UK 47 . 11 January 1996 Scott Lec Stewart Schaublon

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Jan. 11, 12, 16 and 17, 1996

TOEPFER INTERNATIONAL G.m.b.H.
v.
MOLINO BOSCHI SRL

Before Mr. Justice MANCE

Sale of goods (c.i.f.) — Stay of proceedings — Short delivery — Proceedings commenced by defendants in Italy — Plaintiffs applied for declaratory and injunctive relief — Whether application for stay should be granted — Whether Brussels Convention applied — Civil Jurisdiction and Judgments Act, 1982, Schedule, arts. 17, 21, 22.

The defendants (Molino Boschi) had since Oct. 14, 1988 been pursuing proceedings in Ravenna, Italy arising out of the delivery to Venice in February, 1988 of about 11,120 tonnes of Chinese soya meal under a contract for sale c.i.f. Ravenna and/or Venice by Toepfer to Molino Boschi made on terms incorporating GAFTA 100 in January, 1988. Molino Boschi had two claims, a small claim for short delivery and a larger claim for an allowance which they alleged was agreed to reflect excessive urease activity in the cargo.

By originating summons dated Oct. 12, 1995 Toepfer applied for (a) a declaration that Molino Boschi were entitled and obliged, pursuant to an arbitration agreement contained in the contract of sale, to refer to GAFTA arbitration the disputes which were the subject of the Ravenna proceedings and (b) injunctions restraining Molino Boschi from taking further steps or in any way participating further in the Ravenna proceedings, requiring Molino Boschi to discontinue the Ravenna proceedings and restraining them from commencing any proceedings in respect of claims which were the subject of such proceedings otherwise than by GAFTA arbitration in London.

On Oct. 10, 1995 Mr. Justice Waller granted leave to serve these proceedings out of the jurisdiction under R.S.C., O. 11, r. 1(1)(*d*)(i), (ii) and (iv).

By a summons under O. 12, r. 8 Molino Boschi submitted that since the Italian Court was unquestionably first seised of the proceedings the English Court must or should decline or stay jurisdiction under arts. 21 or 22 of the Brussels Convention or if that Convention did not apply that leave should not be granted under O. 11, r. 1(1) as a matter of discretion.

Molino Boschi further contended that although GAFTA 100 included an exclusive jurisdiction clause conferring such jurisdiction on the English Courts, Toepfer had voluntarily submitted on the merits in the Italian litigation so that art. 17 did not apply.

——*Held*, by Q.B. (Com. Ct.) (MANCE, J.), that (1) under art. 21, Molino Boschi had to show that Toepfer's originating summons had the same end in view as Molino Boschi's action in Italy; it did not; Molino Boschi in Italy were seeking to recover sums allegedly due on an examination of the terms and performance of the contracts; Toepfer in England were seeking to stop any such examination taking place in Italy; the cause of action in the two countries was not the same; in Italy the terms regarding delivery and urease and the parties' performance fell to be determined; in England the only issue was whether the Italian claims should be determined by arbitration in London (*see* p. 513, cols. 1 and 2; p. 515, cols. 1 and 2);

(2) the claims for declaratory relief also had a different object and cause of action from the Italian proceedings; in so far as it was to try to oblige or influence the Italian Court to accede to Toepfer's defence that the matter fell within the binding arbitration agreement, the object was to prevent the determination by the Italian Court of Molino Boschi's claims; in so far as it was to resist enforcement in third countries or to base a later claim for damages for breach of the arbitration proceedings the object was again distinct from any at which Molino Boschi's suit in Italy was aimed; art. 21 was of no assistance to Molino Boschi (*see* p. 513, col. 2; p. 515, cols. 1 and 2);

(3) that there was a connection between the Italian proceedings and English proceedings was beyond doubt, the basic issue whether the Italian claims should be arbitrated was the same in both countries and for the purposes of art. 22 differences which would exist between national laws were not decisive; but where there was an exclusive jurisdiction clause art. 17 applied and had precedence over arts. 21 and 22; there was no voluntary submission by Toepfer on the merits in the Italian litigation (*see* p. 513, col. 2; p. 514, cols. 1 and 2; p. 515, cols. 1 and 2);

——*Elefanten Schuh G.m.b.H. v. Pierre Jacqmain*, Case 150/80 [1981] E.C.R. 1671 and *The Atlantic Emperor*, (No. 2) [1992] 1 Lloyd's Rep. 624, considered.

(4) claims for both injunctive and declaratory relief were discretionary; delay was an extremely relevant factor in the exercise of any discretion whether to grant relief as sought in the originating summons; and it was incumbent on Toepfer to investigate and raise the possibility of taking any relevant steps in England to rectify the position long before May or September, 1995 (*see* p. 515, col. 2; p. 516, col. 2);

(5) this was not a case where this Court should at this very late stage contemplate issuing any injunction to prevent Molino Boschi pursuing and seeking the ruling of the Italian Court either on the issues of procedure which had been ventilated before it exhaustively with oral evidence or on any substantive issues which did arise thereafter; it was inappropriate to grant either the injunctive of the declaratory relief sought by Toepfer's originating summons which was dismissed accordingly (*see* p. 518, cols. 1 and 2).

The following cases were referred to in the judgment:

Aggeliki Charis Co. Maritime S.A. v. Pagnan S.p.A. (The *Angelic Grace*), [1995] 1 Lloyd's Rep. 87;

WWW.NEWYORKCONVENTION.ORG

United Kingdom
Page 1 of 9

Atlantic Emperor, (No. 2), The (C.A.) [1992] 1 Lloyd's Rep. 624;

Chapman v. Michaelson, [1909] 1 Ch. 238;

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

Elefanten Schuh G.m.b.H. v. Pierre Jacqmain, (No. 150/80) [1981] E.C.R. 1671;

Lindsay Petroleum Co. v. Hurd and Others, (1874) L.R. 5 P.C. 221;

Maciej Rataj, The (E.C.J.) [1995] 1 Lloyd's Rep. 302;

Mayer Newman & Co. Ltd. v. Al Ferro Commodities Corporation S.A. (The *John Helmsing*), (C.A.) [1990] 2 Lloyd's Rep. 290;

Partenreederei m/s "Heidberg" and Another v. Grosvenor Grain and Feed Co. Ltd. and Others (The *Heidberg*), [1994] 2 Lloyd's Rep. 287;

Rich (Marc) & Co. A.G. v. Societa Italiana Impianti P.A. (The *Atlantic Emperor*), (E.C.J.) [1992] 1 Lloyd's Rep. 342;

SL Sethia Liners Ltd. v. Naviagro Maritime Corporation (The *Kostas Melas*), [1981] 1 Lloyd's Rep. 18;

SL Sethia Liners Ltd. v. State Trading Corporation of India Ltd., (C.A.) [1986] 1 Lloyd's Rep. 31; [1985] 1 W.L.R. 1398;

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

This was an application by the plaintiffs Alfred C. Toepfer International G.m.b.H. for declaratory and injunctive relief against the defendants Molino Boschi Srl and an application by Molino Boschi that the action brought by Toepfer be stayed.

Mr. Duncan Matthews (instructed by Messrs. Middleton Potts) for the plaintiffs; Mr. Stephen Males (instructed by Messrs. Holman Fenwick & Willan) for the defendants.

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

JUDGMENT

Mr. Justice MANCE: The Brussels and Lugano Conventions on Civil Jurisdiction and Judgments implemented in this country by the Civil Jurisdiction and Judgments Act, 1982 as amended and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which the Arbitration Acts, 1950–1979 give effect contemplate the early assignment of cases to a proper forum and tribunal for their substantive resolution. In practice, the resolution of issues relating to forum and tribunal has often proved complex, costly and not without at least some delay. In this country such issues are determinedly decided at the outset of proceedings. In some countries, Italy being one, this is not automatically so. On any view, it is desirable that parties should define their positions on jurisdiction and arbitration at as early a stage as possible. They should not be encouraged to see how they fare in one forum before seeking to invoke or force resort to another. There was a fair measure of agreement between the parties that this represents the modern view in these Courts. But the plaintiffs before me, who I shall call Toepfer, submit that in relation to applications to enjoin foreign proceedings it is only recently that the English Courts have expected a defendant in foreign proceedings to act promptly if he wished to take any steps in England to enjoin the foreign proceedings. Previously, they say, the English Courts would in the interests of comity have expected a foreign defendant first to exhaust any remedies which he might have in the foreign jurisdiction.

In the present case the defendants before me, Molino Boschi, have since Oct. 14, 1988 been pursuing proceedings in Ravenna, Italy arising out of the delivery to Venice in February, 1988 of some 11,120 tonnes of Chinese soya meal under a contract for sale c.i.f. Ravenna and/or Venice by Toepfer to Molino Boschi made on terms incorporating GAFTA 100 in January, 1988. Molino Boschi have two claims, a small claim for short delivery worth U.S.$41,287 and a larger claim for an allowance which they say was agreed to reflect excessive urease activity of the cargo as shown by certificates of Salamon & Seaber. This latter claim is in the sum of U.S.$407,467.71. In each case substantial interest is probably to be added. In the Italian proceedings, Toepfer have made three responses: (i) that the Italian Courts lack jurisdiction to hear the case under the Brussels Convention since the place of contractual performance for the purposes of art. 5 was outside Italy; (ii) that GAFTA 100 provides for arbitration of any dispute arising out of or under the contract in London in accordance with GAFTA 125, and (iii) as a subordinate submission, which in Toepfer's submission is made unnecessary by points (i) and (ii), that Molino Boschi's claims should be rejected on the merits. In submissions dated Dec. 15, 1989 and Oct. 5, 1990 Toepfer specifically sought from the examining Judge, Dr. Cognani, an early determination of points (i) and (ii) by the College of Three Judges. The examining Judge evidently acceded to the request, and Nov. 10, 1992 was fixed for the hearing before the College. This date was on Sept. 1, 1992 postponed to Apr. 12, 1994 when Dr. Cognani was transferred to other duties and

WWW.NEWYORKCONVENTION.ORG

eplaced by Dr. Coco. In the meantime Molino Boschi must have had at least some doubt about heir prospects on points (i) and (ii) in Italy, and ought extensions of time for arbitration in London irst from GAFTA under their rules and then from me, sitting in November, 1992 as a Deputy Judge in he Commercial Court, under the Arbitration Act, 1950, s. 27. In each case Molino Boschi were unsuccessful, and the Court of Appeal refused leave o appeal against my refusal of an extension. I efused the extension sought although in the course of my judgment I concluded that the small shortage laim was unanswerable and that the larger urease laim was "extremely strong".

Shortly before the date for hearing before the College, both parties exchanged long and detailed submissions and replies on all three points. In vigorous submissions dated Mar. 25, 1994 Toepfer not only pointed to Molino Boschi's unsuccessful attempt to arbitrate in London as a sign of lack of faith in its case in Italy, but also asked rhetorically and somewhat inconsistently with their own previous stance) why there was so much exertion on points (i) and (ii) without even a nod in the direction of the substantive merits. Toepfer went on o suggest that Molino Boschi had failed to bring any proof of their claims. Molino Boschi submitted also at length on Apr. 1, 1994 that they had never intended to agree to arbitrate and that their signature of a broker's form of contract confirmation after the event did not amount to a relevant written agreement to arbitrate under Italian law. On the merits, they said that Toepfer had never contested he documents on which their two claims were based. In a reply dated Apr. 8, 1994 Toepfer compared Molino Boschi's attitude before the Italian and English Courts.

The College of Three, Drs. Coco, Agnoi and Picaroni, met on May 6, 1994. They confirmed the relevance of Molino Boschi's evidence as to the date of signature of the broker's confirmation and, as I understand it, although the translation is obscure, they also confirmed the relevance of the issue of arbitration and indicated that they would decide that issue, fixing June 7, 1994 for the hearing of the evidence before Dr. Coco. Certainly, when the matter came back before the Court on June 7, 1994, the evidence heard related to that issue and the matter was adjourned for Toepfer's lawyer to file copies of the documents used in the English proceedings under s. 27. These documents were filed on Oct. 18, 1994 and on Dec. 13, 1994 a further hearing was fixed before the College for Feb. 13, 1996. On the same day Toepfer filed a further brief relying on points (i), (ii) and (iii).

By originating summons dated Oct. 12, 1995 Toepfer now seeks from this Court (a) a declaration that Molino Boschi —

> . . . are entitled and obliged, pursuant to an arbitration agreement contained in [the] contract of sale . . . concluded on 26th January 1988 . . . , to refer to arbitration by [GAFTA] the disputes the subject of . . . the Ravenna proceedings . . .

and (b) injunctions restraining [Molino Boschi] from taking any further step or in any way participating further in the Ravenna proceedings, requiring Molino Boschi to discontinue the Ravenna proceedings and restraining them from commencing any proceedings in respect of the claims the subject of such proceedings otherwise than by GAFTA arbitration in London. In reality Toepfer would object to any such arbitration as time barred, both under GAFTA rules and now under the Limitation Act. Leave to serve these proceedings out of the jurisdiction was sought and on Oct. 10, 1995 granted by Mr. Justice Waller under R.S.C., O. 11, r. 1(1)(*d*)(i), (ii) and (iv). Toepfer's justification for proceeding under O. 11, r. 1(1) rather than O. 11, r. 1(2) was that the case fell outside the Brussels Convention because it concerned arbitration within art. 1(4) of that Convention. Molino Boschi submit that was wrong, but take no specific point on the failure to act under O. 11, r. 1(2); if the matter had arisen for consideration, it may well be that Toepfer's originating summons would have fallen to be regarded as relating to the performance of an alleged obligation to arbitrate in England, within art. 5(1) of the Convention.

Molino Boschi have however issued a summons under O. 12, r. 8 taking different points. Those which are live are that, since the Italian Court was unquestionably first seized of proceedings, the English Court must or should decline or stay jurisdiction under arts. 21 or 22 of the Convention, or that, if the Convention does not apply, that leave should not have been granted under O. 11, r. 1(1) as a matter of discretion. If this originating summons fails, then Molino Boschi submit that Toepfer should be refused the declaratory and injunctive relief sought because there was and is no "dispute" falling within the GAFTA arbitration agreement and/or as a matter or discretion and/or in the light of the lapse of time in issuing the originating summons. Logically, the summons under O. 12, r. 8 comes first, but, in view of the shortness of time before the next hearing in Ravenna and the overlap in some of the matters arising, I have heard argument on the summons and originating summons in open Court together.

Does the Brussels Convention apply to the claims made in the originating summons?

The originating summons contains a claim for a declaration and claims for three injunctions, and it is necessary here, as in other contexts in this

WWW.NEWYORKCONVENTION.ORG

judgment, to bear in mind that the same considerations may not apply to each. A declaration that a defendant is entitled and obliged to arbitrate a particular dispute or disputes might be regarded as more closely related to arbitration than injunctions requiring him not to pursue and to discontinue foreign proceedings. Even so such a declaration is not integral to the arbitration process in the same way as an application to the Court to appoint an arbitrator (cf. *Marc Rich & Co. A.G. v. Societa Italiana Impianti P.A. (The Atlantic Emperor)*, [1992] 1 Lloyd's Rep. 342 (Eur. Ct.)). It may be designed to do no more than to establish the basis for a claim for damages for breach of contract in failing to arbitrate or for an issue estoppel in relation to foreign proceedings. In the former case, a claim for such a declaration would not seem to me to fall within art. 1(4) of the Convention. In the latter case, if the decision in *Partenreederei m/s "Heidberg" and Another v. Grosvenor Grain and Feed Co. Ltd. and Others (The Heidberg)*, [1994] 2 Lloyd's Rep. 287 is right, it would also not fall within art. 1(4). The claims for injunctions, although based on the asserted existence of binding and applicable arbitration clauses, are also directed to stopping foreign proceedings rather than actually bringing any arbitration into existence. As I have said, Toepfer's response to any suggestion that there could actually be any effective arbitration would be time bar. For present purposes, I shall proceed on the basis that the Brussels Convention does apply to all the claims made by Toepfer's originating summons.

Article 21

Again it is necessary to bear in mind possible differences between the claims for declaratory and injunctive relief. The claims for injunctive relief do not in my judgment have the same object or cause of action as the proceedings in Italy. The object means "the end which the action has in view": see *The Maciej Rataj*, [1995] (E.C.J.) 1 Lloyd's Rep. 302 at p. 308, par. 41. Molino Boschi must show that Toepfer's originating summons has the same end in view as Molino Boschi's action in Italy. It does not. Molino Boschi in Italy are seeking to recover sums allegedly due on an examination of the terms and performance of the contract. Toepfer in England are seeking to stop any such examination taking place in Italy at all. By the same token the cause of action (described in *The Maciej Rataj* par. 39 as "the facts and the rule of law relied on as the basis of the action") is not the same in the two countries. In Italy the terms regarding delivery and urease and the parties' performance in that regard fall for determination, whereas in England the only issue is whether the Italian claims should be being determined by arbitration in London. It is true that Toepfer have also raised in Italy the preliminary objection that the claims should be being arbitrated in London. But that is, at most, only one aspect of the Italian proceedings, and, although this is not critical, because of the differences between the English and Italian law regarding arbitration agreements it raises very different considerations in the two countries. It does not make it possible to view the two sets of proceedings as having the same cause of action.

The claim for a declaration also has a different object and cause of action in my view from the Italian proceedings. Its object is less clear-cut. In so far as it is to try to oblige or influence the Italian Court to accede to Toepfer's defence in Italy that the matter falls within a binding arbitration agreement, the object is to prevent the determination by the Italian Court of the claims which it is Molino Boschi's aim in Italy to pursue. In so far as it is to resist enforcement in third countries such as Germany or to base a later claim for damages for breach of the arbitration proceedings, the object is again distinct from any at which Molino Boschi's suit in Italy is aimed. The cause of action in the sense identified above is also not the same for reasons similar to those identified in considering the claims to injunctions.

In my judgment therefore art. 21 is of no assistance to Molino Boschi.

Article 22

This article applies "where related actions are brought in the courts of different Contracting States". For the purposes of the article —

> . . . actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The Court second-seised *may* then, while the actions are pending at first instance, stay its proceedings. The European Court in *The Maciej Rataj* pars. 51–53 emphasized that, to achieve proper administration of justice, the interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive.

That there is a connection between the Italian and English proceedings is beyond doubt. The question is whether they are "related" in the sense envisaged in art. 22 and, if so, whether the Court's discretion should be exercised to grant a stay. Taking the injunctive claims first, their purpose is, as explained, to stop Molino Boschi pursuing the Italian proceedings (or any other proceedings, save arbitration). It would be quite contrary to that

WWW.NEWYORKCONVENTION.ORG

purpose, and inexpedient, to require the present claims to be heard and determined together with the Italian proceedings which it is their very object to stop. Further, it is not to be envisaged that Molino Boschi would disobey any such injunction, if granted. (Indeed, in parenthesis, it would itself appear likely to be entitled to recognition abroad under the Brussels Convention.) If and when an injunction is granted, the Court must assume that there will be no further Italian proceedings. If no injunction is granted, caedit quaestio. Either way, the problem of irreconcilable judgments should not arise. Thirdly, if the Italian action were pursued to a successful judgment by Molino despite an English injunction, there would appear to be every reason to think that the Italian judgment would not be recognized in England: cf. art. 27(1) of the Brussels Convention. The evidence of Frau Drobnig of the German law-firm, Hasche & Eschenlohr, suggests that a like result could apply in Germany.

The declaratory claim raises different considerations. It is aimed at determining inter partes the issue whether the claims being made in Italy should have been pursued in London arbitration. That is the same issue as one of the defences raised by Toepfer in the Italian action, although the legal principles regarding the validity of arbitration agreements in England and Italy are very different. In Italy, the topic is apparently regarded as one of procedure, subject to Italian law, which treats art. II of the New York Convention for its domestic purposes as requiring some form of specific, and (normally at least) separately and contemporaneously signed, agreement on arbitration. If there is a binding arbitration agreement, then it seems in Italy that the Italian action is incompetent and would fail for that reason. In parenthesis, Molino Boschi do not appear in Italy to have the benefit of the argument that exists in the context of English proceedings for summary judgment, namely that, even if there would otherwise be an arguable dispute which ought on its face to go to arbitration, where the claim can on examination be shown to be incapable of serious dispute, judgment should be given and a stay refused. In England, whether there is a valid arbitration agreement is a matter to be determined by the proper law of the contract, here, according to English principles, unquestionably English.

Nonetheless, the basic issue whether the Italian claims should be being arbitrated is the same in both countries, and for the purposes of art. 22 differences which would exist between national laws are not decisive. *The Heidberg* indicates that, if the Italian Courts were to determine that the Italian claims are not subject to arbitration, the English Courts would prima facie be bound by that determination, despite art. 1(4) of the Brussels Convention. Neither party suggested that *The Heidberg* was wrong before me. On that basis, it would presumably follow that, if the English Court were now to determine, either way, that the Italian claims are or are not arbitrable, the Italian Court would be bound thereby in its current proceedings. In my view Toepfer's claim in this country for a declaration is related to the issue of arbitration which arises in Italy in a way which does make it potentially expedient to hear and determine it together with the same issue in Italy to avoid the risk of irreconcilable judgments. In the present case, the aim may be, as I have said, not so much to achieve any irreconcilable judgments, as to pre-empt the Italian Court's decision as to the existence of any arbitration agreement. Since the English Court is second-seised, it should thus look closely at the suggestion that it should as a matter of discretion fulfil any such role. Toepfer can say that the treatment by Italian law (so far as it has been explained to me) of the validity of arbitration agreements as a matter of procedure and its apparently rigid attitude to the nature of the written agreement contemplated by art. II of the New York Convention are on their face unexpected and out of line with general trends. But there would in the present case be a number of other factors which would bear strongly on any question whether the English Court should, in the exercise of any discretion under art. 22, countenance the continuation of the present declaratory claim. I need say no more on these here because my conclusions on the next point mean that there is another reason why art. 22 does not anyway apply.

Article 17 — exclusive jurisdiction agreement

There is Court of Appeal authority that, if art. 17 applies, then it has precedence over arts. 21 and 22: *Continental Bank N.A. v. Aeokos Compania Naviera S.A.*, [1994] 1 Lloyd's Rep. 505; [1994] 1 W.L.R. 588. Here, in addition to the arbitration clause, GAFTA 100 includes a clause (cl. 30) conferring exclusive jurisdiction on the English Courts over all disputes which may arise under this contract. Molino Boschi, while reserving their right to challenge the correctness of that decision at an appropriate level, raised only one answer before me to its application to the present claims for a declaration and injunctions. That was that Toepfer had voluntarily submitted on the merits in the Italian litigation, so that art. 17 was itself trumped by art. 18. In my judgment that is wrong viewing the facts of this case in the light of the guidance given as to the legal conception of voluntary submission in the European Court in *Elefanten Schuh GmbH. v. Pierre Jacqmain*, (Case 150/80) [1981] E.C.R. 1671 and by the Court of Appeal in *The Atlantic Emperor* (No. 2), [1992] 1 Lloyd's Rep. 624, where

WWW.NEWYORKCONVENTION.ORG

at p. 633 Lord Justice Neill explained the *Elefanten* case as saying that —

> . . . provided the defendant makes it clear in his first defence rather than in some subsequent defence that he is contesting the jurisdiction, that will not amount to a submission to the jurisdiction even though there is some additional material which constitutes a plea to the merits of the case.

In that case, the Court of Appeal proceeded on the basis that —

> . . . it may well be that it was not necessary for Marc Rich [the defendant] to lodge an alternative defence on the merits in October, 1988, but they made it abundantly clear in the pleading that the primary purpose of the document was to challenge the jurisdiction of the Genoa Court.

Here, Toepfer have clearly made submissions on the merits, and there is nothing to show that they were required to do this. However, they did so at each stage as a subsidiary and precautionary matter. Their primary case was that the issues regarding jurisdiction and arbitration should be resolved in their favour. The request that those issues should be addressed first in Italy appears to have been accepted and to be being implemented, albeit slowly. Even Toepfer's most enthusiastic reference to the substantive merits, when they asked rhetorically on Mar. 25, 1994 why there was so much exertion on points (i) and (ii) "without even a nod towards the issue of substance" and suggested that Molino Boschi had failed in their proof, followed lengthy submissions on the primary issues. I see nothing to constitute any submission on the merits. It is notable also that no submission has been made by Molino Boschi in Italy to the effect that Toepfer have voluntarily submitted there within art. 18.

Discretion

Apart from the context of art. 22, this does not arise if the Convention applies. Since I am prepared to proceed on the basis that the Convention does apply, it is unnecessary for me to consider any issue of discretion which would have arisen under O. 11, r. 1(1).

Conclusions relating to Molino Boschi's summons under O. 12, r. 8

My conclusions in relation to arts. 21 and 22 indicate that these articles would anyway create no obstacle to the pursuit of the claims for injunctive relief, quite apart from art. 17. Molino Boschi's summons under O. 12, r. 8 therefore fails in relation to the claims for injunctive relief. As to the claim for declaratory relief, art. 21 would anyway be inapplicable to Molino Boschi's summons. Article 22 would on the other hand be potentially applicable, but for the existence of the exclusive jurisdiction clause and application of art. 17. Molino Boschi's summons under O. 12, r. 8 will thus be dismissed in its entirety.

The originating summons

Claims for both injunctive and declaratory relief are discretionary. The present claims in the originating summons are made very late in the course of the Italian proceedings. Molino Boschi suggested that this might make them subject to a defence of laches. Initially, this was disputed by Toepfer in relation to the claim for a declaration, with reference to *Chapman v. Michaelson*, [1909] 1 Ch. 238 at pp. 241–242 and 243, although I doubt whether that authority has the effect suggested. Ultimately it was in any event accepted that the discretionary nature of the relief makes the point academic, unless I were to treat the claims for declaratory and injunctive relief as founded on events occurring more than six years ago and were to apply to them some rigid six year limit analogous to that governing causes of action within the Limitation Act. That would not in my judgment be appropriate. Molino Boschi have, on Toepfer's case, pursued the Ravenna proceedings in breach of agreement up to this very date, and the declaration and injunctions are sought to prevent that current and continuing breach. Leaving aside that point therefore, it was also conceded by Toepfer that all the factors which could be taken into account on a plea of laches could also be taken into account in the exercise of the Court's general discretion. *Lindsay Petroleum Co. v. Hurd and Others*, (1874) L.R. 5 P.C. 221 shows the width and flexibility of the considerations relevant on laches. Laches and the exercise of discretion merge into one another.

As I have said, Toepfer have never accepted the legitimacy of Molino Boschi's pursuit of the Italian action, and both the declaration and the injunction are sought in respect of what is said to be a current and continuing breach by Molino Boschi. Despite this, it seems to me that, in a more general sense, delay is an extremely relevant factor in the exercise of any discretion whether to grant relief as sought by the originating summons. Toepfer's actual state of mind was dealt with in a number of affidavits, which were certainly capable of giving differing impressions about it. At the end of the day, the position appears to be that Toepfer did not actually take any relevant legal advice or think about the possibility of any English relief until after a seminar in Hamburg in May, 1995.

However in the meantime the Italian action has been proceeding for between six and seven years. The parties have investigated and exchanged exhaustive and no doubt costly memoranda under Italian law and procedure on issues regarding jurisdiction, arbitration and the merits. In the Italian

WWW.NEWYORKCONVENTION.ORG
United Kingdom
Page 6 of 9

action, Toepfer appear to have been happy in the belief that all was going well until, they say, May, 1994. The College of Three's decision to call for evidence on, in particular, the dating and signing of the broker's contract confirmation has apparently depressed Toepfer's view of their prospects of success in establishing a binding arbitration agreement under Italian law. A year later, in May, 1995, Toepfer's in-house lawyer, Dr. Katzorke-Weihe attended a seminar in Hamburg where the decision of the English Court of Appeal in *Aggeliki Charis Co. Maritime S.A. v. Pagnan S.p.A. (The Angelic Grace)* [1995] 1 Lloyd's Rep. 87 (decided May 17, 1994) was discussed. Dicta of Lord Justice Millett with which Lord Justice Neill agreed in that case indicate that previous statements about the difference with which an English Court will view applications to enjoin the pursuit of foreign proceedings do not apply when the application is based on a promise not to pursue such proceedings. In that case, as here, the foreign proceedings were being pursued in Italy and it was said that they were contrary to an agreement to arbitrate the claims in question in London. Toepfer thus got in touch once again with Middleton Potts who had acted for them in the s. 27 proceedings before me in 1992, and in September, 1995 the present application was intimated. Toepfer say that they are not to be blamed for any delay in making this application because English law has developed and this only came to their attention in May, 1995. The period of delay from May to September, 1995, which does not seem to me entirely satisfactorily explained, is relatively short and should not they say bar them from the relief claimed.

In my judgment the matter must be looked at more broadly. While I accept that the Court of Appeal in *The Angelic Grace* put a new slant on the exercise of the jurisdiction to enjoin foreign proceedings, it has never been the law that a foreign defendant could with complete impunity allow foreign proceedings to continue practically to judgment and then seek at the last minute relief in England which would halt or undermine. Lord Justice Millett was careful to qualify his statement that the English Court should feel no diffidence in granting an injunction with the caveat "provided that it is sought promptly and before the foreign proceedings are too far advanced". The previous legal atmosphere did not encourage foreign defendants to see how matters went in the foreign proceedings over many years and then, if they felt that matters were turning against them, to seek to prevent or pre-empt any foreign determination by seeking an English injunction or declaration. Mustill & Boyd on Commercial Arbitration (1989) (2nd ed.) contained the following paragraphs at p. 460:

> Where the case falls within the New York Convention, and possibly in other cases as well, we suggest that the right course is for the aggrieved party to exhaust his local remedies by seeking a stay or kindred relief from the local courts, before asking the English Court to intervene. It is only in cases where something has gone plainly gone badly wrong in the local courts that the English Court should grant the extreme remedy of an injunction.
>
> An injunction is unlikely to be granted where the defendant has taken active steps to defend the foreign proceedings. The Court is likely to consider that the balance of convenience is in favour of allowing the foreign proceedings to continue.

The former paragraph is tentative. Further, it is only relevant on an assumption that a foreign decision will not preclude steps being taken in England. Within the regime established by the Brussels Convention, it must be contemplated, as cases like *The Heidberg* indicate, that it is only steps prior to any foreign determination which will have any potential efficacy at all. The latter paragraph in Mustill & Boyd contains a warning. There are also similar warnings in analogous cases on claims for injunctive relief to restrain pursuit of foreign proceedings in breach of an exclusive jurisdiction clause: see *Sohio Supply Co. v. Gatoil (U.S.A.) Inc.*, [1989] 1 Lloyd's Rep. 588 at p. 592. I would also add that *The Angelic Grace* itself also only eliminated some of the diffidence previously felt about granting injunctive relief. It cannot, I think, be suggested that the position relating to declaratory relief has been subject to any equivalent change.

Both on authority and as a matter of commercial common sense, it seems to me that if Toepfer wished to enjoin or take other steps in England affecting the present Italian proceedings, this was something that they could and should have investigated with and pursued through English lawyers long ago. Toepfer are a substantial concern, accustomed no doubt to taking legal advice on English law. Individually diligent as it was of Toepfer's legal adviser to attend a seminar about English law in Hamburg in May, 1995, the matter must, I think, be viewed more generally. Faced with what they have always submitted was a clear breach of an agreement remitting any relevant disputes to English arbitration and giving exclusive jurisdiction to the English Courts on matters not so remitted, it was in my view incumbent on Toepfer to investigate and raise the possibility of taking any relevant steps in England to rectify the position long before September or May, 1995, if they wished to take any such steps at all.

WWW.NEWYORKCONVENTION.ORG

They could have taken such steps at any time from 1989 onwards. During the s. 27 proceedings before me in 1992, although Toepfer always maintained that the Ravenna proceedings were contrary to the London arbitration agreement, one factor before me was that Molino Boschi had voluntarily chosen to take their chance on proceedings in Italy, in disregard of that arbitration agreement. If no prior steps had been taken then, that would have been an occasion when Toepfer could have been expected, objectively, to consider and seek to enjoin the Italian action. Whether it would at the end of the day have made any difference or not, a claim by Toepfer to an injunction at that stage would have been a material factor which I would have needed to evaluate and consider. Since no such claim was raised I dealt with the matter on the basis that I had before me an attempt by Molino Boschi —

> . . . to change direction after having for so long sought to gain what they must have perceived as the advantages of an alternative jurisdiction.

I also mentioned that Molino Boschi's prospects of establishing Italian jurisdiction were presumably no worse in 1992 than they had been at any time since 1989.

Molino Boschi say that, had Toepfer taken or announced such steps at an early stage in the Italian proceedings, then Molino Boschi would have recognized that they should after all protect their position in arbitration, before it was too late to seek the appropriate s. 27 extension. That seems to me, as a matter of fact, quite possible, especially if Toepfer had sought injunctive relief. However, I held in 1992 that it was basically Molino Boschi's own fault in the circumstances as they existed that they lost any right to s. 27 relief by 1992. I do not therefore accept that Molino Boschi can attribute positive prejudice of this nature to Toepfer's failure to seek the present relief then. If, for example, Toepfer had countered the s. 27 application with a claim for injunctive relief, the situation might still have arisen where each side was saying that the other was acting too late, and where each side was saying that, had the other acted earlier, it would have realized that it needed to act itself. Neither party could in that situation attribute to the other a failure which was in reality his own separate fault.

Toepfer say that they were happy until mid-1994 that they were going to succeed in their procedural objections in Italy. An alternative route to establishing these objections only became relevant or attractive in mid-1994 when they detected that they might fail in Italy, although even then it did not occur to them that any such route existed, and they did not investigate whether it did until after the Hamburg seminar of May, 1995. I accept that, on Toepfer's case, the underlying cause of the whole problem is that Molino Boschi have "flagrantly" ignored an arbitration agreement. But, even if one accepts that premise for the moment, and notwithstanding the first paragraph quoted above from Mustill & Boyd, there must still be some end to litigation and to the extent to which and period over which parties can switch between different forums in the hope of achieving what they maintain to be the right result.

The suggestion that Molino Boschi have "flagrantly" ignored an arbitration agreement also requires examination. I held in the context of Molino Boschi's s. 27 application that the shortage claim "was effectively undisputed, although not formally admitted by [then counsel for Toepfer]". That remains the position. No doubt the claim could have been submitted to arbitration, for reasons explained in *SL Sethia Liners Ltd. v. Naviagro Maritime Corporation (The Kostas Melas)*, [1981] 1 Lloyd's Rep. 18 at p. 27, per Mr. Justice Robert Goff (as he was), as neither the party making nor the party resisting such a claim in arbitration could have been heard to say that there was not even a dispute. However, by the same token, if Molino Boschi had pursued the claim by action in this country and sought summary judgment, there would have been no reason not to give summary judgment; in that situation it would have been made clear, pragmatically, that there was no dispute and that cl. 31 of GAFTA 100 could not require a stay: see the same passage in Mr. Justice Robert Goff's judgment; and also *SL Sethia Liners Ltd. v. State Trading Corporation of India Ltd.*, [1986] 1 Lloyd's Rep. 31 at p. 33; [1985] 1 W.L.R. 1398 at p. 1401 per Lord Justice Kerr and *Mayer Newman & Co. Ltd. v. Al Ferro Commodities Corporation S.A. (The John Helmsing)* [1990] 2 Lloyd's Rep. 290 at p. 296 per Lord Justice Bingham. This being the English attitude, it is difficult to see why the English Court should regard it as inappropriate per se, or as a "flagrant" breach, for Molino Boschi to take Court proceedings to enforce this particular indisputable claim. It might be said that under GAFTA 100, cl. 30, any Court proceedings whatever should have been brought in England. But that is not an objection which has been raised by Toepfer anywhere, nor is it one which has any attraction in the context of the present summons seeking injunctive and/or declaratory relief with a view to obstructing an indisputable claim in Italy.

The other, more important urease claim I have previously described as extremely strong. Molino Boschi asked me to revise this description to put this claim in the same indisputable category as the smaller claim. It may be right that the categorization which I adopted under s. 27 [illegible] a more robust analysis if I am asked to [illegible]

WWW.NEWYORKCONVENTION.ORG

he claim would have been one in respect of which in English Court would have been prepared to give ummary judgment, so obviating any question of irbitration. I have reviewed the material bearing on he merits of this claim, and feel some temptation owards a more robust analysis, particularly when I ee that in Italy Toepfer have not in their lengthy 1994 submissions rehearsed any of the arguments out before me in 1992 at all. Mr. Matthews says that s simply because Toepfer wanted to be careful in taly not to submit to Italian jurisdiction on the ubstantive merits, and so restricted themselves to outting Molino Boschi to proof. I find that somewhat difficult to accept, when there is no trace of iny such restriction or of any reservation of other oints in Toepfer's Italian submissions. On the ontrary, Toepfer in their Mar. 25, 1994 submissions purported to invoke and pay respect to "the rinciple of comprehensive coverage of a case".

At the end of the day, however, it is not necessary hat I should do more than repeat the view that the laim is indeed extremely strong. This Court is not oncerned with an application for summary judgment, and it is in the Ravenna Court that the issue of the merits has been raised in submissions over a ubstantial number of years along with the primary procedural defences. So I say no more, save that even if I assume that the claim should — and hould only — have been arbitrated, its strength and size still seem to me a matter of substantial weight in deciding whether this Court should at the present very late stage seek to prevent or pre-empt ts resolution in the natural, although slow, course of the proceedings which have been on foot between the parties for so long in Italy.

Viewing the matter overall, I have no hesitation n concluding that this is not a case where this Court hould at this very late stage contemplate issuing iny injunction to prevent Molino Boschi pursuing and seeking the ruling of the Italian Court either on he issues of procedure which have been ventilated before it exhaustively with oral evidence or on any ubstantive issues which do arise thereafter.

Toepfer suggest that, even if I refuse an injuncion, I should still make the declaration sought regarding Molino Boschi's entitlement and obligation to arbitrate. In so far as the object or effect of such a declaration would be or might be to create some issue estoppel in the Italian proceedings, it again seems to me inappropriate to contemplate making any such declaration at this late stage. The parties have been litigating the position in Italy under Italian principles for years. The claims are either indisputable or extremely strong. If they were being litigated in England, the English Court would in the case of the smaller claim and might well in the case of the larger claim give summary judgment straightway and refuse any stay pending arbitration. Italian law does not appear to recognize such a possibility, but, if so, that is a possible advantage to Toepfer in Italy. Whatever the position if a prompt application had been made in this country, it is not appropriate to contemplate issuing a declaration in an English action brought at the last minute with the simple aim of pre-empting Italian proceedings which have been on foot for years. In so far as the object or effect of the declaration is simply to establish what English law is, that seems of no direct relevance and has not been canvassed in the Italian proceedings. As to any possible relevance of English law in the context of resisting enforcement here or elsewhere, it is also difficult to see how this could arise (see art. 28 of the Brussels/Lugano Convention); further it would anyway appear premature (and, since the matter could presumably be raised in the context of enforcement, unnecessary) to contemplate any such declaration in this context; similar objection applies, if and in so far as any question arises of seeking a declaration to serve as a basis for a claim for damages. Toepfer anyway accept, as I understand it, that a claim for damages would be difficult to mount in view of the strength of the claims.

Conclusion

For the reasons given, and in all the circumstances which I have outlined, I consider it inappropriate to grant either the injunctive or the declaratory relief sought by Toepfer's originating summons, which is dismissed accordingly.

WWW.NEWYORKCONVENTION.ORG