Baghlaf Al Zafer Factory Co BR For Industry Ltd v Pakistan National Shipping Co [1997] Int.Com.L.R. 12/11

CA on appeal from an order of HHJ Kershaw QC before Phillips LJ; Waller LJ; Chadwick LJ. 11th December 1997

LORD JUSTICE PHILLIPS:
On the 24th May 1995 181 coils of steel were shipped in Bilbao aboard the vessel "SIBI", owned by the appellants ("the shipowners"). They were consigned to the respondents ("the cargo owners") in Damman. It is alleged that some of the coils sustained damage in transit to the tune of something under £20,000. The cargo owners seek to recover damages from the shipowners for breach of the contract of carriage.

The coils were carried under bills of lading which contained the following exclusive jurisdiction clause:

JURISDICTION.
The contract evidenced by this Bill of Lading shall be governed by the law of the place where the Carrier has his principal place of business and disputes determined at that place (or, at the option of the Carrier, at the port of destination) according to that law the exclusion of the jurisdiction of the Courts of any other country.

Pakistan is the principal place of business of the shipowners.

Negotiations have taken place between the representatives of the shipowners and cargo owners. The cargo owners contend that these negotiations led to an oral agreement that the English Court should have exclusive jurisdiction in respect of their claim ("the first issue"). Swinnerton Ashley-Claydon ("Swinnertons"), Solicitors acting for the cargo owners, issued a Writ and More Fisher Brown ("MFB"), Solicitors acting for the shipowners, accepted service of the Writ. The cargo owners contend that this precludes the shipowners from invoking the exclusive jurisdiction clause in the bill of lading ("the second issue"). The shipowners contend that the proceedings served upon their Solicitors should be stayed in order to give effect to the exclusive jurisdiction clause ("the third issue").

The shipowners took out a summons seeking a stay of the action. On the 3rd January 1997 His Honour Judge Kershaw, Q.C., sitting as a Judge of the Commercial Court, dismissed their application. The shipowners now appeal against his Order, with leave of the single Lord Justice.

The First Issue
The first issue required the Judge to resolve what he rightly described as a stark issue of fact that arose on the affidavits. Because of the modest amount at stake the parties agreed that the Judge should resolve this on the basis of the inherent probabilities rather than by assessing the credibility of the deponents after seeing them cross-examined on their affidavits.

On this issue he found in favour of the shipowners, holding that there was no oral agreement that the English Court should have exclusive jurisdiction over the dispute. By a respondents' notice the cargo owners seek to reverse this finding, so that this Court is required to re-assess the conflict that arises on the Affidavits.

The Facts
Discharge of cargo in Damman was completed on the 19th July 1995.

On the 25th June 1996 Stean Shaw, the cargo owners' recovery agents, contacted the shipowners' Protection and Indemnity Association, the Steamship Mutual, ("the Club") to seek an extension of the Hague Rules one year time limit. This extension was refused. On the 1st July Swinnertons issued writs in rem and in personam and faxed a letter to the shipowners informing them of this and inviting them to instruct London solicitors to accept service. They threatened to arrest the "SIBI" or a sister ship if a settlement offer was not made.

The shipowners replied the following day in a letter which took the point, among others, that because of the jurisdiction clause in the bill of lading, cargo owners were not entitled to commence proceedings in the United Kingdom.

On the 5th July the Club faxed Swinnertons as follows:
"*We are surprised that you have troubled to issue writs in England in relation to the above captioned claim. Proper jurisdiction for any claim under the above captioned above bill is Pakistan. Accordingly, the proceedings you have issued are, in our view, an abuse of process particularly when the shipment has no connection whatsoever with England. Moreover, as commencing an action in what is patently the wrong jurisdiction will not protect time.*
You should have no doubt that if you do attempt to serve English writs on our Members, we shall make an immediate application to challenge the jurisdiction of the English Court. Moreover should you attempt to arrest any vessels owned by PNSC, in these circumstances,we will apply to set aside any arrest order made."

This response had been discussed with both the shipowners and with MFB. Cargo owners' Solicitors replied aggressively on the 8th July:
"*We are not instructed to discontinue proceedings in this jurisdiction. Indeed cargo interests have a valid claim for damages and are entitled to protect their interests in respect of the same.*
Your members have ignored correspondence requesting an extension of time and then after proceedings were issued alleged that proceedings were commenced out of time which is incorrect.
Will you please confirm that you/your members will give due consideration to the claim immediately. Please note that we are instructed to proceed with an arrest if the SIBI or one of her sister ships calls in England or Wales and a watch is being kept upon the vessels."

On the same day, Stean Shaw faxed to the Club an invitation to put up security, attaching "*a suitable wording for the guarantee*".

The form attached included an undertaking to pay such sums as should be adjudged due by the English High Court, an undertaking to instruct Solicitors to accept service of proceedings commenced in the English High Court and an agreement to submit to the exclusive jurisdiction of the English High Court for the purpose of enforcing the undertaking.

Still on the 8th July the Club invited Swinnertons to send the claims documents and copies of the Writs that had been issued.

On the 9th July the Club faxed to Stean Shaw in the same terms as their fax to Swinnertons of the 5th July.

I now come to a telephone conversation between Stean Shaw and the Club on the afternoon of the 9th July. The First Issue turns on the content of this conversation. Mr Hawes, a claims handler for Stean Shaw, gives this account of it:

"Captain Singh introduced himself and said that Darren Heppel was with him. I heard a voice in the background shouting out "Hello" and assumed that that was Mr. Heppel. Captain Singh said something like "we are all friends here together".

Captain Singh then told me that he had been trying to speak to Swinnerton Ashley-Claydon but was unable to get through. He said he was phoning to say that he did not want one of the Defendants' vessels arrested and that the Club was prepared to provide a letter of undertaking in the form proposed by me. He also said something to the effect that the Plaintiffs could found jurisdiction that way but I cannot remember now precisely how he put it.

I then telephoned Swinnerton Ashley-Claydon and spoke to Mr. Swinnterton's assistant, Julie Allen. I told her about the agreement which I had reached with Mr. Singh."

Both Mr Hawes and Miss Allen made contemporary notes of their conversations:

Mr Hawes note read:

9.7.96

T.C. from Steamship Mutual (Capt Singh/Darren Heppel) - agreeing to security as proposed - I suggested they speak to Tony Swinnerton, as he has been instructed to discuss this claim further.

I phoned Swinnerton's to advise.

Miss Allen's note read:

10.7.96

James Hawes

Stean Shaw

Sibi Capt. Singh

Darren

Heppel

Steamship Mutual

- letter of undertaking wording as per draft.

Mr Singh's version of the conversation is as follows:

Darren Heppel (who has been assisting me on this matter) was beside me when I answered the call. Mr. Hawes confirmed to me that Stean Shaw had instructed SAC but were unaware that SAC had already been in contact with Steamship Mutual. I then advised Mr. Hawes that the Club's views on jurisdiction had been made known to SAC and that since solicitors had been instructed by both parties, future discussions should take place between them. I did say to Mr. Hawes, however, that in order to avoid a PNSC vessel being arrested, that Steamship Mutual would be prepared to provide a guarantee, but in a wording to be agreed between the solicitors. In light of the background which I have explained above, I could not have, even remotely, agreed that Steamship Mutual would provide security in the form suggested by Stean Shaw, and Stean Shaw were quite aware of the position on jurisdiction having received our above-mentioned fax on the morning of 9th July prior to our telephone conversation. There would be absolutely no reason for me to depart from the position which had been unequivocally adopted by both Steampship Mutual and PNSC on the issue of jurisdiction.

Mr Heppel confirms this account:

I recall that during the conversation Captain Singh confirmed to Mr. Hawes that Steamship Mutual was prepared to provide security - our concern being that we wished to avoid the arrest of a PNSC ship which was being threatened by the Plaintiffs at the time. Captain Singh did not, however, agree to the specific wording of the LOU which Stean Shaw had proposed. Both Captain Singh and I had looked at the draft LOU and it was unacceptable for a number of reasons, not least because it referred to PNSC agreeing to English jurisdiction....

After Captain Singh and Mr. Hawes had finished speaking, Captain Singh asked me to send the draft LOU to More Fisher Brown, whom Steamship Mutual had instructed on behalf of PNSC. I therefore sent More Fisher Brown a fax requesting them to negotiate the security wording with Swinnerton Ashley-Claydon.

The fax that Mr Heppel sent to MFB included the following paragraphs:

Given that PNSC have informed Swinnerton's that you have been appointed on their behalf we now feel that in order to deprive cargo interests of a reason to detain a PNSC vessel it would be advisable to a) appoint you to accept service and b) provide a Club LOU.

Accordingly, please could you now contact Swinnterton's and request them to send you the writs that they have issued. We would also be grateful if you could negotiate the wording of the LOU to a form acceptable to the Club and in this regard we attach a copy of Stean Shaw's proposal. Naturally, we would wish the LOU to incorporate "competent Court" as opposed to the jurisdiction of the English High Court.

On behalf of the cargo owners, Mr Nolan argued that the Judge was wrong to conclude on the basis of this evidence that no oral agreement to exclusive English jurisdiction had been concluded. The only issue was whether Mr Singh had agreed that security would be provided on the terms of Stean Shaw's form, which included an agreement to English jurisdiction. As to this, the best evidence consisted of the contemporary notes of Mr Hawes and Miss Allen. The problem with this submission is that the fax sent by Mr Heppel to MFB after the telephone conversation is inconsistent with an agreement to the terms of Stean Shaw's form.

Mr Nolan submitted that the agreement would have been concluded in a sentence or two. If this is correct, and it seems likely that it is, it is hard to accept that either party to the telephone conversation intended to create legal relations in anticipation of the execution of a formal written undertaking.

What seems quite clear is that the participants were never, subjectively, 'ad idem'. It was unlikely in the extreme, having regard to the vigorous protests that had been made as to the effect of the exclusive jurisdiction clause in the bill of lading, that the Club would agree to exclusive English jurisdiction, and Mr Heppel's fax to MFB shows that he did not believe that it had done so. In my judgment the most likely explanation for the conflict on the contemporary documents is that there was a misunderstanding as to what Mr Singh had agreed. He could well have said "we will put up the security asked for by Stean Shaw", intending to refer only to the amount, which was £20,000. Mr Nolan correctly submitted that any agreement fell to be determined having regard to the objective interpretation of the words used. I agree. The trouble is that there is no satisfactory evidence as to what those words were. In these circumstances I agree with the Judge that the cargo owners have failed to establish that the Club orally agreed on behalf of the shipowners to exclusive English jurisdiction.

The Second Issue

On the 10th July MFB faxed to Swinnertons a letter which stated:

We have been instructed on behalf of PNSC in this matter and are authorised on their behalf to accept service. Would you please therefore send us the writs which have been issued.

Swinnertons replied two days later, somewhat confusingly:

We also enclose two Writs in Personam together with two Acknowledgments of Service for the two Defendants by way of service together with, for your information, a copy of the Writ in Rem.

MFB faxed back on the 15th:

Thank you for your 12 July letter received here today. We are unsure whether you are intending by means of your letter to serve us with the Writ or not. As we have already indicated we do have instructions to accept service. Please could you clarify.

If you are serving us then please let us know what you wish to do about an Acknowledgment of Service. Are you proposing to get on with the claim or do you wish to agree a general extension of time for acknowledgment and lodging of Notice of Intention to Defend.

Finally, we should stress that although we are instructed to accept service, this is not a step in the action and we make no admission whatever in relation to jurisdiction. This is a point which we will be considering further in the future but for present purposes please treat all communication with us and from us as being without prejudice to jurisdiction issues.

Swinnertons replied on the 16th:

We thank you for your fax dated 15th July and do apologise for any apparent confusion but we sent the Writ in Personam to you by way of service. We are obliged to you for confirming that you would accept service.

According to our letter dated 12th July we included two Acknowledgments of Service as there are two Defendants. We attach a further copy for your assistance.

In default of any proposals from your clients we are instructed to press ahead with the claim and would ask you please to file the Acknowledgements in the usual way.

We note the third paragraph of your fax.

Mr Nolan submitted that by agreeing to accept service by their Solicitors, the shipowners agreed to submit to the jurisdiction of the English Court, and that this precluded them from thereafter seeking to stay the English proceedings. The Judge rejected this submission. Mr. Nolan referred us to ***Manta v. Sofianites*** [1984] 1 Lloyds Rep. 14. Before turning to consider that case it is helpful to consider the nature of the jurisdiction of the Court. The immediate foundation of the jurisdiction of the English Court is due service of process - see ***Johnson v. Taylor Bros.*** [1920] AC 144 at p. 154 per Lord Dunedin. Of more significance, of course, are the principles of English law which govern the circumstances in which service is permissible. Where service of process is properly effected in accordance with those principles, the jurisdiction of the English Court will normally be established. Where service has been improperly effected contrary to those principles, an application can be made to set service aside. Where service is set aside, the English Court has no jurisdiction.

In ***Manta v. Sofianites*** the Plaintiffs obtained leave ex parte to issue a Writ for service out of the jurisdiction, relying on a number of the grounds for such service to be found in Order 11 RSC. Solicitors acting for the Defendant then undertook to accept service, and the Writ was duly served on them. Their intention was simply to short circuit the process of serving out of the jurisdiction, leaving the Defendant able to challenge the jurisdiction of the English Court on the ground that no case for service under O.11 had been made out. They had not, however, made this plain to the Plaintiffs' solicitors. The Court of Appeal held that the acceptance of service had founded the jurisdiction of the English Court, so that it was no longer material to consider whether or not service could properly be effected outside the jurisdiction. The position was exactly the same as if the Defendant had been served within the jurisdiction personally or through an agent. Sir John

Donaldson MR remarked at p.20 that, had that been the case: *"there would have been no question then of his applying to set the writ aside whether the appearance he subsequently entered was conditional or unconditional, because those who are served within the jurisdiction, personally or through an agent, have no right to challenge the jurisdiction. All that they can do is challenge its exercise on the limited grounds which I have mentioned, which do not apply in this case"*

This last sentence referred back to a passage at p.18 where the Master of the Rolls referred to: *"examples where the Court, although it has jurisdiction, customarily declines jurisdiction as, for example, when the dispute concerns the matrimonial status of persons under other systems of law in the absence of any domicile within the jurisdiction, or a foreign sovereign, or some emanation of a foreign sovereign, or the title to foreign reality".*

Strangely, the Master of the Rolls appears to have overlooked other, more pertinent, circumstances where the English Court will decline to exercise a jurisdiction which it undoubtedly has, such as where it is shown that there is an alternative forum where the action can more suitably be tried having regard to the interests of the parties and the ends of justice. Establishing jurisdiction by service is no bar to seeking a stay of proceedings on the grounds of *'forum non conveniens'* or on the ground that the Plaintiff has agreed that the Court of another country shall have exclusive jurisdiction over the dispute. The fact that a Plaintiff has agreed with a Defendant that any dispute between them will be resolved, exclusively, in a foreign jurisdiction does not deprive the English Court of jurisdiction where the Defendant has been duly served. It may, however, lead the English Court to decline to exercise that jurisdiction.

In the present case, the shipowners have been duly served, having voluntarily instructed solicitors to accept service. That is, however, no bar to their inviting the Court to stay the proceedings in order to give effect to the jurisdiction clause in the bill of lading unless, implicit in their agreement to accept service, was an agreement that they waived their right to invoke the clause. Mr Nolan argues that this was indeed implicit. The shipowners were not susceptible to service in personam and, thus, the only explanation for their accepting service was that they were agreeing that the English Court should adjudicate on the merits of the dispute.

Were one to ignore the relevant background, I would find Mr Nolan's argument convincing. But MFB were instructed to accept service in circumstances where the shipowners were vigorously protesting against proceedings being brought in England but where the cargo owners were on the point of arresting one of their ships. Had they done so, the shipowners would have had no choice but to acknowledge service, whereupon they could have applied for a stay on the ground of the exclusive jurisdiction clause in the bill of lading. By agreeing to accept service they were merely anticipating that situation, and I cannot read into that agreement any implication that they were abandoning the insistence that the dispute should be litigated in Pakistan.

For these reasons I would uphold the conclusions of the Judge in relation to the Second Issue.

The Third Issue

In the concluding paragraph of his judgment, the Judge said this:

Mr. Nolan submitted, correctly, that a stay should only be granted if the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the actions, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice. I have reached the conclusion that that test has not been satisfied. I therefore refuse a stay on the forum non conveniens basis.

I accept the submission of Mr Young, Q.C., for the shipowners that the Judge erred in accepting the approach advanced by Mr Nolan and, in consequence, applied the wrong test. Where the parties have agreed that a dispute shall be resolved in the Courts of one country to the exclusion of all others, the English Court ought to respect such agreement, unless to do so risks resulting in injustice. Lord Goff summarised the position concisely in ***The Pioneer Container*** *[1994]* 2 AC 324 at 347, when he said:

....the Court has a discretion whether to grant a stay of proceedings brought in breach of an agreement to refer disputes to a foreign court; but the discretion should be exercised by granting a stay, unless strong cause for not doing so is shown.

Lord Goff had previously approved the more detailed exposition of the relevant principles given in ***The El Amria*** [1981] 2 Lloyds Rep. 119 at 123 by Brandon L.J., who had made this area of the law peculiarly his own:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the Court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

(b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

As the Judge applied the wrong test when exercising his discretion, it is for this Court to review the position afresh by applying the correct principles. I propose to consider the various matters itemised by Brandon L.J. under his 5th principle.

(a) The evidence on the issues of fact is situated in neither England nor Pakistan.

(b) The exclusive jurisdiction clause provided that the contract of carriage would be governed by the law of Pakistan.

(c) The shipowners are closely connected with Pakistan, but their P.& I. Club is managed in England and consideration of the claim is likely to be carried out in England.

(d) Where a cargo claim is involved, particularly as modest a claim as that in the present case, I do not think that it is realistic to view either party as motivated by a concern that the dispute be litigated in its preferred jurisdiction. Such claims almost always settle. The jurisdiction in which the claim is proceeding is relevant chiefly in relation to the effect that it will have on the negotiating position of the parties in settlement discussions. That is not, of itself, a reason for depriving a party of a negotiating advantage which accrues to that party as a result of a contractual agreement as to jurisdiction.

(e) Time-bar is the only relevant matter under this paragraph of Brandon L.J.'s list. That is the one aspect of this appeal that is of general significance. Before turning to it, I should deal with one further factor upon which the cargo owners have relied.

It seems that litigation is subject to longer delays in Pakistan than in this country. It might take 6 or 7 years to resolve this dispute in the Courts of Pakistan. In the ***El Amria*** Brandon L.J. discouraged a practice of comparing the procedural advantages and disadvantages of rival jurisdictions. He said at p. 126: *"for an English Court to investigate such a matter and pronounce a judgment on it is not consistent with the mutual respect with which the Courts of friendly states, each of which has a well developed system for the administration of justice, owe, or should owe, to each other*".

It does not seem to me that these words are applicable to delay, which may well be attributable not to procedural shortcomings, but to demand swamping the available resources. But I do not consider that the relative lead times in Pakistan and England, when taken on their own or in conjunction with the other matters that I have just considered, constitute strong cause for not giving effect to the exclusive jurisdiction provision agreed by the parties.

The Time Limit

Carriage of goods by sea is covered by international convention. The Brussels Convention of 1924 produced the Hague Rules. Some, but not all, of the parties to that Convention have, by the Brussels Protocol 1968, amended those rules to produce the Hague-Visby Rules. The law of Pakistan applies the Hague Rules; the law of England applies the Hague-Visby Rules. Each set of rules applies the same limitation provision. Suit must be brought within one year of delivery, failing which the carrier is discharged from all liability. The cargo owners commenced the English proceedings within the one year limitation period. They did not commence proceedings in Pakistan and, should they do so now, risk being defeated if the shipowners plead that the claim is out of time. The shipowners have made it plain that they are prepared to undertake not to invoke the time bar in Pakistan if this is the price that they have to pay in order to obtain a stay of the English proceedings. They contend, however, that they should not be required to pay this price. They say that the fact that the claim is likely to be held time-barred in Pakistan is no reason for permitting the cargo owners to proceed in England in breach of the jurisdiction clause.

Where a claim has become time-barred in what would otherwise be the appropriate or agreed jurisdiction in which it should be tried, does this militate in favour of granting a stay of the English proceedings, or against granting a stay, or is it a neutral factor? This is a question which the Courts have considered on a number of occasions. There is, in my judgment, no binding decision on the point and different Judges have expressed different views. The authorities have recently been reviewed in two cases in the Commercial Court involving exclusive foreign jurisdiction clauses in bills of lading and I propose to refer to these, rather than repeat the exercise.

In ***Citi-March Ltd v. Neptune Orient Lines*** [1997] 1 Lloyds Rep. 72 service out of the jurisdiction had been effected in relation to bills of lading which had an exclusive Singapore jurisdiction clause. The Plaintiffs allowed the Hague Rules one year time limit to expire without issuing a protective Writ. After reviewing the authorities, Colman J. gave the following summary of their effect at p. 76-7:

The approach in these cases is, in my judgment, consistent with the view that in an exclusive jurisdiction clause case, where a plaintiff has failed to issue protective proceedings in the contractual forum, a stay will be ordered or service set aside unless strong cause is shown why English jurisdiction should be maintained. In a case where, but for the time bar, there is strong cause for English jurisdiction, a stay will not be ordered or service set aside in spite of the plaintiffs having consciously decided not to preserve time in the contractual forum, for in so conducting himself he cannot be said to have acted unreasonably and it is in the circumstances inappropriate that he should be shut out from pursuing his claim by reason of the foreign jurisdiction clause. In a case where, however, but for the time bar, strong cause in favour of English jurisdiction cannot be shown, a plaintiff may be able to rely on the prejudice to him by reason of a time bar in the contractual forum if he can show that he did not act unreasonably in failing to issue protective proceedings in order to prevent time running against him. Whether his omission is unreasonable will depend on all the circumstances of the case, including his awareness of the potential time bar, the explanation for his omission to preserve time and the extent to which the contractual forum is also, time bar apart, the appropriate forum for the adjudication of the dispute in question. At the end of the day the Court must consider whether in the interests of justice it is more appropriate to permit a plaintiff to proceed in England, although he has omitted to preserve time in the contractual forum, and although England is not clearly the more appropriate forum than to deprive him of all opportunity of pursuing his claim in any forum.

On the facts of that case, Colman J. held that strong cause had been shown for maintaining English jurisdiction. He went on to hold that in those circumstances the Plaintiffs had acted reasonably in proceeding in England and that it could not be maintained that the omission to incur further costs in order to preserve time in Singapore was unreasonable.

In ***The "M C Pearl"*** [1997] 1 Lloyds Rep. 556 the Plaintiffs served proceedings in England in disregard of a clause in the bills of lading which provided for the exclusive jurisdiction of the Courts of South Korea. No proceedings were commenced in South Korea and the Hague Rules time limit expired. Rix J. held that the case was on all fours with ***Citi-March.*** There was strong cause for proceeding in England. Rix J. also reviewed the relevant authorities and, broadly, formed the same conclusions as Colman J. He did, however, differ from him in advancing the following proposition:

Fifthly, it seems to me that it ought to follow that (save possibly in some exceptional circumstance which I cannot presently visualize) a plaintiff's failure to preserve a time limit in the contractual forum cannot *assist* him to found jurisdiction in England where he does not have a strong case for it separately from the time bar point; and that even where he does have a strong case for jurisdiction in England apart from the time bar point, the fact that he has allowed the time bar to go by default in the contractual jurisdiction always requires some consideration or explanation (as in *Citi-March*).

Rix J. obviously was not able to envisage a situation in which it might be reasonable to start proceedings in England in disregard of a foreign jurisdiction clause, but where the Plaintiffs would be unable subsequently to demonstrate that there was strong cause for proceeding in England. Accordingly he did not believe that the following extract from the Speech of Lord Goff in ***The Spiliada*** [1987] 1 A.C. 460 at 483 could apply in an exclusive jurisdiction clause context:

And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective Writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country.....

The appropriate order, where the application of the time bar in the foreign jurisdiction is dependent upon its invocation by the defendant, may well be to make it a condition of the grant of a stay, or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time bar in the foreign jurisdiction; this is apparently the practice in the United States of America.

I consider that the demands of practical justice identified by Lord Goff can in some circumstances apply in an exclusive jurisdiction clause context. Where a Plaintiff has acted reasonably in commencing proceedings in England and in allowing time to expire in the agreed foreign jurisdiction, a stay of the English proceedings should only be granted on terms that the Defendant waives the time bar in the foreign jurisdiction.

Did the cargo owners act reasonably in starting proceedings in England?

In my judgment factors existed in this case which, when viewed objectively, made it reasonable for the cargo owners to commence proceedings in England. Those factors are by no means uncommon.

One of the principal objects of the Brussels Protocol 1968 was to substitute a more realistic limit of liability for the Hague Rules limit, which, at least as interpreted in some countries, inflation had rendered derisory. The new limit under Article IV rule 5 of the Hague-Visby rules, is 2 SDRs per kilo of gross weight or 666.67 SDRs per package. The old limit was £100 per package and the Courts of Pakistan have to date treated this as £100 sterling, rather than £100 gold value. It follows that the effect of the jurisdiction clause in the bill of lading was that cargo owners were required to sue in a jurisdiction where the shipowners would have been entitled to limit their liability to a fraction of the claim. In these circumstances I consider that it was plainly reasonable to commence proceedings in England, where the larger limit would not impinge on the claim. Indeed, the matter goes further than that.

By Article III rule 8 of the Hague-Visby Rules: *Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.*

The effect of this is that the English Court is required to treat as of no effect an exclusive jurisdiction clause if the application of that clause will result in the Plaintiffs' recovery being restricted to less than the Hague-Visby limit.

In ***The Hollandia*** [1983] AC 565 at p. 574-5 Lord Diplock described the position as follows:

My Lords, unlike the first paragraph of condition 2 a choice of forum clause, such as that appearing in the third paragraph, does not ex facie offend against article III, paragraph 8. It is a provision of the contract of carriage that is subject to a condition subsequent; it comes into operation only upon the occurrence of a future event that may or may not occur, viz: the coming into existence of a dispute between the parties as to their respective legal rights and duties under the contract which they are unable to settle by agreement. There may be some disputes that would bring the choice of forum clause into operation but which would not be concerned at all with negligence fault or failure by the carrier or the ship in the duties and obligations provided by article III; a claim for unpaid freight is an obvious example. So a choice of forum clause which selects as the exclusive forum for the resolution of disputes a court which will not apply the Hague-Visby Rules, even after such clause has come into operation, does not necessarily always have the effect of lessening the liability of the carrier in a way that attracts the application of article III, paragraph 8.

My Lords, it is, in my view, most consistent with the achievement of the purpose of the Act of 1971 that the time at which to ascertain whether a choice of forum clause will have an effect that is proscribed by article III, paragraph 8 should be when the condition subsequent is fulfilled and the carrier seeks to bring the clause into operation and to rely upon it. If the dispute

is about duties and obligations of the carrier or ship that are referred to in that rule and it is established as a fact (either by evidence or as in the instant case by the common agreement of the parties) that the foreign court chosen as the exclusive forum would apply a domestic substantive law which would result in limiting the carrier's liability to a sum lower than that to which he would be entitled if article IV, paragraph 5 of the Hague-Visby Rules applies, then an English Court is in my view commanded by the Act of 1971 to treat the choice of forum clause as of no effect.

Thus, where a stay is sought, the English Court will consider as of no effect a foreign jurisdiction clause whose effect will be to subject the Plaintiff to a relevant limit of liability below the Hague-Visby limit. This has led Defendants to adopt the stratagem of undertaking not to rely upon a package limitation under the law of the contractual forum that is less than the Hague-Visby limit, and in ***The Benarty*** [1985] 1 Q.B. 325 at p.339 Ackner L.J. gave this practice his approval.

In the present case, at the hearing of the stay application but not before, the shipowners undertook not to rely upon the Pakistan package limit. Had they not done so, the stay application would have been doomed to failure. This led Mr Young to make the following submission. Until the stay application was heard it was uncertain whether any issue of package limitation would arise and, in the event, no such issue did arise. Accordingly the cargo owners could not justify their decision to proceed in England by the need to avoid the effect of the Pakistan limit. This is wholly unrealistic. Had the cargo owners simply sued in Pakistan, there is every reason to think that the shipowners would have invoked the Pakistan limit. It was only by suing in England that they compelled the shipowners to waive that limit. In my judgment, where a bill of lading contains a foreign jurisdiction clause whose effect will be to limit the holder's claim to a sum that is less than an applicable Hague-Visby Rules limit, the English Court should normally treat the holder as entitled to disregard that clause unless and until the shipowner undertakes that he will not seek to take advantage of the lower limit.

For these reasons, when an objective test is applied to the conduct of the cargo owners in the present case, I conclude that they acted reasonably in commencing the English proceedings.

Mr Young submitted that it was wrong to apply an objective test. The cargo owners ought to have demonstrated that their subjective motive for commencing proceedings in England was reasonable. I disagree. It seems to me that it is appropriate, when considering whether cargo owners acted reasonably, to view the relevant factors objectively.

Mr Young further submitted that the cargo owners ought, in any event, to have commenced proceedings in Pakistan in order to keep time open there. I do not find this an attractive submission. The object of the one year time limit is to ensure that shipowners are given reasonably prompt notice of claims against them and not faced with stale claims. By reasonably commencing proceedings in the English jurisdiction, the cargo owners achieved that object. To have commenced parallel proceedings in Pakistan would have been a pointless technicality. A cautious lawyer might, nonetheless, have advised such a course, but I do not believe that it would be consistent with the practical requirements of justice to penalise the cargo owners for their failure to do so.

For these reasons, I would make it a term of the grant of a stay that the shipowners undertake to waive the one year time limit in Pakistan. Upon that basis I would allow this appeal.

LORD JUSTICE WALLER:
I agree with the judgment of Phillips L.J. entirely, subject to a concern that I have about the ultimate exercise of discretion on the facts of this particular case.

My concern is as to whether having concluded it was reasonable to commence these proceedings in England, and having concluded that it was not necessary to commence parallel proceedings in Pakistan, (with which conclusions I say again I entirely agree), it is right ultimately in an action concerned with such a small sum of money to stay the English proceedings, and force further costs to be incurred in commencing proceedings in Pakistan. I realise it will be said that the costs so far have been concerned essentially with the jurisdiction dispute, but nevertheless lawyers in England will have at the least a broad understanding of the merits, and lawyers in Pakistan on both sides will be required to start from scratch.

I stress that my concern arises simply because of the lack of proportion in this case between the sum claimed, and the costs to which the respective parties will now be put, and has absolutely nothing to do with attempting to compare lead times in the respective jurisdictions.

Having registered my concern, I am not prepared to dissent in the result advocated by Phillips L.J., but when the question of costs comes to be considered, this is a point which in my view should be borne in mind.

LORD JUSTICE CHADWICK:
I agree that this appeal must be allowed. I share the concern of Waller L.J. that the costs yet to be incurred if this dispute is to be litigated in Pakistan may be out of proportion to the sum in dispute; but I am not persuaded by any material before the Court that the costs of litigation in Pakistan are greater, or significantly greater, than the costs of further litigation in England. The problem, as it seems to me, is that the costs of litigation are likely to be disproportionate in relation to the amount in dispute in this case whether the litigation continues in England or commences afresh in Pakistan. But that is a matter for the parties. In relation to the question which we have to decide - whether or not to stay proceedings in England - the point seems to me to be neutral.

Order: Appeal allowed with appellant to have half costs.

MR T YOUNG QC and MR A GHAFFAR (Instructed by More Fisher Brown of London) appeared on behalf of the Appellant
MR M NOLAN (Instructed by Swinnerton Ashley-Claydon of London) appeared on behalf of the Respondent