IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice

Tuesday 24th March 1987

Before:

THE MASTER OF THE ROLLS

(Sir John Donaldson)

LORD JUSTICE WOOLF

LORD JUSTICE RUSSELL

DEUTSCHE SCHACHTBAU-UND TIEFBOHRGESELLSCHAFT mbH

v

THE R'AS AL KHAIMAH NATIONAL OIL COMPANY

&

SHELL INTERNATIONAL PETROLEUM COMPANY LIMITED

(Transcript of the Association of Official Shorthandwriters Limited, Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London WC2A 3RU).

MR A. C. LONGMORE, Q.C., and MR A. D. W. PARDOE, instructed by Messrs William A. Crump & Co., appeared for the Appellant: (Rakoil).

MR S. C. BOYD, Q.C., and MR I. B. GLICK, instructed by Messrs Herbert Smith & Co., appeared for the Respondents (D.S.T.).

MR D. B. JOHNSON, Q.C., and MR A. M. D. HAVELOCK-ALLAN, instructed by Messrs Middleton Potts, appeared for the Interveners (Shell).

J U D G M E N T

THE MASTER OF THE ROLLS: Disputes arose between Deutsche Schachtbau-und Tiefbohrgesellschaft mbH ("D.S.T.") and R'as Al Khaimah National Oil Company ("Rakoil") under an oil exploration agreement dated 1st September 1976. The agreement contained an I.C.C. arbitration clause and, in March 1979, D.S.T. referred its claims to an arbitral tribunal sitting in Geneva. In April 1979 Rakoil instituted proceedings in the court of R'As Al Khaimah for the rescission of the agreement upon the ground that it had been obtained by misrepresentation and also for damages. Neither party took any part in the proceedings instituted by the other. D.S.T. succeeded in the arbitration, the award dated 4th July 1980 being for US $4,635,664. Rakoil succeeded in the litigation, judgment being given on 3rd December 1979 whereby the agreement, or perhaps more accurately an earlier underlying agreement, was rescinded and D.S.T. were held liable to Rakoil in the sum of US $1,424,891.23 and Dirhams 110,687,839.61.

At this stage honour, but little else, was satisfied, since neither party could find a way of enforcing these decisions. That situation might have continued indefinitely, but for the fact that in about June 1986 rumours reached D.S.T. that Shell International Petroleum Co. Ltd. ("Shell") had been buying oil from Rakoil and would, presumably, be paying for that oil. Shell was an English subsidiary of the Anglo-Dutch group and D.S.T. set about trying to satisfy the award out of Shell's payments to Rakoil.

On 2nd July 1986, on the ex parte application of D.S.T., Mr Justice Bingham, as he then was, made orders:

(i) pursuant to Order 73 rule 10 and section 3(1)(a)

of the Arbitration Act, 1975, granting leave to D.S.T. to enforce the Geneva arbitration award in the same manner as a judgment for the sum awarded, together with interest thereon amounting to a further sum of US $3,778,366.49.

(ii) restraining Rakoil from "removing outside the jurisdiction, disposing of, charging or otherwise dealing with any monies owned by them or deposited by them within the jurisdiction, or any debts due or to become due to them within, or from any person within the jurisdiction [and in particular from directing, accepting or receiving payment of the debt or debts due or to become due to them from Shell International Petroleum Co. Ltd. or any other company or corporation resident in England and Wales] up to the amount of US $8,500,000".

The words in square brackets were added by a further order of Mr Justice Bingham made on 24th July 1986, again on the ex parte application of D.S.T.

On 8th August 1986 Mr Justice Bingham refused an application to discharge this injunction, noting that there was a pending application to set aside that part of his order dated 2nd July 1986, which had given D.S.T. leave to enforce the arbitration award as a judgment. That application to set aside was heard by Mr Justice Leggatt on 25th February 1987.

Meanwhile, on 22nd January 1987, Rakoil applied for and obtained the leave of Mr Justice Staughton to issue a writ for service on D.S.T. in Germany claiming to enforce the R'As Al Khaimah judgment. The intention was to found a counterclaim to that based upon the award. An application to set aside that leave and all subsequent proceedings came before Mr Justi

Leggatt at the same time as the application to set aside the leave to enforce the award as a judgment.

Mr Justice Leggatt refused to set aside the leave granted to D.S.T. to enforce the award and set aside the leave to serve the writ issued by Rakoil against D.S.T. However he imposed a stay on execution of the award until after the hearing of an appeal to this court against the refusal of Mr Justice Bingham to discharge the injunction. That appeal was due to be heard on 9th March 1987.

The reality was, and is, that D.S.T. has to uphold the validity of the orders both of Mr Justice Bingham and Mr Justice Leggatt if they are to enjoy any fruits of this litigation. If the leave to enforce the award is set aside, cadit quaestio. If the injunction is set aside, any assets of Rakoil in this country will disappear overseas in the twinkling of a telex.

Accordingly arrangements were made for the appeal from the judgment of Mr Justice Leggatt to be heard at the same time as that from the judgment of Mr Justice Bingham.

Meanwhile Shell were subjected to substantial commercial pressure to pay Rakoil in New York and, on their application, were given leave to intervene in the appeal against the grant and continuance of the injunction, which was inhibiting them from so doing. Thus the scene was set for an appeal which has raised issues of some general importance and which has been argued with great skill by all concerned.

The logical starting point for a consideration of those issues must be the order giving leave to enforce the award and the refusal to set it aside.

1 Enforcement of the Award

The Geneva award is a "Convention Award" within the meaning of the Arbitration Act, 1975, being an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, namely Switzerland, which is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It follows that it is enforceable in England either by action or under section 26 of the Arbitration Act 1950 and that such enforcement is mandatory, save in the exceptional cases listed in section 5 of the 1975 Act.

Section 5 provides, so far as is material, that:

"Refusal of enforcement.

"5.-(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

"(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves -

"(a) ...

"(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or

"(c) ...

"(d) (subject to subsection (4) of this section) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or

"(e) ...

"(f) ...

"(3) Enforcement of a Convention award may also be

refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

"(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted."

Section 26 of the 1950 Act provides that:

"An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

The machinery for applying for leave to enforce such an award is regulated by Order 73 rule 10. Suffice it to say that the application may be made ex parte, although the court can direct that a summons be issued, and that "the debtor" may apply to set the order aside within a specified time, in this case 23 days, of the order giving leave being served upon him and that "the award shall not be enforced until after the expiration of that period or, if the debtor applies within that period to set aside the order, until after the application is finally disposed of". (rule 10(6)).

D.S.T. complied with all the formalities and, subject to the result of this appeal, is, and has since 2nd July 1986 been, entitled "to enforce the award in the same manner as a judgment or order to the same effect" and to enter judgment in the terms of the award, which D.S.T. has in fact done, but subject always to a continuing inability to proceed

to immediate enforcement initially because of the terms of Order 73 rule 10(6) and latterly because of the stay granted by Mr Justice Leggatt.

Mr Andrew Longmore, Q.C., for Rakoil, takes a number of points which can be consolidated under five heads:

(a) Is the arbitration agreement subject to the law of R'As Al Khaimah and void under that law?

(b) Can Rakoil rely upon the decision of the court of R'As Al Khaimah without regard to English rules on the recognition of foreign judgments?

(c) Did the award exceed the scope of the submission and, if so, can enforcement be refused in whole or in part (subsections (2)(d) and (4) of section 5 of the Arbitration Act, 1975)?

(d) Would it be contrary to public policy to enforce the award?

(e) Are the answers to these questions so clear that there ought to be summary judgment, as contrasted with leaving D.S.T. to sue on the award?

The proper law of the arbitration agreement

It is common ground that this falls to be ascertained by the application of the English rules for the resolution of conflict of laws, since the instant proceedings are in the English courts.

The agreement to arbitrate is contained in Article XXI of the contract and is in the following terms:

"XXI.1 All disputes arising in connection with the interpretation or application of this Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by

three arbitrators appointed in accordance with the Rules.

"XXI.2 The arbitration shall be held in Geneva, Switzerland and shall be conducted in the English language."

Mr Longmore submits that the proper law of this agreement to arbitrate is that which applies to the wider (substantive) agreement in which it is contained and that, applying the rule that, in the absence of indications of some different choice by the parties, the proper law of a contract is that system of law with which the transaction has the closest and most real connection, the relevant law is that of R'As Al Khaimah (Compagnie d'Armement Maritime v Compagnie Tunisienne de Navigation S.A. (1971) A.C. 572.)

Mr Stewart Boyd, Q.C., appearing for D.S.T., however rightly points out that an arbitration agreement constitutes a self-contained contract collateral or ancillary to the substantive agreement (Bremer Vulkan v South India Shipping (1981) A.C. 909) and that it need not be governed by the same law as that agreement (Hamlyn v Talisker Distillery (1894) A.C. 202, and Black Clawson v Papierwerke (1981) 2 Ll.L.R. 446). Furthermore the rules for the I.C.C. court of arbitration, of which the parties must be deemed to have been aware, contemplate by Article 8.4 that the arbitrator "shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexisten or null and void, to determine the respective rights of the parties and to adjudicate their claims and pleas". The intention of the parties that the agreement to arbitrate

shall be an independent and collateral contract could not be more clearly indicated.

[A] Looking at the arbitration agreement in isolation, there can only be one answer, namely, that it is governed by Swiss law. Of course it is not permissible to do this and regard must be had to all the surrounding circumstances, including [B] the proper law governing the substantive contract and to the fact that the contract was to be performed in R'As Al Khaimah. However, in view of the international character of the enterprise, it is far from self-evident that the substantive [C] contract is governed by the law of R'As Al Khaimah. As is not unusual in the oil industry, it involved parties of differing nationalities, using United States dollars as the [D] money of account, who have chosen a neutral forum for the resolution of disputes and may well be thought to have chosen a neutral law to govern their rights and liabilities. This probability becomes all the stronger when reference is made [E] to Article 13.3 of the I.C.C. Rules which provides that:

"The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the [F] applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate."

[G] This suggests that the parties intended to delegate to the arbitrators the choice of law governing the substantive contract, applying what they considered to be appropriate principles and, in the event, the arbitrators did not hold that the contract was governed by the law of R'As Al Khaimah.

[H] Giving the fullest possible weight to any argument

favouring the law of R'As Al Khaimah as the proper law of the substantive contract and to the fact that it was undoubtedly the law of the place of performance, I find myself in complete agreement with Mr Justice Leggatt that the proper law of the arbitration is Swiss.

III Effect of the judgment of the court of R'As Al Khaimah

[11] Once it is decided that the agreement to arbitrate is governed by Swiss law, the judgment becomes irrelevant to the validity of that agreement, whether the judgment is viewed as a judgment of a court of competent jurisdiction or as an expert opinion upon the law of R'As Al Khaimah. In terms of Swiss law, which is the only relevant law in the context of the validity of the arbitration agreement, the affidavit evidence of Professor Pierre Lalive is that the arbitration agreement is valid and that this validity is unaffected by any question as to the validity of the contract of which it forms part. This evidence stands uncontradicted. Furthermore no application was made to cross-examine him on his affidavit.

[12] The judgment has, however, to be considered in the context of the decision by Mr Justice Leggatt to set aside the leave to serve the writ outside the jurisdiction seeking to enforce it by way of counterclaim. At this point it becomes necessary to look, albeit briefly, at section 32 of the Civil Jurisdiction and Judgments Act, 1982. This, so far as is material, provides as follows:

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

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

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

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

"(2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.

"(3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2)."

The bringing of proceedings by Rakoil in the court of R'As Al Khaimah was a breach of the arbitration agreement, whose scope was amply wide enough to cover all matters in dispute in those proceedings, and accordingly the judgment cannot be recognised or enforced. It follows that Mr Justice Leggatt was right to set aside the leave to serve the writ out of the jurisdiction and the R'as Al Khaimah judgment disappears from the scene.

The scope of the award and of the arbitration agreement

Mr Longmore submits that the award deals with a difference

or differences not contemplated by, or not falling within, the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration and that it is not possible to separate such matters from those falling within the true scope of the agreement. Accordingly enforcement should be refused (subsections (2)(d) and (4) of section 5 of the Arbitration Act, 1975) or at the very least there should not be summary enforcement.

[16] The claim in the arbitration was made by D.S.T. on its own behalf and as agent for and representative of a group of companies including a German company to which I will refer as "Deminex". Deminex, unlike the other companies in the group, does not appear to have been a party to the arbitration agreement. The award also mentioned a company called "Sea & Land" and notes that it had a contract with the Government of R'As Al Khaimah which had not been submitted to arbitration. It appears from the award that both Deminex and Sea & Land were members of a consortium of which D.S.T. was the leader.

The interest of Deminex was challenged in a letter to the Secretary General of the I.C.C. dated 5th April 1979 from the English solicitors of Rakoil. That letter was brought to the attention of the arbitrators and is mentioned in the award. They were also aware that Sea & Land was not a party to the dispute and it is not apparent to me that D.S.T. was ever claiming on behalf of Sea & Land.

Rakoil has never denied the fact that D.S.T. was a party to the arbitration agreement and the award determines only the rights of D.S.T. and Rakoil inter se. It makes no award in favour of Deminex or Sea & Land and makes no determination

of the rights of Deminex or Sea & Land against D.S.T. If the arbitrators have erred in the amount awarded to D.S.T., because they have wrongly taken account of the interests of Deminex or Sea & Land, that is a matter which should have been the subject of a claim to relief from the Swiss court. No such application has been made. The burden of proving any excess of jurisdictio lies on the person seeking to resist the enforcement of the award. In the light of the failure to apply to the Swiss courts, of the evidence of Professor Pierre Lalive as to the wide powers of arbitrators under Swiss law, of the fact that the award is made solely in favour of D.S.T. and of the terms of the award itself from which it seems that the arbitrators have held that D.S.T. had independent rights as "the Operator", I am not satisfied that there has been any excess of jurisdicti This objection therefore fails.

Public Policy in relation to the enforcement of the award

In pursuance of their duty under Article 13.3 of the I.C.C. rules, the arbitrators determined that the proper law governing the substantive obligations of the parties was "internationally accepted principles of law governing contractu relations". The arbitrators prefaced this decision with the following statement:

"The Arbitration Tribunal holds that:

"The Concession Agreement, the Assignment Agreement and the 1976 Operating Agreement are contracts between, on one hand, a number of companies organised under various laws, and, on the other hand, a State respectively a company which is actually an agency of such state.

"Reference either to the law of any one of the companies, or of such State, or of the State on whose territory one or

several of these contracts were entered into, may seem inappropriate, for several reasons.

"The Arbitration Tribunal will refer to what has become common practice in international arbitrations particularly in the field of oil drilling concessions, and especially to arbitrations located in Switzerland. Indeed, this practice, which must have been known to the parties, should be regarded as representing their implicit will. Reference is made in particular to the leading cases of Sapphire International Petroleums Ltd. v. National Iranian Oil Company (International Law Reports 1967, 136ff), Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic (International Law Reports 1979, 389ff). See also Lalive, Les Règles de conflit de lois appliquées au fond du litige par l'arbitre internationa siégeant en Suisse, L'arbitrage international privé et la Suisse, 1977; see also Derains, L'application cumulative par l'arbitre des systèmes de conflit de lois intéressés au litige, in Revue de l'arbitrage 1972, p. 100."

Mr Longmore submits that it would be contrary to English public policy to enforce an award which holds that the rights and obligations of the parties are to be determined, not on the basis of any particular national law, but upon some unspecified, and possibly ill defined, internationally accepted principles of law.

In Orion v Belfort (1962) 2 Ll.L.R. 257 Mr Justice Megaw, as he then was, was confronted with an arbitration agreement whereby: "The Arbitrators and Umpire are relieved from all judicial formalities and may abstain from following the strict rules of the law. They shall settle any dispute under this Agreement according to an equitable rather than strictly

legal interpretation of its terms and their decision shall be final and not subject to appeal."

The umpire had refused to state his award in the form of a Special Case and the respondents to an application that he be ordered to do so submitted that no substantial or defined question of law arose. Mr Justice Megaw referred to the classic decision of this court in Czarnikow v Roth Schmidt & Co. (1922) K.B. 478 and, in the tradition of that decision and indeed of the English courts throughout the ages, roundly declared at page 265R: "so long as there is supervisory jurisdiction by the Courts, the parties cannot make a question of law any less a question of law, whether for the purpose of the exercise of the Courts' discretion or otherwise, by purporting to agree that it shall be decided by some extra-legal criterion."

[21] However, Mr Justice Megaw also considered the clause in a different context, namely, whether the courts would give effect to such a clause. Referring again to the Czarnikow case he said, at page 264L:

"The conclusion which I draw from those judgments is that it is the policy of the law in this country that, in the conduct of arbitrations, arbitrators must in general apply a fixed and recognizable system of law, which primarily and normally would be the law of England, and that they cannot be allowed to apply some different criterion such as the view of the individual arbitrator or umpire on abstract justice or equitable principles, which, of course, does not mean 'equity' in the legal sense of the word at all.

"This conclusion is, I think, supported by the judgment of Mr. Justice Goddard in the case of Maritime Insurance Compar

Ltd. v. Assecuranz-Union von 1865, (1935) 52 Ll.L.Rep. 16. I am not going to go into that case in detail. The arbitration clause there contained words very similar to the words in the present Art. 17, and they were as follows:

"... The arbitrators or umpire, as the case may be, shall interpret this treaty rather as an honourable engagement than as a merely legal obligation, and shall be relieved from all judicial formalities, and may abstain from following the strict rule of the law.

"At p.20 of the report, Mr. Justice Goddard deals with the effects of that part of the arbitration clause, and, as I read his judgment, he is saying there that the effect of it is not in any way to alter the requirement that English law shall be applied in the decision of disputes by an English arbitration tribunal.

"I agree with Mr. Evans's submission that parties can validly provide for some other system of law to be applied to an arbitration tribunal. Thus, it may be, though perhaps it would be unusual, that the parties could validly agree that a part, or the whole, of their legal relations should be decided by the arbitral tribunal on the basis of a foreign system of law, or perhaps on the basis of principles of international law; for example, in a contract to which a Sovereign State was a party. It may well be that the arbitral tribunal could properly give effect to such an agreement, and the Court in its supervisory jurisdiction would also give effect to it, just as it would give effect to a contractual provision in the body of the contract that the proper law of the contract should be some system of foreign law. Indeed, it might be another way of achieving the same result, and I

see no reason why an arbitral tribunal in England should not, in a proper case, where the parties have so agreed, apply foreign law or international law.

p.13

"Of course, also, as Mr. Evans again suggested, the parties can by their contract, either in the arbitration clause itself or in the rest of the contract, provide that certain incidents of law which would otherwise attach should not attach, such as the exclusion or alteration of the statutory period of limitation, or the exclusion of the implied terms of Sect. 14 of the Sale of Goods Act, 1893, or suchlike matters. There is no possible objection to that, so long as there is nothing contrary to public policy in the exclusion or alteration of the provisions which, in the absence of agreement, would attach.

"But this is not such a case. If the parties choose to provide in their contract that the rights and obligations shall not be decided in accordance with law but in accordance with some other criterion, such as what the arbitrators consider to be fair and reasonable, whether or not in accordance with law, then, if that provision has any effect at all, its effect, as I see it, would be that there would be no contract, because the parties did not intend the contract to have legal effect to affect their legal relations. If there were no contract, there would be no legally binding arbitration clause, and an 'award' would not be an award which the law would recognize."

77] A clause in the same terms was considered in this court in Eagle Star v Yuval (1978) 1 Ll.L.R. 357, where Lord Denning, with the agreement of Lord Justice Goff and Lord Justice Shaw, said at page 362L:

"... I do not believe that the presence of such a clause makes the whole contract void or a nullity. It is a perfectly good contract. If there is anything wrong with the provision, it can only be on the ground that it is contrary to public policy for parties so to agree. I must say that I cannot see anything in public policy to make this clause void. On the contrary the clause seems to me to be entirely reasonable. It does not oust the jurisdiction of the Courts. It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do today under such a clause as this. Even under an ordinary arbitration submission, it was a mistake for the Courts in the beginning to upset awards simply for errors of law. See what Mr. Justice Williams and Mr. Justice Willes said in Hodgkinson v. Fernie, (1857) 3 C.B.N.S. 189 at pp. 202, 205. That mistake can be avoided by such a clause as this: for, as Lord Justice Scrutton said in Czarnikow v. Roth, Schmid & Co., (1922) 12 Ll.L.Rep. 195; (1922) 2 K.B. 478, the parties can, by express provision, authorise arbitrators to depart from the strictnesses of the law.

"So I am prepared to hold that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than a strict legal interpretation. I realise, of course, that this lessens the points on which one party or the other can ask for a case stated. But that is no bad thing. Cases stated have been carried too far. It would be to the advantage of the commercial community that they should be reduced: and a claim (sic. ?clause) of this kind would go far to ensure this."

In my judgment there are three questions which the court has to ask itself when confronted with a clause which purports to provide that the rights of the parties shall be governed by some system of "law" which is not that of England or any other State or is a serious modification of such a law:

1. Did the parties intend to create legally enforceable rights and obligations?

If they did not, there is no basis for the intervention of the coercive power of the State to give effect to those "rights and obligations". An intention not to create legally enforceable rights and obligations may be expressed - "this agreement is binding in honour only" - or it may be implied from the relationship between the parties or from the fact that the agreed criteria for the determination of the parties' rights and obligations are too vague or idiosyncratic to have been intended as a basis for the creation of such rights and obligations.

2. Is the resulting agreement sufficiently certain to constitute a legally enforceable contract?

This question assumes that the parties intended to create a legally enforceable relationship, but is addressed to the problem of whether the terms of their agreement are too uncerta to produce such a result. However, given that this was the intention of the parties, the courts will not be "too astute or too subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, Verba ita sunt intelligenda ut resmagis valeat quam pereat" (per Lord Wright in Hillas & Co. v Arcos (1932) 147 L.T. 503, 514). In this context another maxim is relevant - "id certum est quod certum reddi potest" - and there is a vital distinctior

between an agreement to agree in future and an agreement to accept terms to be determined by a third party. The former cannot and the latter can form the basis for a legally enforceable agreement.

[36] 3. Would it be contrary to public policy to enforce the award, using the coercive powers of the State?

Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Mr Justice Burrough remarked in Richardson v Mellish (1824) 2 Bing 229, 252 "It is never argued at all, but when other points fail". It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.

[37] Asking myself these questions, I am left in no doubt that the parties intended to create legally enforceable rights and liabilities and that the enforcement of the award would not be contrary to public policy. That only leaves the question of whether the agreement has the requisite degree of certainty. By choosing to arbitrate under the rules of the I.C.C. and, in particular, Article 13.3, the parties have left proper law to be decided by the arbitrators and have not in terms confined the choice to national systems of law. I can see no basis for concluding that the arbitrators' choice of proper law - a common denominator of principles underlying the laws of the various nations governing contractual relations - is outwith the scope of the choice which the parties left to the arbitrators.

I have dealt with the matter in general terms, because Mr Boyd told us that this was a matter of considerable importance to those engaged in international commerce. But it would appear that in the instant case the decision of the arbitrators rested primarily, if not exclusively, on findings of fact including a finding that there was no such misrepresentation as was alleged by Rakoil as a ground for its contention that both the substantive agreement and the arbitration agreement were voidable.

Summary Enforcement

Should the award be enforced summarily or should D.S.T. be left to sue on the award? The remedy under section 26 is indeed a summary remedy and if there were matters which required a further investigation which could only appropriately be undertaken by proceedings begun by writ, I would have been in favour of allowing the appeal, but I have been unable to detect any such matters.

For these reasons I would dismiss the appeal from the judgment of Mr Justice Leggatt.

The Injunction

On 22nd May 1975 in Nippon Yusen Kaisha v Karageorgis (1975) 1 W.L.R. 1093, a Court of Appeal consisting of Lord Denning M.R., Lord Justice Browne and Lord Justice Geoffrey Lane granted the first Mareva injunction, Lord Denning at page 1094 saying: "We are told that an injunction of this kind has never been granted before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment or to restrain the disposal of them ... It seems to me that the time has come when we should revise our practice" (my emphasis). On 23rd June 1975 in Mareva

Compania Naviera v International Bulkcarriers S.A. (1975) 2 Ll.L.R. 509, a Court of Appeal consisting of Lord Denning M.R., Lord Justice Roskill and Lord Justice Ormrod had its attention drawn to Lister v Stubbs (1890) 45 Ch. 1 in which Lord Justice Cotton had said: "I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree." Lord Denning M.R. adverted to his earlier decision saying, at page 510, "If it appears that the debt is due and owing - and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment - the Court has jurisdiction in a proper case to grant an interlocutory injunction so as to prevent him disposing of his assets" (my emphasis again).

I mention this at the outset because, although it was convenient to refer to the order made by Mr Justice Bingham as a Mareva injunction, and it was so referred to throughout the argument, it is at least doubtful whether it falls into that category. The Mareva innovation, which time has shown to be one of the most imaginative, important and, on the whole, most beneficient of modern times, lay in giving a plaintiff some degree of protection before he became a judgment creditor and in anticipation that he would become one. Judgment creditors had little need of new protection since they were usually adequately protected by their right to levy execution by a writ of fi fa, attachment of debts or the appointment of a receiver. And where they were not, the court has intervened by injunction to prevent the payment

to and receipt by the judgment debtor of an asset in circumstances in which it would not otherwise have been available to the judgment creditor in satisfaction of the judgment debt (Bullus v Bullus (1910) 102 L.T. 399).

Once Mr Justice Bingham had given D.S.T. leave to enforce the award as a judgment, as he did in the same order as that granting the injunction, D.S.T. became judgment creditors of Rakoil, albeit subject to a suspension of their right to levy execution and subject to the possibility that the order giving them this status might be set aside on the application of Rakoil. It was not the case that D.S.T. would become judgment creditors if and when Rakoil failed to set the order aside. Once the order was made, D.S.T. were in precisely the same position as any plaintiff who has obtained judgment, subject to a stay pending an application to the Court of Appeal to set the judgment aside.

Mr Justice Bingham did not rest his decision on this point, but it has been raised by the respondents' notice of D.S.T. and could be material to the exercise of discretion. On the approach adopted by the learned judge, namely that he was concerned with an application for a Mareva injunction and that the claim of D.S.T. was based upon an award which would not necessarily be enforceable as a judgment, the first questic to be considered was whether Rakoil had any assets within the jurisdiction, either when the injunction was granted on 2nd July, when it was varied on 25th July or when it was affirmed on 8th August 1986. The only asset which has ever been suggested was the trading debt owed by Shell to which I referred at the outset of this judgment. On 2nd July the evidence about this was "somewhat vague", taking more definite

shape by 25th July. However it was only on 8th August that the real point emerged. This was that, whilst the trading debt was very much an asset - it was worth US $4,843,051.10 - it was not, according to Rakoil, an asset within the jurisdiction. There was also a subsidiary point, more fully deployed in this court, that only part of the debt, US $662,751.54, was an asset of Rakoil, the remainder being assets of the government of R'As Al Khaimah or of the R'As Al Khaimah Gas Commission.

The advent of Shell as an intervener in the appeal has further clarified the facts and we now know that there were two shipments of oil at the Hulaylah Terminal, R'As Al Khaimah, one on board the "Euro Pride" covered by two bills of lading dated 16th June 1986 and the other on board the "Nichitima Maru" covered by two bills of lading dated 29th June 1986. The sales were f.o.b. under a contract governed by English law and the payment term was as follows:

"Due within 30 days of Bill of Lading date against receipt of telexed invoice, documents of title and other shipping documents as agreed or in the absence of these documents, Buyer to accept Seller's debt of indemnity in a form acceptable to Buyer.

"Payment to be made by telegraphic transfer to Seller's nominated account."

We also now know, from an affidavit of Mr D. S. S. Reid, Shell's Vice-President of Products Trading, that:

"[Shell] do not maintain bank accounts for oil trading within the jurisdiction. All of their trading is conducted in US dollars and the funds which they use for that purpose are located in bank accounts in New York. In the normal course of

business [Shell] would have given instructions from their London office for [Rakoil's] invoices to be paid by telegraphic transfer from [Shell's] New York bank accounts to the bank accounts in New York nominated by [Rakoil] in each invoice, as and when the date for payment fell due."

There were four invoices addressed by Rakoil to Shell, the two which related to the "Euro Pride" shipments being dated 18th June 1986 and the two which related to the "Nichitima Maru" shipments being dated 29th June 1986. All four invoices called for payment "30 days from Bill of Lading by telegraphic transfer to Account No. 6051395 with Brown Brothers Harriman & Co., 59 Wall Street, New York, account The National Bank of R'As Al Khaimah, favouring ...", the favoured one being named as Rakoil in the case of one invoice, the Government of R'As Al Khaimah in the case of two other invoices and the R'As Al Khaimah Gas Commission in the case of the fourth invoice.

I can dispose at once of the submission that this was or may not have been an asset of Rakoil. Shell say that the supply agreement under which they took the oil was between them and Rakoil and the invoices were raised by Rakoil. There may indeed be contractual arrangements between Rakoil on the one hand and the Government of R'As Al Khaimah and the R'As Al Khaimah Gas Commission on the other, whereby Rakoil is accountable to the Government and to the Commission for part of the receipts from Shell, but the evidence does not give rise to any doubt but that Shell's indebtedness was to Rakoil as a principal.

The issue, however, remains of whether this indebtedness constituted an asset of Rakoil situated within the jurisdiction.

This falls to be considered as a matter of the English law governing conflicts of law and is intimately bound up with the allied question of whether the debt could be taken in execution of an English judgment in favour of D.S.T. by garnishment or the appointment of a receiver, since it would not be right to maintain an injunction if the debt could not be so taken.

So far as the law of garnishment is concerned, Mr Boyd submitted, and I would accept, that the only relevant jurisdictional requirements are that the garnishee shall be "within the jurisdiction" and that the subject-matter should be a "debt due or accruing due to the judgment debtor from the garnishee" (see Order 49 rule 1(1)). However, as a matter of discretion, a garnishee order will not be made against such a person if it would not operate to discharge the garnishee in whole or pro tanto from his liability in respect of the debt. Such a situation can arise where the garnishee, although himself within the jurisdiction, is not indebted within that jurisdiction (S.C.F. Finance v Masri (No. 3) (1987) 2 W.L.R. 81, and Swiss Bank Corporation v Boehmische Industrial Bank (1923) 1 K.B. 637, 680-681).

This problem of double jeopardy is much less serious than it might otherwise be, because garnishment is a process which is recognised internationally and most nations will give effect to a rule similar to that of English law, namely, that "the validity and effect of an attachment of a debt are governed by the lex situs of the debt" (Dicey (10th edition) Rule 84) and that debts "generally are situate in the country where they are properly recoverable or can be enforced" (Dicey Rule 76(1)). A complication and exception arises where the debtor

carries on business in more than one jurisdiction. In such a case, if the creditor has expressly or impliedly stipulated for payment at one of those places, the debt will be held to be there situate. Happily that complication does not arise in the instant appeal, since Shell asserts, with all the emphasis borne no doubt of a desire to avoid adverse consequences under United States fiscal and other laws, that it does not carry on business in New York. It is simply owed money by New York bankers.

If, perish the thought, Shell were to default upon its obligation to pay Rakoil for the oil which it has bought and received, its liability could certainly be enforced in this country and possibly only in this country. Certainly there is no suggestion that it could be enforced in New York. It follows that, but for the stay of execution, the debt could have been the subject of a garnishee order in this country and that if the order were made absolute and payment was made to D.S.T. thereunder, the indebtedness of Shell would be discharged for all purposes.

Mr David Johnson, Q.C., appearing for Shell, reserves the right to challenge the correctness of this analysis which rests upon authority which is not binding upon the House of Lords. However, he also submits that even if this debt is technically an asset of Rakoil situated within the jurisdiction this is too narrow and legalistic an approach to apply to a commercial transaction. Shell will not default and would indeed have paid in July 1986, but for the fact that it was prevented from doing so by the injunction. A chose in action or even a debt is only of commercial value to the extent that it produces money or a credit and this debt would never have

produced either in England. Rakoil would have received this benefit in New York.

He then referred us to the decisions of this court in Z Ltd v A-Z (1982) Q.B. 558 and Intraco Limited v Notis Shippi (The Bhoja Trader) (1981) 2 Ll.L.R. 256 as indicating that Mareva injunctions should be drawn in terms which leave banks free to honour their obligations under letters of credit and bank guarantees, whilst restricting the use which beneficiarie can make of payments received by them from the banks. By a parity of reasoning, the court should not interfere with the performance by Shell of its commercial obligations and should only concern itself with the payment for the oil when it had come into the hands of Rakoil - in New York.

The ratio of the decision in The Bhoja Trader is set out at page 257R of the report:

"Irrevocable letters of credit and bank guarantees given in circumstances such that they are the equivalent of an irrevocable credit have been said to be the life blood of commerce. Thrombosis will occur if, unless fraud is involved, the courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand."

I could have added that it is not only the beneficiary of the credit who relies upon the bank's engagement not to revoke it. Third parties may, and often do, deal with the beneficiary on the faith of the fact that, come what may, he will be paid under the letter of credit. The decision in Z Ltd. v A-Z adds nothing to this, save to extend the principl obiter, to bank credit cards.

The obligation undertaken by Shell towards Rakoil was not

of this character. Indeed Mr Boyd illustrated this neatly by taking an imaginary scenario in which a Mareva injunction is granted restraining Mr X, resident in the United Arab Emirates, from removing his assets from the jurisdiction. He has given his London bank a standing order requiring the making of monthly payments in U.S. dollars to Mr Z in New York. Such an order is revocable and the effect of the injunction is to revoke it (Rekstein v Severo (1933) 1 K.B. 4' The fact that the bank would, in the ordinary course of events, have complied with the order by making payments out of an account with another bank which it maintained in New York for the purpose of making such payments, is irrelevant. Assuming in favour of Rakoil that others had an interest in the New York account to which payments were to be made, those others can be substituted for Mr Z, Rakoil for Mr X and Shell for the bank. There is nothing special about the relationship between Shell and Rakoil. Like that of the bank and Mr X, it is simply one of debtor and creditor.

Some argument was addressed to us on the basis that on 2nd July 1986, when the injunction was imposed, the debt had not yet arisen and so, it was said, there was no subject-matter for the injunction which, accordingly, should not have been granted. It would also follow, although this was not stressed on behalf of Rakoil, that when the time for payment arrived and there was a debt, Shell would at once pay that debt and extinguish it. The interval of time between the debt arising and its extinction would be so short that no injunction could effectively be imposed.

The fallacy of this line of argument is that it confuses indebtedness with a right to payment and ignores the fact that

a debt is a debt whether it is due or merely accruing due. If the customer of a bank is in credit, the bank is indebted to him even if there is no obligation to pay until the customer demands payment. Shell was indebted to Rakoil from the moment when, on or about 18th and 29th June 1986, it took delivery of the oil f.o.b.

There remains only the exercise of discretion. Shell did not seek to intervene in the court below and Mr Justice Bingha did not therefore have to consider their representations. For my part I accept that they are under commercial pressure to pa but not that any court to whose jurisdiction they may be subje would fail to recognise the jurisdiction of the English courts to extinguish their indebtedness to Rakoil by a garnishee orde and to restrain payment by Shell meanwhile. Commercial pressu is to be distinguished from double jeopardy by legal process a does not, in my judgment, provide any reason to refrain from upholding the injunction.

In administering the Mareva jurisdiction, the courts have rightly been mindful that the object of the exercise has been to prevent "cheating" by defendants - dissipating assets, causing them to "disappear" into the pockets of others, removing them from the jurisdiction and so on. It has not beer to provide advance security for the satisfaction of a judgment debt which has not yet arisen. Accordingly, in appropriate cas injunctive orders have been drawn so as to permit ordinary trad debts to be incurred and discharged and the use of assets for living expenses. However it is for the defendant to apply for such exceptions to the generality of the injunctive order and Rakoil has made no such application.

The case for imposing an injunction was much stronger

than Mr Justice Bingham thought that it was, because D.S.T. were actual and not potential judgment creditors. The purpose of the injunction was thus to maintain the status quo during the period covered by the stay of execution and not to preserve assets against the probability that D.S.T. might at some later date be able to establish its claim - the ordinary Mareva situation.

Accordingly I would dismiss this further appeal.

LORD JUSTICE WOOLF: I agree.

LORD JUSTICE RUSSELL: I also agree.

THE MASTER OF THE ROLLS: These two appeals will be dismissed for the reasons set out in the judgment.