SUN MOBILITY
Insurance and Claims Services Limited
新移動保賠顧問有限公司

29 December 2021
Ref : Chans advice/248

To: Transport Industry Operators

US vs Singapore jurisdictions

The United States District Court (Southern District of New York) issued an order on 29 November 2021 to deny a shipping company's motion to rely on the Singapore jurisdiction clause in its bill of lading. [1:19-cv-5731-GHW-RWL]

On January 3, 2019, a fire broke out on board a container ship owned by Hapag-Lloyd ("Hapag"). Hapag's ship, the M/V Yantian Express (the "Vessel"), was in transit from Sri Lanka to Halifax, Nova Scotia and ports along the U.S. East Coast, including the Port of New York. Following the blaze, Hapag commenced the legal action in the U.S. seeking exoneration from, or limitation of, liability pursuant to the Limitation of Liability Act of 1851, 46 U.S.C. §§ 30501 *et seq.*, and Rule F of the Supplemental Rules For Admiralty Or Maritime Claims And Asset Forfeiture Actions, Federal Rules Of Civil Procedure. Hapag's filing sparked numerous third-party claims and counterclaims from the owners and insurers of the destroyed and damaged cargo (the "cargo claimants") and non-vessel-operating common carriers who were responsible to their customers for shipping certain containers on board the Vessel. Those parties filed claims for damages, indemnity, and/or contribution against Hapag and third-party defendants Ocean Network Express ("ONE") and Yang Ming Marine Transport.

Certain cargo claimants filed their initial Third-Party Complaint against ONE and others on December 24, 2019. On March 5, 2020, Zurich American Insurance filed a Third-Party Complaint against claimant Apex and others. Apex answered and crossclaimed against ONE on July 6, 2020.

ONE filed its bellwether motion on September 21, 2020 to dismiss claims governed by a forum selection clause in its standard bill of lading (the "Clause").

The law recognizes the significant value in permitting parties to a contract to litigate in their contractually preselected forum. And certainty is beneficial in commercial contracts. The Court acknowledged that, under the Supreme Court's holdings in *Atlantic Marine*, 571 U.S. at 63 and *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 17 (1972), a valid forum selection clause is given 'controlling weight in all but the most exceptional cases.

When a forum selection clause is at issue, a court need only determine (1) whether the forum selection clause is valid and (2) whether public interest factors nevertheless counsel against enforcement.

In *Phillips v. Audio Active, Ltd.*, 494 F.3d 378 (2d Cir. 2007), which predated *Atlantic Marine* by six years, the Second Circuit outlined a framework for how courts should analyze the validity of forum selection clauses. The *Phillips* court held the following:

> Determining whether to dismiss a claim based on a forum selection clause involves a four-part analysis. The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. The second step requires [the court] the classify the clause as mandatory or permissive . . . . Part three asks whether the claims and parties involved in the suit are subject to

> the forum selection clause. If the forum selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable.

The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching. In this fourth and final step a court must determine whether (1) [the forum-selection clause's] incorporation was the result of fraud or overreaching; (2) the law to be applied in the selected forum is fundamentally unfair; (3) enforcement contravenes strong public policy of the forum state; or (4) trial in the selected forum will be so difficult and inconvenient that the plaintiff effectively will be deprived of his day in court.

The Supreme Court has long held that, in the admiralty context, forum-selection clauses are prima facie valid and should be enforced unless the resisting party meets the heavy burden of showing that enforcement would be unreasonable under the circumstances.

The Court found that Clause satisfied the first three steps outlined in *Phillips* and was, therefore, presumptively enforceable. Nevertheless, the Court found that that Clause was unenforceable in the action in question because it was rendered null and void by COGSA and the public interest weighed against its enforcement. Fundamentally, Congress's will, as enacted by statute in COGSA, reflects public policy. If a contractual provision, such as the Clause, is anathema under COGSA, it is proper to conclude that the public interest weighs against its enforcement.

The Court found that the Clause was rendered null and void by § 3(8) of COGSA. Specifically, the Court reasoned that if the Clause were enforced, and the dispute was heard in the courts of Singapore, the Singapore High Court would apply a Singapore law that would limit ONE's liability beyond the limitations permitted by COGSA. Because the Clause had the effect of limiting liability beyond the scope permitted under COGSA, the Court concluded, § 3(8) of COGSA rendered the Clause void.

COGSA limits liability for certain parties while expressly voiding any provisions in a contract that would further limit liability. Section 4 of COGSA, titled "Rights and Immunities," creates the liability limitation. It states the following:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted into the bill of lading.

Section 3 of COGSA, which sets forth a carrier's duties and liabilities with respect to shipping and care of cargo and issuing bills of lading, renders null and void any terms of a contract that eliminate or lessen a carrier's liability. It states in relevant part the following:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect.

The parties agreed that if the Clause were enforced, the Singapore High Court would apply a Singapore law known as the 1976 Convention of Limitation of Liability for Maritime Claims (the "1976 Convention"), a limitation convention to which Singapore, but not the United States, is a party. The Singapore High Court would still apply COGSA as substantive law but would overlay the 1976 Convention—nominally as a matter of procedure. The effect of the application of the 1976 Convention is significant—using COGSA's limitation on liability, the plaintiffs' recovery could be approximately $75 million while application of the 1976 Convention would limit plaintiffs' recovery

to approximately $16.4 million.

Because the Singapore High Court would indisputably apply the 1976 Convention, the effect of the Clause is to reduce ONE's liability below that which is permitted under COGSA, and by a substantial amount. The Clause is, therefore, voided pursuant to Section 3(8) of COGSA, despite the fact that the Clause on its face deals with a procedural matter—namely, forum.

While the Clause does not on its face transgress § 3(8), it nevertheless is unenforceable because Singapore, as the exclusive forum, would apply the 1976 Limitation Convention, which would result in limiting ONE's liability to a sum lower than what it otherwise would be liable for under COGSA.

That the Clause is nominally procedural, however, does not remove it from the ambit of Section 3(8). The text of the statute does not distinguish amongst the means by which a contractual provision limits liability.

In *Sky Reefer* the Supreme Court made clear that a choice of forum clause that functioned, together with the applicable choice-of-law, as a prospective waiver of a party's rights to pursue statutory remedies would not be permitted. That the choice-of-forum clause is procedural in nature, rather than an express limitation on liability did not figure in the Court's analysis—what mattered was that it functioned as a prospective waiver of the party's rights to pursue statutory remedies.

Under the terms of the Clause, the applicable substantive law and the procedural law applied due to the Clause operated in tandem to limit the litigants' ability to recover to a greater degree than permitted under COGSA. While nominally procedural, the Clause, which brought with it the limitation on liability established in the 1976 Convention, functioned as a substantive limitation on recovery—precisely of the type that the Supreme Court would have little hesitation in condemning. Because the Clause was an effective limitation on liability, the Court found that it was rendered void by Section 3(8) of COGSA.

For the foregoing reasons, ONE's motion to dismiss was DENIED.

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

Simon Chan
Director
E-mail: simonchan@smicsl.com

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

23/F, Excel Centre, 483A Castle Peak Road, Lai Chi Kok, Kowloon, Hong Kong
香港九龍荔枝角青山道 483A 卓匯中心 23 樓 Tel: 2299 5566 Fax: 2866 7096
E-mail: gm@smicsl.com Website: www.sun-mobility.com
CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS
香 港 保 險 顧 問 聯 會 會 員