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To: Transport Industry Operators

Switched B/L & Jurisdiction Clause

In its Judgment dated 23 October 2003, the Singapore Court of Appeal held that the legal proceedings against a shipowner should continue in Singapore despite an Indian jurisdiction clause in relation to a switched bill of lading (“B/L”) case.

The Plaintiff was an Indian bank carrying on business in Singapore through a local branch. A Singapore incorporated trading company arranged for cargoes to be shipped from various East Malaysian ports to Kandla in India. After the cargoes had been loaded on board its vessel, the shipowner issued its B/Ls (“original bills”) stating on the front page that it was governed by the law of Singapore and the consignee was to the order of the Indian bank.

Pursuant to the application of the trading company, letters of credit were issued by the bank to the sellers of the cargoes. The bank eventually became the holder of the original bills. However, around the same time, the trading company procured the issuance of a second set of B/Ls (“switched bills”) by promising to the shipowner that the original bills would be returned. In the switched bills, the trading company was named as the shipper. However, the original bills, which were held by the bank, were never returned to the shipowner. The trading company never paid the bank to obtain the original bills.

The switched bills were transferred by the trading company to buyers in India. The vessel arrived at its destination on 15 January 2001 and the cargoes were, between 15 and 25 January 2001, delivered to Indian receivers upon presentation of the switched bills. On 20 December 2001, the bank, as holder of the original bills, instituted the legal action in Singapore. The shipowner applied to have the action stayed on the ground that clause 17 of the B/L, which was an exclusive jurisdiction clause, required that any dispute between the parties had to be adjudicated upon at the port of delivery.

Clause 17 provided any claims that may arise hereunder must be made at the port of delivery for determination and settlement at that port only. According to the Court, a “claim” meant a demand for something as due or an assertion of a right to something. A claim could be manifested in various forms. It could take the form of a letter or an action. There was no reason why a claim in the form of an action or suit could not come within the meaning of clause 17. The Court held that the word “claims” in clause 17 should be construed to include “suits” and even “disputes”. A claim which was not met became a dispute which would require determination. Accordingly, the court held that clause 17 was an exclusive jurisdiction clause.

It is settled law that where a party seeks to bring an action in a Singapore court in breach of an exclusive jurisdiction clause, the party must show exceptional circumstances amounting to “strong cause” why the court should exercise its discretion in the party’s favour and assist the party in breaching its promise to bring the action in the contractual forum. The burden to show such strong cause obviously rests with the plaintiff, because prima facie it should be held to its contractual commitment. The factors which a court will take into account in determining whether there is a “strong cause” are:

- (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.
- (b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.
- (c) With what country either party is connected and, if so, how closely.
- (d) Whether the defendant genuinely desires trial in the foreign country, or is only seeking procedural advantages.
- (e) Whether the plaintiff would be prejudiced by having to sue in the foreign court because the plaintiff would:



- (i) be deprived of security for its claim;
- (ii) be unable to enforce any judgment obtained;
- (iii) be faced with a time-bar not applicable here; or
- (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In this case, the factors which the Court took into account in coming to its conclusion that there was strong cause for refusing a stay were:

- (a) that both parties were more closely connected with Singapore;
- (b) that Singapore law was the governing law under the B/L;
- (c) that in respect of the main issue as to whether the bank had consented or acquiesced in the switching of the B/L such as to preclude the bank from relying on the original bills, the evidence was primarily to be found in Singapore; and
- (d) that the shipowner did not genuinely desire trial in India. There was no evidence to support the shipowner's highly speculative Defence that the bank had agreed to the switched bills. This should be the major factor for the Court to hold that there was strong cause for refusing a stay.

It was on these four factors that the Court ruled that a strong cause had been established that the case should be allowed to proceed in Singapore. In refusing to order a stay, the Court was exercising a discretion. On all the four factors above, they, in varying degrees, favoured the continuation of the case in Singapore.

Another factor which the Court had considered, but ruled that it was neutral, was the fact that the action had become time-barred in India. Considerable arguments were advanced by the parties, on the facts that the Defence of time bar had accrued in India. If on other grounds the bank, having reviewed the situation, thought that it was entitled to bring an action in a forum other than the contractual forum and did not institute a protective action in the contractual forum, giving rise to a time bar defence from arising, this factor should not be taken against the bank.

The court then went on to consider how the bank could turn the time bar factor in its favour. The bank must justify its conduct in allowing limitation to arise in the contractual forum. The bank must show that it did not act unreasonably in failing to commence proceedings within time in the contractual forum, such as, by issuing a protective writ. The bank must explain fully and fairly to the Court why the bank allowed time to lapse in the contractual forum. In case where the bank could satisfactorily explain why it did not institute a protective writ in the contractual forum, this factor would assist the bank in establishing strong cause. But if the bank could not, this factor would not assist it. However, this did not mean that the bank could not rely on other factors to show strong cause. As for the shipowner, where the bank could not explain the failure to institute a protective writ within time in the contractual forum, the "benefit" to the shipowner would be that the bank could not rely on it.

The Court had found that the bank had acted unreasonably in failing to institute a protective writ in India. The bank could have instituted a protective writ in India to prevent limitation from setting in. But even if the bank had done so, it would not have helped to determine whether in all the circumstances, a strong cause had been established that the case should be allowed to continue in Singapore. As the Court had held that by the other factors the bank had shown a strong cause, its failure to institute a protective writ in India was inconsequential. It was in this sense that the Court held the failure of the bank to institute an action in India to be a neutral point.

Should you have any questions or want to have a copy of the Judgment, please feel free to contact us.

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