QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Dec. 8, 9, 13, 14 and 16, 1993

PARTENREEDEREI M/S "HEIDBERG" AND VEGA REEDEREI FRIEDRICH DAUBER v. GROSVENOR GRAIN AND FEED CO. LTD., UNION NATIONALE DES COOPERATIVES AGRICOLES DE CEREALES AND ASSURANCES MUTUELLES AGRICOLES

(THE "HEIDBERG")

Before His Honour Judge DIAMOND, Q.C.

Bill of lading — Incorporation — Arbitration clause — Vessel chartered for carriage of grain — Vessel collided with jetty and fire broke out on board — Cargo damaged — Claim by cargo interests — Whether amended Centrocon arbitration clause incorporated into bill of lading.

Conflict of laws — Proper law — Bill of lading — Incorporation of arbitration clause — Dispute between owners and cargo interests — Owners brought action in France — French Court decided arbitration clause not incorporated — Whether Court bound by Brussels Convention to recognize French decision — Whether question of incorporation to be determined by English or French law.

On July 23, 1990 a contract of affreightment was concluded between the first defendants (UNCAC) and Peter Dohle Schiffahrts KG (GmbH & Co.). The contract was on the Synacomex form and provided for tonnage nominated by Peter Dohle to perform a minimum of six and a maximum of 12 voyages carrying 2500 tons of bulk maize per shipment from a number of named ports in France including Bordeaux in charterers' option to New Holland. The charter contained an arbitration clause which provided for arbitration in Paris.

Peter Dohle did not have or own a vessel which could meet the cancelling date of Mar. 8, and on Mar. 7 a fixture of *Heidberg* was negotiated over the telephone between English brokers for Peter Dohle and the second plaintiffs, (the managers) for the first plaintiff owners. Certain essential terms were expressly agreed over the telephone but in respect of the other terms it was agreed that the terms of the *Baursberg* charter, a previous fixture between different charterers and the managers, would apply. That charter was on the Synacomex 90 form and contained the Centrocon arbitration clause (with three months limitation amended to 12 months) which provided for arbitration in London according to English law.

Following the agreement the English shipbrokers sent a "recap telex" dated Mar. 7, 1991 to the managers which erroneously referred to the Synacomex form instead of the amended Synacomex 90 form. No other written evidence as to the fixture of *Heidberg* existed at the time of shipment.

On Mar. 8 a bill of lading was issued in respect of 2,550,000 kg of bulk maize on board *Heidberg*. The bill provided for the arbitration clause of an unidentified charter-party to be incorporated in the bill. At the time the bill of lading was issued the only executed document which could be referred to as a charter-party was the contract of affreightment on the Synacomex form of charter which provided for arbitration in Paris. There was also at that date an oral agreement for the charter of *Heidberg* which incorporated the amended Centrocon arbitration clause and provided for arbitration in London.

The cargo was shipped pursuant to a sale contract on c.i.f. terms concluded between UNCAC and the first defendants, an English company (Grosvenor). The cargo was insured by the third defendants (Group AMA).

On Mar. 9, in the early hours, *Heidberg* collided with a Shell jetty at Pauillac on the river Gironde not far from Bordeaux. Both the vessel and the jetty sustained damage. A fire broke out on board the vessel and part of the cargo sustained water damage as a result of fire-fighting operations. The vessel was salved and returned to Bordeaux for repairs. The sound cargo was eventually transhipped onto another vessel and on-carried to New Holland.

On Mar. 18 Grosvenor paid for the cargo and was handed in exchange the shipping documents including the bill of lading, and on or about Nov. 18, Group AMA paid Grosvenor in respect of its loss.

Various actions were brought in both England and in France. On Sept. 23, 1993 the Tribunal de Commerce held inter alia that the bill of lading did not incorporate the arbitration clause providing for arbitration in London.

Meanwhile on June 11, 1991 the owners and managers issued a writ in the English Court (1991 Folio 1352) claiming various relief against Grosvenor and UNCAC. The writ was amended to add Group AMA as a third defendant. They also appointed an arbitrator contending that the Centrocon arbitration clause was incorporated in the bill of lading.

On Aug. 5 the owners and managers commenced a second set of proceedings against Grosvenor, UNCAC and Group AMA (1991 Folio 1768) claiming various declarations.

On Apr. 30, 1992 Grosvenor, UNCAC and Group AMA issued originating summons (1991) Folios 1703, 1704 and 1705) claiming relief against the owners and managers.

On Nov. 5, 1993 Grosvenor UNCAC and Group AMA took out a summons in action 1991 Folio 1352 seeking an order that such action together

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with 1991 Folio 1768 be dismissed pursuant to R.S.C., O. 18, r. 19 and/or the inherent jurisdiction of the Court on the grounds that the claims of the owners and managers in both action and the arbitration were barred by res judicata by reason of the judgment of the Tribunal de Commerce of Sept. 23, 1993.

The issues for determination were (1) Was the Court bound by the Brussels Convention to recognize the decision of the Tribunal de Commerce that the Centrocon clause was not incorporated in the bill of lading? (2) If not, by what law should the Court determine whether the clause was incorporated in the bill? (3) If English law was to be applied, was the clause incorporated in the bill?

——*Held*, by Q.B. (Com. Ct.) (Judge DIAMOND, Q.C.), that (1) the judgment of the Tribunal de Commerce seemed prima facie to fall within the definition of "judgment" contained in art. 25; art. 25 did not exclude judgments on preliminary issues or draw any distinction between these and final judgments on the merits of a case; no objection could be brought to recognition of the French judgment on the ground that the parties to the two sets of proceedings were not the same since under French law an action brought to enforce a subrogated claim had to be brought in the name of the insurer while under English law it had to be brought in the name of the assured with the insurer having an equitable interest in the proceedings (*see* p. 297, cols. 1 and 2);

(2) it was primarily a policy issue whether a decision on validity of an arbitration agreement was held to be excluded by exception (4) to art. 1 of the Brussels Convention; and there were solid practical and policy reasons for holding that decisions as to the validity of an arbitration agreement fell generally within the ambit of the Brussels Convention; it was beyond doubt that the judgment of a foreign Contracting State on the substance of a dispute, even if given in breach of a valid arbitration agreement must be recognized by this Court under art. 26; exception (4) of the Brussels Convention should not apply to judgments as to the validity of arbitration agreements both because such judgments were not confined to "arbitration" but necessarily extended to the construction of the underlying contract and because there were solid practical and policy reasons why the judgment of the first Contracting State to pronounce on the validity or invalidity of the arbitration agreement should be recognized in other Contracting States (*see* p. 300, col. 2; p. 301, col. 1; p. 303, col. 2);

——*The Atlantic Emperor*, [1992] 1 Lloyd's Rep. 342, considered.

(3) the judgment of the Tribunal de Commerce did not fall within exception (4) relating to "arbitration" and this Court was bound to recognize it (*see* p. 303, col. 1; p. 313, col. 2);

(4) it was well established that this Court applied the law of England to decide all disputes that came before it unless and to that extent it was demonstrated that either by statute or by English rules of private international law it was required to apply the law of some other country; it had not been demonstrated that a law other than English law should apply and English law had to be applied to determine whether the Centrocon clause was incorporated into the bill of lading (*see* p. 307, col. 2; p. 308, cols. 1 and 2);

(5) if that was wrong the putative proper law of the bill of lading was French law (*see* p. 308, col. 2);

(6) it would be commercially unsound to hold that on the proper construction of the bill of lading, it was capable of incorporating the terms of an oral contract; what was transferred to the consignee or indorsee consisted only of the terms which appeared on the face and reverse of the bill of lading; collateral oral terms were not transferred and the same principles applied where the bill of lading incorporated a charter-party; and as a matter of construction of the bill of lading it did not incorporate the terms of a charter which at the date the bill of lading was issued had not been reduced to writing; the recap telex did not qualify for this purpose; the charter-party fixture of Mar. 7 was not incorporated in the bill of lading and even if that was wrong no clause providing for arbitration in London was incorporated (*see* p. 310, col. 2; p. 311, cols. 1 and 2; p. 313, col. 2);

(7) the words set out in the bill of lading were more apt to refer to an instrument in writing than to an oral contract evidenced by a recap telex and the parties were more likely to have intended the freight referred to in the bill of lading to be that defined in the charter of July 23, 1990 than that defined in the voyage charter; if it were material and on the assumption that the words "Charter Party dated" were capable of referring to a contract evidenced only by a recap telex, the terms of the contract of affreightment of July 23 were incorporated in the bill of lading and those of the voyage charter of Mar. 7 were not (*see* p. 312, col. 2; p. 313, col. 1);

(8) the Court was bound to recognize the decision of the Tribunal de Commerce that the amended Centrocon arbitration clause was not incorporated in the bill of lading (*see* p. 313, col. 2).

The following cases were referred to in the judgment:

Ardennes, The [1950] 84 Lloyd's Rep. 350; [1951] K.B. 55;

Albeko Schumaschinen A.G. v. Kamborian Shoe Machine Co. Ltd., [1961] 111 L.J. 519;

Bangladesh Chemical Industries Corporation v. Henry Stephens Shipping Co. Ltd., (The *SLS Everest*), (C.A.) [1981] 2 Lloyd's Rep. 389;

Bonython v. Commonwealth of Australia, (D.C.), [1951] A.C. 219;

Coast Lines Ltd. v. Hudig & Veder N.V., (C.A.) [1972] 1 Lloyd's Rep. 52;

Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.,

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(H.L.), [1970] 2 Lloyd's Rep. 99; [1971] A.C. 572;

Dresser U.K. Ltd. v. Falcongate Freight Management Ltd., (C.A.) [1991] 2 Lloyd's Rep. 557 [1992] Q.B. 502;

Fidelitas Shipping Co. Ltd. v. V/O Exportchlels, [1963] 2 Lloyd's Rep. 113;

Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd., [1989] Q.B. 433;

K/S A/S Seateam & Co. v. Iraq National Oil Co., (The *Sevonia Team*) C.A., [1983] 2 Lloyd's Rep. 640;

Leduc v. Ward (1888) 20 Q.B.D. 475;

Mackender v. Feldia A.G., (C.A.) [1966] 2 Lloyd's Rep. 449; [1967] 2 Q.B. 590;

Navigazione Alta Italia SpA v. Svenska Petroleum A.B., (The *Nai Matteni*), [1988] 1 Lloyd's Rep. 452;

Oceanic Sun Line Special Shipping Co. Inc. v. Jay, (1988) C.L.R. 197;

Oinoussin Pride, The [1991] 1 Lloyd's Rep. 126;

Pacific Molasses Co. v. Entre Rios Compania Naviera S.A., (The *San Nicholas*), (C.A.) [1976] 1 Lloyd's Rep. 8;

Parker v. South Eastern Railway Co., (1877) 2 C.P.D. 416;

Parouth, The [1982] 2 Lloyd's Rep. 351;

Renak, The [1978] 1 Lloyd's Rep. 545; [1979] 1 Q.B. 377;

Rich (Marc) & Co. A.G. v. Societa Italiana Impiante P.A., (The *Atlantic Emperor*), (No. 1), (C.A.) [1989] 1 Lloyd's Rep. 548;

Rich (Marc) & Co. A.G. v. Societa Italiana Impianti P.A., (The *Atlantic Emperor*), (No. 2), (C.A.) [1992] 1 Lloyd's Rep. 624;

Rich (Marc) & Co. A.G. v. Societa Italiana Impiante P.A., (The *Atlantic Emperor*) [1991] 1 Lloyd's Rep. 342; [1991] E.C.R. 3855;

T. S. Havprins, [1983] 2 Lloyd's Rep. 356;

Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd., (H.C.), [1912] A.C. 1.

This was the hearing of certain summonses in an action by the plaintiffs, Partenreederei M/S "Heidberg", the owners of the vessel *Heidberg* and the managers of the vessel Vega Reederei Friedrich Dauber claiming declarations and damages from the defendants Grosvenor Grain and Feed Co. Ltd. and Union National des Cooperatives Agricoles de Cereales and Assurances Mutuelle Agricoles. The issue for decision was whether the amended Centrocon arbitration clause was incorporated in the bill of lading.

Mr. Nigel Meeson (instructed by Messrs. Clyde & Co., Guildford) for the defendant cargo interests; Mr. Graham Dunning (instructed by Messrs Holman Fenwick & Willan) for the plaintiff owners.

The further facts are stated in the judgment of His Honour Judge Diamond, Q.C.

Judgment was reserved.

Tuesday Mar. 21, 1994

JUDGMENT

Judge DIAMOND, Q.C.:

Introduction

In the early hours of Mar. 9, 1991 the motor vessel *Heidberg*, while loaded with a cargo of bulk maize which had been shipped at Bordeaux for carriage to New Holland on the river Humber, collided with a Shell jetty at Pauillac on the river Gironde not far from Bordeaux. Both the vessel and the jetty sustained damage. A fire broke out on board the vessel and part of the cargo sustained water damage as a result of fire-fighting operations. The vessel was salved and returned to Bordeaux for repairs. The sound cargo was subsequently transhipped onto another vessel and on-carried to New Holland.

These events have given rise to a tangled web of legal proceedings both in France and in England. The summonses presently before me concern only a relatively small aspect of this litigation but the different aspects interact.

Heidberg was a vessel of 2700 deadweight tons owned by Partenreederei M/S "Heidberg" of Hamburg ("the owners") and managed by Vega Reederei Friedrich Dauber also of Hamburg ("the managers").

On Mar. 11, 1991 the vessel was arrested (but not so as to found in rem jurisdiction) by order of the Tribunal de Commerce at Bordeaux at the request of Societé des Petroles Shell S.A. ("Shell"). In April and May, 1991 Shell commenced proceedings against, inter alios, the owners and the managers, before the Tribunal de Commerce to recover the loss sustained by it as a result of the collision.

On Apr. 5, 1991 the owners, the managers and Messrs. Owe Brugge and Arend Brugge, partners in the owners, applied to the Tribunal de Commerce for a declaration that they were entitled to limit their liability under the Limitation of Liability Convention, 1976. The establishment of the fund was confirmed by the

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Judge in Chambers of the Tribunal de Commerce on Apr. 8 and 16 1991.

The summonses before me are not concerned with the claim brought by Shell against the owners but with the claims brought by cargo interests against the owners and managers and the cross claims by the owners and managers against cargo interests.

The cargo of bulk maize on board the vessel had been shipped at Bordeaux by Union National des Cooperatives Agricoles de Cereales ("UNCAC"). The cargo was shipped pursuant to a sale contract on c.i.f. terms concluded between UNCAC and an English company, Grosvenor Grain and Feed Company Ltd. ("Grosvenor"). Grosvenor was the party to be notified under the terms of the bill of lading. On Mar. 18, 1991, a few days after the casualty, Grosvenor paid for the cargo and was handed in exchange the shipping documents, including the original bills of lading.

The cargo had been insured by a French company, Assurances Mutuelles Agricoles ("Group AMA"). On or about Nov. 18, 1991 Group AMA paid the sum of £92, 067.41 to Grosvenor in respect of its loss. Grosvenor signed a form of subrogation by which it agreed that Group AMA was subrogated to all its rights and that, so far as necessary, those rights were assigned to Group AMA.

On Apr. 17, 1991, before it had paid the claim, Group AMA obtained a conservatory seizure of the vessel.

In the light of the establishment of the limitation fund, the owners and the managers sought the release of the vessel from arrest. The Tribunal de Commerce, however, maintained the arrests on the ground that Shell and Group AMA might have claims which fell outside the terms of the Limitation Convention. This decision resulted in the vessel remaining under arrest for a very prolonged period. There have been further hearings before the Tribunal de Commerce and the Cour d'Appel. I was told that the Cour de Cassation has recently ruled that the vessel should have been released following the constitution of a limitation fund but has remitted the matter to the Cours de Renvoi, which are the Cours d'Appel at Poitiers and Rouen.

Meanwhile in June, 1991 three different sets of proceedings were commenced, one in France and two in England.

On June 17, 1991 Group AMA commenced legal proceedings in the Tribunal de Commerce, Bordeaux, against, inter alios, the owners and the managers, claiming to recover compensation for the damage sustained by the grain cargo and an indemnity in respect of salvage and general average. Group AMA contends that these proceedings were served on the Public Prosecutor in France on June 17, 1991 and that this constituted valid service on the owners and the managers. The owners and managers, while not contesting that the Tribunal de Commerce would otherwise have jurisdiction under the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968 ("the Brussels Convention") contended, first, that the dispute fell within the terms of an arbitration clause of a charter-party dated Mar. 7 1991 which they said was incorporated into the bill of lading and, second, that in any event there were proceedings involving the same cause of action and between the same parties (see below) pending before the High Court of Justice in London, that the English Court was the Court "first seised", and that accordingly the Tribunal de Commerce should decline jurisdiction under art. 21 of the Brussels Convention.

Previously on June 11, 1991 the owners and the managers had issued a writ in the High Court of Justice in London (1991 Folio No. 1352) in which they claimed the following relief against Grosvenor and UNCAC:

(1) A declaration that Grosvenor and/or UNCAC are liable to contribute in general average to the loss and expenditure incurred by the owners as a result of the collision.

(2) A general average contribution.

(3) A declaration that neither the owners nor the managers are liable to Grosvenor and UNCAC for breach of contract and/or duty by reason of the collision.

(4) Alternatively a declaration that the owners and/or the managers are entitled to limit their liability in accordance with the Limitation Convention.

(5) Damages for the wrongful arrest of the vessel.

The writ was amended and re-issued on June 14, 1991 to add Group AMA as third defendant. The writ was served on Grosvenor on June 17, 1991 and on UNCAC and Group AMA on June 18, 1991.

The owners were not, however, content merely to commence legal proceedings in London. On June 11, 1991, the same day as the writ was first issued, they sent a telex to Grosvenor claiming that the bill of lading incorporated a charter-party dated Mar. 7, 1991 which in turn incorporated the amended Centrocon arbitration clause and that accordingly the disputes

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between the owners and Grosvenor fell to be resolved by arbitration in London. The owners appointed Mr. Mark Hamsher as their arbitrator in respect of such disputes. The disputes were described in the telex in substantially the same terms as in the writ. Grosvenor replied through their solicitors on July 26, 1991 appointing Mr. Bruce Harris as their arbitrator. This appointment was stated to be without prejudice to Grosvenor's contention that the owners were not entitled to pursue arbitration, given that they had already commenced High Court proceedings and that Grosvenor had acknowledged service and had undertaken not to seek a stay. At a later stage UNCAC was brought in and also appointed Mr. Harris as their arbitrator but without prejudice to the following contentions: (1) that the owners had no right to arbitrate; (2) that the issues were res judicata before the Courts in Bordeaux; (3) that to seek to arbitrate the claims in view of the fact that the matters in question were already before the Courts in France and England was an abuse of process.

On Aug. 5, 1991 the owners and the managers commenced a second set of legal proceedings in London in the High Court of Justice. By an originating summons (1991 Folio 1768) they asked the Court to grant the following declarations as against Grosvenor, UNCAC and Group AMA.

(1) A declaration that the amended Centrocon arbitration clause contained in the "Synacomex 90" charter-party dated London Mar. 7, 1991 is incorporated in the contract contained in or evidenced by the bill of lading dated Bordeaux Mar. 8, 1991.

(2) A declaration that Grosvenor and/or UNCAC and/or Group AMA are bound to refer all disputes arising out of the contract referred to in par. (1) above to arbitration in London.

(3) A declaration that Grosvenor or alternatively UNCAC is a party to the contract referred to in par. (1).

(4) A declaration that the owners' or the managers' claim against Grosvenor and/or UNCAC and/or Group AMA for damages for the wrongful arrest of the vessel is a dispute subject to the arbitration clause referred to in par. (1) above.

On Apr. 30, 1992 Grosvenor responded by issuing an Originating Summons (1992 Folio No. 1703) by which it asked the Court to grant it the following relief against the owners and the managers:

(1) A declaration that the owners and the managers, having brought an action (1991 Folio 1352) claiming the same relief as that claimed in the arbitration, are no longer entitled to proceed with the arbitration. (Such claim was abandoned before me).

(2) An injunction restraining the owners and the managers from proceeding with the arbitration;

(3) Alternatively a declaration that the arbitrators have no jurisdiction in respect of the claims referred to in the telex of June 11, 1991 and/or no jurisdiction to grant the relief sought in that telex.

On the same day, Apr. 30, 1992, two further originating summonses were issued. UNCAC issued O.S. 1992 Folio 1704 seeking similar relief to that claimed by Grosvenor. Group AMA issued O.S. 1992 Folio 1705 seeking a declaration that they were not a party to any arbitration agreement with the owners or managers and otherwise seeking similar relief to that claimed by Grosvenor and UNCAC.

In France the various actions brought before the Tribunal de Commerce proceeded and on Sept. 23, 1993 the Tribunal de Commerce handed down a judgment in which it held, inter alia, as follows:

(1) That the owners, the managers and Messrs. Owe Brugge and Arend Brugge are not entitled to limit their liability in accordance with the Limitation Convention and that as a result they are jointly and severally liable to Shell in the sum of F.Fr. 63,032,163 plus interest.

(2) That the bill of lading did not contain a clause providing for arbitration in London.

(3) That the Tribunal de Commerce had jurisdiction in respect of Group AMA's action against the owners for damage to cargo under the bill of lading.

(4) That it had not been shown that the English Court was the Court "first seised" and therefore the action would not be stayed.

(5) That the owners were liable to Group AMA but that Group AMA's claim would be provisionally dismissed on the grounds that Group AMA had failed to establish its loss.

This judgment is presently under appeal.

The summonses before the Court

I do not propose to describe in detail the summonses which came before me for argument on Dec. 8, 1993 and on a number of subsequent days. They are even more convoluted than the proceedings I have so far described. It is sufficient to say that they included the following:

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1. O.S. 1991 Folio 1768

I have previously described the relief claimed. The main issue raised by the summons is whether the amended Centrocon arbitration clause, which provides for arbitration in London, was incorporated into the bill of lading.

2. O.S. 1992 Folios 1703, 1704 and 1705

These summonses, issued by Grosvenor, UNCAC and Group AMA respectively mostly mirror the relief claimed in O.S. 1991 Folio 1768. In addition to raising the question whether the amended Centrocon clause was incorporated into the bill of lading they also raise the issue whether, if the clause was incorporated, certain claims fall within the scope of the arbitration agreement, e.g. a declaration for non-liability, a declaration that owners are entitled to limit their liability, and the claim against Group AMA for wrongful arrest.

3. Summonses relating to action 1991 Folio 1352

Three summonses were taken out by Grosvenor, UNCAC and Group AMA asking that the claim be dismissed on the ground that no statement of claim had been served; alternatively that parts be stayed pursuant to art. 22 of the Brussels Convention; alternatively that parts be struck out; alternatively that the Court should decline jurisdiction under art. 21 of the Brussels Convention. These summonses were, however, in practice superseded by an application made by the owners and the managers taken out on Dec. 7, 1993, which proved to be non-contentious. This application asked the Court to declare on what date it became "seised" of action 1991 Folio 1352 within the meaning of art. 21 of the Brussels Convention and that otherwise the action should be stayed pursuant to art. 30.

4. The "res judicata" summons

On Nov. 5, 1993 Grosvenor, UNCAC and Group AMA took out a summons in action 1991 Folio 1352 seeking an order that such action together with O.S. 1991 Folio 1768 be dismissed pursuant to R.S.C., O. 18, r. 19 and/or the inherent jurisdiction of the Court on the grounds that the claims of the owners and the managers in both actions and in the arbitration are barred by res judicata by reason of the judgment of the Tribunal de Commerce dated Sept. 23, 1993. It may be necessary for me to decide one issue raised by this summons, namely whether the Court is bound by the Brussels Convention to recognize the decision of the Tribunal de Commerce that the arbitration clause relied on by the owners was not incorporated in the bill of lading. As to the others, there was a difference between the parties as to whether the Court should decide on this summons whether the arbitrators are bound by the decision of the Tribunal de Commerce on the merits of the dispute or whether there was a dispute on this point which should be referred to the arbitrators to decide. In the course of argument Mr. Meeson for the cargo interests sought to meet the point that there was a dispute on the issue of res judicata which should be left to the arbitrators to decide by seeking leave to amend the relief sought in O.S. 1992 Folios 1703, 1704 and 1705. I came to the conclusion however, that it would be premature and inconvenient at this stage to reach any conclusion on these questions both because they only arise if the owners and the managers are right that the Centrocon arbitration clause is incorporated into the bill of lading and also because the issues had not been adequately formulated in advance of the hearing in the formal Court proceedings and in the parties' skeleton arguments.

The contracts

Before attempting to define or consider the issues which should be decided by the Court, I must first set out the relevant details of three contracts; first, a contract of affreightment dated July 12, 1990; second, a charter-party fixture dated Mar. 7, 1991; third, the bill of lading issued at Bordeaux and dated Mar. 8, 1991.

The contract of affreightment dated July 23, 1990

On July 23, 1990 a contract of affreightment was concluded between UNCAC and Peter Dohle Schiffahrts KG (GmbH & Co) of Hamburg ("Peter Dohle"). This contract was on the form of the Continent Grain Charter-party (last amended 1974 — code name "SYNACOMEX") and provided for tonnage nominated by Peter Dohle to perform a minimum of six and a maximum of 12 voyages carrying 2500 tons of bulk maize per shipment from a number of named ports in France (including Bordeaux) in charterers' option to New Holland. There were to be a maximum of two voyages per month. The period was October, 1990 to April, 1991 or, in charterers' option, May and June, 1991. Clause 4 of the charter-party provided:

> The freight is earned and is to be paid on right and true delivery of cargo and is payable as follows: within three days after signing Bills of Lading by Charterers, direct into Owners nominated bank account at Hamburg (the bank and the number of the account were specified)

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The charter-party contained an arbitration clause as follows:

> Any dispute arising out of the present contract shall be referred to Arbitration of Chambre Arbitrale Maritime -73, Boulevard Haussman, Paris 8. The decision rendered according to the rules of Chambre Arbitrale shall be final and binding upon both parties. The right of both parties to refer any disputes to arbitration ceases six months after date of completion of discharge or, in case of non-performance, six months after the cancelling date as per clause 8. Where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred.

On Feb. 21, 1991 UNCAC gave, in accordance with the contract, 10 days provisional pre-advice for a vessel to load at Bordeaux with a lay-cancelling period of Mar. 4/8, 1991. This was followed by a seven days definite advance notice given on Feb. 25, 1991.

The charter-party fixture dated Mar. 7, 1991

Peter Dohle did not own or have on charter a vessel which could meet the cancelling date of Mar. 8. Accordingly on Mar. 7, 1991 a fixture of *Heidberg* was negotiated over the telephone between Active Chartering Ltd. ("Active Chartering"), English shipbrokers acting on behalf of Peter Dohle, and the managers acting for the owners. The vessel had just discharged in Northern Spain and was seeking employment.

There had previously on Feb. 8, 1991 been concluded between Active Chartering (then acting for different principals by the name of Arklow Shipping Limited) and the managers a fixture of a different vessel, *Baursberg*, to carry grain from Bordeaux to Manchester. The charter-party had been on the form of the Continent Grain Charterparty (last amended 1990 — Code name "SYNACOMEX 90") but amended in type in a number of respects. In particular the charter-party of *Baursberg* contained a typed provision which (in lieu of the Paris arbitration clause contained in the printed form of charter) provided:

> Centrocon Arbitration Clause (with three months limitation amended to twelve months), in London according to English Law.

There was also a typed provision that freight would become payable:

> . . . by Charterers to Active Chartering . . . within three banking days of right and true delivery for onward transfer to the Owners.

The fixture of *Heidberg* was conducted at short notice. Certain essential terms were expressly agreed over the telephone. In respect of other terms it was agreed that the terms of the *Baursberg* charter would apply.

Following the agreement made on the telephone Active Chartering sent a "recap telex" dated Mar. 7, 1991 to the managers.

> This is to reconfirm todays charter party dated 7th March '91.
> M. V. "Heidberg"
> German flag, single decker abt 2700 dwcc abt 134000 cbftgr
> grainfitted and suitable grab discharge
> 1 hoha with moveable bulkhead for
> — 2550 tonnes maize in bulk only, no bags
> — Bordeaux — New Holland
> — Laycan 8th March 0900 hrs provided vessel is in always load ready latest 0900 hrs then Charterers guarantee loading/completion latest 9th 24.00 hrs weather permitting, force majeure and breakdowns excepted.
> — freight DM 18.78 tonne int weight fio, spout/grab trimmed payable after right and true delivery.
> — 24 hours load
> — 54 hours discharge
> — Laytime non rev and wp
> — Demurrage DM 4500 daily/rata free despatch
> — Synacomex charter-party . . .

This telex erroneously referred to the Synacomex charter-party (which contained a Paris arbitration clause) when it should have referred to the amended form of Synacomex 90 form used on Feb. 8, 1991 for the charter of *Baursberg*. No other written evidence as to the fixture of *Heidberg* existed at the time of shipment.

After the casualty had occurred Active Chartering sent to the managers a form of charter-party for signature. This was on the Synacomex 90 form and included the terms agreed for the *Baursberg* fixture save where otherwise agreed. In particular it included the typed clause providing for the amended Centrocon arbitration clause to apply. As the casualty had already occurred, the draft charter-party was neither signed for the owners, nor returned to Active Chartering. At the time of the casualty, and for a long time thereafter there was no written document evidencing the agreement of the owners to the draft charter-party nor, on the other hand, was any suggestion made by them that the draft charter-party did not accurately set out the terms orally agreed. Long after these proceedings had been commenced Peter Dohle

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and the managers executed a form of charter-party in the same terms as the draft. But this did not occur until 1993, presumably after judgment had been given by the Tribunal de Commerce, and it cannot have any effect on the issue raised in these proceedings.

The nomination of Heidberg to UNCAC

In response to the notices given by UNCAC on Feb. 21 and 25, 1991, Peter Dohle had originally nominated "MV *Birta* or sub" with a lay/can of Mar. 5/8, 1991.

After the fixture of *Heidberg* had been agreed, Active Chartering on behalf of Peter Dohle nominated that vessel to UNCAC under the terms of the contract of affreightment. The notice was dated Mar. 7, 1991 and was in the following terms:

> Please to reconfirm today's nomination dated 7th March 1991.
>
> — M.V. "Heidberg"
> German Flag, Singledecker
> Abt 2700 DWCC Abt 134000 CBFTGR
> Grainfitted and suitable grab discharge
> 1 hoha with moveable bulkhead
> FOR
> — 2550 tonnes maize in bulk only, no bags
> — Bordeaux — New Holland
> — Laycan 8th March 0900 hrs provided Vsl is in always load ready latest 0900 hrs then Charterers guarantee loading/completion latest 9th 24.00 hrs weather permitting, force majeure and breakdowns excepted.
> — Synacomex charter party

This telex repeated some of the terms set out in the re-cap telex sent to the managers. In particular, it stated that the form of charter was the "Synacomex" charter-party. There was no reference to any amendment to the printed form of charter-party to provide for arbitration in London.

The bill of lading

The bill of lading acknowledges the shipment of 2,550,000 kg of bulk maize on board *Heidberg* "now lying in the port of Bordeaux" and bound for New Holland. The shipper is stated to be UNCAC (whose address is given as 83, Avenue de la Grande Armee, Paris). The bill states "Notify Grosvenor Grain & Feed Co Ltd". There is a typed clause "Freight payable as per C/p".

The printed form, after acknowledging shipment, continues:

> . . . and to be delivered in the same good order and condition unto [the words "TO ORDER" have been inserted] or their Assigns, they paying freight for the said goods in accordance with the Charter Party dated . . . [the space has been left blank] all the terms, conditions and exceptions of which Charter Party, including the Arbitration clause, are incorporated herewith.

The bill of lading is signed as follows:

> In witness whereof the Master or Agent of the said vessel has affirmed 3 THREE ORIGINALS Bills of Lading . . . one of which being accomplished the others to stand void.
>
> Dated in Bordeaux the 8th day of March 1991
> Clean on Board.

There is then a printed space for the signatures of both the shippers and the master. It was signed for UNCAC and also signed for the master over the rubber stamp of the managers. On the reverse of the bill are set out certain standard clauses.

The different arbitration clauses

The bill of lading provided for the arbitration clause of an unidentified charter-party to be incorporated in the bill.

At the time the bill was issued the only executed document which could be referred to as a charter-party was the contract of affreightment on the "Synacomex" form of charter-party. This provided for arbitration in Paris as set out above.

There was at the date of the bill of lading also an oral contract for the charter of *Heidberg* as agreed on Mar. 7, 1991, which incorporated the amended Centrocon arbitration clause. This provides that all disputes under the contract shall be settled by arbitration in London, each party appointing an arbitrator who is familiar with the business. In the second half of the clause there is a provision relating to the time within which an arbitrator must be appointed. The amendment as referred to in the *Baursberg* charter-party, would amend that provision to read as follows:

> . . . Any claim must be made in writing and Claimant's Arbitrator appointed within twelve months of final discharge and where this provision is not complied with the claim must be deemed to be waived and absolutely barred.

At the date of the bill of lading, however, the

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only written evidence of this charter was the recap telex. This referred only to "Synacomex" charter-party which contains the Paris arbitration clause set out above. Moreover the only notice of that charter-party given to UNCAC was that set out in the nomination notice of Mar. 7, 1991. This likewise referred only to the "Synacomex" charter-party and thus to the Paris arbitration clause contained in the printed form. No notice was given at any stage to UNCAC that the head charter by which Peter Dohle chartered *Heidberg* from the owners contained a London arbitration clause and they d no reason to suspect this.

The issues

A large number of issues were sought to be raised before me. These were helpfully set out in a "Revised List of Issues" prepared by Mr. Dunning who appeared for the owners and the managers. As the hearing progressed, however, it became clear that not all these issues could usefully or properly be decided at the present stage.

It is plain that the central issue which arises on all these summonses is whether the bill of lading incorporates the terms of the charter-party fixture agreed on Mar. 7, 1991 and, if so, whether it incorporates the amended Centrocon arbitration clause. There are, in addition, a number of subsidiary issues. For example there are issues as to whether, if the clause is incorporated, certain types of relief being sought by the owners, namely a declaration of non-liability, a declaration that the owners are entitled to limit their liability and the claim for compensation for wrongful arrest, fall within terms of the clause. I would not however think it right to decide such issues unless I had first come to the conclusion that the Centrocon arbitration clause is incorporated.

Since the central issue is whether the Centrocon arbitration clause is incorporated, I would be disposed to decide it first. But I am immediately faced with the submission made by Mr. Meeson on behalf of the cargo interests that there is nothing to decide because this question has already been determined, subject to appeal, by the Tribunal de Commerce. This is an issue of some difficulty which I cannot avoid considering. I was at one stage attracted by the possibility that I might decline to decide this issue until it is seen whether the decision of the Tribunal de Commerce is upheld on appeal. But, if I were to take this course, it would involve that I must either decline to decide O.S. 1991 Folio 1768 at all or else run the risk of re-opening a matter which, if Mr. Meeson is right, has been determined between the parties by the French Court.

There was also an issue between the parties as to whether, if the question of incorporation has to be determined by this Court (on the grounds that the Court is not bound to recognise the decision of the Tribunal de Commerce on the matter) the question should be decided according to French or English law.

I have therefore come to the conclusion that I must decide the following three issues before considering whether it is necessary to decide any others. These are: 1. Is the Court bound by the Brussels Convention to recognise the decision of the Tribunal de Commerce that the Centrocon clause is not incorporated in the bill of lading? 2. If not, by what law should the Court determine whether the clause is incorporated in the bill? 3. If English law is to be applied, is the clause incorporated in the bill?

French law

It was not necessary to reach a decision as to a further issue which could have arisen, namely whether, if French law is to be applied, the Centrocon arbitration clause is incorporated in the bill. It was common ground that, according to French law, the clause is not incorporated. Two experts were called to give evidence on various aspects of French law; Me. Robert Meilichzon for the owners and managers and Me. Jacques Lassez for the cargo interests. There was in the event little disagreement between these experts. Both agreed that in French law it would be held that the charter-party of Mar. 7, 1991, and thus the Centrocon clause, is not incorporated in the bill of lading. Their reasons differed more in emphasis than in substance. Me. Meilichzon gave as his main reason that, as there are two charter-parties which might have been incorporated into the bill of lading and as the bill does not specify which is incorporated, a French Court would decline to hold that either is incorporated in the absence of evidence that the parties intended to refer to one or other of these charter-parties. Me. Lassez, whose evidence I preferred, gave as his reason that the test to be applied in French law is whether the parties to the bill of lading contract and in particular the party who is being called upon to arbitrate, had knowledge of and had accepted the charter-party. As UNCAC had no knowledge of the charter-party concluded on Mar.7, 1991 Me. Lassez considered that it would be held by a French Court that the Centrocon clause is not binding on UNCAC, Grosvenor or Group AMA. In the event both experts were agreed that if the Cen-

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trocon clause had been binding on UNCAC, then it would also bind Grosvenor; further, that by the French law of subrogation it would also be binding on Group AMA.

Issue 1. Is the Court bound by the Brussels Convention to recognize the decision of the Tribunal de Commerce that the Centrocon clause is not incorporated in the bill of lading?

The Tribunal de Commerce decided this issue in the following way:

> Whereas this bill of lading does not contain any specific arbitration clause, referring only to the one which would appear in an unidentified charter party.
>
> Whereas it is in reliance upon this indeterminate provision that the shipowners undertook an arbitration proceeding in London against Grosvenor . . . UNCAC and Group AMA in June 1991.
>
> Whereas furthermore the alleged charter-party would be one which was concluded between Mr Peter Dohle as charterer and Vega Reederei Friedrich Dauber as owner of the "Heidberg", a document which is apparently not signed and is totally foreign to the owner of the cargo.
>
> Whereas in consequence the shipowners' objection of lack of jurisdiction will be dismissed and this Court will declare itself competent as being the Court of the place where the incident causing the damage took place and will retain the case.

(I have slightly amended the translation in the bundle of documents.)

This is a decision that the arbitration clause relied on by the owners when nominating an arbitrator in June, 1991 was not incorporated in the bill of lading for three reasons; namely that the charter-party has not been identified; that the alleged charter has not been signed; and that it is totally foreign ("totalement étranger") to the cargo-owner.

Before considering whether this decision should be recognized as binding on the owners in these proceedings I must first set out the relevant provisions of the Brussels Convention and of the Civil Jurisdiction and Judgments Act 1982 (the 1982 Act). The Brussels Convention provides, inter alia, as follows:

> Article 1: This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal . . .
>
> The Convention shall not apply to:
>
> (1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
>
> (2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, corporations and analogous proceedings;
>
> (3) social security;
>
> (4) arbitration.
>
> Article 25: For the purposes of this Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.
>
> Article 26: A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required . . .
>
> Article 27: A judgment shall not be recognised . . .
>
> (4) if the Court of the State in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State.
>
> Article 28: [The first paragraph sets out further circumstances in which a judgment shall not be recognised, the third paragraph provides:]
>
> Subject to the provisions of the first paragraph, the jurisdiction of the court of the State in which the judgment was given may not be reviewed: the test of public policy referred to in Article 27(1) may not be applied to the rules relating to jurisdiction.
>
> Article 29: Under no circumstances may a foreign judgment be reviewed as to its substance.

The 1982 Act gives legal effect to the Brussels Convention in the United Kingdom. Section 32 provides:

> (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 ques-

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tion 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).

(4) Nothing in subsection (1) shall affect the recognition or enforcement in the United Kingdom of: (a) a judgment which is required to be recognised or enforced there under the 1968 Convention;

Sections 32(1) and 32(3) have the effect that, subject to s. 32(4), this Court must not recognize or enforce the decision of a foreign Court that an alleged arbitration clause is not incorporated in the contract. But the effect of s. 32(4), as Mr. Dunning for the owners ultimately conceded, is that, if the judgment is one which is required to be recognized in the United Kingdom under the Brussels Convention, then the Court must recognize it.

The judgment of the Tribunal de Commerce seems prima facie to fall within the definition of "judgment" contained in art. 25. I have to put aside as immaterial whether it is called a "decree" "order" or "decision". I do not see how consistently with the language of art. 25 the decision can be disregarded on the grounds that it was a decision on a preliminary issue arising in the case. Article 25 does not exclude judgments on preliminary issues, or draw any distinction between these and final judgments on the merits of a case. Both seem equally to be included within the definition.

I should next deal with the possible objection that the only relevant plaintiff in the French proceedings is Group AMA, whereas the party against whom the owners claim arbitration is Grosvenor. (I ignore UNCAC as it was common ground at the hearing before me that by reason of the Bills of Lading Act, 1855 only Grosvenor can sue or be sued on the bill of lading.) Does this prevent there being identity of parties in the French and English proceedings? It was common ground that the claims being brought before the Tribunal de Commerce for damage to cargo and an indemnity in respect of salvage and general average are subrogated claims arising by virtue of the fact that Group AMA has paid Grosvenor's claim for damage to cargo. Most of the claims which the owners seek to refer to arbitration relate to the same subrogated claims since they include (i) a declaration that Grosvenor is liable to contribute in general average, (ii) a general average contribution and (iii) a declaration that the owners are not liable for breach of contract or duty by reason of the collision, a declaration which, if granted, would include one of non-liability for the damage to cargo claimed in the French proceedings. (Even the claim for wrongful arrest, which may not be a subrogated claim, arises as a result of the action of Group AMA, the plaintiff in the French proceedings.) It was agreed before me by Me. Meilichzon and Me. Lassez that, under the French law of subrogation, the insurer, having paid the claim of the assured, stands in his shoes and that there is transferred to him both the assured's rights and also the assured's obligations relating to the subrogated claim. There is a difference between French and English procedural law. Under French law an action brought to enforce a subrogated claim must be brought in the name of the insurer. Under English law it must be brought in the name of the assured but the insurer has an equitable interest in the proceedings. In these circumstances I conclude that no objection can be brought to recognition of the French judgment on the ground that the parties to the two sets of proceedings are not the same.

Finally, it was suggested that the Tribunal de Commerce may not have been the Court "first seised" of the matter within art. 21. It is not permissible to investigate this matter at the stage of recognition or enforcement.

Having come to this conclusion, I am confronted with the position that the only reason not to recognize the judgment of the Tribunal de Commerce appears to be that it may be excluded from the ambit of the Convention by exception (4) to the second paragraph of art. 1 which states simply "arbitration". The ambit of this exception is a vexed question which has been the subject of much controversy in recent years. I have no doubt that this question will occupy the attention of appellate Courts and ultimately the European Court of Justice either in this case or in some other case before very

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long. When this occurs the views of a single Judge of first instance are unlikely to be of much, if any, interest. In these circumstances I would have preferred to express no opinion on the matter and to leave the decision to a higher Court. This however does not seem to be permitted under English procedure and so there is no alternative but to consider the matter as best I can.

I begin with the decision of the European Court in *Marc Rich & Co. A.G. v. Societa Italiana Impianti P.A.* (The *Atlantic Emperor*), [1992] 1 Lloyd's Rep. 342; [1991] E.C.R. 3855. I should say at the outset however that in my view the decision throws little light on the question I have to decide in the present case.

In *The Atlantic Emperor* a contract had been concluded by an exchange of telex messages in January 1987 whereby Marc Rich agreed to purchase a quantity of Iranian crude oil from Impianti on *f.o.b. terms*. After the main terms had been agreed Marc Rich sent a telex setting out the terms of the contract and including for the first time a choice of law and arbitration clause. The oil was loaded and Marc Rich complained that it was seriously contaminated. Impianti then issued a writ in Italy on 18th February 1988 claiming a declaration that it was not liable to Marc Rich. On May 20, 1988 Marc Rich issued an originating summons in London asking the High Court to appoint an arbitrator on behalf of Impianti under s. 10(3) of the Arbitration Act, 1950. Leave was granted to serve the originating summons on Impianti in Italy. Impianti then issued a summons seeking to set aside the order granting leave on the grounds that under the terms of the Brussels Convention the dispute must be resolved in Italy. The Court of Appeal referred a number of questions to the European Court of Justice including the following:

> 1. Does the exception in Article 1(4) of the Convention extend: (a) to any litigation or judgments and, if so, (b) to litigation or judgments where the initial existence of an arbitration agreement is in issue?

Before coming to the decision of the European Court it is necessary to mention the opinion of Advocate General Darmon (sup. pp. 3875–6 pars. 31 and 33). Having come to the conclusion that proceedings to appoint an arbitrator were not within the scope of the Convention, he continued (par. 31)

> . . . where a court is seised of an issue not falling within the scope of the Convention its jurisdiction to deal with a preliminary issue is in no case governed by the Convention but is a matter for the *lex fori* and that is so even if the preliminary matter falls within the scope of the Convention . . .

He then said (par. 33):

> Two conclusions must be drawn from this. The first is that it is the *lex fori* alone, that is to say English law in this case, which must determine whether the court has jurisdiction to deal with the preliminary matter. The second is that the dispute, of which the principal subject-matter falls outside the scope of the Convention, clearly cannot be brought within the scope of the Convention by the effect of a preliminary matter, even if the latter falls within one of the subject areas covered by the Convention. In that connection, it is unnecessary, in my opinion, for the Court to express a view in this case as to whether or not the question of the existence of an arbitration agreement raised as a main issue before a Court falls within the scope of the Convention. In my view, it would be sufficient to find that, where such a question is in the nature of a preliminary matter in a dispute whose principal subject-matter falls outside the Convention, the Convention does not apply and, consequently, the decision whether the court seised may dispose of the preliminary issue is a matter for the *lex fori*.

I now come to the decision of the European Court in the same case. It began by rephrasing the questions which had been referred to it by the Court of Appeal:

> *The first question*
>
> 11. The first question submitted by the national court seeks, in substance, to determine whether Article 1(4) of the Convention must be interpreted in such a manner that the exclusion provided for therein extends to proceedings pending before a national court concerning the appointment of an arbitrator, and, if so, whether that exclusion also applies where in those proceedings a preliminary issue is raised as to whether an arbitration agreement exists or is valid. These two points will be considered successively.

The Court then proceeded to hold (pars. 13 to 21 of the judgment) that art. 1(4) of the Convention excludes proceedings pending before a national Court for the appointment of an arbitrator. Having so decided the Court turned to consider the second issue under the following heading:

> *Whether a preliminary issue concerning the existence or validity of an arbitration agree-*

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ment affects the application of the Convention to the dispute in question.

The judgment then continues:

22. Impianti contends that the exclusion in Article 1(4) of the Convention does not extend to disputes or judicial decisions concerning the existence or validity of an arbitration agreement. In its view, that exclusion likewise does not apply where arbitration is not the principal issue in the proceedings but is merely a subsidiary or incidental issue.

23. Impianti argues that, if that were not so, a party could avoid the application of the Convention merely by alleging the existence of an arbitration agreement.

24. Impianti contends that, in any event, the exception in Article 1(4) of the Convention does not apply where the existence or validity of an arbitration agreement is being disputed before different courts to which the Convention applies, regardless of whether that issue has been raised as a main issue or as a preliminary issue.

25. The Commission shares Impianti's opinion in so far as the question of the existence or validity of an arbitration agrement is raised as a preliminary issue.

26. Those interpretations cannot be accepted. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the Court must resolve in order to determined the dispute cannot, whatever that issue may be, justify application of the Convention.

27. It would also be contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention (see judgment in Case 38/81, *Effer v. Kantner* [1982] ECR 825, paragraph 6) for the applicability of the exclusion laid down in Article 1(4) of the Convention to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties.

28. It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator.

29. Consequently, the reply must be that Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

It seems to me that in these paragraphs the Court has followed the advice that had been tendered to it by Advocate General Darmon. As I read the judgment what the Court decided was that, as the matter before the English Court (the appointment of an arbitrator) was excluded from the Convention by exception (4), it was not brought within the Convention merely because of:

> . . . the existence of a preliminary issue which the Court must resolve in order to determine the dispute.

In the Court's view the nature of that preliminary issue was not relevant; see "whatever that issue may be" in par. 26. It was therefore not necessary to decide whether, if the issue had arisen in some other way, a dispute as to the existence or validity of an arbitration agreement would have been within or without the Convention.

While, therefore, in the present case both Mr. Dunning for the owners and Mr. Meeson for Grosvenor relied on the European Court's decision in *The Atlantic Emperor* in support of their respective contentions, the judgment seems to me to throw no light on the answer to the problem which confronts me one way or the other. (In *The Atlantic Emperor* (No. 2), [1992] 1 Lloyd's Rep. 624 at p. 628 Lord Justice Neill was similarly disposed to accept the view that the answer given by the Court "gives no guidance in those cases where the challenge to the validity of the agreement constitutes the dispute and stands alone.")

I turn then to consider the matter more generally. I have been referred to the official reports on the Brussels Convention which are made admissible by s. 3(3) of the 1982 Act. The Jenard Report (O.J. No. C 59/1, 5.3.1979 has the following sentence:

> . . . it (s.c. the Convention) does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration.

The Schlosser Report, made at the time of the accession of Denmark, Ireland and the United Kingdom (O.J. No. C 59/71, 5.3.1979)

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has a sentence which is directly relevant to the present problem (par. 64(6)):

> In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings is not covered by the 1968 Convention.

On the other hand the Evrigenis/Kerameus Report, made at the time of the accession of Greece in 1986 (O.J. No. C 298/1 of 24.11.1986) is to opposite effect.

> 35. Arbitration, a form of proceedings encountered in civil and, in particular, commercial matters, (Article 1, second paragraph, point 4) is excluded because of the existence of numerous multilateral international agreements in this area. Proceedings which are directly concerned with arbitration as the principal issue, e.g. cases where the court is instrumental in setting up the arbitration body, judicial annulment or recognition of the validity or the defectiveness of the arbitration award, are not covered by the Convention. However, the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Convention, must be considered as falling within its scope.

The only assistance, so far as I am aware, to be found in any of the reported cases, is in the opinion of Advocate General Darmon in the *The Atlantic Emperor* (sup.) where he expresses the view (par. 34 p. 3876) that—

> . . . a dispute as to the existence of an arbitration agreement falls outside the scope of the Convention.

At par. 76, p. 3886 he favours:

> . . . assessments made by the courts of the place of arbitration by reason of their neutrality.

I have also been referred to a number of English text books and articles on the Convention. It would not be practicable to mention them all. I wish however to acknowledge the assistance I have derived from three articles. Two of these were written just before the European Court's decision and would have answered the question referred to the Court in the opposite way to that in which it was decided. Both favour the view that the judgment in the present case falls within the scope of the Convention; Prof. Dr. Peter Schlosser and Mr. Paul Jenard ("Schlosser 1991" and "Jenard 1991") in Arbitration International, Vol. 7 No. 3, 1991, pp. 227 and 247. The third sets out the arguments extensively on both sides and narrowly favours the view that:

> . . . it seems better to say, whatever the circumstances, that a judgment whose subject-matter was the validity of an arbitration agreement is excluded from the scope of the Convention for recognition purposes simply because it is in "Arbitration". [Prof. Bernard Audit *Arbitration and the Brussels Convention* Arbitration International, Vol. 9 No. 1, 1993, p. 1.]

It seems to me that it is primarily a policy issue whether a decision on the validity of an arbitration agreement is held to be excluded by exception (4) to art. 1. Linguistic arguments do not carry the matter very far. The decision of the Tribunal de Commerce can be fairly said to concern "arbitration" as the Court's conclusion was that no valid arbitration agreement had been shown to exist. On the other hand the decision was not confined to the subject of arbitration. The Tribunal de Commerce had to reach a decision as to the proper construction of the bill of lading and whether it incorporated the terms of any charter-party. This was a broader matter which could have affected the rights and liabilities of the parties in several ways although, as it so happens, the relevance of the point was confined to whether or not an arbitration clause was incorporated. If exception (4) requires that the only subject matter of the Court's judgment must be "arbitration", then the exception does not apply. If exception (4) excludes "mixed" questions of arbitration and the construction of a particular agreement, then the exception may apply. One is thus driven to consider whether, as a matter of policy, the exception should be given a wider or a narrower meaning.

There are in my view solid practical and policy reasons for holding that decisions as to the validity of an arbitration agreement fall generally within the ambit of the Brussels Convention. The chief advantage of so holding is that any Court which has jurisdiction over the substantive dispute under the Convention may be required to rule on whether a valid arbitration agreement exists and, if so, to refer the case to arbitration by virtue of art. II par. 3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("the New York Convention") and, if such decisions are not to be binding in other Contracting States under the Brussels Convention, then there is nothing to prevent a disappointed party from seeking to obtain a different and more favourable judgment in another Contracting State, nor if the Court of one State

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decides in favour of the validity of an arbitration agreement and the Court of a different Contracting State decides against it, for there to ensue a "race" between the parties to see which can first obtain an award or judgment in different jurisdictions, nor to prevent or resolve a potential conflict between an award and a judgment once obtained. If decisions as to the validity of an arbitration agreement are not excluded by exception (4), then, as such judgments would have to be recognized in other Contracting States, this could be expected to prevent most if not all of these conflicts. Thus in the present case recognition of the decision of the Tribunal de Commerce would eliminate both the possibility that this Court might reach a conflicting decision as to the incorporation of the Centrocon clause and also that arbitrators appointed under the clause might publish an award which determines the substance of the underlying dispute in a different way from the Tribunal de Commerce.

It would seem logical, moreover, that if this Court is bound to recognize the judgment of the Tribunal de Commerce on the substance of the dispute, it should also recognize its decision that there is no valid arbitration agreement binding the parties. A failure to recognize the French Court's decision as to the invalidity of the arbitration clause would be the first step which might lead to this Court coming to an opposite conclusion on the existence of a valid arbitration agreement and thus to the prosecution of an arbitration in London which might result in the arbitrators publishing an award on the substance of the dispute which likewise might be at variance with that of the French Court, an award which in turn could result in this Court being asked to enter judgment in terms of the award under s. 26 of the Arbitration Act, 1950. The failure to recognize the decision of the Tribunal de Commerce on the invalidity of the arbitration agreement could thus ultimately result in this Court being asked to enter a judgment which is inconsistent with the decision of the Tribunal de Commerce on the substance of the dispute.

It is in my judgment beyond doubt that the judgment of a foreign Contracting State on the substance of a dispute, even if given in breach of a valid arbitration agreement, must be recognized by this Court under art. 26. The Convention restricts the number of defences available to recognition and enforcement. The failure by the foreign Contracting State to decide a preliminary question concerning arbitration in a way which is consistent with the putative proper law of the arbitration agreement is not one of the defences specified in art. 27 par. (4). The judgment of a foreign contracting State on the substance of the dispute cannot be said to concern "arbitration" or to form any part of proceedings which may culminate in an arbitration award. As appears from the Schlosser report pars. 61 to 62 the United Kingdom delegation was concerned at the time of the negotiations leading to the Accession Convention as to whether, if a national Court adjudicates on the subjet-matter of a dispute because it overlooked an arbitration agreement or considered it inapplicable, recognition and enforcement of the judgment might be:

> . . . refused in another State of the Community on the ground that the arbitration agreement was after all valid and that therefore, pursuant to art. 1, second paragraph, point (4), the judgment falls outside the scope of the 1968 Convention.

But the Schlosser Report also suggests that:

> The new Member States can deal with this problem of interpretation in their implementing legislation.

Parliament, when enacting the 1982 Act, specifically provided in s. 32(4)(a) that nothing in sub-s. (1) should affect the recognition or enforcement in the United Kingdom of a judgment which is required to be recognized or enforced here under the Convention. The point, it seems to me, has been determined, in a sense contrary to that apparently desired by the U.K. delegation, by the enacting legislation; see Jenard, 1991, pp. 246 to 247.

The avoidance of conflict between a judgment on the merits of a dispute in one Contracting State and a possible judgment following the publication of an arbitration award in another Contracting State seems to me to fall within the policy objectives of the Convention. But to hold that a decision on the validity or otherwise of an arbitration agreement falls within the scope of the Convention would not, it is true, prevent all risk of conflict. The Court of the State in which the arbitration would take place if the agreement is valid might have been asked to appoint an arbitrator and in the course of so doing might have determined that the clause was valid. Such decision, being on a issue which is preliminary to a matter excluded by exception (4), is not binding in other Contracting States and would not prevent the Court of a different State from giving a judgment that no valid arbitration agreement had been concluded and from assuming jurisdiction over the substantive dispute. The judgment of that Court however would not be binding on the Court of

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the State where the arbitration was to take place if given after that Court had appointed an arbitrator (since it would be "irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought"; art. 27 par. (3)); whereas it would be binding if given before that Court had appointed an arbitrator. Another arbitrary factor would be that recognition would be dependent upon the precise way a decision as to the validity of an arbitration clause were reached and whether the decision were properly to be regarded as preliminary to a matter excluded by exception (4) or as a principal and free-standing issue. Such a distinction is not always easy to draw. It can be said that whether the validity of an arbitration clause is determined as a preliminary issue in proceedings setting up the arbitration panel or as a self-contained issue in separate proceedings, both situations call for the same answer; see Audit p. 12. These are points which can be said to militate against holding that decisions as to the validity of an arbitration agreement fall with the scope of the Convention. It is not possible to eliminate all risk of conflict whatever conclusion is reached as to the ambit of exclusion (4).

It is however said that the main disadvantage of holding that decisions as to the validity of an arbitration agreement fall generally within the Convention is that the Courts of the State in which the seat of the arbitration would be located if the agreement is valid might be deprived of jurisdiction to rule upon the validity of the arbitration agreement. It can be argued that the Court in which the arbitration would take place is the Court best equipped to decide upon the validity of the arbitration agreement as it is the Court of the putative proper law of that agreement. This is an argument which carries some weight but it is by no means conclusive, since there is no general consensus that disputes as to the validity of an arbitration agreement should be determined solely in accordance with the law which would be the proper law of the agreement on the assumption that it is valid. The Rome Convention on the Law Applicable to Contractual Obligations 1980 ("the Rome Convention") has not resolved the problem as by art. 1 par. 2(d) arbitration agreements are excluded from its field of operation. To the extent that art. 8 of the Rome Convention is any guide as to how conflicts of law problems are to be resolved in the future in the context of arbitration agreements, it would seem that a tension can be expected between the law of the putative arbitration agreement and that of the respondent's place of residence, as also between the Courts of those two jurisdictions. In many cases, moreover, either the arbitration clause does not designate the place where the arbitration is to take place or there are, as in the present case, two possible clauses each providing for the arbitration to take place in different jurisdictions. In these cases it is not possible to apply the concept of the Court of the putative proper law of the arbitration agreement.

There are arguments to the effect that where in a substantive dispute otherwise coming within the Brussels Convention an arbitration clause is adduced by one party as a reason why the Court should refer the matter to arbitration under art. II par. 3 of the New York Convention, that Court should have the controlling power of decision as to whether the arbitration agreement is valid and that its decision should thereafter be recognized in all other Contracting States. There are, on the other side, opposing arguments as to why the controlling decision should be that of the Court of the State in which the arbitration would take place if the arbitration agreement is valid and that likewise its decision should thereafter be recognized in all other Contracting States. To decide that a decision upon the validity of an arbitration agreement falls within the ambit of the Convention would not, it seems to me, decide the matter in favour of either set of arguments. The rules as to the assumption of jurisdiction under the Convention are too various and complex for this to be so. The fundamental principle is that persons domiciled in a particular State should be sued in the Courts of that State (art. 2). This may be thought to favour the first of the two opposing view points. Article 5(1), however, permits a person domiciled in one State to be sued in contractual matters "in the courts for the place of performance of the obligation in question". It can be argued that, where there is an issue as to arbitration, this includes the Courts of the State in which, if the agreement is valid, the parties are bound to arbitrate; see Schlosser (1991) pp. 235 to 238 and Audit pp. 9 to 10. There are, moreover, other provisions of the Convention which might give the Courts of the place where the arbitration would take place jurisdiction to decide upon the validity of the agreement.

What can however be said, it seems to me, is that if a decision as to the validity of an arbitration agreement falls within the ambit of the Convention, then (unless it arises as a preliminary issue in the course of setting up the arbitration panel as in *The Atlantic Emperor*) it will be decided by the Court "first seised" of the

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issue within art. 21 and will thereafter be recognized in all other Contracting States under art. 26. Such a conclusion would leave the Court of the State in which arbitration was to take place free to appoint the arbitration panel and to take all subsequent steps necessary to support or control the arbitration proceedings.

I find this a difficult and perplexing issue. It seems clear that those who drafted the Convention never applied their minds to the question of how this type of issue was to be resolved, no doubt because they expected the problems to be solved in a future European Convention on arbitration law. This perhaps supports the view that such issues were never intended to fall within the scope of the Convention and that they are better left to be dealt with by amending and updating the New York Convention. In the end, however, I feel the force of the arguments that exception (4) of the Brussels Convention should not apply to judgments as to the validity of arbitration agreements both because such judgments are not confined to "arbitration" but necessarily extend to the construction of the underlying contract between the parties; but also and principally because there are solid practical and policy reasons why the judgment of the first Contracting State to pronounce on the validity or invalidity of the arbitration agreement should be recognized in the other Contracting States.

On balance I conclude that the judgment of the Tribunal de Commerce does not fall within exception (4) relating to "arbitration" and that accordingly this Court is bound to recognize it.

Issue 2. By what law should the Court determine whether the Centrocon clause is incorporated in bill of lading

If I am right on the first issue the others do not arise but in case I am wrong I proceed to consider this issue. The Contracts (Applicable Law) Act, 1990 only applies to contracts made after Apr. 1, 1991, the date when the Rome Convention came into force, and in any event does not apply to arbitration agreements. The point therefore has to be decided in accordance with common law principles of private international law.

Mr. Dunning submitted that the question whether the Centrocon clause is incorporated in the bill of lading is governed by English law as being the lex fori. He relied inter alia on the following:

1. English principles of private international law (i.e. the lex fori) govern the ascertainment of the proper law of a contract, including whether the parties have made any express or implied choice of proper law and, if not, the ascertainment of the so called "connecting factors"; *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.* [1970] 2 Lloyd's Rep. 99 at p. 117, col. 1; [1971] A.C. 572 at pp. 603 to 604 per Lord Diplock; *The T. S. Havprins*, [1983] 2 Lloyd's Rep. 356; Dicey and Morris on the Conflict of Laws, 12th ed (1993) pp. 30 to 31; Kahn-Freund, General Problems of Private International Law, 1980 pp. 242–243.

2. English law as the lex fori should therefore govern all questions which are necessarily antecedent to a determination of the proper law, including all questions as to whether the parties have consented to terms bearing upon a determination of the proper law. Mr. Dunning relied on *Mackender v. Feldia*, [1966] 2 Lloyd's Rep. 449 at pp. 455 and 458; [1967] 2 Q.B. 590 at pp. 598 and 603 (where Lord Denning M.R. and Lord Justice Diplock expressed obiter the view that a plea of non est factum might have been governed by English law, presumably as the lex fori) and *Oceanic Sun Line Special Shipping Company Inc. v. Fay*, [1988] 165 C.L.R. 197 (High Court of Australia) at pp. 224 to 225 per Mr. Justice Brennan and pp. 256 to 261 per Mrs. Justice Gaudron; see also Dicey and Morris (op. cit.) 12th ed (1993) p. 1228.

3. Once the proper law has been ascertained in accordance with the lex fori, it may be necessary in some instances (i.e. where the lex causae differs from the lex fori) to consider at a second stage of the investigation whether, according to the proper law, the arbitration clause forms part of the contract; see Briggs "Wider still and Wider; the bounds of Australian exorbitant jurisdiction" (commenting on *Oceanic v. Fay* (sup.)) in [1989] L.M.C.L.Q. 216. That does not arise in the present case.

Mr. Dunning also submitted in the alternative that, if the question whether the Centrocon clause is incorporated in the bill of lading is governed by the law which would be the proper law of the bill in the absence of any incorporation, the law with which the bill of lading transaction has its closest and most real connection is English law.

Mr. Meeson's submissions, on the other hand, may be summarized as follows:

1. All questions relating to the formation of a contract are governed by that law which would be the proper law of the contract if the contract was validly concluded ("the putative proper law"); *Albeko Schumaschinen A.G. v. Kamborian Shoe Machine Co. Ltd.*, [1961] 111 L.J. 519; *The Parouth*, [1982] 2 Lloyd's Rep. 351;

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Dicey and Morris (op. cit.) 11th ed (1987) pp. 1197 to 1201; 12th ed (1993) pp. 1248 to 1254.

2. The putative proper law governs not only whether there is a binding contract, which is not the issue in the present case, but also the question whether the contract contains a particular term such as an arbitration clause; the *Atlantic Emperor*, (No. 1) [1989] 1 Lloyd's Rep. 548 at pp. 552 to 553 per Mr. Justice Hirst and p. 554 per Lord Justice Lloyd (C.A.).

3. In the present case there are two different arbitration clauses which may have been incorporated providing for arbitration in Paris or London according to whether bill of lading incorporates (i) the contract of July 23, 1990 (arbitration in Paris) (ii) the charter-party fixture of May 7, 1991 as set out in the "recap telex" (arbitration in Paris) or (iii) the fixture of May 7, 1991 as orally agreed (arbitration in London). In these circumstances the question of incorporation cannot be answered by reference to the law which would be the proper law if one or other of these contracts were validly incorporated but should be governed by the proper law of the bill of lading, objectively ascertained, disregarding any arbitration clause which may have been incorporated. Mr. Meeson pointed out that although the concept of a "putative objective proper law" was found "confusing" by Lord Justice Diplock in *Mackender v. Feldia* (sup.) at p. 457; p. 602, Cheshire and North on Private International law, 11th ed. (1987) p. 473 favours this concept:

> . . . since any issue affecting the valid creation of a contract should be determined by the proper law objectively ascertained, it follows that, in cases involving arbitration or choice of jurisdiction clauses, no inference should be drawn as to the intentions of the parties from the presence of one of these clauses in the contract.

4. If the proper law be ascertained in accordance with this approach, the law with which the bill of lading has its closest and most real connection is French law.

In the literature there is much discussion of the question, where the issue relates to the consent of the parties to a choice of law, arbitration or jurisdiction clause, the Court should apply the lex fori, the law which the parties purport to choose or the putative proper law ascertained on an objective basis. This an undecided question of considerable difficulty which is answered for most contracts concluded after Apr. 1, 1991 by art. 8 of the Rome Convention.

Since the Convention does not apply, I begin by considering two decisions of the Court of Appeal.

In The *Parouth*, (sup.) the question for decision was whether leave should have been given to issue and serve a writ out of the jurisdiction under R.S.C., O. 11, r. 1(1)(*f*) on the ground that the plaintiffs were seeking to enforce a contract which by its terms or by implication was governed by English law. The alleged contract was a fixture of the vessel said to have been concluded in a series of telex messages concluded between a broker acting for the plaintiffs and a broker (SBS) said to be acting for the defendants. A telex from SBS to the defendants, which was said to evidence the fixture, contained a term providing for arbitration in London. At first instance Mr. Justice Bingham, as he then was, set aside service of the writ on the ground that the arbitration provision should be ignored. This decision was reversed in the Court of Appeal on the ground that, if the case were tried, the Court would probably apply the putative proper law of the contract, to decide whether there was a binding contract between the parties and, as it was arguable that any contract contained an English arbitration clause, it was also arguable that such contract if concluded was governed by English law. The leading judgment was given by Lord Justice Ackner at p. 353.

> It is clear that the learned Judge's attention was not drawn to the principle enunciated in Dicey & Morris's The Conflict of Laws and I refer to the current 10th ed. r. 146 at p. 775 which is in these terms:
>
> > The formation of a contract is governed by the law which would be the proper law of the contract if the contract was validly concluded.
>
> Dicey then goes on to discuss the principle in some detail referring to one English authority in which that principle is to some extent illustrated and dealing with the academic and philosophical criticisms that can be made. Mr. Longmore says of course that that principle is a well understood and accepted one and although it was not referred to by either Counsel — Mr. Gross was not in the Court below — it must have been in everybody's mind.
>
> With great respect, I am wholly unconvinced by that proposition. The parts of the judgment to which I have referred indicate quite clearly to my mind that the application of the putative proper law seems to have escaped everybody's attention in the Courts below.

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It is now accepted in this Court, and clearly was not so accepted in the Court below by Mr. Longmore, that if this case is heard then the probabilities are that the putative proper law, namely English law, will be applied to resolve the issue: Was there a binding contract between the parties? The learned Judge was, therefore, in my judgment in error in saying that he must treat the arbitration clause as neutral; the arbitration clause had the important result of making the proper law of this dispute probably (and I put no higher than is necessary) English law.

What made this case a case to which R.S.C., O. 11, r. 1(1)(*f*) applied was that it was arguably a contract which by its terms or implication was governed by English law. Therefore the learned Judge, by reason of not having his attention directed to this principle, wrongly reached the conclusion that he should disregard the arbitration clause. He thus arrived at the conclusion that there was no English link. And there being no English link, as he said in terms, he was thrown back on the prima facie rule. It seems to me that if there was no English link, a link which made the contract by its terms or implication governed by English law, one did not need any prima facie rule. It was not within R.S.C., O. 11 r. 1(1)(*f*) although strangely enough, that was conceded before him by the defendants.

Accordingly, such being the error, any suggestion that the exercise by the learned Judge of his discretion precludes us from intervening cannot be sustained.

We have then this position: There is a good arguable case that there was a contract; that is conceded. There is a good arguable case that the contract is, by its terms or implication, governed by English law. As I have indicated, that suffices to bring it within R.S.C., O. 11, r. 1(1)(*f*).

This decision has not escaped criticism; see Cheshire and North, op. cit., 11th ed., (1987) pp. 473 to 474. It only decides that it is arguable for the purposes of O. 11, r. 1(1)(*f*) that, at a trial, the Court would apply English law as the putative proper law of the contract, a matter to which Lord Justice Ackner again returned (p. 354) when considering whether, as a matter of discretion, service out of the jurisdiction should be allowed.

The Parouth (sup.) was followed by Mr. Justice Hirst and the Court of Appeal in *The Atlantic Emperor (No. 1)* (sup.) where, once again, the issue was whether service of proceedings out of the jurisdiction should be permitted, this time under R.S.C., O. 73, r. 7(1) which sanctioned such service "provided the arbitration to which the summons relates is governed by English law." In dismissing Impianti's application to set aside the order for service out of the jurisdiction Mr. Justice Hirst said (pp. 552 to 553).

Mr Gross sought to distinguish the present case on the ground that whereas in *The Parouth* the question at issue was whether there was in existence any binding contract (there being no dispute that such contract, if in existence, contained an arbitration clause), in the present case it is common ground that there is in existence a binding contract, and the sole issue is whether that contract contained an arbitration clause.

In my judgment this distinction is unsound. Dicey's rule as to the formation of the contract as a whole must (perhaps a fortiori) apply to the formation of a disputed part. This the relevant formation is governed by the law which would be the proper law of the entire contract if that part was validly concluded. This putative proper law is manifestly English law, having regard to the terms of the disputed arbitration clause quoted above. This conclusion is amply sufficient to found jurisdiction under O. 75, r. 7 since, as under O. 11, the plaintiff need do no more than establish a good arguable case.

This decision was upheld in the Court of Appeal, Lord Justice Lloyd gave the leading judgment.

The Judge held that he was bound by the decision of the Court of Appeal in *The Parouth* [1982] 2 Lloyd's Rep. 351 to decide the second point in favour of the plaintiffs. The facts of *The Parouth* were similar to those of the present case, the question being whether there was a binding contract between the parties. The Court held that question would be decided by an English Court in accordance with putative proper law which, since there was an English arbitration clause, would in all probability be held to be English law. Accordingly the case fell within R.S.C., O. 11, r. 1(1)(*f*).

Mr. Gross sought to distinguish *The Parouth* on the ground that in that case the question was whether there was a contract at all, whereas in the present case it is common ground that there was a contract; the question here is whether the contract contained an arbitration clause. I accept that this is a distinction on the facts. But it makes no difference to the principle stated and applied by

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the Court in *The Parouth*, by which we are of course bound, as was the Judge. Mr. Gross reserved the right to argue that *The Parouth* was wrongly decided. We are not required to express any view on that question. It is sufficient to say that in my judgment it cannot be distinguished.

The passages which I have cited are at least highly persuasive authority that, where this can be done, the putative proper law should be applied to the question whether a disputed arbitration clause forms part of a contract and that the issue is governed—

> ... by the law which would be the proper law of the entire contract if that part was validly concluded.

It is however not possible, as Mr. Meeson concedes, to apply this principle to the present case, since there are not one but two possible arbitration clauses which may have been incorporated each suggesting a different proper law. This factor seems to me to distinguish the present case from those of *The Parouth* and *The Atlantic Emperor* (No. 1). Mr. Meeson therefore has to argue for a somewhat different concept, that of the putative proper law ascertained on an objective basis. Despite the support for this concept in successive editions of Cheshire and North's Private International Law, it has not, as far as I know, been previously adopted in any reported case.

I turn to consider Mr. Dunning's argument based on the High Court of Australia's decision in *Oceanic v. Fay* (sup.). In that case the respondent was injured on board a Greek ship in the course of a cruise in Greek waters beginning and ending at Piraeus. The booking for the cruise had been made in New South Wales and at the time of the booking no mention was made of the terms of the ticket which included a clause conferring exclusive jurisdiction on the courts of Athens. The respondent brought an action against the Oceanic for negligence before the Supreme Court of New South Wales and Oceanic then applied for a stay relying, inter alia, on the clause. It was held by the whole Court, applying the lex fori that the conditions of the ticket did not form part of the contract.

Mr. Justice Brennan said (pp. 224 to 225):

> It may be thought that the terms of a contract should be ascertained by reference to its proper law ... But for the purpose of determining whether the contract of carriage was made when the fares were paid to J.M.A. Tours in New South Wales and whether that contract contained the exclusive foreign jurisdiction clause set out in cl. 13 of the ticket, the system of law by reference to which those questions must be answered cannot be identified by assuming that the contract contained the clause. The question whether a contract has been made depends on whether there has been a consensus ad idem and the terms of the contract, if made, are the subject of that consensus. At all events, those are the issues which an Australian court necessarily addresses when it seeks to determine the existence of what the municipal law of this country classifies as a contract. Classification is, of course, a matter for the law of the forum. In deciding whether a contract has been made, the court has regard to all the circumstances of the case including any foreign system of law which the parties have incorporated into their communications, but it refers to the municipal law to determine whether, in those circumstances, the parties reached a consensus ad idem and what the consensus was: cf. *Mackender v. Feldia* A.G. per Diplock L.J. There is no system other than the municipal law to which reference can be made for the purposes of answering the preliminary questions whether a contract has been made and its terms. Mr D. F. Libling, "Formation of International Contracts" Modern Law Review, vol. 42 (1979), p. 169 (an article to which Gaudron J. has drawn my attention) discusses the reasons why it is inappropriate to determine those questions by reference to the so-called putative proper law of a supposed contract.

Mrs. Justice Gaudron (pp. 256 to 261) adopted the same approach:

> In general terms, the rights and obligations to a contract are to be ascertained in accordance with the proper law of the contract ... In the context of this appeal, the question whether the appellant and respondent agreed in terms of cl. 13 is primarily relevant to the issue of whether a stay should be granted. However, it may also be relevant, in the context of the broader issues between the parties, to the ascertainment of the proper law of their contract, should that need to be decided. If the question whether the parties intended to be bound by cl. 13 were to be asked in the course of ascertaining the proper law of the contract, it would in my view fall for answer in accordance with the lex fori, although this is not a matter which appears to have been authoritatively decided.

She then referred to Lord Diplock's speech in *Compagnie d'Armement Maritime S.A.* (sup.) p. 117; p. 603 and continued:

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The above statements support the proposition that the lex fori determines (inter alia) questions as to the existence, construction and validity of terms bearing upon determination of the parties' agreement as to the proper law. Indeed I think that must be so. If the question of what is the proper law is one to be answered by application of the lex fori, until the lex fori provides the answer to that question there is no scope for the operation of any other law. In other words, all questions which are necessarily antecedent to a determination of the proper law of a contract must fall for answer in accordance with the ex fori: see also *Mackender v. Feldia A.G.*; Cheshire and North, Private International Law, 11th ed. (1987), p. 477.

I have to say, with the greatest respect, that I can see objections to this approach just as I do to each of the alternative solutions which have been adopted. Mr. Briggs in the article cited commented on the fact that the High Court gave no weight at all to the putative proper law of the contract and, to get over this difficulty, he suggested a two-stage approach:

> . . . once it has been held that there is a proper law, the *lex fori* should be seen to drop out of the picture and allow the proper law to take over questions of validity and incorporation of terms.

If this is right, the High Court having held according to the lex fori that the jurisdiction clause was not incorporated, might then have concluded that the contract without that clause was governed by Greek law and, if so, should have considered whether, according to Greek law, the clause was incorporated. A circular ·roach of this kind has in my view little to ·ommend it. Once the lex fori has been held to be the law applicable to the question whether a clause has been validly incorporated it would seem odd if the same issue could then be decided in the opposite sense by a law other than the lex fori. There are, however, rather more fundamental objections which could be advanced to the choice of the lex fori; namely that the accident of the forum should not be decisive on so fundamental an issue of conflict of laws as the existence and validity of a contract and that it is proper objective of private international law to provide objective criteria for deciding such an issue which are not dependent upon the forum in which it has to be decided. There has for some time been a considerable measure of support in the literature for the view that these issues should be decided by reference to some combination of two concepts, the putative proper law and the law of the country in which the parties, or one of the parties, resides or carries on business, a view which has resulted in art. 8 of the Rome Convention.

In the rather unusual circumstances of the present case I have been pressed by Mr. Dunning with arguments in favour of applying the lex fori and by Mr. Meeson with reasons why I should apply the objective putative proper law. While I have indicated why I do not find Mr. Dunning's arguments entirely persuasive, I have not so far considered the concept for which Mr. Meeson contends. The difficulty about this concept is that under English rules of private international law the parties, subject to very few exceptions, are allowed complete autonomy to submit any aspect of their contract to any law they may choose; if they fail to exercise that choice then the governing principle of English law is that the contract is governed by the system of law with which the transaction has the closest and most real connection. The presence of an arbitration clause can be relevant to either stage of the enquiry. If, in the present case, I were to decide that the question of incorporation is governed by the putative proper law ignoring any arbitration clause that may have been incorporated, I would necessarily be making a provisional assumption that no arbitration clause is incorporated and deciding both the first and second stages of the enquiry on a basis which is no more likely to be correct than if I were to ascertain the putative proper law on either of the other two possible assumptions, namely that the contract incorporates a London arbitration clause or that it incorporates a Paris arbitration clause. Accordingly the concept of the objective putative proper law is no more reliable a tool for determining the question of incorporation than is the lex fori. It is perhaps for this reason that Lord Justice Diplock referred to the concept as "confusing" in *Mackender v. Feldia* (sup.) p. 457; p. 602. It may be that some such concept may have to be applied under art. 8(1) of the Rome Convention where there is a "battle" between two or more different sets of standard terms each choosing different laws and jurisdiction (see Dicey & Morris op. cit. 12th ed. (1993) p. 1251 and contrast Plender, the European Contracts Convention, 1991, par. 4–29); but there is in my view no logical reason either of principle or authority why this concept should be applied where common law principles of private international law still prevail.

I can now state the conclusion at which I have arrived. It is well established that this Court applies the law of England to decide all disputes

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that come before it unless and to the extent that it is demonstrated that, either by statute or by English rules of private international law, it is required to apply the law of some other country. In the present case it has not been demonstrated to my satisfaction that English rules of private international law require the Court to apply a law other than English law. On that simple ground I conclude that English law must be applied to determine whether the Centrocon clause is incorporated into the bill of lading.

In case I am wrong on this matter I should perhaps indicate what law I would have held to be the putative proper law of the bill of lading had I accepted Mr. Meeson's submission that this question has to be determined by ignoring the possibility that any arbitration clause may be incorporated into the bill. In this event I would have found that the bill contains no express or implied choice of proper law and that the question has to be determined by reference to the system of law with which the transaction has its closest and most real connection; *Bonython v. Commonwealth of Australia*, [1951] A.C. 201 at p. 219. There are strong factors linking the transaction with French law. The goods were shipped on board the vessel at a French port by a French shipper and the bill of lading was issued in France to the order of the shipper. There are some factors linking the transaction to English law. The strongest of these is that the carriage was to an English port. Other, though weaker factors, are that there was a requirement to notify Grosvenor, an English company and that the bill of lading is in the English language. Finally, there is a factor linking the transaction to German law as this was the law of the vessel's flag.

I would have had no doubt in these circumstances, had I accepted Mr. Meeson's submission, that the system of law with which the bill of lading transaction has its closest and most real connection is French law. The factors pointing to French law are strong in themselves. They seem to me to gain added force from the fact that there is in force a set of international rules for determining the rights and obligations of parties to a contract of carriage of goods by sea in the shape of the Hague Rules and the Hague Visby Rules which require as a condition of applicability, inter alia, that the bill of lading is issued in a Contracting State or that the carriage is from a port in a Contracting State. I refer in this connection to a dictum of Lord Justice Megaw in *Coast Lines Ltd. v. Hudig & Veder N.V.*, [1972] 1 Lloyd's Rep. 52 at p. 59.

So far as the bills of lading were concerned, it might well be that the fact that they were issued in Rotterdam in respect of goods loaded there would be a conclusive, or at least a powerful indication that the proper law of the contracts to which they might give rise would be the law of the Netherlands.

Accordingly, if the possible incorporation of any arbitration clause is to be ignored I would have held the proper law of the bill to be French law. But for the reason I have given I conclude that I must apply English law to determine the question of incorporation.

Issue 3. Is the Centrocon clause incorporated in the bill of lading?

A number of cases have come before the Courts where the printed form of the bill of lading provides for the incorporation of a "charter-party dated ——————" but the parties have omitted to fill in the blank. These have mostly been cases where there was a head charter between the owners and the head charterers and at least one sub-charter between them and sub-charterers who were also the shippers. The bill of lading in these circumstances, as well as being an acknowledgment of the goods and a document of title, contains or evidences a third contract of carriage between the owners and the shippers. Typically the owner has no knowledge of the sub-charter and the shipper has no knowledge of the head charter. One may suspect that in these circumstances the date has not been filled in since the parties, or more probably their agents at the port of shipment, were unable to agree which charter-party was to be identified in the bill. If each had been asked, each would have given a different answer.

I was referred to two cases in the Court of Appeal and two at first instance in which this kind of problem has recently been considered; *Pacific Molasses Co. v. Entre Rios Compania Naviera S.A. (The San Nicholas)*, [1976] 1 Lloyd's Rep. 8 (C.A.); *Bangladesh Chemical Industries Corporation v. Henry Stephens Shipping Co. Ltd.*, (*The S.L.S. Everest*), [1981] 2 Lloyd's Rep. 389 (C.A.); *K/S A/S Seateam & Co. v. Iraq National Oil Co., (The Sevonia Team)*, [1983] 2 Lloyd's Rep. 640; and *Navigazione Alta Italia S.p.A. v. Svenska Petroleum A.B.*, (*The Nai Matteni*), [1988] 1 Lloyd's Rep. 452.

Mr. Dunning submitted that the effect of these authorities is as follows: (1) the absence of a date is no impediment to incorporation; (2) there is a presumption in favour of the head charter being incorporated, this being the contract to which the owners are prior parties; (3) the Court leans in favour of incorporation of

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a voyage charter, rather than a time charter or other long term contract.

Mr. Dunning therefore submitted that, applying those principles, it should be held that the bill of lading incorporating the voyage charter concluded on Mar. 7, 1991.

Mr. Meeson made, in outline, the following submissions:

1. The words on the face of the bill of lading are, as a matter of construction, inconsistent with incorporation of the voyage charter of Mar. 7, 1991 but are consistent with incorporation of the transportation contract of July 23, 1990.

2. Had the blank been completed it would not have referred to the voyage charter of Mar. 7, 1991. Mr Meeson relied on a number of factors such as that the bill of lading was presented in the form drawn up by the shippers to the master for signature; that the master was obliged to sign bills of lading "as presented"; and that UNCAC on Feb. 27, 1991 had instructed their agents at Bordeaux to complete the bill so that it provided "freight payable as per charter party dated 11th July 1990" (this being, it was said, an error for July 23, 1990).

3. The bill of lading can only incorporate a charter-party which is in written form at the date the bill is issued. At that date the voyage charter of Mar. 7 1991 was not in written form. Even if the "recap telex" of Mar. 7, 1991 is a document capable of being incorporated by reference into the bill of lading, it contained no mention of a London arbitration clause but only of the Synacomex form of charter which provided for arbitration in Paris.

4. UNCAC had no knowledge, or means of knowledge, of a London arbitration clause.

5. If the parties were not ad idem, it should be held that neither charter party was incorporated; *Smidt v. Tiden*, (1874) L.R. 19 Q.B. 446. The bill of lading is a workable contract without the incorporation of any charter party.

In my view it is important in considering these contentions to draw a clear distinction between questions of construction of the bill of lading, on the one hand, and questions as to whether reasonable notice of the terms of the contract was given by one party to the other at the time the contract was made, on the other. Questions of construction involve looking at the contract as a whole including the actual words used and taking into account the surrounding circumstances in which the contract was made and its commercial purpose as known to both parties. Questions of notice are normally a matter as to whether one party has done sufficient to give to the other party notice of the incorporation of a term in the contract for the Court to regard it as fair and reasonable to hold that the second party has consented to be bound by that term.

I draw attention to this distinction since at times it seemed to me that it was in danger of being overlooked in the course of argument. When seeking to resolve questions of construction, evidence is admissible to identify the charter-party referred to but it is not permissible to take account of pre-contractual negotiations. Thus it would not be permissible to take account of what instructions were given by the shippers to their agents as to the date to be inserted in the bill of lading, nor, if such evidence had been available, as to any discussions between the master, or ship's agents on the one hand, and the shippers' agents on the other, before the bill of lading was signed. If, however, the question is whether the owners gave reasonable notice to UNCAC of the incorporation of a particular term in the bill of lading, then it might be necessary to have regard to pre-contractual negotiations.

In the present case two questions of construction were raised in argument; first whether the bill of lading is capable of incorporating a charter-party whose terms have not been reduced into writing by the time the bill of lading is issued; second, if so, whether the bill of lading incorporates the terms of the voyage charter of Mar. 7, 1991 or the contract of affreightment of July 23, 1990 or neither contract. As to the question of notice, Mr. Meeson did not raise this expressly but he placed considerable emphasis on the fact that neither the recap telex nor the nomination of the vessel to UNCAC referred to arbitration in London. In his skeleton argument he submitted that "it would be commercially absurd" if the failure of the agent to insert the date:

> . . . were to have the unforeseeable consequence that a London arbitration clause of which the shippers were completely unaware were to be incorporated.

I begin with the question whether, as a matter of construction, the bill of lading is capable of incorporating a charter-party whose terms have not been reduced into writing. I do not know of any case in which it has previously been contended that an incorporation clause in a bill of lading can have the effect of incorporating oral terms which have not been reduced into writing. I was referred to *Fidelitas Shipping Company Ltd. v. V/O Exportchleb*, [1963] 2 Lloyd's Rep. 113 at pp. 120 and 121. It was there held that a bill of lading issued on Oct. 23,

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1960 incorporated a charter dated Oct. 6, 1960 and also an addendum to that charter-party dated Oct. 12, 1960. It was not suggested that a collateral oral agreement, had it not been reduced to writing by the addendum, would have been incorporated.

There are, I think, several factors all of which support the construction that the bill of lading incorporates only the terms of a charter-party which have been reduced to writing. First, the words "in accordance with the Charter Party dated" would seem more apt to refer to an instrument in writing than to an oral contract; c.f. their derivation from the Latin carta partita (Scrutton, op. cit., 19th ed. (1984) p. 3 note 16). Second, a bill of lading is a transferable document and one might expect that, if it incorporates terms by reference, then those terms should be ascertainable and capable of being referred to by the party to whom the bill is issued and by any indorsee to whom the bill may be transferred. The terms of a written document are readily ascertainable by the bill of lading holder whereas those of an oral agreement are not. Third, this bill of lading would incorporate the arbitration clause of any charter-party incorporated into the bill. An arbitration agreement is a type of agreement which is normally only made in writing. The Arbitration Act, 1950 only applies to an agreement in writing; see s. 32. The New York Convention by art. II applies only to agreements in writing. It would be strange if the bill of lading were capable of incorporating an arbitration agreement which fell outside the Arbitration Acts and could not be enforced under the New York Convention.

Mr. Dunning submitted that it must often happen that a charter-party has not been executed by the time the bill of lading is issued and that it might produce unfortunate results if in such cases the terms of the charter-party fixture were not incorporated in the bill. Mr. Dunning pointed out that what in practice normally occurs is that an informal fixture is concluded by telephone, telex or fax; that this constitutes a binding contract; but that the parties later draw up and execute a formal charter-party which is back-dated to the date of the fixture. If it were necessary that the charter-party had been executed by the time the bill of lading was issued, then terms which were intended to be incorporated into the bill of lading, might be held not to have been incorporated and that in some cases, as a result, the bill of lading would not contain the terms necessary for it to function satisfactorily as a contract of carriage.

I see the force of these submissions but in my judgment they should not be pressed too far. If a formal charter-party has been executed in sufficient time to be sent or shown to the bill of lading holder when he first demands to be shown a copy, (and if the date on the charter-party is earlier than that on the bill of lading), I do not see why the Court should go behind the date which appears on the charter-party or should investigate whether the charter-party was executed before or after the bill was issued. In the present case the charter-party was not executed by this stage or indeed for more than two years after the bill was issued. Mr. Dunning's submissions can only suggest, at most, that where an oral contract is evidenced by a written document such as a "recap telex", the terms set out in that document may perhaps be treated as capable of being incorporated into a bill of lading. The argument cannot reasonably be pressed so far as to suggest that an oral term, which is not contained in or evidenced by any document at all, is capable of being incorporated.

There are, however, in my view rather more fundamental reasons why it would be commercially unsound to hold that, on the proper construction of the bill of lading, it is capable of incorporating the terms of an oral contract. Bills of lading are transferrable documents which come into the hands of consignees and indorsees who may be the purchasers of goods or banks. The transferee of the bill of lading does not, however, take precisely the same contract as that made between the shipper and the shipowner (of which the bill of lading is merely the evidence). What is transferred to the consignee or indorsee consists, and consists only, of the terms which appear on the face and reverse of the bill of lading. Thus collateral oral terms are not transferred; see *Leduc v. Ward*, (1888) 20 Q.B.D. 475; *The Ardennes*, (1950) 84 Ll.L.Rep. 340; [1951] 1 K.B. 55. This rule facilitates the use of bills of lading in international commerce since it enables a prospective transferee of a bill of lading to see, merely by inspecting the bill, whether it conforms to his contract (whether it be a sale contract or a letter of credit) and what rights and obligations will be transferred to him if he takes up the bill. The transferee, or prospective transferee, need not enquire whether any collateral oral agreements have been made between the shipper and the shipowner as, for example, a waiver by the shipper of any obligation undertaken by the shipowner in the bill.

Where the bill of lading incorporates a charter-party, precisely the same principles should in my judgment apply, save that the

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rights and obligations which will be or have been transferred to the consignee or indorsee are now set out in two documents, the bill of lading and the charter-party. Once again the transferee should not be affected by oral terms not contained in the two documents. Where a bill of lading incorporates the terms of a charter-party, the only exceptional case where extrinsic evidence may be relevant is where the bill of lading does not identify the charter-party referred to. Here it has been held that the absence of a date in the bill of lading does not negative the apparent intention of the parties to incorporate the terms of a charter-party; *The San Nicholas* (sup.). This gives rise to the exceptional position that evidence may be admissible to identify the charter-party referred to.

It would in my view be detrimental to the transferability of bills of lading and to their use in international trade to hold that an incorporation clause in a bill of lading is capable of incorporating a charter-party which has not been reduced into writing. Such a decision would involve that the transferee would be affected by collateral oral terms which do not appear in any document. Even where the charter-party had been identified in the bill and where it had been supplied to the prospective transferee before he took up the bill, he would still be unable to ascertain what rights and obligations would be transferred to him merely by inspecting the two documents. In cases such as the present, where the bill of lading does not identify the charter-party referred to, the rights and obligations of the transferee would only be ascertainable by means of an extensive investigation as to the undocumented contractual arrangements of third parties with whom he had no direct relations. Such a decision would therefore introduce considerable uncertainty into the field of bills of lading.

I therefore consider that, as a matter of the construction of the bill of lading, it does not incorporate the terms of a charter-party which, at the date the bill of lading is issued, has not been reduced to writing. For the reasons given earlier an oral contract, evidenced only by a recap telex, does not seem to me to qualify for this purpose. I should add moreover that, if I am wrong on this, I would still conclude that the bill of lading does not on its true construction incorporate an oral agreement for arbitration in London which, at the date of the bill of lading, was not evidenced by any document at all. It follows that the charter-party fixture of Mar. 7, 1991 was not incorporated in the bill of lading and that, if I am wrong on this, still no clause providing for arbitration in London was incorporated.

In these circumstances it is not strictly necessary to consider the second point of construction, whether the bill of lading incorporates the terms of the voyage charter of Mar. 7, 1991 or the contract of affreightment of July 23, 1990 or neither contract. This only arises if I am wrong on the first point and if an oral contract is capable of being incorporated.

The Courts in the cases referred to by Mr. Dunning have attempted to give guidance as to how such a question of construction should be approached. It should be remembered however that such authorities do no more than indicate guidelines for ascertaining the intentions of the parties. As was said by Lord Justice Roskill in *The San Nicholas* (sup.) at p. 12:

> One cannot generalize in these cases but it is the duty of the Court to seek to give an intelligent meaning to a commercial document of this kind.

In some cases it has been said, approving a passage in Scrutton on Charterparties, 18th ed. (1974) p. 63 that there is a "normal rule" that:

> . . . a general reference will normally be construed as relating to the head charter, since this is the contract to which the shipowner, who issues the bill of lading is a party . . . [*The San Nicholas* (sup.) at p. 11 per Lord Denning M.R. and *The Sevonia Team* (sup.) p. 644 per Mr. Justice Lloyd.]

There may indeed be reasons for adopting this approach as, for example, if it appears that the words of incorporation were designed to give the owners a lien on the cargo for freight or demurrage. A bill of lading, however, is a bilateral contract and while weight should be given to the presumed intention of the master who signed and issued the bill, equal weight must be given to the intention of the shipper who normally draws up the bill and presents it to the master for signature. In some cases, as in the present, he also signs it, though this is less common.

The main factor in favour holding that the voyage charter of Mar. 7, 1991 was incorporated is that it was a charter of a named ship for a specified voyage whereas the contract of July 23, 1990, though on a form headed "Continent Grain Charter Party" was for a succession of voyages on ships to be nominated over a period of time by Peter Dohle. The former is more likely to be referred to as a "charter-party" than the latter which can be referred to, perhaps more appropriately, as a contract of affreightment, a "tonnage contract" or a trans-

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portation contract. There is, however, no definition in English law of "charter-party" and I proceed on the basis that either type of contract can be referred to as a charter-party but that the word is more likely to refer to the charter of a named ship for a single voyage or for a series of voyages than to a contract for ships to be nominated. There can however be no hard and fast distinction of this kind. Charter-parties for single voyages are sometimes made for ships to be nominated and, where named ships are chartered, the shipowner often retains the right to nominate a substitute.

Mr. Meeson indeed submitted that the contract of July 23, 1990 was the only charter-party which existed at the date the bill of lading was issued. I have to assume in considering this point that (contrary to my decision on the first point) the words "Charter Party dated" are capable of referring to an oral contract evidenced only by a "recap telex" since, if I do not, the point does not require further consideration. But, even if I make this assumption, the words quoted are in my view more apt in their context to refer to an instrument in writing than to an oral contract evidenced by a recap telex.

I turn to the commercial reasons for incorporating either document in the bill of lading. It was not suggested at the hearing that there was any commercial need to incorporate the terms of the voyage charter. Since freight under the voyage charter was to become payable "within three banking days of right and true delivery", the words of incorporation cannot have been intended to give the owners a lien on the goods for freight. As to demurrage, while the voyage charter gave a lien for demurrage, there was no cesser clause in the voyage charter applying to demurrage and it is unheard of for an owner to exercise a lien for demurrage where this can be claimed from the charterer under the terms of the charter-party. In the case of freight, what would no doubt occur in practice, whatever construction is placed on the bill, is that UNCAC would pay freight under the contract of affreightment to Peter Dohle "within three days after signing Bills of Lading" and Peter Dohle would pay freight to the owners under the voyage charter "within three banking days of right and true delivery". It was similarly not suggested that terms as to general average or any other usual incident of a contract of carriage needed to be incorporated. It was agreed that the terms set out in the bill of lading would enable that contract to function perfectly satisfactorily as a contract of carriage without the terms of any charter-party being incorporated.

I turn, then, to the relevant words set out in the bill of lading

> . . . they paying freight for the said goods in accordance with the Charter Party dated . . . all the terms, conditions and exceptions of which Charter Party, including the Arbitration clause, are incorporated herewith.

The clause obliges the UNCAC to pay freight in accordance with a charter-party. It is that charter-party, and not any other, whose terms are incorporated. It is therefore necessary to ask the question: "In accordance with which charter party was UNCAC to pay freight?". The relevance of this question is emphasized by the typed words "Freight payable as per C/P".

It would be surprising in my view if a shipper intended or agreed to pay freight in accordance with a charter-party whose terms were unknown to him and which might specify an entirely different rate of freight and different terms of payment from those which he had agreed under his contract. It is true that in the present case the freight rate specified under the voyage charter of Mar. 7, 1991 was lower than that payable under the contract of affreightment. This however was not known to UNCAC. As to the owners, they had no reason to suspect that Peter Dohle was in financial difficulties or was unlikely to be able to pay the freight. If they had, they would no doubt have required the bill of lading to contain a clause identifying the contract of Mar. 7, 1991 as the one in accordance with which the freight was to be paid as in *Compania Commercial Y Naviera San Martin S.A. v. China National Foreign Trade Transportation Corporation (The Constanza M)*, [1980] 1 Lloyd's Rep 505. I do not think that, in the absence of such provision, an owner would expect or intend that the shipper should pay freight at a rate and on terms which were unknown to the shipper. Prima facie, therefore it seems to me that "they paying freight . . . in accordance with the charter party dated" refer to the only charter-party to which UNCAC was a party, namely that of July 23, 1990, albeit that the bill of lading was a contract between UNCAC and the owners and the obligation to pay freight is one owned by UNCAC to the owners.

I would attach importance to any significant commercial reason which might be advanced for preferring one contract to the other but none was put forward. In the end I would give weight to two factors; first that the words set out in the bill of lading are more apt to refer to an instrument in writing than to an oral contract evidenced by a recap telex; second, that the parties in my view are more likely to have

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intended the freight referred to in the bill of lading to be that defined in the contract of affreightment of July 23, 1990 than that defined in the voyage charter. I therefore consider, if it be material and on the assumption set out earlier, that the terms of the contract of affreightment of July 23, 1990 are incorporated in the bill of lading and that those of the voyage charter of Mar. 7, 1991 are not.

Had I come to the conclusion that the bill of lading on its true construction incorporated not only the voyage charter of Mar. 7, 1991 but also a London arbitration clause, I would nevertheless have found it difficult to believe that such a clause was binding on UNCAC or on an indorsee of the bill of lading, such as Grosvenor. As was emphasized by Mr. Meeson in his submissions and as I have earlier found, UNCAC had no notice at the time the bill of lading was issued that the voyage charter by which Peter Dohle chartered the vessel from the owners contained a London arbitration clause and they had no reason to suspect this. Where wide words of incorporation have the effect of incorporating terms which would not be generally known to the party against whom they are sought to be enforced, then under English law the party who seeks to enforce the term must normally show that the term has been fairly and reasonably brought to the other party's attention; *Parker v. South Eastern Railway Co.*, (1877) 2 C.P.D. 416; *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] Q.B. 433. So far as I know, such questions have not so far arisen in any case concerned with the incorporation of charter-party terms into a bill of lading. It is, however, no doubt for reasons such as this that it has been held in a series of cases beginning with *Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.*, [1912] A.C. 1 that an arbitration clause in a charter-party is not directly germane to the shipment, carriage and delivery of cargo under a bill of lading and can only be incorporated in a bill of lading by specific words, either in the bill of lading or in the charter-party, showing an intention to provide for arbitration. Those authorities are not directly relevant here since the bill of lading specifically incorporates the arbitration clause of whatever charter-party it refers to; *The Rena K*, [1978] 1 Lloyd's Rep. 545; [1979] 1 Q.B. 377; *The Oinoussin Pride*, [1991] 1 Lloyd's Rep. 126. The rights of an indorsee of a bill of lading such as Grosvenor should be ascertainable from the terms set out in the bill of lading and any charter-party incorporated in it and should not be dependent on whether terms have fairly and reasonably been brought to the notice of the shipper. It does however seem wrong in principle that an arbitration clause should be held to be binding on the shipper or bill of lading holder unless it can be shown that the shipper ought reasonably be held to have consented to the clause at the time of shipment.

Conclusions

I conclude that this Court is bound to recognise the decision of the Tribunal de Commerce that the amended Centrocon arbitration clause is not incorporated in the bill of lading. Had I not so decided, I would have concluded, deciding the matter in accordance with English law, that the same result is reached. This only leaves Mr. Dunning's submission that Grosvenor and the owners entered into an ad hoc agreement to arbitrate. I need not take much time in discussing this submission which was entirely based on the fact that, in replying to the owners' demand for arbitration, Grosvenor's solicitors in a letter dated July 26, 1991 appointed Mr. Harris as Grosvenor's arbitrator without prejudice to two specific contentions neither of which concerned the absence of any London arbitration clause in the bill of lading. It is sufficient to say that Mr. Harris was appointed under protest and that in these circumstances I am unable to detect any evidence of an ad hoc agreement between the parties that the dispute was to be resolved by arbitration in London.

I will hear Counsel on the precise terms of the orders to be made in this case. Should the parties think that any further issues can conveniently be determined at this stage, I will consider doing so. At present, however, it seems to me that the applications before the Court should be disposed of in accordance with this judgment by making orders as follows:

O.S. 1991 Folio No. 1768

I propose to declare that the bill of lading dated 8th March 1991 did not incorporate a clause providing for arbitration in London. I will also declare that no ad hoc agreement has been concluded providing for arbitration in London. Finally I will declare, as was common ground at the hearing, that the parties to the bill of lading contract are the owners and Grosvenor.

Action 1991 Folio No. 1352

The only matter to be decided is as to the date on which this Court was "first seised" of the matter for the purposes of art. 21 of the Brussels Convention. The test to be applied was laid down by the Court of Appeal in *Dresser U.K. Limited v. Falcongate Freight Management Ltd.*, [1991] 2 Lloyd's Rep. 557 at p. 569;

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[1992] Q.B. 502, at p. 523. It was there held that:

> . . . in the ordinary, straightforward case service of proceedings will be the time when the English Court becomes seised.

I understood there to be no disagreement between the parties that the writ in this action was served on Grosvenor on June 17, 1991 and on UNCAC and Group AMA on June 18, 1991. If this be so, I shall declare that this Court was "first seised" of the plaintiffs' claim against Grosvenor on June 17 and of the plaintiffs' claim against UNCAC and Group AMA on June 18, 1991. Otherwise I shall order by consent that the action be stayed pursuant to art. 30 of the Brussels Convention.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

June 2, 1994

CHILEWICH PARTNERS v. M.V. ALLIGATOR FORTUNE AND OTHERS

Before District Judge Tenney

Bill of lading — Misdelivery — Breach — Delivery of goods to bonded warehouse without production of bills of lading — Whether carriers properly delivered goods — Whether carriers liable as bailees of goods.

Chilewich was a New York general partnership whose business was selling and shipping cattlehides to various Korean leather tanneries, and since its founding in 1989 one of its largest Korean customers had been Kyong Il.

Kyong Il was a large publicly traded tannery with factories at Inchon and Ansan and at each of them Kyong Il maintained a Korean government licensed bonded warehouse.

In May, June and July, 1991 Chilewich shipped a total of 26,000 pieces of cattlehide "C.i.f. Inchon — Mill delivery". Payment was to be —

> . . . by irrevocable Letter of Credit payable at sight in U.S. dollars against invoice and usual shipping documents — STALE —.

This transaction was a common one in the Korean hide trade and was known as a "stale" bill of lading transaction.

The cattlehides were shipped under 16 negotiable bills of lading issued by seven different ocean carriers, six of whom were the defendants in this action. The bills of lading were consigned "TO THE ORDER OF SHIPPER" and Kyong Il was listed as "notify party". The bills with one exception designated the place of delivery as "mill delivery". This designation obliged the carriers to transport the hides to government bonded warehouses at Kyong Il's factories at Inchon and Ansan. Chilewich were to retain the original bills of lading until Kyong Il established a letter of credit with a commercial bank.

Throughout the three month period during which the hides were shipped, several of the defendant carriers expressed reservations about releasing the hides without receiving either an original bill of lading, a bank guarantee or a letter of guarantee from the shippers. The carriers were also concerned with the importers' potential bankruptcy.

The carriers delivered the hides to the bonded warehouse. No letters of credit were opened and on Oct. 9, Chilewich asked the defendant carriers

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PARTENREEDEREI M/S "HEIDBERG" AND VEGA REEDEREI FRIEDRICH DAUBER v GROSVENOR GRAIN AND FEED CO LTD, UNION NATIONALE DES COOPERATIVES AGRICOLES DE CEREALES AND ASSURANCES MUTUELLES AGRICOLES (THE "HEIDBERG")

QUEEN'S BENCH DIVISION (COMMERCIALO COURT)

[1994] 2 Lloyd's Rep 287

HEARING-DATES: 8, 9, 13, 14, 16 December 1993, 21 March 1994

21 March 1994

CATCHWORDS:

Bill of lading -- Incorporation -- Arbitration clause -- Vessel chartered for carriage of grain -- Vessel collided with jetty and fire broke out on board -- Cargo damaged -- Claim by cargo interests -- Whether amended Centrocon arbitration clause incorporated into bill of lading.

Conflict of laws -- Proper law -- Bill of lading -- Incorporation of arbitration clause -- Dispute between owners and cargo interests -- Owners brought action in France -- French Court decided arbitration clause not incorporated -- Whether Court bound by Brussels Convention to recognize French decision -- Whether question of incorporation to be determined by English or French law.

HEADNOTE:

On July 23, 1990 a contract of affreightment was concluded between the first defendants (UNCAC) and Peter Dohle Schiffahrts KG (GmbH & Co). The contract was on the Synacomex form and provided for tonnage nominated by Peter Dohle to perform a minimum of six and a maximum of 12 voyages carrying 2500 tons of bulk maize per shipment from a number of named ports in France including Bordeaux in charterers' option to New Holland. The charter contained an arbitration clause which provided for arbitration in Paris.

Peter Dohle did not have or own a vessel which could meet the cancelling date of Mar 8, and on Mar 7 a fixture of Heidberg was negotiated over the telephone between English brokers for Peter Dohle and the second plaintiffs, (the managers) for the first plaintiff owners. Certain essential terms were expressly agreed over the telephone but in respect of the other terms it was agreed that the terms of the Baursberg charter, a previous fixture between different charterers and the managers, would apply. That charter was on the Synacomex 90 form and contained the Centrocon arbitration clause (with three months limitation amended to 12 months) which provided for arbitration in London according to English law.

Following the agreement the English shipbrokers sent a "recap telex" dated Mar 7, 1991 to the managers which erroneously referred to the Synacomex form instead of the amended Synacomex 90 form. No other written evidence as to the fixture of Heidberg existed at the time of shipment.

On Mar 8 a bill of lading was issued in respect of 2,550,000 kg of bulk maize on board Heidberg. The bill provided for the arbitration clause of an unidentified charter-party to be incorporated in the bill. At the time the bill of lading was issued the only executed document which could be referred to as a charter-party was the contract of affreightment on the Synacomex form of charter which provided for arbitration in Paris. There was also at that date an oral agreement for the charter of Heidberg which incorporated the amended Centrocon arbitration clause and provided for arbitration in London.

The cargo was shipped pursuant to a sale contract on cif terms concluded between UNCAC and the first defendants, an English company (Grosvenor). The cargo was insured by the third defendants (Group AMA).

On Mar 9, in the early hours, Heidberg collided with a Shell jetty at Pauillac on the river Gironde not far from Bordeaux. Both the vessel and the jetty sustained damage. A fire broke out on board the vessel and part of the cargo sustained water damage as a result of fire-fighting operations. The vessel was salved and returned to Bordeaux for repairs. The sound cargo was eventually transhipped onto another vessel and on-carried to New Holland.

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On Mar 18 Grosvenor paid for the cargo and was handed in exchange the shipping documents including the bill of lading, and on or about Nov 18, Group AMA paid Grosvenor in respect of its loss.

Various actions were brought in both England and in France. On Sept 23, 1993 the Tribunal de Commerce held inter alia that the bill of lading did not incorporate the arbitration clause providing for arbitration in London.

Meanwhile on June 11, 1991 the owners and managers issued a writ in the English Court (1991 Folio 1352) claiming various relief against Grosvenor and UNCAC. The writ was amended to add Group AMA as a third defendant. They also appointed an arbitrator contending that the Centrocon arbitration clause was incorporated in the bill of lading.

On Aug 5 the owners and managers commenced a second set of proceedings against Grosvenor, UNCAC and Group AMA (1991 Folio 1768) claiming various declarations.

On Apr 30, 1992 Grosvenor, UNCAC and Group AMA issued originating summons (1991) Folios 1703, 1704 and 1705) claiming relief against the owners and managers.

On Nov 5, 1993 Grosvenor UNCAC and Group AMA took out a summons in action 1991 Folio 1352 seeking an order that such action together with 1991 Folio 1768 be dismissed pursuant to RSC, O 18, r 19 and/or the inherent jurisdiction of the Court on the grounds that the claims of the owners and managers in both action and the arbitration were barred by res judicata by reason of the judgment of the Tribunal de Commerce of Sept 23, 1993.

The issues for determination were (1) Was the Court bound by the Brussels Convention to recognize the decision of the Tribunal de Commerce that the Centrocon clause was not incorporated in the bill of lading? (2) If not, by what law should the Court determine whether the clause was incorporated in the bill? (3) If English law was to be applied, was the clause incorporated in the bill?

-- Held, by QB (Com Ct) (Judge DIAMOND, QC), that (1) the judgment of the Tribunal de Commerce seemed prima facie to fall within the definition of "judgment" contained in art 25; art 25 did not exclude judgments on preliminary issues or draw any distinction between these and final judgments on the merits of a case; no objection could be brought to recognition of the French judgment on the ground that the parties to the two sets of proceedings were not the same since under French law an action brought to enforce a subrogated claim had to be brought in the name of the insurer while under English law it had to be brought in the name of the assured with the insurer having an equitable interest in the proceedings (see p 297, cols 1 and 2);

(2) it was primarily a policy issue whether a decision on validity of an arbitration agreement was held to be excluded by exception (4) to art 1 of the Brussels Convention; and there were solid practical and policy reasons for holding that decisions as to the validity of an arbitration agreement fell generally within the ambit of the Brussels Convention; it was beyond doubt that the judgment of a foreign Contracting State on the substance of a dispute, even if given in breach of a valid arbitration agreement must be recognized by this Court under art 26; exception (4) of the Brussels Convention should not apply to judgments as to the validity of arbitration agreements both because such judgments were not confined to "arbitration" but necessarily extended to the construction of the underlying contract and because there were solid practical and policy reasons why the judgment of the first Contracting State to pronounce on the validity or invalidity of the arbitration agreement should be recognized in other Contracting States (see p 300, col 2; p 301, col 1; p 303, col 2);

-- The Atlantic Emperor, [1992] 1 Lloyd's Rep 342, considered.

(3) the judgment of the Tribunal de Commerce did not fall within exception (4) relating to "arbitration" and this Court was bound to recognize it (see 303, col 1; p 313, col 2);

(4) it was well established that this Court applied the law of England to decide all disputes that came before it unless and to that extent it was demonstrated that either by statute or by English rules of private international law it was required to apply the law of some other country; it had not been demonstrated that a law other than English law should apply and English law had to

be applied to determine whether the Centrocon clause was incorporated into the bill of lading (see p 307, col 2; p 308, cols 1 and 2);

(5) if that was wrong the putative proper law of the bill of lading was French law (see p 308, col 2);

(6) it would be commercially unsound to hold that on the proper construction of the bill of lading, it was capable of incorporating the terms of an oral contract; what was transferred to the consignee or indorsee consisted only of the terms which appeared on the face and reverse of the bill of lading; collateral oral terms were not transferred and the same principles applied where the bill of lading incorporated a charter-party; and as a matter of construction of the bill of lading it did not incorporate the terms of a charter which at the date the bill of lading was issued had not been reduced to writing; the recap telex did not qualify for this purpose; the charter-party fixture of Mar 7 was not incorporated in the bill of lading and even if that was wrong no clause providing for arbitration in London was incorporated (see p 310, col 2; p 311, cols 1 and 2; p 313, col 2);

(7) the words set out in the bill of lading were more apt to refer to an instrument in writing than to an oral contract evidenced by a recap telex and the parties were more likely to have intended the freight referred to in the bill of lading to be that defined in the charter of July 23, 1990 than that defined in the voyage charter; if it were material and on the assumption that the words "Charter Party dated" were capable of referring to a contract evidenced only by a recap telex, the terms of the contract of affreightment of July 23 were incorporated in the bill of lading and those of the voyage charter of Mar 7 were not (see p 312, col 2; p 313, col 1);

(8) the Court was bound to recognize the decision of the Tribunal de Commerce that the amended Centrocon arbitration clause was not incorporated in the bill of lading (see p 313, col 2).

CASES-REF-TO:

Ardennes, The [1950] 84 Lloyd's Rep 350; [1951] KB 55;
Albeko Schumaschinen AG v Kamborian Shoe Machine Co Ltd, [1961] 111 LJ 519;
Bangladesh Chemical Industries Corporation v Henry Stephens Shipping Co Ltd, (The SLS Everest), (CA) [1981] 2 Lloyd's Rep 389;
Bonython v Commonwealth of Australia, (DC), [1951] AC 219; Coast Lines Ltd v Hudig & Veder NV, (CA) [1972] 1 Lloyd's Rep 52; Compagnie d'Armenent Maritime SA v Compagnie Tunisienne de Navigation SA, (HL), [1970] 2 Lloyd's Rep 99; [1971] AC 572;
Dresser UK Ltd v Falcongate Freight Management Ltd, (CA) [1991] 2 Lloyd's Rep 557 [1992] QB 502;
Fidelitas Shipping Co Ltd v V/O Exportchleb, [1963] 2 Lloyd's Rep 113; Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd, [1989] QB 433; K/S A/S Seateam & Co v Iraq National Oil Co, (The Sevonia Team) CA, [1983] 2 Lloyd's Rep 640;
Leduc v Ward (1888) 20 QBD 475;
Mackender v Feldia AG, (CA) [1966] 2 Lloyd's Rep 449; [1967] 2 QB 590; Navigazione Alta Italia SpA v Svenska Petroleum AB, (The Nai Matteni), [1988] 1 Lloyd's Rep 452;
Oceanic Sun Line Special Shipping Co Inc v Jay, (1988) CLR 197; Oinoussin Pride, The [1991] 1 Lloyd's Rep 126;
Pacific Molasses Co v Entre Rios Compania Naviera SA, (The San Nicholas), (CA) [1976] 1 Lloyd's Rep 8;
Parker v South Eastern Railway Co, (1877) 2 CPD 416;
Parouth, The [1982] 2 Lloyd's Rep 351;
Renak, The [1978] 1 Lloyd's Rep 545; [1979] 1 QB 377;
Rich (Marc) & Co AG v Societa Italiana Impiante PA, (The Atlantic Emperor), (No 1), (CA) [1989] 1 Lloyd's Rep 548;
Rich (Marc) & Co AG v Societa Italiana Impianti PA, (The Atlantic Emperor), (No 2), (CA) [1992] 1 Lloyd's Rep 624;
Rich (Marc) & Co AG v Societa Italiana Impiante PA, (The Atlantic Emperor) [1991] 1 Lloyd's Rep 342; [1991] ECR 3855;
TS Havprins, [1983] 2 Lloyd's Rep 356;
Thomas & Co Ltd v Portsea Steamship Co Ltd, (HC), [1912] AC 1.

INTRODUCTION:

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This was the hearing of certain summonses in an action by the plaintiffs, Partenreederei M/S "Heidberg",the owners of the vessel Heidberg and the managers of the vessel Vega Reederei Friedrich Dauber claiming declarations and damages from the defendants Grosvenor Grain and Feed Co Ltd and Union National des Cooperatives Agricoles de Cereales and Assurances Mutuelle Agricoles. The issue for decision was whether the amended Centrocon arbitration clause was incorporated in the bill of lading.

The further facts are stated in the judgment of His Honour Judge Diamond, QC

COUNSEL:
Mr Nigel Meeson for the defendant cargo interests; Mr Graham Dunning for the plaintiff owners.

JUDGMENT-READ:
Judgment was reserved. Tuesday Mar 21, 1994

PANEL: Judge DIAMOND, QC

JUDGMENTBY-1: JUDGE DIAMOND QC

JUDGMENT-1:
JUDGE DIAMOND QC: Introduction

In the early hours of Mar 9, 1991 the motor vessel Heidberg, while loaded with a cargo of bulk maize which had been shipped at Bordeaux for carriage to New Holland on the river Humber, collided with a Shell jetty at Pauillac on the river Gironde not far from Bordeaux. Both the vessel and the jetty sustained damage. A fire broke out on board the vessel and part of the cargo sustained water damage as a result of firefighting operations. The vessel was salved and returned to Bordeaux for repairs. The sound cargo was subsequently transhipped onto another vessel and on-carried to New Holland.

These events have given rise to a tangled web of legal proceedings both in France and in England. The summonses presently before me concern only a relatively small aspect of this litigation but the different aspects interact.

Heidberg was a vessel of 2700 deadweight tons owned by Partenreederei M/S "Heidberg" of Hamburg ("the owners") and managed by Vega Reederei Friedrich Dauber also of Hamburg ("the managers").

On Mar 11, 1991 the vessel was arrested (but not so as to found in rem jurisdiction) by order of the Tribunal de Commerce at Bordeaux at the request of Societe' des Petroles Shell SA ("Shell"). In April and May, 1991 Shell commenced proceedings against, inter alios, the owners and the managers, before the Tribunal de Commerce to recover the loss sustained by it as a result of the collision.

On Apr 5, 1991 the owners, the managers and Messrs. Owe Brugge and Arend Brugge, partners in the owners, applied to the Tribunal de Commerce for a declaration that they were entitled to limit their liability under the Limitation of Liability Convention, 1976. The establishment of the fund was confirmed by the Judge in Chambers of the Tribunal de Commerce on Apr 8 and 16 1991.

The summonses before me are not concerned with the claim brought by Shell against the owners but with the claims brought by cargo interests against the owners and managers and the cross claims by the owners and managers against cargo interests.

The cargo of bulk maize on board the vessel had been shipped at Bordeaux by Union National des Cooperatives Agricoles de Cereales ("UNCAC"). The cargo was shipped pursuant to a sale contract on cif terms concluded between UNCAC and an English company, Grosvenor Grain and Feed Company Ltd ("Grosvenor"). Grosvenor was the party to be notified under the terms of the bill of lading. On Mar 18, 1991, a few days after the casualty, Grosvenor paid for the cargo and was handed in exchange the shipping documents, including the original bills of lading.

The cargo had been insured by a French company, Assurances Mutuelles Agricoles ("Group AMA"). On or about Nov 18, 1991 Group AMA paid the sum of L92, 067.41 to Grosvenor in respect of its loss. Grosvenor signed a form of subrogation by which

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it agreed that Group AMA was subrogated to all its rights and that, so far as necessary, those rights were assigned to Group AMA.

On Apr 17, 1991, before it had paid the claim, Group AMA obtained a conservatory seizure of the vessel.

In the light of the establishment of the limitation fund, the owners and the managers sought the release of the vessel from arrest. The Tribunal de Commerce, however, maintained the arrests on the ground that Shell and Group AMA might have claims which fell outside the terms of the Limitation Convention. This decision resulted in the vessel remaining under arrest for a very prolonged period. There have been further hearings before the Tribunal de Commerce and the Cour d'Appel. I was told that the Cour de Cassation has recently ruled that the vessel should have been released following the constitution of a limitation fund but has remitted the matter to the Cours de Renvoi, which are the Cours d'Appel at Poitiers and Rouen.

Meanwhile in June, 1991 three different sets of proceedings were commenced, one in France and two in England.

On June 17, 1991 Group AMA commenced legal proceedings in the Tribunal de Commerce, Bordeaux, against, inter alios, the owners and the managers, claiming to recover compensation for the damage sustained by the grain cargo and an indemnity in respect of salvage and general average. Group AMA contends that these proceedings were served on the Public Prosecutor in France on June 17, 1991 and that this constituted valid service on the owners and the managers. The owners and managers, while not contesting that the Tribunal de Commerce would otherwise have jurisdiction under the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968 ("the Brussels Convention") contended, first, that the dispute fell within the terms of an arbitration clause of a charter-party dated Mar 7 1991 which they said was incorporated into the bill of lading and, second, that in any event there were proceedings involving the same cause of action and between the same parties (see below) pending before the High Court of Justice in London, that the English Court was the Court "first seised", and that accordingly the Tribunal de Commerce should decline jurisdiction under art 21 of the Brussels Convention.

Previously on June 11, 1991 the owners and the managers had issued a writ in the High Court of Justice in London (1991 Folio No 1352) in which they claimed the following relief against Grosvenor and UNCAC:

(1) A declaration that Grosvenor and/or UNCAC are liable to contribute in general average to the loss and expenditure incurred by the owners as a result of the collision.

(2) A general average contribution.

(3) A declaration that neither the owners nor the managers are liable to Grosvenor and UNCAC for breach of contract and/or duty by reason of the collision.

(4) Alternatively a declaration that the owners and/or the managers are entitled to limit their liability in accordance with the Limitation Convention.

(5) Damages for the wrongful arrest of the vessel.

The writ was amended and re-issued on June 14, 1991 to add Group AMA as third defendant. The writ was served on Grosvenor on June 17, 1991 and on UNCAC and Group AMA on June 18, 1991.

The owners were not, however, content merely to commence legal proceedings in London. On June 11, 1991, the same day as the writ was first issued, they sent a telex to Grosvenor claiming that the bill of lading incorporated a charter-party dated Mar 7, 1991 which in turn incorporated the amended Centrocon arbitration clause and that accordingly the disputes between the owners and Grosvenor fell to be resolved by arbitration in London. The owners appointed Mr Mark Hamsher as their arbitrator in respect of such disputes. The disputes were described in the telex in substantially the same terms as in the writ. Grosvenor replied through their solicitors on July 26, 1991 appointing Mr Bruce Harris as their arbitrator. This appointment was stated to be without prejudice to Grosvenor's contention that

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the owners were not entitled to pursue arbitration, given that they had already commenced High Court proceedings and that Grosvenor had acknowledged service and had undertaken not to seek a stay. At a later stage UNCAC was brought in and also appointed Mr Harris as their arbitrator but without prejudice to the following contentions: (1) that the owners had no right to arbitrate; (2) that the issues were res judicata before the Courts in Bordeaux; (3) that to seek to arbitrate the claims in view of the fact that the matters in question were already before the Courts in France and England was an abuse of process.

On Aug 5, 1991 the owners and the managers commenced a second set of legal proceedings in London in the High Court of Justice. By an originating summons (1991 Folio 1768) they asked the Court to grant the following declarations as against Grosvenor, UNCAC and Group AMA.

(1) A declaration that the amended Centrocon arbitration clause contained in the "Synacomex 90" charter-party dated London Mar 7, 1991 is incorporated in the contract contained in or evidenced by the bill of lading dated Bordeaux Mar 8, 1991.

(2) A declaration that Grosvenor and/or UNCAC and/or Group AMA are bound to refer all disputes arising out of the contract referred to in par (1) above to arbitration in London.

(3) A declaration that Grosvenor or alternatively UNCAC is a party to the contract referred to in par (1).

(4) A declaration that the owners' or the managers' claim against Grosvenor and/or UNCAC and/or Group AMA for damages for the wrongful arrest of the vessel is a dispute subject to the arbitration clause referred to in par (1) above.

On Apr 30, 1992 Grosvenor responded by issuing an Originating Summons (1992 Folio No 1703) by which it asked the Court to grant it the following relief against the owners and the managers:

(1) A declaration that the owners and the managers, having brought an action (1991 Folio 1352) claiming the same relief as that claimed in the arbitration, are no longer entitled to proceed with the arbitration. (Such claim was abandoned before me).

(2) An injunction restraining the owners and the managers from proceeding with the arbitration;

(3) Alternatively a declaration that the arbitrators have no jurisdiction in respect of the claims referred to in the telex of June 11, 1991 and/or no jurisdiction to grant the relief sought in that telex.

On the same day, Apr 30, 1992, two further originating summonses were issued. UNCAC issued OS 1992 Folio 1704 seeking similar relief to that claimed by Grosvenor. Group AMA issued OS 1992 Folio 1705 seeking a declaration that they were not a party to any arbitration agreement with the owners or managers and otherwise seeking similar relief to that claimed by Grosvenor and UNCAC.

In France the various actions brought before the Tribunal de Commerce proceeded and on Sept 23, 1993 the Tribunal de Commerce handed down a judgment in which it held, inter alia, as follows:

(1) That the owners, the managers and Messrs Owe Brugge and Arend Brugge are not entitled to limit their liability in accordance with the Limitation Convention and that as a result they are jointly and severally liable to Shell in the sum of FFr 63,032,163 plus interest.

(2) That the bill of lading did not contain a clause providing for arbitration in London.

(3) That the Tribunal de Commerce had jurisdiction in respect of Group AMA's action against the owners for damage to cargo under the bill of lading.

(4) That it had not been shown that the English Court was the Court "first seised" and therefore the action would not be stayed.

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(5) That the owners were liable to Group AMA but that Group AMA's claim would be provisionally dismissed on the grounds that Group AMA had failed to establish its loss.

This judgment is presently under appeal.

The summonses before the Court

I do not propose to describe in detail the summonses which came before me for argument on Dec 8, 1993 and on a number of subsequent days. They are even more convoluted than the proceedings I have so far described. It is sufficient to say that they included the following:

1. OS 1991 Folio 1768
I have previously described the relief claimed. The main issue raised by the summons is whether the amended Centrocon arbitration clause, which provides for arbitration in London, was incorporated into the bill of lading.

2. OS 1992 Folios 1703, 1704 and 1705

These summonses, issued by Grosvenor, UNCAC and Group AMA respectively mostly mirror the relief claimed in OS 1991 Folio 1768. In addition to raising the question whether the amended Centrocon clause was incorporated into the bill of lading they also raise the issue whether, if the clause was incorporated, certain claims fall within the scope of the arbitration agreement, eg a declaration for non-liability, a declaration that owners are entitled to limit their liability, and the claim against Group AMA for wrongful arrest.

3. Summonses relating to action 1991 Folio 1352

Three summonses were taken out by Grosvenor, UNCAC and Group AMA asking that the claim be dismissed on the ground that no statement of claim had been served; alternatively that parts be stayed pursuant to art 22 of the Brussels Convention; alternatively that parts be struck out; alternatively that the Court should decline jurisdiction under art 21 of the Brussels Convention. These summonses were, however, in practice superseded by an application made by the owners and the managers taken out on Dec 7, 1993, which proved to be non-contentious. This application asked the Court to declare on what date it became "seised" of action 1991 Folio 1352 within the meaning of art 21 of the Brussels Convention and that otherwise the action should be stayed pursuant to art 30.

4. The "res judicata" summons

On Nov 5, 1993 Grosvenor, UNCAC and Group AMA took out a summons in action 1991 Folio 1352 seeking an order that such action together with OS 1991 Folio 1768 be dismissed pursuant to RSC, O 18, r 19 and/ or the inherent jurisdiction of the Court on the grounds that the claims of the owners and the managers in both actions and in the arbitration are barred by res judicata by reason of the judgment of the Tribunal de Commerce dated Sept 23, 1993. It may be necessary for me to decide one issue raised by this summons, namely whether the Court is bound by the Brussels Convention to recognize the decision of the Tribunal de Commerce that the arbitration clause relied on by the owners was not incorporated in the bill of lading. As to the others, there was a difference between the parties as to whether the Court should decide on this summons whether the arbitrators are bound by the decision of the Tribunal de Commerce on the merits of the dispute or whether there was a dispute on this point which should be referred to the arbitrators to decide. In the course of argument Mr Meeson for the cargo interests sought to meet the point that there was a dispute on the issue of res judicata which should be left to the arbitrators to decide by seeking leave to amend the relief sought in OS 1992 Folios 1703, 1704 and 1705. I came to the conclusion however, that it would be premature and inconvenient at this stage to reach any conclusion on these questions both because they only arise if the owners and the managers are right that the Centrocon arbitration clause is incorporated into the bill of lading and also because the issues had not been adequately formulated in advance of the hearing in the formal Court proceedings and in the parties' skeleton arguments.

The contracts

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Before attempting to define or consider the issues which should be decided by the Court, I must first set out the relevant details of three contracts; first, a contract of affreightment dated July 12, 1990; second, a charter-party fixture dated Mar 7, 1991; third, the bill of lading issued at Bordeaux and dated Mar 8, 1991.

The contract of affreightment dated July 23, 1990

On July 23, 1990 a contract of affreightment was concluded between UNCAC and Peter Dohle Schiffahrts KG (GmbH & Co) of Hamburg ("Peter Dohle"). This contract was on the form of the Continent Grain Charter-party (last amended 1974 -- code name "SYNACOMEX") and provided for tonnage nominated by Peter Dohle to perform a minimum of six and a maximum of 12 voyages carrying 2500 tons of bulk maize per shipment from a number of named ports in France (including Bordeaux) in charterers' option to New Holland. There were to be a maximum of two voyages per month. The period was October, 1990 to April, 1991 or, in charterers' option, May and June, 1991. Clause 4 of the charter-party provided:

The freight is earned and is to be paid on right and true delivery of cargo and is payable as follows: within three days after signing Bills of Lading by Charterers, direct into Owners nominated bank account at Hamburg (the bank and the number of the account were specified)

The charter-party contained an arbitration clause as follows:

Any dispute arising out of the present contract shall be referred to Arbitration of Chambre Arbitrale Maritime -73, Boulevard Haussman, Paris 8. The decision rendered according to the rules of Chambre Arbitrale shall be final and binding upon both parties. The right of both parties to refer any disputes to arbitration ceases sIx months after date of completion of discharge or, in case of non-performance, six months after the cancelling date as per clause 8. Where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred.

On Feb 21, 1991 UNCAC gave, in accordance with the contract, 10 days provisional pre-advice for a vessel to load at Bordeaux with a lay-cancelling period of Mar 4/8, 1991. This was followed by a seven days definite advance notice given on Feb 25, 1991.

The charter-party fixture dated Mar 7; 1991

Peter Dohle did not own or have on charter a vessel which could meet the cancelling date of Mar 8. Accordingly on Mar 7, 1991 a fixture of Heidberg was negotiated over the telephone between Active Chartering Ltd ("Active Chartering"), English shipbrokers acting on behalf of Peter Dohle, and the managers acting for the owners. The vessel had just discharged in Northern Spain and was seeking employment.

There had previously on Feb 8, 1991 been concluded between Active Chartering (then acting for different principals by the name of Arklow Shipping Limited) and the managers a fixture of a different vessel, Baursberg, to carry grain from Bordeaux to Manchester. The charter-party had been on the form of the Continent Grain Charterparty (last amended 1990 -- Code name "SYNACOMEX 90") but amended in type in a number of respects. In particular the charter-party of Baursberg contained a typed provision which (in lieu of the Paris arbitration clause contained in the printed form of charter) provided:

Centrocon Arbitration Clause (with three months limitation amended to twelve months), in London according to English Law.

There was also a typed provision that freight would become payable:

. . . by Charterers to Active Chartering . . . . within three banking days of right and true delivery for onward transfer to the Owners.

The fixture of Heidberg was conducted at short notice. Certain essential terms were expressly agreed over the telephone. In respect of other terms it was agreed that the terms of the Baursberg charter would apply.

Following the agreement made on the telephone Active Chartering sent a "recap telex" dated Mar 7, 1991 to the managers.

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This is to reconfirm todays charter party dated 7th March '91.

MV "Heidberg"

German flag, single decker abt 2700 dwcc abt 134000 cbftgr

grainfitted and suitable grab discharge 1 hoha with moveable bulkhead for

-- 2550 tonnes maize in bulk only, no bags

-- Bordeaux -- New Holland

-- Laycan 8th March 0900 hrs provided vessel is in always load ready latest 0900 hrs then Charterers guarantee loading/completion latest 9th 24.00 hrs weather permitting, force majeure and breakdowns excepted.

-- freight DM 18.78 tonne int weight fio, spout/grab trimmed payable after right and true delivery.

-- 24 hours load

-- 54 hours discharge

-- Laytime non rev and wp

-- Demurrage DM 4500 daily/rata free despatch

Synacomex charter-party .

This telex erroneously referred to the Synacomex charter-party (which contained a Paris arbitration clause) when it should have referred to the amended form of Synacomex 90 form used on Feb 8, 1991 for the charter of Baursberg. No other written evidence as to the fixture of Heidberg existed at the time of shipment.

After the casualty had occurred Active Chartering sent to the managers a form of charter-party for signature. This was on the Synacomex 90 form and included the terms agreed for the Baursberg fixture save where otherwise agreed. In particular it included the typed clause providing for the amended Centrocon arbitration clause to apply. As the casualty had already occurred, the draft charter-party was neither signed for the owners, nor returned to Active Chartering. At the time of the casualty, and for a long time thereafter there was no written document evidencing the agreement of the owners to the draft charter-party nor, on the other hand, was any suggestion made by them that the draft charter-party did not accurately set out the terms orally agreed. Long after these proceedings had been commenced Peter Dohle and the managers executed a form of charterparty in the same terms as the draft. But this did not occur until 1993, presumably after judgment had been given by the Tribunal de Commerce, and it cannot have any effect on the issue raised in these proceedings.

The nomination of Heidberg to UNCAC

In response to the notices given by UNCAC on Feb 21 and 25, 1991, Peter Dohle had originally nominated "MV Birta or sub" with a lay/ can of Mar 5/8, 1991.

After the fixture of Heidberg had been agreed, Active Chartering on behalf of Peter Dohle nominated that vessel to UNCAC under the terms of the contract of affreightment. The notice was dated Mar 7, 1991 and was in the following terms:

Please to reconfirm today's nomination dated 7th March 1991.

-- MV "Heidberg"

German Flag, Singledecker

Abt 2700 DWCC Abt 134000 CBFTGR

Grainfitted and suitable grab discharge 1 hoha with moveable bulkhead

FOR

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-- 2550 tonnes maize in bulk only, no bags

-- Bordeaux -- New Holland

-- Laycan 8th March 0900 hrs provided Vsl is in always load ready latest 0900 hrs then Charterers guarantee loading/ completion latest 9th 24.00 hrs weather permitting, force majeure and breakdowns excepted.

-- Synacomex charter party

This telex repeated some of the terms set out in the re-cap telex sent to the managers. In particular, it stated that the form of charter was the "Synacomex" charter-party. There was no reference to any amendment to the printed form of charter-party to provide for arbitration in London.

The bill of lading

The bill of lading acknowledges the shipment of 2,550,000 kg of bulk maize on board Heidberg "now lying in the port of Bordeaux" and bound for New Holland. The shipper is stated to be UNCAC (whose address is given as 83, Avenue de Ia Grande Armee, Paris). The bill states "Notify Grosvenor Grain & Feed Co Ltd". There is a typed clause "Freight payable as per C/p".

The printed form, after acknowledging shipment, continues:

. . . and to be delivered in the same good order and condition unto [the words "TO ORDER" have been inserted] or their Assigns, they paying freight for the said goods in accordance with the Charter Party dated . . . [the space has been left blank] all the terms, conditions and exceptions of which Charter Party, including the Arbitration clause, are incorporated herewith.

The bill of lading is signed as follows:

In witness where of the Master or Agent of the said vessel has affirmed 3 THREE ORIGINALS Bills of Lading . . . one of which being accomplished the others to stand void.

Dated in Bordeaux the 8th day of March 1991 Clean on Board.

There is then a printed space for the signatures of both the shippers and the master. It was signed for UNCAC and also signed for the master over the rubber stamp of the managers. On the reverse of the bill are set out certain standard clauses.

The different arbitration clauses

The bill of lading provided for the arbitration clause of an unidentified charter-party to be incorporated in the bill.

At the time the bill was issued the only executed document which could be referred to as a charter-party was the contract of affreightment on the "Synacomex" form of charter-party. This provided for arbitration in Paris as set out above.

There was at the date of the bill of lading also an oral contract for the charter of Heidberg as agreed on Mar 7, 1991, which incorporated the amended Centrocon arbitration clause. This provides that all disputes under the contract shall be settled by arbitration in London, each party appointing an arbitrator who is familiar with the business. In the second half of the clause there is a provision relating to the time within which an arbitrator must be appointed. The amendment as referred to in the Baursberg charter-party, would amend that provision to read as follows:

. . . Any claim must be made in writing and Claimant's Arbitrator appointed within twelve months of final discharge and where this provision is not complied with the claim must be deemed to be waived and absolutely barred.

At the date of the bill of lading, however, the only written evidence of this charter was the recap telex. This referred only to "Synacomex" charter-party which contains the Paris arbitration clause set out above. Moreover the only notice of that charter-party given to UNCAC was that set out in the nomination

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notice of Mar 7, 1991. This likewise referred only to the "Synacomex" charter-party and thus to the Paris arbitration clause contained in the printed form. No notice was given at any stage to UNCAC that the head charter by which Peter Dohle chartered Heidberg from the owners contained a London arbitration clause and they had no reason to suspect this.

The issues

A large number of issues were sought to be raised before me. These were helpfully set out in a "Revised List of Issues" prepared by Mr Dunning who appeared for the owners and the managers. As the hearing progressed, however, it became clear that not all these issues could usefully or properly be decided at the present stage.

It is plain that the central issue which arises on all these summonses is whether the bill of lading incorporates the terms of the charter-party fixture agreed on Mar 7, 1991 and, if so, whether it incorporates the amended Centrocon arbitration clause. There are, in addition, a number of subsidiary issues. For example there are issues as to whether, if the clause is incorporated, certain types of relief being sought by the owners, namely a declaration of non-liability, a declaration that the owners are entitled to limit their liability and the claim for compensation for wrongful arrest, fall within the terms of the clause. I would not however think it right to decide such issues unless I had first come to the conclusion that the Centrocon arbitration clause is incorporated.

Since the central issue is whether the Centrocon arbitration clause is incorporated, I would be disposed to decide it first. But I am immediately faced with the submission made by Mr Meeson on behalf of the cargo interests that there is nothing to decide because this question has already been determined, subject to appeal, by the Tribunal de Commerce. This is an issue of some difficulty which I cannot avoid considering. I was at one stage attracted by the possibility that I might decline to decide this issue until it is seen whether the decision of the Tribunal de Commerce is upheld on appeal. But, if I were to take this course, it would involve that I must either decline to decide OS 1991 Folio 1768 at all or else run the risk of re-opening a matter which, if Mr Meeson is right, has been determined between the parties by the French Court.

There was also an issue between the parties as to whether, if the question of incorporation has to be determined by this Court (on the grounds that the Court is not bound to recognise the decision of the Tribunal de Commerce on the matter) the question should be decided according to French or English law.

I have therefore come to the conclusion that I must decide the following three issues before considering whether it is necessary to decide any others. These are: 1. Is the Court bound by the Brussels Convention to recognise the decision of the Tribunal de Commerce that the Centrocon clause is not incorporated in the bill of lading? 2. If not, by what law should the Court determine whether the clause is incorporated in the bill? 3. If English law is to be applied, is the clause incorporated in the bill?

French law

It was not necessary to reach a decision as to a further issue which could have arisen, namely whether, if French law is to be applied, the Centrocon arbitration clause is incorporated in the bill. It was common ground that, according to French law, the clause is not incorporated. Two experts were called to give evidence on various aspects of French law; Me Robert Meilichzon for the owners and managers and Me Jacques Lassez for the cargo interests. There was in the event little disagreement between these experts. Both agreed that in French law it would be held that the charter-party of Mar 7, 1991, and thus the Centrocon clause, is not incorporated in the bill of lading. Their reasons differed more in emphasis than in substance. Me Meilichzon gave as his main reason that, as there are two charter-parties which might have been incorporated into the bill of lading and as the bill does not specify which is incorporated, a French Court would decline to hold that either is incorporated in the absence of evidence that the parties intended to refer to one or other of these charter-parties. Me Lassez, whose evidence I preferred, gave as his reason that the test to be applied in French law is whether the parties to the bill of lading contract and in particular the party who is being called upon to arbitrate, had knowledge of and had accepted the charter-party. As UNCAC had no knowledge of the charter-party concluded on Mar 7, 1991 Me Lassez considered that it would be held by a French Court that the

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Centrocon clause is not binding on UNCAC, Grosvenor or Group AMA. In the event both experts were agreed that if the Centrocon clause had been binding on UNCAC, then it would also bind Grosvenor; further, that by the French law of subrogation it would also be binding on Group AMA.

Issue 1. Is the Court bound by the Brussels Convention to recognize the decision of the Tribunal de Commerce that the Centrocon clause is not incorporated in the bill of lading?

The Tribunal de Commerce decided this issue in the following way:

Whereas this bill of lading does not contain any specific arbitration clause, referring only to the one which would appear in an unidentified charter party.

Whereas it is in reliance upon this indeterminate provision that the shipowners undertook an arbitration proceeding in London against Grosvenor . . . UNCAC and Group AMA in June 1991.

Whereas furthermore the alleged charter-party would be one which was concluded between Mr Peter Dohle as charterer and Vega Reederei Friedrich Dauber as owner of the "Heidberg", a document which is apparently not signed and is totally foreign to the owner of the cargo.

Whereas in consequence the shipowners' objection of lack of jurisdiction will be dismissed and this Court will declare itself competent as being the Court of the place where the incident causing the damage took place and will retain the case.

(I have slightly amended the translation in the bundle of documents.)

This is a decision that the arbitration clause relied on by the owners when nominating an arbitrator in June, 1991 was not incorporated in the bill of lading for three reasons; namely that the charter-party has not been identified; that the alleged charter has not been signed; and that it is totally foreign ("totalement etranger") to the cargo-owner.

Before considering whether this decision should be recognized as binding on the owners in these proceedings I must first set out the relevant provisions of the Brussels Convention and of the Civil Jurisdiction and Judgments Act 1982 (the 1982 Act). The Brussels Convention provides, inter alia, as follows:

Article 1: This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal . . .

The Convention shall not apply to:

(1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, corporations and analogous proceedings;

(3) social security;

(4) arbitration.

Article 25: For the purposes of this Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Article 26: A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required . . .

Article 27: A judgment shall not be recognised . . .

(4) if the Court of the State in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule

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of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State.

Article 28: [The first paragraph sets out further circumstances in which a judgment shall not be recognised, the third paragraph provides:]

Subject to the provisions of the first paragraph, the jurisdiction of the court of the State in which the judgment was given may not be reviewed: the test of public policy referred to in Article 27(1) may not be applied to the rules relating to jurisdiction.

Article 29: Under no circumstances may a foreign judgment be reviewed as to its substance.

The 1982 Act gives legal effect to the Brussels Convention in the United Kingdom. Section 32 provides:

(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 counter-claim 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).

(4) Nothing in subsection (1) shall affect the recognition or enforcement in the United Kingdom of: (a) a judgment which is required to be recognised or enforced there under the 1968 Convention;

Sections 32(1) and 32(3) have the effect that, subject to s 32(4), this Court must not recognize or enforce the decision of a foreign Court that an alleged arbitration clause is not incorporated in the contract. But the effect of s 32(4), as Mr Dunning for the owners ultimately conceded, is that, if the judgment is one which is required to be recognized in the United Kingdom under the Brussels Convention, then the Court must recognize it.

The judgment of the Tribunal de Commerce seems prima facie to fall within the definition of "judgment" contained in art 25. I have to put aside as immaterial whether it is called a "decree" "order" or "decision". I do not see how consistently with the language of art 25 the decision can be disregarded on the grounds that it was a decision on a preliminary issue arising in the case. Article 25 does not exclude judgments on preliminary issues, or draw any distinction between these and final judgments on the merits of a case. Both seem equally to be included within the definition.

I should next deal with the possible objection that the only relevant plaintiff in the French proceedings is Group AMA, whereas the party against whom the owners claim arbitration is Grosvenor. (I ignore UNCAC as it was common ground at the hearing before me that by reason of the Bills of Lading Act, 1855 only Grosvenor can sue or be sued on the bill of lading.) Does this prevent there being identity of parties in the French and English proceedings? It was common ground that the claims being brought before the Tribunal de Commerce for damage to cargo and an indemnity in respect of salvage and general average are subrogated claims arising by virtue of the fact that Group AMA has paid Grosvenor's claim for damage to cargo. Most of the claims which the owners seek to refer to arbitration relate to the same subrogated claims since they include (i) a declaration that Grosvenor is liable to contribute in general average, (ii) a general average contribution and

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(iii) a declaration that the owners are not liable for breach of contract or duty by reason of the collision, a declaration which, if granted, would include one of non-liability for the damage to cargo claimed in the French proceedings. (Even the claim for wrongful arrest, which may not be a subrogated claim, arises as a result of the action of Group AMA, the plaintiff in the French proceedings.) It was agreed before me by Me Meilichzon and Me Lassez that, under the French law of subrogation, the insurer, having paid the claim of the assured, stands in his shoes and that there is transferred to him both the assured's rights and also the assured's obligations relating to the subrogated claim. There is a difference between French and English procedural law. Under French law an action brought to enforce a subrogated claim must be brought in the name of the insurer. Under English law it must be brought in the name of the assured but the insurer has an equitable interest in the proceedings. In these circumstances I conclude that no objection can be brought to recognition of the French judgment on the ground that the parties to the two sets of proceedings are not the same.

Finally, it was suggested that the Tribunal de Commerce may not have been the Court "first seised" of the matter within art 21. It is not permissible to investigate this matter at the stage of recognition or enforcement.

Having come to this conclusion, I am confronted with the position that the only reason not to recognize the judgment of the Tribunal de Commerce appears to be that it may be excluded from the ambit of the Convention by exception (4) to the second paragraph of art 1 which states simply "arbitration". The ambit of this exception is a vexed question which has been the subject of much controversy in recent years. I have no doubt that this question will occupy the attention of appellate Courts and ultimately the European Court of Justice either in this case or in some other case before very long. When this occurs the views of a single Judge of first instance are unlikely to be of much, if any, interest. In these circumstances I would have preferred to express no opinion on the matter and to leave the decision to a higher Court. This however does not seem to be permitted under English procedure and so there is no alternative but to consider the matter as best I can.

I begin with the decision of the European Court in Marc Rich & Co AG v Societa Italiana Impianti PA (The Atlantic Emperor), [1992] 1 Lloyd's Rep 342; [1991] ECR 3855. I should say at the outset however that in my view the decision throws little light on the question I have to decide in the present case.

In The Atlantic Emperor a contract had been concluded by an exchange of telex messages in January 1987 whereby Marc Rich agreed to purchase a quantity of Iranian crude oil from Impianti on fob terms. After the main terms had been agreed Marc Rich sent a telex setting out the terms of the contract and including for the first time a choice of law and arbitration clause. The oil was loaded and Marc Rich complained that it was seriously contaminated. Impianti then issued a writ in Italy on 18th February 1988 claiming a declaration that it was not liable to Marc Rich. On May 20, 1988 Marc Rich issued an originating summons in London asking the High Court to appoint an arbitrator on behalf of Impianti under s 10(3) of the Arbitration Act, 1950. Leave was granted to serve the originating summons on Impianti in Italy. Impianti then issued a summons seeking to set aside the order granting leave on the grounds that under the terms of the Brussels Convention the dispute must be resolved in Italy. The Court of Appeal referred a number of questions to the European Court of Justice including the following:

1. Does the exception in Article 1(4) of the Convention extend: (a) to any litigation or judgments and, if so, (b) to litigation or judgments where the initial existence of an arbitration agreement is in issue?

Before coming to the decision of the European Court it is necessary to mention the opinion of Advocate General Darmon (sup pp 3875-6 pars 31 and 33). Having come to the conclusion that proceedings to appoint an arbitrator were not within the scope of the Convention, he continued (par 31)

. . . where a court is seised of an issue not falling within the scope of the Convention its jurisdiction to deal with a preliminary issue is in no case governed by the Convention but is a matter for the lex fori and that is so even if the preliminary matter falls within the scope of the Convention . . .

He then said (par 33):

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Two conclusions must be drawn from this. The first is that it is the lex fori alone, that is to say English law in this case, which must determine whether the court has jurisdiction to deal with the preliminary matter. The second is that the dispute, of which the principal subject-matter falls outside the scope of the Convention, clearly cannot be brought within the scope of the Convention by the effect of a preliminary matter, even if the latter falls within one of the subject areas covered by the Convention. In that connection, it is unnecessary, in my opinion, for the Court to express a view in this case as to whether or not the question of the existence of an arbitration agreement raised as a main issue before a Court falls within the scope of the Convention. In my view, it would be sufficient to find that, where such a question is in the nature of a preliminary matter in a dispute whose principal subject-matter falls outside the Convention, the Convention does not apply and, consequently, the decision whether the court seised may dispose of the preliminary issue is a matter for the lex fori.

I now come to the decision of the European Court in the same case. It began by rephrasing the questions which had been referred to it by the Court of Appeal:

The first question

11. The first question submitted by the national court seeks, in substance, to determine whether Article 1(4) of the Convention must be interpreted in such a manner that the exclusion provided for therein extends to proceedings pending before a national court concerning the appointment of an arbitrator, and, if so, whether that exclusion also applies where in those proceedings a preliminary issue is raised as to whether an arbitration agreement exists or is valid. These two points will be considered successively.

The Court then proceeded to hold (pars 13 to 21 of the judgment) that art 1(4) of the Convention excludes proceedings pending before a national Court for the appointment of an arbitrator. Having so decided the Court turned to consider the second issue under the following heading:

Whether a preliminary issue concerning the existence or validity of an arbitration agreement affects the application of the Convention to the dispute in question.

The judgment then continues:

22. Impianti contends that the exclusion in Article 1(4) of the Convention does not extend to disputes or judicial decisions concerning the existence or validity of an arbitration agreement. In its view, that exclusion likewise does not apply where arbitration is not the principal issue in the proceedings but is merely a subsidiary or incidental issue.

23. Impianti argues that, if that were not so, a party could avoid the application of the Convention merely by alleging the existence of an arbitration agreement.

24. Impianti contends that, in any event, the exception in Article 1(4) of the Convention does not apply where the existence or validity of an arbitration agreement is being disputed before different courts to which the Convention applies, regardless of whether that issue has been raised as a main issue or as a preliminary issue.

25. The Commission shares Impianti's opinion in so far as the question of the existence or validity of an arbitration agreement is raised as a preliminary issue.

26. Those interpretations cannot be accepted. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the Court must resolve in order to determined the dispute cannot, whatever that issue may be, justify application of the Convention.

27. It would also be contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention (see judgment in Case 38/81, Effer v Kantner [1982] ECR 825, paragraph 6) for the applicability of the exclusion laid down in Article 1(4) of the Convention to vary according to the existence or

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otherwise of a preliminary issue, which might be raised at any time by the parties.

28. It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator.

29. Consequently, the reply must be that Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

It seems to me that in these paragraphs the Court has followed the advice that had been tendered to it by Advocate General Darmon. As I read the judgment what the Court decided was that, as the matter before the English Court (the appointment of an arbitrator) was excluded from the Convention by exception (4), it was not brought within the Convention merely because of:

. . . the existence of a preliminary issue which the Court must resolve in order to determine the dispute.

In the Court's view the nature of that preliminary issue was not relevant; see "whatever that issue may be" in par 26. It was therefore not necessary to decide whether, if the issue had arisen in some other way, a dispute as to the existence or validity of an arbitration agreement would have been within or without the Convention.

While, therefore, in the present case both Mr Dunning for the owners and Mr Meeson for Grosvenor relied on the European Court's decision in The Atlantic Emperor in support of their respective contentions, the judgment seems to me to throw no light on the answer to the problem which confronts me one way or the other. (In The Atlantic Emperor (No 2), [1992] 1 Lloyd's Rep 624 at p 628 Lord Justice Neill was similarly disposed to accept the view that the answer given by the Court "gives no guidance in those cases where the challenge to the validity of the agreement constitutes the dispute and stands alone.")

I turn then to consider the matter more generally. I have been referred to the official reports on the Brussels Convention which are made admissible by s 3(3) of the 1982 Act. The Jenard Report (OJ No C 59/1, 5.3.1979 has the following sentence:

. . . it (sc the Convention) does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration.

The Schlosser Report, made at the time of the accession of Denmark, Ireland and the United Kingdom (OJ No C 59/71, 5.3.1979) has a sentence which is directly relevant to the present problem (par 64(6)):

In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings is not covered by the 1968 Convention.

On the other hand the Evrigenis/Kerameus Report, made at the time of the accession of Greece in 1986 (OJ No C 298/1 of 24.11.1986) is to opposite effect.

35. Arbitration, a form of proceedings encountered in civil and, in particular, commercial matters, (Article 1, second paragraph, point 4) is excluded because of the existence of numerous multilateral international agreements in this area. Proceedings which are directly concerned with arbitration as the principal issue, eg cases where the court is instrumental in setting up the arbitration body, judicial annulment or recognition of the validity or the defectiveness of the arbitration award, are not covered by the Convention. However, the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Convention, must be considered as falling within its scope.

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The only assistance, so far as I am aware, to be found in any of the reported cases, is in the opinion of Advocate General Darmon in the The Atlantic Emperor (sup) where he expresses the view (par 34 p 3876) that --

. . . a dispute as to the existence of an arbitration agreement falls outside the scope of the Convention.

At par 76, p 3886 he favours:
. . . assessments made by the courts of the place of arbitration by reason of their neutrality.

I have also been referred to a number of English text books and articles on the Convention. It would not be practicable to mention them all. I wish however to acknowledge the assistance I have derived from three articles. Two of these were written just before the European Court's decision and would have answered the question referred to the Court in the opposite way to that in which it was decided. Both favour the view that the judgment in the present case falls within the scope of the Convention; Prof Dr Peter Schlosser and Mr Paul Jenard ("Schlosser 1991" and "Jenard 1991") in Arbitration International, Vol 7 No 3, 1991, pp 227 and 247. The third sets out the arguments extensively on both sides and narrowly favours the view that:

. . . it seems better to say, whatever the circumstances, that a judgment whose subject-matter was the validity of an arbitration agreement is excluded from the scope of the Convention for recognition purposes simply because it is in "Arbitration". [Prof Bernard Audit Arbitration and the Brussels Convention Arbitration International, Vol 9 No 1, 1993, p 1.]

It seems to me that it is primarily a policy issue whether a decision on the validity of an arbitration agreement is held to be excluded by exception (4) to art 1. Linguistic arguments do not carry the matter very far. The decision of the Tribunal de Commerce can be fairly said to concern "arbitration" as the Court's conclusion was that no valid arbitration agreement had been shown to exist. On the other hand the decision was not confined to the subject of arbitration. The Tribunal de Commerce had to reach a decision as to the proper construction of the bill of lading and whether it incorporated the terms of any charter-party. This was a broader matter which could have affected the rights and liabilities of the parties in several ways although, as it so happens, the relevance of the point was confined to whether or not an arbitration clause was incorporated. If exception (4) requires that the only subject matter of the Court's judgment must be "arbitration", then the exception does not apply. If exception (4) excludes "mixed" questions of arbitration and the construction of a particular agreement, then the exception may apply. One is thus driven to consider whether, as a matter of policy, the exception should be given a wider or a narrower meaning.

There are in my view solid practical and policy reasons for holding that decisions as to the validity of an arbitration agreement fall generally within the ambit of the Brussels Convention. The chief advantage of so holding is that any Court which has jurisdiction over the substantive dispute under the Convention may be required to rule on whether a valid arbitration agreement exists and, if so, to refer the case to arbitration by virtue of art II par 3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("the New York Convention") and, if such decisions are not to be binding in other Contracting States under the Brussels Convention, then there is nothing to prevent a disappointed party from seeking to obtain a different and more favourable judgment in another Contracting State, nor if the Court of one State decides in favour of the validity of an arbitration agreement and the Court of a different Contracting State decides against it, for there to ensue a "race" between the parties to see which can first obtain an award or judgment in different jurisdictions, nor to prevent or resolve a potential conflict between an award and a judgment once obtained. If decisions as to the validity of an arbitration agreement are not excluded by exception (4), then, as such judgments would have to be recognized in other Contracting States, this could be expected to prevent most if not all of these conflicts. Thus in the present case recognition of the decision of the Tribunal de Commerce would eliminate both the possibility that this Court might reach a conflicting decision as to the incorporation of the Centrocon clause and also that arbitrators appointed under the clause might publish an award which determines the substance of the underlying dispute in a different way from the Tribunal de Commerce.

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It would seem logical, moreover, that if this Court is bound to recognize the judgment of the Tribunal de Commerce on the substance of the dispute, it should also recognize its decision that there is no valid arbitration agreement binding the parties. A failure to recognize the French Court's decision as to the invalidity of the arbitration clause would be the first step which might lead to this Court coming to an opposite conclusion on the existence of a valid arbitration agreement and thus to the prosecution of an arbitration in London which might result in the arbitrators publishing an award on the substance of the dispute which likewise might be at variance with that of the French Court, an award which in turn could result in this Court being asked to enter judgment in terms of the award under s 26 of the Arbitration Act, 1950. The failure to recognize the decision of the Tribunal de Commerce on the invalidity of the arbitration agreement could thus ultimately result in this Court being asked to enter a judgment which is inconsistent with the decision of the Tribunal de Commerce on the substance of the dispute.

It is in my judgment beyond doubt that the judgment of a foreign Contracting State on the substance of a dispute, even if given in breach of a valid arbitration agreement, must be recognized by this Court under art 26. The Convention restricts the number of defences available to recognition and enforcement. The failure by the foreign Contracting State to decide a preliminary question concerning arbitration in a way which is consistent with the putative proper law of the arbitration agreement is not one of the defences specified in art 27 par (4). The judgment of a foreign contracting State on the substance of the dispute cannot be said to concern "arbitration" or to form any part of proceedings which may culminate in an arbitration award. As appears from the Schlosser report pars 61 to 62 the United Kingdom delegation was concerned at the time of the negotiations leading to the Accession Convention as to whether, if a national Court adjudicates on the subject-matter of a dispute because it overlooked an arbitration agreement or considered it inapplicable, recognition and enforcement of the judgment might be:

. . . refused in another State of the Community on the ground that the arbitration agreement was after all valid and that therefore, pursuant to art 1, second paragraph, point (4), the judgment falls outside the scope of the 1968 Convention.

But the Schlosser Report also suggests that:

The new Member States can deal with this problem of interpretation in their implementing legislation.

Parliament, when enacting the 1982 Act, specifically provided in s 32(4) (a) that nothing in sub-s (1) should affect the recognition or enforcement in the United Kingdom of a judgment which is required to be recognized or enforced here under the Convention. The point, it seems to me, has been determined, in a sense contrary to that apparently desired by the UK delegation, by the enacting legislation; see Jenard, 1991, pp 246 to 247.

The avoidance of conflict between a judgment on the merits of a dispute in one Contracting State and a possible judgment following the publication of an arbitration award in another Contracting State seems to me to fall within the policy objectives of the Convention. But to hold that a decision on the validity or otherwise of an arbitration agreement falls within the scope of the Convention would not, it is true, prevent all risk of conflict. The Court of the State in which the arbitration would take place if the agreement is valid might have been asked to appoint an arbitrator and in the course of so doing might have determined that the clause was valid. Such decision, being on a issue which is preliminary to a matter excluded by exception (4), is not binding in other Contracting States and would not prevent the Court of a different State from giving a judgment that no valid arbitration agreement had been concluded and from assuming jurisdiction over the substantive dispute. The judgment of that Court however would not be binding on the Court of the State where the arbitration was to take place if given after that Court had appointed an arbitrator (since it would be "irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought"; art 27 par (3)); whereas it would be binding if given before that Court had appointed an arbitrator. Another arbitrary factor would be that recognition would be dependent upon the precise way a decision as to the validity of an arbitration clause were reached and whether the decision were properly to be regarded as preliminary to a matter excluded by exception (4) or as a principal and free-standing issue. Such a distinction is not always easy to

draw. It can be said that whether the validity of an arbitration clause is determined as a preliminary issue in proceedings setting up the arbitration panel or as a self-contained issue in separate proceedings, both situations call for the same answer; see Audit p 12. These are points which can be said to militate against holding that decisions as to the validity of an arbitration agreement fall with the scope of the Convention. It is not possible to eliminate all risk of conflict whatever conclusion is reached as to the ambit of exclusion (4).

It is however said that the main disadvantage of holding that decisions as to the validity of an arbitration agreement fall generally within the Convention is that the Courts of the State in which the seat of the arbitration would be located if the agreement is valid might be deprived of jurisdiction to rule upon the validity of the arbitration agreement. It can be argued that the Court in which the arbitration would take place is the Court best equipped to decide upon the validity of the arbitration agreement as it is the Court of the putative proper law of that agreement. This is an argument which carries some weight but it is by no means conclusive, since there is no general consensus that disputes as to the validity of an arbitration agreement should be determined solely in accordance with the law which would be the proper law of the agreement on the assumption that it is valid. The Rome Convention on the Law Applicable to Contractual Obligations 1980 ("the Rome Convention") has not resolved the problem as by art 1 par 2(d) arbitration agreements are excluded from its field of operation. To the extent that art 8 of the Rome Convention is any guide as to how conflicts of law problems are to be resolved in the future in the context of arbitration agreements, it would seem that a tension can be expected between the law of the putative arbitration agreement and that of the respondent's place of residence, as also between the Courts of those two jurisdictions. In many cases, moreover, either the arbitration clause does not designate the place where the arbitration is to take place or there are, as in the present case, two possible clauses each providing for the arbitration to take place in different jurisdictions. In these cases it is not possible to apply the concept of the Court of the putative proper law of the arbitration agreement.

There are arguments to the effect that where in a substantive dispute otherwise coming within the Brussels Convention an arbitration clause is adduced by one party as a reason why the Court should refer the matter to arbitration under art II par 3 of the New York Convention, that Court should have the controlling power of decision as to whether the arbitration agreement is valid and that its decision should thereafter be recognized in all other Contracting States. There are, on the other side, opposing arguments as to why the controlling decision should be that of the Court of the State in which the arbitration would take place if the arbitration agreement is valid and that likewise its decision should thereafter be recognized in all other Contracting States. To decide that a decision upon the validity of an arbitration agreement falls within the ambit of the Convention would not, it seems to me, decide the matter in favour of either set of arguments. The rules as to the assumption of jurisdiction under the Convention are too various and complex for this to be so. The fundamental principle is that persons domiciled in a particular State should be sued in the Courts of that State (art 2). This may be thought to favour the first of the two opposing view points. Article 5(1), however, permits a person domiciled in one State to be sued in contractual matters "in the courts for the place of performance of the obligation in question". It can be argued that, where there is an issue as to arbitration, this includes the Courts of the State in which, if the agreement is valid, the parties are bound to arbitrate; see Schlosser (1991) pp 235 to 238 and Audit pp 9 to 10. There are, moreover, other provisions of the Convention which might give the Courts of the place where the arbitration would take place jurisdiction to decide upon the validity of the agreement.

What can however be said, it seems to me, is that if a decision as to the validity of an arbitration agreement falls within the ambit of the Convention, then (unless it arises as a preliminary issue in the course of setting up the arbitration panel as in The Atlantic Emperor) it will be decided by the Court "first seised" of the issue within art 21 and will thereafter be recognized in all other Contracting States under art 26. Such a conclusion would leave the Court of the State in which arbitration was to take place free to appoint the arbitration panel and to take all subsequent steps necessary to support or control the arbitration proceedings.

I find this a difficult and perplexing issue. It seems clear that those who drafted the Convention never applied their minds to the question of how this type of issue was to be resolved, no doubt because they expected the problems to be

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solved in a future European Convention on arbitration law. This perhaps supports the view that such issues were never intended to fall within the scope of the Convention and that they are better left to be dealt with by amending and updating the New York Convention. In the end, however, I feel the force of the arguments that exception (4) of the Brussels Convention should not apply to judgments as to the validity of arbitration agreements both because such judgments are not confined to "arbitration" but necessarily extend to the construction of the underlying contract between the parties; but also and principally because there are solid practical and policy reasons why the judgment of the first Contracting State to pronounce on the validity or invalidity of the arbitration agreement should be recognized in the other Contracting States.

On balance I conclude that the judgment of the Tribunal de Commerce does not fall within exception (4) relating to "arbitration" and that accordingly this Court is bound to recognize it.

Issue 2. By what law should the Court determine whether the Centrocon clause is incorporated in the bill of lading

If I am right on the first issue the others do not arise but in case I am wrong I proceed to consider this issue. The Contracts (Applicable Law) Act, 1990 only applies to contracts made after Apr 1, 1991, the date when the Rome Convention came into force, and in any event does not apply to arbitration agreements. The point therefore has to be decided in accordance with common law principles of private international law.

Mr Dunning submitted that the question whether the Centrocon clause is incorporated in the bill of lading is governed by English law as being the lex fori. He relied inter alia on the following:

1. English principles of private international law (ie the lex fori) govern the ascertainment of the proper law of a contract, including whether the parties have made any express or implied choice of proper law and, if not, the ascertainment of the so called "connecting factors"; Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1970] 2 Lloyd's Rep 99 at p 117, col 1; [1971] AC 572 at pp 603 to 604 per Lord Diplock; The TS Havprins, [1983] 2 Lloyd's Rep 356; Dicey and Morris on the Conflict of Laws, 12th ed (1993) pp 30 to 31; Kahn-Freund, General Problems of Private International Law, 1980 pp 242-243.

2. English law as the lex fori should therefore govern all questions which are necessarily antecedent to a determination of the proper law, including all questions as to whether the parties have consented to terms bearing upon a determination of the proper law. Mr Dunning relied on Mackender v Feldia, [1966] 2 Lloyd's Rep 449 at pp 455 and 458; [1967] 2 QB 590 at pp 598 and 603 (where Lord Denning MR and Lord Justice Diplock expressed obiter the view that a plea of non est factum might have been governed by English law, presumably as the lex fori) and Oceanic Sun Line Special Shipping Company Inc v Fay, [1988] 165 CLR 197 (High Court of Australia) at pp 224 to 225 per Mr Justice Brennan and pp 256 to 261 per Mrs Justice Gaudron; see also Dicey and Morris (op cit) 12th ed (1993) p 1228.

3. Once the proper law has been ascertained in accordance with the lex fori, it may be necessary in some instances (ie where the lex causae differs from the lex fori) to consider at a second stage of the investigation whether, according to the proper law, the arbitration clause forms part of the contract; see Briggs "Wider still and Wider; the bounds of Australian exorbitant jurisdiction" (commenting on Oceanic v Fay (sup)) in [1989] LMCLQ 216. That does not arise in the present case.

Mr Dunning also submitted in the alternative that, if the question whether the Centrocon clause is incorporated in the bill of lading is governed by the law which would be the proper law of the bill in the absence of any incorporation, the law with which the bill of lading transaction has its closest and most real connection is English law.

Mr Meeson's submissions, on the other hand, may be summarized as follows:

1. All questions relating to the formation of a contract are governed by that law which would be the proper law of the contract if the contract was validly

concluded ("the putative proper law"); Albeko Schumaschinen AG v Kamborian Shoe Machine Co Ltd, [1961] 111 LJ 519; The Parouth, [1982] 2 Lloyd's Rep 351; Dicey and Morris (op cit) 11th ed (1987) pp. 1197 to 1201; 12th ed (1993) pp 1248 to 1254.

2. The putative proper law governs not only whether there is a binding contract, which is not the issue in the present case, but also the question whether the contract contains a particular term such as an arbitration clause; the Atlantic Emperor, (No 1) [1989] 1 Lloyd's Rep 548 at pp 552 to 553 per Mr Justice Hirst and p 554 per Lord Justice Lloyd (CA).

3. In the present case there are two different arbitration clauses which may have been incorporated providing for arbitration in Paris or London according to whether bill of lading incorporates (i) the contract of July 23, 1990 (arbitration in Paris) (ii) the charter-party fixture of May 7, 1991 as set out in the "recap telex" (arbitration in Paris) or (iii) the fixture of May 7, 1991 as orally agreed (arbitration in London). In these circumstances the question of incorporation cannot be answered by reference to the law which would be the proper law if one or other of these contracts were validly incorporated but should be governed by the proper law of the bill of lading, objectively ascertained, disregarding any arbitration clause which may have been incorporated. Mr Meeson pointed out that although the concept of a "putative objective proper law" was found "confusing" by Lord Justice Diplock in Mackender v Feldia (sup) at p 457; p 602, Cheshire and North on Private International law, 11th ed (1987) p 473 favours this concept:

. . . since any issue affecting the valid creation of a contract should be determined by the proper law objectively ascertained, it follows that, in cases involving arbitration or choice of jurisdiction clauses, no inference should be drawn as to the intentions of the parties from the presence of one of these clauses in the contract.

4. If the proper law be ascertained in accordance with this approach, the law with which the bill of lading has its closest and most real connection is French law.

In the literature there is much discussion of the question, where the issue relates to the consent of the parties to a choice of law, arbitration or jurisdiction clause, the Court should apply the lex fori, the law which the parties purport to choose or the putative proper law ascertained on an objective basis. This an undecided question of considerable difficulty which is answered for most contracts concluded after Apr 1, 1991 by art 8 of the Rome Convention.

Since the Convention does not apply, I begin by considering two decisions of the Court of Appeal.

In The Parouth, (sup) the question for decision was whether leave should have been given to issue and serve a writ out of the jurisdiction under RSC, O 11, r 1(1)(f) on the ground that the plaintiffs were seeking to enforce a contract which by its terms or by implication was governed by English law. The alleged contract was a fixture of the vessel said to have been concluded in a series of telex messages concluded between a broker acting for the plaintiffs and a broker (SBS) said to be acting for the defendants. A telex from SBS to the defendants, which was said to evidence the fixture, contained a term providing for arbitration in London. At first instance Mr Justice Bingham, as he then was, set aside service of the writ on the ground that the arbitration provision should be ignored. This decision was reversed in the Court of Appeal on the ground that, if the case were tried, the Court would probably apply the putative proper law of the contract, to decide whether there was a binding contract between the parties and, as it was arguable that any contract contained an English arbitration clause, it was also arguable that such contract if concluded was governed by English law. The leading judgment was given by Lord Justice Ackner at p 353.

It is clear that the learned Judge's attention was not drawn to the principle enunciated in Dicey & Morris's The Conflict of Laws and I refer to the current 10th ed r 146 at p 775 which is in these terms:

The formation of a contract is governed by the law which would be the proper law of the contract if the contract was validly concluded.

Dicey then goes on to discuss the principle in some detail referring to one English authority in which that principle is to some extent illustrated and

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dealing with the academic and philosophical criticisms that can be made. Mr Longmore says of course that that principle is a well understood and accepted one and although it was not referred to by either Counsel -- Mr Gross was not in the Court below -- it must have been in everybody's mind.

With great respect, I am wholly unconvinced by that proposition. The parts of the judgment to which I have referred indicate quite clearly to my mind that the application of the putative proper law seems to have escaped everybody's attention in the Courts below.

It is now accepted in this Court, and clearly was not so accepted in the Court below by Mr Longmore, that if this case is heard then the probabilities are that the putative proper law, namely English law, will be applied to resolve the issue: Was there a binding contract between the parties? The learned Judge was, therefore, in my judgment in error in saying that he must treat the arbitration clause as neutral; the arbitration clause had the important result of making the proper law of this dispute probably (and I put no higher than is necessary) English law.

What made this case a case to which RSC, O 11, r 1(1)(f) applied was that it was arguably a contract which by its terms or implication was governed by English law. Therefore the learned Judge, by reason of not having his attention directed to this principle, wrongly reached the conclusion that he should disregard the arbitration clause. He thus arrived at the conclusion that there was no English link. And there being no English link, as he said in terms, he was thrown back on the prima facie rule. It seems to me that if there was no English link, a link which made the contract by its terms or implication governed by English law, one did not need any prima facie rule. It was not within RSC, O 11 r 1(1)(f) although strangely enough, that was conceded before him by the defendants.

Accordingly, such being the error, any suggestion that the exercise by the learned Judge of his discretion precludes us from intervening cannot be sustained.

We have then this position: There is a good arguable case that there was a contract; that is conceded. There is a good arguable case that the contract is, by its terms or implication, governed by English law. As I have indicated, that suffices to bring it within RSC, O 11, r 1(1)(f).

This decision has not escaped criticism; see Cheshire and North, op cit, 11th ed, (1987) pp 473 to 474. It only decides that it is arguable for the purposes of O 11, r 1(1)(f) that, at a trial, the Court would apply English law as the putative proper law of the contract, a matter to which Lord Justice Ackner again returned (p 354) when considering whether, as a matter of discretion, service out of the jurisdiction should be allowed.

The Parouth (sup) was followed by Mr Justice Hirst and the Court of Appeal in The Atlantic Emperor (No 1) (sup) where, once again, the issue was whether service of proceedings out of the jurisdiction should be permitted, this time under RSC, O 73, r 7(1) which sanctioned such service "provided the arbitration to which the summons relates is governed by English law." In dismissing Impianti's application to set aside the order for service out of the jurisdiction Mr Justice Hirst said (pp 552 to 553).

Mr Gross sought to distinguish the present case on the ground that whereas in The Parouth the question at issue was whether there was in existence any binding contract (there being no dispute that such contract, if in existence, contained an arbitration clause), in the present case it is common ground that there is in existence a binding contract, and the sole issue is whether that contract contained an arbitration clause.

In my judgment this distinction is unsound. Dicey's rule as to the formation of the contract as a whole must (perhaps a fortiori) apply to the formation of a disputed part. This the relevant formation is governed by the law which would be the proper law of the entire contract if that part was validly concluded. This putative proper law is manifestly English law, having regard to the terms of the disputed arbitration clause quoted above. This conclusion is amply sufficient to found jurisdiction under O 75, r 7 since, as under O 11, the plaintiff need do no more than establish a good arguable case.

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This decision was upheld in the Court of Appeal, Lord Justice Lloyd gave the leading judgment.

The Judge held that he was bound by the decision of the Court of Appeal in The Parouth [1982] 2 Lloyd's Rep 351 to decide the second point in favour of the plaintiffs. The facts of The Parouth were similar to those of the present case, the question being whether there was a binding contract between the parties. The Court held that question would be decided by an English Court in accordance with putative proper law which, since there was an English arbitration clause, would in all probability be held to be English law. Accordingly the case fell within RSC, O 11, r 1(1)(f).

Mr Gross sought to distinguish The Parouth on the ground that in that case the question was whether there was a contract at all, whereas in the present case it is common ground that there was a contract; the question here is whether the contract contained an arbitration clause. I accept that this is a distinction on the facts. But it makes no difference to the principle stated and applied by the Court in The Parouth, by which we are of course bound, as was the Judge. Mr Gross reserved the right to argue that The Parouth was wrongly decided. We are not required to express any view on that question. It is sufficient to say that in my judgment it cannot be distinguished.

The passages which I have cited are at least highly persuasive authority that, where this can be done, the putative proper law should be applied to the question whether a disputed arbitration clause forms part of a contract and that the issue is governed --

. . . by the law which would be the proper law of the entire contract if that part was validly concluded.

It is however not possible, as Mr Meeson concedes, to apply this principle to the present case, since there are not one but two possible arbitration clauses which may have been incorporated each suggesting a different proper law. This factor seems to me to distinguish the present case from those of The Parouth and The Atlantic Emperor (No 1). Mr Meeson therefore has to argue for a somewhat different concept, that of the putative proper law ascertained on an objective basis. Despite the support for this concept in successive editions of Cheshire and North's Private International Law, it has not, as far as I know, been previously adopted in any reported case.

I turn to consider Mr Dunning's argument based on the High Court of Australia's decision in Oceanic v Fay (sup). In that case the respondent was injured on board a Greek ship in the course of a cruise in Greek waters beginning and ending at Piraeus. The booking for the cruise had been made in New South Wales and at the time of the booking no mention was made of the terms of the ticket which included a clause conferring exclusive jurisdiction on the courts of Athens. The respondent brought an action against the Oceanic for negligence before the Supreme Court of New South Wales and Oceanic then applied for a stay relying, inter alia, on the clause. It was held by the whole Court, applying the lex fori that the conditions of the ticket did not form part of the contract.

Mr Justice Brennan said (pp 224 to 225):

It may be thought that the terms of a contract should be ascertained by reference to its proper law . . . But for the purpose of determining whether the contract of carriage was made when the fares were paid to JMA Tours in New South Wales and whether that contract contained the exclusive foreign jurisdiction clause set out in cl 13 of the ticket, the system of law by reference to which those questions must be answered cannot be identified by assuming that the contract contained the clause. The question whether a contract has been made depends on whether there has been a consensus ad idem and the terms of the contract, if made, are the subject of that consensus. At all events, those are the issues which an Australian court necessarily addresses when it seeks to determine the existence of what the municipal law of this country classifies as a contract. Classification is, of course, a matter for the law of the forum. In deciding whether a contract has been made, the court has regard to all the circumstances of the case including any foreign system of law which the parties have incorporated into their communications, but it refers to the municipal law to determine whether, in those circumstances, the parties reached a consensus ad idem and what the consensus was: cf Mackender v Feldia AG per Diplock [illegible] no

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system other than the municipal law to which reference can be made for the purposes of answering the preliminary questions whether a contract has been made and its terms. Mr DF Libling, "Formation of International Contracts" Modern Law Review, vol 42 (1979), p 169 (an article to which Gaudron J has drawn my attention) discusses the reasons why it is inappropriate to determine those questions by reference to the so-called putative proper law of a supposed contract.

Mrs Justice Gaudron (pp 256 to 261) adopted the same approach:

In general terms, the rights and obligations to a contract are to be ascertained in accordance with the proper law of the contract . . . In the context of this appeal, the question whether the appellant and respondent agreed in terms of cl 13 is primarily relevant to the issue of whether a stay should be granted. However, it may also be relevant, in the context of the broader issues between the parties, to the ascertainment of the proper law of their contract, should that need to be decided. If the question whether the parties intended to be bound by cl 13 were to be asked in the course of ascertaining the proper law of the contract, it would in my view fall for answer in accordance with the lex fori, although this is not a matter which appears to have been authoritatively decided.

She then referred to Lord Diplock's speech in Compagnie d'Armement Maritime SA (sup) p 117; p 603 and continued:

The above statements support the proposition that the lex fori determines (inter alia) questions as to the existence, construction and validity of terms bearing upon determination of the parties' agreement as to the proper law. Indeed I think that must be so. If the question of what is the proper law is one to be answered by application of the lex fori, until the lex fori provides the answer to that question there is no scope for the operation of any other law. In other words, all questions which are necessarily antecedent to a determination of the proper law of a contract must fall for answer in accordance with the lex fori: see also Mackender v Feldia AG Cheshire and North, Private International Law, 11th ed (1987), p 477.

I have to say, with the greatest respect, that I can see objections to this approach just as I do to each of the alternative solutions which have been adopted. Mr Briggs in the article cited commented on the fact that the High Court gave no weight at all to the putative proper law of the contract and, to get over this difficulty, he suggested a two-stage approach:

. . . once it has been held that there is a proper law, the lex fori should be seen to drop out of the picture and allow the proper law to take over questions of validity and incorporation of terms.

If this is right, the High Court having held according to the lex fori that the jurisdiction clause was not incorporated, might then have concluded that the contract without that clause was governed by Greek law and, if so, should have considered whether, according to Greek law, the clause was incorporated. A circular approach of this kind has in my view little to commend it. Once the lex fori has been held to be the law applicable to the question whether a clause has been validly incorporated it would seem odd if the same issue could then be decided in the opposite sense by a law other than the lex fori. There are, however, rather more fundamental objections which could be advanced to the choice of the lex fori; namely that the accident of the forum should not be decisive on so fundamental an issue of conflict of laws as the existence and validity of a contract and that it is proper objective of private international law to provide objective criteria for deciding such an issue which are not dependent upon the forum in which it has to be decided. There has for some time been a considerable measure of support in the literature for the view that these issues should be decided by reference to some combination of two concepts, the putative proper law and the law of the country in which the parties, or one of the parties, resides or carries on business, a view which has resulted in art 8 of the Rome Convention.

In the rather unusual circumstances of the present case I have been pressed by Mr Dunning with arguments in favour of applying the lex fori and by Mr Meeson with reasons why I should apply the objective putative proper law. While I have indicated why I do not find Mr Dunning's arguments entirely persuasive, I have not so far considered the concept for which Mr Meeson contends. The difficulty about this concept is that under English rules of private international law the parties, subject to very few exceptions, are allowed complete autonomy to submit any aspect

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of their contract to any law they may choose; if they fail to exercise that choice then the governing principle of English law is that the contract is governed by the system of law with which the transaction has the closest and most real connection. The presence of an arbitration clause can be relevant to either stage of the enquiry. If, in the present case, I were to decide that the question of incorporation is governed by the putative proper law ignoring any arbitration clause that may have been incorporated, I would necessarily be making a provisional assumption that no arbitration clause is incorporated and deciding both the first and second stages of the enquiry on a basis which is no more likely to be correct than if I were to ascertain the putative proper law on either of the other two possible assumptions, namely that the contract incorporates a London arbitration clause or that it incorporates a Paris arbitration clause. Accordingly the concept of the objective putative proper law is no more reliable a tool for determining the question of incorporation than is the lex fori. It is perhaps for this reason that Lord Justice Diplock referred to the concept as "confusing" in Mackender v Feldia (sup) p 457; p 602. It may be that some such concept may have to be applied under, art 8(1) of the Rome Convention where there is a "battle" between two or more different sets of standard terms each choosing different laws and jurisdiction (see Dicey & Morris op cit 12th ed (1993) p 1251 and contrast Plender, the European Contracts Convention, 1991, par 429); but there is in my view no logical reason either of principle or authority why this concept should be applied where common law principles of private international law still prevail.

I can now state the conclusion at which I have arrived. It is well established that this Court applies the law of England to decide all disputes that come before it unless and to the extent that it is demonstrated that, either by statute or by English rules of private international law, it is required to apply the law of some other country. In the present case it has not been demonstrated to my satisfaction that English rules of private international law require the Court to apply a law other than English law. On that simple ground I conclude that English law must be applied to determine whether the Centrocon clause is incorporated into the bill of lading.

In case I am wrong on this matter I should perhaps indicate what law I would have held to be the putative proper law of the bill of lading had I accepted Mr Meeson's submission that this question has to be determined by ignoring the possibility that any arbitration clause may be incorporated into the bill. In this event I would have found that the bill contains no express or implied choice of proper law and that the question has to be determined by reference to the system of law with which the transaction has its closest and most real connection; Bonython v Commonwealth of Australia, [1951] AC 201 at p 219. There are strong factors linking the transaction with French law. The goods were shipped on board the vessel at a French port by a French shipper and the bill of lading was issued in France to the order of the shipper. There are some factors linking the transaction to English law. The strongest of these is that the carriage was to an English port. Other, though weaker factors, are that there was a requirement to notify Grosvenor, an English company and that the bill of lading is in the English language. Finally, there is a factor linking the transaction to German law as this was the law of the vessel's flag.

I would have had no doubt in these circumstances, had I accepted Mr Meeson's submission, that the system of law with which the bill of lading transaction has its closest and most real connection is French law. The factors pointing to French law are strong in themselves. They seem to me to gain added force from the fact that there is in force a set of international rules for determining the rights and obligations of parties to a contract of carriage of goods by sea in the shape of the Hague Rules and the Hague Visby Rules which require as a condition of applicability, inter alia, that the bill of lading is issued in a Contracting State or that the carriage is from a port in a Contracting State. I refer in this connection to a dictum of Lord Justice Megaw in Coast Lines Ltd v Hudig & Veder NV, [1972] 1 Lloyd's Rep 52 at p 59.

So far as the bills of lading were concerned, it might well be that the fact that they were issued in Rotterdam in respect of goods loaded there would be a conclusive, or at least a powerful indication that the proper law of the contracts to which they might give rise would be the law of the Netherlands.

Accordingly, if the possible incorporation of any arbitration clause is to be ignored I would have held the proper law of the bill to be French law. But for

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including the actual words used and taking into account the surrounding circumstances in which the contract was made and its commercial purpose as known to both parties. Questions of notice are normally a matter as to whether one party has done sufficient to give to the other party notice of the incorporation of a term in the contract for the Court to regard it as fair and reasonable to hold that the second party has consented to be bound by that term.

I draw attention to this distinction since at times it seemed to me that it was in danger of being overlooked in the course of argument. When seeking to resolve questions of construction, evidence is admissible to identify the charter-party referred to but it is not permissible to take account of pre-contractual negotiations. Thus it would not be permissible to take account of what instructions were given by the shippers to their agents as to the date to be inserted in the bill of lading, nor, if such evidence had been available, as to any discussions between the master, or ship's agents on the one hand, and the shippers' agents on the other, before the bill of lading was signed. If, however , the question is whether the owners gave reasonable notice to UNCAC of the incorporation of a particular term in the bill of lading, then it might be necessary to have regard to pre-contractual negotiations.

In the present case two questions of construction were raised in argument; first whether the bill of lading is capable of incorporating a charter-party whose terms have not been reduced into writing by the time the bill of lading is issued; second, if so, whether the bill of lading incorporates the terms of the voyage charter of Mar 7, 1991 or the contract of affreightment of July 23, 1990 or neither contract. As to the question of notice, Mr Meeson did not raise this expressly but he placed considerable emphasis on the fact that neither the recap telex nor the nomination of the vessel to UNCAC referred to arbitration in London. In his skeleton argument he submitted that "it would be commercially absurd" if the failure of the agent to insert the date:

> . . . were to have the unforeseeable consequence that a London arbitration clause of which the shippers were completely unaware were to be incorporated.

I begin with the question whether, as a matter of construction, the bill of lading is capable of incorporating a charter-party whose terms have not been reduced into writing. I do not know of any case in which it has previously been contended that an incorporation clause in a bill of lading can have the effect of incorporating oral terms which have not been reduced into writing. I was referred to Fidelitas Shipping Company Ltd v V/O Exportchleb, [1963] 2 Lloyd's Rep 113 at pp 120 and 121. It was there held that a bill of lading issued on Oct 23, 1960 incorporated a charter dated Oct 6, 1960 and also an addendum to that charter-party dated Oct 12, 1960. It was not suggested that a collateral oral agreement, had it not been reduced to writing by the addendum, would have been incorporated.

There are, I think, several factors all of which support the construction that the bill of lading incorporates only the terms of a charter-party which have been reduced to writing. First, the words "in accordance with the Charter Party dated" would seem more apt to refer to an instrument in writing than to an oral contract; cf their derivation from the Latin carta partita (Scrutton, op cit, 19th ed (1984) p 3 note 16). Second, a bill of lading is a transferable document and one might expect that, if it incorporates terms by reference, then those terms should be ascertainable and capable of being referred to by the party to whom the bill is issued and by any indorsee to whom the bill may be transferred. The terms of a written document are readily ascertainable by the bill of lading holder whereas those of an oral agreement are not. Third, this bill of lading would incorporate the arbitration clause of any charter-party incorporated into the bill. An arbitration agreement is a type of agreement which is normally only made in writing. The Arbitration Act, 1950 only applies to an agreement in writing; see s 32. The New York Convention by art II applies only to agreements in writing. It would be strange if the bill of lading were capable of incorporating an arbitration agreement which fell outside the Arbitration Acts and could not be enforced under the New York Convention.

Mr Dunning submitted that it must often happen that a charter-party has not been executed by the time the bill of lading is issued and that it might produce unfortunate results if in such cases the terms of the charter-party fixture were not incorporated iii the bill. Mr Dunning pointed out that what in practice normally occurs is that an informal fixture is concluded by telephone, telex or fax; that this constitutes a binding contract; but that the parties later draw up

and execute a formal charter-party which is back-dated to the date of the fixture. If it were necessary that the charterparty had been executed by the time the bill of lading was issued, then terms which were intended to be incorporated into the bill of lading, might be held not to have been incorporated and that in some cases, as a result, the bill of lading would not contain the terms necessary for it to function satisfactorily as a contract of carriage.

I see the force of these submissions but in my judgment they should not be pressed too far. If a formal charter-party has been executed in sufficient time to be sent or shown to the bill of lading holder when he first demands to be shown a copy, (and if the date on the charterparty is earlier than that on the bill of lading), I do not see why the Court should go behind the date which appears on the charter-party or should investigate whether the charter-party was executed before or after the bill was issued. In the present case the charter-party was not executed by this stage or indeed for more than two years after the bill was issued. Mr Dunning's submissions can only suggest, at most, that where an oral contract is evidenced by a written document such as a "recap telex" the terms set out in that document may perhaps be treated as capable of being incorporated into a bill of lading. The argument cannot reasonably be pressed so far as to suggest that an oral term, which is not contained in or evidenced by any document at all, is capable of being incorporated.

There are, however, in my view rather more fundamental reasons why it would be commercially unsound to hold that, on the proper construction of the bill of lading, it is capable of incorporating the terms of an oral contract. Bills of lading are transferrable documents which come into the hands of consignees and indorsees who may be the purchasers of goods or banks. The transferee of the bill of lading does not, however, take precisely the same contract as that made between the shipper and the shipowner (of which the bill of lading is merely the evidence). What is transferred to the consignee or indorsee consists, and consists only, of the terms which appear on the face and reverse of the bill of lading. Thus collateral oral terms are not transferred; see Leduc v Ward, (1888) QBD 475; The Ardennes, (1950) 84 Ll L Rep 340; [1951] 1 KB 55. This rule facilitates the use of bills of lading in international commerce since it enables a prospective transferee of a bill of lading to see, merely by inspecting the bill, whether it conforms to his contract (whether it be a sale contract or a letter of credit) and what rights and obligations will be transferred to him if he takes up the bill. The transferee, or prospective transferee, need not enquire whether any collateral oral agreements have been made between the shipper and the shipowner as, for example, a waiver by the shipper of any obligation undertaken by the shipowner in the bill.

Where the bill of lading incorporates a charter-party, precisely the same principles should in my judgment apply, save that the rights and obligations which will be or have been transferred to the consignee or indorsee are now set out in two documents, the bill of lading and the charter-party. Once again the transferee should not be affected by oral terms not contained in the two documents. Where a bill of lading incorporates the terms of a charter-party, the only exceptional case where extrinsic evidence may be relevant is where the bill of lading does not identify the charter-party referred to. Here it has been held that the absence of a date in the bill of lading does not negative the apparent intention of the parties to incorporate the terms of a charter-party; The San Nicholas (sup). This gives rise to the exceptional position that evidence may be admissible to identify the charter-party referred to.

It would in my view be detrimental to the transferability of bills of lading and to their use in international trade to hold that an incorporation clause in a bill of lading is capable of incorporating a charter-party which has not been reduced into writing. Such a decision would involve that the transferee would be affected by collateral oral terms which do not appear in any document. Even where the charter-party had been identified in the bill and where it had been supplied to the prospective transferee before he took up the bill, he would still be unable to ascertain what rights and obligations would be transferred to him merely by inspecting the two documents. In cases such as the present, where the bill of lading does not identify the charter-party referred to, the rights and obligations of the transferee would only be ascertainable by means of an extensive investigation as to the undocumented contractual arrangements of third parties with whom he had no direct relations. Such a decision would therefore introduce considerable uncertainty into the field of bills of lading.

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I therefore consider that, as a matter of the construction of the bill of lading, it does not incorporate the terms of a charter-party which, at the date the bill of lading is issued, has not been reduced to writing. For the reasons given earlier an oral contract, evidenced only by a recap telex, does not seem to me to qualify for this purpose. I should add moreover that, if I am wrong on this, I would still conclude that the bill of lading does not on its true construction incorporate an oral agreement for arbitration in London which, at the date of the bill of lading, was not evidenced by any document at all. It follows that the charter-party fixture of Mar 7, 1991 was not incorporated in the bill of lading and that, if I am wrong on this, still no clause providing for arbitration in London was incorporated.

In these circumstances it is not strictly necessary to consider the second point of construction, whether the bill of lading incorporates the terms of the voyage charter of Mar 7, 1991 or the contract of affreightment of July 23, 1990 or neither contract. This only arises if I am wrong on the first point and if an oral contract is capable of being incorporated.

The Courts in the cases referred to by Mr Dunning have attempted to give guidance as to how such a question of construction should be approached. It should be remembered however that such authorities do no more than indicate guidelines for ascertaining the intentions of the parties. As was said by Lord Justice Roskill in The San Nicholas (sup) at p 12:

One cannot generalize in these cases but it is the duty of the Court to seek to give an intelligent meaning to a commercial document of this kind.

In some cases it has been said, approving a passage in Scrutton on Charterparties, 18th ed (1974) p 63 that there is a "normal rule" that:

. . . a general reference will normally be construed as relating to the head charter, since this is the contract to which the shipowner, who issues the bill of lading is a party . . . [The San Nicholas (sup) at p 11 per Lord Denning MR and The Sevonia Team (sup) p 644 per Mr Justice Lloyd.]

There may indeed be reasons for adopting this approach as, for example, if it appears that the words of incorporation were designed to give the owners a lien on the cargo for freight or demurrage. A bill of lading, however, is a bilateral contract and while weight should be given to the presumed intention of the master who signed and issued the bill, equal weight must be given to the intention of the shipper who normally draws up the bill and presents it to the master for signature. In some cases, as in the present, he also signs it, though this is less common.

The main factor in favour holding that the voyage charter of Mar 7, 1991 was incorporated is that it was a charter of a named ship for a specified voyage whereas the contract of July 23, 1990, though on a form headed "Continent Grain Charter Party" was for a succession of voyages on ships to be nominated over a period of time by Peter Dohle. The former is more likely to be referred to as a "charter-party" than the latter which can be referred to, perhaps more appropriately, as a contract of affreightment, a "tonnage contract" or a transportation contract. There is, however, no definition in English law of "charter-party" and I proceed on the basis that either type of contract can be referred to as a charter-party but that the word is more likely to refer to the charter of a named ship for a single voyage or for a series of voyages than to a contract for ships to be nominated. There can however be no hard and fast distinction of this kind. Charter-parties for single voyages are sometimes made for ships to be nominated and, where named ships are chartered, the shipowner often retains the right to nominate a substitute.

Mr Meeson indeed submitted that the contract of July 23, 1990 was the only charter-party which existed at the date the bill of lading was issued. I have to assume in considering this point that (contrary to my decision on the first point) the words "Charter Party dated" are capable of referring to an oral contract evidenced only by a "recap telex" since, if I do not, the point does not require further consideration. But, even if I make this assumption, the words quoted are in my view more apt in their context to refer to an instrument in writing than to an oral contract evidenced by a recap telex.

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I turn to the commercial reasons for incorporating either document in the bill of lading. It was not suggested at the hearing that there was any commercial need to incorporate the terms of the voyage charter. Since freight under the voyage charter was to become payable "within three banking days of right and true delivery", the words of incorporation cannot have been intended to give the owners a lien on the goods for freight. As to demurrage, while the voyage charter gave a lien for demurrage, there was no cesser clause in the voyage charter applying to demurrage and it is unheard of for an owner to exercise a lien for demurrage where this can be claimed from the charterer under the terms of the charter-party. In the case of freight, what would no doubt occur in practice, whatever construction is placed on the bill, is that UNCAC would pay freight under the contract of affreightment to Peter Dohle "within three days after signing Bills of Lading" and Peter Dohle would pay freight to the owners under the voyage charter "within three banking days of right and true delivery". It was similarly not suggested that terms as to general average or any other usual incident of a contract of carriage needed to be incorporated. It was agreed that the terms set out in the bill of lading would enable that contract to function perfectly satisfactorily as a contract of carriage without the terms of any charter-party being incorporated.

I turn, then, to the relevant words set out in the bill of lading

. . . they paying freight for the said goods in accordance with the Charter Party dated . all the terms, conditions and exceptions of which Charter Party, including the Arbitration clause, are incorporated herewith.

The clause obliges the UNCAC to pay freight in accordance with a charter-party. It is that charter-party, and not any other, whose terms are incorporated. It is therefore necessary to ask the question: "In accordance with which charter party was UNCAC to pay freight?". The relevance of this question is emphasized by the typed words "Freight payable as per C/P".

It would be surprising in my view if a shipper intended or agreed to pay freight in accordance with a charter-party whose terms were unknown to him and which might specify an entirely different rate of freight and different terms of payment from those which he had agreed under his contract. It is true that in the present case the freight rate specified under the voyage charter of Mar 7, 1991 was lower than that payable under the contract of affreightment. This however was not known to UNCAC. As to the owners, they had no reason to suspect that Peter Dohle was in financial difficulties or was unlikely to be able to pay the freight. If they had, they would no doubt have required the bill of lading to contain a clause identifying the contract of Mar 7, 1991 as the one in accordance with which the freight was to be paid as in Compania Commercial Y Naviera San Martin SA v China National Foreign Trade Transportation Corporation (The Constanza M), [1980] 1 Lloyd's Rep 505. I do not think that, in the absence of such provision, an owner would expect or intend that the shipper should pay freight at a rate and on terms which were unknown to the shipper. Prima facie, therefore it seems to me that "they paying freight . . . in accordance with the charter party dated" refer to the only charter-party to which UNCAC was a party, namely that of July 23, 1990, albeit that the bill of lading was a contract between UNCAC and the owners and the obligation to pay freight is one owned by UNCAC to the owners.

I would attach importance to any significant commercial reason which might be advanced for preferring one contract to the other but none was put forward. In the end I would give weight to two factors; first that the words set out in the bill of lading are more apt to refer to an instrument in writing than to an oral contract evidenced by a recap telex; second, that the parties in my view are more likely to have intended the freight referred to in the bill of lading to be that defined in the contract of affreightment of July 23, 1990 than that defined in the voyage charter. I therefore consider, if it be material and on the assumption set out earlier, that the terms of the contract of affreightment of July 23, 1990 are incorporated in the bill of lading and that those of the voyage charter of Mar 7, 1991 are not.

Had I come to the conclusion that the bill of lading on its true construction incorporated not only the voyage charter of Mar 7, 1991 but also a London arbitration clause, I would nevertheless have found it difficult to believe that such a clause was binding on UNCAC or on an indorsee of the bill of lading, such as Grosvenor. As was emphasized by Mr Meeson in his submissions and as I have earlier found, UNCAC had no notice at the time the bill of lading was issued that the voyage charter by which Peter Dohle chartered the vessel from the owners contained a London arbitration clause and they had no reason to suspect this.

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Where wide words of incorporation have the effect of incorporating terms which would not be generally known to the party against whom they are sought to be enforced, then under English law the party who seeks to enforce the term must normally show that the term has been fairly and reasonably brought to the other party's attention; Parker v South Eastern Railway Co, (1877) 2 CPD 416; Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd, [1989] QB 433. So far as I know, such questions have not so far arisen in any case concerned with the incorporation of charter-party terms into a bill of lading. It is, however, no doubt for reasons such as this that it has been held in a series of cases beginning with Thomas & Co Ltd v Portsea Steamship Co Ltd, [1912] AC 1 that an arbitration clause in a charter-party is not directly germane to the shipment, carriage and delivery of cargo under a bill of lading and can, only be incorporated in a bill of lading by specific words, either in the bill of lading or in the charter-party, showing an intention to provide for arbitration. Those authorities are not directly relevant here since the bill of lading specifically incorporates the arbitration clause of whatever charter-party it refers to; The Rena K [1978] 1 Lloyd's Rep 545; [1979] 1 QB 377; The Oinoussin Pride, [1991] 1 Lloyd's Rep 126. The rights of an indorsee of a bill of lading such as Grosvenor should be ascertainable from the terms set out in the bill of lading and any charter-party incorporated in it and should not be dependent on whether terms have fairly and reasonably been brought to the notice of the shipper. It does however seem wrong in principle that an arbitration clause should be held to be binding on the shipper or bill of lading holder unless it can be shown that the shipper ought reasonably be held to have consented to the clause at the time of shipment.

Conclusions

I conclude that this Court is bound to recognise the decision of the Tribunal de Commerce that the amended Centrocon arbitration clause is not incorporated in the bill of lading. Had I not so decided, I would have concluded, deciding the matter in accordance with English law, that the same result is reached. This only leaves Mr Dunning's submission that Grosvenor and the owners entered into an ad hoc agreement to arbitrate. I need not take much time in discussing this submission which was entirely based on the fact that, in replying to the owners' demand for arbitration, Grosvenor's solicitors in a letter dated July 26, 1991 appointed Mr Harris as Grosvenor's arbitrator without prejudice to two specific contentions neither of which concerned the absence of any London arbitration clause in the bill of lading. It is sufficient to say that Mr Harris was appointed under protest and that in these circumstances I am unable to detect any evidence of an ad hoc agreement between the parties that the dispute was to be resolved by arbitration in London.

I will hear Counsel on the precise terms of the orders to be made in this case. Should the parties think that any further issues can conveniently be determined at this stage, I will consider doing so. At present, however, it seems to me that the applications before the Court should be disposed of in accordance with this judgment by making orders as follows: OS 1991 Folio No 1768

I propose to declare that the bill of lading dated 8th March 1991 did not incorporate a clause providing for arbitration in London. I will also declare that no ad hoc agreement has been concluded providing for arbitration in London. Finally I will declare, as was common ground at the hearing, that the parties to the bill of lading contract are the owners and Grosvenor.

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The only matter to be decided is as to the date on which this Court was "first seised" of the matter for the purposes of art 21 of the Brussels Convention. The test to be applied was laid down by the Court of Appeal in Dresser UK Limited v Falcongate Freight Management Ltd, [1991] 2 Lloyd's Rep 557 at p 569; [1992] QB 502, at p 523. It was there held that:

. . . in the ordinary, straightforward case service of proceedings will be the time when the English Court becomes seised.

I understood there to be no disagreement between the parties that the writ in this action was served on Grosvenor on June 17, 1991 and on UNCAC and Group AMA on June 18, 1991. If this be so, I shall declare that this Court was "first seised" of the plaintiffs' claim against Grosvenor on June 17 and of the plaintiffs' claim against UNCAC and Group AMA on June 18, 1991. Otherwise I shall order by consent that the action be stayed pursuant to art 30 of the Brussels Convention.

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the reason I have given I conclude that I must apply English law to determine the question of incorporation.

Issue 3. Is the Centrocon clause incorporated in the bill of lading?

A number of cases have come before the Courts where the printed form of the bill of lading provides for the incorporation of a "charterparty dated --" but the parties have omitted to fill in the blank. These have mostly been cases where there was a head charter between the owners and the head charterers and at least one sub-charter between them and sub-charterers who were also the shippers. The bill of lading in these circumstances, as well as being an acknowledgment of the goods and a document of title, contains or evidences a third contract of carriage between the owners and the shippers. Typically the owner has no knowledge of the sub-charter and the shipper has no knowledge of the head charter. One may suspect that in these circumstances the date has not been filled in since the parties, or more probably their agents at the port of shipment, were unable to agree which charter-party was to be identified in the bill. If each had been asked, each would have given a different answer.

I was referred to two cases in the Court of Appeal and two at first instance in which this kind of problem has recently been considered; Pacific Molasses Co v Entre Rios Compania Naviera SA (The San Nicholas), [1976] 1 Lloyd's Rep 8 (CA); Bangladesh Chemical Industries Corporation v Henry Stephens Shipping Co Ltd, (The SLS Everest), [1981] 2 Lloyd's Rep 389 (CA); K/S A/S Seateam & Co v Iraq National Oil Co, (The Sevonia Team), [1983] 2 Lloyd's Rep 640; and Navigazione Alta Italia SpA v Svenska Petroleum AB, (The Nai Matteni), [1988] 1 Lloyd's Rep 452.

Mr Dunning submitted that the effect of these authorities is as follows: (1) the absence of a date is no impediment to incorporation; (2) there is a presumption in favour of the head charter being incorporated, this being the contract to which the owners are prior parties; (3) the Court leans in favour of incorporation of a voyage charter, rather than a time charter or other long term contract.

Mr Dunning therefore submitted that, applying those principles, it should be held that the bill of lading incorporating the voyage charter concluded on Mar 7, 1991. Mr Meeson made, in outline, the following submissions:

1. The words on the face of the bill of lading are, as a matter of construction, inconsistent with incorporation of the voyage charter of Mar 7, 1991 but are consistent with incorporation of the transportation contract of July 23, 1990.

2. Had the blank been completed it would not have referred to the voyage charter of Mar 7, 1991. Mr Meeson relied on a number of factors such as that the bill of lading was presented in the form drawn up by the shippers to the master for signature; that the master was obliged to sign bills of lading "as presented"; and that UNCAC on Feb 27, 1991 had instructed their agents at Bordeaux to complete the bill so that it provided "freight payable as per charter party dated 11th July 1990" (this being, it was said, an error for July 23, 1990).

3. The bill of lading can only incorporate a charter-party which is in written form at the date the bill is issued. At that date the voyage charter of Mar 7 1991 was not in written form. Even if the "recap telex" of Mar 7, 1991 is a document capable of being incorporated by reference into the bill of lading, it contained no mention of a London arbitration clause but only of the Synacomex form of charter which provided for arbitration in Paris.

4. UNCAC had no knowledge, or means of knowledge, of a London arbitration clause.

5. If the parties were not ad idem, it should be held that neither charter party was incorporated; Smidt v Tiden, (1874) LR 19 QB 446. The bill of lading is a workable contract without the incorporation of any charter party.

In my view it is important in considering these contentions to draw a clear distinction between questions of construction of the bill of lading, on the one hand, and questions as to whether reasonable notice of the terms of the contract was given by one party to the other at the time the contract was made, on the other. Questions of construction involve looking at the contract as a whole

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