1985 March 21

[MALACHTOS, SAVVIDES, LORIS, STYLIANIDES AND PIKIS, JJ.]

CYPRUS PHASSOURI PLANTATIONS CO. LTD.,

Appellants-Plaintiffs,

v.

ADRIATICA DI NAVIGAZIONE SP. A OF VENICE THROUGH THEIR AGENTS A.L. MANTOVANI & SONS LTD., AND ANOTHER,

Respondents-Defendants.

(Civil Appeal No. 6659).

Stay of Proceedings—Carriage of goods by sea—Bill of lading—Foreign jurisdiction clause—Discretion of the Court—Principles applicable—And principles on which Court of Appeal interferes with exercise of such discretion by a trial Court—Dispute more closely connected with foreign Country and witnesses more readily available there—Trial Judge properly exercised his discretion in granting stay.

Practice—Stay of proceeding—Not necessary, in order to ask for a stay, to enter a conditional appearance.

Admiralty—Carriage of goods by sea—Bill of lading—Time bar clause—Though in conflict with Article III, rule 8 of the Hague Rules, which are implemented in the Carriage of Goods by Sea Law, Cap. 263, has been waived—Remaining part of the relevant clause in the bill of lading which embodies a foreign jurisdiction clause can be severed and is a valid one and can be enforced on its own—"Damage... or loss of the loaded goods" in the bill of lading—Includes loss caused by misdelivery.

The appellants-plaintiffs, as owners of goods which were shipped on board defendant 2 ship for carriage from Limassol to Venice, under a contract of carriage, contained in a bill of lading, sued the respondents-defendants claiming Stg. £10,298.88 by way of damages for the loss suffered by them by reason of the defendants breach of the

contract of carriage, in that the latter did not deliver the said goods to the plaintiffs or to their Order but, delivered them to others and/or without the production of or the delivery of, or against the said bill of lading. When the writ of summons was served on the defendants they appeared unconditionally and at a later stage they applied for "an order of the Court to set aside the writ and or the service thereof and/or to stay the proceedings on the ground that this Court is not seized with jurisdiction to try the present case". Defendants relied on clause 26 of the Bill of lading which reads as follows:

"Any claim for damage, shortage, deterioration or loss of the loaded goods must be filed in writing to the agents of the Company at the port of destination within 8 days after the discharge date, failing which the consignee loses any right to take his action or file his claim.

In lack of a friendly agreement, the suit must be brought before the competent Court of Venice, on penalty of prescription within 6 months after the delivery date of the loaded goods, or, in case of total loss, within 6 months after the date when said goods were supposed to be at destination.

Both the Shipper and the Consignee, as well as any other person interested in the goods, expressly waive the competence of any other jurisdiction.

All what is not provided for in the present carriage conditions shall be ruled by the Code of Maritime Law in force in the Italian Republic."

The trial Judge exercised his discretion in favour of stay because the dispute was more closely concerned with Italy, in that the carrying vessel was Italian, witnesses as to facts were more readily available in Italy and it would be more convenient to be tried there where third parties reside and process can be issued against them and because according to Article 26 of the bill of lading what is not provided for in the carriage conditions shall be ruled by the Code Maritime Law in force in the Italian Republic. The trial Judge, further, held that the term "damage....

or loss of the loaded goods," which appears in clause 26 of the bill of lading, includes misdelivery or non-delivery. The stay was granted on condition that "the time bar issue is waived as assurance has already been given by counsel for the defendants."

Upon appeal by the plaintiffs:

Held, (1) that the trial Judge rightly came to the conclusion that the words "loss or damage" in clause 26 of the bill of lading cover, also, loss caused by misdelivery of the goods *(Archangelos Domain* v. *Adriatica* (1978) 1 C.L.R. 439 distinguished).

(2) That since the application was confined to the prayer for stay of the proceedings, it was not necessary in order to ask for a stay to make the appearance entered a conditional one.

(3) That the grant of stay of proceedings is within the discretion of the trial Judge; that this Court will not interfere with the exercise of discretion of the trial Court unless the trial Judge was plainly wrong in the way he exercised his discretion or that he applied the wrong principles of Law; that the burden to satisfy the Court that there are no good reasons existing for granting an order for stay is upon the plaintiffs; that where there is an express agreement providing that disputes are to be referred to a foreign tribunal it requires a strong case to satisfy the Court that that agreement should be overriden and that proceedings in this country should be allowed to continue; that in reviewing the factors which tended to show that the trial in Venice would be more convenient than in Cyprus, the trial Judge cannot be said to have reached incorrect conclusions of fact on the evidence before him on any of the matters relevant to the exercise of his discretion or that he exercised his discretion in an improper way; that this was an exercise of the discretion vested in him, founded on a careful appreciation of all the relevant circumstances and this Court would not be justified in interfering.

On the contention of counsel for appellants that clause 26 of the Bill of Lading was null and void in its totality as being repugnant to the Carriage of Goods by Sea Law,

Cap. 263 because the Bill of Lading being an outward Bill of Lading came under the provisions of Cap. 263 and could not embody any provisions which were contrary to the Law:*

Held, that it is possible in a clause consisting of two parts to sever that part which does not offend the Law and merely strike out the offending part; that once the time-bar part of clause 26 of the Bill of lading which is in conflict with Article III, rule 8 of the Rules in the Schedule of the Carriage of Goods by Sea Law (Cap. 263) has been waived the remaining part which embodies a foreign jurisdiction clause is a valid one and can be enforced on its own (The *Morvigen* [1983] 1 Lloyds Rep. 325 distinguished).

Appeal dismissed.

Cases referred to:

G. H. Renton & Co. v. *Palmyra Trading Corporation of Panama* [1957] A.C. 149;

Anglo-Saxon Petroleum Co. v. *Adamastos Shipping Co.* [1957] 2 Q.B. 233 at p. 253;

Seven Seas Transportation v. *Pacific Union Marina Corporation* [1983] 1 All E.R. 672 at pp. 678, 679;

Archangelos Domain v. *Adriatica* (1978) 1 C.L.R. 439 at p. 468;

The Eleftheria [1969] 2 All E.R. 641 at p. 642;

Nigerian Produce v. *Sonora Shipping Co. and Another* (1979) 1 C.L.R. 395;

Asimenos v. *Paraskeva* (1982) 1 C.L.R. 145;

Cyprus Phasouri Plantations Co. Ltd. v. *Adriatica di Navigazione and Another* (1983) 1 C.L.R. 949 at pp. 964, 965;

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* The relevant provision is rule 8 of Article III of the old Hague Rules, which is implemented in our Carriage of Goods by Sea Law Cap. 263 and is quoted at p. 324 post.

Jadranska Slobodna Plovidba v. *Photiades* (1965) 1 C.L.R. 58 at p. 68;

The Chapparal [1968] 2 Lloyd's Rep. 158;

Photiades & Co. v. *Jadranska Slobodna Plovidba* (1963) 2 C.L.R. 345;

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

Sonco Canning Ltd. v. *Adriatica* (1972) 1 C.L.R. 210;

Archangelos Domain v. *Van Nievelt* (1974) 1 C.L.R. 137;

The Fehmarn [1957] 1 Lloyd's Rep. 511; [1957] 1 W.L.R. 815;

Mackender v. *Feldia* [1966] 2 Lloyd's Rep. 449; [1967] 2 Q.B. 590;

Evans Marshall & Co. Ltd. v. *Bertola S.A.* [1973] 1 Lloyd's Rep. 453; [1973] 1 W.L.R. 349;

YTC Universal v. *Trans Europa Compania De Aviation* [1973] 1 Lloyd's Rep. 480;

Trendtex Trading Corporation and Another v. *Credit Suisse* [1980] 3 All E.R. 721 at pp. 734, 735 [1981] 3 All E.R. 520;

Stella v. *Sayias* (1983) 1 C.L.R. 186;

Guendjian v. *Societe Tunisienne* (1983) 1 C.L.R. 588;

Dolphin Shipping Co. Ltd. v. *Cantieri Navali Ruiniti* (1984) 1 C.L.R. 853;

The Morvigen [1982] 1 Lloyd's Rep. 325; [1983] 1 Lloyd's Rep. 1;

Unicoop Japan v. *Ion Shipping Co.* [1971] 1 Lloyd's Rep. 541;

Svenska Traktor Akt. v. *Maritime Agencies (Southampton)* [1953] 2 Q.B. 295;

Maharani Woollen Mills [1927] 29 Lloyd's Rep. 169.

Appeal.

Appeal by plaintiff against the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J.) dated the 29th December, 1983 (Admiralty Action No. 22/80)* whereby procedings in the above Admiralty Action were stayed provided that the time bar issue was waived.

St. Mc Bride, for the appellant.

Chr. Mitsides, for the respondent.

Cur. adv. vult.

MALACHTOS J.: The Judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal against an order made by a Judge of this Court, in the exercise of original jurisdiction in Admiralty proceedings, staying the proceedings in Admiralty Action No. 22/80), on an application by the respondents (defendants in the action) for stay of the proceedings for lack of jurisdiction of the Court.

The appellants (plaintiffs in the action), a company of fruit growers and exporters of Cyprus, entered into a contract with the respondents for the carriage of 3,000 standard cartons of orange from Limassol to Venice by respondents' 1 ship CORRIERE DELL OVEST, respondent-defendant 2. The said contract of carriage, according to paragraph 3 of appellants' petition, was contained in or evidenced by a bill of lading dated 21.5.79 issued to the appellants by the respondents 1.

Respondents 1 are an Italian Shipping Company operating for many years in Cyprus, through their agents A.L. Mantovani & Sons Ltd., their ships calling regularly at Cyprus ports.

By their petition in the action the apellants-plaintiffs allege that the respondents-defendants in breach of the said contract of carriage of goods, did not deliver at destination the said goods to them or "their order and/or to the holders of the said bill of lading", an obligation emanating from the bill of lading, but delivered them to others and/or without the production of or the delivery

* Reported in (1983) 1 C.L.R. 949.

up of or against the said bill of lading as a result of which they suffered loss in respect of which they claim:

(A) (i) £10,298.98 Stg. or CY £7,682.865 the equivalent thereof.

(ii) C£22.490 Bank charges.

(B) Interest on £7,682.685 at 9 per cent p.a. from 26.5.79 to judgment.

(C) Legal interest and costs.

When the writ of summons was served on the respondents-defendants the respondents unconditionally appeared before the Court on 10th March, 1980, the day fixed in the writ of summons for appearance, and pursuant to directions made by the Court for the filing of pleadings, appellants filed their petition on the 11th March, 1980. The respondents-defendants failed to file their answer within the time fixed by the Court and the appellants filed an application for judgment by default of pleadings. After respondents-defendants were served with such application, applied to the Court on the 28th April, 1980, for extension of time for filing their answer which was granted and the time was extended to the 17th May, 1980. Respondents failed to file their answer within the so-extended time and on the 7th June, 1980, they filed an application praying for:

(a) An order of the Court to set aside the writ and/or to stay proceedings on the ground that: This Court is not seized with judisdiction to try the present case.

(b) Any further or other order the Court may consider fit and proper.

Such application came up for hearing before the Court on the 23rd June, 1980, the same day on which appellants' application for judgment by default was fixed for hearing, when the Court, with the consent of counsel on both sides, adjourned the hearing of the application for judgment by default sine die with directions to be fixed,

if necessary, after the hearing of the application of the defendants of the 7th June, 1980.

The application was based on the Civil Procedure Rules, Order 64 and Order 48, rule 2(3), on the Courts of Justice Law 14/60, section 19(a) and the inherent jurisdiction of the Court. It was accompanied by an affidavit sworn by Mr. Valentinos Harakis, a practising advocate who was acting for the applicants-defendants, invoking the following reasons in support of the application:

"(a) Clause 26 of the B/L which reads:

> Any claim for damage, shortage, deterioration or loss of the loaded goods must be filed in writing to the agents of the Company at the port of destination within 8 days after the discharge date, failing which the Consignee loses any right to take his action or file his claim. In lack of a friendly agreement, the suit must be brought before the competent Court of Venice, on penalty of prescription within six months after the delivery date of the loaded goods, or, in case of total loss, within six months after the date when said goods were supposed to be at destination.
>
> Both the shipper and the Consignee, as well as any other person interested in the goods, expressly waive the competence of any other jurisdiction.
>
> All what is not provided for in the present carriage conditions shall be ruled by the Code of Maritime Law in force in Italian Republic.

(b) The breach was allegedly committed in Italy.

(c) The relevant evidence on the issues of fact is more readily available in Italy and I may say that it is almost impossible for either party and especially for the defendants to produce such evidence in Cyprus. Furthermore it will be relatively more convenient and less expensive to have the case tried in Italy as eventualy third parties reside in Italy and as governmental authorities of Italy are involved.

(d) There is more security for the plaintiffs' claim and

the prospects of enformement of a judgment in Italy are greater if the case is tried there.

(e) Courts of Cyprus and in particular the Admiralty Court of Cyprus are competent Courts to decide their jurisdiction."

By a supplementary affidavit filed by the defendants the circumstances relating to the arrival and delivery of the goods in Italy are set out as follows:

"(a) On or about the 21.5.79 the plaintiffs shipped on board the defendant ship No. 2 a consignment of oranges for Venice. The ultimate consignees were a certain firm Eurimex of Geneva, Switzerland. According to the relevant Bill of Lading a certain Salvatori S. A. of Venice was to be notified. The said B/L was issued by the defendants' No. 2 agents and duly delivered to the shippers.

Upon arrival of the goods in Venice, the said Salvatori S. A. were notified according to the B/L and the responsibility of the carriers.

Although repeatedly notified, the said Salvatori did not produce the B/L to take delivery of the goods but informed the defendants that they were not as yet in possession of the relevant B/L.

By their letter dated 28.5.79, a photocopy and certified translation of which is attached hereto marked exhibit 'A', the said Salvatori in their capacity as clearing agents and/or agents of the consignees and/or agents of the shippers, requested from the defendants delivery of the goods without production of the relevant B/L and undertook to produce a Bank Guarantee instead.

As the consignment in question consisted of perisable goods and in order to minimize the loss of all parties concerned, the defendants delivered the goods against production of the said Guarantee according to the custom of the port and established practice.

On delivery of the goods as aforesaid, it was established that the said goods were found decayed. A

survey was carried out in Venice to that effect.

(b) In view of the above, the production of evidence as to the following is necessary:

(i) The notification of Salvatory.

(ii) The conditions under which no B/L was received.

(iii) The production of the aforesaid guarantee, the conditions under which it was issued and the legislation rules and regulations pertaining to the production and release of Bank guarantees in Italy.

(iv) The custom of the port.

(v) The delivery of the goods and the survey held in Venice.

All the above evidence is available only in Italy and the defendants have no possibility to issue summons of witness to third parties residing in Italy to come and testify in Cyprus, thus being deprived of their right to produce evidence substantial for their defence but even if such evidence could be made available in Cyprus, the costs to be incurred by the defendants would be unjustifiedly high."

In support of their opposition the appellants contended that:

"(i) Both defendants on 10.3.80 duly entered appearance and consented to an order/directions that the Petition should be filed within 15 days and the Defence/Answer within 1 month thereafter and the Reply, if any, within a further 15 days thereafter.

(ii) Had the defendants' wished to challenge the validity of the writ and service thereof a conditional appearance ought to have been entered and none has been entered.

(iii) This Honourable Court has jurisdiction as is evidence by the matters set out in the Petition inter alia in particular that it concerns a contract of affreightment made within the jurisdiction.

(iv) an application is pending for judgment in default of pleading."

An affidavit was also attached to the opposition dated 17th June on behalf of the appellants by which they maintained that the Court had jurisdiction to try this case inasmuch as proof of the breach is more readily available in Cyprus inter alia because the original bill of lading against which the cargo ought to have been delivered to was in the hands of the respondents-plaintiffs, here in Cyprus, that parts of the said bill of lading in particular clause 26 are repugnant to the Laws of Cyprus, that there is in fact no defence available to the defendants short of proving that they made delivery against the bill of lading in question, which they have not done, and that it is inequitable to require the plaintiffs to go to Italy for no purpose and which could in fact be most inconvinient and far more costly to them. Also that if these proceedings are in fact stayed they will now, be faced with a time-bar in Italy.

By a supplementary affidavit filed on behalf of the appellants a detailed narration of the facts which led to the breach of the contract is made. It is contended on their behalf that Article 26 of the Bill of Lading has no application in the circumstances alleged in the petition in the action as:

"..... .....

(c) The claim in this action is not a claim for damage, shortage, deterioration or loss of the loaded goods, but,

(d) This is a claim for a fundamental breach of contract and for failure to deliver the goods to the holder of the bill of lading. In this connection I would also invite the attention of the Court to Article 19 of the bill of lading.

..... "

On the question raised by counsel for the appellants at the hearing before the trial Court that in case the proceedings were stayed, they would be faced with a time bar in Italy, counsel on behalf of the defendants expressly stated

at the hearing that the defendants waived any right to raise such defence and this statement was affirmed in the course of the hearing of this appeal. In fact the learned trial Judge in granting the stay made his order conditional "that the time bar issue is waived as assurance has already been given by counsel for the applicants-defendants."

In dealing with the argument of counsel for appellants that clause 26 of the Bill of Lading had no application because non-delivery or misdelivery of the goods after discharge is not loss or damage within the meaning of the said clause, and in respect of which we have also heard lengthy argument by counsel as it was one of the main grounds of appeal, the learned trial Judge after reviewing relevant case Law on the matter, found as follows:

> "The words 'loss or damage' which occur repeatedly throughout the Hague Rules which from part of the Schedule to the Carriage of Goods by Sea Law, Cap. 263, or the English corresponding Act of 1924, were judicially interpreted in a number of cases....
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> . . . . . In my view the words 'loss of the loaded goods' include misdelivery or non-delivery. The words appearing in this Clause to the effect that any claim for damage, shortage, etc., must be filed in writing to the agents at the port of destination within eight days 'after the discharge date', does not change the aforesaid meaning of the word 'loss' inasmuch as there is bound to be a discharge date, both in respect of goods lost prior to discharge or goods misdelivered after discharge, nor does the reference to the case of total loss in the second paragraph of Clause 26 make any difference as that refers to a different eventuality and does not exclude by itself the aforesaid interpretation."

The above finding of the learned trial Judge is in line with the opinions expressed in a series of English cases. In *G. H. Renton & Co.* v. *Palmyra Trading Corporation of Panama* [1957] A. C. 149 the House of Lords held that

the words "loss or damage to" or "in connection with goods" in Article III, rule 8 of the Hague Rules were not limited to actual loss or physical damage to the goods.

In *Anglo-Saxon Petroleum Co. v. Adamastos Shipping Company* [1957] 2 Q. B. 233 Devlin, J., gave the same meaning to "in relation to" as to "in connection with" as explained in *Renton's* case and construed the meaning of the words "loss or damage" as follows (at page 253):

> "The last question asks whether the words 'loss or damage' in section 4(1) and (2) of the Act relate only to physical loss of or damage to goods. The words themselves are not qualified or limited by anything in the section. The Act is dealing with responsibilities and liabilities under contracts of carriage of goods by sea, and clearly such contractual liabilities are not limited to physical damage. A carrier may be liable for loss caused to the shipper by delay or misdelivery, even though the goods themselves are intact. I can see no reason why the general words 'loss or damage' should be limited to physical loss or damage. The only limitation which is, I think, to be put upon them is that which is to be derived from section 2 which is headed: 'Risks'. The 'loss or damage' must, in my opinion, arise in relation to the 'loading, handling, stowage, carriage, custody, care and discharge of such goods', but is subject to no other limitation."

The above passage of Devlin J., as judgment was approved in the same case in the House of Lords by Viscount Simond and Lord Somervell ([1959] A. C. 133), Viscount Simonds had this to say at page 157:

> "The question is whether the words 'loss or damage' in section 4(1) or section 4(2) of the Act relate only to physical loss of, or damage to goods.
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> This is a short point upon which I can only adopt the reasoning and conclusion of the learned Judge. It is perhaps sufficient to say that there is nothing in section 4(1) or section 4(2) which expressly limits loss or damage to physical loss or damage to the goods,

and that section 2 does not constrain me to put a narrower meaning of the words."

At page 186, Lord Somervell expressed his agreement with Devlin, J. that "loss or damage" in the Act is not limited to physical damage to the goods.

Finally, in the same case, at page 181, Lord Keith said:

"As to the nature of the loss or damage for which immunity may be claimed, I see no reason for limiting this to physical loss of or damage to goods. Here, again, the force of the argument for such a limitation stems from the fact that the United States Act applied only to goods carried under bills of lading. Even in such a case it does not follow that loss or damage is limited to physical loss of or damage to goods. Section 3(8) shows that the loss or damage contemplated is 'loss or damage to or in connection with the goods', and it has been held in this House that such loss or damage is not limited to physical loss or damage: *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama.*"

In the *Seven Seas Transportation* v. *Pacific Union Marine Corporation* [1983] 1 All E. R. 672 in which the *Adamastos* case was followed, Staughton J. in considering the meaning of "loss or damage" said the following at pp. 678, 679:

"These words occur on their own in s. 4(1) and (2) of the Act without any express qualification. So, too, do they occur without qualification in s 3(6), which deals with the time limit. In s 3(8), which, in effect, prevents contracting out of the Act to a limited extent, the words are 'loss or damage to or in connection with the goods'. In s 4(5), which deals with package limitation, the words again are 'loss or damage to or in connection with the goods'. There have been a number of cases considering these words. The first was *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corp. of Panama* [1956] 3 All E. R. 957, [1957] A. C. 149. That was concerned with the English art. III, r. 8. The House of Lords there held that the words 'loss or damage to or in connection with the goods' were not

limited to physical loss and damage, but were wide enough to include financial harm by reason of the goods being delivered at the wrong destination. Turning to the words 'loss or damage' on their own, one can say that they will certainly not be narrower than 'loss or damage to or in connection with the goods'."

In Carver's Carriage by Sea, 12th Edition, Volume 1 at p. 223 we read:

"The words 'loss or damage to or in connection with goods' in Article III, r.8, it has now been held, cannot be construed as limited to 'loss or damage to' goods—they are wide enough to cover, for instance, loss in connection with goods arising because they are discharged at the wrong port."

In support of his contention that the words "loss" or "damage" should be strictly interpreted as meaning only "physical loss" counsel for appellants sought to rely on the decision of a Judge of this Court sitting in the first instance in an admiralty action *Archangelos Domain* v. *Adriatica* (1978) 1 C.L.R. 439 and in particular to his finding at p. 468 which reads as follows:

"It is therefore, clear in my view that delivery to a person not entitled to the goods without production of the bill of lading is prima facie a conversion of the goods and a breach of the contract".

And also at page 470:

"With respect, the exception, on the face of it, could hardly be more comprehensive, and I think that shipping company cannot be absolved from responsibility for the act which the plaintiff company complains, i.e., the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolves the shipping company for an act such as that, that would be entirely unreasonable because these goods were not damaged or lost, but I repeat, there was a misdelivery of the goods."

The above case is distinguishable from the present one,

as the Court in that case had to construe Clause 23 of the bill of lading, which was not a clause as regards jurisdiction, but it is a clause limiting the liability of the carrier as regards the quantum of damages. Furthermore, that case was decided on the basis that the bill of lading was not in itself the contract between the ship-owner and the shipper of the goods and the Court found that irrespective of the stipulation in clause 23 of the bill of lading, the shipper had a right to suppose that the goods were received on the terms of the contract. The learned Judge said the following in his judgment (at pp. 471, 472):

> "I would, therefore, find as a fact that the shipper has never been told of such stipulations (the stipulations in clause 23 of the bill of lading), and has never agreed to abide by them, once he was not aware and was not informed in the course of shipment. Having regard to all circumstances, the shipper had a right to suppose that his goods were received on the terms of the contract."

In the present case it is a common ground that the contract of affreightment was embodied in the bill of lading.

In the result, we are of the opinion that the learned trial Judge rightly came to the conclusion that the words "loss or damage" in Clause 26 of the bill of lading cover also loss caused by misdelivery of the goods.

As to the effect of the unconditional appearance entered by the defendants, rightly in our opinion the learned trial Judge did not adjudicate on such issue. It is clear from the record that in the course of the hearing of the application, counsel for defendants made a statement that he would not pursue his application for setting aside the writ of summons and service thereof, but confined himself to the prayer for stay of the proceedings, as a result of which, counsel for appellants conceded that as the prayer before the Court was limited to stay of the proceedings only, the fact that the defendants entered an unconditional appearance, was not an impediment and that "it was not too late in the day for him to apply for a stay of the proceedings".

Rightly, in our view, in the circumstances, counsel for

appellants withdrew his objection as such course is in line with the dictum of Brandon, J. in *THE ELEFTHERIA* [1969] 2 All E. R. 641, 642 which reads as follows:

> "In presenting his case to the Court at the hearing, counsel for the defendants did not pursue the application to set aside the writ or service of it contained in the notice of motion, but confined himself to the alternative application for a stay. He was right in this, for the authorities show that, assuming the defendants to be entitled to relief at all on the grounds put forward, a stay would be correct form for such relief to take. It appears to me, however, that it was not necessary, in order to ask for a stay, to make the appearance entered a conditional one."

One of the grounds of appeal (ground 2) is that the Court wrongly stayed the action upon an application based on inapplicable Rules of Court. Rightly in our view, counsel for appellants did not pursue this ground of appeal, as it was not in issue before the trial Court and no objection was taken in this respect. We avail ourselves, however, of this opportunity to reiterate what has been judicially pronounced in *Nigerian Produce etc.* v. *Sonora Shipping and Another* (1979) 1 C.L.R. 395 and *Asimenos* v. *Paraskeva* (1982) 1 C.L.R. 145, that in admiralty proceedings the Rules applicable are the Rules of the Supreme Court of Cyprus in its Admiralty jurisdiction and in all cases not provided for by such Rules, then, under the provisions of rule 237 of the said Rules and section 19(a) of the Courts of Justice Law, (1960) (Law 14/60), the practice of the Admiralty Division of the High Court of Justice in England, as on the 15th August, 1960, so far as the same shall be applicable.

We come next to consider whether the circumstances of this case justified the making of an order by the trial Court for stay of the proceedings.

The learned trial Judge in his elaborate judgment carefully considered all the facts of the case as evidenced by the material contained in the affidavits filed on behalf of the parties and the various documents produced. Bearing in mind the arguments advanced by counsel on both sides,

and after reviewing the principles emanating from the English Case Law and the decisions of this Court, he concluded as follows: (see *Cyprus Phassouri Plantations Co. Ltd.* v. *Adriatica di Navigazioni and another* (1983) 1 C.L.R. 949, at pp. 964, 965):

"The net result of the Law as above stated is that I have a discretion whether or not to stay the proceedings and that the general rule is that a foreign jurisdiction clause should be enforced and that the Court would be very slow to refuse stay if the claim was the sort of a claim which could be expected when the agreement was made and the plaintiffs had to show strong grounds for not giving effect to such foreign jurisdiction clause (see *Kislovodsk* [1980] 1 Lloyd's Rep. 183).

On the facts of this case I have come to the conclusion that I should exercise my discretion in favour of a stay as this dispute was more closely concerned with Italy, in that the carrying vessel was Italian, witnesses as to facts were more readily available in Italy and it would be more convenient to be tried there where third parties reside and process can be issued against them and that according to clause 26 of the Bill of Lading what is not provided for in the carriage conditions shall be ruled by the code of Maritime Law in force in the Italian Republic.

Finally the plaintiffs have not satisfied me that there is any good reason for me to refuse the application for the stay of these proceedings and I hereby grant a stay on condition that the time bar issue is waived as assurance has already been given by counsel for the applicants/defendants."

It has been held time and again that this Court will not interfere with the exercise of discretion of the trial Court unless the trial Judge was plainly wrong in the way he exercised his discretion or that he applied the wrong principles of Law. In this respect, Josephides, J. had this to say in delivering the judgment of the Full Bench in *Jadranska Slobodna Plovidba* v. *Photos Photiades & Co.* (1965) 1 C.L.R. 58, 68:

"We have, therefore, to consider whether the learned Judge exercised his discretion on right principles, and the burden is on the appellants to satisfy this Court that he failed to do so. If the learned Judge erred in any way in exercising his discretion then the Court of Appeal will intervene, but otherwise it is not for this Court to substitute its discretion for his if he has not erred in any way in exercising his discretion; *The Athenee* [1922] 1 All E. R. 333 at page 336; and *Vitkovice Horni* v. *Korner* [1951] 2 All E. R. 334, at page 336 (H. L.)."

The same principle has been enunciated by the appellate Courts in England. In particular in cases of the one under consideration by way of example reference may be made to the following dicta of Willmer, Diplock and Widgery, L.JJ. in *The Chapparal* [1968] 2 Lloyd's Rep. 158:

"We in this Court should not interfere with the Judge's exercise of his discretion unless it is shown that he acted on some wrong principle, or misapprehended the facts, or unless it is shown that his exercise of his discretion was plainly wrong." (per Willmer L. J. at p. 153).

The learned Judge from whom this appeal is brought recognised that he had a discretion. So far as I can see he applied his mind to all the relevant matters: and even if I myself might have come to some other conclusion, I do not think that any ground has been put forward which would justify the Court in interfering with his discretion." (per Diplock L. J. at p. 169).

I also would put my decision on the footing that there is no reason here to suppose that the learned Judge exercised his discretion improperly. But, like my Lord, I feel that had I had to decide the matter myself, I should have reached precisely the same conclusion." (Per Widgery L.J. at pp. 164). (See also: *The Makefjell* [1976] 2 Lloyd's Rep. at pp. 35, 36). Per Cairn L. J., and *Carvalho* v. *Hull Blyth (Angola) Ltd.* [1979] 3 All E. R. 280, 284 in both of which the above opinions in *The Chaparral* were adopted).

The question of disputes arising out of contracts embodying a foreign jurisdiction clause has come up for consideration by this Court in a number of cases. In the case of *Photos Photiades & Co.* v. *Jadranska Slobodna Plovidba* (1963) 2 C.L.R. 345, Vassiliades, J. as he then was, sitting in the first instance in the exercise of the Admiralty jurisdiction of this Court, had this to say at pp. 354, 355:

> "If the plaintiffs have in fact knowlingly agreed that disputes arising from their contract should be referred to arbitration; or to a foreign tribunal; or shall be determined according to the Law of a foreign country, 'there is no indisposition on the part of the Courts in this Country (to use Lord Hodson's words in the *Fehman* case, infra to give effect to such a bargain'. But, before doing so, the Court must be satisfied that that was indeed the parties' bargain.
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> As to the part of the defendants' contention regarding convenience, I have no hesitation, in the circumstances of this case, as to the direction where I should exercise my discretion. The judgments of the three eminent Lord Justices of the Court of Appeal in *Fehmarn's* [1958] 1 All E.R., p. 333 are so lucid and helpful on this point, if I may say so with all respect, that my task becomes, in this case, much easier. *Fehmarn's* case governs, in my opinion, the substance of the matter for decision now before me."

On appeal, the above aproach was upheld (*Jadranska* v. *Photos Photiades & Co.* (1965) 1 C.L.R. 58). Josephides, J. at p. 69, said:

> "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 (The *Fehmarn*, ibid. at page 338)".

The claim in the above case was a claim by a merchant living and trading within the jurisdiction of this Court who having acquired goods of considerable value abroad arranged for their transport to Cyprus and the defendants undertook to carry the goods on one of their ships from the country of the goods' origin to that of their destination. It should be noted, however, that, as observed by Josephides J., the defendants applied 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 the Yugoslavian Law.

In *Cubazucar and Another* v. *Camelia Shipping Co. Ltd.* (1972) 1 C.L.R. 61 and *Sonco Canning Limited* v. *Adriatica* (1972) 1 C.L.R. p. 210, A. Loizou J. after having reviewed the relevant case Law on the matter followed what was held by the Full Bench in *Jadranska case* (supra). In *Sonco Canning Limited* v. *Adriatica* (supra) the learned Judge in considering the question of disputes arising under a contract embodying a term for reference of same to a foreign Court summed up the legal position as follows (at p. 213):

"It is now well settled that the burden of showing strong cause why an agreement to refer disputes to a foreign Court should not be observed, and why the Court's discretion should not be exercised in favour of such a stay, is upon the plaintiff. In exercising such discretion, the Court must take into account all the circumstances of the particular case, including in what country the evidence on the issue of facts is situated or more readily available and the effect of that on the relative convenience and expense of trial as between Cyprus and foreign Courts.

Another fact to be considered is whether the Law of the foreign Court applies and if so, whether it differs from the Cypriot Law in any material respects. On

this last point, it may be observed that there has been no evidence to show what is the foreign Law and in the absence of such evidence, it should be taken as being similar to our Law. The only thing that has been mentioned was that by the Italian Laws the claim is statute barred, but counsel for the applicants has stated that if the proceedings are stayed and new proceedings instituted in Italy, they are prepared to waive this statute bar issue.

A point which has to be examined is also with what country either party is connected and how closely. Of course the plaintiffs are a Cyprus Company with business here, but the defendants are not a company which has no links in Cyprus. They have been represented for many years by the firm A.L. Mantovani & Sons Ltd. and their ships call regularly in Cyprus ports. There is no question and it has been argued that the defendants are not genuinely desiring trial in their country or that they are only seeking procedural advantages. The issue does not arise that the plaintiffs would be prejudiced by having to sue in the foreign Court, because they would be deprived of security for that claim or be unable to enforce any judgment obtained or be faced with a time bar not applicable here or for political, racial, religious or other reasons be unlikely to get a fair trial."

The above case concerned damage to two consignments of fruit shipped from Italy to Famagusta and which arrived at the port of destination at Famagusta in bad condition. Notwithstanding the fact that the Bills of Lading embodied a similar clause as the one in the present case, the application for stay was refused as on the facts of the case it was found that it would be more convenient for both sides to have the trial held in this country than in Italy because the bulk of the evidence as to the quality of goods upon arrival was in this country, that the defendants had long links with Cyprus, a lot of expenses would be saved and no prejudice would result to the defendants.

The principles as stated in *Jadranska* case and in *Fehmarn* have also been applied in *Archangelos Domain Ltd.* v. *Van Nievelt etc.* (1974) 1 C.L.R. 137.

Useful reference may also be made to some English authorities on the matter, such as *The Fehmarn* [1957] 1 Lloyd's Rep. 511, [1957] 1 W.L.R. 815 and *The Eleftheria* [1969] 2 All E.R. 641 which were considered and the principles enunciated therein were followed and applied in *Jadranska Slobodna Plovidba* case (supra) and in a series of other cases of this Court.

In the *Fehmarn* case (supra) Willmer L.J., directed himself as follows ([1957] 1 W.L.R. 815 at p. 819):

> "Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this Court that that agreement should be overridden and that proceedings in this country should be allowed to continue."

That direction was approved by the Court of Appeal in the same case [1957] 2 Lloyd's Rep. 551; [1958] 1 W.L.R. 159. In the years that have followed similar statements of the principle to be followed have been made in numerous cases both at first instance, and in the Court of Appeal notably *Mackender* v. *Feldia,* [1966] 2 Lloyd's Rep. 449; [1967] 2 Q.B. 590, *The Chaparral* [1968] 2 Lloyd's Rep. 158, *The Eleftheria,* [1969] 1 Lloyd's Rep. 237; [1970] P. 94, *Evans Marshall & Co. Ltd. v. Bertola S.A.,* [1973] 1 Lloyd's Rep. 453; [1973] 1 W.L.R. 349 and *YTC Universal* v. *Trans Europa Compania de Aviacion,* [1973] 1 Lloyd's Rep. 480.

The test of "just and proper" is enunciated in the *Fehmarn* case by Willmer, J. [1957] 1 W.L.R. at p. 819 where he says:

> "...it is well established that, where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then prima facie this Court will stay proceedings instituted in this country in breach of such agreement, and will only allow them to proceed when satisfied that it is *just and proper* to do so. I think that fairly states the principle to be applied."

Brandon, J. in *The Eleftheria* [1969] 2 All E.R. 641 at p. 645 summarised the principles as follows:

"The principles established by the authorities can, I think, be summarised as follows: (I) where plaintiffs are 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."

and after expounding on the arguments advanced before him, expressed the following view at pp. 648, 649, 650:

"First, as to prima facie case for a stay arising from the Greek jurisdiction clause. I think that it is essential that the Court should give full weight to the prima facie desirability of holding the plaintiffs to their agreement. In this connection, I think that the Court must be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of mere balance of convenience.....

. . . . . .

Second, as to the factors tending to rebut the prima facie case for a stay, I think that there is much force in the main point taken by counsel for the plaintiffs, that the bulk of the factual evidence is in England. While it may be that some of the facts with regard to labour disputes, etc., can be agreed or proved by documents, I accept the plaintiffs' case that they will probably wish to call a substantial number of witnesses on this topic, and that, if they have to take them to Greece, it will cause them substantial inconvenience and expense. The evidence of such witnesses would, moreover, have to be interpreted, with the difficulties and further expense involved in that process...

. . . . . .

Third, as to factors tending to re-inforce the prima facie case for a stay. Of these I regard as carrying some weight the very real connection of the defendants with Greece and their willingness to protect the plaintiffs in relation to security for their claim. I further regard as of substantial importance the circumstance that Greek Law governs, and is, in respects which may well be material, different from English Law. I recognise that an English Court can, and often does, decide questions of foreign Law on the basis of expert evidence from foreign lawyers. Nor do I regard such legal concepts as contractual good faith and morality as being so strange as to be beyond the capacity of an English Court to grasp and apply. It seems to be clear, however, that, in general and other things being equal, it is more satisfactory for the Law of foreign country to be decided by the Courts of that Country. That would be my view, as a matter of common sense, apart from authority... . . . . .

. . . . . .

Apart from the general advantage which a foreign Court has in determining and applying its own Law, there is a significant difference in the position with regard to appeal. A question of foreign Law decided by a Court of the foreign country concerned is appeal-

able as such to the appropriate appellate court of that country. But a question of foreign Law decided by an English court on expert evidence is treated as a question of fact for the purposes of appeal, with the limitations in the scope of an appeal inherent in that categorisation. This consideration seems to me to afford an added reason for saying that, in general and other things being equal, it is more satisfactory for the Law of a foreign country to be decided by the courts of that country. Moreover, by more satisfactory I mean more satisfactory from the point of view of ensuring that justice is done.

Fourth, as to my conclusion. I have started by giving full weight to the prima facie case for a stay, and I have gone on to weigh on the one hand factors tending to rebut that prima facie case, and on the other hand the factors tending to re-inforce it. With regard to these, it appears to me that there are considerations of substantial weight on either side, which more or less balance each other out, leaving the prima facie case for a stay largely, if not entirely, intact. On this basis I have reached the clear conclusion that the plaintiffs, on whom the burden lies, have not, on the whole of the matter, established good cause why they should not be held to their agreement. The question whether to grant a stay or not, and if so on what terms, is one for the discretion of the court. Having arrived at the clear conclusion which I have stated, I shall exercise my discretion by granting a stay, subject to appropriate terms as regards security."

In Dicey and Morris, The Conflict of Laws, 10th Edition, 1980 p. 255, in the comments under Rule 31, it reads:

"The Court's power to grant a stay under this Rule is discretionary but, once the contract has been proved, the onus of inducing it not to do so rests on the plaintiff, and not, as in cases under the inherent jurisdiction to prevent injustice (Rule 30), on the defendant. This is because the ground on which the court grants a stay is that the court makes people abide by their contracts."

In *Mackander and Others* v. *Feldia A.G. and Others* [1967] 2 Q.B. 596; [1966] 2 Lloyd's Rep. 449, Diplock L.J., (at pp. 604 and 459 of the respective reports) said:

> "Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reasons to induce me to permit one of them to go back on his word..."

In *The Chapparal (Unterweser Reederei G.M.B.H.* v. *Zapatta Offshore Company* [1968] 2 Lloyd's Rep. 158 Willmer, L.J., at pp. 162 and 163 approached the matter as follows:

> "The Law on the subject, I think, is not open to doubt, and I do not think that it is really necessary to cite the authorities to which we have been referred. It is always open to parties to stipulate (as they did in this case) that a particular Court shall have jurisdiction over any dispute arising out of their contract.....
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> .. ..
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> .. ..
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> I aproach the matter, therefore, in this way, that the Court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain."

The same principles have also been applied by the Supreme Court of the United States. In giving the majority judgment of the United States Supreme Court in the *Chaparral* [1972] 2 Lloyd's Rep. 315, Chief Justice Burger, explaining the approach of the Supreme Court, stated that their approach is substantially that followed in other common-law countries including England. In dealing with "forum selection clauses" Chief Justice Burguer had this to say (at p. 319):

> "Forum selection clauses have historically not been favored by American Courts. Many Courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or

that their effect was to 'oust the jurisdiction' of the Court. Although this view apparently still has considerable acceptance, other Courts are tending to adopt a more hospitable attitude toward forum selection clauses. This view advanced in the well-reasoned dissenting opinion in the instant case, is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumastances. We believe this is the correct doctrine to be followed by federal District Courts sitting in admiralty."

And at page 321:

"The correct aproach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."

As to the difference between the principles applicable to cases where a party seeks to invoke the inherent jurisdiction of the Court to stay proceedings in England or to restrain the institution or continuance of proceedings in foreign courts, and those applicable in the case of stay of proceedings in cases of contracts embodying an exclusive jurisdiction clause, useful reference may be made to the case of *Trendtex Trading Corporation and Another* v. *Credit Suisse* [1980] 3 All E.R. 721, where Robert Goff, J., after expounding on the legal principles as emanating from the decided cases expressed the following view (at pp. 734, 735).

"It will at once be apparent that the principles now applicable are not far different from those applicable in the case of an exclusive jurisdiction clause. But there are important differences. First, in the case of an exclusive jurisdiction clause, the burden of proving that there is strong cause for not granting a stay rests on the plaintiff, because the parties have chosen the foreign jurisdiction. But in other cases, where no such choice has been made, the burden of proof (including the burden of proving that there is another clearly more appropriate forum) rests on the defendant. There is

another important point of difference. If the parties have chosen to submit their disputes to the exclusive jurisdiction of a foreign Court it is difficult to see how either can in ordinary circumstances complain of the procedure of that Court; whereas the mere fact that there exists another more appropriate forum should not of itself preclude the plaintiff from seeking to obtain the benefit of a procedural advantage in the English jurisdiction."

(The decision in the above case was affirmed by the Court of Appeal [1980] 3 All E.R. 721 and by the House of Lords [1981] 3 All E.R. 520).

The legal principles applicable to cases where the inherent jurisdiction of this Court is sought to be invoked for stay of proceedings in this country on the ground of lis alibi penden before a more appropriate foreign forum have been expounded by this Court, in its appellate capacity, in the recent cases of *Stella* v. *Sayias* (1983) 1 C.L.R. 186, *Guendjian* v. *Societe Tunisienne* (1983) 1 C.L.R. 588 and *Dolphin Shipping Co. Ltd.* v. *Cantieri Navali Ruiniti* S.P.A. (1984) 1 C.L.R. 853.

It is well established by the authorities, reference to which has already been made in this judgment, that the burden to satisfy the Court that there are no good reasons existing for granting an order for stay, is upon the plaintiffs, the appellant in this case. According to the learned trial Judge the appellants failed to discharge such burden, and we agree with such finding.

The question is whether sufficient circumstances have been shown to exist in this case to make it desirable that proceedings in this country should be stayed and the parties should be left to fight their dispute at Venice, Italy, the stipulated in their contract, forum. The learned trial Judge made a careful review of the factors which tended to show that the trial in Venice would be more convenient than in Cyprus. In our opinion, the learned Judge cannot be said to have reached incorrect conclusions of fact, on the evidence before him or any of the matters relevant to the exercise of his discretion or that he exercised his discretion in an improper way. This was an exercise of the discretion

vested in him, founded on a careful appreciation of all the relevant circumstances and we do not think that this Court would be justified in interfering.

We shall finally deal with the contention of counsel for appellants that clause 26 of the Bill of Lading is null and void in its totality as being repugnant to the Carriage of Goods by Sea Law, Cap. 263. Counsel for appellants argued that the Bill of Lading being an outward Bill of Lading comes under the provisions of Cap. 263 and cannot embody any provisions which are contrary to the Law; the eight days restriction for submitting a claim embodied in the first paragrapgh and the six months limitation for instituting proceedings embodied in the second paragraph of clause 26 of the Bill of Lading, contravene rules 6 and 8 of Article III of the Carriage of Goods by Sea Law, Cap. 263. In support of his argument that clause 26 should not be given effect at all, he sought to rely on the dicta in *The Morvigen* [1982] 1 *Lloyd's Rep.* 325 and [1983] 1 Lloyd's Rep. 1, in which the finding of Sheen J., who tried the case in the first instance that "the agreement which established the maximum liability of the carrier was contained in the first paragraph and since that paragraph was severable from the remainder of the clause, if it was deleted, the agreement that all actions should be brought in Amsterdam would remain intact" was overruled both by the Court of Appeal and the House of Lords which affirmed the decision of the Court of Appeal. The Court of Appeal and the House of Lords concluded that the whole of such clause could not be given effect as being repugnant to the Law.

The dispute in that case was in connection with the validity of a clause in the Bill of Lading providing that the Law applicable was "the Law of Netherlands in which the Hague Rules as adopted by the Brussels Convention of 25th August, 1924 are incorporated." The goods were shipped from an English port and the action was brought in England where the new Hague Rules (Hague-Visby Rules) were the ones applicable, having been implemented by the 1971 Act and by virtue of which the limitation of liability for loss or damage was enlarged and the result of giving effect to such clause and applying the old Hague Rules which

were the ones in force in Netherlands would be of lessening the liability of a carrier.

We wish to point out, at this stage, that *The Morvigen* is distinguishable from the present case, as that case was decided on the basis of the Hague Rules as amended by the Brussels Protocol of 1969, known as Hague-Visby Rules, which were implemented in England by the Carriage of Goods by Sea Act, 1971, and not on the basis of the Carriage of Goods by Sea Act, 1824 which was repealed by the 1971 Act. The provisions in our Law, Cap. 263, correspond to those of the English 1924 Act, and the Rules implemented in our Law are the old Hague Rules and not the Hague-Visby Rules.

Material changes have been brought about by the 1971 Act in England. Section 1(2) has introduced a new provision whereby it is provided that the Rules as set out in the Schedule *shall have the force of Law*. As to the meaning to be attributed to the words "shall have the force of Law" in *The Morvigen*, in the Court of Appeal at p. 328 of [1982] 1 Lloyd's Report, Lord Denning, M.R. in expounding on "the far reaching reforms", brought about by the 1971 Act, had this to say:

> "Section 1(2) said that:
>
> The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of Law.
>
> What does this mean? In my opinion it means that, in all Courts of the United Kingdom, the provisions of the rules are to be given the coercive force of Law. So much so that, 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 the lading to the contrary, the provisions of the rules are to be paramount."

As to the effect of this change, we read the following in

Scrutton on Charterparties, 18th Edition at pp 454, 455;

> "The 1924 Act provided that the Hague Rules were 'to have effect' in relation to the stipulated carriage.
>
> The 1971 Act provides that the Amended Rules 'shall have the force of Law.' It is submitted that this change in terminology has two results.
>
> First, it demonstrates that the statutory implied terms take effect, not merely as part of the proper Law, where that Law is English, but as part of the statute Law of England, to which an English Court must give effect, irrespective of the proper Law, in all cases falling within section 1 and Article X
>
> Secondly, the Act for the first time gives statutory force to the Rules irrespective of the termini of the voyage, where there is an express incorporation clause. This means that whereas under the previous legislation the incorporation of the Hague Rules in cases falling outside the Act gave them merely contractual effect, so that they had to be construed in conjunction with the other terms of the bill of lading, under the 1971 Act incorporation of the Amended Rules causes them to override any contradictory provisions of the bill"

In Dicey and Morris, The Conflict of Law, 10th Edition, at page 858, it sets out the principle as evolving from section 1 and Schedule Art X as follows:

> "Where the provisions of the Rules set out in the Schedule to the Carriage of Goods by Sea Act 1971 apply to a contract of carriage of goods by sea, those provisions regulate the rights and liabilities of the parties, irrespective of the proper Law of the contract."

and under the heading "Comment" on the Carriage by Sea Act 1924 at pp. 858, 859, it reads:

> "'.. .The question therefore arose whether the parties could contract out of the Rules by selecting as proper Law of the contract a legal system other than that of the foreign port of shipment. The Privy Coun-

cil indicated in 1939 that they could do so.* The Court of Appeal took the opposite view in 1932,** but a decision of the Court in 1941 suggested, without deciding it, that by using appropriate words in the bill of lading the parties could avoid the application of a foreign statute embodying the Rules.*** This meant that a shipment of cargo from a State like Australia which had adopted the Rules to another State like the United Kingdom which had also adopted the Rules could escape the Rules. The logic of the conflict of laws was here at variance with the need for the unification of commercial Law. Should not a contract designed to frustrate this unification be regarded as contrary to English public policy?"

And at page 860 in the comment on the Carriage of Goods by Sea Act 1971, it reads:

"Hence, if a cargo is shipped from a foreign contracting State to any other State (including the United Kingdom), or from the United Kingdom to any other State, and the question comes before an English Court, the Rules will apply as a matter of English statute Law irrespective of the proper Law of the contract. Therefore the parties can no longer contract out of the Rules by choosing as the proper Law of the contract some Law other than that of the port of shipment."

In Dicey and Morris (supra) the Carriage of Goods by Sea Act 1971 is treated and classified as an overriding statute together with a number of other similar Acts. At page 22 of Vol. 1, we read in this respect:

"....(these acts).... provide that the provisions of the international conventions set out in the Schedules to those Acts shall have the force of Law in the United Kingdom. The conventions all contain provisions which determine when they are applicable. These provisions

* Vita Food Products Inc. v. Unus Shipping Co. [1939] A.C. 277
* The Torni [1932] P. 78.
*** Ocean Steamship Co. Ltd v. Queensland State Wheat Board [1941] 1 K.B. 402 esp. at pp. 412, 414.

make use of factors quite different from the proper Law of the contract of carriage. The proper Law of the contract is thus generally irrelevant in the Law of international transport, where the matter is regulated by an international convention; and the statutory provisions mentioned above apply whether the proper Law of the contract is that of some part of the United Kingdom or of some foreign country."

In commenting on the old Hague Rules in *The Morvigen* supra, at page 328 [1982] 1 Lloyd's Rep. Lord Denning, M.R., had this to say:

"Most of the countries in the world gave effect to the old Hague Rules. But in a very limited form. In many countries the rules were applied only to outward shipments. Thus with us the Carriage of Goods by Sea Act, 1924, only applied to shipments from a port in the United Kingdom. This gave rise to this odd result. Suppose a ship flying the Norwegian flag sails from an English port to a destination in Norway. The Norwegian owner issues a bill of lading expressed to be subject to Norwegian Law. That stipulation was perfecly valid. If the goods were damaged in transit and the goods owner sued the Norwegian owner in England, The Hague Rules would not apply at all for this reason: that Norwegian Law would not apply because the shipment was not from a port in Norway. The English Law would not apply because the parties had stipulated for Norwegian Law. This meant that it was quite possible, as Lord Justice Scrutton said, for every shipowner to defeat the convention and the whole system under it by simply putting in a clause:

This bill of lading is to be construed by the Law, not of the place where it is made, but by the Law of the place to which the ship is going (see *The Torni*, [1932] 43 Ll.L. Rep. 78; [1932] P. 78 at pp. 81 and 84).

I may add that Lord Justice Scrutton with his robust commonsense would not have allowed them to

'upset the whole applecart' in this way. But the Privy Council would and did upset by what they said in the Vita Food case *(Vita Food Products* v. *Unus Shipping Co.)* [1939] 63 L1.L. Rep. 21; [1939] A.C. 277 and by the Court of Appeal in *Ocean Steamship Co.* v. *Queensland State Wheat Board* [1941] 68 L1.L. Rep. 136; [1941] 2 K.B. 402".

As already said *The Morvigen* is distinguishable from the present case which has to be examined on the state of the Law as it was prior to the enactment of the 1971 Act on the basis of the old Hague Rules as implemented in the Carriage of Goods by Sea Act 1924 and our Carriage of Goods by Sea Law (Cap. 263).

Rule 8 of Article III of the Rules in Cap. 263, provides as follows:

"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 goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability."

The only provision in clause 26 of the Bill of Lading which has been objected to by counsel for appellants as offending the Rules is that in respect of time bar set out for instituting proceedings, by which the time bar provided by the Rules in Cap. 263, is lessened.

As regards the time limitation provided in clause 26 of the Bill of Lading we have before us the express statement of counsel for defendants at the hearing of the application, as appearing on the record, that the defendants waived any right to raise any defence as to time bar and also the condition in the order of the trial Court that "the stay was granted on condition that the time bar issue is waived." Therefore, what was to be considered is whether the jurisdiction part in clause 26 can be separated from the time bar part and be given effect to, or whether, in

its totality, clause 26 should be declared null and void as contended by counsel for appellants.

In Scrutton on Charterparties, 18th Edition, under the part which deals with the Carriage of Goods Act, 1924, and in particular to the comments on Article 3, rule 8, we read the following at page 430:

> "*'Any clause'*. It may be possible in a clause consisting of two parts to sever that part which does not offend against the Act and merely strike out the offending part."

And at page 432:

> "*'Shall be null and void'*. It is submitted that, notwithstanding the literal meaning of these words, they should be construed as nullifying the offending clause only so far as it is in conflict with the Rules—at any rate in a case where the clause is severable."

Reference in respect of both these propositions is made to the cases of *Unicoop Japan* v. *Ion Shipping Co.* [1971] 1 Lloyd's Rep. 541 and *Svenska Traktor Akt.* v. *Maritime Agencies (Southampton)* [1953] 2 Q.B. 295. In the former case, it was held by Brandon J. that the effect of the bill of lading repugnancy clause contained in the arbitration clause was that to the extent that the arbitration clause was in conflict with the Rules, but no more, it was void.

At page 545, Brandon J. had this to observe:

> "I find myself unable to accept entirely the approach to the application of the bill of lading repugnancy clause advanced by either side. In my view, the right approach is to ask to what extent the second sentence of the Centrocon arbitration clause is in conflict with art, III, r. 6, and then to hold that the provision is void to that extent and no further. Adopting that approach, I am of opinion that the second sentence of the Centrocon arbitration clause is in conflict with art. III, r. 6, to the extent that, after the first sentence has prescribed arbitration of all disputes, it provides that claims by cargo-owners shall be barred if not made in writing and not made by appointing an arbi-

trator within three months than 12 months. To that extent it is void, but no further. That is sufficient to enable the Court to answer the arbitrator's question (a). It means that the question must be answered in the negative and I so hold."

In Carver, Carriage by Sea, 12th Edition, Vol. 1 under the heading which deals with the Hague Rules as implemented in the Carriage of Goods by Sea Act 1924 and in particular Article III rule 8, at p. 242 (under paragraph 276) it reads:

"It has been suggested that the effect of the rule may be to make an offending clause totally void, but where the Rules are expressly incorporated in the bill of lading it is submitted that their effect is to cut down the provisions of an offending clause only in so far as it is repugnant to the Rules, and that the clause, as so limited, is effective on the ground that it does not then infringe Art. III, rule 8."

Also, at page 244 (paragrapgh 279) under the sub-heading "Jurisdiction clause", the following are stated:

"A clause limiting jurisdiction over disputes under the bill of lading to the Courts of a specified country does not offend the rule. Thus in *Maharani Woollen Mills* v. *Anchor Line* (1) a provision in a bill of lading, 'all claims arising shall be determined at the port of destination' was held to be valid notwithstanding Art. III, r. 8."

In the *Maharani Woollen Mills* case (supra) at p. 169 of the report [1927] 29 Lloyd's Rep. 169) Scrutton, L.J. is reported to have said the following:

"The liability of the carrier appears to me to remain exactly the same under the clause. The only difference is a question of procedure—where shall the Law be enforced?—and I do not read any clause as to procedure as lessening liability."

(1) [1927] 29 Lloyd's Rep. 169.

In the result we have come to the conclusion that once the time-bar part of clause 26 of the Bill of Lading which is in conflict with Article III, rule 8 of the Rules in the Schedule of the Carriage of Goods by Sea Law (Cap. 263) has been waived the remaining part which embodies a foreign jurisdiction clause is a valid one and can be enforced on its own.

For all the above reasons, this appeal fails and is hereby dismissed with costs in favour of the respondents.

Appeal dismissed.