SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Anti-suit injunction (II)

In our Chans advice/169 last month, we mentioned the English Court's Judgment dated 14/10/2014 holding CSAV's bill of lading's English jurisdiction clause to be an exclusive jurisdiction clause. In this issue, let's look at that English High Court Judgment [2013 Folio No 1248, 2014 EWHC 3632 Comm, 2014 WL 5113447] issued by Justice Cooke in detail.

This was the trial of CSAV's claim for a permanent anti-suit injunction and for declarations and damages in respect of alleged breaches of Hin-Pro of the jurisdiction clause contained in bills of lading by taking proceedings in China. Hin-Pro did not attend the trial. It chose to ignore the proceedings, and indeed the related action in 2012, and was in breach of various court orders. In the context of the 2012 action, it was found to be in contempt of court.

Hin-Pro was a freight forwarder registered in Hong Kong. The disputes between CSAV and Hin-Pro concerned allegations of mis-delivery. Hin-Pro alleged that CSAV wrongly delivered cargo without production of original bills of lading in various ports in Venezuela. The bills of lading in question were all CSAV bills, showing shipments from China to Venezuela. The bills were straight bills naming Raselca as consignee. Some of those bills named Hin-Pro as shipper, but others named different companies, namely Hefei Hauling and Moonlight Trading.

It was CSAV's position in the Chinese proceedings that no mis-delivery took place, because Venezuelan law required that cargo should be delivered to the storage provider authorised by the Venezuelan Government. The exception to the rule arose where a direct discharge or urgent shipment request was made, but that did not apply to the shipments in question. Thus, CSAV were legally obliged under Venezuelan law to deliver the goods to the authority which then had sole control over the goods. CSAV's case was that not only was delivery so made, but that all the goods were in fact on-delivered to Raselca, Hin-Pro's agents in Venezuela, and then on-delivered by them to the buyers of the cargo.

What was sought from the English court was an injunction in relation to the Chinese proceedings, which were said to have been begun in breach of the jurisdiction clause.

The amounts claimed in the Chinese proceedings involved the value of the cargo carried under the bills, the freight which Hin-Pro claimed it was entitled to receive, and an exchange rate loss, port and other charges and attorney's costs. The biggest sum was the alleged value of the cargo at approximately $24 million.

Hin-Pro were freight forwarders. It was hard to see how they could be the sellers of the goods, or to have suffered the loss claimed in respect of the cargo value. It was CSAV's case that the actual sellers were Chinese companies, who sold on a C & F basis, and who had in fact been fully paid for the goods. The claim made in China was, therefore, said to be dishonest.

In 2012 Hin-Pro commenced proceedings in the Wuhan Maritime Court against CSAV under 5 bills of lading.

In November 2012, CSAV commenced action 2012 Folio No 1519 in the English High Court, seeking an anti-suit injunction prohibiting Hin-Pro from pursuing or taking any further steps in the Wuhan proceedings on the basis of a breach of the jurisdiction clause in the bills of lading. Burton J granted an *ex parte* interim injunction, and that was continued as an *inter partes* hearing by order of Andrew Smith J at the end of November 2012. Hin-Pro did not in fact attend the *inter partes* hearing in London, and did not comply with the order. Instead, it progressed the matter in Wuhan. In consequence, there was a committal hearing in the

English High Court on 21/3/2013, at which it was found that both Hin-Pro and its sole director, Ms Su were in contempt of court. Ms Su was sentenced to imprisonment for 3 months, and permission was given for writs of sequestration to be issued against Hin-Pro.

Between May and July 2013, Hin-Pro commenced 23 sets of proceedings in Guangzhou, Qingdao, Tianjin, Ningbo and Shanghai in respect of a further 70 bills of lading. In each, Hin-Pro alleged that it was the named shipper on the bill, or, alternatively, that "Although not specified as the shipper on the bill, it was the statutory and actual shipper" CSAV challenged the jurisdiction of the court in China, but its challenges were dismissed, since Chinese courts apparently disregard agreed jurisdiction clauses.

The English legal proceedings in question was then begun by CSAV, and permission to serve out of the jurisdiction was granted. A claim form was served at Hin-Pro's offices in Hong Kong on 10/10/2013.

On 10/10/2013 an application notice was served on Hin-Pro seeking an *inter partes* anti-suit injunction in relation to the 2013 proceedings commenced in China. No response was received to the application notice, and no evidence filed by Hin-Pro. On 29/11/2013 Blair J granted an *inter partes* anti-suit injunction in this action. Once again, however, that injunction was ignored.

On 27/5/2014 the Ningbo Court issued a judgment in one of the cases before it. The Chinese court awarded damages for the value of the cargo claimed, some $360,000, and legal costs in Chinese currency of 100,000. However, the court disallowed Hin-Pro's claim for freight on the basis that they were sellers on C & F terms. The sums awarded by the court in that action have been paid by CSAV to Hin-Pro.

An *ex parte* worldwide freezing order was granted by Walker J on 13/6/2014. When granting it on CSAV's application, he said:

> "I am satisfied that there is good reason for concern that Hin-Pro's activities in China involve a fraudulent bringing of proceedings and there are good grounds to fear that they may result in execution in China so as to force CSAV to pay a sum which, when combined with costs in this country, would total something in the region of USD27,845,000. Similarly I am satisfied that there are strong grounds for thinking that a cause of action has accrued now, even though a substantial part of the damages may not be suffered until sometime in the future … Great care has been taken by those advising CSAV to ensure that appropriate proceedings are brought here and in Hong Kong."

The order froze assets worldwide up to the sum of $27.835 million and required disclosure of worldwide assets and a verifying affidavit. On the return date Hin-Pro did not attend, and the freezing order was continued by Eder J on 27/6/2014. At about the same time, a freezing order was sought and obtained on an *ex parte* basis in Hong Kong. Hin-Pro was a Hong Kong registered company, and the assistance of the Hong Kong court was considered necessary to seek to preserve Hin-Pro's assets there. The Hong Kong order was served on 17/6/2014, and once again time limits passed without Hin-Pro complying with the order for disclosure of information or an affidavit as to assets. Hin-Pro did not attend on the return date in Hong Kong on 20/6/2014.

In those circumstances, CSAV sought and obtained the appointment of a receiver in Hong Kong on 17/7/2014, and it was following that that Hin-Pro appointed lawyers in Hong Kong to act for it, and commenced attempts to stay or set aside the Hong Kong freezing order and the appointment of the receiver.

A further judgment was then handed down by the Ningbo court on about 10 September, and a sum of $652,936 was awarded in respect of cargo value, with legal costs in local currency of 100,000 again. The claim in respect of freight was once more disallowed.

As Walker J remarked in the context of granting a worldwide freezing order, there were good reasons for considering that the claims brought in China by Hin-Pro were dishonest claims, based on false documents purporting to show contracts in the form of a master agreement and sales confirmations between Hin-Pro and Raselca. On the evidence, Hin-Pro was a freight forwarder, and, as it recognised itself in correspondence in 2012, would not suffer any loss in relation to the value of the cargo unless the seller for the cargo remained unpaid and then sued Hin-Pro for its value. Initially that was how Hin-Pro described its potential claim in a letter of complaint sent on 8/6/2012. In October 2012 Hin-Pro also agreed to withdraw the Wuhan proceedings if CSAV paid $1.8 million by the end of the month, and stated that it would not file any law suit against CSAV for the shipments so long as nobody lodged claims against it in respect of mis-delivery. The claims in China which were issued thereafter, however, did seek to claim the value of the cargo. The statements of claim put forward the position that "a foreign client" commissioned Hin-Pro to "arrange for the

shipment of some purchased cargo" from China to Venezuela, with the role of Hin-Pro being described as "booking space and arranging for shipment". Hin-Pro thus described itself in classic terms of freight forwarding.

In April 2014, however, Hin-Pro disclosed in the Ningbo court a master sale agreement supposedly dated 20/1/2011 between Hin-Pro and Raselca. That showed an intention for Hin-Pro to sell, and Raselca to buy, various different types of product ranging from shoes, to industrial parts, to medical instruments and supplies, up to a total value of US$45 million. The master sale agreement noted that quantities and individual prices were to be specified in separate orders, and provided for bills of lading to be sent to the buyer when Hin-Pro received payment of the purchase price. The agreement purported to contain a signature on the part of Raselca, but with no stamp from Raselca or any indication of the identity of the signatory. Furthermore, some 79 sales confirmations were produced by Hin-Pro which again purported to show Hin-Pro as seller and Raselca as buyer of the various cargoes which were the subject matter of the bills of lading. The sales confirmations took much the same form as each other, providing for payment by cash on delivery, with the buyer being obliged to pay the price 10 days after the cargo arrived at destination. The option for payment by a letter of credit had not been utilised, but the ensuing clause which set out documents required to be submitted for banks for negotiation and collection was completed. The sales confirmations purported to contain a signature on behalf of Raselca, but without any stamp from Raselca or indication of the signatory. In China, Hin-Pro alleged that the master agreements and sales confirmations which they had produced were signed on behalf of Raselca by Mr Salazar. Mr Salazar had confirmed to CSAV that he did not sign these documents or enter into any such sale contracts with Hin-Pro at all. Mr Lopez of Raselca signed a similar statement stating there were no sale contracts between Raselca and Hin-Pro, and that Raselca did not sign the documents produced by Hin-Pro. In fact, house bills of lading were issued, as was often the way when the ocean bill of lading named freight forwarders as shippers. Those house bills were issued by an affiliated company of Hin-Pro called Soar International. They had the same registered office in Hong Kong, and Ms Su was the sole director of both these companies. The Soar bills named various Chinese companies as shippers and various Venezuelan companies as consignee. Contact had been made with a limited number of the companies in China whose names appeared on the Soar bills, who indeed confirmed that they were sellers of goods direct to Venezuelan buyers, and that they had been paid for the cargo. Moreover, they said that they had never heard of Hin-Pro. CSAV also obtained copies of various documents relating to cargoes shipped under the bills, which showed that the sellers were not Hin-Pro. These included invoices from the Chinese companies on the Soar bills addressed to the Venezuelan companies appearing on those bills. Evidence was also obtained showing that these invoices had been paid. CSAV thus believed that the documents produced by Hin-Pro did not evidence genuine transactions at all, and that the actual sales were between the various Chinese and Venezuelan companies whose names appeared on the Soar bills of lading. Thus, it was said that Hin-Pro's assertions in the Chinese proceedings that they were unpaid sellers entitled to claim the price of cargoes were false and fraudulent and based on forged documents. Hin-Pro continued to claim for over $25 million as an unpaid seller, and had two judgments in its favour in relation to specific cargoes.

Clause 23 of the bills of lading reads as follows:

> "Law and jurisdiction.
> This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceedings shall be referred to ordinary courts of law. In the case of Chile, arbitrators shall not be competent to deal with any such disputes and proceedings shall be referred to the Chilean Ordinary Courts."

By the first sentence of this clause each party agreed to submit to the jurisdiction of the English High Court and to the application of English law as the governing law of the contract contained in, or evidenced by, the bill of lading. The question which arose was whether or not the parties had agreed to the exclusive jurisdiction of the English court, with the result that proceedings taken elsewhere, such as those in China, amounted to a breach of contract. If the first sentence of the clause stood alone, it would, by reference to a body of authority, constitute an exclusive jurisdiction clause. In Svendborg v Wansa [1997] 2 Lloyd's Rep 183 the clause read as follows:

> "Wherever the Carriage of Goods by Sea Act 1936 (COGSA) of the United States of America applies … this contract is to be governed by United States law and the United States Federal Court Southern District of New York is to have exclusive jurisdiction to hear all disputes hereunder. In all other cases, this Bill of Lading is subject to English law and jurisdiction."

Staughton LJ, with whom the other members of the Court of Appeal agreed, said this, referring to his own

earlier judgment in the Court of Appeal decision in Sohio Supply Co v Gatoil [1989] 1 Lloyd's Rep 588 :

> "It can be argued that the express mention of exclusive jurisdiction in the first part of the clause excludes any implication that the second part provides for exclusive jurisdiction. On the other hand it can be argued that the author wished to provide for exclusive jurisdiction throughout, and did not think it necessary to repeat the word "exclusive" in the second part… I conclude that the clause does confer exclusive jurisdiction on the English courts. My reasons are in substance, first those which I stated in Sohio Supply Co v. Gatoil (USA) Inc (1989) 1 Ll R 588 at pp. 591–2, and in particular that I could think of no reason why businessmen should choose to go to the trouble of saying that the English Courts should have non-exclusive jurisdiction. My second reason is that the parties in the second part of the clause were plainly saying that English law was to be mandatory if the American Carriage of Goods by Sea Act did not apply; it seems to me that they must have intended English jurisdiction likewise to be mandatory in that event."

Justice Cooke did not find the first reason entirely persuasive, because parties might wish to provide for a neutral court to have agreed jurisdiction, where they wished to be able to institute proceedings, whilst accepting that other courts might also exercise jurisdiction by reference to their own connection to the dispute and their own procedural rules. The second reason was, in Justice Cooke's judgment, more compelling, namely that, in agreeing to English law as the governing law, and *ex hypothesi* therefore the mandatory governing law which allowed of no other law being applied, the parties must be taken also to have intended that the English courts should have exclusive jurisdiction. Self-evidently, English courts would be seen by the parties as best able to apply the provisions of English law which the parties agreed to be applicable in the circumstances.

In British Aerospace v Dee Howard [1993] 1 Ll R 368, Waller J considered a clause which read as follows:

> "This agreement shall be governed by and be construed and take effect according to English law and the parties hereto agree that the courts of law in England shall have jurisdiction to entertain any action in respect hereof … "

He also referred to the Sohio decision and Staughton LJ's comment that he could think of no reason why parties should go to the trouble of saying that the English courts should have non-exclusive jurisdiction, but could think of every good reason why the parties should choose that some courts should have exclusive jurisdiction, so that both sides could know where all cases were to be tried. He went on to say:

> "In the instant case the parties have expressly agreed English law and there would be no need to expressly agree that the English court should have jurisdiction or the English court to have non-exclusive jurisdiction. The English court would in any event have such jurisdiction, and by expressly agreeing to English jurisdiction they must be seeking to add something, i.e. that the English court should have exclusive jurisdiction."

The tenor of these decisions and Austrian Lloyd Steamship Company v Gresham Life Assurance Society [1903] 1 KB 249, and other decisions to which Justice Cooke had been referred, was clear. An agreement to English law and jurisdiction, absent any other relevant provision in the contract, is generally to be taken not only as an agreement to the mandatory application of English law, but also to the exclusive jurisdiction of the English court.

Under clause 23 of the relevant bills of lading "Any claim or dispute arising under such bills of lading 'shall be subject to English law and the jurisdiction of the English High Court'". This was, on its face, clear and applied to all such claims and disputes. The parties agreed that they were to be determined in the English High Court, and, by necessary inference, agreed that they should not be determined elsewhere. The clause was not simply an agreement to submit to the jurisdiction of the English court, which could be read as allowing proceedings to be brought elsewhere, but required that claims and disputes be determined in accordance with English law by the English court.

The issue which arose, however, was whether the clause as a whole, and this sentence when read with the second and third sentences, effectively provided for different courts to have jurisdiction in different circumstances.

The bills of lading provided in clause 2 for a clause paramount and for the application of the Hague Rules, save in three situations. First, where as a matter of English law and the English Carriage of Goods by Sea Act 1971 the Hague-Visby Rules were compulsory applicable. In such circumstances, those Rules would fall to be applied. Secondly, where there were shipments to and from the United States of America, US COGSA was to apply. Thirdly, where the bill of lading was subject to legislation which made the Hamburg Rules compulsorily applicable, then those rules would apply "Which shall nullify any stipulation derogating therefrom to the detriment of shipper or consignee".

The terms of clause 23 of the bills and the exclusive jurisdiction clause (if that was what it was) must be seen in the light of this provision. There could be no doubt that the second and third sentences of the clause envisaged and provided for the situation where proceedings were brought elsewhere than England. The third sentence specifically referred to Chile, the country where CSAV was incorporated. Chile is a party to the Hamburg Rules. Whereas neither the Hague nor the Hague-Visby Rules make any provision about jurisdiction, the Hamburg Rules, by contrast, do. Article 21 essentially provides that the claimant, at his option, may institute an action in a court within the jurisdiction of which (a) the defendant has his principal place of business or habitual residence; (b) the contract was made; (c) the cargo was loaded or discharged; or (d) any additional places designated by the contract of carriage. Article 23 then provides that any stipulation in the contract is null and void to the extent that it derogates from the provisions of the Convention. An exclusive jurisdiction clause is, therefore, to be of no effect, to the extent that it does not permit actions to be brought in the places designated in Article 21.

Having struggled with the terms of the clause for some time, and in particular the second and third sentences, which provided that proceedings elsewhere than England "shall be referred to ordinary courts of law" and "the Chilean ordinary courts" respectively, Justice Cooke came to a clear conclusion. It seemed odd to Justice Cooke that if the clause was intended to provide for the exclusive jurisdiction of the English courts, it should then go on to provide in the second and third sentences for any breach to be restricted to courts rather than arbitration. The explanation for this lay in the terms of clause 2, the paramount clause of the bill of lading. It was recognised in the bills themselves that, notwithstanding the choice of English law and English jurisdiction, US COGSA or the Hamburg Rules might have application in certain circumstances. If, for example, proceedings were brought by a claimant against CSAV in Chile, as the place where CSAV was incorporated and where the Hamburg Rules would be applied, the first sentence of clause 23 providing for English law and jurisdiction would be null and void under Article 23 of those rules, and Article 21 would be applied to allow suit in Chile under Chilean law. Justice Cooke was persuaded that the words "If, notwithstanding the foregoing", which followed the first sentence of the clause and preceded the second and third sentences, did indeed take effect as if the clause expressly read "If, notwithstanding the parties agreement that all claims or disputes arising under the bill of lading shall be determined in accordance with English law and by the English High Court", any proceedings commenced elsewhere shall be determined by ordinary law courts and not by some other mechanism such as arbitration. In short, the second and third sentences did provide a fallback defence, where it was known that the first sentence would be ineffective in some foreign courts.

The result was, in Justice Cooke's judgment, however odd it might appear, that proceedings begun by a claimant in Chile against CSAV would be brought in breach of clause 23, and CSAV would be entitled to seek an anti-suit injunction, subject to consideration by the court of all other relevant factors. Thus, proceedings brought in China by Hin-Pro were, in Justice Cooke's judgment, brought in clear breach of clause 23, as was held in the English High Court on an interim basis by Blair J and Andrew Smith J in the 2012 proceedings of a similar kind.

The principles to be applied when proceedings are brought in breach of an exclusive jurisdiction clause are those laid down by the Court of Appeal in The Angelic Grace [1995] 1 Ll R 87. In essence, an anti-suit injunction will be granted where there is a breach of an exclusive jurisdiction clause unless there are strong reasons not to do so. In the case in question there were no strong reasons not to grant an injunction, and every reason why such an injunction should be granted. It was pointed out that proceedings in England would be time barred. The 1-year time bar expired in about June 2013, but before that expiry Hin-Pro knew that CSAV relied on clause 23 as an exclusive jurisdiction clause and knew that the English court had been satisfied that it was an exclusive jurisdiction clause for the purpose of granting an anti-suit injunction in the 2012 proceedings, and knew that the English court regarded Hin-Pro's conduct in continuing in China as contempt. Nonetheless, it commenced 23 actions in China in May to July 2013 in breach of the clause. That was its own deliberate decision with knowledge of the English High Court's view. Thus, the falling of the time bar could not amount to a reason, let alone a good reason, to refuse an anti-suit injunction in such circumstances. It would only be where a defendant acted reasonably in not protecting its claim in a contractual forum that it would become a relevant factor.

The English High Court was not concerned with the substance of the dispute between the parties. The English High Court was satisfied that there was a good arguable case that fraud was being perpetrated in China. The prosecution of the action in China in that context rather than the contractually agreed forum certainly had the effect of putting unfair pressure on CSAV. In Justice Cooke's judgment, CSAV were clearly entitled to a

permanent mandatory injunction.

Justice Cooke turned to the claim for damages. Costs incurred in foreign proceedings brought in breach of an exclusive jurisdiction clause are recoverable as damages for breach of contract. That is clear from a number of authorities. Furthermore, CSAV claimed damages in respect of the substantive sums claimed against it in China, including sums which had been paid, sums for which it had been found liable to pay, and sums which might yet be awarded against it in China. Such sums would have to be paid by CSAV to avoid arrests or other disruptive enforcement procedures in relation to its ships. CSAV was not claiming sums which would put it in pocket. It was claiming sums equivalent to those which it had already had to pay or would have to pay. Damages fell to be assessed to put CSAV in the same position that it would have been if Hin-Pro had not broken the contract. In Justice Cooke's judgment, it was clear that the breach which had occurred was the breach committed by Hin-Pro in bringing foreign proceedings at all. The breach did not consist in failing to bring them in the English courts. The relevant comparison with the no-breach situation was therefore a situation in which no proceedings were brought at all.

Hin-Pro had contracted not to seek relief in any forum other than England. In breach of that obligation it had sought relief in China. If it had complied with its obligations, there would be no current or future judgments in China at all. Absent any claim against CSAV in England, CSAV's loss and damage arising from Hin-Pro's breach amounted to all the sums awarded to Hin-Pro in China. The court would not engage in considering the hypothetical question of what might be the result if Hin-Pro had brought a claim in the English court. That stance has been approved by the Court of Appeal in its second decision in the Alexandros T [2014] EWCA (Civ) 1010 at paragraphs 19 and 20.

Thus, CSAV was entitled to the sums awarded in China and, in the absence of Hin-Pro's advancement of its claims in the English court, the English High Court would not engage in consideration of what hypothetically might happen if the claims had been brought in the English court. If Hin-Pro had in fact brought a claim in the English court, then CSAV's claim for damages in the amount of the judgments payable in China might be reduced by a set-off or counterclaim by Hin-Pro if Hin-Pro could show that there was liability on CSAV in the English proceedings. The fact was that Hin-Pro had deliberately disregarded England as a forum to make its claims, and indeed had disregarded the orders made by the English court in relation to the proceedings it had brought elsewhere.

Even were the English High Court to consider what liability CSAV might have to Hin-Pro in proceedings brought in the English courts in accordance with the clause, the result would not avail Hin-Pro. The reason was that all its claims were time barred. Justice Cooke had already referred to clause 2 of the bill of lading and the clause paramount, where the Hague Rules would bring in Article 3 Rule 6 and the 1-year time bar. There was also an additional clause 18 in the bills of lading which provided for a discharge from claims in relation to loss or damage, freight charges or expenses, or any claim of whatsoever kind, nature or description with respect to, or in connection with, the goods if suit was not brought within one year of delivery or the date when delivery should have taken place.

It was clear that CSAV was, in Justice Cooke's judgment, entitled to damages in the amount of any sums awarded in China, and no credit or consideration needed to be given to claims Hin-Pro might have brought in the English court had it sought to exercise its rights to do so, because those claims were time barred. In such circumstances, Justice Cooke made an order in the terms sought, both in relation to a permanent anti-suit injunction and in relation to a continued worldwide freezing order.

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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