Inconsistent Bill of Lading Terms and Incorporating Charterparty Arbitration Clause

In the recent case of Golden Endurance Shipping SA v RMA Watanya SA and Others (The Golden Endurance) the English Commercial Court considered the correct forum to deal with claims from cargo receivers and their insurers where there was conflicting reference to different editions of the Congenbill form for Bills of Lading and, whether this was affected by the fact the charterparty had not been signed.

Facts

A cargo of 6489.95mt of wheat bran pellets was shipped on MV ‘Golden Endurance’ (‘the vessel’) to Morocco from three ports in Gabon (Owendo), Togo (Lomé) and Ghana (Takoradi) in June and July 2013. Three separate Bills of Lading (the “Owendo Bill”, the “Lomé Bill” and the “Takoradi Bill”) were issued providing for “freight payable as per charterparty dated 11 June 2013”. There was no signed charterparty.

The Lomé Bill of Lading referred on its face to the 1976 Congenbill but on the reverse it stated “To be used with charterparties Code Name ‘CONGENBILL’ Edition 1994”. The 1994 edition expressly incorporates the law and jurisdiction clause of the charterparty “dated as overleaf”. However, while both the 1978 and 1994 Editions of the Congenbill incorporate all terms and conditions of the charterparty “dated as overleaf”, the 1978 Edition does not contain an express reference to the law and jurisdiction of that charterparty. Both the Owendo and Takoradi Bills of Lading referred to the 1978 Edition on the front and reverse.

The cargo interests arrested the vessel at Casablanca for security for claims for damage to the cargo in the sum of US$1,010,713.32 and started substantive proceedings in the Casablanca Court. The vessel owners were unhappy at the length of delays and the unnecessary requirements which were being made in relation to the posting of security to release the vessel. As such, they applied and were granted leave by the English Court to serve an anti-suit injunction on the cargo interests against the Moroccan proceedings on the basis that English law and arbitration was the correct law and forum for the claims under the Bills of Lading. If claims under the Bills of Lading were decided in London the Hague Rules would apply, but if pursued in Morocco the Hamburg Rules would apply.

Judgment

The cargo interests sought to challenge the anti-suit injunction served on them on a number of grounds which for the purpose of this article were:

- That the reference to the Congenbill 1978 on the face of the Lomé Bill of Lading was to be preferred over the 1994 edition on the reverse and, that the law and jurisdiction provision in the charterparty were not incorporated into that Bill of Lading, and
- That no English law clause was incorporated into any of the Bills of Lading because the charterparty was not signed.

Congenbill 1978 or Congenbill 1994

Cargo interests relied on the House of Lords decision in “The Stars in” to support their position, namely that where there was inconsistency between the front and reverse sides of the Bill of Lading the words specifically chosen on the front should be preferred.

The Court noted that there was obviously a muddle by reference to the 1978 Edition on the front page of the Bills of Lading and the 1994 Edition on the reverse but adopted a purely business approach, and held that the terms were those as stated on the reverse of the bill, rather than those which were said to be incorporated by reference to a remark on the front. They took the view that the inconsistency would only become apparent to someone with knowledge of the difference in the terms. As a result, and in so far as the Lomé Bill of Lading, English law and arbitration was the appropriate forum in accordance with the terms of the charterparty.

Had the charterparty been concluded?

Cargo interests had also argued that there was no effective law and arbitration clause on the basis that the charterparty was unsigned and “uncertain and incomplete”, and relied on the fact that items such as banking details, the identity of the relevant underwriters and the estimated maximum cargo quantity were missing.

The Court was not persuaded. The terms of the charterparty had been concluded on the basis of an internal email from the fixing brokers attaching a standard form charterparty which clearly stated “fixtures (if any) is concluded with GSP owners”. In addition they accepted that for an English law clause to be incorporated, the charterparty had to be evidenced in writing which it clearly was.

Comment

Unsigned charterparties are not an unusual feature where fixtures are conducted via brokers and, to some extent, are a reflection of the speed at which negotiations during the fixing stage are concluded. However, this case is a stark reminder of the problems which can occur when there are conflicting references in a Bill of Lading. To avoid misunderstandings it is important to check that any express reference to terms and conditions on a Bill of Lading correspond with the version which appears on the reverse. Further, Owners would have been in a better position if Congenbill 1994 forms had been used for all three Bills of Lading because, at least if proceedings are started by cargo interests outside the EU, it might have been possible to obtain anti-suit injunctions from the English Courts if the Bills of Lading incorporate English law and jurisdiction.

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