LLOYD'S
LAW REPORTS

Editor: Miss M. M. D'SOUZA, LL.B., Barrister

COURT OF APPEAL

Feb. 14 and 15, 1995

DAVAL ACIERS D'USINOR ET DE SACILOR AND OTHERS

v.

ARMARE S.R.L.

("THE NERANO")

Before Lord Justice GLIDEWELL, Lord Justice SAVILLE and Lord Justice ALDOUS

Bill of lading — Arbitration clause — Incorporation — Stay of action — Plaintiffs not charterers of vessel — Bill of lading incorporated "all terms and conditions . . . and arbitration clause of the Charter-party" — Dispute between defendants and plaintiffs — Whether bill of lading incorporated arbitration clause — Whether defendants entitled to stay action.

Under a bill of lading dated Oct. 26, 1991 a consignment of 248 cylinder steel coils were shipped on board the defendants' ship *Nerano* at Fos in France for carriage to Marsa el Brega in Libya. The bill of lading was signed by Cargill International S.A. but contained an identity of carrier clause the effect of which was that the contract of carriage was initially between the first plaintiffs as shippers and the defendants as shipowners.

On the face of the bill of lading a clause provided:

> The conditions as per relevant charterparty dated 02.07.1990 are incorporated in this bill of lading and have precedence if there is a conflict. English Law and Jurisdiction applies.

Clause 1 of the conditions of carriage on the back of the document provided inter alia:

> All terms and conditions liberties exceptions and arbitration clause of the Charterparty, dated as overleaf, are herewith incorporated.

It was common ground that the charter-party referred to was a voyage charter in the Gencon form dated July 2, 1990 between Cargill as owners and the fourth plaintiffs Korf Shipping G.m.b.H. as charterers. The charter referred to a vessel to be nominated and was in effect a contract of affreightment for a number of voyages from Fos to Marsa el Brega. The charter provided inter alia:

> 24. The following to be stamped on all Bills of Lading under this contract: The conditions as per relevant Charter Party dated 2nd July 1990 are incorporated in this Bill of Lading and have precedence if there is a conflict. English Law and Jurisdiction applies.
>
> 36. That should any dispute arise between the Owners and Charterers the matter in dispute shall be determined in London England according to the Arbitration Acts, 1975 to 1979 and any amendments or modifications thereto and English law to govern.

The plaintiffs claimed damages in respect of alleged seawater damage and rusting said to have been caused to 71 of the coils. The writ was served on the defendants on Nov. 4, 1992.

The defendants contended that the contract of carriage contained in or evidenced by the bill of lading contained an arbitration clause and that they were entitled to a stay of the action under s. 1 of the Arbitration Act, 1975.

The plaintiffs submitted that the arbitration clause was not incorporated and that if it was it was not apt to submit disputes between the plaintiffs and defendants to arbitration because the plaintiffs were not charterers of the vessel.

The plaintiffs further contended that the defendants were not in any event entitled to a stay of the action on the ground that they had agreed to vary the contract by agreeing to the dispute being determined by the Court. Alternatively they argued that the defendants had waived their rights to rely on the arbitration clause or that they were estopped from doing so.

Held, by Q.B. (Adm. Ct.) (CLARKE, J.), that (1) in order to effect incorporation of an arbitration clause, the clause of incorporation in the bill of lading must expressly refer to the arbitration clause in the charter-party; the only possible exception to that principle was where there were general words in the bill of lading but the arbitration clause in the charter-party was wide enough on its true construction, without manipulation to include disputes under the bill of lading and between the parties to the bill of lading;

(2) cl. 36 of the charter expressly referred to any dispute between the owners and the charterers; it did

not therefore cover disputes between the owners and the parties to the contract contained in or evidenced by the bill of lading without some manipulation of its wording; the arbitration clause was not incorporated unless it was expressly referred to in the bill of lading; and the arbitration clause was expressly referred to in cl. 1 of the general conditions on the back of the bill of lading;

(3) the correct course was to give effect to all the provisions of the bill, if that attempt was made it led to the conclusion that effect could be given to both the clause on the front and the clause on the back of the bill of lading; there was some overlap but there was no conflict; the notion of English jurisdiction was not inconsistent with a submission to arbitration if only because the English Court retained a supervisory jurisdiction over the arbitration which according to cl. 30 was to take place in England; there was no reason to disregard the specific references in cl. 1 to the incorporation of the arbitration clause;

(4) the arbitration clause was incorporated, on the true construction of the contract contained in or evidenced by the bill of lading (including the arbitration clause in the charter-party incorporated in it) the parties to the bill of lading had agreed to submit their disputes to arbitration in London;

(5) on the evidence there was no agreement which could amount to a variation of the arbitration agreement in the bill of lading and no unequivocal representation of conduct which could form the basis of any waiver or estoppel; and there was nothing in the exchanges between the parties to suggest that the defendants intended to waive their right to apply for a stay or that they made any representation to that effect either by words or conduct; the defendants were entitled to a stay of the action under s. 1 of the Arbitration Act, 1975;

The plaintiffs appealed; the issue for decision being whether the relevant bill of lading contract contained an arbitration clause within the meaning of the Arbitration Act, 1975, s. 1, binding on them and if so whether the owners had lost the right to a stay under that Act.

Held, by C.A. (GIBSON, SAVILLE and ALDOUS, L.JJ.), that (1) looked at on its own, the provision on the front of the bill of lading which incorporated the conditions of the charter (which, it was common ground would not include the arbitration clause in the charter) and the reference to English jurisdiction could (in the absence of any reference to arbitration) only be a reference to the English Courts; however if the provisions was considered with cl. 1 on the back of the bill of lading a different meaning emerged; the provision on the face of the bill of lading did not expressly prohibit the incorporation of terms other than conditions from the charter, nor was the reference to English jurisdiction couched in language that excluded an English arbitration agreement which would ex hypothesi be subject to English jurisdiction; the two provisions read together were not inconsistent with each other (*see* p. 4, col. 1);

(2) the parties had not merely used general words of incorporation, they had expressly identified and specified the charter arbitration clause as something to be incorporated into their contract; by identifying and specifying the charter-party arbitration clause it was clear that the parties to the bill of lading contract did intend and agree to arbitration so that to give force to that intention and agreement the words in the clause had to be read and construed as applying to those parties (*see* p. 4, col. 2);

———The Rena K, [1979] 1 Lloyd's Rep. 545, *applied*.

———Mitsui Marine Corporation v. Hellenic Oil Trading Ltd., [1984] 2 Lloyd's Rep. 129, and *The Nai Matteoli*, [1988] 1 Lloyd' Rep. 452, *not followed*.

(3) the Court was engaged on the process of construing the words the parties had written down and said, in their context the words were to be given the meaning the law ascribed to them and the arbitration agreement did not thereby cease to be an agreement in writing if the words of the arbitration clause were to be manipulated or adapted (*see* p. 5, col. 1);

(4) as to waiver or estoppel, even if the defendants had promised to serve a defence by Sept. 30 (which they deny was the case) this did not amount to an agreement to accept the jurisdiction of the Admiralty Court (in other words to give up their right to a stay by reason of the arbitration clause); nor did the defendants, by so promising waive, or were estopped from seeking, a stay in the proceedings (*see* p. 5, col. 2, p. 6, col. 1);

(5) so far as the exchanges between the parties were concerned there was nothing to suggest that these were concerned with anything except the question of extensions of time and the reasonableness of the plaintiffs (if settlement negotiations were unfruitful) to get on with the prosecution of their cargo claims; on no view could the correspondence have been intended to deal with the arbitration questions; it was simply concerned with the extension of time for defence, and an agreement for such extension, without more could not amount to an agreement to abandon their right to a stay (*see* p. 6, cols. 1 and 2).

Appeal dismissed.

The following cases were referred to in the judgment of Lord Justice Saville:

Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd., (H.L.) [1958] 1 Lloyd's Rep. 73; [1959] A.C. 133;

Elizabeth H, The [1962] 1 Lloyd's Rep. 172;

Lawson v. Midland Travellers Ltd., (C.A.) [1993] 1 W.L.R. 735;

Mitsui Maritime Corporation v. Hellenic Oil Trading Ltd., (H.L.) [1984] 2 Lloyd's Rep. 129; [1984] A.C. 676;

Nai Matteoli, The [1988] 1 Lloyd's Rep. 452;

Overseas Pride, The [1993] 1 Lloyd's Rep. 126;

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

This was an appeal by the plaintiff cargo owners, Duval Aciers D'Usinor et de Sacilor, Dong Ah Consortium, Dong Ah Construction Co. Ltd. and Korf Shipping G.m.b.H. from the decision of Mr. Justice Clarke ([1994] 2 Lloyd's Rep. 50) granting the defendants, Armare S.r.l., a stay of the action brought by the plaintiffs for damage to their cargo on board the defendants' vessel *Nerano* on the ground that the contract of carriage contained in or evidenced by the bill of lading incorporated an arbitration clause.

Miss Belinda Bucknall, Q.C. and Mr. Nigel Gaisner (instructed by Messrs. Dres. Dabelstein & Bischoff) for the plaintiffs; Mr. Michael Beloff, Q.C. and Mr. Charles Sussex (instructed by Messrs. Clyde & Co.) for the defendants.

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

JUDGMENT

Lord Justice SAVILLE: The question in these proceedings is whether cargo claims advanced by the plaintiffs in the Admiralty Court against the owners of the motor vessel *Nerano*, in respect of the carriage of a cargo of some 3000 tonnes of steel coils from Fos in France to Marsa el Brega in Libya should be stayed under s. 1 of the Arbitration Act, 1975. The issues between the parties are whether the relevant bill of lading contract contained an arbitration clause within the meaning of this Act binding upon them, and if so whether the owners have lost the right to a stay under that Act. In the Admiralty Court Mr. Justice Clarke decided that the claims should be stayed (see [1994] 2 Lloyd's Rep. 50) and from that decision the plaintiffs appeal.

On the face of the bill of lading appear the following words in capital letters:

> THE CONDITIONS AS PER RELEVANT CHARTER PARTY DATED 02.07.1990 ARE INCORPORATED IN THIS BILL OF LADING AND HAVE PRECEDENCE IF THERE IS A CONFLICT. ENGLISH LAW AND JURISDICTION APPLIES.

The back of the bill of lading is headed "Conditions of Carriage". The first sentence of cl. 1 of these conditions is as follows:

> All terms and conditions, liberties, exceptions and arbitration clause of the Charter Party, dated as overleaf, are herewith incorporated.

It is common ground that the charter-party referred to in the bill of lading was one on the Gencon form dated July 2, 1990 and made between Cargill International S.A. of Antigua as owners and Korf Shipping, G.m.b.H. of Frankfurt as charterers. It is also common ground that the contract contained in or evidenced by the bill of lading was made with the true owners of the vessel, the defendants to these proceedings. It should also be noted that the charterers under the charter-party are named as fourth plaintiffs in the proceedings, but do not in fact advance any claim against the defendants.

The charter-party was expressed to be a contract of affreightment for the carriage of 98,400 tonnes of steel coils on a number of voyages from Fos (or other ports) to Marsa el Brega over a period of 60 months. The claims relate to one of these voyages.

Clause 24 of the charter-party provides that the master and/or owner are to authorize the charterers to issue and sign bills of lading on their behalf. The last sentence of this clause provides as follows:

> The following to be stamped on all Bills of Lading under this contract: The conditions as per relevant Charter Party dated 2nd July, 1990 are incorporated in this Bill of Lading and have precedence if there is a conflict. English law and Jurisdiction applies.

The arbitration clause in the charter-party is in the following terms:

> That should any dispute arise between the Owners and the Charterers the matter in dispute should be determined in London, England, according to the Arbitration Acts, 1950 to 1979 and any amendments or modifications thereto and English law to govern.

The defendant shipowners' submission is that this provision was incorporated into the bill of lading by the express words of incorporation of the charter-party arbitration clause in cl. 1 on the back of the bill of lading and that read in the context of the bill of lading contract the expression "the Charterers" must, to make any sense, be read as meaning the parties to the bill of lading contract with the shipowners.

The plaintiff cargo-owners' submission is that cl. 1 on the back of the bill of lading cannot stand with the quoted provision on the face of the bill of lading, for this only incorporates the "conditions" of the charter-party (which do not include the arbitration clause) and by its reference to English jurisdiction contains an agreement to refer disputes to the English Courts. Furthermore and in any event the cargo-owners submit that it is simply impermissible to "manipulate" the words of the charter-party arbitration clause so as to make them apply to disputes between parties other than the owners and the charterers.

The basic English rule for the construction of contracts of the present kind is to examine the words the parties have used in the context in which

they have used them, in order to try and ascertain objectively what bargain the parties intended to make. The contract must be looked at as a whole in its context, rather than seeking to construe provisions in isolation, for to do otherwise is in effect to shut one's eyes to what the parties themselves actually did.

In the present case, looked at on its own, the provision on the front of the bill of lading only incorporates the conditions of the charter-party (which it is common ground would not include the arbitration clause in the charter-party) and the reference to English jurisdiction could (in the absence of any reference to arbitration) only be a reference to the English Courts. To my mind, however, once this blinkered approach is discarded and the provision is considered together with cl. 1 in the back of the bill of lading, a different meaning emerges. The provision on the face of the bill of lading does not expressly prohibit the incorporation of terms other than conditions from the charter-party, nor is the reference to English jurisdiction couched in language that excludes an English arbitration agreement, which would ex hypothesi be subject to English jurisdiction. Thus there is room for the provisions on the back of the bill of lading to be read consistently with the provision on the front, even accepting that the latter is to be given more importance, since it seems more of an ad hoc term than the standard printed clauses on the back. In short, I do not accept that the two provisions (read together) are inconsistent with each other.

There remains the fact that cl. 1 on the back of the bill of lading seeks to incorporate an arbitration clause which on its face only applies to disputes between owners and charterers. In *The Rena K*, [1978] 1 Lloyd's Rep. 545, [1979] Q.B. 377, Mr. Justice Brandon, as he then was, took the view that when the parties to a bill of lading contract had expressly chosen to incorporate an arbitration clause from a charter-party, they must have intended and agreed to arbitration in accordance with that clause as the means of resolving their disputes, from which it followed that to give effect to that intention and agreement the words of the clause must be manipulated or adapted so that they covered disputes arising under the bills of lading contract. Much the same kind of reasoning may be found, of course, in the decision of the House of Lords in *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.*, [1958] 1 Lloyd's Rep. 73, [1959] A.C. 133, to the effect that the United States Carriage of Goods by Sea Act, 1936 was incorporated by express reference into a charter-party, notwithstanding that the Act itself was expressed to be inapplicable to charter-parties.

It is submitted by Miss Bucknall, Q.C. on behalf of the cargo-owners that this part of the decision in *The Rena K* cannot stand in the light of earlier authorities and the later judgment of the House of Lords in *Miramar Maritime Corporation v. Holborn Oil Trading Ltd.*, [1984] 2 Lloyd's Rep. 129, [1984] A.C. 676. I disagree. As Mr. Justice Brandon himself pointed out, an essential element in the earlier cases was that the words of incorporation were general words without specific reference to the arbitration clause in the charter-party, and I can find nothing in those cases which in any way conflicts with the reasoning in *The Rena K*. The later case in the House of Lords was concerned with demolishing the argument that there was some rule of construction to the effect that general words of incorporation of the terms of the charter-party brought into the bill of lading contract all the obligations imposed on the charterers germane to the shipment, carriage or delivery of the goods and (by changing the language of the charter) imposed those obligations on the bills of lading holders or consignees instead of or in addition to the charterers.

In that case the obligation in question was to pay demurrage. As Lord Diplock put it, no businessman who had not taken leave of his senses would intentionally enter into a bills of lading contract where his liability for demurrage would be outside his control and where such demurrage might well exceed the value of his goods; so that it is hardly surprising that the House of Lords would not be persuaded that general words of incorporation were sufficient to alter the words of the charter so as to produce this extraordinary result.

In the present case the parties have not merely used general words of incorporation. They have expressly identified the specified the charter-party arbitration clause as something to be incorporated into their contract. Such a clause does not impose unusual burdens on the parties: it is a common agreement in contracts of all kinds for the carriage of goods by sea. Thus none of the material considerations in the *Miramar* case applies in the present circumstances. On the contrary, by identifying and specifying the charter-party arbitration clause it seems to me to be clear that the parties to the bill of lading contract did intend and agree to arbitration, so that to give force to that intention and agreement the words in the clause must be read and construed as applying to those parties. Indeed it seems to me that it would be an extraordinary result if English law reached a different conclusion.

For these reasons I disagree with the views of Mr. Justice Gatehouse in *The Nai Matteini*, [1988] 1 Lloyd's Rep. 452 and prefer and adopt those of Mr. Justice Webster in *The Ioannis Pride*, [1991] 1 Lloyd's Rep. 126. It also follows that I agree with the reasoning and judgment of Mr. Justice Clarke on this point.

On behalf of the cargo-owners it was argued that if the words of the arbitration clause were to be manipulated or adapted, then the consequence is that the arbitration agreement as incorporated into the bill of lading is no longer an agreement in writing and is not subject to the Arbitration Act, 1975, which by s. 1 is confined to such agreements. Mr. Justice Clarke rejected this argument and so do I. As I have observed, the Court is engaged on the process of construing the words the parties have chosen and used. In their context the words must be given the meaning the law ascribes to them. The arbitration agreement does not thereby cease to be an agreement in writing.

I now turn to the question whether the owners have lost the right to a stay of the proceedings in the Admiralty Court.

The cargo the subject of the claims was discharged at the beginning of November, 1991. In September, 1992 the vessel was arrested in France and then released against club security. The writ was issued at the beginning of November, 1992. It was renewed in order to enable service to be effected in Italy, which took place in March, 1993. In this month the points of claim were served, but soon afterwards, since the possibility of settlement negotiations existed, the plaintiffs' solicitors agreed with the defendants' solicitors to grant a general extension of time for points of defence, terminable on seven days notice, which was not to be given before a without prejudice meeting, provided this took place in the near future.

At the beginning of July, the plaintiffs' solicitors gave notice to the defendants' solicitors calling for points of defence within seven days, since no without prejudice meeting had taken place. The defendants' solicitors asked for another seven days to try and arrange a meeting and a further seven days thereafter should this not be possible, and the plaintiffs' solicitors in effect agreed to this.

A meeting was arranged for mid-August, but the plaintiffs' solicitors could not manage those dates and suggested further dates in mid-September. On Aug. 19 the plaintiffs' solicitors notified the defendants' solicitors that the extensions granted would come to an end in seven days, (i.e. on or about Aug. 26) but said that they would take no point if the defence was served by Sept. 3. They expressed the view that a defence would clarify the issues between them and assist negotiations.

According to the plaintiffs' solicitors, on Aug. 27 in a telephone conversation, the defendants' solicitors informed them that they now preferred to put in a defence; that they had no instructions about a without prejudice meeting; that their client was on holiday until the middle of the following week; and that they would therefore get Counsel to draft a defence and would serve it. This version of what transpired is challenged by the defendants' solicitors.

The plaintiffs' solicitors also assert that on Aug. 31, the defendants' solicitors telephoned them and a meeting was arranged for Sept. 16. The plaintiffs' solicitors say that it was also agreed that if there was no settlement the defence would be served on Sept. 30. On Sept. 1 the plaintiffs' solicitors sent the defendants' solicitors a fax in the following terms:

> Further to our telephone conversation yesterday fixing a w/p meeting for the 16th September, we confirm our agreement that your clients serve a Defence by the 30th September 1993.

On Sept. 16 there was a meeting at which the defendants' solicitors raised for the first time the point that the bill of lading was subject to an arbitration clause and that accordingly the plaintiffs had started their proceedings in the wrong forum. The plaintiffs' solicitors reply to this was that the defendants had agreed to serve a defence in the action by Sept. 30. On the same day by fax the defendants' solicitors challenged the assertion that they had agreed to serve a defence, and said that all that had been agreed was an extension of time for the defence until Sept. 30. On Sept. 29 the defendants issued a summons for a stay under the 1975 Act. It was this summons which came before Mr. Justice Clarke.

It should be noted at this point that if the defendants were entitled to a stay, then on the face of it they are very likely to have a defence to the cargo claims, for the bills of lading contract was subject to the Hague-Visby Rules, requiring suit to be brought within one year from the date of discharge. The action, although brought within this period, would in the absence of other factors in all probability not suffice for these purposes if the matter should have been referred to arbitration.

It seems to me that the highest that the plaintiffs can put their case on this point is that since there was an agreement between the parties for the defendants to serve their defence by Sept. 30, 1993, either the defendants had thereby implicitly agreed, in effect, to accept the jurisdiction of the Admiralty Court (in other words to give up their right to a stay by reason of the arbitration clause) or the defendants are otherwise precluded by the doctrines of waiver or estoppel from challenging that jurisdiction by relying upon the arbitration clause for the purposes of obtaining a stay.

Even assuming that the defendants had promised to serve a defence by Sept. 30 (which they deny was the case) I am not persuaded either that this amounted to an agreement to the effect suggested,

or that the defendants by so promising waived or are estopped from seeking a stay in the proceedings.

As the plaintiffs' solicitors themselves are at some pains to point out, it was not until Sept. 16, 1993 that the defendants raised the point about a stay, before which no one had suggested that there was any question over the jurisdiction of the Admiralty Court to entertain the cargo claims. So far as the exchanges between the parties are concerned, therefore, there is nothing to indicate that these were concerned with anything except the question of extensions of time and the expressed desire of the plaintiffs (if settlement negotiations were unfruitful) to get on with the prosecution of the cargo claims. Thus looking at the matter objectively it seems to me that on no view could the suggested agreement have been intended to deal with jurisdictional questions; in its context, it was simply concerned with an extension of time for defence. In other words, the promise of the defendants' solicitors to serve a defence (if such a promise was given) could in its context only amount to an agreement that if a defence was not forthcoming the plaintiffs would be entitled to treat the defendants as in default. In view of the fact that under the 1975 Act the right to a stay is only lost if the applicant serves a defence or takes some other step in the proceedings, it seems to me that an agreement for an extension of time for defence, without more, could not have amounted to an agreement to abandon the right to a stay. Much the same considerations apply to the Rules of the Supreme Court relating to challenges to the jurisdiction: see O. 12, r. 8 and *Lawson v. Midland Travellers Ltd.*, [1993] 1 W.L.R. 735.

Miss Bucknall, in the course of her argument on this point, placed reliance on the decision in *The Elizabeth H.* [1962] 1 Lloyd's Rep. 172 in support of her submission that there had been an agreement to the jurisdiction of the Admiralty Court. To my mind, however, that case is clearly distinguishable because (apart from anything else) unlike the present case the defendants there had expressly agreed to accept service of English proceedings.

So far as waiver or estoppel is concerned, there is nothing to indicate whether or not the plaintiffs' solicitors were concerned about the possibility that the defendants might seek to rely upon the arbitration clause. It is possible that they were and that by asking for a defence they were trying (without letting on that this was their aim) to get the defendants to serve one and thereby lose the right to a stay under s. 1 of the 1975 Act. If this is the case, then they did not succeed in that endeavour, nor can there be any question of a waiver or estoppel. If on the other hand the plaintiffs' solicitors had not thought of the point, then they can hardly suggest either that they were led to believe that no jurisdictional point would be taken, or that the exchanges amounted to a waiver of the right to a stay. In this context, of course, waiver and estoppel are really one and the same thing and depend upon the same requirement of an unequivocal representation reasonably relied upon by and to the detriment of the representee.

For these reasons, I consider that Mr. Justice Clarke was also right to reject this argument. I would accordingly dismiss this appeal.

Lord Justice ALDOUS: I agree.

Lord Justice GIBEWELL: I also agree and there is nothing I wish to add.

[Appeal dismissed with costs of defendants to have costs of and consequent on the respondent's application to adduce further evidence. Leave to appeal to the House of Lords refused.]

COURT OF APPEAL

Mar. 22, 23 and 24, May 20, 1994

GRUPO TORRAS S.A. AND TORRAS HOSTENCH LONDON LTD.
v.
SHEIKH FAHAD MOHAMMED AL SABAH AND OTHERS

Before Lord Justice STUART-SMITH, Lord Justice HOBHOUSE and Lord Justice MILLETT

Practice — Application to set aside — Stay of action — Plaintiffs claimed damages for conspiracy, moneys allegedly due under constructive trusts and damages for breaches of duties relating to four transactions — Whether plaintiffs' claims should be tried — Application of arts. 16, 21, 22 and 27 of the Brussels Convention and R.S.C., O. 11 — Whether action should be stayed pursuant to arbitration clause.

The plaintiffs were a Spanish company (GT) and its English subsidiary (THL) and they claimed against 22 defendants damages for conspiracy or conspiracies, moneys allegedly due under constructive trusts and damages for breaches of directors' duties relating to four transactions identified as Crouseo, Oakthorn, Pinciroo and Wardbase. Some defendants were said to have been involved in all, others in only some or one of such transactions.

The defendants applied for the English proceedings to be set aside or stayed in favour of Spain. They argued that the Spanish Court had exclusive jurisdiction under art. 16(2) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Convention) on the basis that the proceedings had, as their object, the decisions (or validity of decisions) of organs of GT and should therefore be determined in Spain. If this was not so, then there were said to be pending in Spain proceedings (the Quail proceedings and Spanish criminal proceedings) of which the Spanish Court were first seised and the English Courts should either decline or stay the present proceedings under art. 21 of the Convention. They further argued that art. 22 applied to like effect.

The defendants further submitted that the Court should exercise an inherent jurisdiction to stay or decline the English action having regard to the risk that the English action or any judgment given in it might be regarded in Spain as inconsistent with the pursuit of recovery of any Spanish proceedings and unenforceable under art. 27 of the Convention.

On behalf of certain of the defendants it was argued that the plaintiffs had failed to plead, or by their evidence to establish any serious issues to be tried to justify proceedings either under arts. 5(3) and 6(1) of the Convention or under R.S.C., O. 11. They submitted that neither of the plaintiffs had established any serious case that they had suffered any loss recoverable, whether in damages or pursuant to any constructive trust, there was no serious case of conspiracy by anyone at least in relation to the plaintiffs, and there was in any event no serious case of any conspiracy to which any of those defendants were party.

The defendants also contended that as against any defendants over whom jurisdiction could only be exercised, if at all, under O. 11, (the O. 11 defendants) the plaintiffs were required by O. 11, r. 1(1)(c) to show a good arguable case as against the defendants duly served within the jurisdiction as well as a good arguable case of damage sustained or which resulted from an act committed within the jurisdiction under O. 11, r. 1(1)(f). The defendants further argued that the plaintiffs had failed to justify their choice of English forum as clearly more appropriate than the Spanish jurisdiction for the resolution of any such issue or to satisfy the requirement that it should sufficiently appear to the Court that the case was a proper one for service out of the jurisdiction. There was a further argument that the leave given to serve out should be set aside for non-disclosure or material misstatement in the affidavit sworn on Apr. 20, 1993 by which O. 11 leave was obtained.

The 11th defendants (Coll & Co.), the 18th defendant (Mr. Coll) and the 15th defendants (Wardbase) sought a stay under s. 1 of the Arbitration Act, 1975 in respect of the English action on the basis of arbitration clauses which, they argued, embraced the present claims. It was common ground that the dispute between GT and Coll & Co. fell within an arbitration clause in a contract for consultancy services dated Nov. 6, 1989 but there was an issue whether the clause could apply to THL's claim against Coll & Co. There was also an issue whether it could avail Mr. Coll in respect of the claims made by either plaintiffs. As regards Wardbase, there was an arbitration clause in a contract purported to be between Torrapapel S.A., a paper making subsidiary of GT, and the issue was whether that clause could apply to either plaintiffs' claim against Wardbase.

During the hearing the plaintiffs formulated amended points of claim to which they purported to give effect without leave under R.S.C., O. 20, r. 5 and the issue raised was as to the propriety of the purported amendments.

——*Held*, by Q.B. (Com. Ct.) (MANCE, J.), that (1) in each of the three transactions i.e. Crouseo, Oakthorn and Pinciroo there was a serious case for arguing that there was a conspiracy and in the case of those who were directors, breach of duty as directors, as against GT and/or THL; only in relation to the Wardbase transaction was it clear that, THL was used as a mere conduit to make a payment for GT and there was a serious case for saying that there was a conspiracy and breach of duty as against GR but not against THL;

(2) the plaintiffs had a serious case for trial to the effect that the capitalization of GT (by which GT's debt to a holding company, Kolmaro Holding B.V., was converted into share capital) was only conceived at a time well after any losses on the Crouseo, Oakthorn and Pinciroo transactions had arisen;

(3) there was a properly pleaded and serious case for trial for breach of duty by the defendants (Messrs. Folchi, Coll and Russell) who had acted as professional

LEVEL 1 - 1 OF 2 CASES

DAVAL ACIERS D'USINOR ET DE SACILOR AND OTHERS v ARMARE SRL

(THE "NERANO")

COURT OF APPEAL (CIVIL DIVISION)

[1996] 1 Lloyd's Rep 1

HEARING-DATES: 14, 15 February 1995

15 February 1995 CATCHWORDS: Bill of lading Arbitration clause – Incorporation – Stay of action – Plaintiffs not charterers of vessel – Bill of lading incorporated "all terms and conditions . . . and arbitration clause of the Charterparty" – Dispute between defendants and plaintiffs – Whether bill of lading incorporated arbitration clause – Whether defendants entitled to stay action. HEADNOTE: Under a bill of lading dated Oct 26, 1991 a consignment of 248 cylinder steel coils were shipped on board the defendants' ship Nerano at Fos in France for carriage to Marsa el Brega in Libya. The bill of lading was signed by Cargill International SA but contained an identity of carrier clause the effect of which was that the contract of carriage was initially between the first plaintiffs as shippers and the defendants as shipowners.

On the face of the bill of lading a clause provided: The conditions as per relevant charterparty dated 02.07.1990 are incorporated in this bill of lading and have precedence if there is a conflict. English Law and Jurisdiction applies.

Clause 1 of the conditions of carriage on the back of the document provided inter alia:

All terms and conditions liberties exceptions and arbitration clause of the Charterparty, dated as overleaf, are herewith incorporated.

It was common ground that the charter-party referred to was a voyage charter in the Gencon form dated July 2, 1990 between Cargill as owners and the fourth plaintiffs Korf Shipping Gmbh as charterers. The charter referred to a vessel to be nominated and was in effect a contract of affreightment for a number of voyages from Fos to Marsa el Brega. The charter provided inter alia:

24. The following to be stamped on all Bills of Lading under this contract: The conditions as per relevant Charter Party dated 2nd July 1990 are incorporated in this Bill of Lading and have precedence if there is a conflict. English Law and Jurisdiction applies.

36. That should any dispute arise between the Owners and Charterers the matter in dispute shall be determined in London England according to the Arbitration Acts, 1975 to 1979 and any amendments or modifications thereto and English law to govern.

The plaintiffs claimed damages in respect of alleged seawater damage and rusting said to have been caused to 71 of the cols. The writ was served on

 the defendants on Nov 4, 1992.

The defendants contended that the contract of carriage contained in or evidenced by the bill of lading contained an arbitration clause and that they were entitled to a stay of the action under s 1 of the Arbitration Act, 1975.

The plaintiffs submitted that the arbitration clause was not incorporated and that if it was it was not apt to submit disputes between the plaintiffs and defendants to arbitration because the plaintiffs were not charterers of the vessel.

The plaintiffs further contended that the defendants were not in any event entitled to a stay of the action on the ground that they had agreed to vary the contract by agreeing to the dispute being determined by the Court.

Alternatively they argued that the defendants had waived their rights to rely on the arbitration clause or that they were estopped from doing so.

– Held, by QB (Adm Ct) (CLARKE, J), that in order to effect incorporation of an arbitration clause, the clause of incorporation in the bill of lading must expressly refer to the arbitration clause in the charter-party; the only possible exception to that principle was where there were general words in the bill of lading but the arbitration clause in the charter-party was wide enough on its true construction without any verbal manipulation to include disputes under the bill of lading and between the parties to the bill of lading;

(2) cl 36 of the charter expressly referred to any dispute between the owners and the charterers; it did not therefore cover disputes between the owners and the parties to the contract contained in or evidenced by the bill of lading without some manipulation of its wording; the arbitration clause was not incorporated unless it was expressly referred to in the bill of lading; and the arbitration clause was expressly referred to in cl 1 of the general conditions on the back of the bill of lading;

(3) the correct course was to give effect to all the provisions of the bill; if that attempt was made it led to the conclusion that effect could be given to both the clause on the front and the clause on the back of the bill of lading; there was some overlap but there was no conflict; the notion of English jurisdiction was not inconsistent with a submission to arbitration if only because the English Court retained a supervisory jurisdiction over the arbitration which according to cl 36 was to take place in England; there was no reason to disregard the specific references in cl 1 to the incorporation of the arbitration clause;

(4) the arbitration clause was incorporated; on the true construction of the contract contained in or evidenced by the bill of lading (including the arbitration clause in the charter-party incorporated in it) the parties to the bill of lading had agreed to submit their disputes to arbitration in London;

(5) on the evidence there was no agreement which could amount to a variation of the arbitration agreement in the bill of lading and no unequivocal representation of conduct which could form the basis of any waiver or estoppel; and there was nothing in the exchanges between the parties to suggest that the defendants intended to waive their right to apply for a stay or that they made any representation to that effect either by words or conduct; the defendants PAGE 3

[1996] 1 Lloyd's Rep 1 were entitled to a stay of the action under s 1 of the Arbitration Act, 1975;

The plaintiffs appealed, the issue for decision being whether the relevant bill of lading contract contained an arbitration clause within the meaning of the Arbitration Act, 1975. s l, binding on them and if so whether the owners had lost the right to a stay under that Act.

– Held, by CA (GLIDEWELL, SAVILLE and ALDOUS, LJJ), that (1) looked at on its own, the provision on the front of the bill of lading only incorporated the conditions of the charter (which it was common ground would not include the arbitration clause in the charter) and the reference to English jurisdiction could (in the absence of any reference to arbitration) only be a reference to the English Courts; however if the provisions was considered with cl 1 on the back of the bill of lading a different meaning emerged; the provision on the face of the bill of lading did not expressly prohibit the incorporation of terms other than conditions from the charter,

nor was the reference to English jurisdiction couched in language that excluded an English arbitration agreement which would ex hypothesi be subject to English jurisdiction; the two provisions read together were not inconsistent with each other (see p 4, col 1);

(2) the parties had not merely used general words of incorporation, they had expressly identified and specified the charter arbitration clause as something to be incorporated into their contract; by identifying and specifying the charter-party arbitration clause it was clear that the parties to the bill of lading contract did intend and agree to arbitration so that to give force to that intention and agreement the words in the clause had to be read and construed as applying to those parties (see p 4, col 2);

– The Rena K, [1978] 1 Lloyd's Rep 545; applied.

– Miramar Maritime Corporation v Holborn Oil Trading Ltd, [1984] 2 Lloyd's Rep 129, and The Nai Matteini, [1988] 1 Lloyd' Rep 452, not followed.

(3) the Court was engaged on the process of construing the words the parties had written down and used; in their context the words were to be given the meaning the law ascribed to them and the arbitration agreement did not thereby cease to be an agreement in writing if the words of the arbitration clause were to be manipulated or adapted (see p 5, col 1);

(4) as to waiver or estoppel, even if the defendants had promised to serve a defence by Sept 30 (which they deny was the case) this did not amount to an agreement to accept the jurisdiction of the Admiralty Court (in other words to give up their right to a stay by reason of the arbitration clause); nor did the defendants, by so promising waive, or were estopped from seeking, a stay in the proceedings (see p 5, col 2; p 6. col 1);

(5) so far as the exchanges between the parties were concerned there was nothing to indicate that these were concerned with anything except the question of extensions of time and the expressed desire of the plaintiffs (if settlement negotiations were unfruitful) to get on with the prosecution of the cargo claims; on no view could the suggested agreement have been intended to deal with jurisdictional questions; it was simply concerned with an extension of time for defence; and an agreement for such extension, without more could not amount to an agreement to abandon their right to a stay (see p 6, cols 1 and 2).

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[1996] 1 Lloyd's Rep 1

Appeal dismissed, CASES-REF-TO: Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd, (HL) [1958] 1 Lloyd's Rep 73; [1959] AC 133; Elizabeth 4, The [1962] 1 Lloyd's Rep 172; Lawson v Midland Travellers Ltd, (CA) [1993] 1 WLR 735; Miramar Maritime Corporation v Holborn Oil Trading Ltd, (HL) [1984] 2 Lloyd's Rep 129; [1984] AC 676; Nai Matteini, The [1988] 1 Lloyd's Rep 452; Oinoussin Pride, The [1991] 1 Lloyd's Rep 126; Rena K, The [1978] 1 Lloyd's Rep 545; [1979] QB 377. INTRODUCTION: This was an appeal by the plaintiff cargo-owners, Daval Aciers D'Usinor et de Sacilor, Dong Ah Consortium, Dong Ah Construction Co Ltd and Korf Shipping GmbH from the decision of Mr Justice Clarke ([1994] 2 Lloyd's Rep 50) granting the defendants, Armare Srl, a stay of the action brought by the plaintiffs for damage to their cargo on board the defendants' vessel Nerano on, the ground that the contract of carriage contained in or evidenced by the bill of lading incorporated an arbitration clause. COUNSEL: Miss Belinda Bucknall, QC and Mr Nigel Cooper for the plaintiffs; Mr Michael Beloff, QC and Mr Charles Sussex for the defendants.

The further facts are stated in the judgment of Lord Justice Saville PANEL: GLIDEWELL, SAVILLE, ALDOUS LJJ JUDGMENTBY-1: SAVILLE LJ JUDGMENT-1: SAVILLE LJ: The question in these proceedings is whether cargo claims advanced by the plaintiffs in the Admiralty Court against the owners of the motor vessel Nerano, in respect of the carriage of a cargo of some 3000 tonnes of steel coils from Fos in France to Marsa el Brega in Libya should be stayed under s 1 of the

Arbitration Act, 1975. The issues between the parties are whether the relevant bill of lading contract contained an arbitration clause within the meaning of this Act binding upon them, and if so whether the owners have lost the right to a stay under that Act. In the Admiralty Court Mr Justice Clarke decided that the claims should be stayed (see [1994] 2 Lloyd's Rep 50) and from that decision the plaintiffs appeal.

On the face of the bill of lading appear the following words in capital letters:

THE CONDTIONS AS PER RELEVANT CHARTER PARTY DATED 02.07.1990 ARE INCORPORATED IN THIS BILL OF LADING AND HAVE PRECEDENCE IF THERE IS A CONFLICT. ENGLISH LAW AND JURISDICTION APPLIES.

The back of the bill of lading is headed "Conditions of Carriage". The first sentence of cl 1 of these conditions is as follows:

All terms and conditions, liberties, exceptions and arbitration clause of the Charter Party, dated as overleaf, are herewith incorporated.

It is common ground that the charter-party referred to in the bill of lading was one on the Gencon form dated July 2, 1990 and made between Cargill International SA of Antigua as owners and Korf Shipping, Gmbh of Frankfurt as charterers. It is also common ground that the contract contained in or evidenced by the bill of lading was made with the true owners of the vessel, the defendants to these proceedings. It should also be noted that the charterers under the charter-party are named as fourth plaintiffs in the proceedings, but do not in fact advance any claim against the defendants.

The charter-party was expressed to be a contract of affreightment for the carriage of 98,400 tonnes of steel coils on a number of voyages from Fos (or other ports) to Marsa el Brega over a period of 60 months. The claims relate to one of these voyages.

Clause 24 of the charter-party provides that the master and/or owner are to authorize the charterers to issue and sign bills of lading on their behalf. The last sentence of this clause provides as follows:

The following to be stamped on all Bills of Lading under this contract: The conditions as per relevant Charter Party dated 2nd July, 1990 are incorporated in this Bill of Lading and have precedence if there is a conflict. English law and Jurisdiction applies.

The arbitration clause in the charter-party is in the following terms:

That should any dispute arise between the Owners and the Charterers the matter in dispute should be determined in London, England, according to the Arbitration Acts, 1950 to 1979 and any amendments or modifications thereto and English law to govern.

The defendant shipowners' submission is that this provision was incorporated into the bill of lading by the express words of incorporation of the charterparty arbitration clause in cl 1 on the back of the bill of lading and that read in the context of the bill of lading contract the expression "the Charterers" must, to make any sense, be read as meaning the parties to the bill of lading contract with the shipowners.

The plaintiff cargo-owners submission is that cl 1 on the back of the bill of lading cannot stand with the quoted provision on the face of the bill of lading, for this only incorporates the "conditions" of the charter-party (which do not include the arbitration clause) and by its reference to English jurisdiction contains an agreement to refer disputes to the English Courts. Furthermore and in any event the cargo-owners submit that it is simply impermissible to "manipulate" the words of the charter-party arbitration clause so as to make them apply to disputes between parties other than the owners and the charterers.

The basic English rule for the construction of contracts of the present kind is to examine the words the parties have used in the context in which they have used them, in order to try and ascertain objectively what bargain the parties intended to

make. The contract must be looked at as a whole in its context, rather than seeking to construe provisions in isolation, for to do otherwise is in effect to shut one's eyes to what the parties themselves actually did.

In the present case, looked at on its own, the provision on the front of the bill of lading only incorporates the conditions of the charter-party (which it is common ground would not include the arbitration clause in the charter-party) and the reference to English jurisdiction could (in the absence of any reference to arbitration) only be a reference to the English Courts. To my mind, however, once this blinkered approach is discarded and the provision is considered together with cl 1 in the back of the bill of lading, a different meaning emerges. The provision on the face of the bill of lading does not expressly prohibit the incorporation of terms other than conditions from the charterparty, nor is the reference to English jurisdiction couched in language that excludes an English arbitration agreement, which would ex hypothesi be subject to English jurisdiction. Thus there is room for the provisions on the back of the bill of lading to be read consistently with the provision on the front, even accepting that the latter is to be given more importance, since it seems more of an ad hoc term than the standard printed clauses on the back. In short, I do not accept that the two provisions (read together) are inconsistent with each other.

There remains the fact that cl 1 on the back of the bill of lading seeks to incorporate an arbitration clause which on its face only applies to disputes between owners and charterers. In The Rena K, [1978] 1 Lloyd's Rep 545; [1979] QB 377, Mr Justice Brandon, as he then was, took the view that when the parties to a bill of lading contract had expressly chosen to incorporate an arbitration clause from a charter-party, they must have intended and agreed to arbitration in accordance with that clause as the means of resolving their disputes; from which it followed that to give effect to that intention and agreement the words of the clause must be manipulated or adapted so that they covered disputes arising under the bill of lading contract. Much the same kind of reasoning is to be found of course, in the decision of the House of Lords in Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd, [1958] 1 Lloyd's Rep 73; [1959] AC 133, to the effect that the United States Carriage of Goods by Sea Act, 1936 was incorporated by express reference into a charterparty, notwithstanding that the Act itself was expressed to be inapplicable to charter-parties.

It is submitted by Miss Bucknall, QC on behalf of the cargo-owners that this part of the decision in The Rena K cannot stand in the light of earlier authorities and the later judgment of the House of Lords in Miramar Maritime Corporation v Holborn Oil Trading Ltd, [1984] 2 Lloyd's Rep 129; [1984] AC 676. I disagree. As Mr Justice Brandon himself pointed out, an essential element in the earlier cases was that the words of incorporation were general words without specific reference to the arbitration clause in the charter-party, and I can find nothing in those cases which in any way conflicts with the reasoning in The Rena K. The later case in the House of Lords was concerned with demolishing the argument that there was some rule of construction to the effect that general words of incorporation of the terms of the charter-party brought into the bill of lading contract all the obligations imposed on the charterers germane to the shipment, carriage or delivery of the goods and (by changing the language of the charter) imposed those obligations on the bills of lading holders or consignees instead of or in addition to the charterers.

In that case the obligation in question was to pay demurrage. As Lord Diplock put it, no businessman who had not taken leave of his senses would intentionally enter into a bills of lading contract where his liability for demurrage would be out of his control and where such demurrage might well exceed the value of his goods; so that it is hardly surprising that the House of Lords could not be persuaded that general words of incorporation were sufficient to

[1996] 1 Lloyd's Rep 1 alter the words of the charter so as to produce this extraordinary result.

In the present case the parties have not merely used general words of incorporation. They have expressly identified and specified the charter-party arbitration clause as something to be incorporated into their contract. Such a clause does not impose unusual burdens on the parties: it is a common agreement in contracts of all kinds for the carriage of goods by sea. Thus none of the material considerations in the Miramar case applies in the present circumstances. On the contrary, by identifying and specifying the charter-party arbitration clause it seems to me to be clear that the parties to the bill of lading contract did intend and agree to arbitration, so that to give force to that intention and agreement the words in the clause must be read and construed as applying to those parties. Indeed it seems to me that it would be an extraordinary result if English law reached a different conclusion.

For these reasons I disagree with the views of Mr Justice Gatehouse in The Nai Matteini, [1988] 1 Lloyd's Rep 452 and prefer and adopt those of Mr Justice Webster in The Oinoussin Pride, [1991] 1 Lloyd's Rep 126. It also follows that I agree with the reasoning and judgment of Mr Justice Clarke on this point.

On behalf of the cargo-owners it was argued that if the words of the arbitration clause are to be manipulated or adapted, then the consequence is that the arbitration agreement as incorporated into the bill of lading is no longer an agreement in writing and is not subject to s 1 of the Arbitration Act, 1975, which by s 5 is confined to such agreements. Mr Justice Clarke rejected this argument and so do I. As the Judge observed, the Court is engaged on the process of construing the words the parties have written down and used. In their context the words are to be given the meaning the law ascribes to them. The arbitration agreement does not thereby cease to be an agreement in writing.

I now turn to the question whether the owners have lost the right to a stay of the proceedings in the Admiralty Court.

The cargo the subject of the claims was discharged at the beginning of November, 1991. In September, 1992 the vessel was arrested in France and then released against club security. The writ was issued at the beginning of November, 1992. It was renewed in order to enable service to be effected in Italy, which took place in March, 1993. In this month the points of claim were served, but soon afterwards, since the possibility of settlement negotiations existed, the plaintiffs' solicitors agreed with the defendants' solicitors to grant a general extension of time for points of defence, terminable on seven days notice, which was not to be given before a without prejudice meeting, provided this took place in the near future.

At the beginning of July, the plaintiffs' solicitors gave notice to the defendants' solicitors calling for points of defence within seven days, since no without prejudice meeting had taken place. The defendants' solicitors asked for another seven days to try and arrange a meeting and a further seven days thereafter should this not be possible, and the plaintiffs' solicitors in effect agreed to this.

A meeting was arranged for mid-August, but the plaintiffs' solicitors could not manage those dates and suggested further dates in mid-September. On Aug 19 the plaintiffs' solicitors notified the defendants' solicitors that the extensions granted would come to an end in seven days, (ie on or about Aug 26)

[1996] 1 Lloyd's Rep 1 but said that they would take no point if the defence was served by Sept 3. They expressed the view that a defence would clarify the issues between them and assist negotiations.

According to the plaintiffs' solicitors, on Aug 27 in a telephone conversation, the defendants' solicitors informed them that they now preferred to put in a defence; that they had no instructions about a without prejudice meeting; that their client was on holiday until the middle of the following week; and that they would therefore get

Counsel to draft a defence and would serve it. This version of what transpired is challenged by the defendants' solicitors.

The plaintiffs' solicitors also assert that on Aug 31, the defendants' solicitors telephoned them and a meeting was arranged for Sept 16. The plaintiffs' solicitors say that it was also agreed that if there was no settlement the defence would be served on Sept 30. On Sept 1 the plaintiffs' solicitors sent the defendants' solicitors a fax in the following terms:

Further to our telephone conversation yesterday fixing a w/p meeting for the 16th September, we confirm our agreement that your clients serve a Defence by the 30th September 1993.

On Sept 16 there was a meeting at which the defendants' solicitors raised for the first time the point that the bill of lading was subject to an arbitration clause and that accordingly the plaintiffs had started their proceedings in the wrong forum. The plaintiffs' solicitors reply to this was that the defendants had agreed to serve a defence in the action by Sept 30. On the same day by fax the defendants' solicitors challenged the assertion that they had agreed to serve a defence, and said that all that had been agreed was an extension of time for the defence until Sept 30. On Sept 29 the defendants issued a summons for a stay under the 1975 Act. It was this summons which came before Mr Justice Clarke.

It should be noted at this point that if the defendants were entitled to a stay, then on the face of it they are very likely to have a defence to the cargo claims, for the bills of lading contract was subject to the Hague-Visby Rules, requiring suit to be brought within one year from the date of discharge. The action, although brought within this period, would in the absence of other factors in all probability not suffice for these purposes if the matter should have been referred to arbitration.

It seems to me that the highest that the plaintiffs can put their case on this point is that since there was an agreement between the parties for the defendants to serve their defence by Sept 30, 1993, either the defendants had thereby implicitly agreed, in effect, to accept the jurisdiction of the Admiralty Court (in other words to give up their right to a stay by reason of the arbitration clause) or the defendants are otherwise precluded by the doctrines of waiver or estoppel from challenging that jurisdiction by relying upon the arbitration clause for the purposes of obtaining a stay.

Even assuming that the defendants had promised to serve a defence by Sept 30 (which they deny was the case) I am not persuaded either that this amounted to an agreement to the effect suggested, or that the defendants by so promising waived or are estopped from seeking a stay in the proceedings.

As the plaintiffs' solicitors themselves are at some pains to point out, it was not until Sept 16, 1993 that the defendants raised the point about a stay, before which no one had suggested that there was any question over the jurisdiction of the Admiralty Court to entertain the cargo claims. So far as the exchanges between the parties are concerned, therefore, there is nothing to indicate that these were concerned with anything except the question of extensions of time and the expressed desire of the plaintiffs (if settlement negotiations were unfruitful) to get on with the prosecution of the cargo claims. Thus looking at the matter objectively it seems to me that on no view could the suggested agreement have been intended to deal with jurisdictional questions; in its context, it was simply concerned with an extension of time for defence. In other words, the promise of the defendants' solicitors to serve a defence (if such a promise was given) could in its context only amount to an agreement that if a defence was not forthcoming the plaintiffs would be entitled to treat the defendants as in default. In view of the fact that under the 1975 Act the right to a stay is only lost if the applicant serves a defence or takes some other step in the proceedings, it seems to me that an agreement for an extension of time for defence, without more, could not have amounted to an agreement to abandon the right to a stay. Much the same considerations apply to the Rules of the Supreme

Court relating to challenges to the jurisdiction: see O 12, r 8 and Lawson v Midland Travellers Ltd, [1993] 1 WLR 735.

Miss Bucknall, in the course of her argument on this point, placed reliance on the decision in The Elizabeth H, [1962] 1 Lloyd's Rep 172 in support of her submission that there had been an agreement to the jurisdiction of the Admiralty Court. To my mind, however, that case is clearly distinguishable because (apart from anything else) unlike the present case the defendants there had expressly agreed to accept service of English proceedings.

So far as waiver or estoppel is concerned, there is nothing to indicate whether or not the plaintiffs' solicitors were concerned about the possibility that the defendants might seek to rely upon the arbitration clause. It is possible that they were and that by asking for a defence they were trying (without letting on that this was their aim) to get the defendants to serve one and thereby lose the right to a stay under s 1 of the 1975 Act. If this is the case, then they did not succeed in that endeavour, nor can there be any question of a waiver or estoppel. If on the other hand the plaintiffs' solicitors had not thought of the point, then they can hardly suggest either that they were led to believe that no jurisdictional point would be taken, or that the exchanges amounted to a waiver of the right to a stay. In this context, of course, waiver and estoppel are really one and the same thing and depend upon the same requirement of an unequivocal representation reasonably relied upon by and to the detriment of the representee.

For these reasons, I consider that Mr Justice Clarke was also right to reject this argument. I would accordingly dismiss this appeal. JUDGMENTBY-2: ALDOUS LJ JUDGMENT-2: ALDOUS LJ: I agree. JUDGMENTBY-3: GLIDEWELL LJ

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[1996] 1 Lloyd's Rep 1 JUDGMENT-3: GLIDEWELL LJ: I also agree and there is nothing I wish to add. DISPOSITION: Appeal dismissed with costs (Appellants to have costs of and connected with Respondent's application to adduce further evidence). Leave to appeal to the House of Lords refused. SOLICITORS: Dres Dabelstein & Passehl; Clyde & Co

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LEVEL 1 - 2 OF 2 CASES

DAVAL ACIERS D'USINOR ET DE SACILOR AND OTHERS v ARMARE SRL

(THE "NERANO") QUEEN'S BENCH DIVISION (ADMIRALTY COURT)

[1994] 2 Lloyd's Rep 50
HEARING-DATES: 2 December 1993

2 December 1993 CATCHWORDS: Bill of lading – Arbitration clause – Incorporation – Stay of action – Plaintiffs not charterers of vessel – Bill of lading incorporated "all terms and conditions . . . and arbitration clause of the Charterparty" – Dispute between defendants and plaintiffs – Whether bill of lading incorporated arbitration clause – Whether defendants entitled to stay action. HEADNOTE: Under a bill of lading dated Oct 26, 1991 a consignment of 248 cylinder steel hot rolled coils were shipped on board the defendants' ship Nerano at Fos in France for carriage to Marsa el Brega in Libya. The bill of lading was signed by Cargill International SA but contained an identity of carrier clause the effect of which was that the contract of carriage was initially between the first plaintiffs as shippers and the defendants as shipowners.

On the face of the bill of lading a clause provided:

The conditions as per relevant charterparty dated 02.07.1990 are incorporated in this bill of lading and have precedence if there is a conflict, English Law and Jurisdiction applies.

Clause 1 of the conditions of carriage on the back of the document provided inter alia:

All terms and conditions liberties exceptions and arbitration clause of the Charterparty, dated as overleaf, are herewith incorporated.

It was common ground that the charter-party referred to was a voyage charter in the Gencon form dated July 2, 1990 between Cargill as owners and the fourth plaintiffs Korf Shipping GmbH as charterers. The charter referred to a vessel to be nominated and was in effect a contract of affreightment for a number of voyages from Fos to Marsa el Brega. The charter provided inter alia:

24. The following to be stamped on all Bills of Lading under this contract: The conditions as per relevant Charter Party dated 2nd July 1990 are incorporated in this Bill of Lading and have precedence if there is a conflict. English Law and Jurisdiction applies.

36. That should any dispute arise between the Owners and Charterers the matter in dispute shall be determined in London England according to the Arbitration Acts, 1975 to 1979 and any amendments or modifications thereto and English law to govern.

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[1994] 2 Lloyd's Rep 50

The plaintiffs claimed damages in respect of alleged seawater damage and rusting said to have been caused to 71 of the coils. The writ was served on the defendants on Nov 4, 1992.

The defendants contended that the contract of carriage contained in or evidenced by the bill of lading contained an arbitration clause and that they were entitled to a stay of the action under s 1 of the Arbitration Act, 1975.

The plaintiffs submitted that the arbitration clause was not incorporated and that if it was it was not apt to submit disputes between the plaintiffs and defendants to arbitration because the plaintiffs were not charterers of the vessel.

The plaintiffs further contended that the defendants were not in any event entitled to a stay of the action on the ground that they had agreed to vary the contract by agreeing to the dispute being determined by the Court. Alternatively they argued that the defendants had waived their rights to rely on the arbitration clause or that they were estopped from doing so.

Held, by QB (Adm Ct) (CLARKE J), that (1) in order to effect incorporation of an arbitration clause, the clause of incorporation in the bill of lading must expressly refer to the arbitration clause in the charter-party; the only possible exception to that principle was where there were general words in the bill of lading but the arbitration clause in the charter-party was wide enough on its true construction without any verbal manipulation to include disputes under the bill of lading and between the parties to the bill of lading (see p 52, col 2);

(2) cl 36 of the charter expressly referred to any dispute between the owners and the charterers; it did not therefore cover disputes between the owners and the parties to the contract contained in or evidenced by the bill of lading without some manipulation of its wording; the arbitration clause was not incorporated unless it was expressly referred to in the bill of lading; and the arbitration clause was expressly referred to in cl 1 of the general conditions on the back of the bill of lading (see p 52, col 2; p 53, col 1);

(3) the correct course was to give effect to all the provisions of the bill; if that attempt was made it led to the conclusion that effect could be given to both the clause on the front and the clause on the back of the bill of lading; there was some overlap but there was no conflict; the notion of English jurisdiction was not inconsistent with a submission to arbitration if only because the English Court retained a supervisory jurisdiction over the arbitration which according to cl 36 was to take place in

England; there was no reason to disregard the specific reference in cl 1 to the incorporation of the arbitration clause (see p 54, col 2; p 55, col 1);

(4) the arbitration clause was incorporated; on the true construction of the contract contained in or evidenced by the bill of lading (including the arbitration clause in the charter-party incorporated in it) the parties to the bill of lading agreed to submit their disputes to arbitration in London (see p 55, col 1);

(5) on the evidence there was no agreement which could amount to a variation of the arbitration agreement in the bill of lading and no unequivocal representation of conduct which could form the basis of any waiver or

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[1994] 2 Lloyd's Rep 50 estoppel; and there was nothing in the exchanges between the parties to suggest that the defendants intended to waive their right to apply for a stay or that they made any representation to that effect either by words or conduct; the defendants were entitled to a stay of the action under s 1 of the Arbitration Act, 1975 (see p 56, cols 1 and 2; p 57, col 1). CASES-REF-TO: Annefield, The (CA) [1971] 1 Lloyd's Rep 1; [1971] P 168; [1970] 2 Lloyd's Rep 252; Elizabeth H, The [1962] 1 Lloyd's Rep 172; Federal Bulker, The (CA) [1989] 1 Lloyd's Rep 103; Lawson v Midland Travellers Ltd, (CA) [1993] 1 WLR 735; Merak, The (CA) [1964] 2 Lloyd's Rep 527; [1965] P 223; Miramar Maritime Corporation v Holborn Oil Trading Ltd, (HL) [1984] 2 Lloyd's Rep 129; [1984] AC 676; Nai Matteini, The [1988] 1 Lloyd's Rep 452; Oinoussin Pride, The [1991] 1 Lloyd's Rep 126; Rena K, The [1978] 1 Lloyd's Rep 545; [1979] 1 QB 377; Thomas (TW) & Co Ltd v Portsea Steam Ship Co Ltd, (HL) [1912] AC 1; Warenna, The [1983] 2 Lloyd's Rep 592. INTRODUCTION: This was an application by the defendants Armare Srl that the action brought by the plaintiffs Daval Aciers D'Usinor et de Sacilor, Dong Ah Consortium, Dong Ah Construction Co Ltd and Korf Shipping GmbH for damage to their cargo on board the defendants' vessel Nerano be stayed on the ground that the contract of carriage contained in or evidenced by the bill of lading incorporated an arbitration clause. COUNSEL: C Sussex for the defendants; N Cooper for the plaintiffs. PANEL: CLARKE J JUDGMENTBY-1: CLARKE J JUDGMENT-1: CLARKE J: In this action the plaintiffs claim damages in respect of alleged seawater damage and rusting said to have been caused to 71 out of a consignment of 248 cylinder steel hot rolled coils which were shipped on board the defendants' ship Nerano at Fos in France for carriage to Marsa el Brega in Libya under a bill of lading dated Oct 26, 1991.

The defendants, who are the registered owners of the vessel, say that the contract of carriage contained in or evidenced by the bill of lading contained an arbitration clause and that they are entitled to a stay of this action under s 1 of the Arbitration Act, 1975. The plaintiffs resist the defendants' application for a stay.

The first question for consideration is whether the bill of lading incorporates an arbitration clause. It is not I think in dispute that the contract of carriage is contained in or evidenced by the bill of lading so that the question is whether the bill of lading incorporates an arbitration clause. The first plaintiffs are the shippers named in the bill of lading. It is

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[1994] 2 Lloyd's Rep 50 alleged in the statement of claim that the second and third plaintiffs became holders of the bill of lading and that they are entitled to sue under it. They are accordingly bound by its terms. The bill of lading is signed by Cargill International SA of Antigua ("Cargill") but contains an identity of carrier clause the effect of which is that the contract of carriage was initially between the first plaintiffs as shippers and the defendants as shipowners.

On the face of the bill of lading there is a clause in capital letters which reads as follows:

THE CONDITIONS AS PER RELEVANT CHARTER PARTY DATED 02.07.1990 ARE INCORPORATED IN THIS BILL OF LADING AND HAVE

PRECEDENCE IF THERE IS A CONFLICT, ENGLISH LAW AND JURISDICTION APPLIES.

That clause was not part of the original printed form of bill of lading, but it may be that it was printed on the form actually used before any of the typed words were added with reference to this particular shipment. Clause 1 of the conditions of carriage on the back of the document (which is undoubtedly part of the original form) reads as follows:

(1) All terms and conditions, liberties, exceptions and arbitration clause of the Charterparty, dated as overleaf, are herewith incorporated . . .

It is common ground that the charter-party referred to is a voyage charter in the Gencon form dated July 2, 1990 between Cargill as owners and Korf Shipping GmbH ("Korf") as charterers. Korf are named as fourth plaintiffs but no claim is advanced on their behalf. The charter-party referred to a vessel to be nominated and was in effect a contract of affreightment for a number of voyages from Fos to Marsa el Brega. Clause 24 provided in part as follows:

The following to be stamped on all Bills of Lading under this contract: "The conditions as per relevant Charter Party dated 2nd July, 1990 are incorporated in this Bill of Lading and have precedence if there is a conflict. English Law and Jurisdiction applies."

Clause 36 provided as follows:

That should any dispute arise between the Owners and Charterers the matter in dispute shall be determined in London, England, according to the Arbitration Acts, 1975 to 1979 and any amendments or modifications thereto and English law to govern.

Mr Charles Sussex submits on behalf of the defendants that cl 36 of the charter-party is incorporated into the bill of lading and that it is apt to submit disputes under the bills of lading to arbitration in London. Mr Nigel Cooper, on the other hand, submits on behalf of the plaintiffs that the arbitration clause is not incorporated and that, if it is, it is not apt to submit disputes between the plaintiffs and the defendants to arbitration because the plaintiffs were not charterers of the vessel.

Mr Sussex submits that the bill of lading should be construed as a whole and that if that is done the arbitration clause has been effectively incorporated into the bill of lading. Mr Cooper submits that the clause on the front of the bill of lading is inconsistent with that on the back and that, given the approach of the Courts to the incorporation of arbitration clauses in bills of

 lading, it should be held that the clause is not incorporated. He further submits that in considering the question of incorporation it is important to consider whether the clause in the charter-party is apt to apply to the bill of lading contract and that where, as here, the clause cannot apply to the parties to the bill of lading contract without manipulation it must be held that the clause is not incorporated.

There have been many cases in which the Courts have considered in what circumstances an arbitration clause in a charter-party is incorporated in a bill of lading. The most recent of them is the decision of the Court of Appeal in The Federal Bulker, [1989] 1 Lloyd's Rep 103. The Court of Appeal there reiterated the general principle that a strict test of incorporation is applied. That is that general words of incorporation are not apt to incorporate an arbitration clause in a charter-party into a bill of lading. Thus (subject to one possible exception) a term incorporating all terms conditions and exceptions of the charter-party does not have the effect of incorporating the arbitration clause: see for example TW Thomas & Co Ltd, [1912] AC 1, The Annefield, [1971] 1 Lloyd's Rep 1; [1971] P 168, The Varenna, [1983] 2 Lloyd's Rep 592 and The Federal Bulker (sup).

In order to effect incorporation of an arbitration clause the clause of incorporation in the bill of lading must expressly refer to the arbitration clause in the charter-party. The only possible exception to that principle is where there are general

words in the bill of lading but the arbitration clause in the charter-party is wide enough on its true construction without any verbal manipulation to include disputes under the bill of lading and between the parties to the bill of lading.

I add that possible exception because some of the cases suggest that an arbitration clause is incorporated in such circumstances: see in particular The Annefield, [1970] 2 Lloyd's Rep 252 at p 260, col 2; [1971] P 168 at p 173 per Mr Justice Brandon; [1971] 1 Lloyd's Rep at p 4; [1971] P 168 at p 184 per Lord Denning MR, The Rena K, [1978] 1 Lloyd's Rep 545 at pp 550-551; [1979] 1 QB 377 at pp 389-390 per Mr Justice Brandon, The Varenna, [1983] 1 Lloyd's Rep 416 at p 422 per Mr Justice Hobhouse at first instance and The Federal Bulker (sup) per Lord Justice Bingham at p 108 (at least if the general words include a reference to "clauses" in the charter-party) but compare The Varenna, [1983] 2 Lloyd's Rep 592 per Lord Justice Oliver at p 599 and The Federal Bulker (sup) per Lord Justice Dillon at p 111. It appears that the Courts which have considered the decision and dicta in The Merak, [1964] 2 Lloyd's Rep 527; [1965] P 223 have not all approached them in the same way.

However that may be, in the instant case cl 36 of the charter-party expressly refers to any dispute between the owners and charterers. It does not therefore cover disputes between the owners and the parties to the contract contained in or evidenced by the bill of lading without some manipulation of its wording. It follows, on the authorities, that the arbitration clause is not incorporated unless it is expressly referred to in the bill of lading. Mr Sussex correctly says that the arbitration clause is expressly referred to in cl 1 of the general conditions on the back.

The question is whether in those circumstances the clause is incorporated in the light of the clause on the front of the bill of lading which I have set out above and despite the fact that the wording of cl 36 refers only to disputes between owners and charterers. So far as the latter point is concerned, there

 are a number of cases in which the Court has held that wide words of incorporation are not apt to incorporate an arbitration clause because the clause in the charter-party is not wide enough to apply to the parties to the bill of lading. In this regard Mr Cooper relies for example upon The Annefield (sup) per Lord Justice Cairns, [1971] 1 Lloyd's Rep 1 at p 5; [1971] P 168 at p 186.

However, in none of those cases was there an express reference in the incorporating clause in the bill of lading to the arbitration clause in the charter-party. The first case which has been brought to my attention in which there was such a clause is The Rena K (sup). In that case Mr Justice Brandon, after referring to the distinction drawn in the authorities between clauses in the relevant charter-party which are directly germane to the shipment, carriage and delivery of the goods covered by the bill of lading and other clauses which are not directly germane to such matters, set out the following passage from the judgment of Lord Denning MR in The Annefield, [1971] 1 Lloyd's Rep 1 at p 4, col 1; [1971] P 168 at p 184:

I would say that a clause which is directly germane to the subject matter of the bill of lading (that is, to the shipment, carriage and delivery of goods) can and should be incorporated into the bill of lading contract, even though it may involve a degree of manipulation of the words in order to fit exactly the bill of lading. But if the clause is one which is not thus directly germane, it should not be incorporated into the bill of lading contract unless it is done explicitly in clear words either in the bill of lading or in the charter-party.

Mr Justice Brandon then said that the plaintiffs' argument was that an arbitration clause in a charter-party could never be incorporated into a charter-party if it was necessary to manipulate the wording of the clause because an arbitration clause is not a clause which is germane to the shipment, carriage and delivery of cargo and moreover that was so even if the incorporating clause expressly referred to the arbitration clause in the charter party. Mr Justice Brandon rejected that argument. He said at p 551, col 1; p 390:

It was an essential element in the facts of the cases referred to that the words of incorporation in the bill of lading were general words without specific reference to

the arbitration clause in the charterparty; the conclusions reached on the questions of construction involved depended entirely on that circumstance; and the judgments of the Judges who decided the cases must be read and understood in the light of it.

The present case is, in my view, clearly distinguishable, in that there are added to the usual general words of incorporation in the two bills of lading the further specific words "including the arbitration clause". The addition of these words must, as it seems to me, mean that the parties to the bills of lading intended the provisions of the arbitration clause in the charter-party to apply in principle to disputes arising under the bill of lading; and, if it is necessary, as it obviously is, to manipulate or adapt part of the wording of that clause in order to give effect to that intention, then I am clearly of opinion that this should be done.

In The Varenna, [1983] 1 Lloyd's Rep 416 Mr Justice Hobhouse referred (at p 422) to the first part of that reasoning without disapproval, although the Court of Appeal did not mention The Rena K. It has however been considered in two

[1994] 2 Lloyd's Rep 50 later cases. The first of those is The Nai Matteini, [1988] 1 Lloyd's Rep 452 in which Mr Justice Gatehouse did not follow The Rena K on the ground that it was inconsistent with the speech of Lord Diplock in Miramar Maritime Corporation v Holborn Oil Trading Ltd, [1984] 2 Lloyd's Rep 129; [1984] AC 676.

In the Miramar case shipowners sought to make cargo-owners liable for demurrage as a result of a clause in a bill of lading which provided that all terms whatsoever of the charter-party except the rate and payment of freight were to apply to and govern the rights of the parties concerned in the shipment. Lord Diplock made it clear (at p 131, col 2; p 683) that leave to appeal was given so that the House of Lords could consider the extent if any to which it was permissible to resort to verbal manipulation in circumstances such as those set out in the dicta of Lord Denning MR in The Annefield which are quoted above. He said (in what Mr Justice Gatehouse described as a "final emphatic passage") at p 134, col 2; p 688:

. . . I regard it, however, as more important that this House should take this opportunity of stating unequivocally that where in a bill of lading there is included a clause which purports to incorporate the terms of a specified charter-party, there is not any rule of construction that clauses in that charter-party which are directly germane to the shipment, carriage or delivery of goods and impose obligations upon "the charterer" under that designation, are presumed to be incorporated in the bill of lading with the substitution of (where there is a cesser clause), or inclusion in (where there is no cesser clause), the designation "charterer", the designation "consignee of cargo" or bills of lading holder.

The House of Lords thus rejected the shipowners' claim for demurrage against the cargoowners.

Mr Justice Gatehouse took the view that in the light of the reasoning in Lord Diplock's speech he should hold that since some manipulation would be required of the arbitration clause in the charter-party which he held to be incorporated the parties to the bill of lading were not bound by the arbitration clause in the charter-party to arbitrate their disputes with the shipowners.

In The Oinoussin Pride, [1991] 1 Lloyd's Rep 126 Mr Justice Webster took a different view. There too the incorporating clause expressly incorporated the arbitration clause in the charter-party but some manipulation was required to make that clause applicable to disputes between the parties to the bill of lading. Mr Justice Webster said (at p 130) that were it not for the decision of Mr Justice Gatehouse he would follow The Rena K without hesitation and (at p 131) he gave these reasons for disagreeing with the conclusion in The Nai Matteini:

. . . the words of incorporation in Miramar were general words, not including any specific incorporation of the arbitration clause in the charter-party into the bills of lading. The issue in that case has nothing to do with the question whether the receivers were bound by the arbitration clause contained in that charter-party, but only with the question whether they were liable for demurrage under it. Mr Steyn, as

he then was, in argument submitted that the case before their Lordships' House was entirely different from cases which concerned the question whether the arbitration clause had been incorporated, and I can find no indication in the speech of Lord Diplock, with which all the other members of their Lordships' House agreed, that the principle which he was enunciating, or

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[1994] 2 Lloyd's Rep 50 any of his reasoning, applied to cases of specific incorporation of an arbitration clause such as exists in this case and such as existed in The Rena K.

I agree with the decision and reasoning of Mr Justice Webster in that case. For the reasons which he gave I do not think that there is anything in the reasoning or the decision in Miramar to cast doubt upon the reasoning and decision of Mr Justice Brandon in The Rena K. While my conclusion does not depend upon this point, I observe that Lord Brandon was a party to the decision in Miramar and that he agreed with Lord Diplock. While it is, I suppose, possible that he had forgotten about his decision The Rena K, that seems to me to be rather unlikely and, if he had not, it is inconceivable that he intended to overrule it without referring to it.

The question remains whether the express reference to the arbitration clause in cl 1 of the general conditions has the effect of incorporating cl 36 of the charter-party or whether the effect of the clause on the front which I have set out above, when considered in the context of the whole document including cl 1, leads to the conclusion that the parties to the bill of lading agreed to submit their disputes to the jurisdiction of the English Courts but not to arbitration.

Mr Cooper submits that the reference to "English law and jurisdiction" can only refer to English law and to the English Courts. Moreover he draws attention to the fact that the provenance of the clause is cl 24 of the charter-party, where he says that it must refer only to the English Courts because if the draftsman had intended to refer to arbitration he would have done so, as he did in cl 36. There is I think some force in these submissions and, indeed, Mr Sussex accepts that if the clause stood alone without cl 1 on the back of the bill of lading, the reference to English jurisdiction would be a reference to the English Court. However he submits that the correct approach is to construe the bill of lading as a whole and that the Court should not reject any of the terms of the document on the ground of inconsistency unless driven to do so.

I accept the submission that the correct course is to try to give effect to all the provisions of the bill. In my judgment if that attempt is made it leads to the conclusion that effect can be given to both the clause on the front and the clause on the back. There is some overlap between the clauses but, as I see it, no conflict. The notion of English jurisdiction is not inconsistent with a submission to arbitration, if only because the English Court retains a supervisory jurisdiction over the arbitration, which according to cl 36 is to take place in England. In these circumstances I see no reason to disregard the specific reference in cl 1 to the incorporation of the arbitration clause.

In my judgment the arbitration clause is incorporated and, as Mr Justice Brandon put it in The Rena K (sup) at p 551, col 1; pp 390-391,

. . . if it is necessary, as it obviously is, to manipulate or adapt part of the wording of that clause in order to give effect to that intention, then I am clearly of opinion that this should be done.

Those considerations apply equally here. I therefore hold that on the true construction of the contract contained in or evidenced by the bill of lading (including the arbitration clause in the charter-party incorporated in it) the parties to the bill of lading agreed to submit their disputes to arbitration

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[1994] 2 Lloyd's Rep 50 in London.

Mr Cooper submits however that if the arbitration clause is to be manipulated to vary the identity of the parties to it, it is no longer an arbitration

agreement for the purposes of s 1 of the Arbitration Act, 1975 because it is no longer an agreement in writing. I disagree. In my judgment the conclusion which I have set out above is reached by a process of construction of the bill of lading and of the arbitration clause incorporated into it. Both the bill of lading and the charter-party are documents in writing. In these circumstances it seems to me to be impossible to say that the arbitration agreement is other than in writing.

Since it is common ground that the arbitration agreement, if there is one, is not a domestic arbitration agreement, it follows that the defendants are entitled to a stay of this action unless the defendants have taken a step in the action or the agreement is inoperative on the ground of variation or waiver or estoppel. The defendants have not taken a step in the action; so I turn to the submissions which have been made under the heads of variation, waiver and estoppel.

Variation, waiver and estoppel

Mr Cooper submits that the defendants are not in any event entitled to a stay of this action on the ground that they have agreed to vary the contract by agreeing to the dispute being determined by the Court. Alternatively he submits that they have waived their right to rely upon the arbitration clause or that they are estopped from doing so. He submits that the case is similar on the facts to The Elizabeth H, [1962] 1 Lloyd's Rep 172 and relies upon the events from the period from the issue of the writ until now. Those events may be summarized as follows.

At some time in 1992 the plaintiffs arrested the vessel at Fos. In order to obtain her release the defendants' P & I Club gave an undertaking to pay any sum found to be due "by a final arbitration award or judgment of a competent court in England".

The writ in this action was served on Nov 4, 1992 and on Mar 5, 1993 Messrs Clyde & Co acknowledged service of the writ on behalf of the defendants. Negotiations between Dres Dabelstein & Passehl on behalf of the plaintiffs and Messrs Clyde & Co on behalf of the defendants began on or about Mar 10 in an attempt to settle the dispute. Points of claim were served on Mar 17. On Mar 29 the plaintiffs agreed to extend time for service of a defence indefinitely subject to seven days' notice. It was hoped that further negotiations would take place. The extension was confirmed in writing on Mar 31.

On July 7 seven days' notice terminating the extension time was given. On the next day Ms Maxwell of Messrs Clyde & Co telephoned Mr Salander of Dres Dabelstein & Passehl and it was agreed in effect that the notice would be withdrawn but that if Ms Maxwell did not revert within seven days Mr Salander would serve a new notice. In the event Ms Maxwell telephoned on July 14 and it was agreed that the parties would meet on Aug 18 or 19. However the plaintiffs proved unable to make those dates and on Aug 16 Mr Salander telephoned to say that the first dates which he and his clients could make were Sept 16 and 17. Ms Maxwell said that she would have to take instructions.

On Aug 19 Mr Salander faxed Ms Maxwell saying inter alia that service of a defence would serve to clarify the issues between the parties, terminating any agreement to extend time for service of the defence as from seven days from receipt of the fax and stating "we hereby agree that the defence be served by Friday 3rd September." On Aug 27 Mr Salander and Ms Maxwell had a telephone conversation. According to Mr Salander during that conversation Ms Maxwell said that she had no instructions regarding a without prejudice meeting to discuss settlement and would now be preparing a defence. That account is supported by Mr Salander's attendance note. Ms Maxwell's account of the meeting is different. She says that she told Mr Salander that her client was away on holiday and that he could not expect her at the same time to defend the proceedings and to meet to discuss settlement. Mr Salander agreed to refix the time for service of the defence if she reverted within a week with arrangements for a meeting. Ms Maxwell's account is supported by an attendance

note which contains no reference to her saying that she would now be preparing a defence.

It is convenient to consider whether there was any variation, waiver or estoppel before Aug 31. In my judgment, however the issue of fact as to the contents of the conversation of Aug 27 is resolved, there plainly was not. There was no agreement which could amount to a variation of the arbitration agreement in the bill of lading and no unequivocal representation or conduct which could form the basis of any waiver or estoppel.

I turn therefore to the events of Aug 31 when a further telephone conversation took place between Mr Salander and Ms Maxwell. Mr Salander says that Ms Maxwell offered a without prejudice meeting for Sept 16 or 17 and then referred to the question of the service of the defence if the matter was not settled. He says that it was agreed that Clyde & Co's clients would serve a defence by Sept 30 and that Ms Maxwell asked him to confirm the agreement in writing. He accordingly sent her a fax dated Sept 1 in which inter alia he wrote "we confirm our agreement that your clients serve a defence by 30th September". His attendance note confirms that agreement.

Ms Maxwell's account in her affidavit is not quite the same. She says that she asked him to agree an extension of time for service of the defence but that Mr Salander wanted to leave that until after the meeting of Sept 16 because it might not be necessary. She said that she was not happy with that and that she wanted to agree an extension then and there and suggested Sept 30. He agreed and also agreed that he would confirm the time extension in writing. Ms Maxwell's attendance note includes the words "Agree now. Service of Defence by 30th September".

When Ms Maxwell received the fax on Sept 1 she did not immediately reply but on Sept 16 she sent a fax which referred to the agreement to meet and continued:

You said that you would leave the question of an extension for service of defence until after the meeting. We asked for an extension to 30th September in any event which you agreed. It would have made no sense in that conversation to agree to serve a defence and we did not agree it.

In my judgment the agreement amounted to no more than this. Ms Maxwell agreed to serve any defence by Sept 30. The agreement must he viewed in the context of many previous discussions relating to an extension of time for service of a defence. Moreover, as is said in Ms Maxwell's fax of Sept 16, it would make no sense to agree to serve a defence by the Sept 30 whatever

 happened. Thus it makes no sense to hold that the parties made a contract whereby the defendants agreed to serve a defence whatever happened at the meeting because a settlement might have been reached.

It would perhaps make more sense to say that it was agreed that if the matter were not settled the defendants would serve a defence by Sept 30. However, there is no suggestion that that was the agreement. Moreover I can see no reason why Ms Maxwell should have agreed on Aug 31 that the defendants would serve a defence by Sept 30 and in effect have agreed that no application for a stay would be made in the meantime.

There is nothing in the exchanges between the parties that suggests that the defendants intended to waive their right to apply for a stay or that they made any representation to that effect either by words or conduct. Ms Maxwell says in her affidavit that by August she was aware of the arbitration point. I see no reason to reject that evidence. In my judgment the only agreement that makes any sense is that the defendants agreed to serve any defence by Sept 30. Thus if they did not, they would not be in breach of contract but the plaintiffs would be able to sign judgment in default of defence in the absence of an application for a stay.

There may have been a misunderstanding between Mr Salander and Ms Maxwell but the evidence does not in my judgment show that the defendants agreed to serve a defence and not to apply for a stay. The position is much as in the recent decision of the Court of Appeal in Lawson v Midland Travellers Ltd, [1993] 1 WLR

735, where there was an agreement between solicitors to "extend our time for service of the defence until 14 days after" a particular event. It was argued that the agreement amounted to an agreement to extend time for service of the defence but not for applying to set aside the writ. Lord Justice Stuart-Smith said (at p 742):

I can see no basis for this construction. If, as in my opinion is the case, an extension of time for service of the defence automatically involves an extension of time for applying under Ord 12 r 8(1) a plaintiff who wishes only to extend the time for the former but not the latter purpose, must expressly say so in granting his consent. I see no reason why he should not do so, if he is so minded; though this will draw attention to the defective service which he may hope, perhaps forlornly, that the defendant has overlooked.

Just as RSC, O 12, r 8 provides that an application under that rule may be made within the time limited for serving a defence, so s 1 of the Arbitration Act, 1975 provides that an application for a stay may be made at any time before the defendant takes a step in the action or serves a defence. Thus even an agreement to serve a defence by a particular date would not in my judgment without more amount to an agreement not to apply for a stay or to a representation not to do so. It would, as Mr Sussex submits, be equivocal.

In all the circumstances none of the events to date, whether looked at individually or together, supports the submission that there has been any relevant variation of the contract or any unequivocal representation or conduct such as might found a waiver or estoppel. In arriving at this conclusion I have not found the decision in The Elizabeth H, (sup) of particular assistance. It was simply a decision on its own facts.

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For these reasons I have reached the conclusion that the defendants are entitled to a stay of this action under s 1 of the Arbitration Act, 1975 DISPOSITION: Judgment accordingly SOLICITORS: Clyde & Co; Dres Dabelstein & Passehl

UK #41

LEVEL 1 - 2 OF 2 CASES DAVAL ACIERS D'USINOR ET DE SACILOR AND OTHERS v ARMARE SRL (THE "NERANO")

QUEEN'S BENCH DIVISION (ADMIRALTY COURT)

[1994] 2 Lloyd's Rep 50 HEARING-DATES: 2 December 1993

2 December 1993CATCHWORDS: Bill of lading – Arbitration clause – Incorporation – Stay of action –Plaintiffs not charterers of vessel – Bill of lading incorporated "all termsand conditions . . . and arbitration clause of the Charterparty" – Disputebetween defendants and plaintiffs – Whether bill of lading incorporatedarbitration clause – Whether defendants entitled to stay action.HEADNOTE: Under a bill of lading dated Oct 26, 1991 a consignment of 248 cylinder steelhot rolled coils were shipped on board the defendants' ship Nerano at Fos inFrance for carriage to Marsa el Brega in Libya. The bill of lading was signedby Cargill International SA but contained an identity of carrier clause theeffect of which was that the contract of carriage was initially between thefirst plaintiffs as shippers and the defendants as shipowners. On the face of the bill of lading a clause provided: The conditions as per relevant charterparty dated 02.07.1990 are incorporatedin this bill of lading and have precedence if there is a conflict, English Lawand Jurisdiction applies. Clause 1 of the conditions of carriage on the back of the document providedinter alia: All terms and conditions liberties exceptions and arbitration clause of theCharterparty, dated as overleaf, are herewith incorporated. It was common ground that the charter-party referred to was a voyage charterin the Gencon form dated July 2, 1990 between Cargill as owners and the fourthplaintiffs Korf Shipping GmbH as charterers. The charter referred to a vesselto be nominated and was in effect a contract of affreightment for a number ofvoyages from Fos to Marsa el Brega. The charter provided inter alia: 24. The following to be stamped on all Bills of Lading under this contract:The conditions as per relevant Charter Party dated 2nd July 1990 areincorporated in this Bill of Lading and have precedence if there is a conflict.English Law and Jurisdiction applies. 36. That should any dispute arise between the Owners and Charterers thematter in dispute shall be determined in London England according to theArbitration Acts, 1975 to 1979 and any amendments or modifications thereto andEnglish law to govern.

[1994] 2 Lloyd's Rep 50 The plaintiffs claimed damages in respect of alleged seawater damage andrusting said to have been caused to 71 of the coils. The writ was served on thedefendants on Nov 4, 1992. The defendants contended that the contract of carriage contained in orevidenced by the bill of lading contained an arbitration clause and that theywere entitled to a stay of the action under s 1 of the Arbitration Act, 1975. The plaintiffs submitted that the arbitration clause was not incorporated andthat if it was it was not apt to submit disputes between the plaintiffs anddefendants to arbitration because the plaintiffs were not charterers of thevessel. The plaintiffs further contended that the defendants were not in any evententitled to a stay of the action on the ground that they had agreed to vary thecontract by agreeing to the dispute being determined by the Court.Alternatively they argued that the defendants had waived their rights to rely onthe arbitration clause or that they were estopped from doing so. – Held, by QB (Adm Ct) (CLARKE J), that (1) in order to effect incorporationof an arbitration clause, the clause of incorporation in the bill of lading mustexpressly refer to the arbitration clause in the charter-party; the onlypossible exception to that principle was where there were general words in thebill of lading but the arbitration clause in the charter-party was wide enoughon its true construction without any verbal manipulation to include disputesunder the bill of lading and between the parties to the bill of lading (see p52, col 2); (2) cl 36 of the charter expressly referred to any dispute between the ownersand the charterers; it did not therefore cover disputes between the owners andthe parties to the contract contained in or evidenced by the bill of ladingwithout some manipulation of its wording; the arbitration clause was notincorporated unless it was expressly referred to in the bill of lading; and thearbitration clause was expressly referred to in cl 1 of the general conditionson the back of the bill of lading (see p 52, col 2; p 53, col 1); (3) the correct course was to give effect to all the provisions of the bill;if that attempt was made it led to the conclusion that effect could be given toboth the clause on the front and the clause on the back of the bill of lading;there was some overlap but there was no conflict; the notion of Englishjurisdiction was not inconsistent with a submission to arbitration if onlybecause the English Court retained a supervisory jurisdiction over thearbitration which according to cl 36 was to take place in England; there was noreason to disregard the specific reference in cl 1 to the incorporation of thearbitration clause (see p 54, col 2; p 55, col 1); (4) the arbitration clause was incorporated; on the true construction of thecontract contained in or evidenced by the bill of lading (including thearbitration clause in the charter-party incorporated in it) the parties to thebill of lading agreed to submit their disputes to arbitration in London (see p55, col 1); (5) on the evidence there was no agreement which could amount to a variationof the arbitration agreement in the bill of lading and no unequivocalrepresentation of conduct which could form the basis of any waiver or

[1994] 2 Lloyd's Rep 50estoppel; and there was nothing in the exchanges between the parties to suggestthat the defendants intended to waive their right to apply for a stay or thatthey made any representation to that effect either by words or conduct; thedefendants were entitled to a stay of the action under s 1 of the ArbitrationAct, 1975 (see p 56, cols 1 and 2; p 57, col 1).CASES-REF-TO:Annefield, The (CA) [1971] 1 Lloyd's Rep 1; [1971] P 168; [1970] 2 Lloyd's Rep252;Elizabeth H, The [1962] 1 Lloyd's Rep 172;Federal Bulker, The (CA) [1989] 1 Lloyd's Rep 103;Lawson v Midland Travellers Ltd, (CA) [1993] 1 WLR 735;Merak, The (CA) [1964] 2 Lloyd's Rep 527; [1965] P 223;Miramar Maritime Corporation v Holborn Oil Trading Ltd, (HL) [1984] 2 Lloyd'sRep 129; [1984] AC 676;Nai Matteini, The [1988] 1 Lloyd's Rep 452;Oinoussin Pride, The [1991] 1 Lloyd's Rep 126;Rena K, The [1978] 1 Lloyd's Rep 545; [1979] 1 QB 377;Thomas (TW) & Co Ltd v Portsea Steam Ship Co Ltd, (HL) [1912] AC 1;Varenna, The [1983] 2 Lloyd's Rep 592.INTRODUCTION: This was an application by the defendants Armare Srl that the action broughtby the plaintiffs Daval Aciers D'Usinor et de Sacilor, Dong Ah Consortium, DongAh Construction Co Ltd and Korf Shipping GmbH for damage to their cargo on board the defendants' vessel Nerano be stayed on the ground that the contract ofcarriage contained in or evidenced by the bill of lading incorporated anarbitration clause.COUNSEL: C Sussex for the defendants; N Cooper for the plaintiffs.PANEL: CLARKE JJUDGMENTBY-1: CLARKE JJUDGMENT-1: CLARKE J: In this action the plaintiffs claim damages in respect of allegedseawater damage and rusting said to have been caused to 71 out of a consignmentof 248 cylinder steel hot rolled coils which were shipped on board thedefendants' ship Nerano at Fos in France for carriage to Marsa el Brega in Libyaunder a bill of lading dated Oct 26, 1991. The defendants, who are the registered owners of the vessel, say that thecontract of carriage contained in or evidenced by the bill of lading containedan arbitration clause and that they are entitled to a stay of this action unders 1 of the Arbitration Act, 1975. The plaintiffs resist the defendants'application for a stay. The first question for consideration is whether the bill of ladingincorporates an arbitration clause. It is not I think in dispute that thecontract of carriage is contained in or evidenced by the bill of lading so thatthe question is whether the bill of lading incorporates an arbitration clause.The first plaintiffs are the shippers named in the bill of lading. It is

[1994] 2 Lloyd's Rep 50alleged in the statement of claim that the second and third plaintiffs becameholders of the bill of lading and that they are entitled to sue under it. Theyare accordingly bound by its terms. The bill of lading is signed by CargillInternational SA of Antigua ("Cargill") but contains an identity of carrierclause the effect of which is that the contract of carriage was initiallybetween the first plaintiffs as shippers and the defendants as shipowners. On the face of the bill of lading there is a clause in capital letters whichreads as follows: THE CONDITIONS AS PER RELEVANT CHARTER PARTY DATED 02.07.1990 AREINCORPORATED IN THIS BILL OF LADING AND HAVE PRECEDENCE IF THERE IS A CONFLICT,ENGLISH LAW AND JURISDICTION APPLIES. That clause was not part of the original printed form of bill of lading, butit may be that it was printed on the form actually used before any of the typedwords were added with reference to this particular shipment. Clause 1 of theconditions of carriage on the back of the document (which is undoubtedly part ofthe original form) reads as follows: (1) All terms and conditions, liberties, exceptions and arbitration clause ofthe Charterparty, dated as overleaf, are herewith incorporated . . . It is common ground that the charter-party referred to is a voyage charter inthe Gencon form dated July 2, 1990 between Cargill as owners and Korf ShippingGmbH ("Korf") as charterers. Korf are named as fourth plaintiffs but no claimis advanced on their behalf. The charter-party referred to a vessel to benominated and was in effect a contract of affreightment for a number of voyagesfrom Fos to Marsa el Brega. Clause 24 provided in part as follows: The following to be stamped on all Bills of Lading under this contract: "Theconditions as per relevant Charter Party dated 2nd July, 1990 are incorporatedin this Bill of Lading and have precedence if there is a conflict. English Lawand Jurisdiction applies." Clause 36 provided as follows: That should any dispute arise between the Owners and Charterers the matter indispute shall be determined in London, England, according to the ArbitrationActs, 1975 to 1979 and any amendments or modifications thereto and English lawto govern. Mr Charles Sussex submits on behalf of the defendants that cl 36 of thecharter-party is incorporated into the bill of lading and that it is apt tosubmit disputes under the bills of lading to arbitration in London. Mr NigelCooper, on the other hand, submits on behalf of the plaintiffs that thearbitration clause is not incorporated and that, if it is, it is not apt tosubmit disputes between the plaintiffs and the defendants to arbitration becausethe plaintiffs were not charterers of the vessel. Mr Sussex submits that the bill of lading should be construed as a whole andthat if that is done the arbitration clause has been effectively incorporatedinto the bill of lading. Mr Cooper submits that the clause on the front of thebill of lading is inconsistent with that on the back and that, given theapproach of the Courts to the incorporation of arbitration clauses in bills of

[1994] 2 Lloyd's Rep 50lading, it should be held that the clause is not incorporated. He furthersubmits that in considering the question of incorporation it is important toconsider whether the clause in the charter-party is apt to apply to the bill oflading contract and that where, as here, the clause cannot apply to the partiesto the bill of lading contract without manipulation it must be held that theclause is not incorporated. There have been many cases in which the Courts have considered in whatcircumstances an arbitration clause in a charter-party is incorporated in a billof lading. The most recent of them is the decision of the Court of Appeal inThe Federal Bulker, [1989] 1 Lloyd's Rep 103. The Court of Appeal therereiterated the general principle that a strict test of incorporation is applied.That is that general words of incorporation are not apt to incorporate anarbitration clause in a charter-party into a bill of lading. Thus (subject toone possible exception) a term incorporating all terms conditions and exceptionsof the charter-party does not have the effect of incorporating the arbitrationclause: see for example TW Thomas & Co Ltd, [1912] AC 1, The Annefield, [1971] 1Lloyd's Rep 1; [1971] P 168, The Varenna, [1983] 2 Lloyd's Rep 592 and TheFederal Bulker (sup). In order to effect incorporation of an arbitration clause the clause ofincorporation in the bill of lading must expressly refer to the arbitrationclause in the charter-party. The only possible exception to that principle iswhere there are general words in the bill of lading but the arbitration clausein the charter-party is wide enough on its true construction without any verbalmanipulation to include disputes under the bill of lading and between theparties to the bill of lading. I add that possible exception because some of the cases suggest that anarbitration clause is incorporated in such circumstances: see in particular TheAnnefield, [1970] 2 Lloyd's Rep 252 at p 260, col 2; [1971] P 168 at p 173 perMr Justice Brandon; [1971] 1 Lloyd's Rep at p 4; [1971] P 168 at p 184 per LordDenning MR, The Rena K, [1978] 1 Lloyd's Rep 545 at pp 550-551; [1979] 1 QB 377at pp 389-390 per Mr Justice Brandon, The Varenna, [1983] 1 Lloyd's Rep 416 at p422 per Mr Justice Hobhouse at first instance and The Federal Bulker (sup) perLord Justice Bingham at p 108 (at least if the general words include a referenceto "clauses" in the charter-party) but compare The Varenna, [1983] 2 Lloyd's Rep592 per Lord Justice Oliver at p 599 and The Federal Bulker (sup) per LordJustice Dillon at p 111. It appears that the Courts which have considered thedecision and dicta in The Merak, [1964] 2 Lloyd's Rep 527; [1965] P 223 have notall approached them in the same way. However that may be, in the instant case cl 36 of the charter-party expresslyrefers to any dispute between the owners and charterers. It does not thereforecover disputes between the owners and the parties to the contract contained inor evidenced by the bill of lading without some manipulation of its wording. Itfollows, on the authorities, that the arbitration clause is not incorporatedunless it is expressly referred to in the bill of lading. Mr Sussex correctlysays that the arbitration clause is expressly referred to in cl 1 of the generalconditions on the back. The question is whether in those circumstances the clause is incorporated inthe light of the clause on the front of the bill of lading which I have set outabove and despite the fact that the wording of cl 36 refers only to disputesbetween owners and charterers. So far as the latter point is concerned, there

[1994] 2 Lloyd's Rep 50are a number of cases in which the Court has held that wide words ofincorporation are not apt to incorporate an arbitration clause because theclause in the charter-party is not wide enough to apply to the parties to thebill of lading. In this regard Mr Cooper relies for example upon The Annefield(sup) per Lord Justice Cairns, [1971] 1 Lloyd's Rep 1 at p 5; [1971] P 168 at p186. However, in none of those cases was there an express reference in theincorporating clause in the bill of lading to the arbitration clause in thecharter-party. The first case which has been brought to my attention in whichthere was such a clause is The Rena K (sup). In that case Mr Justice Brandon,after referring to the distinction drawn in the authorities between clauses inthe relevant charter-party which are directly germane to the shipment, carriageand delivery of the goods covered by the bill of lading and other clauses whichare not directly germane to such matters, set out the following passage from thejudgment of Lord Denning MR in The Annefield, [1971] 1 Lloyd's Rep 1 at p 4, col1; [1971] P 168 at p 184: I would say that a clause which is directly germane to the subject matter ofthe bill of lading (that is, to the shipment, carriage and delivery of goods)can and should be incorporated into the bill of lading contract, even though itmay involve a degree of manipulation of the words in order to fit exactly thebill of lading. But if the clause is one which is not thus directly germane, itshould not be incorporated into the bill of lading contract unless it is doneexplicitly in clear words either in the bill of lading or in the charter-party. Mr Justice Brandon then said that the plaintiffs' argument was that anarbitration clause in a charter-party could never be incorporated into acharter-party if it was necessary to manipulate the wording of the clausebecause an arbitration clause is not a clause which is germane to the shipment,carriage and delivery of cargo and moreover that was so even if theincorporating clause expressly referred to the arbitration clause in the charterparty. Mr Justice Brandon rejected that argument. He said at p 551, col 1; p390: It was an essential element in the facts of the cases referred to that thewords of incorporation in the bill of lading were general words without specificreference to the arbitration clause in the charterparty; the conclusions reachedon the questions of construction involved depended entirely on thatcircumstance; and the judgments of the Judges who decided the cases must be readand understood in the light of it. The present case is, in my view, clearly distinguishable, in that there areadded to the usual general words of incorporation in the two bills of lading thefurther specific words "including the arbitration clause". The addition ofthese words must, as it seems to me, mean that the parties to the bills oflading intended the provisions of the arbitration clause in the charter-party toapply in principle to disputes arising under the bill of lading; and, if it isnecessary, as it obviously is, to manipulate or adapt part of the wording ofthat clause in order to give effect to that intention, then I am clearly ofopinion that this should be done. In The Varenna, [1983] 1 Lloyd's Rep 416 Mr Justice Hobhouse referred (at p422) to the first part of that reasoning without disapproval, although the Courtof Appeal did not mention The Rena K. It has however been considered in two

[1994] 2 Lloyd's Rep 50later cases. The first of those is The Nai Matteini, [1988] 1 Lloyd's Rep 452in which Mr Justice Gatehouse did not follow The Rena K on the ground that itwas inconsistent with the speech of Lord Diplock in Miramar Maritime Corporationv Holborn Oil Trading Ltd, [1984] 2 Lloyd's Rep 129; [1984] AC 676. In the Miramar case shipowners sought to make cargo-owners liable fordemurrage as a result of a clause in a bill of lading which provided that allterms whatsoever of the charter-party except the rate and payment of freightwere to apply to and govern the rights of the parties concerned in the shipment.Lord Diplock made it clear (at p 131, col 2; p 683) that leave to appeal wasgiven so that the House of Lords could consider the extent if any to which itwas permissible to resort to verbal manipulation in circumstances such as thoseset out in the dicta of Lord Denning MR in The Annefield which are quoted above.He said (in what Mr Justice Gatehouse described as a "final emphatic passage")at p 134, col 2; p 688: . . . I regard it, however, as more important that this House should takethis opportunity of stating unequivocally that where in a bill of lading thereis included a clause which purports to incorporate the terms of a specifiedcharter-party, there is not any rule of construction that clauses in thatcharter-party which are directly germane to the shipment, carriage or deliveryof goods and impose obligations upon "the charterer" under that designation, arepresumed to be incorporated in the bill of lading with the substitution of(where there is a cesser clause), or inclusion in (where there is no closerclause), the designation "charterer", the designation "consignee of cargo" orbill of lading holder. The House of Lords thus rejected the shipowners' claim for demurrage againstthe cargoowners. Mr Justice Gatehouse took the view that in the light of the reasoning in LordDiplock's speech he should hold that since some manipulation would be requiredof the arbitration clause in the charter-party which he held to be incorporatedthe parties to the bill of lading were not bound by the arbitration clause inthe charter-party to arbitrate their disputes with the shipowners. In The Oinoussin Pride, [1991] 1 Lloyd's Rep 126 Mr Justice Webster took adifferent view. There too the incorporating clause expressly incorporated thearbitration clause in the charter-party but some manipulation was required tomake that clause applicable to disputes between the parties to the bill oflading. Mr Justice Webster said (at p 130) that were it not for the decision ofMr Justice Gatehouse he would follow The Rena K without hesitation and (at p131) he gave these reasons for disagreeing with the conclusion in The NaiMatteini: . . . the words of incorporation in Miramar were general words not includingany specific incorporation of the arbitration clause in the charter-party intothe bills of lading. The issue in that case has nothing to do with the questionwhether the receivers were bound by the arbitration clause contained in thatcharter-party, but only with the question whether they were liable for demurrageunder it. Mr Steyn, as he then was, in argument submitted that the case beforetheir Lordships' House was entirely different from cases which concerned thequestion whether the arbitration clause had been incorporated, and I can find noindication in the speech of Lord Diplock, with which all the other members oftheir Lordships' House agreed, that the principle which he was enunciating, or

[1994] 2 Lloyd's Rep 50any of his reasoning, applied to cases of specific incorporation of anarbitration clause such as exists in this case and such as existed in The RenaK. I agree with the decision and reasoning of Mr Justice Webster in that case.For the reasons which he gave I do not think that there is anything in thereasoning or the decision in Miramar to cast doubt upon the reasoning anddecision of Mr Justice Brandon in The Rena K. While my conclusion does notdepend upon this point, I observe that Lord Brandon was a party to the decisionin Miramar and that he agreed with Lord Diplock. While it is, I suppose,possible that he had forgotten about his decision The Rena K, that seems to meto be rather unlikely and, if he had not, it is inconceivable that he intendedto overrule it without referring to it. The question remains whether the express reference to the arbitration clausein cl 1 of the general conditions has the effect of incorporating cl 36 of thecharter-party or whether the effect of the clause on the front which I have setout above, when considered in the context of the whole document including cl 1,leads to the conclusion that the parties to the bill of lading agreed to submittheir disputes to the jurisdiction of the English Courts but not to arbitration. Mr Cooper submits that the reference to "English law and jurisdiction" canonly refer to English law and to the English Courts. Moreover he drawsattention to the fact that the provenance of the clause is cl 24 of thecharter-party, where he says that it must refer only to the English Courtsbecause if the draftsman had intended to refer to arbitration he would have doneso, as he did in cl 36. There is I think some force in these submissions and,indeed, Mr Sussex accepts that if the clause stood alone without cl 1 on theback of the bill of lading, the reference to English jurisdiction would be areference to the English Court. However he submits that the correct approach isto construe the bill of lading as a whole and that the Court should not rejectany of the terms of the document on the ground of inconsistency unless driven todo so. I accept the submission that the correct course is to try to give effect toall the provisions of the bill. In my judgment if that attempt is made it leadsto the conclusion that effect can be given to both the clause on the front andthe clause on the back. There is some overlap between the clauses but, as I seeit, no conflict. The notion of English jurisdiction is not inconsistent with asubmission to arbitration, if only because the English Court retains asupervisory jurisdiction over the arbitration, which according to cl 36 is totake place in England. In these circumstances I see no reason to disregard thespecific reference in cl 1 to the incorporation of the arbitration clause. In my judgment the arbitration clause is incorporated and, as Mr JusticeBrandon put it in The Rena K (sup) at p 551, col 1; pp 390-391, "... if it is necessary, as it obviously is, to manipulate or adapt part ofthe wording of that clause in order to give effect to that intention, then I amclearly of opinion that this should be done. Those considerations apply equally here. I therefore hold that on the trueconstruction of the contract contained in or evidenced by the bill of lading(including the arbitration clause in the charter-party incorporated in it) theparties to the bill of lading agreed to submit their disputes to arbitration

[1994] 2 Lloyd's Rep 50in London. Mr Cooper submits however that if the arbitration clause is to be manipulatedto vary the identity of the parties to it, it is no longer an arbitrationagreement for the purposes of s 1 of the Arbitration Act, 1975 because it is nolonger an agreement in writing. I disagree. In my judgment the conclusionwhich I have set out above is reached by a process of construction of the billof lading and of the arbitration clause incorporated into it. Both the bill oflading and the charter-party are documents in writing. In these circumstancesit seems to me to be impossible to say that the arbitration agreement is otherthan in writing. Since it is common ground that the arbitration agreement, if there is one, isnot a domestic arbitration agreement, it follows that the defendants areentitled to a stay of this action unless the defendants have taken a step in theaction or the agreement is inoperative on the ground of variation or waiver orestoppel. The defendants have not taken a step in the action; so I turn to thesubmissions which have been made under the heads of variation, waiver andestoppel. Variation, waiver and estoppel Mr Cooper submits that the defendants are not in any event entitled to a stayof this action on the ground that they have agreed to vary the contract byagreeing to the dispute being determined by the Court. Alternatively he submitsthat they have waived their right to rely upon the arbitration clause or thatthey are estopped from doing so. He submits that the case is similar on thefacts to The Elizabeth H, [1962] 1 Lloyd's Rep 172 and relies upon the eventsfrom the period from the issue of the writ until now. Those events may besummarized as follows. At some time in 1992 the plaintiffs arrested the vessel at Fos. In order toobtain her release the defendants' P & I Club gave an undertaking to pay any sumfound to be due "by a final arbitration award or judgment of a competent courtin England". The writ in this action was served on Nov 4, 1992 and on Mar 5, 1993 MessrsClyde & Co acknowledged service of the writ on behalf of the defendants.Negotiations between Dres Dabelstein & Passehl on behalf of the plaintiffs andMessrs Clyde & Co on behalf of the defendants began on or about Mar 10 in anattempt to settle the dispute. Points of claim were served on Mar 17. On Mar29 the plaintiffs agreed to extend time for service of a defence indefinitelysubject to seven days' notice. It was hoped that further negotiations wouldtake place. The extension was confirmed in writing on Mar 31. On July 7 seven days' notice terminating the extension time was given. Onthe next day Ms Maxwell of Messrs Clyde & Co telephoned Mr Salander of DresDabelstein & Passehl and it was agreed in effect that the notice would bewithdrawn but that if Ms Maxwell did not revert within seven days Mr Salanderwould serve a new notice. In the event Ms Maxwell telephoned on July 14 and itwas agreed that the parties would meet on Aug 18 or 19. However the plaintiffsproved unable to make those dates and on Aug 16 Mr Salander telephoned to saythat the first dates which he and his clients could make were Sept 16 and 17.Ms Maxwell said that she would have to take instructions.

[1994] 2 Lloyd's Rep 50 On Aug 19 Mr Salander faxed Ms Maxwell saying inter alia that service of adefence would serve to clarify the issues between the parties, terminating anyagreement to extend time for service of the defence as from seven days fromreceipt of the fax and stating "we hereby agree that the defence be served byFriday 3rd September." On Aug 27 Mr Salander and Ms Maxwell had a telephoneconversation. According to Mr Salander during that conversation Ms Maxwell saidthat she had no instructions regarding a without prejudice meeting to discusssettlement and would now be preparing a defence. That account is supported byMr Salander's attendance note. Ms Maxwell's account of the meeting isdifferent. She says that she told Mr Salander that her client was away onholiday and that he could not expect her at the same time to defend theproceedings and to meet to discuss settlement. Mr Salander agreed to refix thetime for service of the defence if she reverted within a week with arrangementsfor a meeting. Ms Maxwell's account is supported by an attendance note whichcontains no reference to her saying that she would now be preparing a defence. It is convenient to consider whether there was any variation, waiver orestoppel before Aug 31. In my judgment, however the issue of fact as to thecontents of the conversation of Aug 27 is resolved, there plainly was not.There was no agreement which could amount to a variation of the arbitrationagreement in the bill of lading and no unequivocal representation or conductwhich could form the basis of any waiver or estoppel. I turn therefore to the events of Aug 31 when a further telephoneconversation took place between Mr Salander and Ms Maxwell. Mr Salander saysthat Ms Maxwell offered a without prejudice meeting for Sept 16 or 17 and thenreferred to the question of the service of the defence if the matter was notsettled. He says that it was agreed that Clyde & Co's clients would serve adefence by Sept 30 and that Ms Maxwell asked him to confirm the agreement inwriting. He accordingly sent her a fax dated Sept 1 in which inter alia hewrote "we confirm our agreement that your clients serve a defence by 30thSeptember". His attendance note confirms that agreement. Ms Maxwell's account in her affidavit is not quite the same. She says thatshe asked him to agree an extension of time for service of the defence but thatMr Salander wanted to leave that until after the meeting of Sept 16 because itmight not be necessary. She said that she was not happy with that and that shewanted to agree an extension then and there and suggested Sept 30. He agreedand also agreed that he would confirm the time extension in writing. MsMaxwell's attendance note includes the words "Agree now. Service of Defence by30th September". When Ms Maxwell received the fax on Sept 1 she did not immediately reply buton Sept 16 she sent a fax which referred to the agreement to meet and continued: You said that you would leave the question of an extension for service ofdefence until after the meeting. We asked for an extension to 30th September inany event which you agreed. It would have made no sense in that conversation toagree to serve a defence and we did not agree it. In my judgment the agreement amounted to no more than this. Ms Maxwellagreed to serve any defence by Sept 30. The agreement must he viewed in thecontext of many previous discussions relating to an extension of time forservice of a defence. Moreover, as is said in Ms Maxwell's fax of Sept 16, itwould make no sense to agree to serve a defence by the Sept 30 whatever

[1994] 2 Lloyd's Rep 50happened. Thus it makes no sense to hold that the parties made a contractwhereby the defendants agreed to serve a defence whatever happened at themeeting because a settlement might have been reached. It would perhaps make more sense to say that it was agreed that if the matterwere not settled the defendants would serve a defence by Sept 30. However,there is no suggestion that that was the agreement. Moreover I can see noreason why Ms Maxwell should have agreed on Aug 31 that the defendants wouldserve a defence by Sept 30 and in effect have agreed that no application for astay would be made in the meantime. There is nothing in the exchanges between the parties that suggests that thedefendants intended to waive their right to apply for a stay or that they madeany representation to that effect either by words or conduct. Ms Maxwell saysin her affidavit that by August she was aware of the arbitration point. I seeno reason to reject that evidence. In my judgment the only agreement that makesany sense is that the defendants agreed to serve any defence by Sept 30. Thusif they did not, they would not be in breach of contract but the plaintiffswould be able to sign judgment in default of defence in the absence of anapplication for a stay. There may have been a misunderstanding between Mr Salander and Ms Maxwell butthe evidence does not in my judgment show that the defendants agreed to serve adefence and not to apply for a stay. The position is much as in the recentdecision of the Court of Appeal in Lawson v Midland Travellers Ltd, [1993] 1 WLR735, where there was an agreement between solicitors to "extend our time forservice of the defence until 14 days after" a particular event. It was arguedthat the agreement amounted to an agreement to extend time for service of thedefence but not for applying to set aside the writ. Lord Justice Stuart-Smithsaid (at p 742): I can see no basis for this construction. If, as in my opinion is the case,an extension of time for service of the defence automatically involves anextension of time for applying under Ord 12 r 8(1) a plaintiff who wishes onlyto extend the time for the former but not the latter purpose, must expressly sayso in granting his consent. I see no reason why he should not do so, if he isso minded; though this will draw attention to the defective service which he mayhope, perhaps forlornly, that the defendant has overlooked. Just as RSC, O 12, r 8 provides that an application under that rule may bemade within the time limited for serving a defence, so s 1 of the ArbitrationAct, 1975 provides that an application for a stay may be made at any time beforethe defendant takes a step in the action or serves a defence. Thus even anagreement to serve a defence by a particular date would not in my judgmentwithout more amount to an agreement not to apply for a stay or to arepresentation not to do so. It would, as Mr Sussex submits, be equivocal. In all the circumstances none of the events to date, whether looked atindividually or together, supports the submission that there has been anyrelevant variation of the contract or any unequivocal representation or conductsuch as might found a waiver or estoppel. In arriving at this conclusion I havenot found the decision in The Elizabeth H, (sup) of particular assistance. Itwas simply a decision on its own facts.

[1994] 2 Lloyd's Rep 50 For these reasons I have reached the conclusion that the defendants areentitled to a stay of this action under s 1 of the Arbitration Act, 1975DISPOSITION: Judgment accordinglySOLICITORS: Clyde & Co; Dres Dabelstein & Passehl