CUBAZUCAR AND ANOTHER,
Plaintiffs,

v.

CAMELIA SHIPPING COMPANY LTD.,
Defendants.

(*Admiralty Action No.* 36/71).

Reference of disputes to foreign Courts—Under a provision in the contract between the parties—Contract embodied in two bills of lading—Defendant a Cypriot Shipping company—Its ship flying the Cypriot flag—Action for damages for short delivery of cargo—Carriage from Cuba to Russian ports, Black Sea—Admiralty action by foreign shippers and consignees filed in Cyprus, registry of the Supreme Court—Jurisdiction of the Court to determine the matter not disputed—Application for a stay of these proceedings on account of the aforesaid provision in the contract—Discretion of the Court to stay proceedings in a proper case—Principles applicable—The question of security for the purpose of ultimately enforcing a judgment obtained in the matter—Coupled in the instant case with the fact that the plaintiffs-respondents would be faced under Russian law with a time-bar which is not applicable to the present proceedings as filed in Cyprus—Above considerations militate against stay—Stay refused.

Foreign Courts—Reference by agreement of a dispute to the determination and adjudication of foreign Courts—Principles applicable—Discretion of the Court to stay or not proceedings filed in Cyprus, in the instant case an admiralty action—Discretion exercised against stay—See further supra.

Admiralty Court—Admiralty action—Jurisdiction—Stay of proceedings in view of a provision in the contract between the parties to the effect that disputes arising out therefrom would be referred to foreign Courts for adjudication—Principles applicable—Discretion of the Court—See further supra.

This is an application whereby the applicant (defendant in the action), a Cypriot shipping company and owner of the m/s " Noelle " with Cypriot flag, applies for an order that all proceedings in this admiralty action be stayed on the

ground that the parties by their agreement embodied in two bills of lading agreed to refer and submit all disputes arising out from, and in connection with the said bills of lading, for determination and adjudication to the Courts of U.S.S.R. The action concerned the shipment of a cargo of sugar from Cuba for carriage to a Soviet port, Black Sea, U.S.S.R., the plaintiffs (who are the shippers and the consignees of the cargo) claiming £8,200 damages for short delivery of, or loss or damage to, the said cargo loaded on the defendant's said m/s " Noelle ".

In the course of the hearing of this application counsel for the defendant-applicant abandoned his objection to the jurisdiction of the Court, conceding that the defendant shipowner being a Cypriot company—and their ship " Noelle " flying the Cypriot flag—the Court has jurisdiction to deal with the action (*see post* the judgment where the relevant statutory provisions are quoted). But, it was alleged, in view of the aforesaid agreement between the parties to refer such disputes as the present claim for determination to the Courts of U.S.S.R., the Court in exercising its discretion should stay all proceedings in the action. On the other hand, counsel for the plaintiffs-respondents urged the Court to exercise its discretion in their favour and dismiss the application regard being had to the facts and circumstances of the case.

It would appear that under Russian law the plaintiffs would be faced with a time-bar which is not applicable to the present proceedings as filed in Cyprus. Moreover, if the Cyprus proceedings were to be stayed, the plaintiffs would stand to lose a security in the way of a letter of guarantee delivered to them by the National Bank of Greece for the sum of U.S. dollars $34, 571. This letter of guarantee provides, *inter alia*, as follows : " . We have the above amount of U.S. $34,571 at your disposal and we shall pay it to you only upon receipt of your claim, accompanied with final judicial decision of the *presently pending actions adjudging payment to you* of any amount up to U.S. $34,571 ". It is common ground that the said " final judicial decision of the presently pending actions concern the proceedings now pending in Cyprus "

Dismissing this application for stay of these proceedings, the Court :—

Held, (*A*) : *As to the issue of jurisdiction :*

Counsel for applicant did not pursue the application to set aside the proceedings on the ground that this Court has no

jurisdiction. Rightly so, as by section 1 (1) (g) of the Administration of Justice Act 1956, following previous statutes, it is plain that the Court of Admiralty in England has jurisdiction to deal with such a claim as the present one, and, consequently, this Court has jurisdiction also by virtue of sections 19 (a) and 29 (2) (a) of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960) which provide :

" 19 (a) As a Court of Admiralty vested with and exercising the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its Admiralty jurisdiction on the day immediately preceding Independence day (*viz.* August 16, 1960) . . ....

29 (2) The High Court in exercise of the jurisdiction—

(a) Conferred by paragraph (a) of section 19 *supra* shall apply
the law which was applied by the High Court of Justice in England in the exercise of its Admiralty jurisdiction on the day preceding Independence Day, as may be modified by any law of the Republic. "

Held, (*B*) : *On the merits of the application :*

(1) The question, therefore, that is before me is whether the action should be stayed because of the provision in the two bills of lading that all disputes etc. are to be adjudged by the Russian Courts. As stated by Lord Denning in *Fehmarn* [1958] 1 All E.R. 333, at p. 335 :—

" I do not regard this provision as equal to an arbitration clause but I do say that the English Courts are in charge of their own proceedings and one of the rules which they apply is that a stipulation that all disputes should be adjudged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the Courts of this Country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these Courts of their jurisdiction in a matter that properly belongs to them. "

(2) On the authorities it may be stated with certainty that it is for the plaintiffs-respondents to show good cause against the stay.

(3) In seeking to do so, counsel for the plaintiffs—respondents relied on those factual aspects of the present case that bring same within the provisions of paragraph (*e*) (i), (ii)

and (iii) of *Brandon's J.* judgment in the case *Eleftheria* [1969] 2 All E.R. 641, at p. 645 (see the whole passage set out *post* in the judgment of the Court).

(4) *Note : After referring to the aforesaid letter of guarantee given to the plaintiffs-respondents by the National Bank of Greece for U.S.* $34,571, *the learned Judge went on :*

The securing of a security for the purpose of ultimately enforcing any judgment obtained does not seem to be an easy matter. In fact proceedings for the arrest of this ship (*viz.* m/s " Noelle ") were commenced in Greece in relation to the Cyprus case but they were discontinued because the ship left Greek waters before the warrant of arrest had been issued. This is of vital importance in determining whether this Court should exercise its discretion in favour or against the stay.

(5) It is further of the utmost importance that the plaintiffs-respondents under Russian law will be faced with a time-bar which is not applicable to the present proceedings as filed in Cyprus (see the British Shipping Laws, 1 Admiralty Practice, 1964, paragraph 30 at p. 18). This reason, therefore, together with the first one, also militates in favour of exercising my discretion against an order for a stay of the present proceedings.

(6) *As to the argument of convenience :*

It is they (the plaintiffs-respondents) that came all the way from Cuba and U.S.S.R. to Cyprus to seek justice ; and the defendant-applicant company does not have to go anywhere except to the Courts of its own country. This argument adds indeed to the force of the remaining ones.

Application dismissed.
Stay refused ; costs in cause.

Cases referred to :

Fehmarn [1958] 1 All E.R. 333, at p. 335 ;

Jadranska Slobodna Plovidba v. *Photos Photiades & Co.* (1965) 1 C.L.R. 58, at p. 69 ;

Eleftheria [1969] 2 All E.R. 641, at p. 645.

Application.

Application for an order that the proceedings be set aside and all proceedings be stayed, made by defendants in

an admiralty action whereby plaintiffs claimed £8,200 as damages for short delivery of, or loss or damage to, cargo.

G. Economou, for applicants-defendants.

G. Cacoyiannis, for the respondents-plaintiffs.

Cur. adv. vult.

The following ruling was delivered by :—

A. LOIZOU, J. : This an application whereby the applicant-defendant in this case applies for an order that these proceedings be set aside and all proceedings in this action be stayed, on the ground that the plaintiffs and the defendant have by their agreement embodied in two bills of lading dated 28th June and 19th July, 1970, respectively, agreed to refer and submit all disputes arising under and in connection with the said bills of lading, in respect of which matters this action is brought, for determination and adjudication, to the U.S.S.R.

The action concerned the shipment of a cargo of sugar from Cuba for carriage to a Soviet port, Black Sea, U.S.S.R., under three bills of lading dated : Santiago 15th July, 1970, covering 37,715 bags of raw cane sugar ; Tunas de Zaza 28th June, 1970, and 19th July, 1970, covering 28,812 and 33,499 bags of raw cane sugar respectively.

The writ in the action was issued on the 25th August, 1971, and in the said writ the plaintiffs No. 1 are described as the shippers and plaintiffs No. 2 are described as the consignees of the said cargo. The defendants are the owners of the m/s. " Noelle ".

The plaintiff's claim is for £8,200 damages for short delivery of, or loss or damage to the said cargo ; or for damages for failure to properly and carefully load and/or handle and/or discharge and/or deliver the said cargo to plaintiff No. 2.

On the 18th September, 1971, the defendant company entered a conditional appearance without prejudice to the filing of an application to set aside the writ. The time limit for setting aside was one month and on the 16th October, 1971, the defendants filed an application praying as above.

In arguing the case for the applicant-defendant, counsel did not pursue the application to set aside the proceedings

on the ground that this Court had no jurisdiction. Rightly so, as by section 1 (1) (*g*) of the Administration of Justice Act 1956, following previous statutes, it is plain that the Court of Admiralty in England has jurisdiction to deal with such a claim as the present one, and, consequently, this Court has jurisdiction also by virtue of sections 19 (*a*) and 29 (2) (*a*) of our Courts of Justice Law 14/1960 which provide :—

> " 19. (*a*) As a Court of Admiralty vested with and exercising the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its Admiralty jurisdiction on the day immediately preceding Independence Day ;....
>
> 29. (2) The High Court in exercise of the jurisdiction—
>
> (*a*) Conferred by paragraph (*a*) of section 19 shall apply, subject to paragraphs (*c*) and (*d*) of subsection (1), the law which was applied by the High Court of Justice in England in the exercise of its admiralty jurisdiction on the day preceding Independence Day, as may be modified by any law of the Republic ; "

The question, therefore, that is before me is whether the action ought to be stayed because of the provision in the two bills of lading that all disputes are to be adjudged by the Russian Courts. As stated by Lord Denning in *Fehmarn* [1958] 1 All E.R. p. 333 at p. 335—

> " I do not regard this provision as equal to an arbitration clause but I do say that the English Courts are in charge of their own proceedings and one of the rules which they apply is that a stipulation that all disputes should be adjudged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the Courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these Courts of their jurisdiction in a matter that properly belongs to them ".

The evidence before me consists of, two affidavits filed by each side, copies of the three bills of lading—the third one having no Russian jurisdiction clause—and an extract from a legal opinion, *exhibit* 1, regarding Russian law relating to prescription and other relevant matters.

By condition 26 of two of the said three bills of lading, namely those dated 28th June and 19th July, 1970, *exhibits*

A and B, " all claims and disputes arising under and in connection with this bill of lading shall be judged in the U.S.S.R. " and by their condition 27 " all questions and disputes not mentioned in this bill of lading shall be determined according to the Merchant Shipping Code of the U.S.S.R. "

The goods were shipped in Cuba and were discharged in the U.S.S.R. There is no connection of the contract of carriage with Cyprus, other than the ship having a Cyprus flag and the defendant company being registered here ; the defendants, however, operate through their general agents in Athens, Greece.

Counsel for the applicant-defendant correctly summed up the legal position governing the issue by referring me, *inter alia*, to the judgment of our Supreme Court in the case of *Jadranska Slobodna Plovidba* v. *Photos Photiades* & *Co.* (1965) 1 C.L.R. p. 58 where at p. 69 Josephides J. stated :

> " On the authorities there is a *prima facie* presumption that the Court will insist on the parties honouring their bargain in cases where they have agreed that all disputes arising under a contract should be determined by a foreign Court. The Court will, however, consider whether there are sufficient grounds for displacing this *prima facie* presumption so as to entitle the parties to take advantage of the jurisdiction of the Court. Such a presumption may be displaced on good and sufficient reasons."

As in the *Jadranska* case the Supreme Court upheld the judgment of the trial Judge who exercised his discretion in favour of the plaintiffs, I was invited to distinguish the present case from that one as the factual issues involved are different. Whilst counsel for respondents-plaintiffs is in agreement with the law as argued by counsel for the applicant-defendant, he drew my attention also to the more recent case of the *Eleftheria* [1969] 2 All E.R. p. 641 where at p. 645 Brandon J. summarises the legal position on this point and with which with respect I agree. It reads :

> " The principles established by the authorities can, I think, be summarised as follows : (I) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(II) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion the Court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters, where they arise, may properly be regarded : (*a*) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts ; (*b*) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects ; (*c*) With what country either party is connected, and how closely ; (*d*) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages ; (*e*) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would— (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a timebar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

On the authorities it may be stated with certainty, and with this counsel for the plaintiffs-respondents does not seem to disagree, that it was for him to show good cause against the stay. In seeking to do so, he relied on those factual aspects of the present case that bring same within the provisions of paragraph (*e*) of Brandon's J. judgment hereinabove set out, except (*e*) (iv) as it was emphasized that no suggestion is made that there is any risk of the plaintiffs not getting a fair trial in the U.S.S.R. The matter, therefore, is being approached on the basis that as far as fairness of trial is concerned there is no distinction between Cypriot and U.S.S.R. Courts.

As far as the question of the plaintiffs being deprived of the security for their claim, I was referred to the contents of a supplementary affidavit, filed on their behalf, where it is stated that on a visit of the m/s " Noelle " to Russia, subsequent to the institution of the present action the ship was arrested. It may be noted that in the U.S.S.R., as in Greece and other countries, one can take proceedings for the arrest of a ship without instituting an action, such proceedings being separate and independent and just for the purpose of obtaining a security and nothing more. The outcome

of these proceedings was that a letter of guarantee was given by the National Bank of Greece for the release of the ship which reads as follows :—

> " U.S. $34,571 to which amount only our guarantee is limited in respect of alleged claim for shortage of 952 bags of sugar voyage Cuba Novorossisk, August, 1970, which the subject matter of this action, and 2934 pieces of sleepers voyage Novoros—Cuba October, 1970. This guarantee is issued and will be valid only if you release M.V. Noelle which is seized by you in Novorossisk. We have the above amount at your disposal and we shall pay it to you only upon receipt of your written claim, accompanied with a final judicial decision of the presently pending actions adjudging payment to you of any amount up to U.S. $34,571."

As it appears from *exhibit* 2, no proceedings were pending in the U.S.S.R. at the time. The only pending proceedings were the present ones in Cyprus and proceedings in Greece regarding the sleepers. It is contended that by granting the stay the plaintiffs would be prejudiced because they will be deprived of that security as " the final judicial decisions of the presently pending actions " concern the proceedings now pending in Cyprus and Greece. The securing of a security for the purpose of ultimately enforcing any judgment obtained does not seem to be an easy matter. In fact proceedings for the arrest of this ship were commenced in Greece in relation to the Cyprus case but they were discontinued because the ship had left Greek waters before the warrant of arrest had been issued. This is of vital importance in determining whether this Court should exercise its discretion in favour or against granting the stay. As stated in the British Shipping Laws, I Admiralty Practice, 1964, paragraph 30 at p. 18 :

> " The situation may be different in cases where the parties have agreed by the contract of carriage to submit all disputes to the Courts of a country other than England. In such circumstances the Court has power to set aside the writ and with it the arrest. The Court may decide to do so unless it can be shown that only by allowing the action to continue can the plaintiff be given the relief to which he is entitled as where the claim has become barred in the country agreed."

It is, therefore, of the utmost importance to examine also the further argument to the effect that under Russian law the plaintiffs will be faced with a time-bar which is not applicable to the present proceedings as filed in Cyprus. It

is clear from the legal opinion filed by consent that there exists in the Soviet legal code a statute of limitation for one year period which starts from the day of delivery of the cargo or when the cargo should have been delivered. This reason, therefore, together with the first one, also militates in favour of exercising my discretion against an order for a stay of the present proceedings.

The last argument advanced by counsel for respondents-plaintiffs, relates to the question which is the Court of convenience. In this respect my attention was drawn to the provisions in the Courts of Justice Law 14/1960 that one of the main considerations in deciding jurisdiction in Cyprus is the residence of the defendant. On this point it has been argued that had it been the other way round, the plaintiffs being sued in Cyprus, might rightly object to being brought all that way to Cyprus to defend a case ; but, it is they themselves that came all the way from Cuba and the U.S.S.R. to Cyprus to seek justice, and the defendant company does not have to go anywhere except to the Courts of its own country. This argument adds indeed to the force of the remaining ones. The present action is in relation to a Cypriot company for cargo carried by a ship with a Cypriot flag ; the ship and its crew must be more readily available in Cyprus than the U.S.S.R.; also, the fact that the company is managed from Greece does not change the position in-as-much as Greece is nearer and more closely related to Cyprus than to the U.S.S.R.

It was argued by counsel for the applicants-defendants that if the action is allowed to proceed in Cyprus it is probable that the law applicable will be the Merchant Shipping Code of the U.S.S.R. and this will entail considerable expense as it will have to be proved as a matter of foreign law. It was also contended that evidence material to the proceedings relating to the goods which were discharged in Russia is not available in Cyprus and it may not be possible to get Russian witnesses to Cyprus, or difficult to get evidence by commission in Russia, whereas if the case is tried there the evidence of the Russian witnesses can easily be considered. In this respect one may point out that the Cuban witnesses will also have to travel and it does not appear, judging from the fact that plaintiffs had elected to file the present proceedings in Cyprus, that it is less convenient for such witnesses to be brought to Cyprus than to the U.S.S.R.

On the totality of the evidence before me and having in mind in particular that in any event witnesses will have to travel to another country, wherever the case is heard,

that the plaintiffs will be prejudiced by having to sue in the foreign Court because they would be deprived of the security for their claim, be unable to enforce any judgment obtained, and be faced with a time-bar, I have come to the conclusion that I should exercise my discretion in favour of allowing the present case to proceed rather than be stayed. Therefore, the application is dismissed, but, in the circumstances, the costs should be costs in cause.

Application dismissed ; *costs in cause.*