The Hon Mr Justice Morison : Commercial Court. 6th March 2006

1. This is a challenge to the court's jurisdiction and a cross-application for an anti suit injunction.

2. The underlying dispute relates to a contract of carriage evidenced by a bill of lading dated 6 October 2003 in respect of a shipment of goods from Hamburg in Germany to Cartagena in Colombia on board a vessel called the M.V. HORNBAY. The Claimants are a German ship owning company that operates a liner service to South America. The First Defendants were the consignees of a cargo shipped on board the vessel. The cargo was printing machinery which was, contrary to instructions, stowed on deck as opposed to under deck. During the early stages of the voyage there was inclement weather and the goods were landed at Le Havre and are a constructive total loss.

3. On its face the bill of lading referred to a jurisdiction clause on its reverse, and by clause 37 it was stated that *"The contract evidenced by this bill of lading shall be governed by English Law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English law to the exclusion of the Courts of any other country."*

4. Other standard terms include an express incorporation of the Hague-Visby Rules (including thereby the weight related limitations and a 1 year limitation period) and a Himalaya Clause exempting the Claimants' agents from *"any liability whatsoever … to the Consignee"*.

5. The Second Defendants are the cargo insurers, ACE, who are responsible for the events which have given rise to this jurisdiction challenge.

6. ACE procured proceedings to be issued against Maritrans, the Claimants' agents in Colombia, in the Colombian courts, seeking judgment for the full value of the cargo. That claim is founded upon the contract of carriage and Maritrans are claimed to be contractually liable. Reliance is placed on two Articles of the Colombian Code of Commerce:

7. Article 1455 which provides: *"The [shipowner] of every foreign ship arriving to port must have a maritime agent accredited in the country. For all legal effects, the maritime agents of the ships must be the representative of their owners .."*

   Article 1492: *"The responsibilities of the agent are as follows:*
   4. *To legally represent the [shipowner] or captain regarding responsibilities inherent to the ship of which it is the agent ..*
   5. *To personally and with solidarity be responsible with the captain of the ship for the non-execution of the duties relating to the delivery or reception of the merchandise."*

8. To some extent the legal effect of these provisions is controversial and the two experts are not in agreement. The Defendants say that a contract for the carriage of goods to and delivery in Colombia is governed by Colombian Law and secondly the parties cannot agree a choice of foreign law and jurisdiction as any such term would be void and contrary to public policy: it would infringe the sovereignty of its law. Pursuant to Article 23.5 of the Code of Civil Procedure, the forum for a contractual dispute is to be determined by the place of performance or the Defendant's domicile, at the plaintiff's option. Contracts arranged abroad but to be performed in Colombia must be governed by Colombian Law except where the parties have agreed to resolve their disputes by international arbitration. The Claimants dispute the proposition that a contractual choice of foreign law or place of jurisdiction other than Colombian Law or in the Colombian courts [at the claimants' option] would be contrary to public policy and unenforceable. They argue that the express exception for international arbitration emphasises that the Claimants' arguments cannot be right, since the law would not provide for an exception which was contrary to public policy. Since this argument before me was concluded, a judge at first instance has found that the Colombian courts have jurisdiction and will apply Colombian law to the dispute. The judgment will be appealed if necessary and a notice of appeal has been filed. On the basis of the written material I cannot resolve the issues of fact as to the proper interpretation of Colombian Law and, for reasons which will emerge, I do not think that I have to do so to rule on the two substantive applications before the Court:

   (1) an application by the Defendants challenging this court's jurisdiction and

(2) an application by the Claimants for an anti suit injunction against the Defendants in respect of the Colombian proceedings.

9. As counsel for the Claimants submitted, the resolution of these disputes has commercial significance. If the English proceedings for a negative declaration, which were commenced contemporaneously with the commencement of the Colombian proceedings, were allowed to proceed, the cargo interests would be likely to recover nothing because of the time limit, which, despite reminders of the position, the defendants failed to heed. On the other hand, the Colombian Courts will not apply the "Hague-Visby" Rules and may not recognise and give effect to the parties' contractual bargain as to choice of law and forum; thus, if those proceedings are allowed to continue, ACE may be able to recover the full value of the claim without reference to the provisions of the "Hague-Visby" rules.

The Jurisdiction Challenge

10. I start with the Defendants' jurisdiction challenge. The Defendants challenge the validity of clause 37 as being an effective choice of law or forum clause. They do so *"on the basis that the appropriate law to determine the validity of that clause is Colombian law and by that law a choice of law and court is void and contrary to public policy for contracts to be performed in Colombia"*

11. The choice of applicable law is governed by the Contracts (Applicable Laws) Act 1990 which incorporates the Rome Convention into English law [so much is common ground].

12. The Convention provides, relevantly, that:

"Article 3.1: A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."

Article 3.4: The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 8.1 The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

Article 8.2 Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

The Defendants' arguments

13. ACE and their insured contend that it would not be reasonable to determine the effect of their conduct in accepting the express choice of law in accordance with English Law; rather, the issue of consent [under Article 8.2] should be determined by Colombian Law for the following reasons:

(1) The Claimants are a company carrying on business running a regular container service to Colombia. They comply with the requirement of Colombian Law that it must have a representative in Colombia and the Claimants should therefore be aware of the provisions of Colombian law which apply.

(2) The First Defendant was not a party to the original contract with the Claimants; it entrusted the choice of carrier to its Colombian forwarding agent [Translago] with whom it contracted for the movement of the print machinery from Hamburg to Cartagena.

(3) The First Defendant was unaware prior to the cargo damage that the Claimants purported to do business on terms that included a choice of English law and jurisdiction.

(4) The First Defendant has not issued proceedings against the Claimants in Colombia: they have merely sued Maritrans, their representative relying on the relevant principles of Colombian law [Articles 1455 and 1492].

(5) Colombian law stipulates that a contract for the carriage of cargo to and for delivery in Colombia is governed by Colombian Law and that the parties cannot agree a choice of foreign law and jurisdiction as any such term would be void and contrary to public policy. The Claimants could have lawfully chosen arbitration in a foreign forum but did not do so.

The Claimants' submissions

14. Mr Timothy Otty for the Claimants submitted that there are two questions:
    (1) would it be unreasonable in the circumstances to look to English law to determine whether the First Defendants consented to the choice of English law? and
    (2) if it is unreasonable, can the First Defendants rely upon Colombian Law to establish that it did not consent to clause 37?

15. He submitted that some guidance is to be derived from the judgment of Mance J. in ***Egon Oldendorff v Liberia Corporation*** **[**1995] 2 Lloyd's Reports 64 at pages 70 – 71. In essence the Judge decided that the question of unreasonableness cannot be decided by the law of the party's residence nor by the law to which the party had apparently consented but, rather, the court should answer the question by adopting a dispassionate, internationally minded approach. The onus is on the party seeking to invoke Article 8(2).

16. The First Defendant is a substantial company whose business is not confined to Colombia. It is to be inferred that this was not the first occasion when it had decided to make imports. It used freight forwarding agents to whom it gave instructions as to the terms of the carriage contract. It must have been aware that international carriage contracts frequently contained choice of law and jurisdiction clauses. There can be no suggestion that the forwarding agents were not entitled to contract as they did for the First Defendant's benefit.

17. The Claimants operate world wide. The fact that they also trade into Colombia cannot suffice to oust a very clear jurisdiction clause. In any event there is a dispute between the parties as to the effect of Colombian Law in respect of jurisdiction clauses. The proposition that an agreement to apply a law other than Colombian law is contrary to public law and order is disputed.

18. As to the jurisdiction clause, such clauses are specifically excluded from the scope of the Rome Convention [Article 1.2(d)] and the validity of clause 37 of the Bill of Lading is to be determined by the proper law of the contract, namely English Law [see **OT** ***Africa Line Ltd v Magic Sportswear Corporation & Others*** [2005] 2 Lloyd's Law reports 170 at 173 and 183, paragraphs 2 and 60]. Under English Law such a clause is valid and effective to confer exclusive jurisdiction on the English Courts and Maritrans are able to invoke the clause by virtue of the Contracts (Rights of Third Parties) Act 1999. This latter point was abandoned, rightly, in view of section 6((5)(a) and (6)(a) of the Act.

Decision on Choice of Law & Jurisdiction

19. It seems to me that in a case where Article 8(2) of the Rome Convention is invoked, the court should follow the approach suggested by Mance J. I agree with him that, having regard to the language of the article, those responsible for agreeing the Convention cannot have intended that a court would apply either of the two laws referred to: that is, either the law of the challenging party's habitual residence [Colombian law] nor the law specified in the contract [English Law] when answering the first question. Here, there is no doubt that through the forwarding agent, the Defendants agreed to the application of English Law to the contract of carriage. In international trade by sea, there must be a regime whereby a contract of carriage between carrier and consignee comes into existence even where the carriage may have initially been contracted for with the carrier by a third person, such as a freight forwarder or the original cargo owner. The terms of such contracts are negotiable and, in this case, the terms of this contract were negotiated on the instructions of the Defendants, including ACE who were the cargo insurers. Against that background, I ask myself the question: 'does it appear from the circumstances that it would not be reasonable to determine the effect of the Defendants' express choice of English Law in accordance with that law'? The answer is 'no'. I can think of no good reason why it would be reasonable to judge the consent of the Defendants otherwise than by the law of their choice. I am dealing with a commercially experienced company, with a commercially aware insurance company involved, who must be assumed, I think, to understand that contracts of international carriage by sea often contain jurisdiction and choice of law clauses as well as applying international rules. Their failure to choose a different law or a different place for the determination of any dispute could have been bargained for. They chose not to specify terms and it may be that it would not have been easy to have made a contract without clause 37. There can be no suggestion that the Defendants were entitled to repudiate the carriage contract merely because of the terms of clause

37 on the grounds that the clause was not stipulated for. There is no suggestion that the Defendants regard Translago as being in breach of their instructions in negotiating the particular contract.

20. In my view, looking at the matter dispassionately, the Defendants have entered into a contract, by which they are bound, with a choice of law and jurisdiction clause in it and there is no reason why they should be heard to say that their consent was not real or genuine or was not given. The mere fact, if it be a fact, that by agreeing an English law jurisdiction clause and an English law clause the Defendants offended Colombian public policy is not of itself a good reason for holding that their consent to Clause 37 was not truly given or that it would be unfair or unreasonable to hold them to their bargain, whatever system of law was applied. *"This was a contract of carriage where goods are shipped in one country for delivery in another country on board a ship whose owners may carry on business in a third country. For this reason it is common for the parties to the carriage contract to agree on the law which is to govern their relationship. In the present case the contract of carriage did contain such an agreement viz that it should be governed by English Law. There can be no doubt that in the light of such agreement, the proper law of the contract was English law. It would, therefore, on any ordinary view of the principles of private international law, be English law which determines whether the exclusive jurisdiction clause applies to the dispute; it should also be a matter of English law to determine whether it is appropriate to restrain any party from acting contrary to the clause by bringing proceedings in some court other than that provided for by that clause."* Per Longmore LJ in *OT Africa Line Ltd v Magic Sportswear & Others* [2005] 2 Lloyd's Law Reports page 170 at paragraph 2.

21. I answer the first question by saying that the Defendants expressly, and effectively, agreed to the choice of English Law as the governing law and to the English Court as the chosen forum in accordance with the parties' express agreement to that effect.

Forum non conveniens and anti-suit injunction

22. **The Defendants' Arguments**

(1) The claim in Colombia is not brought against the Claimants but against Maritrans who are resident in Colombia and who are amenable to the Colombian court's non-exorbitant jurisdiction. The Defendants have not acted vexatiously or oppressively by bringing those proceedings. *Prima facie* the proper law to determine Maritrans' liability to the First Defendant is Colombian law since it is a claim which arises under statute under which Maritrans accepted joint and several liability with the carrier. It is not, so counsel asserted, a direct claim under the contract of carriage.

(2) The applicable principles of law are to be found in the judgment of Thomas J. in ***Akai v People's Insurance Co. Ltd*** [1998] 1 Lloyd's Law Reports 90 104-105; who has helpfully gathered together all the relevant factors. *"To a considerable extent the principles to be applied in an application in the context of a jurisdiction clause in a contract between the parties are the same whether a Court is considering an application for a stay or an application for an anti-suit injunction; the principles generally differ only where the different nature of the relief sought renders a particular principle inapplicable to the form of relief. The principles that are relevant to my decision in this application are the following:*

(1) *It is the policy of the Courts to hold parties to the bargain in respect of their choice of forum by use of a jurisdiction clause, unless there is good reason to the contrary: see* ***The Chaparral****, [1968] 2 Lloyd's Rep. 158.*

(2) *The same principles apply whether the contractual forum is England or another country: see the judgment of Lord Justice Diplock in* ***The Chaparral*** *at p. 164. Mr. Lawrence Collins, Q.C. (who appeared for PIC) argued that Lord Justice Diplock was wrong as a matter of historical analysis of the cases. He may be correct in his analysis of the history (see in particular* ***The Fehmarn****, [1957] 2 Lloyd's Rep. 551 at p. 555; [1958] 1 W.L.R. 159 at p. 164 and the* ***Atlantic Star****, [1973] 2 Lloyd's Rep. 197; [1974] A.C. 436. However, given the developments of this area of the law, I prefer to follow what Lord Justice Diplock said in The Chaparral, though he may have anticipated the developments he was later to make in this area of the law. Looking at the question as a matter of principle today, it must be right to approach all jurisdiction clauses whether English or overseas, on the same basis.*

(3) *Where a plaintiff sues in England in clear breach of a foreign jurisdiction clause, the Court is not bound to grant a stay but has a discretion whether or not to do so; the discretion should be exercised by granting a stay unless a strong cause for not doing so was show: see* ***The El Amria****, [1981] 2 Lloyd's Rep. 119 at p. 123.*

(4) *Where a plaintiff seeks an injunction to restrain foreign proceedings where there is a clear breach of jurisdiction clause, an injunction should be granted as a matter of course but usually should be granted unless good reason was shown why it should not: see* ***The Angelic Grace****, [1995] 1 Lloyd's Rep. 87 at p. 96.*

(5) *Where proceedings are brought in breach of a jurisdiction clause, the test for the grant of an anti-suit injunction is the same test as that which applies where a stay of English proceedings is sought: see* ***Ultisol Transport Contractors Ltd. v. Bouygues Offshore S.A****., [1996] 2 Lloyd's Rep. 140 at p. 149.*

(6) *The Court must on all such applications take into account all the circumstances of the case.*

(7) *If the party applying for a stay or an injunction has already litigated the issue of jurisdiction in another state and failed, this will be a significant factor counting against him if that Court has applied principles relating to jurisdiction similar to those applied by this Court: see* ***The Angelic Grace, Amchem Products Inc. v. Workers Compensation Board*** *(sup.). Where the foreign Court is not bound to apply such principles or has not applied such principles, the fact the issue of jurisdiction has been litigated in another state will not generally be significant (see* ***Airbus Industrie GIE v. Patel****, [1997] 2 Lloyd's Rep. 8.)*

(8) *In the case of a stay, the particular matters to be taken into account are those set out in the judgment of Lord Justice Brandon in* ***The El Amria****, [1981] 2 Lloyd's Rep. 119; 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 applied 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 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.*

(9) *Where the parties have chosen a neutral forum connected with neither party, factors relating to the convenience of the parties or the location of witnesses (such as those set out in (a) and (c) above) are of little relevance: see* ***Attock Cement Co. Ltd. v. Romanian Bank for Foreign Trade,*** *[1989] 1 Lloyd's Rep. 572 at p. 582, col. 1 where Lord Justice Staughton said:*

> *For my part, I think we ought to look with favour on the choice of our jurisdiction, when it appears to have been made in order to find a Court which is neutral rather than one that is convenience.*
>
> *Indeed many international contracts are expressly made subject to the discretion of this Court as a neutral forum in much the same way as arbitration at a neutral seat is chosen. In such cases, it would only be for exceptional reasons that this Court would not exercise the jurisdiction that the parties have chosen.*

(10) *In considering whether to grant an injunction, the Court will also take account of: (a) whether the plaintiff seeking an injunction had applied promptly and before foreign proceedings were too far advanced: see* ***The Angelic Grace****. The longer the delay that occurs before the application is made, the more likely a Court is to refuse it; (b) any voluntary submission to the jurisdiction of the foreign Court, particularly where proceedings have progressed for any period of time: see* ***A/S D/S Svendborg v. Wansa,*** *[1996] 2 Lloyd's Rep. 559 at p. 570; (c) the undesirability of a second set of proceedings where the matter is already being litigated elsewhere, except where there are powerful reasons for so doing: see* ***The Abidin Daver,*** *[1984] 1 Lloyd's Rep. 339 at pp. 344 and 351; [1984] A.C. 398 at pp. 411 and 423."*

23. They are also reaffirmed authoritatively by the House of Lords in ***Donohue v Armco Inc & Others*** [2002] Vol 1 Lloyd's Law Reports 425 at page 431:

"19. The jurisdiction of the English court to grant injunctions, both generally and in relation to the conduct of foreign proceedings, has been the subject of consideration by the House of Lords and the Privy Council in a series of decisions in recent years which include ***Siskina (Owners of cargo lately laden on board) and others v Distos Compania Naviera SA*** *[1979] AC 210;* ***Castanho v Brown & Root (UK) Ltd*** *[1981] AC 557;* ***British Airways Board v Laker Airways Ltd*** *[1985] AC 58; South* ***Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien"*** *NV [1987] AC 24;* ***Société Nationale Industrielle Aérospatiale v Lee Kui Jak*** *[1987] AC 871; and* ***Airbus Industrie GIE v Patel*** *[1999] 1 AC 119. Those decisions reveal some development of principle and there has in other decisions (for example,* ***Mercedes Benz AG v Leiduck*** *[1996] AC 284) been some divergence of opinion. But certain principles governing the grant of an injunction to restrain a party from commencing or pursuing legal proceedings in a foreign jurisdiction, in cases such as the present, as between the Armco companies and these PCCs, are now beyond dispute. They were identified by Lord Goff of Chieveley giving the opinion of the Judicial Committee of the Privy Council in* ***Aérospatiale*** *(at p 892):*

(1) The jurisdiction is to be exercised when the ends of justice require it.

(2) Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.

(3) An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy.

(4) Since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.

24. [I interpolate] This latter case is an example where the court exercised its discretion against the grant of an injunction, despite the existence of an express choice of law and jurisdiction in a contract. The essence of the decision was that the preferable course for the litigation was a one stop case where all issues and parties were before one tribunal. That could only be achieved by refusing the relief but requiring an undertaking from the claimants that they would not seek multiple or punitive damages in the New York courts, whether pursuant to RICO or common law. Therefore, the mere existence of an express choice of forum was not of itself a sufficient ground for an injunction [see Thomas J.'s principle (3)]. (4) The claim in this country is only for declaratory relief; whereas there is a substantive claim in the Colombian courts against Maritrans. Thus, there is no breach of the jurisdiction clause which does not cover Maritrans' liability to the Defendants. Maritrans cannot have the benefit of the Himalaya clause because, on the authority of ***The Mahkutai*** [1996] AC page 650 at pages 666 – 667, such a clause does not operate so as to extend to agents and sub-contractors the benefits of a choice of jurisdiction clause for the reasons given by Lord Goff.

The Claimants' arguments

25. The mere existence of an express choice of jurisdiction raises a very strong presumption that England is a convenient forum for the determination of their disputes and strong grounds will be required to override it. The fact that proceedings were launched against Maritrans was an obvious tactical device by ACE to get round the clear contractual terms. The fact that there is a jurisdictional challenge in the Colombian courts is not a ground for this court to refuse to grant, as opposed awaiting the outcome of the foreign proceedings. England was obviously chosen as a neutral forum for the benefit of both parties; the events giving rise to the destruction of the cargo did not occur in Colombia. The jurisdiction clause could not be clearer or 'more exclusive': "*to the exclusion of the Courts of any other country*". Proceedings in a foreign jurisdiction designed to frustrate even a non-exclusive jurisdiction clause have been described by the Court of Appeal as vexatious: *a fortiori* where the clause gives exclusive jurisdiction: ***Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan and Another*** [2003] 2 Lloyd's Law Reports 571 and paragraph 35 of Longmore LJ's judgment in the ***OT Africa Line*** case. By starting an action in Colombia, ACE have procured a breach of the agreed contractual provisions and have created the risk of inconsistent decisions in different jurisdictions. Insurers should not be permitted to act inconsistently with the rights and correlative obligations to which they were subrogated and the true role of comity is to ensure respect for the parties' agreement and for party autonomy, more generally: see paragraphs 14 and 32 of the *OT Africa Line* case. I propose to make an order in terms to be determined when this judgment is handed down.

Decision on Forum non-conveniens and anti-suit Injunction

26. One of the unattractive features of an anti-suit injunction is that whatever this court says, its order will be liable to be taken as an unwarranted interference with another court's jurisdiction. The position this court is in has been entirely caused by the activities of ACE. What seems to me to be an ideal solution to the issues in this case would be an action against ACE here seeking damages for the tort of procuring a breach of contract, the damages being the difference between what is recovered in Colombia and what, if anything, would have been recovered had the proceedings been conducted here. That case has not been argued before me and I can see that there might be difficulties in law to such a solution. Therefore, I must deal with this case as it stands and on the basis of the materials and arguments presented to me.

27. In the first place, it seems to me that the fact that the proceedings in Colombia are against Maritrans, rather than against the Claimants, is something of a red herring. Maritrans is being sued in Colombia on the basis of the contract of carriage. That, as I read the pleadings, is what is being alleged, and the first head of relief recites that: *"First declare that MARITRANS LTDA as the Maritime Agent of the shipping line Horn Linie contractually liable for the **entire** damages to [the defendants] due to the loss of the printing machine shipped from the port of Hamburg to Cartagena on October 6 2003 as may be evidenced in bill of lading No. …"*

28. The position of Maritrans under Colombian law, as I understand it, is that it is a local 'target' for claims in respect of contracts of carriage for the transport of goods into Colombia but that its liability derives from the contract of carriage made with the principal. That contract of carriage is evidenced by the bill of lading, with all its terms and conditions. The relationship between Maritrans and Horn Linie in respect of this contract of carriage is governed by English Law, as I see it. It is commercially unreal not to recognise that Maritrans will be entitled to an indemnity from Horn Linie and that an action against the agent is, effectively, an action against Horn Linie. I do not understand the argument that in some way the contract upon which Maritrans is sued does not confer on them the benefit of the jurisdiction clause. If, as a matter of Colombian law Maritrans are liable on the contract that cannot by itself affect the terms of the contract. What is causing the conflict is not the law which permits Maritrans to be sued on the contract but rather the provisions of Colombian Law which are said to override the will of the parties to have their relationship governed by English law in proceedings brought in England. In other words, I can see no material distinction between this case and the ***OT Line*** case.

29. Further, I think that the Claimants have a good arguable case for saying that, if they needed to rely on it, which I doubt, the Himalaya clause would of itself give protection to Maritrans. In ***The Mahkutai*** the clause in question contained the words: *"Without prejudice to the foregoing, every such servant, agent, and subcontractor shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier …"*

    The clause in this case is more widely worded: *"every exception, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder"*

30. The argument is that by seeking to confer on their agents the carrier's rights, the clause in the instant case is sufficient to confer the right to jurisdiction and to choice of law. In ***The Mahkutai*** Lord Goff asked the question whether the jurisdiction clause there could be an exception, limitation or provision benefiting the carrier? But it is true to say that this was not the determining factor in the decision. The Privy Council pointed out that the preference shown for one jurisdiction in favour of a carrier could not be said to apply with equal force to all his servants and agents. But in this case, vis-à-vis the statutory agent, there would be no difficulty in reading the clause across to confer on him that right, especially as his liability is dependent upon the contract. But, as I say, this argument is I think unnecessary, as the agent is apparently liable under the contract as evidenced by the bill of lading, and for this purpose is treated as a party to it, with its jurisdiction and choice of law clauses [which are then disapplied]. To that extent, the only real difference between Colombian and English law is that the agent is liable on the contract under that law but not under English Law.

31. It seems to me clear that England as a neutral forum is a convenient one for the hearing of this dispute. The only basis for ACE saying that it is not, is simply because this court will apply the law chosen by the parties to govern their disputes, including the provisions of the Hague-Visby Rules.

32. Because ACE are intent on seeking to avoid the parties' contractual bargain by commencing proceedings in Colombia, it seems to me that an anti-suit injunction is an appropriate form of relief. By granting the injunction the interests of justice are best served. The parties would be given back the forum of their choice and their choice of law. ACE will suffer no prejudice beyond the fact that their commercial position may be worse as a result of the court giving effect to the parties' bargain. There is no good reason not to hold the parties to the bargain they have made. ACE is readily amenable to this court's jurisdiction.

33. This is an international contract expressly made subject to English law and English jurisdiction and it would only be for an exceptional reason that the court would not exercise the jurisdiction conferred on it and there is no such exceptional reason here. It is clearly undesirable that there should be two sets of proceedings proceeding in two different jurisdictions with different laws being applied and different outcomes. It seems to me that the only sensible course at this stage is to grant an anti-suit injunction in order to support the express terms of the bargain the parties made. Whilst this is an order directed only against the parties and not the Colombian Courts, I would wish to record that by making this order no discourtesy is intended to those courts.

34. There are three other matters which are not in substantial dispute:
    (1) Should ACE be joined pursuant to CPR 6.20(3)(c)(c) & (d)? In my view, as ACE are effectively pulling the strings in this case they are properly to be regarded as a necessary and proper party. An injunction against them will be more effective than against Panamerica alone. This was the course taken in the *OT Africa Line* case.
    (2) Should the Claimants have permission to join Maritrans as a party? It seems to me that the plain answer is yes.
    (3) Should the Claimants be entitled to amend their claim for a negative declaration to plead the time limit point? The answer to that question is also yes, since the court would wish to consider all issues at one time.

35. I would ask the parties to draw up an order which reflects this decision and when the judgment is handed down I will consider the question of costs.

Mr Timothy Otty (instructed by Constant & Constant) for the Claimant
Mr Nigel Cooper (instructed by Cozen O'Connor) for the Defendants