1988 December 23

(STYLIANIDES J)

## ELECTROMATIC CONSTRUCTIONS CO LTD ,

*Plaintiffs*

v

1 AZOV SHIPPING CO
2 CYPMED SHIPPING CO
3 THE SHIP M/V «IVAN KOROTEV».

*Defendants*

*(Admiralty Action No 127/83)*

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*Contracts — Clause limiting liability — The Contract Law, Cap 149, s 28 — The clause is outside the ambit of the section*

*Admiralty — Bill of Lading — Relationship between shipowner and consignee of the goods — The Bills of Lading Act, 1855, section 1 — Rights to sue transferred to the indorsee/consignee of the bill of lading — Limited to those under the contract, as expressed by the Bill of Lading*

*Admiralty — Carriage of Goods by Sea — The Hague Rules — The Carriage of Goods by Sea Law, Cap 263, section 2 — Ambit of*

*Conflict of Laws — Contracts — Proper law of — Intention of parties — If not expressed, it should be objectively ascertained*

*Conflict of Laws — Public policy — Meaning of*

The plaintiffs claim as consignees under a bill of lading, C£503 98 for default of delivery of one carton of goods The first defendants raised a preliminary point that the liability of the shipowners is limited by clause 13 of the Bill of Lading to 250 roubles or Cyprus pound equivalent

The shipowners are a company of U S S R The ship is under the flag of U S S R

Counsel for the plaintiffs, invited the Court to ignore clause 13 on the following grounds

(a) It is contrary to section 28 of the Contract Law, Cap. 149.

(b) The Bill of lading does not contain the contract between the parties.

(c) The rouble is not freely convertible currency.

(d) The Hague Rules, 1924 are incorporated in the Schedule to the Cyprus Carriage of Goods by Sea Law, Cap. 263. Article IV(5) limits liability at one hundred pounds per package or unit, or the equivalent of that sum in other currency; under Article IX the monetary units are to be taken to be gold value.

(e) It is contrary to clause 4 of the Bill of Lading, which is the paramount clause.

Held: (1) Section 28 of Cap. 149 nullifies agreements in restraint of legal proceedings. It has no bearing in this case

(2) Doubt has been raised sometimes whether the Bill of Lading is a conclusive statement of the contract between the shipper and the shipowners.

In the present case, however, the dispute is between the shipowner and the consignee. The shipper is not involved at all. The consignee acquires rights only by the Bill of Lading. He has no privity of contract otherwise with the shipowner. The law with regard to consignees/indorsees is well settled. The rights to sue transferred to the indorsee/ consignee are limited to those under the contract, as expressed in the Bill of Lading and no more.

(3) The value of the rouble is on the uncontested evidence before this Court ascertainable at any time.

It is impermissible for the Court to declare that the currency of one of the major countries of the world cannot be used by the citizens of that country in their contracts with people outside U.S.S.R., in an era like the present one, where international trade is expanding and moving so rapidly. Certainly this does not offend public policy in this country and it is not prohibited by any law.

(4) The Carriage of Goods by Sea Law, Cap. 263 provides that the rules which were set out in the Schedule (Articles I to IX) shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Cyprus to any other port in or outside Cyprus. It follows that this case, where the carriage was from a port of U.S.S.R., the said rules are not applicable.

(5)(a) As it clearly emanates from clauses 4 and 5* of the Bill of Lading it is clear that the Hague Rules are not applicable, if the proper law of the contract is the Russian Law They are only applicable if the national law of another country is the proper law of the contract, where the matter is determined by the Court in another country, and their application in that other country is obligatory to be incorporated in the Bill of Lading

(b) The proper law of a contract is the law which the parties intended to apply That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances

(c) There can be no doubt that in this case the parties intended the Merchant Shipping Code of U S S R , 1968, to be the Law applicable for the carriage under this Bill of Lading

(d) Public policy must be understood in a wider sense No statute of this country forbids the application of the provisions of the Merchant Shipping Code of the U S S R , 1968 The objection on grounds of public policy fails

(6) It follows that the liability of the defendants - ship owners, under the Bill of Lading, does not exceed 250 - Russian roubles, which on the material date were equivalent to C£145 805

*Order accordingly Costs in cause, but in any event, not against defendants*

*Cases referred to*

*Domestica Ltd v Adriatica Societa Per Azioni Di Navagazione and Another* (1981) 1 C L R 85,

*Fraser v Telegraph Construction Co* [1982] L R 7 Q B 566,

*Clyn, Mills and Co v East and West India Dock Co* [1882] 7 App Cas. 591;

*Leduc and Co. v Word and Others* [1886-1890] All E.R. Rep. 266;

*The Ardennes*, 84 Ll L. Rep. 340;

*Jadranska Slobodna Blovidba v. Photos Photiades and Co.* (1965) 1 C L R 58,

*Archangelos Domain Ltd v Adriatica Societa Per Azzione Di Navigatione* (1978) 1 C.L.R. 439;

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* *Quoted at p 777 post*

*Dobell and Co. v. Steamship Rossmore Company* [1895] 2 Q.B D 408;

*Vita Food Products Inc v Unus Shipping Co Ltd* [1939] 1 All F R 513

**Preliminary point.**

Preliminary point raised by the shipowners to the effect that under Clause 13 of the Bill of Lading their liability if any is limited to 250 roubles or their equivalent in Cyprus pounds

*St McBride*, for the applicants-defendants

*Chr. Mitsides*, for respondents-plaintiffs

*Cur adv vult*

STYLIANIDES J read the following decision The plaintiffs by this action claim C£503.926 for default of delivery of one carton No 275 of goods The defendants No 1 a company of U S S R are the shipowners Defendant No 3 is the ship under the flag of U S S R owned by defendants No 1

In the petition it is alleged that there was a contract of carriage evidenced by a Bill of Lading No 3 dated 13th May 1982 and that the amount of the value of the short landed carton box and/or damage is £503 926

In the answer of the defendants No 1 it is alleged that under Clause 13 of the Bill of Lading the liability if any is limited to 250 roubles or Cyprus pound equivalent

The point raised in the answer of the shipowners was taken by the Court, after an appropriate application as a preliminary point pursuant to Rule 87 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, which provides that either party may apply to the Court or Judge to decide any question of fact or law raised by any pleading and the Court or Judge shall thereupon make such order as it shall seem fit to him.

It is common ground that the plaintiffs are consignees of the Bill of Lading No 3 dated 13th May, 1982 Counsel for defendants No 1 contended that the Bill of Lading as between a consignee/ indorsee and the shipowner and the ship contains the contract, that the Bill of Lading in this case is governed by the Russian Law

that Article 155 of the Merchant Marine Code of U.S.S.R provides: «For the sea carriage the Carrier shall in no case be liable in an amount exceeding Rbls 250 per package or unit or the equivalent of that sum in other currency, unless value declared on Bill of Lading» and that Clause 13 of the Bill of Lading limits liability to 250 roubles and the Hague Rules are not appicable.

Counsel for the plaintiffs contended that the Bill of Lading does not contain the contract between the parties in the litigation. Clause 13 is invalid as it is contrary to Clause 4 the «paramount clause». The Hague Rules, 1924 are incorporated in the Schedule to the Cyprus Carriage of Goods by Sea Law, Cap. 263. Article IV(5) limits liability at one hundred pounds per package or unit, or the equivalent of that sum in other currency; under Article IX the monetary units are to be taken to be gold value. Furthermore Clause 13 of the Bill of Lading is illegal, it being contrary to section 28 of our Contract Law, Cap. 149, as it limits the liability and does not allow this Court the freedom for ascertainment and assessment of the damages. And finally it is illegal, because the Russian rouble is not freely convertible.

Counsel's for the defendants reply to the last argument is that the value of the rouble is ascertainable and it is not permissible to declare that the Russians cannot contract in their currency or stipulate as the measure of ascertainment their own liability by their own currency.

SECTION 28 OF CAP. 149:

I may say from the outset that section 28 of our Contract Law Cap. 149 has no bearing in this case and the contention of counsel for the plaintiffs is ill conceived and unfounded. Under the provisions of this section an agreement which restricts absolutely the enforcement of rights under or in respect of any contract, by the usual legal proceedings in the Courts, or which provides that a suit should be brought for the breach of any terms of the agreement within a time shorter than the period of limitation prescribed by law, is void to that extent. It nullifies, in effect agreements in restraint of legal proceedings. (Pollock and Mulla Indian Contract and Specific Relief Acts 9th Ed. p. 295, *Domestica Ltd., v. 1 Adriatica Societa Per Azioni Di Navigazione and Another* (1981) 1 C.L.R. 85.)

BILL OF LADING:

Doubt has been raised sometimes whether the Bill of Lading is

a conclusive statement of the contract between the shipper and the shipowners.

In the present case, however, the dispute is between the shipowner and the consignee. The shipper is not involved at all. The consignee acquires rights only by the Bill of Lading. He has no privity of contract otherwise with the shipowner. Prior to the Bills of Lading Act, 1855, the contract of carriage was not transferred by a transfer of the property in the goods by the Bill of Lading. The transferee did not acquire any right to sue for a breach of the contract in his own name. (*Thompson v. Dominy*, 14 L.J. Ex. 320).

As, however, by the custom of merchants a Bill of Lading of goods, being transferable by endorsement, the property in the goods might thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the Bill of Lading continued in the original shipper or owner, in order to remedy this situation, the Bills of Lading Act, 1855 was passed. Section 1 reads as follows:-

> «1. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.»

In *Fraser v. Telegraph Construction Co.* [1872] L.R. 7 Q.B. 566 Blackburn, J. said at p. 571:-

> «The bill of lading, notwithstanding some case that Mr. Cohen referred to in the Common Pleas, must be taken to be the contract under which goods are shipped, and until I am told different by a court of error, I shall so hold.»

In *Clyn, Mills & Co. v. East and West India Dock Co.* [1882] 7 App. Cas. 591, Lord Selborne said at p. 576:-

> «Everyone claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill of lading although by mercantile law and usage it is a symbol of the right of property

in the goods, is to express the terms of the contract between the shipper and the shipowner.»

In *Leduc & Co. v. Ward and Others* [1886-90] All E.R. Rep. 266 (20 Q.B.D. 475), an action by an indorsee for a loss of the goods during a deviation from the voyage, Lord Esher, M.R., said at p. 268:-

«The question in this case is, what is the contract contained in the bill of lading? It was suggested that a bill of lading is, in all circumstances, nothing but a receipt for the goods, and contains no contract, except that the goods have been received by the shipowners and are to be delivered by them at the place named. This is an instrument which has received one construction from the mercantile world and the courts for more than a hundred years. Where there is a charterparty, the bill of lading is only a receipt for the goods, because all the terms of the contract of carriage, as between the shipowner and the charterer, are contained in the charterparty, and the bill of lading is only given to enable the charterer to deal with the goods during transmission. But even where there is a charterparty, although the bill of lading is only a receipt as between the charterer and the shipowner, it is more than a receipt as between the endorsee and the shipowner; it contains the contract between them.»

And at p. 269:-

«It seems to me impossible to say that a bill of lading does not contain the terms of the contract of carriage.»

Fry, L.J. said at p. 270:-

«In my view a very large portion of the argument which we have heard in this case is concluded by the provisions of the Bills of Lading Act, 1855. The plaintiffs entered into a contract with merchants abroad for the purchase of goods to be shipped from a foreign port. The substance of that contract was that the vendors were to deliver shipping documents to the purchasers, and that the purchasers were to pay the price in exchange for the documents. The Bills of Lading Act provides, by s.1, that .....»

After he recites the section he continues:-

«Those words appear to me to be applicable to the present

case The plaintiffs are endorsees of a bill of lading to whom the property in the goods therein mentioned has passed on or by reason of the endorsement The legislature have declared that there is a contract in the bill of lading, and that the benefit of that contract is vested in the endorsees It seems to me to be impossible in the face of that section for the court to say that a bill of lading contains no contract »

And further down

« I prefer to rest my judgment on the view that the provision of the statute making the contract contained in the bill of lading assignable is inconsistent with the idea that anything which took place between the shipper and shipowner, not embodied in the bill of lading, could affect the contract

... as I have said, where a statute has made the benefit of a contract assignable to the third party, it is inconsistent with the policy of the statute to allow anything which took place between the parties to the contract, but which is not embodied in it, to affect the contract »

In *The «Ardennes»*, 84 Ll L Rep 340 at p 345 we read

*«Leduc & Co v Ward and Others,* 20 Q B D 475, on which Sir Robert so strongly relied, was a case between shipowner and indorsee of the bill of lading, between whom its terms are conclusive by virtue of the Bills of Lading Act, 1855, so that no evidence was admissible in that case to contradict or vary its terms Between those parties the statute makes it the contract »

In *Jadranska Slobodna Plovidba v Photos Photiades & Co* (1965) 1 C L R 58 a clear and distinctive differentiation was made between the shipper on the one side and those who acquired a right under the Bills of Lading Act, 1855. At p 65 it was said

«Where a bill of lading has been held to be the contract it was either so by reason of section 1 of the Bill of Lading Act, 1855 (as in the case of *Leduc v Ward* 20 Q B D 475) or the parties appear to have agreed that it should be so

It appears to be well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms »

In *Archangelos Domain Limited v. Adriatica Societa Per Azione Di Navigatione through their Cyprus Agents Messrs. A.L. Mantovani & Sons Ltd.*, (1978) 1 C.L.R. 439, Mr. Justice Hadjianastassiou, after reviewing the English Case Law on the subject, held that the Bill of Lading is not in itself the contract between the shipowner and the shippers of goods though it is an excellent evidence of its terms. At p. 467 he clearly adopted the *Leduc's* case and said:

> «That was a case between shipowner and endorsee of the bill of lading, between whom its terms are conclusive by virtue of the Bills of Lading Act, 1855, so that no evidence was admissible in that case to contradict or vary its terms. Between those parties the statute makes it the contract.»

The law with regard to consignees/indorsees is well settled. The rights to sue transferred to the indorsee/consignee are limited to those under the contract, as expressed in the Bill of Lading, and no more.

*CLAUSE 13*

The material part of Clause 13 of the Bill of Lading reads:

> «*13. Limitation of Responsibility.* For the sea carriage the Carrier shall in no case be liable in an amount exceeding Rbls 250 per package or unit or the equivalent of that sum in other currency, unless value declared on the Bill of Lading».

It was contended that this stipulation in the Bill of Lading is not valid, as the rouble is not freely convertible currency. The value of the rouble is on the uncontested evidence before me ascertainable at any time.

It is to be noted that Mr. McBride addressed a letter to the Trade Representation of the U.S.S.R. in the Republic of Cyprus on 30th October, 1984, inquiring as to the conversion rate of the U.S.S.R. Rouble to the US Dollar on 20th May, 1982, and the Deputy Trade Representative of the U.S.S.R. after consulting the Bank of Foreign Trade of the U.S.S.R. certified the conversion rate on the date requested. (See Exhibit A in the affidavit of Maro Panayidou dated 20th November, 1984).

It is impermissible for this Court to declare that the currency of one of the major countries of the world cannot be used by the citizens of that country in their contracts with people outside

U.S.S.R., in an era like the present one, where international trade is expanding and moving so rapidly. Certainly this does not offend public policy in this country and it is not prohibited by any law.

*CARRIAGE OF GOODS BY SEA LAW, CAP. 263*

At a meeting of the International Law Association at Hague on 3rd September, 1921, «the Hague Rules» were originally adopted. They were adopted at an international conference on the maritime law held at Brussels in October, 1922 and after their amendment at a further conference in Brussels in October, 1923, received the form of an international convention and were intended for adoption by municipal legislation. Indeed Articles IX to XI! contain provisions regarding the adoption of those rules by municipal legislation and regarding accession to, and ratification, denunciation and amendment of the proposed convention.

By the Carriage of Goods by Sea Law enacted on 4th February, 1927, it was provided that the rules which were set out in the Schedule (Articles I to IX) shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Cyprus to any other port in or outside Cyprus. As the carriage and voyage in the present case do not come within the ambit of section 2 of Cap. 263 this Law is *inapplicable*.

THE CONTRACT OF THE PARTIES:

We have to turn to the contents of the Bill of Lading. Clause 4 reads:

«4. *Paramount Clause*. Carriage by water under this Bill of Lading shall have effect subject to the provisions of the Merchant Shipping Code of the U.S.S.R., 1968, or the Hague Rules contained in the international Convention for the unification of certain rules relating to the Bills of Lading dated 25th August, 1924, if no national law is applied in accordance with cl. 5.»

Clause 5 reads:

«5. *Jurisdiction*. Disputes arising under Bill of Lading shall be determined at the place, where the Carrier has his principal place of business. No proceedings may be brought before other courts; unless the parties both expressly agree on the choice of another court or arbitration.»

The material provision of Clause 13 has already been quoted verbatim.

It was submitted by counsel for defendants No. 1 that the law applicable in this case is the Russian Law.

It is clear that the Hague Rules are not applicable, if the proper law of the contract is the Russian Law. They are only applicable if the national law of another country is the proper law of the contract, where the matter is determined by the Court in another country, and their application in that other country is obligatory to be incorporated in the Bill of Lading. *(Dobell & Co. v. Steamship Rossmore Company* [1895] 2 Q.B.D., 408 and *Vita Food Products Inc. v. Unus Shipping Co., Ltd.* [1939] 1 All E.R. 513.)

The proper law of a contract is the law which the parties intended to apply. That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances. The intention of the parties will be ascertained by the intention expressed in the contract which will be conclusive.

In *Vita Food Products* (supra) Lord Wright said at p. 521:

> «It is true that, in questions relating to the conflict of laws, rules cannot generally be stated in absolute terms, but rather as prima facie presumptions, but, where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.»

We have to look at the contract and the Bill of Lading. The contract must be read as a whole.

Clauses 4, 5, and 13 read together and, subject, to public policy in this country, leave no doubt that the parties intended the Merchant Shipping Code of U.S.S.R, 1968, to be the Law applicable for the carriage under this Bill of Lading.

Public policy should be understood in a wide sense. If the contract is forbidden by a local statute, or is declared to be void, or nullified for disobedience to a statutory provision, then foreign law is excluded and stipulations in the contract for the foreign law are

nullified. Public policy, however, as was said by Lord Wright, is better served by refusing to nullify a bargain, save on serious and sufficient grounds.

No statute of this country forbids the application of the provisions of the Merchant Shipping Code of the U.S.S.R., 1968. The objection on grounds of public policy fails.

To sum up the contract between plaintiffs - consignees and defendants 1 - shipowners is contained conclusively in the Bill of Lading. The relevant provisions in the Bill of Lading are Clauses 13, 4 and 5. The law governing this Bill of Lading is the Russian Law. The Carriage of Goods by Sea Law, Cap. 263, is not applicable and has no bearing on this case. The application of the Merchant Shipping Code of the U.S.S.R., 1968, cannot in any way be excluded on grounds of public policy. This is the intention of the parties expressed in the Bill of Lading, as this is the only construction that can be placed on the words of the written contract of the parties. The fact that Russian rouble is not freely convertible, though its convension value is ascertainable, is no obstacle to the application of the law of the contract - the Russian Law.

Section 28 of the Contract Law refers to agreements in restraint of legal proceedings. This matter does not arise in this care.

Apart from special circumstances, which may affect the case in such ways, the value of the goods for which compensation must be made, when they have been lost or damaged, is that which they would have had at the time and place at which they ought to have been delivered.

From the facts of this case, having regard to the above, the material date is the 20th May, 1982.

The liability of the defendants - ship owners, under the Bill of Lading, does not exceed 250.- Russian roubles, which on the material date were equivalent to C£145.805.

This determines the preliminary point raised in the pleadings.

Costs of this application to be costs in the cause, but at any rate not against the defendants.

*Order as above.*