken in those proceedings, and in particular no further steps can be taken to execute the warrant of arrest.

This argument I am unable to accept. I do not consider that counsel can, so to speak, pre-empt the position in this way. The function of a stay of proceedings under s 1(1) is to give effect to the arbitration agreement: only in so far as it is necessary for that purpose should the proceedings be stayed. To take a simple example, let it be supposed that in certain proceedings two claims are advanced, one of which is within the relevant arbitration agreement and the other is not. In such a case it would be entirely consistent with s 1(1) to order a stay of the proceedings only in so far as they are related to the claim within the arbitration agreement, allowing the proceedings to continue as to the other claim. Likewise, in my judgment, if the principle in *The Rena K* is well founded, it presupposes that the security will stand for the purpose of a judgment in the action in rem in the event, which on the evidence might well occur, of the arbitration foundering because an award is not satisfied and the stay then being lifted. To permit security to be retained for that purpose is, on the principle as stated in *The Rena K*, consistent with giving effect to the arbitration agreement, and so the security is not caught by a stay which has effect only so far as is necessary to give effect to the arbitration agreement.

It is necessary, therefore, [illegible]

well founded. Counsel for the shipowners advanced four reasons why in his submission it was not. He first submitted that it ignored the reality of the situation. In reality, he said, if a stay of the action in rem is lifted after an arbitration award has been made but has not been honoured, the action is being used for the purpose of enforcing the award. All that will happen is that the award will be invoked as an issue estoppel, and a judgment will be given which has in practice the effect of enforcing the award. The Admiralty jurisdiction, he pointed out, is a jurisdiction to hear and determine claims within the categories specified in s 20 of the Supreme Court Act 1981. In a *Rena K* type of case there would be no hearing or determination at all. I cannot accept this submission. At the very least, as counsel for the cargo owners pointed out, there will be a determination whether to give effect to an issue estoppel, and so the award and the basis on which the award is said to create an issue estoppel will have to be the subject of evidence before the court if not admitted. There will, therefore, be a hearing and a determination, though it may well be brief. Moreover, it will not in law be an action in which the award is itself enforced. The action is not an action on the award, but an action founded on the original cause of action identified in the writ. The result may be that a judgment will be obtained in a sum equal to the sum awarded by arbitration, and in respect of the same cause of action, but it does not follow that the award itself is being enforced in the action.

Counsel for the shipowners next submitted that to give effect to the principle in *The Rena K* is really to order a stay of proceedings on terms, which is not permissible under a statute requiring a mandatory stay of proceedings. I do not agree. A stay of proceedings on terms occurs where a stay would only be effective if a certain condition is fulfilled, eg the provision of security in a certain sum. But on the principle in *The Rena K* there is an unconditional stay of proceedings. All that happens is that it leaves the warrant of arrest unaffected.

Next, counsel for the shipowners referred to a decision of this court in *Paczy v Haendler & Natermann GmbH* [1981] 1 Lloyd's Rep 302. That case has, however, no bearing on the principle in *The Rena K*, which was apparently not cited to the court, being concerned not with that principle but with the effect of the words 'incapable of being performed' in s 1(1) of the 1975 Act.

Finally, counsel for the shipowners submitted that under the principle in *The Rena K* the effect is that, despite a stay of proceedings, a vessel can be arrested or detained under arrest, and all sorts of steps will be taken in consequence, eg the vessel will be in the custody of the marshal, he may have to seek directions from the court and the parties may have to appear before the court on applications for directions, all of which, he submitted, were inconsistent with a stay of proceedings. I do not, however, find this argument persuasive, because the vessel is arrested or retained as security, and the security is being administered not in relation to the arbitration proceedings but in relation to a possible judgment in the action in the event of the stay of the proceedings being lifted.

It follows that I am unable to accept any of counsel's criticisms of *The Rena K* principle. I for my part find the reasoning of Brandon J in *The Rena K* persuasive, and, for the reasons set out by him in his judgment in that case, I respectfully accept the principle as stated by him as being well founded.

It is, of course, true that in *The Rena K* the question was whether it was possible in the event of a stay of proceedings to retain security that had already been obtained, whereas in the present case the question is whether, if a stay of proceedings is ordered, the warrant of arrest shall stand unaffected so that it can be executed by the marshal in the event of the vessel coming within the jurisdiction of the court. I can, however, see no relevant distinction between the two cases. If the principle in *The Rena K* is well founded, it is in my judgment equally applicable in both cases. If it is applicable the effect must be that a warrant of arrest already issued but not executed will not be stayed and that security already obtained by the execution of the warrant of arrest or otherwise will not be released.

Before I turn to consider whether on the evidence this is a case where *The Rena K* principle should be applied, I should briefly mention one other argument advanced by

of arrest did not disclose the fact that there was an arbitration clause in the wool bill of lading, there had not been the full and frank disclosure which is required on ex parte applications of this kind, and on that ground also the arrest should be set aside: see *The Andria*. In my judgment, this argument is without substance, as appears from the judgment in that case. There an arrest was set aside because the affidavit to lead the warrant failed to disclose that at the date of the affidavit the parties had entered into an ad hoc arbitration agreement for the resolution of the very dispute which was the subject matter of the action in rem and that the parties were actively pursuing arbitration proceedings under that agreement. In such circumstances the court would, had it been aware of those facts, have declined to exercise its jurisdiction to issue a warrant, unless facts were also deposed to (which they were not) bringing the case within the principle in *The Rena K*. The present case is, however, not such a case. It does not follow that, because there is an arbitration agreement, eg (as here) an arbitration clause in a bill of lading, that agreement will be invoked for the purpose of deciding a dispute which has arisen under it, and so, as is pointed out in the judgment in *The Andria* [1984] 1 All ER 1126 at 1135–1136, [1984] 2 WLR 570 at 580–581, the mere fact that there is an arbitration agreement does not of itself generally preclude a party of the agreement from bringing an action or, in the case of an action in rem, procuring the arrest of a ship. I can discern no lack of disclosure in the affidavit to lead the warrant in the present case.

I turn then to the question whether, on the evidence, this is an appropriate case for the application of *The Rena K* principle. The evidence discloses the following state of affairs. First, the shipowners can obtain no assistance from their P & I Club, because that club, the Oceanus, is in severe financial difficulty and indeed is at present the subject of winding-up proceedings in Bermuda. So the possibility of club support, assuming that that factor would in any event be relevant, can be rejected as out of the question in the present case. So far as the shipowners themselves are concerned, it appears from the evidence that they own two ships. The Tuyuti herself is stated by the shipowners' solicitors to have a sound, open market value of about $US700,000 but she is subject to two mortgages: on the first, over 8m French francs are still outstanding, and the second appears to be for a sum of about $US720,000. The other ship, the Yaguari, was purchased at some unspecified date for $US1,500,000, but it appears that $US840,000 of her purchase price is still outstanding, presumably on mortgage. In addition, $US270,000 is owed by the shipowners in respect of bunkers; Oceanus has unpaid calls in the sum of $US413,000 in respect of the shipowners' fleet, of which $US167,000 relates to the Tuyuti herself, though we are told that these calls are the subject matter of a dispute between the shipowners and the club; and there are cargo claims which have to be directly attended to by the shipowners owing to the failure of Oceanus. It is scarcely surprising that in these circumstances the shipowners have stated that they recognise that the cargo owners will not find the position encouraging, although they have expressed hopes as to the payment of these debts and as to the future when they emerge from the most difficult times in which the shipping industry now finds itself.

As counsel for the shipowners pointed out, this is not the case of a one-ship company, where the single ship is likely to be disposed of to defeat the claim. But the applicable test is whether, if the plaintiff should obtain an award in respect of the full amount of that claim, the defendants might well be unable to satisfy it. I feel bound to conclude that, on the evidence now before us, that test is indeed fulfilled. I should add that in reaching that conclusion I have taken into account a limitation fund established, I believe in Antwerp, by means of an AFIA bond.

It follows, in my judgment, that on the evidence in this case the *Rena K* principle is applicable and that the warrant of arrest should not be stayed but should be allowed to stand to be executed as appropriate. For these reasons I would give leave to appeal and, treating the hearing of the renewed application for leave as the hearing of the appeal, I would allow the appeal and reverse the judge's order in so far as it imposed a stay on the execution of the warrant.

I should before concluding this judgment refer to one other argument advanced by

screws bill of lading. So far as the claim under that bill of lading is concerned, the writ and the warrant were issued first, and the ad hoc submission to arbitration came later. In his argument on this point counsel focused on the opening words of s 1(1) of the 1975 Act, which reads: 'If any party to an arbitration agreement to which this section applies ... commences any legal proceedings ...' It follows, submitted counsel, that the subsection only applies where, at the time of the commencement of the proceedings, that party was already a party to the relevant arbitration agreement. This was not so in respect of the screws bill of lading. Accordingly, s 1(1) had no application to the claim under that bill of lading and there should have been no stay of proceedings in respect of it. This submission raises the question of the meaning to be given to the word 'commences' in the subsection. Ought that word to be read as relating only to commencement of proceedings by a person who is then party to the relevant arbitration proceedings? Or ought it to be read as referring to commencement at any time, including commencement before the arbitration agreement has been made? An absolutely literal construction favours the first approach, but regard to the purpose of the subsection would appear to favour the second approach, because it is not apparent why the court's duty to stay proceedings should not equally apply where an arbitration has been entered into after proceedings have been commenced. I am inclined to prefer the latter approach. There is however here an ambiguity, and since the 1975 Act was passed to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (TS 20 (1976); Cmnd 6419), it is legitimate in such circumstances to have regard to the treaty: see *The Jade, The Eschersheim, Erkowit (owners) v Jade (owners), Erkowit (cargo owners) v Eschersheim (owners)* [1976] 1 All ER 920, [1976] 1 WLR 430. Article II of the treaty provides as follows:

> '1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
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> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration ...'

That article shows that under the treaty the court's duty to refer the parties to arbitration arises when seised of an action in a matter in respect of which the parties have made an arbitration agreement. It is not limited to cases where after the parties have made such an agreement the court becomes seised of the action or matter. Recourse to the treaty therefore favours the second approach, which I myself have felt inclined to accept as a matter of construction. In these circumstances, I would reject the literal approach, and it follows that I would, therefore, reject the argument of counsel for the cargo owners on this point.

For these reasons I would not interfere with the judge's order staying the proceedings in relation to the screws bill of lading as well as the wool bill of lading. I would only allow the appeal so far as it relates to the stay of execution of the warrant of arrest.

ACKNER LJ. I agree, and there is nothing that I can usefully add.

Leave to appeal granted. Appeal allowed so far as relates to stay of execution of warrant of arrest. Leave to appeal to House of Lords refused.

Solicitors: *Clyde & Co*, Guildford (for the cargo owners): *Ince & Co* (for the shipowners).

177. UNITED KINGDOM: COURT OF APPEAL, CIVIL DIVISION 6 April 1984 – *"The Tuyuti"*

Effects of an arbitration agreement on judicial proceedings – Security for giving effect to a judgment for the case that arbitration does not reach its intended effect – Arbitration agreement concluded after commencement of judicial proceedings

(See Part I. B. 1)

ROBERT GOFF LJ (delivering the first judgment at the invitation of Ackner LJ). There is before the court a renewed application by the plaintiffs for leave to appeal from an order by Sheen J dated 20 March 1984 under which, on the defendants' application, he stayed all further proceedings in the action pursuant to s 1 of the Arbitration Act 1975 and further ordered that there be a stay of execution of the warrant of arrest issued in the action until further order. He refused leave to appeal.

For reasons which I shall explain in a moment, the plaintiffs' application for leave to appeal against the order of a stay under s 1 of the 1975 Act is restricted to one limited point. It is against the order staying the execution of the warrant of arrest that their application is primarily directed. They appeared before Ackner LJ a day or two ago and he then adjourned the matter for consideration by this court. We heard submissions yesterday, for which we are much indebted, and we decided to give judgment immediately because the relevant vessel is due to enter the jurisdiction of the court in the next few days, and so the question whether the warrant of arrest should be subject to a stay of execution has assumed some urgency.

The matter arises as follows. The plaintiffs were the owners of cargo shipped on the defendants' ship Tuyuti (which I shall refer to as 'the vessel') at Montevideo, in Uruguay, in December 1982. I shall refer to the plaintiffs as 'the cargo owners' and to the defendants as 'the shipowners'. The cargo was a general cargo. We are concerned in the present case with a quantity of screws loaded in two containers shipped under a single bill of lading, destined for Liverpool, and a quantity of wool shipped under 38 bills of lading destined for Liverpool, and also for Rotterdam. The cargo owners claim that the wool, part of which was off-loaded in Spain and the remainder discharged at Rotterdam, was discharged in a damaged condition, and that this damage was due to the unseaworthiness of the vessel, arising from the state of the hatch covers and the adjacent stowage in the holds of other cargo which was spontaneously combustible. The containers of screws were lost overboard in a storm.

The cargo owners' claim in respect of the damage to the wool amounts to about $US 545,000 and for the loss of the screws to about $US40,000. Each of the bills of lading under which the wool was shipped was in the same form and contained a clause paramount (cl 2) and a so-called jurisdiction clause (cl 3) which provided that the bill of lading should be governed by English law and included a London arbitration clause. The bill of lading under which the screws were shipped contained no arbitration clause, but contained an exclusive jurisdiction clause under which disputes were to be referred to a court in the country where the carrier had his principal place of business, which was Uruguay, and that the proper law of the contract was the law of Uruguay.

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* The text is reproduced from All England Law Reports, Vol. 2, p. 546 ff. (1984)

The wool cargo was discharged in January 1983. The one-year time limit, with extensions, was due to expire on 17 February 1984. On 31 January 1984 the cargo owners issued their writ in the action, and on the same day the cargo owners' solicitors obtained a warrant for the arrest of the vessel. She has not yet come within the jurisdiction of the Admiralty Court, and so the writ has not been served, nor has the vessel been arrested. However, solicitors acting on behalf of the shipowners discovered that the writ had been issued. They then voluntarily filed an acknowledgment of service on behalf of the shipowners, although no writ had been served. Their purpose in so doing I shall explain in a moment.

On 17 February 1984, in order to protect the time position having regard to the arbitration clause in the wool bills of lading, the cargo owners' solicitors nominated an arbitrator. The appointment was expressed to be in respect of both the wool bills of lading and the screws bill of lading, and was also expressed to be without prejudice to, inter alia, cargo claimant's rights to arrest any of the shipowners' vessels. On 27 February the shipowners' solicitors responded, nominating an arbitrator both under the wool bills of lading and under the screws bill of lading.

On 2 March the shipowners issued a notice of motion, asking for a stay of proceedings. This was served on 13 March. Argument took place before Sheen J on 20–23 March and, as I have recorded, he delivered his judgment on 29 March. The shipowners applied for a stay of proceedings under s 1 of the Arbitration Act 1975 and, if necessary, an order setting aside the warrant of arrest. It is common ground between the parties that the wool bills of lading contained a non-domestic arbitration agreement, to which s 1 of the 1975 Act applied. The screws bill of lading contained no such agreement. Even so, by virtue of the nomination of the parties' arbitrators, there has come into existence an ad hoc arbitration agreement in respect of the dispute which has arisen under the screws bill of lading, though there is a dispute whether s 1 of the 1975 Act applies in the circumstances of the present case.

It will, I think, be helpful if at this stage I set out the provisions of s 1(1) and (2) of the 1975 Act:

> "Staying court proceedings where party proves arbitration agreement.—(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings 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."

I need not refer to sub-ss (3) and (4).

The shipowners' application for a stay was made under that section. I must now explain the purpose of the shipowners in entering a voluntary acknowledgment of service. This was to make what has been called a 'pre-emptive strike'. Their purpose was to put themselves in a position to make an application for a stay of proceedings under s 1 of the 1975 Act before their vessel arrived within the jurisdiction of the court, so that they could obtain an order which would effectively freeze the warrant of arrest before the vessel was arrested. For the cargo owners' counsel has conceded, rightly in my opinion, that the effect of the Rules of the Supreme Court (in particular Ord 20, r 10, Ord 10, r 1(5) and Ord 75, rr 1, 3 and 8) is that the shipowners did by this step put themselves in the position of defendants to an action in personam in which proceedings are deemed to have been served, and so they did, by acknowledging service, enable themselves to make an application under s 1 of the 1975 Act.

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Moreover, if the decision of the judge is right, the shipowners' pre-emptive strike has been successful. Before the judge the following issues arose. The first issue was whether he should grant a mandatory stay of the proceedings. As to that, counsel for the cargo owners submitted to the judge, first, that no stay should be granted in respect of the claim under the wool bills of lading because on the evidence the shipowners were in such financial difficulty that they were unable to satisfy any arbitration award which might be made against them, with the effect that the arbitration agreement was incapable of being performed within those words in s 1 of the 1975 Act and, second, that, as regards the screws bill of lading, s 1 of the 1975 Act was not applicable because proceedings were commenced before the parties entered into the ad hoc arbitration agreement. The judge rejected the first of these submissions and counsel has not sought to pursue the point before this court. The judge also rejected the second submission on the ground that on the form of indorsement on this particular writ it was not possible to distinguish the claim of one plaintiff from the claim of another. So the result was that the judge granted a stay of proceedings in respect of all claims under s 1 of the 1975 Act.

He then proceeded to consider the position as regards the warrant of arrest. The judge rejected an argument of the shipowners that the effect of an order for a stay of proceedings was that the warrant could not be executed, and so the question then arose whether an order should be made staying the execution of the warrant. For the cargo owners counsel advanced two reasons why no such order should be made. His first submission was that the court has power under s 12(6)(*f*) of the Arbitration Act 1950 to permit or order the arrest of a ship for the purpose of obtaining security in an arbitration. His second submission was that the court has power to permit or order the arrest of the ship on the evidence before it to secure a judgment in the action on the principles stated by Brandon J in *The Rena K* [1979] 1 All ER 397, [1979] QB 377, because it appeared that the shipowners might well be unable to satisfy an arbitration award and, in that event, the cargo owners might find it necessary to invoke the residual jurisdiction of the Admiralty Court to lift the stay and allow the action in rem to proceed. The judge rejected both these submissions, and so ordered a stay of execution of the warrant of arrest. The pre-emptive strike, therefore, succeeded.

The cargo owners, in seeking leave to appeal, submit that the judge was wrong in rejecting each of these two submission. The first of the two submissions I can deal with briefly. Section 12(6) of the 1950 Act provides, so far as material, as follows:

> 'The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of . . . (*f*) securing the amount in dispute in the reference . . . as it has for the purpose of and in relation to an action or matter in the High Court . . .'

The submission of counsel for the cargo owners before the judge, which he repeated before us, was that the power to issue a warrant of arrest under which the Admiralty Marshal is commanded to execute the warrant by arresting the ship constitutes a power of the High Court of making an order securing the amount in dispute within this subsection. A similar submission was considered on two occasions by Brandon J, first in *The Golden Trader, Danemar Scheepvaart Maatschappij BV v Golden Trader (owners)* [1974] 2 All ER 686 at 695, [1975] QB 348 at 358 and second in *The Rena K* [1979] 1 All ER 397 at 418, [1979] QB 377 at 408. On each occasion the submission was rejected by him.

I turn straight to *The Rena K*, where Brandon J had this to say:

> '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 RSC Ord 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 RSC Ord 29, rr 2(3) and 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.'

This reasoning was followed and applied by the judge in the present case, and I find myself to be in agreement with him. I must confess that it would not have occurred to me to describe the jurisdiction to issue a warrant of arrest as a power of the court of making an order securing the amount in dispute. I would describe it as a power to issue a warrant, the warrant being rather an instruction to the marshal than an order in the sense in which the latter word is usually used in interlocutory orders of the court, especially having regard to the orders listed in paras (*a*) to (*h*) of s 12(6), relating to such matters as security for costs, discovery and so on. I agree with Brandon J that s 12(6)(*f*) relates to the court's powers under such rules as Ord 29, rr 2(3) and 6, and that it does not, on its true construction, refer to the jurisdiction to issue a warrant of arrest. I can see no ground for interfering with the judge's decision on this point.

I turn then to the central point in the case, which is concerned with the principle enunciated by Brandon J in *The Rena K*. The question of the Admiralty Court's jurisdiction to arrest a ship or to continue such an arrest in relation to arbitration proceedings was recently considered by this court in *The Andria* [1984] 1 All ER 1126, [1984] 2 WLR 570. It may help to put the principle in *The Rena K* in its context if I first refer to the judgment in *The Andria*. In that case it was held that, although the only prerequisite to the court's jurisdiction to issue a warrant for arrest is that a writ must have been issued in an action in rem, nevertheless the court should not exercise that jurisdiction for the purpose of providing security for an award which may be made in arbitration proceedings. The relevant passage in the judgment of the court in *The Andria* [1984] 1 All ER 1126 at 1134–1135, [1984] 2 WLR 570 at 579–580 reads as follows:

> 'The mere fact that the dispute between the parties falls within the scope of an arbitration agreement entered into between them does not of itself generally preclude one of them from bringing an action. Accordingly, the mere existence of an arbitration agreement will not of itself prevent a party from issuing a writ, or serving the writ and (in the case of an action in rem), procuring the arrest of the ship, or otherwise proceeding with the action. But the arbitration agreement can, of course, have certain consequences. For example, if an action is begun, the other party may apply for a stay of proceedings. Generally speaking, the court's power to grant a stay in such a case is discretionary; though of course in cases falling within s 1 of the Arbitration Act 1975 the court is bound to grant a stay. Again, if a party actively pursues proceedings in respect of the same claim both in the court and in arbitration, his so proceeding may be regarded as vexatious and an abuse of the process of the court; if so, the court may, in the exercise of its inherent power, require him to elect in which forum he will pursue his claim: see *The Cap Bon* [1967] 1 Lloyd's Rep 543. Next, let it be supposed that, before the court has granted a stay of proceedings under the Arbitration Acts, the plaintiff has obtained security by the arrest of a ship in an action in rem. If the stay is granted in the exercise of its discretionary power under s 4 of the Arbitration Act 1950, the court may require, as a condition of granting a stay, that alternative security should be made available to secure an award made in the arbitration proceedings: see *The Golden Trader*. If a mandatory stay is granted under s 1 of the Arbitration Act 1975, no such term can be imposed. But it has been held by Brandon J that, where it is shown by the plaintiff that an arbitration award in his favour is unlikely to be satisfied by the defendant, the security available in the action in rem may be ordered to stand so that, if the plaintiff may have thereafter to pursue the action in rem (possibly using an unsatisfied arbitration award for the purpose of an issue estoppel) the security will remain available in that action: see *The Rena K*. (We have not had to consider the principle in that case, and we have not heard arguments on the point; however, we proceed on the basis that that principle is sound.) However, on the law as it stands at present, the court's jurisdiction to arrest a ship in an action in rem should

not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings, eg arbitration proceedings. The time may well come when the law on this point may be changed: see s 26 of the Civil Jurisdiction and Judgments Act 1982, which has however not yet been brought into force. But that is not yet the law. It follows that, if a plaintiff invokes the jurisdiction of the court to obtain the arrest of a ship as security for an award in arbitration proceedings, the court should not issue a warrant of arrest.'

It is the principle in *The Rena K*, summarised in the passage I have just read, which the cargo owners have invoked in the present case. In *The Andria* this court declined to express any opinion on the soundness of that principle, which had not been considered in argument before it. It is necessary to turn to *The Rena K* itself to find a statement of that principle, and the basis on which it was formulated. Brandon J there drew a distinction between the choice of forum for the determination of the merits of the dispute and the right to security in respect of maritime claims under the Admiralty law of this country, and pointed out that this distinction had been recognised and given effect to by the way in which the court had exercised its jurisdiction in relation to foreign jurisdiction clauses and in vexation cases. He continued ([1979] 1 All ER 397 at 415, [1979] QB 377 at 404–405):

'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 (TS 47 (1960); Cmnd 1128). 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 RSC Ord 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 of 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.'

Brandon J then proceeded to consider and reject an argument that the power to lift the stay of the action could not be exercised once an arbitration award had been made

because, once an award was made, the cause of action would become merged in the award and, therefore, would no longer be available for prosecution in the action. He concluded, however, that no such merger would take place where the cause of action was in rem. He then concluded the relevant passage in his judgment as follows, addressing himself to the facts of the case before him: [1979] 1 All ER 397 at 417, [1979] QB 377 at 406):

> 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 . . . 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 that 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 28th July 1977, by either keeping the ship under arrest or by only releasing her subject to a term for the provision of alternative security.'

On the basis of that principle, counsel for the cargo owners submitted to the judge in the present case that, having regard to the evidence before the court relating to the financial situation of the shipowners, they might well be unable to satisfy an award in the pending arbitration and, therefore, it would not be appropriate for the judge, in the exercise of his discretion, to stay the execution of the warrant of arrest, so that the vessel could be arrested to provide security to enable a judgment in the action to be satisfied, if the stay of the proceedings were thereafter to be lifted and the cargo owners were to obtain such a judgment in the action. The judge's reaction to that submission was as follows. He quoted a passage from this court's judgment in *The Andria* [1984] 1 All ER 1126 at 1134–1135, [1984] 2 WLR 570 at 579–580 which I have already set out in this judgment, and he then continued:

> 'In *The Rena K* Brandon J pointed out that a claimant who obtains an award in an arbitration is not prevented from pursuing his remedy in an action in rem. It was for this reason that the judge found it possible to hold that the security obtained by the arrest of *The Rena K* could be retained in case the plaintiffs' award in the arbitration remained unsatisfied. In that event the plaintiffs would seek to persuade the court to lift the stay in the action. In *The Andria* the Court of Appeal did not have to consider whether the course taken by Brandon J in *The Rena K* was justified in principle. Mr Macdonald [counsel for the shipowners] invited me to say that I should not follow that decision because it was wrong in principle. I do not have to decide that point because in the light of the passage quoted above from the judgment of the Court of Appeal in *The Andria* there can be no doubt that the court's jurisdiction to arrest a ship in an action in rem will not be exercised for the purpose of providing security for an award in arbitration proceedings until s 26 of the Civil Jurisdiction and Judgments Act 1982 is brought into force. I can only express the hope that that section will soon come into force. For these reasons I order that this action be stayed and that there be a stay of execution of the warrant of arrest until further order.'

With all respect to the judge, however, it was not being suggested to him by the cargo owners at this stage of their argument that it would be appropriate, on the principle in *The Rena K*, for the court's jurisdiction to arrest to be exercised for the purpose of providing security for an award in arbitration proceedings. That had been their submission based on s 26(3) of the 1950 Act, but the whole point of the principle of *The Rena K* invoked by the cargo owners was that security is provided not for an arbitration award but for judgment in the action in rem itself, if the stay of the action

should subsequently be lifted after failure by the shipowners to satisfy an award in the arbitration.

Before the court, counsel for the shipowners repeated the submission made before the judge by Mr Macdonald that the principle in *The Rena K* was wrong and ought not to be followed. But he put in the forefront of his argument a submission that the decision of the judge should be supported on a different ground. This submission was founded on the wording of s 4(1) of the 1975 Act. Under that subsection in the circumstances there specified it is provided that the court 'shall make an order staying the proceedings'. This meant, submitted counsel, the whole proceedings. The warrant of arrest is the creature of the action itself. If the proceedings have to be stayed, there can be no further steps taken in those proceedings, and in particular no further steps can be taken to execute the warrant of arrest.

This argument I am unable to accept. I do not consider that counsel can, so to speak, pre-empt the position in this way. The function of a stay of proceedings under s 4(1) is to give effect to the arbitration agreement; only in so far as it is necessary for that purpose should the proceedings be stayed. To take a simple example, let it be supposed that in certain proceedings two claims are advanced, one of which is within the relevant arbitration agreement and the other is not. In such a case it would be entirely consistent with s 4(1) to order a stay of the proceedings only in so far as they are related to the claim within the arbitration agreement, allowing the proceedings to continue as to the other claim. Likewise, in my judgment, if the principle in *The Rena K* is well founded, it presupposes that the security will stand for the purpose of a judgment in the action in rem in the event, which on the evidence might well occur, of the arbitration foundering because an award is not satisfied and the stay then being lifted. To permit security to be retained for that purpose is, on the principle as stated in *The Rena K*, consistent with giving effect to the arbitration agreement, and so the security is not caught by a stay which has effect only so far as is necessary to give effect to the arbitration agreement.

It is necessary, therefore, to proceed to consider whether the principle in *The Rena K* is well founded. Counsel for the shipowners advanced four reasons why in his submission it was not. He first submitted that it ignored the reality of the situation. In reality, he said, if a stay of the action in rem is lifted after an arbitration award has been made but has not been honoured, the action is being used for the purpose of enforcing the award. All that will happen is that the award will be invoked as an issue estoppel, and a judgment will be given which has in practice the effect of enforcing the award. The Admiralty jurisdiction, he pointed out, is a jurisdiction to hear and determine claims within the categories specified in s 20 of the Supreme Court Act 1981. In a *Rena K* type of case there would be no hearing or determination at all. I cannot accept this submission. At the very least, as counsel for the cargo owners pointed out, there will be a determination whether to give effect to an issue estoppel, and so the award and the basis on which the award is said to create an issue estoppel will have to be the subject of evidence before the court if not admitted. There will, therefore, be a hearing and a determination, though it may well be brief. Moreover, it will not in law be an action in which the award is itself enforced. The action is not an action on the award, but an action founded on the original cause of action identified in the writ. The result may be that a judgment will be obtained for a sum equal to the sum awarded by arbitration, and in respect of the same cause of action, but it does not follow that the award itself is being enforced in the action.

Counsel for the shipowners next submitted that to give effect to the principle in *The Rena K* is really to order a stay of proceedings on terms, which is not permissible under a statute requiring a mandatory stay of proceedings. I do not agree. A stay of proceedings on terms occurs where a stay would only be effective if a certain condition is fulfilled, e g the provision of security in a certain sum. But on the principle in *The Rena K* there is an unconditional stay of proceedings. All that happens is that it leaves the warrant of arrest unaffected.

Next, counsel for the shipowners referred to a decision of this court in *Paczy v Haendler & Natermann GmbH* [1981] 1 Lloyd's Rep 302. That case has, however, no bearing on the principle in *The Rena K*, which was apparently not cited to the court, being concerned not with that principle but with the effect of the words 'incapable of being performed' in s 4(1) of the 1975 Act.

Finally, counsel for the shipowners submitted that under the principle in *The Rena K* the effect is that, despite a stay of proceedings, a vessel can be arrested or detained under arrest, and all sorts of steps will be taken in consequence, eg the vessel will be in the custody of the marshal, he may have to seek directions from the court and the parties may have to appear before the court on applications for directions, all of which, he submitted, were inconsistent with a stay of proceedings. I do not, however, find this argument persuasive, because the vessel is arrested or retained as security, and the security is being administered not in relation to the arbitration proceedings but in relation to a possible judgment in the action in the event of the stay of the proceedings being lifted.

It follows that I am unable to accept any of counsel's criticisms of *The Rena K* principle. I ~~for my part~~ find the reasoning of Brandon J in *The Rena K* persuasive, and, for the reasons set out by him in his judgment in that case, I respectfully accept the principle as stated by him as being well founded.

It is, of course, true that in *The Rena K* the question was whether it was possible in the event of a stay of proceedings to retain security that had already been obtained, whereas in the present case the question is whether, if a stay of proceedings is ordered, the warrant of arrest shall stand unaffected so that it can be executed by the marshal in the event of the vessel coming within the jurisdiction of the court. I can, however, see no relevant distinction between the two cases. If the principle in *The Rena K* is well founded, it is in my judgment equally applicable in both cases. If it is applicable the effect must be that a warrant of arrest already issued but not executed will not be stayed and that security already obtained by the execution of the warrant of arrest or otherwise will not be released.

Before I turn to consider whether on the evidence this is a case where *The Rena K* principle should be applied, I should briefly mention one other argument advanced by counsel for the shipowners. This was that, since the affidavit to lead the warrant of arrest did not disclose the fact that there was an arbitration clause in the wool bill of lading, there had not been the full and frank disclosure which is required on ex parte applications of this kind, and on that ground also the arrest should be set aside: see *The Andria*. In my judgment, this argument is without substance, as appears from the judgment in that case. There an arrest was set aside because the affidavit to lead the warrant failed to disclose that at the date of the affidavit the parties had entered into an ad hoc arbitration agreement for the resolution of the very dispute which was the subject matter of the action in rem and that the parties were actively pursuing arbitration proceedings under that agreement. In such circumstances the court would, had it been aware of those facts, have declined to exercise its jurisdiction to issue a warrant, unless facts were also deposed to (which they were not) bringing the case within the principle in *The Rena K*. The present case is, however, not such a case. It does not follow that, because there is an arbitration agreement, eg (as here) an arbitration clause in a bill of lading, that agreement will be invoked for the purpose of deciding a dispute which has arisen under it, and so it is pointed out in the judgment in *The Andria* [1984] 1 All ER 1126 at 1135–1136, [1984] 2 WLR 570 at 580–581, the mere fact that there is an arbitration agreement does not of itself generally preclude a party of the agreement from bringing an action in the case of an action in rem, procuring the arrest of a ship. I can discern no lack of disclosure in the affidavit to lead the warrant in the present case.

I turn then to the question whether, on the evidence, this is an appropriate case for the application of *The Rena K* principle. The evidence discloses the following state of affairs. First, the shipowners can obtain no assistance from their P & I Club, because that club, the Oceanus, is in severe financial difficulty and indeed is at present the subject of winding up proceedings in Bermuda. So the possibility of club support, assuming that that factor would in any event be relevant, can be rejected as out of the question in the present case. So far as the shipowners themselves are concerned, it appears from the evidence that they own two ships. The Tuyuti herself is stated by the shipowners' solicitors to have a sound, open market value of about $US[illegible] but she is subject to two mortgages; on the first, over 8m French francs are still outstanding, and the second appears to be for a sum of about $US720,000. The other ship, the Yaguari, was purchased at some unspecified date for $US1,500,000, but it appears that $US840,000 of her purchase price is still outstanding, presumably on mortgage. In addition, $US270,000 is owed by the shipowners in respect of bunkers; Oceanus has unpaid calls in the sum of

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$US413,000 in respect of the shipowners' fleet, of which $US117,000 relates to the Luyuti herself, though we are told that these calls are the subject matter of a dispute between the shipowners and the club; and there are cargo claims which have to be directly attended to by the shipowners owing to the failure of Oceanus. It is scarcely surprising that in these circumstances the shipowners have stated that they recognise that the cargo owners will not find the position encouraging, although they have expressed hopes as to the payment of these debts and as to the future when they emerge from the most difficult times in which the shipping industry now finds itself.

As counsel for the shipowners pointed out, this is not the case of a one-ship company, where the single ship is likely to be disposed of to defeat the claim. But the applicable test is whether, if the plaintiff should obtain an award in respect of the full amount of that claim, the defendants might well be unable to satisfy it. I feel bound to conclude that, on the evidence now before us, that test is indeed fulfilled. I should add that in reaching that conclusion I have taken into account a limitation fund established, I believe in Antwerp, by means of an AFIA bond.

It follows, in my judgment, that on the evidence in this case the *Rena K* principle is applicable and that the warrant of arrest should not be stayed but should be allowed to stand to be executed as appropriate. For these reasons I would give leave to appeal and, treating the hearing of the renewed application for leave as the hearing of the appeal, I would allow the appeal and reverse the judge's order in so far as it imposed a stay on the execution of the warrant.

I should before concluding this judgment refer to one other argument advanced by counsel for the cargo owners, both before the judge and before this court, relating to the screws bill of lading. So far as the claim under that bill of lading is concerned, the writ and the warrant were issued first, and the ad hoc submission to arbitration came later. In his argument on this point counsel focused on the opening words of s 1(1) of the 1975 Act, which reads: 'If any party to an arbitration agreement to which this section applies . . . commences any legal proceedings . . .' It follows, submitted counsel, that the subsection only applies where, at the time of the commencement of the proceedings, that party was already a party to the relevant arbitration agreement. This was not so in respect of the screws bill of lading. Accordingly, s 1(1) had no application to the claim under that bill of lading and there should have been no stay of proceedings in respect of it. This submission raises the question of the meaning to be given to the word 'commences' in the subsection. Ought that word to be read as relating only to commencement of proceedings by a person who is then party to the relevant arbitration proceedings? Or ought it to be read as referring to commencement at any time, including commencements before the arbitration agreement has been made? An absolutely literal construction favours the first approach, but regard to the purpose of the subsection would appear to favour the second approach, because it is not apparent why the court's duty to stay proceedings should not equally apply where an arbitration has been entered into after proceedings have been commenced. I am inclined to prefer the latter approach. There is however here an ambiguity, and since the 1975 Act was passed to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (TS 20 (1976); Cmnd 6419), it is legitimate in such circumstances to have regard to the treaty: see *The Jade, The Eschersheim, Erkowit (owners) v Jade (owners), Erkowit (cargo owners) v Eschersheim (owners)* [1976] 1 All ER 920, [1976] 1 WLR 430. Article II of the treaty provides as follows:

> '1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration . . .'

* * *

[illegible]

10. That article shows that under the treaty the court's duty to refer the parties to arbitration arises when seised of an action in a matter in respect of which the parties have made an arbitration agreement. It is not limited to cases where after the parties have made such an agreement the court becomes seised of the action or matter. Recourse to the treaty therefore favours the second approach, which I myself have felt inclined to accept as a matter of construction. In these circumstances, I would reject the literal approach, and it follows that I would, therefore, reject the argument of counsel for the cargo owners on this point.

For these reasons I would not interfere with the judge's order staying the proceedings in relation to the screws bill of lading as well as the wool bill of lading. I would only allow the appeal so far as it relates to the stay of execution of the warrant of arrest. [11]

ACKNER LJ. I agree, and there is nothing that I can usefully add.

Leave to appeal granted. Appeal allowed so far as relates to stay of execution of warrant of arrest. Leave to appeal to House of Lords refused.

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