Neutral Citation Number: [2015] EWCA Civ 401

Case No: A3/2014/3584

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE COOKE
[2014] EWHC 3632 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2015

Before :

LORD JUSTICE ELIAS
LORD JUSTICE BEATSON
and
LORD JUSTICE CHRISTOPHER CLARKE

Between :

Hin-Pro International Logistics Limited	**Appellant**
- and -	
Compania Sud Americana De Vapores S.A.	**Respondent**

James Collins QC (instructed by **Bird & Bird LLP**) for the **Appellant**
Poonam Melwani QC and Gemma Morgan (instructed by **Stephenson Harwood LLP**) for the **Respondent**

Hearing dates: 26th February 2015

Approved Judgment

Lord Justice Christopher Clarke:

1. The central question in this appeal is whether a clause in bills of lading providing for English jurisdiction is, as the respondent claims, an exclusive jurisdiction clause. Whether we get to that question depends on whether the appellant should be heard. The respondent contends that it should not. In order to address both issues it is necessary to recount the facts which give rise to them. Much of what follows is derived from the judgment of Cooke J, from whom this appeal is brought.

2. Hin-Pro International Logistics Ltd ("Hin-Pro"), the appellant, is a freight forwarder registered in Hong Kong. Compania Sud Americana de Vapores S.A ("CSAV"), the respondent, is an international shipping corporation with a worldwide business.

The 2012 proceedings

3. In 2012 Hin-Pro began 5 separate proceedings against CSAV in the Wuhan Maritime Court in China under 5 bills of lading covering the carriage of cargo from Nanjing, China to Puerto Caballo in Venezuela. The claim was that the cargo had been released without production of the original bills.

4. CSAV's bills of lading contain the following clause:

> *"23 Law and jurisdiction*
>
> *This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceeding shall be referred to ordinary courts of law. In the case of Chile, arbitrators shall not be competent to deal with any such dispute and proceedings shall be referred to the Chilean Ordinary Courts".*

It is common ground that, as a matter of Chilean law, the third sentence is void.

5. In November 2012 CSAV commenced action 2012 Folio No 1519 in the Commercial Court. On 22 November 2012 Burton J made an order *ex parte* restraining the continued pursuit of the Wuhan Court proceedings, and the commencement of any further proceedings relating to the disputes under the 5 bills of lading in any court other than the High Court of England & Wales (or a court of another member state of the European Union or another contracting state of the Lugano Convention). On 29 November 2012 Andrew Smith J continued that injunction until further order. Nonetheless the Wuhan Court proceedings continued.

6. On 21 March 2013 there was a committal hearing at which Smith J held Hin-Pro and its sole director Miss Su Wei to be in contempt. Hin-Pro's contempt lay in participating in a mediation and jurisdiction hearing in the Wuhan Court. Miss Wei's contempt consisted of causing or permitting Hin-Pro to do so. Smith J gave permission for the issue of writs of sequestration against Hin-Pro and, for her contempt, he committed Miss Wei to Prison for 3 months. At neither hearing was Hin-Pro or Miss Wei represented. Miss Wei has not yet been apprehended.

The 2013 proceedings

7. Between May and July 2013 Hin-Pro commenced a further 23 actions in China against CSAV under 70 bills of lading in respect of the carriage of goods from China to Venezuela. These proceedings were begun in the Qingdao, Tianjin, Ningbo, Guangzhou and Shanghai Maritime Courts. CSAV challenged the jurisdiction of the courts in China but its challenges have so far been dismissed.

8. Hin-Pro's claim in the Chinese proceedings is that CSAV wrongly delivered cargo without production of the original bills of lading in various ports in Venezuela. In some but not all of the cases Hin-Pro was named as the shipper. Where it was not so named it claimed to be an original party in respect of the contract of carriage contained in the bill. CSAV said that no misdelivery took place because Venezuelan law required, subject to non-applicable exceptions, that cargo should be delivered to the storage provider authorised by the Venezuelan Government; delivery was so made; and all the goods were on delivered to Raselca Consolidadores CA ("Raselca"), Hin-Pro's agent in Venezuela, who were the named consignees, and on-delivered by them to the buyers of the cargo.

9. On 18 September 2013 CSAV started the current proceedings in the Commercial Court seeking (a) declarations that Hin-Pro was obliged by clause 23 to litigate claims under the 70 bills of lading in England, (b) damages and (c) a permanent injunction. On 2 October 2013 Eder J gave CSAV permission to serve the proceedings on Hin-Pro in Hong Kong together with an application notice for an anti-suit injunction. The order provided for an Acknowledgment of Service (AOS) to be filed within 31 days of service. Service of the proceedings and of the application for an anti-suit injunction took place on Hin-Pro on 10 October 2013.

10. On 29 November 2013 Blair J made an anti-suit injunction against Hin-Pro precluding the commencement or pursuit of, or the taking of any steps in, the proceedings in China in respect of the disputes under the 70 bills.

Events in 2014

11. On 27 May 2014 the Ningbo Court awarded Hin-Pro damages for the value of the cargo claimed in the sum of some $ 360,000 and legal costs. CSAV paid that sum. This decision is subject to challenge in the Chinese courts. CSAV was provided with documents which it regarded as fraudulent. These were what purported to be contracts in the form of a master sale agreement supposedly dated 20 January 2011 between Hin-Pro and Raselca and some 79 sales confirmations between Hin-Pro as seller and Raselca as buyer, when, as CSAV contends, in truth Hin-Pro was a freight forwarder which would suffer no loss in respect of the cargo unless the seller remained unpaid and it was sued for its value.

12. On 13 June 2014 CSAV sought and was granted by Walker J *ex parte* a worldwide freezing order against Hin-Pro in the sum of $ 27,835,000. Walker J was satisfied on the material before him that there was good reason for concern that Hin-Pro was fraudulently bringing proceedings, and that there were good grounds to fear that these might result in execution in China, so as to force Hin-Pro to pay what, with costs, would amount to that sum.

13. That order was continued by Eder J on 26 June 2014, the return date, when Hin-Pro did not attend. Hin-Pro failed to comply with the asset disclosure orders made by Walker J until 8 October 2014.

14. On 17 July 2014 CSAV secured the appointment of Receivers in Hong Kong. We have not seen that order; but we were told that the Receivers were given control over the proceedings in China and power to ensure that any payment under any judgment was paid into court in Hong Kong, although it does not appear that that order has been of any effect in China. At about the same time CSAV obtained a freezing order against Hin-Pro in Hong Kong. Hin-Pro made unsuccessful attempts to set aside the orders made in Hong Kong. It finally served an incomplete and deficient affidavit of assets on 5 August.

15. The Particulars of Claim in the action were filed and served on or about 22 July 2014. On about 10 September 2014 a further judgment was handed down by the Ningbo court in the sum of $ 652,936 plus costs. That judgment was appealed.

16. On 25 September 2014 Hin-Pro applied to adjourn the trial listed for 14 October 2014. On 29 September 2014 Hin-Pro filed an AOS – some 10 months out of time.

17. On 3 October 2014 Flaux J dismissed Hin-Pro's application to adjourn. He found that Hin-Pro had deliberately refrained from participating in the proceedings, no doubt because it felt that it was in its interests to do so. He regarded it as tolerably clear that the only thing that had brought Hin-Pro before the court had been the receivership order in Hong Kong. He advanced the trial start date by a day and increased the estimate to 2 days to allow time for the arguments which Hin-Pro wished to make. He permitted Hin-Pro to file their AOS late provided that 6 conditions were complied with. These were set out in paragraph 4 of his order and included the discontinuance of all proceedings commenced by it in China and cooperation with the Receivers appointed in Hong Kong. Paragraph 5 of his order provided that, unless each of those conditions was satisfied, Hin-Pro should not be entitled to participate in the trial. Five of the conditions were not complied with and the trial took place without participation by Hin-Pro. Flaux J also ordered Hin-Pro to serve a skeleton argument by 9 October 2014. This was not done. Hin Pro did not attend the trial.

The judgment of Cooke J

18. By his judgment of 14 October 2014 Cooke J held that Hin-Pro was obliged by clause 23 of the bills of lading to litigate its disputes in relation to the contracts evidenced by the bills before the English High Court. He held that each of the actions commenced in the five Chinese Maritime Courts had been commenced in breach of that clause. In consequence he made a permanent injunction precluding Hin-Pro from pursuing or taking any further steps in the actions it had commenced in those courts.

19. The order required Hin-Pro to take all steps within its power to terminate or otherwise discontinue all of the proceedings in the five courts. It provided for repayment by Hin-Pro to CSAV of sums awarded to Hin-Pro in the Ningbo Maritime Court and a sum in respect of costs so far incurred in the Chinese Court proceedings. It declared CSAV to be entitled to damages in the amount of any sums which CSAV was ordered to pay in the actions commenced in China. Cooke J also continued the freezing order with variations until further order.

The applications for permission to appeal

20. On 4 November 2014 Hin-Pro filed two application notices. The first sought permission to appeal, out of time, the order of Flaux J of 3 October 2014. The second sought permission to appeal the judgment of Cooke J of 14 October 2014. By an order of 25 November 2014 Tomlinson LJ refused Hin-Pro permission in respect of the former on the ground that there was no good reason for an extension of the 21 day time limit. He granted permission in respect of the latter but did not grant a stay. He expedited the appeal.

21. On 4 December 2014 CSAV applied under CPR 52.9 to set aside Tomlinson LJ's order granting Hin-Pro permission to appeal the order of Cooke J on the ground that – so it was said – the Court of Appeal had no jurisdiction to grant permission to appeal and/or the proposed appeal was an abuse of process and that Tomlinson LJ must have been misled on the papers before him.

22. On 30 December 2014 Tomlinson LJ directed that the application of 4 December 2014 be heard at the same time as or immediately before the hearing of the appeal. He also directed, of his own motion, that Hin-Pro provide security for the costs of the appeal in the "modest" sum of £ 25,000. This security has been provided.

23. After the grant of permission two questions arose as to whether the Court should in fact entertain the appeal. First, CSAV sought to set the permission aside. Second, the Court indicated that it wished to hear submissions on whether it should entertain Hin-Pro's appeal having regard to the fact that it is in contempt of orders of the Commercial Court.

Contempt

24. The contempts in question are manifold. Hin-Pro is in breach of (i) the interim injunction made by Burton J and continued by Smith J in November 2012 relating to the Wuhan proceedings; (ii) the interim injunction granted by Blair J on 29 November 2013; and (iii) the permanent injunction granted by Cooke J on 14 October 2014. Hin-Pro was found guilty of contempt by Andrew Smith J on 21 March 2013 and its director was committed for contempt. Neither of these contempts has been purged. No attempt was made to appeal the orders made other than the final order made by Cooke J. Conditions 2-6 imposed by Flaux J were designed to deal with Hin-Pro's breaches of the anti-suit injunctions. In particular condition 2 required Hin-Pro to discontinue the proceedings in China. CSAV undertook to take no time bar point if Hin-Pro won at trial and then recommenced proceedings.

25. CSAV points out that Hin-Pro has not explained why they have not or could not comply with conditions 2 and 6; and submits that it is plain that it is because they have no intention of obeying the judgments of the Court and stopping the proceedings in China. Indeed on 9 October 2014 in an email to the Receivers Hin-Pro said that it would "*not cease its actions against CSAV in the PRC and the Receivers cannot unilaterally cease the action in the PRC*". We were told that since October 2014 further judgments had been handed down in the PRC in favour of Hin-Pro and that the other actions had continued.

Discussion

26. The Court has a discretion not to hear a contemnor until his contempt is purged. In *ASM Shipping v TTMI* [2007] EWHC 927 (Comm) I endeavoured to summarise the position as follows:

> *"Further authorities*
>
> 45 In *Hadkinson v Hadkinson* [1952] P 285 Denning LJ referred to the rule that the court will not entertain an application by a person who is in contempt of court until he has purged himself of that contempt as traceable to an ordinance of Lord Bacon in 1618 which laid down that "*they that are in contempt are not to be heard neither in that suit nor in any other except the court of special grace suspend the contempt*".
>
> 46 In *Bettinson v Bettinson* [1954] P 465 Plowman J observed that the practice of the court in applying that ancient rule had changed in the course of time and became much restricted in scope. One of the ways in which, as he said, it was restricted was that the Court confined its operation to contempt *in the same suit* as that in which the application was made ...
>
> 47 In *The Messiniaki Tolmi* [1981] 2 Ll Rep 595 Lord Justice Brandon reviewed a number of earlier authorities and concluded that:
>
> > "*while the general rule is that a Court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which had put the person concerned in contempt*".
>
> Lord Justice Templeman did not dissent from Lord Justice Brandon's expression of general principle but thought that there was no absolute rule which entitled or disbarred a party in contempt from prosecuting an appeal against the order with which he has failed to comply.
>
> 48 In *X Ltd v Morgan Grampian* [1991] 1 A.C.1 a journalist had indicated that, whilst he sought to appeal the order requiring him to name his source, he had no intention of complying with any such order if the appeal should be unsuccessful. He declined to place the name of the source in a sealed envelope pending the final determination of his appeal. The Court of Appeal had refused to hear Counsel on his behalf. Lord Bridge cited with approval the observations of Denning LJ in *Hadkinson* to the effect that it is:
>
> > *"a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance".*

> 49It is thus apparent that, on the assumption that the Charterers are in contempt, I have a discretion as to whether I should hear them in opposition to the section 24 application. The Court has a wide power to do what is just."

27. In *X Ltd v Morgan Grampian* Lord Bridge added to the passage that I have cited the following:

> *"Certainly in a case where a contemnor not only fails wilfully and contumaciously to comply with an order of the court but makes it clear that he will continue to defy the court's authority if the order should be affirmed on appeal the court must, in my opinion have a discretion to decline to entertain his appeal against the order".*

28. In the same case Lord Oliver said at 50G:

> *"Whilst, therefore, there must clearly be a strong inclination in favour of preserving a litigant's right to appeal, even though he may be in contempt of court, I am in entire agreement with my noble and learned friend Lord Bridge of Harwich in thinking that there must also be a discretion to refuse to hear a contemnor and in favouring the flexible approach suggested by the judgment of Denning LJ in Hadkinson v Hadkinson [1952] P285".*

29. In *Arab Monetary Fund v Hashim and others* (CA) 21 March 1997, Lord Bingham CJ referred to the position as stated in the *Morgan Grampian* case by Lord Bridge and, in particular, by Lord Oliver at 50G, and said:

> *"From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt but then to ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders."*

The general rule/exception approach which Lord Bingham had in mind was that articulated in *The Messiniaki Tolmi* by Lord Brandon. In *Arab Monetary Fund* the contempts committed by Dr Hashim were so serious that the Court struck out the appeal.

30. There is much to be said for refusing to hear the appellant until they have discontinued the Chinese proceedings on the basis that there may be no other effective means of securing compliance with the orders of the court or on the basis that they appear to intend to continue their disobedience even if the appeal fails. Hin-Pro has been in continuous breach of the orders of the court; it has deliberately failed to comply with the conditions specified by Flaux J. Its approach is designed to ensure that the proceedings in China should not be restrained or held back so that it can obtain, and later enforce, judgments in China and it is tolerably clear that it will not voluntarily comply with the orders of Cooke J.

31. It seems to me, however, that, since the appeal (a) concerns a clause which is the foundation of all the orders which Hin-Pro and Miss Wei have disobeyed; (b) is, in effect, an appeal against one of "*the very [orders] disobedience of which [has] put the person concerned in contempt*"; (c) raises matters of some general importance; and (d) is an appeal for which Tomlinson LJ has already given leave, subject to the provision of security for costs (which has been given) we should entertain it. I am also conscious of the fact that our knowledge of exactly what orders have been made in Hong Kong is incomplete. The Receivership and Receiving Orders are said to have been set aside and replaced by undertakings, which, again, we have not seen.

32. Such an approach is consistent with that taken by this court in *Motorola Credit Corporation v Cem Cegiz Uzan* [2003] EWCA Civ 753. In that case the court held that to hear a person in contempt when the purpose of his application was to appeal against the order disobedience of which put him in contempt had the merit of good sense and was necessary to satisfy considerations of fairness. The Court also took into account that the arguments to be run on the appeal were likely to have effects wider than the case itself.

The application to set the permission aside

33. This Court has jurisdiction to set aside a permission given to appeal if there is a compelling reason to do so: CPR 52.9. "*'Compelling reason' in this context connotes something sufficiently serious to be in the nature of an irregularity in the grant of permission*": per Jonathan Parker LJ in *Barings Bank PLC v Coopers & Lybrand* [2002] EWCA Civ 1155; [2003] CP Rep 2 at [34], followed in *Mamidoil v Okta Crude Oil* [2003] EWCA Civ 617 at [6]. Unless the Court of Appeal has no jurisdiction (see *Athletic Union of Constantinople v The National Basketball Association* [2002] 1 WLR 2863) or some decisive authority or statutory provision has been overlooked by the Lord Justice granting permission it would normally be necessary to show that he had been misled: per Longmore LJ in *Nathan v Smilovich* [2002] EWCA Civ 759 cited by Laws LJ in Barings Bank Plc [43].

34. CSAV submits that there are compelling reasons for setting aside permission. First and foremost, Hin-Pro ignored the proceedings for 10 months before filing an AOS out of time. It has never filed a valid AOS and was in consequence debarred from taking any part in the trial. It had, but – by its non-compliance with the conditions – lost, its opportunity to file an AOS out of time and then to argue before the trial judge that clause 23 was not an exclusive jurisdiction clause. It could have put forward its argument about the clause at the *inter partes* hearings in November 2013 and June 2014 or at the trial (if it had complied with the conditions). In those circumstances, CSAV submits, it cannot be open to Hin-Pro to appeal. It had no standing to seek permission to appeal and the court had no jurisdiction to grant it; alternatively to grant permission would be to allow an abuse of process.

35. I do not agree. I do not regard the requirement to file an AOS either as a precondition to seeking permission to appeal or as something the lack of which precludes such an application. Since the claim was in the Commercial Court Hin-Pro was required by CPR 58.6 to file an AOS. But no specific sanction is laid down in the event of breach. The filing of an AOS requires the ticking of boxes by which the defendant indicates whether he admits the claim, seeks to defend all or part of it, or seeks to contest the jurisdiction. Whilst an AOS is required in all proceedings under Part 8 (CPR 8.3) -

and if not filed in time the defendant may attend the hearing of the claim but may not take part in the hearing unless the court gives permission (CPR 8.4) - it is not generally required in proceedings under Part 7. If a defendant wants more time to file a defence he may file an AOS in which case his time for serving a defence is 28, and not 14, days after service of the particulars of claim: CPR 10.1.3 (a) and 15.4 (1) (a) and (b). If a foreign defendant wishes to dispute the court's jurisdiction he must file an AOS: CPR 11 (2). If an AOS is required but is not filed the claimant may, subject to exceptions which include all Part 8 claims, seek judgment in default of an AOS: CPR 12.3. He may also, as here, find that he is debarred from participating in the trial.

36. But nothing in the rules provides that failure to file an AOS prevents an appeal. Failure to do so is an error in procedure which by CPR 3.10 (a) does not invalidate any step taken in the proceedings unless the court otherwise orders. Under CPR 3.10 (b) the court has power to make an order to remedy the error and by CPR 3.1 (3) (a) and (b) it has power to make any such order subject to conditions and to specify the consequences of failure to comply with the conditions. Flaux J did this in relation to the trial. Hin-Pro accepts that, as a result, it was prevented from challenging the evidence adduced by CSAV or from advancing any positive case as to the loss suffered or as to the form of the order or the appropriateness of the relief claimed. Flaux J's order was not, therefore, nugatory.

37. CSAV suggested that the order of Flaux J debarring Hin-Pro from participation at the trial necessarily precluded any appeal in respect of any order made at trial so that the Court of Appeal had no jurisdiction to grant permission. It is not so. His order provided that if the conditions were not met Hin-Pro was not entitled to participate in the trial. CSAV submit that by that he meant the proceedings. I disagree. That is not what his order says. Flaux J neither had, nor did he purport to exercise, any power to prevent this Court from granting permission to appeal to itself. The jurisdiction of this Court derives from section 16 (1) of the *Senior Courts Act 1981* and CPR 52.1. (3) (a) and 52.3 (2). Participation in or being a party to the first instance proceedings is not a requisite: *MA Holdings v George Wimpey UK* [2008] 1 WLR 1649.

38. Nor do I regard it as an abuse of process in the circumstances of this case for Hin-Pro to seek, or for this court to grant, permission. To seek to appeal does not involve the use of the court process "*for a purpose or in a way significantly different from its ordinary and proper use*" - the definition of abuse of process used by Lord Bingham LCJ in *AG v Barker* [2000] 1 FLR 759 at [19]. The point in respect of which permission was given is a short point of constriction with which Cooke J said that he had "*struggled*" and arises in relation to CSAV's standard form. It goes to the jurisdiction of the court to make the orders that it did. If the clause was not an exclusive jurisdiction clause neither the declarations, nor the injunctions, nor the award of damages can stand, since on that hypothesis there was no breach on Hin-Pro's part in suing outside England. It was within Tomlinson LJ's discretion, having decided that there was a real point to be considered, to give permission to allow Hin-Pro to argue that the clause was non-exclusive. The alternative, which would be to let the matter go by default, is not attractive. It would leave Hin-Pro subject to a permanent injunction, enforceable by penal sanction, when arguably the order should not have been made at all. The fact that Hin-Pro was in breach of the rules in not filing an AOS in time was a factor weighing against the grant of permission but by no means a conclusive one.

39. Lastly, it is said that Tomlinson LJ was misled. He had before him the order of Flaux J and his *ex tempore* judgment. The Notice of Appeal and Skeleton Arguments made reference to paragraph 4 of the order, which imposed the conditions for an extension of time for filing an AOS, and paragraph 5 which provided that, in default of compliance with those conditions Hin-Pro would be debarred from participation in the trial. Hin-Pro's skeleton had argued that it did not need to appeal paragraphs 4 and 5 of Flaux J's order because that order prohibited participation in the trial but not in the appeal. It explained that it was seeking to do so "*lest it be said that Hin-Pro's ability to pursue the appeal is somehow conditional upon those paragraphs being set aside*".

40. What is complained of is that, according to the Respondent, the skeleton did not discuss or deal with paragraph 4 and the consequences of non-compliance with the conditions therein on Hin-Pro's ability to launch any appeal. Tomlinson LJ did not, it is said, have his attention drawn to the fact that Flaux J was only prepared to allow argument on the exclusive jurisdiction clause if the paragraph 4 conditions were fulfilled. As a result, so it is said, Tomlinson LJ did not engage with paragraph 4 of Flaux J's order when considering whether to give permission to appeal from Cooke J. Had he not been misled he would have understood that Flaux J had decided that Hin-Pro was not entitled to pursue their argument as to the effect of clause 23 unless and until the conditions specified by Flaux J had been met, and would have refused permission.

41. I do not accept that Tomlinson LJ was misled; and certainly not in such a way as should cause us now to rescind his permission to appeal from Cooke J. Tomlinson LJ was plainly aware from the appellant's notice and Hin-Pro's skeleton (a) that paragraph 4 of the Flaux J's order set out conditions for the late filing of an AOS; (b) that paragraph 5 of that order imposed a bar on participation at trial in default of compliance with those conditions; and (c) that Hin-Pro had never filed an AOS in time or complied with all the conditions laid down for an extension of time for doing so. The argument that Hin-Pro's ability to pursue the appeal was conditional on those paragraphs being set aside was expressly referred to in Hin-Pro's skeleton. In the reasons for his order refusing permission to appeal the order of Flaux J, Tomlinson LJ expressed the view (with which I agree) that paragraph 5 of that order did not preclude Hin-Pro expressly or by implication from appealing the order of Cooke J.

42. Further, in circumstances, as here, where I am not minded to set aside the order giving permission on the grounds relied on other than the alleged misleading of Tomlinson LJ it would, in my judgment, require a fairly egregious example of such conduct to justify setting aside permission to appeal on that ground alone.

The construction of the clause

Hin Pro's submissions

43. Hin-Pro submits that clause 23 should not be taken to mean that the English Court shall have *exclusive* jurisdiction for a number of reasons. First the clause does not say so. It does not refer to *exclusive* jurisdiction; nor does it say that *only* the English Court shall have jurisdiction or that no other Court shall have it. On the contrary the second and third sentences recognise that proceedings may not be begun in England and make provision for that eventuality. This shows that the English courts were <u>not</u> intended to have exclusive jurisdiction; rather than prohibiting the commencement of

proceedings in other jurisdictions the clause seeks to regulate them by providing that they shall be "*referred to ordinary courts of law*".

44. Second, the clause appears in a set of standard terms which would no doubt be read by many whose first language was not English. A reasonable person reading the words used would think that both parties could commence proceedings either in England or in the ordinary courts of some other jurisdiction. Third, at the lowest the wording leaves room for doubt as to whether CSAV - the *proferens* of the clause - was to have the benefit of exclusivity and CSAV should not be entitled to claim that benefit if the wording is not clear. It should be construed *contra proferentem*.

The authorities

45. A number of authorities have considered whether particular clauses provided for exclusive jurisdiction. In *Svendborg v Wansa* [1997] 2 Lloyd's Rep 183 – followed by Flaux J in *A/S D/S Svendborg v Akar* [2003] EWHC 797 - the relevant clause was as follows:

> "*Wherever the Carriage of Goods by Sea Act 1936 (COGSA) of the United States of America applies ... this contract is to be governed by United States law and the United States Federal Court Southern District of New York is to have exclusive jurisdiction to hear all disputes hereunder. In all other cases, this Bill of Lading is subject to English law and jurisdiction.*"

46. Staughton LJ, with whom the other members of the Court, agreed said this:

> "*It can be argued that the express mention of exclusive jurisdiction in the first part of the clause excludes any implication that the second part provides for exclusive jurisdiction. On the other hand it can be argued that the author wished to provide for exclusive jurisdiction throughout, and did not think it necessary to repeat the word "exclusive" in the second part... I conclude that the clause does confer exclusive jurisdiction on the English courts. My reasons are in substance, first those which I stated in Sohio Supply Co v. Gatoil (USA) Inc (1989) 1 Ll R 588 at pp. 591-2, and in particular that I could think of no reason why businessmen should choose to go to the trouble of saying that the English Courts should have non-exclusive jurisdiction. My second reason is that the parties in the second part of the clause were plainly saying that English law was to be mandatory if the American Carriage of Goods by Sea Act did not apply; it seems to me that they must have intended English jurisdiction likewise to be mandatory in that event.*"

47. Hin-Pro observes that the reasoning in *Svendborg* was lifted from *Sohio* but that the circumstances in *Svendborg* were different. In *Sohio* there was a specifically negotiated clause ("*... Under the jurisdiction of the English Court without recourse to arbitration*"), and Staughton LJ drew attention to the fact that part of the matrix was that "*this was a contract made between sophisticated business men who specifically chose their words as to English jurisdiction for the purpose of this contract. It is not a*

consumer contract on a printed form or anything like that". By comparison in *Svendborg* there was a standard form wording intended for use by many different parties, who might well wish to sue elsewhere than in England e.g. at the port of shipment or discharge. If CSAV, the author of the wording, had intended jurisdiction to be exclusive it would, Hin-Pro submits, surely have said so in terms.

48. Cooke J did not find Staughton LJ's first reason "*entirely persuasive*" but found the second "*more compelling*". As to the first, he recognised that parties may wish to provide for a neutral court to have agreed jurisdiction whilst accepting that other courts may also exercise jurisdiction by reference to their own connection to the dispute and their own procedural rules. Hin-Pro submits that one reason for preferring a non-exclusive jurisdiction is that in some cases (e.g. where CSAV is suing for freight or other liabilities) it may be quicker and cheaper to sue the shipper in the place of its domicile rather than sue in England and enforce abroad. It may, also, be highly desirable for CSAV not to sue in England, if an English judgment would not be enforced in the place[s] where the paying party's assets are situated.

49. Hin-Pro also submits that it is simply wrong to regard an agreement for *non-exclusive* jurisdiction as otiose where there is an English law provision. Leaving aside proceedings to which CPR 6.32 or 6.33 apply, if an agreement is governed by English law the English Court will have jurisdiction: PD 6 B 3.1.(6) (a). But that does not mean that it will necessarily exercise it, particularly if the facts in issue have nothing to do with England. The court is, however, very likely to do so if, in addition to an agreement on English law, there is also an agreement to English jurisdiction, even if it is not exclusive, so that PD 6 B 3.1. (6) (b) also applies.

50. In *British Aerospace v Dee Howard* [1993] 1 Ll R 368, Waller J (as he then was) had to consider the following clause:

> "*This agreement shall be governed by and be construed and take effect according to English law and the parties hereto agree that the courts of law in England shall have jurisdiction to entertain any action in respect hereof...*"

He referred to Staughton LJ's observation in *Sohio* that he could think of no reason why parties should go to the trouble of saying that the English courts should have non-exclusive jurisdiction, but could think of every good reason why the parties should choose that some courts should have exclusive jurisdiction, so that both sides could know where all cases were to be tried. He went on to say:

> "*In the instant case the parties have expressly agreed English law and there would be no need to expressly agree that the English court should have jurisdiction or the English court to have non-exclusive jurisdiction. The English court would in any event have such jurisdiction, and by expressly agreeing to English jurisdiction they must be seeking to add something, i.e. that the English court should have exclusive jurisdiction.*"

51. Like the judge I can see a reason for a non-exclusive English jurisdiction clause, and I do not regard such a clause as without additional benefit where there is, also, a

provision for English law. The nature of that benefit appears from *Import Export Metro Limited v CSAV* [2003] 1 Ll R 405. In that case clause 24 of the CSAV bills was in materially the same terms as clause 23. Gross J (as he then was) declined to stay proceedings brought in England in reliance on the clause as sought by CSAV. He held, following extensive citation of authority, that, even in the case of a non-exclusive jurisdiction clause, it required "*strong reasons*", ordinarily going beyond a mere matter of foreseeable convenience and extending either to some unforeseeable matter of convenience or into the interests of justice itself, to allow a party to depart from the bargain it had struck in agreeing to English jurisdiction; and on the facts of that case there were none.

52. In that case the parties and the court proceeded on the basis that clause 24 of the CSAV bills provided for the non-exclusive jurisdiction of the English courts. The background was this. Metro had commenced proceedings in England under 11 bills of lading alleging that CSAV had delivered goods without production of the original bills of lading. Having missed the one year time bar under the Hague/Hague Visby rules in this country, it began proceedings under 14 other bills of lading in Chile, which, by virtue of its adherence to the Hamburg Rules, had a longer time limit of 2 years. As a result Metro had no interest in arguing that the clause provided for *exclusive* English jurisdiction. CSAV had sought a stay of the English proceedings in favour of Chile, because, it would appear, provisions of the law of Chile relating to the discharge of performance there, were more favourable than its view of English law. So it, also, had no interest in arguing that the clause represented an *exclusive* jurisdiction clause in favour of the English court.

53. Gross J (as he then was) said this at paragraph 5(iv) and (v):

> "*(iv) As to proceedings in Chile, the following facts were not in dispute: First, that claims for loss of or damage to cargo are subject to mandatory arbitration; contractual clauses (such as the final sentence of cl.24 of the bills of lading) purporting to provide for the reference of such proceedings to the Chilean Courts have been declared by the Chilean Courts to be void. Secondly, under Chilean law, the provision contained in cl.24 of the bills of lading for English law and jurisdiction will be deemed null and void; the Metro Chilean claim will be determined in accordance with Chilean substantive law. Thirdly, if CSAV's application succeeded then, if Metro so chose, its claims under the bills of lading could be heard by the same arbitrator already appointed to hear the Metro Chilean claim.*
>
> *(v) Reverting to cl.24 of the bills of lading, it was not in dispute that it provided for English law and non-exclusive English jurisdiction. The second sentence recognised that in certain jurisdictions (for example where the Hamburg Rules are applicable), the English jurisdiction clause might be disregarded. On the material before me, it appears that the third sentence represented an ineffective preference for the Chilean Courts over Chilean arbitration; as already noted, such clauses have been held by the Chilean Courts to be null and void.*"

54. In his judgment Cooke J said this:

> *"30 Miss Poonam Melwani QC does not quarrel with anything said by the judge, save insofar as, without argument, he accepted that the clause was a non-exclusive jurisdiction clause. The bills of lading in the current action provided in clause 2 for a clause paramount and for the application of the Hague Rules, save in three situations. First, where as a matter of English law and the English Carriage of Goods by Sea Act 1971 the Hague-Visby Rules are compulsory applicable. In such circumstances, those Rules would fall to be applied. Secondly, where there are shipments to and from the United States of America, US COGSA is to apply. Thirdly, where the bill of lading was subject to legislation which makes the Hamburg Rules compulsorily applicable, then those rules would apply "Which shall nullify any stipulation derogating therefrom to the detriment of shipper or consignee".*
>
> *31 The terms of clause 23 of the bills and the exclusive jurisdiction clause (if that is what it is) must be seen in the light of this provision. There can be no doubt that the second and third sentences of the clause envisage and provide for the situation where proceedings are brought elsewhere than England. The third sentence specifically refers to Chile, the country where CSAV is incorporated. Chile is a party to the Hamburg Rules. Whereas neither the Hague nor the Hague-Visby Rules make any provision about jurisdiction, the Hamburg Rules, by contrast, do. Article 21 essentially provides that the claimant, at his option, may institute an action in a court within the jurisdiction of which (a) the defendant has his principal place of business or habitual residence; (b) the contract was made; (c) the cargo was loaded or discharged; or (d) any additional places designated by the contract of carriage. Article 23 then provides that any stipulation in the contract is null and void to the extent that it derogates from the provisions of the Convention. An exclusive jurisdiction clause is, therefore, to be of no effect, to the extent that it does not permit actions to be brought in the places designated in Article 21."*

I agree with this summary. As is apparent from it, the Hamburg Rules, specifically referred to in clause 2 of the bills, provide part of the contractual background.

Discussion

55. The contracts contained in or evidenced by the bills of lading are, so far as is presently relevant, contracts of adhesion. Clause 23 is a standard term in a standard form prepared by CSAV, which is unlikely to be, and in this case was not, the subject of separate negotiation. It will apply to a wide range of shipments by many different shippers from and to many different ports. It does not seem to me that those circumstances (equally applicable in *Wansa*) themselves cast much light on the true interpretation of the clause. This is a contract between corporations engaged in international trade; it is not one between consumers.

56. Nor is it a case such as *S & W Berisford Plc v New Hampshire* [1990] 1 Lloyd's Rep 454 where a provision in a printed form of insurance policy "*This insurance is subject to English jurisdiction*" was held by Hobhouse J (as he then was) to be "*inapt to*

create any obligation" on the part of the assured to litigate only in England, in circumstances where it was only the assured who was likely to sue. The clause was treated as "*a statement to the assured, who may be foreign, that the rights he has under the policy are capable of enforcement in the English Courts*" and a "*contractual agreement to the invocation of that jurisdiction*". The "*very limited*" mutuality of the clause in practice was treated as significant.

57. The bill of lading contracts are, like all commercial contracts, to be interpreted in the light of the facts which were known to the original parties to it or which were reasonably available to them in the situation in which they were at the time of the contract: *Rainy Sky v Kookmin Bank* [2011] UKSC 2900 at [14], applying *ICS v West Bromwich Building Society* [1998] 1 WLR 896.

58. That begs the question as to what facts fall into that category. The first is knowledge of the English language. I do not accept Hin-Pro's submission that the fact that the bills of lading will probably be issued to companies staffed by those whose first language is not English should affect the way in which they are to be interpreted, or that the court should endeavour to determine what the words would mean to a person in that category. This would be an exercise fraught with difficulty, not least because it would, potentially, produce different results according to the non-English first language chosen, and require a determination, in many cases incapable of ready resolution, of which first language the reasonable man is to be taken as speaking. In agreeing in English to an English law contract the parties must be taken to have agreed that it shall be interpreted with all the nuances of the English language and in the way that a speaker whose first or only language was English would do so.

59. More debatable is whether clause 23 should be interpreted in the light of the provisions of the CPR about service out of the jurisdiction. It seems to me somewhat unrealistic to regard the knowledge of both parties to these bill of lading contracts as extending to the provision of the CPR. But, even if such knowledge should be treated as reasonably available, I do not think that that takes the matter much further. Whilst I accept that a non-exclusive English jurisdiction clause is not otiose if there is agreement as to the application as to English law, that leaves unresolved whether or not the present clause provides in effect for exclusive jurisdiction.

Conclusion

60. I have come to the conclusion that it does for the following reasons.

61. First, the words "*shall be subject to*" are imperative and directory. They are not words which are apt simply to provide an option. That is certainly the case in relation to the applicable law and, *prima facie*, the same should be so in relation to jurisdiction. In *Svendborg* the words "*In all other cases this Bill of Lading is subject to English law and jurisdiction*" were held to provide for exclusive jurisdiction. The phrase "*This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and jurisdiction* " is, for this purpose, stronger. This is not wording which does no more than indicate consent or agreement to English jurisdiction. It is transitive in the sense that the parties agree to submit all disputes to the English court, rather than submitting themselves to its jurisdiction if that jurisdiction is invoked: see, in this respect, *Continental Bank N.A. v Aeakos Compania Naviera S.A.* [1994] 1 Lloyd's Rep. 505, where such an approach was taken in respect of a clause which read "*Each*

of the Borrowers ... irrevocably submits to the jurisdiction of the English Courts"; and where Steyn LJ (as he then was) said that "*it would be a surrender to formalism to require a jurisdiction clause to provide in express terms that the chosen Court is to be the exclusive forum*".

62. Consistently with this analysis, in *Konkola Copper Mines plc v Coromin* [2005] 2 Lloyd's Rep 55 Colman J interpreted the words "*This policy is subject to Zambian law, practice and jurisdiction*", if standing alone, as signifying that all parties were to refer all disputes to the Zambian courts and not merely to consent to such jurisdiction should it be invoked. See also *Austrian Lloyd Steamship Co v Gresham Life Assurance Society Ltd* [1903] 1 KB 249 where an agreement to submit all disputes arising out of a contract of insurance to the jurisdiction of the courts of Budapest having jurisdiction in such matters was held by Romer LJ to be an exclusive jurisdiction agreement. He pointed out that if there had been an agreement in similar terms to submit to the decision of a particular individual there could have been no doubt that it would have amounted to an agreement to submit any dispute to the arbitration of that person.

63. Second, whilst I accept (i) that a non-exclusive English jurisdiction clause is not worthless or otiose even when there is express provision for English law, and (ii) that there can, generally speaking, be only one law governing the contract but that there can be more than one court having jurisdiction over disputes, the natural commercial purpose of a clause such as the present is to stipulate (a) what law will govern; and (b) which court will be *the* court having jurisdiction over any dispute. If "*shall be subject to*" makes English law mandatory (as it does) the parties must, as it seems to me – as it did to Staughton LJ - be taken to have intended (absent any convincing reason to the contrary) that the same should apply to English jurisdiction. I do not think that the reasonable commercial man would understand the purpose of the clause to be confined to a submission to English jurisdiction, if invoked, or to an underscoring of the convenience of litigation here.

64. In a case such as the present, there is only limited benefit in specifying England as an optional jurisdiction without any obligation on either party to litigate here. The number of courts that might have jurisdiction over a dispute between the bill of lading holder and the owners is at least as large as the range of countries in which (in this and other cases) cargo may be loaded, transhipped, or discharged, and might include the country where the bill of lading contract was made or that of the ship's flag. Some of these countries are likely not to apply English Law, despite clause 23, if their jurisdiction is invoked. Some might apply it in an idiosyncratic way. Which court a claimant might select could not, itself, be predicted with any certainty. In those circumstances it makes little commercial sense to add England as an optional additional court, but without any obligation on either party to litigate there; and there was every reason to think, as the judge did, that when the parties were agreed that claims and disputes should be determined by the English High Court, by necessary inference they were agreeing that they should not be determined elsewhere. That would make good commercial sense.

65. What I have said in the previous paragraph takes some account of the fact that the terms of the bill of lading will apply not only to the bills of lading in suit, but to the many other bills which CSAV will issue to other shippers. I regard that as a relevant

consideration. A reasonable person would realise that the clause was intended for widespread use by CSAV for many different shipments.

66. Third, there is obvious sense in making both English law and English jurisdiction mandatory. Whilst foreign courts may (but will not necessarily) apply English law if that is what the parties have agreed, England is the best forum for the application of its own law.

67. Fourth, the use of the phrase "*If **notwithstanding the foregoing**, any proceedings are commenced in another jurisdiction*" in the second sentence is, as it seems to me, a recognition that the first sentence requires litigation in England as a matter of contract. I do not regard it as realistic to interpret it as meaning "notwithstanding that advantage is not taken of the option for English jurisdiction". If the first sentence made English jurisdiction optional, the phrase "*notwithstanding the foregoing*" would be unnecessary. Like the judge I would treat the phrase as if the clause read "If notwithstanding the parties' agreement that all claims or disputes arising under the bill of lading shall be determined in accordance with English law and by the English High Court".

68. Fifth, as the judge recognised, the second and third sentences of the clause cover a situation where the first sentence is ineffective e.g. because of the application of the Hamburg Rules (as in Chile and elsewhere) or where the country whose jurisdiction is invoked does not recognise the intended effect of an exclusive jurisdiction clause as in China or, in some circumstances, Canada: *OT Africa Line v Magic Sportswear* [2004] EWHC 2441 (Comm) – see section 46 (1) of the *Canadian Maritime Liability Act.* They provide that, in that event, the proceedings are at least to be before the ordinary courts – ineffective although that provision is in Chile.

69. Sixth, it does not seem to me that much assistance in the interpretation of this clause is - as Hin-Pro contends - to be derived from the *contra proferentem* rule. That rule has been said to have limited application in the interpretation of ordinary commercial contracts. In *K/S Victoria Street v House of Fraser (Stores Management) Limited* [2012] Ch 497 Lord Neuberger MR observed at [68], in a case of a negotiated contract, that "*such rules are rarely if ever of any assistance when it comes to construing commercial contracts*" and that "*the words used, commercial sense, and the documentary and factual context are, and should be, normally enough to determine the meaning of a contractual provision*".

70. There are, however, observations in other cases that indicate that the principle may "*still sometimes be of assistance when construing a contract which is in the standard form of one of the parties*"; per Neuberger LJ in *Taylor v River Droitte Music Ltd [2006] EWCA Civ 1300 at [142]* and per Lewison LJ in *SAS Institute Inc v World Programming Limited [2013] EWCA Civ 1482 at [108]* ("*...the licence agreement is offered on a take-it-or-leave-it basis...There is no room for negotiation. If there were any doubt about the meaning of the licence at this stage in my judgment the application of the contra proferentem principle would tip the balance in WPL's favour. In my judgment the judge was wrong to rule out the principle at an early stage in his analysis*").

71. In *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] BCC 388, 394 Lord Mustill observed that "*the basis of the contra proferentem principle is*

that a person, who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not".

72. The rule has not so far featured in any of the authorities which consider whether a jurisdiction clause was exclusive or non-exclusive. In the light of what I say below this may not be particularly surprising.

73. The rule invites a construction adverse to the *proferens* where the clause is ambiguous. For the reasons which I have given it does not seem to me that clause 23 is of that character. If that be too strong a view, it would, in my judgment, be necessary to assess whether, when the contract was made, a requirement of English jurisdiction was more favourable to the owner than a non exclusive clause: see the dissenting judgment of Cote J in the Canadian case of *Crawford v Morrow* [2004] ABCA 150 at [68-69] - cited with approval in *Lewison* on *The Interpretation of Contracts* (5th Ed) at 7.08 - where he said:

> *"... If the doctrine does apply, it tells the Court to select one of the two possible interpretations of the contract, the one less favourable to the party who drafted the contract.*
>
> *That refers to selecting one interpretation of the contract, not selecting one result of the suit. The proper interpretation of the contract must exist at the time it is made, and not change. It cannot come and go as the parties' fortunes wax and wane. It cannot be unknowable and shrouded in fog until after the event. For example one interprets an insurance contract the same way before and after a fire, and it has meaning before any fire".*

74. That assessment seems to me a very difficult task which admits of no clear answer, given that the circumstances of any putative litigation (both as to the identity of the claimant, the facts of the claim and the defence to it and the possible alternative jurisdiction) would be unknown. It would, also, beg the question as to what was meant by "favour" in this context. If the question is which court would be most likely to apply the relevant law correctly, the answer would be England. That characteristic would be of benefit to both parties. If the question was which court would be quicker, cheaper or involve the parties in less expense (e.g. in being represented and securing the availability of evidence) the answer might well be unclear, and differ according to whose interests were under consideration.

75. Hin-Pro submits that CSAV, which introduced the clause, must have thought that it would be for its benefit. But it was unlikely to be of benefit to CSAV's customers unless they were based in England, and for small size customers litigation in England would be a very real and, quite possibly, major inconvenience. This would be particularly so if their claim was a modest one. Most claims would be likely to be against CSAV, which would probably not need to resort to litigation since freight would either be prepaid or, if it was not, they would have a lien for it.

76. In truth, as it seems to me, the clause binds and benefits both parties in the same or, at any rate, a similar way. The benefit of the clause is that it provides certainty and the

selection of a court which will be neutral and which will be applying its own law. Whether in relation to any given claim the stipulation of English jurisdiction benefits one party or the other will depend on the nature of the case brought and by whom it is put forward. In some cases the shipper or person entitled to sue under the bills will be disadvantaged; in others it will be CSAV. Even if the preponderance of advantage (whether looked at in relation to the particular voyage the subject of an individual bill or in relation to the totality of voyages carried out by CSAV) is with CSAV I would not regard that as a good enough reason to treat the clause as non exclusive.

77. Seventh, whilst I accept (i) that authorities in relation to different provisions in different contracts are, at best a guide; (ii) that the result in other cases is of no binding force in relation to a different clause; and (iii) that the question is one of construction and nothing more, the tenor of English authorities is that an agreement to English law and jurisdiction in this form is likely to be interpreted, as the judge recognised [26], as involving both the mandatory application of English law and the exclusive jurisdiction of the English court: see *The Alexandros T* [2012] 1 Lloyd's Rep 162 and the authorities there cited.

78. I recognize that the suggestion in some of the authorities that an agreement to non-exclusive English jurisdiction is otiose if English law is agreed to apply, is misplaced. But the other considerations that have led to the result in earlier authorities are not; and the tendency to construing clauses such as this as exclusive provides some confirmation of what view the reasonable businessman would take.

Article 21 (1) (d) of the Hamburg Rules

79. An interesting question arose in the course of the hearing as to the meaning, and potential significance of Article 21 (1) (d) of the Hamburg Rules, which provide that the plaintiff may institute an action in a court situated within the jurisdiction of which is situated one of the following places:

> "*(d) any additional place designated for that purpose in the contract of carriage by sea*"

80. I am satisfied that Article 21 (1) (d) is referring to a place designated for the institution of proceedings and not an additional place designated as a port of loading or discharge. In the end that was common ground between the parties. It is also apparent from some of the discussion of possible amendments in the *Travaux Preparatoires* that participants understood that Article 21 (d) permitted the institution of proceedings in additional places designated for that purpose, and not in additional places designated as ports of loading or discharge. In addition the use of the words "*additional*" is inapposite when applied to a port of loading or discharge. If the bill provides for loading or discharge at one place but that occurs at another place, that place is an "alternative", not an "additional" place.

81. Hin-Pro submitted that this analysis supported its case that the jurisdiction clause was non-exclusive. A non-exclusive clause would be consistent with Article 21 (1) of the Hamburg Convention. An exclusive jurisdiction clause would not - because Article 23 provides that "*any stipulation ...in a bill of lading ...is null and void to the extent that it derogates, directly or indirectly, from the provisions of the Convention*".

82. I do not regard Article 21 (1) (d) as of any substantial assistance to Hin-Pro's argument. Article 23 of the Hamburg Rules would not render clause 23 void, but only void in so far as it provides for exclusive jurisdiction. Even if the effect of the Rules was to render the clause wholly void, that would not, in my judgment, affect the proper construction of clause 23, which is to be determined in accordance with English law. The fact that the Hamburg Rules would treat the first sentence of clause 23 as either void, or void so far as it provided for exclusivity, does not determine how it is, in English law, to be interpreted; especially when the second and third sentences of the clause are apt to cater for the situation where another country does not recognise exclusive jurisdiction clauses as ousting its jurisdiction.

83. For these reasons I would dismiss the appeal.

Lord Justice Beatson:

84. I agree.

Lord Justice Elias:

85. I, also, agree.