JUDGMENT : Mr Justice Gross: Commercial Court. 11th June 2003

INTRODUCTION

1. There is before the Court an application by the Defendant for an order (1) declaring, pursuant to CPR, Part 11, that the Court does not have jurisdiction over it; and (2) that the Claim Form in this case and service thereof and of the Particulars of Claim, must be set aside.

2. In a nutshell, the Defendant submits that this Court has no jurisdiction to entertain these proceedings and that any proceedings brought against it by the Claimant must be pursued, in accordance with Art. 2 of Council Regulation (EC) 44/2001 ("*the Regulation*", the successor to the Brussels Convention), in France, its country of domicile.

3. The Claimant's answer is that it and the Defendant were or, pursuant to the Carriage of Goods by Sea Act 1992 ("COGSA 1992") are to be treated as, parties to a bill of lading contract, which incorporated by reference to a charterparty, *inter alia,* an exclusive English jurisdiction clause ("*the EJC*"). Accordingly, the Claimant contends that this Court has jurisdiction to entertain these proceedings, by virtue of Art. 23 of the Regulation. No other basis is asserted for English jurisdiction or for displacing the basic rule under the Regulation, namely that in accordance with Art. 2, a defendant is to be sued in the courts of his domicile.

4. Art. 23 of the Regulation provides as follows:

> *" 1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or courts of a Member State are to have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement shall be either:*
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> *(a) in writing or evidence in writing; or*
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> *(b) in a form which accords with practices which the parties have established between themselves; or*
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> *(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned... "*

5. The principal issue on this application is whether the EJC was incorporated into the bill of lading. If it was, then the Defendant's application must be dismissed. If it was not, then the Defendant's application must succeed, subject only to a point as to an alleged concession made by the Defendant in French proceedings concerning a lien *("the concession point*").

THE FACTS

6. I turn to the facts; for present purposes, these may be shortly summarised.

7. By a voyage charterparty on the ASBATANKVOY form, dated 16th October, 2001 ("the charterparty"), the Claimant chartered its vessel, the "SIBOTI" ("the vessel") to Enron International Corporation ("EIC") through Enron Europe Finance and Trading Limited London ("EEFT"), as charterer, for, in the event, the carriage of clean petroleum products from India to France, via Malta.

8. At Malta part of the cargo was discharged for blending in shore tanks; subsequently, some 30,000.945 mt of blended gasoil ("*the cargo*") was re-loaded onto the vessel.

9. By a bill of lading, dated Malta 19th November, 2001 ("the bill of lading"), the Claimant acknowledged shipment of the cargo in apparent good order and condition by Enron Capital and Trade Resources International Corp. ("ECTRIC") through EEFT, for carriage to and delivery at Sete, France.

10. At Sete, the cargo was discharged into shore tanks, for the account of the Defendant, the ultimate purchaser of the cargo.

11. Doubtless due to the Enron group's financial difficulties, EIC failed to pay any of the freight (US$1.4 million) or loadport demurrage (US$131,000) alleged by the Claimant to be due and owing in respect of the carriage of cargo from India.

12. In consequence, the Claimant asserted a lien over the cargo in the shore tanks at Sete and obtained from the French Court two "*saisies conservatoire"* to secure its claim to freight and demurrage respectively.

13. Before the French Court, the Defendant contended that there was no lien. As I understand it, the French Court has upheld the lien but on procedural rather than substantive grounds.

14. For completeness, the freight and demurrage claimed by the Claimant has still not been paid by EIC. An arbitration award in the Claimant's favour against EIC remains unsatisfied.

15. In these proceedings, the Claimant seeks to recover from the Defendant the amounts allegedly outstanding in respect of freight and demurrage. The claim is brought under the bill of lading. The Claimant alleges that the Defendant, as an indorsee of the bill of lading, is a lawful holder thereof pursuant to s.2 (1) of COGSA and that, by taking delivery of the cargo under the bill of lading, became subject to the outstanding liabilities thereunder, pursuant to s.3(1) of COGSA. Such liabilities include liabilities in respect of the freight and demurrage allegedly due to the Claimant under the charterparty.

THE CONTRACTUAL TERMS

16. *The charterparty:* As foreshadowed, the charterparty was on the ASBATANKVOY form. By cl. M of Part I of the charterparty, Special Provisions Nos. 1-14 were incorporated therein. Special Provision 14 provided that "Enron

clauses as amended and attached are incorporated" in the charterparty. The "Enron clauses" were in fact the ECTRIC Charter Party Clauses ("the ECTRIC clauses"), dated January 1, 1996. ECTRIC it will be recollected was the shipper under the bill of lading, to which I shall return in due course. Cl. 49 of the ECTRIC clauses is central to the present dispute; it provided as follows:

" 49. GOVERNING LAW/ DISPUTE RESOLUTION

Notwithstanding anything to the contrary contained in this Charter Party (including Part II), the parties hereby agree as follows:

(a) This Charter Party shall be construed and interpreted in accordance with, and governed by, the laws of England ….

(b) Subject to subclause (c) below, any dispute of whatsoever nature arising under this Charter Party shall be determined by the English [Court] … and the parties hereby expressly submit to the exclusive jurisdiction of the English … Courts and to service of process by certified or registered mail sent to the address for such party as set forth in Part I hereof.

(c) Notwithstanding the foregoing… either party may … elect to have any such dispute referred (and exclusively determined by) … arbitration in London …

(d) It is expressly understood that this Clause supersedes the Arbitration and Interpretation clauses in Part II hereof.

(e) All bills of lading under this Charter Party shall incorporate this exclusive dispute resolution clause….."

There followed various (unnumbered) Additional Clauses, two of which provided as follows:

" COMMERCIAL COURT LONDON

This charterparty shall be governed by and construed in accordance with English law and the English courts have jurisdiction in respect of all disputes arising out of this charter party.

LONDON ARBITRATION

This charterparty shall be governed by and construed in accordance with English law and any dispute arising out of this charterparty shall be referred to arbitration in London …"

17. Pausing here, it is plain and was not in dispute that the charterparty was governed by English Law (cl.49(a)). Further, it seems clear that the dispute resolution regime under the charterparty provided for the exclusive jurisdiction of the English Court (cl. 49(b)), subject only to the right of election for London arbitration (cl.49(c)). The additional unnumbered clause spelled out these jurisdiction provisions. In effect, this jurisdiction regime superseded the references to arbitration contained in the standard ASBATANKVOY form provisions found in Part I and Part II of the charterparty.

18. *The bill of lading:* The bill of lading provided as follows:

" This shipment is carried under and pursuant to the terms of the charter dated between and … and all the terms whatsoever of the said charter apply to and govern the rights of the parties concerned in this shipment."

As is apparent, this provision did not supply the date of the charterparty in question nor the names of the parties thereto. There is, however, no realistic doubt that the charterparty in question was the charterparty (dated 16th October, 2001, between the Claimant and EIC).

THE RIVAL CASES IN OUTLINE

19. I turn to the rival cases in outline, leaving over the concession point for separate consideration at the end of this judgment.

20. Before proceeding further, it is convenient to explain the references which follow to English and Community Law. It was common ground between the parties that the question of whether as between the Claimant and the Defendant (as holder of the bill of lading), in isolation, the EJC was incorporated in the bill of lading was to be approached by reference to Community Law. That said, there was no or no serious dispute that under the bill of lading a holder would succeed to the rights and obligations of the shipper. As there was at least some doubt as to the domicile of the shipper (ECTRIC) and, accordingly, as to the applicability of Community Law to the question of the incorporation of the EJC into the bill of lading as between it and the Claimant, that question was addressed by the parties in terms of English Law. On the view which I take of this matter, as explained below, it is immaterial whether the incorporation issue is addressed by reference to English or Community Law. While the terminology differs, the two systems are engaged in an essentially similar inquiry and it would in general be unlikely, if not impossible, that the answer to the question of incorporation would differ as between English and Community Law. Against this background, I shall follow the approach adopted by the parties and deal with the matter in terms of both English and Community Law.

21. For the Claimant, the essence of Mr. Young QC's argument proceeded as follows. The starting point was the bill of lading contract but that contract incorporated by reference "*all the terms whatsoever*" of the charterparty. The precise wording "*all the terms whatsoever*" was very wide and was not covered or confined by previous authority. That said, such wording read simply with cl. 49(b) of the charterparty, would not suffice to incorporate the EJC into the bill of lading. Matters did not, however, rest there. Cl. 49(e) of the charterparty was of the first importance. Cl. 49(e) provided an explicit reference to the bills of lading and served to make it plain that the EJC was intended to be operative in the bill of lading context. The exercise of construction was to be undertaken in a modern fashion and in any event it should not be assumed that the old law as to the incorporation of arbitration

clauses in bills of lading should be applied to the incorporation of jurisdiction clauses. As between the shipper (ECTRIC) and the Claimant, it would be contrary to commonsense to treat the EJC as not incorporated in the bill of lading; most unusually, the EJC here formed part of the shipper's rather than the shipowner's standard terms. Accordingly, "*stopping the clock*" at the stage when the bill of lading was a contract between the original parties thereto, the conclusion was that the EJC was incorporated therein. If so, the same conclusion followed with respect to the bill of lading contract as between the Claimant and the Defendant (a subsequent holder). The same answer was arrived at in terms of Community Law. By the route of cl. 49(e), a consensus as to the incorporation of the EJC was clearly and precisely demonstrated; if anything, this result was all the more clear under Community Law, which was not hidebound by old English authority. The Defendant's stance, involving as it does a subsidiary or arm of BP resisting the English jurisdiction in order to conduct an English law dispute before the French Courts, was without merit.

22. For the Defendant, Mr. Flaux QC emphasised its entitlement, under Art. 2 of the Regulation, to be sued in the Courts of its domicile. That entitlement was not displaced here; neither as a matter of English nor Community Law was the EJC incorporated into the bill of lading contract. As a matter of English Law, the inquiry began (and perhaps ended) with the bill of lading contract. It was well-established that general wording of incorporation such as "*all the terms whatsoever*" did not suffice to incorporate into the bill of lading ancillary clauses such as arbitration or jurisdiction clauses, which, for these purposes, were to be approached in the same way. In order to incorporate the EJC into the bill of lading, there needed to be some explicit reference thereto either in the bill of lading or the charterparty. There was no such explicit reference in either the bill of lading (with its general wording of incorporation) or the charterparty. As to the charterparty, cl. 49(e) could not be relied on in order to construe the bill of lading; cl. 49(e) went only to the intention of the parties to the charterparty, not to the intention of the parties to the bill of lading. There was no claim for rectification of the bill of lading; the subjective intention of the parties thereto was irrelevant and no objective intention to incorporate the EJC into the bill of lading could be demonstrated; the fact that the EJC formed part of the ECTRIC standard terms did not warrant re-writing the terms of the bill of lading contract. Neither as between the original parties to the bill of lading nor as between the Claimant and the Defendant, was the EJC incorporated therein. The same conclusion was arrived at in terms of Community Law; no agreement to incorporate the EJC had been clearly and precisely demonstrated. Had there been any such intention, it could have been simply achieved by an express reference to the EJC in the bill of lading.

23. Standing back from the matter, it seemed at once plain that the Claimant's case for incorporation of the EJC into the charterparty could readily be dismissed under both English and Community Law but for (1) the presence of cl.49(e) of the charterparty; and (2) the fact that the EJC formed part of the shipper's rather than the shipowner's standard clauses. The question to be resolved is whether these two matters simply enabled Mr. Young to argue the question of incorporation or whether they entitled him to succeed on it. The route to the determination of this question lies via the relevant frameworks of English and Community Law. To those I now turn.

ENGLISH LAW

24. The incorporation of charterparty provisions in bills of lading in English Law is an area well-travelled in the authorities. As to the following propositions, there was no or no serious dispute:

i) The starting point is the contract contained in or evidenced by the bill of lading; it is that contract which the court must construe. See, for example: ***The Federal Bulker*** [1989] 1 Lloyd's Rep. 103, at pp.105, 110.

ii) The incorporation of terms is to be distinguished from mere notice of terms; the fact that the holder of a bill of lading has notice of terms in a charterparty does not mean that those terms are incorporated in the bill of lading: ***The Varenna*** [1984] QB 599, esp. at pp. 616, 619. Further, it is terms not intentions which are incorporated; in ***The Varenna,*** Oliver,LJ said this *(ibid)*: " *The purpose of referential incorporation is not – or at least not generally – to incorporate the intentions of the parties to the contract whose clauses are incorporated but to incorporate the clauses themselves in order to avoid the necessity of writing them out verbatim.*"

iii) General words of incorporation will incorporate into the bill of lading only those provisions of the charterparty which are directly germane to the shipment, carriage and delivery of the goods. Provisions of the charterparty which are ancillary rather than directly germane to the subject-matter of the bill of lading as aforesaid, will not be incorporated by general words of incorporation in the bill of lading. By way of amplification:

a) "*General words of incorporation*" are to be distinguished from wording making a specific reference to a particular charterparty provision (for example, a charterparty arbitration clause). Accordingly, even comparatively wide wording such as "*all terms, conditions and exceptions as per charterparty*" constitute "*general words of incorporation*" for these purposes.

b) Arbitration clauses are ancillary in this sense. See: ***Thomas v Portsea*** [1912] AC 1; ***The Annefield*** [1971] P 168, esp. at pp. 184, 186; ***The Federal Bulker*** *(supra)*, at p.107.

iv) Even when the wording of a bill of lading is *prima facie* of sufficient width to incorporate the charterparty clause in question, such incorporation may be defeated if undue manipulation is required. That said, in this regard the intention of the parties is paramount. Accordingly, while the purported incorporation of certain charterparty clauses may prove ineffective on the ground of linguistic inapplicability alone (for example, charterparty arbitration clause wordings such as "*any disputes arising out of … this charter*", as in ***Thomas v Portsea,*** *supra*), where the intention to incorporate a particular charterparty clause is clear, difficulties of manipulation may be overcome (as in ***The Nerano*** [1996] 1 Lloyd's Rep. 1, where the wording of incorporation made explicit reference to an otherwise inapplicable charterparty arbitration clause). It may well be that the true intentions of the parties serve to define the ambit of permissible manipulation: cf. ***The Miramar*** [1984] AC 676.

25. For the purposes of the present dispute, the more controversial aspects of English Law may be grouped under the following headings:

(1) Does the inquiry end with the bill of lading contract ?

(2) Are jurisdiction clauses to be treated differently from arbitration clauses ?

(3) When can the provisions of the charterparty be taken into account ?

(4) What is the relevance to the bill of lading contract of charterparty clauses as to the intended form and content of bills of lading to be issued thereunder ?

(5) Is English Law in this area hidebound by authority, antiquated and over-technical?

I take each in turn.

26. ***(1) Does the inquiry end with the bill of lading contract ?*** There is, as it seems to me, Court of Appeal authority for the proposition that unless the wording in the bill of lading is of a sufficient width so as *prima facie* to incorporate the provision of the charterparty under consideration, it is irrelevant and unnecessary to construe the charterparty. That stage is never reached; the inquiry not only begins but ends with the bill of lading: See: ***The Varenna*** *(supra)*, at pp. 618 and 621-2; ***The Federal Bulker*** *(supra)*, at pp. 108, 110. It appears to follow that where general wording of incorporation in the bill of lading is insufficient to incorporate an ancillary clause in the charterparty, such as an arbitration clause, then the wording of the charterparty clause in question and whether or not it contains an explicit reference to the bill of lading, matter not. If this be right, it has obvious consequences for the suggested incorporation of the EJC in this case, provided only that jurisdiction clauses are (for present pruposes) indistinguishable from arbitration clauses (see below).

27. It may be, however, that the authorities do not all speak with one voice. Observations of all three members of the Court of Appeal in ***The Merak*** [1965] P 223, appear to suggest that the charterparty arbitration clause was incorporated in the bill of lading on the basis, *inter alia,* that the arbitration clause itself contained an explicit reference to the bill of lading ("*Any dispute arising out of this charter or any bill of lading issued hereunder shall be referred to arbitration…*"): see, esp. at pp.250, 253 and 259-260. Certainly, it is difficult to resist the conclusion that the Court of Appeal in ***The Annefield*** *(supra)*, a decision to which I must shortly return, analysed ***The Merak*** in this way; see too and not least, the judgment of Brandon,J. (as he then was) at first instance in ***The Annefield,*** at pp.173 and following.

28. By contrast, in ***The Federal Bulker*** (at pp. 107-108), Bingham,LJ (as he then was,) explained and distinguished ***The Merak*** on the basis of the incorporation wording in the bills of lading. The word "*clauses"* included in ***The Merak*** wording was sufficient to incorporate the arbitration clause, whereas the word "*terms",* found in ***The Federal Bulker*** bill of lading was insufficient to do so, in the light of the authority of ***Thomas v Portsea*** *(supra)*. See too, Oliver,LJ in ***The Varenna,*** at pp. 621-622.

29. It is unnecessary and inappropriate for me to say more on this topic. A reconciliation between these approaches, if one is needed, must await another occasion. Here, firstly, my duty is plain; I must follow the more recent decisions of the Court of Appeal in ***The Varenna*** and ***The Federal Bulker,*** even if I thought that they could not be reconciled with the earlier decisions in ***The Merak*** and ***The Annefield.*** Secondly, on the view which I take of the matter (see below), it matters not to the outcome of this case whether I regard the inquiry as ending with the bill of lading wording or whether I go on to consider the charterparty wording – which I shall do in any event.

30. ***(2) Are jurisdiction clauses to be treated differently from arbitration clauses?*** This question can be very shortly answered. Jurisdiction clauses, like arbitration clauses, are ancillary to the subject-matter of a bill of lading. There is no good reason for distinguishing between arbitration and jurisdiction clauses in this regard: see, in the insurance, reinsurance and Community Law context, ***AIG Europe v Ethniki*** [1998] 4 All ER 301, at pp. 309-311 (Colman,J.) and [2000] 2 All ER 566 (CA), at pp. 375-6 (Evans,LJ); ***AIG v QBE*** [2001] 2 Lloyd's Rep. 268, esp. at paras. 17 and 26.

31. ***(3) When can the provisions of the charterparty be taken into account ?*** As already foreshadowed, I propose to consider the position on the assumption that the inquiry does not necessarily end with the wording of the bill of lading. On this footing, it can confidently be said that charterparty clauses ancillary or collateral to the subject-matter of the bill of lading will only be incorporated into the bill of lading by explicit reference, either in the bill of lading or the charterparty. Such a proposition formed the ratio of ***The Annefield*** *(supra)* and the second ratio of ***The Federal Bulker*** *(supra)*. Whether there is, in any particular case, such an "*explicit reference*", must be a matter of construction of the contract in question.

32. The nature of this proposition may be seen most clearly from ***The Annefield.*** There, the issue was whether the Centrocon arbitration clause was incorporated in the bills of lading and hence whether the claim was time barred. The material words in the bills were these: *"… all the terms, conditions and exceptions of …[the] charterparty, including the negligence clause, are incorporated herewith.*" The arbitration clause in the charterparty provided that "All disputes …arising out of this contract…" were to be referred to arbitration. Such wording (of both the bills of lading and the charterparty) had been in use since 1914; the selfsame point had arisen on the same wording in ***The Njegos*** [1936] P 90, where it had been held that the arbitration clause was not incorporated; Lord Denning MR observed (at p.183) that it would require a strong case to upset the practice. Upholding Brandon,J the Court of Appeal held that the arbitration clause was not incorporated in the bills of lading. At pp. 184-185, Lord Denning, MR said this:

" I would say that a clause which is directly germane to the subject-matter of the bill of lading (that is, to the shipment, carriage and delivery of goods) can and should be incorporated into the bill of lading contract, even though it may involve a degree of manipulation of the words in order to fit exactly the bill of lading. But if the clause is one which is not thus directly germane, it should not be incorporated into the bill of lading contract unless it is done explicitly in clear words either in the bill of lading or in the charterparty.

Applying this test, it is clear that an arbitration clause is not directly germane to the shipment, carriage and delivery of goods. That appears from the decision of the House of Lords in ***T.W. Thomas & Co. Ltd. v Portsea****…. It is, therefore, not incorporated by general words in the bill of lading. If it is to be incorporated, it must be either by express words in the bill of lading itself (for example, if there were added in this case: 'including the arbitration clause as well as the negligence clause'), or by express words in the charterparty itself (as indeed happened in* ***The Merak*** *where the words were:* ***'Any dispute arising out of the charter or any bill of lading issued hereunder'****). If it is desired to bring in an arbitration clause, it must be done explicitly in one document or the other…..*

In this case the words in the charterparty are ***'any disputes under this contract.'*** *Those words, in this context, meant:* ***'under this charterparty contract'****. They do not include the bill of lading contract. In any case they are not so explicit as to bring in disputes under the bill of lading."*

Cairns,LJ (at p.186) succinctly encapsulated the matter in this way:

" … there must be incorporated in the bill of lading only such terms as are directly relevant to the shipment, carriage or discharge of the cargo or which by explicit reference, either in the bill of lading or in the charterparty, are intended to be incorporated."

33. ***(4) What is the relevance to the bill of lading contract of charterparty clauses as to the intended form and content of bills of lading to be issued thereunder ?*** Whether strictly *ratio* or not, powerful observations in ***The Merak, The Varenna*** and ***The Federal Bulker*** support the answer that clauses in the charterparty as to the form or content of bills of lading to be issued thereunder are irrelevant to the contract constituted by the bills of lading themselves. Such clauses have certainly not been treated as furnishing the "explicit reference", as discussed in ***The Annefield,*** to the ancillary clause which it is sought to incorporate into the bill of lading. Taking these authorities in turn:

i) In ***The Merak***, the bill of lading had mistakenly referred to cl. 30 of the charterparty, whereas the arbitration clause in the charterparty was numbered 32. To overcome this difficulty, it was argued that another clause of the charterparty (clause 10) made it plain which clause was referred to as clause 30 in the bills of lading. Clause 10 of the charterparty provided, so far as material, as follows: "*the bills of lading shall be prepared in the form indorsed upon this charter and shall be signed by the master, quality, condition and measure unknown, freight and all terms, conditions, clauses (including clause 32) and exceptions as per this charter.*" Russell, LJ (at p.259), rejected this argument:

" The agreement between charterer and shipowner that bills issued under the charter ought to take a particular form cannot be regarded as incorporated in the bill: as a contractual term it is irrelevant to the contract constituted by the bill itself… "

ii) In ***The Varenna***, the consignees of the cargo in question were seeking a stay of the court proceedings in which owners were claiming demurrage, on the ground that the bill of lading incorporated an arbitration clause. As already noted, the consignees failed, without reference to the charterparty wording, because the language of the bill of lading was insufficient to incorporate the charterparty arbitration clause. However, Oliver,LJ (as he then was) went on to consider the position under the charterparty. He alluded to the difficulty faced by the consignees at this stage, given that the arbitration clause referred to disputes "under this charter". As Oliver,LJ remarked, the consignees sought to escape from this dilemma by reliance on a clause of the charterparty (cl. 44) which provided that "*all bills of lading issued pursuant to this charter shall incorporate by reference all terms and conditions of this charter including the terms of the arbitration clause…*". Oliver,LJ (at p.623) rejected this argument. It could "*scarcely be argued*" that this clause itself could be incorporated in the bill of lading. This was the same argument as that advanced in ***The Merak*** and rejected by Russell,LJ, whose reasoning Oliver,LJ found persuasive. He continued:

"*I do not see how it can be permissible to ascertain what the parties to a particular contract intended to be incorporated by reference to an entirely different document.*"

iii) The judgment at first instance in ***The Varenna*** was given by Hobhouse,J (as he then was) and repays careful study. Whatever precise approach was adopted to the clause in the charterparty dealing with the intended form or content of bills of lading to be issued thereunder (a matter on which Oliver,LJ was more inclined than Hobhouse,J to follow the observations of Russell,LJ in ***The Merak***), it was still necessary, as Hobhouse,J put it (at p.610), to look for "*a clear, explicit intention to incorporate the charterparty arbitration clause into the bill of lading*". Continuing, the learned Judge said this:

"*If, as in the present case, the bill of lading wording specifically creates an antithesis with the charterparty wording so that one must infer, reading the two documents together, an intention of the parties to the bill of lading to incorporate less into the bill of lading than the charterparty had provided, then the charterparty clause cannot … affect the incorporation proprio motu. On the other hand, if the bill of lading wording does follow that of the relevant provision in the charterparty, they must both, ex hypothesi disclose a clear, explicit intention to make the bill of lading subject to an arbitration clause and no problem arises. If the bill of lading wording … had followed the wording of clause 44 of the charterparty the arbitration clause would clearly have been incorporated.*

… The bill of lading uses a well-established form of wording of well-known and limited effect. It demonstrates that the bill of lading parties did not intend the wide incorporation provided for by clause 44 of the charterparty…."

In short, a charterparty clause dealing with the intended form or content of bills of lading to be issued thereunder either (a) added nothing to the argument for incorporation, because the wording of the bill of lading followed the wording of the clause, or (b) told against the argument for incorporation, because the difference between the wordings disclosed an intention by the parties to the bill of lading contract not to give effect to the intentions of the parties to the charterparty.

iv) Finally, in **The Federal Bulker,** Bingham,LJ (at p.109) cited the above observations of both Russell,LJ and Oliver,LJ, with approval; he added that the difficulty of relying on the intentions of parties, one of whom was not a party to the bill of lading contract, was illustrated in that case by the fact that the bills of lading actually issued contained some but not all of the clauses stipulated in the charterparty. Bingham,LJ concluded these remarks *(ibid)*, by observing:

"If the cargo-owners were to succeed on this point they would … have to show that the express terms of the arbitration clause apply to resolution of disputes arising under the bill of lading."

Dillon,LJ put the same matter tersely (at p.111):

" One has to look at the bill of lading to see what was intended to be incorporated in the bill of lading."

34. ***(5) Is English Law in this area hidebound by authority, antiquated and over-technical?*** I canvass this issue in the light of Mr. Young's argument that a "modern" approach to construction was to be adopted. Insofar as that submission implied that the authorities adopted a hidebound, antiquated, or over-technical approach, I am unable to accept it. To the contrary, the approach of the Courts to the incorporation by reference of charterparty clauses in bills of lading reflects the need for clarity and precision arising from (a) the status of bills of lading as negotiable commercial instruments; (b) the jurisdictional consequences of such incorporation; and (c) the importance of certainty in this area.

35. Elaboration is hardly necessary but, as to (a), bills of lading may pass through many hands internationally. As to (b), the incorporation of arbitration or jurisdiction clauses in bills of lading may result in the displacement of the jurisdiction otherwise seized of the matter – as here, where the EJC, if incorporated, would override the general principle contained in Art. 2 of the Regulation. As to (c), the need for certainty is readily apparent; where a settled construction has been placed on a particular form of words, commercial parties are entitled to rely and act upon it. If there is dissatisfaction with the line drawn in previous authorities, the parties are free to make specific provision to the contrary. See, generally, Bingham,LJ in ***The Federal Bulker*** *(supra)*, at p.105. In the light of all these considerations, there is nothing over-technical in requiring parties to a bill of lading who intend to incorporate a charterparty arbitration or jurisdiction clause to make that intention clear; moreover, it can be done very simply by explicit reference in the bill of lading incorporation wording.

36. ***A postscript on English Law:*** Notwithstanding the importance of considerations such as certainty which point to the conclusion to be reached in the generality of cases, the principles in this area are "*rules*" or aids to construction; they are not to be treated as statutes. In every case, the Court is seeking to ascertain the intention of the parties and, when construing the language, it is necessary to have regard to the individual context and commercial background. See: ***AIG Europe v Ethniki*** *(supra)*, at p.311 (Colman,J) and ***AIG v QBE*** *(supra)*, at p.273. If necessary, general "rules" may have to yield to exceptional or unusual facts.

COMMUNITY LAW

37. The applicable principles of Community Law may be summarised comparatively briefly.

38. Art. 2 of the Regulation provides (subject to the other provisions thereof) that a person domiciled in a Member State shall be sued in the courts of that Member State. That domiciliary rule expressed the "*basic philosophy*" of the Brussels Convention ("*the Convention*"): ***Knauf v Peters*** [2001] EWCA Civ 1570; [2002] 1 Lloyd's Rep. 199, at [49]. It accordingly expresses the basic philosophy of the Regulation. As Henry,LJ remarked in ***Knauf v Peters*** *(ibid)*: *" It is not merely that a claimant is entitled to sue his defendant where he is domiciled; the defendant is entitled to be sued there.*"

39. Art. 23 of the Regulation (the terms of which have already been set out) deals with jurisdiction clauses. It has replaced Art. 17 of the Convention, as amended and is further drafted so as to reflect the interpretation placed on Art. 17 by decisions of the European Court. The effect of a consensual agreement as to jurisdiction within Art. 23 is to exclude both the general principle laid down in Art. 2 and the special jurisdictions provided for in Arts. 5 and 6 of the Regulation. Against this background, the requirements which a jurisdiction clause must fulfil to come within Art. 17 have been strictly construed under Community Law; such clauses must be the "*subject of a consensus between the parties, which must be clearly and precisely demonstrated*": ***Salotti v RUWA*** [1976] ECR 1831, esp. at para. 7, a decision on Art. 17 in its original form. The strict ***Salotti*** approach remains good law; the subsequent amendment to Art. 17 and the further changes introduced in Art. 23 accommodate a course of dealings between the parties and practices in international trade; they do not signify any relaxation in the requirement of consensus, clearly and precisely demonstrated.

40. In ***AIG v QBE*** *(supra)*, Moore-Bick,J. considered (*inter alia*) whether a jurisdiction clause had been incorporated by reference from an insurance contract into a reinsurance contract. On the facts of the case, the answer was that it had not been. The decision turned on Art. 17 of the Convention and contains, with respect, an instructive treatment

of the relevant Community Law considerations, taking into account ***Salotti*** *(supra)*, together with other decisions of the European Court, in addition to the decision of Colman,J. in ***AIG v Ethniki*** *(supra)*. From this valuable judgment (see, esp. paras. 15, 22 and 25-26), I would seek to extract the following guidance:

i) The construction and effect of Art. 17 was to be determined by reference to Community Law rather than the proper law of the contract.

ii) In Community Law, there was a need to be confident that the jurisdiction clause had been effectively drawn to the attention of the other contracting party so as to satisfy the requirement of genuine consensus.

iii) Community Law recognised the validity of incorporation by reference, provided that the body of terms to be incorporated was clearly identified and whether or not it was available to the contracting parties at the time of entry into the contract.

iv) For the purposes of Art. 17, Community Law, like English Law, regarded jurisdiction clauses as ancillary to the substantive provisions of the contract. In many cases, general words of incorporation would only suffice to incorporate terms germane to the subject-matter of the contract and not terms ancillary thereto; the reason is that in the absence of specific language, the Court may not be able to conclude that the parties have demonstrated clearly and precisely the existence of a consensus to incorporate clauses which are ancillary to the subject-matter of their contract.

v) While, in Community Law, the language of the contract was emphasised, rather than extrinsic factors, this did not entail ignoring the commercial background; to the contrary, in each case the Court must construe the language of the contract in context and inquire whether a consensus on the subject matter of the jurisdiction clause had been clearly and precisely demonstrated. It was, however, to be kept in mind that the commercial background could not always be relied upon to make good deficiencies in the language which the parties had chosen to use.

41. With regard to the position of subsequent holders of bills of lading, as distinct from the original parties thereto, the European Court has held as follows: if a jurisdiction clause included in the carrier's printed conditions of carriage was effective as between the carrier and the shipper, then it was also effective between the carrier and any subsequent holders, provided that under the relevant national law, the holder of the bill of lading succeeded to the shipper's rights and obligations thereunder: ***The Tilly Russ*** [1985] QB 931; ***Coreck Maritime v Handelsveem*** [2000] ECR I-9337. Given the recognition by Community Law of incorporation by reference (see above), it seems to me to follow that the same answer would be given in respect of a jurisdiction clause effectively incorporated by reference into a bill of lading.

42. Pausing here, in my judgment, though the route followed may be different, the objectives of English and Community Law in this area are very similar indeed. It is true that in Community Law attention must be focussed on the provisions of Art. 23 of the Regulation and that no such question arises in English Law. It is equally true that in English Law there is a weight of relevant authority not present in Community Law. That said, it would be surprising indeed if, at least in the generality of cases, the answer arrived at was not the same under English and Community Law.

43. For completeness, in the light of certain allusions in the argument at the hearing, given the jurisdiction regime contained in the Regulation, the fact that a dispute may be governed by one national law but proceed before the Courts of another Member State, is a commonplace and not a matter for remark.

CONCLUSIONS AS TO INCORPORATION

44. Applying the law to the facts, in my judgment, Mr. Young's argument faces insuperable hurdles under both English and Community Law. Whether as between the original parties or as between the Claimant and the Defendant (a subsequent holder) I am persuaded that the EJC was not incorporated into the bill of lading. Accordingly, subject only to the concession point, the Defendant's application must succeed. My reasons follow.

45. ***English Law:*** *(1) The first hurdle:* I start with the bill of lading. The incorporation wording was general, *"..all the terms whatsoever of the said charter..".* There was no explicit reference to the EJC in the bill of lading.

46. On the authorities, general wording including "all terms" is insufficient to incorporate an ancillary charterparty arbitration clause into a bill of lading: ***Thomas v Portsea; The Federal Bulker.*** The same result must follow with regard to charterparty jurisdiction clauses. Does the addition of the word "whatsoever" make all the difference ? I do not think it does or should.

i) In principle, the real divide lies between *general* wording of incorporation on the one hand and *explicit* reference to the ancillary clause in the charterparty, on the other. With or without the word "whatsoever", the incorporation wording in the bill of lading was general wording.

ii) If and insofar as it is necessary to qualify this principle and to treat incorporation as turning on the precise form of general wording used in the bill of lading, then, on the authority of the analysis contained in ***The Federal Bulker*** of the wording of incorporation in *The Merak,* the addition of the word *"clauses"* was decisive; wording going no wider than "*all terms"* was insufficient to achieve the necessary incorporation.

iii) I cannot accept that "*all terms"* would be insufficient to incorporate an ancillary charterparty clause into a bill of lading but "*all terms whatsoever"* would be apt to do so. As already discussed a bill of lading has the status of a negotiable commercial instrument. If the word *"terms"* lacks the necessary width, there can be no good reason for the rights of holders to hinge on the addition of the word "*whatsoever"*. No authority on the word

"whatsoever" compels such a conclusion; instead, the interests of certainty support the conclusion that a general formula involving no wider wording than "*terms"* will not suffice for present purposes.

47. In the light of the decisions of the Court of Appeal in ***The Varenna*** and ***The Federal Bulker,*** this conclusion is by itself fatal to any argument that it is permissible to proceed from the wording of incorporation in the bill of lading directly to the EJC. In other words, as I understood Mr. Young to accept, if matters rested with the bill of lading and the EJC alone, the Claimant's case could not succeed.

48. Faced with this difficulty, the Claimant must in some other fashion construct a bridge between the bill of lading and the charterparty. This it seeks to do by placing reliance on cl.49(e) of the charterparty. I shall presently deal with the difficulties in the way of this approach at the stage of considering the charterparty (on the assumption that that stage is reached). For immediate purposes, confining myself to the bill of lading, if the wording "*all the terms whatsoever*" is insufficient to incorporate the EJC (cl. 49(b) of the charterparty), then I cannot see why it should be apt to bring cl. 49(e) of the charterparty into the bill of lading in any manner; plainly, cl.49(e) is every bit as ancillary to the subject-matter of the bill of lading as the EJC itself.

49. If this conclusion is right, then the Claimant's case must fail at the first hurdle. The inquiry begins and ends with the bill of lading. It is unnecessary and irrelevant to have regard to the terms of the charterparty. I go on, however, to consider the charterparty.

50. ***(2) The EJC itself (cl. 49(b) of the charterparty):*** Even if it is permissible to get as far as the EJC, it lends no support to the Claimant's case for incorporation.

51. The EJC provided that "any dispute … arising under this Charter Party" shall be determined by the English Court. The contrast with the (arbitration) clause in ***The Merak,*** which made explicit reference to disputes arising out of the bill of lading, could not be more marked; the EJC is not even a clause which provided for any disputes "under this contract" to be determined by the English Court. Still further, the concluding words of the EJC contain a specific and personal reference to the parties to the charterparty, when dealing with service of process.

52. For completeness, if academic, had the wording in the bill of lading demonstrated a manifest intention to incorporate the EJC, then, for my part, following ***The Nerano,*** I would not have been inclined to regard the need for manipulation, by itself, to preclude incorporation.

53. *(3) Cl. 49(e) of the charterparty:* Accordingly, neither the incorporation wording of the bill of lading read on its own nor considered in conjunction with the EJC itself, is sufficient to incorporate the EJC into the bill of lading. It follows that (assuming reference to the charterparty to be permissible at all) the Claimant's argument depends on the opening words of cl. 49(e) of the charterparty, namely, that "all bills of lading under this Charter Party shall incorporate this exclusive dispute resolution clause". In my judgment, that is a weight which cl.49(e) cannot bear.

54. First, cl. 49(e) is a charterparty clause as to the form or content of bills of lading to be issued thereunder; indeed, I did not understand the contrary to be suggested. The location of cl.49(e) can make no difference; the fact that it is a sub-clause of cl. 49, rather than a separate clause, must be neither here nor there.

55. Secondly, if this characterisation of cl. 49(e) is correct, then the observations (recorded earlier) in ***The Merak, The Varenna*** and ***The Federal Bulker,*** as to such clauses are in point. Whether or not strictly *ratio*, those observations are persuasive and tell, in general, against cl.49(e) assisting the argument for incorporation of the EJC into the bill of lading. In essence:

    i) Cl. 49(e) is not itself incorporated into the bill of lading; it is plainly inapt to be incorporated.

    ii) The intention of the parties to the charterparty, expressed in cl. 49(e) is irrelevant to the construction of the bill of lading contract.

    iii) If and insofar as cl. 49(e) sheds any light on the intention of the parties to the bill of lading contract, the fact that the wording of the bill of lading did not follow the wording contemplated by cl. 49(e) gives rise, if anything, to the inference that they did not intend to give effect to the intentions of the parties to the charterparty; see, in this regard, the reasoning of Hobhouse,J. in The Varenna (at p.610).

    iv) Assuming ***The Merak*** to be good law as regards the incorporation of a charterparty arbitration or jurisdiction clause based on an explicit reference in the charterparty, the present is not a like case. The explicit reference in ***The Merak*** was contained in the arbitration clause itself; a clause to be incorporated in the bill of lading. The sole reference to incorporation of the EJC here is to be found in cl. 49(e). To hold that in the present case there was the necessary "*explicit reference*" to incorporation of the EJC by reason of cl. 49(e) would not be an application of ***The Merak*** (the high water mark of incorporation cases); it would be an extension of ***The Merak*** and, moreover, an extension in a manner disapproved of (at least by Russell, LJ) in ***The Merak*** itself and in the other authorities to which reference has been made.

    v) While it is correct, as Mr. Young urged, that there are factual differences between cl.49(e) here and the clauses under consideration in the authorities in question, to my mind these are distinctions without a material difference.

56. Thirdly, the fact that the EJC was contained in the ECTRIC clauses does not tip the scale in favour of its incorporation into the bill of lading.

    i) As it seems to me, the high point of any such argument must be this: given that the EJC formed part of the ECTRIC clauses, cl.49(e) of the charterparty (entered into between the Claimant and EIC) must be taken as indicative of the intentions of the original parties to the bill of lading (the Claimant and ECTRIC) to incorporate

the EJC therein. The Claimant had signified its intention to do so in the charterparty; ECTRIC must have had a like intention with regard to the bill of lading, given that the EJC formed part of its own standard terms. If so, then the EJC remained incorporated in the bill of lading when it came into the hands of subsequent holders. Whatever the position generally as to clauses in charterparties concerning the form and content of bills of lading to be issued thereunder, in this case cl.49(e) was relevant to the bill of lading by reason of the ECTRIC clauses comprising the shipper's rather than the shipowner's standard terms. For the reasons which follow, I cannot accept this submission.

ii) To begin with, it must be underlined that the task is to construe the bill of lading; that task involves ascertaining the objective intentions of the parties to the bill of lading. There is no claim to rectify the bill of lading. The subjective intentions of the parties to the bill of lading are therefore irrelevant. The fact, if it be the fact, that one or other of the original parties to the bill of lading subjectively intended to incorporate the EJC is neither here nor there.

iii) As already discussed, unless the wording "*all terms whatsoever*" is to be read in a wholly novel and, in my judgment, insupportable manner as extending, directly or via cl.49(e) to the EJC, there is nothing in the wording of the bill of lading itself which appears capable of disclosing an intention to incorporate the EJC.

iv) It remains to consider whether there is matrix evidence, disclosing that the parties to the bill of lading contract, notwithstanding the initial impression given by its language, intended to incorporate the EJC. Pausing here, it is to be noted that the Claimant does not seek to rely on any matrix evidence relating to the bill of lading contract, other than the existence of cl.49(e) of the charterparty and the origins of the ECTRIC clauses. I do not think that the Claimant's intention as a party to the charterparty can be amalgamated with what is no more than an inference as to ECTRIC's intention, derived from the origins of the ECTRIC clauses, so as to read into the bill of lading something which is not otherwise there. Nor do I think that such material as there is warrants jettisoning the guidance given in the authorities as to the nature and analysis of clauses such as cl. 49(e). For this submission to succeed, it has to be said contrary to such guidance and improbably (1) that cl.49(e) is itself to be incorporated in the bill of lading; and/or (2) that clause 49(e) is both relevant to and decisive as to the intentions of the parties to the bill of lading, notwithstanding no outward manifestation of such intentions in the bill of lading itself. On any view, the submission inescapably requires the re-writing of the bill of lading; it is not a matter of doing no more than construing the bill of lading in context. For my part, this is a leap altogether too far. I am not persuaded that the provenance of the clauses of which the EJC forms a part, justifies such a conclusion or that commonsense dictates it. On all the material available to me, the furthest I would be minded to go is to accept that there would have been understandable reasons why the original parties to the bill of lading might have contemplated incorporating the EJC; absent a case of rectification, such an argument cannot go anywhere; if that was what the parties had in mind, the contract they entered into failed to achieve it.

57. Returning to the question originally posed, the presence of cl. 49(e) and the fact that the EJC formed part of the ECTRIC clauses, enabled Mr. Young to submit that, as a matter of English Law, the EJC was incorporated in the bill of lading; these considerations do not entitle that argument to succeed. The hill is simply too steep to climb. Even having regard to cl.49(e), ***The Varenna*** and ***The Federal Bulker*** stand in the way of the Claimant getting to the charterparty at all. If that be wrong and the charterparty is reached, to hold that cl.49(e), considered in context, achieves the incorporation of the EJC into the bill of lading, would, *inter alia*, fly in the face of the reasoned observations contained in ***The Merak, The Varenna*** and ***The Federal Bulker.*** In short, the route to incorporation of the EJC via cl. 49(e) of the charterparty, does not work. I add this. Had the original parties to the bill of lading intended to do so, they could very simply have put the matter beyond argument, by doing no more than adding to the language of incorporation in the bill of lading the words "including the dispute resolution clause"; that wording would then have read "all the terms whatsoever of the said charter *including the dispute resolution clause* apply to and govern the rights of the parties concerned in this shipment". This they failed to do; for all the reasons already discussed, it is not for the Court to strain the construction of either the bill of lading or the charterparty so as to re-write their agreement. It is perhaps not to be forgotten that the full style of the ECTRIC clauses is "*the ECTRIC Charter Party Clauses*".

58. ***Community Law:*** Given the relatively extended and overlapping discussion of English Law, I can state my conclusions as to Community Law very shortly indeed. The question here is whether the basic philosophy contained in Art. 2 of the Regulation has been displaced by the EJC? In summary, whatever the position as between the parties to the charterparty, I am wholly unpersuaded that a consensus between the parties to the bill of lading to do so has been demonstrated, let alone clearly and precisely demonstrated. As with English Law, if incorporation of the EJC was desired, the parties to the bill of lading could and should have made their intentions clear in the bill of lading wording, or, at the least, in the EJC itself. While incorporation by reference from a charterparty is permissible in Community Law, the concerns which it occasions, especially in connection with general wording of incorporation and clauses ancillary to the subject-matter of the bill of lading, are, in substance, similar to those encountered in English Law. The presence of cl.49(e) and the provenance of the clauses of which the EJC forms part, do not outweigh the difficulties to which the language, chosen by the parties to express their bargain, has given rise. Jurisdiction clauses are not to be incorporated, as it were, by a sidewind.

59. It is true, as foreshadowed earlier, that in the result a dispute governed or largely governed by English Law, will be heard before the French Courts; it may further be true that the stance of the Defendant is possibly

opportunistic or guided by partisan considerations lacking in "*merits";* so be it. Such an outcome is no more or less than a consequence of the jurisdiction regime of the Regulation.

THE CONCESSION POINT

60. This point can be taken almost summarily. The argument here is that in the course of the French proceedings, a French lawyer acting for the Defendant admitted in written submissions or otherwise the incorporation of the EJC. The parties, sensibly, if I may say so, agreed that I could deal with this matter on the documents and without the need for oral evidence. In the event, on the available materials, I am not persuaded that the Defendant's admission in the French proceedings went beyond accepting that (1) the charterparty and (2) the validity of the lien, were, respectively, governed by and to be determined in accordance with, English Law. I am bound to add, that even had any such "*admission"* extended to the EJC, it should not readily be assumed that the requirements of Art. 23 of the Regulation would thereby have been satisfied; as a matter of English Law, such an admission would have been immaterial at least unless a case of election or estoppel could have been made good. In the event, it is unnecessary to say more of the concession point.

OVERALL CONCLUSION

61. The Defendant's application must accordingly succeed. I shall be grateful for the assistance of counsel as to the form of the order and all questions of costs.

62. Finally, I record as requested, that the parties reserved the right to argue before a higher Court (1) on the part of the Claimant, that many of the English Law cases in this area were wrongly decided; and (2) on the part of the Defendant, that ***The Merak*** was wrongly decided.

Timothy Young QC (instructed by Stephenson Harwood) for the Claimant
Julian Flaux QC & Stephen Kenny (instructed by Clyde & Co.) for the Defendant