SEA VENTURE

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1. Shipper's Liability for Unpaid Freight

Switch Bills and the Owners' Claims for Bill of Lading Freight: The "Illawarra Fortune

What is the status of bills of lading when "switch" bills are issued and how do courts look at claims by owners for bill of lading freight? Rohan Bray of Steamship Hong Kong discusses these issues in his new article.

2. Arbitration Agreements – draft them carefully

Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors [2020] EWCA Civ 574

It is important that an arbitration agreement is carefully drafted and includes an express choice of law provision – getting this right at the start avoids wasting time and costs as explained by Pushpa Pandya in her article below.

Shipper's Liability for Unpaid Freight

By Rohan Bray

A case in the New South Wales (Australia) Supreme Court earlier this year (Wollongong Coal Limited v PCL (Shipping) Pte Ltd [2020] NSWSC 184) examined two aspects of the carriage of goods on which the Club is frequently asked to comment: (a) the status of bills of lading when "switch" bills are issued; and (b) potential claims by owners for bill of lading freight.

Facts

PCL (Shipping) Pte Ltd ("PCL") had entered into a contract of affreightment as disponent owner with Gujarat NRE Coke Limited ("Gujarat India") to ship coking coal from Port Kembla, Australia, to India three times a year for 10 years. In 2013, in order to fulfil the first of these shipments, PCL used its time chartered (on standard NYPE terms) vessel the "Illawarra Fortune", establishing a charter chain consisting of Head Owner ("HO") → PCL (time charterer) → Gujarat India (voyage charterer).

Wollongong Coal Limited ("WCL") was an Australian coal mining company and subsidiary of Gujarat India, with whom it entered into coal sale contracts.

WCL was the shipper under a number of bills of lading issued for the carriage of coking coal under the voyage charter. These bills of lading ("the August bills") were on the Congenbill form and signed by agents on behalf of the master. The Consignee was "To Order" and the space provided to specify the charterparty to be incorporated into the bills was left blank.
The cargo was shipped in July 2013 and in August PCL issued an invoice for freight to WCL (NB.: It is not clear from the judgment whether PCL also made demands for charterparty freight from Gujarat India). The vessel arrived at the first discharge port in India on 10 September and a part payment of freight was made by WCL soon afterwards. By the time the vessel arrived at the second discharge port on 21 September, some US$3.2 million in freight was still outstanding.

WCL then requested that the August bills be replaced by switch bills, which were identical to the August bills, save that the identities of the shipper, consignee and notify party were to be changed. PCL agreed to this and, as a result, the August bills were surrendered at PCL's office and marked "Null & Void". A letter of indemnity was provided by Gujarat India to PCL, who in turn provided a LOI to HO. HO issued the switch bills in early October and these were released to the "new" shippers named on the switch bills, New Alloys Trading Pte Limited ("New Alloys"). Discharge of the remaining cargo followed shortly, and the voyage was completed on 9 October. The outstanding freight was never paid and this led to the legal proceedings in New South Wales.

"...any liability of WCL to pay freight to HO was extinguished by the cancellation of the August bills"

The Claim

The Court case concerned a direct claim by PCL against WCL for the US$3.2 million unpaid freight. There was no direct contract between these two parties, so PCL's claim was founded on a legal assignment it had obtained from HO, of a claim based on the bill of lading contracts between HO as carrier, and WCL as shipper. No details are provided in the judgment as to whether any action had been taken by PCL against Gujarat India under the voyage charter, but it seems reasonable to assume that trying to recover substantial freight by legal means from a company based in India might prove more daunting than attempting to make an equivalent recovery from an Australian company through an Australian forum.

Put simply, PCL's claim could only succeed if WCL had remained liable throughout to HO for the payment of freight under the August bills. WCL's main defence was that once those bills had been cancelled as a precursor to the issuing of the switch bills, any obligation it might previously have had to pay the freight was extinguished. However, if this "cancellation" argument failed, WCL's secondary defence was that they never had an obligation at all to pay freight under the August bills. There were also minor claims by PCL, as assignee from

the Head Owner, for demurrage, dead-freight, bunker adjustment and port costs; here again, if WCL's obligations under the August bills had been extinguished then any liability for these items would also fall away.

The Decision

On the principal question the judge, Stevenson J, found in favour of WCL and held that the cancellation of the original bills extinguished any liability that WCL might otherwise have had to pay freight to HO. He said that the issuing of the switch bills constituted a novation of the contract of carriage, meaning that the three parties involved (viz. HO, WCL and New Alloys) had agreed to substitute New Alloys for WCL as the original shipper. The effect of this was that the obligations imposed on New Alloys were identical to those previously imposed on WCL, including the obligation to pay freight to the carrier "as per charter party" (following the wording on the face of all the bills of lading). Accordingly, the judge said (at §53):

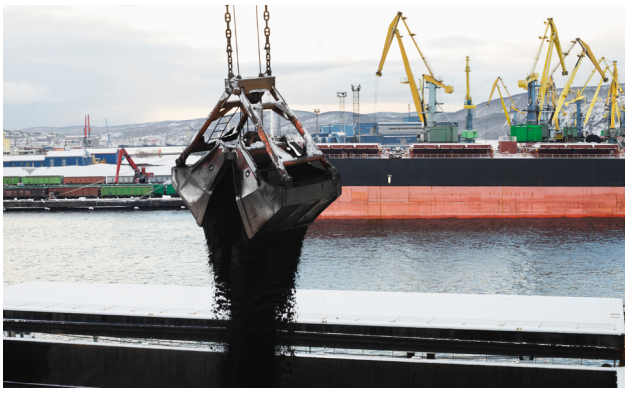
> *"the parties intended to substitute the Switch Bills for the August Bills, rather than preserve WCL's obligations under the August Bills as well as imposing an identical obligation on New Alloys under the Switch Bills."*

He speculated that the commercial reason for this being agreed by HO and PCL was perhaps that Gujarat India had failed to pay freight under the voyage charter, and the novation brought about the possibility of imposing that obligation on another party (viz. New Alloys), which was the holder of the bills of lading at the time, and therefore may have had an interest in ensuring the discharge of the coal. Whatever the case, the judge was quite definite in his view that any liability of WCL to pay freight to HO was extinguished by the cancellation of the August bills and their substitution by the switch bills.That would have been sufficient to dispose of the case, but Stevenson J also remarked on the question of whether WCL had ever owed an obligation to pay freight to HO under the August bills. On the basis that all parties agreed the words "Freight payable as per charter party" on the face of the bills of lading referred to the voyage charter, the judge said:

A. It is not the case that these words should be construed as meaning only that freight is payable by the person liable to pay freight under the voyage charter (ie. Gujarat India in this case). There is a common law obligation on a shipper to pay freight for the carriage of goods and, moreover, he cited (at §70) several English cases which have held that these words:

   i. amount to a direction by the carrier to the shipper as to how it is to comply with the obligation to pay the bill of lading freight;

   ii. effect a delegation by the owner to the party payable under the voyage charter (PCL in this case) of the "manner or mode"



   of collecting the freight; and

   iii. constitute an appointment of the delegated party as the owner's agent for that purpose, whose receipt binds the shipowner.

B. Following the English Court of Appeal decision in *The Bulk Chile* (*Dry Bulk Handy Holding Inc & Anor v Fayette International Holdings Limited & Anor* [2013] EWCA Civ 184), a head owner's right to demand freight from the shipper is separate and distinct from its right to lien sub-freights. The latter is dependent on there being a default in the payment of hire or charter party freight by a time or voyage charterer, and PCL were not in default here. The fact that the Head Owner would not itself suffer a loss if it wasn't paid the freight is irrelevant: it is purely the exercise by the owner of an entitlement to freight under a contract of carriage, which is not contingent on any default or other event. Of course, if the owner is not out of pocket and does receive the freight, it is understood that it must account for any excess to another party or parties (eg. the time charterer).

   Accordingly, had the August bills not been cancelled, the judge would have found that freight due from WCL under those bills would have been payable directly to HO, and therefore to PCL as assignee.

Shipper's Liability for Unpaid Freight

By Rohan Bray

Regarding the minor claims for demurrage, dead-freight, bunker adjustment and port costs, PCL accepted that the sums claimed could not be viewed as falling within the definition of "freight" so as to make them payable under the "freight payable"

obligation on the face of the bills. However, it was said that payment obligations arose due to the incorporation of the voyage charter terms into the contract of carriage by virtue of the standard term on the reverse side of the Congenbill (viz. "All terms and conditions, liabilities and exceptions of the [voyage charter] are herewith incorporated."). On that point the judge cited the requirement, often stated in English cases (eg. *Thomas v Portsea* [1912] AC 1; *The Annefield* [1971] 1 LLR 1; *The Varenna* [1983] 2 LLR 592) and textbooks (eg. *Voyage Charters*, 4th edn, §18.50; Aikens et al., *Bills Of Lading*, 2nd edn, §7.89-7.92), that only clauses in the charterparty which are "directly germane to the subject matter of the bill of lading" (eg. to the shipment, carriage and delivery of the cargo) can be incorporated into the contract of carriage, provided also that this can be achieved without excessive manipulation of the words used (in practice, often whether "shipper"
can be substituted for "charterer"). With that in mind, and dealing with each claim in turn:

C. Demurrage. Whilst demurrage *per se* is "directly germane" to the carriage of goods, the judge considered that the time at which the vessel would arrive at the load and discharge ports would be beyond the control of a party who, like WCL, was purely a shipper. As such, it would not have been the intention of the parties to make WCL liable for demurrage and, therefore, inappropriate to substitute "shipper" for "charterer" in the incorporated voyage charter.

D. Dead-freight. The voyage charter in question contained no provision for the payment of dead-freight. That being the case, any obligation on WCL to pay dead-freight could not have arisen under the bills of lading and PCL, as assignee of rights under those bills, could not make a recovery from WCL.

E. Bunker Adjustment. The Voyage Charter required Gujarat India to pay an increased freight if fuel costs increased. This was considered an "incident of freight" and WCL would be liable to pay it for the same reasons as it would be required to pay freight.

F. Port Costs. As there was no provision in the Voyage Charter for payment of port costs by the voyage charterer, these could not be claimed from WCL.

Concluding Remarks

The NSW Supreme Court is a "Superior Court" in the Australian judicial hierarchy and therefore its decisions should have persuasive effect in other common law jurisdictions. The analysis of the means by which a Head Owner can demand payment of freight from shippers under bills of lading followed English authority closely, and in any event this aspect, and the minor claims, were not necessary for the judge to reach his final decision on the case (ie. "*obiter dicta*" and therefore of less importance). However, the conclusions reached regarding the cancellation of the August bills and reissuing of switch bills, and how this amounts to a novation of the contract of carriage, may prove notable given the prevalence of this practice in commercial shipping.

For another recent case examining a shipper's liability under bills of lading see "Why the shipper was not the shipper" https://www.steamshipmutual.com/publications/Articles/why-the-shipper-was-not-the-shipper082020.htm

If you have any questions about the article please email Rohan.Bray@simsl.com

Arbitration Agreements – draft them carefully

By Pushpa Pandya

When parties to a contract agree to submit future disputes to arbitration it is important that the arbitration agreement (AA) is carefully drafted and includes an express choice of law provision. This is especially important when drafting contracts with different choice of laws governing the main agreement and any arbitration provision. If the parties do not wish the law governing the contract to be the law governing the AA, they must make this express. Getting it right at the outset of the relationship avoids wasted time and costs if, or when, later there is a dispute.

The majority decision of the Supreme Court establishes the leading authority on the correct approach under English law to determine the proper law of an AA and the role of courts of the seat in granting anti suit injunctions.

> *"...the Supreme Court establishes the leading authority on the correct approach under English law to determine the proper law of an AA"*

The facts of the claim were that Enka, a Turkish construction and engineering company was one of many subcontractors working on the construction of power plants in Russia for Unipro. The subcontract contained an AA which provided that all disputes arising from or in connection with the subcontract were to be resolved by arbitration seated in London, England, under the Rules of Arbitration of the International Chamber of Commerce (ICC). The subcontract was executed in both Russian and English and provided that the Russian language version was to prevail in case of inconsistency or conflict. Both the subcontract and the AA were silent in relation to the governing law.

Following a fire at the plant, Unipro made a claim and received from its insurers, Chubb Insurance Group, approximately USD400 million for the damage caused by the fire.

The insurers, as the subrogated party, sought

recovery of their losses from Enka on the basis that the fire was caused by defects in Enka's work. The insurers commenced proceedings in Russia.

Enka applied to the English High Court for an injunction to restrain the insurers from continuing the Russian proceedings which they claimed should be stayed in favour of arbitration under ICC rules in London. Enka argued that the arbitration clause was governed by English law, the law of the seat of the arbitration.

The insurers argued that the injunction should not be granted because they claimed the contract was governed by Russian law and this extended to arbitration clause, the claim in tort rather than under the contract, fell outside the scope of the arbitration clause under Russian law, and as matter of comity and discretion the High court should defer to the Russian courts to determine the scope of the arbitration clause.

At first instance, the judge dismissed Enka's application and refused to grant the anti-suit injunction. The application was dismissed mainly on *fourum conveniens* grounds that the Russian courts were the more appropriate forum to determine the governing law and the scope of the arbitration clause and its impact on the claim in Russia. Enka appealed.

The Court of Appeal allowed the appeal and held that there was nothing to suggest an express choice of Russian law as the governing law of the contract

and/or the AA. The parties had chosen London to be the seat of arbitration indicating that the parties intended the governing law of the AA to be English

law and that the Russian court proceedings were brought in breach of the AA.

The insurers appealed to the Supreme Court which upheld the Court of Appeal's decision but for different reasons.

The correct approach to determine the governing law of an AA

The governing law of an arbitration clause will be relevant whenever a jurisdictional issue arises in connection with an arbitration (actual or prospective) as this will turn on the validity and scope of the clause. The English courts may be required to rule on such jurisdictional issues not only in the context of anti-suit relief but also (a) when granting other injunctive relief under s44 of the Arbitration Act 1996 (the applicant must show a prima facie case on the merits, including jurisdiction) (b) when determining a challenge to an award on jurisdictional grounds under s67 of 1996 Act and (c) where a party brings proceedings in English courts in breach of an arbitration clause and the other party applies to stay those proceedings under s9 of the 1996 Act.

The principles summarised by the Supreme court to determine the law applicable to AA are:

1. Apply the three-stage test required by English common law conflict of laws rules: (i) is there an express choice of law for the AA? (ii) if not, is there an implied choice of law? (iii) if not, with what system of law does the AA have its closest and most real connection?
2. The contract is to be interpretated as a whole in deciding whether the parties have agreed on a choice of law to govern the AA and the contract which contains it.
3. Where the law applicable to the AA is not specified, a choice of governing law for the contract will generally apply to an AA which forms part of the contract. This general rule "encourages legal certainty, consistency and coherence while avoiding complexity and artificiality."
4. The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the AA.
5. Additional factors which may however, negate such inference and may in some cases imply that the AA was intended to be governed by the law of the seat are (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration will also be treated as governed by the that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the AA would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.
6. Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the AA) is intended to be governed by the law of that place.
7. In the absence of any choice of law to govern the AA, the AA is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations. This default rule is justified because a) the seat is where the arbitration is to be performed (legally if not physically) attracts the greatest weight as a connecting factor; b) this approach is consistent with both legislative policy and international law c) the rule is likely to uphold the reasonable expectations of the parties who have chosen to settle their disputes by arbitration in a specified place

without choosing the law to govern their contract and d) provides legal certainty allowing parties easily to predict which law, in the absence of choice, the English Courts will apply.Applying these principles, the majority of the Supreme Court held that the contract in this case contained no choice of law intended to govern the contract or the AA within it. In this case, the validity and scope of the AA is governed by the law of the chosen seat of arbitration as the law with which the dispute resolution is closely connected. The seat of arbitration is London. Therefore, the Supreme Court upheld the Court of Appeal's decision that English law governs the AA.

"...the validity and scope of the AA is governed by the law of the chosen seat of arbitration"

The role of the court of the seat of arbitration and *forum conveniens*

The choice of seat is made by choosing the "place" of arbitration usually by words such as arbitration is to "be in" or to "take place in" the specified place, for example, London. This is a choice of seat rather than a venue. The significance of the choice of seat is not only a practical one as to where the hearing or deliberations of the tribunal will be held but a legal one that is relevant to the law governing the arbitration proceedings. The choice of seat also determines where the award is made for the purposes of enforcement as governed by the New York Convention In this case questions of *forum conveniens* did not arise because the English court, as the court of seat, was an appropriate court to grant an antisuit injunction. It follows therefore, that in choosing a London seat the parties confer a supervisory jurisdiction on the English Courts which includes the power to grant an anti-suit relief.

Comments

The Supreme Court has established a general rule and a default rule for determining the law applicable to the AA. It confirms that by choosing London as the seat of the arbitration, parties can be confident that the English courts will have full supervisory powers, including the power to grant anti-suit relief to stop foreign proceeding brought in breach of the AA which makes England an attractive choice of an arbitral seat.

If you have any questions about the article please email
pushpa.pandya@simsl.com