1983 September 24

[STYLIANIDES, J.]

ELIE SADEK AND ANOTHER,
Plaintiffs-Respondents.

v.

EFPALINOS SHIPPING COMPANY LIMITED AND ANOTHER,
Defendants-Applicants.

(Admiralty Action No. 29/83).

Admiralty—Shipping—Bill of lading—Incorporation of terms of charter party—Text of incorporation clause in charter party—Bill of lading providing that "all terms and conditions..... of the charter party ..... incorporated"—Whether arbitration clause incorporated.

Arbitration—Stay of proceedings—Arbitration clause in charter party—Whether incorporated in bill of lading—Principles applicable.

Following service of the writ of summons on defendants 1, in an action whereby plaintiffs claimed damages for short delivery of goods, the latter, after entering a conditional appearance, took out a summons whereby they applied for an order that further proceedings in the action be stayed pending the determination by arbitration of the matters in dispute. Though the bill of lading did not contain expressly an arbitration clause Counsel for the applicants submitted that the arbitration clause 32*, which was set out in the charter party, was incorporated into the contract evidenced by the bill of lading by reason of the incorporation clause**.

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* Clause 32 provided as follows:

"All disputes arising out of this contract shall be referred to arbitration in London and English Law and practice to apply. Each party to appoint his own arbitrator. In case such arbitrators cannot agree, the arbitration shall be referred to an umpire appointed by such arbitrators. The award of the arbitrators or of the umpire shall be final and binding for both parties".

** The incorporation clause—Condition No. 1—of the bill of lading provided as follows:

"(I) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, are herewith incorporated. The Carrier shall in no case be responsible for loss of or damage to cargo arisen prior to loading and after discharging".

On the question whether the arbitration clause was incorporated into the bill of lading,

Held, that specific words in the charter party will suffice to incorporate a clause of the charter party, provided that the bill of lading has once directed the reader to look at the charter party; that in this case the arbitration clause is not incorporated either by express words in the bills of lading or by express words in the charter party itself; that it is not incorporated by general words in the bills of lading; that, furthermore, the words of incorporation in the bills of lading fall short of describing the arbitration clause in the charter party as incorporated and lastly the incorporation of the arbitration clause in the bills of lading is inconsistent with the wording of the bills of lading themselves; and that, also, the arbitration clause is not germane to the subject-matter of the bills of lading; accordingly the application must fail.

Application dismissed

Cases referred to:

T.W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd. [1912] A.C. 1 at pp. 8-9;

Astro Violente Compania Naviera S.A. v. Pakistan Ministry of Food and Agriculture (No. 2) - The Emmanuel Kolocotronis (No. 2) [1982] 1 All E.R. 823;

The Northumbria [1906] P. 292 at p. 300;

The Merak—T.B. and S. Batchelor and Co. Ltd. (Owners of Cargo on the Merak) v. *Owners of S.S. Merak* [1965] 1 All E.R. 230 at p. 233;

The Njegos [1935] All E.R. (Rep.) 863;

The Annefield [1971] 1 All E.R. 354 at p. 405;

The Rena K. [1979] 1 All E.R. 397 at p. 404;

Federal Commerce and Navigation Co. Ltd. v. Tradex Export S.A. - The Martha Envoy [1977] 2 All E.R. 849 at p. 852; [1978] A.C. 1 at p. 8;

A.S. Awilco v. Fulvia Sp. A. di Navigazione, The Chikuma [1981] 1 All E.R. 652 at p. 658; [1981] 1 W.L.R. 314 at p. 322;

Bunge Corp. v. Tradax Export S.A. [1981] 2 All E.R. 513 at p. 545; [1981] 1 W.L.R. 711 at p. 720.

Application.

Application by defendants for an order staying further pro-

ceedings pending the determination by arbitration of the matters in dispute.

St. McBride, for applicants.

D. A. Demetriades, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The plaintiffs raise this action in rem against "SAN NICOLAS" ship and the owners thereof. They claim U.S. $ 32,504.94 or its equivalent in Cyprus currency, as owners of goods and/or holders of 9 bills of lading and/or indorsees of the said bills of lading and/or as receivers of goods shipped on board the said vessel as damages for breach of contract and/or breach of duty and/or negligence of the defendants, their servants or agents in respect of short delivery of the said goods.

The writ of summons was served on the owners but has not yet been served on the ship. The owners entered a conditional appearance and took out a summons whereby they apply for an order that further proceedings in this action be stayed pending the determination by arbitration of the matters in dispute.

The 9 bills of lading are identical and photocopy of one of them is attached to the affidavit in support of the application. It does not contain expressly an arbitration clause. Counsel for the applicants submitted that the arbitration clause, which is set out in the charterparty - Clause 32 - is incorporated into the contract evidenced by the bills of lading by reason of the incorporation clause. The respondents-plaintiffs contend that the arbitration clause was not incorporated into the bills of lading by any incorporation and the charterparty clause itself does not refer to the bills of lading contract.

Condition No. 1 of the bills of lading reads as follows:-

> "(1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, are herewith incorporated. The Carrier shall in no case be responsible for loss of or damage to cargo arisen prior to loading and after discharging".

The charterparty to which reference is made is admittedly the one dated November 20, 1981. It contains an arbitration clause - Clause 32 - which reads:-

"All dispute arising out of this contract shall be referred to arbitration in London and English Law and practice to apply. Each party to appoint his own arbitrator. In case such arbitrators cannot agree, the arbitration shall be referred to an umpire appointed by such arbitrators. The aware (obviously a typing error for "award") of the arbitrators or of the umpire shall be final and binding for both parties".

The law applicable in Cyprus in the Admiralty Jurisdiction is, subject to the provisions of paragraphs (c) and (e) of subsection (1) of section 29 of the Courts of Justice Law (Law No. 14 of 1960), the law applied by the High Court of Justice in England on the date prior to Independence - 15th August, 1960 - as it may be amended by a law of the Republic - (section 29(2)(a)).

The effect of deciding to stay the action would be that the bill of lading holder or shipowner is ousted from the jurisdiction of the Courts and compelled to decide all questions by means of arbitration. Broadly speaking, very clear language should be introduced into any contract which has to have that effect; more so in view of the right of access to the Court safeguarded by Article 30.1 of the Constitution.

Even when there is an arbitration clause the Court may exercise its discretion not to stay the proceedings, having regard to certain considerations. The respondents-plaintiffs do not seek such a relief. They simply deny that the arbitration clause was incorporated into the bills of lading. This is the only point that falls for consideration; it is a point of law.

The tendency some decades ago was against arbitration. In *T. W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.*, [1912] A.C. 1, at pp. 8-9, Lord Gorell said:-

"The shipper is not likely, I think, to have been desirous of consenting to an arbitration clause which places upon him possibly the obligation of deciding by arbitration at any port where a dispute occurs a question on which there is any dispute. Certainly no consignee would ever naturally be likely to assent to such a proposition, because he might find himself landed in the difficulty of having to go to ar-

bitration at a port of shipment with which he had no further connection than the mercantile one of correspondence."

Times change, and so do trading conditions. In 1911 it was no doubt a strong and even harsh measure to require a merchant to arbitrate in a foreign country. The merchants of today, having connections by telex, air mail and air travel, are less impressed by the difficulties of going to arbitration in a distant place, as is shown by the great volume of arbitrations conducted in London where one or both parties are from overseas. Commercial activities have become much more refined and sophisticated over the years - (*Astro Valiente Compania Naviera S.A. v. Pakistan Ministry of Food and Agriculture* (*No.* 2) - *The Emmanuel Colocotronis* (*No.* 2), [1982] 1 All E.R. 823).

The issue before this Court is whether the words of the bills of lading have the effect of incorporating the arbitration clause from the charterparty into the bills of lading.

A bill of lading is a negotiable instrument. It may pass from hand to hand as an article of commerce, and its effect should be apparent from its tenor. Lord Esher, M.R., in *Serraine & Sons v. Campbell,* [1891] 1 Q.B. 283, said at p.291:-

> "The consignee of the goods is entitled to look to the bill of lading alone for the conditions upon which the goods are carried, and he is not bound to look to anything else".

If, however, the bill of lading once directs the reader to a charterparty, it is proper to look at the charterparty also in order to ascertain which of its conditions are incorporated. If he is told by the bill of lading in sufficiently clear terms to look also at the charterparty, he must do so. This is consistent with the later authorities. (*The Northumbria,* [1906] P. 292, at p. 300).

Only so much of the charterparty as is actually covered by the words of incorporation in the bill of lading is to be incorporated into the bills of lading. In deciding this there are two points which it is important to distinguish: First, are the words of incorporation apt to describe the clause sought to be incorporated? This is the description issue. Second, would the clause be consistent with the bill of lading if it were incorporated? This is the consistency issue. (*Astro Valiente S.A. v. Pakistan Food* (*No.* 2), (supra), p. 828).

The arbitration clause is not incorporated in the bill of lading by virtue of the word "exceptions". (*The Annefield,* [1971] 1 All E.R. 394).

In *The Merak - T. B. & S. Batchelor & Co. Ltd. (Owners of Cargo on The Merak) v. Owners of S.S. Merak* [1965] 1 All E.R. 230, Sellers, L.J., said at p. 233:-

> "In my opinion if 'including cl. 30' is struck out the remaining clause is quite adequate and effective to make cl. 32, the arbitration clause, in the charterparty 'deemed to be incorporated' into the bill of lading. Amongst the various clauses in the charterparty which can be regarded as relevant to the bill of lading is cl. 32, which in terms stipulates for arbitration of 'any dispute arising out of this charter or any bill of lading issued thereunder .. '. In this respect it is in contrast to *Thomas & Co., Ltd. v. Portsea S.S. Co., Ltd.,* [1912] A.C. 1; 12 Asp. M.L.C. 23, on which so much reliance was placed by the plaintiffs. In that case no mention was made of the bills of lading issued under the charterparty and the inclusion of the arbitration clause in them would have been by implication. No such argument can arise here and I do not think that *Thomas v. Portsea* (supra) can be regarded as an authority that a clause to be incorporated must relate to shipment, carriage and delivery and cannot be extended further and cannot provide for arbitration. It was scarcely argued that, if the incorporation clause had read 'including cl. 32', the arbitration clause would not then have been incorporated, subject to a further argument on repugnancy.
>
> Although in this contract it was unnecessary specially to mention the arbitration clause in order that it should be clearly incorporated, it seems to me that the bill of lading clause can properly be read by substituting '32' for '30' and on two grounds. Anyone reading the charterparty, as the bill of lading holder would have to do, would know that the arbitration clause was intended, and I cannot see why the Court should shut its eyes to the obvious on some technical ground of construction. A practical not an abstract construction is called for. The bill of lading is a commercial document to be used by commercial people. It is a negotiable instrument which may be acquired by a

party who has no knowledge of the charterparty to which it refers and the Court should be mindful of this circumstance; but the incorporating clause is clear and wide and to be understood requires reference to the charterparty. In order to discover what the terms of a bill of lading are, that is to construe or interpret it, the holder has to refer to the charterparty and select therefrom the clauses which apply. He cannot do this without reading them. Lord Esher's observations in *Hamilton & Co. v. Mackie & Sons*, [1889], 5 T.L.R. 677, are apt.

> 'Conditions of the charterparty must be read verbatim into the bill of lading, as though they were there printed in extenso. Then, if it was found that any of the conditions of the charterparty on being so read were inconsistent with the bill of lading they were insersible, and must be disregarded'.

Even if a narrower view is taken, however, and only the relevant clauses enter the bill of lading, the others have to be read before they can be rejected and I do not see how cl. 10 can fail to convey to any holder of the bill of lading with a copy of the charterparty, which it is necessary for him to peruse, that cl. 32 was intended where cl. 30 was inserted. To me it does not seem to leave room for doubt and it is the way any ordinary business man would read the clause in the light of the two documents".

The rule that is derived from the *Portsea* case and *The Merak* is that specific words in the charterparty will suffice, provided that the bill of lading has once directed the reader to look at the charterparty, to incorporate a clause of the charterparty.

In *The Njegos*, [1935] All E.R. (Rep.) 863, the charterparty contained the usual English arbitration clause and the material words of the bill of lading were: "To be delivered ___ 1932. All the terms, conditions and exceptions of which charterparty, including the negligence clause, are incorporated herewith". Sir Boyd Merriman, P., held that the arbitration clause was not incorporated in the bill of lading.

The Njegos was approved and applied by the Court of Appeal in *The Annefield*, [1971] 1 All E.R. 394, at p. 405. In *The*

Annefield the charterparty contained an arbitration clause - Clause 39 - which ran: "All disputes from time to time arising out of this contract shall, unless .". Lord Denning, M.R., at p. 405 said:-

"I would follow the test laid down by Russell, L.J., in *The Merak*, but I would adapt it slightly. I would say that a clause which is directly germane to the subject-matter of the bill of lading (i.e. 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 charterparty.

It is, therefore, not incorporated by general words in the bill of lading. If it is to be incorporated, it must be either by express words in the bill of lading itself (e.g. if there were added in this case: 'including the arbitration clause as well as the negligence clause'), or by express words in the charterparty itself (as indeed happened in *The Merak* where the words were: 'Any dispute arising out of this charter or any bill of lading issued hereunder'). If it is desired to bring in an arbitration clause, it must be done explicitly in one document or the other. As Lord Loreburn, L.C., said in *Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.:*

> '... if it is desired to put upon the holders of a bill of lading an obligation to arbitrate because that obligation is stated in the charterparty, it must be done explicitly'.

In this case the words in the charterparty are 'any disputes under this contract'. Those words, in this context, meant: 'under this charterparty contract'. They do not include the bill of lading contract. In any case they are not so explicit as to bring in disputes under the bill of lading."

The words of the arbitration clause in the charterparty and on the bills of lading in the present case are identical with those of *The Njegos* and *The Annefield.*

Finally in *The Rena K*, [1979] 1 All E.R. 397, Brandon, J., stated the law as follows at p. 404:-

> "A long series of authorities has established that, where a charterparty contains an arbitration clause providing for arbitration of disputes arising under it (and here I pause to say that the word 'it' deserves emphasis), general words in a bill of lading incorporating into it all the terms and conditions, or all the terms, conditions and clauses, of such charterparty, are not sufficient to bring such arbitration clause into the bill of lading so as to make its provisions applicable to disputes arising under that document: see *Hamilton v. Mackie & Sons Ltd.*, [1889] 5 T.L.R. 677, *T. W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.*, [1912] A.C. 1, *The Njegos*, [1936] P. 90, [1935] All E.R. Rep. 150, *The Phonizien*, [1966] 1 Lloyd's Rep. 150, and *The Annefield*, [1971] 1 All E.R. 394, [1971] P. 168. By contrast it has been held that, where an arbitration clause in a charterparty provides for arbitration of disputes arising not only under the charterparty itself but also under any bill of lading issued pursuant to it general words of incorporation in such a bill of lading of the kind referred to above are sufficient to bring in the arbitration clause so as to make it applicable to disputes arising under that bill of lading: see *The Merak*, [1965] 1 All E.R. 230, [1965] P. 223".

Scrutton on Charterparties, 18th edition. (1974), p. 66, Article 36 reads as follows:-

> "An arbitration clause in a charterparty will be incorporated into a bill of lading if either - (a) there are specific words of incorporation in the bill, and the arbitration clause is so worded as to make sense in the context of the bill, and the clause does not conflict with the express terms of the bill; or (b) there are general words of incorporation in the bill, and the arbitration clause or some other provision in the charter makes it clear that the clause is to govern disputes under the bill as well as under the charter. In all other cases, the arbitration clause is not incorporated into the bill".

Paragraph (a) needs modification in the light of the judgment of Brandon, J., in *The Rena K.*

In the present case the material words in Clause 32 of the charterparty are: "All dispute arising out of this contract". The material part of Condition No. 1 of the bills of lading is: "All terms and conditions, liberties and exceptions of the charterparty are herewith incorporated". The words "terms, conditions, liberties and exceptions", as judicially defined, do not include an arbitration clause.

When a word or phrase that is commonly used in commerce has received a settled meaning in the Courts, that meaning should not be altered. The parties to a commercial transaction are in general entitled to make such bargain as they please; justice requires that once made it should be performed, and not changed by some fresh judicial exposition. (*Federal Commerce and Navigation Co. Ltd. v. Tradax Export S.A., The Maratha Envoy* [1977] 2 All E.R. 849, at 852, [1978] A.C. 1 at p. 8 per Lord Diplock, *A/S Awilco v. Fulvia SpA di Navigazione, The Chikuma,* [1981] 1 All E.R. 652 at 658, [1981] 1 W.L.R. 314 at 322 per Lord Bridge, and *Bunge Corp. v. Tradax Export S.A.,* [1981] 2 All E.R. 513 at 545, [1981] 1 W.L.R. 711 at 720 per Lord Lowry).

The arbitration clause is not incorporated either by express words in the bills of lading or by express words in the charterparty itself. It is not incorporated by general words in the bills of lading. Furthermore the words of incorporation in the bills of lading fall short of describing the arbitration clause in the charterparty as incorporated and lastly the incorporation of the arbitration clause in the bills of lading is inconsistent with the wording of the bills of lading themselves. The arbitration clause is not germane to the subject-matter of the bills of lading.

For the aforesaid reasons this application fails and is hereby dismissed with costs.

Application dismissed with costs.