UK 83

COURT OF APPEAL

May 16 and 17, 1994

ANGELIKI CHARIS COMPANIA MARITIMA S.A.

PAGNAN S.p.A.

(THE "ANGELIC GRACE")

Before Lord Justice Neill,
Lord Justice Leggatt
and Lord Justice Millett

Charter-party — **Arbitration clause — Jurisdiction — Vessel collided with lightening vessel — Whether claims made in London and in Italy within arbitration clause and within jurisdiction of London arbitrators — Whether charterers should be restrained from proceeding in Italy.**

The plaintiff Panamanian company were owners of *Angelic Grace* which they let to the Italian charterers for the carriage of grain from Rio Grande to two safe ports on the Italian Adriatic. The charter dated Oct. 2, 1992 contained an amended Centrocon arbitration clause which provided inter alia:

"All disputes from time to time arising out of this contract shall . . . be referred to the arbitrament of two arbitrators carrying on business in London . . ."

The charterers nominated Chioggia as a discharge port and became entitled under a special Chioggia lightering clause to use Chioggia roads for lightering/ discharge operations.

The charterers called for discharge into *Chalia*, an unberthed open "floating elevator", which they owned. The two vessels were moored alongside each other for the purpose of the discharging operation. During deteriorating weather conditions in December, 1992 the master of *Angelic Grace* deemed it prudent to move her position. During the manoeuvre the mooring lines connecting the two vessels either parted or were released on the advice of the master of *Chalia* and as a result contact occurred between the two vessels damaging both.

Following the casualty bank guarantees were exchanged between the parties in Italy.

On Jan. 15, 1993 the owners obtained leave ex parte to serve an originating summons on the charterers in Italy claiming a declaration that the claims and cross-claims arising out of the incident were properly justiciable by arbitration in London and that the charterers be restrained from commencing proceedings in respect of any such claims otherwise than by arbitration in London. The originating summons was issued on Jan. 18 and served in Italy on Jan. 25 and on Jan. 27 the owners commenced arbitration proceedings. The charterers commenced proceedings in Venice on Feb. 9.

On Apr. 30 the owners served points of claim in the arbitration and on July 16, 1993 the charterers served points of defence and counterclaim in that arbitration.

The issues for decision were whether the claims and counterclaims made or anticipated in the London arbitration and Italy were within the arbitration clause and thus within the jurisdiction of the London arbitrators, and whether an injunction should be granted restraining the charterers from continuing their proceedings in Italy.

Held, by Q.B. (Com. Ct.) (Rix, J.), that (1) the submission by the charterers that both parties' claims in negligence, as well as the owners' claims for salvage arising out of the collision were properly to be characterised as tortious claims or collision claims and were not within the arbitration clause would be rejected; the so called "collision claims" raised disputes which were within the arbitration clause; all the claims and cross-claims arose out of the same incident, the identical set of facts which had to be investigated by the arbitrators, and the parties plainly contemplated that a collision or other accident could give rise to a charter-party dispute; moreover the discharging operation which gave rise to all these claims was an integral part of the contractual adventure;

(2) the disputes which were the subject matter of the arbitration and of the Italian proceedings were disputes arising out of the contract and fell within the scope of the parties' agreement to arbitrate and the declaration would be granted;

(3) it was right, in this case in the Court's discretion to grant a permanent injunction preventing a party to an English arbitration clause from pursuing foreign proceedings in breach of that clause before any challenge to the foreign Court's jurisdiction had been resolved; if the Italian proceedings continued the owners could suffer real prejudice in the form of a binding judgment on the merits in Italy which would render their rights to arbitration nugatory; the charterers had presented no evidence of any argument or interest under Italian law why an Italian Court would not stay the Italian proceedings under the mandatory provisions of the New York Convention, applying English law for the purpose of construing the arbitration clause; in the circumstances the charterers' determination to proceed in Italy was vexatious;

(4) the collision occurred in Italian waters and if it were not for the parties' contract and their agreement to arbitrate in London the Italian Courts would be the natural and appropriate forum for the adjudication of a claim arising out of such a collision; there was need for caution and desirability of judicial comity in this area; nevertheless much greater damage would be done to the interests which that caution and that comity were intended to serve if these proceedings were adjourned to await the outcome of the challenge to the jurisdiction in Italy and then resulted in an injunction against the charterers; nothing had happened in Italy since the issue of the Italian summons and the Court's injunction at this stage would be of the least possible interference to the Italian Courts; an injunction to restrain the charterers from proceeding in Italy would be granted.

The charterers appealed submitting that (1) the claim before the Italian Court was not a claim which fell within the arbitration clause in the charter-party; and (2) even if it could be so characterised the Court ought

not to have granted an injunction, the effect of which, it was said, was to pre-empt the decision of the Italian Court as to its own jurisdiction.

Held, by C.A. (NEILL, LEGGATT and MILLETT, L.JJ.), that (1) the parties ought be taken to have intended that disputes between them should be determined by the same tribunal as dealt with disputes about its express terms; the difficulties relating to claims for torts committed abroad were due to their treatment under English law not to the provisions of the arbitration agreement; while it was possible that, had the parties had their attention directed specifically to these difficulties, they might have made special provision for tortious claims, there was no warrant for inferring that the parties intended *separate resolution of disputes* caused by a collision involving the chartered vessel (*see* p. 91, col. 1; p. 96, col. 1);

(2) in the circumstances of this case the claim in tort could not be segregated from the cross-claims under the charter party; the collision in the course of discharge operations under the charter, on any view, arose out of the contract, since the same facts founded the owners' claim in tort as founded the claims and cross-claims in contract (*see* p. 91, cols. 1 and 2);

(3) the Judge's conclusion that the charterers' maintenance of proceedings in Italy were vexatious was correct in the circumstances, and his consequent exercise of discretion in favour of granting an injunction was unassailable (*see* p. 96, col. 1);

(4) where an injunction was sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court ought not to feel any diffidence in granting the injunction provided that it was sought promptly and before the foreign proceedings were too far advanced; there was no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause; the justification for the grant of the injunction in either case was that without it the plaintiff would be deprived of its contractual rights in a situation in which damages were manifestly an inadequate remedy; the appeal would be dismissed (*see* p. 96, col. 2; p. 97, col. 1);

Continental Bank N.A. v. Aeakos Compania Naviera S.A., [1994] 1 Lloyd's Rep. 505 considered.

The following cases were referred to in the judgments:

Ashville Investments Ltd. v. Elmer Contractors Ltd., (C.A.) [1988] 2 Lloyd's Rep. 73; [1989] 1 Q.B. 488;

Continental Bank N.A. v. Aeakos Compania Naviera S.A., (C.A.) [1994] 1 Lloyd's Rep. 505; [1994] 1 W.L.R. 588;

Ermoupolis, The [1990] 1 Lloyd's Rep. 160;

Golden Anne, The [1984] 2 Lloyd's Rep. 489;

Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd., (C.A.) [1993] 1 Lloyd's Rep. 455;

Lisboa, The (C.A.) [1980] 2 Lloyd's Rep. 546;

Pyrna Copper Mines Ltd. v. Rio Tinto Co. Ltd., (C.A.) (1911) 105 L.T. 846;

Playa Larga, The [1983] 2 Lloyd's Rep. 171;

South Carolina Insurance Co. v. Assicurate Maatschappij "De Zeven Provincien" N.V., (H.L.) [1986] 2 Lloyd's Rep. 317; [1987] 1 A.C. 24;

Tracomin S.A. v. Sudan Oil Seeds Co. Ltd., [1983] 2 Lloyd's Rep. 624; [1983] 1 W.L.R. 1026.

This was an appeal by the defendant charterers Pagnan S.p.A. against the order of Mr. Justice Rix ([1994] 1 Lloyd's Rep. 168) given in favour of the plaintiff owners Aggeliki Charis Compania Maritima S.A. and holding in effect that the owners and charterers were entitled and obliged to refer certain claims and cross-claims between them to arbitration under the amended Centrocon arbitration clause in a voyage charter in the Synacomex form relating to the vessel *Angelic Grace*; and that the owners were entitled to an injunction restraining the charterers from pursuing against the owners in the Italian Courts the claims declared to be arbitrable.

The Hon. Peregrine Simon, Q.C. and Miss Rose Lee (instructed by Messrs. Middleton Potts) for the charterers; Mr. Peter Gross, Q.C. and Mr. A. Baker (instructed by Messrs. Holman Fenwick & Willan) for the owners.

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

JUDGMENT

Lord Justice LEGGATT: The defendant charterers, Pagnan S.p.A., appeal against the order of Mr. Justice Rix dated Oct. 22, 1993 made in favour of the plaintiff owners, Aggeliki Charis Compania Maritima S.A. By his order, the Judge (1) declared that the owners and charterers are entitled and obliged to refer certain claims and cross-claims between them to arbitration under the amended Centrocon arbitration clause in a voyage charter in Synacomex form dated London Oct. 2, 1992 relating to the vessel *Angelic Grace*; and (2) granted an injunction restraining the charterers from pursuing against the owners in the Court of Venice the claims declared to be arbitrable (see [1994] 1 Lloyd's Rep. 168).

The charterers' submissions before us were (1) that the claim before the Italian Court is not a claim which falls within the arbitration clause in the charter-party; and (2) that even if it can be so characterized, the Court should not have granted an injunction, the effect of which, it is said, was to pre-empt the decision of the Italian Court as to its own jurisdiction.

The charter was a voyage charter. The circumstances in which the dispute came about are conveniently summarized by the Judge in his judgment is now reported at [1994] 1 Lloyd's Rep. 168. At p. 170 he said:

> The charter-party was for the carriage of grain from Rio Grande to two safe ports on the Italian Adriatic. In the event the charterers nominated Chioggia as a discharging port and thereby became entitled under a special "Chioggia Lightering Clause" to use Chioggia roads for lightering lighterage operations. The charterers called for discharge into *Cloelia*, an unpowered open "floating elevator" which they owned. The two vessels were moored alongside one another for the purpose of the discharging operation. During the prevailing weather conditions in December, 1992 the master of the *Angelic Grace* deemed it prudent to move her position, with *Cloelia* still moored alongside. During the manoeuvre the mooring lines connecting the two vessels either parted or were released on the advice of the master of *Cloelia*, and as a result contact occurred between the two vessels, damaging both of them.

It should be said that bank guarantees have been given on behalf of both parties. That given on behalf of the owners is dated Dec. 23, 1992 and was for the purpose of securing payment of damages awarded by the Italian Court. That given on behalf of the charterers was dated the following day, and secured payment of damages awarded in arbitration proceedings in London.

In the course of the trial it seems that the owners offered to provide security in relation to the arbitration proceedings equivalent to what the charterers had obtained in relation to the Italian proceedings.

The arbitration proceedings were began on Jan. 27, 1993. The amended Centrocon arbitration clause provided, so far as material, that:

> All disputes from time to time arising out of this contract shall . . . be referred to the arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic and engaged in the shipping and/or grain trades . . .

It was on Feb. 9, 1993 that the charterers began proceedings in the Court of Venice. It is those proceedings which the owners say is brought in breach of the arbitration clause and to which the injunction ordered by the Judge applies. That, it is common ground, is a claim in tort as a matter of English law. It is said to arise, according to the charterers, on account of the negligent conduct of the master of *Angelic Grace* in manoeuvring his vessel in the circumstances which the Judge recounted in the passage I have read from his judgment.

The question in a nutshell is whether the relevant claims and cross-claims arise out of the contract. It is common ground that the question must be answered in the light of *The Playa Larga*, [1983] 2 Lloyd's Rep. 171, in which this Court upheld the dictum of Mr. Justice Mustill that a tortious claim does "arise out of" a contract containing an arbitration clause *if there is a sufficiently close connection* between the tortious claim and a claim under the contract. In order that there should be a sufficiently close connection, as the Judge said, the claimant must show either that the resolution of the contractual issue is necessary for a decision on the tortious claim, or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other.

The respondent's case is that the Judge's approach exactly accorded with that dictum. At p. 172 of the report of his judgment, Mr. Justice Rix remarked that:

> There was in truth, little, if anything, between the parties as to the governing principles or the relevant authorities.

He then referred to the case of *Ashville Investments Ltd. v. Elmer Contractors Ltd.*, [1988] 2 Lloyd's Rep. 73; [1989] 1 Q.B. 488, for comments by Lords Justices Balcombe and Bingham sufficiently summarised in the words of the latter, who said at p. 90, col. 1; p. 517E:

> . . . I would be very slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings.

Relied on before the Judge and also in this Court by Mr. Simon, Q.C. for the charterers, was a passage from the judgment of Lord Justice May in the same case who said at p. 75, col. 1; p. 494B:

> . . . In seeking to construe a clause in a contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise which has to be undertaken is to determine what the words used mean. It can happen that in doing so one is driven to the conclusion that that clause is ambiguous, that it has two possible meanings. In those circumstances the Court has to prefer one above the other in accordance with settled principles.

Lord Justice May went on to remark that that was a well-recognized principle of construction, not the

consequence of adopting any particular approach to the question of construction, save, as he said:

> . . . to ascertain the true intention of the parties and the correct meaning of the words used.

Also cited by Mr. Justice Rix was the pithy comment of Lord Justice Hoffmann in *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*, [1993] 1 Lloyd's Rep. 455 at p. 470, where he said:

> The presumption [meaning a presumption in favour of what he called "one-stop adjudication"] merely reassures one that the natural meaning of the words produce a sensible and business-like result.

The Judge observed that:

> It was common ground between the parties that an appropriate clause could cover a claim in tort if there is a sufficiently close connection between a contractual and tortious claim . . .

citing *The Playa Largo*.

The Judge referred also to a recent decision of Mr. Justice Steyn in *The Ermoupolis*, [1990] 1 Lloyd's Rep. 160 at p. 163, when he said:

> Clearly the matters to be proved, and therefore the potential issues, greatly overlap. That such closely related claims should be subject to different forms of dispute resolution, arbitration and litigation, possibly in different jurisdictions, would, in my view, hold no attraction for the reasonable businessman versed in the business of shipping.

Mr. Justice Rix summarized his conclusion on this topic by saying at p. 174:

> Applying these principles and following these authorities, I have no hesitation in holding that the so-called "collision claims" in the present case raised disputes which are within the arbitration clause. To some extent the claims in contract and in tort are true alternatives (for example the charterers' counterclaim). To some extent they may not be true alternatives, but they closely overlap (as in the owners' claims for breach of the warranty of safety and for fault in collision). In any event all claims and cross-claims arise out of the same incident, the identical set of facts which have to be investigated by the arbitrators. To the extent that the charterers' cross-claim in negligence, their claim cannot be adjudicated without considering the charter-party terms, not only the exceptions clause, but perhaps also cl. 33, which states that lightering and/or lightage, if any, is to be at receivers' risk. The parties plainly contemplated that a collision or other accident of navigation could give rise to a charter-party dispute: see not only cl. 19, but also the Both to Blame Collision clause. Moreover, the discharging operation which gave rise to all those claims was an integral part of the contractual adventure.

Power is lent to that conclusion by the case since decided in this Court of *Continental Bank N.A. v. Aeakos Compania Naviera S.A.*, [1994] 1 Lloyd's Rep. 505; [1994] 1 W.L.R. 588. Those were proceedings in which a stay was sought in relation to a loan agreement requiring the borrowers to submit to the jurisdiction of the English Courts. One issue raised was whether the English Courts had exclusive jurisdiction over disputes concerning the agreement, and the Court was also called upon to determine whether an injunction should be available to restrain the borrowers' action in the Greek Court against the lending bank.

The judgment of the Court was delivered by Lord Justice Steyn, who considered the same authorities as had Mr. Justice Rix in the present case. At p. 508, col. 2; p. 593D, Lord Justice Steyn said:

> . . . If the defendants' contention is accepted, it follows that the two claims might have to be tried in different jurisdictions. That would be a forensic nightmare. Again, in the field of the construction of arbitration clauses the modern approach provides helpful guidance.

Having referred to the relevant authorities at that time, *Ashville Investments Ltd. v. Elmer Contractors Ltd.*, [1988] 2 Lloyd's Rep. 73; [1989] 1 Q.B. 488, and *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*, [1993] 1 Lloyd's Rep. 455, Lord Justice Steyn said:

> We are in respectful agreement with these observations, and there is no conceivable reason why the same approach should not apply to the construction of jurisdiction agreements.

The same is manifestly true in reverse.

In support of his argument, Mr. Simon made submissions about the ambit of the arbitration clause. He contended that English law does not construe arbitration clauses, either narrowly or liberally. As authority for that proposition, he referred, of course, to the judgment of Lord Justice May in *Ashville Investments Ltd. v. Elmer Contractors Ltd.* and *Continental Bank v. Aeakos S.A.*. Mr. Simon discerned what he called a move away from the ordinary construction, towards a presumption in favour of "one-stop adjudication". Before, however, the Court moved in that direction, he counselled caution on the ground that there is a danger in a presumption in favour of one-stop adjudication, because in any particular case it would be impossible to know where to draw the line. In relation to the intention of the parties, he asked three questions, which he described as rhetorical, but which in due course I shall endeavour to answer: Can the parties have intended (a) that tortious claims should be heard not in the place where the tort was committed but in arbitration; (b) that a tort should have to be actionable as a matter of English law as well as by the law of the place where the tort was committed; and (c) that parties seeking relief would have to prove, as a matter of fact, that a tort was actionable in the place where it was committed?

The approach which Mr. Simon commended to this Court was, while accepting that the test propounded in *The Playa Largo* applies, to take the view that it is not enough to say that there is an argument that the contract impinges, as a matter of law, on the tortious claim. Here, he contends that the charterers are not going so far as to say that the claim is not arbitrable; they are simply concerned to make their claim, as they have, as soon as possible, in a convenient forum. This is not a case, as Mr. Simon reminds the Court, in which there are claims which are truly alternative. He submits that the real question is whether the dispute is contractual in its nature, or tortious albeit against a background of contract. He submits that the Court should conclude that it is the latter.

Where such general words have been chosen in an arbitration clause as "arise out of", it is not difficult to conclude that a particular dispute is within its terms. It is then that Judges have found room for the exercise of common sense, and have not readily been prepared to assume that the parties would have intended that cross-claims arising out of the same incident should be tried in different countries by different processes, that is by litigation and by arbitration.

I bear in mind that there may be difficulties inherent in a presumption of one-stop adjudication, but the answer, to my mind, to all three of Mr. Simon's questions, is that the parties may be taken to have intended that disputes between them about the performance of the charter-party, should be determined by the same tribunal as deals with disputes about its express terms. The difficulties relating to claims for torts committed abroad are due to their treatment under English law, not to the provisions of the arbitration agreement. While it is possible that, had the parties had their attention directed specifically to these difficulties, they might have made special provision for tortious claims, there is no warrant for inferring that the parties intended separate resolution of disputes caused by a collision involving the chartered vessel.

About Mr. Simon's argument that the Court should not be deflected from viewing a claim in tort independently from the charter-party by the possibility that the charter-party might be relied on by way of defence, I need say no more than that in the circumstances of this case the claim in tort cannot

in my judgment be segregated from the cross-claims under the charter-party. The collision in the course of discharge operations under the charter on any view arose out of the contract, since the same facts founded the owners' claim in tort as founded the claims and cross-claims in contract.

The second main submission made by Mr. Simon was, as I have indicated, that the Judge ought not in the circumstances to have granted an injunction. The background against which he did so, as Mr. Peter Gross, Q.C. for the owners has indicated in his skeleton argument, although we have not called upon him orally, included the fact that a final decision had been made at trial that the claim pursued by the charterers in Italy was arbitrable, with the result that the continued pursuit of the Italian proceedings would be in breach of contract.

The charterers had, it must be remembered, submitted to the jurisdiction of the English Court for the purpose of determining whether their claim in Italy was arbitrable, and they had participated fully in the trial of that issue. It is also material that, as the Judge recorded in the course of his judgment, the charterers had made plain that they intended to proceed with their claim in Italy, even if the English Court were to hold that that claim was arbitrable.

The Judge, at pp. 181 and 182 of the report of his judgment, reviewed the relevant authorities and remarked:

> There is a risk that, if the Italian proceedings continue, the owners could suffer real prejudice, in the form of a binding judgment on the merits in Italy which would render their rights to arbitration nugatory.

The Judge said that he did not know what difficulties the owners might face in enforcing an award against the charterers in Italy, pending the determination of the Italian proceedings. He expressed the view that:

> . . . in such circumstances the burden upon the charterers to persuade this Court that the position is in any real sense different just because the challenge to the Italian Courts' jurisdiction has not yet been determined is a heavy one.

I bear in mind that the collision occurred in Italian waters and that, were it not for the parties' contract and their agreement to arbitrate, the Italian Courts would be the natural and appropriate forum for the adjudication of a claim arising out of such a collision. I am also fully conscious of the need for caution and the desirability of judicial comity in this area. Yet it seems to me that much greater damage is done to the interest which that caution and that comity are intended to serve, if this Court adjourns these proceedings to await the outcome of a challenge

to the jurisdiction is Italy, as Mr. Simon has urged me to do, and then proceeds to issue an injunction. Moreover, that could involve an adjournment of up to two years and waste considerable costs on the part of both parties.

The Judge mentioned that no reason for the persistence of the Italian proceedings had been advanced other than that the charterers wished to relitigate the question of the arbitration agreement's scope in relation to their claim in Italy. He added:

> No evidence has been put before me of any argument or interest under Italian law why an Italian Court would do other than stay the proceedings under the mandatory provisions of the New York Convention.

Mr. Justice Rix concluded:

> ... the charterers have failed in this Court as a matter of English law, and have not even raised a scintilla of an argument as to why their rights in Italy should be any different.

The Judge said that in those circumstances he did not see why he should not conclude that their determination to press on in Italy is vexatious and, in his judgment, it was. The exercise of jurisdiction to grant an injunction, would, in the Judge's estimate, at this of all stages be the least possible interference to the Italian Courts.

Mr. Simon prefaced his submissions under this head by reminding the Court that, as a general principle, it does not enforce arbitration agreements by injunction, but negatively by stay or by refusing to enforce a foreign judgment made notwithstanding an arbitration agreement. Relevant in this context is the fact that English Courts do not regard a party as acting vexatiously by issuing proceedings, despite the fact that there is an apparently governing arbitration agreement.

According to Mr. Simon, although in the past English Courts have been prepared to grant injunctions in circumstances such as these, in recent years they have done what he describes as "exercised caution" on the ground that to grant an injunction would constitute an interference with the judicial process of another State. As my brother Lord Justice Millett remarked in argument, one must be a little careful in one's approach to the word "caution". The exercise of caution does not involve that the Court refrains from taking the action sought, but merely that it does not do so except with circumspection.

Mr. Simon referred to *Peruvian Guano Co. v. Bockwoldt* (1881) 19 Ch.D. 64 and *Peruvian Guano Co. v. Dreyfus Brothers & Co.* [1892] A.C. 166. Those cases concerned a contract made in England containing an arbitration clause. Rio Tinto began proceedings in a Spanish Court in breach of contract. This Court had to consider whether there was jurisdiction to do so, as Mr. Justice Swinfen Eady had held. The Master of the Rolls, Sir Herbert Cozens-Hardy, felt no doubt about the matter, and indeed, it should be said, the respondents were not called on in that case. At p. 851 he said:

> But to contend that as regards any breach of a clear contract made between the plaintiffs and the defendants the court cannot restrain the defendants — who have contracted that they will not sue in a foreign court — from so suing is a proposition to which I think no sanction ought to be given by this court and which is certainly quite unwarranted by any authority that I am aware of.

Lord Justice Fletcher Moulton considered the position of arbitration clauses before saying at p. 852:

> ... the status of an arbitration clause in England is that it will not be specifically enforced, but by proper proceedings you can prevent the other party from appealing to the English Courts in respect of any matter which by contract ought to be decided by arbitration.

Later on the same page he added:

> In the present case by bringing an action in the Spanish court the Rio Tinto Company are depriving the Peña Company, the plaintiffs in the present action, of the right to apply to our courts to prevent this dispute from being decided in any other way than by arbitration. Therefore we ought to exercise our powers *in personam* to prevent that line of conduct taking effect which is certainly contrary to their contractual duties. Of course if it was a question of discretion, and it certainly is — I agree with what the Master of the Rolls has said, to the effect that this is a case in which certainly we ought to exercise our discretion.

Also cited by Mr. Simon for its reiterated references to caution, was *The Lisboa*, [1980] 2 Lloyd's Rep. 546, a case in which cargo-owners had towed a vessel to a discharging port and arrested it in Italy. The bill of lading contained an exclusive jurisdiction clause affording jurisdiction to the English Courts, and the question was whether the owners' application for an injunction restraining the cargo-owners from proceeding with the arrest should be granted.

The approach of the Court is sufficiently seen from the judgment of Lord Justice Dunn at p. 552 where he said:

> The question at the end of the day is whether the arrest of the vessel was so vexatious and oppressive that the defendants ought to be ordered by mandatory injunction to release her. It is said on behalf of the plaintiffs that the effect of not granting the injunction will be to enable the defendants to take advantage of their breach of the exclusive jurisdiction clause and that the

cases show that the Courts are astute to hold parties to their agreements especially as to jurisdiction and arbitration clauses. That is certainly right. But there are other considerations here. There is no suggestion that the merits of the defendants' claim will be litigated in the Italian Courts. The only purpose in arresting the vessel was to provide security for the event of the defendants succeeding in the English proceedings. The arrest of a vessel is a very common and recognized proceeding in all maritime countries. And the remedy of arrest was not available to the defendants in England because the vessel was not here, and was only available in Italy. In this case there is reason to suppose that if the vessel were released the plaintiffs would be unable to satisfy any judgment against them. The counterclaim itself is not vexatious. In those circumstances, I cannot see anything oppressive in the defendants' action.

It may be observed that the Court was permitting an exception to the operation of the exclusive jurisdiction clause, and doing so in order to maintain the arrest of a ship, which constituted the sole security for the cargo-owner's action properly constituted before our Courts.

Mr. Simon submits that an injunction will not be granted merely because there is a breach of an exclusive jurisdiction clause or an arbitration clause. Great caution should be exercised before granting an injunction. Whether the conduct of a defendant is at the stage when the discretion is exercised so vexatiously as to require an injunction, is the test which the Court should apply. He referred us to *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.*, [1986] 2 Lloyd's Rep. 317; [1987] 1 A.C. 24, a case in which the House of Lords were concerned with an action brought in England, and defendants who nonetheless lodged a petition in the District Court in the United States seeking pre-trial discovery. The question was whether the defendants should be restrained from proceeding with the petition in exercise of the Court's inherent jurisdiction. At p. 324, col. 1; p. 30 of the reports, delivering the principal speech, Lord Brandon of Oakbrook considered the basic principles governing the grant of injunctions in the High Court. After referring to the first such principle as being that the power is statutory, and to the second as being that although the jurisdiction is very wide, it has in practice been circumscribed by the practice of the Court, so as ordinarily to grant it only when one party to an action can show that the other party has invaded a legal or equitable right, or one party to an action has behaved in a manner which is unconscionable, he said at p. 324, col. 2; p. 40D:

> ... The third basic principle is that, among the forms of injunction which the High Court has power to grant, is an injunction granted to one party to an action to restrain the other party to it from beginning, or if he has begun from continuing, proceedings against the former in a foreign Court. Such jurisdiction is, however, to be exercised with caution because it involves indirect interference with the process of the foreign Court concerned.

Mr. Simon's citation of the case ended at that point, but it is necessary to read the next paragraph to understand the context in which Lord Brandon was referring to his third specific principle. He continued at p. 324, col. 2; p. 40E:

> The latter form of injunction may be granted in such circumstances as to constitute an exception to the second basic principle stated above. This may occur where one party has brought proceedings against another party in a foreign Court which is not the forum conveniens for the trial of the dispute between them, as that expression was defined and applied in *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795. In such a case the party who has brought the proceedings in the foreign Court may not, by doing so, have invaded any legal or equitable right of the other party, nor acted in an unconscionable manner. The Court nevertheless has power to restrain him from continuing his foreign proceedings on the ground that there is another forum in which it is more appropriate, in the interests of justice, that the dispute between the parties should be tried.

The same principle would be applicable in the circumstances of the present case. As I have already indicated, since Mr. Justice Rix gave judgment in this case, the charterers have additionally been confronted by the decision of this Court in *Continental Bank N.A. v. Aeakos Compania Naviera S.A.*, [1994] 1 Lloyd's Rep. 505; [1994] 1 W.L.R. 588, in relation to the grant of an injunction and in particular the exercise of discretion under English law. Lord Justice Steyn referred to the argument of Counsel in that case which has a striking resemblance to that of Mr. Simon in the present case. He said at p. 511, col. 2; p. 597G:

> Miss Dohmann emphasized that the Greek Court is the Court first seised with the substantive action. She said that it would be wrong for the English Court to decide that the Greek Court does not have jurisdiction. The question whether the Greek Court has jurisdiction ought to be left to the Greek Court. The English Court ought to trust the Greek Court. The injunction will operate as an indirect interference with the workings of a Community Court. Such an injunction should only be granted if the pursuit of the

remedy in the foreign Court would be vexatious and oppressive. That test is not satisfied. For these reasons, Miss Dohmann submitted, the Judge erred in not staying the English action, but, in any event, she said, he plainly erred in exercising his discretion in favour of the granting of an injunction.

Lord Justice Steyn mentioned that in the case then before the Court there had arguably been a submission to the jurisdiction, but he made clear that the Court did not rest its judgment on that point. He referred also to the fact that when objecting to jurisdiction it was necessary for the purposes of Greek law to file a defence on the merits with the supporting evidence, an expensive process. But once more he made plain that the Court did not rest its judgment on that point.

He concluded at p. 512, col. 1; p. 598E by saying:

> In our view the decisive matter is that the bank applied for the injunction to restrain the defendants' clear breach of contract. In the circumstances, a claim for damages for breach of contract would be a relatively ineffective remedy. An injunction is the only effective remedy for the defendants' breach of contract. If the injunction is set aside, the defendants will persist in their breach of contract, and the bank's legal rights as enshrined in the jurisdiction agreements will prove to be valueless. Given the total absence of special countervailing factors, this is the paradigm case . . .

and I complete my citation from the judgment by supplementing the language of the Law Report from [1994] 1 Lloyd's Rep. 505 at p. 512, col. 1. The Judge continued:

> . . . this is the paradigm case for the grant of an injunction restraining a party from acting in breach of an exclusive jurisdiction agreement. In our judgment the continuance of the Greek proceedings amounts to vexatious and oppressive conduct on the part of the defendants. The Judge exercised his discretion properly.

Confronted by that authority, which has considerably increased Mr. Simon's difficulties since he was before the Judge, he urges that this Court (to a memorable phrase) should "robustly restrain" itself. In effect, he asks the Court, notwithstanding the *Continental Bank* case, still to approach the resolution of the present problem with diffidence. He submits that a plaintiff cannot overcome the reluctance of an English Court to grant an injunction in circumstances such as these by dubbing foreign proceedings as vexatious or oppressive. That diffidence, as he submits, should be heightened where the foreign proceedings are properly within the jurisdiction of the foreign Court. The country of the foreign Court has bound itself to recognize arbitration agreements, and has done so by a treaty which envisages that the Court should give effect to an arbitration clause. Those references are to the New York Convention, 1958, art. II, par. 1 of which provides:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any difficulties which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

More pertinently, and invoked by Mr. Simon, is par. 3 of that article which provides that:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

It seems to me, however, that that provision does not confer an exclusive jurisdiction on the Court of the Contracting State concerned; and it is consistent with that provision that the Court of another Contracting State should make an order producing the same result.

The present case is, as my brother Lord Justice Steyn would say, the paradigm case for the prompt issue of an injunction. The matter here is governed by English law. According to English law, the arbitration clause extends to disputes in tort. Proceedings in a foreign Court are a breach of contract, so an injunction can issue to restrain them. If no injunction issues, a foreign Court will either decline or accept jurisdiction. If, as we are entitled to assume would be the Italian Court were to decline jurisdiction, then our proceedings would have constituted a waste of time and money. If, on the other hand, the Italian Court were to accept jurisdiction, any injunction then issued would directly conflict with the deliberate assumption of jurisdiction by the foreign Court. The owners would also be set at risk of being held to have submitted to the jurisdiction of the foreign Court. In the absence of submission, the undesirable process would then occur envisaged by this Court in *Trasconin S.A. v. Sudan Oil Seeds Co. Ltd.*, [1983] 2 Lloyd's Rep. 624; [1983] 1 W.L.R. 1026 and the arbitrator's award would have to be for any damage held by them to have been suffered by the owners, in excess of any sum found due from them by the Italian Court. But if there were held to have been a submission, there would follow two parallel sets of proceedings where the arbitration clause had been contractually designed

to ensure that there was only one. If the charterers are not restrained from pursuing the Italian proceedings and the Italian Court exercises jurisdiction, then the question would arise, referred to by the Judge, whether a judgment by the Italian Court on the merits of the charterers' claim would be recognised or enforced in England.

The approach suggested by Mr. Gross on behalf of the owners to that dilemma is this. If such a judgment would not be recognised and enforced in England, then an injunction to restrain the charterers from seeking to obtain such a judgment is appropriate because the continuance of the Italian proceedings would only lead to multiplicity of proceedings and additional inconvenience and expense. However, if such a judgment would be recognised and enforced in England, then a further and wholly effective remedy for the charterers' breach would be an injunction preventing them from seeking to obtain such a judgment.

It was to avoid predicaments of this kind that in the exercise of his discretion the Judge granted the injunction. No reason was advanced before him, or before us, why the Italian Court might come to a different conclusion. It was an undisguised attempt by the charterers to have another bite at the same cherry, in the hope, presumably, that the domestic Court might irrationally come to a conclusion favourable to them.

Mr. Simon crowns his submissions with the contention that "the proper approach", as he terms it, of the English Courts, is to leave to the local Court the question whether it should decline jurisdiction or not. Alternatively, he submits that this Court should defer the grant of an injunction until it is clear, as he puts it, that "something has gone wrong", in other words, that the Italian Court has accepted jurisdiction.

In aid of this submission, Mr. Simon relies on *The Golden Anne*, [1984] 2 Lloyd's Rep. 489, in which Mr. Justice Lloyd was concerned with a case in which the plaintiffs had let their vessel to the defendants for a period of five years. The charter contained an arbitration clause. While the vessel was discharging in Florida, one of the longshoremen employed by the stevedoring company sustained personal injuries. He brought proceedings against the plaintiffs in Florida, and some time later he joined as defendants several other companies, including the defendants in the proceedings before Mr. Justice Lloyd. One of the issues for his decision was whether he should grant an injunction to prevent the arbitrator's award in proceedings brought between the plaintiffs and the defendant from being pre-empted by a decision of the United States District Court before which both plaintiffs and defendants were parties.

The Judge dealt with this matter at p. 498 of the report by pointing to the need for caution and judicial comity and remarking that the desirability of leaving the decision whether or not to grant a stay, or as the American Court would term "continuance", was a matter for the District Court. He said:

> I recognise that the District Court may refuse a stay, in which case the unfortunate result will follow that if Daiichi's motion for summary judgment is rejected, there will be concurrent proceedings on both sides of the Atlantic. Obviously I hope that that will not happen. But to my mind it is better to run that risk, rather than grant an injunction which will, in effect, operate as a stay of the Florida proceedings. That is a function which belongs properly to the District Court, and may still, I hope, be exercised by that Court. This Court should not appear to usurp that function, except as a last resort.

It is not altogether clear what the Judge meant by that last expression, although he may be taken to have contemplated that it would still be open to this Court to grant an injunction in the event that the District Court came to a conclusion other than that to which he hoped it would come.

In the circumstances of that case, an injunction would have had the effect of frustrating proceedings before the District Court which by then were far advanced. The Judge therefore thought it appropriate to leave that decision to that Court.

Mr. Simon, by reference to that case in particular, urged us to conclude that by cutting the Gordian Knot, the Judge was not adopting "the proper approach". For my part, I do not contemplate that an Italian Judge would regard it as an interference with comity if the English Courts, having ruled on the scope of the English arbitration clause, then seek to enforce it by restraining the charterers by injunction from trying their luck in duplicated proceedings in the Italian Court. I can think of nothing more patronising than for the English Court to adopt the attitude that if the Italian Court declines jurisdiction, that would meet with the approval of the English Court, whereas if the Italian Court assumed jurisdiction, the English Court would then consider whether at that stage to intervene by injunction. That would be not only invidious but the reverse of comity. The Judge was not deterred from rejecting this approach by *The Golden Anne* and, in my judgment, he was right not to be deterred.

That case is sufficiently explained as an exercise of discretion in the light of the foreign Court's past history of involvement. It is not to be regarded as authority for the proposition that it is wrong in principle to grant an injunction before the foreign Court has decided whether to assume jurisdiction or

reject it in favour of arbitration. That it is not wrong in principle to do so is plain from the recent decision of this Court in *Continental Bank*.

Contrary to Mr. Bumble's view, the law is not normally "an ass" and comity does not require it to behave like one. In my judgment, the Judge's conclusion that the charterers' maintenance of proceedings in Venice are vexatious is correct in the circumstances, and his consequent exercise of discretion in favour of granting an injunction was unassailable. I pay my tribute to his careful judgment which has made possible, and I hope appropriate, the summary treatment in this Court of Mr. Simon's arguments. I endorse the Judge's order and would dismiss the appeal.

Lord Justice MILLETT: I agree and wish only to add a few observations of my own on the approach which the Courts should adopt when asked to exercise its undoubted jurisdiction to restrain a party from taking or continuing proceedings in a foreign Court in breach of an agreement to refer the dispute to arbitration.

In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubts on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.

The Courts in countries like Italy, which is a party to the Brussels and Lugano Conventions as well as the New York Convention, are accustomed to the concept that they may be under a duty to decline jurisdiction in a particular case because of the existence of an exclusive jurisdiction or arbitration clause. I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.

In *The Golden Anne*, [1984] 2 Lloyd's Rep. 489, the Court refused a similar injunction because the foreign Court had not yet ruled on an application to stay the proceedings in favour of arbitration in London. We were pressed to follow that decision and leave it to the Italian Court to determine the limits of its own jurisdiction, even though that jurisdiction depended upon a question of construction of a contract governed by English law.

We should, it was submitted, be careful not to usurp the function of the Italian Court except as a last resort, by which was meant, presumably, except in the event that the Italian Court mistakenly accepted jurisdiction, and possibly not even then. That submission involves the proposition that the defendant should be allowed, not only to break its contract by bringing proceedings in Italy, but to break it still further by opposing the plaintiff's application to the Italian Court to stay those proceedings, and all on the ground that it can safely be left to the Italian Court to grant the plaintiff's application. I find that proposition unattractive. It is also somewhat lacking in logic, for if an injunction is granted, it is not granted for fear that the foreign Court may wrongly assume jurisdiction despite the plaintiffs, but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to that Court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign Court, far less offence is likely to be caused if an injunction is granted before that Court has assumed jurisdiction than afterwards, when to refrain from granting it at any stage would deprive the plaintiff of its contractual rights altogether.

In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank N.A. v. Aeakos Compania Naviera S.A.*, [1994] 1 W.L.R. 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights to a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case.

I agree that *The Golden Anne* should be regarded as having been decided on its own special facts and that this appeal should be dismissed.

Lord Justice NEILL: I agree that this appeal should be dismissed for the reasons given by my Lords. It is unnecessary for me to add anything except to endorse the approach suggested by Lord Justice Millett as to the grant of an injunction in cases where an exclusive jurisdiction clause or an arbitration agreement has provided that the proceedings between the parties should be brought in the manner agreed between the parties in the clause or in the arbitration agreement, and therefore the foreign proceedings are in contravention either of the clause or of the agreement. I too would dismiss the appeal.

[Order: Appeal dismissed with costs. Application for leave to appeal to the House of Lords refused.]

[Editorial Note: The defendants subsequently petitioned the House of Lords for leave to appeal. That petition was dismissed.]

COURT OF APPEAL

July 20 and 21, 1994

CEMENTATION PILING AND FOUNDATIONS LTD
v.
AEGON INSURANCE CO. LTD. AND COMMERCIAL UNION INSURANCE CO. PLC.

Before Lord Justice RUSSELL
Lord Justice WAITE and
Sir RALPH GIBSON

Insurance (Contractors All Risks) — Construction — Plaintiffs contractually bound to carry out works at Barrow-in-Furness docks — Defects in design material and workmanship —Plaintiffs required to remedy defects — Whether rectification of defects within insurance cover.

By a sub-contract dated Nov. 15, 1983, the plaintiffs contracted with Sir Alfred McAlpine and Son Ltd. to carry out, complete and maintain bored, piling and continuous diaphragm walls forming part of a series of quays to be constructed within the existing docks at Barrow-in-Furness. The whole project included the filling and reclaiming of a redundant part of the Devonshire Dock.

The area was reclaimed from the sea by depositing pumped sand dredged from Morecambe Bay to form a land area of berth some seven hectares in area protruding 2½ metres above sea level.

The diaphragm walls were constructed by excavating cavities in the sand in the precise shape of the concrete sections which would form the diaphragm walls of the dock. As the excavations were carried out the cavities were continuously filled with liquid bentonite which maintained the integrity of the cavity. Steel reinforcement cages were lowered into the cavity which was then filled with liquid concrete through a "tremi" pipe at the foot of the cavity. At the joints between the sections one metre side panels were cast in such a shape as to enable the next panel to abut and provide a tight fit behind the diaphragm wall in the finished dock. Upon completion of the sections the sand in the centre was dredged out to a depth of 10 metres and removed allowing seawater to enter and take its place.

In September 1985 it was discovered that quantities of sand fill which had previously been placed in the area retained by the walls had escaped into the newly constructed docks. It was discovered that in a number of places there were gaps and voids between adjacent panels which had permitted sand to escape. There were also places where the steel reinforcement for the panels were exposed or where the reinforcement was inadequately covered by concrete.

The plaintiffs were obliged to carry out works to remedy these matters. It was accepted by the parties that the need for these works arose from defects in design materials and workmanship. The losses suffered

Therefore, subject to further argument and the question of costs, the order of the Court on the trial of this originating summons will be confined to declaring that: (1) There was an agreement between the plaintiffs and the defendants to refer to arbitration the dispute between them under the time charter dated Feb. 18, 1987. (2) The plaintiffs commenced arbitration proceedings against the defendants on Jan. 31, 1992 and thereby brought suit against the defendants for the purposes of the Hague Rules. (3) The defendants have, accordingly, not been discharged by the clause paramount and art. III, r. 6 of the Hague Rules from any liability they may be under to the plaintiffs.

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Oct. 4 and 5, 1993

AGGELIKI CHARIS COMPANIA MARITIMA S.A.

v.

PAGNAN S.p.A.

(THE "ANGELIC GRACE")

Before Mr. Justice RIX

Arbitration — Jurisdiction — Vessel collided with lightening vessel — Whether claims made in London and in Italy within arbitration clause and within jurisdiction of London arbitrators — Whether charterers should be restrained from proceeding in Italy.

The plaintiff Panamanian company were owners of *Angelic Grace* which they let to the Italian charterers for the carriage of grain from Rio Grande to two safe ports on the Italian Adriatic. The charter dated Oct. 2, 1992 contained an amended Centrocon arbitration clause which provided inter alia:

> All disputes from time to time arising out of this contract shall . . . be referred to the arbitrament of two arbitrators carrying on business in London . . .

The charterers nominated Chioggia as a discharge port and became entitled under a special Chioggia lightening clause to use Chioggia roads for lightening/lighterage operations.

The charterers called for discharge into *Clodia* an unpowered open "floating elevator" which they owned. The two vessels were moored alongside each other for the purpose of the discharging operation. During deteriorating weather conditions in December, 1992 the master of *Angelic Grace* deemed it prudent to move her position. During the manœuvre the mooring lines connecting the two vessels either parted or were released on the advice of the master of *Clodia* and as a result contact occurred between the two vessels damaging both.

Following the casualty bank guarantees were exchanged between the parties in Italy.

On Jan. 15, 1993 the owners obtained leave ex parte to serve an originating summons on the charterers in Italy claiming a declaration that the claims and cross-claims arising out of the incident were properly justiciable by arbitration in London and that the charterers be restrained from commencing proceedings in respect of any such claims otherwise than by arbitration in London. The originating summons was issued on Jan. 18 and served in Italy on Jan. 25 and on Jan. 27 the owners commenced

arbitration proceedings. The charterers commenced proceedings in Venice on Feb. 9.

On Apr. 30 the owners served points of claim in the arbitration and on July 16, 1993 the charterers served points of defence and counterclaim in that arbitration.

The issues for decision were whether the claims and counterclaims made or anticipated in the London arbitration and Italy were within the arbitration clause and thus within the jurisdiction of the London arbitrators, and whether an injunction should be granted restraining the charterers from continuing their proceedings in Italy.

———*Held*, by Q.B. (Com. Ct.) (Rix, J.), that (1) the submission by the charterers that both parties' claims in negligence, as well as the owners' claims for salvage arising out of the collision were properly to be characterized as tortious claims or collision claims and were not within the arbitration clause would be rejected; the so called "collision claims" raised disputes which were within the arbitration clause; all the claims and cross-claims arose out of the same incident, the identical set of facts which had to be investigated by the arbitrators; and the parties plainly contemplated that a collision or other accident could give rise to a charter-party dispute; moreover the discharging operation which gave rise to all these claims was an integral part of the contractual adventure (*see* p. 174, col. 1);

(2) the disputes which were the subject matter of the arbitration and of the Italian proceedings were disputes arising out of the contract and fell within the scope of the parties agreement to arbitrate and the declaration would be granted (*see* p. 174, col. 2);

(3) it was right, in this case in the Court's discretion to grant a permanent injunction preventing a party to an English arbitration clause from pursuing foreign proceedings in breach of that clause before any challenge to the foreign Court's jurisdiction had been resolved; if the Italian proceedings continued the owners could suffer real prejudice in the form of a binding judgment on the merits in Italy which would render their rights to arbitration nugatory; the charterers had presented no evidence of any argument or interest under Italian law why an Italian Court would not stay the Italian proceedings under the mandatory provisions of the New York Convention, applying English law for the purpose of construing the arbitration clause; in the circumstances the charterers' determination to proceed in Italy was vexatious (*see* p. 176, col. 1; p. 181, col. 2; p. 182, cols. 1 and 2);

(4) the collision occurred in Italian waters and if it were not for the parties' contract and their agreement to arbitrate in London the Italian Courts would be the natural and appropriate forum for the adjudication of a claim arising out of such a collision; there was need for caution and desirability of judicial comity in this area; nevertheless much greater damage would be done to the interests which that caution and that comity were intended to serve if these proceedings were adjourned to await the outcome of the challenge to the jurisdiction in Italy and then resulted in an injunction against the charterers; nothing had happened in Italy since the issue of the Italian summons and the Court's injunction at this stage would be of the least possible interference to the Italian Courts; an injunction to restrain the charterers from proceeding in Italy would be granted (*see* p. 182, cols. 1 and 2).

The following cases were referred to in the judgment:

Ashville Investments Ltd. v. Elmer Contractors Ltd., (C.A.) [1988] 2 Lloyd's Rep. 73; [1989] 1 Q.B. 488;

Astro Vencedor Compania Naviera S.A. v. Mabanaft G.m.b.H. (The *Damianos*) (C.A.) [1971] 1 Lloyd's Rep. 502; [1971] 3 Q.B. 588;

Doherty v. Allman, (H.L.) (1878) 3 App. Cas. 708;

Ermoupolis, The [1990] 1 Lloyd's Rep. 160;

Gibraltar (Government of) v. Kenney, [1956] Q.B. 410;

Golden Anne, The [1984] 2 Lloyd's Rep. 489;

Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd., (C.A.) [1993] 1 Lloyd's Rep. 455;

Lisboa, The (C.A.) [1980] 2 Lloyd's Rep. 546;

Marc E.D.& F. v. (Sugar) Yani Haryanto (No. 2), (C.A.) [1991] 1 Lloyd's Rep. 429; [1991] 1 Lloyd's Rep. 161;

Pena Copper Mines Ltd. v. Rio Tinto Co., (1911) 105 L.T. 846;

Playa Larga, The [1983] 2 Lloyd's Rep. 171;

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

Scott v. Avery, (1856) 5 H.L.C. 811;

Sohio Supply Co. v. Gatoil (U.S.A.) Inc. (C.A.) [1989] 1 Lloyd's Rep. 588;

Tracomin S.A. v. Sudan Oil Seeds Co. Ltd., [1983] 2 Lloyd's Rep. 624; [1983] 1 W.L.R. 1026;

Woolf v. Collis Removal Services, [1948] 1 K.B. 11.

This was an application by the owners, Aggeliki Charis Compania Maritima S.A. for a declaration that the claims and counterclaims by the owners and the defendant charterers Pagnan S.p.A. made or anticipated in the London arbitration and in Italy were within the arbitration clause and within the jurisdiction of the London arbitrators and that the defendant charterers should be restrained by injunction from continuing the proceedings in Italy.

Mr. Peter Gross, Q.C. and Mr. Andrew Baker (instructed by Messrs. Holman Fenwick & Willan) for the owners; The Hon. Peregrine Simon, Q.C. and Miss Sarah Lee (instructed by Messrs. Middleton Potts) for the charterers.

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

Judgment was reserved.

Friday Oct. 22, 1993

JUDGMENT

Mr. Justice RIX: During discharge operations under a charter-party at an Italian port an ocean-going vessel came into contact with a lightening vessel owned as it happened by the charterers of the ocean-going vessel, and both were damaged, each vessel blaming the other. The charter-party contained a London arbitration clause, and the owners of the ocean-going vessel (Aggeliki, the plaintiffs) have commenced arbitration proceedings against the charterers (Pagnan, the defendants) in London. The charterers have commenced proceedings against the owners in Venice. Are the issues before the Italian Court arbitrable in London? If so, should the charterers be injuncted from continuing with their proceedings in Italy? As will appear, the second question raises, albeit in an indirect form, an interesting point under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968 (the "Convention"), as well as the general and important issue of judicial comity.

The facts

Both sets of proceedings are, relatively speaking, in their infancy, and whichever tribunal will ultimately hear and decide the merits of the parties' claims and cross-claims, it will not be the English Court. Accordingly anything I may say, about the facts of the case, or any submissions of Counsel as to the merits, is intended only for the purpose of explaining the matters which I do have to decide in this case, which are of a jurisdictional nature, and should otherwise be disregarded.

The plaintiffs are owners of *Angelic Grace*. They are a Panamanian company. By a voyage charter-party dated London, Oct. 2, 1992, they chartered the vessel to the charterers, who are an Italian company. The charter-party was for the carriage of grain from Rio Grande to two safe ports on the Italian Adriatic. In the event the charterers nominated Chioggia as a discharge port and thereby became entitled under a special "Chioggia Lightening Clause" to use Chioggia roads for lightening/lighterage operations. The charterers called for discharge into *Clodia*, an unpowered open "floating elevator" which they owned. The two vessels were moored alongside one another for the purpose of the discharging operation. During deteriorating weather conditions in December, 1992 the master of the *Angelic Grace* deemed it prudent to move her position, with *Clodia* still moored alongside. During the manœuvre the mooring lines connecting the two vessels either parted or were released on the advice of the master of *Clodia*, and as a result contact occurred between the two vessels, damaging both of them.

The charter-party contained an amended Centrocon arbitration clause as follows:

> All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single Arbitrator, be referred to the arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic and engaged in the shipping and /or grain trades, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire.
>
> 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 shall be deemed to be waived and absolutely barred.
>
> No award shall be questioned or invalidated on the ground that any of Arbitrators is not qualified as above, unless objection to his acting be taken before the award is made.

Following the casualty, bank guarantees were exchanged in Italy. An Italian bank undertook to pay to the charterers any amount up to U.S.$ 500,000—

> . . . as may be adjudged by enforceable judgments rendered by Italian Courts [if competent] or as may be agreed.

The same Italian bank undertook to pay to the owners any amount up to U.S.$ 850,000:

> . . . as may be adjudged by a final arbitration Award in London, if competent . . . or as may be agreed.

This wording reflected the dispute which had already surfaced between the parties as to where the claims arising out of the incident should be heard. The words in square brackets above are not in the guarantee, and there is a dispute about whether they were ever formally agreed to be inserted and as to their effect if inserted, but that dispute does not have to be resolved for present purposes. It is no longer

suggested that the absence of those words precludes any challenge to the jurisdiction of the Italian Courts.

The owners were the first off the mark and on Jan. 15, 1993 obtained leave ex parte to issue and serve an originating summons upon the charterers in Italy claiming the relief sought in these proceedings, namely a declaration that the claims and cross-claims of the parties arising out of the incident are properly justiciable by arbitration in London; and an injunction that the charterers be restrained from commencing proceedings in respect of any such claims otherwise than by arbitration in London. On Jan. 18 the originating summons was issued, on Jan. 25 it was served in Italy, and on Jan. 27 the owners commenced arbitration by giving notice of the appointment of Mr. Bruce Harris as their arbitrator in London. In response to this on Feb. 9 the charterers commenced proceedings in Venice by the issue of a summons. I have given leave to amend the owners' claim for an injunction to one restraining the charterers from *pursuing* the Italian proceedings.

The charterers' Italian summons makes no mention of the charter-party, but is a straightforward claim in what in England would be called tort, alleging damage to *Clodia* due to the sudden and unexpected manœuvre of *Angelic Grace*—

> . . . which was in no way justified, and therefore for which it was to blame.

A hearing date was fixed for Oct. 27.

On Apr. 30 owners served points of claim in the arbitration. They alleged a breach of the safe anchorage warranty contained in cl. 3 of the charter-party, particularizing insufficient pilots or tugs, an inadequate system for monitoring safety, an unsafe method of discharge, and vulnerability to the weather, and gave an account of how the casualty occurred by reason of breach of this warranty. Alternatively, they put forward a claim in tort, alleging that *Angelic Grace* had been damaged in a collision for which *Clodia* was wholly or in part at fault, the degree of fault to be apportioned at law or pursuant to s. 1 of the Maritime Conventions Act, 1911. As particulars of fault they repeated matters already at issue under the claim for breach of warranty. Further, they claimed a contribution in general average, and a salvage reward for saving *Clodia* and her cargo. At the hearing before me the owners further indicated that in the alternative to their collision claim in tort, they would in due course be seeking to amend their points of claim in the arbitration by including a claim in contract for breach of an implied term that the charterers would take, or ensure the taking of, reasonable care during lightening operations not to damage the chartered vessel.

On July 16, 1993 the charterers served points of defence and counterclaim in the arbitration. Their pleading was served:

> Without prejudice to the [charterers'] contention that all of the claims brought by the [owners] against the [charterers] and all of the counterclaims pleaded by the [charterers] against the [owners] fall out with the arbitration agreement . . .

There was some discussion before me as to whether it is possible to plead a counterclaim "without prejudice" to a prior objection to jurisdiction. There is evidence that in Italy it is. In the field of sovereign immunity, in England, it is probably not. However, the point was not explored in depth, and I have no need to and I will not, decide the jurisdictional point on this ground. The charterers were, of course, concerned to reserve their position, bearing in mind among other things the substantive time-bar contained in the arbitration clause.

In their points of defence the charterers denied any breach of warranty and responded in detail inter alia to the allegations that the method of discharge was unsafe and that the damage had been caused by any deficiency or fault on the part of *Clodia*. They gave their own account of how the casualty occurred. Further, they pleaded an implied term of the charter-party that the master and crew of the chartered vessel would navigate and handle her at all times with reasonable care and skill, and averred that the casualty had been caused by the negligence of the master and crew of *Angelic Grace* alternatively by breach of the implied term just referred to. That was also the basis of their counterclaim. They denied liability in general average or salvage, alternatively averred and counterclaimed that any liability failed for circuity of action due to the owners' own negligence and breach of contract. They also relied in defence to the claim in tort on the Law Reform (Contributory Negligence) Act, 1945.

No points of reply and defence to counterclaim have yet been pleaded. Mr. Gross for the owners stated that when that pleading comes to be drawn up it will inter alia contain reliance on the exceptions clause in the charter-party, cl. 19, which refers to:

> . . . collisions . . . and other accidents of navigation . . . always excepted even when occasioned by negligence, default or error in

judgment of the Pilot, Master, Mariners or other servants of the Owners.

Declaration

The first question I have to decide is whether the claims and counterclaims made or anticipated in the London arbitration and in Italy are within the arbitration clause and thus within the jurisdiction of the London arbitrators. This is the subject matter of the declaration sought. If they are, then the parties are obliged to arbitrate them.

I can begin by recording some concessions made by the charterers. First, they conceded that the owners' claim based on the unsafety of the anchorage was arbitrable. Secondly, they conceded that the owners' claim for general average contribution was arbitrable. The logic of these concessions was that these were contractual claims. They contended, however, that both parties' claims in negligence, as well as the owners' claim for salvage, arising out of the collision, were properly to be characterized as tortious claims or "collision claims" and were not within the arbitration clause. This was so, Mr. Simon submitted, whether the claims were pleaded in tort, or in contract for breach of an implied duty of care, or alternatively in both as the charterers had done in their points of defence and counterclaim and as the owners had given notice of their intention to amend to plead in their points of claim. The parties were not to be lightly taken to have agreed to arbitrate in London collision claims which were naturally and appropriately within the Admiralty jurisdiction of the local national Courts, especially under an arbitration clause which specified that the arbitrators be members of the Baltic and engaged in the shipping or grain trade, which did not, it was said, encompass Admiralty expertise in collision disputes or the apportionment of fault under the Maritime Conventions Act, 1911. Although there was a connection between the contractual and tortious claims, the connection was not so close as to permit it to be said that an agreement to arbitrate the former can properly be construed as covering the latter. This could be tested by considering the Italian summons, which made no reference to the charter-party, and did not need to.

Mr. Gross for the owners, on the other hand, submitted that, whatever its precise ambit, it was generally recognized that an arbitration clause written in the form of disputes "arising out of" the contract was particularly wide. Where one set of facts gave rise to alternative claims in contract or tort, or where the contractual or tortious disputes were so closely connected that an agreement to arbitrate the former could properly be construed as covering the latter, or where the resolution of a contractual issue (for instance under an exceptions clause) was necessary for a decision on a tortious claim, the dispute in question could readily be said to be one "arising out of the contract". All these conditions were present in the instant case. Although it was primarily a matter of construction of the arbitration clause, the Courts would in any event be slow to attribute to reasonable parties the intention to permit two sets of proceedings — with their attendant costs, inconvenience and dangers of inconsistent results — where arbitration alone would do: so much so that there was a presumption in favour of "one-stop adjudication", a phrase used by Lord Justice Hoffmann in *Harbour Assurance Co (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*, [1993] 1 Lloyd's Rep. 455 at p. 470. As for the salvage claim, that arose out of the same facts, as an incident of the performance of the contract, and there was authority for saying that quasi-contractual claims in such circumstances could be covered by an arbitration clause: see *Government of Gibraltar v. Kenney*, [1956] Q.B. 410.

There was in truth, little, if anything, between the parties as to the governing principles or the relevant authorities. A leading modern authority is *Ashville Investments Ltd. v. Elmer Contractors Ltd.*, [1988] 2 Lloyd's Rep. 73; [1989] 1 Q.B. 488. The arbitration clause in that case was different, but the Judges of the Court of Appeal gave guidance as to the general approach to the question of construction of such arbitration clauses, at any rate to those written in wide terms. Thus Lord Justice Balcombe (at p. 81, col. 1; p. 503E) said:

> That approach is summarised in the following propositions. (1) It may be presumed that the parties intended to refer all disputes arising out of this particular transaction to arbitration. (2) It may also be presumed that the parties intended that all disputes should be determined finally by the same tribunal.

Lord Justice Bingham (at p. 90, col. 1: p. 517E) said:

> I would be very slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings.

Lord Justice May said (at p. 75, col. 1, p. 494B/D):

> In seeking to construe a clause in a con-

tract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise which has to be undertaken is to determine what the words used mean. It can happen that in doing so one is driven to the conclusion that that clause is ambiguous, that it has two possible meanings. In those circumstances the Court has to prefer one above the other in accordance with settled principles. If one meaning is more in accord with what the Court considers to be the underlying purpose and intent of the contract, or part of it, than the other, then the Court will choose the former rather than the latter. In some circumstances the Court may reach its conclusion on construction by applying the contra proferentem rule. These are, however, well recognized principles of construction; they are not the consequence or examples of adopting any particular approach to the question of construction, save to ascertain the true intention of the parties and the correct meaning of the words used.

Mr. Simon submitted that the dictum of Lord Justice May is to be preferred to what Lord Justice Balcombe and Lord Justice Bingham said. I do not believe that there is any reason to understand there to be any disagreement between them. It is neither liberal nor narrow to approach questions as to the construction of a wide arbitration clause conscious of the underlying purpose of the contract and with a view to the expectations of reasonable contracting parties. As Lord Justice Hoffmann put it in his own words, in the passage from *Harbour Assurance v. Kansa* referred to above:

> The presumption [in favour of one-stop adjudication] merely reassures one that the natural meaning of the words produce a sensible and business-like result.

It was common ground between the parties that an appropriate clause could cover a claim in tort if there is a sufficiently close connection between a contractual and tortious claim: see *The Playa Larga*, [1983] 2 Lloyd's Rep. 171 at pp. 182–183. In that case the purchasers of a cargo claimed alternatively in conversion and for breach of an implied contractual term damages for loss of their cargo at the hands of their sellers. The arbitration clause was in essentially similar form. The Court of Appeal approved the following passage from the judgment at first instance of Mr. Justice Mustill:

> It seems to me that the claimant must show either that the resolution of the contractual issue is necessary for a decision on the tortious claim (as in *Astro Vencedor v. Mabanaft*, [1971] 2 Q.B. 588) or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other: as in *Woolf* v. *Collis Removal Services*, [1948] 1 K.B. 11, and *The Merita* (unreported) . . .
>
> The wrongful acts relied upon as a breach of s. 12(2) were the same as those which founded the claim in conversion. The dispute is whether these acts entitled Iansa to a remedy, and if so, for how much. This was a single dispute, even though the argument upon it was brought forward in different alternative ways; and in my judgment the whole of the dispute in all its aspects can properly be regarded as falling within the scope of the agreement to arbitrate.

Examples where the Courts have held particular tortious claims to have been within an arbitration clause include: *Woolf v. Collis Removal Service*, [1948] 1 K.B. 11, mentioned by Mr. Justice Mustill above, in which the claim was by a goods owner against a warehouseman, alternatively in contract and/or negligence, for loss and damage to his goods, and where the Court of Appeal distinguished between claims which are entirely unrelated to the transaction covered by the contract and claims which albeit not "under the contract" have a sufficiently close connection with the transaction; *Astro Vencedor Compania Naviera S.A. v. Mabanaft G.m.b.H. (The Damianos)*, [1971] 1 Lloyd's Rep. 502; [1971] 2 Q.B. 588, also mentioned by Mr. Justice Mustill above, where a tortious claim for wrongful arrest of a vessel made by a shipowner against his charterer was held by the Court of Appeal to be within the arbitration clause because it could not be determined whether the arrest was wrongful or not without considering the terms of the parties' charter. Lord Denning M.R. said (at p. 504, col. 2; p. 595):

> It seems to me that the arrests were so much part and parcel of the inquiry that they come within the broad scope of the arbitration clause. I agree with the way Mr. Justice Mocatta put it: If the claim or the issue has a sufficiently close connection with the claim under the contract, then it comes within the arbitration clause;

and, more recently, *The Ermoupolis*, [1990] 1 Lloyd's Rep. 160 at pp. 163–164 where short delivery led to claims both in contract and tort, and Mr. Justice Steyn said:

> Clearly, the matter to be proved, and therefore the potential issues, greatly over-

lap. That such closely related claims should be subject to different forms of dispute resolution, arbitration and litigation, possibly in different jurisdictions, would, in my view, hold no attraction for the reasonable businessman versed in the business of shipping.

Applying these principles and following these authorities I have no hesitation in holding that the so-called "collision claims" in the present case raised disputes which are within the arbitration clause. To some extent the claims in contract and in tort are true alternatives (for example the charterers' counterclaim). To some extent they may not be true alternatives, but they closely overlap (as in the owners' claims for breach of the warranty of safety and for fault in collision). In any event all claims and cross-claims arise out of the same incident, the identical set of facts, which have to be investigated by the arbitrators. To the extent that the charterers cross-claim in negligence, their claim cannot be adjudicated without considering the charter-party terms, not only the exceptions clause, but perhaps also cl. 33, which states that lightening and/or lighterage, if any, is to be at receivers' risk. The parties plainly contemplated that a collision or other accident of navigation could give rise to a charter-party dispute: see not only cl. 19, but also the Both to Blame Collision clause. Moreover, the discharging operation which gave rise to all these claims was an integral part of the contractual adventure.

Mr. Simon's submission that the connection between contractual and tortious claims in this case was not sufficiently close was supported in his reasoning only by the form of the Italian summons. But that it seems to me begs the question. In *The Playa Larga*, Mr. Justice Mustill accepted that the claim in conversion could have been pleaded without reference to the contract, but he nevertheless held the claim to be within the arbitration clause. Nor can I accept Mr. Simon's submission that the clause's reference to the expertise of the arbitrators indicates that the parties intended that collisions should lie outside their jurisdiction. It is well known that arbitrators from the shipping trade have a broad expertise to deal with problems which arise in maritime adventures and include among their ranks retired master mariners and others of similar experience. Navigational accidents occurring in the context of unsafe port claims are frequently the subject matter of arbitration before such arbitrators. Moreover, arbitrators are not uncommonly asked to apportion fault for contributory negligence, even in a contractual context: see Chitty on Contracts, 1989, at par. 1789. As for Mr. Simon's submission that Italy was the natural and appropriate forum for a dispute arising out of a collision in Italian waters, this begs the question of whether the parties have agreed to arbitrate such a dispute in a different forum. It is in the very nature of arbitration clauses that they constitute the parties' agreement for a consensual tribunal different from what might otherwise be the natural and appropriate forum for any particular dispute; and that a neutral forum is thus deliberately chosen and isolated from the home jurisdictions of either party.

As for the salvage claim, in *Government of Gibraltar v. Kenney*, sup., there was a dispute whether a contract had been frustrated. On the basis that there had been frustration, one party claimed a quantum meruit alternatively compensation under the Law Reform (Frustrated Contracts) Act, 1943. Mr. Justice Sellers held that these claims, albeit in quasi-contract, were claims "arising out of" the contract. It was conceded that claims for remuneration under and/or for damages for breach of contract, as well as the issue of frustration itself, were arbitrable. The quasi-contractual claims were regarded as incidental to the contract, requiring the same investigation of the contract and performance under it and closely linked up with it. So it seems to me it is with the salvage claim in this case. Mr. Simon did not suggest any reason for distinguishing between the salvage claim and the other claims whose arbitrability was in dispute. In any event the same defence has been pleaded in the arbitration to the salvage claim as to the other claims, namely that it fails for circuity of action given the owners' negligence and/or breach of contract.

For all these reasons I conclude that all disputes which are the subject matter of the arbitration and of the Italian proceedings are disputes arising out of the contract and fall within the scope of the parties' agreement to arbitrate, and I shall grant a declaration accordingly. I can hear Counsel as to the precise formulation of that declaration.

Injunction

The second issue follows upon my decision to grant the declaration sought. Having held that the charterers' claim in Italy, as well as all the claims in the arbitration, are arbitrable, should I go on to grant an injunction restraining the charterers from continuing their proceedings in Italy? Or should I leave it to the Italian Courts to form their own view as to the validity of any objection by the owners to their jurisdiction?

It should be noted at the outset that the owners have made it clear to the charterers that

they are willing to amend the security given to the charterers so that it is answerable to a London arbitration or final appeal therefrom. In the light of this offer, I asked Mr. Simon at the commencement of the hearing whether charterers intended to proceed with their claim in Italy even if I were to hold that the whole dispute was within the parties' arbitration agreement. He told me that they did.

It is common ground that the English Court has jurisdiction to grant injunctions restraining a party from bringing foreign proceedings in breach of an arbitration clause. It is also common ground that there have been repeated authoritative statements as to the great caution which should be exercised before this Court grants such an injunction. Although the injunction is against the litigant, not against the foreign Court, it is nevertheless recognized that as a matter of judicial comity this Court should be slow in its discretion to exercise its power to injunct the pursuit of foreign proceedings.

The importance of the issue makes it necessary for me to review the authorities with some care. The leading case is *Pena Copper Mines Ltd. v. Rio Tinto Co.*, (1911) 105 L.T. 846. There Rio Tinto contracted (by novation) with Pena, both of them English companies, for the construction and working of a branch railway-line to Pena's mines in Spain. The contract contained an English law and jurisdiction clause, an arbitration agreement, and a *Scott v. Avery* (1856) 5 H.L.C. 811 clause. Rio Tinto commenced proceedings in Spain, and Pena sought to injunct them from continuing them. The Court of Appeal held that it had jurisdiction to grant an injunction against Rio Tinto, and considered that it was a plain case in its discretion to do so. There is no sign of any concern about or even comment upon the question of comity. Of course the defendant, Rio Tinto, was an English company and the contract contained an express submission to the jurisdiction of the English Courts. The presence of the *Scott v. Avery* clause appears to have been a factor in the Court's decision, but not necessary to it. The essential reasoning seems to have been that what the English Court would do by way of a stay, if an action had been commenced in England in breach of the arbitration clause, it could and would do by way of an injunction in the case of foreign proceedings.

For the next case, one comes into modern times — *The Lisboa*, [1980] 2 Lloyd's Rep. 546. That concerned an exclusive English jurisdiction clause in a bill of lading. The vessel suffered loss of power at sea and had to be towed to her destination, Chioggia (the bill of lading holders were as it happened the same as, or an associate of, the present charterers). The bill of lading holders arrested the vessel in proceedings in the Court of Venice to recover the towage expenses. Shipowners issued proceedings in England on the basis of the exclusive jurisdiction clause disputing liability for the cost of towage and claiming damages for the loss of earnings caused by the arrest. The bill of lading holders responded by commencing their own proceedings in England. The shipowners then applied for an interlocutory injunction to restrain the arrest in Italy, in effect a mandatory injunction for the vessel to be released. Unlike the present case, there was no offer to transfer the security of the arrest to the English proceedings. The Court of Appeal, upholding the decision of Mr. Justice Mocatta, refused the injunction. The submission that the exclusive jurisdiction clause was in effect a negative covenant which should be enforced by injunction as of right under the principle of *Doherty v. Allman*, (1878) 3 App. Cas. 708 was rejected. Mr. Gross wished to reserve that point, if necessary, for another Court. Lord Denning, M.R. said (at p. 549):

> In the present case we are concerned with a clause giving exclusive jurisdiction to the Courts of *this country*. It is similar to an arbitration clause providing for arbitration in London. If one of the parties breaks that clause and brings proceedings in the Courts of a foreign country, then the Courts of this country have jurisdiction to restrain him from continuing those proceedings — if he is a British subject resident here, see *Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.*, (1912) 105 LT 846; *Ellerman v. Read*, [1928] 2 KB 145; or if he has sufficient connections with this country as to be within the reach of our Courts, see *The Tropaioforos*, [1962] 2 Lloyd's Rep. 410. This jurisdiction is, however, to be exercised with great caution so as to avoid even the appearance of undue interference with another Court, see *Castanho v. Brown*, [1980] 2 Lloyd's Rep. 423; [1980] 1 W.L.R. 833 at pp. 438 and 856. Alternatively, in lieu of an injunction, the Court may award damages against him for proceeding in a foreign jurisdiction in breach of the clause, see *Mantovani v. Carapelli S.p.A.*, [1978] 2 Lloyd's Rep. 63 at p. 73 by Mr. Justice Donaldson and [1980] 1 Lloyd's Rep. 375 at p. 383 by Lord Justice Browne.

Lord Justice Dunn said (at p. 551):

> Although the English Court has jurisdiction to restrain a party to English proceedings from proceeding in a foreign Court, the juris-

diction will be exercised with great caution especially when the defendant to the English proceedings is plaintiff in the foreign proceedings, and the injunction should not normally be granted unless the foreign proceedings are vexatious or oppressive (see *Cohen v. Rothfield*, [1919] 1 K.B. 410 per Lord Justice Scrutton and *Castanho v. Brown and Root (U.K.) Ltd.*, [1980] 2 Lloyd's Rep. 423; [1980] 1 W.L.R. 833. This is so even if the parties have agreed not to proceed in the foreign Court (*Settlement Corporation v. Hochschild*, [1966] 1 Ch. 10 per Mr Justice Ungoed-Thomas at pp. 17 and 18) or if they have agreed that all disputes shall be submitted to arbitration in England (*Marazura v. Oceanus*, [1977] 1 Lloyd's Rep. 283). There may however be cases in which the Court will exercise the jurisdiction, but as a matter of discretion and not of right . . . it is always a relevant consideration whether or not the party seeking the injunction will be adequately protected by an award of damages. So far as I am aware there is no case in which an injunction has been granted ordering the release of a ship which has been arrested by a valid order of a foreign Court, but this too in my view is a matter of discretion.

It is quite clear that the focus of the Court of Appeal's reasoning was upon the right of arrest to obtain security for a maritime claim, a procedure recognised by international convention. Moreover the bill of lading holders did not intend to pursue their claim in the Italian proceedings; they would proceed in England. The decision would probably have been different if there had been an offer of equivalent security in England. Thus Lord Denning, M.R. said at p. 550:

> If they succeed in getting judgment [in England] it may be fruitless — seeing that the owners are a one-ship company. Simple justice demands that the arrest should be upheld and maintained, unless and until security is provided for its release . . .

and Lord Justice Dunn said (at p. 552):

> The question at the end of the day is whether the arrest of the vessel was so vexatious and oppressive that the defendant ought to be ordered by mandatory injunction to release her. It is said on behalf of the plaintiff that the effect of not granting the injunction will be to enable the defendants to take advantage of their breach of the exclusive jurisdiction clause and that the cases show that the Courts are astute to hold parties to their agreement especially as to jurisdiction and arbitration clauses. That is certainly right. But there are other considerations here. There is no suggestion that the merits of the defendants' claim will be litigated in the Italian Courts. The only purpose in arresting the vessel was to provide security in the event of the defendants succeeding in the English proceedings. The arrest of a ship is a very common and recognised proceeding in all maritime countries. And the remedy of arrest was not available to the defendants in England because the vessel was not here, and was only available in Italy. In this case there is reason to suppose that if the vessel were released the plaintiffs would be unable to satisfy any judgments against them.

It seems to me that on balance *The Lisboa* is more favourable to the owners than to the charterers, for in the present case the charterers are determined to proceed in Italy on the merits, even though I hold them to be in breach of their arbitration agreement, and even though they could have their security in the arbitration in London.

In *Tracomin S.A. v. Sudan Oil Seeds Co. Ltd.*, [1983] 2 Lloyd's Rep. 624; [1983] 1 W.L.R. 1026 an injunction against foreign proceedings was granted to uphold an arbitration agreement which included a *Scott v. Avery* clause under English law contracts. Proceedings had been commenced by the buyers in Switzerland and both parties nominated arbitrators in London. The sellers applied in Switzerland to stay the Swiss proceedings on the ground of the arbitration clauses, which were invalid under Swiss law, but neglected to bring to the attention of the Swiss Court that the contracts were governed by English law. The Swiss Court refused a stay, and this was upheld on appeal. Subsequently the buyers applied to the English Court for a declaration that the London arbitrators had no jurisdiction, on the ground that the Swiss judgment had created an estoppel. This action failed, because of ss. 32 and 33 of the Civil Jurisdiction and Judgments Act, 1982: s. 32(1) provides that a foreign judgment shall not be recognized in the United Kingdom if the foreign proceedings were brought contrary to a valid agreement for the settlement of disputes elsewhere; and s. 33(1) states that a person against whom a foreign judgment has been given shall not be regarded as having submitted to that jurisdiction by reason only of the fact that he appeared, conditionally or otherwise, to contest the jurisdiction of the Court or to ask it to stay the proceedings on the ground that the dispute in question should be submitted to arbitration. The sellers then applied to the English Court to injunct continuance of the Swiss pro-

ceedings, and succeeded in the Court of Appeal. Mr. Justice Leggatt had refused the injunction in his discretion on the ground that the Swiss Court's conclusion had been due to the sellers' own negligence. The Court of Appeal took another view: the sellers' negligence was not in the same scale as the buyers' blameworthiness in seeking to deny their contractual obligation to arbitrate in England; moreover, if the Swiss Courts gave judgment against the sellers, the latter would have an unanswerable claim for damages for breach of the arbitration clause. Sir John Donaldson M.R. continued (at p. 627, cols. 1 and 2; pp. 1036–1037):

> . . . The question which would then arise would be whether they were entitled to more than nominal damages. That would depend on whether the Swiss Court had reached the same conclusion as would the FOSFA arbitrators if the claim which formed the basis of the Swiss judgment had been submitted to arbitration. So we should have the position that in so far as the Swiss Courts gave any judgment against the sellers, there would then be a claim in arbitration which would have to be fully investigated and adjudicated upon by the FOSFA arbitrators, and on appeal by the FOSFA Board of Appeal in order to decide whether FOSFA agreed with the Swiss Court. If FOSFA would have reached the same conclusion, the sellers would have been entitled only to nominal damages. If FOSFA decided that they would have reached a different conclusion, and one which would have been less adverse to the sellers, they would have to make an award in favour of the sellers representing the difference between the two.
>
> That seems to me to be a very special factor, and one which neither these Courts, nor the Swiss Courts if they were in a position to consider the matter, could contemplate with any degree of equanimity whatsoever. The Swiss Courts, owing to the negligence of the sellers, have been put into the position in which they have given a judgment which is wrong in terms of English law. It is no fault of the Swiss Court whatsoever, but it is going to have these consequences, and I cannot believe that the Swiss Courts will be unduly perturbed at the English Courts intervening to avoid the rather unseemly spectacle, if I may say so with respect to FOSFA, of trade arbitrators considering a Swiss judgment and deciding whether it is right or wrong.

There is no sign in the judgments of the Court of Appeal that the presence of the *Scott v. Avery* clause was a critical factor. This case supports the owners' claim for an injunction here. If in *Tracomin* the Court was prepared to grant an injunction, after the Swiss Court had ruled in favour of their own jurisdiction, there would be grounds for thinking that the owners' claim in this case for an injunction was even stronger.

However, in *The Golden Anne*, [1984] 2 Lloyd's Rep. 489, an injunction was refused by Mr. Justice Lloyd, precisely because the foreign Court had not yet ruled on an application to vacate a trial in favour of arbitration in London. A longshoreman had been injured while working on *Golden Anne* in the port of Tampa, Florida, and he brought proceedings in Florida against the shipowners, as well as against their charterers and various sub-charterers. The shipowners filed an answer and cross-claimed against their charterers as well as against the other defendants for an indemnity. The charterers also filed an answer and cross-claimed for an indemnity against their sub-charterers as well as applying for summary judgment on the shipowners' cross-claim against them. At this point the shipowners relied on the London arbitration clause in their charter with the charterers, and an arbitrator was subsequently appointed. Meanwhile the longshoreman's claim was settled on terms of a payment to which only the shipowners and the ultimate sub-charterers contributed. That left only the various cross-claims between the defendants to the Florida proceedings. The shipowners and the ultimate sub-charterers then applied to the Florida Court jointly for a "continuance", that is to say for a stay, or adjournment, of the pending trial on the ground that the longshoreman's claim had been satisfied and all issues arising out of the various defendants' cross-claims would be dealt with in arbitration in London, where a series of arbitrations and sub-arbitrations had been commenced. However, the charterers opposed the joint motion for a continuance; they wanted their motion for summary judgment against the shipowners to be dealt with in Florida. It was in these circumstances that the shipowners applied to the English Court for an injunction to restrain the charterers from pursuing their cross-claim in Florida. Mr. Justice Lloyd said (at 498):

> The crucial difference between the present case and *Tracomin* is that in *Tracomin* the Swiss Court had already refused the stay pursuant to the arbitration clause. The Court agreed there was no way in which the English Court could seek to compel the buyers to honour the arbitration agreement except by granting an injunction. In the present case,

by contrast, the American Court has not yet ruled on the join motion for continuance. The matter is still open. It seems to me that in those circumstances it would be much better that the District Court should itself rule on the motion for continuance and, if it thinks fit, stay all further proceedings on World Pride's cross-claim, in the light of the judgment I have given upholding the validity of Mr. Eckersley's appointment as arbitrator, rather than that I should seek to pre-empt, and perhaps even seem to dictate the decision of a foreign Court. It may be said that having answered the first four questions in favour of World Pride consistency and logic require me to go one step further and answer the fifth question also in their favour. But consistency must yield to caution and logic to the requirements of judicial comity, by which I mean only the mutual respect due between those who, as Sir John Donaldson, M.R. has said, "labour in adjoining judicial vineyards". I recognise that the District Court may refuse a stay; in which case the unfortunate result will follow that if Daiichi's motion for summary judgment is rejected, there will be concurrent proceedings on both sides of the Atlantic. Obviously I hope that that will not happen. But to my mind it is better to run that risk, rather than grant an injunction which will, in effect, operate as a stay of the Florida proceedings. That is a function which belongs properly to the District Court, and may still, I hope, be exercised by that Court. This Court should not appear to usurp that function, except as a last resort.

Mr. Simon for the charterers relies strongly upon Mr. Justice Lloyd's approach. He points out that it is supported by a passage in Mustill & Boyd on Commercial Arbitration, 2nd ed. 1989, at 460:

> Where the case falls within the New York Convention, and possibly in other cases as well, we suggest that the right course is for the aggrieved party to exhaust his local remedies by seeking a stay or kindred relief from the local courts, before asking the English Court to intervene. It is only in cases where something has plainly gone badly wrong in the local courts that the English Court should grant the extreme remedy of an injunction.

Sohio Supply Co. v. Gatoil (U.S.A.) Inc. [1989] 1 Lloyd's Rep. 588 involved an English exclusive jurisdiction clause. The buyers commenced proceedings in Texas and the sellers commenced proceedings in England almost contemporaneously. The sellers applied for an injunction to restrain the buyers from proceeding in Texas, but only after a delay of over one year. Nevertheless, the Texas action was merely for a declaration of non-liability, nothing much had happened in the intervening period, and there was no real prejudice to the buyers. Mr. Justice Phillips granted the injunction, while accepting that such relief should "normally be sought promptly" (at p. 592). The Court of Appeal upheld the injunction, adding reasons of their own, of which one was a distaste for actions for a negative declaration. Lord Justice Staughton then continued (at p. 593):

> Furthermore, it is inherently undesirable that there should be concurrent proceedings in different jurisdictions, about the same subject matter: see art. 21 of the Convention in the Schedule to the Civil Jurisdiction and Judgments Act, 1982, and also the judgment of Lord Justice Bingham in *E.I. Du Pont de Namours & Co. v. Agnew*, [1987] 2 Lloyd's Rep. 585, particularly at p. 589. Of course, it is sometimes unavoidable; it was unavoidable in that case, but it is certainly a factor to be taken into account.

In dealing with *The Lisboa*, Lord Justice Staughton had this to say (at p. 592):

> Lord Justice Dunn went on to say that an injunction should not be granted unless the foreign proceedings were vexatious or oppressive; but it seems to me that the continuance of foreign proceedings in breach of contract where the contract provides for exclusive English jurisdiction may well in itself be vexatious and oppressive in any given case. The Court of Appeal in that case allowed the arrest in Italy to stand, because it was for security only.

This case was relied on by Mr. Gross, and supports his application. Mr. Simon submitted that the crucial distinction between that case and the present is that in that case there was no call for the Texan Court to decide its jurisdiction, whereas in the present case the Italian Court would have to. I do not think that submission can be right. The sellers had at a relatively early stage challenged the Texan jurisdiction by serving a plea in abatement, but that was dismissed, apparently on the ground that such a plea could not succeed unless there had been another action started before the Texan action — but the Texan action had been commenced two days before the English writ had been issued. In any event, as I have understood the situation in Italy, the owners have not yet been put to a decision as to how to challenge the Italian jurisdiction. I shall have to refer to Italian procedure in further detail below.

E.D. & F. Man v. (Sugar) Yani Haryanto (No. 2), [1991] 1 Lloyd's Rep. 161, 429 was relied on by Mr. Simon, not because it involved either an arbitration clause or an exclusive jurisdiction clause, which it did not, but because an injunction to restrain foreign proceedings was refused, even though it was assumed for the purpose of the argument that unconscionability had been established, although a necessary ground for the granting of an extra-territorial injunction in that case, it proved to be an insufficient ground as a matter of discretion: see at pp. 167–168 in the judgment of Mr. Justice Steyn and at pp. 438 and 440 in the Court of Appeal. However, the facts of that case were far removed from the situation with which I am concerned, and the very special factors which bore upon the courts' discretion are conveniently listed by Mr. Justice Steyn in the last paragraph of the left hand column at p. 168.

Finally, there is *Marc Rich & Co. AG v. Societa Italiana Impianti PA, The Atlantic Emperor (No. 2)*, where Mr. Justice Hobhouse refused an interlocutory injunction to restrain further proceedings in Italy in breach of an English arbitration clause (which for the purpose of this interlocutory stage was assumed to exist) on the decisive ground that the applicants, Marc Rich, had already voluntarily submitted to the jurisdiction of the Italian Court on the merits. The Court of Appeal [1992] 1 Lloyd's Rep. 624 upheld Mr. Justice Hobhouse on the broader ground that Marc Rich was estopped by a prior judgment of the Italian Court resolving the jurisdictional dispute of whether there was any arbitration agreement between the parties; but if it had been necessary, they would have dismissed the appeal on the narrower ground of whether an injunction should be granted for reasons broadly in line with those given below [1992] 1 Lloyd's Rep. 624 at pp. 633–634. Mr. Justice Hobhouse said this:

> Where the injunction is one which seeks to enjoin a foreign national from continuing proceedings before his own country's courts and where the most senior court in that country, after hearing both sides, has ruled that it has jurisdiction, considerations of comity and caution become of the greatest importance. There are many judicial statements which confirm the need for caution even where the plaintiff is asserting, or has established, a legal right that he should not be subjected to legal proceedings in a foreign country.

He then referred to *The Lisboa*, and continued:

> Those words of caution are to my mind even more imperative where as in the present case the foreign jurisdiction is one which the British Government has by treaty undertaken to recognise and where the jurisdiction assumed by the foreign court is one which under that treaty the foreign court is entitled to assume. It is of course true as was expressly recognised in the argument of Impianti before me that the injunction only enjoins the litigant and does not affect the foreign court as such. But it does affect the foreign court indirectly and it has as its subject matter acts which are going to be done within the territorial jurisdiction of that court and relate to its procedure. Whatever the niceties, such injunctions are justifiably seen by the foreign court as an interference with its exercise of its legitimate restriction. (see Steyn J. in *Man v. Haryanto*, [1991] 1 Lloyd's Rep. 161 at 168 and Neill and Mann L.JJ. in the same case in the Court of Appeal at pages 438 and 440. See also Lloyd J. in *The Golden Anne*, [1984] 2 Lloyd's Rep. at 498).

He then pointed out that what Marc Rich wanted the injunction for was to guard themselves against the creation of an issue estoppel on the merits which would be binding upon them before the English Court and in the London arbitration. If an Italian decision on the merits was not binding, then the position would be the same as in *Tracomin*, where it was contemplated that the arbitrators might have the invidious task of trying to second-guess a foreign judgment. If, however, an Italian decision on the merits was binding, then a decision against Marc Rich would be conclusive for all purposes. Italy was a Convention country, and a judgment given by its courts on the merits could not be questioned: see arts. 26, 27, and 29 of the Convention and s. 32(4) of the Act of 1982. He then continued:

> On their face, these provisions appear to accept that the duty to recognise a Convention judgment is paramount. Therefore in considering where the balance of advantage lies the more forceful way in which Marc Rich can put their case is that they need to avoid an Italian judgment on the merits which will, on that logic, have to be recognised for all relevant purposes in this country. Such a judgment would, on this basis, render their right to arbitration nugatory; an injunction is essential to protect that right. Damages would never be an adequate remedy since they could never establish one of the essential steps to its success, the liability of Impianti on the sale contract.
>
> Precisely what is the effect of a conflict in this country between the Brussels and the

New York Conventions and the effect of section 32 is no doubt disputed and is something which the parties may have to argue on another occasion. But the considerations I have referred to would in my judgment make out a very forceful case for preserving the existing status quo were it not for one further factor.

The one further factor, of course, was Marc Rich's submission to the Italian Court's jurisdiction on the merits. As to this Mr. Justice Hobhouse concluded:

It will be seen that at almost every level the delivery of that substantive defence undermines their present applications. It affects the analysis. It provides a clear basis for distinguishing the *Tracomin* case. It affects the equity of the position. It could be said to amount to a waiver of the right of specific performance of the alleged arbitration clause. But most importantly it alters the balance of convenience. Marc Rich are going to be bound by the judgment of the Genoa Court and are going to have no basis for disputing that it is binding upon them and must be recognised, whether under the Brussels Convention, the 1982 Act or the ordinary principles of private international law internationally accepted.

Mr. Gross relied strongly on Mr. Justice Hobhouse's reasoning. In the present case the owners have not submitted to the jurisdiction in Italy. On the contrary, they are at the outset of the proceedings there, and will shortly have to take a decision as to what they do there, if those proceedings continue. It is common ground that the owners can attack the jurisdiction of the Italian Court in one of two ways. They must either oppose jurisdiction before the Court of Venice on the ground of the arbitration clause, or they must first petition the Corte di Cassazione, The Italian Supreme Court, to restrain the Venice Court from hearing the merits of the claim because of the arbitration clause. If they opt to go before the Venice Court, they must submit a pleading at the first hearing (shortly due on Oct. 27). That first pleading must contain their challenge to the jurisdiction (if they wish to make one) and any cross-claim they may wish to bring. They cannot await the outcome of their jurisdictional challenge before making a cross-claim. There is also evidence before me, but I do not know whether it is common ground, that if the owners elect to go before the Venice Court and submit a first pleading there, any cross-claim they may wish to make (that is of course highly relevant in the present situation) *must* be made in that pleading and cannot await the outcome of the jurisdictional challenge; however a defence on the merits may either be included in that pleading or left to await that outcome; and any cross-claim or defence included subject to a challenge to the jurisdiction, whether before the Venice Court or by petition to the Corte di Cassazione, does not prejudice that challenge.

In these circumstances Mr. Gross submits as follows. If the Italian proceedings continue, the owners have to tread a legal tightrope. They must challenge the jurisdiction, but do so in a way which does not amount to an acceptance of the jurisdiction should they fail in that challenge. If their challenge to the jurisdiction in Italy succeeds, well and good, save that it is a shame to waste the costs and effort involved in relitigating a jurisdictional challenge which has already been decided in England. If their challenge to the jurisdiction fails, however, the difficulties multiply. If their jurisdictional challenge fails in circumstances where they have managed to avoid a submission to the jurisdiction which is recognized in England, then the arbitrators maybe placed in the invidious position discussed in *Tracomin*. If, however, their challenge to the jurisdiction in Italy fails in circumstances where they will be adjudged to have committed themselves to the Italian jurisdiction, as may well happen if they cross-claim, then all rights to arbitrate may be rendered nugatory, as discussed in *The Atlantic Emperor (No. 2)*; and in any event, there is the embarrassment of two separate proceedings, with a race to judgment and the danger of inconsistency.

Moreover, Mr. Gross continues, even if the owners avoid a submission to the Italian jurisdiction, there is an unresolved crux under s. 32 of the 1982 Act of which they may fall foul. Section 32(1)(a) 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 . . .

Section 32(4), however, provides:

(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. . . .

Since sub-s. (1) is made subject to sub-s. (4) it might seem that the peril cannot be avoided, for

Italy is a Convention country, and, subject to the dispute as to the scope of the arbitration clause, it is common ground that jurisdiction in Italy for the charterers' claim is properly founded. However, it is an undecided question whether, because of art. 1(4) of the Convention, which excludes arbitration from its scope, s. 32(4)(a) would have any bearing on a judgment on the merits given in a Convention country in breach of an arbitration agreement: see O'Malley and Layton's "European Civil Practice", 1989, at pars. 14.32/3 and 43.26.

Mr. Simon does not, in effect, dispute the substance of these submissions, but he makes a powerful submission of his own which sidesteps them, when he says that the correct approach nevertheless is that of Mr. Justice Lloyd in *The Golden Anne*, which is to trust to the remedies of the local Courts and not to pre-empt them, for the sake of the policy reasons embraced in the concept of judicial comity, whatever may be the prompting of strict consistency and logic. Mr. Simon can also point to the support of Mustill & Boyd in this regard, and can invoke by way of analogy, albeit not directly (for of course the Convention is not concerned with arbitration) similar remarks to be found in Cheshire & North's Private International Law, 12th ed., 1992, at p. 251, and Brigg's Norton Rose on Civil Jurisdiction and Judgments, 1993 at p. 142. However, acknowledging the force of Mr. Gross's submissions in general, he volunteered that if I refused to grant an injunction solely on this ground, namely that the owners should first pursue their jurisdictional challenge in Italy, I should adjourn these proceedings until after the Italian Courts had ruled on that challenge: so that if the Italian Courts rejected the challenge, the matter could then be relisted. He did not say what result he anticipated at such relisting, but he said nothing to suggest that an injunction should not then be granted. Therefore, he did not pursue to the end of the line the approach taken by Mr. Justice Lloyd in *The Golden Anne*, for Mr. Justice Lloyd anticipated that if the Florida Court refused the continuation, then duplicate proceedings, however unfortunate that was, would follow. Rather Mr. Simon preferred the half-way approach of Mustill & Boyd. As for art. 21 of the Convention, invoked by Lord Justice Staughton in *Sohio v. Gatoil* as supporting an injunction, by analogy, in that the Court second seized declines jurisdiction in favour of the Court first seized: Mr. Simon submitted that this reflects the trust reposed by one Court in the other, rather than encourages one Court to injunct, however indirectly, the proceedings in another.

In response to Mr. Simon's approach, Mr. Gross submits as follows. There is evidence from Avv. Michele Mordiglia that it would take one to two years from the date of petition for the Corte di Cassazione to pass judgment on the Venice Court's jurisdiction, even though that petition would automatically be treated as urgent. It would not be convenient nor fair to postpone the outcome of this trial for an injunction for that length of time. In the meantime the problems of potentially conflicting jurisdictions would remain unresolved. If the outcome in Italy stayed the Venice Court's proceedings, that would simply leave things where they stood following my decision on the scope of the arbitration clause, but at the price of expense, delay and uncertainty. If, however, the Italian Courts' decision went the other way, all the problems which he had referred to would return in exacerbated form. What is the English Court to do then? If it would then injunct the charterers, would that not risk a greater inroad into judicial comity, than if the nettle were grasped now? If so, why not act now? After all, it would not be as though the charterers would be inviting the Italian Courts to approach the matter of jurisdiction along the same lines as my judgment: it would presumably invite the Italian Courts to come to the opposite conclusion.

When I review again the authorities cited above I find that there is none, except *Pena Copper Mine* itself, in which a party to an arbitration clause has been injuncted from pursuing foreign proceedings in breach of his obligations *before* a challenge to the foreign Court's jurisdiction had failed. No doubt there may have been many unreported cases, where the challenge to the foreign Court's jurisdiction has succeeded and there has never been any need even to come to the English Court for an injunction. In *Pena Copper Mine*, however, there is no hint of the consideration of caution for the sake of judicial comity which more modern authorities have stressed. So I find myself having to decide perhaps for the first time, in modern times, whether it is right in my discretion to grant a permanent injunction preventing a party to an English arbitration clause from pursuing foreign proceedings in breach of that clause before any challenge to the foreign Court's jurisdiction on that ground has been resolved. In my judgment I should grant such an injunction in this case, and for the following reasons.

There is a risk that, if the Italian proceedings continue, the owners could suffer real prejudice, in the form of a binding judgment on the merits in Italy which would render their rights to arbitration nugatory. Although it could per-

haps be argued that that risk is diminished by the probability that the arbitration in London will be concluded before the Italian proceedings would both clear the jurisdictional hurdle and reach finality on the substantive merits, there are uncertainties involved in that proposition about which it is in any event somewhat invidious to speculate. Moreover, even if the owners were to be successful in their claim in arbitration, I do not know what difficulties they might face in enforcing such an award against the charterers in Italy pending the determination of the Italian proceedings. For these and the other reasons advanced by Mr. Gross, Mr. Simon effectively recognized that he would be in some difficulties in resisting an injunction, if the Italian Courts had already rejected the owners' attempt to stay the Italian proceedings in favour of arbitration. It seems to me that in such circumstances the burden upon the charterers to persuade this Court that the position is in any real sense different just because the challenge to the Italian Courts' jurisdiction has not yet been determined is a heavy one.

I bear in mind that the collision occurred in Italian waters and that, were it not for the parties' contract and their agreement to arbitrate, the Italian Courts would be the natural and appropriate forum for the adjudication of a claim arising out of such a collision. I am also fully conscious of the need for caution and the desirability of judicial comity in this area. Yet it seems to me that much greater damage is done to the interests which that caution and that comity are intended to serve, if this Court adjourns these proceedings to await the outcome of a challenge to the jurisdiction in Italy, as Mr. Simon has urged me to do, and *then* proceeds to issue an injunction. Moreover, that could involve an adjournment of up to two years and a waste of considerable costs on the part of both parties. In the meantime the issue between the parties as to the scope of their English law arbitration clause would have been resolved by this Court, the condition subject to which the charterers' pleaded their defence and counter-claim in the arbitration would have failed, and the charterers would be committed to an arbitration in which their collision claim will be adjudicated before the tribunal of their contractual choice. Why then should they be permitted to proceed, ex hypothesi and in my judgment in breach of their obligation to arbitrate, in Italy? No reason has been advanced, other than that they wish to relitigate the question of the arbitration agreement's scope in relation to their claim in Italy. No evidence has been put before me of any argument or interest under Italian law why an Italian Court would do other than stay the proceedings under the mandatory provisions of the New York Convention; nor has Mr. Simon suggested to me that the Italian Court would proceed to construe the arbitration clause other than as a matter of and by reference to English law. It is not as though some other issue has or even may have arisen in Italy, such as that the arbitration agreement is incapable of being performed (to refer to art. II of the New York Convention), or that the past history of the foreign proceedings could affect the foreign Court's decision (as in my view may have been the case in *The Golden Anne*). In such circumstances, where the charterers have failed in this Court as a matter of English law, and have not even raised a scintilla of an argument as to why their rights in Italy should be any different, I do not see why I should not conclude that their determination to press on in Italy is vexatious, and in my judgment it is. Moreover, so far as has been brought to my attention nothing has happened in Italy since the issue and service of the Italian Summons. This Court's injunction would therefore at this of all stages be of the least possible interference to the Italian Courts.

In these circumstances it is my hope and sincere belief that the Italian Courts would feel not at all perturbed if I said to the charterers: you have agreed to arbitrate the dispute; you have submitted to come to this Court to resolve your contention that you have not so agreed, but you have failed in that contention; you are now arbitrating these disputes and have pleaded them before the arbitrators; and yet you are seeking to put the owners in difficulties by proceedings abroad without providing any explanation at all of what legitimate interests you are there pursuing; and in my discretion I shall injunct you from doing so.

For these reasons there shall be an injunction to restrain the charterers accordingly.