LLOYD'S LIST
LAW REPORTS

Editor :
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of the Middle Temple, Barrister-at-Law

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of the Middle Temple, Barrister-at-Law

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CASES CITED

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STATUTES CONSIDERED.

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[1957] VOL. 1] WEDNESDAY, APRIL 10, 1957. [PART 1

COURT OF APPEAL.

Friday, Feb. 1, 1957.

FROTA NACIONAL DE PETROLEIROS v. SKIBSAKTIESELSKAPET THORSHOLM.

Before Lord Justice DENNING, Lord Justice ROMER and Lord Justice PARKER.

Arbitration—Stay of proceedings—Dispute under charter-party—"Differences . . . shall be put to arbitration in the City of London"—Notice of cancellation by owners—Action for damages commenced by charterers in U.S.—Exceptions filed by owners in U.S.—Arbitrator appointed by owners in London—Charterers notified—Motion by charterers to restrain owners from continuing with arbitration—Power of Court to revoke arbitrator's authority—Arbitration Act, 1950, Sect. 1.

Time charter for five years of Norwegian motor vessel *Thorsoy* by Brazilian charterers, providing (*inter alia*):

> 40. . . . In the event of a war involving Norway or Brazil, or involving any two or more of the following powers: Great Britain or United States of America or Russia or France, both the owner and the charterer have the right to cancel this charter . . .
>
> 49. Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the owner, one by the charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. . . .

Notice of cancellation given by owners following naval and military operations in Suez Canal area—Proceedings *in rem* and *in personam* commenced by charterers in United States—Ship arrested, but afterwards released upon owners providing security — Preliminary objections immediately filed by owners, it being submitted that dispute should go to arbitration in London — Arbitration proceedings accordingly commenced by owners in London, arbitrator being appointed — Charterers notified of appointment—Motion brought by charterers claiming (1) an interim injunction restraining owners from proceeding with arbitration, pending outcome of U.S. proceedings; (2) that authority of owners' arbitrator should be revoked—Risk of conflict of jurisdiction—Power of Court to revoke authority of arbitrator—Arbitration Act, 1950, Sect. 1.

———*Held*, by C.A., that the charter-party provided that disputes should be resolved by arbitration in London and that no good reason had been shown why the Court should intervene to stay arbitration proceedings which had properly been commenced in London; *further*, that there was no power in the Court to revoke the authority of an arbitrator against the will of the party appointing him—Decision of GLYN-JONES, J., refusing charterers' motion, upheld.

Per DENNING, L.J. (at p. 5): It is said that there may be different decisions by the Courts of the United States and by the arbitrators in the City of London. I am not oppressed by the difficulties which are set before us, because the Courts of the United States view arbitration proceedings with the same respect as do these Courts, and view a contract to go to arbitration in the same light.

This was an interlocutory appeal by plaintiffs, Frota Nacional de Petroleiros, of Rio de Janeiro, Brazil, charterers of the motor vessel *Thorsoy*, for leave to appeal

against the refusal of Mr. Justice Glyn-Jones, in Chambers, to grant them an interim injunction restraining defendants, Skibsaktieselskapet Thorsholm, of Sandefjord, owners of the vessel, from proceeding with, or taking any further step in, an arbitration begun in London by defendants pending the hearing of an action commenced by plaintiffs in the United States.

The charter-party, which was in "Standime" form, was dated Dec. 17, 1953, and was for five years from the date of delivery, which was in August, 1954. It provided (*inter alia*):

> 35. This charter shall, so far as possible, be governed by the laws of the flag of the vessel, except in cases of general average, which shall be settled according to York/Antwerp Rules 1950 and as to the matters not therein provided for, according to the usages and customs of the port of London. . . .
>
> 40. . . . In the event of a war involving Norway or Brazil, or involving any two or more of the following powers: Great Britain or United States of America or Russia or France, both the owner and the charterer have the right to cancel this charter, in which case the vessel to be redelivered to the owner at the port of destination, or if prevented from reaching such port, at the nearest open and safe port, at owner's option, after discharge of any cargo on board. Either party to give in writing three weeks' notice of their intention to cancel this charter.
>
> In the event of cancellation by owner, the charterer shall have the first right to re-charter the vessel for the balance outstanding of the charter period or part of such period at rate to be mutually agreed.
>
> 49. Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the owner, one by the charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person, with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any Court of maritime jurisdiction in the city above mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this charter for hearing and determination. Awards made in pursuance to this clause may include costs, including a reasonable allowance for attorney's fees, and judgment may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

On Nov. 5, 1956, owing to naval and military operations in the Suez Canal area, defendants gave notice of cancellation, but plaintiffs denied that any circumstances had arisen which entitled defendants to cancel. Defendants offered the vessel to plaintiffs for re-charter under Clause 40 and to arbitrate their right to cancel, but the ensuing discussions were unsuccessful, and on Dec. 3, defendants withdrew their vessel from the services of plaintiff charterers. On Dec. 15, plaintiffs commenced an action *in rem* and *in personam* against the *Thorsoy* and defendants in the U.S. District Court and the ship was arrested; but she was released on defendants putting up security for 500,000 dols. Defendants immediately filed preliminary objections to these proceedings, contending that the U.S. District

Court had no jurisdiction (or mere discretionary jurisdiction) to determine the dispute, as the charter-party, by Clause 49, provided that any disputes arising under the charter-party should go to arbitration in London. The U.S. District Court fixed a day (which plaintiffs said was Feb. 11, 1957) for determination of the issue raised by defendants. On Jan. 5, defendants wrote to plaintiffs calling for arbitration in London to determine defendants' right to cancel under Clause 40, and they informed plaintiffs that they (defendants) had appointed Mr. J. Chesterman as their arbitrator and also requested plaintiffs to advise defendants of the name of plaintiffs' arbitrator.

On Jan. 31, 1957 (by writ issued on Jan. 30) plaintiffs applied for an interim injunction to restrain defendants from proceeding with the arbitration commenced by defendants, pending the final outcome of the proceedings commenced in the United States. They also asked that the authority of Mr. Chesterman as arbitrator should be revoked. Plaintiffs' application was rejected by Mr. Justice Glyn-Jones, and by co-operation between the parties an appeal was enabled to be brought to the Court of Appeal on the following day, as Feb. 2 was the last day on which plaintiffs could appoint an arbitrator:

Mr. A. A. Mocatta, Q.C., and Mr. H. V. Brandon (instructed by Messrs. Coward, Chance & Co.) appeared for appellant plaintiffs; Mr. Ashton Roskill, Q.C., and Mr. Basil Eckersley (instructed by Messrs. Ince & Co.) represented respondent defendants.

Mr. MOCATTA said that if as a result of the preliminary proceedings in the United States defendants' objections were overruled, plaintiffs' action in that Court would proceed and the issues between the parties under the charter-party would be determined, and in such proceedings the security provided by defendants would be available to meet plaintiffs' claim. In that event plaintiffs would have a good cause of action on the merits for a permanent injunction as claimed on the writ on the grounds (1) that the questions involved under Clause 40 and the application thereto of Norwegian law were more fit for determination by a Court of law than by arbitration; (2) that it would be undesirable for parallel proceedings, with potentially different results, to take place in two countries; (3) that proceedings in the District Court were started by plaintiffs prior to the institution of arbitration proceedings by defendants; (4) that if the arbitration proceeded in this country notwithstanding the dismissal of defendants' objections by the District Court, that decision would in effect be rendered nugatory; and (5) that there was security to meet plaintiffs' claim in the American proceedings, whereas there would be no security available to meet any counterclaim advanced by plaintiffs at the arbitration.

Lord Justice ROMER: I do not understand why you delayed so long issuing your writ. You got defendants' letter claiming arbitration on Jan. 14, and you did not issue your writ until the 30th.

Mr. MOCATTA said that the letter was received in Brazil and discussion then had to take place with plaintiffs' United States lawyers.

Lord Justice ROMER: But you had nearly three weeks from the 14th in which to appoint your arbitrator.

Mr. MOCATTA (continuing) said that the two tribunals might quite well arrive at different conclusions, which would be most embarrassing to all concerned. On the question of the revocation of the authority of Mr. Chesterman, Counsel submitted that the Court had power to do that under Sect. 1 of the Arbitration Act, 1950*; and if the Court did revoke that authority, it still left the arbitration clause in being and of full force and effect, and it did not deprive either party of proceeding with their arbitration in due course.

Mr. ROSKILL said that nothing which plaintiffs had put forward suggested that the arbitration proceedings proposed to be held in England were vexatious or an abuse of any process, and in Counsel's view Mr. Justice Glyn-Jones, in refusing plaintiffs' application, had quite rightly exercised his discretion in the light of the facts put forward. As regards plaintiffs' claim that the arbitrator's authority should be revoked, Counsel agreed that that power obtained where a sole arbitrator was appointed with power to adjudicate upon differences which arose, but that was not this case at all. Mr. Chesterman had no authority at all to adjudicate upon the matters in dispute. The facts here were that plaintiffs had signed a charter-party with an arbitration clause. There was a

* "1. The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court or a judge thereof."

dispute, on their own showing, which arose in November, 1956, or at the very latest by December, when the vessel was withdrawn. During the intervening period time was taken up negotiating under the War Clauses in the charter-party, which gave an option to plaintiffs to re-charter the vessel in the event of war. They could have appointed their arbitrator from the date of withdrawal early in December. As these negotiations were going on it might have been premature; but they failed to appoint an arbitrator, and they now applied to the Court at the very last minute. They had had indulgence shown to them by the Courts and by the defendants, who had accepted short notice of everything and service of all proceedings in England so as to enable plaintiffs to bring this matter before their Lordships before Feb. 2. Had defendants been so minded, they could have made it impossible for plaintiffs to argue their case.

JUDGMENT.

Lord Justice DENNING: The plaintiffs in this matter are a Brazilian concern who took a long term charter of a Norwegian vessel, the *Thorsoy*. The defendants are the Norwegian company who owned that vessel. The charter-party was for five years from August, 1954, so that if it went its full term it would not expire until August, 1959. In that charter-party there was a clause which said that in the event of a war involving Norway or Brazil, or involving any two or more of the following powers—Great Britain, the United States, Russia, France—both the owners and the charterers have the right to cancel the charter, either party to give in writing three weeks' notice of their intention to cancel the charter. There was in the charter-party an arbitration clause which provided for arbitration in London. I will read it a little later.

On Nov. 5, 1956, when things were happening in the Suez Canal area, the owners of the ship gave notice of cancellation of the charter-party—their contention presumably being that there was a war involving Great Britain and France. That was denied by the charterers; but none the less, in pursuance of their notice of cancellation, the owners withdrew the vessel from the services of the charterers on Dec. 3, 1956. I need hardly say, in view of the increase in freight rates, that they have utilized this vessel (it was an oil tanker) at a rate of freight greatly in excess of that provided in the charter.

In these circumstances, on Dec. 15, 1956, the charterers brought proceedings in the District Court for the Eastern District of Pennsylvania, claiming damages. The ship was then at Philadelphia. The charterers brought those proceedings *in rem* against the ship, which was only released by the authorities on 500,000 dols. being put up as security. When the charterers took those proceedings the owners promptly took exception to them. They objected to the jurisdiction of the Court of the United States because they said that there was an arbitration clause in the charter-party under which the matter had to go to arbitration. No ruling has yet been given by the United States Court on that matter. Meanwhile, the owners have taken steps to go to arbitration in London under the arbitration clause. The object of the present application is this: The charterers want to restrain the owners from taking those arbitration proceedings; and that is the question we have to determine.

This is the arbitration clause, agreed upon by both parties, the Brazilian charterers and the Norwegian owners:

> 49. Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the owner, one by the charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person, with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second

arbitrator, either arbitrator may apply to a Judge of any Court of maritime jurisdiction in the city above mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. . . .

I need not read more of that clause, because what has happened in this case is that the owners have called for arbitration in the City of London, in accordance with that clause, and they have stated that they have appointed Mr. Chesterman in London as their arbitrator. They have asked the charterers to appoint their arbitrator; and that the charterers have not yet done. The charterers have got, under the clause which I have read, twenty days in which to do it, and the time is going to be up to-morrow.

The parties have been very co-operative in this matter and have brought these proceedings speedily before the Court so as to have this matter determined, and we are in a position to determine it here and now. The question is whether this Court should restrain the owners from proceeding to arbitration in the City of London, and also whether it should revoke the appointment of Mr. Chesterman as arbitrator. The argument put forward in support of that application is mainly this: Proceedings are now pending in the Courts of the United States: security is lodged in that Court. Is there not a danger of there being a conflict of jurisdiction in the two Courts in the two countries if, while proceedings are pending in the United States, the arbitration proceedings are to go on in the City of London? It is said that there may be different decisions by the Courts of the United States and by the arbitrators in the City of London. I am not oppressed by the difficulties which are set before us, because the Courts of the United States view arbitration proceedings with the same respect as do these Courts, and view a contract to go to arbitration in the same light.

The Courts of the United States have not pronounced upon this document at all at the moment. It seems to me that here is a contract between the parties—a contract whereby they have provided that all their differences and disputes are to be put to arbitration in the City of London. That is a contract which binds them still; and I have heard of no reason in the course of this case why there should not be arbitration in the City of London according to their contract. I do not pause to consider whether the question of war or no war is a question of fact or a question of law. Suffice it to say that the parties have agreed that all their differences are to be put to arbitration in the City of London. I can see no reason why this Court should intervene to hamper that contract or to say that the owners are not at liberty to proceed to the arbitration in the City of London when both parties have agreed that they should be. I can see no equity or any reason whatever for this Court to intervene to prevent this arbitration going forward in accordance with the terms of the contract. I do not fear that there will be any conflict of jurisdiction. The Courts of both these countries, the United States of America and the United Kingdom, can be trusted to see that in the end there is no conflict.

The other question was whether we should revoke the appointment of the arbitrator under Sect. 1 of the Arbitration Act, 1950. Suffice it to say that this arbitrator, Mr. Chesterman, has been appointed by one party, and I see nothing in Sect. 1 of this Act which enables the Court to revoke his appointment. It could in a proper case give leave for the party to revoke it; but I see no ground for saying that the Court has power to revoke it against the will of the party who appointed the arbitrator. I am dealing, of course, only with the case where the provision is for an arbitrator to be appointed by each of the two parties who in their turn appoint an umpire.

For these reasons, it seems to me that the Judge below was quite right in the decision to which he came, and I would dismiss the appeal.

Lord Justice ROMER: I agree, and there is nothing that I wish to add.

Lord Justice PARKER: I also agree.

Mr. ROSKILL: My Lords, the appeal will be dismissed with costs?

Lord Justice DENNING: Yes.
