

1986 September 13

[A. LOIZOU, J.]

TAKIS ECONOMIDES.

Plaintiff.

v.

1. M/V "COMETA-23" NOW LYING AT THE PORT OF LARNACA
2. BLACK SEA SHIPPING COMPANY.

Defendants.

(Admiralty Action No. 171/82).

Admiralty—Arbitration clause in a charterparty—Nature of clause—Procedural—The law governing the arbitration proceedings—Proceedings instituted in breach of the clause—Power of Courts to stay proceedings—Power discretionary—Principles on which the Courts rely in order to exercise the discretion—Discretion exerciseable along the same lines as when there is a foreign jurisdiction clause.

This is an application by the defendants in the above action to stay the proceedings, whereby the plaintiffs claim, inter alia, specific performance of a charterparty and damages for breach of such charterparty, on the ground that there exists a valid arbitration clause, which reads: "All disputes arising under and in connection with this contract shall be submitted to the Arbitration Commission in Stockholm, Sweden. The procedure of the Arbitration will be agreed upon by both parties during one month from the date of signing of the contract".

It should be noted that "the procedure of the arbitration" was never agreed upon.

Held, granting the application: (1) An agreement to submit to arbitration is procedural in nature; it merely provides the manner in which the rights and obligations of the parties are determined. The law and procedure

which is to govern the agreement need not be stated, but may be determined by implication. In the absence of an agreement to the contrary the arbitration proceedings will almost certainly be governed by the law of the country in which the arbitration is held, as that is the country most closely connected with the proceedings. 5

(2) The failure to specify the procedure to be followed is in the light of the authorities not fatal to the matter and does not affect the validity of the clause. It is safe to reach the conclusion that the arbitration proceedings will be governed by Swedish law. Moreover, the clause in question does not appear to be conditional upon agreeing the procedure to be followed. 10

(3) When there is a contractual provision to refer disputes to a foreign tribunal, the Courts will prima facie stay the proceedings brought in breach of the agreement, unless satisfied that it is just and proper to allow them to proceed. The power to stay proceedings in the light of the existence of an arbitration clause is discretionary. The principles on which the Courts rely in order to exercise the discretion, which is exercised on the same lines as when there is a foreign jurisdiction clause, have been decided and settled by reference to English authorities. 15 20

(4) There is nothing to show that the plaintiffs in this case will be unfairly prejudiced, if the matter is referred to arbitration. All evidence likely to be produced is available to a great extent in a documentary form and, therefore, it is as readily available in Sweden as in Cyprus and the expenses of arbitration will not be overwhelming. Most important is that the alleged breach was a matter within the contemplation of the parties at the time of entering into the charterparty. In the circumstances the discretion should be exercised in favour of granting the stay applied for. 25 30

Application granted. 35
No Order as to costs.

Cases referred to:

Miller and Partners Ltd., v. Whitworth Street Estates (Manchester) Ltd., [1970] A.C. 583;

Re O'Brien and Canadian Pacific Railway Co., 25 D.L.R. (3rd) 230;

Compagnie D' Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A. [1971] A.C. 572;

5 "The Eleftheria" [1970] P. 94;

Heyman v. Darwins Ltd. [1942] A.C. 356;

The Athenee [1922] 11 Lloyds Law Rep. 6;

10 *Cyprus Phassouri Plantations Co. Ltd., v. Adriatica di Navigazione S.P.A.* (1983) 1 C.L.R. 949, and on appeal (1985) 1 C.L.R. 290;

La Societe Mauritanienne d' Assurances et de Reassurances v. Alkostar Shipping Co. Ltd. (1983) 1 C.L.R. 723, and on appeal (1984) 1 C.L.R. 849;

15 *Investa Foreign Trade Co. Ltd. v. Demetriades and Co.* (1982) 1 C.L.R. 276.

Application.

20 Application by defendants for an order of the Court staying the proceedings instituted by plaintiffs whereby they claim specific performance of the charterparty dated 5.5.82 on the ground that there exists a valid arbitration clause.

K. Chrysostomides with *K. Andrews (Miss)*, for applicants-defendants.

L. Papaphilippou, for respondents-plaintiffs.

25 *Cur. adv. vult.*

A. LOIZOU J. read the following decision. This is an application by the applicants/defendants to stay the proceedings instituted by the respondents/plaintiffs whereby they claim:

30 "(a) An order of the Honourable Court ordering the specific performance by the defendants of the charterparty dated the 5.5.82 entered into between the plaintiff and defendants 2 by which defendant vessel was chartered/hired to the plaintiff.

(b) 1.000.000 U.S.D. damages for breach of charter-party and/or otherwise.

(c) Further or other relief as the Court may deem just in the premises.

(d) The costs and expenses of this action.” 5

The present application is based on the ground that there exists a valid arbitration clause and on sections 5 and 8 of the Arbitration Law, Cap. 4.

I shall not go into the facts in detail since they are dealt with and stated in extenso in the decision of this Court dated 8th September 1982, discharging the arrest of the defendant ship (see (1982) 1 C.L.R. 685), but I shall deal, only briefly, with the main relevant points. 10

The respondent/plaintiff by a written agreement dated 5th May, 1982, agreed with the applicants/defendants to charter the defendants' vessel for trips from Larnaca, Cyprus to Latakia and Beirut and Joun'ieh, Lebanon, for a period from 1st June, 1982, to 30th November 1982, with the option to extend the charter to the 31st May, 1983. On the 15th June, 1982, the said charter was amended to the effect that calls to Beirut and Jounieh were excluded for a period of sixty days on account of the abnormal situation in Lebanon. 15 20

On the 20th August 1982, the plaintiff was informed by the master of the defendant ship, at the marine of Larnaca that he would not be carrying out the voyage to Latakia but that he had instructions to proceed to Yalta instead. 25

The plaintiff alleging a breach of contract filed the present action together with an application for the arrest of the vessel. The warrant of arrest issued was subsequently discharged because as stated by this Court at p. 697 of its decision of the 8th September 1982 (see (1982) 1 C.L.R. 685): 30

“Having gone through the telexes exchanged between the parties, I have come to the conclusion that the new agreement concluded between the parties re- 35

5 fers to the agreement of the 5th May with its amend-
ments regarding the ports of calls, which existed on
the 20th August and which excluded the Lebanese
ports because of the prevailing situation there. That
being so, there is no cause of action disclosed on the
material before me now that the totality of it has been
adduced and as there was no cause of action the
warrant of arrest issued cannot be sustained and is
hereby discharged.”

10 Upon delivery of the judgment discharging the warrant
of arrest of the defendant ship, counsel for the plaintiff
applied orally that the said judgment be stayed for 48
hours so that he would take steps for its further stay; it
was however, refused.

15 Subsequently, on the 28th September 1982, the present
application for stay of all further proceedings in this action
was filed by the defendants, in view of, as claimed, the
existence of a valid arbitration clause in the charterparty,
clause 21, which provides as follows:

20 “All disputes arising under and in connection with
this Contract shall be submitted to the Arbitration
Commission in Stockholm, Sweden. The procedure of
the Arbitration will be agreed upon by both parties
during one month from the date of signing of the
25 Contract.”

It is stated in paragraph 4 of the affidavit dated 28th
September 1982, filed in support of the said application:

30 “... the matters in dispute and all differences in this
action and all claims contained therein arose out of
the said charterparty which includes the aforemen-
tioned valid arbitration clause and are matters within
the scope of the said contract which speaks clearly
of submission to arbitration in a neutral Country and
such disputes and differences are fit and proper to
35 be so referred to and decided by arbitration pursuant
to the terms of the relevant clause of such contract.
Such matters arose before the commencement of this
action.”

40 It was argued by the applicant that the arbitration
clause is an internal part of the agreement and all matters

in dispute and all differences arose out of such agreement. it was submitted therefore that the parties should be held to their agreement and that the Court should exercise its discretion and grant the stay, more so since all prerequisites for the subsistence of an arbitration agreement were satisfied. 5

On the other hand it was contended on behalf of the respondent/plaintiff that the arbitration clause is vague and incomplete, the procedure never having been agreed upon, rendering thus such clause void and unenforceable. 10 But in any event, it was argued, the jurisdiction of the Court cannot be ousted by a private stipulation such as an arbitration clause and especially by means of a foreign jurisdiction clause; and thirdly that the arbitration clause refers to "disputes" arising out of and in connection with the contract, and not to claims as in the present case. 15

What must be decided by this Court is whether there is a valid arbitration clause, or not, and secondly whether in the circumstances this Court can assume jurisdiction.

As already stated above, clause 21 provides that "the procedure of the arbitration will be agreed upon..." 20 In fact, it was never agreed upon and the question is whether such failure to agree renders the arbitration clause incomplete and invalid.

An agreement to submit to arbitration is by its nature procedural; it merely regulates the manner in which the mutual rights and obligations of the parties are determined (see Dicey and Morris, *The Conflict of Laws* (10th Ed.) Vol. 2 p. 1126). The parties to an arbitration agreement do not have to state expressly the law and procedure which is to govern their agreement, but such may be determined by implication. "Thus, if the parties to an English contract provide for arbitration in Switzerland, English law would govern the validity, interpretation and effect of the arbitration clause as such (including the scope of the arbitrators' jurisdiction), but the arbitration proceedings (including the extent to which they are subject to judicial control) would be governed by Swiss law. Where the parties fail to choose the law governing the arbitration proceedings, those proceedings will almost certainly be governed 25 30 35 40

by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings”.

(See Dicey and Morris (Supra) at p. 1128.)

5 In *Miller and Partners Ltd., v. Whitworth Street Estates (Manchester) Ltd.*, [1970] A.C. 583, a case where the parties failed to choose the law governing the arbitration proceedings it was held that such proceedings must be considered, prima facie, as being governed by the law of the
10 country in which the arbitration is held, on the ground that that was the country most closely connected with the proceedings. It was stated by Lord Hodson at p. 606:

15 “I am satisfied, however, that, whether the proper law of the contract is English or Scottish, the arbitration being admittedly a matter of procedure as opposed to being a matter of substantive law is on principle and authority to be governed by the *lex fori*, in this case Scottish law. Furthermore, the parties have, in my judgment, plainly submitted to the Scottish
20 arbitration on the footing that Scottish procedure was to govern.”

Relevant is also what was stated in the Canadian case of *Re O'Brien and Canadian Pacific Railway Co.*, 25 D.L.R. (3d) 230, at pp. 233-4:

25 “The general principles to be followed in determining the law governing a contract, or a particular issue within the contract, such as arbitration proceedings, may be stated as follows:

30 (1) if the intention of the parties as to the law governing is expressly stated in the contract, then in general that law governs;

35 (2) if the intention of the parties as to the law governing the contract, or a particular matter therein, is not expressly stated, but may properly be inferred from the terms and nature of the contract and the surrounding circumstances, then the intention so inferred, in general, governs;

- (3) if the intention of the parties as to the applicable law cannot be ascertained from the express terms of the contract, or cannot be inferred from the terms of the contract in the light of surrounding circumstances, the intention of the parties may be inferred by referring to the system of law with which the contract has its closest and most real connection.” 5

And further down at p. 235:

“Further, I am satisfied the inference is inescapable that in the collective agreement under consideration, the parties, by appointing the Canadian Railway Officer of Arbitration at Montreal to be the arbitrator as required by the federal legislation, intended the arbitration procedure to be that set forth in the agreement of June 25, 1969, under which the proceedings would be governed by the law and the Court of Quebec. 10 15

Such a conclusion is, in my opinion, in accordance with the views expressed by Lord Morris of Bothy-Gest in *Compagnie D' Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.* [1971] A.C. 572 when at p. 588 he said: 20

‘An agreement to refer disputes to arbitration in a particular country may carry with it, and is capable of carrying with it, an implication or inference that the parties have further agreed that the law governing the contract (as well as the law governing the arbitration procedure) is to be the law of that country. But I cannot agree that this is a necessary or irresistible inference or implication: there is no inflexible or conclusive rule to the effect that an agreement to refer disputes to arbitration in a particular country carries with it the additional agreement or necessarily indicates a clear intention that the law governing the matters in dispute is to be the law of that country.’ 25 30 35

In my respectful view, there is neither any other agreement, nor are there any other surrounding circumstances to suggest that the parties, by providing for the arbitrator to be the Canadian Railway Office 40

of Arbitration at Montreal, intended anything other than that the arbitration procedure would be governed by Quebec law to be enforced in the Courts of that Province.”

5 It is my view that the failure to specify the procedure to be followed is in the light of the authorities not fatal to the matter and does not affect the validity of the arbitration clause, but I feel that I can safely reach the conclusion that the arbitration proceedings by the selection of
10 an arbitration clause in Sweden are to be governed by Swedish law; matters of procedure are in any case governed by the *lex fori*.

Moreover the clause as construed does not appear to be conditional upon agreeing the procedure to be followed,
15 which is, I would say, independent to the valid existence of such clause.

The next matter that I must consider now is whether, irrespective of whether there is a valid arbitration clause, this Court can assume jurisdiction or grant the stay applied for.
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It is generally accepted that where there is provision in a contract to refer disputes to a foreign tribunal, then *prima facie* the Courts will stay proceedings instituted in breach of such agreement and will only allow them to proceed when satisfied that it is just and proper to do so.
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See “*The Eleftheria*” [1970] P. 94 at p. 103 per Brandon J.:

“First, as to the *prima facie* case for a stay arising from the Greek jurisdiction clause, I think that it is
30 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 a mere balance of convenience.”
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And *Heyman v. Darwins Ltd.*, [1942] A.C. 356 at 391:

“The parties have chosen to refer their differences to arbitration, and to arbitration they should go in

the ordinary course unless there is some good reason to the contrary....”

The Court’s power to grant such a stay of proceedings is discretionary—See *Hayman v. Darwins* (supra) at p. 388:-

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“Section 4 of the Arbitration Act, 1889, makes the power of the Court to stay an action under the arbitration clause a matter of discretion and not ex debito justitiae. Though the dispute is clearly within the arbitration clause, the Court ‘may’ still refuse to stay if, on the whole, that appears to be the better course. But the Court must be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the Court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though in truth an arbitration clause is not of strict obligation, because it is under s. 4, always subject to the discretion of the Courts.”

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The general principles on which such discretion of the Court is exercised are summarised in *Russel on Arbitration* (19th Ed.) at p. 190:

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“Where parties have agreed to refer a dispute to arbitration, and one of them notwithstanding that agreement, commences an action to have the dispute determined by the Court, the prima facie leaning of the Court is to stay the action and leave the plaintiff to the tribunal to which he has agreed. ‘If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then, since that Act of Parliament (Common Law Procedure Act 1854) was passed a prima facie duty is cast upon the courts to act upon such an agreement.’ Once the party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay.”

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And also at page 175:

“Under section 4(1) the Court, or a Judge thereof, has power to exercise its discretion to make an order staying proceedings, provided that:

5 (1) There is a valid agreement to have the dispute concerned settled by arbitration.

(2) Proceedings in the Court have been commenced.

10 (3) The proceedings have been commenced by a party to the agreement or a person claiming through or under him, against another party to the agreement, or a person claiming through or under him.

(4) The proceedings are in respect of a dispute so agreed to be referred.

(5) The application to stay is made by a party to the proceedings.

15 (6) The application is made after appearance by that party, and before he has delivered any pleadings or taken any other ‘step in the proceedings.’

20 (7) The party applying for a stay was and is ready and willing to do all things necessary to the proper conduct of the arbitration.”

As to the manner of exercising such discretion, it is stated in *Heyman v. Darwins Ltd.*, (supra) at pp. 369-370 in the words of Lord Macmillan:

25 “The law permits the parties to a contract to include in it as one of its terms an agreement to refer to arbitration disputes which may arise in connection with it, and the courts of England enforce such a reference by staying legal proceedings in respect of any matter agreed to be referred ‘if satisfied that there is
30 no sufficient reason why the matter should not be referred in accordance with the submission’: Arbitration Act, 1889, s. 4. Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party,
35 founding on the clause, applies for a stay, the first

thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having been found to be still effective, there remains for the Court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.”

The grounds on which the discretion to grant or not a stay of proceedings is exercised and summed up by Brandon J., in “*The Eleftheria*” (supra) at pp. 99-100:

“The principles established by the authorities can, I think, be summarised as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), 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 pro-

cedural 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 their 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.”

The law and the general principles on which the Courts in Cyprus will rely in order to exercise such discretion of theirs, which, as in England, is exercised on the same lines where there is an arbitration clause as where there is a foreign jurisdiction clause (see Russell (supra) p. 194 and *The Athenee* [1922] 11 Lloyds Law Rep. 6), have been decided and are settled by reference to the English authorities. Such principles have been extensively stated in the case of *Cyprus Phassouri Plantations Co., Ltd., v. Adriatica di Navigazione S.P.A.* (1983) 1 C.L.R. 949 which was approved and upheld by the Full Bench of this Court the judgment of which appears in (1985) 1 C.L.R. 290.

See also the case of *La Societé Mauritanienne d' Assurances et de Reassurances v. Alkostar Shipping Co., Ltd.*, (1983) 1 C.L.R. 723 at 724-727, where the legal principles expounded therein regarding the granting of stay of proceedings in the light of the existence of a valid arbitration clause were approved on appeal, though the decision was reversed, the Appeal Court having found that it was a proper case to grant the stay of proceedings in order that the matter be referred to arbitration. ((1984) 1 C.L.R. 849 at 851).

See also *Investa Foreign Trade Co., Ltd., v. Demetriadis and Co.*, (1982) 1 C.L.R. 276.

In the circumstances and in the light of the above principles I am of the view that this is a proper case for exercising the Court's discretion in favour of granting a stay of proceedings to enable the defendants to refer the matter to arbitration as per clause 21 and I find that the plaintiffs have not satisfied me that they have a good case not to be held to their agreement.

I find that there is nothing to show that the plaintiffs will be unfairly prejudiced by referring the matter to arbitration. Almost all the evidence which is likely to be produced is available to a great extent in a documentary form, having already so been produced before this Court in the form of affidavits, telexes etc., and is thus as readily available in Sweden as it is in Cyprus. I do not consider, therefore, that if the parties are held to their agreement and are referred to arbitration that it will be prejudicial to the plaintiff, or inconvenient or the expenses will be overwhelming.

Most important, I consider that the alleged breach was a matter within the contemplation of the parties at the time of entering into the contract/charterparty. due to the prevailing situation in Lebanon at the time.

Generally speaking and independently of the outcome of the warrant of arrest in the present case I consider that such an action in rem can rightly be filed in Cyprus for the purpose of arresting the ship, as the existence of a valid arbitration clause "does not preclude an intended plaintiff from arresting a ship" or taking any other preservative measures for purposes of security (See Admiralty Practice para. 30).

"It is a not uncommon feature of contracts of carriage of cargo. be they bills of lading or charter parties, to include either an arbitration clause or a clause whereby the parties to the contract purport to agree to all disputes being decided by the courts of a named country. This is usually the country of the ship's flag but sometimes the country of destination of the ship. If the contract of carriage contains an arbitration clause, this does not, as stated, preclude an intended plaintiff from arresting a ship. It does, however, mean that upon application by the defendant, made after appearance but before taking any other step in the action, the court may stay the action under section 4 of the Arbitration Act, 1950. It is important to remember with regard to this that the court's power is a power to stay and not to set aside the action. Consequently, in such an event, the intended plaintiff

5 still gets the benefit of security, in that the vessel will remain under arrest unless bail or other security is given to secure its release, but the merits of the dispute will have to be decided by the arbitrator and not by the Court.”

In the circumstances I find that I must exercise my discretion and grant the stay of proceedings applied for.

In the result this application succeeds, but in the circumstances there will be no order as to costs.

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Application granted.
No order as to costs.