principle of consistency applies, and that the meaning of "loss or damage" in the limitation clause should be harmonized with the established meaning of these words in s. 4.

Turning now to more general considerations, I am satisfied that the proper approach is to apply the main purpose of the convention in accordance with the principles laid down in the leading authorities.

Contrary to Mr. Broadbent's argument, it is in my judgment of no significance that the mode of incorporation of the limitation clause is contractual and non statutory. The clause paramount in the charter-party in terms incorporates the U.S. Act as a whole, so that the limitation clause only comes in as part and parcel of that Act, and cannot therefore properly be construed otherwise than as a component part of an international convention. Nothing elsewhere in the charter-party has any bearing whatsoever on its construction, and indeed Mr. Broadbent's submissions hinge entirely on the words themselves in their context.

I am quite satisfied, for the reasons given by Mr. Hamblen which I need not repeat, that the wider construction is fully consistent both with the purpose of the limitation clause itself and with the broader purpose of the convention as a whole, and that the narrow construction is repugnant to these purposes. Indeed Mr. Broadbent did not advance any argument to the contrary.

For all these reasons I am satisfied, and I hold, that the answer to question 1 is that the words "loss or damage" in the limitation clause extend to loss or damage which is related to the goods.

Subject to the few items at issue under the second question, it is not disputed by Mr. Broadbent that all the claims come within this definition.

QUESTION 2

This question falls within a very narrow compass.

Mr. Broadbent submits that the loss or damage must be related to goods actually loaded on the vessel, otherwise there is no terminus a quo from which the time limit can operate. He submits that the sub-section even on its wider construction contemplates that the time-limit will run from two alternative points, namely the time when the goods were delivered, which pre-supposes they have been shipped on the vessel, or the time when they ought to have been delivered, which again presupposes that they have been loaded, since under the charter-party the only delivery obligation is to deliver cargo which has been loaded.

I disagree with this approach. Part II cl. 1 of the charter-party provides under the heading "WARRANTY-VOYAGE-CARGO" that:

> . . . the vessel shall with all convenient dispatch proceed as ordered to the loading port . . . and . . . shall load . . . a full and complete cargo . . . and being so loaded shall forthwith proceed . . . direct to the discharging port . . . and deliver said cargo.

The obligation to load is thus the other side of the same coin as the obligation to deliver.

Where, as is alleged here, goods destined for the vessel were not loaded due to the delay, it seems to me that any resulting loss or damage is manifestly "in relation to goods", saving that, adopting Mr. Justice Devlin's test in the *Adamastos* case, it arises in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods. Moreover, there is no difficulty in determining the terminus a quo of the time limit, since it will begin to run from the date from which the goods ought to have been delivered, assuming the loading obligation had been fulfilled.

For these reasons in my judgment the answer to Question 2 is that, at least in the circumstances of this case, the time limit does operate even though the goods to which the relevant loss or damage relates have never been loaded on the vessel. It follows that I would dismiss this appeal.

Lord Justice ROCH: I agree.

Sir DAVID CROOM-JOHNSON: I also agree.

COURT OF APPEAL

May 19 and 20, 1993

STAR SHIPPING A.S.
v.
CHINA NATIONAL FOREIGN TRADE TRANSPORTATION CORPORATION

(THE "STAR TEXAS")

Before Lord Justice Lloyd, Lord Justice Mann and Lord Justice Steyn

Arbitration — Proper law — Clause in charter that disputes to be referred to arbitration in Beijing or London in "defendants' option" — Whether clause contained implied choice of floating proper law — Whether clause invalid — Whether clause void for uncertainty — Whether plaintiffs were "defendants" and entitled to exercise option.

On Nov. 27, 1989 the plaintiff disponent owners of their vessel *Star Texas* let the defendants for a period of one time chartered trip. The charter contained an arbitration clause which stated inter alia:

> 35. Any dispute arising under the charter is to be referred to arbitration in Beijing or London in defendant's option.

The vessel loaded in China a cargo which included a consignment of chemicals. While at Singapore a container of chemicals was found to be leaking and the vessel was required to return to China.

The plaintiffs alleged that except for two short periods the vessel remained on hire during the return voyage and that the defendants were liable for unpaid hire, certain costs and expenses amounting to $304,952. The defendants denied liability.

On June 16, 1992 the plaintiffs issued a writ for service out of the jurisdiction.

The defendants applied to set aside the service on the grounds that the case did not fall under any of the heads of O. 11, r. 1 and they applied for a stay under s. 1 of the Arbitration Act, 1975.

Prima facie the defendants were entitled to a stay because the arbitration clause in the contract was clearly not a domestic arbitration agreement within s. 1 of the Act.

The plaintiffs argued that s. 1 did not apply because the arbitration agreement was null and void, inoperative or incapable of being performed within s. 1(1). They contended that since under cl. 35 the choice of the venue for the arbitration was at the defendants' option this necessarily imported into the contract a floating proper law which was a concept which English law would not countenance. The express agreement as to the place of arbitration and the implied choice of a floating proper law were so closely related to each other that if the latter was to be disregarded by the English Court then so was the former. Alternatively the plaintiffs contended that the clause was void for uncertainty in that the word "defendant" was capable of bearing eight different meanings none of which could be regarded as satisfactory. On the assumption that cl. 35 was valid the plaintiffs submitted that the plaintiffs were the defendants for the purposes of that clause and they were entitled to exercise the option.

———*Held*, by Q.B. (Com. Ct.) (Evans, J.), that the issues would be decided in favour of the defendants.

The plaintiffs appealed.

———*Held*, by C.A. (Lloyd, Mann and Steyn, L.JJ.), that (1) the submission by the plaintiffs that the parties intended by reference to adopt a floating proper law would be rejected; no such implication of an implied floating applicable law had ever been established in any English case and such implication was contrary to the general approach of English law; since the actual selection of a place of arbitration did not of itself give rise to an implied choice of law it seemed implausible to suggest that the granting of an option to choose the place of arbitration could by itself give rise to an implied choice of floating applicable law; the arbitration agreement was valid (*see* p. 448, col. 2; p. 451, col. 2; p. 452, col. 1);

(2) the plaintiffs' submission that the arbitration contained a floating curial law, either Chinese or English would be rejected; there was no doctrinal reason why the law governing the arbitration had to be fixed at the time of making the arbitration agreement and policy reasons strongly supported the validity of an arbitration clause containing a floating curial law; a contract without a proper law could not exist but an arbitration agreement could perfectly exist without it being known at the time the agreement was entered into what law would govern the arbitration procedure (*see* p. 449, col. 1; p. 452, cols. 1 and 2);

(3) the fact that a multiplicity of possible meanings of a contractual provision were put forward and that there were difficulties of interpretation did not justify a conclusion that the clause was meaningless; the Court had to do its best to select the one that best matched the intention of the parties as expressed in the language they had adopted; the most natural and contextual interpretation of "defendant" was one which referred to the party against whom the arbitration or Court proceedings were taken; the learned Judge was right in his conclusion and cl. 35 was valid and enforceable (*see* p. 449, col. 2; p. 452, col. 2);

(4) the plaintiffs submitted that on the facts and on the correspondence it was the defendants who referred the dispute to arbitration within the meaning of cl. 35; however the plaintiffs accepted that if it was held that the word "defendant" meant the defendant in Court and arbitration proceedings their submission did not arise for decision; in any event there would have been great difficulty in holding that the defendants had referred the claim to arbitration when all they were seeking to do was

apply for a stay; the appeal would be dismissed (see p. 449, col. 2; p. 453, col. 1).

The following cases were referred to in the judgment:

Amin Rasheed Shipping Corporation v. Kuwait Insurance Co., (H.L.) [1983] 2 Lloyd's Rep. 365; [1984] A.C. 50;

Armar Shipping Co. v. Caisse Algerienne D'Assurance et de Reassurance (The *Armar*), (C.A.) [1980] 2 Lloyd's Rep. 450; [1981] 1 W.L.R. 207;

Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A., (H.L.) [1970] 2 Lloyd's Rep. 99; [1971] A.C. 572;

Forsikringaktieselskapet Vesta v. Butcher, (H.L.) [1989] 1 Lloyd's Rep. 331; [1989] A.C. 852;

Frank Pais, The [1986] 1 Lloyd's Rep. 529;

Iran Vojdan, The [1984] 2 Lloyd's Rep. 380;

Lovelock (E.J.R.) Ltd. v. Exportles, [1968] 1 Lloyd's Rep. 163;

Naviera Amazonica Peruana v. Compania Internacional De Seguros Del Peru, (C.A.) [1988] 1 Lloyd's Rep. 166;

Scally v. Southern Health and Social Services Board, (H.L.) [1991] 3 W.L.R. 778.

This was an appeal by the plaintiffs Star Shipping A.S. from the decision of Mr. Justice Evans given in favour of the defendants, China National Foreign Trade Transportation Corporation and holding in effect that the arbitration clause in the charter-party was valid and enforceable and the defendants, pursuant to s.1 of the Arbitration Act 1975, were entitled to a stay of the action brought by the plaintiffs against them.

Mr. Bernard Rix, Q.C. (instructed by Messrs. Sinclair Roche & Temperley) for the plaintiffs; Mr. Jonathan Gaisman (instructed by Messrs. Herbert Smith) for the defendants.

The further facts are stated in the judgment of Lord Justice Lloyd.

JUDGMENT

Lord Justice LLOYD: On Nov. 27, 1989 the plaintiffs, Star Shipping A.S., as disponent owners, chartered *Star Texas* to the defendants, China National Foreign Trade Transportation Corporation, for the period of one time chartered trip. The charter contained an arbitration clause in unusual, if not, as Mr. Rix submitted, unique terms. Clause 35 provides:

> Any dispute arising under the charter to be referred to arbitration in Beijing or London in defendant's option.

The vessel loaded in China. The cargo included a consignment of chemicals. While at Singapore a container of chemicals was found to be leaking. As a result the vessel was required to return to China. The plaintiffs say that save for two short periods the vessel remained on hire during the return voyage, and that the defendants are liable for unpaid hire and certain costs and expenses amounting to $304,952 in all. The defendants deny liability.

On June 16, 1992 the plaintiffs issued a writ for service out of the jurisdiction pursuant to leave granted by Mr. Justice Evans (as he then was). The defendants applied by summons under O. 12, r. 8 to set aside service on the ground that the case did not fall under any of the heads of O. 11, r. 1. Without prejudice to that contention they applied for a stay under s. 1 of the Arbitration Act, 1975. Prima facie the defendants are entitled to a stay because the arbitration clause in the contract is clearly not a domestic arbitration agreement within s. 1(4) of the Act.

Mr. Rix submits, however, that s. 1 does not apply because the arbitration agreement is, he says, null and void, inoperative or incapable of being performed within s. 1(1) of the Act. In support of that argument he advances two main submissions. These can be summarized as follows: (1) the parties must have intended that if the arbitration were to take place in Beijing it would take place in accordance with Chinese law, not only as the curial law of the arbitration, but also as the proper law governing the contract, including the arbitration agreement. If, on the other hand, the arbitration were to take place in London, then English law should govern. The parties cannot have intended that an arbitration should take place in London with the contract being governed by Chinese law or vice versa.

Since under cl. 35 the choice of the venue for the arbitration was to be at the defendant's option this necessarily imported into the contract what has come to be known as a floating proper law. But a floating proper law is a concept which English law will not countenance (see *Armar Shipping Co. v. Caisse Algerienne D'Assurance et de Reassurance (The Armar)*, [1980] 2 Lloyd's Rep. 450 at p. 455; [1981] 1 W.L.R. 207 at p. 215 per Lord Justice Megaw and *The Iran Vojdan*, [1984] 2 Lloyd's Rep. 380

per Mr. Justice Bingham at p. 385). There are cases such as *The Frank Pais*, [1986] 1 Lloyd's Rep. 529 where the objectional part of a choice of jurisdiction clause can be severed leaving the rest of the clause unaffected. But in the present case that is not possible. The express agreement in cl. 35 as to the place of arbitration and the implied choice of a floating proper law are so closely related to each other that if the latter must be disregarded by the English Court, applying the lex fori, so must the former. This was the conclusion reached by Mr. Justice Bingham in *The Iran Vojdan* at p. 385, col. 2. On that ground Mr. Rix submits that cl. 35 as a whole is null and void.

(2) Alternatively the clause is void for uncertainty. The clause provides for the arbitration to be held at Beijing or London in the defendant's option. But who is the defendant? It cannot mean the defendant in legal proceedings since that would presuppose a breach of cl. 35, which requires disputes to be referred to arbitration. It cannot mean the respondent in arbitration proceedings since this would mean that the unsettled dispute under the charter-party would give rise to an abortive arbitration. The claimant would no sooner claim arbitration in his own jurisdiction when the respondent would exercise his option under cl. 35. The Judge characterized this consequence as absurd; and all the more so where, as so frequently happens, there are claims and cross-claims under the same charter-party. Each party would presumably wait as long as possible before making his claim in the hope that the other party would make his claim first. This would hardly encourage the expenditure resolution of commercial disputes.

There is a third issue before us. Assuming that cl. 35 is valid and effective, Mr. Rix submits that it is the plaintiffs who are the defendants for the purpose of cl. 35, and therefore the option rests with them. Each of these three issues, as well as others, were decided in the defendants' favour by the Judge. The plaintiffs now appeal to this Court. I take each of the issues in turn.

Floating proper law

As to the first issue, Mr. Rix drew our attention to certain passages in the speeches in the House of Lords in *Compagnie Tunisienne de Navigation S.A. v. Compagnie D'Armement Maritime S.A.*, [1970] 2 Lloyd's Rep. 99; [1971] A.C. 572. Although the situs of the arbitration is not conclusive as to the proper law of the contract, as the decision in that case shows, nevertheless it is an important factor "and in many cases may be the decisive factor": see per Lord Reid at p. 603, col. 1; p. 584. At p. 607, col. 2; p. 588 Lord Morris said:

> One circumstance that parties agree that any differences are to be settled by arbitration in a certain country may and very likely will lead to an inference that they intend the law of that country to apply. But it is not a necessary inference or an inevitable one though it will often be the reasonable and sensible one.

At p. 111, col. 2; p. 596 Lord Wilberforce described it as a "weighty indication". Lord Diplock said at p. 117, col. 2; p. 601.

> . . . The fact that . . . [the parties] have expressly chosen to submit their disputes under the contract to a particular arbitral forum of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the arbitration takes place, since this is the law with which arbitrators sitting there may be supposed to be most familiar.

Then a little later at p. 119, col. 1; p. 605 he said:

> Nevertheless, strong though the implication may be, it can be negatived by the other terms of the contract when the contract, as it must be, is construed as a whole in the light of the surrounding circumstances. It is clearly negatived by an express term prescribing some other law than the curial law as the proper law, and it may also be negatived by an overwhelming implication from the other terms all pointing to one single other system of law as the proper law of the contracts as distinct from the curial.

Basing himself on those observations Mr. Rix says that there is here at least a strong inference that the parties intended the proper law to be either Chinese law or English law, according to where the arbitration takes place. Indeed he argues that the inference in the present case is stronger than it was in the *Compagnie Tunisienne* case, for in that case there was an express choice of law clause, cl. 13, which provided that the contract be governed by the law of the carrying vessel's flag; whereas here there is no express choice of law clause. Nor is there here, as there was in the *Compagnie Tunisienne* case —

> . . . an overwhelming implication from the other terms of the contract that the parties

intended one single system of law to apply, whether English, Chinese or some other law.

It is, he says, unfortunate for the parties that the floating proper law, which they clearly intended to govern the contract is something which English law as the lex fori does not permit; a consequence of which no doubt the parties were wholly unaware. But this is a case where, in Mr. Gaisman's pithy phrase—

> . . . their implied choice of law abrogates their express choice of arbitration.

As for the judgment below, Mr. Rix criticizes the Judge's approach. He decided, first, that English law was the proper law of the contract, as being the system of law with which the contract has the closest or most real connection. Only then did he turn to cl. 35. This was, says Mr. Rix, the wrong way around. The proper approach was to seek out the parties' intention as to the proper law, whether express or inferred. Only if no such intention could be ascertained is one driven to choose the system of law with which the contract has its closest connection. Of course, once the Judge had decided that English law was the proper law of the contract, it followed almost inevitably that cl. 35 would be upheld. But the Judge started at the wrong end. The point can be illustrated by a quotation from the Judge's judgment at p. 16 of the transcript:

> In my judgment the plaintiffs' analysis is too rigorous and in fact is not the result of the correct application of the principles which are involved. The proper law of the charter-party in my judgment for the reasons already given is English law and that conclusion, it seems to me, could be reached without any assistance from Clause 35, although the reference to London does in my view support it. What can be said is that Clause 35 gives no guidance as to the choice of proper law as between English and Chinese, both being possible venues for the arbitration.

That passage, says Mr. Rix, illustrates the error in the Judge's approach. It goes without saying that cl. 35 gives no guidance as to the choice of law as between English and Chinese. But that is not the point. It gives strong guidance, says Mr. Rix, that the parties intended both systems of law to apply, according to where the arbitration was to take place.

I think there is force in Mr. Rix's criticism of the Judge's approach, although, as Mr. Gaisman pointed out, it may receive some support from the approach adopted by Mr. Justice Bingham in *The Iran Vojdan*, [1984] 2 Lloyd's Rep. 380. The explanation for the Judge's approach may be that Mr. Rix's argument was not made as clear to the learned Judge as it has been to us. Mr. Rix points out that in an earlier passage in the judgment the Judge clearly misunderstood his argument when he said:

> The plaintiffs' submission, as I understand it, is that although English law is the proper of the charter-party, it is not the proper law of the agreement to arbitrate.

But whatever view one takes as to the Judge's approach, the underlying question remains whether Mr. Rix's argument is sound. In my view it is not. It attaches much too much importance to cl. 35 as an indication of the parties' intentions as to the proper law of the contract. Where the arbitration clause provides for a single situs, then the observations in *Compagnie Tunisienne* on which Mr. Rix relies carry full weight. The arbitration clause then provides a strong, although not conclusive, indication of what the parties intended as to the proper law of the contract, including the arbitration agreement. But where the arbitration clause provides for a dual situs, the indication that they intended both laws to apply, according to where the arbitration takes place, is much less strong. Suppose cl. 35 had contained no provision as to where the arbitration was to take place as for example in a typical contract calling for arbitration in accordance with the I.C.C. rules. It could not be argued with any hope of success that that was an indication that the parties intended the proper law of the contract to depend upon wherever the arbitration ultimately took place. The same reasoning applies, albeit with less force, where the contract provides for arbitration in one of two places. I would therefore reject Mr. Rix's argument that these parties by inference intended to adopt a floating proper law. The truth is that they probably never gave their minds to the matter at all. At all events, one cannot deduce from cl. 35 what they would have intended if they had.

The conclusion I have thus reached is in line with (even if it is not precisely covered by) the views expressed by the editors of Dicey and Morris Conflict of Laws at p. 537. After referring to the strong presumption that the proper law of the contract is the law of the country in which the arbitration is to be held, the editors continue:

> The presumption cannot operate if no place of arbitration is agreed in the original contract, or if the place of arbitration is left to be chosen by the arbitrators or by an outside body. In such cases the proper law of the contract (including the arbitration clause) will be determined in accordance with the normal principles.

Two things follow from my conclusion. First, as to the proper law of the contract, the Court will be driven back to asking what is the system of law with which the contract has the closest and most real connection, since nothing can be inferred from cl. 35. Secondly, the foundation of Mr. Rix's attack on cl. 35 disappears. The clause is not destroyed in the eyes of English law as the lex fori by the parties' choice of a floating proper law, because the parties have made no such choice. Mr. Rix advances an alternative argument under this head. Even if the parties have not chosen a floating proper law for their contract, they have at least chosen a floating curial law for the arbitration, according to whether it takes place in London or Peking. But here Mr. Rix's argument founders for a different reason. We have not been referred to any case which decides that a floating curial law invalidates an arbitration clause. Nor can I see any good reason why it should. It must be possible, indeed it frequently happens, that an arbitration clause provides for one or other of two or more venues. Nobody has suggested, so far as I know, that that makes the arbitration clause void for uncertainty or otherwise unworkable. It makes good commercial sense that the law governing the arbitration procedure should be the law of the country where the arbitration takes place, unless, which is unlikely, the parties have agreed on some other curial law. The objections which apply to a floating proper law do not apply to a floating curial law. A contract without a proper law cannot exist. It is, as has been said, no more than an abstraction or a piece of paper. But an arbitration agreement can exist perfectly well without it being known at the time the arbitration agreement is entered into what law will govern the arbitration procedure. I would reject Mr. Rix's alternative way of putting the argument.

Uncertainty

I now turn to the second issue on which we did not find it necessary to call on Mr. Gaisman. Mr. Rix submitted that an arbitration clause can be so ambiguous and uncertain that the Court is left with no alternative but to disregard it altogether. A good example of this would be *E. J. R. Lovelock Ltd. v. Exportles*, [1968] 1 Lloyd's Rep. 163 where one part of the arbitration clause provided for any dispute to be referred to arbitration in London, and another part of the same clause provided for any other dispute to be referred to arbitration in Moscow. The Court of Appeal held that the clause was meaningless and should be rejected. Mr. Rix submits that the same applies here. He puts forward eight possible meanings for "the defendant" in the phrase "in the defendant's option". He said none could be regarded as satisfactory. I have already explained why, according to Mr. Rix, "the defendant" cannot mean either the defendant in legal proceedings or the respondent in arbitration proceedings.

The learned Judge solved this problem neatly by the ruling that it covers both. In my view he was right. The one thing which is clear about cl. 35 is that the parties intended to refer their disputes to arbitration. I would be very reluctant indeed to defeat that intention. *E. J. R. Lovelock Ltd. v. Exportles* was an extreme case. The clause was self-contradictory. There is no such inherent self-contradiction here. In my judgment the meaning given by the Judge to this important clause was sensible and workable. Of course it may mean that an arbitration may be commenced in one jurisdiction only to be recommenced in another. But even if that consequence can properly be described as absurd, which I doubt, it does not mean that the clause is uncertain. I would therefore reject Mr. Rix's argument on the second issue.

In dealing with that issue I have assumed that English law is the proper law, since it is only by reference to some system of law that the question can be judged at all. But I must not be taken as deciding that English law is the proper law of this contract. The point has not been argued. I expressly leave it open. If Chinese law should be held to apply then it was not, as I understand it, suggested that the clause would be void for uncertainty. In any event, we have had no evidence as to Chinese law. It follows that in my view cl. 35 is valid and enforceable.

Then comes the third issue raised by Mr. Rix. He submits that on the facts of the case, and on the correspondence to which he referred us, it was the defendants who referred the dispute to arbitration within the meaning of cl. 35. But he accepted, as I understood him, that if the Judge's decision on the second issue is to stand, then the third issue does not arise. In any event, I should have found great difficulty in holding that the defendants had referred the claim to arbitration when all they were seeking to do was to apply for a stay. For all those reasons I would dismiss this appeal.

Lord Justice MANN: For the reasons given by my Lord I would also dismiss the appeal.

Lord Justice STEYN: I also agree. The arbitration clause in the charter-party (as corrected in an immaterial respect) reads as follows:

> Any dispute arising under the charter to be referred to arbitration in Beijing or London in defendant's option.

In argument the clause was described as unique. It is true that there is apparently no reported English authority on the validity of such a clause. But in my experience "defendant's option" arbitration clauses are used in one-off international trade transactions from time to time. What is novel about the present case is that it is the first known challenge to the validity of such a clause.

It may be useful to sketch the contextual scene in which such clauses are to be seen. It is an axiom of international trade that each party usually wishes to contract subject to the substantive law of his own country and subject to dispute resolution in his own country. If a party is in a significantly stronger bargaining position than the counter-party his wishes may prevail. Often compromises have to be made. Sometimes the law of a neutral country is selected as the applicable law governing the contract. Similarly, compromises often have to be made in respect of jurisdiction. One compromise is to stipulate for arbitration in a neutral country. Another compromise is to stipulate for arbitration subject to the rules of, for example, the International Chamber of Commerce, leaving the venue of the arbitration to be fixed by the arbitral institution or by the arbitral tribunal. The arbitration clause in the present case is yet another compromise. The technique adopted is to give "the defendant" the option to select arbitration in Beijing or London. Realistically London must have been the favoured place of arbitration of the Norwegian owners, and Beijing must have been the favoured venue of the Chinese charterers. At the time of the conclusion of the charter-party and the arbitration agreement it was conceivable that either the owners or the charterers might be the claimants. The clause did not stipulate for a forum actoris. On the contrary, subject to the exercise of the defendant's option, the objective of the clause is that the claimant must pursue his remedy in the home territory of the other party. In saying that I am, of course, treating London as the home territory of the Norwegian owners. That seems a realistic view. It remains to be considered whether the parties achieved their objective in agreeing to the terms of the particular arbitration clause.

The validity of the arbitration clause

Mr. Rix, Q.C. submitted that the arbitration clause is invalid under English rules of private international law because: (1) it involved an implied choice of a "floating" proper law (either English or Chinese) to govern the arbitration agreement; or (2) it contained an implied choice of a "floating" curial law (either English or Chinese). It will be convenient to examine the two submissions separately.

English law is the lex fori. Our conflict rules provide that the validity of the arbitration agreement must be determined in accordance with the applicable law of that agreement. Mr. Rix, Q.C. submits that the arbitration agreement in the present case has no existing and ascertainable applicable law. If this premise is established, Mr. Rix submits that the arbitration agreement is invalid in accordance with the principles of English private international law. It is common ground that the Contracts (Applicable Law) Act 1990 is not applicable to the present dispute. Even if s. 3(2) of the Act permits a floating applicable law, that cannot affect the present dispute: see Cheshire and North's Private International Law, 12th ed. 483. Mr. Rix reminded us of Lord Diplock's often cited observation in *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.*, [1983] 2 Lloyd's Rep. 365; [1984] A.C. 50. Lord Diplock stated (at p. 370, col. 2; p. 65C to D):

> My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a Court of justice for failure to perform any of those obligations . . .

The correctness of this proposition as a general principle is not in doubt: see also *Forsikringsaktieselskapet Vesta v. Butcher*, [1988] 1 Lloyd's Rep. 331; [1989] A.C. 852.

It may, however, require qualification by reason of the provisions of s. 5(2) of the Arbitration Act 1975 which provides that the enforcement of a New York Convention award may be refused if the person against whom it is invoked proves:

> (f) that the arbitration agreement was not valid under the law to which the parties subjected it or failing indication thereon, under the law of the country where the award is made:

Section 5(2)(b) creates a new conflict rule which supersedes the relevant English conflict rules to the extent to which that provision applies. It contemplates an applicable law which often would not be ascertained at the time of the making of the arbitration agreement: see Van Den Berg, The New York Arbitration Convention 1958, p. 291. But is not necessary to pursue the impact of this qualification. For present purposes I will consider the matter in the light of the principle enunciated by Lord Diplock in *Amin Rasheed*.

The question is therefore a narrow one, is the arbitration clause in the charter-party governed by an ascertainable proper law? But it is important to bear in mind the approach to be adopted, in accordance with English conflict rules, as to relevant time for the determination of the issue. *Armar Shipping Co. v. Caisse Algérienne D'Assurance et de Réassurance*, [1980] 2 Lloyd's Rep. 450; [1981] 1 W.L.R. 207 establishes that the relevant time is the time of the making of the contract. See also Dicey and Morris Conflict of Laws 11th ed. vol. 2 at p. 1167.

Mr. Rix's argument concentrates entirely on the terms of the arbitration clause. Mr. Rix relies on the speeches in the House of Lords in *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.*, [1970] 2 Lloyd's Rep. 99; [1971] A.C. 572. He seeks to extract from this case the proposition that an express choice of forum amounts to an implied choice of applicable law in the absence of overwhelming rebutting factors. I would not accept this interpretation. On my reading of the speeches in the House of Lords *Compagnie Tunisienne* is authority for no more than the proposition that a choice of forum will generally be a strong, but not necessarily decisive factor, in relation to the issue with which legal system the contract has its closest connection. Mr. Rhodri Thomas (now Professor Thomas) has shown convincingly how the weight of this factor may depend on the nature of the arbitration clause, and the circumstances of each case: Commercial Arbitration: Arbitration Agreements As a Signpost of The Proper Law, 1984 L.M.C.L.Q. 141. Moreover, it is implicit in *Compagnie Tunisienne* that there may be circumstances in which the weight to be attached to the arbitration clause may be minimal.

In the absence of an express choice of law, the first question is whether an appropriate implied intention can be gathered from the terms of the contract and the circumstances of the case. If no such implied intention is established, the contract is governed by the system of law with which the transaction has its closest connection. Mr. Rix concedes that if he cannot establish an *implied* floating applicable law, his argument must fail. In that event, "the defendant's option" in choosing London or Beijing as the seat of the arbitration is a neutral factor in choosing between English and Chinese law as the applicable law of the arbitration agreement. Everything therefore hinges on the question whether Mr. Rix can establish an implied floating applicable law.

It is necessary to pause to consider what kind of implication is under consideration. I have not understood Mr. Rix to submit that it can be inferred that the Norwegian charterers and the Chinese owners had an actual common intention to select a floating proper law. That is not surprising: one would not expect it to be a subject of conversation among shipping people in the suburbs of Oslo and Beijing. It would in my respectful view be preposterous to imagine that those parties would have considered such an obscure concept. How is the matter then to be approached? Our law recognizes a distinction between what Professor Treitel (The Law of Contract, 8th Ed., 185–194) has described as terms implied in fact and terms implied by law. In *Scally v. Southern Health and Social Services Board*, [1991] 3 W.L.R. 778 the House of Lords recognized this distinction. Lord Bridge in the only speech in the case explained (at p. 787G):

> A clear distinction is drawn in the speeches of Viscount Simonds in *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555 and Lord Wilberforce in *Liverpool City Council v. Irwin* [1977] A.C. 239 between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship . . .

I understood Mr. Rix to argue in favour of the first kind of implication, i.e., a term implied in fact. If that were correct, the simple answer is that the arbitration agreement is entirely workable without the implication. The implication is not necessary. On this simple ground I would reject Mr. Rix's first argument.

There is, however, another way of approaching the matter. On analysis Mr. Rix relies on a single factor for the implication, namely the defendants' option contained in the arbitration clause. The implication put forward is therefore a constructional implication. It is therefore more correct to view it as a proposed implication by law. No such implication of an implied floating applicable law has ever been established in any English case. Such an implication is also contrary to the general approach of our law. The principle qui elegit judicem elegit jus forms no part of our law. It is clear from *Compagnie Tunisienne* that even an express

choice of jurisdiction does not by itself give rise to an implied choice of law. It may do so together with other factors. But more realistically it will play an important role in the next inquiry, that is the determination of the system of law with which the contract has the closest connection. Given that the actual selection of a place of arbitration does not of itself give rise to an implied choice of law it seems to me implausible to suggest that the granting of an option to choose the place of arbitration can by itself give rise to an implied choice of a floating applicable law. Moreover, as Lord Bridge made clear in *Scally*, wider consideration of justice and policy play a role in the kind of implication which I am now considering. It is therefore material to bear in mind that the sole purpose for which the implication is put forward is to achieve the destruction of the specially negotiated arbitration clauses. If there is a doubt, the Court ought to lean in favour of an interpretation which does not destroy the arbitration agreement. Lastly, in considering whether an implication of law is established the true standard is not reasonableness. In *Scally* Lord Bridge, speaking of such an implication, stated at 788H:

> I fully appreciate that the criterion to justify an implication of this kind is necessity, not reasonableness.

In my judgment there is no necessity to imply floating applicable law. If there is no implication, no gap is left and the arbitration clause can take effect according to its terms. In my view the suggested implication is unsustainable.

For these reasons I would reject the submission that the arbitration agreement is invalid on the ground that it contains a floating applicable law.

That brings me to the alternative argument that the arbitration contained a floating curial law, i.e. either English or Chinese. It can readily be accepted that English arbitration law does not recognize a "de-localised" arbitration or arbitral procedures unconnected with any municipal system of law. *Naviera Amazonica Peruana v. Compania Internacional De Seguros Del Peru*, [1988] 1 Lloyd's Rep. 166. In international commercial arbitration the place or seat of arbitration is always of paramount importance. It is to the Courts of the place of arbitration that parties have to look for support if the arbitral process breaks down; e.g., if the arbitral tribunal has to be reconstituted. The law governing the arbitration is almost invariably the law of the place where the arbitration is held: see Hunter and Redfern, The Law and Practice of International Commercial Arbitration 2nd pp. 77–80, pp. 299–300. The place of arbitration will frequently not be determined when the arbitration agreement is made. Often the fixing of the place of arbitration is left to an arbitral institution or even to the arbitral tribunal. There is no doctrinal reason why the law governing the arbitration must be fixed at the time of making the arbitration agreement. And policy reasons strongly support the validity of an arbitration clause containing a floating curial law. The contrary view would mean, if the place of arbitration is not fixed at the time of the making of a contract subject to a standard I.C.C. arbitration clause, that English law would treat the arbitration clause as invalid. That would be patently absurd. The dictum of Lord Diplock in *Amin Rasheed* about the requirement that every contract must have a proper law is not to be extended to cover the curial law of arbitrations. Lord Diplock was confining his observations to the proper law of contracts, and he said nothing about the law governing an arbitration. Moreover, in *The Iran Vojdan*, [1984] 1 Lloyd's Rep. 380, at p. 385, Mr. Justice Bingham expressly recognized the validity of a floating forum in a party's choice. I respectfully agree with the observations of Mr. Justice Bingham. I would therefore reject this alternative challenge to the validity of the arbitration clause.

Uncertainty

Mr. Rix submits that the arbitration clause is null and void for uncertainty. If Chinese law applies, it is common ground that the arbitration clause is valid. I therefore approach the matter on the basis that the lex arbitri is English law. Mr. Rix submits that the possible constructions of the words "the defendant" are so various that it is impossible to give any clear or certain meaning to the clause. Mr. Rix said that the word "defendant" in the arbitration clause is capable of bearing eight different meanings. The spectre of a catalogue of possible alternative constructions may at first glance seem to confront us with a daunting task. The reality is different. The fact that a multiplicity of possible meanings of a contractual provision are put forward and that there are difficulties of interpretation does not justify a conclusion that the clause is meaningless. The Court must do its best to select, among the contending interpretations, the one that best matches the intentions of the parties as expressed in the language they adopted. And, in a case where there are realistic alternative interpretations of an arbitration clause, the Court will always tend to favour the interpretation which gives a sensible and effective interpretation to the arbitration clause.

The interpretation of the words "the defendant" in the arbitration agreement is made. Often the fixing of the place of arbitration is left to an arbitral institution or even to the arbitral tribunal. There is no doctrinal reason why the law governing the arbitration must be fixed at the time of making the arbitration agreement. And policy reasons strongly support the validity of an arbitration clause containing a floating curial law. The contrary view would mean, if the place of arbitration is not fixed at the time of the making of a contract subject to a standard I.C.C. arbitration clause, that English law would treat the arbitration clause as invalid. That would be patently absurd. The dictum of Lord Diplock in *Amin Rasheed* about the requirement that every contract must have a proper law is not to be extended to cover the curial law of arbitrations. Lord Diplock was confining his observations to the proper law of contracts, and he said nothing about the law governing an arbitration. Moreover, in *The Iran Vojdan*, [1984] 1 Lloyd's Rep. 380, at p. 385, Mr. Justice Bingham expressly recognized the validity of a floating forum in a party's choice. I respectfully agree with the observations of Mr. Justice Bingham. I would therefore reject this alternative challenge to the validity of the arbitration clause.

Uncertainty

Mr. Rix submits that the arbitration clause is null and void for uncertainty. If Chinese law applies, it is common ground that the arbitration clause is valid. I therefore approach the matter on the basis that the lex arbitri is English law. Mr. Rix submits that the possible constructions of the words "the defendant" are so various that it is impossible to give any clear or certain meaning to the clause. Mr. Rix said that the word "defendant" in the arbitration clause is capable of bearing eight different meanings. The spectre of a catalogue of possible alternative constructions may at first glance seem to confront us with a daunting task. The reality is different. The fact that a multiplicity of possible meanings of a contractual provision are put forward and that there are difficulties of interpretation does not justify a conclusion that the clause is meaningless. The Court must do its best to select, among the contending interpretations, the one that best matches the intentions of the parties as expressed in the language they adopted. And, in a case where there are realistic alternative interpretations of an arbitration clause, the Court will always tend to favour the interpretation which gives a sensible and effective interpretation to the arbitration clause.

Who is the defendant?

That brings me to Mr. Rix's final submission that the Judge erred in ruling that the Chinese charterers were the defendants, because in truth the Chinese charterers claimed arbitration in Beijing against the Norwegian owners who were therefore the defendants. But Mr. Rix expressly conceded that this submission must fail if the construction clause is given the interpretation which I have preferred. I need therefore say no more about this point.

Conclusion

In agreement with the Judge I conclude that the Chinese charterers were entitled to a stay of the English legal proceedings pursuant to s. 1 of the Arbitration Act 1975. I therefore agree that the appeal should be dismissed.

[Order: The appeal was dismissed and costs awarded to the respondents. Leave to appeal to the House of Lords was refused.]

COURT OF APPEAL

Mar. 30, 31 and Apr. 1, 1993

SIG. BERGESEN D.Y. & CO. AND OTHERS
v.
MOBIL SHIPPING AND TRANSPORTATION CO.

(THE "BERGE SUND")

Before Lord Justice BALCOMBE, Lord Justice STAUGHTON and Sir Roger PARKER

Arbitration — Award — Off-hire — Dispute as to delay in loading — Arbitrators found vessel off-hire — Whether vessel remained fully efficient within off-hire clause — Whether owners entitled to indemnity — Whether award should be remitted.

By a charter-party dated Sept. 20, 1979 the owners let their vessel *Berge Sund* to the charterers for a period of 20 years. The charter provided inter alia:

> 8(a) In the event that a loss of time, not caused by Charterer's fault, shall continue, (i) due to repairs, breakdown, accident or damage to the vessel, collision, stranding, fire, interference by authorities or any other cause preventing the efficient working of the vessel, for more than twenty-four (24) consecutive hours . . . then hire shall cease for all time so lost until the vessel is again in an efficient state to resume her service and has regained a point of progress equivalent to that when hire ceased hereunder.
>
> 11(b) Master, although appointed by, and in the employ of Owner, and subject to Owner's direction and control, shall observe the orders of the Charterer as regards employment of the vessel . . . or other arrangements required to be made by Charterer hereunder.
>
> (d) Master shall be furnished by Charterer, from time to time, with all requisite instructions and sailing orders . . .

For a period of 10 months after delivery the vessel carried only cargoes of butane and propane and she did not have to be cleaned. In July 1982 a sister vessel carried cargoes of butane and propane to Chiba, Japan and when the butane gas was discharged it was found to be contaminated. It was decided to sell the contaminated cargo to receivers in Europe and that cargo was loaded on board *Berge Sund*.

On Nov. 8, *Berge Sund* completed discharging at Terneuzen and was then ordered to sail to the Arabian Gulf. During this ballast voyage tank cleaning took place. The vessel arrived at Ras Tanura and on Dec. 20, the surveyors appointed on behalf of the charterers conducted tests on the ship's tanks. It was found that No. 3 tanks and No. 2 tanks were

STAR SHIPPING AS v CHINA NATIONAL FOREIGN TRADE

TRANSPORTATION CORPORATION THE "STAR TEXAS"

COURT OF APPEAL (CIVIL DIVISION)

[1993] 2 Lloyd's Rep 445

HEARING-DATES: 19, 20 May 1993

20 May 1993

CATCHWORDS:

Arbitration -- Proper law -- Clause in charter that disputes to be referred to arbitration in Beijing or London in "defendants' option" -- Whether clause contained implied choice of floating proper law -- Whether clause invalid -- Whether clause void for uncertainty -- Whether plaintiffs were "defendant" and entitled to exercise option.

HEADNOTE:

On Nov 27, 1989 the plaintiff disponent owners let their vessel Star Texas to the defendants for a period of one time chartered trip. The charter contained an arbitration clause which stated inter alia:

35. Any dispute arising under the charter is to be referred to arbitration in Beijing or London in defendant's option.

The vessel loaded in China a cargo which included a consignment of chemicals. While at Singapore a container of chemicals was found to be leaking and the vessel was required to return to China.

The plaintiffs alleged that except for two short periods the vessel remained on hire during the return voyage and that the defendants were liable for unpaid hire, certain costs and expenses amounting to $304,952. The defendants denied liability.

On June 16, 1992 the plaintiffs issued a writ for service out of the jurisdiction.

The defendants applied to set aside the service on the grounds that the case did not fall under any of the heads of O 11, r 1 and they applied for a stay under s 1 of the Arbitration Act, 1975.

Prima facie the defendants were entitled to a stay because the arbitration clause in the contract was clearly not a domestic arbitration agreement within s 1 of the Act.

The plaintiffs argued that s 1 did not apply because the arbitration agreement was null and void, inoperative or incapable of being performed within s 1(1). They contended that since under cl 35 the choice of the venue for the arbitration was at the defendants' option this necessarily

imported into the contract a floating proper law which was a concept which English law would not countenance. The express agreement as to the place of arbitration and the implied choice of a floating proper law were so closely related to each other that if the latter was to be disregarded by the English Court then so was the former. Alternatively the plaintiffs contended that the clause was void for uncertainty in that the word "defendant" was capable of bearing eight different meanings none of which could be regarded as satisfactory. On the assumption that cl 35 was valid the plaintiffs submitted that the plaintiffs were the defendants for the purposes of that clause and they were entitled to exercise the option.

-- Held, by QB (Com Ct) (EVANS, J), that the issues would be decided in favour of the defendants.

The plaintiffs appealed.

-- Held, by CA (LLOYD, MANN and STEYN, LJJ), that (1) the submission by the plaintiffs that the parties intended by reference to adopt a floating proper law would be rejected; no such implication of an implied floating applicable law had ever been established in any English case and such implication was contrary to the general approach of English law; since the actual selection of a place of arbitration did not of itself give rise to an implied choice of law it seemed implausible to suggest that the granting of an option to choose the place of arbitration could by itself give rise to an implied choice of floating applicable law; the arbitration agreement was valid (see p 448, col 2; p 451, col 2, p 452, col 1);

(2) the plaintiffs' submission that the arbitration contained a floating curial law, either Chinese or English would be rejected; there was no doctrinal reason why the law governing the arbitration had to be fixed at the time of making the arbitration agreement and policy reasons strongly supported the validity of an arbitration clause containing a floating curial law; a contract without a proper law could not exist but an arbitration agreement could perfectly exist without it being known at the time the agreement was entered into what law would govern the arbitration procedure (see p 449, col 1; p 452, cols 1 and 2);

(3) the fact that a multiplicity of possible meanings of a contractual provision were put forward and that there were difficulties of interpretation did not justify a conclusion that the clause was meaningless; the Court had to do its best to select the one that best matched the intention of the parties as expressed in the language they had adopted; the most natural and contextual interpretation of "defendant" was one which referred to the party against whom the arbitration or Court proceedings were taken; the learned Judge was right in his conclusion and cl 35 was valid and enforceable (see p 449, col 2; p 452, col 2);

(4) the plaintiffs submitted that on the facts and on the correspondence it was the defendants who referred the dispute

to arbitration within the meaning of cl 35; however the plaintiffs accepted that if it was held that the word "defendant" meant the defendant in Court and arbitration proceedings their submission did not arise for decision; in any event there would have been great difficulty in holding that the defendants had referred the claim to arbitration when all they were seeking to do was apply for a stay; the appeal would be dismissed (see p 449, col 2; p 453, col 1).

CASES-REF-TO:

Amin Rasheed Shipping Corporation v Kuwait Insurance Co, (HL) [1983] 2 Lloyd's Rep 365; [1984] AC 50;
Armar Shipping Co v Caisse Algerienne D'Assurance et de Reassurance (The Armar), (CA) [1980] 2 Lloyd's Rep 450; [1981] 1 WLR 207;
Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA, (HL) [1970] 2 Lloyd's Rep 99; [1971] AC 572;
Forsikringsaktieselskapet Vesta v Butcher, (HL) [1989] 1 Lloyd's Rep 331; [1989] AC 852;
Frank Pais, The [1986] 1 Lloyd's Rep 529;
Iran Voldan, The [1984] 2 Lloyd's Rep 380;
Lovelock (EJR) Ltd v Exportles, [1968] 1 Lloyd's Rep 163;
Naviera Amazonica Peruana v Compania Internacional De Seguros Del Peru, (CA) [1988] 1 Lloyd's Rep 166;
Scally v Southern Health and Social Services Board, (HL) [1991] 3 WLR 778.

INTRODUCTION:

This was an appeal by the plaintiffs Star Shipping AS from the decision of Mr Justice Evans given in favour of the defendants, China National Foreign Trade Transportation Corporation and holding in effect that the arbitration clause in the charter-party was valid and enforceable and the defendants, pursuant to s 1 of the Arbitration Act 1975, were entitled to a stay of the action brought by the plaintiffs against them.

COUNSEL:

Mr Bernard Rix, QC for the plaintiffs; Mr Jonathan Gaisman for the defendants.

The further facts are stated in the judgment of Lord Justice Lloyd.

PANEL: Lloyd, Mann, Steyn LJJ

JUDGMENTBY-1: LLOYD LJ

JUDGMENT-1:

LLOYD LJ: On Nov 27, 1989 the plaintiffs, Star Shipping AS, as disponent owners, chartered Star Texas to the defendants, China National Foreign Trade Transportation Corporation, for the period of one time chartered trip. The charter contained an arbitration clause in unusual, if not, as Mr Rix submitted, unique terms. Clause 35 provides:

Any dispute arising under the charter to be referred to arbitration in Beijing or London in defendant's option.

The vessel loaded in China. The cargo included a consignment of chemicals. While at Singapore a container of chemicals was found to be leaking. As a result the vessel was required to return to China. The plaintiffs say that save for two short periods the vessel remained on hire during the return voyage, and that the defendants are liable for unpaid hire and certain costs and expenses amounting to $304,952 in all. The defendants deny liability.

On June 16, 1992 the plaintiffs issued a writ for service out of the jurisdiction pursuant to leave granted by Mr Justice Evans (as he then was). The defendants applied by summons under O 12, r 8 to set aside service on the ground that the case did not fall under any of the heads of O 11, r 1. Without prejudice to that contention they applied for a stay under s 1 of the Arbitration Act, 1975. Prima facie the defendants are entitled to a stay because the arbitration clause in the contract is clearly not a domestic arbitration agreement within s 1(4) of the Act.

Mr Rix submits, however, that s 1 does not apply because the arbitration agreement is, he says, null and void, inoperative or incapable of being performed within s 1(1) of the Act. In support of that argument he advances two main submissions. These can be summarized as follows: (1) the parties must have intended that if the arbitration were to take place in Beijing it would take place in accordance with Chinese law, not only as the curial law of the arbitration, but also as the proper law governing the contract, including the arbitration agreement. If, on the other hand, the arbitration were to take place in London, then English law should govern. The parties cannot have intended that an arbitration should take place in London with the contract being governed by Chinese law or vice versa.

Since under cl 35 the choice of the venue for the arbitration was to be at the defendant's option this necessarily imported into the contract what has come to be known as a floating proper law. But a floating proper law is a concept which English law will not countenance (see Armar Shipping Co v Caisse Algerienne D'Assurance et de Reassurance (The Arma), [1980] 2 Lloyd's Rep 450 at p 455; [1981] 1 WLR 207 at p 215 per Lord Justice Megaw and The Iran Vojdan, [1984] 2 Lloyd's Rep 380 per Mr Justice Bingham at p 385). There are cases such as The Frank Pais, [1986] 1 Lloyd's Rep 529 where the objectional part of a choice of jurisdiction clause can be severed leaving the rest of the clause unaffected. But in the present case that is not possible. The express agreement in cl 35 as to the place of arbitration, and the implied choice of a floating proper law, are so closely related to each other that if the latter must be disregarded by the English Court, applying the lex fori, so must the former. This was the conclusion reached by Mr

Justice Bingham in The Iran Vojdan at p 385, col 2. On that ground Mr Rix submits that cl 35 as a whole is null and void.

(2) Alternatively the clause is void for uncertainty. The clause provides for the arbitration to be held at Beijing or London in the defendant's option. But who is the defendant? It cannot mean the defendant in legal proceedings since that would presuppose a breach of cl 35, which requires disputes to be referred to arbitration. It cannot mean the respondent in arbitration proceedings since this would mean that every unsettled dispute under the charter-party would give rise to an abortive arbitration. The claimant would no sooner claim arbitration in his own jurisdiction when the respondent would exercise his option under cl 35. The Judge characterized this consequence as absurd; and all the more so where, as so frequently happens, there are claims and cross-claims under the same charter-party. Each party would presumably wait as long as possible before making his claim in the hope that the other party would make his claim first. This would hardly encourage the expenditure resolution of commercial disputes.

There is a third issue before us. Assuming that cl 35 is valid and effective, Mr Rix submits that it is the plaintiffs who are the defendants for the purpose of cl 35, and therefore the option rests with them. Each of these three issues, as well as others, were decided in the defendants' favour by the Judge. The plaintiffs now appeal to this Court. I take each of the issues in turn.

Floating proper law

As to the first issue, Mr Rix drew our attention to certain passages in the speeches in the House of Lords in Compagnie Tunisienne de Navigation SA v Compagnie D'Armement Maritime SA, [1970] 2 Lloyd's Rep 99; [1971] AC 572. Although the situs of the arbitration is not conclusive as to the proper law of the contract, as the decision in that case shows, nevertheless it is an important factor "and in many cases may be the decisive factor": see per Lord Reid at p 103, col 1; p 584. At p 107, col 2; p 590 Lord Morris said:

> The circumstance that parties agree that any differences are to be settled by arbitration in a certain country may and very likely will lead to an inference that they intend the law of that country to apply. But it is not a necessary inference or an inevitable one though it will often be the reasonable and sensible one.

At p 111, col 2; p 596 Lord Wilberforce described it as a "weighty indication". Lord Diplock said at p 117, col 2; p 604.

> . . . The fact that . . . [the parties] have expressly chosen to submit their disputes under the contract to a particular arbitral forum of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the

arbitration takes place, since this is the law with which arbitrators sitting there may be supposed to be most familiar.

Then a little later at p 119, col 1; p 605 he said:

Nevertheless, strong though the implication may be, it can be negatived by the other terms of the contract when the contract, as it must be, is construed as a whole in the light of the surrounding circumstances. It is clearly negatived by an express term prescribing some other law than the curial law as the proper law, and it may also be negatived by an overwhelming implication from the other terms all pointing to one single other system of law as the proper law of the contracts as distinct from the curial.

Basing himself on those observations Mr Rix says that there is here at least a strong inference that the parties intended the proper law to be either Chinese law or English law, according to where the arbitration takes place. Indeed he argues that the inference in the present case is stronger than it was in the Compagnie Tunisienne case, for in that case there was an express choice of law clause, cl 13, which provided that the contract be governed by the law of the carrying vessel's flag; whereas here there is no express choice of law clause. Nor is there here, as there was in the Compagnie Tunisienne case --

. . . an overwhelming implication from the other terms of the contract that the parties intended one single system of law to apply, whether English, Chinese or some other law.

It is, he says, unfortunate for the parties that the floating proper law, which they clearly intended to govern the contract is something which English law as the lex fori does not permit; a consequence of which no doubt the parties were wholly unaware. But this is a case where, in Mr Gaisman's pithy phrase --

. . . their implied choice of law abrogates their express choice of arbitration.

As for the judgment below, Mr Rix criticizes the Judge's approach. He decided, first, that English law was the proper law of the contract, as being the system of law with which the contract has the closest or most real connection. Only then did he turn to cl 35. This was, says Mr Rix, the wrong way around. The proper approach was to seek out the parties' intention as to the proper law, whether express or inferred. Only if no such intention could be ascertained is one driven to choose the system of law with which the contract has its closest connection. Of course, once the Judge had decided that English law was the proper law of the contract, it followed almost inevitably that cl 35 would be upheld. But the Judge started at the wrong end. The point can be

illustrated by a quotation from the Judge's judgment at p 16 of the transcript:

In my judgment the plaintiffs' analysis is too rigorous and in fact is not the result of the correct application of the principles which are involved. The proper law of the charter-party in my judgment for the reasons already given is English law and that conclusion, it seems to me, could be reached without any assistance from Clause 35, although the reference to London does in my view support it. What can be said is that Clause 35 gives no guidance as to the choice of proper law as between English and Chinese, both being possible venues for the arbitration.

That passage, says Mr Rix, illustrates the error in the Judge's approach. It goes without saying that cl 35 gives no guidance as to the choice of law as between English and Chinese. But that is not the point. It gives strong guidance, says Mr Rix, that the parties intended both systems of law to apply, according to where the arbitration was to take place.

I think there is force in Mr Rix's criticism of the Judge's approach, although, as Mr Gaisman pointed out, it may receive some support from the approach adopted by Mr Justice Bingham in The Iran Vojdan, [1984] 2 Lloyd's Rep 380. The explanation for the Judge's approach may be that Mr Rix's argument was not made as clear to the learned Judge as it has been to us. Mr Rix points out that in an earlier passage in the judgment the Judge clearly misunderstood his argument when he said:

The plaintiffs' submission, as I understand it, is that although English law is the proper of the charter-party, it is not the proper law of the agreement to arbitrate.

But whatever view one takes as to the Judge's approach, the underlying question remains whether Mr Rix's argument is sound. In my view it is not. It attaches much too much importance to cl 35 as an indication of the parties' intentions as to the proper law of the contract. Where the arbitration clause provides for a single situs, then the observations in Compagnie Tunisienne on which Mr Rix relies, carry full weight. The arbitration clause then provides a strong, although not conclusive, indication of what the parties intended as to the proper law of the contract, including the arbitration agreement. But where the arbitration clause provides for a dual situs, the indication that they intended both laws to apply, according to where the arbitration takes place, is much less strong. Suppose cl 35 had contained no provision as to where the arbitration was to take place as for example in a typical contract calling for arbitration in accordance with the ICC rules. It could not be argued with any hope of success that that was an indication that the parties intended the proper law of the contract to depend upon wherever the arbitration ultimately took place. The same reasoning applies, albeit with less force, where the contract provides for arbitration in one of two places. I

would therefore reject Mr Rix's argument that these parties by inference intended to adopt a floating proper law. The truth is that they probably never gave their minds to the matter at all. At all events, one cannot deduce from cl 35 what they would have intended if they had.

The conclusion I have thus reached is in line with (even if it is not precisely covered by) the views expressed by the editors of Dicey and Morris Conflict of Laws at p 537. After referring to the strong presumption that the proper law of the contract is the law of the country in which the arbitration is to be held, the editors continue:

The presumption cannot operate if no place of arbitration is agreed in the original contract, or if the place of arbitration is left to be chosen by the arbitrators or by an outside body. In such cases the proper law of the contract (including the arbitration clause) will be determined in accordance with the normal principles.

Two things follow from my conclusion. First, as to the proper law of the contract, the Court will be driven back to asking what is the system of law with which the contract has the closest and most real connection, since nothing can be inferred from cl 35. Secondly, the foundation of Mr Rix's attack on cl 35 disappears. The clause is not destroyed in the eyes of English law as the lex fori by the parties' choice of a floating proper law, because the parties have made no such choice. Mr Rix advances an alternative argument under this head. Even if the parties have not chosen a floating proper law for their contract, they have at least chosen a floating curial law for the arbitration, according to whether it takes place in London or Peking. But here Mr Rix's argument founders for a different reason. We have not been referred to any case which decides that a floating curial law invalidates an arbitration clause. Nor can I see any good reason why it should. It must be possible, indeed it frequently happens, that an arbitration clause provides for one or other of two or more venues. Nobody has suggested, so far as I know, that that makes the arbitration clause void for uncertainty or otherwise unworkable. It makes good commercial sense that the law governing the arbitration procedure should be the law of the country where the arbitration takes place, unless, which is unlikely, the parties have agreed on some other curial law. The objections which apply to a floating proper law do not apply to a floating curial law. A contract without a proper law cannot exist. It is, as has been said, no more than an abstraction or a piece of paper. But an arbitration agreement can exist perfectly well without it being known at the time the arbitration agreement is entered into what law will govern the arbitration procedure. I would reject Mr Rix's alternative way of putting the argument.

Uncertainty

I now turn to the second issue on which we did not find it necessary to call on Mr Gaisman. Mr Rix submitted that an

arbitration clause can be so ambiguous and uncertain that the Court is left with no alternative but to disregard it altogether. A good example of this would be EJR Lovelock Ltd v Exportles, [1968] 1 Lloyd's Rep 163 where one part of the arbitration clause provided for any dispute to be referred to arbitration in London, and another part of the same clause provided for any other dispute to be referred to arbitration in Moscow. The Court of Appeal held that the clause was meaningless and should be rejected. Mr Rix submits that the same applies here. He puts forward eight possible meanings for "the defendant" in the phrase "in the defendant's option". He said none could be regarded as satisfactory. I have already explained why, according to Mr Rix, "the defendant" cannot mean either the defendant in legal proceedings or the respondent in arbitration proceedings.

The learned Judge solved this problem neatly by the ruling that it covers both. In my view he was right. The one thing which is clear about cl 35 is that the parties intended to refer their disputes to arbitration. I would be very reluctant indeed to defeat that intention. EJR Lovelock Ltd v Exportles was an extreme case. The clause was self-contradictory. There is no such inherent self-contradiction here. In my judgment the meaning given by the Judge to this important clause was sensible and workable. Of course it may mean that an arbitration may be commenced in one jurisdiction only to be recommend in another. But even if that consequence can properly be described as absurd, which I doubt, it does not mean that the clause is uncertain. I would therefore reject Mr Rix's argument on the second issue.

In dealing with that issue I have assumed that English law is the proper law, since it is only by reference to some system of law that the question can be judged at all. But I must not be taken as deciding that English law is the proper law of this contract. The point has not been argued. I expressly leave it open. If Chinese law should be held to apply then it was not, as I understand it, suggested that the clause would be void for uncertainty. In any event, we have had no evidence as to Chinese law. It follows that in my view cl 35 is valid and enforceable.

Then comes the third issue raised by Mr Rix. He submits that on the facts of the case, and on the correspondence to which he referred us, it was the defendants who referred the dispute to arbitration within the meaning of cl 35. But he accepted, as I understood him, that if the Judge's decision on the second issue is to stand, then the third issue does not arise. In any event, I should have found great difficulty in holding that the defendants had referred the claim to arbitration when all they were seeking to do was to apply for a stay. For all those reasons I would dismiss this appeal.

JUDGMENTBY-2: MANN LJ

JUDGMENT-2:

MANN LJ: For the reasons given by my Lord I would also dismiss the appeal.

JUDGMENTBY-3: STEYN LJ

JUDGMENT-3:

STEYN LJ: I also agree. The arbitration clause in the charter-party (as corrected in an immaterial respect) reads as follows:

Any dispute arising under the charter to be referred to arbitration in Beijing or London in defendant's option.

In argument the clause was described as unique. It is true that there is apparently no reported English authority on the validity of such a clause. But in my experience "defendant's option" arbitration clauses are used in one-off international trade transactions from time to time. What is novel about the present case is that it is the first known challenge to the validity of such a clause.

It may be useful to sketch the contextual scene in which such clauses are to be seen. It is an axiom of international trade that each party usually wishes to contract subject to the substantive law of his own country and subject to dispute resolution in his own country. If a party is in a significantly stronger bargaining position than the counter-party his wishes may prevail. Often compromises have to be made. Sometimes the law of a neutral country is selected as the applicable law governing the contract. Similarly, compromises often have to be made in respect of jurisdiction. One compromise is to stipulate for arbitration in a neutral country. Another compromise is to stipulate for arbitration subject to the rules of, for example, the International Chamber of Commerce, leaving the venue of the arbitration to be fixed by the arbitral institution or by the arbitral tribunal. The arbitration clause in the present case is yet another compromise. The technique adopted is to give "the defendant" the option to select arbitration in Beijing or London. Realistically London must have been the favoured place of arbitration of the Norwegian owners, and Beijing must have been the favoured venue of the Chinese charterers. At the time of the conclusion of the charter-party and the arbitration agreement it was conceivable that either the owners or the charterers might be the claimants. The clause did not stipulate for a forum actoris. On the contrary, subject to the exercise of the defendant's option, the objective of the clause is that the claimant must pursue his remedy in the home territory of the other party. In saying that I am, of course, treating London as the home territory of the Norwegian owners. That seems a realistic view. It remains to be considered whether the parties achieved their objective in agreeing to the terms of the particular arbitration clause.

The validity of the arbitration clause

Mr Rix, QC submitted that the arbitration clause is invalid under English rules of private international law because (1)

it involved an implied choice of a "floating" proper law (either English or Chinese) to govern the arbitration agreement; or (2) it contained an implied choice of a "floating" curial law (either English or Chinese). It will be convenient to examine the two submissions separately.

English law is the lex fori. Our conflict rules provide that the validity of the arbitration agreement must be determined in accordance with the applicable law of that agreement. Mr Rix, QC submits that the arbitration agreement in the present case has no existing and ascertainable applicable law. If this premise is established Mr Rix submits that the arbitration agreement is invalid in accordance with the principles of English private international law. It is common ground that the Contracts (Applicable Law) Act 1990 is not applicable to the present dispute. Even if s 3(2) of the Act permits a floating applicable law, that cannot affect the present dispute: see Cheshire and North's Private International Law, 12th ed 483. Mr Rix reminded us of Lord Diplock's often cited observation in Amin Rasheed Shipping Corporation v Kuwait Insurance Co, [1983] 2 Lloyd's Rep 365, [1984] AC 50. Lord Diplock stated (at p 370, col 2; p 65C to D):

My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a Court of justice for failure to perform any of those obligations . . .

The correctness of this proposition as a general principle is not in doubt: see also Forsikringsaktieselskapet Vesta v Butcher, [1989] 1 Lloyd's Rep 331; [1989] AC 352.

It may, however, require qualification by reason of the provisions of s 5(2) of the Arbitration Act, 1975 which provides that the enforcement of a New York Convention award may be refused if the person against whom it is invoked proves:

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

Section 5(2)(b) creates a new conflict rule which supersedes the relevant English conflict rules to the extent to which that provision applies. It contemplates an applicable law which often would not be ascertained at the time of the making of the arbitration agreement: see Van Den Berg, The New York Arbitration Convention 1958, p 291. But is not necessary to pursue the impact of this qualification. For present purposes I will consider the matter in the light of the principle enunciated by Lord Diplock in Amin Rasheed.

The question is therefore a narrow one: is the arbitration clause in the charter-party governed by an ascertainable proper law? But it is important to bear in mind the approach to be adopted, in accordance with English conflict rules, as to relevant time for the determination of the issue. Armar Shipping Co v Caisse Algerienne D'Assurance et de Reassurance, [1980] 2 Lloyd's Rep 450; [1981] 1 WLR 207 establishes that the relevant time is the time of the making of the contract. See also Dicey and Morris Conflict of Laws 11th ed vol 2 at p 1167.

Mr Rix's argument concentrates entirely on the terms of the arbitration clause. Mr Rix relies on the speeches in the House of Lords in Compagnie Tunisian de Navigation SA v Compagnie d'Armement Maritime SA, [1970] 2 Lloyd's Rep 99; [1971] AC 572. He seeks to extract from this case the proposition that an express choice of forum amounts to an implied choice of applicable law in the absence of overwhelming rebutting factors. I would not accept this interpretation. On my reading of the speeches in the House of Lords Compagnie Tunisienne is authority for no more than the proposition that a choice of forum will generally be a strong, but not necessarily decisive factor, in relation to the issue with which legal system the contract has its closest connection. Mr Rhidian Thomas (now Professor Thomas) has shown convincingly how the weight of this factor may depend on the nature of the arbitration clause, and the circumstances of each case: Commercial Arbitration; Arbitration Agreements As a Signpost of The Proper Law, 1984 LMCLQ 141. Moreover, it is implicit in Compagnie Tunisienne that there may be circumstances in which the weight to be attached to the arbitration clause may be minimal.

In the absence of an express choice of law, the first question is whether an appropriate implied intention can be gathered from the terms of the contract and the circumstances of the case. If no such implied intention is established, the contract is governed by the system of law with which the transaction has its closest connection. Mr Rix concedes that if he cannot establish an implied floating applicable law, his argument must fail. In that event, "the defendant's option" in choosing London or Beijing as the seat of the arbitration is a neutral factor in choosing between English and Chinese law as the applicable law of the arbitration agreement. Everything therefore hinges on the question whether Mr Rix can establish an implied floating applicable law.

It is necessary to pause to consider what kind of implication is under consideration. I have not understood Mr Rix to submit that it can be inferred that the Norwegian charterers and the Chinese owners had an actual common intention to select a floating proper law. That is not surprising: one would not expect it to be a subject of conversation among shipping people in the suburbs of Oslo and Beijing. It would in my respectful view be preposterous to imagine that those parties would have considered such an obscure concept. How is the matter then to be approached?

Our law recognizes a distinction between what Professor Trietel (The Law of Contract, 8th Ed, 185-194) has described as terms implied in fact and terms implied by law. In Scally v Southern Health and Social Services Board, [1991] 3 WLR 778 the House of Lords recognized this distinction. Lord Bridge in the only speech in the case explained (at p 787G):

A clear distinction is drawn in the speeches of Viscount Simonds in Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555 and Lord Wilberforce in Liverpool City Council v Irwin [1977] AC 239 between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship . . .

I understood Mr Rix to argue in favour of the first kind of implication, ie a term implied in fact. If that were correct, the simple answer is that the arbitration agreement is entirely workable without the implication. The implication is not necessary. On this simple ground I would reject Mr Rix's first argument.

There is, however, another way of approaching the matter. On analysis Mr Rix relies on a single factor for the implication, namely the defendants' option contained in the arbitration clause. The implication put forward is therefore a constructional implication. It is therefore more correct to view it as a proposed implication by law. No such implication of an implied floating applicable law has ever been established in any English case. Such an implication is also contrary to the general approach of our law. The principle qui elegit judicem elegit jus forms no part of our law. It is clear from Compagnie Tunisienne that even an express choice of jurisdiction does not by itself give rise to an implied choice of law. It may do so together with other factors. But more realistically it will play an important role in the next inquiry, that is the determination of the system of law with which the contract has the closest connection. Given that the actual selection of a place of arbitration does not of itself give rise to an implied choice of law it seems to me implausible to suggest that the granting of an option to choose the place of arbitration can by itself give rise to an implied choice of a floating applicable law. Moreover, as Lord Bridge made clear in Scally, wider consideration of justice and policy play a role in the kind of implication which I am now considering. It is therefore material to bear in mind that the sole purpose for which the implication is put forward is to achieve the destruction of the specially negotiated arbitration clauses. If there is a doubt, the Court ought to lean in favour of an interpretation which does not destroy the arbitration agreement. Lastly, in considering whether an implication of law is established the true standard is not reasonableness. In Scally Lord Bridge, speaking of such an implication, stated at 788B:

I fully appreciate that the criterion to justify an implication of this kind is necessity, not reasonableness.

In my judgment there is no necessity to imply floating applicable law. If there is no implication, no gap is left and the arbitration clause can take effect according to its terms. In my view the suggested implication is unsustainable.

For these reasons I would reject the submission that the arbitration agreement is invalid on the ground that it contains a floating applicable law.

That brings me to the alternative argument that the arbitration contained a floating curial law, ie either English or Chinese. It can readily be accepted that English arbitration law does not recognize a "de-localised" arbitration or arbitral procedures unconnected with any municipal system of law. Naviera Arnazonica Peruana v Compania Internacional De Seguros Del Peru, [1988] 1 Lloyd's Rep 166. In international commercial arbitration the place or seat of arbitration is always of paramount importance. It is to the Courts of the place of arbitration that parties have to look for support if the arbitral process breaks down; eg. if the arbitral tribunal has to be reconstituted. The law governing the arbitration is almost invariably the law of the place where the arbitration is held: see Hunter and Redfern, The Law and Practice of International Commercial Arbitration 2nd pp 77-80, pp 299-300. The place of arbitration will frequently not be determined when the arbitration agreement is made. Often the fixing of the place of arbitration is left to an arbitral institution or even to the arbitral tribunal. There is no doctrinal reason why the law governing the arbitration must be fixed at the time of making the arbitration agreement. And policy reasons strongly support the validity of an arbitration clause containing a floating curial law. The contrary view would mean, if the place of arbitration is not fixed at the time of the making of a contract subject to a standard ICC arbitration clause, that English law would treat the arbitration clause as invalid. That would be patently absurd. The dictum of Lord Diplock in Amin Rasheed about the requirement that every contract must have a proper law is not to be extended to cover the curial law of arbitrations. Lord Diplock was confining his observations to the proper law of contracts, and he said nothing about the law governing an arbitration. Moreover, in The Iran Vojdan, [1984] 1 Lloyd's Rep 380, at p 385, Mr Justice Bingham expressly recognized the validity of a floating forum in a party's choice. I respectfully agree with the observations of Mr Justice Bingham. I would therefore reject this alternative challenge to the validity of the arbitration clause.

Uncertainty

Mr Rix submits that the arbitration clause is null and void for uncertainty. If Chinese law applies, it is common ground that the arbitration clause is valid. I therefore approach this matter on the basis that the lex arbitri is English law. Mr Rix submits that the possible constructions of the words

"the defendant" are so various that it is impossible to give any clear of certain meaning to the clause. Mr Rix said that the word "defendant" in the arbitration clause is capable of bearing eight different meanings. The spectre of a catalogue of possible alternative constructions may at first glance seem to confront us with a daunting task. The reality is different. The fact that a multiplicity of possible meanings of a contractual provision are put forward, and that there are difficulties of interpretation, does not justify a conclusion that the clause is meaningless. The Court must do its best to select, among the contending interpretations, the one that best matches the intention of the parties as expressed in the language they adopted. And, in a case where there are realistic alternative interpretations of an arbitration clause, the Court will always tend to favour the interpretation which gives a sensible and effective interpretation to the arbitration clause.

The interpretation of the words "the defendant" in the arbitration clause is a matter of first impression. For my part I regard the most natural and contextual interpretation as one which refers to the party against whom arbitration proceedings or Court proceedings are taken. That was how the Judge construed the clause. If the clause is capable of being construed differently, I would still select the same interpretation on the ground that it is the most sensible and effective interpretation. It follows that in my judgment the arbitration clause is valid.

Who is the defendant?

That brings me to Mr Rix's final submission that the Judge erred in ruling that the Chinese charterers were the defendants, because in truth the Chinese charterers claimed arbitration in Beijing against the Norwegian owners who were therefore the defendants. But Mr Rix expressly conceded that this submission must fail if the arbitration clause is given the interpretation which I have preferred. I need therefore say no more about this point.

Conclusion

In agreement with the Judge I conclude that the Chinese charterers were entitled to a stay of the English legal proceedings pursuant to s 1 of the Arbitration Act 1975. I therefore agree that the appeal should be dismissed.

DISPOSITION:
The appeal was dismissed and costs awarded to the respondents. Leave to appeal to the House of Lords was refused.

SOLICITORS:
Sinclair Roche & Temperley; Herbert Smith.

CLIENT: YCA
LIBRARY: CANADA