SMC SUN MOBILITY
Insurance and Claims Services Limited

30 June 2006
Ref : Chans advice/66

To: Transport Industry Operators

Arbitration clause

In his Judgment of 15/5/2006, Judge William Waung of the Hong Kong High Court had to decide whether an arbitration clause in a Bill of Lading referred to the head time charter party or the voyage sub-charter party.

The shipowner of the vessel "Yaoki" by motion sought a stay of the Hong Kong proceedings on the ground of an arbitration clause in the Bill of Lading.

The claim of the cargo owner was based on a Bill of Lading dated 31 August 2003 ("B/L"). The claim was in respect of damage to cargo of benzene in bulk carried under the B/L. The B/L contained the following provision on the front and on the back:

> " ......This shipment is carried under and pursuant to the terms of the Contract of Affreightment/Charter Party dated AS PER CHARTER PARTY at PER CHARTER PARTY between AS PER CHARTER PARTY and AS PER CHARTER PARTY as Charterer and all the terms whatsoever of the said Contract of Affreightment/Charter Party including the Arbitration clause, cargo line clause, and the conditions appearing on both sides of this Bill of Lading to apply and to govern the rights of the parties concerned in this shipment. A copy of the Contract of Affreightment/Charter Party may be obtained from the Shipper or the Charterer upon request."

Clause 3 on the back reads:

> "3. Arbitration
> Any and all differences and disputes of whatsoever nature arising out of this Bill of lading shall be put to Arbitration in the City of New York or in the City of London, whichever place is specified in the Charter and in accordance with the Arbitration clause therein."

The reference to the Charter Party in the B/L created the problem. There were two Charterparties in existence, the head charter which was a Time Charter on Shelltime 4 Form dated 24 September 2002 ("Time CP") with S.H. Marine as the charterer and a Voyage Charter dated 14 August 2003 ("Voyage CP") with S.H. Marine as owner and BP Singapore as the voyage charterer. The Time CP contained a London Arbitration Clause [Clause 61] but the Voyage CP contained no arbitration clause, only an Exclusive Jurisdiction Clause for London High Court [Clause 44]. The dispute before the Court was on the proper construction of the B/L, having regard to these two Charters, whether there was a binding arbitration clause under the B/L so that the Hong Kong proceedings had to be stayed.

The lack of sufficient identification of the Charter Party in the B/L had created the problem of which of the two CP, the B/L referred to. This is not an unusual problem in carriage disputes. *Carver on Bills of Lading*, 2nd edition discusses the problem this way at 3-025 and 3-026:

> "...One question which can arise in such cases is whether the shipowner or his agent is contractually bound to sign such a bill; and the answer to this question depends on whether the bill complies with any requirements with regard to it in the charterparty alleged to have been broken by the shipowner's refusal to sign the bill. ... [para. 3-025]

> ...The lack of clarity may, secondly, result from the facts that the carrying ship is the subject of more than one charterparty, and that the incorporating clause does not state from which of these the incorporated terms are to be taken, e.g. because a blank in the incorporating clause is not filled in, or because that clause merely uses the words 'as per charterparty', without specifying which is intended. One possible view was that in such cases the attempt to incorporate the charterparty terms failed on the ground that the incorporation clause was too uncertain. But the courts are now reluctant to take this view and will make considerable efforts to determine which of the charters it was the original parties to the bill of lading contract intended to incorporate. One view is that it is the terms of the "head charter" which are incorporated (presumably on the ground that it was by reference to that charter that the shipowner intended to define his obligations). However, this is a somewhat one-sided argument ... The view that the terms incorporated by an ambiguous incorporation clause are those of the head charter also seems to be based on the assumption that the original parties to the bill of lading contract are shipowner and shipper; but where ... that contract is between a sub-charterer and the shipper, then it might be more appropriate to regard a reference in the bill of lading incorporation clause simply to a charterparty as being one to the sub-charter. There is no easy answer to the problem raised by cases of the kind here under discussion. The only general statement which can safely be made about them is that where the courts have to choose between two or more charterparties, they will be inclined to favour the incorporation of terms of that charter which are the more (or the most) appropriate to regulate the legal relations of the parties to the bill of lading contract. Where each (or more than one) of the charterparties is equally appropriate for this purpose, the courts might determine the issue by holding the relevant charterparty to be that one which governed the contractual relations between the original parties to the bill of lading and in pursuance of which the bill was issued. [3-026]"

In *Scrutton on Charterparties*, 20th ed., this was said in Article 38:

> "... It is submitted that a general reference will normally be construed as relating to the head charter, since this is the contract to which the shipowener, who issues the bill of lading, is a party. But this will not invariably be so, and the court may conclude, on examining the facts, that the intention was to incorporate the sub-charter; or even, in extreme cases, that the bill of lading is so ambiguous as to be void."

With these general principles in mind, it seemed to the Judge that on the proper construction of the B/L, having regard to the terms of the B/L, the terms of the head Time CP and the terms of the Voyage CP that the Charter Party referred to in the B/L was the Time CP and not the Voyage Charter. The Judge reached this conclusion for the reasons below.

The shipowner was a party to both the B/L and the Time CP but was not a party to the Voyage CP. Whereas the shipper of the B/L was the original party to the B/L but was not a party to the Voyage CP. There was therefore a much stronger reason for the shipowner to link the B/L (of which the shipowner was a party) to the Time CP (of which the shipowner was a party) than for the shipper to link the B/L (of which the shipper was a party) to the Voyage CP (of which the shipper was not a party). This strong reason supported the general rule (repeatedly stated in various editions of *Scrutton*) that "general reference will normally be construed as relating to the head charter".

There were however in this case further very strong support that the B/L was issued pursuant to and incorporating the Time Charter. First and foremost was the Arbitration Clause appearing not only on the front of the B/L but also expressly stated in clause 3 on the back of the B/L. A linkage of the B/L to the Time CP simply fulfilled the intention in the Time CP of the shipowner that disputes were to be settled by arbitration. The Voyage CP had an Exclusive Jurisdiction Clause which was certainly not what was intended by the shipowner in either the Time CP or the B/L nor by the shipper of the B/L in the B/L who was not a party to the Voyage CP.

Secondly, the Time CP specified that bills of lading issued had to contain two particular clauses with specific wordings spelt out in the Time CP. The two mandatory clauses in the bills of lading were the Paramount Clause [Clause 38 of Time CP] and the Export Restrictions Clause [Clause 40 of the Time CP]. Clause 1 of the B/L was the very same Paramount Clause required by and with the wordings set out in Clause 38 of the Time CP. Clause 10 of the B/L was the very same Export Restrictions Clause required by and with the wordings set out in Clause 40 of the Time CP. The exact match of these two very important clauses suggested compellingly in the Judge's view that the B/L Clause 1 and 10 was the attempt to comply with the Time CP [Clause 38 and 40] to which, the B/L was linked by its reference to "As per Charter Party".

It was to be further noted in the context of these two clauses that the Voyage CP contained a differently worded Clause Paramount [Clause 33] and did not contain any Export Restrictions Clause. If the Voyage CP was the incorporated Charter Party then it would mean that the B/L issued was in breach of Clause 33 of the Voyage CP which required B/L to be issued in the wordings stated therein not per clause 1 of the B/L.

The Judge accepted that the shipowner had satisfied him that the Time CP was the relevant Charter Party referred to in the B/L. It followed therefore that the Judge was satisfied that the Arbitration Clause at Clause 3 on the back of the B/L and the Arbitration Clause on the Front of the B/L were binding on the cargo owner and that therefore a mandatory stay of Hong Kong proceedings must be ordered.

The Judge therefore made the Order that all further proceedings in the action be stayed in favour of arbitration. The cargo owner must pay to the shipowner the costs of this action including the costs of this motion.

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

Simon Chan
Director
E-mail: simonchan@sun-mobility.com

Richard Chan
Director
E-mail: richardchan@sun-mobility.com

Multi-modal transportation involves far more complicated liability regime than port-to-port or airport-to-airport carriage. Pure international sea or air transport often affords better protection by international conventions. Conversely, multi-modal transport entails a variety of operational risk elements on top when the cargo is in- transit warehouse and during overland delivery. Fortunately, these risks are controllable but not without deliberate efforts. Sun-Mobility is the popular risk managers of many multi-modal operators providing professional assistance in liability insurance, contract advice, claims handling, and as a matter of fact risk consultant for their staff around-the-clock.