QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

June 26; July 31, 1997

SACOR MARITIMA S.A.
v.
REPSOL PETROLEO S.A.

Before Mr. Justice MANCE

Carriage by sea — Damage to cargo — Indemnity — Contracts for carriage of polymer grade propylene — Cargo contaminated — Receivers' claims settled by disponent owners — Whether disponent owners obliged to purge tanks with nitrogen before loading — Whether disponent owners entitled to be indemnified.

Arbitration — Award — Head charter and sub-charter — Cargo damaged by contamination — Disputes referred to two separate arbitrations — Arbitrator in head charter arbitration found disponent owner liable to owners by virtue of acts or omissions of SGS surveyor — Whether finding binding in arbitration between disponent owners and charterers — Whether cause of damage to be treated as acts or omissions of SGS rather than failure or breach by disponent owners.

The vessel *Henriette Tholstrup* had been chartered in by Sacor from her owners Kosan Tanker AS (Kosan) under a time charter on the Shelltime form (the head charter).

Under a contract of affreightment (COA) dated Dec. 30, 1987 Sacor undertook to provide Repsol as charterers vessels to carry cargoes of chemical grade propylene from La Coruña and polymer grade propylene (PGP) from Algeçiras to ports in North Europe. The COA provided inter alia:

> II . . . (b) *Algeçiras loading — polymer grade propylene*
>
> (1) If last cargo is propylene, vessel to present liquid free under vapours of last cargo.
>
> (2) In case last cargo is different from next cargo, vessel to present under nitrogen . . .
>
> If last cargo is VCM or propylene oxide visual inspection of cargo tanks taken by independent surveyor and once accepted, oxygen content to be brought down to 0.3pct by means of nitrogen.
>
> (3) . . . REPSOL PETROLEO S.A. will pay for the nitrogen and SACOR MARITIME S.A. to bear the time element till vessel has been accepted . . .
>
> (6) The cleanliness inspection for putting tanks under the required presentation conditions is for the Owners' account . . .

In January, 1988 *Henriette Tholstrup* under the COA carried a cargo of PGP from Algeçiras to Carrington. At the conclusion of the voyage the cargo was found to be contaminated with carbon dioxide. The source of that contamination was the inert gas in the vessel's tanks into which the cargo had been loaded at Algeçiras. The tanks had not been purged with nitrogen prior to loading although the last cargo had been propane discharged at Lisbon.

Kosan settled the cargo-receivers' claims and commenced arbitration proceedings against Sacor under the head charter. The sole arbitrator held that Sacor was liable to Kosan by virtue of the acts or omissions of the SGS surveyor appointed by Repsol.

Sacor sought to be indemnified by Repsol and the dispute was referred to arbitration.

The arbitrators found that Repsol and Sacor knew that the PGP to be loaded at Algeçiras had to be free of cargon dioxide contamination and that unless the previous cargo was PGP it would be necessary to purge the tanks with nitrogen prior to loading. The arbitrators concluded that acts or omissions by both parties led to the ultimate loss. As to Sacor they held that Sacor failed to properly instruct the master and consequently breached their obligation to have the vessel's tanks purged with nitrogen after inerting. As to Repsol they held that Repsol failed to instruct their appointed surveyors SGS at the load port of the requirements of cl. 11(b) and that had they done so the SGS surveyor Mr. Molina would have required the vessel to be purged with nitrogen.

Sacor challenged the arbitrators' conclusion that Sacor were obliged under cl. 11(b) to have the tanks purged with nitrogen before loading. It was further argued that the finding by the sole arbitrator in the arbitration under the head charter between Kosan and Sacor, that Sacor was liable to Kosan by virtue of acts or omissions of the SGS surveyor, should have been treated as binding in the arbitration between Sacor and Repsol and in particular as binding the arbitrators to treat the cause of damage as acts or omissions of SGS rather than any failure or breach by Sacor.

———*Held*, by Q.B. (Com. Ct.) (MANCE, J.), that (1) the intention in cl. 11(b)(2) was to impose on Sacor a primary obligation to purge with nitrogen; and whatever problems cl. 11(b)(3) might create if a vessel was accepted before she was in fact ready cl. 11(b)(3) was incapable of altering the straightforward conclusion that cl. 11(b)(2) imposed on Sacor an obligation to ensure proper nitrogen purging for the carriage of the particular cargo, if necessary by expressly requesting from Repsol or Repsol's surveyor any further information about the cargo specification they might need for the purpose; that scheme was consistent with the general scheme of Sacor's obligations as disponent owners in respect of sea- and cargo-worthiness under the COA and Asbatankvoy (*see* p. 523, cols. 1 and 2);

(2) the arbitrators were right in construing the COA as imposing on Sacor an obligation to purge with nitrogen which Sacor broke since they did not attempt any purging at all (*see* p. 523, col. 2);

(3) there was no principle on which the sole arbitrator's primary findings of fact or conclusions on causation on the evidence before him in the arbitration between Kosan and Sacor under the head time charter fell to be regarded as binding in the context of the different arbitrations involving different evidence between Sacor and Repsol under the COA (*see* p. 524, col. 2);

(4) what Sacor had to establish against Repsol was liability, whether for breach of contract or to indemnify, not just one fact which might be relevant to liability to indemnify; no request by Repsol to load the cargo could carry any implication of liability to indemnify in circumstances where Repsol could show that the cause of contamination leading to the claim to indemnity was Sacor's own breach of contract to Repsol under the terms of the COA; Repsol were entitled to take any point open to them on liability and were able to show that the cause of any contamination and any resulting liability on Sacor's part to anyone was Sacor's own breach of the COA; it was impossible for Sacor to maintain any claim to be indemnified by Repsol against their liability to indemnify Kosan in respect of Kosan's liability to cargo interests for such contamination (*see* p. 527, cols. 1 and 2);

(5) the arbitrators did not err in finding that no request was made by the crew to, and no reply given by, Mr. Molina regarding nitrogen purging; the appeal against the arbitrator's award failed (*see* p. 527, col. 2).

The following cases were referred to in the judgment:

Moundreas (George) & Co. Ltd. v. Navimpex Centrala Navala, [1985] 2 Lloyd's Rep. 515;

Petrofina S.A. & Co. v. Compagnia Italiana Trasporto Olii Minerali, (C.A.) (1937) 57 Ll.L.Rep. 247;

Stargas S.p.A. v. Petredec Ltd. (The *Sargasso*), [1994] 1 Lloyd's Rep. 412.

This was an appeal by Sacor Maritima S.A. against an arbitration award dated Dec. 24, 1996 dismissing Sacor's claim as disponent owners against Repsol Petroleo S.A. as charterers under a contract of affreightment, dated Dec. 30, 1987 to be indemnified by Repsol in respect of Sacor's liability to the owners Kosan Tankers A.S. for contamination of a cargo of polymer grade propylene which had been carried by the vessel *Henriette Tholstrup*, the owners have settled the receivers' claims.

Mr. David Donaldson, Q.C. and Mr. Hugo Page (instructed by Messrs. Penningtons) for the disponent owners Sacor; Mr. Peter Gross, Q.C. and Mr. Richard Lord (instructed by Messrs. Thomas Cooper & Stibbard) for the charterers Repsol.

The further facts are stated in the judgment of Mr. Justice Mance.

Judgment was reserved.

Thursday July 31, 1997

JUDGMENT

Mr. Justice MANCE: This is an appeal by Sacor Maritima S.A. ("Sacor") against an award dated Dec. 24, 1996 by a tribunal consisting of Mr. Bruce Harris, Mr. George Hardee and Mr. Alexander Kazantzis dismissing Sacor's claim as disponent owners against Repsol Petroleo S.A. ("Repsol") as charterers under a contract of affreightment ("COA") dated Dec. 30, 1987. The COA related to the year 1988. Under its terms Sacor undertook to provide vessels to carry cargoes of chemical grade propylene ("CGP") from La Coruña and polymer grade propylene ("PGP") from Algeçiras to ports in North Europe. The COA provided inter alia by cl. 16(c):

> Voyages under this contract of affreightment
>
> Each nominated/accepted voyage/vessel will be considered as an independent voyage under the head charter party and be ruled by the terms/conditions and exceptions of the ASBATANKVOY charter party. In case there is a discrepancy between the ASBATANKVOY Charter Party and the present charter, contract conditions will overrule the Charter Party.

Clause 11 provided:

> (a) *La Coruña — Chemical Grade Propylene*
>
> (1) If last cargo is propylene, vessel to present liquid free under vapours of last cargo.
>
> (2) If last cargo is other than propylene, vessel to present liquid free of last cargo under ship's own generated inert gas with max. 0.3 pct oxygen content and with max. 5 pct last cargo in vapour phase. If the above values have not been reached any nitrogening cost, time and shifting to be for Owners' account till vessel is ready to load (i.e. acceptance by Charterers' Inspector).
>
> (3) If vessel's last cargo is propane presentation under propane vapours always provided vessel reaches the values under paragraph 2 of this Clause. In such case Charterers agree to supply a small quantity of propylene free of charge to Owners to ease up the purging and for venting by the vessel at Owners' time and expense including shifting.
>
> (4) In case last cargo is butane and propane Owners undertake to discharge butane first at previous discharge port and thereafter propane parcel to be discharged through butane tanks in order to put tanks under propane vapours (it is not sufficient to pass propane vapours into butane tanks). If this is not possible paragraph 2 to apply.

(b) *Algeçiras loading — polymer grade propylene*

(1) If last cargo is propylene, vessel to present liquid free under vapours of last cargo.

(2) In case last cargo is different from next cargo, vessel to present under nitrogen with maximum 0.3 pct oxygen, dew point minus 25 deg C free of liquid from previous cargo and a maximum of 5 pct product in gaseous phase of last cargo: propane, butadiene, butane, butane/propane mixture, C4 Raffinate, C4 Fraction. If last cargo is VCM or propylene oxide visual inspection of cargo tanks by an independent surveyor and once accepted, oxygen content to be brought down to 0.3 pct by means of nitrogen.

(3) Notwithstanding anything said previously in this clause REPSOL PETROLEO S.A. will pay for the nitrogen and SACOR MARITIMA S.A. to bear the time element till vessel has been accepted.

(4) Owners to use inert gas plant of their vessel to prepare purging procedure.

(5) Clauses 11(a)(3) and 11(a)(4) shall be applicable if acceptable values for polymer grade propylene can be reached.

(6) The cleanliness inspection for putting the tanks under the required presentation conditions is for the Owners' account but can be substituted by a certificate issued by the Master in which it is established that the vessel is presenting herself under the conditions of the presentation clause ready for loading.

The dispute arises from a voyage carrying PGP from Algeçiras to Carrington performed under the COA in January, 1988 by the vessel *Henriette Tholstrup*, a specialized liquified gas carrier of 2320 tons deadweight. She had been chartered in by Sacor from her owners Kosan Tankers A.S. ("Kosan") under a time charter on the Shelltime form ("the head charter"). At the conclusion of the voyage the cargo was found to be contaminated with carbon dioxide. The source of that contamination was the inert gas in the vessel's tanks into which the cargo had been loaded at Algeçiras. The tanks had not been purged with nitrogen prior to the loading, although the last cargo had been propane discharged at Lisbon.

The cargo receivers, two companies in the Shell group, in conjunction with Repsol pursued an action in this Court against the vessel's owners, Kosan, under the bills of lading. The action was settled, whereupon Kosan commenced arbitration proceedings against Sacor under the head charter. The sole arbitrator was Mr. Bruce Harris, who awarded Kosan damages in the sum of £479,906.96 plus interest and costs. In the arbitration now under appeal Sacor sought in turn to be indemnified by Repsol.

The vessel was fitted with her own plant for the production of inert gas consisting in the main of a mix of nitrogen and carbon dioxide, for use when inerting her tanks when appropriate. She had no equipment on board for production of pure nitrogen, but a supply of pure nitrogen was available at Algeçiras for use in purging ship's tanks.

PGP, with a typical minimum purity of 99.5 per cent. propylene, is a purer and more sensitive grade than CGP, with a typical minimum purity of only 95 per cent. propylene. The award records that it was common ground that, if the vessel's tanks had to be inerted prior to loading PGP, this would normally be done with nitrogen; if inert gas was used, there would be a risk of contamination from its carbon dioxide content. Shell's actual cargo specification for the cargo of PGP loaded on the vessel involved a minimum of 99.5 per cent. propylene, a maximum of 0.5 per cent. methane/propane/ethane and a very small maximum of 5ppm carbon dioxide. On discharge the actual carbon dioxide content was found to be between 48 and 90ppm.

Although Shell's specification was not itself known to Sacor, the award finds that, in negotiating the COA, both Repsol and Sacor —

> . . . were well aware that the PGP to be loaded at Algeçiras destined for Shell, had to be free of carbon dioxide contamination. They were aware too, that unless the previous cargo was also PGP it would be necessary to purge the tanks with nitrogen prior to loading.

The arbitrators concluded that "acts or omissions of both parties led to the ultimate loss". As to Sacor, they held that:

> Sacor failed to properly instruct the Master and consequently breached their obligation to have the vessel's tanks purged with nitrogen after inerting.

As to Repsol, they held that Repsol failed to instruct their appointed surveyors, SGS, at the load port of the requirements of cl. 11(b), and that, had they done so, the SGS surveyor, Mr. Molina, would have required the vessel to purge with nitrogen and "Sacor would have been saved from, the consequences of their breach". The arbitrators considered however that:

> Repsol were . . . entitled to assume that Sacor would comply with the requirements of Clause 11(b) and had they done so the instructions to SGS would have been completely adequate. Repsol's failure to adequately instruct their surveyor does not, however, break the chain of causation that linked Sacor's breach to the loss which occurred.

So far as concerns Sacor's "failure to properly instruct the Master", the basis for this finding was that Sacor replaced its original instructions to —

> ... present tanks liquid free under vapours of last cargo with maximum vacuum possible in order to inertize with nitrogen prior to loading...

with instructions to —

> ... present tanks liquid free in inert gas atmosphere with max 0.3 pct of oxygen content and less than 5 pct of last cargo.

Further, in answer to a request from their own agents at Algeçiras, Sacor said that —

> ... the vessel will present tanks liquid free under inert gas. If needed the vessel will purge alongside with propylene [sic].

The award finds that there was no explanation for the reference to purging with propylene, which "appears never to have been in the contemplation of either party", a finding which is reinforced by the consideration that the answer referred to purging with propane after inert gassing of the tanks.

The arbitrators further rejected Sacor's case both that the removal from the instructions to the master of reference to inertising with nitrogen arose as a result of instructions by Repsol, and that Mr. Molina was asked by the master or chief officer whether the vessel should purge with nitrogen and positively instructed them not to purge. Mr. Molina was a relatively inexperienced surveyor. Repsol had not made him aware of the intended use of the cargo or of Shell's cargo specification, and had not instructed him that the vessel's tanks were to be purged with nitrogen. They had simply advised him that 99.5 per cent. purity in propane was required, with a dew point less than minus 25 per cent. C. and oxygen content less than 0.3 per cent. The award finds no more than that Mr. Molina should have been aware that most PGP shipped from Algeçiras required to be free of contamination with carbon dioxide, and of the risk of such contamination if PGP was loaded into a tank containing inert gas, and that, having received no instructions on the point and being faced with tanks under inert gas, a more experienced surveyor would have checked the position with his appointers.

As to the master and chief officer, the arbitrators made no criticism:

> They were aware it was more troublesome to purge an inert gas with nitrogen than it would have been to purge the propane cargo vapours but we do not consider they are to be criticized for not knowing that the cargo was highly sensitive to contamination by carbon dioxide and for not re-checking their instructions before loading.

The arbitrators' finding that Sacor failed properly to instruct the master would not itself appear relevant, but for the arbitrators' further conclusion that Sacor were contractually responsible for ensuring that the tanks were purged with nitrogen before the loading of the PGP. The first ground on which leave to appeal has been given to Sacor challenges the arbitrators' conclusion that Sacor were obliged under cl. 11(b) to have the tanks purged with nitrogen before loading. The second ground is, in summary, that Mr. Harris' finding, as sole arbitrator in the arbitration under the head charter between Kosan and Sacor, that Sacor was liable to Kosan by virtue of the acts or omissions of the SGS surveyor should have been treated as binding in the arbitration between Sacor and Repsol, and in particular as binding the arbitrators to treat the cause of the damage as acts or omissions of SGS, rather than any failure or breach by Sacor.

(1) Were Sacor obliged to have the tanks purged with nitrogen before loading?

The arbitrators took the apparently straightforward view that cl. 11(b) imposed such an obligation on Sacor. Sacor's contrary case was and is that the purging process required co-operation between the vessel and an inspector appointed by Repsol, here Mr. Molina, and that it was only if and insofar as the inspector required purging with nitrogen that such purging was obligatory. Mr. Donaldson, Q.C. for Sacor submitted that the period for which any purging with nitrogen was required would depend on the desired cargo specification, in particular for carbon dioxide traces, which would not be known to the vessel or to disponent owners such as Sacor. It must therefore be up to Repsol and its inspector to determine what (if any) purging with nitrogen was required. Clause 11(b)(3) reflected and confirmed this reality, in that it contemplated that nitrogen purging would continue only until the vessel was accepted, which — Mr. Donaldson submitted, referring back to cl. 11(a)(2) — meant accepted as ready to load by charterers' inspector. Repsol had no interest in unnecessary nitrogen purging, for which they would have to pay under cl. 11(b)(3). Further, acceptance must mark the end point of any obligation to purge with nitrogen, since it was only until acceptance that cl. 11(b)(3) imposed any obligation on Repsol to pay for the nitrogen. If acceptance by Sacor's surveyor must mark the end of any obligation to purge with nitrogen, it must do so whether or not purging with nitrogen had actually started. The surveyor must be able to accept the vessel at once, if levels of carbon dioxide in the tanks were such that nitrogen purging was not required, just as he could accept her at any time during nitrogen purging, once an appropriate level of carbon dioxide had been achieved.

The most obvious problem about these submissions is that they postulate that there could be circumstances where, after a vessel's tanks had been put under inert gas, no nitrogen purging at all was required before loading with PGP at Algeçiras. This hypothesis flies in the face of the finding in the award that in negotiating the COA —

> . . . both parties were well aware that the PGP to be loaded at Algeçiras destined for Shell, had to be free of carbon dioxide contamination [-and that-] unless the previous cargo was also PGP it would be necessary to purge the tanks with nitrogen prior to loading.

Even if Sacor's other submissions about the significance of acceptance under cl. 11(b)(3) were accepted, it would not therefore follow that the contract contemplated or assigned any role to a purported acceptance which took place before any nitrogen purging had taken place at all.

A further foundation of Sacor's argument is the hypothesis that the extent of nitrogen purging required would depend on and vary according to the particular cargo specification known only to the cargo interests. This on its face represents a quite plausible submission. But the award does not actually contain any finding to that effect. The express language of cl. 11(b)(2) indicates that there should be nitrogen purging for at least such period as would achieve the maximum 0.3 per cent. oxygen and 5 per cent. product in gaseous phase of last cargo there contemplated. As regards carbon dioxide levels, there may be shipping practices or understandings which would set the period, or further period, of nitrogen purging generally regarded as appropriate for a cargo of PGP, even a cargo of which the precise specification remained unknown. Mr. Donaldson pointed out that the award also contains no finding to that effect, and submitted that there would have been, had any such practice or understanding existed. But, even assuming that there was no such practice or understanding, all that follows, on the face of cl. 11(b)(2), is that Sacor were obliged to purge with nitrogen for a period and until a time which they could only determine by ascertaining from Repsol or Repsol's inspector more precise information about the required carbon dioxide level or about the required period of purging in order to achieve an appropriate carbon dioxide level. On this basis, cl. 11(b)(2) would require co-operation, but co-operation in the form of a request for information by Sacor, and the provision of information by Repsol, to enable Sacor to fulfil their obligation to purge with nitrogen. It is clear that neither Sacor nor, because of Sacor's failure to instruct him of the need for nitrogen purging, the master or chief officer made any such request either of Repsol or of the surveyor, Mr. Molina.

In submitting that the key to the correct interpretation of cl. 11(b)(2) is to be found in cl. 11(b)(3), Sacor's case rests too much weight, in my view, on a clause which appears concerned not with shaping or defining the obligation to purge with nitrogen, but with the allocation of financial risk, in terms of either direct cost or time spent. Closer examination of the framework of the contract as a whole also suggests, to my mind, that cl. 11(b)(3) cannot bear the weight put on it.

One answer which Repsol suggested to Sacor's case on cl. 11(b)(3) was that the phrase "till vessel has been accepted" only applied to Sacor's obligation to bear the time element, so that the obligation to pay for nitrogen would then expressly rest on Repsol even if further nitrogen had to be supplied after acceptance. I doubt whether this is the correct reading of cl. 11(b)(3), and to that extent would accept Sacor's submissions on its interpretation. It does not to my mind follow that Sacor could by arbitrarily "accepting" the vessel before the start or completion of nitrogen purging have avoided paying for nitrogen used subsequently for such purging.

The next step in Sacor's submissions relates the phrase "until the vessel is accepted" to the words in cl. 11(a)(2) "till vessel is ready to load (i.e. acceptance by Charterers' inspector)". I would accept that the conception behind these two phrases is probably the same. However, cl. 11(b)(6) suggests that cl. 11(b)(3) is not comprehensive or may require an expanded interpretation to cover situations in which there was no such inspector and no acceptance by an inspector at all. Under cl. 11(b)(6) any "cleanliness inspection" could at Sacor's option be substituted by a certificate of readiness issued by the master. Mr. Donaldson submitted that cl. 11(b)(6) simply could not work. No inspector appointed by Sacor and no master could know what was an acceptable level of nitrogen purging, at least without knowing of the required cargo specification. But if cl. 11(b)(6) would be unworkable by Sacor without seeking further information from charterers' side, that itself suggests that it would be quite acceptable to read cl. 11(b)(2) as including an obligation on Sacor's part which they could only perform by requesting and obtaining further information about the cargo from Repsol. There is no reason on this basis to treat the primary obligation to ensure proper purging with nitrogen as resting on anyone other than Sacor, even though Sacor may need for its performance to request and obtain such information from Repsol, or from the surveyor (if any) appointed by Repsol.

Even confining attention to the situations contemplated by cl. 11(a)(2) and 11(b)(3) in which there was inspection by a surveyor appointed by charterers, the language of these clauses evinces a

possible looseness of thought and ambiguity. Readiness to load and acceptance by charterers' inspector are likely to accompany one another. The intention is that they will. But cases can arise where they do not. Charterers' inspector may accept a vessel tendered to him as ready to load, but in fact, although he does not appreciate or observe it, she may not be ready to load. The Asbatankvoy charter, incorporated in this COA unless inconsistent, contains the familiar provisions:

> 1. WARRANTY-VOYAGE-CARGO. The vessel ... being seaworthy, and having all pipes, pumps and heater coils in good working order and being in every respect fitted for the voyage, so far as the foregoing conditions can be achieved by the exercise of due diligence, ... shall load ...
>
> 18. CLEANING. The Owner shall clean the tanks, pipes and pumps of the Vessel to the satisfaction of the Charterer's Inspector.

Further, by cl. 20(b), the carriage of cargo under the Asbatankvoy form of charter was subject to statutory and other provisions, including those incorporating the Hague Rules as enacted in the U.S.A. or other place of issue of the bill of lading.

In *Petrofina S.A. & Co. v. Compagnia Italiana Trasporto Olii Minerali*, (1937) 57 Ll.L.Rep. 247 the Court of Appeal held that a clause like cl. 18 will, in the absence of clear words, be treated not as the measure of charterers' protection in matters of sea- and cargo-worthiness, but as offering *additional* protection to charterers. Charterer's inspector's approval will thus be no answer if the vessel is not in fact also seaworthy and fitted for the voyage. The apparent correlation in cl. 11(a)(2) of readiness to load and acceptance by charterer's inspector blurs this distinction. However, although under cl. 16(c) the COA prevails in case of discrepancy, I do not regard either cl. 11(a)(2) or cl. 11(b)(3) as sufficiently clear to achieve a different effect to that intended by the ordinary language of the Asbatankvoy interpreted in the manner indicated in the *Petrofina* case. By parity of reasoning, I do not regard either clause as sufficiently clear to alter the apparent intention in cl. 11(b)(2) to impose on Sacor a primary obligation to purge with nitrogen. Indeed, the logic of Sacor's case, as Mr. Donaldson acknowledged, is that, even in respect of gases for which values *are* stated in cl. 11(b)(3) (e.g. oxygen at maximum 0.3 per cent.), charterers' inspector's acceptance of the vessel would terminate any further obligation to purge with nitrogen, whether or not such values had been reached. This demonstrates the extent to which Sacor's case seeks, in relying on cl. 11(b)(3), to alter the natural meaning of cl. 11(b)(2) in a respect in which it can work perfectly adequately without Sacor receiving further information about the required cargo specification or depending in any way on any surveyor appointed by charterers. In my judgment, therefore, whatever problems cl. 11(b)(3) might create if a vessel was accepted before she was in fact ready, cl. 11(b)(3) is incapable of altering the straightforward conclusion that cl. 11(b)(2) imposes on Sacor an obligation to ensure appropriate nitrogen purging for the carriage of the particular cargo, if necessary by expressly requesting from Repsol or Repsol's surveyor any further information about the cargo specification they might need for the purpose. That scheme is consistent with the general scheme of Sacor's obligations as disponent owners in respect of sea- and cargo-worthiness under the COA and Asbatankvoy. Mr. Donaldson acknowledged that his submissions involved a partial abrogation of the obligations of disponent owners in relation to the contents of the vessel's tanks prior to loading. In my judgment, the arbitrators were right in concluding that this was not the case on a proper construction of the terms of this COA.

My conclusion is therefore that the arbitrators were right in construing the COA as imposing on Sacor an obligation to purge with nitrogen which Sacor broke, since they did not attempt any such purging at all. Further, even if one makes the assumption (not in my judgment established by this award) that Sacor would have needed to know more about the required cargo specification in order to know for how long to purge, Sacor were still in breach since it took no steps whatever to fulfil their obligation to purge by requesting the relevant specification.

It was not suggested that the award could be challenged if Sacor were in breach of contract in failing to purge. Indeed, the limited leave given would not allow such a challenge. It is not therefore necessary to consider in any detail what would have been the consequences if I had concluded that Sacor were not in breach. Repsol submitted that the leave given was so limited as to preclude the Court from interfering with the award, unless Sacor also succeeded on the second issue. I do not consider that would have been so. It is very possibly implicit in the award that, but for the arbitrators' conclusion that Sacor were in breach of cl. 11(b)(2), they would have held Sacor to be entitled to recover from Repsol. The basis for this is not however spelled out. Mr. Donaldson suggested that a right to indemnity in respect of Sacor's liability to Kosan would, in the absence of any breach of contract by Sacor, arise from the loading of the cargo at Repsol's request, or alternatively that it would be implied that Repsol and any surveyor appointed by Repsol would act with reasonable skill and care in identifying the need for and extent of any purging by nitrogen required. Mr. Gross, Q.C. for Repsol

submitted that there was no basis for any indemnity, even if it were concluded that Sacor had not been in breach of the COA. If I had reached a contrary conclusion to the arbitrators on Sacor's breach, it may be that the award would have had to be referred back to the arbitrators for further consideration. I need not consider this aspect further.

(2) Was Mr. Harris' finding, as sole arbitrator in the arbitration under the head charter between Kosan and Sacor, that Sacor was liable to Kosan by virtue of the acts or omissions of the SGS surveyor binding in the arbitration between Sacor and Repsol, and in particular binding on the arbitrators to treat the cause of damage as acts or omissions of SGS, rather than any failure or breach by Sacor?

The arbitrators recorded Sacor's contention as being that Repsol were bound by Mr. Harris' "finding that liability arose from SGS's decision to accept the vessel for loading at Algeçiras in the absence of a purge", in the light of which Sacor also submitted that —

> . . . it was not open to Repsol to argue that the act of the vessel broke the chain of causation that linked the loss to SGS's decision.

The arbitrators rejected this case for reasons which they expressed as follows:

> 42. Sacor's liability to Kosan and the quantum of damages payable under the arbitration award upstream are not open to argument by Repsol; they are established facts and form the basis of Sacor's claim. The findings in the head arbitration as to the cause of Sacor's liability to Kosan are however a different matter. The decision on that arbitration was based in a different contract between different parties. That decision was reached in the context of an altogether different legal framework; a timecharterparty, not a COA, and there was no parallel in the timecharterparty for the provisions of Clause 11 of the COA which are crucial to any consideration of the position as between Sacor and Repsol. We see no support for Sacor's contention in the decisions made in either of the authorities cited.

Mr. Donaldson sought before me to refer to the full terms of and findings in Mr. Harris' award, in particular to point out that Mr. Harris had not only made the general finding regarding causation which I have just set out, but that he had also found (at pars. 12–15 and 35) that the master and chief officer asked Repsol's appointed surveyor, Mr. Molina, whether there should be purging with nitrogen and were specifically told that there would be no nitrogen purge. Mr. Harris held (at par. 35) that they were entitled to accept this without more. By contrast, in the present arbitration, the arbitrators, while still exonerating the master and chief officer from any fault, refused to accept Sacor's case that any such request had been made or any such reply given (pars. 19–21). If it is legitimate to compare the differences in the two awards in this way, it is certainly true that the two tribunals, despite their overlapping constitution, arrived at inconsistent factual findings. They did so, however, in disputes between different parties under different contracts and on the basis of, and because of, different evidence called in each arbitration. Mr. Molina, in particular, did not give oral evidence before Mr. Harris, and the only evidence from him before Mr. Harris was a written statement. Mr. Donaldson said that was because Repsol did not co-operate with Sacor in defending Kosan's claim. That may or may not be so, though, if it is, it does not necessarily follow that there was no other way in which Mr. Molina's oral testimony could not have been compelled. At the end of the day, however, none of this can be decisive. There were two separate arbitrations. It is inherent in present arbitration practice that any arbitration is a private and separate matter as regards the issues which it raises and the evidence which is called in it. In the absence of consent, there are in arbitration no procedures similar to R.S.C., O.4, r.4 and O.16, r.1 for combining or trying together common issues arising between different parties with a view to avoiding inconsistent findings of fact. The present case may in that respect illustrate a disadvantage which can occasionally attach to arbitration agreements. The very rationale behind O.4, r.4 and O.16, r.1 is that findings in one set of proceedings may well not bind in another.

Mr. Donaldson submitted that this is not so in the case of string arbitrations. Presumably, if so, a similar position must apply to actions seeking to pass liability up and down a string of contracts. I am unable however to see any principle on which Mr. Harris' primary findings of fact or conclusions on causation on the evidence before him in the arbitration between Kosan and Sacor under the head time charter fall to be regarded as binding in the context of the different arbitration involving different evidence between Sacor and Repsol under the COA.

Mr. Donaldson relied on *George Moundreas & Co. Ltd. v. Navimpex Centrala Navala*, [1985] 2 Lloyd's Rep. 515 at p. 520 and *Stargas S.p.A. v. Petredec Ltd. (The Sargasso)*, [1994] 1 Lloyd's Rep. 412.

In the former case, shipbrokers were claiming commission or damages for loss of commission in respect of shipbuilding contracts entered into by the defendants as shipbuilders through their services. The shipbuilding contracts had, they alleged, been

cancelled due to the defendant shipbuilders' breach of their terms. Mr. Justice Saville, as he was, held that the commission agreements contained an implied term that the defendant builders would not break the shipbuilding contracts so as to deprive the brokers of the commission due under the commission agreements. However, it was for the brokers to prove that the shipbuilding contracts were broken by the builders. This required examination of the position between the builders and the buyers, which had in fact been the subject of arbitration under the relevant shipbuilding contract in the case of one vessel. In this context Mr. Justice Saville said:

> It seems to me that where the rights or obligations of the parties to a contract are determined by the contractual machinery of arbitration under that contract there is something to be said for the view that the result that the arbitrators reach can (in the absence of special circumstances) be treated in effect as part of the contract and thus established by third parties in the same way as any contract can be proved. Thus in the present case the arbitrators have concluded that the sellers had a right to cancel the contract and to claim damages as the result of the failure of the buyers to perform their obligations under the contract. As between the parties that is now the contractual position as determined by the contractual machinery of arbitration — and it is difficult to see why a stranger to the contract cannot prove that contractual position by simply producing the award as he can prove other contractual rights and obligations by simply producing the contract.
>
> Be that as it may, the plaintiffs took the precaution of calling much the same evidence on the buyers' major complaint as was presented to the arbitrators and on the basis of the evidence I have heard I am satisfied that the hatch covers and coamings of this vessel were not constructed in accordance with the standards stipulated in art. 1.4 of the shipbuilding contract and that the defects were so serious that the buyers were fully justified in refusing to accept delivery of the vessel and in eventually cancelling the contract for breach by the sellers.

Assuming that the first paragraph quoted represents the law, it still does not assist Sacor. The issue between the shipbuilders and their brokers in *George Moundreas* was whether the shipbuilders had been in breach of the relevant shipbuilding contract with their buyers. It made sense to treat the award under the shipbuilding contract as determining that issue. In the present case, it is not in issue that Sacor were, as held by Mr. Harris, liable to Kosan. It is not sought to look to Mr. Harris' award to establish that liability. What is sought is to take findings of fact and conclusions of causation which Mr. Harris made between Kosan and Sacor and to transpose them wholesale into the arbitration between Sacor and Repsol on the question whether Repsol incurred any liability to indemnify Sacor in respect of Sacor's unquestioned liability to Kosan. That question was one for determination by the contractual machinery of arbitration under the contract between Sacor and Repsol, not by Mr. Harris as arbitrator between Kosan and Sacor. Nothing in *George Moundreas* therefore lends any support to Mr. Donaldson's submissions.

In *The Sargasso* Petredec time chartered the vessel for 19 months to Stargas, who sub-chartered her for a voyage to Neste Chemicals S.A. Neste made a claim, again for contamination of propylene, in that case by butadiene, and was awarded D.M.460,587.25 against Stargas, who sought an indemnity from Petredec. Both the time charter and the voyage charter were subject to the Hague Rules. Mr. Justice Clarke considered first whether the contamination had been caused by Petredec's breach of its obligations under the Hague Rules, and held (in the absence of any positive case to the contrary) that it had been. By the same token, it followed, he said, that Petredec's breach under the time charter put Stargas in breach of the voyage charter with Neste. The question then arose of the measure of damages recoverable by Stargas from Petredec, and it was in this context that Stargas submitted (a) that it was in the reasonable contemplation of both Stargas and Petredec when making the time charter that any breach by Petredec of its Hague Rules obligations under the time charter would also involve Stargas in breach of identical Hague Rules obligations under a voyage charter entered into by it containing an arbitration clause with the result that Stargas would have to pay damages in an amount awarded by arbitrators and (b) that the amount awarded in the arbitration under the voyage charter thus constituted the measure of Petrodec's liability, unless Petrodec could show that Stargas had failed to take reasonable steps to mitigate their loss in the conduct of their defence in that arbitration or the award was for some reason perverse or such that no reasonable arbitrator could reach on the material before them. The rationale for the last two exceptions is no doubt that there would then have been a break in the chain of causation.

Mr. Justice Clarke cited Mr. Justice Saville's dictum from *George Moundreas* and other dicta for the proposition which I also consider that they support, namely that the award between Neste and Stargas established and quantified the contractual liability of Stargas to Neste. He also had no difficulty in accepting point (a) identified above. The key issue was however whether Petredec could challenge the use of the award as the measure of its

liability to indemnify Stargas, and in particular could, by showing some error of fact or law by the arbitrators under the voyage charter, show that the cause of Stargas's liability to Neste was not Petredec's breach of the time charter, but the arbitrators' error. Mr. Justice Clarke held that they could not, saying at p. 417:

> If the matter were free from authority I would prefer the submissions of Mr Schaff. It seems to me that where the breach of the two charter-parties is proved to be the same and the arbitrators have held the charterer under a charter-party liable to a sub-charterer in a particular amount the better view as a matter of principle is to say that the cause of the liability so determined was the breach of the charter-party. Any other conclusion would or might cause injustice to the charterer because the charterer may not have available evidence which is available to the owner or disponent owner. On the other hand the conclusion which I have reached does not seem to me to be unjust to the owner or (in this case) disponent owner because if he has available relevant evidence which will assist the charterer in his defence to the sub-charterer's claim he can make it available to him. If for some reason he does not and the charterer acts reasonably throughout, the charterers should in my judgment be able to pass his liability to the owner.
>
> That is in my judgment so even if it can later be shown that the arbitrators have made an error of fact or law. It does not seem to me that such an error should be held to break the chain of causation between the breach of contract and the loss sustained by the charterer as quantified by the arbitrators unless the charterer has failed to take reasonable steps to mitigate his loss (as for example by failing to adduce evidence which was or ought to have been available to him or to advance a defence available to him in law or perhaps to make an application for leave to appeal or for remission to enable him to adduce fresh evidence before the arbitrators) or unless the arbitrators have acted perversely or have reached a conclusion which no reasonable arbitrators could have reached on the evidence before them. In any other case the breach of charter-party remains an effective cause of the charterer's loss even if it can be said that there was another cause of the loss, namely an error made by the arbitrators.
>
> The position would of course be different if it was not reasonably foreseeable that the liability of the charterer to the sub-charterer would be ascertained in a particular way, as for example by arbitration in some wholly unexpected forum. That problem does not however arise here because there can be no doubt that it was reasonably foreseeable that liability under the sub-charter would be determined by arbitration in London. Equally the position would be different if the terms of the two charter-parties were different. Moreover it remains for the charterer in a case such as the present to prove that the owner's breach of the charter-party put the charterer in breach of the sub-charter. The role of the award in the arbitration under the sub-charter is to quantify the liability of the charterer to the sub-charterer and thus establish the quantum of the charterer's claim against the owner or disponent owner. In the latter case, other things being equal, the disponent owner will in principle be able to adopt the same attitude vis-à-vis the head owner.
>
> Mr. Nolan submits that the solution which I prefer would not be just to the owner or disponent owner because he may not have sufficient information to enable him to judge whether the charter has failed to mitigate his loss or whether the award is perverse or in the relevant sense unreasonable. In my judgment it is most unlikely that that will be the case. In every case the charterer will have to prove that the breach of the head charter-party put him in breach of the sub-charter. He will thus have to produce the documents relevant to that question. Moreover I would expect the owner or disponent owner to have enough knowledge of the case to be able to decide whether to assert that the charterer had failed to mitigate his loss or that the award was perverse or unreasonable. In the exceptional case where that might not be so it is I think most unlikely that the Court does not have power to make an appropriate order for interrogatories or discovery.

After extensive review of the authorities, Mr. Justice Clarke concluded at p. 425 that there was nothing in them that required him to reach a different conclusion. It is important however to note the limitations of Mr. Justice Clarke's decision. Above all, it is limited to situations where a breach of contract A has itself been proved and has, furthermore, been proved to have put the other party in breach of contract B under which an award or, no doubt, judgment has been given in favour of the other party to contract B. Mr. Justice Clarke also limited himself to situations where the terms, no doubt meaning the relevant terms, of the two contracts were the same.

Consistently with the first limitation, Mr. Justice Clarke started his judgment by considering whether Stargas had made out its case that the contamination arose from Petredec's breach of its Hague Rules' obligations under the time charter, and whether that breach had also put Stargas in breach of its sub-voyage charter with Neste. In the present

case, liability under the bills of lading to cargo interests is being sought to be passed back down the chain in the opposite direction. But; by parity of reasoning, Sacor must start by establishing as against Repsol that, in relation to the contamination which occurred, Repsol is obliged to indemnify Sacor against liability which Sacor incurred to Kosan under the head charter. Only once liability to indemnify is thus established as between Sacor and Repsol, could the principles identified by Mr. Justice Clarke enable Sacor to measure the indemnity by reference to the liability established by the award made by Mr. Harris between Kosan and Sacor.

I reject Mr. Donaldson's contention that all that Sacor needed to establish by way of liability was a request by Repsol to load the cargo, and that on all other matters the award between Sacor and Kosan bound. What Sacor had to establish against Repsol was liability, whether for breach of contract or (in this case) to indemnify, not just one fact which might be relevant to liability to indemnify. No request by Repsol to load the cargo could carry any implication of liability to indemnify in circumstances where Repsol could show that the cause of the contamination leading to the claim to indemnity was Sacor's own breach of contract to Repsol under the particular terms of the COA. Nothing in any principle recognized by Mr. Justice Clarke can impose a liability on Repsol to Sacor by reference to findings of fact or conclusions of causation regarding the cause of contamination reached in an arbitration to which Repsol were not parties and contrary to the findings and conclusions reached in actual arbitration proceedings between Sacor and Repsol by which alone they agreed under the COA to be bound as between themselves. If Sacor had succeeded in establishing in the present arbitration that Repsol had requested them to load PGP in circumstances overriding any obligation to purge with nitrogen under cl. 11(b)(2) and giving rise to an implied obligation on Repsol's part to indemnify Sacor for any loss suffered by resulting contamination, Sacor might well have been able to measure their loss by reference to Mr. Harris' award. The arbitrators said as much (par. 42). But, as between Sacor and Repsol, Repsol were entitled to take any point open to them on liability, and were able to show that the cause of any contamination and of any resulting liability on Sacor's part to anyone was Sacor's own breach of the COA. That being so, it was impossible for Sacor to maintain any claim to be indemnified by Repsol against their liability to indemnify Kosan in respect of Kosan's liability to cargo interests for such contamination.

For these reasons, there is no basis for Mr. Donaldson's submission that the present arbitrators erred in finding, contrary to Mr. Harris' findings of fact as sole arbitrator, that no request was made by the crew to and no reply given by Mr. Molina regarding nitrogen purging, even if these submissions are open to him in circumstances where the present award does not refer to the difference and it is only apparent on reading Mr. Harris' award. Mr. Donaldson's further submission that the arbitrators should have regarded themselves as bound by the finding that the contamination was caused by Mr. Molina's decision to accept the vessel without a nitrogen purge fails for the same reasons. Its lack of merit is further underlined by the fact that cl. 11(b)(2) of the COA had no counterpart in the head charter with Kosan at all.

Conclusion

This appeal against the arbitrators' award therefore fails on both the grounds which leave was given to argue.