Please do not remove
this slip from the book

4 The ADLRJ [1995]

Canada Packers

Singapore 2

For these reasons, therefore, I am quite satisfied that the arbitration clause in the assembly sub-contract has been incorporated into the contract between the parties before me and, in those circumstances, I have no discretion other than to grant a stay of these proceedings, pursuant to the terms of article 8 of the Model Law.

As to costs, I propose to make a costs order nisi in favour of the defendant, who has been successful in the application for a stay of proceedings."

For the plaintiff: *Mr J. Scott* (instructed by Bateson Starr).
For the defendant: *Mr M. Thomas Q.C.* and *Mr G. Law* (instructed by Kwok & Chu).

Owners of Cargo Lately Laden on Board the Ship or Vessel "Dai Yun Shan" v. Owners of and Other Persons Interested in the Ship or Vessel "Dai Yun Shan"

Singapore: High Court of Singapore, Admiralty Division, Goh Joon Seng J., 2 March 1992.

Contract—arbitration/choice of forum clause—action in rem—application to stay proceedings—whether a dispute that had to be referred to arbitration under the Arbitration (Foreign Awards) Act, s.4—application for security for costs—whether a step in the proceedings

Facts:

The plaintiffs shipped cargo on board the Dai Yun Shan ("the vessel") from Singapore to a port in China. On arrival, the cargo was released by the defendants' agent against a copy, rather than the original, of the bill of lading and a letter of indemnity. The bill of lading provided for all disputes arising under or in connection with it would be determined by Chinese law in the courts of, or by arbitration in China. The plaintiffs were not paid for the cargo and commenced proceedings *in rem* against the defendants, the owners of the vessel.

The defendants applied, *inter alia*, for a stay pending reference to the courts of, or arbitration in China. Prior to the hearing of their application, the defendants applied for security for their costs of the application for a stay. Subsequently a stay was granted on terms that the defendants provide security. The plaintiffs appealed against the stay on the grounds that there was no dispute as to the defendants' liability by releasing cargo without production of the bill of lading and that by applying for security for costs the defendants had taken a step in the proceedings. The defendants cross appealed against the conditions attached to the stay.

Held:

The appeal and the cross-appeal would be dismissed. So long as a claim was not admitted, there was a dispute for the purposes of s.2 of the Arbitration (Foreign Awards) Act and the court had to order a stay although it might impose conditions. But the clause relied on gave the plaintiffs the option of proceeding in either the courts, or by way of arbitration in China. In consequence, there was no requirement that the dispute be referred to arbitration and the Act did not apply.

Nevertheless, a stay would be granted as the applicable law was the law of China, the evidence of misdelivery was in China, the parties had agreed to have all disputes determined in China and there was no evidence that the defendants were seeking a procedural advantage. Neither did the defendants' application for security for costs amount to a step in the proceedings as this was limited to the costs of the application for a stay.

The judgment of the court reads as follows:

WWW.NEWYORKCONVENTION.ORG

"The plaintiffs, Canada Packers Inc., are a foreign company having their principal place of business at 3080 Yonge Street, Toronto, Canada. The plaintiffs have a representative office in Singapore at 10 Beach Road #32-04, Shaw Towers, Singapore 0718. They were, at all material times, the shippers and holders of the bill of lading No. H/1 relating to 4,210 drums of Red Palm Olein ('the cargo') shipped on board the '*Dai Yan Shan*' ('the vessel') for carriage from Singapore to the port of Huangpu, Guangzhou, China. The defendants are the Fujian Shipping Co., a state-owned company in the People's Republic of China. The consignee under the bill of lading was 'To order', and the party to notify was Man Shui (Macau) Co. Ltd ('Man Shui').

The vessel left Singapore with the cargo on board on 7 January 1990 and arrived at Huangpu on or about 11 January 1990. Upon its arrival, the cargo was discharged into the warehouses of the Huangpu Harbour Authority.

On 13 January 1990 a representative of Man Shui presented a copy of the bill of lading to the ship's agent, the China Ocean Shipping Agency ('Penavico') with a letter of indemnity in favour of Penavico against liability for delivery of the cargo to Man Shui, or its order, prior to presentation of the original bill of lading. Penavico, as agent of the defendants, accepted the indemnity and chopped 'as delivery order' on the copy bill of lading in the hands of Man Shui. The said copy bill of lading thus became a delivery order. On or about 15 January 1990, the said copy bill of lading was presented to the Huangpu Harbour Authority and the cargo was then released to another party, the Shanxi Provincial Cereal Oil and Foodstuffs Import and Export Corp.

The plaintiffs have to date not received payment in full for the cargo. Accordingly, they commenced these proceedings *in rem* against the defendants, owners of the vessel on 6 March 1990.

Upon being served with the writ herein on 9 March 1990, the defendants entered conditional appearance on 10 March 1990 without prejudice to an application to, *inter alia*, stay all proceedings. On 22 March 1990 the defendants filed the application for stay in Summons-in-Chambers No. 1603 of 1990.

Pending the hearing of the application in SIC No. 1603 of 1990, the defendants filed an application in Summons-in-Chambers No. 5906 of 1990 for, *inter alia*, the following orders:

> (i) The plaintiffs provide security for the defendants' costs of the defendants' summons-in-chambers entered No. 1603 of 1990 in the sum of $10,000 or such other sums as the court may order by way of a banker's guarantee within seven (7) days, without prejudice to the defendants' rights to apply for further security if there is an appeal from the defendants' said application.
> (ii) In default of prayer 1, the plaintiffs' action be stayed.

The application for costs was heard by the assistant registrar who, by order of court dated 26 October 1990, ordered as follows:

> (1) The plaintiffs provide security for the defendants' costs of the action only up to the stage of the defendants' summons-in-chambers entered No. 1603 of 1990 in the sum of $5,000 . . . ;
> (2) In default of prayer 1, the plaintiffs' action be stayed.

The application for stay was heard by the senior assistant registrar who, on 26 November 1990, so far as is material, ordered as follows:

> (1) All proceedings in this action be stayed.
> (2) In default of prayer 1, this action be dismissed.
> (3)(a) The defendants are to provide the plaintiffs within 14 days hereof with security of a sum in the same amount as the bail bond filed herein by way of a composite bank guarantee in the form of the draft submitted by the plaintiffs as amended by the senior assistant registrar. Upon the provision of the said composite bank guarantee, the bail bond filed herein on 9 March 1990 is to stand cancelled and the surety released from all obligations therein;
> (3)(b) In default of (a) the bail bond filed herein on 9 March 1990 shall remain on file and the defendants are to provide the plaintiffs within a further 14 days of the default in (a) with security in the same amount as the bail bond filed herein on terms to be agreed between the parties failing which on terms to the satisfaction of the senior assistant registrar.
> (4) The defendants refrain from raising time bar as a defence to the plaintiffs' claim in arbitration or in the court of the People's Republic of China provided the plaintiffs commence arbitration or court proceedings in the People's Republic of China within five months hereof.
> (5) The stay in prayer 1 is conditional upon the defendants complying with prayers 3 and 4.

WWW.NEWYORKCONVENTION.ORG

Please do not remove
this slip from the book

The plaintiffs thereupon filed their notice of appeal on 3 December 1990 against the order of the senior assistant registrar. The defendants, on the same day, filed their notice of cross-appeal against the conditions of stay in prayer 3(a) and (b) set out above.

The appeals came up for hearing before me. The defendants' application is for stay pending arbitration in the People's Republic of China, or pending reference to the courts of the People's Republic of China and forum non conveniens. It is not in dispute that the claim is within the admiralty jurisdiction of the High Court. But the defendants rely on cl. 2 of the bill of lading which reads:

> 'Jurisdiction: All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of, or by arbitration in, the People's Republic of China.'

It is contended on behalf of the plaintiffs that on the authority of *Sze Hai Tong Bank Ltd* v. *Rambler Cycle Co. Ltd*[1] ('*Rambler's* case'), there cannot be any 'dispute' on the liability on the part of the defendants herein for releasing the cargo without production of the bill of lading. In *Rambler's* case the Privy Council held that a shipowner who delivered without production of the bill of lading did so at their peril. The Privy Council held that in delivering goods without production of the bill of lading to a person who to their knowledge was other than one entitled under the bill of lading to receive them, the carrier was liable for breach of contract and conversion, and the carrier could not rely on exception cl. 2(c) of the bill of lading under which the liability of the carrier should be deemed to cease absolutely after the cargo was discharged from the vessel.

But so long as the claim is not admitted, a dispute exists. Lord Saville in *Hayter* v. *Nelson Home Insurance Co.*,[2] citing Templeman JC in *Ellerine Bros* v. *Klinger*,[3] said, at p. 268:

> As Templeman LJ put it (at 1383): 'There is a dispute until the defendant admits that the sum is due and payable.'
>
> In my judgment in this context neither the word 'disputes' nor the word 'differences' is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right, and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

In the matter before me, all disputes are to be determined according to Chinese law. The opinions of lawyers of Chinese law obtained by each party differ on the liability of the defendant. Hence a dispute exists between the parties hereto.

The first question therefore is whether the dispute is one required to be referred to arbitration under the Arbitration (Foreign Awards) Act (Cap. 10A) ('the Act'). Section 4 of the Act reads:

> (1) This section shall apply in relation to every arbitration agreement—
>
> (a) which provides, expressly or by implication, for arbitration in any State other than Singapore; or
>
> (b) to which there is, at the time the legal proceedings under subsection (2) are commenced, at least one party who is a national of, or habitually resident in, any State other than Singapore.
>
> (2) Where—
>
> (a) any party to an arbitration agreement to which this section applies institutes any legal proceedings in any court in Singapore against any other party to the agreement; and
>
> (b) the proceedings involve the determination of a dispute between the parties in respect of any matter which is required, in pursuance of the agreement, to be referred to, and which is capable of settlement by, arbitration,
>
> any party to the agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.
>
> (3) . . . the court to which an application has been made in accordance with subsection (2) shall make an order, upon such conditions or terms as it thinks fit, staying the proceedings or, as the case may be,

1. [1959] 3 W.L.R. 214.
2. [1990] 2 Lloyd's Rep. 265.
3. [1982] 1 W.L.R. 1375.

WWW.NEWYORKCONVENTION.ORG

> so much of the proceedings as involves the determination of the dispute and which refers the parties to arbitration in respect of the dispute in accordance with the arbitration agreement.

If the arbitration agreement in cl. 2 of the bill of lading falls within s.4 of the Act, then the court *shall make an order* of stay but may impose conditions. Since under cl. 2 the plaintiffs have a choice of either proceeding to arbitration in China or prosecuting their claim in the Chinese courts, it is my view that the dispute is not one that is required to be referred to arbitration. Therefore the Act does not apply.

I turn now to the jurisdiction clause requiring all disputes arising under or in connection with the bill of lading to be determined by Chinese law in the courts of the People's Republic of China. In *The Eleftheria*[4] the plaintiff's plywood was shipped on the *Eleftheria* at Galatz (Rumania) for carriage to Hull under a bill of lading. Clause 3 of the bill of lading provided:

> Jurisdiction. Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply. . . .

Clause 16(c) provided that should it appear, *inter alia*, that labour troubles would prevent the vessel from reaching or entering the port of discharge, the master may discharge the cargo at the port of loading or any other safe and convenient port. Pursuant to cl. 16(c), the vessel discharged the cargo at Rotterdam. The plaintiffs, by an action *in rem*, sought to recover from the defendants the costs of on-carriage from Rotterdam to Hull. The defendants, whose head office was at Athens, Greece, applied for stay of the plaintiffs' action, contending that the parties had agreed to submit to the courts of Greece. Brandon J. stayed the proceedings. At p. 242, Brandon J. summarised the principles of law governing an application for stay based on such 'jurisdiction' clause:

> The principles established by the authorities can, I think, be summarized as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In *Amerex Timbers Pte Ltd* v. *Chatsworth Timber Corp. Pte Ltd*[5] the barge L2600 carrying a cargo of Ramin logs from Indonesia to Singapore and towed by the tug Jeddy X was grounded in Indonesia waters. The logs were found to be damaged by sea water. The owners of the cargo commenced an admiralty action *in rem* against the owners of the barge L2600, the owners of the tug Jeddy X and against the third defendants *in personam* as the persons who issued the two bills of lading. The third defendants applied for a stay, relying on cl. 28 of the bills of lading which read:

> Jurisdiction. All actions under this contract be brought before the court at Djakarta and no other court shall have jurisdiction with regard to any such action unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto.

In delivering the judgment of the Court of Appeal, Kulasekaram J., at pp. 181–182, said:

> The law concerning an application for a stay is clear. Where a plaintiff sues in Singapore in breach of an agreement to submit their disputes to a foreign court, and the defendant applies for a stay, the Singapore court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The court in exercising its discretion should grant the stay and give

4. [1970] P. 94.
5. M.L.R.

WWW.NEWYORKCONVENTION.ORG

Please do not remove
this slip from the book

effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words, the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court may have regard to the following matters, where they arise:

(a) in what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts;
(b) whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects;
(c) with what country either party is connected and if so, how closely;
(d) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages;
(e) whether the plaintiffs would be prejudiced by having to sue in the foreign country because they would—
    (i) be deprived of security for their claim;
    (ii) be unable to enforce judgment obtained;
    (iii) be faced with a time bar not applicable here; or
    (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In *The Asian Plutus*,[6] by a bill of lading issued by them, the defendants acknowledged shipment on board their vessel *Asian Plutus* of four boxes containing a lathe machine for carriage from Kobe to Singapore. When the boxes were unstuffed the machine was found to be seriously damaged. The plaintiffs commenced an action *in rem* in Singapore against the vessel. Clause 2 of the bill of lading provided that the bill of lading shall be governed by the International Carriage of Goods by Sea Act 1957 of Japan. Clause 3 of the bill of lading provided that the contract evidenced by or contained in the bill of lading shall be governed by Japanese law and any action against the carrier thereunder shall be brought before the Tokyo district court in Japan. On the application of the defendants, the registrar ordered a stay on conditions:

(1) that the defendants provide security acceptable to all parties to the plaintiffs' action to be brought in the Tokyo district court in Japan;
(2) that the defendants refrain from raising time bar as a defence in the action in the Tokyo district court if the plaintiffs commence action there within four months; and
(3) that the defendants appoint a firm of solicitors to accept service of process in the proceedings to be commenced in the Tokyo district court.

The plaintiffs appealed against the registrar's order. Applying the principles enunciated in *The Eleftheria* and *Amerco Timbers Pte Ltd* v. *Chatsworth Timber Corp. Pte Ltd*, Yong Pung How J., as he then was, dismissed the appeal. At p. 455 the learned judge stated:

> Whether to grant a stay or not is a matter for the discretion of the court. In my judgment, this was a dispute which the parties had expressly agreed under the bill of lading should be decided by the Tokyo district court, and decided in accordance with Japanese law. The choice of Japanese law tied to the choice of a Japanese court as the selected forum are strong factors in upholding the jurisdiction clause. The parties are therefore bound by the jurisdiction clause in the bill of lading to which they have agreed unless exceptional circumstances amounting to strong cause to the contrary can be shown.

In the matter before me, the applicable law is the law of China, the evidence of misdelivery is in China, the parties have agreed to all disputes being determined in courts of China. There is no evidence that the defendants are seeking a procedural advantage. The appeal by the plaintiffs and the cross-appeal by the defendants are therefore dismissed with costs. The registrar's order as regards prayer 4 is varied to the effect that the plaintiffs are to commence arbitration or court proceedings in the People's Republic of China within five months from the date hereof.

6. M.L.R.

WWW.NEWYORKCONVENTION.ORG