SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

B/L jurisdiction clause

The Hong Kong High Court issued a Judgment on 3/8/2011 holding that a Korean shipping company could not rely on its Bill of Lading's Korean jurisdiction clause to stay a Hong Kong legal action. [HCCL 13/2010]

In March 2009 a shipper contracted with a freight forwarder for the carriage of frozen meat from Hong Kong to Vietnam. The forwarder (acting through Champion Service as agent) in turn engaged the shipping company to carry the goods. The goods were stuffed into 10 containers. The forwarder issued a House Bill of Lading (HBL) to the shipper in respect of the goods. The shipping company (acting through its Hong Kong office) in turn issued a Master Bill of Lading (MBL) to the forwarder. The HBL and MBL were issued in Hong Kong. En route to Vietnam the vessel carrying the goods (the "BOHAI STAR") was involved in a collision with another vessel (the "PACIFIC GRACE"). As a result, 2 containers fell overboard. Those containers and their cargo were thereafter delivered in Vietnam in severely damaged condition.

The shipper commenced an action (HCCL No.4 of 2010) against the forwarder on 17/3/2010 claiming for loss of the frozen meat stuffed in the 2 damaged containers. That action is ongoing here in Hong Kong. The shipper's claim is worth about US$220,000.

The forwarder brought legal proceedings for an indemnity from the shipping company in the event that the shipper is successful in its action. The forwarder obtained leave from Stone J to serve the Writ on the shipping company in Korea. The shipping company applied to set aside the leave granted by Stone J or (alternatively) to stay these proceedings to Korea on the following grounds:-

(1) There was material non-disclosure. The shipping company said that the forwarder's affirmation evidence in support of service outside the jurisdiction failed to point out that the MBL expressly provided for Korean law to apply and for the Korean court to have exclusive jurisdiction over any disputes.
(2) The forwarder should be bound by the exclusive jurisdiction clause.
(3) Korea was the more appropriate forum for the trial of this action.

Was there material non-disclosure?

The MBL provided as follows:-

"2. CLAUSE PARAMOUNT. As far as this Bill of Lading covers the carriage of the Goods by water, this Bill of Lading shall have effect subject to the provisions of the Commercial Code of the Republic of Korea, unless it is adjudged that any other legislation of a nature similar to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on August 25, 1924 except Article 9 gold value clause compulsorily applies to this Bill of Lading, in which case it shall have effect subject to the provisions of such legislation, and the said Act or legislation (hereinafter called the Hague Rules of Legislation) shall be deemed to be incorporated herein. If any provision of this Bill of Lading is held to be repugnant to any extent to the Hague Rules Legislation or any other laws, statutes or regulation applicable to the contract evidenced by this Bill of Lading, such provision shall be null and void to such extent but no further.

3. GOVERNING LAW AND JURISDICTION. The contract evidenced by or contained in this Bill of Lading shall be governed by the law of the Republic of Korea as may be otherwise provided for herein, and any action against the Carrier thereunder shall be brought before the Seoul District Court in the Republic of Korea."

Under MBL cls. 2 and 3, it was far from evident that Korean law governed every action brought in respect of the MBL. Thus, for example, given the collision, the goods were obviously damaged while still at sea. The shipment then being from Hong Kong to Vietnam, by Carriage of Goods by Sea Ordinance (Cap.462) (COGSO) ss.3(1) and (2), the Hong Kong Court must apply the Hague-Visby Rules to the carriage. Consequently, by MBL cl.2, insofar as the Hague-Visby Rules governed the rights and obligations of the forwarder and the shipping company, the Korean Commercial Code would not govern the carriage. Further, MBL cl.3 might appear to make Korean law applicable to all disputes arising out of the MBL. But that would be to ignore the words "as may be otherwise provided for herein". The precise intent behind those words was ambiguous. They could conceivably mean that Korean law was to apply to the MBL only where some other body of law was not made applicable by the MBL. MBL cl.2 would then be a situation where there was provision for some other law (such as COGSO) to apply.

A normal canon of construction is that where a clause is ambiguous it should be construed *contra proferentem*, that is, against the party which drafted the clause or which seeks to rely on the provision. Given the ambiguity in MBL cl.3 just identified, the latter provision should be construed against the shipping company. The MBL constituted the shipping company's standard terms and the shipping company was seeking to rely on a clause which it drafted itself. It should not be permitted to take advantage of any ambiguity in the clause.

Similarly, the second half of MBL cl.3 might seem to give the Korean court exclusive jurisdiction over disputes arising out of the MBL. But that would be to ignore the words "any action against the Carrier thereunder". The word "thereunder" was telling. It was unlikely to mean "under the MBL". That was because the MBL was referred to in the immediately preceding words using the expression "herein". As a matter of English usage, it would be odd initially to describe a document as "here" and then later in the same sentence as "there". More likely, "thereunder" must mean "under the law of Korea". If so, given MBL cl.2, the action in question would not be an action covered by the jurisdiction stipulation in cl.2. The present action was a claim brought pursuant to the Hague-Visby Rules as made compulsorily applicable by COGSO, a piece of Hong Kong legislation. The claim was not an action against the shipping company "under the law of Korea". On this reading, the Korean Court would not have an exclusive (as opposed to merely concurrent) jurisdiction where the claim related to damage suffered in the course of carriage by sea from Hong Kong to Vietnam. At the very least, the use of "thereunder" introduced an added ambiguity to MBL cl.3. That should lead to the jurisdiction provision in cl.3 being construed in favour of the forwarder and against the shipping company.

The evidence was that the forwarder (as opposed to Champion Service) was unaware of the terms on the reverse of the MBL at the time when the same was issued. The forwarder had previously done business with the shipping company through Champion Service. But the forwarder never focused its mind on ascertaining the precise terms of the carriage (including the Clause Paramount and Governing Law clauses just examined) on the reverse of relevant bills of lading issued by the shipping company. Champion Service had notice of the relevant terms (as Champion Service placed its chop on the reverse of the relevant bills of lading). Thus, it might be said that Champion Service had actual notice of the terms on the reverse of the MBL. It might also be said that, as Champion Service's principal, the actual knowledge which Champion Service had as agent was attributable to the forwarder. The Judge appreciated that in reality it was doubtful that Champion Service subjectively focused its mind on the precise terms on the reverse of a relevant bill. In all probability, Champion Service may have merely placed its chop on the reverse of a relevant bill as a matter of course without too much thought to the precise terms contained there. But that did not negate the conclusion that, as a matter of objective fact, the forwarder should be deemed to have had the notice which its agent had.

The forwarder in fact requested a copy of the reverse of the MBL from the shipping company's solicitors before the forwarder applied to Stone J for service outside the jurisdiction. In response, the shipping company's solicitors provided a copy of the reverse side of a sample the shipping company bill of lading. The forwarder exhibited that sample copy to its affirmation in support of the application for service out. Unfortunately, that sample copy exhibited was so blurred and the typeface so small as to be illegible. No one could discern the terms of clauses 2 and 3 from the copy exhibited, much less realise that they contained terms going to governing law and jurisdiction. For whatever reason, the forwarder did not exhibit the large typeface version which the shipping company's solicitors had also helpfully provided to the forwarder's solicitors. Inexplicably, despite the large typeface version which it had obtained from the shipping company's solicitors, the forwarder appeared to have assumed that there was no jurisdiction or governing law clause of any kind on the reverse of the MBL. The forwarder instead suggested in its affirmation in support that the proper law of the carriage was Hong Kong law by implication.

It seemed to the Judge that there had been material non-disclosure on the forwarder's part. At the very least, as a matter of courtesy to the Court, even ignoring the attribution of Champion Service's knowledge as agent to the forwarder as principal, the forwarder's solicitors ought to have exhibited a legible copy of the reverse side of the sample bill of lading. Had that been done, Stone J would have had the benefit of considering the impact of clauses 2 and 3 of the sample bill of lading. The terms of those clauses would have been material to Stone J's decision whether or not to grant leave. This would be so even if ultimately Stone J might have reached a similar conclusion on the effect of the clauses as the conclusion reached by the Judge. The Judge thought that it would be a waste of time to set aside the leave granted by Stone J. That was because the Judge did not believe that the Korean Commercial Code (as opposed to the Hague-Visby Rules made applicable by COGSO) governed the specific claim. Further, the Judge did not think that the Korean Court had exclusive jurisdiction. That meant there would be little point in setting aside the leave.

Under the Hague-Visby Rules as applied in Hong Kong, if Stone J's leave were set aside for material non-disclosure, the forwarder could re-apply for leave. The forwarder would still be within the time limit stipulated in Hague-Visby Rules Article III Rule 6 *bis* for the bringing of an indemnity action before the Hong Kong Court. The ambiguities identified in MBL cls. 2 and 3 would still be there. In all likelihood the forwarder would again obtain leave, despite the Court's attention being drawn to MBS cls. 2 and 3 as ought originally to have been done. Accordingly, there would be no point in wasting everyone's time (including that of the Court) by making the forwarder go through the process of re-applying for leave as a mere formality. It would be more appropriate in the Judge's view to impose some sort of sanction in relation to the incidence of the costs of the application for leave to serve out.

Should there be a stay on account of an exclusive jurisdiction clause?

It followed from the analysis that MBL cl. 3 would not operate as an exclusive jurisdiction clause. There was no cogent basis for granting a stay to the Korean Court as a contractually agreed forum of exclusive jurisdiction.

Even if MBL cl.3 amounted to an exclusive jurisdiction clause, the clause would not be conclusive on the question of a stay. The Court retains a discretion to refuse a stay where there are compelling reasons for a case to be heard in Hong Kong. See *The "EL AMRIA"* [1981] 2 Lloyds Rep 119.

If MBL cl.3 were an exclusive jurisdiction clause, the Judge would nonetheless refuse a stay on the ground that, in any event, the exact same circumstances underlying the loss of the cargo would have to be investigated by the Hong Kong Court at the trial of the shipper's claim against the forwarder. It makes sense from the viewpoint of saving time and money for there to be a single investigation of the relevant circumstances in one (as opposed to two) jurisdictions. The Judge was particularly concerned that, if there were to be 2 trials in relation to the damaged cargo, one in Hong Kong between the shipper and the forwarder and another in Korea between the forwarder and the shipping company, there would be a real risk of the 2 legal forums arriving at inconsistent decisions. That would be inimical to the interests of justice. The existence of the shipper's Hong Kong proceedings (which the forwarder had said that it would be applying to consolidate with the indemnity proceedings) must be a compelling factor against the strict enforcement of any exclusive jurisdiction stipulation in MBL cl.3.

The shipping company had suggested that the shipper might itself bring proceedings against the shipping company in Korea. Accordingly, the Judge should (the shipping company said) disregard the shipper's Hong Kong proceedings as a cogent factor militating against a stay. But the Judge was unable to accept that argument. Of course the shipper could always bring proceedings in Korea. Although the shipper had intimated that it might do so, it had so far not done so. It would therefore be pure speculation for the Judge to assume that, if the Judge granted a stay, the shipper would inevitably bring proceedings in Korea and all issues relating to the loss of cargo could be litigated in a single jurisdiction.

Should there be a stay on the ground of forum non conveniens?

First, the Judge did not accept the shipping company's submission that the forwarder had no good arguable case and so no leave at all should have been granted in the first place. As bailee, it was incumbent upon the shipping company to explain why goods bailed to it were not delivered to the consignee in the same order and condition as when received. In the absence of proper explanation, a bailor in the position of the forwarder would invariably succeed. The shipping company had indicated that it would be relying on the error of navigation exception in the Hague-Visby Rules. But the shipping company had not condescended into particulars as to how the collision occurred and precisely what error of navigation was involved. The Judge was therefore unable to determine whether or not the shipping company had a complete defence to the forwarder's indemnity claim.

Second, as between Korea and Hong Kong as the proper and appropriate forum for litigation of this dispute, the factors in favour of Hong Kong as the venue for the trial of this action were overwhelming.

The Judge spelt out some key factors:

(1) The forwarder was a Hong Kong company.
(2) The MBL was issued in Hong Kong by the shipping company's Hong Kong agent.
(3) The shipment originated from Hong Kong. By COGSO, the Hague-Visby Rules as promulgated in Hong Kong were compulsorily applicable. It was unclear in light of MBL cl.2 what (if any) significant role the Korean Commercial Code would play in the Hong Kong Court's deliberations.
(4) The crew on board the vessel might have been partly Korean, but the evidence was that they regularly visited Hong Kong on the shipping company's vessels. To the extent that crew members were required to give evidence on the circumstances of the collision, they were likely to be readily available as witnesses in Hong Kong.
(5) Most critically, there was the fact of the shipper's legal proceedings. The Judge noted that the shipper's claim was for a relatively modest amount (about US$220,000). Accordingly, the Judge did not think that it would be just for the Hong Kong Court by the grant of a stay to compel the forwarder to expend significant amounts of time and money to litigate this matter in 2 jurisdictions.

The Judge concluded that, however one regarded this matter, in the interests of all concerned and in furtherance of the ends of justice, especially insofar as time and expense were concerned, it would be more suitable for the forwarder's indemnity action to be tried in Hong Kong.

Conclusion

The shipping company's application to set aside and for a stay was dismissed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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The robust freight industry in 2009 did not sustain well to the last quarter of 2010 as worldwide governments were not in unison in their fiscal policies. The worldwide government interference in 2011, such as the U.S. QEII, is likely to impact the worldwide movement of freight even more.

As uncertain as it was the economy in 2010, we believe the number of E&O, uncollected cargo and completion of carriage claims will continue the major concerns for transport operators in 2011. If you need a cost effective professional solution to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.