SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

London arbitration's anti-suit injunction

The English High Court issued a Judgment on 15/5/2015 maintaining an anti-suit injunction to restrain the Xiamen Maritime Court's legal proceedings in breach of a London arbitration agreement. [Case No: 2015-515], [2015 WL 2238741], [2015 EWHC 1974 COMM]

In November 2013 a cargo of 55,000 metric tonnes of nickel ore ("the Cargo") was loaded on board the vessel M/V Anna Bo ("the Vessel") in Indonesia for carriage to China. The cargo was shipped on board the vessel pursuant to a CONGEN bill of lading dated 28/11/2013. It was consigned "To The Order" and named Tsingshan Holding as the notifying party. The bill of lading stated on its face "Freight payable as per CHARTER-PARTY dated 11/04/13" and included the following term on its reverse:

> "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

The charterparty referred to on the face of the Bill of Lading was a time charterparty concluded on an amended NYPE 1946 form dated 11/4/2013 between the shipowner and AMC Shipping as charterers ("the Charterparty"). The Charterparty included, in relevant part, the following clauses:

> "17. Bimco Arbitration Clause to apply — as per Clause 93 — with English Law and arbitration in London …. Any dispute arising out of this Charter Party and from the issuing of Bill of Lading shall be referred to arbitration in London and English law to apply.
>
> …
>
> 19. … Furthermore all Bills of Lading issued under this Charter Party are to incorporate the Arbitration Clause and English Law.
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> CLAUSE 93 ARBITRATION CLAUSE
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> ANY DISPUTE ARISING UNDER THE CHARTER TO BE REFERRED TO ARBITRATION IN LONDON IN ACCORDANCE WITH THE LMAA RULES IN FORCE AT THE TIME OF COMMENCEMENT OF ARBITRATION …. ENGLISH LAW TO APPLY"

On 3/12/2013, a few days after departure from the loadport, the Vessel developed a starboard list. It was subsequently discovered that the Cargo had liquefied and the Vessel proceeded to a safe anchorage in the Philippines. Salvage services were engaged and the shipowner declared general average by reason of the incident. In due course Tsingshan Holding took delivery of the Cargo and sold it to a third party. Transhipment costs of approximately $1.2 million were allegedly incurred in respect of the onward sale of the Cargo.

On 24/6/2014 the shipowner commenced arbitration proceedings against charterers seeking damages for breach of the Charterparty and/or indemnity in respect of the charterers' loading of dangerous cargo.

On 30/10/2014 the shipowner also commenced arbitration proceedings against Tsingshan Holding under the bill of lading, notifying Tsingshan Holding it had appointed Mr Brown as arbitrator in respect of all claims arising out of the carriage of the Cargo under the bill of lading and invited Tsingshan Holding to appoint its own arbitrator. On 19/11/2014 Tsingshan Holding informed the shipowner that it had appointed Mr Aston as its arbitrator in respect of disputes between the shipowner and Tsingshan Holding under the bill of lading, reserving Tsingshan Holding's position as to the jurisdiction of the tribunal so appointed. A third arbitrator had yet to be appointed. No further steps were taken in the London arbitration.

On about 3/3/2015 the Vessel's managing agents received, via ordinary post at their address in Greece, official Chinese court papers and documents from the Xiamen Maritime Court in China. These papers, when translated, showed Tsingshan Holding had commenced court proceedings against the shipowner in that court seeking damages or an indemnity in respect of the transhipment costs together with any General Average contribution and Tsingshan Holding's portion of the salvage fees. On 17/3/2015 the managing agents wrote to the Chinese court returning the papers served upon them and informing the court they were not authorised to accept service of any official court papers on behalf of the shipowner.

The shipowner issued this arbitration claim form on 21/4/2015 seeking to restrain Tsingshan Holding from litigating matters under the bill of lading otherwise than in London arbitration. The shipowner also sought an interim anti-suit injunction, which was granted by Blair J on 24/4/2015 restraining Tsingshan Holding from pursuing proceedings against the shipowner before the Xiamen Maritime Court in China or otherwise than by arbitration in London. Blair J also granted permission to serve Tsingshan Holding out of the jurisdiction and by way of alternative service.

In the legal proceedings in question, Tsingshan Holding opposed the continuation of the injunction on three grounds. The first raised arguments concerning the incorporation of the Charterparty and the arbitration clause contained therein. The second challenged the jurisdiction of the court to grant an anti-suit injunction in the case in question, the contention being that the conditions set out in s44 of the Arbitration Act 1996 had to be satisfied even if an injunction was in fact granted under section 37 of the Senior Courts Act 1981, it being asserted that the conditions of section 44 were not met in the case in question. And thirdly, it was contended that there were strong reasons not to grant the order as a matter of discretion even if the arbitration clause was to be treated as incorporated and the court did otherwise have jurisdiction.

Turning first to the question of incorporation, Tsingshan Holding confined its submission to a contention that there was doubt as to the Charterparty's incorporation so that the court should not regard the position as sufficiently certain as to justify the grant of an anti-suit injunction. Tsingshan Holding accepted that the bill of lading referred to the incorporation of a charterparty dated 11/4/2013 and further purported to incorporate all terms and conditions of the charterparty "dated as overleaf", including the law and arbitration clause therein. It submitted, however, that it was arguable that, on a true construction, the reference to a charterparty dated 11/4/2013 should not be read as referring to the time charterparty of that date but to a voyage charterparty of 28/11/2013, which was not referred to expressly anywhere in the bill of lading. In support of that contention Tsingshan Holding referred to the fact that the bill of lading referred to freight being payable as per the specified charterparty, whereas a time charterparty such as the 11/4/2013 Charterparty provided for payment of hire rather than freight. It referred to The SLS Everest [1981] 2 Lloyds Rep 389 , in which the Court of Appeal held that, where reference to a charterparty in a bill of lading was left blank, it was readily to be inferred that a voyage charterparty was intended to be incorporated. Lord Denning MR referred at page 392 to a note in *Scrutton on Charterparties* , which says:

> "The position is less clear where it is a time charter, the terms of which are in many respects inapposite for the carriage of goods on a voyage. The court might well hesitate to hold the consignee liable for, say, unpaid time hire charter."

It is clear, however, that there is no bar to the court finding that a time charterparty is incorporated by reference in a bill of lading, for example in The "Duden" [2009] 1 Lloyd's Rep 145. Mr Jonathan Hirst QC, sitting as a judge of the High Court, stated as follows:

> "The bills of lading expressly provided that all terms and conditions, liberties and exceptions of the Charter Party dated 28 September 2005 'including the Law and Arbitration Clause' were incorporated. The charterparty was a time charter rather than a voyage charter, so hire rather than freight would be payable. There can be no doubt that the parties intended the terms of the time charterparty (to which the sellers Capezzana were party) to be incorporated in the bill of lading contracts. The express reference to the arbitration clause would be sufficient to incorporate a charter party arbitration clause, even if it required a degree of manipulation … "

Tsingshan Holding did not therefore suggest that it was impossible to incorporate a time charterparty such as the 11/4/2013 charterparty, but suggested that there was a sufficient degree of uncertainty that

the court might be persuaded to find that, on a true construction, the parties intended to refer to a voyage charter party instead.

In the Judge's judgement the reference in the case in question to the charterparty of 11/4/2013 was entirely clear and unambiguous. As it is accepted that there is nothing impermissible or necessarily irreconcilable about the incorporation of the terms of a time charter, the Judge saw no reason to doubt that the time charterparty of 11/4/2013 was incorporated as per the express terms of the bill of lading and the Judge did not accept Tsingshan Holding's suggestion that this should be approached as a matter which was in doubt. The shipowner was entitled to rely upon the express terms of the bill of lading as incorporating the Charterparty there referred to. The Judge was therefore satisfied that the London arbitration clause in the 11/4/2013 Charterparty was effectively incorporated, as indeed was Blair J.

On the second ground, the question of jurisdiction, in v AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC [2013] 1 WLR 1889 SC , the question arose as to whether the court had jurisdiction under section 37 to grant an anti-suit injunction where no actual or intended arbitration was in view. Lord Mance JSC, with whom all other members of the court agreed, held in paragraph 43 that:

> "…the court's powers listed in section 44 are exercisable only 'for the purposes of and in relation to arbitral proceedings' and depend upon such proceedings being on foot or 'proposed': see section 44(3). That alone is sufficient in my opinion to lead to a conclusion that section 44 has no bearing on the question whether section 37 empowers the court to restrain the commencement or continuation of foreign proceedings in the light of an arbitration agreement under which neither party wishes to commence an arbitration."

Lord Mance went on to make further observations as to the inter-relationship between s37 of the Senior Courts Act and s44 of the Arbitration Act. At paragraph 48 he stated that:

> "The reference in section 44(2)(e) to the granting of an interim injunction was not intended either to exclude the Court's general power to act under section 37 of the 1981 Act in circumstances outside the scope of section 44 of the 1996 Act or to duplicate part of the general power contained in section 37 of the 1981 Act. Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement — whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed — the source of the power to grant such an injunction is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act. Such an injunction is not 'for the purposes of and in relation to arbitral proceedings', but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed."

That reasoning, that the power to grant an anti-suit injunction to enforce a negative promise comes from s37 as opposed to s44 , was a complete answer to Tsingshan Holding's contention. Lord Mance's analysis is the most powerful and persuasive reasoning. Further, the conclusion that an anti-suit injunction is not for the purposes of and in relation to arbitral proceedings but for the purposes of enforcing the negative promise contained in the arbitration agreement not to bring foreign proceedings was, in the Judge's judgement, irresistible. The Judge was satisfied that he had jurisdiction under s37 to continue the anti-suit injunction.

The primary question which arose, given that arbitrators had been appointed, was whether the case was one of urgency. Tsingshan Holding argued that, given that a period of some two months passed between notification that Chinese proceedings had been commenced and the shipowner making its application for an injunction, it could not be said to be a situation of urgency. Whilst there was some force in that submission, it was equally the case that the urgency arose from what might happen in the near future, namely the continuation of the pursuit of the Chinese proceedings rather than what had happened so far. The Judge agreed with the reasoning of Blair J that the situation was urgent because the Chinese proceedings might be pursued if an injunction was not urgently granted.

The Judge was satisfied that the court had jurisdiction to grant an anti-suit injunction in the case in question.

The final ground advanced by Tsingshan Holding was the alleged existence of strong reasons why an injunction should not be granted. The primary factor upon which Tsingshan Holding relied in this regard was the fact that Tsingshan Holding had an outstanding claim in China against insurers under an

insurance contract which was subject to Chinese law and arbitration in the China Maritime Arbitration Commission. Tsingshan Holding contended that, if it was restrained from continuing proceedings against the shipowner in China, that would seriously prejudice its insurance claim in China, in particular because the insurance policy, by Clause 16.1, required Tsingshan Holding to take such measures as might be reasonable for the purpose of averting or minimising such loss.

The question arose as to why any difficulties which Tsingshan Holding might have with its separate relationship with an insurer in China should be regarded as a strong reason not to enforce the shipowner's contractual rights not to be sued other than by way of London arbitration. Insurance contracts and proceedings thereunder were typically regarded as *res inter alios acta* : in other words, matters which were not relevant to the relationship between the shipowner and Tsingshan Holding. Even if pursuing arbitration in London did deprive Tsingshan Holding of certain rights against the shipowner, it was clear that that would not be a reason not to grant an anti-suit injunction (see in that regard *Raphael on the Anti-suit Injunction*, paragraph 820, and the decision in Beazley v Horizon Offshore Contractors Inc [2005] 1 Lloyd's Rep IR 231 at 237–238). The position, in the Judge's judgement, was even stronger where the right or interest which Tsingshan Holding might lose was against a third party and was not something for which the shipowner was responsible or otherwise interested. The Judge did not regard Tsingshan Holding's insurance claim in China as a strong reason not to grant an anti-suit injunction.

The Judge dealt briefly with the other factors which Tsingshan Holding said might amount to strong reasons for not granting an anti-suit injunction. The first was Tsingshan Holding asserted that damages would be a sufficient remedy for the shipowner, as the only concern the shipowner had raised, Tsingshan Holding suggested, was that the shipowner would be exposed to the costs of the Chinese proceedings. In the Judge's judgement, that was an unfair reading of the shipowner's first statement where, although the shopowner did refer to the fact that the shipowner would be forced to incur costs in China, the shipowner also referred to the fact it would lose its right to be sued through arbitration under the bill of lading if proceedings were allowed to continue in China. It is well recognised that a claimant is entitled to enforce their contractual rights to be sued in the agreed forum and that damages are not an adequate remedy for the loss of that right (see, in particular, The "Alexandros T" [2008] 1 Lloyd's Rep 230 per Cooke J at 233, paragraph 12).

The next suggestion was that the application was not made promptly. In the Judge's judgement, there was no force in this submission. The application was made before any steps were taken in the Chinese proceedings by the shipowner and, even if was not made urgently, in the sense of within a matter of days, it was in the Judge's judgement made sufficiently promptly and there was no reason to refuse the injunction on the grounds of delay.

Finally, Tsingshan Holding made a point that it was Tsingshan Holding who was the innocent party in this dispute, being the party who suffered the loss following the problems with the Cargo. The Judge failed to understand the import of this submission. Issues of which party was in the right or the wrong were obviously matters for determination in the arbitration, and the fact that Tsingshan Holding claimed to be the aggrieved party was by no means unusual and was certainly not a strong reason for refusing an anti-suit injunction.

For all these reasons the Judge was satisfied it was appropriate to continue this anti-suit injunction. The Judge agreed with the reasons which were given by Blair J on the without notice hearing.

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

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