Date of Release: January 31, 1996

No. C951424
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
SIDERURGICA MENDES JUNIOR S.A. and MITSUI & CO. (CANADA) LTD.	**REASONS FOR JUDGMENT**
PLAINTIFFS	**OF THE HONOURABLE**
AND:	
THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "ICE PEARL" AND ICEPEARL SHIPPING CO. and NORSCUL INTERNACIONAL S.A.	**MADAM JUSTICE HUDDART**
DEFENDANTS	

Robert Margolis	Counsel for the Plaintiff
Murray Smith	Counsel for the Defendant
Heard at Vancouver:	December 8, 1995
Written Submissions:	December 15 and 21, January 5, 1996

1 Norsul Internacional S.A. asks the Court to refer the parties to arbitration pursuant to Article 8 of the Commercial Arbitration Code, scheduled to the Commercial Arbitration Act, of Canada, and for a stay of proceedings. It is a Brazilian company that was the time charterer of the M. V. Icepearl, owned by the defendant, Icepearl Shipping Co., a Cypriot company. The underlying dispute concerns responsibility for damage to steel

1996 CanLII 2746 (BC SC)

wire. The issue on this application is about the interpretation of a charter-party and bills of lading, whether one or both of them requires that the dispute between Norsul and the plaintiff Mitsui & Co. (Canada) Ltd. ("Mitsui Canada") be resolved by arbitration in New York.

1996 CanLII 2746 (BC SC)

2 The facts are not in dispute.

3 Siderurgica Mendes Junior S.A. ("SMJ") is a Brazilian manufacturer of steel products. Mitsui Canada is a British Columbia trading company.

4 Under bills of lading dated 27 January l994, SMJ shipped a part cargo of "hot rolled steel wire" on board Icepearl. The bills of lading were endorsed to Mitsui Canada, which was also a voyage charterer of part of the vessel under a charter-party dated 27 December l993. The goods arrived in Vancouver in March l994 with salt water damage. The plaintiffs claim damages in contract or in tort, or for breach of duty as bailee.

5 The bills of lading include clause 19, what the plaintiffs called the "supersession clause."

> 19. Except as to deadfreight, all dock receipts, freight engagements and previous agreements for the shipment are superseded by this Bill of Lading and none of its terms shall be deemed to have been waived by the carrier unless by express waiver in writing.

> If any part or any term of this Bill of Lading is not enforceable or is inconsistent with the law applicable to this Bill of Lading contract, the circumstances shall not effect the validity of any other part or term hereof.
>
> [Emphasis added]

6 Mitsui and Norsul that the charter-party is a previous agreement for the shipment and that the deletion of clause 9 of the charter-party permits the Captain to vary the charter-party when he signs a bill of lading. The charter-party is in the standard Gencon form with rider clauses specific to the shipper and cargo and voyage. Clause 9 would have provided that the "bills of lading are to be signed without prejudice to the charter-party."

7 The bills of lading were endorsed:

> "All terms, conditions and exceptions of governing c/p hereby incorporated herein." Charter-party dated December 27, l993 at Long Beach between Norsul Internacional S.A. and Mitsui & Co. (Canada) Ltd.

8 Clause l2 of the Rider Clauses in the charter-party between Norsul and Mitsui Canada provides:

> If any dispute arises **between Owners and Charterers**, the matter in dispute shall be referred to three (3) persons in New York, one to be appointed by the each of the parties hereto and the third by the two so chosen; their decision or that of any two of them shall be final and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The arbitrators shall be commercial men, the fees for the arbitrators chosen by each party shall be paid

1996 CanLII 2746 (BC SC)

> by each party, and the fees for the third arbitrator shall be paid by both parties equally.
>
> [Emphasis added]

1996 CanLII 2746 (BC SC)

9 It is not disputed that the property in the wire passed to Mitsui Canada as endorsee of the bills of lading by reason of the endorsement or that Mitsui Canada has all rights of action in respect of the goods as if the contract contained in the bills of lading had been made with it. Bills of Lading Act, s. 2.

10 Thus, the issues to be decided are three:

l. Do the Bills of Lading incorporate by reference the arbitration clause in the charter-party?

2. If they do not, does the agreement to arbitrate disputes "between Owners and Charterers" require Norsul and Mitsui to submit their dispute about the rusting of the steel wire during shipment to arbitration at New York?

3. If so, has Norsul waived its right under the arbitration agreement?

I.

11 The plaintiffs say that clause 9 was deleted from the bills of lading to avoid the effect of the decision in ***President of India*** **v** ***Metcalfe Shipping Company*** [1969] 3 All E.R. 1549 (C.A.). In that case, the charter-party was found to govern the relations between the shipowners and the charterers although the charterers took the goods as indorsee of the bill of lading, because they had signed the bill of lading without prejudice to the charter-party. The shipowners were bound by their agreement that "Any dispute **arising under this charter** ..." [emphasis added] should be settled by arbitration in London. The bill of lading was endorsed "All conditions and exceptions as per charter-party ...." That endorsement would not have brought the arbitration clause into the bill of lading such that a stranger to the charter-party would have been bound by it.

12 The same conclusion must follow in this case, despite the variation in the words of the endorsement to include "terms."

13 Canadian and English courts have been consistent in finding that an endorsement in the words used in the Norsul bills of lading does not incorporate an arbitration clause included in the charter-party. ***Agro Co. of Canada Ltd.*** **v** ***The "Regal Scout"*** [1984] 2 F.C. 851 (F.C.T.D.) at 860 to 864; ***Nanisivik Mines Ltd et al*** **v** ***Canarctic Shipping Co. Ltd. et al*** (1994), 113 D.L.R. (4th)

1996 CanLII 2746 (BC SC)

536 (F.C.A.) at 547 to 548. The words "all terms, conditions and exceptions of governing c/p are hereby incorporated herein" incorporate only those provisions in the charter-party that are "directly germane to the subject-matter of the bill of lading (ie to the shipment, carriage and delivery of goods". ***The Annefield*** [1971] 1 All ER 394 at 406 (C.A.).

1996 CanLII 2746 (BC SC)

14 The rationale for an interpretation that seems at first glance to be contrary to the plain meaning of the words is found in commercial necessity. It was expressed this way by Lord Robson in ***T.W. Thomas & Co.*** **v.** ***Portsea Steamship Co.***, [1912] A.C. 1 (H.L.) at 11:

> It is to be remembered that the bill of lading is a negotiable instrument, and if the obligations of those who are parties to such a contract are to be enlarged beyond the matters which ordinarily concern them, or if it is sought to deprive either party of his ordinary legal remedies, the contract cannot be too explicit and precise. It is difficult to hold that words which require modification to read as part of the bill of lading and then purport to deal only with disputes arising under a document made between different persons are quite sufficiently explicit for the appellants' purpose.

While Lord Robson was speaking of an arbitration clause that related only to disputes "arising out of the conditions of this charter-party," in a time when the courts were exhibiting less deference to alternate methods of dispute resolution, this view is

the only one that makes commercial sense. The fact that the shipper must have been aware of the inclusion in the agreement between the owners and the charterer of a clause requiring arbitration of disputes between the parties to that charter-party is insufficient reason to find that the endorsement brings the arbitration clause into the bills of lading.

1996 CanLII 2746 (BC SC)

15 More is required by the authorities. For example, in ***The Merak*** [1965] 1 All ER 230 (C.A.), the charter-party, to which the plaintiffs were a party, provided for the inclusion in the bills of lading of a clause that mandated the arbitration of any dispute "arising out of this Charter or any Bill of Lading issued hereunder ..." and the bills of lading contained a specific provision intended by the parties to incorporate the arbitration clause. Davies, L.J. concluded that a party to that charter fell within an exception to the general rule that an indorsee for value of a bill of lading may rely on its terms without reference to any extrinsic facts or documents. The fact that distinguishes this case from the situation before me is that the charter-party provided that the arbitration clause be included in the bill of lading.

16 Nor do I find much assistance in the decision of Staughton, J. in ***The "Emmanuel Colocotronis" (No.2)***, [1982] 1 Lloyd's Law Rep. 286 [Q.B. (Com. Ct)]. There are no specific words of incorporation in the bills, and the general words of the endorsement do not suffice when there is no provision in the

charter to "make it clear that the clause is to govern disputes under the bill as well as under the charter" when one of the disputants is a stranger to the charter. Clause 12 concerns only disputes between Mitsui and Norsul. It could never be read as meaning to include disputes between Norsul and an indorsee of the bills of lading other than Mitsui.

17 If Mitsui or SMJ is to be required to arbitrate its dispute with the defendants, the obligation to do so must be founded on an agreement between them other than the bills of lading. That conclusion leads inexorably to the view that SMJ is subject at most to a stay of proceedings pending arbitration. As to Mitsui, it takes us to the charter-party.

II.

18 The parties agree that "previous agreements for the shipment" were superseded by the bills of lading. They also agree that the charter-party, insofar as it relates to the shipment of the goods is a previous agreement.

19 The fundamental issue in this case is whether the party-specific words Mitsui and Norsul used in clause 12 of the charter-party bind them to arbitrate all disputes between them in New York. Put another way, is the arbitration clause a "previous agreement for the shipment?"

1996 CanLII 2746 (BC SC)

20 It seems aberrant to interpret the arbitration clause as not being sufficiently germane to the shipment to bring it within the endorsement, then to interpret it as sufficiently germane to the shipment to bring it within the supersession clause. In the former case the arbitration clause is treated effectively as having been severed from the charter-party; in the latter case it is treated as part of the charter-party.

21 Such anomalies are not rare in the interpretation of commercial paper. Customary interpretations grow and become frozen in time so that those who deal with commercial paper can rely on words having a stable meaning when it falls to a court to interpret them. The difficulty in this case is that the parties chose words that depart from those used in the authorities upon which Mitsui relies. In that sense they created the problem when they chose the words of clause 12. The authorities are of little help.

22 The precise words used by Mitsui and Norsul do not appear to have been considered in any of the authorities cited. The closest provision is that found in clause 16 of the subcharter-party considered in ***The "Regal Scout",*** *supra.* That clause provided for arbitration "[S]hould any dispute arise between Owners and Charterers ...." Clause 17 of the head charter-party was to the same effect. Walsh J. of the Federal Court found that the bill of lading did not incorporate either agreement to arbitrate. It does

1996 CanLII 2746 (BC SC)

not appear that he was called upon to consider whether the agreement to arbitrate survived the bill of lading.

1996 CanLII 2746 (BC SC)

23 The factual situation created by Mitsui and Norsul is not among those discussed in ***The Rena K***, [1979] 1 All ER 397 (H.L.) upon which the Federal Court of Appeal relied in ***Nanisivik***, *supra.* The distinguishing feature of ***Nanisivik*** is that the shipper entered the charter-party rather than the consignee. In that case the shipper was obliged to arbitrate its claim arising under the charter-party, while the consignee was not. The court approved the decision of the motions judge to stay the consignee's action pending the arbitration of the shipper's claim. It follows that a party to a charter-party and to a bill of lading can be bound by an arbitration clause contained in the charter-party even when the indorsee of the bill of lading is not.

24 The plaintiffs say that the conclusion is clear: if Mitsui were suing on the charter-party, as the plaintiffs were in ***Nanisivik*** the agreement to arbitrate would bind it. However, Mitsui is suing only as consignee on the bills of lading. Thus, it is not bound by its agreement in the charter-party.

25 I can find nothing in the decision in ***Nanisivik*** to suggest that the shipper was suing on the charter-party. Its action, like that of the consignee, was said to be founded in negligence and breach of duty. The cargo of ore had been lost when

the vessel Finnpolaris sank on the high seas between Nanisivik, N.W.T. and Darrow, Louisiana. Mahoney J.A. referred to the charter-party between Nanisivik and Canarctic (the time charterer and the shipper) only with regard to the arbitration clause on which Canarctic was relying.

1996 CanLII 2746 (BC SC)

26 Norsul suggests that the decision of Reed J. in ***Union Industrielle et Maritime*** **v** ***Petrosul International Ltd.*** [1984] 26 B.L.R. 309 (F.C.T.D.) provides useful guidance in this passage (at 317):

> It seems to me that the law is that as between shipowner and the charterer, the contract of carriage is prima facie contained in the charter-party. As regards third persons, the contract is, however, prima facie to be found in the bill of lading.

27 Accepting that as a valid statement of the law, it does not help in the factual situation before me. The issue is whether the supersession clause in the bills of lading overrides the agreement to arbitrate disputes between Norsul (the owner) and Mitsui (the charterer). Mitsui argues that Norsul includes the supersession clause in its standard form bill of lading to avoid being bound by the arbitration clause. It incorporates the terms, conditions and exceptions of the charter-party to cover a variety of things that are not stipulated in the bill of lading, by words that are well known not to incorporate the arbitration clause. The

issue is one of finding the intent of the parties from the words they have used, with whatever stable meanings they may have acquired over the years.

28 In ***The "Jocelyne"***, [1977] 2 Lloyd's Law Rep. 122 [Q.B. (Adm. Ct.)], the purchaser of yellow soya beans, who took the goods as indorsee of bills of lading, was also the undisclosed principal of the charterer of the "David Marquess of Milford Haven". The charter-party provided for its supersession by bills of lading including *inter alia* an arbitration clause. The yellow beans were damaged during their voyage from Chicago to Leningrad. The purchasers sued *in personam* and against the vessel "Jocelyne", a sister ship of the one chartered. Brandon J. found that supersession had not taken place because the bills of lading did not contain the required arbitration clause. Thus the charter-party remained the only contract between the parties.

29 In ***The "Federal Bulker"***, [1989] 1 Lloyd's Rep. 103 (C.A.) a unanimous court approved the long line of authorities giving a narrow interpretation to an endorsement on a bill of lading incorporating provisions of a charter-party. However, Bingham J.A. paused to observe (at 105) that the arbitration clause in the charter-party "is without doubt, an effective arbitration clause as between owners and charterers and the contrary has not been suggested." This decision is not helpful because the charter-party

1996 CanLII 2746 (BC SC)

in question provided for its supersession by bills of lading containing, among others, the arbitration clause.

30 After reading these authorities, I was driven to the conclusion that there is no venerable authority or settled meaning upon which I can rely to determine the effect of the arbitration clause as between Norsul and Mitsui. I also concluded that, at least when the charterer is also the consignee, a court called upon to consider the effect of the arbitration clause, can have regard to both the charter-party containing that clause and the bills of lading that follow the charter-party.

31 In reading the agreements, I had regard to the Commercial Arbitration Code and particularly to these articles:

> 8.(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> 16.(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. **For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.** A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

1996 CanLII 2746 (BC SC)

[Emphasis added]

32 There is much to recommend the separate consideration of the arbitration clause in the charter-party beyond Article 16(1) of the Code. The application of this doctrine to the Mitsui/Norsul agreement is consistent with the policy of the law to maintain the negotiability of a bill of lading, and with the equally important policy to respect and enforce private contracts for the arbitration of disputes. It permits the words "agreements for the shipment" to be interpreted consistently with the settled meaning of the various standard forms of endorsement, as meaning those agreements "directly germane to the subject-matter of the bill of lading, the shipment, carriage and delivery of goods."

33 Thus, when a bill of lading contains a supersession clause that varies or replaces a charter-party and a general endorsement is interpreted so as to bring back into the bill of lading only those parts of the charter-party relating to payment of freight and other conditions to be performed on the delivery of the cargo, there is some logic to the exclusion of the arbitration clause as one not relating to the subject-matter of the bill of lading.

34 Most importantly, it makes the most sense of the words the parties have chosen. Mitsui and Norsul said clearly that disputes between themselves are to be arbitrated at New York. That

1996 CanLII 2746 (BC SC)

agreement to arbitrate disputes arising between them means that all disputes with regard to the cargo must be arbitrated, whether the claim be in tort, contract, or against Norsul as bailee.

1996 CanLII 2746 (BC SC)

35 I am strengthened in my view that the agreement to arbitrate is enforceable separately from the other provisions of the charter-party by this passage from the decision of Brandon J. in ***The Annefield***, [1971] P. 168 at 177:

> In the end, it seems to me that one has to ask oneself what an ordinary businessman, having both documents before him, would think with regard to the applicability of the arbitration clause in the charter-party to bill of lading disputes.

This general advice is useful although I am not persuaded that the dispute is purely a "bill of lading" dispute. Were it so, were it about payment of freight or about the mode of delivery of the cargo to the consignee, it might be that Mitsui's argument would be more tenable, particularly if Mitsui and Norsul had confined their agreement to arbitrate to disputes arising under the charter-party or under bills of lading. Were it so, one would expect the statement of claim to sound only in breach of contract.

36 Although Mitsui is suing Norscul on the bill of lading, it also alleges that the defendant breached its duties as bailee and acted negligently. Its pleadings are clear that the dispute concerns the negligence of the carrier, breach of the contract of

carriage, and breach of duties as bailee. Mitsui and Norsul agreed that "any dispute" between them would be referred to arbitration.

1996 CanLII 2746 (BC SC)

37 Finally, Mitsui and Norsul could have included in the charter-party a provision for the supersession of the arbitration clause by a bill of lading without such a clause. They did not do that.

38 Thus, I have concluded that Mitsui and Norsul are bound by their agreement to arbitrate all disputes between them with regard to the shipment of steel wire rod from Rio de Janeiro to New Westminster unless Norsul has waived its right to arbitration or is estopped by its conduct from relying on the agreement to arbitrate.

III.

39 Mitsui says that Norsul lost its opportunity to request a referral to arbitration by the steps it has taken in this action, either by waiver or by estoppel.

40 Mitsui relies on the statement of the law of waiver by election by Lord Goff in ***The Kanchenjunga***, [1990] 1 Lloyd's Rep. 391 (H.L.), and particularly on these words at page 397:

> In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having

> chosen one of the two alternative and inconsistent courses of action open to him ... he is held to have made his election accordingly. ... Once an election is made, however, it is final and binding.

41 As to estoppel, Mitsui relies on the rule regarding promissory estoppel stated by Lord Denning in ***Combe* v *Combe***, [1951] 1 All E.R. 767 (C.A.), approved in ***John Burrows Ltd.* v *Subsurface Surveys Ltd. et al***, [1968] S.C.R. 607 at 615.

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualifications which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

42 Norsul entered an appearance on May 9, 1995, responded to a request for a statement of defence, issued a demand for discovery of documents, requested copies of some documents, listed and otherwise, and requested particulars of the Statement of Claim. It must be taken to have done so with full knowledge of its right to have its dispute with Mitsui referred to arbitration.

1996 CanLII 2746 (BC SC)

43 The promise upon which counsel for Mitsui relied in not seeking instructions to obtain default judgment is the statement by solicitors for Norsul that:

> We are in the process of preparing our Statement of Defence and expect to have it to you shortly. In the meantime we ask that you not take any steps towards default judgment without first contacting us.

Additionally, Mitsui incurred the expense of providing a List of Documents upon Norsul's demand.

44 Counsel for Norsul says that he was unaware of the terms of the Charter-party until September 8, 1995, after he took the steps in this action on the instructions of Norsul's insurers. He immediately sought instructions, as a result of which he wrote counsel for Mitsui on October 19 that he was instructed to request a reference.

45 This issue can be resolved easily. The decision of the Court of Appeal in ***Gulf Canada Resources Ltd.*** **v** ***Arochem International Ltd.*** (1992), 66 B.C.L.R. (2d) 113 makes it crystal-clear that this court is to promote certainty of contract by adhering strictly to the provisions of arbitration legislation. The relevant provisions of the British Columbia International Commercial Arbitration Act are not materially different from those

1996 CanLII 2746 (BC SC)

found in the Commercial Arbitration Code that the parties agree governs the arbitration agreement between them.

46 Thus, this court's task is to determine whether the conditions precedent to a referral exist. I have concluded earlier that the dispute raised by the statement of claim is the subject of a valid, enforceable arbitration agreement. There remains, therefore, only the question as to whether Norsul has met the time condition, that is, whether Norsul requested the referral "not later than when submitting his first statement of the substance of the dispute." The question is answered easily. No such statement has yet been made.

47 Thus, the dispute between Norsul and Mitsui is referred to arbitration in New York in accordance with their agreement in the charter-party under Article 8 of the Commercial Arbitration Code. This action is stayed pending the arbitration, the claims of SMJ as well as those of Mitsui.

48 If it is ever appropriate to consider waiver and estoppel in an action where the issue before the court is the enforcement of an agreement to arbitrate, this is not the case. The evidence does not support the intention to waive a right with full knowledge of that right. The detriment to the plaintiff is minimal.

1996 CanLII 2746 (BC SC)

49 In proceedings such as these, where there is a genuine disagreement as to whether the dispute is the subject of an arbitration agreement, any prejudice the plaintiffs suffer from the conduct of the defendants, in the form of costs thrown away, can be remedied by an order for costs. Counsel may address that issue at our mutual convenience.

Vancouver, B.C.
January 31, 1996 "C.M. Huddart J."

1996 CanLII 2746 (BC SC)