JUDGMENT : Mr Justice Thomas: Commercial Court. 10th July 2003

Origins of the dispute

1. Vysanthi Shipping Co Limited, a company incorporated in Cyprus, the Defendants in Claim No 2002 Folio 344 and the Claimants in Claim No 2002 Folio No 661, were the owners of the bulk carrier *Joanna V;* I shall refer to them as the owners. On 28 June 1996, they issued two bills of lading for 29,900 MT Argentine yellow soya bean pellets in bulk loaded aboard the vessel in San Lorenzo, Argentina for carriage to and delivery at Chinese ports. The bills of lading (which were on the Norgrain Charterparty 1973 form) were consigned to Order and claused on their face:

   "London Arbitration/English law to apply to all disputes arising out of this bill of lading in accordance with Clause 8 on the back of this bill.

   Clause 8: All disputes arising out of the Bill of Lading shall be arbitrated at London and unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrument of two arbitrators carrying on business in London who shall be members of Baltic Mercantile & Shipping Exchange and engaged in the Shipping and/or Grain Trades, one to be appointed by each of the parties with power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the Award is made. Any dispute arising under the Bill of Lading should be governed by English Law.

2. When attempting to leave San Lorenzo, the first load port, the vessel grounded and was only re-floated after the intervention of salvors who provided their services on LOF 1995 terms. The owners declared general average. The vessel was re-floated, but salvors requested security and the vessel was delayed until cargo interests provided such security.

3. The bill of lading was negotiated and China National Feeding Stuff Import/Export Corporation (the Second Claimants in claim No 2002 Folio 344 and the Respondents in action 2002 Folio 661) became the receivers. I shall refer to them as the receivers. They have their principal place of business in Beijing, China. On 19 July 1996 People's Insurance Company of China, the First Claimants in Claim No 2002 Folio 344 (to whom I shall refer as PICC) provided salvage guarantees.

The commencement of the arbitration in London

4. On 23 August 1996, the owners commenced an arbitration against Chinese National Native Produce & Animal By-Products Import & Export Corporation, the company that they believed were the relevant cargo interests; they were in fact mistaken and on 19 October 1999, the owners commenced a further arbitration, this time against the receivers. In each of the arbitrations they appointed Mr Donald Davies, a distinguished London Maritime arbitrator, as the arbitrator. As no arbitrator was appointed by either the Respondents to the first arbitration or the receivers, he became the sole arbitrator by virtue of the provisions of section 17(2) of the Arbitration Act 1996.

The commencement of proceedings in China

5. The vessel arrived in Ningbo, China in September 1996. She was immediately arrested; she was released after the provision of a guarantee for $1.3m issued by PICC against counter security provided by the owners' P& I Club.

6. On 24 October 1996, the receivers commenced proceedings before the Ningbo Maritime Court, seeking to recover the amount for which they were liable for salvage, together with costs and expenses. The owners at once objected to the jurisdiction of the Ningbo Maritime Court. On 23 January 1998 the Ningbo Maritime Court held that it had jurisdiction; it will be necessary to refer to the terms of that judgment - see paragraph 31 below. The owners appealed to the Zhejiang Provincial Higher People's Court which, on 21 May 1998, dismissed the appeal; it will again be necessary to refer to that decision - see paragraph 32 below. The owners then appealed to the Supreme Court of China to review the decision of the two lower courts on the grounds that they were perverse; the Supreme Court declined to rule on the matter, but asked the Zhejiang Provincial Higher People's Court to reconsider its position. The Zhejiang Provincial Higher Peoples Court ruled that its earlier decision was correct.

7. Proceedings on the merits then followed with a series of hearings, the first of which took place on the 18 January 1999; witnesses were called including the Master of the vessel.

8. Either in May 1998 or February 2001, PICC were substituted as Claimants as they had indemnified the receivers.

9. On 28 September 2001, the Ningbo Maritime Court gave judgment on the merits, holding that the owners were at fault and ordering them to pay damages to PICC; it will be necessary to refer to that judgment in a little more detail - see paragraph 33.

The course of the arbitration and the arbitration award

10. Whilst the proceedings before the courts in China had been taking place, the arbitration before Mr Donald Davies was proceeding in London. The receivers objected at once to the jurisdiction of the arbitrator, but they appeared and defended the claim under that reservation. Between 12 and 15 February 2001, a four day hearing took place before Mr Donald Davies at which witnesses were called and submissions made by counsel for each party.

11. On 14 March 2001, Mr Donald Davies published his award. Various minor corrections were made to that award under s.57 of the Arbitration Act on 4 April 2001. In summary, he held that he had jurisdiction under the

arbitration clause contained in the bill of lading and that there had been no submission of the claim advanced in the arbitration to the courts of China. He held that the receivers were liable to pay general average in the sum of $367,138.86 and damages for detention in the sum of $28,500.

12. On 20 June 2001, Mr Donald Davies made a further award dealing with issues of interest and costs and on 13 February 2002 (after a hearing at which the receivers appeared through their costs consultant), he made a third award on which he assessed the costs payable by the receivers.

The proceedings before this Court

13. No proceedings were brought before this court until 28 March 2002. PICC and the receiver were the first to bring proceedings; these were brought against the owners on 28 March 2002 (following permission granted by David Steel J on 19 March 2002 to issue proceedings out of the jurisdiction) in Claim No 2002 Folio 344. PICC and the receivers sought a declaration that the judgment of the Ningbo Maritime Court for payment to PICC of cargo's proportion of liability to salvors' salvage charges and to salvors for fees together with interest and costs be declared enforceable and capable of recognition in England and Wales. They also sought an injunction against the enforcement of the award of Mr Donald Davies.

14. In July 2001, the owners commenced an arbitration application (Claim No 2002 Folio 661) against the receivers, seeking to enforce the award of Mr Donald Davies. An Order was made by Aikens J on 12 July 2002 in those proceedings ordering the enforcement of those awards, subject to the right of the receivers to apply to set aside that Order.

The application to set aside the award

15. It is convenient and necessary first to consider the question as to whether the award made by Mr Donald Davies on 21 March 2001 can be challenged and whether this Court should grant an injunction against its enforcement.

16. Under the scheme of the Arbitration Act 1996, the arbitral tribunal has power under s.30(1) to rule on its own substantive jurisdiction, subject to challenge before the courts in accordance with the provisions of the Act.

17. As I have set out at paragraph 10, the receivers, in accordance with the provisions of s.31 of the Act, objected to the substantive jurisdiction of the arbitral tribunal, but under that reservation continued to participate in the arbitration. Neither party sought an award on jurisdiction or made any application to this Court in respect of the arbitrator's jurisdiction during the pendency of the arbitration. The arbitrator, in such a case, would therefore be expected to deal with the question of jurisdiction in his substantive award on the merits.

18. This was the course followed by Mr Donald Davies. In a characteristically clear section in his award, Mr Donald Davies set out the objection of the receivers and then, at paragraphs 38-45 of his award, set out his conclusions. He referred to the fact that the receivers had not led any evidence of their own regarding the proceedings in China, although they had had ample opportunity for doing so. He pointed out that they had relied upon the evidence of Mr Ansley (a partner in a Shanghai firm of Bull Husser and Tupper who had had conduct of the case in the Courts of China on behalf of the owners). His summary of that evidence was that:

    i) The object of the steps taken on behalf of the owners in the Courts of China was to emphasise that the disputes relating to the grounding of the vessel was subject to London arbitration and the law of England and Wales.

    ii) The owners were seeking to avoid a default judgment against them which would lead to the execution of the guarantee of $1.3 million which, as I have set out at paragraph 5, had been provided to secure the release of the vessel from arrest.

    iii) The effect of the decision of the Ningbo Maritime Court was that the dispute before it was not a dispute which arose under the bills of lading and the arbitration clause was therefore not applicable.

    iv) The Zhejiang Provincial Higher Peoples Court ruled that the Ningbo Maritime Court had assumed jurisdiction because the dispute was not a dispute relating to the contract of affreightment. But at no time had the Ningbo Maritime Court ruled that the dispute which arose out of the bill of lading could be determined by the Courts of China.

    v) Neither Court had held that such disputes could not be determined by arbitration in London.

    vi) Mr Ansley had emphasised that it would have been commercially unthinkable not to have continued efforts in the Courts of China to protect the guarantee that had been provided on behalf of the owners.

19. On the basis of that evidence, Mr Donald Davies concluded that the owners had not submitted to the jurisdiction of the Chinese Courts for the determination of any claims under the bills of lading, and that no claims by the owners which were subject to the arbitration had been put before the Courts of China. He stated at paragraph 41: *"While the owners are participating in the hearings regarding the merits…., those hearings are not, on the evidence before me, concerned with disputes under the bills of lading. They appear to be concerned with a different dispute or disputes to those presently before me, even though the affidavit of Mr Lesmi and the report of Domingo Cancelo and Associates [submitted to the Ningbo Maritime Court] deal with navigation and draught matters. What seems abundantly clear is the Chinese courts are not concerned with disputes under the bills of lading so that, in essence there is a different submission before the Chinese Courts as compared to the submission before me".*

20. He then went on to hold that the provisions for s.32 and s.33 of the Civil Jurisdiction and Judgments Act 1982 did not avail the receivers.

21. Under the scheme of the Arbitration Act (as paragraph 140 of the DAC Report on the Arbitration Bill makes clear), if the arbitral tribunal deals with a question of jurisdiction in its awards on the merits, then the decision of the arbitral tribunal on jurisdiction may be challenged under s.67. That section makes it clear that a party may lose the right to object by reason of the operation of the provisions of s.73. section 73 (2) provides:

"Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling –

(a) by any available arbitral process of appeal or review, or (b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling".

The time allowed by the Act is a period of 28 days (see s.70 (3)).

22. Thus subject to the powers of the Court under ss. 79 and s.80(5), it is clear under the scheme of the Act that any challenge to an award on the question of jurisdiction must be made within 28 days of the publication of the award; the consequence of a failure to do so is that the party objecting to the jurisdiction loses that right. This is, in my view, clear from the provisions and the scheme of the Act; this is also the view reached by Professor Merkin at paragraphs 17.3 and 17.12 of his work entitled *Arbitration Law*.

23. As I have set out above, no proceedings whatsoever were commenced in this court until 28 March 2002, when PICC and the receivers commenced the action for declaratory relief. It was not until 25 November 2002 that the receivers requested (in an affidavit filed on their behalf) that the Court consider exercising its powers to extend time. I refer to that application at paragraph 27 below.

The position in respect of the award

24. As matters stand at present, unless I exercise the Court's power to extend time, it was not seriously disputed (nor could it be) that the receivers have lost their right to challenge the jurisdiction of Mr Donald Davies to make his award through the operation of the positions of s.67 and s.73. It therefore follows that his decision on the merits was a decision which this Court is bound, under the statutory scheme of the Arbitration Act, to recognise as an award made by an arbitrator with jurisdiction.

25. When I observed that under the scheme of the Act the Court is bound to do so, that is not to say that the Act does not entirely accord with the needs of the commercial community and of international understandings. It is self evident, as paragraph 138 of the DAC Report makes clear, that an arbitral tribunal cannot be the final arbitrator of the question of jurisdiction; as is pointed out in the DAC Report, this would provide a classic case of *"pulling oneself up by one's own boot straps"*. However, giving a tribunal power to rule on its own jurisdiction means that the parties cannot delay valid arbitration proceedings indefinitely by making spurious challenges to the jurisdiction of the arbitral tribunal. Nonetheless the protection of the party objecting to the jurisdiction of the tribunal is its right to apply to the Court. That is an unfettered right and in any such application the party challenging the jurisdiction of the arbitrator is entitled to adduce such evidence as it considers necessary to show that the arbitrator had no jurisdiction. The Court is not in any way bound or limited to the findings made in the award or to the evidence adduced before the arbitrator; it does not review the decision of the arbitrator but makes its own decision on the evidence before it; I entirely agree with the observations of Gross J in *Electrosteel Castings Ltd. v Scan-Trans Shipping & Chartering Sdn. Bhd.* [2002] EWHC (Comm) 1993 at paragraphs 22 and 23 that the court's duty is to re-hear the matter and in doing so the court is not limited to the evidence before the arbitral tribunal. However, that right to make a challenge before the Court is made subject to a time limit so that a party challenging the jurisdiction of the arbitrator has to make up his mind as to what to do and cannot hold over a challenge until an attempt at enforcement is made.

26. Subject therefore to consideration of the application before the Court to extend time to make a challenge, there can be no doubt that (1) the receivers had long before they issued proceedings in March 2002 lost their right to object to the jurisdiction of Mr Donald Davies, and that (2) there was no other basis for challenge to the award. The award had therefore taken effect as a binding determination of the issues decided on the merits as between the parties.

The application to extend time

27. There are two sections of the Arbitration Act which confer upon the Court power to extend time; the first is s.79 and the second is s.80(5). It was common ground that the relevant provision was s.80(5). It was also common ground that the principles for the exercise of the power were succinctly summarised by Colman J in ***Kalmneft JSC v. Glencore International AG*** [2001] 2 All ER Comm 577. At paragraphs 53 to 60 of the judgment, Colman J set out what he regarded as the applicable principles. He pointed to the need for expedition in proceedings before the Court, as the object of arbitration was defined in the Act as obtaining a fair resolution of disputes without unnecessary delay or expense. He referred to the special requirement in s.79 *"that a substantial injustice should otherwise be done"* was not expressed to be applicable under s.80(5). He concluded that it was necessary to make some allowance for parties to London arbitration who had little experience of arbitration in London. He concluded by saying at paragraph 59: *"Accordingly, although each case turns on its own facts, the following considerations are, in my judgment, likely to be material: (i) the length of the delay; (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay; (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss*

of time if the application were permitted to proceed; (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have; (vi) the strength of the application; and (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

I shall therefore approach the application on the basis of the principles set out in that paragraph in the judgment of Colman J, although with one slight gloss. As counsel for the owners correctly pointed out, s.67 expressly drew attention to the fact that the parties might lose the right to object if they failed to make a challenge within the requisite time. This is an important gloss because the Act was intended (as it most successfully has achieved) to provide a code in clear language for those engaged in arbitration in England and Wales whatever their nationality; the Act itself gives notice that a right might be lost if not exercised in time.

28. In an affidavit sworn on behalf of the receivers, it was contended that a substantial injustice would, absent the extension of time, be done to the receivers as they would be bound by an arbitration award which was founded upon inaccurate and unsupportable findings as to jurisdiction. The delay in making the application was said to be excusable upon the basis that:

i) The receivers and PICC did not seek to appeal the award of Mr Donald Davies because it was based on findings which were not capable of sensible challenge on appeal. It was said that the award of Mr Donald Davies rested on findings of fact which prior to the publication of the judgment of the Ningbo Maritime Court, were not capable of challenge. This had the effect that any appeal in relation to an error of law in the award would not of itself have resulted in the decision as to jurisdiction being overturned, and would have been impermissible under s.69 of the Arbitration Act 1996 and doomed to fail. In those circumstances, no attempt was made to appeal Mr Donald Davies' determination and the receivers were only in a position to do so when the judgment of the Ningbo Maritime Court was issued and it had the effect of destroying the basis of Mr Donald Davies' determination.

ii) Until the Ningbo Maritime Court issued its judgment on the merits and until the owners had threatened to seek to enforce the award, there was no conflict between the award and any judgment on the merits. Accordingly it was said that no application to challenge the award would have served any practical purpose.

29. I therefore turn to consider that submission in the light of the principles set out in the judgment in *Kalmneft:*

i) The delay in making the application was very substantial. The challenge to Mr Donald Davies' determination on jurisdiction should have been made within 28 days of the publication of the award on 14 March 2001. But no application could be treated as having been made to extend time until November 2002, although a challenge to the enforceability of the award was made when Claim No 2002 Folio 344 was issued on 28 March 2002. Taking the earlier of these dates, the delay was of about a year.

ii) Was the party that had failed to challenge acting reasonably in all the circumstances? I have already set out the reason given by the receivers for the delay and the failure to act. The owners contended that the decision was in truth made for different reasons; if the receivers had sought to challenge the award prior to the decision of the Ningbo Maritime Court, they would have been compelled in the course of that challenge to clarify their case on jurisdiction which they were not anxious to do prior to the issue of the decision of the Ningbo Maritime Court. In considering that submission, I must have regard to the fact that the explanation of the receivers for not challenging the jurisdiction (which I have set out at paragraph 28) was that given on oath by the solicitor for the receivers and that no application was made to cross-examine him. The important fact was, in my view, not the reason for not making a challenge, but the fact that a deliberate decision was made not to challenge the award. In the light of the scheme of the Act, that was plainly an obvious error, but one made by a very experienced firm of solicitors and by receivers who are not unfamiliar with London arbitration.

iii) Neither the arbitrator nor the owners contributed in any way to the delay.

iv) Was there any prejudice apart from mere loss of time? As this question requires an examination of the judgment given by the Chinese Courts, I will consider this separately - see paragraphs 31 and following.

v) There has been no impact upon the arbitration as the arbitration had been concluded.

vi) The strength of the application. Again I will consider that below in conjunction with the question of prejudice- see paragraphs 31 and following.

vii) The issue of fairness. I will express my view on that having dealt with the question of prejudice and the strength of the application.

30. As I have mentioned in the preceding paragraph, I now turn to consider the question of prejudice and the strength of the application. It was submitted on behalf of the owners that, if the receivers had made an application to the Court within the 28 day time limit specified, they would then have had to set out their case as to why Mr Donald Davies was wrong in his decision on jurisdiction. That would have meant that they would have had to clarify the basis upon which the Chinese Courts had assumed jurisdiction. That would, on the evidence before me, not have been an easy task for them, given the basis upon which the two Courts in China had decided that they had jurisdiction;

31. The Ningbo Maritime Court based its decision on the following grounds: *"The validity of the arbitration clause should be decided on the basis of the law governing the arbitration clause agreed upon by both parties. In the event that no governing law is chosen, the governing law should be the law of the place of arbitration or the place where*

the arbitration award is issued. In this case, the place of arbitration is London. According to English law, any dispute arising out of the Bill of Lading refers to a dispute under the Bill of Lading itself, but not a dispute relating to the Bill of Lading. The dispute in this case involves the salvage cost incurred during the performance of the freight contract, which is evidenced by the Bill of Lading. It is not a dispute under the Bill of Lading. Therefore, this dispute is not included in the disputes to be arbitrated as regulated in the bill of lading".

32. On appeal, the Zhejiang Provincial Higher People's Court in dismissing the appeal, held as follows: *"The Appellee (the Claimant) filed claims before the original Court against the Appellant (the Owners) claiming for contribution to the salvage cost. Consequently, this case is a dispute over contribution to the salvage cost, instead of a dispute over the freight contract and therefore the arbitration clause in the Bill of Lading shall not apply. The salvage agreement between the salvage company and M.V. Joanna V representing the salvagee did not regulate London arbitration for disputes arising from contribution to the salvage cost. Therefore, it is correct for the original court to exercise jurisdiction over this case based on the ground that the vessel was arrested by the original court prior to litigation."*

33. Before considering the meaning of these two judgments, it is convenient to summarise the basis of the decision of the Ningbo Maritime Court on the merits. The Court first set out the evidence. Among the documents before the Court was the award of Mr Donald Davies in the arbitration; it was relied on by the owners as proving that they had exercised due diligence to ensure that the vessel was seaworthy prior to setting sail and were not at fault for running aground. The Court held that the award was not binding on the Court in determining the liability for the accident and should not be used as evidence. The Court's conclusions can be summarised as follows:

    i) The Court took the view: *"That there was a contractual relationship with respect to carriage of goods by sea between the consignee, China Animal Feed Import & Export Corporation, and the [owners]. The bills of lading in question did not have any Paramount Clauses. Nor should the arbitration clauses and clauses regarding applicable law apply in this case. Based on the 'Most Closely Connected' principle, the consignee could legitimately bring an action to a Chinese court with a view to recovering the salvage charges from the carrier, and the People's Republic of China Maritime and Commercial Law should apply".*

    ii) PICC, as the insurer of the receivers, after having paid the receivers under the policy of insurance, had obtained subrogation rights and was entitled to try and recover what had been paid from the owners.

    iii) On the facts of the case: *"The defendant, as carrier, failed in its duty to exercise due diligence to ensure that the vessel was seaworthy prior to and at the beginning of the voyage, and should therefore be held liable for cargo owner's losses which arose from the un-seaworthiness. The unseaworthiness of M/V "Joanna V" at setting sail led to the salvage operations, causing the cargo owner to bear a huge sum of salvage charges. The cargo owner is entitled to recover the money from the defendant. Documents filed by the plaintiff indicated that it had indeed paid the salvage charges, the salvor's legal fees, the salvage security and premiums, the overseas legal representation fees, the domestic legal representation fees, and property preservation fee. The defendant should be liable for these expenses. The plaintiff's pleadings are legitimate and should be supported. In accordance with Article 47 and Article 197 of the People's Republic of China Maritime and Commercial Law…".*

    Article 47 of the Maritime and Commercial Law of the People's Republic of China falls under Chapter 4 of the Maritime Code (which is headed *Contract of Carriage of Goods by Sea*) Article 47 provides:

    "The carrier shall, before and at the beginning of the voyage, exercise due diligence to make the ship seaworthy, properly man, equip and supply the ship and to make the holds, refrigerated and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation".

34. The owners adduced evidence before me as to the effect of the judgment on the merits. Included in that evidence was the evidence of Professor Xu Jie. He was a member of the Shanghai Bar, former Chief Judge and President of the Maritime Contracts Tribunal in the Shanghai Maritime Court, visiting Professor of the Shanghai Foreign Trade University, accredited Arbitrator with the China Maritime Arbitration Commission and Shanghai Arbitration Commission, and a member of the China Maritime Law Association. He had appeared for the owners in the Courts of China after the decision on jurisdiction had been made. His evidence was that the receivers and PICC had not specified in their pleadings whether the claim was in contract or tort; I have examined a translation of the Statement of Claim and it refers to *"negligence"* without making clear whether the claim was in contract or tort.

35. Professor Xu Jie's further evidence was that under Chinese procedure, it was unusual for a Claimant alleging negligence not to say whether the claim was in contract or tort. His evidence was that he repeatedly challenged the advocate for the receivers and PICC to state whether his clients' claim was in tort or in contract, because the ruling of the Zhejiang Provincial Higher People's Court had made clear that this was not a dispute under the Bill of Lading. His evidence was that no answer was given to that question. His evidence was that when the Ningbo Maritime Court gave judgment, it was clear, from the terms of the judgment, that the claim rested in contract and that it had been based on the Bill of Lading.

36. The evidence served on behalf of the receivers and PICC by Miss Liu Yan, the advocate for the receivers (who had seven years' experience in practice), was that PICC and the receivers did not state that the claim was not contractual; she relied on the decision of the Ningbo Maritime Court which was that the claim advanced was that there was a claim relating to the bill of lading and not a claim under the bill of lading; it was therefore not governed by the arbitration clause. She also stated that she thought that in the decision of the Zhejiang Provincial Higher People's Court, a distinction was drawn between a claim relating specifically to carriage and a claim

which related specifically to salvage contributions. She nonetheless accepted that in the decision on the merits, the Ningbo Maritime Court had decided that there was a contract between the owners and the receivers and that the contract had been breached by the owners' failure to exercise due diligence to make the vessel seaworthy.

37. Considering the evidence before me and the terms of the judgments of the Chinese Courts, it is clear that the judgment on the merits given by the Ningbo Maritime Court was that the claim which succeeded against the owners was a claim under the bill of lading and that the bills of lading evidenced the only contracts between the owners and the receivers. However, in the earlier rulings upon jurisdiction, it is clear that the Zhejiang Provincial Higher People's Court had decided that the claim was not a dispute over the contract of affreightment.

38. It is quite clear that if the receivers had applied to this Court prior to the judgment being given by the Ningbo Maritime Court, they would have had to consider what position they were to take on jurisdiction. There are three possibilities:

    i) Before Mr Donald Davies, the receivers had deliberately decided not to call evidence on Chinese law on the effect of the decision of the Ningbo Maritime Court and the Zhejiang Provincial Higher People's Court on the question of jurisdiction. If they had followed that course before this Court and within the time scale permitted by the Arbitration Act, then it is difficult to see how this Court could have reached a different conclusion to that reached by Mr Donald Davies as the evidence before the Court would have been the same as that before Mr Donald Davies. The claims before him were, as a matter of English law, obviously claims under the bills of lading and, as on the evidence of the owners such claims were not being adduced in China, the Court would have reached the same conclusion as Mr Donald Davies.

    ii) If, however, the receivers had decided to adduce their own evidence, it is difficult to understand how they could have credibly put forward a case that did not involve adopting a course which would have meant making clear that the claim being made in China was either a claim under the bill of lading or a claim in tort or both.

    iii) If they had adduced evidence before the Court to the effect that the claim before the Courts of China was a claim under the bill of lading, then again it is difficult to see how this Court could have reached a different conclusion on that evidence to that reached by Mr Donald Davies on the evidence before him in view of the terms of the decision of the Courts of China on jurisdiction, where each Court expressly stated that claims under the bill of lading were not claims which were before the Courts of China. If they had contended that the claim in China was one relating to the bill of lading (as Miss Liu appears to suggest, as is set out at paragraph 36), then that would have made no difference as the claim being made before Mr Donald Davies was a claim under the bill of lading and there would have been no reason why he did not have jurisdiction over such a claim.

    iv) If the receivers had adduced evidence that the claim was a claim in tort, then it is difficult to see how Mr Donald Davies' decision could have been successfully attacked; he would have had jurisdiction to determine the claim in contract, unless there was a principle analogous to the doctrine of *cumul*, though with the opposite effect – see ***The Sindh*** [1975] 1 Lloyd's Rep 372

39. There is a further consideration. If the receivers had asserted that the claim being advanced in the Courts of China was a claim under the bill of lading, that assertion and the evidence in support would have been embodied in the judgment of this Court that would, for the reasons I have explained have reached the same conclusion on jurisdiction as Mr Donald Davies.

40. As is clearly set out in the affidavit of Professor Xu Jie, Miss Liu had studiously avoided explaining whether the claim was based in contract or tort. If it had been conceded in this jurisdiction that the claim made in the Chinese courts was a claim in contract under the bill of lading, it is difficult to see how the Ningbo Maritime Court could have reached a decision, prior to the issue of the decision on the merits, other than a decision that the decision on jurisdiction had been mistaken. In any event, the owners were deprived of the opportunity of making that powerful submission.

41. It therefore follows that the owners were caused irredeemable prejudice by the failure of the receivers to make an application within the time permitted by the Act.

42. Having reached that conclusion, and taking into account all the other factors which I have enumerated, I am sure that I should exercise my discretion against extending time.

43. I had reached that decision without having received the respective written submissions on a point raised in the course of argument. As I have set out (at paragraph 29.ii) above), the decision not to make an application in the 28 day period permitted by the Act was a deliberate one. Furthermore, it was one that the owners submitted had been made for tactical reasons by the receivers to avoid having to make clear the basis of their claim before the Chinese Courts. However, as I have also said, the explanation given on behalf of the receivers was that they thought that they were bound by the findings made by Mr Donald Davies in his award.

44. The solicitors who represented the receivers and PICC are extremely experienced solicitors in maritime and arbitration law. Their counsel (who was not the counsel who appeared before me) who represented the receivers and PICC at the arbitration was also very experienced in these areas of the law. It is impossible to understand in the circumstances how the decision not to appeal was arrived at unless it was deliberate (for the reasons submitted by the owners) or due to an error that should not have been made (because the operation of the scheme of the Act should have been clear to those involved in advising PICC and the receivers). If the decision was

deliberate, the decision now to seek an extension of time was manifestly ill-founded and an abuse of the process of this Court. But what if the decision had been the result of erroneous advice that should not have been given?

45. I am grateful to both counsel for their diligence in examining the case law where the courts have considered the relevance of a remedy over against a party's lawyer when exercising a discretion:

i) In cases on dismissal for want of prosecution, the view expressed by Lord Diplock and the majority of the House of Lords in ***Birkett v James*** [1978] AC 297 was that the court should not inquire into the attribution of fault as between the Claimant and his lawyers; the real question was the prejudice to the Defendant by the delay. Lord Salmon, who disagreed, considered that the existence of a remedy against a lawyer should be brought into account, but that this should not carry much weight.

ii) In cases under s.33 of the Limitation Act 1980, the view of the House of Lords in ***Thompson v Brown Construction (Ebbw Vale) Ltd*** [1981] 1 WLR 744 was that in deciding whether the Claimant had suffered prejudice, the existence of a remedy over against his lawyers was a material consideration, but even if he had a cast iron claim against his lawyers there would still be some prejudice.

iii) In ***Unitramp v Jenson and Nicholson(S) pte. Ltd*** [1992] 1 WLR 862, Webster J in an application to extend time under s.27 of the Arbitration Act 1950 took into account the possible claim against the solicitors, but did not attach much weight to it. Both the first and second editions of *Mustill & Boyd* took the view that the fault of the adviser was attributable to the Claimant.

46. In my view, each case must turn on its facts and it is not desirable to import into the exercise of the discretion under the Arbitration Act the case law from other areas of the law. When a court is considering an application to extend time under the Arbitration Act 1996, there may, on particular facts, be cases where it is necessary to investigate the position as between the party seeking the extension and his own lawyer; the court would have to consider whether such an enquiry would be appropriate as it might well involve investigating matters which are privileged. On the facts of this case, it is clearly inappropriate to examine as between the lawyers and the receivers why the decision not to challenge was made. Thus I do not consider it a relevant consideration to take into account the question as to whether there might be a remedy against the lawyers.

47. If the decision was an erroneous one based on a mistaken view of the law, then in the circumstances of this case I have to consider the nature of the error. As I have set out, this was not the kind of error that sometimes occurs when a time limit is overlooked; the scheme of the Act was clear and if a mistake was made, then that was the type of mistake which provides no grounds for granting an extension, given the prejudicial effect which I have found the owners have suffered.

Conclusion on the Application in respect of the Award

48. For these reasons therefore, I refuse the application to extend the time for challenging the jurisdiction under s.67. It follows therefore, that the arbitrator had jurisdiction to make the award on the merits. That award cannot be impugned before this Court and stands in the jurisdiction of England and Wales as a decision on the merits.

Enforcement of the award or recognition of the Ningbo Judgment

49. It was submitted on behalf of the owners that having reached this conclusion, it inevitably followed that I should give leave to enforce the award within this jurisdiction. They submitted that I should do so for two reasons.

i) First, under the statutory scheme of the Arbitration Act 1996, the Court was bound to enforce the award as there were no grounds on which it could be validly impugned.

ii) Secondly, they contended that as the award of Mr Donald Davies on the merits had preceded the judgment of the Ningbo Maritime Court on the merits, this Court should recognise the decision of the Arbitrator on the merits given earlier in point of time.

50. In my view both these arguments are well founded. As I have set out above, the remedy of the receivers was to challenge the decision of Mr Donald Davies on jurisdiction. Once the time for challenging that decision had expired, the decision on jurisdiction stood and there were no grounds for impugning his decision on the merits. As a valid award had therefore been made, there are no grounds upon which enforcement should be refused under the scheme of the Act.

51. Though the Ningbo Maritime Court reached a different decision on the merits, that decision was reached after the decision of Mr Donald Davies on the merits, and after the time set out in the Act for challenging the decision had expired.

52. Mr Donald Davies' decision on the facts as between the owners and the receivers was that the owners had not failed to exercise due diligence, that there was no fault on the part of the owners' employees that had caused the grounding, and that there had been no breach of the contract of affreightment contained in the bills of lading. That decision on the merits gave rise, in my view, to a clear issue estoppel between the parties on those issues.

53. Although the decision of the Ningbo Maritime Court was a decision between the owners and PICC, PICC derived their right entirely from the receivers; they are as much bound by the issue estoppel as were the receivers because there was the necessary privity between them: see the authorities cited and the discussion in the judgment of Megarry V-C in ***Gleeson v Wippell*** [1977] 1 WLR 510 and the approval of that judgment by the House of Lords in ***Johnson v Gore Wood*** [2000] UKHL 65.

54. In ***Showlag v Mansour*** [1995] 1 AC 431, the Privy Council held that where there are conflicting final decisions each pronounced by a court of competent jurisdiction the earlier in time is to be recognised and given effect.

Assuming for these purposes that the decision in the Ningbo Maritime Court should be one recognised as one made with jurisdiction, it is clear that the award of Mr Donald Davies on the merits was given earlier and should therefore be recognised in preference to the judgment of the Ningbo Maritime Court. Similarly, in *Vervaeke v Smith* [1983] 1 AC 145, Lord Diplock in the House of Lords observed that an earlier judgment which was previous in date to a second judgment made the matters in issue *res judicata*.

55. It seems to me therefore to follow that this Court should give leave to enforce the award and that the judgment of the Ningbo Maritime Court does not stand in the way.

Owners' application to strike out the claim made by the receivers and PICC

56. It was the contention of the owners that in these circumstances, this Court should immediately strike out the application made by PICC and the receivers for recognition of the judgment of the Ningbo Maritime Court on the grounds that it was an abuse of the process of this Court. They based their submissions on the grounds that the action represented a collateral attack on the arbitration award and that it was clear that the judgment of the Ningbo Maritime Court could not be recognised in any event.

57. The receivers and PICC contended, however, that in the circumstances I should not strike the action out, but refer the matter for decision on a preliminary issue.

58. During the course of argument, I was referred to:

i) the decisions in ***Hunter v Chief Constable*** *[1982]* AC 529 and ***Arthur JS Hall v Simmons*** [2000] UKHL 38 on the principles applicable to a collateral attack;

ii) the decision of the House of Lords in ***Barrett v Enfield London Borough Council*** [1999] UKHL 25, where Lord Browne-Wilkinson expressed the view that important developments of the law should only be made on the basis of actual facts at trial and not on the basis of hypothetical facts; and

iii) the scope of issue estoppel as set out in ***Henderson v Henderson*** (1843) 3 Hare 114 and ***Hoystead v Commissioner of Taxation*** [1926] AC 155 at 170 and the decision in ***Arnold v National Westminster Bank*** [1991] 2 AC 93 on the special circumstances where issue estoppel did not give rise to re-litigation of a point already decided.

59. It seems to me clear that in the light of my conclusions, there are no grounds upon which the award of Mr Donald Davies can be challenged and that the principles of issue estoppel and *res judicata* operated. As I have set out, before the Ningbo Maritime Court had given its judgment on the merits, the relevant issues had been decided by the award of Mr Donald Davies and could not be re-litigated; he had decided that the owners had exercised due diligence and that they were not at fault. There were plainly no special circumstances; as a matter of English law (which governed the bill of lading), the dispute was unarguably one that should have been determined by arbitration in London; that arbitration had concluded and no challenge had been made to the jurisdiction to make the award within the statutory scheme. Such a challenge was only made after the judgment on the merits given by the Ningbo Maritime Court which ignored the prior decision made in the arbitration, despite the fact that the award was drawn to its attention.

60. In those circumstances, the action brought by PICC and the receivers in which they seek recognition of the judgment of the Ningbo Maritime Court cannot possibly succeed. All the relevant facts are before me. In those circumstances, it seems to me that no useful purpose can be served by allowing the action brought by the receivers and PICC to proceed.

61. It was submitted on behalf of the owners that in the light of the decision of Hobhouse J (as he then was) in ***Dalal v Bank Mellat*** [1986] QB 441 at 451-2, the proper course for the Court to take was to strike out the claim. Quite clearly, under the procedure set out in the RSC as it existed prior to April 1999, that was correct. However, it seems to me that although a strike out remedy is possible under the CPR, the equally appropriate remedy is for me to grant summary judgment on the basis that the claim cannot possibly succeed.

Conclusion

62. For these reasons therefore, I give leave to enforce the award of Mr Donald Davies and grant summary judgment against PICC and the receivers in their action for recognition of the judgment of the Ningbo Maritime Court.

Michael McParland (instructed by Shaw & Croft) for the Claimants in action 2002 Folio 344
Timothy Saloman QC (instructed by Hill Taylor Dickinson) for the Defendants in action 2002 Folio 344