1985 February 23

[A. LOIZOU, J.]

TAITO CO. LTD., AND OTHERS,

Plaintiffs.

v.

1. THE SHIPP "ARMAR",

2. ARMAR SHIPPING CO. LTD..

Respondents.

(Admiralty Action No. 178/78).

Admiralty—Shipping—Bill of lading—Incorporating the provisions of the Carriage of Goods by Sea Act of the United States—Limitation clause in bill of lading "unless suit is brought within one year..."—United States Law treated as a contractual stipulation—Limitation clause extinguishes the claim once no proceedings were brought within the period envisaged by the bill of lading—Section 28 of the Contract Law, Cap. 149 and the Limitation of Actions (Suspension) Law, 1964 (Law No. 57 of 1964) not applicable.

Limitation of Actions—Distinction between statutes of Limitation which bear the remedy and those which extinguish the right—In the former case they are rules of procedure and in the latter rules of substantive law.

By virtue of a bill of lading defendants No. 2, a Cyprus Company who at the material times were the owners of defendant ship No. 1, agreed to carry a cargo of Cuban raw sugar from Cuba to Japan. The cargo, which was alleged to have been damaged, was discharged in Japan, between the 26th October, 1974 and the 1st November, 1974. Clause 4 * of the bill of lading provided that the bill of lading "shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United

* Clause 4 is quoted at p. 145 post.

States, approved April 16, 1936, which shall be deemed to be incorporated herein" and clause 20 * provided that the carrier "shall be discharged from all liability in respect of loss, damage and every claim with respect to the goods unless suit is brought within one year after delivery of the goods."

In an action against the carriers for damages, which was brought about three years after the one year bar had expired the following point of law was heard as preliminary to the hearing of the action:

"Whether the present action is time barred under the terms of the Bill of Lading in question and in particular under clause 20 thereof and/or under the Carriage of Goods by Sea Act of the United States (16th April 1936) the provisions of which are incorporated in the said Bill of Lading and became an express term of the contract and in particular under section 3(6) ** of the said Act."

Held, that the U.S. Law is to be treated as a contractual stipulation and the wording of the limitation clause extinguishes the claim which so ceases to exist and consequently the provision is outside the scope of section 28 of the Contract Law, Cap. 149 and not subject to it; and that, therefore, the action cannot stand as the right has been extinguished once no proceedings were instituted within the period envisaged by the bill of lading and irrespective of whether the U.S. Act applies by contract or by its adoption as foreign law; accordingly the action must be dismissed

Held, further, that the Limitation of Actions, (Suspension) Law, 1964 (Law No. 57 of 1964) does not apply because the said Law applies to "provisions of legislative nature" and not to contractual stipulations as it has been in the present case to be the provisions of the U.S A. Act, and because though the question of limitation is a matter of procedure and therefore it is governed by the lex fori a distinction has to be drawn between statutes of limi-

* Clause 20 is quoted at pp 145-146 post
** *Section 3(6) is quoted at p 146 post*

tation which bear the remedy and those which extinguish the right. In the former case obviously they are rules of procedure, whereas in the latter they are rules of substantive law.

Action dismissed.

Cases referred to:

The Ship "Ntama" v. Th. D. Georghiades S.A. (1980) 1 C.L.R. 386;

Morviken [1982] 1 Lloyd's L.R. 325 at p. 328;

Tzortzis v. *Monark Line A/B* [1968] 1 W.L.R. 411;

Dobell v. *Rossmore* [1895] 2 Q.B. 408 at pp. 412, 413;

Vita Food Products v. *Unus Shipping Co.* [1939] A.C. 277;

Domestica Ltd. v. *Adriatica Societa Per Azioni Di Navigazione* (1981) 1 C.L.R. 85;

Aries Tanker Corporation v. *Total Transport* [1977] 1 All E.R. 398;

UNICEF v. *Armar Shipping Co. Ltd.* (1983) 1 C.L.R. 361;

Avgousti v. *Papadamou and Another* (1968) 1 C.L.R. 66.

Application.

Application by plaintiffs, with the consent of the defendants, to have the point of law raised by the defendants in their defence "that action is time barred under the terms of the bill of lading" heard and disposed of as preliminary to the hearing of the action.

P. Ioannides, for the applicants-plaintiffs

E. Psillaki (Mrs.), for the respondents-defendants.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. On the application of the plaintiffs and with the consent of the defendants, the following point of law raised by the latter in their defence has been decided to be heard and disposed of by me as preliminary to the hearing of the action.

"Whether the present action is time barred under the terms of the Bill of Lading in question and in particular under clause 20 thereof and/or under the Carriage of Goods by Sea Act of the United States (16th April 1936) the provisions of which are incorporated in the said Bill of Lading and became an express term of the contract and in particular under section 3(6) of the said Act".

For the purposes of this application certain facts have been agreed between the parties and two documents, namely the text of the Carriage of Goods by Sea Act, 1936 of the United States of America and the Bill of Lading No. 1, dated 27th September 1974 have been produced by consent as exhibits 1 and 2 respectively.

The agreed facts are that Defendants 2 are a Cyprus Company and were at the material time the owners of the vessel "ARMAR" (defendants 1), that this is an action brought on the aforesaid Bill of Lading and that the cargo in question which is alleged to have been damaged and was carried under the said Bill of Lading was discharged in Japan between the 26th October 1974, and the 1st November 1974. The cargo consisted of 11,500 net long tons of Cuban raw sugar in bulk, shipped from Cienfuegos, Cuba for carriage to Kawasaki, Japan.

Clauses 4 and 20 of the Bill of Lading read:

"Clause 4: This bill of lading shall have effect subject to the provisions of the Carriages of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further".

"Clause 20: The carrier shall be discharged from all liability in respect of loss, damage and every claim whatsoever with respect to the goods unless suit is brought within one year after delivery of the goods or the date when the goods should have been deli-

vered even though the claim is based on gross negligence, unseaworthiness, conversion, deviation, the fact that the goods were carried on deck under an underdeck bill of lading or other grounds. Such suit shall not be considered to have been brought within the time specified above unless process shall have been actually served and jurisdiction obtained within such time".

Section 3(6) of the U.S. Act provides as follows:

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: Provided, that if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered".

It has been submitted on behalf of the defendants that in view of the above provisions since no action was brought against the carriers within one year of their alleged breach but about three years after the one year bar had expired, the action is time barred and the carriers should be discharged from any liability. In support of this proposition I was referred to the case of the ship *"NTAMA"* v. *Th. D. Georghiades S.A.* (1980) 1 C.L.R. 386, in which it was held that such a claim is time barred and extinguished. In that case, however, it was considered that the deciding factor in determining whether an action is time barred, under a Statute of Limitation, is the date on which the suit was filed before the Court and not whether other proceedings had been instituted within the period of limitation which could not prevent an action from being time-barred.

The defendants further referred to the *Limitation of Actions (Suspension) Law of 1964* (Law No. 57 of 1964) which as they argued has no application in the present instance as it does not apply to cases of limititation time

imposed by agreement between the parties but applies exclusively to limitation period imposed by "provisions of a legislative nature", and, in this case, the main reason for the imposition of the one year limitation period was Clause 20 of the Bill of Lading which, as they argued should be given its full effect. The U.S. Act, they went on further to say, is applicable not as the proper law of the contract but only because of the specific agreement of the parties that its terms were to be incorporated in their contract i.e. the Bill of Lading. Consequently, they said, Law No. 57 of 1964 solely applies to "provisions of a legislative nature" and makes no reference to agreements or contracts it does not apply.

The plaintiffs on their part have argued that the provisions of the U.S. Act have precedence over the terms of the Bill of Lading because the parties have, by their own choice adopted the Act, Clause 3(8) of which provides:

> "(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause, shall be deemed to be a clause relieving the carrier from liability".

Therefore, according to the plaintiffs, irrespective of what Clause 20 of the Bill of Lading provides, it would be irrelevant and of no effect, if it were contrary to the provisions of the Law and in particular of Clause 3(8) of the U.S. Act.

I would agree with the plaintiffs on this point, that the provisions of the U.S. Act have as such precedence over the terms of the Bill of Lading. This is borne out by what was said in the *"MORVIKEN"* [1982] 1 Lloyd's Law Reports, p. 325 by Lord Denning when considering the Hague Rules which were implemented in the English Carriage of Goods by Sea Act, 1924, and finally by s. 1(2)

of the Carriage of Goods by Sea Act 1971 "were given the force of Law" which correspond to the United States Carriage of Goods by Sea Act 1936, said at p. 328:

> "in every case properly brought before the Courts of the United Kingdom, the rules are to be given supremacy over every other provision of the bill of lading. If there is anything elsewhere in the bill of lading which is inconsistent with the rules or which derogates from the effect of them, it is to be rejected. There is to be no contracting-out of the rules. Notwithstanding any clause in the bill of lading to the contrary, the provisions of the rules are to be paramount. A parallel is to be found in Community law. Whenever there is a conflict or inconsistency between the law contained in any article of the Treaty and the law contained in the internal law of the member state, the law of the Community prevails, see *Shields* v. *E. Coomes (Holdings) Ltd.*, [1978] 1 W.L.R., 1408 at p. 1414; *Macarthys Ltd.* v. *Smith*, [1980] 3 W.L.R. 929 at p. 938; *Worringham* v. *Lloyds Bank Ltd.*, [1981] 1 W.L.R. 950. So here, whenever there is any inconsistency between the terms of the bill of lading and the rules, then the rules prevail".

This is in effect what also section 3(8) of the U.S. Act provides.

The plaintiffs have further argued in support of their case that under the principles of Private International Law, the governing law in this instance, i.e. the Proper Law, is the U.S. Act, since this is the law so adopted by the parties and this is their expressed intention in the agreement, i.e. the Bill of lading; I was referred in support of this proposition to *Gravenson, Conflict of Laws,* (6th Edition), p. 429, and also to the case of *Tzortzis* v. *Monark Line A/B* [1968] 1 W.L.R. where Lord Denning at p. 411, said:-

> "It is clear that, if there is an express clause in a contract providing what the proper law is to be, that is conclusive in the absence of some public policy to the contrary. But where there is no express clause,

it is a matter of inference from the circumstances of the case".

In considering this case, I should say at the outset that this Bill of Lading which refers to carriage from Cuba to Japan, i.e. from one foreign port to another, is not subject to the Cyprus Carriage of Goods by Sea Law, Cap. 263, since this Law applies only to outward journeys from Cyprus. It may also be added here that in the U.S.A. the incorporation of the Hague Rules is only compulsory in the case of outward journeys. Where, however, the Hague Rules do not normally apply, they can so become applicable by express agreement between the parties. (See Tetley Marine Cargo Claims, p. 5).

The U.S. Act has been expressly incorporated in the Bill of Lading by a clause paramount, and its provisions have to be construed as part of the agreement made between the parties, as being a contractual stipulation. (See: *Scrutton:* Charterparties and Bills of Lading (18th Ed.) at p. 404 and p. 504. (See also *Dobell* v. *Rossmore* [1895] 2 Q.B. 408 at pp. 412, 413, and *Vita Food Products* v. *Unus Shipping Co.*, [1939] A.C. 277). Thus the application of the law would be contractual and in this instance, since the U.S. Carriage of Goods by Sea Act has been expressly incorporated in the Bill of Lading it is construed as a contractual stipulation. Since however, it is to be treated as a contractual stipulation, its validity and effect must be tested against Cypriot Law.

Section 28(1) of our Contract Law, Cap. 149 provides:

> "28.(1) Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the Courts, or which limits the time within which he may thus enforce his rights, is void to that extent".

This provision has been judicially considered in the case of *Domestica Ltd.*, v. *Adriatica Societa Per Azioni Di Navigazione*, (1981) 1 C.L.R. 85. In the statement of the Law agreement in *Pollock and Mulla, Indian Contract and Specific Relief Act* (9th Ed.) at p. 295, on the interpreta-

tion of section 28 of the Indian Contract Act which is the same with our sec.28(1) of Cap. 149, reads:

> "Under the provisions of this section, an agreement which provides that a suit should be brought for the breach of any terms of the agreements within a time shorter than the period of limitation prescribed by law is void to that extent. The effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation. Agreements of this kind must be distinguished from those which do not limit the time within which a party may enforce his rights, but which provide for a release or forfeiture of rights if no suit is brought within the period stipulated in the agreement. The latter class of agreements are outside the scope of the present section, and they are binding between the parties".

So in effect, these are two types of limitation clauses which must be distinguished from each other.

(a) Clauses which absolutely restrict the parties from enforcing their rights after the expiration of the stipulated period though it may be within the period of limitation, which are within the ambit of section 28(1) and thus void, and

(b) Clauses which do not limit the time within which a party may enforce his rights but which provide for a release or forfeiture of right, if no action is brought within the stipulated in the agreement period. These agreements which extinguish the claim altogether, are outside the ambit of section 28(1) and thus are binding between the parties.

Useful guidance may also be derived from the case law on the matter.

In the case of *Aries Tanker Corporation* v. *Total Transport Ltd.*, [1977] 1 All E.R. 398, carriage was agreed under a charterparty from the Arabian Gulf to Rotterdam (i.e. from and to a foreign port). The Carriage of Goods

by Sea Act, 1924 of the U.K. was incorporated by contract (as it does not normally apply to Charterparties). A provision that:

> "...in any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered...".

was held to be of the kind that extinguishes the claim altogether which thus ceases to exist and was considered as a valid clause: It was stated at p. 402:

> "This amounts to a time bar created by contract. But, and I do not think that sufficient recognition to this has been given in the Courts below, it is a time bar of a special kind, viz., one which extinguishes the claim (cf. art. 29 of the Warsaw Convention, 1929) not one which, as most English statutes of limitation (e.g. the Limitation Act, 1939, the Maritime Conventions Act, 1911) and some international conventions (e.g. the Brussels Convention on Collisions, 1910 art. 7) do, bars the remedy while leaving the claim itself in existence. Therefore, arguments to which much attention and refined discussion has been given, as whether the charterer's claim is a defence, or in the nature of a cross action, or a set off of one kind or another, however relevant to cases to which the Limitation Act, 1939, or similar Acts apply, appear to me, with all respects, to be misplaced. The charterers' claim after May, 1974, and before the date of the writ, had not merely become unenforceable by action, it had simply ceased to exist, and I fail to understand how a claim which has ceased to exist can be introduced for any purpose into legal proceedings, whether by defence or (if this is different) as a means of reducing the respondents' claim, or as a set off, or in any way whatsoever".

In the case of *Domestica Ltd.*, (supra) a carriage was agreed under a Bill of Lading from Venice to Limassol —i.e. an inward journey to which Cap. 263 did not apply —which therefore had to be seen in the light of the prin-

ciples of the Cypriot Contract Law. A provision that "...the suit must be brought... on penalty of prescription, within six months..." was considered that it took away only the remedies by action—it did not provide for a forfeiture of rights—as was thus within the scope of section 28(1) of Cap. 149, it was subject to it and therefore void.

In the case of *The Ship Ntama* v. *Th. D. Georghiades S.A.* (1980)1 C.L.R. 386, a voyage was agreed under a Bill of Lading from the U.K. to Greece (i.e. to/from a foreign port). The Hague Rules did not apply by operation of law but because they had been expressly incorporated by a clause paramount, they thus had contractual force. A provision that: "...the ship shall be discharged... unless suit is brought within one year" was considered on the authority of *"Aries"* (supra) that it extinguishes the right altogether and was thus valid.

It is perhaps worth noting that the effect of section 28, was neither raised nor discussed in the case of *"Ntama"*. If one, however, is to reconcile the result of *"Ntama"*, as it stands and that which would have been, had it been considered under section 28, I believe that such result would have been the same because the stipulation as to time since it completely extinguished the claim, would be outside the ambit of section 28 and would therefore be valid.

In the present instance, as said above, the U.S. Law is to be treated as a contractual stipulation. and the wording of the limitation clauses, is clear. It extinguishes the claim which so ceases to exist and consequently the provision is outside the scope of section 28 and not subject to it.

The next point for consideration is whether the Limitation of Actions (Suspension) Law, 1964 (Law No. 57 of 1964) applies or not. The answer in the present case is in the negative. The first reason is that the said Law applies to "provisions of legislative nature" and not to contractual stipulations as it has been in the present case to be the provisions of the U.S.A. Act. The second reason is that though the question of limitation is a matter of procedure and therefore it is governed by the lex fori, yet a distinction has to be drawn between statutes of limitation which

bear the remedy and those which extinguish the right. In the former case obviously they are rules of procedure, whereas in the latter they are rules of substantive law.

In Halsbury's Laws of England 4th Edition volume 28 p. 266, paragraph 606, it is stated:

> "Those provisions of statutes of limitation which bar the remedy and not the right are rules of procedure only, and form part of the lex fori. Therefore, if an action is brought in England, then wherever the cause of action arose the period of limitation is governed by the appropriate English limitation enactment, except where foreign law has extinguished the right as well as the remedy".

In foot-notes 1 and 2 to the said page it is stated:

> "(1) Those provisions of statutes of limitation which extinguish the right as well as the remedy are rules of procedure insofar as they bar the remely, but are substantive law insofar as they extinguish the right. *(Dundee Harbour Trustees* v. *Dougall* (1852) 1 Macq 317 at 321 H.L.).
>
> (2) An English Court does not regard a foreign rule of limitation as mere procedure if the rule extinguishes both the right and the remedy. Once the right has gone in any case in which English Courts regard foreign law as applicable, an action in England will fail whether or not the time for bringing such an action in England has expired: *Huber* v. *Steiner* (1835)2 Scott 304: *Harries* v. *Quine* [1869] L.R. 4 Q.B. 653".

In our case as the provisions of the U.S.A. Act as to time limit were found to extinguish the right, they are substantive provisions. Such right has gone and our Courts which might regard this foreign Law as applicable will consider an action brought there that it should fail whether or not the time for bringing such action in Cyprus has expired.

In the case of *Vita Food Products Inc.* v. *Unus Shipp-*

ing Co. [1939] A.C. 277, the following was stated at p. 291:

> "It has been explained that the incorporation of these Acts may have only contractual effect, but in any case, though the proper law of the contract is English, English law may incorporate the provisions of the law of another country or other countries as part of the terms of the contract, and apart from such incorporation other laws may have to be regarded in giving effect to the contract".

Similar approach is to be found in the case of *UNICEF* v. *Armar Shipping Company Ltd.*, (1983)1 C.L.R. 361, in which Savvides J., referred also to our Supreme Court case *Eleni Andrea Avgousti* v. *Niovi Papadamou and Another* (1968)1 C.L.R. 66.

Once I have concluded that the right has not merely become unenforceable, but it had simply ceased to exist, I fail to see how such a claim can be introduced for any purpose into legal proceedings.

Before concluding, however, I would like to deal with a further point. The effect of Clause 20 earlier set out in this judgment. Whatever the position was found to be as regards the U.S.A. Act, again this action could not have been instituted in Cyprus as being out of time by virtue of the said clause by which the carrier "is discharged from all liability in respect of loss, damage and every claim whatsoever with respect to the goods unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered... Such suit shall not be considered to have been brought within the time specified above, unless process shall have been actually served and jurisdiction obtained within such time".

This last provision is indeed repugnant to the provisions of the U.S.A. Act. It might be argued that because of its concluding part the whole clause should be considered as void. That cannot be in my view so as there is ample authority that this further time limit could be separated from the remaining provisions of the clause and the clause

be considered as void only to that extent. (See the *"Ion"* [1971]1 Lloyds Law Reports p. 541.

For all the above reasons this action cannot stand as the right has been extinguished once no proceedings were instituted within the period envisaged by the Bill of Lading and this irrespective of whether the U.S. Act applies by contract or by its adoption as foreign Law. Consequently the action is dismissed with costs.

Action dismissed with costs.