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To: Transport Industry Operators

PRC jurisdiction clause

In our monthly newsletter Chans advice/74 regarding the case of damage to a cargo of frozen squids carried by sea from Ningbo to Nagoya, we mentioned the Hong Kong District Court on 4/8/2006 dismissed the shipping company's application for a stay of proceedings. In this issue of Chans advice, we would like to examine the Hong Kong District Court's Judgment of 4/8/2006 to find out why the PRC jurisdiction clause in the bill of lading failed to help the shipping company.

The shipping company was in fact only acting as a contractual carrier under its bill of lading issued. It subcontracted the carriage job to an actual carrier. Both the contractual carrier and the actual carrier were sued in the same legal proceedings in Hong Kong by the PRC shipper and the Japanese receiver of the cargo.

The shipper shipped the cargo by sea from the port of Ningbo to the port of Nagoya on board the vessel Xiang Xing ("the vessel") under a contract of carriage contained or evidenced in a bill of lading number 8NGBNG03A5975 dated 27/8/2005 issued by the contractual carrier ("the said Bill of Lading"). Upon delivery to the receiver, the cargo was found to be damaged; there was evidence that it had defrosted during the course of carriage from Ningbo to Nagoya.

It was the shipper's and receiver's case that the contractual carrier and actual carrier were jointly and severally liable for the damage to the cargo. The contractual carrier being liable in contract, tort and bailment; the actual carrier was liable in tort and/or bailment. The writ in these proceedings was served on both the contractual carrier and actual carrier in Hong Kong on 8/2/2006. Service was acknowledged by both of them and both filed notice of intention to defend. The shipper's and receiver's Statement of Claim was served on 27/2/2006. By a consent summons on 30/3/2006, time for service of the contractual carrier's Defence was extended to 10/4/2006. The contractual carrier on 7/4/2006 applied for an order that all proceedings against the contractual carrier be stayed in favour of the Ningbo Maritime Court in the PRC under a foreign jurisdiction clause of the contract. The actual carrier did not challenge the jurisdiction of the Hong Kong Courts and filed a defence on 26/4/2006.

According to the Writ, the shipper's address was at Zhoushan in the province of Zhejiang in the PRC whereas the receiver's address was at Shimonoseki, Japan. On the other hand, the contractual carrier was in fact a PRC company. The actual carrier was a company incorporated in Hong Kong.

The contractual carrier relied on the contractual jurisdiction provision allegedly written on the reverse side or the back of the said Bill of Lading. The shipper and receiver disputed the alleged terms to have formed part of the contract of carriage. The contractual carrier failed to exhibit the said Bill of Lading and the reverse side of the said Bill of Lading with the terms containing the alleged jurisdiction and applicable law provision. The contractual carrier had not been able to produce either a copy or the original of the said Bill of Lading for the particular cargo in question. The contractual carrier produced at the hearing a similar bill of lading form with terms and conditions appearing on the reverse side. The shipper and receiver took strong objection to the contractual carrier's failure to produce a copy of the original Bill of Lading with the terms set out on the back. The contractual carrier admitted that it had not in its possession a copy of the original Bill of Lading. The shipper had retained only a photo or fax copy of the front of the said Bill of Lading and the original Bill of Lading had been sent to the contractual carrier. The receiver had never received or seen a copy of the said original Billing of Lading with the alleged terms and conditions on the back. This was said to be an accepted trade practice where the cargo was released by telex.

If the contractual carrier was relying on the terms of the contract (the bill of lading), it had to discharge the onus of proof by producing the said Bill of Lading with the terms and conditions binding on the parties. The contractual carrier could not rely on a clause in the contract that had not been proved to exist. As the shipper

and receiver made no admission to the terms forming part of the said Bill of Lading, the burden was on the contractual carrier to show that the alleged terms formed part of the contract between the shipper and receiver and the contractual carrier.

Had the contractual carrier succeeded in proving the alleged foreign jurisdiction clause was one of the terms on the reverse side of the said Bill of Lading and binding on the shipper and receiver, this clause would be significant in the determination of whether these proceedings should be stayed in favour of an action against the carrier to be brought before the Maritime Court of Ningbo in the People's Republic of China. In the event the shipper and receiver were pursuing a claim in Hong Kong in breach of an exclusive jurisdiction clause, the Hong Kong Court could exercise its discretion to refuse a stay provided strong cause was shown by the shipper and receiver. The Court's discretion in refusing a stay is subject to the principles established by a line of authorities referred to by Brandon L.J. in the case of The "El Amria" [1981] Lloyd's Law Reports vol.2 119 at p.123-124. The Court has to consider all of the circumstances of the case, taking into account the following factors summarised by Dicey and Morris on the Conflict of Laws 13th edition volume 1 page 443 paragraph 12-117:

> "In exercising its discretion whether or not to grant a stay, the court considers all the circumstances of the case, and the following formulation of the particular factors to be taken into account has been much relied upon: (1) in which country the evidence is available, and the effect of that on the relative convenience and expense of a trial in England or abroad; (2) whether the contract is governed by the law of the foreign country in question, and if so, whether it differs from English law in any material respect; (3) with what country either party is connected, and how closely; (4) whether the defendants genuinely desire trial in a foreign country, or are only seeking procedural advantages; (5) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, or be unable to enforce the judgment in their favour, or be faced with a time-bar not applicable in England, or for political, racial, religious or other reasons be unlikely to get a fair trial. The fact that a stay will result in concurrent proceedings with different parties, but similar issues, may militate against a stay."

Should the contractual carrier succeed in proving the terms on the reverse side of the said Bill of Lading, these terms would have become part of the contract of carriage because on the front of the said Bill of Lading it was expressly stated:-

> "In accepting this B/L the Merchant hereby expressly accept and agree to all printed, written or stamped provisions, exceptions and conditions of this B/L, including those on the back hereof."

At the back of the sample bill of lading form submitted at the hearing, Clause 4 stated:

> "4. Jurisdiction and Applicable Law
> Any dispute arising under and/or in connection with this B/L shall be determined by the law of the People's Republic of China and any action against the carrier shall be brought before the Maritime Court in the People's Republic of China."

The Judge agreed that should Clause 4 formed part of the said Bill of Lading and the contract of carriage between the shipper and receiver and the contractual carrier, Clause 4 being mandatory, the appropriate Court for disputes arising out of the contract would be the Maritime Court of the PRC. The Court should exercise its discretion in favour of a stay for the action to be taken up in the Maritime Court of the PRC unless there was a strong cause for not doing so. The main issue for determination at the trial would be the cause of damage to the cargo. The burden of proof was on the shipper and receiver to show the contractual carrier and actual carrier were liable. The shipper would be expected to prove the condition of the cargo at the time of delivery to the contractual carrier's custody in Ningbo. Such evidence had to come from the shipper's servants or agents in Ningpo. As to the evidence on the discovery of the damage at the time of delivery to the receiver in Nagoya, evidence would come from the receiver's agents or servants in Nagoya in Japan. The investigators who made enquiries in Ningbo and prepared a report in English on the receiver's instruction would also be giving evidence at the trial. Both the contractual carrier’s and actual carrier’s witnesses would have to come to Hong Kong from China to give evidence if the trial was conducted in Hong Kong. Consequently, the evidence at the trial would come from witnesses resident in China and in Japan. The only connection with Hong Kong was the fact that both contractual carrier and actual carrier had an address in Hong Kong. However, even though the actual carrier was incorporated in Hong Kong, the cargo was carried from the port of Ningbo in China to the port of Nagoya in Japan.

The shipper and receiver argued that the actual carrier being a Hong Kong incorporated company should be able to give evidence in Hong Kong with no difficulties and it was within the power of the actual carrier to call its servants or agents to prove the condition of the cargo while the cargo was in its custody throughout the period of the carriage.

There was obvious advantage for the trial to be conducted in English because all the documents were in written in English, including the report of the surveyor appointed by the receiver in Japan. However, the evidence of the

shipper's agents or servants and the contractual carrier's and actual carrier's witnesses would presumably have to come from Ningbo. There were no language difficulties if the case was tried in Hong Kong because the Hong Kong Courts have excellent interpretation facilities. So far as costs and expenses of the trial were concerned, the surveyor/investigators from Japan had to travel to the city where the trial was conducted whether it be Hong Kong or Ningpo in any event. The witnesses from Ningbo, however, would have to travel to Hong Kong if these proceedings were allowed to continue.

The shipper and receiver submitted that should the shipper and receiver be required to take up further proceedings in the PRC they would be exposed to further delay and incur additional expenses and costs. Furthermore, all the documents written in English would have to be translated into Chinese.

If the alleged Clause 4 formed part of the contract of carriage, the applicable law under Clause 4 was the law of the People's Republic of China. Since the alleged Clause 4 also stated that any dispute arising should be brought in the Maritime Court of the PRC, there was no doubt that the Maritime Court in China would be the appropriate Court to take up this matter and apply the law of the People's Republic of China instead of a common law jurisdiction Court in Hong Kong. Of the four parties involved, three were said to be closely connected to the PRC. The actual carrier was incorporated in Hong Kong with its major shareholder, a company registered in Shanghai. The only exception was the receiver, which was based in Japan.

There was no evidence that the shipper and receiver were merely seeking procedural advantage in commencing proceedings in Hong Kong. The shipper and receiver, however, claimed that they would be disadvantaged should they commence proceedings in the PRC because of enforcement difficulties of a PRC judgment on the actual carrier, a company incorporated in Hong Kong. The shipper and receiver referred to the possibility of multiple proceedings if these proceedings were stayed. The actual carrier being a company incorporated in Hong Kong, there was possible difficulties involved in the enforcement of a judgment from the Maritime Court in Ningbo against the actual carrier. Consequently, the shipper and receiver would have to continue with the present proceedings against the actual carrier in Hong Kong in any event. Furthermore, there was a risk that the Courts in Ningpo and Hong Kong might differ in their respective findings.

These were genuine concerns. On the basis that contractual carrier could show the parties had chosen the governing law of the contract to be the law of the People's Republic of China, the shipper and receiver would have to show a very strong case to resist a stay of these proceedings in breach of the exclusive jurisdiction clause. The contractual carrier claimed that under article 257 of the Chinese Maritime Code, the limitation period for claims against the carrier with regard to the carriage of goods by sea is one year. The contractual carrier believed the shipper and receiver's claim against the contractual carrier had not been time-barred in the PRC until the expiry of one year after the cargo was delivered to the consignee's premises on 6/9/2005. That indeed should be the position if not for Clause 24 of the alleged terms of the said Bill of Lading which stated:

> "24. Time Bar
> The carrier shall be discharged of all liabilities under this B/L unless suit is brought within 9 months after the delivery of the goods or the date when the goods should have been delivered."

The shipper and receiver submitted that there was a risk that article 257 might not override Clause 24. The shipper and receiver consequently should not be exposed to the risk to have their claims thrown out by the Chinese Maritime Court under Clause 24 because it was not brought within 9 months of 9/9/2005. As no expert opinion from a Chinese law expert on the applicable principles between the terms in the contract of carriage that conflicted with an article in the Chinese Maritime Code had been produced at the hearing, the Hong Kong Court would adopt an interpretation according to the local law.

The Judge found there was a genuine risk that the shipper and receiver might be put in the position similar to the case of The "Blue Wave" [1982] volume 1 Lloyd's Law Reports, part II, page 151 where Sheen J. held at page 153:-

> "At the time when this contract was made it was made between the cargo-owners and the shipowners, who were identified under cl. 17 of the bill of lading as "the carrier". I have no doubt that the proper law of the contract is the law of the country in which the shipowners have their principal place of business."

Sheen J. held that the defendants had a place of business in Piraeus. They had no office or staff in Liberia. The "Blue Wave" did not operate from Liberia. There could therefore be no doubt that the defendants had their principal place of business in Greece. He further found that as between the original parties to the contract of the carriage there was an agreement that any dispute arising thereunder would be decided in the Courts of Greece. He held that the Court would give effect to the agreement by granting a stay of proceedings unless the Plaintiffs can show strong grounds for not doing so.

At page 156 of the report he held further:-

> "The approach of the Courts of this country to a time bar has significantly altered in recent years. If it is open to a Court to extend the time limit, the Court will look to see if the defendant has been prejudiced by the delay in commencing proceedings. Such prejudice cannot arise where a claim is brought in time, but not in the correct tribunal. There would be an injustice to a plaintiff, who has suffered a legal wrong and has started proceedings, if he is precluded altogether from pursuing his remedy. The fact that the plaintiff will have no remedy in the foreign Court seems to me to be a powerful factor against a stay."

At page 157, he said:

> "It seems to me that I have two options. I can refuse to stay the action in England, or I can grant a stay conditional upon the defendants not taking the time bar point in Greece. Thereafter, if the Court takes the point of its own motion I could treat that as grounds for lifting the stay. On the evidence before me, it seems that if I were to adopt the second option I might be putting the parties to a great deal of unnecessary expense and I might cause delay in the resolution of this dispute. I have already indicated my view that on the facts of this case, when considering only the convenience to the parties as between litigation in Athens and litigation in London, there is very little to choose between the two possible venues. On that basis, it would be quite wrong to stay proceedings in London and thereby put the parties to the expense, inconvenience and delay which would result from starting again in Athens if there is a possibility that the matter would have to come back to London because the claim in Greece is time barred."

Should the present proceedings be stayed for the shipper and receiver to pursue their claims in the Maritime Court of Ningbo and should the contractual carrier raise the issue of limitation of action under the contract in the PRC Court relying on Clause 24 of the alleged terms and conditions on the back of the said Bill of Lading, it was likely that the shipper and receiver would not be able to recover against the contractual carrier in the PRC. As a result, the shipper and receiver would have to turn to the Hong Kong Courts and apply for the lifting of the stay of proceedings in Hong Kong after a long delay and having incurred further expenses in the Ningbo Maritime Court proceedings. It seemed to the Judge to be quite wrong to stay proceedings in Hong Kong and expose the shipper and receiver to the risks of wasting huge expenses and time if there was a strong possibility that the matter might be time-barred in China under the alleged Clause 24 of the said Bill of Lading.

The Judge came to the following conclusions after considering all of the circumstances of this case. Firstly, the contractual carrier had failed to produce a copy or the original of the said Bill of Lading with the terms attached to establish its claim that the parties were subject to a binding exclusive jurisdiction clause. Secondly, even if the contractual carrier was able to establish that the shipper and receiver were bound by a foreign jurisdiction clause in the contract, there was a strong possibility that the Maritime Court in Ningpo might reject the shipper and receiver's claims upon finding them to be bound by Clause 24 of the alleged terms and conditions, the shipper and receiver having failed to bring their claims against the contractual carrier within 9 months of the delivery of the cargo. The period of 9 months having expired on 8/6/2006. Thirdly, the shipper and receiver would have to face multiplicity of proceedings and put to great expense to commence proceedings in the Maritime Court in Ningbo which might be an exercise in futility due to Clause 24; resulting in their return to Hong Kong to pursue their claims against the contractual carrier. Further, they might have to continue their claims against the actual carrier in any event. For the aforesaid reasons, the Judge was satisfied the shipper and receiver had shown a strong cause for not granting a stay of these proceedings. The contractual carrier's application to stay was, therefore, dismissed.

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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