[HADJIANASTASSIOU, J.]

ARCHANGELOS DOMAIN LIMITED,

Plaintiffs,

v.

VAN NIEVELT, GOUDRIAAN & CO'S STOOMVAART MAAT SCHAPPIJ N. V. ROTTERDAM, THROUGH THEIR CYPRUS AGENTS MESSRS. THE CYPRUS SHIPPING COMPANY LIMITED,

Defendants.

(Admiralty Action No. 42/71).

Carriage of goods by sea—Bill of lading—Providing for disputes thereunder to be adjudged by foreign Court—Contract of affreightment—Concluded before the signing of the said bill—Effect of bill of lading on contract.

Foreign Court—Reference of disputes to foreign Court—Action commenced in Cyprus—Action for damages for breach of contract of affreightment—Application by foreign defendant to stay proceedings—Discretion of the Cyprus Courts to grant or refuse stay—Principles governing exercise of such judicial discretion—Dispute in the instant case most closely connected with Cyprus—Which is a forum of convenience regarding witnesses in this case—Court's discretion exercised against stay.

Reference of disputes to foreign Courts—Effect—Discretion of the Cyprus Courts—See supra.

Bill of lading—Contract of affreightment—Effect of the bill of lading on, and in relation to, the antecedent contract of affreightment—Principles governing the matter.

This is an application by the owners of the ship 'Nushaba' to stay the Admiralty Action *in rem* No. 42/71 brought against them by the shippers and cargo owners claiming £4,147 damages for breach of a contract of affreightment in relation to a shipment of 4147 cartons of Valencia oranges on board the said vessel on May 22, 1971, lying then at Famagusta port, for carriage to the port of Marseilles. The application is based on the ground that the parties by agreement evidenced or embodied in the relevant bill of lading,

particularly in clause 2 thereof, dated May 22, 1971, agreed to refer and submit all disputes between themselves for determination and adjudication in accordance with French law to the Commercial Court of the Seine. Clause 2 mentioned above is one of the twenty five clauses, all printed in French, of the said same bill of lading; and the full text of said clause 2 translated in English is set out *post* in the judgment of the Court.

It was contended by the plaintiffs-shippers that they never accepted clause 2 of the bill of lading (*supra*), which bill, signed on behalf of the master by the agents in Cyprus of the ship owners, was not delivered to them (the shippers) until some days after the departure of the ship. In any event, the argument went on, the Court should, as a matter of discretion, allow the action to proceed because in the circumstances of the case the *forum conveniens* is obviously in Cyprus, not in France.

Eventually, the learned judge, though entertaining doubts as to whether the said clause 2 of the bill of lading was part of the contract of affreightment, proceeded to treat it as binding on the parties; and, deciding the issue as a matter of judicial discretion, refused the application for stay and allowed the case to proceed on its merits.

The facts of the case are very briefly as follows:

The plaintiffs (respondents in the application) are a company registered under the Companies Law in Cyprus, carrying on business here and abroad. The defendants (applicants in the application) are shipowners and owners of the aforesaid ship 'Nushaba'. The principal place of their business is in Rotterdam, and they are operating through agents, among other places in Cyprus through their agents the Cyprus Shipping Co. Ltd., and in Marseilles. On May 22, 1971, the plaintiffs shipped on board the m/v 'Nushaba' lying then at Famagusta port 4147 cartons of Valencia oranges for carriage to the port of Marseilles under a bill of lading in the French language, the goods being consigned to a firm at 3, Quai de la Joliette, Marseilles. Apparently the said bill of lading was signed for and on behalf of the master by the Cyprus Shipping Co. Ltd. the agents in Cyprus of the shipowners. Clause 2 of the bill of lading printed in French (as well as the other twenty four remaining clauses thereof) is given as translated in English

post in the judgment. It provides, *inter alia,* that the bill of lading is governed by French law and that the Commercial Court of the Seine is the Court which shall have sole and exclusive jurisdiction to deal with any disputes between the parties by whomsoever caused and whichever their origin and cause may be.

Mr. K., the manager of the plaintiffs (shippers) stated in his affidavit dated June 24, 1972, that he had never agreed to abide by clause 2 of the bill of lading (*supra*); he alleged that acting for and on behalf of his employers he concluded some time in the second week of May, 1971, a contract of affreightment (for the carriage of the said goods to Marseilles on board the ship 'Nushaba') with the agents of the defendants (shipowners) (*see* this contract *post* in the judgment); he further stated that the bill of lading was neither read nor signed by him because it was sent to him by the agents of the defendants some days after the departure of the ship in question, and because the said bill was printed in French, a language with which he is not familiar and could not read. Finally, he stated that in the circumstances of the case and once the contract of carriage was made in Cyprus and the agents of the defendants are also in Cyprus, the *forum conveniens* is in Cyprus.

Now, it was the case for the plaintiffs (shippers and cargo owners) that the defendants delivered the cargo to the said consignees in Marseilles "without the latter first delivering or handing over to you (*i.e.* the defendants) the clean bill of lading" which was duly issued by the Cyprus agents of the defendants to the plaintiffs and bearing date the 22nd May, 1971, "the original of which was sent by the plaintiffs through their Cyprus Bankers, the Popular Bank of Cyprus Ltd. together with the relative invoice for the payment of the value thereof".

It would appear that as a result of the alleged failure on the part of the defendants (shipowners), the amount of the cargo in question was never paid to, or collected by, the plaintiffs (shippers and cargo owners) as per the said relative invoice attached to the said bill of lading (*supra*). Hence, the present action, whereby the plaintiffs claim damages in the sum of £4,147 for breach of contract as aforesaid.

(*Note*: The full indorsement on the writ of summons is set out *post* in the judgment).

After hearing argument, reviewing the affidavit evidence and applying the relevant legal principles, the learned judge expressed doubts as to whether the said clause 2 of the bill of lading became part of the contract of affreightment and as such binding on the parties; however, treating the clause 2 in question on the footing that it was so binding, he finally determined the issue as a matter of judicial discretion; and exercising his own discretion he reached the conclusion that in the circumstances of the case and in the light of the authorities the application for stay must be refused.

Held, (I) *(As to whether the bill of lading contains the actual contract):*

(1) It appears from the trend of the authorities that the shipper is not prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional terms. The shipper is not a party to the preparation of the bill of lading; nor does he sign it. (See: S.S. *Ardennes (Cargo Owners)* v. *S.S. Ardennes (Owners)* [1951] 1 K.B. 55, at p. 59, per Lord Goddard C.J.; see also *Jadranska Slobodna Plovidba* v. *Photos Photiades and Co.* (1965) 1 C.L.R. 58, at p. 66).

(2) It would appear that the true view of the authorities is, thus, that the question whether or not the bill of lading contains the actual contract depends on the facts of each particular case.

(3) In the light of the evidence and in the light of the principles explained above, it would seem that the dispute in the present case is not clearly within the aforesaid clause 2 of the bill of lading (*supra*).

Held, (II) *(As to the question on what principles of law an application to stay an action, on the ground that the parties have agreed to refer their disputes to foreign courts for determination, should be decided):*

(1) *(After reviewing the authorities):* It seems to me that the authorities show that when the plaintiffs

sue in England in breach of an agreement to refer the disputes to a foreign Court, and the defendants apply to stay proceedings; the English Courts (and indeed our Courts) are not bound to grant a stay, but have a discretion whether to do so or not (*see, inter alia, Fehmarn* [1958] 1 All E.R. 333, at p. 335, per Lord Denning M.R.).

(2) In the light of the authorities and taking into consideration all the circumstances of this case, I would with respect adopt and apply the test enunciated by Lord Denning M.R. in the *Fehmarn* case (*supra*); and in exercising my discretion whether or not to grant a stay of the present proceedings I have taken into account: (a) The stipulation in the bill of lading that all disputes should be adjudged by the French Commercial Court of Seine; (b) that our Courts are in charge of their own proceedings and one of the rules which they apply is that such stipulation is not absolutely binding; and although such a stipulation is a matter to which the Courts of this country will give much regard and to which they will normally give effect, still it is subject to the overriding principle that no one by his private stipulation can oust the jurisdiction of our Courts in a matter that properly belongs to them; (c) that this dispute is a matter which properly belongs to the Courts of this country, because here are the Cypriot exporters, the cargo owners, who were never paid the value of their goods, although delivered to the consignees in Marseilles; and (d) the vessel in question visits Cyprus and the shipowners are represented by Cypriot agents here.

Held, (III) *(As to the merits of the application):*

(1) Reading the affidavits and attending to the arguments on both sides, my impression is that the defendants (the Dutch owners of the ship in question) do not object to the dispute being decided in this country, but wish to take advantage of the limitation law governing the filing of disputes in France.

(2) Furthermore, there seems to me to be no doubt that although the said clause 2 of the bill of lading is governed by French law and should be judged by the French Court aforesaid, nevertheless, the dispute is mostly concerned with Cyprus and the French element in the dispute seems to be comparatively small. The real dispute is between the Dutch shipowners and the Cyprus cargo owners. It depends on the evidence here as to what was the contract of carriage.

(3) Having reached the conclusion that the dispute is mostly closely connected with Cyprus and not with France, and that Cyprus is a *forum* of convenience regarding the witnesses, I think that sufficient reasons have been put before me why the proceedings in this action should continue in out Courts and should not be stayed.

Application for stay dismissed.

Cases referred to:

Leduc and Co. v. *Ward* [1888] 20 Q.B.D. 475;

Sewell v. *Burdick* [1884] 10 App. Cas. 74 (H.L.) at p. 105;

Crooks v. *Allan* [1879] 5 Q.B.D. 38;

Dennis and Sons Ltd. v. *Cork Steamship Co. Ltd.* [1913] 2 K.B. 393;

S.S. Ardennes (Cargo Owners) v. *S.S. Ardennes (Owners)* [1951] 1 K.B. 55, at p. 59;

Jadranska Slobodna Providba v. *Photos Photiades and Co.* (1965) 1 C.L.R. 58, at p. 66;

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

Cap Blanco [1911 - 1913] All E.R. Rep. 365;

Eleftheria [1969] 2 All E.R. 641;

Evans Marshall and Co. v. *Bertola S.A. and Another, Evans Marshall and Co.* v. *Bertola S.A.* [1973] 1 All E.R. 992;

Golden Trader, Danemar Scheepvaart Maatschappij BV v. *Owners of the Motor Vessel Golden Trader* [1974] 2 All E.R. 686;

Cubazucar and Another v. *Camelia Shipping Co. Ltd.* (1972) 1 C.L.R. 61.

Application.

Application by defendants for an order that an admiralty action, for £4,147.- damages for breach of contract, be stayed on the ground that the plaintiffs and the defendants have by their agreement, embodied in and/or evidenced by a bill of lading for the shipment of goods, agreed to refer and submit all disputes arising under and in connection with the said bill of lading for determination and adjudication in France.

L. Demetriades, for the plaintiffs.

A. Markides, for the defendants.

Cur. adv. vult.

The following ruling was delivered by:-

HADJIANASTASSIOU, J.: The Court has before it an application by the ship owners to stay an action brought against them by the shippers, the cargo owners, on the ground that the plaintiffs and the defendants have by their agreement, evidenced or embodied in a bill of lading dated May 22, 1971, agreed to refer and submit all disputes between themselves for determination and adjudication in France. In effect the defendants are invoking the French jurisdiction clause and are claiming that the bill of lading is governed by French Law.

The action concerned is an action in rem and the writ was issued on September 17, 1971. In the writ, the plaintiffs Archangelos Domain Ltd., a Cypriot company, claims damages against the defendants for breach of contract. The endorsement of the writ reads:-

"£4147.000 mils as damages for breach of contract entered between them and yourselves through your agents, aforenamed, in or about the latter part of May, 1971 relating to a shipment of goods to wit 4147 cartons of Valencia Oranges, on prepaid freight to your said agents as were shipped

from Famagusta Port on your M/V NUSHABA on the 22—23rd May, 1971, and consigned to Societe Marseillaise de groupage of 3 Quai de la Joliette, Marseilles France, and which goods in breach of the terms of the contract between you as aforesaid you caused the same to be delivered and/or handed over and/or taken by the said consignees without the latter first delivering and/or handing over to you the clean Bill of Lading as was duly issued by your said agents for and/or on your behalf to the plaintiffs bearing date the 22nd May, 1971, the Original of which was sent by the plaintiffs through their Cyprus Bankers, the Popular Bank of Cyprus Ltd. together with the relative invoice for the payment of the value thereof".

The writ was served on the agents of the defendants on September 25, 1971, and on October 20, the defendants by leave of the Court entered a conditional appearance to the writ. On November 19, 1971, they filed a notice of motion asking for the setting aside of the proceedings and for the stay of the action. This motion was supported by an affidavit sworn by Mr. Savvas Menelaou, a clerk working at the law office of Messrs. John Clerides & Sons.

On April 29, 1972, the plaintiffs gave notice opposing the application of the defendants. This notice was not supported by an affidavit and on May 31, 1972, by consent and with the leave of the Court, an amended notice was filed but again not supported by an affidavit. The motion was heard by me on May 31, 1972, and in presenting his case to the Court at the hearing, counsel for the defendants did not pursue the application to set aside the writ contained in the notice of motion on the ground of jurisdiction, but confined himself to the alternative application for a stay of the action. In my view, counsel was right in his stand, for the authorities show that assuming the defendants to be entitled to relief at all on the grounds put forward, a stay will be the correct form for such relief to take. (*The Eleftheria* [1969] 2 All E.R. 641 at p. 642).

The evidence before the Court consisted of the first affidavit of Mr. Menelaou, to which I have referred to

earlier, and the second affidavit is that of Mr. Andreas Koulermos, the officer in charge of the plaintiff's business department dealing with all the exports and shipments abroad. Mr. Menelaou's affidavit had exhibited to it a copy of a bill of lading printed in French. Mr. Koulermos' long affidavit dated June 24, 1972, although it did not exhibit to it the telex containing the terms of the contract of carriage, nevertheless, it was later on produced.

The background and nature of the dispute between the parties as they appear from the affidavits and the other documents exhibited are as follows :- The plaintiffs are a company registered under the Companies Law, carrying on business in Cyprus and abroad. The defendants are shipowners and the owners of the ship NUSHABA. The principal place of their business is in Rotterdam, and they are operating through agents, among other places in Cyprus through their agents the Cyprus Shipping Co. Ltd., and in Marseilles.

In May, 1971, there were shipped on board the NUSHABA lying at Famagusta Port 4147 cartons of Valencia oranges for carriage to the French port of Marseilles under a bill of lading in the French language, and the French language, and the goods were consigned to Societe Marsellaise De Groupage (3 Quai de La Joliette Marseilles). Apparently, as is shown on the face of it (written in English) it was signed for and on behalf of the Master by the Cyprus Shipping Co. Ltd., the agents of the ship owners, and the words read "Freight prepaid", "Free out", "In transit", "Copy Not Negotiable" and "Freight prepaid and not to be returned, Vessel and/or Cargo lost or not lost". On the reverse side of the bill of lading there were printed in French 25 clauses, and in clause 2 (as translated by counsel) I read :-

> "2.- Base of contract. The present contract of carriage is governed by the clauses of the present bill of lading and by those provisions of the International Convention of 25th August, 1924, the French Law of April 2, 1936 and Dihir Marocain which are obligatory upon the parties and because of the express public policy."

It further provides in substance that the Court which shall have the sole and exclusive jurisdiction to deal with any disputes by whomsoever caused and whichever their origin and cause may be, that Court is the Commercial Court of the Seine.

The affidavit of Mr. Koulermos shows that there is a dispute as to whether the bill of lading constitutes the contract of carriage of the cargo in question between the parties and in effect he denies that he has agreed to abide by clause 2 of the bill of lading providing that disputes should be determined in France according to French Law. He alleged that on behalf of his employers he concluded a contract of carriage for the loading of the cargo in question on the ship 'Nushaba', with the agents of the defendants, sometime towards the second week of May, 1971. He further stated that the bill of lading was neither read nor signed by him because it was sent to him by the agents of the defendants some days after the departure of the ship in question, and because the said bill of lading was printed in French, a language with which he is not familiar with and could not read. Finally, he stated that in the circumstances of this case and once the contract of carriage was made in Cyprus, and the agents of the defendants are also in Cyprus, the forum conveniens is Cyprus.

After hearing long arguments by both counsel, the first question to be considered is whether the dispute, the subject matter of the action, is a dispute which, by the terms of the contracts between the parties they have agreed to should be decided by the French Court of Seine.

As to this question, the uncontradicted evidence is that the defendants have their principal place of business in Rotterdam and that their ships are visiting Cyprus. By a telex exchanged between the parties, a contract of affreightment was made and is in these terms :-

"ATTENTION MR AKIS
OUR REQUIREMENTS ON S.S. NUSHABA DUE F/STA 17/19 THEY ARE 8000 - 10000. PLS HAVE THIS IN MIND AND ADVISE US ACCORDINGLY".

"NOTED AND WE CAN CONFIRM NOW RESERVATION OF SPACE FOR THE ABOVE QUANTITY LOADING AT FAMAGUSTA ABT 17/19TH MAY. PLS RECONFIRM DEFINITE BOOKING OVER".

"OK WE CONFIRM".

"FINE WE SHALL BE KEEP YOU CLOSELY ADVISED REG DEFINITE DATE OF ARRIVAL OF TALITA AND NUSHABA MANY TKS REGARDS AND BIBI".

There is also evidence that until now although the defendants have delivered the goods to the consignees, the amount of the said cargo was not paid or collected by them as per the relative invoice attached to the said bill of lading. What then is the effect of a bill of lading on the contract of affreightment? The answer is that where there is a bill of lading relating to the goods, and where the terms of the contract on which the goods are carried are *prima facie* to be ascertained from the bill of lading. (*Leduc & Co.* v. *Ward* [1888] 20 Q.B.D. 475). It is further said that the bill of lading is not conclusive evidence of those terms (*Sewell* v. *Burdick* [1884] 10 App. Cas. 74, H.L. at p. 105) and the person accepting it is not necessarily bound by all its stipulations (*Crooks* v. *Allan* [1879] 5 Q.B.D. 38; also *Dennis & sons Ltd.* v. *Cork Steamship Co. Ltd.* [1913] 2 K.B. 393), but may be entitled to repudiate them on the ground that, as he did not know, and could not reasonably be expected to know, of their existence, his assert to them is not to be inferred from his acceptance of the bill of lading without objection (*Crooks* v. *Allan* (*supra*)).

It appears that the true view of the authorities may be that it depends on the facts of each case whether the bill of lading contains the actual contract. Where the bill of lading has been held to be the contract, it was either so by reason of s. 1 of the Bill of Lading Act, 1855 (as in the case of *Leduc* v. *Ward* (*supra*)) or the parties appear to have agreed that it should be so. As Lord Goddard, C.J. said in *S.S. Ardennes (Cargo Owners)* v. *S.S. Ardennes (Owners)* [1951] 1 K.B. 55 at p. 59 :-

"The contract has come into existence before the bill of lading is signed; the latter is signed by one party only, and handed by him to the shipper usually after the goods have been put on board. No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain some term for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion, for that reason, prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term. He is not a party to the preparation of the bill of lading; nor does he sign it."

It appears from the trend of the authorities that the shipper is not prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term. See also *Jadranska Slobodna Plovidba* v. *Photos Photiades & Co.* (1965) 1 C.L.R. 58 at p. 66.

In the light of what I have endeavoured to explain, it follows that the dispute is not clearly within clause 2 of the bill of lading.

The second question to be considered is on what principles of law an application to stay an action on the ground of such an alleged agreement should be decided. As to the point that all disputes should be adjudged by the French law, I was referred by counsel for the defendants to two cases, *Jadranska Slobodna Plovidba* (*supra*) at p. 69 and *Fehmarn* [1958] 1 All E.R. 333 at p. 335.

I find it convenient to deal with the case of *Fehmarn* first, and I propose quoting a passage from the judgment of Lord Denning 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.

I would ask myself therefore: is this dispute a matter which properly belongs to the courts of this country? Here are English importers, the cargo-owners, who, when they take delivery of the goods in England, find them contaminated. The goods are surveyed by surveyors on both sides, with the result that the English cargo-owners make a claim against the German shipowners. The vessel is a frequent visitor to this country. In order to be sure that their claim, if substantiated, is paid by the shipowners, the English cargo-owners are entitled by the procedure of our Courts of Admiralty to arrest the ship whenever she comes here in order to have security for their claim. There seems to me to be no doubt that such a dispute is one that properly belongs for its determination to the courts of this country. But still the question remains: ought these courts in their discretion to stay this action?

It has been said by counsel for the shipowners that this contract is governed by Russian law and should be judged by the Russian courts, who know that law, and that the dispute may involve evidence from witnesses in Russia about the condition of the goods on shipment. Then why, says counsel, should not it be judged in Russia as the condition says? I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country the dispute is most closely concerned. Here the Russian element in the dispute seems to be comparatively small. The dispute is between the German owners of the ship and the English owners of the cargo. It depends on evidence here as to the condition of the goods when they arrived here in London and on evidence of the ship, which is a frequent visitor to London. The correspondence

leaves in my mind, just as it did in the learned Judge's mind, the impression that the German owners did not object to the dispute being decided in this country but wished to avoid the giving of security.

The dispute is more closely connected with England than with Russia, and I agree with the Judge that sufficient reason has been shown why the proceedings should continue in these courts and should not be stayed."

In *Jadranska's* case (*supra*) the defendants applied to the trial Judge to set aside the notice of the writ for want of jurisdiction, but they did not apply to the Court to stay the proceedings on the ground that the parties agreed that all disputes under the contract should be decided in Yugoslavia according to Yugoslavian Law. In this case it appears also that the plaintiffs (respondents) disputed the defendants' (appellants') allegation that they agreed to clause 3 in the bill of lading providing that disputes should be determined in Yugoslavia according to Yugoslavian Law.

Josephides, J. delivering the judgment of the Court of Appeal, after referring to a number of cases including the *Fehmarn* case said at p. 69 :-

"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".

Finally, the appeal Court upheld the ruling of the trial Judge who exercised his discretion in favour of the plaintiffs. C/f the *Cap Blanco* [1911 - 1913] All E.R. (reprint) 365, dealing with the same question of stay of the proceedings.

In a recent case, the *Eleftheria* [1969] 2 All E.R. 641, Brandon, J., after dealing with a number of cases.

regarding the principles of law applicable to stay an action where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, had this to say at p. 645 :-

"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 time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

It seems to me that the authorities show that when the plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply to stay the proceedings, the English Court and indeed our Court, is not bound to grant a stay, but has a discretion whether to do so or not. This question

arose again in *Evans Marshall & Co.* v. *Bertola S.A. and Another, Evans Marshall & Co. Ltd* v. *Bertola S.A.* [1973] 1 All E.R. 992 where the head-note reads:

"The plaintiffs, an English company, were wholesale wine merchants. In 1951 the plaintiffs entered into an agreement with the first defendants ('Bertola'), a company incorporated in Spain, whereby Bertola granted the plaintiffs sole agency and distribution rights for their products in the United Kingdom and certain Commonwealth territories, specifically agreeing not to sell them there except through the plaintiffs. By cl. 13 Bertola were entitled to determine the agreement if the plaintiffs did not fulfil their duties. Clause 15 provided: 'If any law claim arises between the two parties it will be submitted to the Barcelona Court of Justice'."

It was Held—"(i) On the assumption that cl. 15 of the agreement was to be treated as an exclusive jurisdiction clause, leave should nevertheless be given to serve the writs on Bertola out of the jurisdiction under RSC Ord 11 since there were exceptional circumstances justifying such a course: (a) the substance of the case concerned the marketing of sherry in the United Kingdom; (b) all the essential witnesses were within the jurisdiction; (c) Bertola were a proper and necessary party, within RSC Ord 11, r 1 (j)a, to the plaintiffs' proceedings against ISI, which had nothing to do with the Barcelona court, a state of affairs which had been brought about by Bertola's own actions in purporting to terminate the agency agreement and to appoint ISI instead; (d) the evidence disclosed that the relevant Spanish law did not differ from English law to any substantial extent. Accordingly it would, in all the circumstances, be unjust to allow Bertola to terminate the plaintiffs' agency in the United Kingdom and at the same time avoid the jurisdiction of the English courts. It followed that Bertola's cross-appeals would be dismissed (see p. 1001 g to p. 1002 g, p. 1009 f and p. 1010 f and g, *post);* dicta of Diplock LJ in *Mackender* v. *Feldia AG* [1966] 3 All E.R. at 853 and of Lord Denning MR

in *The Fehmarn* [1958] 1 All E.R. at 335 applied."

Edmund Davies, L.J., delivering a concurring judgment in this case, and after dealing with clause 15 of the original agreement of the parties, had this to say at pp. 1008 - 1009 :-

> "In the light of this clause counsel for the defendants referred with considerable frequency to the plaintiffs as being in breach of their contract in seeking in English courts any contractual relief against the first defendants. It is therefore said that they should not be permitted to bring Bertola within the jurisdiction of our courts, and particular reliance was placed on the judgment of Brandon J in the *Eleftheria* [1] case.
>
> That case was before Kerr J., as well as the authorities therein reviewed by Brandon J. These included *The Fehmarn* [2], where a bill of lading provided that all claims thereunder should be judged in the Union of Soviet Socialist Republics. The English company who held the bill of lading sued the owners of the German vessel in which a cargo of turpentine was carried, on the ground that it had arrived here in a contaminated condition. Willmer J. [3] refused to stay the action, and the Court of Appeal declined to interfere with that decision, Lord Denning MR saying [4] :
>
> > '... is this dispute a matter which properly belongs to the courts of this country? Here are English importers... who, when they take delivery of the goods in England, find them contaminated... It has been said... that this contract is governed by Russian Law and should be judged by the Russian courts, who know that law... I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country the dispute is most closely concerned.'

---

1. [1969] 2 All E.R. 641.
2. [1958] 1 All E.R. 333.
3. [1957] 2 All E.R. 707.
4. [1958] 1 All E.R. 335.

Counsel for the defendants pointed out that *The Fehmarn* [1] dealt with an action in rem, and I gathered that he regarded this as a feature which diminished the relevance of what was there said to the facts of the present case. As to this, it is sufficient to say that *The Eleftheria* [2], on which counsel himself strongly relied, was also an action in rem. In my judgment both decisions may properly be here adverted to, and Kerr J was entitled to apply, as he did, the test enunciated by Lord Denning MR [3] in the former.

Kell J furthermore properly directed himself:

'(a) in RSC Ord 11 cases there is a heavier burden on the plaintiff who wants to bring the defendants within the jurisdiction than in cases of applications for staying actions properly instituted here (b) to bring a defendant before the English courts in the face of a foreign jurisdiction clause clearly goes further than merely allowing an action against a defendant properly served here to proceed'."

See *the Golden Trader, Danemar Scheepvaart Maatschappij BV* v. *Owners of the Motor Vessel Golden Trader,* [1974] 2 All E.R. 686 where Brandon, J., after reviewing a number of authorities decided to stay the action; also *Cubazucar and Another* v. *Camelia Shipping Co. Ltd.* (1972) 1 C.L.R. 61.

In the light of the authorities and taking into account all the circumstances of this case, I would with respect, adopt and apply the test enunciated by Lord Denning in the *Fehmarn* case referred to earlier, and in exercising my discretion whether or not to grant a stay of the proceedings I have taken into consideration (a) the stipulation in the bill of lading that all disputes should be adjudged by the French Court of Seine; (b) that our Courts are in charge of their own proceedings and one of the rules which they apply is that such a stipulation

---

1. [1958] 1 All E.R. 333.
2. [1969] 2 All E.R. 641.
3. [1958] 1 All E.R. 335.

is not absolutely binding, although such a stipulation is a matter to which the Courts of this country will give much regard to 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; (c) that this dispute is a matter which properly belongs to the Courts of this country because here are the Cypriot exporters, the cargo owners, who found themselves not being paid the value of their goods although they have been delivered to the consignees; and (d) the vessel in question visits Cyprus and the shipowners are represented by Cypriot agents here.

Reading the affidavits and the arguments, my impression is that the Dutch owners of the ship do not object to the dispute being decided in this country, but wish to take advantage of the limitation law governing the filing of disputes in France. Furthermore, there seems to me to be no doubt that although Clause 2 of the bill of lading is governed by French Law and should be judged by the French Court of Seine, nevertheless, the dispute is mostly concerned with Cyprus and the French element in the dispute seems to be comparatively small. The real dispute is between the Dutch owners of the ship and the Cyprus owners, the exporters of the cargo. It depends on the evidence here as to what was the contract of carriage, and as to whether or not the owners of the cargo have accepted the foreign jurisdiction clause.

Having reached the view that the dispute is mostly closely connected with Cyprus and not with France, and that Cyprus is a forum of convenience regarding the witnesses, I think that sufficient reasons have been put before me why the proceedings should continue in our courts, and should not be stayed.

I would, therefore, dismiss the application, but I would consider the question of costs of this application at the end of the trial of the case, because there was such a long delay in pursuing these proceedings.

Application dismissed.