JUDGMENT : Mr Justice David Steel: Commercial Court. 25th April 2002

Introduction

1. The court is faced with cross applications. The claimant seeks a declaration that no arbitration agreement was incorporated into a contract of carriage contained in or evidenced by a bill of lading between Welex AG ("Welex") as consignees/receivers and Rosa Maritime Ltd ("Rosa") as owners of *Epsilon Rosa,* together with an application for consequential orders, first that the London arbitration proceedings commenced by Rosa are of no effect and secondly restraining Rosa from proceeding with the arbitration. The defendant applies for an anti-suit injunction restraining Welex from continuing the proceedings that it has commenced against Rosa in Szczecin, Poland or otherwise prosecuting proceedings against Rosa other than by way of the arbitration that has been commenced.

The background

2. The dispute relates to a shipment of 5,394 metric tonnes of steel plates from Mariupol, Ukraine, to Szczecin, Poland on board *Epsilon Rosa*. The Bill of Lading, dated 9th April 2001, was on the Congenbill form expressly "to be used with Charterparties". The shippers were Ilyich Iron and Steel Works. The consignee was named as "Korympic Steel International GmbH on behalf of Welex AG".

3. The Bill of Lading was claused by various ship's remarks that the cargo had been stored in the open, was wet before shipment and exhibited some rust. There was a typed clause to the effect that "freight payable as per Charter Party". There was also a box, which had not been filled in, that read:- "Freight payable as per CHARTERPARTY dated…". On the reverse, clause 1 read: - "*All the terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.*" The focus of the dispute between the parties was whether there was, at any material time, a "Charter Party" and whether the arbitration clause contained within it was incorporated into the Bill of Lading by virtue of Clause 1.

4. The purchase contract was evidenced by an exchange of Purchase Orders between Welex and Liberty Steel and Services GmbH ("Liberty") dated 28th January and 8th February 2001 respectively. The delivery terms were cfr, free out, Szczecin, INCO Terms 2000. The general purchase terms of Welex were applicable. They included the provision:- "*Unless otherwise agreed, bills of lading tendered under CIF and CFR contracts may be issued incorporating terms of any Charter Party.*" Notably, whilst INCO terms 1990 stipulated that the seller must provide a copy of the Charter Party, this requirement had been deleted in INCO terms 2000.

5. The Master signed the Bills of Lading on 9th April 2001. The same day, the charterers intimated a small claim for short shipment. The owners' response on the 12th April was a demand for payment of the freight in full, pending particularisation of any claim. The charterers made a proposal on the 13th April for payment of freight, less a shortage of 100 metric tonnes and other expenses. This freight claim was in due course settled on about the 20th April.

6. On May 1st, the vessel arrived at the discharge port of Szczecin. During discharge, the claimant's surveyors found that the cargo was damaged. It was their view that the cargo had been wetted by seawater, probably through leaking hatch covers.

7. On 31st May 2001, the vessel was sold by Rosa to Alexia Navigation Ltd ("Alexia"). The Maltese register was duly amended to that effect in June 2001. On 16th July 2001, the claimant instituted arrest proceedings in the maritime court in Lisbon. These proceedings were instituted against both Rosa and Alexia. Despite the sale, *Epsilon Rosa* was arrested on the 19th July following a short oral hearing. On 4th September, the claimant filed a claim with the District Court of Szczecin against both Rosa and Alexia claiming compensation in the sum of $868,654 USD. It was the claimant's contention that the claim carried a lien irrespective of the change of ownership, pursuant to the Polish maritime code.

8. On 18th September, the new owners applied to lift the arrest in Lisbon. This application was dismissed, although security was ordered in the reduced sum of $596,463.00. Nonetheless, Alexia's club refused to pay security on the grounds that it was not liable in respect of the claim. Rosa's club also refused to furnish security on the grounds that its member no longer owned the vessel.

9. This unfortunate impasse has led to the vessel remaining under arrest to date since there is no provision for sale *pendente lite* under Portuguese law. This situation was rendered all the more unattractive by the fact that the vessel's value is no more than $1,000,000 even before the deduction of the costs of arrest and any other prior claims.

10. On 19th September, the day after the application to lift the arrest failed, Rosa commenced arbitration proceedings in London. This arbitration was purportedly invoked pursuant to a fixture evidenced by recap telex from Caspi Cargo Lines ("Caspi") acting on behalf of charterers dated 19th March 2001. This re-cap telex read as follows:

    "FULL RECAP IS AS FOLL FOR YR URGENT REAPPROVAL:

    MV EPSILON ROSA , AS FULLY DECRIBED

    FOR:

    - ACCT MESSRS. RED SEA HEAVY INDUSTRIES L.A

    - *SUB STEM / SHIPPERS / RECEIVERS APPROVALS LIFTED*
    - *MIN 5,474.033 / MAX 5.500 MTS CHOPT STEEL PLATES OF MAX 12 MTRS, STW – DWT*

- *LDING: 1SB MARIUPOL COMMERCIAL PORT*
- *DISCH: ISB STETTIN (SZCZECIN – NORT POLAND)*
- *FRT USD 23.00 PER MT FIOS L/S/D PAYABLE IN USD*
- *FRT DEEMED EARNED ON COMPL OF LDING DISC NOT RETURNABLE VSL N/O CGO LOST OR NOT LOST*
- *FRT TO BE PAYABLE 100 PCT LESS BROKERAGE COMM W/1 3 B. DAYS AFTER S/R BS/L MARKED "FRT PAYABLE AS PER C/P" IN TO THE OWS NOMINATED BANK ACCOUNT IN US DOLL CURRENCY IAC BBB*
- *BSL MARKED "CLEAN ON BOARD"*
- *CHRTRS TO ISSUE LOI WITH OWNS PANDI WORDING FOR THE OTHER REMARKS WHICH WILL BE INSERTED IN THE MATE'S RECEIPT*
- *FOLLOWING REMARKS ALLOWABLE IN THE BS/L:*
- *"ATHMOSPHERICALLY RUSTY"*
- *"LOADED EX OPEN STORAGE"*
- *"WET BEFORE SHIPMENT"*
- *ARB IN LONDON, ENGLISH LAW TO APPLY*
- *OWISE AS PERCHRTS STANDART C/P DETAILS AMENDED AS PER MAIN RECAP WHICH RECAP TERMS TO SUPERSEDE ANY CONTRADICTORY TERMS IN THE C/P WITH THE FOLL ALTERATIONS:*

+ C1. 47: As written by hand "London""

11. The accompanying standard form had indeed been amended in manuscript in that clause 47 read:- "47. Arbitration, if any, to be settled in London in accordance with the Rules of the LMAA".

12. In reply, Epsilon had stated that the recap telex was "in order" and that, accordingly, the vessel was "fully fixed". Notably, Liberty had then sent a fax to Welex (Deutschland) GmbH on the 16th March confirming the fixture of *Epsilon Rosa* "subject your stem". Welex (Deutschland) responded on the 20th March giving bill of lading instructions in a fax copied to Welex.

13. Despite all this, the reaction of the claimant (through its German lawyers in a letter dated 20th September 2001) to the notification by Rosa of the institution of arbitration proceedings, and the concurrent request to terminate the proceedings in Poland, was to deny the existence of any Charter Party:-

    "*Most certainly the documents attached to your first message to our clients dated 19th September 2001 does not prove an agreement on that Charter Party and/or arbitration clause.*"

14. The letter went on to say:-

    "*The Bill of Lading issued on the 9th April 2001 was apparently signed by the Master. The Bill does not identify any Charter Party, let alone any particular one dated 19th March 2001 between owners and Red Sea Heavy Industries LA. As no Charter Party was indentified, the general words of incorporation in the printed clause 1 on the back of the B/L are not capable of incorporating terms and conditions of any Charter Party*".

15. The claimant issued its application notice seeking a declaration that there was no arbitration clause incorporated in the Bill of Lading on the 17th October 2001. Its primary case at that stage was that the issue had been decided in their favour by the Portuguese Court in their judgment dismissing Alexia's application to lift the arrest. This submission is no longer pursued.

16. The actual focus of the claimant's case has become and remains that no formal "Charter Party" was executed at any material time by the parties. By way of further particularisation, the claimant says:

    a) No such document has ever been produced;

    b) No satisfactory evidence as to its existence has ever been tendered.

17. Alternatively, it was contended that the resolution of this factual issue in the defendant's favour was not determinative of the issue of incorporation. The claimant submitted that the law applicable to the incorporation of the arbitration clause was Swiss law or, in the alternative, Ukrainian law, pursuant to which the arbitration clause of even an executed Charter Party would not be incorporated.

18. The defendant's position was that a Charter Party had been duly executed, the applicable law was English law and that, accordingly, the arbitration clause within it was duly incorporated. Alternatively, in the event a Charter Party had not been executed, nonetheless the recap fax and the associated documentation was sufficient to constitute the Charter Party for the purpose of incorporation.

The procedural history

19. I have taken this analysis of the issues very shortly because of the way in which matters have developed procedurally:

    a) In a statement by the defendant's solicitor in support of the anti-suit injunction dated 10th October 2001, it was stated that a formal version of the charterparty had probably been drawn up but that the person most likely to be able to locate it, namely Captain Ioannou of Epsilon, was at that stage away from the office.

    b) Following a period of investigation, in a further statement dated the 13th November, the defendant's solicitor exhibited what was described as an executed copy of the charterparty, albeit not derived from Epsilon but from Caspi, the charterer's brokers.

c) This provoked the claimant's solicitors to request further disclosure with regard to the date of the document, the identity of those who had executed it and the explanation for the difference between the terms of the executed Charter and the recap telex.

d) In response, the defendant furnished a witness statement of Mr Altug Suzer of Caspi. He described how he drew up the Charter Party, obtained the signature of Mr Nakis Kassos of Epsilon and forwarded it to the Charterers for signature prior to 3rd April 2001. When asked by the claimant to produce a copy in September, he realised that he had not received it back. On making enquiries with the charterers, he received a copy of the executed document which had been produced, signed by Mr Ali Uzon of Scanurosteel on 28th October. Mr Uzon was reported to have said that he considered he had signed the charterparty some time in the previous April.

e) On 20th December, agreement was reached between the parties for inspection by the claimant of the faxed copy of the charterparty referred to in paragraph (b) above. Such examination revealed that it was clearly made up of three different sets of documents, something which has since been confirmed by forensic analysis. An explanation was sought by the claimant from the defendant.

f) In pressing for an explanation, the claimant threatened to resurrect an earlier application for disclosure. In response, the defendant produced a letter addressed to Mr Suzer dated 21st December asking for confirmation that the document that had been produced was indeed a copy of the one executed by the Charterers. In reply, Mr Suzer had dispatched a copy of the document, initialled on each page and with the notation: "I hereby confirm that this is the Charter Party referred to in my witness statement".

g) On 18th January 2001, the defendant's solicitors provided a further statement. This referred to the fact that, prior to the executed charterparty being sent back for signature by the Charterers, it had apparently been scanned into Epsilon's electronic database. The document that had already been produced was, it was accepted, made up of the first and last pages of the Charter Party sent by Caspi, with the central section derived from the database because it was said to be more legible. Epsilon now provided what was said to be a copy of the original document sent by Caspi.

h) Once again, the assistance of a forensic expert was sought by the claimant. She reported on the 24th January that the copy of the "original" was simply a further copy of the document that had been produced earlier.

i) The following day, this Court made an order for disclosure, in both hard copy and electronic form, of all relevant documents, including the documents said to have been scanned into the Epsilon database and the computer log evidencing the date on which it was scanned.

j) This hearing commenced on the 31st January 2002. There was only time during the course of the day set aside for the hearing for counsel for the claimant to complete his submissions. Since the defendant had not been able to respond properly to the Order that had been made on 28th January, I ordered an adjournment until the 28th February and also ordered that an explanation be tendered in statement form from Captain Ioannou as regards discovery. I further agreed that he should be permitted to give oral evidence.

k) In the statement produced in response, Captain Ioannou accepted that the alleged copy of the original was simply a further copy of the earlier document onto which bogus fax and printer headers had been added. This was said to have been attributable to panic on part of a junior member of Epsilon's staff. He also confirmed that, so far as documentation from Caspi was concerned, he had only received the first and last pages of the Charter Party document which had been forwarded to him on 31st October.

l) On 22nd February, Moore-Bick J made a further order requiring Captain Ioannou to provide further details of the technique used to add fax headers, producing all relevant documents.

m) In the meantime, Captain Ioannou had sent an e-mail to the claimant's solicitors, attaching the documents said to have been scanned into the Epsilon IT system. A review of the header information on that e-mail by a computer expert retained by the claimant revealed that, at the time of transmission of the e-mail, the clock on Epsilon's computer system had been reset for the 27th March 2001 at 13.54. The claimant accordingly challenged the assertion, said to be supported by the computer log, that the file had been created and/or modified in March 2001 rather than in February 2002.

n) On the eve of the resumed hearing, Captain Ioannou filed a further statement in which he accepted that he had indeed changed the date on the computer with a view, he claimed, to enable him to recover the files created on that date.

20. The hearing resumed with the cross-examination of Captain Ioannou. At completion of his evidence, it was clear that there was insufficient time to complete the argument on all the issues in the time available. This situation was made all the more troubling by the fact that the parties had already invested something in the region of £250,000 in terms of costs on the jurisdictional dispute.

21. Against that background, I sought to persuade the parties that the costs were disproportionate to the sums at stake, let alone when incurred in the context of a threshold jurisdictional point. The underlying objective as I understood it from the defendant's point of view was not simply to insist on a private arbitral venue in London rather than in a public curial venue in Poland but also, in the process, to undermine the reliance on Polish law in support of the arrest proceedings following the change of ownership.

22. Whilst recognising these interests as legitimate, I expressed the view that the parties would be better engaged in spending their money on attempting to resolve the merits of the claim by way of mediation. The parties, albeit accepting the soundness of my concerns, nonetheless invited me to take advantage of the time available to

conclude the argument on the issue of incorporation but based on the assumption that English law was applicable. A judgment on that issue might enable, it was said, the parties to resolve their other differences without further expense. I accepted that suggestion.

The recap telex

23. It is common ground that the reference to the "Charter Party" in clause 1 of the bill of lading refers to a document or documents. An oral agreement would not constitute the referenced item. It is also common ground that it must have been agreed and reduced to writing when the bill of lading was issued. On the assumption that no formal charterparty was drawn up and executed by, or as of, that time, the question arises whether the recap telex, either alone or taken with the standard form referred to in the telex confirmation, can constitute the "Charter Party". It is convenient to take that issue first.

24. It was the claimant's submission that the re-cap telex and the associated documentation did not constitute a Charter Party for the purposes of the clause. The principal reasons appeared to be as follows:-

i) The use of the initial capital letters suggested a significant degree of formality.

ii) This view was supported by dictionary definitions referring to "charters" or "deeds".

iii) The reference to a single document was inconsistent with a group or collection of documents being referred to.

iv) All the more when the outcome would otherwise be the need to embark on a degree of detective work to "tease out" the terms of the agreement.

25. The claimants derived some support for their approach from the decision of His Honour Judge Diamond QC in ***The Heidberg*** [1994] 2 Lloyd's Rep 287. The Judge was there concerned with a fixture agreed over the telephone. It was followed up by a re-cap telex. The re-cap telex was in fact erroneous in referring to the wrong standard form of charterparty (which contained a Paris arbitration clause) in comparison with that which had been agreed (which contained a London arbitration clause). Although in due course, the charterers sent a form of charterparty to the owners for signature, that was not acted on as the casualty had already occurred.

26. Amongst the many issues upon which the judge was asked to rule was whether "an incorporation clause in a Bill Of Lading can have the effect of incorporating oral terms which have not been reduced into writing". Having set out his reasons for concluding that it would be commercially unsound to hold that a Bill of Lading (in like terms to the present) was capable of incorporating the terms of an oral agreement, the judge concluded:

"I therefore consider that, as a matter of the construction of the bill of lading, it does not incorporate the terms of the charterparty which, at the date of the bill of lading, is issued, had not been reduced to writing. For the reasons given earlier, an oral contract evidenced only by a re-cap telex, does not seem to me to qualify for this purpose."

27. I am unable to accept the claimant's submission:-

i) There is in my judgment no significance in the use of capital letters, any more than there is anything to be derived by dictionary references to charterparties in the form of deeds.

ii) Whilst a contract for chartering a ship is normally embodied, in due course, in a printed form, the parties agreement can remain in the written fax or telex exchanges: a signed charterparty is unnecessary: ***Lidgett v. Williams*** (1845) 4 Hare 456.

iii) The terms can be readily identified from the contents of the re-cap telex and the standard form to which it refers. Indeed, freight was payable (and paid) according to the terms of the very same charterparty.

iv) There is no significance in the fact that the formal written agreement, whether executed or not, is in different terms, subject of course to the appropriate authority of those who have executed it: ***Rossiter v. Miller*** [1878] 3 App Cas 1124.

v) The absence of an identifying date on the bill of lading does not negative incorporation: ***The San Nicholas*** **[1976] 1 Lloyd's Rep 8, *The SLS Everest* [1981] 2 Lloyd's Rep 389**

28. I fully accept and adopt the decision in ***The Heidberg*** to the extent that the transferee of a bill of lading should not be affected by oral terms. But I cannot accede to the further proposition, that where the contract is contained in or evidenced by a re-cap telex, this does not qualify for the purposes of having been reduced to writing. This conclusion of His Honour Judge Diamond QC was expressed to be "*for the reasons given earlier*". The only earlier reference to this matter is in his comment at page 310 rhc:

Mr Dunning's submissions can only suggest, at most, that where an oral contract is evidenced by written documents such as a "recap telex", the terms set out in that document may perhaps be treated as capable of being incorporated into a bill of lading. The argument cannot reasonably be pressed so far as to suggest that an oral term, which is not contained in or evidenced by any document at all, is capable of being incorporated.

29. In my judgment, commercial realities are wholly inconsistent with the claimant's submission. Indeed, the claimant was aware of and had approved the fixture. I find the "Charter Party" referred to in the bill of lading was the agreement contained in the re-cap telex (and the standard form to which it refers). This conclusion seems to me to accord with the duty on the Court to give an intelligent meaning to documents surrounding this commercial transaction.

Human Rights

30. It was submitted that the court should be particularly cautious with regard to reaching this conclusion (or at least as regards the next stage of treating the express reference to the arbitration clause as sufficiently incorporated) in the light of the Human Rights Act 1998.

31. This argument in my judgment is misconceived. The provisions of the Act were not engaged. Article 6 is not material to the issue whether, as a matter of law, an agreement for arbitration has been entered into. A right to a public hearing can be waived so long as the waiver is clear and unequivocal. There is no basis for the assertion that the Human Rights Act requires the court to adopt a "reluctant" approach to the incorporation of an arbitration and/or choice of law clause into a Bill of Lading.

An executed charterparty

32. Strictly speaking, this conclusion makes it unnecessary to resolve the issue whether or not a formal charterparty was executed prior to the completion of discharge referable to a date prior to the bill of lading. However, an enormous amount of effort and expense was consumed on this issue and it is right that I should express my conclusion briefly in case I am wrong on the sufficiency of the recap telex.

33. Against the background described earlier in this judgment, Captain Ioannou came to give oral evidence and was cross-examined to considerable effect. The defendants accepted that his evidence "*at best was confused and demonstrated that there has been, and continues to be, a regrettable failure to give proper weight and consideration to the serious allegations that have been made in relation to the manner in which Epsilon has dealt with documents*." This was a realistic concession. Captain Ioannu's evidence was in many respects inaccurate, unreliable and lacking in frankness. I am compelled to disregard it save to the extent that it is supported by reliable independent evidence.

34. For this the defendant relied on the written statement of the charterer's broker, Mr Suzer, of Caspi which has already been referred to. It was his evidence that he drew up a charterparty by the 21st March 2001 and sent the original to Mr Nakis Kassos for signature on the owner's behalf. He received it back almost immediately whereupon he forwarded it to the charterers on a date prior to the 3rd April 2001. This latter date he was able to confirm, because he spoke to the charterers on the 4th April to discuss an application by the owners for an extension of the laycan date and they had already received it.

35. The dispute about the carrying capacity of the vessel caused Mr Suzer to overlook the fact that the charterers had not returned the Charter Party duly counter signed. However, in September, having been contacted by Mr Nakis Kassos, he got in touch with the charterers and received in October a faxed copy of the charterparty signed by Mr Uzon. Mr Uzon reported that he had probably signed it during April when the dispute was still underway.

36. Mr Suzer was contacted again in December. He was sent a copy of the Charter Party document forwarded by Epsilon (admittedly now established not to be a true copy of the charterparty faxed by Mr Uzon). As already indicated, Mr Suzer was asked to confirm "*whether this is the Charter Party…..referred to in your witness statement*." If so, Mr Suzer was asked to sign each page. This he duly did.

37. The claimant's case was (indeed had to be given the existence of an executed document) that this evidence was false. It was put to Captain Ioannou that no attempt to prepare an executed Charter Party was made until September when a request for it was made by the defendant and that, accordingly, Mr Suzer's evidence, in response to a request from Captain Ioannou, must be dishonest.

38. Despite the claimant's emphasis on the fact that Epsilon themselves only forwarded to London the first and last pages of the executed charterparty as received by them from Caspi (perhaps even then deriving from two different copies), I see no good grounds for rejecting Mr Suzer's evidence. If anything, Mr Suzer appears to have been reluctant to help the defendant, becoming somewhat impatient with requests for copies of the charterparty.

39. The attempts by Captain Ioannou to gild the lily are most regrettable and may have some costs implications. (In that connection, the situation may have been exacerbated by excessively hasty suspicion on the part of the claimant's legal advisors and unduly lax responses on the part of the defendant's legal advisors.) But I conclude that the defendant has adduced convincing secondary evidence that the Charter Party was duly executed in April 2001.

Conclusion

40. It follows that, on the assumption that English law is applicable, the arbitration clause referred to in the executed charterparty (alternatively in the recap telex) was incorporated into the bill of lading.

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KAREN TROY-DAVIES (instructed by BROOKES & CO) for the DEFENDANT