

## **Jurisdiction Clauses and Who Is the Carrier: Part II**

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In August, 1997 in this column, Gary Wharton wrote about the decision of the Federal Court Trial Division in *Jian Sheng Co. Ltd. v M.V. Trans Aspiration*. That decision was the result of an appeal from the Prothonotary's order that denied the shipowner's application for a stay of proceedings based on a jurisdiction clause in the bill of lading. The Trial Division allowed the shipowner's appeal and ordered a stay of the Canadian proceedings in favour of Hong Kong. The decision was important for the treatment of the issue regarding the identity of the carrier, and the validity of the particular jurisdiction clause commonly found in ocean bills of lading.

The Federal Court of Appeal recently set aside the decision of the Trial Division and restored the order of the Prothonotary to deny a stay of proceedings. The facts of the case and the decisions of the lower courts will be briefly reviewed before discussing the judgment of the Court of Appeal.

The facts of the case are that a transportation broker, on behalf of the shipper, booked space, through an agent, for 2,300 to 2,500 MFBM of lumber cargo on the M.V. Trans Aspiration for carriage from Nanaimo to Taiwan. A liner Bill of Lading, in standard form, was issued in favour of Taipei Business Bank with the Plaintiff, Jian Sheng Co. Ltd. of Taiwan being the party to be notified. The agent signed the Bill of Lading as "Agents only for the Carrier: Trans Aspiration."

Approximately one quarter of the whole cargo of package lumber, constituting a substantial portion of that which was carried on deck, was lost overboard during the voyage. The Plaintiff filed a statement of claim against the shipowner and agent for loss and damage to the lumber. The Defendant shipowner filed a motion for a stay of proceedings in favour of Hong Kong pursuant to the jurisdiction clause in the Bill of Lading.

The Bill of Lading had two significant clauses which read as follows:

### 3. 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 except as provided elsewhere herein.

### 17. IDENTITY OF CARRIER

The contract evidenced by the Bill of Lading is between the merchant and the owner of the vessel named herein (or substitute) and it is therefore agreed that said shipowner only shall be liable for any damage or loss due to any breach of non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the carrier and or bailee of the goods shipped hereunder, all limitations of, and exonerations from liability provided for by law or by this Bill of Lading shall be available to such other. It is further understood and agreed that as the Line, Company or Agent who has executed this Bill of Lading for and on behalf of the master is not a principal in the transaction, said Line, Company or Agent shall not be under any liability arising out of the Contract of Carriage nor as carrier nor bailee of the goods.

#### **Decision of the Prothonotary**

The Prothonotary denied a stay of proceedings on the basis that the jurisdiction clause in the Bill of Lading on which the Plaintiff relied was void for uncertainty. The Prothonotary, upon reviewing the facts and terms of the identity of the carrier clause in the Bill of Lading, found that they did not disclose the identity of the carrier and therefore the jurisdiction clause was void for uncertainty. The Prothonotary found that the agent might be either the carrier or a carrier. He found support for this finding in the comments of Professor Tetley in his text, *Marine Cargo Claims*, which states that notwithstanding any identity of carrier clauses, the shipowner and the charterer, if any, are jointly and severally responsible as carriers:

“Carriage of goods is effectively a joint venture of owners and charterers (except in the case of a bareboat charter) and, consequently, they should be held jointly and severally responsible as carriers.”

The shipowner appealed the decision to the Federal Court Trial Division.

#### **Decision of the Motion Judge of the Trial Division**

The Motion Judge agreed with counsel for the shipowner that Professor Tetley’s general statement must be rejected.

The Motion Judge relied on two Supreme Court of Canada decisions to find that there can be no joint venture between the owner of a vessel and its charterer unless there is an express undertaking on the charterer's part to this effect. The Motion Judge also held that the jurisdiction clause in the Bill of Lading is not void for uncertainty.

The Motion Judge agreed that the Bill of Lading is a standard liner Bill of Lading with the ship designated on the face of the document. The Bill of Lading states that the master of the vessel has signed the original Bills of Lading and sets out the master's name. The agent signed as "Agents only for the carrier: Trans Aspiration." Under the identity of carrier clause it followed that the Defendant shipowner is the carrier. Consequently, only the owner of the vessel remains the carrier for the shipper.

The Court then found that the shipowner had proved the location of its "principal place of business" with evidence that 100 percent of its business was conducted from Hong Kong. The Court noted that this was no surprise to the Plaintiff as the Plaintiff expressly recognized in its statement of claim that the shipowner had its principal place of business in Hong Kong.

The Motion Judge found that the Defendant, having established a *prima facie* case that there ought to be a stay of the proceedings pursuant to the jurisdiction clause in the Bill of Lading, then decided that the Plaintiff had not discharged the onus of demonstrating that there were special circumstances which militated in favour of the Court exercising its discretion to not grant the stay. The Court weighed the factors enunciated in *The Eleftheria*, including that the Plaintiff did not explain or demonstrate why Hong Kong would not be an appropriate forum; the Plaintiff's place of business was in Taiwan, closer to Hong Kong than to Vancouver; the vessel's officers and crew were nationals from either Hong Kong or China; other witnesses were also in Taiwan; Hong Kong courts can deal with questions of conflicts of law and the application of foreign law; and there was no evidence that the Defendant was seeking some juridical advantage or that the Plaintiff would somehow be prejudiced by a stay of the Canadian proceedings.

The Plaintiff appealed the decision of the Trial Division to the Federal Court of Appeal.

### **Decision of the Court of Appeal**

The issue before the Federal Court of Appeal was whether the standard jurisdiction clause in

question is void for uncertainty as a matter of principle, or, if not, whether it is void for uncertainty in the circumstances of this case.

The Court found that there was no ambiguity in the jurisdiction clause and it meant precisely what it says. Its application will in each case be a question of fact. The Court determined that who is the carrier and what is its principal place of business are information which often do not appear expressly in bills of lading and are to be determined, with respect to the identify of the carrier, by the terms of the contract and with respect to the location of the principal place of business, by the circumstances of the case. The fact that there may be unnamed parties, unnamed vessels and unidentified principal places of business in bills of lading is no cause for finding that an uncertainty such as to invalidate bills of lading.

The Court was deferential to the long standing law and commercial practice regarding the standard clause:

“We are dealing with standard clauses which have been applied for ages in the industry and by the courts .... Such is the law freely adhered to by the parties. It is too late in the day to question a practice that has acquired its letters patent of nobility in anglo-canadian law and usage.”

If the application of the jurisdiction clause in certain circumstances gives rise to too much uncertainty, the relief is not to declare the clause invalid but for the court to exercise its discretion not to enforce it. Therefore, the jurisdiction clause in principle was not invalid for uncertainty and the Court held that it “should apply it as being the law of the parties, the law of the trade, the law of the land and the law of anglo-canadian courts.”

The Court having held that the jurisdiction clause was not void for uncertainty as a matter of principle, it then considered whether the jurisdiction clause is void for uncertainty in the circumstances in this case.

The Court held that the defendant has the burden of persuading the court that the conditions of application of the clause have been met. Once the Court is satisfied that the clause applies, the burden of proof then shifts to the plaintiff to show sufficiently strong reason to support the conclusion that it would not be reasonable or just in the circumstances to keep the plaintiff to the terms of the contract.

The defendant must show that it is the carrier. The defendant must then show where its principal place of business is. The evidence provided must be convincing. The Court of Appeal stated that if the court is left in doubt as to the identity of the carrier or as to the location of the carrier's principal place of business, it ought not go to the second step of the process and it ought deny the stay forthwith.

Regarding the identity of the carrier, the Court of Appeal stated that in shipowners' bills of lading, there is a presumption that the shipowner is the carrier. In charterers' bills of lading, the presumption is that the demise charterer is the carrier. Any other can be the carrier only where the above presumptions have been rebutted, and such rebuttal occurs only when there is evidence that such other has actually assumed the role of carrier under the contract of carriage with the shipper. Counsel for the Plaintiff suggested there could be more than one carrier, one being the shipowner, the other being an alleged demise charter or an alleged time charterer who would have assumed the role of carrier. Counsel relied on the decision of Reed J. in the *Lara S.* Reed J. had adopted the comments of Professor Tetley noted above. The Court of Appeal held that the implicit joint venture concept is incompatible with the gist of decisions of the Supreme Court of Canada and the Federal Court of Appeal. The Court agreed with the recent judgment in *Union Carbide Corp. v. Fednav Ltd.*, where Nadon J. stated:

“The position of the learned authors appears to be that in circumstances where the charterer will be liable on the contract of carriage, the shipowner will not. I agree with this point of view. A charterer will issue and sign a bill of lading either on his own behalf or on behalf of the master. Where he signs on behalf of the master, and is so authorized, the shipowner will be bound by the issuance of the bills of lading but not the charterer. Where the charterer issues and signs bills of lading on his own behalf, he shall be bound by those bills. Consequently, in most cases, the word “or” in article 1(a) of the Hague Rules will mean exactly that. The carrier shall either be the owner or the charterer, but not both. I need not discuss a situation where a charterer issues and signs a bill of lading on behalf of the master and on his own behalf. That is certainly not the situation in the present case.”

To determine the location of the principal place of business, the Court adopted the stringent test set out in the recent decision of the English Court of Appeal in *The “Rewia”*. The principal place of business is the place at which the business of the company is controlled and managed, or the place with the real business centre from which the governing and directing minds of the

company operated, regulating and controlling its important affairs. The Court stated that the test is a demanding one, imposing on the Defendant an obligation to come forward with as much information as possible, even more so because such information is totally within its control and generally not available to the Plaintiff.

In the circumstances of the present case, the Court noted the jurisdiction clause and also the identity of carrier clause in the Bill of Lading. Regarding the identity of the carrier, the Court agreed with the Motion Judge that the Prothonotary erred in relying on Professor Tetley's joint venture principle. The Court appreciated the Prothonotary's concern as to the identity of the carrier, but the Court would not have denied the motion for a stay on the sole basis that there was no proof of the identity of the carrier. The terms of the Bill of Lading could not lead one to conclude that the agent had assumed as principal the role of carrier. It is true that by signing as "Agents only for Carrier: Trans Aspiration", the agent left open the possibility that it was not acting as agent for the shipowner, but as agent for an unknown demise charter. However, the identity of carrier clause indicates that the Bill of Lading is intended to be a shipowners' bill of lading and that the contract evidenced by the Bill of Lading is one between the owner of the cargo and the owner of the vessel. That clause in effect establishes a rebuttable presumption that the shipowner is the carrier.

The Court did not make a definite finding as to the identity of the carrier in the circumstances of the case because of the Court's conclusion that the Defendant had failed to establish that its principal place of business was in Hong Kong and the jurisdiction clause could therefore not be found to be applicable. The Court stated that the Defendant had not filed affidavit evidence bearing the signature of its officers or its employees. The Defendant's evidence was an affidavit of an employee of the manager that provided evidence of the carrier's principal place of business. There was no evidence before the Court regarding the names of the officers and where the control over the employees and the business was exercised.

Therefore, in allowing the appeal, the Court of Appeal decided that the Prothonotary had erred in relying on Professor Tetley's comments, and the Trial Division had erred in misconstruing the test in *The "Rewia"* in failing to appreciate how stringent that test is for providing information to

the Court regarding its principal place of business. The result was that the Court of Appeal set aside the decision of the Trial Division and restored the order denying the stay of proceedings.

The Court of Appeal decision is important for the following reasons:

1. it confirms that this standard form jurisdiction clause is valid and should be applied as a being the law of the parties, the law of the trade, the law of the land, and the law of anglo-canadian courts;
2. it clarifies the issue of the identity of the carrier in bills of lading and rejects the concept that owners and charterers are jointly responsible as carriers;
3. it establishes a stringent test for a party adducing evidence of its principal place of business when seeking a stay of proceedings on the basis of a jurisdiction clause in a bill of lading.

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