WILLIAM CO v CHU KONG AGENCY CO LTD & ANOR - [1993] 2 HKC 377

HIGH COURT
KAPLAN J

COMMERCIAL LIST NO 155 OF 1991

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Arbitration -- Agreement -- Agreement providing for either arbitration or litigation -- Whether arbitration agreement void for uncertainty -- Effect of Hague-Visby Rules on contractual exemption and limitation clauses -- Whether application of Hague-Visby Rules precludes stay -- Uncitral Model Law arts 7 & 8

Arbitration -- Agreement -- Record of agreement in contemporaneous correspondence within art 7(1) of Model Law -- Whether such contemporaneous correspondence showed agreement to arbitrate -- Whether correspondence which is post-dated can be a record of agreement -- Uncitral Model Law art 7

The plaintiff brought a claim in the High Court for damages under the Hague-Visby Rules for damage to its cargo on board a vessel under a bill of lading issued by the first defendant but not signed by the plaintiff. The bill of lading contained a clause that all disputes shall, in accordance with Chinese law, be resolved in the courts of the People's Republic of China or be arbitrated in China. After the dispute had arisen, there was correspondence between the parties' solicitors, and an affidavit by the plaintiff's solicitor, all of which made references to that clause. The defendants also argued that the points of claim of the plaintiff were based on the bill of lading.

Further, the bill of lading contained clauses excluding or limiting the carrier's liability beyond the limits laid down in the Hague-Visby Rules.

It was accepted that the Uncitral Model Law applied. The defendants applied for a stay of proceedings in favour of arbitration in China, or on the grounds of a Chinese exclusive jurisdiction clause or forum non conveniens.

Held, allowing the defendant's application:

(1) Although the clause provided for either litigation or arbitration, it was not void for uncertainty. Under the clause, the claimant in a dispute had a choice, which would be binding on the defending party, either to seek arbitration or litigation in China. The plaintiff's choice of litigation in Hong Kong was not a method within the contract and was invalid. It was therefore open to the defendants to choose. The defendants had opted for arbitration by seeking a stay under art 8 of the Model Law and were prima facie entitled to a stay.

(2) Correspondence contemporaneous with or which post dated the arbitration agreement, could be a record of the agreement within art 7(2) of the Model Law. The materials before the court showed that the plaintiff agreed to arbitration through its solicitors in the correspondence and affidavit. Such materials contained a record of that agreement, and could further be described as a statement of case and defence. This was so even though the materials did not refer to arbitration as such but only to the choice of law and jurisdiction clause. Article 7(2) had

therefore been complied with. Dictum of Mayo J in *Hissan Trading Co v Orkin Shipping* default (Comm L 39/92, unreported) not followed.

(3) Article 8 of the Model Law was mandatory in terms. Once the court was satisfied there was an arbitration clause within art 7(2) of the Model Law, the court should not concern itself with how

the arbitrators would treat the terms of the bill of lading. The choice of law was a matter for the Chinese arbitrators. The fact that they would probably apply the terms of the bill of lading which were more generous to the carrier than the Hague-Visby Rules was the natural consequence of the agreement in the bill of lading.

(4) It might be that the plaintiff's expert evidence of Chinese law did not comply with the requirements for the reception of expert evidence, in which case the presumption applied that foreign law was the same as Hong Kong law, and it followed that the arbitrators would not apply the restrictive clauses in the bill of lading because of the Hague-Visby Rules.

Obiter

The court would have exercised its discretion against granting a stay on the basis of the exclusive jurisdiction clause and forum non conveniens because of the substantial juridical disadvantage to the plaintiff if the matter were to be tried in China. *The Morviken* [1983] 1 Lloyd's Rep 1 applied.

Cases referred to

Adhiguna Harapan, The; Owners of Cargo lately laden on board the Ship or Vessel Adhiguna Meranti v Owners of the Ships or Vessels Adhiguna Harapan [1987] HKLR 904

China Steel Construction Engineering Corp Guangdong Branch v Madiford (A6563/91, unreported) default

El Amria, The; Aratra Potato Co v Egyptian Navigation Co [1981] 2 Lloyd's Rep 119

Eleftheria, The (1970) P 94

Frank Pais, The [1986] 1 Lloyd's Rep 529

Hissan Trading Co v Orkin Shipping (Comm L 39/92, unreported) default

Morviken, The [1983] 1 Lloyd's Rep 1

Pan Lloyd Shipping v Cho Hung Bank [1992] 1 HKLR 356

Société Générale v Koram Bank (CA 73/92, unreported) default

Spiliada, The; Spiliada Maritime Corp v Cansulex [1986] 3 All ER 843

Zambia Steel & Building Supplies v Clark & Eaton [1986] 2 Lloyd's Rep 225

Legislation referred to

(HK) Evidence Ordinance (Cap 8) s 59

(UK) Arbitration Act 1950 [UK] s 4(1)

(UK) Arbitration Act 1975 [UK] ss 1, 7

(UK) Carriage of Goods by Sea Act 1971 [UK]

(UK) Law of Property Act 1925 [UK] s 40

Other legislation referred to

Hague-Visby Rules

Holtzman and Neuhaus Guide to The Uncitral Model Law p 263

Uncitral Model Law arts 7, 8

Application

This was an application by the defendants for a stay of proceedings instituted by the plaintiff in the High Court of Hong Kong in favour of arbitration in China, alternatively, a stay on the grounds of a Chinese exclu-

sive jurisdiction clause and/or on the grounds of forum non conveniens. The facts appear sufficiently in the following judgment.

Barry Ayliffe (Clifford Chance) for the plaintiff.

Andrew Cheung (Liu Chan & Lam) for the first defendant.

KAPLAN J

The plaintiff has instituted proceedings in the High Court of Hong Kong to recover HK$56,000 arising out of a claim in respect of a damaged cargo made under a bill of lading issued in Hong Kong.

The defendants applied for a stay of these proceedings in favour of arbitration in China, alternatively, a stay on the grounds of a Chinese exclusive jurisdiction clause and/or on the grounds of forum non conveniens. A number of interesting points arise.

This action is brought by the plaintiff to recover damages for loss and damage suffered as a result of fire and water damage to its cargo carried on board a vessel 'Qian Jin 57' under a bill of lading no 1933 issued by the first defendant. The cargo consisted of 15 packages of micro-switches weighing 60kg. The claim is brought under the provisions of the Hague-Visby Rules, which, it is said, apply as the bill of lading was issued in Hong Kong.

The date of departure shown in the bill of lading was 9 October 1990.

The bill of lading contained three additional clauses as follows:

> (1)All the information regarding the cargo listed in this bill of lading is supplied by the consignor and our company shall not be responsible for the correctness in the contents of packaging.
>
> (2)If any loss and damage are caused to the cargo due to default of the carrier during shipment, the maximum amount of compensation under this bill of lading will be RMB 200 per piece.
>
> (3)All disputes arising out of or in connection with this bill of lading shall, in accordance with Chinese law, be resolved in the courts of the People's Republic of China or be arbitrated in the People's Republic of China.

It is accepted that the Model Law applies to this case as the bill of lading is dated after 9 April 1990.

It is common ground that the first defendant signed the bill of lading and that the plaintiff did not.

Article 7 of the Model Law provides as follows:

> Definition and form of arbitration agreement.
>
> (1)'Arbitration agreement' is an agreement by the parties to submit disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration
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> *[1993] 2 HKC 377 at 380*
>
> agreement may be in the form of an arbitration clause in a separate agreement.
>
> (2)The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

The following points arise for my determination:

(1) Is the agreement to arbitrate contained in the bill of lading void for uncertainty?

(2) If no, does it comply with art 7(2) of the Model Law?

(3) If yes, have I any discretion but to stay these proceedings under art 8 of the Model Law? This question raises the issue whether there is any conflict between the provisions of the Model Law on the one hand and the Hague-Visby Rules on the other.

(4) If the answer to question (1) is in the affirmative or if the answer to question (2) is in the negative, should I stay these proceedings on the grounds of the allegedly exclusive jurisdiction clause or on the grounds of forum non conveniens?

Void for uncertainty?

This argument is based on the fact that the disputed resolution clause provides for either arbitration or litigation and is also based upon the wording of the clause being permissive and not mandatory. It was also suggested that the clause was in some way impossible to perform.

In *China Steel Construction Engineering Corp Guangdong Branch v Madiford Ltd* default ((A6563/91, unreported), judgment delivered 2 March 1992), I rejected the argument that the use of the word 'may' prevented the court from granting a stay of proceedings in favour of arbitration and held that once a party had indicated a preference for arbitration by seeking a stay, as the respondents in that case had, the plaintiffs were, all other things being equal, bound by the arbitration clause.

Mr Ayliffe's argument on behalf of the plaintiff runs like this. This dispute resolution clause does not provide for arbitration as the only method of dispute resolution. The plaintiff has opted for litigation, and therefore, there is no scope now for enforcing the arbitration part of the clause.

With respect, this argument is fallacious. The clause is not void for uncertainty. It is a clause in a commercial document and this court must

strive to give it meaning within the context of the commercial relationship of the parties.

In my judgment, this clause should be construed in the following manner. The parties have agreed on arbitration or litigation in China. When a dispute arises, the claimant has a choice. He can either seek arbitration or litigation in China. Once he has made the choice, that is the end of the matter and the defendants will have no say. Once arbitration or litigation in China is chosen, that creates a binding choice to which the court will usually give effect.

However, in this case, the plaintiff opted for a method of dispute resolution not agreed upon in the contract, namely, litigation in Hong Kong. Thus, it is open to the defendants to exercise their choice in the matter. By applying for a stay under art 8 of the Model Law, they have opted for arbitration in China. On this basis, the plaintiff's choice is invalid as it does not come within the range of options agreed upon. Subject to all other points, I conclude that, prima facie, the defendants are entitled to a stay in favour of arbitration in China because they have made a valid choice from one of the two permissible methods of dispute resolution contained in the bill of lading.

Agreement in writing

Clearly the bill of lading, which is the agreement in this case, is not signed by both parties. However, the issues raised are:

(1) whether there is an exchange of letters, etc which do provide a record of the agreement; and

(2) whether there has been an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

The facts relevant to this argument are as follows. By letter dated 27 November 1992, the defendants' solicitors wrote to the plaintiff's solicitors and stated:

> Upon perusal of the relevant documents, we note that cl 3 of the bill of lading no 1933 provides that 'all disputes arising from or related to this bill of lading should, in accordance with Chinese law, be resolved in PRC courts or by arbitration in PRC.'

In the circumstances, we are of the view that the Hong Kong court has no jurisdiction and the present proceedings should be dismissed.

The next day, the plaintiff's solicitors replied, stating that such application was inappropriate as the claim was governed by Hague-Visby Rules and they referred to the House of Lord's decision in *The Morviken* [1983] 1 Lloyd's Rep 1. They pointed out that cl 8 of art III of the Hague-Visby Rules provided that any clause in the contract of carriage relieving thecarrier from liability for loss and damage or lessening such liability otherwise than provided by the rules will be held null and void. They then set out the clauses in the bill of lading which would lessen or exclude the defendants' liability and they asserted that a PRC court would give effect not to the Hague-Visby Rules but to the terms of the bill of lading.

On 1 December 1992, the defendants' solicitors took issue with the plaintiff's solicitors. In the third paragraph of their letter they said this:

> With respect, we do not agree that the jurisdiction and choice of law clause would be of no effect on the ground as alleged. We maintain that the Hong Kong court has no jurisdiction to deal with the dispute and the proper forum should be the PRC court.

On 14 December 1992, the plaintiff's solicitors replied and stated this:

> It remains our view that Hong Kong is the proper and appropriate forum in which to determine our client's claim notwithstanding the express choice of law and jurisdiction clause contained in the bill of lading. We will in part rely on the authority of *The El Amria* [1981] 2 Lloyd's Rep 119 in this regard and will also refer the court to the advice we have received from C and C Law Office in Beijing.

Affidavits were put in by both sides. Paragraph 4 of Mr Ayliffe's affidavit for the plaintiff dated 18 January 1993 states as follows:

> While the said bill of lading contains a choice of law/jurisdiction clause, I would ask this court to declare the said clause null, void and of no effect by reason of art III r 8 of the Hague-Visby Rules since the effect of the clause is to lessen and/or exclude the first defendant's liability, otherwise than would be the case pursuant to the Hague-Visby Rules. This fact has repeatedly been made to the first defendant's lawyers in correspondence and I would refer the court to the correspondence between myself and Messrs Liu Chan and Lam in this regard ...

In the light of the above, can the defendants establish that the bill of lading complies with art 7(2) of the Model Law?

In order to answer that question, it is necessary to have regard to the purpose behind art 7(2). It seems clear to me that this is to ensure that parties do not get forced into arbitration unless it is clear beyond doubt that they have agreed to it. This can either be proved by an agreement in writing or by an exchange of letters which provide a record of the agreement or an exchange of statements of claim and defence in which the existence of an agreement is alleged by one side and not denied by the other.

It is submitted on behalf of the defendants that the letters to which I have made reference provide a record of the agreement. The defendants contend that they have referred specifically to this clause and the plaintiff has also referred to this clause contained in the bill of lading. There is no doubt, so the defendants submit, that the parties are both referring to the same bill of lading, and the same clause in which it is agreed that arbitration

or litigation under Chinese law in China shall be the method of dispute resolution. The defendants put the case alternatively by submitting that the correspondence itself is an exchange of statements of case and defence in which the existence of an agreement is alleged but not denied. This submission is based upon the fact that there is nothing in the Model Law which deals with statements of case or defence. These are not

defined terms. There is no reason why the parties should not have spelt out their cases and defences in correspondence whether or not they are reduced into a more formal document at a later stage.

Further or alternatively, the defendants submitted that when one looks at the points of claim filed in this case, which is after all a claim based upon the very bill of lading, and reads it with para 4 of Mr Ayliffe's affidavit above referred to, there can be no doubt that these are statements of case and defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other. The whole thrust of the plaintiff's arguments in the present case is that the clause is null and void and of no effect by reason of the Hague-Visby Rules and not that there was no such clause ever agreed. The phrase 'statements of case and defence' was originally intended to cover those statements served in arbitration proceedings but the same rationale, it is argued, should apply to court pleadings and documents by which respective parties set out their contesting cases.

In *Hissan Trading Co Ltd v Orkin Shipping* default (Comm L 39/92, 8 September 1992, unreported), Mayo J had to consider art 7 of the Model Law. In that case, there was also a cargo claim under a bill of lading. There were in existence three charter parties, a head time charter party and two voyage charter parties. Each provided that the dispute should be referred to arbitration in Japan. The bill of lading was governed by Japanese law. It contained an endorsement which read:

> All terms, conditions and exceptions including arbitration clause of relevant charter party dated 6 February 1990 (sic) at Tokyo are fully incorporated.

It was again common ground that the bill of lading was not signed by both parties. It was submitted before Mayo J that there was sufficient written evidence available to comply with art 7(2) of the Model Law. Reliance was placed on correspondence which had been exchanged between the parties' solicitors prior to the commencement of proceedings. Mayo J considered this material and having done so, concluded emphatically that such argument had no prospect of success. However, at the end of this passage in his judgment, there appears the following passage upon which the plaintiff in the present case relies:

> Even if there was merit in this argument, I am of the view that the drafting of art 7(2) precludes the adoption of memoranda in writing being relied upon which post date the agreement to arbitrate.
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> *[1993] 2 HKC 377 at 384*

If I were to agree with this passage in Mayo J's judgment, I would be bound to find against the defendants in the present case because all of the material upon which they rely post dates the agreement to arbitrate contained in the bill of lading.

It is with hesitation and diffidence that I find myself unable to agree with the views expressed by Mayo J. Strictly speaking, his observations on the point are obiter as he had concluded that the material itself did not support the agreement contended for. It was, thus, strictly unnecessary for him to go on and conclude that if the material had supported the argument, then in any event 'the drafting of art 7(2) precludes the adoption of memoranda in writing being relied upon which post date the agreement to arbitrate.'

Mr Andrew Cheung for the defendants emphasized the phrase 'provide a record of the agreement'. He submitted, and I think correctly, that this phrase is wide enough to include correspondence which is either contemporaneous with or post dates the arbitration agreement. Take the *reductio ad absurdum*. If after a dispute arises, one party writes to the other and says 'There is a clause in this bill of lading which provides for arbitration in China --- do you agree?' Assume then that the other party replies, 'Yes, we agree that there is such a clause but we do not want arbitration in China and are going to institute court proceedings in Hong Kong and will resist vigorously any application you take out for a stay of such proceedings.' Would it not be strange to say that there was no record of the agreement to arbitrate in China because the record came into being after the agreement was entered into and acted upon, albeit that it was not signed by one party?

The drafters of the Model Law recognized the difficulties that might exist with regard to bills of lading and broker's notes which are not usually documents signed by both parties. Further, the Model Law was not intended to conflict with the New York Convention's definition. Similarly, the Departmental Advisory Committee (The Mustill Committee) in England referred to this problem. The HK Law Reform Commission Report, in proposing the adoption of the Model Law, unfortunately underplayed the difference between the old definition of 'arbitration agreement' and that contained in the Model Law. (As a member of the sub committee which

prepared the report, I accept responsibility for this.) I have also considered the commentary to art 7 contained in *Holtzman and Neuhaus' Guide to The Uncitral Model Law* at p 263 where they say:

> The requirement of a 'record' is to ensure that there is some writing involved ... It should be noted that the 'exchange' of letters, telexes, etc does not require that both mention the arbitration agreement, or even that one or both letters be signed. What is sought is a written form of assent from each party.

It is clear that the agreement cannot be oral but later evidenced in writing. In this case, the agreement is in writing and the plaintiff's assent to it is

[1993] 2 HKC 377 at 385

contained in the material to which I have referred. I would only add that such assent can be given by either party's agent, in this case his solicitor, whose authority to act has never been withdrawn and whom I am entitled to assume obtained instructions before instituting these proceedings for damages based on this very bill of lading.

I appreciate that if enforcement of any award made in this case is sought under the New York Convention, the party so seeking will have to produce the original arbitration agreement or a certified copy thereof. My provisional view, without hearing any argument on the issue, would be that the bill of lading together with the correspondence and affidavit would suffice, but this will have to be decided by the enforcing court if the matter is ever raised.

Each case has to be considered on its own facts. In the present case, the material which I have set out above shows quite conclusively, in my judgment, that the parties did agree on arbitration or litigation in China and that such material contains a record of that agreement. I would further hold on the basis of the above material that the existence of the agreement to arbitrate or litigate in China is recorded in documents which can, without violence to the language, be described as a statements of case and defence. I note that there is no definition of these terms in the Model Law and that they are not referred to with capital letters. At the end of the day, the court has to be satisfied that these parties agreed on arbitration or litigation in China. It seems to me clear beyond doubt on this material that such agreement is recorded in the manner I have set out. I respectfully differ from Mayo J in concluding that material which post dates the agreement to arbitrate can provide a record of the agreement to arbitrate. To decide otherwise would seem to me to place an unnecessarily narrow construction on art 7(2), which does not do justice to the language used and which would produce a result which conflicts with the commercial reality of the situation.

I should add that I was not impressed by Mr Ayliffe's submission that in the correspondence and affidavit, he had been careful not to refer to arbitration or the arbitration clause. He referred fully and fairly to the bill of lading which clearly contained an agreement to arbitrate and reference to it as 'an express choice of law and jurisdiction clause' is not sufficient to prevent the correspondence constituting a record of the agreement to arbitrate.

I would also add that the situation under art 7(2) is somewhat analogous to the requirement under s 40 of the English Law of Property Act 1925 which provides:

> that no action may be brought for the sale of land ... unless the agreement upon which such action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged ...

[1993] 2 HKC 377 at 386

This section was referred to by Ralph Gibson LJ in *Zambia Steel and Building Supplies v Clark & Eaton* default [1986] 2 Lloyd's Rep 225 at 234 when in considering the definition of arbitration agreement in s 7 of the English Arbitration Act 1975 pointed out that:

> That provision permits of prove of the making of a prior agreement by a subsequent signed note of it.

I therefore conclude that on the facts of the present case, art 7(2) has been complied with. I would add this. If I were wrong, there is a very strong case for further consideration of art 7 so as to bring within its ambit cases such as the present which are commonplace in a trading centre like Hong Kong.

Should a stay be granted?

Should I now grant a stay or should I have regard to the provisions of the Hague-Visby Rules?

Article 8(1) of the Model Law provides as follows:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

It will be noted that this article is in mandatory terms and thus there is no discretion in the court unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Mr Ayliffe's submission goes something like this. The bill of lading was issued in Hong Kong and thus the Hague-Visby Rules apply. The Hague-Visby Rules provide that any clause in the contract of carriage relieving the carrier from liability for loss or damage or lessening such liability otherwise unless provided by the rules will be held null and void and of no effect. He submits that this bill of lading contains such clauses, namely, the financial limitation clause, the clause excluding the carrier's liability for fire damage and a clause to the effect that the cargo owner shall be responsible for damage incurred in the course of transportation. If the 200 RMB limit per piece is applied, as per the bill of lading, the claim is for no more than US$525. However, if the Hague-Visby Rules apply, then the maximum claim is worth some US$13,709.

Mr Ayliffe invites me to consider the fact of the Hague-Visby Rules and to refuse to stay these proceedings in favour of arbitration in China, so that this court can apply the Hague-Visby Rules which are more beneficial to his clients. He points out that on the evidence, it seems likely that the Chinese court or arbitral tribunal would give effect to the terms of the bill of lading and would not apply the Hague-Visby Rules. He submits,

therefore, that there is an apparent conflict between the Model Law which requires me to stay these proceedings in favour of arbitration in China and the Hague-Visby Rules which require me to strike down those conditions of the bill of lading which are more beneficial to the defendants in the Hague-Visby Rules.

I now have to ask myself whether there is in fact a conflict, and if there is, how do I resolve any such conflict.

The researches of both sides have not been able to unearth any authority directly in point. The nearest we have are certain observations of Lord Diplock in *The Morviken*, supra. In that case, a piece of machinery was shipped on board a Dutch ship in the United Kingdom for carriage to the Dutch Antilles. The bill of lading issued contained a clause which applied the law of the Netherlands (in which the Hague Rules, as adopted by the Brussels Convention of 25 August 1924, are incorporated) to the contract. There was a maximum liability per package and the clause went on to provide that all actions under the contract of carriage shall be brought before the court of Amsterdam, and it further provided that no other court shall have jurisdiction with regard to any action.

The machine was transhipped in Holland to *The Morviken* and when it was being discharged, it was dropped and was severely damaged. The plaintiffs brought an action in rem against the defendants. The defendants applied for an order that all further proceedings in the action be stayed on the ground that all actions arising under the bill of lading should be brought before the court of Amsterdam. The plaintiffs argued that the action ought not to be stayed on the grounds that the jurisdiction clause was unenforceable or, alternatively, if the clause was enforceable, there was strong reason for refusing the stay. The plaintiffs, as in the case before me, sought to rely upon the Carriage of Goods by Sea Act 1971 which gave effect to the Hague Rules as amended by Protocol signed at Brussels in 1968. They rely upon the very same clause, namely, r 8 of art III.

The admiralty judge, Sheen J, granted a stay of proceedings. The Court of Appeal allowed the appeal and removed the stay. On appeal to the House of Lords, it was held that:

> (1) The provisions of s 1 of the Act appeared to be free from any ambiguity; the Hague-Visby Rules ... were to have the force of law in the United Kingdom; they were to be treated as if they were part of directly enacted statute law and they were to be given a purposive, rather than a narrow literalistic construction.
>
> (2) The bill of lading was one to which the Hague-Visby Rules were expressly made applicable by art X; it fell within both paras (a) and (b); it was issued in a contracting state, the United Kingdom, and it covered a contract for carriage from a port in a contracting state and it also fell directly within s 1(3) of the 1971 Act.

(3) The first paragraph of cl 2 of the bill of lading was ambiguous, in that it might have meant that the general law of the Netherlands (including its

[1993] 2 HKC 377 at 388

private international law) relating to the carriage of goods by sea was adopted as the proper law or it might have meant that only that part of the law of the Netherlands which incorporated the Hague Rules was to be applicable to the contract; but whether this paragraph was given the wider or narrower meaning, in so far as it purported to lessen the liability of the carriers for which art IV r 5, of the Hague-Visby Rules provided, it unquestionably contravened art III r 8, and by that rule was deprived of any effect.

(4) The submission by the defendants that the choice of forum clause fell outside the ambit of art III r 8 would be rejected in that the only sensible meaning to be given to the description of provisions in contract which were rendered 'null and void and of no effect' by this rule was one which would embrace every provision in the contract, which, if it were applied, would have the effect of lessening the carrier's liability otherwise than is provided in the rule.

(5) The choice of forum clause did not, however, ex facie, offend against art III r 8. It was a provision of the contract that was subject to a condition subsequent and it came into operation only upon the occurrence of a future event that might or might not occur; so a choice of forum clause, which selected as the exclusive forum for the resolution of disputes, a court which would not apply the Hague-Visby Rules even after such clause came into operation, did not necessarily always have the effect of lessening the liability of the carrier in a way that attracted the application of art III r 8.

(6) Having regard to the nature of the dispute, the learned judge was bound to treat the bill of lading as if it contained neither the first paragraph nor the third paragraph of condition 2, and consequently was without any choice of forum clause; in exercising his discretion to grant a stay, the learned judge had given decisive weight to the fact that by accepting the bill of lading, the plaintiff had agreed not to bring any action under the contract against the defendants in any court other than the court of Amsterdam; since by English law he was required to treat the choice of law forum clause as null and void and of no effect, it followed that by giving any weight to it in deciding how to exercise his discretion, he was taking into consideration a matter which he was not entitled to take into consideration.

(7) The choice of forum clause being eliminated from the contract of carriage, the plaintiffs were, prima facie, at liberty to avail themselves of the right of access to the admiralty court and the appeal would be dismissed.

It will be immediately apparent that this case had nothing to do with arbitration and therefore the comments made by Lord Diplock on pp 7-8 in relation to s 1 of the Arbitration Act 1975, though to be given the highest respect, were purely obiter comments. What he said was this:

My Lords, it is not necessary, in the instant appeal, to consider what the effect of art III r 8 would be on a foreign arbitration clause in a bill of lading, and since we have no actual specimen of any such clause before us, it would be unwise to attempt to deal with the effect of s 1(1) of the Arbitration Act 1975, on a foreign arbitration clause in a bill of lading issued in, or for carriage from

[1993] 2 HKC 377 at 389

a port in the United Kingdom which purported by the wording that it used to exclude the application by the arbitrator of the Hague-Visby Rules. I content myself by saying that I do not accept the analogy nor do I accept the suggested consequences under s 1(1) of the Arbitration Act 1975. An arbitration clause providing for the submission of future disputes to arbitration is to be distinguished from a clause making a choice of the substantive law by which the agreement containing the arbitration clause is to be governed. What the arbitration clause does is to leave it to the arbitrator to determine what is the 'proper law' of the contract in accordance with accepted principles of conflict of laws and then to apply that 'proper law' to the interpretation, and the validity of the contract and the mode of performance and the consequences of breaches of contract. One, but by no means the only, matter to be taken into consideration in deciding what is the 'proper law' is a particular choice of substantive law by which the contract is to be governed, made by an express clause in the contract itself. But if the particular choice of substantive law made by the express clause is such as to make the clause null and void under the law of the place where the contract was made, or under what, in the absence of such express clause, would be the proper law of the contract, I am very far from accepting that it would be open to the arbitrator to treat the clause as being otherwise than null and void, or to give any effect to it.

In the instant appeal, however, your Lordships are not concerned with a foreign arbitration clause or an application for a stay of proceedings in the High Court whether under s 1(1) of the Arbitration Act 1975, or under s 4(1) of the Arbitration Act 1950. Having regard to the nature of the dispute which the carriers asserted brought into operation the choice of forum clause that forms the third paragraph of condition 2 of the bill of lading, Mr Justice Sheen was, for the reasons that I have given, bound to treat the bill of lading as if it contained neither the first nor the third paragraph of condition 2 and consequently was without any choice of forum clause. That did not deprive the learned judge of all discretion to grant a stay if the carriers were able to

satisfy him that, independently of condition 2, the court of Amsterdam was a forum conveniens and the admiralty court in London was not. ...

So in *The Morviken*, Lord Diplock eliminated the choice of forum clause from the contract of carriage and thus the shippers were at liberty to avail themselves of the right of access to the admiralty court. What I understand Lord Diplock to be saying is that if there is, as in the present case, an arbitration clause, it is for the arbitrator to determine what is the 'proper law' of the contract in accordance with accepted principles of conflict of laws and then to apply that law to the interpretation, validity, mode of performance and consequences of breach of that contract. Clearly, the arbitrators will have regard to the choice of law made by an express clause. However, if the particular choice of substantive law made by the express clause is such as to render the clause null and void under the law of the place where the contract was made, then Lord Diplock opined that the arbitrator would have to treat the clause as being null and void.

Applying these principles to the case before me, if I stay these proceedings under art 8 of the Model Law, then the matter will go to

arbitration in China. The Chinese arbitrators will have to decide what law to apply. The fact that they might decide to apply Chinese law which would not give effect to the Hague-Visby Rules but would, instead, give effect to the terms of the bill of lading is in my judgment, the natural consequence of the agreement of the parties set out in the bill of lading.

I accept that if the Chinese arbitrators were to apply the terms of the bill of lading and ignore the provisions of the Hague-Visby Rules, this would be detrimental to the plaintiff. I do not see that I have any choice but to leave the choice of law to the arbitrators. I would go further and hold that once I have been satisfied that there is an arbitration clause which complies with art 7 of the Model Law, I should not concern myself with the likely way in which the Chinese arbitrators will treat the terms contained in the bill of lading. I say this because the decision I have to make is whether I should stay these proceedings in favour of arbitration in China. Once I have decided that, I am bound to take that course by virtue of the terms of art 8 of the Model Law, I do not see that it can be right for me to go on to consider what choice of law the Chinese arbitrators would apply and on the assumption that it is different to Hong Kong Law, what effect that would have upon the plaintiff's claim. The simple fact remains that the parties have chosen arbitration in China and I am bound by art 8 to give effect to that agreement.

It appears to me that the view at which I have arrived is consistent with my own decision in *Pan Lloyd Shipping Ltd v Cho Hung Bank* 1992 1 HKLR 356. In that case, I was concerned with an application for summary judgment under O 14, which application was met by a summons to stay the proceedings in favour of the courts of Korea. The plaintiffs, who had regularly commenced proceedings in Hong Kong against the bank's representative office in Hong Kong, accepted that Korea was the most convenient forum for this dispute, but invited me to deal with that part of the claim which they submitted was susceptible to an application for summary judgment. They conceded that the balance of the claim would have to be stayed in favour of the Korean courts. I refused to deal with the O 14 proceedings and granted the stay on the simple basis that once I had decided that it was appropriate to grant a stay, it was not proper to reserve it to myself and deal within that part of the case which was amenable to a claim for summary judgment and send the balance to Korea. Either Korea was the most convenient forum for the trial of the action or it was not, and as the plaintiffs had conceded it was, it did not seem right or proper to me to consider further any aspect of the case. That decision was not appealed but in *Société Générale v Koram Bank* default (CA 73/92, unreported) the Court of Appeal followed the same reasoning as I adopted in *Pan Lloyd*. At p 17 of his judgment, Fuad VP said this:

> It does not seem right to me, that where an application for a stay is timeously and properly made, a party should be able to pre-empt a consideration of what
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> is the natural or appropriate forum for the resolution of the dispute between the parties by relying on the O 14 procedure with the intent of establishing, in the very court in respect of whose exercise of jurisdiction the stay has been sought, that a trial is not necessary.

In my judgment, the same reasoning applies to the case before me. If, as I have concluded, there is a valid arbitration agreement which, by virtue of art 8 of the Model Law I have to give effect, it cannot be right for me

to try and assess how the Chinese arbitrators will approach the task of choosing what law to apply to the contract. Although the clause states that Chinese law is to apply I do have before me a letter from Mr Jiang Bo of the Guangdong Maritime Law Office which states:

> While judging the cases with foreign elements, the maritime court will choose the applying law, basing on the Conflict Laws provided by the Chinese Civil Code. The maritime courts judge cases relating to disputes arising from carriage of goods by sea often with reference to the Hague-Visby Rules and other international customs. In appropriate cases, they will also apply foreign laws.

The plaintiff has also exhibited correspondence from C and C Law Office Beijing. They say that the clauses in the bill of lading will be enforced in China. They do not deal with how Chinese arbitrators or courts apply the conflict of laws rules. Mr Cheung has attacked the C and C material as not being evidence as it is not contained in affidavit and does not comply with O 41 r 5. Further, there is no reference to the qualifications or experience of the writer of the letters and it is said that this offends s 59(1) of the Evidence Ordinance. On this basis, Mr Cheung submits that there is no admissible evidence of foreign law adduced by the plaintiff and thus I should fall back on the presumption that foreign law is the same as Hong Kong Law. [See *The Frank Pais* [1986] 1 Lloyd's Rep 529.] It seems to me that either approach is sufficient for my purposes. If there is a presumption that Chinese law is the same as Hong Kong law then I can be confident that the Chinese arbitrators will not give effect to the restrictive clauses. If I take cognizance of both sides' alleged experts, then I am thrown back to the position that I cannot be certain what they will do when they come to consider what law to apply to this contract. In those circumstances, I do not consider it right for me to pre-empt their decision. I would, however, like to add that if parties wish the court to consider the effect of foreign law, they should ensure that they provide the court with expert evidence in a form which complies with the requirements for the reception of expert evidence. There was force in Mr Cheung's submission that the plaintiff's evidence did not so comply. Much the same can be said of his own expert evidence, but in that case, he was content to rely on the presumption.

I therefore conclude that as art 7 of the Model Law has been complied with, I have no discretion other than to apply art 8 of the Model Law and

to stay these proceedings in favour of arbitration in China. I have to apply art 8 because I do not find that the agreement, namely, the arbitration agreement, is null and void, inoperative or incapable of being performed.

Exclusive jurisdiction clause/forum non conveniens

It is strictly not necessary for me to go on to deal with these matters as I have decided that I am bound to grant the stay sought. However, it may be helpful if I very briefly set out the way I would have approached the matter had I not been bound to stay the proceedings under art 8 of the Model Law.

In considering these matters I would, of course, have considered the observations in *The Eleftheria*[1970] P 94, *The El Amria; Aratra Potato Co v Egyptian Navigation Co* 1981 2 Lloyd 's Rep 119, *The Spiliada; Spiliada Maritime Corp v Cansulex* 1986 3 All ER 843 and *The Adhiguna Harapan; Owners of Cargo lately laden on board the Ship or Vessel Adhiguna Meranti v Owners of the Ships or Vessels Adhiguna Harapan* 1987 1 HKLR 904.

Applying these principles, I would have exercised my discretion against granting a stay. I think I would have found myself in exactly the same position as Lord Diplock in *The Morviken*. I would have had regard to the fact that the bill of lading contained restrictions on the defendants' liability which were more favourable to them than under the provisions of the Hague-Visby Rules. I, of course, take into account the fact that most of the witnesses come from China but at the end of the day, I would have been prepared to exercise my discretion against granting a stay recognizing that the burden is on the plaintiff because of the substantial juridical disadvantages which would affect the plaintiff if I did not. In this connection, I should note that Mr Cheung, on behalf of the defendants, agreed to take no time-bar point if I stayed the matter in favour of proceedings in China. Nevertheless, it still seems to me that there are substantial juridical disadvantage if the matter were to be tried in China and after weighing up all the competing arguments I would have exercised my discretion in favour of the plaintiff.

Accordingly, I grant the stay sought by the defendants and I make a costs order nisi in their favour.