[2005–06 Gib LR 143]

BOLS DISTILLERIES B.V. (trading as BOLS ROYAL DISTILLERIES) and UNICOM BOLS GROUP SP. Z.O.O. v. SUPERIOR YACHT SERVICES LIMITED

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe): October 11th, 2006

Conflict of Laws—contracts—exclusive jurisdiction clause—requirement of Council Regulation (EC) No. 44/2001, art. 23(1) that agreement to confer jurisdiction on court to be in writing or evidenced in writing not satisfied by written clause in draft contract to which defendant raised no objection—jurisdiction to hear civil action by Gibraltar company against foreign party only if clearly and precisely demonstrated that agreement to exclusive jurisdiction of Gibraltar court and in form required by art. 23(1)

The respondent brought an action against the appellants in the Supreme Courts seeking a declaration that a contract existed between them and claiming damages for its breach.

The respondent was a Gibraltar company through which K, a professional yachtsman, raced yachts sponsored by the appellants. It put forward a proposal to procure the design and construction of a new yacht and submitted a draft sponsorship agreement to L, president of Unicom Bols Group, and O'C, a director of Bols Distilleries. The terms were, *inter alia*, that the respondent would retain ownership of the yacht whilst "the company" (which was not identified) would finance the project and make payments in accordance with a separate schedule. The agreement contained a clause submitting to the jurisdiction of the Gibraltar courts.

L became concerned at the imbalance in the contract between finance and ownership. On December 16th, 2001, K emailed O'C, enclosing an updated sponsorship agreement and commenting that the ownership and payment issues required further discussion. Nevertheless, on January 3rd, 2002, O'C replied enclosing a letter, described as a "draft," confirming "Bols' commitment to proceeding with the project." K then instructed the boat builder to commence construction. In February, L and the legal adviser to Rémy Cointreau (the parent company of Bols Distilleries) met with K, who agreed to forgo ownership of the yacht in return for performance bonuses, though the details of these were not finalized. In due course the construction of the yacht was completed and the

respondent operated it until given notice of termination of its appointment by Bols Distilleries, when it commenced the present proceedings.

The respondent alleged that a contract was concluded on or shortly after January 3rd, 2002, consisting of the sponsorship agreement, the payment schedule and the letter of January 3rd. The appellants responded that there was no contract, and even if there were, it did not incorporate the jurisdiction clause because the letter relied on as acceptance made no express reference to it. They accordingly applied for an order that the court did not have jurisdiction to hear the suit, since the appellant companies were domiciled in the Netherlands and Poland respectively and art. 2(1) of Council Regulation (EC) No. 44/2001 gave them the right to be sued in their own jurisdiction. The Supreme Court (Schofield, C.J.) dismissed their application.

On appeal, the Court of Appeal held (Staughton, P., Stuart-Smith and Aldous, JJ.A.) that the court had jurisdiction because there was a good arguable case that a contract incorporating the jurisdiction clause had been concluded and that clause was in or evidenced in writing so as to satisfy art. 23(1) of the Regulation. The proceedings in the Court of Appeal are reported at 2005–06 Gib LR.

On further appeal, the appellants submitted that (a) there was no written agreement on jurisdiction because there was no concluded contract between the parties that included the jurisdiction clause; (b) there was no oral agreement since, although the sponsorship agreement was referred to during discussions, the jurisdiction clause itself was never expressly mentioned and agreed; and (c) in any event, the courts below had failed to apply the correct standard in finding that the respondent had shown a good arguable case that the parties had reached a clear and precise agreement on jurisdiction and that the formalities of art. 23(1) had been satisfied.

The respondent submitted in reply that (a) there was an agreement in writing on jurisdiction since the sponsorship agreement, including the jurisdiction clause, became a binding contract as a result of the exchange of emails on December 16th, 2001 and January 3rd, 2002; and (b) the parties had orally agreed on jurisdiction during their discussions and this agreement was, for the purposes of art. 23(1), evidenced in writing in the sponsorship agreement that K had emailed to O'C on December 16th and to which he had failed to object.

Held, allowing the appeal:

The Supreme Court did not have jurisdiction to hear the proceedings and the action would be dismissed. The standard to be applied in determining whether the court had jurisdiction was that of a "good arguable case," which required the respondent to show that, on the material available, it had a much better argument than the appellants that the parties had agreed to the jurisdiction of the Gibraltar court and that the requirements of Council Regulation (EC) No. 44/2001, art. 23(1) had been satisfied. It was necessary for the respondent to demonstrate, clearly

and precisely, that the jurisdiction clause had been the subject of consensus between the parties but to do this, it could not point to the sponsorship agreement sent on December 16th as showing that there had been a written agreement on jurisdiction because many fundamental matters, including ownership and financial details, had not been resolved and thus the terms of the agreement were inappropriate. That O'C had failed to object to the clause in his reply to the email of December 16th did not amount to confirmation in writing of an oral agreement on jurisdiction, within the meaning of art. 23(1), since there was no evidence that the jurisdiction clause had ever been discussed and agreed in meetings, emails or telephone calls. The respondent had thus failed to show that it had a much better case than the appellants that the court had jurisdiction (para. 28; para. 35; para. 38).

Cases cited:

(1) *Berghoefer GmbH* v. *ASA S.A.* (Case 221/84), [1985] E.C.R. 2699; [1986] 1 C.M.L.R. 13, distinguished.

(2) *Canada Trust Co.* v. *Stolzenberg (No. 2)*, [1998] 1 W.L.R. 547; [1998] 1 All E.R. 318; [1998] C.L.C. 23; [1998] I.L. Pr. 290; on appeal, [2002] 1 A.C. 1; [2000] 4 All E.R. 481; [2001] C.L.C. 118; [2001] I.L. Pr. 40, applied.

(3) *Coreck Maritime GmbH* v. *Handelsveem B.V.* (Case C–387/98), [2000] E.C.R. I–9337; [2001] C.L.C. 550; [2001] I.L. Pr. 39, applied.

(4) *Estasis Salotti di Colzani Aimo* v. *RÜWA Polstereimaschinen GmbH* (Case 24/76), [1976] E.C.R. 1831; [1977] 1 C.M.L.R. 345, applied.

(5) *Partenreederei M.S. Tilly Russ* v. *Haven & Vervoerbedrijf Nova N.V.* (Case 71/83), [1985] Q.B. 931; [1984] E.C.R. 2417; [1984] 3 C.M.L.R. 499, applied.

(6) *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhouri Islami Iran*, [1994] 1 A.C. 483; [1993] 4 All E.R. 456, referred to.

(7) *Shevill* v. *Presse Alliance S.A.* (Case C–68/93), [1995] E.C.R. I–415; [1995] 2 A.C. 18; [1995] All E.R. (EC) 289; [1995] I.L. Pr. 267; [1995] E.M.L.R. 543, applied.

Legislation construed:

Council Regulation (EC) No. 44/2001 of December 22nd, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 2(1): The relevant terms of this paragraph are set out at para. 2.

art. 23(1): The relevant terms of this paragraph are set out at para. 2.

T.N. Young, Q.C. for the appellants;
J. Dingemans, Q.C. and *R.A. Triay* for the respondent.

1 **LORD RODGER OF EARLSFERRY,** delivering the judgment of the Board: This appeal concerns the jurisdiction of the Supreme Court of Gibraltar to hear a case concerning an alleged contract relating to the

construction and operation of a racing yacht. The parties are said to have been a Gibraltar company on the one hand and a Dutch and a Polish company on the other. The Gibraltar company is Superior Yacht Services Ltd. which is the respondent in the appeal. The Dutch company is Bols Distilleries B.V. (trading as Bols Royal Distilleries) and the Polish company is Unicom Bols Group Sp. z.o.o. The Dutch and Polish companies, which their Lordships refer to collectively as "the Bols companies," are the appellants. Superior Yacht claims, *inter alia*, a declaration that it is the owner of the yacht and damages for breach of contract by reason of wrongful and early termination of the contract.

2 Article 2(1) of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." Article 23(1) provides, *inter alia*:

> "(1) If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing . . ."

3 The Bols companies are domiciled in the Netherlands and Poland respectively. They assert, accordingly, that by reason of art. 2(1), they are not subject to the jurisdiction of the Gibraltar courts. Superior Yacht relies, however, on cl. 15 of the alleged agreement between the parties which is in these terms: "This agreement shall be governed by the laws of Gibraltar and the parties hereby submit to the jurisdiction of the courts of Gibraltar." On that basis, Superior Yacht contends that art. 23(1) applies and the Gibraltar courts have jurisdiction. The critical question is whether the court can be satisfied that there is an agreement, in writing or evidenced in writing, conferring jurisdiction on the courts of Gibraltar. On the basis of cl. 15, both Schofield, C.J., sitting in the Supreme Court, and the Court of Appeal (Staughton, P., Stuart-Smith and Aldous, JJ.A.) held that there is such an agreement, in writing or evidenced in writing, and that art. 23 therefore applies so as to confer jurisdiction on the Supreme Court of Gibraltar. The Bols companies appeal on the ground that, in reaching their decision, the Court of Appeal applied the wrong test.

4 Before turning to that issue, their Lordships must explain some of the background to the dispute. At all material times, Bols, the well-known

brand of vodka, was manufactured and distributed by Bols Distilleries and by Unicom Bols, which was the Polish division of Bols Distilleries. For some years, the two companies promoted their brand by operating ocean-going yachts which took part in high-profile races and other events. In 1998, Unicom Bols employed Gordon James Wallace Kay, a professional yachtsman, to manage and operate their first yacht, *Lodka Bols*. With the encouragement of the Bols companies, however, on January 5th, 1999, Mr. Kay arranged for Superior Yacht to be incorporated in Gibraltar. It was thought to be more expedient for the business of managing and operating the yacht to be arranged through a company, rather than for Unicom Bols and Bols Distilleries to employ Mr. Kay and his crew directly. Following incorporation, Superior Yacht managed and operated the yacht *Lodka Bols*. Under the management of Superior Yacht, the yacht was placed first in its class in the 2001–2002 Sydney–Hobart race. A few months later, in July 2002, that yacht was sold.

5 Meantime, in 2000, the president of Unicom Bols, Stefan Laux, approached Superior Yacht about the future of the companies' advertising campaign. It responded by offering them first refusal of a project which would involve the Bols brand enjoying what was anticipated to be substantial publicity and international exposure through a three-year campaign based on a new state-of-the-art yacht, *Lodka II*. The design of the new yacht was to be initiated by Superior Yacht. One distinctive feature of the proposal was that, while Unicom Bols and Bols Distilleries would put up the sponsorship funds, Superior Yacht would contract for the construction of the yacht and would own it once it had been built. They would operate and race the yacht in accordance with a programme to be agreed with the sponsors.

6 Superior Yacht submitted a formal written proposal to Unicom Bols in November 2000. This included budget projections for the design and construction costs during the first year and operating costs for the subsequent three years. While the initial response was positive, consideration of the project had to be shelved due to the takeover of the Bols Group by Rémy Cointreau.

7 In September 2001, however, Bols Distilleries asked Superior Yacht to re-present the project to Mr. Laux and to Mr. Peter O'Connell, a director of Bols Distilleries who was in charge of marketing the Bols brand internationally. Further discussions took place and on September 19th, 2001, Mr. Kay sent Mr. Laux and Mr. O'Connell a provisional contract for the proposed project. The first recital to the agreement recorded that Superior Yacht intended to procure the design and construction of a high performance 80-foot racing yacht and that they relied on "the company" to enter into the agreement for the purpose of financing the cost of the design and construction of the yacht. At this

stage, "the company" had not been specified. The next recital referred to the companies which were envisaged as carrying out the design and building of the yacht. The third recital recorded that, in return for the company's financial support, after the vessel had been constructed, Superior Yacht would manage it in consultation with, and at the direction of, the company. Superior Yacht would enter it in various specified yachting events and regattas with a view to providing a platform for the promotion of the company, its logo, brand and certain agreed products. The aim would be to raise the public profile and awareness of the company, the brand and the agreed products. This agreement still had the distinctive effect that, although the sponsoring company would put up the funds, Superior Yacht would become the owner of the new yacht and, in return, it would have to operate it for a period of three years in accordance with the provisions of the agreement. This agreement contained cl. 15 on jurisdiction which their Lordships have already quoted in para. 3 above.

8 Over the following weeks, discussions on a variety of points continued against a background of financial and political pressures on Unicom Bols, partly due to the policy of the Polish government on the advertising of alcohol. These pressures were felt acutely in relation to the *Lodka Bols* yacht that was due to take part in the Sydney to Hobart race in December of that year. One major decision which was taken on the new yacht was to change the proposed designers and builders. As these discussions went on, Mr. Kay was becoming increasingly anxious that, if the final decision to proceed with the project was not taken fairly quickly, the new yacht would not be finished in time to take part in the Sydney to Hobart race starting in December 2002. On October 29th, 2001, he sent an email to Mr. Laux attaching "a slightly amended copy of the contract." It contained the same jurisdiction clause but still did not specify which company was to contract with Superior Yacht. It included details of the new designer and builders and also revamped the schedule of the payments to be made to Superior Yacht, with a view to reducing the payments in the first year. The contract still envisaged that Superior Yacht would own the yacht which the two companies had paid for.

9 This apparent imbalance in the contract, between financing and ownership, was causing concern to Mr. Laux. On November 6th, 2001, he sent an email to Mr. Kay, which ended:

> "And, my friend, in the end it is a joint venture with Unicom Bols having all the risk and you at worst end up with a nice boat that can be used, utilised or sold!! I know you are after the real glory and to achieve all the dreamed of results, but ask yourself: You feel this is balanced?"

Mr. Kay replied the following day that he fully understood Mr. Laux's

point, but asked him for a counter-proposal which they could discuss at the meeting which they were due to hold in Warsaw.

10 That meeting was eventually held in Warsaw on November 19th and was attended by Mr. O'Connell, Mr. Laux and Mr. Kay. It appears that the question of the ownership of the yacht was discussed but not settled. According to Mr. Kay, his position at that time and subsequently was that the question of ownership was not critical, but, if Superior Yacht was not to own the yacht, it would need to be compensated in terms of additional bonuses under the contract. At the meeting, Mr. O'Connell indicated to Mr. Kay that they would let Superior Yacht have a decision on the project within the next two weeks, but by December 13th, Mr. Kay had still not heard and so he wrote to Mr. O'Connell emphasizing the need for an early response. On December 15th, having been unable to contact Mr. Kay on his mobile, Mr. O'Connell emailed him to say that: "Both Stefan and I have discussed *Lodka II* today. Decision is go." He asked for details in terms of cost "bookings" over the next 24 months. Mr. Kay replied that he was looking forward to working with Mr. O'Connell on the project and added: "We still need to resolve a few issues, such as a contract and the bonus issues we discussed ref. boat ownership, *etc*."

11 On December 16th, Mr. Kay, who was in Australia, sent an email to Mr. O'Connell, attaching the scanned version of a document on Superior Yacht paper, dated December 17th and headed "Invoicing and Contract Information." Also attached to the email was a scanned updated version of the contract. The email read:

> "Please find attached revised payment schedule, as we discussed in the Warsaw meeting, where this year's costs are reduced as much as possible.
>
> I will show this to Stefan on his arrival.
>
> We will need to address this contract, bonus arrangements and the clear understanding as laid out in the contract of what is excluded, with particular reference to graphics and branding."

12 The invoicing information was clearly intended to provide "the details in terms of cost 'bookings'" which Mr. O'Connell had requested two days before. It gave the details of the Superior Yacht bank account and, in turn, asked for the necessary invoicing details. It then specified the payments and relevant dates for a period of four years, the total being $6,100,000.

13 On the next page, there was a heading "Additional costs," which listed certain items which would not be covered by the sponsorship moneys and for which the company would accordingly have to pay separately. Under the list of the items whose cost was to be excluded from

the sponsorship moneys, the document stated "Full details are in the contract." And, indeed, some details of what was meant by "the cost of graphics or the placing of sponsor logos or branding on the vessel and its mainsail and spinnakers" were to be found in item 2 of the company's rights set out in Schedule 2 of the version of the draft agreement which was attached to the email. Likewise, "the cost of crew uniforms and wet weather gear as selected by the company to a style and livery as agreed with Superior Yacht together with the branding thereof" seems to refer to the cost involved in the company's exercise of its right, in item 4 of Schedule 2, to "participate in the selection of style and livery of the crew uniforms and wet weather gear and to place an advertisement bearing the company's name and/or logo on the uniforms of the crew and of the team personnel."

14 Then came a heading "Ownership and Registry," followed by this:

> "As owners of the vessel, you will need to address the issue of port of registry, the cost of the project is based on the vessel being flagged in a tax free port. Should you decide to register the boat in a country where tax is payable you will be responsible for this cost.
>
> The issue of ownership and performance bonus are potentially interlinked as we discussed, there are several options here which need to be discussed and resolved, I look forward to your input."

An email dated December 17th from Mr. Laux to Mr. O'Connell indicates that they had still not finally decided what to do about the ownership of the yacht, but that he preferred that ownership should be with Unicom Bols or Rémy Cointreau, or an independent entity.

15 By January 3rd, 2002, Mr. Kay still had not had a reply from Mr. O'Connell to the email he had sent on December 16th. In an email to Mr. Laux of that date, he said, *inter alia*:

> "I am, however, very aware that we are no closer in real terms to closing this project. I copied you my response to POC and I think that no one is taking this seriously. I do not have invoicing details, a written agreement, *etc*. and unless we have these in place, then we have no project. Surely it is the basis of any agreement that it is written and agreed??? Or is this unreasonable? With the constant changes at Bols and movement of the goal posts, even with the current project, I am unprepared to commit the next 3–4 years of life to a period of constant uncertainty.
>
> I am sure you understand and surely you would feel more comfortable having me under contract . . ."

16 In fact, news was on its way. On January 3rd, Mr. O'Connell sent Mr. Kay an email in these terms:

> "Please see the attached letter as requested. This is a draft, and I have also copied Stefan, for any input that he wishes to add.
>
> (See attached file: Gordon Kay.doc.)
>
> In terms of the payment transfer timing, I have to speak with Piotr on Monday to discuss this further, as I have indicated in the letter."

The draft letter attached to the email was from Mr. O'Connell to Mr. Kay and was headed "Re: Bols *Lodka II*." It read:

> "As *per* our telephone conversation of earlier today, I wish to confirm the decision that we have spoken of in relation to the further development of the 'Bols *Lodka II*' project.
>
> Thus, by way of this letter, I wish to confirm Bols' commitment to proceeding with the project, as we discussed in Warsaw, and to the project schedule as forwarded by you on December 17th, 2001.
>
> With specific reference to the project payment schedule, I will confirm the transfer details and timings (in line with your project schedule) by Tuesday of next week (January 8th, 2002), following discussions with Unicom Bols Poland.
>
> I wish you the best of success with the project, and look forward to continued success in the future."

17 It is common ground that this draft letter was never signed. According to his witness statement, Mr. Kay forwarded a copy of Mr. O'Connell's draft letter to Mr. Laux and talked to both men about it on the telephone.

18 On the basis of the draft letter, and, presumably, the prior indication that the "decision is go," Mr. Kay then took the step of instructing the builders, Boatspeed, to start work on *Lodka II*. He also instructed another company, Southern Spars, to supply equipment for the construction. It appears that Superior Yacht entered into an agreement for the work with Boatspeed on January 8th. Two versions of the agreement were produced in court, neither signed by Superior Yacht, one signed by Boatspeed. In one of the agreements, Superior Yacht is described as "the purchasing agent," in the other as "the purchaser."

19 Their Lordships need not follow subsequent events in such detail since the position of Superior Yacht is that the agreement between the parties on jurisdiction, in writing or evidenced in writing, can be spelled out of the exchange of emails of December 16th, 2001 and January 3rd, 2002, on the basis of which Superior Yacht proceeded to instruct the construction of the boat. Some later events should be mentioned, however.

20 Early in 2002, Mr. O'Connell, who had played a major role in the negotiations, left Bols Distilleries. In February, Mr Stéphane Laugery, the group legal adviser of Rémy Cointreau, began to take a close interest in the situation. He invited Mr. Kay to a meeting in Paris to discuss the position. At that meeting on March 4th, 2002, according to Mr. Kay, he agreed that Superior Yacht would forgo ownership of the yacht, provided certain conditions were met. No formal agreement between the parties was ever signed.

21 Construction of the yacht was eventually finished in February 2003 and it was launched in March of that year. Bols Distilleries decided to operate it on the basis of annual budgets and Superior Yacht prepared a programme of events for the period from March 2003 to March 2004. Superior Yacht managed the yacht during that period. On February 17th, 2004, however, Bols Distilleries gave Superior Yacht notice of the termination of their appointment as from March 31st, 2004. The claim form in the present proceedings was issued two weeks later, on April 14th, 2004.

22 With that outline of the factual material, their Lordships must now examine the relevant law. For present purposes, Council Regulation (EC) No. 44/2001 replaced the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. Article 17(1) of the Convention was to the same effect as art. 23(1) of the Regulation. Article 17(1) provided:

> "If the parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement confirmed in writing, agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction."

The wording of art. 17(1) of the Convention is not exactly the same as the wording of art. 23.1 of the Regulation, but it was not suggested that, for present purposes, there was any material difference between the provisions. Article 17(1) refers specifically to the parties agreeing on jurisdiction "by agreement in writing or by an oral agreement confirmed in writing." Article 23(1) simply says that the agreement on jurisdiction "shall be either . . . in writing or evidenced in writing . . ." Unlike art. 17(1), the later article does not spell out that the agreement which is evidenced in writing is an oral agreement. But plainly that is what is envisaged. Again, neither counsel suggested that the guidance which the Court of Justice had given on the interpretation of art. 17(1) of the Convention was inapplicable to the interpretation of art. 23(1) of the Regulation.

23 In *Estasis Salotti di Colzani Aimo* v. *RÜWA Polstereimaschinen GmbH* (4), having pointed out that the effect of conferring jurisdiction by consent is to exclude the jurisdiction provided for in art. 5 of the Convention, the Court of Justice continued ([1976] E.C.R. 1831, at para. 7):

> "In view of the consequences that such an option may have on the position of parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed.
>
> By making such validity subject to the existence of an 'agreement' between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated.
>
> The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established."

For the reasons given by the court, the policy of the legislation requires that it is "clearly and precisely demonstrated" that the parties actually agreed to any clause conferring jurisdiction. There is a risk that a jurisdiction clause in a standard form contract put forward by one party might be overlooked by the other and the purpose of art. 23(1), as of art. 17(1), "is to neutralize the effect of jurisdiction clauses that might pass unnoticed in contracts": *Partenreederei M.S. Tilly Russ* v. *Haven & Vervoerbedrijf Nova N.V.* (5) ([1984] E.C.R. 2417, at para. 24). As the court had indicated earlier in the same judgment (*ibid.*, at para. 16), fulfilling the requirements of the article will "guarantee that the other party has actually consented to the clause derogating from the ordinary jurisdiction rules of the Convention." In *Coreck Maritime GmbH* v. *Handelsveem B.V.* (3), the court summarized its jurisprudence in this way ([2000] E.C.R. I–9337, at para. 13):

> "The Court has held that, by making the validity of a jurisdiction clause subject to the existence of an 'agreement' between the parties, Article 17 of the Convention imposes on the court before which the matter is brought the duty of examining first whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, and that the purpose of the requirements as to form imposed by Article 17 is to ensure that consensus between the parties is in fact established . . ."

24 Before the Board, counsel for Superior Yacht sought to argue that in the present case, the requirements of art. 23(1) were satisfied in one or

other of two ways. First, he argued that on January 3rd, 2002, Mr. O'Connell agreed to the terms of the sponsorship agreement, including the jurisdiction clause, which Mr. Kay had forwarded to him on December 16th. So there was an agreement in writing on jurisdiction. Alternatively, during the discussions between the parties, there had been an oral agreement on jurisdiction which was evidenced in writing in the draft sponsorship agreement which Mr. Kay forwarded to Mr. O'Connell on December 16th and to which Mr. O'Connell did not object when he replied on January 3rd. Whichever approach falls to be considered, it is necessary to identify the standard which is to be applied in deciding whether it is made out on the available factual material. The main thrust of the submissions on behalf of the Bols companies was that the courts in Gibraltar had applied the wrong standard.

25 In *Shevill* v. *Presse Alliance S.A.* (7), the Court of Justice had to consider an issue of jurisdiction in relation to defamation under art. 5(3) of the Brussels Convention. The court observed ([1995] E.C.R. I–415, at paras. 37–39):

> "37 In the area of non-contractual liability, the context in which the questions referred have arisen, the sole object of the Convention is to determine which court or courts have jurisdiction to hear the dispute by reference to the place or places where an event considered harmful occurred.
>
> 38 It does not, however, specify the circumstances in which the event giving rise to the harm may be considered to be harmful to the victim, or the evidence which the plaintiff must adduce before the court seised to enable it to rule on the merits of the case.
>
> 39 Those questions must therefore be settled solely by the national court seised, applying the substantive law determined by its national conflict of laws rules, provided that the effectiveness of the Convention is not thereby impaired."

It follows that, in deciding whether, on the material placed before the courts of Gibraltar, the plaintiffs have established jurisdiction under the Regulation, the law to be applied is the law of Gibraltar, provided that the effectiveness of the Regulation is not thereby impaired.

26 The courts below asked themselves whether the claimants had established that there is "a good arguable case" that the Gibraltar court has jurisdiction. In the Court of Appeal, Stuart-Smith, J.A. (with whom the other members of the court agreed) applied that test under reference to the exhaustive judgment of Waller, L.J. in *Canada Trust Co.* v. *Stolzenberg (No. 2)* (2). In that case, the jurisdiction of the High Court depended on whether one of the defendants had been domiciled in England, for the purposes of the Lugano Convention, at the time when the

writ had been served on certain other defendants. That in turn raised the question of the standard which the court should apply in determining that issue. In the course of his analysis, Waller, L.J. explored the development of the law and examined a line of cases, including the speech of Lord Goff of Chieveley in *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhouri Islami Iran* (6). Waller, L.J., with whom the other members of the court agreed, concluded that the plaintiff needed to show that he had a "good arguable case." He continued ([1998] 1 W.L.R. at 555):

> "It is I believe important to recognise, as the language of their Lordships in *Korner's* case [1951] A.C. 869 demonstrated, that what the court is endeavouring to do is to find a concept not capable of very precise definition which reflects that the plaintiff must properly satisfy the court that it is right for the court to take jurisdiction. That may involve in some cases considering matters which go both to jurisdiction and to the very matter to be argued at the trial, e.g. the existence of a contract, but in other cases a matter which goes purely to jurisdiction, e.g. the domicile of the defendant. The concept also reflects that the question before the court is one which should be decided on affidavits from both sides and without full discovery and/or cross-examination, and in relation to which therefore to apply the language of the civil burden of proof applicable to issues after full trial is inapposite. Although there is power under Ord. 12, r. 8(5) to order a preliminary issue on jurisdiction, as Staughton L.J. pointed out in the *Attock Cement Co.* case [1989] 1 W.L.R. 1147, 1156D, it is seldom that the power is used because trials on jurisdiction issues are to be strongly discouraged. It is also important to remember that the phrase which reflects the concept 'good arguable case' as the other phrases in *Korner's* case 'a strong argument' and 'a case for strong argument' were originally employed in relation to points which related to jurisdiction but which might also be argued about at the trial. The court in such cases must be concerned not even to appear to express some concluded view as to the merits, e.g. as to whether the contract existed or not. It is also right to remember that the 'good arguable case' test, although obviously applicable to the ex parte stage, becomes of most significance at the inter partes stage where two arguments are being weighed in the interlocutory context which, as I have stressed, must not become a 'trial'. 'Good arguable case' reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."

27 The decision of the Court of Appeal in the *Canada Trust* (2) case was appealed by the defendants to the House of Lords. Counsel for the defendants dealt with the appropriate standard of proof in their written case but not in oral argument. So counsel for the plaintiffs was not called upon to address it. In these circumstances, only Lord Steyn referred to the matter. He gave his view briefly ([2002] 1 A.C. at 13):

> "In a purely internal English case the test of a good arguable case had been laid down by the House of Lords as applicable also in respect of domicile as a ground of jurisdiction: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 A.C. 438. The question is whether in the context of article 6 the more stringent test of a balance of probabilities should apply. The adoption of such a test would sometimes require the trial of an issue or at least cross-examination of deponents to affidavits. It would involve great expense and delay. While it is true that the jurisdictional issues under the Conventions are very important, they ought generally to be decided with due despatch without hearing oral evidence. In my view Waller, L.J.'s judgment [1998] 1 W.L.R. 502, 553–559 correctly explained on sound principled and pragmatic grounds why the defendants' argument is misconceived."

28 Their Lordships would respectfully join Lord Steyn in endorsing the approach in the judgment of Waller, L.J. Despite the submissions of counsel for the defendants to the contrary, it appears to the Board that, if the standard of "a good arguable case" is properly understood and applied, there is no risk that the effectiveness of the Regulation will be impaired. The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice, what amounts to a "good arguable case" depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the Court of Justice emphasizes, in order to establish that the usual rule in art. 2(1) is ousted by art. 23(1), the claimants must demonstrate "clearly and precisely" that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. So, applying the "good arguable case" standard, the claimants must show that they have a much better argument than the defendants that, on the material available at present, the requirements of form in art. 23(1) are met and that it can be established, clearly and precisely, that the clause conferring jurisdiction on the court was the subject of consensus between the parties.

29 With that approach in mind, their Lordships turn to examine the two bases upon which Superior Yacht claims that the Supreme Court of Gibraltar has jurisdiction.

30 The first contention for Superior Yacht is that cl. 15 is simply one clause in a concluded contract between the parties in terms of the sponsorship agreement. That contract had been negotiated between the parties and, though not signed, it became binding, it is said, as a result of the exchange of emails on December 16th, 2001 and January 3rd, 2002, on the basis of which Superior Yacht proceeded to contract for the yacht to be constructed. The Bols companies argue, on the other hand, that there never was any concluded contract between the parties which included the jurisdiction clause. Their Lordships have concluded that on this matter the contention of Superior Yacht must be rejected.

31 In order to succeed, Superior Yacht would have to show that there is a good arguable case that, by the exchange of emails, the parties concluded a contract in terms of the draft sponsorship agreement which Mr. Kay forwarded on December 17th. If it could show that, then the inclusion of cl. 15, containing detailed provisions on jurisdiction, in a non-standard contract, would indeed demonstrate "clearly and precisely" that the parties had agreed on jurisdiction in Gibraltar. The obstacle to that conclusion is that the available material does not show that the parties had concluded an agreement for the construction and operation of the yacht in terms of the sponsorship agreement attached to Mr. Kay's email.

32 Their Lordships accept that there is a good arguable case that the parties concluded an agreement covering some significant matters relating to the construction of the yacht. For instance, it is clear that agreement was eventually reached on the schedule of payments—but only after some further revisions at the beginning of January 2002. Invoices were submitted and paid in terms of that agreement. Nevertheless, it is equally clear that the sponsorship agreement which Mr. Kay forwarded on December 16th did not set out the terms of any overall contract to which the parties were committing themselves. Indeed, Mr. Kay himself makes that clear in the document attached to his email when he deals with the ownership and registry of the yacht. Their Lordships have quoted the relevant passage in para. 14 above. It shows that, presumably in light of what had been discussed at the meeting in Warsaw, Mr. Kay was proceeding on the basis that it was likely that, once built, the yacht would be owned by Bols rather than Superior Yacht and that Bols would, accordingly, have to decide where it was to be registered. As Mr. Laux's email to Mr. O'Connell on December 17th shows, however, the Bols companies had still not finally decided who should own the yacht. Two significant and related consequences follow.

33 First, as Mr. Kay indicated, the contract which he was forwarding had been drawn up on the basis that Superior Yacht would own the yacht. Even though there might not be a ready market for such yachts, plainly if

someone else was now going to own the yacht and therefore have the benefit of any residual value, Superior Yacht expected that their performance bonus would be adjusted to compensate for its loss of the sale value of the yacht. Mr. Kay envisaged that several options would need to be discussed and resolved and he looked forward to Mr. O'Connell's input. This indicates that the parties had not actually decided on what the financial arrangements between the parties were going to be if, as seemed likely, someone other than Superior Yacht became the owner of the yacht. So the document which Mr. Kay was forwarding did not contain any agreement of the parties on that important matter. Equally clearly, the contract could never have been finalized until the Bols companies had decided who was actually going to own the yacht.

34 Significantly also, the sponsorship agreement had been drawn up on the basis that, since Superior Yacht was going to own the yacht, the Bols companies would have only certain specific rights in relation to the yacht. Those rights were set out in Schedule 2. Obviously, if the Bols companies were now going to own the yacht, they would enjoy all the rights of owners. The schedule of rights in the sponsorship agreement became inappropriate. Conversely, the original draft proceeded on the assumption that Superior Yacht would have all the rights of owners: to meet the new situation, the contract terms would have had to be revised so as to set out the rights which Superior Yacht would have in relation to the yacht.

35 In short, at the time when the exchange of emails took place, many fundamental matters remained to be resolved. That being so, the draft which Mr. Kay forwarded to Mr. O'Connell cannot be regarded as a binding contract between the parties regulating the position on all the various aspects of the construction and operation of the yacht. Many of the terms were likely to be inappropriate, as both sides recognized. It follows that Superior Yacht cannot point to that document as showing that the parties had reached an agreement on jurisdiction in the terms set out in cl. 15. Superior Yacht has therefore not shown that it has a much better argument than the Bols companies, on the available material, that the Supreme Court of Gibraltar has jurisdiction on the basis that there was a concluded agreement between the parties as to the jurisdiction of the Gibraltar courts.

36 On his alternative approach, counsel for Superior Yacht pointed to the long series of negotiations between the parties on the basis of the draft sponsorship agreement which Mr. Kay had put forward and which always contained the jurisdiction clause. In his witness statement, Mr. Laux accepts that in discussion he was referred to the sponsorship agreement on a number of occasions. So far as the jurisdiction clause itself is concerned, he says that, to the best of his knowledge, neither he nor any other person directly involved with the projects ever objected to the

Gibraltar jurisdiction and he gives various reasons why Gibraltar, a quiet English-speaking jurisdiction far from Poland, might have been acceptable to them. It seemed natural, he says, for the aspects of operating an ocean-going vessel, since Gibraltar certainly had more "practice around" such projects (*i.e.* experience in such projects) than other jurisdictions such as Poland. So Superior Yacht asserts that, in the course of the discussions, the parties agreed orally that the Gibraltar court should have jurisdiction.

37 Next, Superior Yacht says that the parties' oral agreement on jurisdiction was "evidenced in writing" in the document, dated December 17th, 2001, which Mr. Kay emailed to Mr. O'Connell. Having been sent that document, including cl. 15, which evidenced the agreement on jurisdiction, Mr. O'Connell did not object to it. On the contrary, the draft letter which Mr. O'Connell emailed to Mr. Kay on January 3rd indicated that the Bols companies were committed to proceeding with the project as they had discussed in Warsaw "and to the project schedule" forwarded on December 17th. In these circumstances, it would be a breach of good faith for Bols to contest the application of the parties' oral agreement on jurisdiction. In this connection, Mr. Dingemans, Q.C. for Superior Yacht cited the decision of the Court of Justice in *Berghoefer GmbH* v. *ASA S.A.* (1) ([1985] E.C.R. 2699, at paras. 14–15):

> "14 It must be pointed out that . . . Article 17 of the Convention does not expressly require that the written confirmation of an oral argument should be given by the party who is to be affected by the agreement. Moreover, as the various observations submitted to the Court have rightly emphasized, it is sometimes difficult to determine the party for whose benefit a jurisdiction agreement has been concluded before proceedings have actually been instituted.
>
> 15 If it is actually established that jurisdiction has been conferred by express oral agreement and if confirmation of that oral agreement by one of the parties has been received by the other and the latter has raised no objection to it within a reasonable time thereafter, the aforesaid literal interpretation of Article 17 will also, as the Court has already decided in another context . . . be in accordance with the purpose of that article, which is to ensure that the parties have actually consented to the clause. It would therefore be a breach of good faith for a party who did not raise any objection subsequently to contest the application of the oral agreement."

38 Their Lordships are unable to accept this argument. First, while it is clear that all the various drafts of an agreement discussed by the parties contained the Gibraltar jurisdiction clause, there is nothing in the material before the Board to show that the jurisdiction clause itself was actually ever discussed and agreed in meetings, emails or telephone calls. While

Mr. Laux's statement gives good reasons for thinking that a Gibraltar jurisdiction clause might have been acceptable in any finalised agreement, it does not suggest that the point was ever actually discussed and agreed. Rather, he gives the impression that the parties had never got round to it. This would not be surprising: a jurisdiction clause is unlikely to have been high up on the list of topics when there were all kinds of more immediately pressing issues to be settled, such as the ownership of the yacht and any consequential adjustments to the financial arrangements and the timing of payments. In that situation, there is nothing to show clearly and precisely that cl. 15 in the sponsorship agreement sent to Mr. O'Connell on December 16th was a written confirmation of a prior oral agreement on jurisdiction, rather than just a term in a contract to be agreed. That being so, the fact that Mr. O'Connell did not object to cl. 15 when he replied does not bring the case within the *ratio* of the judgment of the Court of Justice in the *Berghoefer* case (1). In that situation, Superior Yacht have not shown that they have a much better argument than the Bols companies, on the available material, that the court has jurisdiction on this basis.

39 For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the action should be dismissed. Parties should make submissions in writing on costs within 14 days.

Appeal allowed.
