SUN MOBILITY
Insurance and Claims Services Limited

30 September 2004
Ref : Chans advice/45

To: Transport Industry Operators

Exclusive jurisdiction clause

In his Judgment dated 7/6/2004, Judge Arjan H. Sakhrani of the Hong Kong High Court stayed the Hong Kong legal proceedings in favour of the Court of Tribunal de Commerce du Havre in France on the grounds of an exclusive jurisdiction clause contained in the bills of lading concerned.

The case was about two shipments of 215 packages and 190 packages of poplin from Qingdao in the Mainland to Dar Es Salaam in Tanzania in November 2002. The cargoes were discharged from the vessels at Dar Es Salaam on or about 27/12/2002 and 1/1/2003. They were then moved to Tanzania International Container Terminal Services ("TICTS") a private but monopolistic terminal. The consignee sent a truck to TICTS for the collection of the cargoes on 9/1/2003. However, TICTS were unable to locate the cargoes. As a result of this, the shipper and/or consignee has suffered loss or damage and incurred expenses and they claimed against the carrier under the bills of lading for the sum of US$153,780 or alternatively damages, interest and costs.

The carrier relied on Clause IV of the bills of lading which provided that:

"Carrier's Responsibility – Port to Port Shipment

(1) Where the carriage called for by this Bill of Lading is a Port to Port Shipment then, whatever the custom of the port and freight tariff applicable, the Carrier is deemed to take possession of the Goods on loading on the vessel and to deliver same on discharge from the vessel and the Carrier shall not be liable for loss or damage to the Goods during the period before loading on or after discharge from the vessel, howsoever such loss or damage arises and even if an original of the Bill of Lading is not presented or accomplished by the Merchant or his agent on discharge from the vessel.

(2) Loading shall be deemed to have commenced when the Goods are connected with the tackle alongside the vessel, and discharge shall be deemed to have been completed when the Goods are disconnected from the tackle.

(3) For the operation of handling, stowage, loading or unloading carried out before loading or after discharge from the vessel, the stevedore or/and the Ship Agent are deemed to act on behalf of the Merchant even if they were chosen by the Carrier, in particular, when these operations are performed by a public or semi public or monopolistic orangization."

The carrier's case was that this was a port to port shipment and that under the said Clause IV the carrier had discharged its obligations under the bills of lading after the cargoes were discharged from the vessels concerned. The cargoes were lost after discharge from the vessels and when in the custody of the agent appointed by the consignee.

The shipper and consignee disputed the carrier's contention that the cargoes were delivered to TICTS as the consignee's agent. The shipper and consignee also disputed that the carrier was entitled to rely on the said Clause IV as exempting the carrier from liability. The shipper and consignee submitted that even though the carrier unloaded the cargoes from the vessels it still had the obligation to deliver the same to the consignee and that the carrier failed to do so.

The carrier applied for an order that all further proceedings in this action against the carrier be stated in favour of the Court of Tribunal de Commerce du Havre in France pursuant to the law and jurisdiction clause of bills of lading issued by the carrier. The clause relied on was as follows:

"LAW AND JURISDICTION: Any claim or dispute against the Carrier arising under this Bill of Lading, including third party proceedings or those involving several defendants, shall be governed, for the maritime part of the carriage either by the International Convention for the unification of certain rules relating to Bills of Lading dated Brussels, 25/8/1924 as enacted in the country where the Bill of Lading is issued or when the Convention is not compulsorily applicable, by the said Convention non amended and, for the non maritime part of the carriage either by the provisions contained in any International Convention or National Law compulsorily applicable, or by the French Law applicable to the means of transport utilized and shall be determined in France by the "Tribunal de Commerce du Havre"."

The Judge accepted the submission that the clause provided for the resolution of disputes to be determined exclusively in France by the said Tribunal. The matter could be tested by asking the following questions:

(1) what was it that "shall be governed"? and
(2) what was it that "shall be determined"?

In the Judge's view, on a plain reading of the clause the answer to both these questions must be "any claim or dispute against the Carrier arising under this Bill of Lading". In his judgment the clause was an exclusive jurisdiction clause whereby the parties had agreed that any claim or dispute against the carrier should be determined in France by the "Tribunal de Commerce du Havre."

The shipper and consignee also submitted that the clause was in any event invalid and unenforceable. It was submitted that the clause envisaged four possible laws applying to the party's rights and obligations and that, therefore, the clause was invalid and unenforceable and the carrier could not rely on the same. The carrier submitted that there was no express choice of law provided for in the clause. It was only the rules that had been chosen and not the system of law.

It cannot be disputed that there must be a proper law and that there cannot be a proper law which "floats" i.e. not identified when the contract is made but which is left to be determined later by the unilateral act of one of the parties. There must be a governing law from the outset: not a floating absence of law, continuing to float until the carrier, unilaterally, makes a decision. The governing law cannot fall to be decided, retrospectively, by reference to an event which was an uncertain event in the future at the time when obligations under the contract had already been undertaken, had fallen to be performed, and had been performed. A contract can, however, validly provide for two proper laws, the second to be applied if the event on which the application of the first depends is negatived. There is a clear distinction in theory between reference to a foreign law as a choice of law to govern the contract (or part of a contract), on the one hand, and incorporation of some provisions of a foreign law as a term or terms of the contract, on the other hand, although sometimes it is difficult to draw the distinction in practice.

The Judge was satisfied that the clause did not incorporate four different systems of law as was submitted by the shipper and consignee. The obligations were certain at the commencement of the contract of carriage and there was no question of there being a proper law which "floats". In his judgment the clause was valid and enforceable.

The shipper and consignee relied on the following factors:

(1) the shipper as the plaintiff was a Hong Kong company;
(2) the carrier as the defendant was a Hong Kong company;
(3) the bills of lading were issued in Hong Kong;
(4) the contract was agreed in Hong Kong;
(5) the freight was paid in Hong Kong dollars.

However, the Judge was unable to accept that the above factors were sufficient to displace the strong and compelling inference that the parties intended that the proper law of the contract should be the law of the forum where the parties intended their disputes to be determined. That was in France and to be determined by the Tribunal de Commerce du Havre. The Judge accepted the carrier's submission that there was an implied choice of law by the parties namely, French law.

As the Judge found that the clause was an exclusive jurisdiction clause whereby the parties had contractually agreed for the resolution of disputes in France, the Court retained a discretion whether or not to grant a stay of the proceedings brought in breach of contract. The discretion would be exercised in favour of a stay unless strong cause for not doing so was shown. The burden of showing such strong cause was on the shipper and consignee who opposed the stay application.

The Judge considered that the shipper was based in Hong Kong and that it would be more convenient for the shipper to give evidence in Hong Kong rather than in France. The consignee was prepared to come to Hong Kong to give evidence. But it seemed to the Judge that the consignee could equally travel to France to give evidence there. The Judge also considered that the carriage of the cargoes was from Qingdao in the Mainland direct to Dar Es Salaam in Tanzania. There was no transhipment in Hong Kong. The cargo went missing after discharge from the vessel in Dar Es Salaam.

The carrier summarized some of the key issues between the parties as follows:

a. The construction of the Bills of Lading under French law;
b. The events which occurred at Dar Es Salaam relating to the loss of the cargoes;
c. The role and responsibilities of TICTS in Dar Es Salaam;
d. The relationship between TICTS and the consignee.

No evidence was required from Hong Kong to determine any of the above issues.

The shipper and consignee also submitted that the carrier did not genuinely desire trial in France and was seeking a mere procedural advantage in seeking the order for a stay.

The Judge was unable to accept the submission that the carrier did not genuinely desire trial in France. The carrier had set out the defences that it relied on. It had identified the issues between the parties and the carrier had been advised that it had good defences to the claim of the shipper and consignee. The Judge was unable to see what tactical advantage or procedural advantage could be gained by the carrier in seeking the stay.

It seemed to the Judge that the shipper and consignee had failed to show a strong cause for the Court not to exercise its discretion in favour of a stay.

The Judge was satisfied that the Court should exercise its discretion in the carrier's favour. He made an order that all further proceedings in the action against the carrier be stayed in favour of the Court of Tribunal de Commerce du Havre in France. He also made an order nisi that the costs of and occasioned by the carrier's application and of the action be paid by the shipper and consignee to the carrier.

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

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