Inco Europe Ltd v First Choice Distribution (A Firm) [1998] APP.L.R. 09/30

CA before Hobhouse LJ; Thorpe LJ; Mummery LJ : 30 September 1998

HOBHOUSE LJ:

1. By a writ issued out of the Manchester District Registry of the High Court on 24th June 1997, the Plaintiffs in this action, Inco Europe Ltd and Inco Alloys Ltd, made a claim for damages in respect of the loss of a consignment of nickel cathodes being carried from Rotterdam to Hereford. One of the Defendants' named in the writ was Steinweg (Handlesveem BV). Steinweg made an application under s.9 of the Arbitration Act 1996 for the stay of the action against them on the ground that it was brought in respect of a matter which the Plaintiffs had agreed to refer to arbitration. The application was heard by HHJ Hegarty QC. He refused to grant the stay, holding that the arbitration agreement was "*null and void or inoperative*". (p.21 of the transcript) Steinweg seek to appeal from that decision. The Judge refused leave to do so. Steinweg have accordingly applied to this Court for leave to appeal.

2. It is a matter of credit to Mr Ghaffar, counsel for Steinweg, that he identified a problem which had previously been overlooked. He drew to the attention of the Judge, and has drawn to our attention, that it appears that s.107 of the 1996 Act and paragraph 37 of the Third Schedule to that Act have removed the jurisdiction of the Court of Appeal to entertain any appeal from a decision of a lower court or judge under s.9. Judge Hegarty refused leave to appeal on the basis that there is no jurisdiction and Mr Justice Tuckey in February of this year in a similar case (***Wealands v CLC Contractors***), having also had his attention drawn to the point, refused leave on the same basis. In neither instance was the matter the subject of developed argument such as has taken place before us.

3. By contrast, in the case ***Halki Shipping v Sopex Oils*** [1998] 2 AER 23 (decided in December of last year), the Court of Appeal assumed that it did have jurisdiction to entertain an appeal from a s.9 decision. The point of jurisdiction was not raised. Leave to appeal to the House of Lords was subsequently given. This would have provided the opportunity for an authoritative decision upon the question of jurisdiction but the appeal was withdrawn by consent before it could be heard.

4. The application for leave to appeal was referred to the full Court. It has been listed before us as an application with the appeal to follow if leave is granted. We have heard full argument both on the jurisdiction question and upon the merits of the appeal, should it be permissible. The first thing we have to decide is whether or not the Court of Appeal has a jurisdiction to entertain the application and appeal.

Jurisdiction:

5. The point for the Plaintiffs can be very simply stated. The Third Schedule of the 1996 Act amended a large number of earlier statutes. One was the Supreme Court Act 1981. S.18(1) was amended so as to read -

   "No appeal shall lie to the Court of Appeal - ....

   (g) except as provided in Part I of the Arbitration Act 1996 from any decision of the High Court under that Part; ...."

6. The 1996 Act, either in s.9 or elsewhere in Part I, makes no express provision for there to be any right of appeal from a decision under s.9 to the Court of Appeal. It is therefore submitted that under the amended s.18(1)(g) no appeal lies to the Court of Appeal. The argument of the Plaintiffs' is thus straightforward. The effect of the amendment is that unless an express right of appeal is given, as is found (albeit qualified) in other provisions of Part I of the 1996 Act, no appeal is to lie. This submission does not lose any of its force by its brevity. Indeed it is a submission which must be accepted unless some convincing answer arising within the permitted canons of statutory construction can be made to it.

7. A number of arguments have been advanced on behalf of Steinweg. The argument which needs to be considered is that which arises from an examination and consideration of the provisions of the 1996 Act itself. Mr Ghaffar submits that when this task is undertaken it will be seen that what might be termed the literal construction of the amended 1981 Act does not accord with the statutory intention disclosed by the 1996 Act and that the better view is that the intention of the 1996 Act is that the previously existing right of appeal (with leave) to the Court of Appeal in respect of decisions on applications for the stay of litigation has not been taken away by the 1996 Act.

8. In general terms, it is undoubtedly correct that the effect of an amendment to a statute should be ascertained by construing the amended statute. Thus, what is to be looked at is the amended statute itself as if it were a free-standing piece of legislation and its meaning and effect ascertained by an examination of the language of that statute.

9. However in certain circumstances it may be necessary to look at the amending statute as well. This involves no infringement of the principles of statutory interpretation: indeed it is an affirmation of them. The expression of the relevant parliamentary intention is the *amending* Act. It is the amending Act which is the operative provision and which alters the law from that which it had been before. It is the expression of the parliamentary will as to what changes in the law Parliament wishes to make. In the present case this approach is further justified by the reference in the amended 1981 Act back to the 1996 Act and by the terms of the 1996 Act itself.

10. As I stated earlier in this judgment the amending provision is s.107(1). The heading is "Consequential Amendments and Repeals". Sub-section (1) provides: *"The enactments specified in Schedule 3 are amended in accordance with that Schedule, the amendments being consequential on the provisions of this Act."*

11. Schedule 3 is entitled *"Consequential Amendments"*. It is therefore a legitimate consideration to ask whether an amendment abolishing a right of appeal from a decision refusing or allowing a stay of an action could properly be described as consequential upon the provisions of the 1996 Act.

12. Before amendment, paragraph (g) of s.18(1) of The Supreme Court Act had read -
"Except as provided by the Arbitration Act 1979, from any decision of the High Court -
(i) on an appeal under s.1 of that Act, on a question of law arising out of an arbitration award; or
(ii) under s.2 of that Act on any question of law arising in the course of a reference.""

13. The 1979 Act is the Arbitration Act which radically amended the statutory scheme of judicial review of arbitration awards by the courts. It abolished the appeal by way of case stated and 'error of law on the face of the award' as a ground for setting aside an award. It substituted a system of reasoned awards open to only very carefully limited rights of appeal to the courts. As part of this scheme, special limitations were introduced upon rights of appeal to the Court of Appeal. It was these which were referred to in the unamended paragraph (g). Questions of the stay of litigation were dealt with in a different Act, the Arbitration Act 1996, which contained no special restrictions on rights of appeal to the Court of Appeal.

14. The status of arbitration clauses in English law has been gradually developed over the last century and a half. It has also been the subject of international conventions. At the time of the passing of the Arbitration Act 1950, the relevant international agreement requiring states to recognise and give effect to arbitration clauses was the League of Nations Protocol of 24th September 1923 and its corollary, the Geneva Convention on the Execution of Foreign Arbitral Awards dated 26th September 1927. This Protocol and Convention were scheduled to the 1950 Act. The stay of litigation where there had been a submission to arbitration was dealt with in s.4 of that Act. Sub-section (1) dealt with domestic arbitrations which did not come within the scope of the Protocol, in which case the court had a discretion whether or not to grant the stay. Sub-section (2) provided for the mandatory recognition and enforcement of arbitration agreements falling within the scope of the Protocol and therefore the stay of any legal proceedings in respect of a matter agreed to be referred unless the court was *"satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred."*

15. In June 1958 the United Nations Conference on International Commercial Arbitration adopted a fresh convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention. The United Kingdom subscribed to and ratified that Convention as did very many other states. The Arbitration Act of 1975 was enacted to give effect to that Convention. The obligation of the United Kingdom was to recognise and give effect to arbitration agreements to which an individual who was a national or habitually resident in a state other than the United Kingdom, or an entity incorporated in or with its central control and management in such a state, was a party. Similarly it was the obligation of the United Kingdom to recognise and give effect to arbitration awards involving one or more such parties. The scheme was mandatory, subject to certain safeguards. The safeguard in respect of the obligation to stay litigation was set out in s.1(1) of the 1975 Act the wording of which has in the material respect been repeated in s.9(4) of the 1996 Act. *"On an application under this section, the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."*

16. Thus, the feature of the New York Convention and its implementation in the law of the United Kingdom by the Arbitration Act 1975 was the combination of the obligation to recognise arbitration agreements with the obligation to enforce awards; being an international convention, its subject matter was arbitration agreements or awards which were not exclusively domestic. The New York Convention remains a convention by which the United Kingdom is bound. It was no part of the intention of the 1996 Act to detract from the obligations of the United Kingdom under that Convention or to resile from it. It is clearly the intention of the 1996 Act to continue to give effect to the New York Convention (and the provisions of the 1975 Act). The provisions for the enforcement of foreign awards are contained in Part III of the 1996 Act. The provisions for the stay of litigation are contained in sections 9-11 in Part I of the Act. No material change was made in s.9 itself; it repeats, as of general application, the same provisions and criteria as had previously been in s.1 of the 1975 Act. The new modifications of those provisions for purely domestic agreements are contained in ss.85 and 86 in Part II of the Act.

17. The preamble to the 1996 Act stated that it was - *"An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes."*

18. The genesis of the Act was a Department of Trade and Industry consultation paper of February 1994 which had attached to it a draft arbitration bill. A draft bill was also attached to the Report of a Departmental Advisory Committee of very considerable distinction chaired by the then Lord Justice Saville. In paragraphs 50 and following of the Report, the Committee explained that their proposals had in mind (among other things) the treaty obligations of the United Kingdom and Article 8 of the UNCITRAL model law. The Report discloses no intention to restrict rights of appeal to the Court of Appeal on questions relating to the stay of litigation. This is in contrast to other parts of their proposals which, in a development of the policy underlying the 1979 Act, revised and extended the limitations on the scope for interference by the court with the arbitral process or the finality of awards whether by appeal or otherwise. In that context it further limited the scope for appeals beyond the level of the Commercial Court. The draft bill did not deal with consequential amendments to other Acts of Parliament. This was clearly regarded as a technical matter to be covered by Parliamentary draftsmen.

19. The bill as introduced corresponded, for present purposes, to the Act which received the Royal Assent. The bill included what became s.107 and the Third Schedule. There were no material changes in s.9 between the February 1994 draft and the bill as enacted. A Supplementary Report was produced by the Departmental Advisory Committee in January 1997. The purpose of this Report was to identify and explain any changes that had been introduced since February 1996. There were some changes but none which are material for present purposes or which would support an intention to remove any right of appeal in respect of the grant or refusal of a stay of litigation. Neither the Supplementary Report nor the Parliamentary Debates provide any support in any relevant respect for any statutory intention other than to give effect to the original Report of the Departmental Advisory Committee.

20. It is therefore the case that, if the effect of s.107 and the Third Schedule has been to abolish a right of appeal which previously existed in relation to the 1975 Act, it is an intention which either has never come to the notice of or has not been thought worthy of comment by those most intimately concerned with the drafting of and the bringing into effect of this highly important measure to update the law of arbitration of this country. If, nevertheless, it is right to conclude that such was Parliament's intention, discrepancies of treatment become apparent. There is no additional restriction on the right of appeal or the jurisdiction of the Court of Appeal under Parts II and III of the 1996 Act. Part II includes s.85 which modifies the provisions of s.9 in relation to purely domestic arbitration agreements. It contains no restriction on the right of appeal. The same applies to Part III which includes a re-enactment of the provisions of the 1975 Act for the enforcement of awards covered by the Geneva and New York Conventions. There is no discernable reason why the re-enactment of the United Kingdom's obligation to recognise and enforce arbitration agreements as required by in particular the New York Convention, should be treated differently or should be within the exclusive jurisdiction of a lower court which may, under s.105 of the 1996 Act, be a county court.

21. The fulfilment of the international obligations of the United Kingdom under the New York Convention is a matter of importance. Further, the issues to which any application for a stay may give rise are also of substance. An application for a stay may require the court to try, and decide, questions of who were the parties to an alleged agreement, what were the terms of that agreement and whether that agreement was valid and subsisting. The decision given by the court on those questions may affect questions of liability as well as of procedure. If they affect liability, they will ultimately be capable of appeal when a judgment on liability has been given. Thus the exclusion of a right of appeal, particularly when, as in s.9, questions of discretion cannot arise, serves no rational purpose save, possibly, a desire for *'sudden death'* solutions which finds no support from the Report which gave rise to this Act or any other part of the statutory context of s.9.

22. Accordingly, as a matter of construing the phrase *"consequential amendments*", the conclusion to which one is driven is that a removal of a right of appeal (with leave) from a decision whether or not to stay litigation covered by an arbitration clause would not be consequential upon anything contained in the 1996 Act. It would be a radical and additional provision. In my judgment such a change in the pre-existing law is not achieved by wording such as that used in s.107 of the 1996 Act. In my judgment the effect is that the amendment to s.18(1) of the 1981 Act must be understood as giving effect to the exclusions (and restrictions) on the right of appeal to the Court of Appeal laid down in Part I of the 1996 Act and no more. Thus, as is self-evident from the wording of the amendment, it is necessary to look at the provisions in Part I of the 1996 Act to ascertain to what extent the right of appeal to the Court of Appeal is excluded. If some provision of Part I does not exclude it, the right of appeal remains.

23. There is nothing in s.9 which excludes the jurisdiction of the Court of Appeal. The same applies to sections 10 and 11, 13, 28, 64 and 65, 72 and 74. It is not necessary to go through all these sections. Like for s.9, it is a reasonable inference from the language, the statutory scheme and the enactments being replaced, that the existing rights of appeal and the restrictions upon them are not being changed. These sections are to be contrasted with a whole raft of sections which do limit rights of appeal. A number of these confine the right of appeal to where the lower court has itself given leave to appeal; in other instances there are rights of appeal which only exist if the lower court grants a certificate that a point of law of general public importance is involved. All these provisions, in their various forms, are designed (in succession to and development from the 1979 Act) to reduce to an acceptable minimum the interference of courts with the conduct of arbitrations and the finality of awards. It is recognised that, in the interests of justice and a healthy arbitral system, there should be some limited scope for recourse to the courts. But it is also recognised, particularly in response to international commercial opinion, that the parties having chosen their tribunal should not be able to evade the decisions of that tribunal or obstruct or delay them save within carefully confined and controlled circumstances.

24. This logic and policy does not apply to the separate question of the fulfilment by the United Kingdom of its obligations under the New York Convention. As explained previously, these have a different character and arise at a different stage. The construction of s.107 which I prefer does not give rise to anomaly. It involves a coherent distinction between the differing provisions of various sections in Part I of the Act. It gives effect to the stated intention only to make consequential amendments. It enables the issues which are liable to arise under s.9 to be finally resolved in an appropriate and just manner consistent with the Report which preceded the introduction of the bill.

25. In my judgment the simple reading of the amended 1981 Act for which the Plaintiffs contend and which was understandably accepted by Judge Hegarty and Mr Justice Tuckey is not correct. There is a jurisdiction of the Court of Appeal to hear appeals from decisions of a judge or court under s.9 of the 1996 Act and there is a right

of an aggrieved party to apply to the judge or to the Court of Appeal for leave to appeal and a power of that judge or this Court to grant leave.

26. Having concluded that there is jurisdiction to grant this application for leave it is necessary to consider whether it is an application which should be granted. For reasons which will become apparent when I turn, as I now do, to the merits of the appeal, I consider that leave to appeal should be granted.

The Appeal:

27. It appears that the relevant consignment of nickel cathodes was packed in 52 drums. The origin of these was the Steinweg warehouse in Rotterdam. They were loaded by Steinweg onto a trailer which was then taken across the Channel to Felixstowe and there picked up by, it is said, the first Defendants, First Choice Distribution. The driver went via the first Defendant's premises where the trailer was unhitched and, the Plaintiffs allege, left unguarded so that it and its load were stolen.

28. Steinweg and Inco Europe were well known to each other. The latter was a dealer in non-ferrous metals traded on the London Metal Exchange. Steinweg had an approved LME warehouse for metals being traded on the exchange. It was under these circumstances that Steinweg received their instructions in respect of this and two similar consignments on 23rd December from a Miss Janet Povey of Inco Europe. By her fax of that date, confirming her telephone call, she requested Steinweg to "please arrange" the delivery of the three lots of nickel cathodes to Inco Alloys Hereford. On 30th December Steinweg faxed her at Inco Europe -

"We herewith confirm having loaded above mentioned parcel today, 30.12.1996 for delivery to Inco Alloys, Hereford via Felixstowe on 02/03.01.1997.

Trailer numbers SM 72, SM 53, SM 114"

29. A CMR consignment note was made out. It is in the form prescribed by Article 6 of the CMR Convention. Box 1 is for the name, address and country of the sender. That was filled in with the name and address of Steinweg. Box 2 is for the name, address and country of the consignee and that was filled in with the name and address of Inco Alloys at Hereford. The place of delivery and dispatch were respectively filled in as Hereford and Rotterdam. Steinweg also filled in box 22 confirming their status as sender. Boxes 16-18 and 23 are to be filled in by the carrier. They have not been completed in the only copy of the CMR consignment note which has been produced in the action. Only box 23 has been filled in, acknowledging receipt of the parcel in good order and condition by the carrier with an illegible signature on behalf of the carrier. It is not suggested that that signature was a signature by or on behalf of Steinweg. (It also appears to include a different trailer number but no-one has founded any argument upon that discrepancy.) In due course Steinweg rendered an invoice to Inco Europe for the warehouse rent, the sealing of drums, palletising, customs documentation and "truckfreight".

30. It was the evidence that Inco Europe had dealt with Steinweg on a regular basis for at least about three years before this transaction. Steinweg's invoices have on the reverse a clause printed in four languages; the English version includes - *"Storage activities are subject to the filed Storage Conditions at Amsterdam-Rotterdam; ship brokers activities are subject to the filed General Dutch Shipbrokers' Conditions, latest version; forwarding activities are subject to the filed FENEX-conditions; stevedoring activities are subject to ... "*

31. The FENEX general conditions are the conditions of the Netherlands Association for Forwarding and Logistics and are apparently widely used in the Netherlands. They are printed in English (and other languages). They are clearly intended to be governed by Dutch law. They are in most respects typical of the standard conditions of Freight Forwarders. The role of a forwarder is well-recognised in international trade. It is to act as the agent of a goods owner in making all the necessary arrangements for the carriage of goods by others from one place or country to another. Article 1 of the FENEX conditions deals with applicability and provides:

"Article 1

1. *These general conditions shall apply to any form of service which the forwarder shall carry out. Within the framework of these general conditions the term forwarder must not be understood exclusively to mean the forwarder as contemplated in Book 8 of the Dutch Civil Code.*
2. *With respect to the operations and activities, such as those of shipbrokers, stevedores, carriers, insurance agents, warehousing and superintending firms etc. which are carried out by the forwarder, the conditions customary in the particular trade, or the conditions stipulated to be applicable, will also be applicable.*
3. *The forwarder may at any time declare applicable the conditions stipulated by third parties with whom he has made contracts for the purpose of carrying out the orders given to him.*
4. *The forwarder may have his orders and/or the work connected therewith carried out by third parties or the servants of third parties. In so far as such third parties or their servants bear statutory liability towards the forwarder's principal, it is stipulated on their behalf that in doing the work for which the forwarder employs them they shall be regarded as solely in the employ of the forwarders. All the provisions (inter alia) regarding non-liability and limitation of liability and also regarding indemnification of the forwarder, as described herein shall apply to such persons."*

32. Similarly Article 7 (Performance of the Contract) provides that: *"If the principal has not given any specific instructions in his order, the mode and route of transport shall be at the forwarder's option and he may at all times accept the documents customarily used by the firms with which he contracts for the purpose of carrying out his orders."*

33. Under "Liability", Article 11 includes the provision:

"8. The forwarder, who is not a carrier, even in the event all-in or fixed rates, as the case may be, have been agreed, shall be liable under the present conditions and not as a carrier."

34. The tenor of these clauses is therefore that the forwarder is primarily an agent carrying out the duties of an agent including making contracts on behalf of his principal and is not, other things being equal, acting as a carrier but if he does act as a carrier, he is liable as a carrier (Article 16.1). Article 23 includes an arbitration clause under the auspices of FENEX. It expressly provides: *"The arbitrators shall make the award equitably as good men and true, subject to their liability to observe the applicable imperative legal stipulations, including the provisions of international transport treaties."*

35. The Plaintiffs' claim against Steinweg in the action is for damages for breach of contract as the first CMR carrier, that is to say, the person or entity with whom the actual contract of carriage was made. The Plaintiffs say that it was Inco Europe who made that contract with Steinweg on 23rd December. Inco Alloys claim under the CMR consignment note as the consignee of the goods who is by Article 13.1 *"entitled to enforce in his own name against the carrier any right arising from the contract of carriage"*, that is to say as a person entitled to enforce the contract of carriage between the sender and the carrier evidenced by the CMR consignment note.

36. Steinweg say that whatever contractual relationship they had with Inco Europe was on the terms of the FENEX conditions as referred to on the back of their invoices; these conditions include an arbitration clause. Therefore, they say, they are entitled to a stay under s.9 of the 1996 Act of the claim that is made against them by Inco Europe and by Inco Alloys through Inco Europe.

37. In a structured judgment Judge Hegarty held that the arbitration clause was incorporated in the contractual relationship between Inco Europe and Steinweg and that it was also binding upon Inco Alloys. He also held that as a matter of construction the claim made in the action fell within the matters agreed to be referred to FENEX arbitration in accordance with the arbitration clause. Therefore he concluded that, unless the Plaintiffs were entitled to rely upon subsection (4) of s.9 of the Act, Steinweg were entitled to a stay of the action against them. He recognised that the burden of proof and persuasion was upon the Plaintiffs to satisfy him that the arbitration agreement was, in the circumstances, null and void or inoperative. He however held that because the Plaintiffs were making a contractual claim under CMR against Steinweg, the arbitration clause must be held to be void and invalid because it did not expressly provide that the arbitration tribunal should apply the CMR Convention in accordance with the requirements of Articles 33 and 41 of CMR. He applied ***Bofors-UVA v Skandia Transport*** [1982] 1 Lloyds 410. The requirement in the arbitration clause that the arbitrators should observe "the applicable imperative legal stipulations including the provisions of international transport treaties" did not in his judgment suffice for this purpose. For good measure he also held that the Plaintiffs had a good arguable case that Steinweg were the first carriers of this consignment under CMR.

38. It can be commented at the outset that there is a certain circularity in the reasoning which the Judge adopted. The Plaintiffs allege that Steinweg was the first carrier under CMR. Therefore any arbitrator must be required to apply CMR. This arbitration clause does not necessarily require the arbitrators to do so. Therefore the arbitration clause is void under CMR and cannot be relied upon in support of an application for a stay under the New York Convention and s.9 of the 1996 Act. This gives rise to an absurdity. If Steinweg dispute, as they do and are patently entitled to dispute, that they were ever in the position of carrier under CMR in relation to the relevant consignment and, if the question whether or not they were a CMR carrier is among the matters which the parties have agreed to refer to FENEX arbitration, as the Judge has held they did, it begs the question to require the arbitrators to apply CMR. Whether or not CMR is applicable is one of the matters which the arbitrators have got to decide at the outset. Indeed, the way in which it has been put in the FENEX arbitration clause may be thought to be appropriate: the arbitrators are required to observe any *applicable* international convention.

39. The nearest that the Judge's judgment comes to recognising the circularity of his reasoning is that he seems to proceed on the basis that he is not required to find whether Steinweg was a CMR carrier or was, in respect of this particular consignment bound by CMR, but only to examine whether the Plaintiffs had a good arguable case. However this again begs a question: why is it not enough for Steinweg to show that they have a good arguable case that the arbitration clause is valid? Indeed, it is the preferable view that the arbitration clause must be observed and the New York Convention obligation given effect to unless it is actually proved that the arbitration clause is null and void. The Judge's reasoning therefore cannot be supported and it confirms that it is right to be surprised by the result at which he arrived.

40. It is convenient to approach the Judge's conclusions in the reverse order to that which he adopted. He concluded that the Plaintiffs had a good arguable case that Steinweg was the first CMR carrier, that is to say that Steinweg made a *contract of carriage* with Inco Europe. There was no evidence to support that conclusion or the conclusion that the Plaintiffs had shown even an arguable case to that effect. The fax of 23rd December was a typical fax of instruction by a goods owner to a forwarder. It requested Steinweg to *arrange* the consignment of the relevant goods. The use of the word "arrange" is not conclusive but it is indicative. The fax does not come anywhere near showing that the employment of Steinweg was as carrier or that Steinweg was accepting the obligations of carrier as opposed to of forwarder. The next document upon which the Judge relied was the CMR consignment note.

41. This was wholly contradictory of the Plaintiffs' case. Steinweg was named as the sender not as the carrier. The sender is the antithesis of the carrier: the sender is the person who makes the contract of carriage with the carrier.

The consignment note contains no evidence whatsoever that Steinweg was the contracting carrier for any purpose, let alone for the purposes of CMR. The consignment note confirms the role of Steinweg as the person from whose possession or custody the goods were delivered to the carrier and, in relation to the carriage, as a forwarder or other agent of whomever it was that owned the goods at that time.

42. Finally, the Judge relied upon the invoice which referred to "truckfreight". This document is neutral. It is as consistent with Steinweg being a forwarder as with its being a carrier. As a forwarder and consignor Steinweg would be liable for the freight to the carrier and would be entitled to charge Inco Europe for that sum, which is what occurred.

43. The Judge should not have concluded that the Plaintiffs had a good arguable case against Steinweg that Steinweg was a contracting carrier. He should have concluded that the Plaintiffs had not provided any basis for their allegation that Steinweg was the carrier and that the evidence which the Plaintiffs relied on showed no more than that Steinweg were forwarders. This shows that the whole basis upon which the Judge arrived at his conclusion was fundamentally mistaken.

44. The next point (in reverse order) which the Judge had to address was whether or not the arbitration clause offended against CMR. In my judgment he arrived at the wrong conclusion on this point as well. The FENEX clause required the arbitrators to observe the applicable imperative legal stipulations *"including the provisions of international transport treaties"*. The effect of his conclusion is that the Convention can never be satisfied by a multi-purpose arbitration clause. It was not suggested that there was any ambiguity about the reference to the international convention (treaty) which was compulsorily applicable where the substantive contract was a contract for the international carriage of goods by road. The applicable convention was the CMR Convention. It is that to which the clause necessarily referred. Similarly there was no ambiguity about the requirement in the arbitration clause that the arbitrators should observe the applicable convention. It contained an express requirement that they should do so. The ***Bofors*** case is clearly to be distinguished. In that case there was no reference of any kind to any convention. Bingham J said: *"[The Convention] seems to require a provision which would ordinarily, I think, be taken to mean an express provision that the tribunal shall apply the Convention and I can really see no justification in the language, or indeed in the general purpose of the provision, for watering down what seems on the face of it to be fairly plain."*

45. But the Judge's analysis in this connection was further mistaken since the relevant question was whether a contract of carriage had been made on 23rd December between Inco Europe and Steinweg. That was the relevant allegation. It was an issue which the parties had agreed would be decided by FENEX arbitration. It was an issue which was antecedent to any question of the application of the CMR Convention. The Judge's reasoning in relation to the CMR Convention provided no basis for nullifying the effect of or refusing to enforce that arbitration agreement.

46. Therefore in my judgment the Judge's conclusion on the merits of the Plaintiff's response to the application of Steinweg for a stay of the action under s.9 was wrong. The Judge should have held that Steinweg were entitled to the stay of the action against them. The appeal should be allowed accordingly.

THORPE LJ:

47. I agree.

MUMMERY LJ:

48. I also agree.

Order: Appeal allowed with costs in the Court of Appeal and below; application for leave to appeal to House of Lords refused; all further legal proceedings and actions be stayed save that the defendant Steinweg have liberty to apply to set aside default judgment.

MR. A. GHAFFAR (instructed by Messrs Holman, Fenwick & Willan) appeared for the Appellants/Applicants.
MR. M. HALLIWELL (instructed by Messrs Hill Dickinson) appeared on behalf of the Respondent.