SUN MOBILITY
Insurance and Claims Services Limited

21 July 2015
Ref : Chans advice/175

To: Transport Industry Operators

Anti-suit injunction (V)

As reported in our Chans advice/170 dated 27/2/2015, the English High Court on 14/10/2014 held CSAV's bill of lading's English jurisdiction clause as an exclusive jurisdiction clause. On 23/4/2015, the English Court of Appeal issued its Judgment reaching the same conclusion. [Neutral Citation No: 2015 EWCA Civ 401, Case No: A3/2014/3584]

CSAV's bills of lading contain the following clause:

> "*23 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 proceeding shall be referred to ordinary courts of law. In the case of Chile, arbitrators shall not be competent to deal with any such dispute and proceedings shall be referred to the Chilean Ordinary Courts*".

It is common ground that, as a matter of Chilean law, the third sentence is void.

The Court of Appeal came to the conclusion for the following reasons.

First, the words "*shall be subject to*" are imperative and directory. They are not words which are apt simply to provide an option. That is certainly the case in relation to the applicable law and, *prima facie*, the same should be so in relation to jurisdiction. In *Svendborg* the words "*In all other cases this Bill of Lading is subject to English law and jurisdiction*" were held to provide for exclusive jurisdiction. The phrase "*This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and jurisdiction*" is, for this purpose, stronger. This is not wording which does no more than indicate consent or agreement to English jurisdiction. It is transitive in the sense that the parties agree to submit all disputes to the English court, rather than submitting themselves to its jurisdiction if that jurisdiction is invoked: see, in this respect, *Continental Bank N.A. v Aeakos Compania Naviera S.A.* [1994] 1 Lloyd's Rep. 505, where such an approach was taken in respect of a clause which read "*Each of the Borrowers … irrevocably submits to the jurisdiction of the English Courts*"; and where Steyn LJ (as he then was) said that "*it would be a surrender to formalism to require a jurisdiction clause to provide in express terms that the chosen Court is to be the exclusive forum*".
Consistently with this analysis, in *Konkola Copper Mines plc v Coromin* [2005] 2 Lloyd's Rep 55 Colman J interpreted the words "*This policy is subject to Zambian law, practice and jurisdiction*", if standing alone, as signifying that all parties were to refer all disputes to the Zambian courts and not merely to consent to such jurisdiction should it be invoked. See also *Austrian Lloyd Steamship Co v Gresham Life Assurance Society Ltd* [1903] 1 KB 249 where an agreement to submit all disputes arising out of a contract of insurance to the jurisdiction of the courts of Budapest having jurisdiction in such matters was held by Romer LJ to be an exclusive jurisdiction agreement. He pointed out that if there had been an agreement in similar terms to submit to the decision of a particular individual there could have been no doubt that it would have amounted to an agreement to submit any dispute to the arbitration of that person.

Second, whilst the Court of Appeal accepted (i) that a non-exclusive English jurisdiction clause is not worthless or otiose even when there is express provision for English law, and (ii) that there can, generally speaking, be only one law governing the contract but that there can be more than one court having jurisdiction over disputes, the natural commercial purpose of a clause such as the one in question is to stipulate (a) what law will govern; and (b) which court will be *the* court having jurisdiction over any dispute. If "*shall be subject to*" makes English law mandatory (as it does) the parties must be taken to have intended (absent any convincing reason to the contrary) that the same should apply to English jurisdiction.
In a case such as the one in question, there is only limited benefit in specifying England as an optional jurisdiction without any obligation on either party to litigate in England. The number of courts that might

have jurisdiction over a dispute between the bill of lading holder and the owners is at least as large as the range of countries in which cargo may be loaded, transhipped, or discharged, and might include the country where the bill of lading contract was made or that of the ship's flag. Some of these countries are likely not to apply English Law, despite clause 23, if their jurisdiction is invoked. Some might apply it in an idiosyncratic way. Which court a claimant might select could not, itself, be predicted with any certainty. In those circumstances it makes little commercial sense to add England as an optional additional court, but without any obligation on either party to litigate in England; and there was every reason to think that when the parties were agreed that claims and disputes should be determined by the English High Court, by necessary inference they were agreeing that they should not be determined elsewhere. That would make good commercial sense.

The Court of Appeal took some account of the fact that the terms of the bill of lading will apply not only to the bills of lading in question, but to the many other bills which CSAV will issue to other shippers. The Court of Appeal regarded that as a relevant consideration. A reasonable person would realise that the clause was intended for widespread use by CSAV for many different shipments.

Third, there is obvious sense in making both English law and English jurisdiction mandatory. Whilst foreign courts may (but will not necessarily) apply English law if that is what the parties have agreed, England is the best forum for the application of its own law.

Fourth, the use of the phrase "*If **notwithstanding the foregoing**, any proceedings are commenced in another jurisdiction*" in the second sentence is a recognition that the first sentence requires litigation in England as a matter of contract. The Court of Appeal did not regard it as realistic to interpret it as meaning "notwithstanding that advantage is not taken of the option for English jurisdiction". If the first sentence made English jurisdiction optional, the phrase "*notwithstanding the foregoing*" would be unnecessary. The Court of Appeal would treat the phrase as if the clause 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".

Fifth, the second and third sentences of the clause cover a situation where the first sentence is ineffective e.g. because of the application of the Hamburg Rules (as in Chile and elsewhere) or where the country whose jurisdiction is invoked does not recognise the intended effect of an exclusive jurisdiction clause as in China or, in some circumstances, Canada: *OT Africa Line v Magic Sportswear* [2004] EWHC 2441 (Comm) – see section 46 (1) of the *Canadian Maritime Liability Act.* They provide that, in that event, the proceedings are at least to be before the ordinary courts – ineffective although that provision is in Chile.

Sixth, it did not seem to the Court of Appeal that much assistance in the interpretation of this clause is - as Hin-Pro contended - to be derived from the *contra proferentem* rule. That rule has been said to have limited application in the interpretation of ordinary commercial contracts. In *K/S Victoria Street v House of Fraser (Stores Management) Limited* [2012] Ch 497 Lord Neuberger MR observed at [68], in a case of a negotiated contract, that "*such rules are rarely if ever of any assistance when it comes to construing commercial contracts*" and that "*the words used, commercial sense, and the documentary and factual context are, and should be, normally enough to determine the meaning of a contractual provision*".

There are, however, observations in other cases that indicate that the principle may "*still sometimes be of assistance when construing a contract which is in the standard form of one of the parties";* per Neuberger LJ in *Taylor v River Droitte Music Ltd [2006] EWCA Civ 1300 at [142]* and per Lewison LJ in *SAS Institute Inc v World Programming Limited [2013] EWCA Civ 1482 at [108]* ("*…the licence agreement is offered on a take-it-or-leave-it basis…There is no room for negotiation. If there were any doubt about the meaning of the licence at this stage in my judgment the application of the contra proferentem principle would tip the balance in WPL's favour. In my judgment the judge was wrong to rule out the principle at an early stage in his analysis*").

In *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] BCC 388, 394 Lord Mustill observed that "*the basis of the contra proferentem principle is that a person, who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not*".

The rule has not so far featured in any of the authorities which consider whether a jurisdiction clause was exclusive or non-exclusive.

The rule invites a construction adverse to the *proferens* where the clause is ambiguous. It did not seem to the Court of Appeal that clause 23 is of that character. If that be too strong a view, it would, in the Court of Appeal's judgment, be necessary to assess whether, when the contract was made, a requirement of English

jurisdiction was more favourable to CSAV than a non exclusive clause: see the dissenting judgment of Cote J in the Canadian case of *Crawford v Morrow* [2004] ABCA 150 at [68-69] - cited with approval in *Lewison* on *The Interpretation of Contracts* (5th Ed) at 7.08 - where he said:

> "*... If the doctrine does apply, it tells the Court to select one of the two possible interpretations of the contract, the one less favourable to the party who drafted the contract.*
> *That refers to selecting one interpretation of the contract, not selecting one result of the suit. The proper interpretation of the contract must exist at the time it is made, and not change. It cannot come and go as the parties' fortunes wax and wane. It cannot be unknowable and shrouded in fog until after the event. For example one interprets an insurance contract the same way before and after a fire, and it has meaning before any fire*".

That assessment seemed to the Court of Appeal a very difficult task which admits of no clear answer, given that the circumstances of any putative litigation (both as to the identity of the claimant, the facts of the claim and the defence to it and the possible alternative jurisdiction) would be unknown. It would, also, beg the question as to what was meant by "favour" in this context. If the question is which court would be most likely to apply the relevant law correctly, the answer would be England. That characteristic would be of benefit to both parties. If the question was which court would be quicker, cheaper or involve the parties in less expense (e.g. in being represented and securing the availability of evidence) the answer might well be unclear, and differ according to whose interests were under consideration.

Hin-Pro submitted that CSAV, which introduced the clause, must have thought that it would be for its benefit. But it was unlikely to be of benefit to CSAV's customers unless they were based in England, and for small size customers litigation in England would be a very real and, quite possibly, major inconvenience. This would be particularly so if their claim was a modest one. Most claims would be likely to be against CSAV, which would probably not need to resort to litigation since freight would either be prepaid or, if it was not, they would have a lien for it.

In truth, as it seemed to the Court of Appeal, the clause binds and benefits both parties in the same or, at any rate, a similar way. The benefit of the clause is that it provides certainty and the selection of a court which will be neutral and which will be applying its own law. Whether in relation to any given claim the stipulation of English jurisdiction benefits one party or the other will depend on the nature of the case brought and by whom it is put forward. In some cases the shipper or person entitled to sue under the bills will be disadvantaged; in others it will be CSAV. Even if the preponderance of advantage (whether looked at in relation to the particular voyage the subject of an individual bill or in relation to the totality of voyages carried out by CSAV) is with CSAV, the Court of Appeal would not regard that as a good enough reason to treat the clause as non exclusive.

Seventh, whilst the Court of Appeal accepted (i) that authorities in relation to different provisions in different contracts are, at best a guide; (ii) that the result in other cases is of no binding force in relation to a different clause; and (iii) that the question is one of construction and nothing more, the tenor of English authorities is that an agreement to English law and jurisdiction in this form is likely to be interpreted as involving both the mandatory application of English law and the exclusive jurisdiction of the English court: see *The Alexandros T* [2012] 1 Lloyd's Rep 162 and the authorities there cited.

The Court of Appeal recognized that the suggestion in some of the authorities that an agreement to non-exclusive English jurisdiction is otiose if English law is agreed to apply, is misplaced. But the other considerations that have led to the result in earlier authorities are not; and the tendency to construing clauses such as the one in question as exclusive provides some confirmation of what view the reasonable businessman would take.

For the above reasons, the Court of Appeal would dismiss Hin-Pro's appeal.

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@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com