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#### CONTRACTS AND JURISDICTIONS – EVALUATING OPTIONS

London lawyers are invariably consulted when there is a problem involving London arbitration or English jurisdiction. While it is often in the lawyers' short term selfish interests to conduct cases in England the first consideration in any new case should be to consider if determining the case in England is best and most beneficial to clients. There can often be a large number of factors and reasons why another jurisdiction might be preferred or might be advantageous.

When preparing the talk I went into some detail in relation to various matters but then found that my talk, instead of some 15 minutes as the organisers had requested, would have taken much longer. A full copy of my original talk is available so the work is not wasted but I will seek to try and give you an overview.

Although the subject of the talk is “contracts and jurisdictions” I will say a few words initially about claims in tort – as you are all probably well aware, a tort is a civil claim not based on contract and usually involves a claim of negligence or breach of a non-contractual duty.

If the claim is in tort then conflicting jurisdictions can apply different rules and different criteria. English law provides that the general rule is that the applicable law of a tort is the law of the country in which the events constituting the tort occurred. Where elements of those events occur in different countries the applicable law under the general rule is to be taken as being the law of the country where the property was when it was damaged. The legislation goes on to provide that if there are significant factors connecting the tort with a particular country then the general rule is displaced in favour of the law of that other country.

In the Tropical Reefer the English courts recently had to consider a case of a Cyprus registered vessel carrying cargo from Ecuador to Germany on bills of lading providing for English law and subject to a mortgage which was also subject to English law and where the vessel was arrested in Panama by the mortgagee bank. After considerable argument the court concluded that the critical events - arrest and loss of the cargo - all happened in Panama, where the bank availed itself of a judicial procedure which caused loss to the cargo owner. The court held the factors in that case established a close connection

with Panama and that these factors were of considerably greater significance than adopting the law of the ship's flag would have led to certainty.

The Court also very recently considered another case involving a collision between a vessel and a marker buoy which caused damage to a North Sea oilfield. The shipowners accepted that the damage was caused by the negligence of the ship and they commenced an action in England under the 1976 Convention for Limitation of Liability for Maritime Claims – that is a limitation action. The owners of the oilfield commenced an action in Texas claiming damages and the reason for this was because the limitation fund in Texas was many times greater than in England – the owners of the oilfield also applied to strike out the English proceedings whereas the shipowners applied to the English courts for summary judgement. The High Court held that it had jurisdiction and allowed the shipowners to limit liability but it refused Owners an anti-suit injunction. The Court of Appeal upheld this decision and found that there was nothing in the Convention restricting the right to limit in any way. However, because this was not a claim in contract the Court of Appeal declined to grant the sought for anti-suit injunction in respect of the Texas proceedings. This case, The Western Regent, shows the importance of considering the most adventurous jurisdiction and commencing proceedings promptly.

Turning to claims in contract, these are far more usual and far more common and if the dispute is subject to London arbitration then by the 1996 Arbitration Act London arbitrators now have jurisdiction to determine their own jurisdiction and section 30 provides that unless otherwise agreed by the parties, the arbitral tribunal have power to and shall decide if there is a valid arbitration agreement and also to determine what matters have been submitted to arbitration in accordance with the arbitration. Any such ruling may be challenged by appeal or review.

The Arbitration Act makes it clear that any objection that the arbitral tribunal lacks substantive jurisdiction must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction. A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

There is the possibility of an appeal to the courts to determine as a preliminary point any questions as to the substantive jurisdiction of the arbitrators but if a party to arbitral proceedings takes part in, or continues to take part in the proceedings they can lose the right to appeal to the courts. Subject to this point as to losing a right to appeal to the court, the court will only consider an application if there agreement of all parties or with the permission of the tribunal and if the court is satisfied that it will produce substantial costs savings and there is good reason why the matter should be decided by the court.

The Arbitration Act needs careful consideration but it is clear that if one party wishes to dispute or to challenge the jurisdiction of the arbitrators then the first essential step is that the party must raise objection without delay and certainly before taking any steps in the proceedings to contest the merits. The point

must be referred to and determined by the arbitrators and it is only once that remedy has been exhausted that the party may apply to the court. An appeal from a decision by the court is only possible if it involves a point of law of general importance or there is some other special reason why it should be considered by the Court of Appeal.

The position under English law in relation to an arbitration clause was recently considered by the Court of Appeal in Fiona Trust v Privalov & Others. The background to that case is that some eight charterparties had been concluded by Sovcomflot with companies which the shipowners said had been procured by bribery. The shipowners maintained that the eight charterparties had been validly rescinded by reason of bribery and they commenced proceedings in the High Court seeking damages for conspiracy and payment of profits. The Charterers commenced London arbitration proceedings asking the arbitrators to determine the effectiveness of the shipowners' rescission of the charterparties. Owners responded saying that the charterparties (and thus the arbitration agreements) had been rescinded by reason of the bribery. Clearly, one side saw tactical benefits and advantages of arbitration whereas the other saw benefits and advantages to litigation.

The High Court allowed the Owners court proceedings to continue and stayed the arbitration proceedings. However, the Court of Appeal reversed this and held that the issue of whether the charterparties had been rescinded for bribery came within the arbitration clause. The Court of Appeal said that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The Court of Appeal went on to say that a dispute whether a contract could be set aside for alleged bribery was within the arbitration clause and was different from a dispute as to whether there was ever a contract at all. An arbitration clause was, the court said, a separate contract which survived the destruction or other termination of the main contract and it was only if the arbitration agreement itself was directly impeached for some specific reason that the tribunal would be prevented from deciding the disputes that related to the main contract.

The Fiona Trust case involved an argument whether it was to be London arbitrators or the High court which was to determine a dispute between two parties. A far more usual scenario is where there is a contract between two parties which contains (or is alleged to contain) an agreement that disputes be determined in accordance with one jurisdiction (in particular in England) but in breach of the agreement proceedings are commenced in a different jurisdiction.

The High Court expressed a very clear view last year in The Kallang which involved the alleged shortlanding of some 3,000 bags of cargo in Senegal. The cargo was carried under bills of lading which incorporated a charterparty which in turn contained an English law and London arbitration clause. Receivers' insurers demanded substantial security and maintained that the arbitration provision did not apply because they were not a party to the bill of lading contract. The shipowners' insurers offered to provide a letter of undertaking on the usual club terms subject to English law and London arbitration. The vessel was arrested and receivers' insurers insisted on a bank

guarantee subject to Senegalese jurisdiction while the shipowners' insurers were only prepared to provide a letter of undertaking on the usual club terms subject to English law and London arbitration. There was thus stalemate!

Shipowners made an urgent application to the English Commercial Court which granted the shipowners an anti-suit injunction. A club letter was provided but receivers then sought to set aside the anti-suit injunction. The court held that it would not have restrained the receivers from applying for the arrest of the vessel in order to obtain security for their claim in Senegal if no adequate security had been forthcoming - such an approach by the English Court would have been perfectly consistent with the principle that it was for the arresting court to decide on the appropriate nature of the security. The court said that the shipowners' insurers letter was clearly adequate and reasonable security and the receivers conduct in contending for security provisions that would bring about a situation where the London arbitration clause was frustrated amounted not only to a breach of implied terms of the arbitration clause but also it amounted to oppressive conduct. Accordingly, the Court declined to discharge the anti-suit injunction.

Thus the court in that case, The Kallang, took prompt and active steps to give effect to the agreements reached between the parties.

A similar result was achieved in The Hornbay, again last year, and there a printing machine was being carried from Germany to Colombia on deck contrary to instructions. As a result of inclement weather the cargo became a constructive total loss and the cargo was landed at Le Havre. The bill of lading contained an exclusive jurisdiction provision providing for disputes to be referred to England. The cargo insurers commenced proceedings in Colombia. The German shipowners brought proceedings in England against the receivers and their insurers seeking an anti-suit injunction in respect of the Colombian proceedings and the receivers brought a cross application challenging the English court's jurisdiction.

The Court said that it was dealing with a commercially experienced company, with a commercially aware insurance company involved, who must be assumed to understand that contracts of international carriage by sea often contained jurisdiction and choice of law clauses as well as applying international rules. The court went on to say, looking at the matter dispassionately, that the receivers had entered into a contract, by which they were bound, with a choice of law and jurisdiction clause in it and there was no reason why they should be heard to say that their consent was not real or genuine or was not given. The mere fact that by agreeing an English law jurisdiction clause and an English law clause the defendants offended Colombian public policy was not of itself a good reason for holding that their consent to the jurisdiction clause was not truly given or that it would be unfair or unreasonable to hold them to their bargain, whatever system of law was applied.

As is clear, the English courts are prepared to adopt an approach so that parties are held to the bargain and to the agreement they reached. However, the result of such an application to the English courts is by no means

a foregone conclusion as is clear from a dispute between two insurers in The Hari Blum. A Finnish shipowner became insolvent and was struck off the register and cargo insurers who were subrogated to a claim brought proceedings in Finland against the shipowners' insurers seeking to rely upon a Finnish provision which gave them a direct right against the shipowners' insurers. The shipowners' insurers contested the jurisdiction of the Finnish Court and issued proceedings in England seeking an injunction to restrain them from pursuing their claim in Finland because of the arbitration agreement between the parties. While the English proceedings were going on the Finnish Court rejected the shipowners challenge to its jurisdiction, holding that it had jurisdiction.

The Court of Appeal held that the claim under the Finnish Act was a claim under the contract to enforce the obligations of the shipowners' insurers so that the shipowners' insurers could as a matter of English law rely on the arbitration clause in their rules. While the court held that shipowners insurers was entitled to a declaration that the cargo insurers were bound to refer any claims against the shipowners insurers to arbitration in accordance with their rules it declined to grant an injunction restraining the cargo insurers from pursuing a claim under the Finnish Act in Finland.

The English courts will take a commercial and not a pedantic or over legalistic approach to jurisdiction and this is clear from The Epsilon Rosa. The parties had been negotiating to fix a vessel and included a London arbitration provision. A bill of lading was issued on the Congenbill form but, as is so often the case, the box on the front with the details of the charterparty had not been filled in. The reverse contained the usual provision reading "All the terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated".

There was a cargo claim and cargo claimants commenced proceedings in Szczecin and the shipowners complained and commenced London arbitration proceedings. There were three issues which came before the English courts, a) whether there was a valid charterparty, b) whether the bill of lading incorporated the charterparty's London arbitration clause and c) whether the shipowners were entitled to an anti-suit injunction to restrain cargo interests from proceeding with its claim against the shipowners in Poland. The Court of Appeal held that there was a valid charterparty and that it should be apparent to any holder of the bill of lading that all the terms of the contract were not contained in that document and that the other terms were to be found in the related charterparty. The court said that the clear intention was to refer to the contract under which the vessel was to carry the goods and whilst the omission of the date on the face of the bill was not fatal, no one could infer from that that the parties to the bill had not intended to incorporate the terms of the charter. Court of Appeal held that cargo interests had not shown sufficiently strong reasons to displace the shipowners' entitlement to enforce the contractual bargain that there should be arbitration in London.

The importance of considering the actual documents was made clear in The Michael S where that vessel was chartered under a trip time charter containing a London arbitration clause. The insurers of the endorsees and

receivers of a cargo of sulphur alleged that the cargo had been damaged during the course of carriage between Abu Dhabi and Nanjing as a result of the unseaworthiness of the vessel. The insurers brought a subrogated claim against the shipowners in the Wuhan Maritime Court, China. The shipowners brought an application before the English courts for an anti-suit injunction restraining the cargo insurers from pursuing the proceedings in China, on the basis that the contract of carriage contained an agreement to refer all disputes to London arbitration and the contract contained an express choice of English law by reason of the incorporation of the arbitration clause in the charterparty. Again a Congenbill of lading form had been used. There was an issue as to whether it was the 1978 or the 1994 Congenbill form and in the event the court held that the wording of the particular bills of lading did not incorporate the arbitration clause from the charterparty.

While the outcome of that claim depended to a great extent upon its own facts it does make clear the importance of ensuring that the correct documents are used and it highlights the dangers if the incorrect documents are used.

In a very recent case the very experienced commercial judge started his judgement saying that the case "is, without doubt, the most unusual arbitration dispute I have ever encountered, either personally or in the law reports". The claim was only identified as A v B and it involved a clearly very acrimonious dispute between family members which involved allegations of fraud and breaches of trust. Many tens of millions were involved and in 2004 the parties agreed the wording of an arbitration agreement and this provided that it was governed by Swiss law and provided for the seat of arbitration to be in Geneva. Matters deteriorated and A commenced proceedings in England and he included an application for an injunction against B who was a solicitor and also the arbitrator under the arbitration agreement seeking to restrain him from taking any steps as arbitrator. B in turn applied to stay the court action. The court took the view that the purpose of the English proceedings had as their object the avoidance of the arbitration agreement and the setting aside of the arbitration orders already made by B in his capacity as arbitrator. Looking at the matter as a whole the court considered that the principal object or focus of the English proceedings was designed to impugn the validity or existence of the arbitration agreement and the jurisdiction of the arbitrator. The court held that there was no strong reason for it to intervene and directed that the dispute should be determined by arbitration in Switzerland as the parties had agreed.

In a subsequent and very interesting hearing in relation to the same claim the court held that if it could be established by a successful application for a stay or an anti-suit injunction as a remedy for a breach of an arbitration or jurisdiction clause that the breach had caused the innocent party reasonably to incur legal costs then those costs should normally be recoverable on an indemnity basis. This is thus a real incentive for a party not to break a jurisdiction provision.

The Owners of the vessel Athena entered the vessel through brokers and agents with the Hellenic Mutual War Risk Association (Bermuda) Ltd in 1992 and

cover was offered "in accordance with the rules and bye-laws of the Association". Details of the "rates and terms" were provided and the certificate of entry referred to "the Rules of the Association for the time being in force". The cover was renewed annually but in 1997 the vessel sustained damage from an explosion said to have been caused by Tamil Tigers when the vessel was at Trincomalee. The claim was presented on the basis that there was no right to recover under the insurance because Sri Lanka had been declared an "Additional Premium Area" (APA) and the shipowners, had failed to give proper notice of the fact that it was going to Sri Lanka. The Association decided, in the exercise of its discretion, to make a payment of up to US\$3.4 million to the shipowners but the shipowners claimed a further US\$3.5 million and brought proceedings against the Association in Greece and in New York.

A stay of the New York proceedings was granted in favour of London arbitration. In the London arbitration shipowners contended that the arbitration provision had not been incorporated into the insurance contract because it had not been specifically referred to and because the shipowners were unaware of it or they said that the provision was not an exclusive jurisdiction clause in favour of the English courts. The arbitrators held that the arbitration provision was incorporated into the insurance and that it did constitute an exclusive jurisdiction clause. The court upheld this saying that arbitration clauses could be incorporated by the use of general words.

A particularly interesting development is the House of Lords decision in The Front Comor where the vessel collided with Charterers oil jetty in Syracuse causing damage in excess of US\$15,000,000. Charterers' insurers commenced proceedings in Sicily relying upon their rights of subrogation under the Italian Civil Code and the shipowners commenced proceedings in England on the basis that the claim arose out of the charterparty which contained a London arbitration provision and the Owners claimed an anti-suit injunction. The High Court upheld the shipowners' argument and granted the anti-suit injunction. The case skipped over the Court of Appeal and was heard by the House of Lords who said that the appeal raised the question of whether the court of a member state of the EU may grant an injunction against a party bound by an arbitration agreement, to restrain them from commencing or prosecuting proceedings in breach of the arbitration agreement, in the courts of another members state of the EU which has jurisdiction to entertain such proceedings under EC Regulations 44/2001. After hearing argument the House was of the opinion that an answer to the question is not obvious and the question was thus referred to the European Court of Justice under Article 234.

The House observed that courts of the United Kingdom had for many years exercised the jurisdiction to restrain foreign court proceedings. Whether the parties should submit themselves to such a jurisdiction by choosing the United Kingdom as the seat of their arbitration was said the House of Lords entirely a matter for them. The courts were there to serve the business community rather than the other way round. No one was obliged to choose London. The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly did not deter parties to commercial agreements. On the contrary, it might be regarded as one of the advantages which the chosen seat of arbitration had to offer.

Finally, the House noted that the European Community was engaged not only with regulating commerce between member states but also in competing with the rest of the world. If the member states of the European Community were unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there was no shortage of other states which would. New York, Bermuda and Singapore were also the House of Lords noted, leading centres of arbitration and each of them exercised the jurisdiction which was challenged in the present appeal. There seemed to be no doctrinal necessity or practical advantage which required the European Community to handicap itself by denying its courts the right to exercise the same jurisdiction. This decision was handed down by the House of Lords in February and so it will be some time before the European Court of Justice is able to hear and determine this interesting issue.

I hope that the foregoing comments are of assistance. As I have sought to explain, the English courts will usually hold a party to the jurisdictional bargain they agreed, especially if it was London arbitration, but the English courts will also assume jurisdiction if they are satisfied that there is a suitable link or connection with England rather than if the parties are seen to be seeking the benefits of the English courts for some tactical reason.