JUDGMENT : Mr Justice Gross : QBD. Commercial Division. 9th October 2002.

INTRODUCTION

1. By an Interim Final Arbitration Award ("the award"), issued on the 28th February, 2002, the sole arbitrator ("the arbitrator"):
   (1) Recorded that the parties had agreed that, pursuant to s.31 of the Arbitration Act 1996 ("the Act"), he should answer certain questions going to his own jurisdiction as preliminary points;
   (2) Found that the Respondent ("Scan-Trans") was entitled to claim demurrage and/or damages for detention from the Claimant ("Electrosteel");
   (3) Further found, that Scan-Trans was still entitled to bring this claim, notwithstanding that Electrosteel was no longer the owner of the cargo at the time the claim arose.

2. Electrosteel now applies to this Court:
   (1) Under s.67 of the Act ("the s.67 application"), for an order that the award be set aside or varied, on the ground that, as Scan-Trans was not a party (as principal) to any contract with Electrosteel, there was, accordingly, no valid arbitration agreement between them – and no entitlement on the part of Scan-Trans to claim demurrage or detention from Electrosteel.
   (2) Under s.69 of the Act ("the s.69 application"), for leave to appeal against the arbitrator's further finding, recorded in paragraph 1(3) above. It was made clear by Electrosteel that the s.69 application only arose in the event that Electrosteel failed on its s.67 application.

THE S.69 APPLICATION

3. Before going further, it is convenient to dispose of the s.69 application. As I indicated to the parties during the hearing, leave would be refused, regardless of the view to which I came on the s.67 application. Assuming, without deciding, in favour of Electrosteel that the term in question was incorporated into the relevant contract between the parties, the arbitrator's construction of that term was right or, at least, not obviously wrong. Further, the suggested question of law was not one of general public importance. These conclusions do not, however, assist Scan-Trans unless it is successful in resisting the s.67 application. It is unnecessary to say more of the s.69 application.

THE S.67 APPLICATION – THE FACTS

4. I return to the s.67 application. The facts are these. A part-cargo ("the cargo") of some 1447 bundles of ductile iron pipes and 50 packing cases containing rubber gaskets and lubricants was transported from Calcutta to Algiers. There was, allegedly, delay at Algiers and Scan-Trans claims demurrage or damages for detention from Electrosteel. As already foreshadowed, the central question is whether Scan-Trans was a party, as principal, to any contract with Electrosteel.

5. Negotiations for the carriage of the cargo were conducted between Scan-Trans (from its Malaysian office) and Electrosteel, through Marcons Shipmanagement Pvt Ltd of Mumbai ("Marcons"). For present purposes and deferring for the moment questions as to their admissibility, the principal communications may be summarised as follows:

   (1) On the 27th October, 2000, Mr. Jesper Svenstrup of Scantrans ("Mr. Svenstrup") telexed Captain Adil Vesuvela of Marcons, saying this: *" Ref telcon this mrng Carrier's are prepared to fix along below lines …*
   Carrier: East Enterprise & Transport Association Ltd, Nassau Bahamas …
   Adil, can we get around not paying frt tax as Carrier's are situated in Bahamas, we here act only as agents for Carrier's"

   (2) On the same day, Marcons replied to Scan-Trans: *" merchants counter on accept/except basis asf …"*

   There followed the details of the Electrosteel counter at that stage. Captain Vesuvela asked Scan-Trans to counter firm on an accept/except basis and then added this: *" jesper, if the frt beneficiary is in Bahamas, then full frt tax of 3.6 pct is payable. If you can have a danish frt beneficiary (say monsted) with proper documentation, 100 pct frt tax relief is avlbl. we must make the booking note and remit the frt accdngly."*

   (3) On the 28th October, 2000, Mr. Svenstrup responded by telex: *" Thanks very much Chrt s counter which on behalf of Carrier's A/E reply 30 mins*

   Carrier's: Scan-Trans Shipping & Chartering Sdn Bhd, Kuala Lumpur or nom on behalf of Carrier's"

(4) Still on the 28th October, Marcons reverted with the merchant's (ie. Electrosteel's) counter, recording (amongst other things) a request that "all carrier's subs to be lifted by 14.00 hours IST on 30/10/2000". In the course of the hearing it was clarified that IST meant Indian Standard Time. Captain Vesuvela now awaited Mr. Svenstrup's "acceptance of abv in order draw out the b/n".

(5) Finally on the 28th October, 2000, there came the "recap telex" from Scan-Trans to Marcons:

" We are pleased to recap fixture with no subs from merchant's side and only carrier's subject checking costs in Algeria and Master approval of stowage.
"SOCOFL STREAM" or sister sub …
Carrier: Scan-Trans Shipping & Chartering SDN Bhd, Kuala Lumpur or nom
For
- Electro Steel, Calcutta …
- Conline B/N 2.5 pct ttl YE
- Subject checking expenses in Algeria
- Subject to Master's approval of stowage
End
Please confirm this recap is in accordance with your notes, and issue and get the Booking Note signed."

6. A Booking Note was drawn up by Marcons and signed by both Electrosteel and Scan-Trans on the 30th October, 2000 ("the Booking Note"). As will become apparent, the status of the Booking Note was very much in dispute; Electrosteel argued that it contained the contract between the parties; Scan-Trans submitted that, at most, it evidenced the contract (already made in or evidenced by the recap telex). Further, the terms of the Booking Note are in one particular respect in dispute, as explained below. Postponing for the time being the argument as to the status of the Booking Note and before recording the terms or alleged terms of the Booking Note, it is first necessary to describe the physical make-up of the Booking Note, to note the sequence in which it came to be signed and to identify the pages signed.

7. In physical terms, the Booking Note comprised three pages:
(1) Page 1 of the "Conlinebooking Liner Booking Note" form, a pre-printed form headed "Full Terms of the Carrier's Bill of Lading Form*". Nineteen numbered clauses were set out, together with two "Additional Clauses", lettered "A" and "B". (For completeness, "A" was the clause with which the s.69 application was concerned.)
(2) Page 2 of the "Conlinebooking Liner Booking Note" form, as amended – a matter to which I shall return. This page contained numbered boxes completed by the parties.
(3) A document headed "Additional Clauses to MV "SOCOFL STREAM" – Conline B/N dated 30.10.2000" containing typed clauses (aa) to (kk).

8. As to the sequence in which the Booking Note came to be signed, it was common ground (or not in dispute) that: (1) Marcons drew it up and faxed it, unsigned, on the 28th October, 2000 to Electrosteel for signature; (2) on the 30th October, Electrosteel signed it and returned it to Marcons; (3) on the 30th October, Scan-Trans, having received it from Marcons, signed by Electrosteel, themselves signed it; (4) still on the 30th October, it was faxed back by Marcons to Electrosteel, now containing the signatures of both parties.

9. With reference to the pages of the Booking Note already physically identified, the parties signed page 2 of the "Conlinebooking Liner Booking Note" form (as amended) and the document headed "Additional Clauses to MV "SOCOFL STREAM" – Conline B/N dated 30.10.2000". The parties did not sign page 1 of the "Conlinebooking Liner Booking Note" form.

10. Turning to the terms of the Booking Note, the parties were, as already foreshadowed, in dispute as to which of the terms on page 1 of the "Conlinebooking Liner Booking Note" form were incorporated therein. For convenience, I shall record the material terms (or alleged terms), in the following order: first, those found on page 2 of the "Conlinebooking Liner Booking Note" form (as amended) ("[page 2]"); secondly, those found on the document headed "Additional Clauses to MV "SOCOFL STREAM" – Conline B/N dated 30.10.2000" ("[additional clauses]"); thirdly, those found on page 1 of the "Conlinebooking Liner Booking Note" form ("[page 1]").

(1) [page 2]:

" 2. Place and date Calcutta/ 30 Nov 2000
3. Carrier Scan-Trans Shipping & Chartering SDN BHD, Kuala Lumpur, Malaysia or Nominee
4. Merchant (see clause 1) Electrosteel Castings Ltd Calcutta, India
5. Vessel's name MV SOCOFL STREAM/SISTER
9. Description of goods
- *Abt 6850 CBM/abt 3265 MT ductile iron pipes in bundles + packing cases …*
- *As part cargo carriers option*
- *Full cargo to be loaded. No shut out …..*

11. Demurrage rate (if agreed) USD 6,000 per day/prorata
13. Special Terms, if agreed Additional Clauses aa) to kk) both inclusive to be considered fully incorporated in this Booking Note
Signature (Carrier)
[stamp of Scan-Trans and Mr. Svenstrup's manuscript signature]
As agents only
30/10/00
Signature (Merchant)
For Electrosteel Castings Ltd.
B. Govindarajan
Dy. General Manager-Exports
Dt: 30/10/00
(2) [additional clauses]
dd) Documents/cargo to be ready prior vessel's arrival in port. Merchants to present/receive cargo under vessel's hooks as fast as vessel can load/discharge Merchants not responsible for any berthing delays at both ends
ee) Detention USD 6000/- per day pro rata
ff) Any/all taxes … on vessel freight or calculated on same to carriers account, both ends
kk) Arbitration in London. UK law to apply.
FOR CARRIERS
[Stamp of Scan-Trans and Mr. Svenstrup's manuscript signature]
As Agents Only
30/10/00
FOR MERCHANTS
For Electrosteel Castings Ltd.
(signature)
B. Govindarajan
Dy. General Manager-Exports
DT: 30/10/2000
(2) [page 1]
1. Definition. Wherever the term "Merchant" is used in this Bill of Lading, it shall be deemed to include the Shipper, the Receiver, the Consignee, the Holder of the Bill of Lading and the Owner of the cargo.
2. General Paramount Clause. The Hague Rules … as enacted in the country of shipment shall apply to this contract….Trades where Hague-Visby Rules apply
In trades where …[the] Hague-Visby Rules apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading.…
3. Jurisdiction. Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.
11. Freight and Charges.
(c) Any dues, duties, taxes and charges which … may be levied on basis such as amount of freight … shall be paid by the Merchant.

17. Identity of Carrier. The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.
It is further understood and agreed that as the Line Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in this transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, nor as Carrier nor bailee of the goods.
ADDITIONAL CLAUSES (To be added if required in the contemplated trade).
A. Demurrage … any delay in waiting for berth at or off port to count …"

11. Pausing here, it is right to record the reason for referring to page 2 of the "Conlinebooking Liner Booking Note" form as being "as amended". On the standard form of page 2, between box 13 (Special terms) and the Signature boxes, there appears the following wording: *" It is hereby agreed that this Contract shall be performed subject to the terms contained on Page 1 and 2 hereof which shall prevail over any previous arrangements and which shall in turn be superseded (except as to deadfreight and demurrage) by the terms of the Bill of Lading, the terms of which (in full or in extract) are found on the reverse side hereof."*

These words did not appear in the form of the Booking Note drawn up in this case and signed by the parties, as described above. In the event, neither party submitted that this wording was incorporated in the Booking Note; nor was it submitted that any significance attached to the absence of this wording. In these circumstances, I shall simply proceed to construe the Booking Note with reference to the terms which were contained therein.

12. Subsequent to the 30th October, Bills of Lading were issued and the cargo was carried from Calcutta to Algiers where it was discharged. As I understand it (the copies are very indistinct), the front page of the Bills of Lading contained the heading "Liner Bill of Lading"; on the reverse, there were to be found the terms contained on [page 1] of the Booking Note, albeit under the heading "Liner Bill of Lading". It is convenient now to tie up some loose ends. First, although as already noted, with regard to the contract contained in or evidenced by the Booking Note, the parties are in dispute as to which of the terms found on [page 1] are incorporated, it is common ground that all those terms formed part of the contact contained in or evidenced by the Bills of Lading; secondly, there is no suggestion that the terms found on the [additional clauses] page of the Booking Note formed part of the contract contained in or evidenced by the Bills of Lading.

THE REASONING OF THE ARBITRATOR

13. The arbitrator's essential reasoning may be summarised as follows:

(1) Whether or not the Booking Note is properly described as a charterparty, the negotiations which led up to it *"followed the same pattern as would have been followed had this been a conventional charterparty negotiation"*. Apart from the two carrier's subjects, a consensus had been arrived at between Scan-Trans and Electrosteel which was recorded in the recap telex (set out above).

(2) The carrier's subjects came to be lifted with the result that there was a binding contract between the parties on the terms of the recap telex. No formal document was required. Staying with the recap telex, the parties thereto were Scan-Trans and Electrosteel. Scan-Trans was a party to the contract on those terms as a principal; it was there described as the carrier.

(3) The recap telex further contemplated the drawing up of a booking note on the Conline booking note form; terms on that form which did not contradict the express terms recorded in the recap telex were to form part of the contract between the parties. Such terms included the standard form wording set out in paragraph 11 above.

(4) In summary, the contract between Scan-Trans and Electrosteel was contained in or evidenced by the recap telex; it was at all events concluded before the drawing up and signature of the Booking Note; the Booking Note was simply evidence of the contract between these two parties.

(5) The terms found on [page 1] of the Booking Note were not incorporated into the contract evidenced by the Booking Note. The function of [page 1] was simply pre-advice of the terms to be contained in subsequent and separate bill of lading contracts. Accordingly, cl. 17 was not incorporated into the contract between the parties and did not alter the identity of the carrier (Scan-Trans) agreed between the parties and recorded in the recap telex.

(6) The decision of the House of Lords in **Universal Steam Navigation Co. v James McKelvie & Co.** [1923] AC 492 required anxious consideration in the light of the signature of the Booking Note by Scan-Trans "as agents only". In the present case, however, the form of signature was not determinative. A binding contract had come into existence before signature of the Booking Note; **McKelvie** was accordingly distinguishable. There was an inconsistency on the face of the Booking Note – between box 3, where the description of carrier suggested that Scan-Trans were principals – and the signature as agents only. To clear up that inconsistency it was permissible to look at the

"original contract" and, with reference thereto, to conclude that Scan-Trans had contracted, as principal, as the carrier.

(7) It followed that Scan-Trans and Electrosteel were parties to the contract evidenced by the Booking Note, containing an agreement to London arbitration; accordingly, the arbitrator had jurisdiction to entertain a claim for demurrage, alternatively detention, by Scan-Trans against Electrosteel. For completeness, the "cesser clause" standard form wording contained in the Booking Note (see paragraph 11 above), did not preclude such a claim. This preliminary issue was accordingly resolved in favour of Scan-Trans.

14. It is convenient to note here two further matters contained in the arbitrator's Reasons. First, the arbitrator recorded that no plea of rectification had been advanced. Secondly, the arbitrator observed (paragraph 40 of the Reasons) that, if he was wrong in concluding that Scan-Trans acted as principal in connection with the relevant contract, it did not follow that Scan-Trans signed as agents for the registered owners of the vessel; in those circumstances "it would seem more likely that they thought they were acting as agents for East Enterprise…" ("East Enterprise").

THE RIVAL ARGUMENTS IN OUTLINE

15. This case was well-argued; I was most grateful to Mr. Collett, who appeared for Electrosteel and to Mr. Ashcroft, who appeared for Scan-Trans, for their carefully structured and helpful submissions.

16. As a preliminary matter, Mr. Collett submitted that the s.67 application was in the nature of a re-hearing. It was Electrosteel's case that the recap telex neither contained nor evidenced a binding contract; there could be no concluded contract unless and until the subjects were lifted. The arbitrator was wrong to infer that the subjects had been lifted before the signature of the Booking Note. Accordingly, the only contract to be considered was that contained in the Booking Note.; it was the beginning and end of the inquiry. If that was wrong, then in any event the contract contained in the Booking Note superseded any prior contract evidenced by the recap telex. In these circumstances it was either impermissible or unhelpful to have regard to the recap telex. As to the Booking Note, the dominant feature was the signature by Scan-Trans "as agents only": see, **McKelvie** *(supra)*. The clauses on [page 1] of the Booking Note were incorporated into the Booking Note, save where inconsistent therewith. The provisions of cl. 17 (on [page 1]) thus incorporated, reinforced the conclusion that Scan-Trans had not contracted as principal but instead as agents for a disclosed principal, namely, the registered owners of the vessel. There was no ambiguity in the Booking Note. If wrong in any of this, then: (1) the Booking Note at least embodied the contract between the parties thereto and Scan-Trans was not one of them; (2) if cl. 17 was not incorporated into the Booking Note, then in any event Scan-Trans had contracted as agents only, most probably for an associated company, perhaps East Enterprise; at all events Scan-Trans was not party, as a principal, to any contract with Electrosteel; (3) if it was permissible pursuant to old authorities (said by Mr. Collett to be distinguishable) to refer to extrinsic evidence to ascertain whether Scan-Trans had contracted as principals, there was an element of circularity in having resort to the recap telex and, that telex apart, there was no material to support Scan-Trans's submission that it was the principal; any pointers in the recap telex favourable to Scan-Trans were outweighed by the contrary indications contained in the Booking Note. The fact that not all the terms on [page 1] were incorporated into the Booking Note (for example, cl. 3) and that not all the terms of the Booking Note were incorporated into the Bills of Lading (for example, those found on the [additional clauses] page) was neither here nor there; this was a situation not untypically found where a bill of lading in terms differing from a charterparty makes its way from a charterer to a third party; in the hands of the charterer, the charterparty governs whereas in the hands of a (relevant) third party the bill of lading must be taken to contain the contract. The arbitrator was wrong to conclude that he had jurisdiction on the issues argued before him. Finally, the case for Scan-Trans could not be improved or saved by the rectification argument, raised for the first time in Court; first, deleting the reference "as agents only" in the Booking Note was of no assistance to Scan-Trans, if cl. 17 remained incorporated in the Booking Note; secondly, the evidence fell well short of providing convincing proof that the Booking Note as executed was not in accord with the parties' true intentions at the time of such execution.

17. As to the nature of the exercise upon which the Court was engaged when dealing with the s.67 application, Mr. Ashcroft initially submitted (in his skeleton argument) that it was a review only; ultimately, however, he submitted that the right course was (1) a re-hearing but (2) confined to the evidence before the arbitrator. He did not seek to press this submission in a partisan fashion; indeed, were it right then, as he acknowledged, it would exclude Scan-Trans' own rectification case. More generally, Mr. Ashcroft developed his submissions to this effect: the contract between the parties was contained in or, at the least, evidenced by the recap telex. The arbitrator was right to infer that the subjects had been lifted before signature of the Booking Note. As to the Booking Note, this did no more than evidence the contract between the parties; the recap telex prevailed. Having regard to the recap telex, it was plain that Scan-Trans contracted as principals. If wrong and if the Booking Note did embody a contract between the parties, any such contract did not supersede the contract disclosed by the recap telex, at least not so as to preclude reference to the terms of the recap telex. While Mr. Ashcroft could not support the arbitrator's reasoning that the clauses on [page 1] of the Booking Note constituted no more than pre-advice of the terms to be contained in a subsequent bill of lading contract, nonetheless cl. 17 was not incorporated into the Booking Note; it was inconsistent with the description of Scan-Trans as carrier in the recap telex. Further, there was no warrant for any conclusion that Scan-Trans contracted as agents on behalf of the registered owners of the vessel; there were two contracts; a contract for carriage on terms of the recap telex as evidenced by the Booking Note and a separate and subsequent contract on terms of the Bills of Lading; it was only that latter contract that was made with the registered owners of the vessel. On the footing that cl. 17 was not incorporated into the Booking Note, it followed that Scan-Trans' signature of the Booking Note "as agents only" resulted, at most, in Scan –Trans contracting as agents for an unidentified principal. In these circumstances, **McKelvie** *(supra)* was not determinative and was in any event distinguishable, because there was a prior concluded contract between the parties; long-standing authority entitled Scan-Trans to refer to extrinsic evidence to establish that it was the principal; once reference was made, by this route, to the recap telex, Scan-Trans made good its argument. The arbitrator's conclusion was accordingly correct and should be upheld. If wrong so far, then this was a clear case for rectification, an argument now supported by the recent statement of Mr. Svenstrup (to which I shall come in due course). No difficulty arose as to the extent of rectification; the words "as agents only" should simply be deleted wherever found in the Booking Note.

18. In the light of these arguments, it was common ground between the parties that the matter gave rise to four principal Issues:
    (I) What documents contain or evidence the contract ?
    (II) To what documents may or should the Court refer when construing the contract ?
    (III) Is Scan-Trans a principal party to the contract ? In particular: (a) Does cl. 17 form part of the contract ? (b) What is the effect of Scan-Trans' signature "as agents only"?
    (IV) Is Scan-Trans entitled to rectification of the contract ?

    I shall deal with these Issues in turn; before doing so, I must, however, first address the nature of the Court's task on the s.67 application.

DISCUSSION AND CONCLUSIONS

19. **The Court's task on the s.67 application:** In the present case, unless Scan-Trans was party as a principal to a contract contained in or evidenced by the Booking Note, containing as it did (albeit as an autonomous agreement) the arbitration clause, then it was not party to any agreement conferring jurisdiction on the arbitrator to determine the dispute between the parties – leaving aside the obvious difficulties it would have in mounting its substantive, underlying claim. Permitting the arbitrator to rule on the question of whether Scan-Trans was party as a principal to the relevant contract, accordingly involves him ruling on his own jurisdiction.

20. It is unnecessary in this case to explore the question of the power of an arbitrator to rule on his own jurisdiction (or competence/ competence). Suffice to say that for good practical reasons it has long been part of English Law that an arbitrator has power to rule ***provisionally*** on his own jurisdiction; but, given the logical difficulty inherent in the ***assumption*** that the arbitrator has jurisdiction to

conduct the examination in question, such rulings are subject to challenge in the English Court: see, for example, **Christopher Brown v Genossenschaft Oesterreichischer** [1954] 1 QB 8. The Act has now provided a legislative framework regulating the topic of rulings by arbitrators on their own jurisdiction and subsequent court challenges.

21. With regard to the procedure followed in this case, the Act provides, so far as material, in ss. 30, 31 and 67 as follows:

" 30. Competence of tribunal to rule on its own jurisdiction

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction …

(2) Any such ruling may be challenged … in accordance with the provisions of this Part.

31. Objection to substantive jurisdiction of tribunal ….

(3) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may –

(a) rule on the matter in an award as to jurisdiction …

67. Challenging the award: substantive jurisdiction

(1) A party to arbitral proceedings may … apply to the court –

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; …

(2) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order –

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part"

In summary, what has happened here is that Electrosteel took an objection before the tribunal (as contemplated by s.31); the arbitrator has ruled on his own jurisdiction, as he is entitled to do (s.30), in an award as to jurisdiction (s.31). That award is now challenged under s.67.

22. As already recorded, there was ultimately no dispute that a Court challenge under s.67 to an arbitrator's ruling as to his own jurisdiction should involve a re-hearing rather than simply a review. The question for the Court is therefore not whether an arbitrator was entitled to reach the decision to which he came but whether he was correct to do so. As a matter of principle, it is not surprising that this should be so. The challenge is to a provisional ruling only. Such rulings are contemplated under the Act (as they were before) and are to be encouraged where appropriate, perhaps especially where they overlap with the determination of substantive issues plainly falling within the jurisdiction of the arbitration tribunal; but for all that, these remain provisional determinations only. Very different considerations apply to an appeal (under s.69 of the Act) from an admittedly valid award. At all events, the weight of authority supports the conclusion that the Court is here engaged on a re-hearing: see, **Azov v Baltic Shipping** [1999] 1 Lloyd's Rep. 68, esp. at p. 70; **Astra SA v Sphere Drake** [2000] 2 Lloyd's Rep. 550, at p. 551; **Kalmneft v Glencore** [2002] 1 Lloyd's Rep. 128, at p.141. I shall follow these authorities and respectfully prefer them to the early decision of **Ranko Group v Antartic Maritime SA**, only, it would seem and sparsely, reported in [1998] LMLN 492, insofar as it apparently contained a suggestion to the contrary.

23. There remains the question as to whether the evidence on the re-hearing should be confined to that adduced before the arbitrator. I do not think that it is. First, there is no provision restricting the introduction of additional evidence on such a re-hearing. Secondly, Colman,J. held, in terms, that additional evidence was admissible: **Kalmneft** *(supra)*, at p.141. It follows that I would admit the evidence from both parties (to which I shall come) sought to be adduced subsequent to the award. I would add only this; nothing said here should encourage parties to seek two evidential bites of the cherry in disputes as to the jurisdiction of arbitrators, not least because: (1) evidence introduced late in the day may well attract a degree of scepticism and (2) the Court has ample power to address such matters when dealing with questions of costs. I come now to the principal Issues.

24. **Issue (I): What documents contain or evidence the contract ?** It is plain that no binding contract came into existence at the time of the recap telex; as already observed, at that stage, two subjects remained

outstanding. I do, however, think that the arbitrator was right to infer that those subjects came to be lifted before the signature of the Booking Note; insofar as there is evidence from Mr. Taylor (Electrosteel's solicitor) to the contrary, I am unable to accept that evidence. For my part, I reach that conclusion on the simple ground that it would have been curious to execute the formal Booking Note while subjects remained outstanding, ex hypothesi leaving the parties free of contractual obligation. At all events, had the subjects remained outstanding when the Booking Note came to be executed, I would at least have expected some reference to be made to this feature in the Booking Note; but the Booking Note says nothing about any subjects. If no more happened than that the "carrier's" subjects were lifted or waived by entry into the Booking Note, then in my judgment that lifting came instantaneously before entry into the Booking Note. It follows that a concluded contract on terms of the recap telex came into existence before the conclusion of the Booking Note. In the present context, such a conclusion is unsurprising: see, *Voyage Charters* (2nd ed., 2001), at paras. 1.14 – 1.15. For completeness, my conclusion here does not place any reliance on the precise timing of the exchanges between the parties and Marcons (no easy matter given the different time zones involved), nor do I rest it on Electrosteel's own request for "all carrier's subs to be lifted by 14.00 hours IST on 30/10/2000" (see paragraph 5(4) above).

25. I turn to the Booking Note. I do not think it follows from the determination that there was a prior concluded contract, that the Booking Note enjoys no status greater than constituting evidence of that contract. The Booking Note was signed and stamped; it was complete and self-contained and, as Mr. Collett put it in his skeleton argument "there is no suggestion on its face that it was intended that the terms of the contract were contained in any other document". In these circumstances, I am satisfied that the Booking Note was intended to embody the contract between the parties thereto – not merely to evidence a prior contract. I do not think that it is mere habit which leads to countless pleadings in analogous charterparty cases referring to the contract as being contained in – not simply evidenced by – the charterparty itself, even when, in many such cases, there will have been a prior concluded agreement evidenced by a fixture recap ; so too with the Booking Note here. I respectfully disagree with the arbitrator on this point.

26. In summary therefore, I answer Issue (I) as follows: There were two contracts: (1) The Booking Note contained a contract between the parties thereto; (2) The recap telex evidenced a prior contract between the parties thereto, concluded once the subjects had been lifted before entry into the Booking Note contract.

27. **Issue(II): To what documents may or should the Court refer when construing the contract ?** This Issue must be approached on the footing that, as I have already held, there were two concluded contracts. Plainly, the Booking Note can and must be referred to. The question next arises as to the use which can permissibly be made of the prior contract, evidenced by the recap telex, in order to construe the later contract, contained in the Booking Note. In seeking to answer this question, I begin by adopting with respect the valuable guidance given (in the insurance, or reinsurance context) by the Court of Appeal in **HIH v New Hampshire** [2001] 2 Lloyd's Rep. 161, at p. 179, in paragraphs 83-84 (*per* Rix, LJ), to the following effect:

> *" 83. In principle ….it is always admissible to look at prior contracts as part of the matrix or surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations. The difficulty of course is that, where the later contract is intended to supersede the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any, assistance. Where the later contract is identical, its construction can stand on its own feet …. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems … to be a sound principle. What I doubt, however, is that such a principle can be elevated into a conclusive rule of law.*

84.Where, however, it is not even common ground that the later contract is intended to supersede the earlier contract, I do not see how it can ever be permissible to exclude reference to the earlier contract. I do not see how the relationship of the two contracts can be decided without considering both of them. In essence there are …. three possibilities. Either the later contract is intended to supersede the earlier, in which case the above principles apply. Or, the later contract is intended to live together with the earlier contract, to the extent that that is possible, but where that is not possible it may well be proper to regard the later contract as superseding the earlier. Or the later contract is intended to be incorporated into the earlier contract, in which case it is prima facie the second contract which may have to give way to the first in the event of inconsistency. I doubt that it is in any event possible to be dogmatic about these matters."

28. In my judgment, the Court can and should have regard to the recap telex when construing the Booking Note; that said, the assistance to be derived from it is a question best deferred until a consideration of Issue (III), below. My reasons are these:

(1) The recap telex is admissible in order to construe the Booking Note, whether or not the Booking Note was intended to supersede the prior contract: **HIH** *(supra)*. Strictly, that answer is sufficient to dispose of Issue (II) but it is convenient here to go on to consider the relationship between the two contracts in question.

(2) I do not think that the two contracts were intended to survive and co-exist alongside one another. In that sense, it can be said that the Booking Note contract was intended to supersede the contract evidenced by the recap telex. Even so, in the realm of maritime disputes, I am not aware that any technical evidential rules have precluded reference to fixture recaps when seeking to resolve ambiguities in the later, formal charterparties. This is so at least where the consensus in the fixture recap has evolved into a concluded contract prior to entry into the subsequent charterparty, or booking note. It would certainly be undesirable now to import any technical evidential rules into this area of the law; first, because HIH *(supra)* cautions generally against dogmatism; secondly, because the likely forum for so many such disputes is commercial arbitration. For the avoidance of doubt, I should add that nothing said here is intended to encourage any trawling through pre-contractual *negotiations*; these remarks are aimed at prior contracts, not mere negotiations.

(3) The question remains of how to approach apparent differences between the earlier and later contracts. As already suggested, the parties must be taken to have intended the Booking Note contract to embody their agreement and to continue in existence as the contract between them. For my part, that Booking Note contract must therefore form the starting point of any inquiry as to the parties' contractual intention. The existence of the earlier contract must not, however, be overlooked. Where possible, there is every reason to suppose that the parties intended the later Booking Note contract to reflect the earlier contract. Where it is not possible to reconcile the two contracts, then, as it seems to me, a decision must be taken as to which is to prevail and questions of contractual variation may arise. Additionally, in the present case, it will be necessary to have regard to (a) the absence of any negotiations between the recap telex of 28th October and the Booking Note of 30th October; and (b) the absence of any suggestion that the Booking Note was intended to be incorporated into the prior contract evidenced by the recap telex; indeed, to the contrary, the recap telex contemplated that the agreement which it came to evidence would be drawn up in the form of a Conline Booking Note.

With these considerations in mind, I turn to Issue (III).

29. **Issue (III): Is Scan-Trans a principal party to the contract ? (a) Does cl. 17 form part of the contract? (b) What is the effect of Scan-Trans' signature "as agents only" ?** In my view, the answer to Issue (III) turns on the answers to sub-issues (a) and (b); I therefore turn directly to them.

30. As to **sub-issue (a)**, it is, as has been seen, common ground that the clauses on [page 1] do not simply constitute pre-advice of the forthcoming Bills of Lading terms. It was, however, further common ground that not all of the terms on [page 1] were incorporated into the Booking Note contract; Mr. Collett accepted that, for example, cl. 3 (Jurisdiction) was not so incorporated. Against this background, was cl.17 incorporated into the Booking Note contract ?

31. On this point, I agree with the arbitrator and prefer Mr. Ashcroft's argument to that of Mr. Collett's. Cl. 17 was not incorporated into the Booking Note contract. My reasons are these:

(1) Primarily, looking at the arrangements between the parties in their wider context, I am satisfied that what was intended was (a) a contract for carriage, contained in the Booking Note to be followed by (b) separate and subsequent contracts of carriage, contained in or evidenced by the Bills of Lading. I can infer an intention that the terms of the two contracts should be consistent, so far as possible; I am unable to discern any intention to unite the two contracts into a single contract with the registered owners of the vessel. But that, in a nutshell, would be the effect of incorporating cl. 17 into the Booking Note. Viewed in this light, cl. 17 was only intended to apply when Bills of Lading came to be issued.

(2) This conclusion is reinforced by certain additional considerations. First and to my mind significantly, as the arbitrator remarked (in paragraph 40 of his Reasons, to which reference has already been made), there is nothing to link Scan-Trans and Box 3 of the Booking Note to the registered owners of the vessel other than cl. 17 itself. Even if it be right (see sub-issue (b) below), that Scan-Trans contracted "as agents only" by reason of the signature of the Booking Note, it does not follow that they were agents for the registered owners. Secondly, it is apparent that the Booking Note contract (on [page 2] and the [additional clauses] page), differs from the Bills of Lading contracts in a number of respects. To begin with, there is no basis for suggesting that any of the terms on the [additional clauses] page are incorporated in the Bills of Lading. Further, it would appear that clauses dd) (insofar as it deals with berthing delays) and ff) (taxes on freight) are inconsistent with the express provisions on [page 1] (cl. 11 and ADDITIONAL CLAUSE A, respectively). Still further, cl. 3 (Jurisdiction, on [page 1]) which on any view forms part of the Bills of Lading contracts, is, as is common ground, not incorporated in the Booking Note, *inter alia*, on the ground of inconsistency. With respect to Mr. Collett's argument to the contrary, I think that these differences underline the intention of the parties to the Booking Note contract that the Bills of Lading contracts would be separate therefrom.

(3) Various further matters were canvassed in argument as to the incorporation of cl. 17 into the Booking Note but, to my mind, carry little independent weight. First, emphasis was placed on cl. 17, containing as it does the reference to the registered owners of the vessel, being apparently inconsistent with the designation of Scan-Trans as Carrier in Box 3 of the Booking Note. The importance to be attached to such inconsistency (or apparent inconsistency) will depend on the context. Here it is the context rather than this apparent inconsistency that tells against incorporation, not least given the need to grapple in any event with sub-issue (b). Secondly, in support of incorporation and with a view to answering the argument as to inconsistency (which I have just mentioned), I was referred to **The Flecha** [1999] 1 Lloyd's Rep. 612 and **The Starsin** [2001] 1 Lloyd's Rep. 437. Those authorities, however, are, with respect, somewhat removed from the facts of this case; in those cases, the only contract in question was the contract contained in or evidenced by the bill of lading, the only issue was whether the bill of lading was an owner's or charterer's bill and the presence of a demise clause (in addition to an identity of carrier clause) must be treated as of significance. Thirdly, it was said (rightly) that cl. 17 would at least require some manipulation, in that the wording "this Bill of Lading" would have to be manipulated so as to read "this Booking Note". I think this point adds little because such manipulation could readily be undertaken if the context so required; once again, it is the context here, rather than the extent or difficulty of manipulation which, in my judgment, discloses the parties' intentions.

(4) For completeness, I do not think that the conclusion that cl. 17 was not incorporated into the Booking Note contract is weakened or displaced by the fact that some clauses on [page 1] were incorporated into the Booking Note. First, there is a discernible commercial purpose in consistency, where possible; secondly, in the case of Box 4 (on [page 2]) and clause 1 (on [page 1]), there plainly was express incorporation.

32. I turn to **sub-issue (b)**. As earlier foreshadowed, the inquiry begins with the Booking Note itself. Box 3 designates Scan-Trans as Carrier, without apparent qualification. The Signature Box, however, records

Scan-Trans signing "as agents only". This qualified signature is also to be found on the [additional clauses] page. In my judgment, this qualification of Scan-Trans' signature is of the first importance. If attention is confined to the terms of the Booking Note itself, there can be no doubt that the qualification of signature outweighs or serves to define the designation of Scan-Trans as Carrier in Box 3, with the result that (if matters rested here) Scan-Trans did not contract as a principal to the Booking Note contract.

33. Reference has already been made to the decision of the House of Lords in **McKelvie** *(supra)*. The basic facts were simple. James McKelvie & Co. were described in the body of the charterparty as "charterers"; they signed the charterparty "as agents". Upholding a majority decision of the Court of Appeal, itself reversing the judgment at first instance, the House of Lords held that James McKelvie & Co. were not liable as principals to pay demurrage. The speeches in the House of Lords made plain the importance attached to the qualification of signature, a consideration emphasised by Bankes, LJ in the Court of Appeal ([1922] 1 KB 518, at p.524), when he said, *"that it is by the signature that the party expresses his consent to the terms of the document"*. In the House of Lords, Viscount Cave LC said this (at pp. 495-6): *" … If the Respondents had signed the charterparty without qualification, they would of course have been personally liable to the shipowners; but by adding to their signature the words "as agents" they indicated clearly that they were signing only as agents for others and had no intention of being personally bound as principals. I can imagine no other purpose for which these words could have been added; and unless they had that meaning, they appear to me to have no sense or meaning at all….*

It is, as Bankes, LJ said, to the interest of the commercial community that a signature "as agent" should have a generally accepted meaning, and I agree with him that such a qualification of the signature should be taken as a deliberate expression of intention to exclude any personal liability on the part of the signatory."

Lord Sumner put the matter this way (at pp. 499-500): *" … for many years past it has, I believe, been generally understood in business that to add "as agents" to the signature is all that is necessary to save a party, signing for a principal, from personal liability on the contract, and I agree also that, even as a matter of construction, when a signature so qualified is attached to a general printed form with blanks filled in ad hoc, preponderant importance attaches to the qualification in comparison with printed clauses or even with manuscript insertions in the form. It still, however, remains true, that the qualifying words "as agents" are a part of the contract and must be construed with the rest of it….. They are a form of words and not a mere part of the act of signifying assent and closing a negotiation by duly attaching a name. They purport to limit and explain a liability, and not merely to identify the person signing or to justify the inscription of a name by the hand of another person than the owner of it."*

Later, Lord Sumner added this (at p.502): *" … If throughout the charter "James McKelvie & Co." is to be read wherever the word "charterers" is found, I think, reading the whole instrument together and giving effect to every part of it, that "James McKelvie & Co. as agents" must be so read in lieu of the word "charterers", and then matters are left as they were on the meaning of the words "as agents"…."*

34. While **McKelvie** was concerned with the ***liability*** of the signatory, plainly its reasoning applies to the signatory's ***right to sue***; if anything, such reasoning applies *a fortiori*, because a limitation on the liability of the signatory may cause prejudice to the third party whereas a limitation on the signatory's right to sue is, at the least, unlikely to do so.

35. In this case, the inquiry cannot end with **McKelvie** because of the presence of two factors: First, here, as I have held, there was a concluded contract prior to entry into the Booking Note contract; that does not appear to have been the case in **McKelvie (**see, at p.499); secondly, in **McKelvie** (see, at p.497), the principal appears to have been identified; here, in the light of my conclusion that cl. 17 was not incorporated, I do not think it can be said that the principal has been identified – though it may be (see below) that there are good indications of who Scan-Trans' principal might be. Given Scan-Trans' contention that it was a principal to the Booking Note contract, these two factors require further consideration and I turn directly to them.

36. As it seems to me, the first of these two factors underlines the appropriateness of at least referring to the prior concluded contract: see too, the discussion under Issue (II) above. The second of these two

factors, permits reference to such extrinsic evidence as is available to examine the force of Scan-Trans' contention that it was the principal, notwithstanding its qualified signature of the Booking Note. In this latter regard, it is right that I should follow long-standing authorities such as **Schmaltz v Avery** (1851) 16 QB 655 and **Harper v Vigers** [1909] 2 KB 549, notwithstanding the very cogent doubts expressed as to their justification in terms of principle, set out in *Bowstead & Reynolds on Agency* (17th ed.), at paras. 9-086 and 9-092 and following.

37. It is at this point that, in my judgment, the Scan-Trans argument breaks down. It is one thing to admit reference to the earlier contract evidenced by the recap telex and to permit the introduction of extrinsic evidence; it is another, to obtain any useful assistance from the material available. For all that is available at this stage of the argument (putting rectification to one side) is the recap telex itself. No other extrinsic evidence was adduced suggesting that Scan-Trans was acting as principal, notwithstanding its qualified signature of the Booking Note. Pausing there, it was not submitted that subjective views on the correct contractual party to the Booking Note were admissible on this point; I would add that, for reasons which will become apparent later, even had they been, they would not have advanced the argument. I confess, accordingly, to seeing force in Mr. Collett's submission that there is an uncomfortable element of circularity in seeking to derive assistance from the recap telex in order to ascertain the true construction of the Booking Note.

38. At all events, I revert to the guidance furnished by the Court of Appeal in **HIH** *(supra),* together with the considerations canvassed under Issue (II) above. The point will not benefit from much elaboration. I cannot reconcile Scan-Trans' unqualified designation as Carrier in the recap telex with its qualified signature of the Booking Note "as agents only". It is true that there were no further negotiations between the recap telex (28th October) and signature of the Booking Note (30th October); but neither the documents nor the context lend support to the notion that the later Booking Note contract is to be incorporated in, or must give way to, the prior contract evidenced by the recap telex. It follows that, in all the circumstances, the correct inference to draw is that the Booking Note contract was intended to govern. Insofar as it is necessary to analyse the matter in terms of contractual variation, Scan-Trans' qualified signature constituted a proposed variation of the prior contract, accepted by Electrosteel by conduct. In context, the signature of the Booking Note evidences a deliberate decision to depart from the earlier contract; in Mr. Collett's phrase, at the last throw of the dice, Scan-Trans decided against contracting as a principal.

39. In summary, I answer sub-issues (III) (a) and (b) as follows: (a) no; (b) to disentitle Scan-Trans from claiming demurrage as a principal under the Booking Note contract. It follows that in respect of conclusion (b), I respectfully differ from the arbitrator.

40. Standing back from these conclusions:
(1) Conclusion (b) gives proper effect to the importance of the signature of the Booking Note by Scan-Trans "as agents only" - a matter that would indubitably have loomed large had Scan-Trans been the defendant to a claim advanced by Electrosteel.
(2) Conclusion (a) involves the rejection of the argument that Scan-Trans contracted as agents on behalf of the registered owners of the vessel and accords recognition to the intention of the parties that separate contracts would be entered into, first, for carriage and, subsequently, of carriage.
(3) The question remains as to the identity of the principal on whose behalf Scan-Trans was contracting. That is not a question falling for decision by me and I express no concluded view on it; however, on the material available to me (if anything reinforced by the material to which I shall come when dealing with rectification), I, like the arbitrator, provisionally incline to the view that Scan-Trans contracted as agents for East Enterprise or perhaps some other associated company. Certainly nothing in evidence before me suggests that Scan-Trans lacked authority in this regard. The ramifications of this (provisional) view are not a matter for me and I say no more in this connection.

41. **Issue (IV): Is Scan-Trans entitled to rectification of the contract ?** In the light of my decision on Issue (III)(a), this question has to be approached on the basis that cl.17 was not incorporated in the Booking Note. It follows that rectification would assist Scan-Trans if it can make good its case on this Issue, in

accordance with the test, as summarised in *Chitty on Contracts* (28th ed.), Vol. 1, para. 5-069: *" **Proof of mistake.** The burden of proof is on the party seeking rectification. He must produce "convincing proof" not only that the document to be rectified was not in accordance with the parties' true intentions at the time of its execution, but also that the document in its proposed form does accord with their intentions. … Where it is sought to rectify a document in accordance with a prior agreement between the parties, it must be shown that the intention of the parties continued unaltered up to the time of the execution of the document."*

42. As already recorded no case of rectification was advanced before the arbitrator and no evidence was adduced before him in support of any such contention. Late in the day, on 17th September, 2002, Scan-Trans served a witness statement of Mr. Svenstrup, dated 29th July, 2002. Mr. Collett made submissions as to its weight but did not oppose its admissibility. Having referred to the Scan-Trans usual practice of concluding chartering contracts during the course of fixture negotiations, Mr. Svenstrup went on to say this: *" … Unfortunately, although the pre-fixture negotiations were concluded on terms that the carrier would be Scan-Trans (or nominee and no alternative was nominated), I mistakenly signed the Liner Booking Note and the Additional Clauses "as agents only" applying Scan-Trans' stamp to both documents. The reason why I signed "as agents only" was because this was our normal practice when signing on behalf of Scan-Trans."*

In essence, that is the extent of the evidence relied upon by Scan-Trans in support of its argument for rectification of the Booking Note.

43. In my judgment, this evidence falls well short of satisfying me that Scan-Trans is entitled to rectification of the Booking Note, let alone furnishing "***convincing proof***" thereof. With respect, I do not find the statement from Mr. Svenstrup at all persuasive; to the contrary, I am left with the distinct impression that, if there was a mistake at all, it lay in the recap telex not the Booking Note. By way of elaboration:

(1) The statement was on any view prepared late in the day and well after the hearing before the arbitrator. Had there been substance in the case for rectification, an early statement, asserting from the outset that a mistake had been made, might well have been anticipated.

(2) The statement makes it plain that usually Scan-Trans did not contract as principals. That much at least is consistent with the principal pre-fixture communications: see paragraph 5(1) and (3) above.

(3) The statement gives no reason as to why this case should have been different. The suggestion, emanating from Marcons (paragraph 5(2) above), of a saving in freight tax, contemplated a Danish entity contracting as carrier; but Scan-Trans is a Malaysian entity.

(4) Overall, the statement points to Scan-Trans having authority to contract and usually contracting, on behalf of other associated companies. In my judgment, it does not get the rectification case off the ground and that case accordingly must fail.

44. For its part, Electrosteel denied that the Booking Note was contrary to its intentions at the time of its execution. Given the weakness of the Scan-Trans evidence, the criticism which may otherwise have been made of the exiguous nature of the Electrosteel evidence on this point (a bare denial in a solicitor's witness statement, also, if understandably, post-dating the award), is somewhat academic. The inference which can be drawn from Electrosteel's lack of objection to Scan-Trans' qualified signature of the Booking Note is only that (wisely or otherwise) it was content with such designation of Scan-Trans as appeared therein. On the available material, I do not think it would be right to draw any inference that Electrosteel had a continuing intention that Scan-Trans should contract as Carrier. The rectification case fails on this ground as well.

OVERALL CONCLUSION

45. For the reasons given, the s.67 application must succeed. I shall be grateful for counsels' assistance in drawing up the Order and in relation to costs.

Mr. Michael Collett (instructed by Hardwick Stallards) for the Claimant
Mr. Michael Ashcroft (instructed by Holman Fenwick & Willan) for the Respondent