SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Vessel sharing agreement

The High Court of Hong Kong issued a Judgment on 2/12/2011 concerning a vessel sharing agreement. [HCAJ 138/2008]

In June 2008 Sinokor entered into a Vessel Sharing Agreement (VSA) with C& Line and TS Lines. By the VSA each party agreed to share its designated vessels and the capacity (slots) for the carriage of containers consigned to the other party. The VSA envisaged that the ships contributed by a party could include ships which were chartered or owned by the party. C& Line contributed the Marcatania to the VSA pool. C& Line had chartered the Marcatania from its shipowners under an NYPE (1946) Time Charter dated 1/6/2005. In August 2008 Sinokor entered in a Slot Exchange Agreement (SEA) with Heung-A Shipping Co Ltd. By the SEA Sinokor and Heung-A agreed to exchange slots on vessels between themselves. In September 2008 Sinokor shipped 433 containers on the Marcatania for carriage from Jakarta to Hong Kong, Shanghai and Busan. The 433 containers were so carried pursuant to the VSA. There were 2 batches of bills of lading. 292 bills of lading were signed by Sinokor as carrier. 141 bills of lading were signed by Heung-A as carrier. Sinokor, acting on behalf of Heung-A, caused the containers corresponding to the 141 bills to be loaded the Marcatania in accordance with the SEA. When the Marcatania reached Hong Kong on 28/9/2008, containers could not initially be discharged from the Vessel. That was because C& Line had failed to pay charterhire to the shipowners and the shipowners had consequently withdrawn the Marcatania from the Time Charter. C& Line was no longer able to operate the vessel. Sinokor demanded that the shipowners discharge the containers destined for Hong Kong. It also required the shipowners to carry the remaining containers to their intended destinations in the Mainland and South Korea. The shipowners initially refused, requiring payment of the outstanding hire due from C& Line before the containers would be released. But eventually the shipwners agreed to release all the containers in Hong Kong. All containers were discharged as at 18/10/2008.

Sinokor claimed against the shipowners for breach of terms of bailment and for conversion. As to bailment, Sinokor contended that the shipowners were obliged to on-carry the containers to Shanghai or Busan in accordance with terms of bailment evidenced by the VSA or the Sinokor bills of lading. Sinokor thus claimed its own costs of trans-shipping the remaining containers from Hong Kong to Shanghai or Busan. Heung-A arranged on its own for on-carriage from Hong Kong of the cargo consigned under its bills of ladings. As a result, Heung-A was entitled under the SEA to treat the voyage from Jakarta to Hong Kong as off-hire. Sinokor thereby lost US$8,860 in slot hire. Sinokor also claimed that amount as damages for breach of bailment. As to conversion, Sinokor claimed the hire which the 292 containers which were the subject of its bills of lading could have earned over the 20 days between the arrival of the Marcatania in Hong Kong 28/9/2008 and the release of the containers on 18/10/2008.

Bailment

There was a contractual relationship between Sinokor and C& Line (namely, the VSA), but there was no contractual relationship between Sinokor and the shipowners. No shipowners' bills of lading were issued in respect of the 433 containers. The Sinokor or Heung-A bills of lading evidenced Sinokor or Heung-A as carriers. None of those bills were signed by the master. In the premises, there could not have been a contract between the shipowners and Sinokor to carry the goods pursuant to the terms of the Sinokor or Heung-A bills.

Assume (without accepting) in Sinokor's favour that Sinokor's containers were bailed with the shipowners. Obviously, if there was no bailment relationship between Sinokor and the shipowners, Sinokor's claim for breach of terms of a bailment would fail from the outset. A bailee owes a duty to take such reasonable care of goods as the circumstances of a bailment warrant and to re-deliver the goods upon demand to a bailor having the right to immediate possession of the same. Sinokor's real difficulty was to show how as a matter of bailment the shipowners came under an additional duty to carry the goods from Hong Kong to Shanghai or Busan and to deliver them there. In the Judge's view, Sinokor failed to establish this additional duty.

First, Sinokor argued that the shipowners fell under the additional duty as bailees, because the master supervised the loading of the containers on the Marcatania. The master directed where the containers ought to be stowed, while

presumably knowing that the containers were destined for Hong Kong, Shanghai or Busan. The Judge was unable to accept the submission. The Judge did not see how merely directing where on board ship containers were to be placed the master could be regarded as accepting on behalf of the shipowners an obligation to carry given containers to particular destinations. All the master would be doing by supervising stowage was ensuring that containers were loaded in a safe and efficient manner, such that they could be discharged from the vessel in an equally safe and efficient manner.

Second, Sinokor suggested that the shipowners accepted the containers on board the Marcatania subject to the terms of the VSA. The Judge disagreed. The shipowners were not party to the VSA. The VSA allowed its parties to employ ships which were chartered or owned by them. But this fact could hardly support the conclusion that, where a party X to the VSA contributed a chartered vessel, owners of the vessel would be bound to carry out the terms of the VSA if X should become insolvent. It would be the parties to the VSA which took upon the risk of one of their members becoming insolvent. It would be odd if a complete stranger to the VSA (such as the shipowners) should be deemed to have taken the risk of C& Line becoming insolvent.

On Sinokor's argument, the shipowners would be liable to Sinokor simply because C& Line chartered their vessel and then became insolvent. On Sinokor's submission, the shipowners would be obliged to confer a benefit on Sinokor (by fulfilling C& Line's obligation under the VSA to on-carry goods from Hong Kong to Shanghai or Busan) without themselves being able to demand that Sinokor pay for the transit. Having lost charterhire through C& Line's default, the shipowners on this scenario would stand to lose even more, because of the obligations which C& Line undertook under the VSA. That could not be a right result. It violated the principle of privity of contract.

The shipowners pointed out that NYPE included a provision (see for instance cl.5) allowing a shipowner to withdraw a vessel from the charterer's service where hire is unpaid. The Time Charter included a rider cl.70 affirming the shipowners' right under cl.5 to withdraw the Marcatania in the event of non-payment by C& Line of charterhire. Further, it would be common knowledge in the shipping world that ships are not chartered for free and, if hire is not paid, shipowners are likely to withdraw chartered vessels from service. In those circumstances, the parties to the VSA must have envisaged that, insofar as a chartered vessel was or could be employed, there was a risk that the ship might be withdrawn as a result of non-payment of charter hire. In other words, parties to the VSA undertook the risk that a given vessel employed as part of the VSA might be withdrawn if a member to the pool became insolvent or failed to pay charterhire. The Judge thought that was right.

Far from the shipowners taking on board goods subject to the terms of the VSA, the more natural and commercial interpretation of events was that Sinokor loaded containers on the Marcatania subject to the risk of that ship being withdrawn by the shipowners. The terms of the Time Charter (especially, cls. 5 and 70) qualified the terms of carriage. It was not the VSA which qualified the terms of the Time Charter.

Third, Sinokor suggested that cls. 5 and 70 of the Time Charter were overridden by cls. 8 and 58 of the same. Cl.8 states that the Captain shall prosecute the voyage with utmost dispatch. Rider cl. 58 authorises charterers to sign bills of lading on master's or owners' behalf. The Judge was unable to see how Sinokor's suggestion could be the case. It is the captain's obligation to prosecute a voyage with dispatch, but that must be subject to the prompt and timely payment by charterers of hire. Cl.58 authorises charterers to sign bills of lading on owners' behalf. However, in fact, that did not happen in the case in question. In any event the charterer's authority to sign was expressly limited by the Time Charter. Any bills of lading signed must be "without prejudice to this Charterparty".

Fourth, Sinokor referred the Judge to *Elder Dempster & Co. Ltd. v. Paterson Zochonis & Co. Ltd.* [1924] AC 522 and *The "Pioneer Container"* [1994] 2 AC 324. The Judge did not see how either case assisted Sinokor. Both cases deal with bailment on terms. The question is to determine what terms govern a bailment. There was no good reason why the terms of the Sinokor or Heung-A bills of lading should govern the bailment to the shipowners. There was no evidence that the shipowners had sight of those bills or gave authority to Sinokor or Heung-A to issue such bills on behalf of the shipowners. Instead, the shipowners only authorised C& Line to accept cargo subject to the terms of the Time Charter. Sinokor was able to load goods on board the Marcatania in consequence of C& Line's charterparty with the shipowners. C& Line (as it was obliged to do under the VSA) permitted Sinokor to use C& Line's available slots on board the Marcatania. In the premises, the bailment of goods by Sinokor on board the Marcatania must equally have been subject to the terms of the Time Charter binding on C& Line. There was no obligation on the shipowners to carry containers free of further charge to Sinokor from Hong Kong to Shanghai or Busan. Sinokor's claim for breach of terms of bailment failed.

Conversion

The claim arose because the shipowners did not immediately deliver containers to Sinokor upon arrival of the Marcatania in Hong Kong. Unlawful keeping may constitute conversion. A demand by a bailor entitled to the immediate possession of goods followed by a refusal of delivery by a bailee may evidence an unlawful keeping.

However, in the event of doubt as to a bailor's entitlement to the delivery of goods, a bailee is entitled to a reasonable time to make relevant enquiries. See *Clerk & Lindsell on Torts* (20th ed.) at paras. 17-26 and 17-27.

Sinokor appeared to have demanded delivery of containers from the shipowners by a fax dated 6/10/2008. Even then, Sinokor was only demanding the immediate delivery in Hong Kong of the containers destined Hong Kong. It asked for on-carriage to Shanghai and Busan of the remaining containers. Further, at the time, there was a dispute between the parties as to whether the shipowners were entitled to exercise a lien over all of the containers on board pending payment of outstanding hire (about US$676,000) due from C& Line. Negotiations ensued between Sinokor and the shipowners. The shipowners were insisting on payment of outstanding charterhire as a condition of releasing any containers. Sinokor offered to pay no more than US$200,000, but was insistent that the Shanghai and Busan bound containers had to be on-carried by the Marcatania. The shipowners rejected the offer of US$200,000. In the event, the shipowners by a letter to the Chief Bailiff dated 16/10/2008 evinced an intention to berth the Marcatania so as to release all containers in Hong Kong. The shipowners then discharged all containers (both those under Sinokor bills and those under Heung-A bills) by about 1400 hours on 18/10/2008.

It seemed to the Judge that the shipowners and their lawyers were entitled to a reasonable amount of time to consider whether the shipowners were entitled to exercise a lien on some or all of the containers and whether the shipowners should exercise any lien which they might have. The Judge did not think that the answer to the question of a right of lien over the containers could be said to have been self-evident. The shipowners and their lawyers were also entitled to a reasonable time to consider the question whether there was an obligation to carry the Shanghai and Busan containers onwards as claimed by Sinokor. This was particularly the case since, even on 16 October Sinokor by letter from its solicitors was pressing the shipowners to carry the non-Hong Kong bound containers to subsequent ports. The Judge did not think that it was unreasonable for the shipowners to take 10 days (that is, from 6 to 16/10/2008) before finally deciding not to exercise any lien, but instead to release all containers in Hong Kong. Having decided to discharge the containers by 16 October, the shipowners took immediate steps to do so and all containers were discharged 2 days later. Accordingly, the Judge did not find that there had been an unlawful keeping.

Even if there had been conversion, then contrary to Sinokor's submission, the Judge did not think that the correct measure of damages was the cost of hiring the containers over 12 days (that is, from 6 to 18/10/2008). The normal measure of damages for conversion is the value of the converted goods at the date of conversion. But that could not be the measure in the case in question, since Sinokor obtained the containers from the shipowners. Sinokor had therefore not lost the value of the goods. To compensate Sinokor with the value of the containers as at some date before 18/10/2008 would give Sinokor a windfall. Subject to issues of remoteness, Sinokor might be entitled to consequential loss which it suffered as a result of an alleged conversion. Nonetheless, there was no evidence that, Sinokor had to hire alternative containers or Sinokor had to turn away persons who wished to hire the containers on board the Marcatania. Consequently, even if it were assumed that there was a conversion, the Judge disagreed that Sinokor would be entitled to the hire value of the containers on board. Sinokor had not shown that it had suffered loss as a result of the alleged conversion. Sinokor's claim in conversion failed.

CONCLUSION

Sinokor's claim was dismissed. There would be an Order Nisi that Sinokor pay the shipowners' costs of the action.

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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