SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Which law to apply ?

The Hong Kong High Court on 18/11/2011 issued a Judgment concerning a quite confusing situation that three different laws (the USA, the PRC, and Hong Kong) might apply to the one shipment. [HCAJ 198/2009]

This was a trial of preliminary issues.

There was no dispute that, as between the shippers and the carrier, the relevant carriage from Shanghai to various US ports was governed by 3 Sea Waybills issued by the carrier. Those Waybills incorporated the terms of the carrier's Combined Transport Bill of Lading (the Terms). The Terms provided in cl.7(1) that, "[e]xcept as provided for in Clause 7(2)," the Waybills were to be "subject to the provisions" of the PRC Maritime Code. Terms cl.7(2) stipulated that, if the relevant carriage involved a US port, the Waybills "shall be subject to" US Carriage of Goods by Sea Act (US COGSA). The Terms further provided in cl.26(1) that the Waybills were "governed by the laws of the [PRC]" and "[a]ll disputes arising under or in connection with [the Waybills] shall be determined by the laws of the [PRC]". But Terms cl.26(2) added that, "[n]otwithstanding the provision of Clause 26(1)," where carriage involves a US port, the Waybills shall be "subject to the Provisions of the US COGSA".

The parties disagreed over the applicable limit of liability. If US COGSA applied, the limit would be lower than the limit stipulated in Chapter IV of the PRC Maritime Code. But, according to the PRC Maritime Code, any stipulation in a contract of carriage which derogates from the provisions of Chapter IV shall be rendered null and void.

The shippers contended that the PRC Maritime Code neutralised Terms cls. 7(2) and 26(2) to the extent that they provided for a limit lower than that stipulated in Chapter IV of the Code.

The carrier argued that, PRC law and the PRC Maritime Code were irrelevant to the Waybills. US ports being involved, the parties clearly intended by Terms cls. 7(2) and 26(2) that US COGSA alone should govern the carriages. The carrier also contended that, in any case, by a Letter of Undertaking (LOU) agreed between the parties on 19/1/2010 when the carrier's insurers put up security to prevent the carrier's vessel from being arrested in this action, the shippers agreed that the claims "shall be subject to Hong Kong law and to the exclusive jurisdiction of the [Hong Kong High Court]". The LOU additionally stated that it was made "without prejudice to any right of defence available to [the carrier] including but limited to ... the right to limit liability in accordance with applicable law". It was the carrier's case that Hong Kong law (not PRC law) governed the Waybills and Hong Kong law in enforcing Terms cls. 7(2) and 26(2) would apply the US COGSA limit.

Finally, the carrier contended that, even if PRC law and the PRC Maritime Code were applicable, cls.26(2) and 7(2) evidenced the parties' intention that US COGSA should apply to the shipment. PRC law would (the carrier said) respect the parties' choice of law. Consequently, PRC law (the carrier asserted) would not refuse to give effect to the parties' choice of law by reason only that the limit of liability under US COGSA was lower than that prescribed by the PRC Maritime Code.

In brief, the issues which the Judge had to decide were as follows:-

(1) Did Hong Kong law govern the carriages under the Waybills and (if so) with what result?
(2) Did the limit in the PRC Maritime Code or that in US COGSA apply to the carriages under the Waybills?

Question (1): Hong Kong law to govern the carriages?

The Judge was unable to read the LOU as an agreement that, irrespective of the terms of the Waybills, Hong Kong law was to govern the carriages. The plain meaning of the LOU was that the shippers and the carrier (acting by its insurers) agreed to the exclusive jurisdiction of the Hong Kong High Court and to the resolution of the dispute in that forum in accordance with Hong Kong procedural law. An indicator of this was the stipulation that the LOU was agreed without prejudice to any right of defence the carrier might have to limit liability "in accordance with applicable law" (whatever that might be). That the parties left open what the "applicable law" was points, in the Judge's view, to the LOU amounting to no more than an agreement to submit to Hong Kong forum and civil procedure.

But, assume to the contrary that in agreeing the claims were to be "subject to Hong Kong law," the parties were agreeing that Hong Kong substantive (as opposed to procedural) law was to be applicable. That state of affairs would not actually assist the carrier. The body of Hong Kong substantive law included Hong Kong's conflict of law principles. Thus, even on the carrier's reading of the LOU, a judge trying the parties' dispute would still have to decide what effect to give to Terms cls.7(1) and (2) and 26(1) and (2) as matter of Hong Kong private international law. It would still be open to the judge to hold (say) that, in light of Hong Kong's conflicts rules, PRC law would apply because of the express choice of that body of law in cls. 7(1) and 26(1). The judge could then go on to hold that, as a matter of Hong Kong private international law and Hong Kong principles of construing a contract, the choice of PRC law trumped the incorporation of US COGSA within Terms cls. 7(2) and 26(2). In other words, nothing was gained by the carrier's argument that the LOU amounted to a choice of Hong Kong substantive (not just procedural) law.

Consequently, the Judge would answer the first question: Hong Kong procedural law alone governed the carriages.

Question (2): Which limit to apply?

In determining the applicable law, one needed to construe, and give effect to, the terms of the Waybills. There was no suggestion on the part of any party that the principles applicable to construing a contract were different in any relevant jurisdiction, whether Hong Kong, the PRC or the US.

Terms cl. 7(1) expressly provided that "[e]xcept as provided for in Clause 7(2)," the Waybills "shall be subject to the provisions of the Maritime Code". In its natural and ordinary meaning, that must mean that where cl.7(2) was applicable and the Waybills were (in the words of cl.7(2)) "subject to the provisions of [US COGSA]" as a result, then the PRC Maritime Code was not to apply. Terms cls.26(1) and (2) led to a similar result. It was true that Terms cl.26(1) stated that the Waybills were "governed by the laws of the [PRC]". But Terms cl.26(2) immediately qualified this by stipulating that "[n]otwithstanding the provision of Clause 26(1)," where a US port was involved the Waybills "shall be subject to the Provisions of the US COGSA".

For good measure, Terms cl.26(2) added that US COGSA:-

> "shall be deemed to have been incorporated herein and nothing herein contained shall be deemed a surrender by [the carrier] of any of its rights, immunities, exceptions or limitations or an increase of any of its liabilities under US COGSA".

It followed on the clear wording of the Waybills that, US ports being involved, US COGSA applied to the exclusion of PRC law or the PRC Maritime Code. The answer to the second question then must be that the US COGSA limit applied.

The outcome of this case might well be different where PRC law was compulsorily applicable to the carriages and the PRC Maritime Code applied as an overriding statute, regardless of the parties express intentions in the contract. Here there was no such suggestion.

The shippers confined their case to the argument that PRC law applied as a matter of the parties' express choice of law in Terms cls. 7(1) and 26(1). But the Judge's difficulty was that, given a principle of freedom of contract, if PRC law applied purely as a matter of the parties' contractual choice, then the parties must also be free to agree between themselves that PRC law was not to apply in specified situations.

The shippers suggested that the Judge ignore the wording of Terms cl.7 as it only dealt with limitation. The Judge was unable to do so since the Judge had to construe the Waybill terms as a whole. Terms cls.7(1) and (2) made clear what the parties intended by Terms cls. 26(1) and (2) dealing with "Law and Jurisdiction".

The shippers suggested that the word "notwithstanding" in Terms cl.26(2) should be understood in a "weak" sense of "although PRC law applies generally by Terms cl.26(1), US COGSA should be treated as applying in addition to that law". But the Judge was unable to accept that "weak" reading of "notwithstanding" in light of Terms cls.7(1) and (2) which expressly stipulated that the PRC Maritime Code should not apply where a US port was involved and US COGSA was applicable. Nor was the shippers submission compatible with the words which the Judge observed above were added at the end of Terms cl.26(2).

The shippers noted that US COGSA was only a piece of legislation and not a complete body of law, such as PRC law. If US COGSA applied, then (the shippers asked) what happened if a question was not covered by any provision of US COGSA? What law would apply then? The shippers submitted that the answer would be PRC law. According to the shippers, this was because US COGSA should be treated for the purposes of determining rights and liabilities under the Waybills as a super-added contractual term incorporated into the Waybills, to be construed in accordance with the body of PRC law which governed the entirety of the parties' agreement.

The Judge was unable to accept that argument, which seemed contrary to Terms cl.7(2) and the words at the end of cl.26(2) already identified above. Assume, in any event, that there was some question of carriage that US COGSA did not deal and such question arose for determination under the Waybills in connection with a carriage involving a US port. The matter might or might not be governed by PRC law. That would depend on the proper construction of the Waybills in the context of the specific question needing to be resolved. That the question might be governed by PRC law as the shippers asserted, would not by itself logically mean that a matter plainly covered by US COGSA should also be subject to PRC law generally and the PRC Maritime Code in particular.

The problem in this case was akin to that sometimes encountered when the Hague Rules were incorporated into a bill of lading, by agreement of the parties, as a clause paramount. In such situation, by suitable drafting of the bill of lading, the parties could agree to limit the scope of application of the Hague Rules. This meant that the parties could voluntarily agree among themselves that Hague Rules Art. III r.8 (striking down a provision in a bill of lading which imposes a lesser liability than that stipulated by the Hague Rules) would not apply in specific situations. The Hague-Visby Rules have gotten around this problem. That is because the Hague-Visby Rules are typically made compulsorily applicable by force of law, regardless of what the parties may or may not have agreed in a bill of lading.

CONCLUSION

The result was that US COGSA limits would apply despite Terms cls. 7(1) and 26(1).

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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