SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Korean jurisdiction clause

On 9/9/2004, the Singapore Court of Appeal held a shipowner could not stay the Singapore legal proceedings despite the existence of an exclusive Korean jurisdiction clause in the bill of lading.

On 3/7/2002, 1473 cartons of hami-melons ("the cargo") were packed, at Shenzhen, China, into a reefer container provided by the owner of the vessel Hyundai Fortune ("the vessel"). On arrival in Hong Kong, the reefer container was loaded onto the vessel which was destined for Singapore. On arrival in Singapore on 7/7/2002 it was discovered that 1232 cartons of the cargo were badly damaged. In the bill of lading dated 5/7/2002 ("the B/L"), it was stated that the journey was from Shenzhen, China to Singapore via Hong Kong. The B/L also stated that the cargo was to be stowed in a reefer container at the requisite temperature of 3[degrees]C. On 9/7/2002, a joint survey was carried out by surveyors appointed by the cargo owner and the shipowner respectively. Each surveyor produced his own report. The cargo owner's surveyor reported the cause of damage as follows:

> Based on the findings of survey, we were of the opinion that the damage was basically of deterioration and partial decomposition of fruit brought about by Bacterial Rot and Lasiodiplodia Fruit Rot which may have been accelerated by the exposure of the melons to adverse/high temperature after stowage in the container for shipment and damage was sustained whilst the cargo was under due care and custody of the Carrier and/or their agents.

Following this report, on 21/8/2002, the cargo owner made a claim of US$ 8,396.92 against the shipowner in respect of its loss. There was no response. On 7/12/2002 the cargo owner's solicitors made another demand for the same, with an indication that unless the claim was met, proceedings would be instituted against the appellants in Singapore. Again, there was stone silence. A further reminder by the cargo owner's solicitors in March 2003 also failed to elicit any answer. Therefore, on 2/7/2003, shortly before the expiry of the limitation period of one year, the cargo owner's solicitors instituted the in rem action against the shiponwer, followed by the arrest of the vessel on 19/7/2003. Subsequently, through the provision of security, the vessel was released.

On 20/8/2003, the shipowner applied to stay the action on the ground that under cl 30 of the B/L, the parties had agreed that claims arising from the B/L "shall be brought in Korea." The clause reads:

> The claims arising from or in connection with or relating to this Bill of Lading shall be exclusively governed by the law of Korea except otherwise provided in this Bill of Lading. Any and all action concerning custody or carriage under this Bill of Lading whether based on breach of contract, tort or otherwise shall be brought before the Seoul Civil District Court in Korea.

The shipowner's basic point of contention was that the damage to the cargo occurred before it came on board the vessel.

In the shipowner's surveyor's report, reference was made to the voyage Partlow chart which showed the following readings:

Date	Temperature Readings
4-7-2002	Commenced at +3 degree C but rose to +25 degree C and dropped to +22.5 degree C.
5-7-2002	Temperature dropped further to +17 degree C.
6-7-2002	Temperature rose to +25 degree C but dropped to +3 degree C.
7-7-2002 to 9-7-2002	Temperature constantly maintained at +3 degree C.

The surveyor's report further contained the following explanatory note as to how the Partlow chart (on the question of dates) should be read:

> The partlow chart has been placed 1 day ahead of its actual date on the temperature recording housing. Hence, the recorded temperature should be read backwards by 1 day to reflect its correct date.

For a period of two to three days, from 3/7/2002 to 5/7/2002, while the reefer container with the cargo was being moved from Shenzhen to Hong Kong, the temperature in the container was set at an unusually high level

instead of the prescribed 3[degrees]C. The shipowner did not challenge the readings of the Partlow chart. There was a clear breach of this obligation on the part of the shipowner.

The senior assistant registrar allowed the application. However, her decision was reversed by Ang J. The judge held that there were exceptional circumstances amounting to strong cause warranting the refusal of a stay. In coming to her view, she took into consideration the following factors:

(a) there was really no defence on the merits to the claim;
(b) no trial would be held in Korea as the action had become time barred there;
(c) the connecting factors of the case were all related to Singapore; and
(d) the overall justice of the case was with the cargo owner.

Having come to the view that these circumstances constituted strong cause, the judge also noted that the claim was for a very small sum.

Being dissatisfied with the ruling of the judge, an appeal was lodged to the Court of Appeal. Effectively, what the shipowner was saying was that the judge failed to properly evaluate the facts and had thus incorrectly applied the law to the facts. The parties were in agreement that despite an exclusive jurisdiction clause, the court could refuse a stay of proceedings if exceptional circumstances amounting to strong cause were shown.

It would appear that the first case which dealt with the question in a comprehensive manner was The Eleftheria [1969] 1 Lloyd's Rep 237 where Brandon J held that the plaintiff had the burden of proving strong cause. While the court should, in coming to its decision, take into account all the circumstances of the case, the following were identified by Brandon J to be matters pertinent to have regard to:

(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 defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
    (i) be deprived of security for their 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.

These principles were approved and adopted by numerous subsequent English cases. It was settled law that in refusing a stay of proceedings, the judge was exercising a discretion and unless it was shown that the judge had wrongly applied the law, or had wrongly appreciated the facts, or that her decision was plainly wrong, the appellate court should not interfere in the exercise of his or her discretion. It was clear to the Court of Appeal that the judge had not erred in any manner. She correctly set out the principle which should apply in a case of this nature, ie, exceptional circumstances amounting to strong cause. She also held that the burden of showing such strong cause rested with the party who sought to have the action continued in Singapore. Having considered the facts which included the following:

(a) the fact that the reefer container was not maintained at the prescribed temperature of 3[degrees]C during the journey from Shenzhen to Hong Kong as shown by the Partlow chart;
(b) the fact that on the documents it would appear that at the time the cargo was placed in the reefer container at Shenzhen, it was in apparent good order and condition;
(c) the fact that the higher the temperature at which fruits like the hami-melon were stored, the greater the likelihood of rot or disease developing; and
(d) the fact that the shipowner failed to give any reply whatsoever to the respondents' claim,

the judge came to the conclusion that there was really no issue of liability to be tried in Korea. Moreover, in view of the fact that the time bar had set in in Korea and the shipowner was not prepared to waive the limitation defence, there could be no trial in Korea. In addition, the case had strong connecting factors with Singapore. Though the B/L was to be governed by Korean law, there was no evidence to show that Korean law was any different from Singapore law in that regard. In the judge's opinion, the overall justice of the case did not favour having the action stayed.

With respect to every such application, the weight to be given to each of the relevant factors is not something that is amenable to precise definition. The Singapore Court of Appeal had in Golden Shore Transportation v UCO Bank, with reference to certain connecting factors favouring Singapore, stated that the weight to be given to those factors must still be placed in the basket together with other factors to see if, in their totality, they would add up to "strong cause".

In relation to the appeal in question, two factors were crucial. The first concerned the question whether there was a defence to the claim, which, in turn, could be translated into the question whether the shipowner seriously wanted a trial in Korea. It is common knowledge that the shelf life of fruits depends very much on the condition of storage. The warmer the environment, the more rapid the deterioration. Thus, the cargo owner's surveyor in its report stated that the deterioration of the hami-melons was probably aggravated or accelerated by the high temperature in the reefer container. That was why the parties had, by contract, prescribed that the temperature in the reefer container should at all times be maintained at 3[degrees]C. There was a breach of this requirement. Even the shipowner's surveyor in its report stated that the cause of the damage was:

> likely due to post harvest disorder aggravated by the unfavourable storage in high carrying temperature for 3 consecutive days commencing from 3/7/2002 to 6/7/2002 whilst in stowage of the 40ft refeer container.

This fact, coupled with the further fact that the shipowner totally ignored the cargo owner's claim for a period of almost a year and was not able in its affidavits to identify the defences which the shipowner would be relying on with an indication of the evidence in support was clear evidence that the shipowner had no defence to the claim. In this connection, the shipowner argued that it was under no duty to answer the cargo owner's claim. However, as Sheen J said in The Frank Pais [1986] 1 Lloyd's Rep 529 at 533:

> I do not understand why it is inappropriate to discuss the merits of a claim if this can be done, thereby saving the cost of litigation. If the defendants have an answer to the claim put forward by the plaintiffs, I can see no reason why they should not say what that answer is.

Accordingly, it would be reasonable to infer that, had the shipowner thought that it had a defence, it would have responded. The fact that the shiponwer did nothing until one year had elapsed from the date the action first accrued, and then applied for a stay of the proceedings, suggested that it was waiting for time to lapse so as to seek a procedural advantage. It did not seriously want a trial in the contractual forum.

The Court of Appeal turned to the second question as to whether it was reasonable for the cargo owner not to have instituted a protective writ in Korea before the limitation period had set in in that forum. The Court of Appeal noted that in the cargo owner's solicitors' letter of 7/12/2002, it was expressly stated that unless the claim was met, proceedings would be instituted in Singapore. Bearing in mind that there was a joint survey on 9/7/2002, and that the shipowner's surveyor would have submitted his report to the shipowner, it would not be unreasonable for the cargo owner to have assumed that the shipowner had adopted the stonewalling approach, without even acknowledging the receipt of the claim, because it really had no answer to the claim. In the Court of Appeal's opinion, it did not appear unreasonable for the cargo owner in the circumstances not to have taken out a protective writ in Korea. The fact that the shipowner was not willing to waive the time bar defence and had the security furnished transferred to Korea, lent further weight to the point that the shipowner did not desire a trial in Korea. Its aim was clear. It wanted to obtain a tactical advantage.

Thus, when the Court of Appeal weighed these factors, together with the other connecting factors which favoured a hearing in Singapore, not only was the Court of Appeal satisfied that the shipowner had not shown that the judge had exercised her discretion wrongly, the Court of Appeal were of the view that exceptional circumstances amounting to strong cause had, in fact, been established. Accordingly, the Court of Appeal dismissed the appeal, with the usual consequential orders.

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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