House of Lords before Lords Bingham; Rodger; Brown ; Mance; Neuberger : 20th February 2008

LORD BINGHAM OF CORNHILL : My Lords,

1. In this action the seller (Scottish & Newcastle International Limited) seeks to recover the price of goods sold from the buyer (Othon Ghalanos Limited). S&N is a company based in Scotland, Ghalanos a company registered in Cyprus. The contract related to 11 consignments of cider shipped from Liverpool to Limassol in June-July 2004. The question before the House is whether the English court has jurisdiction to entertain the action. The answer to that question turns, by virtue of article 5(1)(b) of Council Regulation (EC) No 44/2001, on whether, as a matter of English law applied to the particular contract made between the parties, the goods were or should have been delivered by S&N to Ghalanos in England. Both Andrew Smith J ([2006] EWHC 1039 (Comm)) and the Court of Appeal (Waller and Rix LJJ: [2006] EWCA Civ 1750, [2007] 1 All ER (Comm) 1027) held in favour of S&N that the English court does have jurisdiction, but Ghalanos challenges the correctness of that conclusion.

2. The general rule, expressed in article 2(1) of the Regulation referred to, is that persons domiciled in a member state must, irrespective of their nationality, be sued in the courts of their home state. That is the result Ghalanos seeks, and if article 2(1) were applicable, S&N would have to pursue its claim in the Cypriot court. But the general rule in article 2(1) is qualified by a special rule in article 5(1) of the Regulation, which provides:

   "A person domiciled in a Member State may, in another Member State, be sued:

   (1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

   (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

   - *in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*
   - *in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,*

   (c) if subparagraph (b) does not apply then subparagraph (a) applies..."

   Thus in matters of contract a person domiciled in one member state need not be sued in the courts of that state but may be sued in the courts of another member state if one or other of the conditions in the article is satisfied.

3. Article 5(1)(a), applying to matters of contract quite generally and therefore very broad in its scope, focuses attention on the particular obligation in question in the particular action and permits a claimant to sue in a member state other than that of the defendant's domicile if the particular obligation in question was or should have been performed in that other member state. But in subparagraph (b) a more specific rule is laid down, not applicable to the whole field of contract, but only to contracts for the sale of goods or the provision of services. In each of these cases, in the absence of contrary agreement, the place of performance of the obligation in question must be taken to be the place where, under the particular contract between the parties, the goods were or should have been delivered or the services were or should have been provided, as the case may be. If subparagraph (b) does not apply, whether because the contract is not one for the sale of goods or the provision of services or because a contract of that character contains no term as to the place of delivery of goods or the place of provision of services, subparagraph (a) applies.

4. The sale of goods contract made between S&N and Ghalanos is, as they agree, governed by English law. Thus it is to that contract, interpreted according to the principles of English law, that we must look to ascertain whether, under the contract, the goods were or should have been delivered in England. This is made clear by the decision of the European Court of Justice in (Case 12/76) ***Industrie Tessili Italiana Como v Dunlop AG*** [1976] ECR 1473, paras 13-15. Thus (as the parties rightly agree) the Regulation does not purport to impose a uniform concept of delivery on all member states but leaves member states to apply whatever, under their rules of private international law, is the law properly applicable to the particular contract, in this case English law.

5. I am grateful to my noble and learned friends Lord Rodger of Earlsferry and Lord Mance for their summaries of the terms of the contract upon which this appeal turns, which I need not repeat. The issue is whether, as held by the courts below, the goods were delivered to Ghalanos under the contract in Liverpool.

6. For reasons given by Lord Mance in paragraph 31 of his opinion, I would reject the primary argument of Ghalanos that Limassol was the contractually agreed place of delivery because that port was entered in box (iv), *"Place of delivery",* on the invoices. The courts below did not accept that argument, and nor would I.

7. For reasons given by Lord Rodger in paragraphs 10 to 17 of his opinion and by Lord Mance in paragraphs 36 to 48 of his opinion, I am of opinion that on a proper analysis of this contract in accordance with established principles of English commercial law the contractual agreed place of delivery was Liverpool and the goods were duly delivered there to Ghalanos. It follows that the English court has jurisdiction under article 5(1)(b) of the Regulation to entertain this claim, and Ghalanos' appeal must be dismissed. Like Lord Rodger, however, I would prefer to reserve my opinion on the points discussed in paragraphs 49 to 55 of Lord Mance's opinion, which do not arise for decision in this case.

LORD RODGER OF EARLSFERRY : My Lords,

8. In about April 2004 the appellants (Ghalanos), a company domiciled in Cyprus, agreed to buy 11 container loads of cider from the respondents (S & N), a company having its head office in Scotland. The contract was subject to English law. The cider was shipped at Liverpool and taken by Zim Line vessels to Limassol where Ghalanos took delivery. Ghalanos have not, however, paid for the cider and S & N now sue them for the price. It

is common ground that, in terms of article 5(1)(b) of Council Regulation (EC) No 44/2001, the English courts do not have jurisdiction unless, according to English law, the cider was "delivered" in England - more particularly, on shipment at Liverpool.

9. For the reasons to be given by my noble and learned friend, Lord Mance, I would reject the appellants' primary argument, that Limassol was the contractually agreed place of delivery, because "Limassol" was written into box (iv), headed "Place of delivery", on the invoices. I concentrate on the appellants' alternative case.

10. So far as relevant, section 61(1) of the Sale of Goods Act 1979 ("the Act") provides that, in the Act, unless the context or subject matter otherwise requires, *"delivery"* means *"voluntary transfer of possession from one person to another"*. Section 32(1) provides:

"Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer."

From the definition of "delivery" in section 61(1) it follows that, in cases where section 32(1) applies, by voluntarily transferring possession of the goods to a carrier for the purpose of transmission to the buyer, the seller is prima facie deemed to have voluntarily transferred possession of the goods to the buyer. For purposes of article 5(1)(b) of the Regulation the place where the seller voluntarily transferred possession of the goods to the carrier would therefore be the place where the goods were "delivered" to the purchaser.

11. S & N say that section 32(1) applies and provides the answer in this case: the goods were delivered under the contract of sale when S & N shipped them on board the Zim Line vessels at Liverpool. Even where goods are delivered to a carrier, however, it does not automatically follow that they are deemed to have been delivered to the buyer. The subsection gives only a prima facie rule, which would have to yield if the terms of the contract between the parties indicated that the seller was to keep, rather than to transfer, possession of the goods. Similarly, it is accepted that where the carrier is the employee or agent of the seller, delivery to the carrier does not constitute delivery to the buyer.

12. The subsection reflects the position at common law. For example, in the (much discussed) case of ***Dunlop v Lambert*** (1839) 6 Cl & F 600, a puncheon of whisky, which merchants in Edinburgh had sold to a customer in England, was lost at sea during a voyage from Leith to Newcastle. The merchants, who had contracted with the carriers, sued them for the loss of the whisky. One of the questions which arose was whether the whisky had been delivered to the purchaser, so that the property or risk had passed to him, by the time it was lost. Lord Cottenham LC observed, at p 620:

"It is no doubt true as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is after such delivery the risk of the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance: the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent."

He added, at pp 620-621: *"But though the authorities all establish the general inference I have stated, yet that general inference is capable of being varied by the circumstances of any special arrangement between the parties, or of any particular mode of dealing between them."*

(The parallel report of both these extracts is to the same effect, even if the language differs somewhat: ***Dunlop v Lambert*** (1839) Macl & Rob 663, 674-675.) The rationale for the approach which the Lord Chancellor outlines must be that, when the consignor delivers the goods to the carrier, the consignee is then in a position to take delivery of them from the carrier at the other end.

13. In the present case the contract provided for S & N to send the goods to Ghalanos. But Ghalanos designated the carrier to be used: shipment was to be from Liverpool or Felixstowe *"per Zim Line vessel as per attached shipping schedule…."* In addition, although S & N were to pay the freight, Ghalanos told them that it was to be *"at the rate of Stg £275,00 liner terms all in plus BAF (Banker Adjustment Factor) per 20' container as agreed with the Cyprus agents of Zim Line."* In other words, the rate had already been negotiated between Ghalanos and the Cyprus agents of the designated carriers, Zim Line. Having regard to these factors and applying the approach of Lord Cottenham in ***Dunlop v Lambert***, I would hold that the carriers, Zim Line, are properly to be regarded as the agents of Ghalanos for purposes of section 32(1). It follows that, by shipping the containers of cider on board the vessels at Liverpool, S & N are prima facie deemed to have delivered the cider to Ghalanos in Liverpool. The question then is whether there is anything to displace that prima facie conclusion.

14. Before Andrew Smith J it seems to have been common ground that, since the terms of the contract were CFR, no distinction was to be drawn between it and a CIF contract. In the Court of Appeal Rix LJ observed, however, at para 9, that, although it was expressed to be CFR, the contract contemplated by the parties differed very little from a form of FOB contract. I agree. But I doubt whether it matters, for present purposes, where exactly the parties' contract stands in the spectrum of possible contracts. What matter are the terms of the arrangement between the parties.

15. In this case, not only were the sellers to pay the freight, but they were also to obtain the bills of lading from the carriers. This is apparent from the term providing for the documents to be forwarded to Ghalanos immediately

after shipment. The bills were, however, to be made out to Ghalanos as consignee and were to be non-negotiable. Nor did S & N reserve the right of disposal of the cider. Plainly, therefore, the property in the cider had passed to Ghalanos and the consignors, S & N, were to have no continuing interest in the cider once it had been shipped. This is confirmed by the requirement that S & N were to forward the documents to Ghalanos immediately, by registered and express mail: the clear intention was that Ghalanos were to have the bills of lading, and so were to be in a position to take delivery of the cider from the carriers, when they were notified that the vessels had reached Limassol. This, again, was consistent with payment of the price only being due 90 days after the vessel arrived there.

16. In my view, all these factors combine to confirm that, by shipping the containers on board the vessels at Liverpool with the intention that Ghalanos should be in a position to take delivery of them immediately on their arrival at Limassol, under section 32(1) of the Act S & N are deemed to have delivered the cider to Ghalanos at Liverpool.

17. Another way of putting the same point would be to say that, in these particular circumstances, where the property had passed and S & N had no continuing interest in the cider after shipment, the bills of lading evidenced a bailment, with Zim Line as bailee and the consignee, Ghalanos, as bailor: ***Borealis AB v Stargas Ltd (The Berge Sisar)*** [2002] 2 AC 205, 219, para 18, per Lord Hobhouse of Woodborough.

18. I accordingly agree with Lord Mance that, in terms of article 5(1)(b) of the Regulation, the High Court has jurisdiction in this case. He goes on to indicate that, in his view, the place of shipment would also be the place of delivery for the purposes of article 5(1)(b) in all types of FOB contracts, including those which provide for the seller to retain the bills of lading, for instance, until the buyer has paid for the goods. I readily acknowledge the powerful factors in favour of that view, including the language of article 5(1)(b) - which may be thought to focus on the physical delivery of the goods themselves - and the desirability of having an easily applicable rule for determining jurisdiction.

19. Nevertheless, I prefer to reserve my opinion on the point. I can explain my reasons very briefly.

20. A term under which the seller is to retain the bills of lading until payment is, of course, common in both CIF and FOB contracts. Since the bill of lading is the symbol of the goods, under such an arrangement the seller or his agent not only retains possession of the bill of lading but also, thereby, retains the right to possession of the goods until the price is paid. Often, the property in the goods will also be intended to pass only on payment. In such a case, even though the seller ships the goods on board a vessel nominated by the buyer, by doing so, he does not intend to transfer possession of the goods to the buyer. On the contrary, the intention of the parties is that the buyer is not to obtain possession of the bill of lading - and hence of the means to take delivery of the goods from the carrier - unless and until he has paid the price. In that situation it seems to me at least arguable that the prima facie rule in section 32(1) of the Sale of Goods Act would be displaced by the terms of the contract between the parties. So, under the English law of sale, the goods would not have been "delivered" to the buyer by being shipped on the carrier's vessel. I refer, by way of illustration, to the discussion of the passing of the right to possession of the cargo in the judgments of Brandon J and Roskill LJ in ***The Albazero*** [1977] AC 774, 800-801, and 809-812, respectively. Their reasoning was approved by Lord Diplock in this House, at p 840.

21. Whether, even if the goods had not been "delivered" for the purposes English law, they would none the less have been "delivered" for the purposes of article 5(1)(b) of the Regulation gives rise to other questions which it is also unnecessary to decide on this occasion.

22. For these reasons I would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD : My Lords,

23. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Mance and for the reasons he gives, with which I agree, I too would dismiss this appeal.

LORD MANCE : My Lords,

24. The question on this appeal is whether the English courts have jurisdiction under article 5(1)(b) of the Judgments Regulation (EC) No 44/2001 over a claim for the price of cider sold and delivered by the respondents, Scottish & Newcastle International Limited ("S&N") to the appellants, Othon Ghalanos Limited ("Ghalanos"). S&N are a Scottish company based in Edinburgh, where it appears that the price should have been paid. Ghalanos are a Cypriot company, and were until 2004 distributors to S&N (following, it appears, a takeover by S&N of H.P. Bulmer). The termination of their Cypriot distributorship has given rise to separate proceedings in Cyprus. The present proceedings (which S&N started before the Cypriot proceedings) are brought in England solely on the basis that this is "*the place….where, under the contract, the goods were delivered….*" within the meaning of article 5(1)(b).

25. Article 5(1)(b) was introduced into the Brussels regime by the Regulation to provide in relation to contracts for the sale of goods and provision of services a single point of reference for the alternative head of contractual jurisdiction permitted by article 5(1). The basic rule contained in article 5(1)(a) is that a person domiciled in a Member State may be sued in another Member State in matters relating to a contract in the courts for the place of performance of the obligation in question. But article 5(1)(b) radically alters the effect of this provision by providing that, for its purpose and unless otherwise agreed, the place of performance of the obligation in question shall be, in the case of sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered. Likewise, in the case of the provision of services, it is now the place where, under the contract, the services were provided or should have been provided.

26. S&N maintain that the cider was, for the purposes of article 5(1)(b), delivered in Liverpool, where it was shipped for carriage to Cyprus under eleven bills of lading on three different vessels in late June and July 2004. Ghalanos submit that the contract provided, expressly or in effect, for delivery in Limassol, Cyprus, or alternatively that the terms of delivery were CFR Limassol, and in either case that delivery was not in Liverpool. These submissions make it necessary to analyse the nature of the contract.

27. By letter dated 3rd March 2004 Ghalanos ordered 11 containers of cider. Under the heading "Shipment" the order provided "From Liverpool or Felixstowe per Zim Line vessel as per attached shipping schedule". It stipulated for email notification to Ghalanos when shipment was effected. It gave full details of Zim Line's Liverpool and Felixstowe agents (Bahr Behrend Agencies Ltd. at Liverpool). Under the head "Delivery", it provided: "CFR Limassol", under "Payment": "90 days….from the date of arrival of the vessel" and under "Freight": "Prepaid at the rate of Stg £275 liner terms all in plus BAF (Banker Adjustment Factor) per 20' container, as agreed with the Cyprus agents of Zim Line". Under "Insurance" it provided "Our care". Proforma invoices were to be provided showing FOB prices, while the final invoices were to show the FOB prices stated in the order, the total FOB value and the freight. The order further provided that there should be a bill of lading "original and copy non negotiable, each in three copies" for each container, stating "Notify Othon Ghalanos Ltd.". Under "Documents", the order provided that separate documents for each container should be issued in the name of and forwarded "immediately after shipment by registered and express mail" to Ghalanos. This last instruction was repeated at the end as one of five important "Notes".

28. S&N's response to this order was by letter dated 21st April to raise a number of points, the first of which was that: *"you have mentioned that the terms are CFR Limassol while requesting us to ship on an FOB basis. The pricing which we have on our records shows that you have an FOB price and [we] will therefore treat your order accordingly. Bearing this in mind we have asked your agents, Bahr Behrend in Liverpool, for an FOB quote and are waiting for them to return to us with this information."*

    Ghalanos replied on 3 May that

    "Our prices are FOB UK port, but as per our agreement you prepay the freight on our behalf, thus making the delivery terms CFR. The delivery terms CFR should be stated on the invoice. The amount of the freight prepaid, should also be stated on the invoice, separately, see attached H. P. Bulmer's invoice. For the record please note that Bahr Behrend in Liverpool are the agents of Zim Line in the U.K. and are not our agents. …..

    We reconfirm that the agreed freight rate we have with the Cyprus agents of Zim Line is Stg£275 linerterms all in plus BAF (Banker Adjustment Factor) per 20' container"

29. On 18th June 2004 S&N wrote forwarding proforma invoices covering the 11 containers, saying that

    "Your agreed freight charges will be added to the final invoices which will be sent after the goods have been despatched.

    I have contacted our shipping agent in the UK and we're aiming to despatch the first 6 containers next week for shipment on the next available vessel. …..".

    All 11 proforma invoices showed the FOB price (as Ghalanos had requested in their original order letter). Two of them stated expressly, in a box with the printed heading *"Terms of delivery and payment": "Free on board. Payment due 90 days from date of arrival"*. The others stated "Cost and Freight Limassol. Payment due 90 days from date of arrival" (or, in three cases, *"from date of invoice"*), although only the FOB prices were entered on them. After shipment, final invoices were made out, each showing separately the FOB price and the freight incurred at the rate which Ghalanos had agreed with Zim Line's Cyprus agent. The *"Terms of delivery and payment*" boxes on these invoices were all completed "*Cost and Freight Limassol. Payment due 90 days from date of arrival."*

30. The proforma and final invoices also contained a set of four boxes with printed headings contemplating their use to show *(i) the "Vessel/flight no. and date", (ii) "Port/airport of loading", (iii) "Port/airport of discharge" and (iv) "Place of delivery"*. These (with some exceptions as regards the first two boxes in the proforma invoices) were completed by entering in box (i) the relevant vessel's relevant shipment date, in box (ii) Liverpool and in both of boxes (iii) and (iv) Limassol.

31. Ghalanos's primary case, on this basis, was that Limassol was the contractually agreed place of delivery under the sale contract. Mr Richard Lord QC for Ghalanos suggested that this case gained support from the fact that Ghalanos would not in practice be able to inspect the goods until after their arrival in Cyprus and from the provision for payment 90 days after arrival. None of these submissions has in my opinion any force. The standard printed heading to box (iv) refers to the place of delivery in the context of transport arrangements which could well involve an element of through or mixed transport, whereby goods discharged from a vessel or aircraft at one place might well be on-carried for delivery at another final destination. As completed with the word Limassol, the invoices merely confirmed that the transport arranged went no further than the discharge port of Limassol. That Ghalanos would not in practice inspect until after arrival in Cyprus adds nothing. It is a commonplace of international sales. The agreement for payment only 90 days after arrival was no more than a relaxed payment regime with no significance in relation to the place of delivery.

32. In the alternative to their primary case, Ghalanos submit that the contract was on terms providing for delivery CFR Limassol and that *"whilst the focus of a fob contract is the place of shipment….the focus of a c&f or cfr/cif contract is the place of discharge*". In relation to a CFR (or C&F) contract, Ghalanos maintain that delivery should be regarded as occurring, at earliest, when the shipping documents were forwarded to and/or received by Ghalanos.

33. Rix LJ took a different view of the general nature of the contract. He considered that "*the contract contemplated by the parties differed very little from a form of FOB contract, although it was expressed to be CFR*". I agree and would if anything go further. It was to all intents and purposes an FOB contract, although, at Ghalanos's request, the sum of the agreed FOB price and the freight which S&N prepaid on Ghalanos's behalf led to the description CFR being applied, in the final invoices in particular.

34. There is considerable flexibility both within and between categorisations such as FOB, CFR (or C&F), CIF and ex-ship: see e.g. ***The Parchim*** [1918] AC 157 (PC) and ***The Gabbiano*** [1940] P 166, 173-4. The editors of Benjamin's Sale of Goods (7th Ed.) (2006) observe at para. 20-001 - quoting Devlin J in ***Pyrene v. Scindia*** [1954] 2 QB 402, 424 - that the FOB contract has become "*'a flexible instrument', so much so that no really satisfactory definition of such a contract is possible*". It embraces (a) cases where the buyer arranges and nominates the ship, but the seller ships and takes the bill of lading in his own name as consignor, (b) cases where the seller arranges shipment and takes the bill in his own name as consignor and (c) cases where the buyer arranges and nominates the ship, and the seller ships but the buyer is named in the bill as consignor: Benjamin para. 20-003. Further, in cases (a) and (b), the seller may be either the only party to the bill of lading or acting as agent for the buyer as a (more or less undisclosed) principal: see Benjamin para. 20-008 and ***East West Corp. v. DKBS*** *AF 1912 A/S* [2003] EWCA Civ 83, [2003] QB 1509, para. 34. In either of cases (a) and (b) the seller may of course prepay the freight, and recoup himself by invoicing the buyer.

35. However, there are three general differences between FOB and C&F contracts:
    (i) First, an FOB contract specifies a port or a range of ports for shipment of the goods. A C&F contract specifies a port or ports to which the goods are consigned.
    (ii) Secondly, an FOB contract requires shipment (whether by or on behalf of the seller or the buyer) of the goods at the port (or a port within the range) so specified; i.e. the seller cannot buy afloat: see Benjamin para. 20-009. In contrast, under a C&F contract responsibility for shipment rests on the seller, and this can be fulfilled by the seller either shipping goods or acquiring goods already afloat after shipment, and moreover shipment can be at *any* port (unless the contract otherwise provides).
    (iii) Thirdly, and as a result, a C&F contract involves (subject to any special terms) an all-in quote by the seller, who carries the risk of any increase (and has the benefit of any reduction) in the cost of carriage. In contrast, under an FOB contract, although the seller may contract for and pay the freight, the buyer carries the risk (and has the benefit) of any such fluctuation.

36. So viewed, it is clear that the present contract was and should be regarded as being in all essential respects an FOB contract. All the indicia of an FOB contract are present. Shipment was required to be made by S&N at one of two ports of shipment contractually specified by the buyer. Indeed, Ghalanos went further and specified in the contract the shipping line and Liverpool shipping agents, with whom S&N were to arrange for carriage to Cyprus. There was no question of buying afloat, and S&N never offered or agreed an all-in price. On the contrary, Ghalanos had made an agreement on the freight rate with the line's Cyprus agents which the sellers were to invoke when arranging carriage; further, the sale contract specified that the invoices should show the FOB price separately from such freight, and required proforma invoices showing only the FOB prices, with final invoices showing the total FOB value and whatever freight was paid separately. The price was in other words to be FOB, with the actual freight rate to be added in the final invoices, once it was ascertained.

37. S&N had no commercial interest in the goods after shipment. The bills of lading were to be and were (a) made out to the buyer as consignee and (b) non-negotiable, and were to be forwarded to the buyer *"immediately after shipment*". Risk and property therefore both passed on shipment: Sale of Goods Act 1979 s.18 Rule 5(1) and (2), ss.19(2) and 20(1). Here, the goods were not deliverable to the order of the seller or his agent, so there was no reservation of any right of disposal within s.19(2).

38. As to delivery, Rix LJ in the Court of Appeal (para. 21) noted that s.61 of the Sale of Goods Act defines this as meaning (unless the context or subject-matter otherwise requires) *"voluntary transfer of possession from one person to another"*. Rix LJ referred to s.32 as dealing expressly with the concept in the present context of an international sale of goods involving carriage by sea, and concluded (para 23) that delivery under the present contract was thus prima facie effected on shipment, together with the transfer of title and risk. S.32(1) and (2) read:
    "(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.
    (2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages."

39. Mr Lord submits that Rix LJ failed to appreciate the limited scope of application of s.32(1) and (2) in relation to documentary sales of goods involving bills of lading. Mr Lord points out that Benjamin at para. 8-014 states that s.32(1) does not apply where the carrier is the servant or agent of the carrier, citing in support inter alia ***Dunlop v. Lambert*** (1839) 6 Cl & F 600 and ***The Albazero*** [1977] AC 774. He suggests that in *"a typical cif contract"* the carrier is the seller's agent, "because the carrier is engaged by the seller (on his own behalf) and not the buyer". However, I need say nothing about the position under a typical CIF (or CFR) contract, because the present contract belongs for reasons already indicated to a different category.

40. Both *Dunlop v. Lambert* and ***The Albazero*** concerned the extent to which a consignor can claim damages against a carrier in circumstances where the consignor did not retain either property or risk. Both cases contain statements affirming that the principles in s.32 may apply to documentary sales involving bills of lading where the consignor retains property and risk. In ***Dunlop v. Lambert*** Lord Cottenham LC said at p.620 that:

"It is no doubt true as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is after such delivery the risk of the consignee….And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent.

But though the authorities all establish the general inference I have stated, yet that general inference is capable of being varied by the circumstances of any special arrangement between the parties, or any particular mode of dealing between them."

At both pp. 620 and 621 Lord Cottenham mentioned that the consignor might have paid the freight in terms indicating that this did not conclude the question for whom the carriage was being undertaken. He also gave, as two examples where the "*general inference*" was varied, cases where the consignor by agreement retained the risk until delivery, but added that in *"an infinite variety of circumstances, the ordinary rule may turn out not to be that which regulates the liabilities of the parties."*

41. In ***The Albazero*** Lord Diplock explained the common law approach underlying s.32 in terms of bailment, saying at pp.841-2 that:

"The question who stood in relation of bailor to carrier and so was entitled to sue him for the full value of the goods lost or the full amount of the damage could only arise where the consignor and consignee were different persons. In such a case the presumption was that the bailor was the person named as consignee and that in delivering possession of the goods to the carrier the consignor was acting and purporting to act as agent only for a designated principal - the consignee."

He added that a consignor could make with the carrier a "special contract" - one entered into on his own behalf and not as agent for the consignee - but that, where the consignor was selling to the consignee, the question whether or not he had done so would often be a matter of inference from the terms of the contract of sale.

42. The application of the common law principle described by Lord Diplock was also contemplated by Lord Hobhouse of Woodborough in ***Borealis AB v. Stargas Ltd. (The Berge Sisar)*** [2001] UKHL 17, [2002] 2 AC 205, when he said at para. 18:

"The bill of lading acknowledges the receipt of the goods from the shipper for carriage to a destination and delivery there to the consignee. It therefore evidences a bailment with the carrier who has issued the bill of lading as the bailee and the consignee as bailor".

Commenting on this dictum in ***East West Corporation v. Dampskibsselskabet AF, 1912, Aktieselskabet*** [2003] EWCA Civ 83, [2003] QB 1509, paras. 34-35, I said:

*"34. …This was said in a context where the named consignees were FOB buyers: cf pp. 215, 216, paras. 7 and 10. In such a context, a shipper may readily, indeed normally, be regarded as acting as agent for a named consignee in making the relevant bill of lading contract: cf **Albacruz v. Albazero (The Albazero)** [1977] AC 774, 786A-B, per Brandon J. The goods will then have been from the outset bailed by the consignee, acting through the agency of the consignor, to the carrier. But this is only the first of three categories identified by Brandon J in a close analysis of the authorities, which later received approval in the House of Lords [1977] AC 774, 842H, per Lord Diplock, with whose speech all other members of the House agreed. The other categories were: (2) cases where the consignor in delivering the goods to the carrier was acting as principal on his own account, with property and risk remaining in him during the carriage; and (3) cases where the consignor was held entitled to sue, whether or not the property and risk in the goods was in him at any material time, on the ground that the consignor had made a 'special contract' with the carrier, and that, because of this, the carrier could not dispute the consignors' title to sue. …..*

*35. …It is clear both from Brandon J's definition of the three categories and from Lord Diplock's speech [1977] AC 774, 842C-843A that (a) whether a consignor has contracted with the carrier on behalf of an named consignee or on his own behalf (i.e. whether the case falls within the first or second category) depends upon an analysis of the terms, e.g. of any contract for sale, agreed between the consignor and consignee, which would normally be quite unknown to the carrier, while (b) the question whether the case falls within the third category (i.e. is one where, whatever the position regarding property and risk, the consignor has made a 'special contract' with the carrier) involves an analysis of the relationship between the consignor and carrier. Thus, in circumstances where a consignor was acting on his own behalf in shipping the goods, or at all events reserving the right vis-à-vis the consignees to deal with and redirect the goods, Lord Brandon's analysis in **The Aliakmon** [1986] AC 785, 818 was that: **"The only bailment of the goods was one by the sellers to the shipowners."** See also Carver on Bills of Lading, para. 7-038, footnote 47 and Benjamin's Sale of Goods, 6th ed (2002), para 18-057."*

43. In the most recent (7th) edition of Benjamin at para. 18-065, Sir Guenther Treitel points to possible difficulties about Lord Hobhouse's invocation of the common law principle on the particular facts of ***The Berge Sisar***. These do not affect the general distinction drawn in the ***East West Corporation*** case between situations where, on the one hand, a seller ships goods on the buyer/consignee's behalf and, on the other hand, a seller acts on his own behalf, whether because he retains property and risk or simply because he reserves rights to deal with and redirect the goods, for example against the event that the buyer defaults in taking up and paying for the goods against the documents.

44. None of the latter features exists in the present case. Here the bills of lading were, under the sale contract between S&N and Ghalanos to be, and were, non-negotiable. They were made out to Ghalanos as consignees. The sale contract required them to be forwarded "immediately after shipment by registered and express mail" to Ghalanos. S&N were to arrange and "prepay" on behalf of Ghalanos freight at a rate negotiated by Ghalanos. The price and freight were not payable by Ghalanos against transfer of the bills, but 90 days after each vessel's arrival in Cyprus. S&N were to have no actual or potential right or interest in the goods or the bills of lading after shipment.

45. The only factor that, it may be suggested, takes the present case outside s.32 and outside the analysis of the position in bailment in the statement by Lord Diplock in ***The Albazero*** (paragraph 41 above) is that S&N accept that they incurred liability as principals to the carriers for the freight, which, as between S&N and Ghalanos, S&N were requested to "prepay" on Ghalanos's behalf. But this factor could mean (at most) that S&N were party to a special contract with the carriers, and could have claimed damages in respect of any breach of that contract, e.g. involving loss or damage to the goods. In relation to Ghalanos, S&N may still have been acting as an agent, rather than a principal, in shipping the goods and/or in holding the bills of lading received upon shipment. An analysis, according to which S&N, when contracting personally with the carrier, were also contracting on behalf of Ghalanos was not suggested below, though there could have been much to say for it (cf also Bowstead & Reynolds on Agency (18th ed.) para. 9-006). But, assuming that S&N alone were party to the carriage contract, everything still indicates that S&N ceased as regards Ghalanos to have any interest in the goods upon shipment and held the bills of lading issued upon shipment on behalf of Ghalanos, with the corresponding obligation to forward them to Ghalanos immediately. The bills symbolise the goods, and possession of the goods was on this basis held by S&N for and on behalf of Ghalanos as from shipment.

46. This conclusion is consistent with general principle. "The legal relationship of bailor and bailee of a chattel can exist independently of any contract": ***Morris v. Martin Ltd***. [1966] 1 QB 716, 731, per Diplock LJ, and *East West Corporation*, para. 24. A bailee may owe duties in bailment not merely to his immediate bailor, but also to a third party owning or having an immediate proprietary interest in the goods, certainly where the bailee is on notice that such a third party exists: ***East West Corporation***, paras. 25-27 and cf generally Palmer on Bailment (2nd ed.) chaps. 15(II) and 20. Cases of sub-bailment are only one example. In *East West Corporation* bills of lading were made out by the shippers to Chilean banks or order and delivered to the banks, who were acting vis-a-vis the shippers purely as agents (to collect on behalf of the shippers the price payable by buyers at destination). Under the Carriage of Goods by Sea Act 1992 the contractual rights of suit evidenced by the bills of lading were transferred to the banks. However, the shippers retained an immediate possessory interest in the goods, entitling them to hold the carriers responsible as bailees accordingly: ***East West Corporation***, paras. 27 and 37-39.

47. Here, there is every reason, in view of the nature and terms of the sale contract, to regard S&N as bailing the goods to the carriers on behalf of Ghalanos, even if Ghalanos were not party to any contract which S&N made with the carriers. The carriers could not reasonably suggest that they thought that S&N were the only persons likely to own and be at risk in respect of the goods on or from shipment. The fact that the bills were non-negotiable and made out to Ghalanos as consignees were clear contrary indications. Ghalanos would be bound by the terms of the bills of lading qualifying the carriers' liability in respect of the goods and their carriage: ***The Pioneer Container*** [1994] 2 AC 324. If the bills of lading had been taken out and held by S&N in their own interests (e.g. pending payment of the price), then delivery of the bills to Ghalanos as the named consignees could have been required before Ghalanos acquired any possessory interest. But that sheds no light on the present case, where S&N made the shipment and held the bills throughout for Ghalanos.

48. In these circumstances, under the principles contained in the Sale of Goods Act, Rix LJ was in my opinion correct to treat delivery of possession of the goods as well as property and risk in respect of them as having taken place upon shipment. It follows that delivery of the goods took place upon shipment in every sense that can conceivably be relevant under article 5(1)(b) of the Judgments Regulation and that the appeal should be dismissed on that basis alone.

49. It thus becomes unnecessary to consider what the position might have been after the passing of property and risk on shipment if S&N had not only made a special contract with the carriers but had also, for some reason (e.g. to secure payment of the price), retained symbolic possession of the goods through the bills of lading until these were forwarded to and/or received by Ghalanos. I will however say something about the position on this hypothesis. Mr Lord's primary submission was that the *"place of delivery"* under article 5(1)(b) would then be (i) nowhere, (ii) the place of shipment, Liverpool, (iii) the place where the documents were transferred, (iv) the place where the goods happened to be when the documents were transferred (at least if that was within the territory or territorial waters of a Member State) or (v) the place of destination, Cyprus. It might, he suggested, be necessary to consider referring to the European Court of Justice the question what is the correct approach under a documentary sale such as the present.

50. For reasons already indicated, I see no basis for possibility (v). Possibility (i) arises, in Mr Lord's submission, from the nature of a documentary sale, under which delivery takes place in more than one sense and may therefore take place in more than one place. It is true that article 5(1)(c) itself contemplates that article 5(1)(b) may not apply. However, the most obvious reason for article 5(1)(c) is that not all contracts are for the sale of goods or provision of services, and still less for the delivery or goods or the provisions of services in any Member State. Article 5(1)(a) thus covers for example a contract for the sale of goods for delivery in South Africa. It would seem

surprising however if there was no place of delivery at all within article 5(1)(b) even though all the places identified under possibilities (ii), (iii) and (iv) lay within Member States.

51. In its recent decision in ***Color Drack GmbH v. Lexx International Vertriebs GmbH*** (Case C-386/05) [2007] I.L.Pr. 35, the European Court of Justice explained the aim of Regulation EC 44/2001 as being to enable a claimant "to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued" (paras. 19, 20, 32 and 33) and the origin of article 5(1)(b) as an exception to the original rule reflected in article 5(1)(a):

"By that provision (article 5(1)(b)), the Community legislature intended, in respect of sales contracts, expressly to break with the earlier solution under which the place of performance was determined, for each of the obligations in question, in accordance with the private international rules of the court seised of the dispute. By designating autonomously as 'the place of performance' the place where the obligation which characterises the contract is to be performed, the Community legislature sought to centralise at its place of performance jurisdiction over disputes concerning all the contractual obligations and to determine sole jurisdiction for all claims arising out of the contract." (para. 39)

52. Article 5(1)(b) takes a very simple contractual model. It directs attention to a place of physical delivery of goods. The physical obligation by way of delivery which characterises an essentially FOB contract such as the present is clearly shipment. That involves an easily identifiable physical delivery at an easily identifiable place. It is on and at shipment that the goods have to be of the contractual quantity and quality as well as fit for carriage to destination (ss. 2, 14, 15 and 30 of the Sale of Goods Act), and it is then that the risk of any subsequent loss, damage or problem passes to the buyer (ss.18 rule 5 and 20(1)). The transfer of documents may under some FOB sales give rise to a notional passing of possession in the goods: cf e.g. ***Kwei Tek Chao v. British Traders and Shippers Ltd.*** [1954] 2 QB 459, 486. But it would be highly undesirable that the place of delivery for the purpose of article 5(1)(b) should be understood in a way which could mean that it varied according to an analysis of which of the types of FOB contract identified in paragraph 34 above was involved. The *place* where possession passes, or where either the shipping documents or the goods are when it passes, is generally irrelevant under FOB contracts and under this particular contract. Further, any place with which such events might be associated could not be regarded as either easy to identify or reasonably foreseeable.

53. That shipment identifies the place of delivery with which FOB contracts are naturally associated is illustrated by a number of passages in Benjamin. In the chapter on FOB contracts, para. 20-014 headed "*Place of delivery*" reads:

"An f.o.b. contract will normally indicate the port of shipment, either by naming it or by stating which party has the right to name it. The place of delivery may also be stated more narrowly, as a particular wharf within a port. An f.o.b. contract which contains no indication at all as to the place of delivery may be void for uncertainty."

In considering the duty to obtain and tender shipping documents at paras. 20-020 to 20-027, Benjamin also observes (in para. 20-026) that

"There is no necessary connection between delivery and passing of property, and a seller may perform his duty to deliver by shipping the goods without at the same time unconditionally appropriating them to the contract so as to pass the property."

In relation to the governing law of an FOB contract, Benjamin also identifies (para. 25-010)

"the observable tendency in the relatively few authorities to treat the country of shipment as the place of performance by delivery on board the ship and to regard the contract as governed by the law of that place in the absence of any countervailing considerations".

54. The Sale of Goods Act generally uses delivery to refer to passing of possession, and this under some FOB contracts will be associated with the transfer of the shipping documents. But there are, as the definition in s.61(1) contemplates, occasions when in the Act delivery is used in another sense. An example is s.30, dealing with the seller's obligation to deliver the contractual quantity, which must in the context of an FOB contract refer to delivery by shipment.

55. Bearing in mind the general aim of article 5(1)(b) as explained in ***Color Drack*** and the general nature of FOB contracts, I would consider it clear that the place of shipment is the place of delivery which characterises an FOB contract such as the present and is relevant under article 5(1)(b). This is so whether the matter is viewed simply under domestic law (as in both parties' primary submissions can and should be done) or is viewed as engaging autonomous conceptions of delivery (as Mr Lord submitted in an alternative).

56. For the reasons given in paragraphs 24 to 48 above, I would hold that the place of delivery under the present sale contract was Liverpool and would accordingly dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY : My Lords,

57. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Mance and for the reasons he gives, with which I agree, I too would dismiss this appeal.

For the Appellants: Richard Lord QC (Instructed by Thomas Eggar LLP)
For the Respondents: Michael Bools (Instructed by Kimbells LLP)