Orin Energy Investments Ltd v The Owners of the Ship or Vessel MT Cavalier 2022 MLJU 673

Bills of lading: incorporation of charterparty arbitration clauses

Two issues are discussed in this note on a case from the Kuala Lumpur Admiralty Court. First, the law governing the incorporation of charterparty arbitration clauses into bills of lading – an issue that continues to bedevil the courts, despite the plethora of case law discussing the issue; secondly, how the right to arbitrate may be (unwittingly) lost by a party's conduct. The conduct in question arises within the usual setting of maritime disputes, featuring the arrest of vessels, the provision of letters of undertaking and applications to stay court proceedings in favour of arbitration. Therefore, the lesson here is of general application although drawn from the specific facts of the case.

Overview

Two suits were filed by Orin Energy Investments Ltd. The admiralty in rem suit was against the vessel *MT Cavalier*, which was owned by Daya Marine Pte Ltd. The admiralty in personam suit named Daya Marine as sole defendant. Both suits arose out of Daya Marine's (alleged) refusal to deliver a cargo of oil to purchasers to whom Orin Energy had sold the oil. In both suits, Daya Marine filed applications to stay the proceedings at the Kuala Lumpur Admiralty Court in favour of arbitration in London. The basis of the applications was that the parties had agreed that any dispute between them had to be arbitrated in London. The two issues mentioned above arose during the determination of the stay applications. The judge dismissed both applications in April 2022.

The contracts

In August 2020 Orin Energy sold 230,000 barrels of oil to Jiangsu Soho International Group Corporation. The sale contract provided for the cargo to be loaded at the Port of Linggi, Malaysia and delivered at the Port of Zhanjiang, China. Orin Energy procured the services of Kirk Ward Sdn Bhd to advise Orin Energy on the chartering of vessels to perform the sale. In October 2020 Kirk Ward chartered the vessel from Daya Marine for a voyage from the load port to the discharge port.

Orin Energy alleged that the terms of the charter were contained in a fixture recap dated 10 October 2020 (the 10 October Fixture Recap). Daya Marine argued that Kirk Ward had chartered the vessel under a tripartite agreement entered into between Kirk Ward, Orin Energy (both as charterers) and Daya Marine (as owners) contained in a fixture recap dated 14 October 2020 (the 14 October Fixture Recap).

The carriage of the cargo on board the vessel was evidenced by two bills of lading (Congenbill 2016) issued in October 2020. Both bills named Orin Energy as shipper and were indorsed in blank. Jiangsu Soho was named as the party to be notified. Both bills contained the clause "To be used with charter parties". The signatory of the bills did not specify the capacity in which they signed, whether as master, agent, owner or charterer. Both "Master" and "Agent" boxes at the foot of the bills were ticked, with the words "KIRK WARD SDN BHD MR SOO WEI" typewritten besides the "Agent" column. Kirk Ward's stamps appeared beside the typewritten words.

The bills of lading did not in themselves contain arbitration clauses, but they did contain the usual Congenbill incorporation clause, which reads:

"All terms and conditions, liberties and exceptions of the Charterparty, dated as overleaf, including Law and Arbitration Clause/Dispute Resolution Clause, are herewith incorporated."

The sole reference to a charterparty on the face of both bills was to the 10 October Fixture Recap. Neither the 10 October Fixture Recap nor the 14 October Fixture Recap contained any clause of "Law and Arbitration Clause/Dispute Resolution Clause". The only semblance to a clause of that nature was clause 24 of Part II of both fixture recaps, the material parts of which read:

"Arbitration. Any ... disputes ... arising out of this Charter shall be put to arbitration in ... London ... pursuant to the laws of arbitration there is force, before a board of three persons, consisting of one arbitrator to be appointed by the Owners, one by the Charterer, and one by the two so chosen. ..."

Upon Orin Energy's arrest of the vessel, Daya Marine provided a letter of undertaking (the "LOU") to secure the release of the vessel. The wording of the LOU offered contained the following terms:

(a) That Orin Energy refrain from "commencing and/or prosecuting legal or arbitration proceedings in any other forum [apart from the Kuala Lumpur High Court] against the Owners of the above [V]essel".

(b) That Orin Energy will be paid such sum as adjudged "by a final and unappealable judgment of the ... Kuala Lumpur High Court Admiralty Action".

The LOU was governed by Malaysian law and any dispute arising from it was required to be resolved before the Malaysian courts. The LOU was provided subsequent to Daya Marine's application to the Kuala Lumpur Admiralty Court to determine the amount to be given as security in exchange for the release of the vessel.

London Arbitration

Pursuant to the 14 October Fixture Recap, Daya Marine commenced arbitration proceedings against Kirk Ward and Orin Energy on 2 February 2021. Both respondents in the arbitration argued that they had not entered into the 14 October Fixture Recap. The arbitral tribunal agreed with Kirk Ward's and Orin Energy's position, and on 10 December 2021 ruled that it did not have jurisdiction over the dispute. The arbitral tribunal's ruling came after Daya Marine's filing of the stay applications in May 2021 (in the in personam suit) and November 2021 (in the in rem suit).

Incorporation of the charterparty arbitration clause

Daya Marine could rely on the arbitration clause only if it was a party to the bills of lading, provided that the arbitration clause was incorporated into them. In determining whether Daya Marine was entitled to rely on the arbitration clause, the first sub-issue to be determined was whether it was an owners' bill and Daya Marine was therefore a party to the bills of lading. However, nothing on the face of the bills indicated that Daya Marine was a party to them.

It was nevertheless conceded by Orin Energy that Kirk Ward had issued the bills of lading on behalf of the master of the vessel. This concession was in keeping with the "reverse presumption"1 in *Manchester Trust*,2 that is, where a vessel is chartered (other than by demise) and the bill of lading is signed by the master, the shipowners are the contracting carriers. The judge accepted the concession and held that Daya Marine was indeed a party to the bills of lading.

The next sub-issue to be determined was whether the bills of lading incorporated the arbitration clause. The judge held that the bills of lading did not incorporate the arbitration clause for two reasons. First, the arbitration clause was not germane to the receipt, carriage or delivery of the goods, which were the subject of the bills of lading. Secondly, the reference to "owners" and "charterers" in the arbitration clause meant that "it was tailored specifically for the resolution of disputes and differences between them, and did not include any one else, including shipper, consignee, etc".3 However, the judge did not examine the wording or width of the Congenbill incorporation clause to check if it was in keeping with the accepted canons of construction in this area of law.

It is submitted that a better view would have been to hold that the arbitration clause was indeed incorporated into the bills of lading, as the incorporation clause met the test for the incorporation of the arbitration clause as stated below.

First, the starting point is that general words of incorporation "do not include more than … matters which have to be dealt with by both the shipowner and the consignee in relation to the carriage, discharge and delivery of cargo".4 The incorporation of an arbitration clause should be done by distinct and specific words. This is because an arbitration clause is not germane to bills of lading, but only ancillary to it.5 The two policy reasons that account for this view are: (i) the transferability of bills of lading, which may result in remote transferees of the bill not consenting to a term in a charterparty that they are unlikely to have access to; and (ii) that clear words are needed to exclude the jurisdiction of the courts.6

It has been held by a string of authorities that charterparty arbitration clauses are incorporated into Congenbills.7 This is due to the words "including [the] Law and Arbitration Clause …" in the Congenbill incorporation clause, which is both a specific and distinct reference to the charterparty arbitration clause, thus effectively incorporating the clause into the bill of lading. Nothing in the present case suggested that the clear wording of the incorporation clause was somehow travestied by the text of the bills of lading or the context in which it was agreed. Recognising the incorporation of arbitration clause would have lent credence to the view that "where a settled construction has been given to a particular form of words, courts will recognise that … commercial parties are entitled to rely and act on it".8

Secondly, it is established that some degree of "verbal manipulation" is necessary in applying a charterparty arbitration clause in the context of a bill of lading contract. This manipulation might extend to substituting or adding to the words "owners" and "charterers" in the charterparty arbitration clause, the words "shippers" or "receivers".9

Thus, perhaps a "manipulated" version of the charterparty arbitration clause in the present case could have read:

"Arbitration. Any … disputes … arising out of this Charter shall be put to arbitration in … London … pursuant to the laws of arbitration there is force, before a board of three persons, consisting of one arbitrator to be appointed by the Owners [or Shippers], one by the Charterer [or Receivers], and one by the two so chosen. …"

This reading of the clause would have made it apt to resolve disputes under both the Fixture Recaps and the bills of lading.

Waiving the right to arbitration

Having held that the arbitration clause was not incorporated into the bills of lading, the judge found that Daya Marine had lost the right to arbitrate the dispute. First, both of Daya Marine's stay applications in favour of arbitration in London were premised on the arbitration proceedings initiated on 2 February 2021. With the tribunal's ruling declining jurisdiction on 10 December 2021, the applications to stay Kuala Lumpur court proceedings in favour of arbitration (filed in May and November 2021 and both decided in April 2022) were redundant.

Secondly, Daya Marine's LOU said that: (i) Orin Energy was to refrain from commencing or prosecuting proceedings in any other forum apart from the Kuala Lumpur High Court; and (ii) payment under the LOU was conditional on a judgment in the in rem suit. The judge held the view that these wordings lent credence to the argument that Daya Marine itself contemplated no further proceedings by Orin Energy apart from the Kuala Lumpur Admiralty Court suit.

Thirdly, while applying to the Admiralty Court to fix the amount of security to be provided to secure the release of the vessel, Daya Marine did not indicate that the merits of the dispute would be heard in any other forum apart from the Admiralty Court.

Fourthly, Daya Marine had agreed that the LOU be governed by Malaysian law and that any dispute arising under it was to be heard by Malaysian courts. Thus, the judge reasoned, "if the LOU was to be governed by Malaysian law and any dispute to be referred to the Malaysian courts, then the Malaysian courts also ought to decide the

dispute for which the LOU had been provided".10 Taken with the above factors, the judge held that Daya Marine's conduct had rendered superfluous the line in the LOU, namely that the LOU "is not to be construed as any admission of liability or any submission to the jurisdiction of the Malaysian courts".11

Fifthly, due to the finding of the arbitral tribunal in declining jurisdiction, Daya Marine was estopped by the doctrine of res judicata from contending that there was an arbitration agreement between Daya Marine and Orin Energy. The judge held that Daya Marine could with reasonable diligence have contended in the London arbitration that the arbitration clause had been incorporated into the bills of lading to enable its claim to be brought against Orin Energy in the arbitration. Daya Marine's failure to do so and its insistence that the 14 October Fixture Recap was the only arbitration agreement between it and Kirk Ward and Orin Energy, meant that Daya Marine was bound by that election.

The judge's reasoning that the choice of law and jurisdiction clause in the LOU meant that the arbitration clause had been varied (the fourth point mentioned above) is in keeping with Sheen J's holding in *The Pia Vesta*12 that the exclusive jurisdiction clause in contracts of carriage can be varied by means of the agreement embodied in a Club letter of undertaking.

It is submitted that the two steps that could have helped improve Daya Marine's position would have been for it expressly to reserve in the LOU its right to refer the dispute to arbitration in London; and to act throughout the proceedings in a manner consistent with a party keen to have the dispute arbitrated in London.

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1 Paul Todd, *Principles of the Carriage of Goods by Sea* (Routledge 2016), para 17.1.4.

2 *Manchester Trust v Furness, Withy & Co Ltd* [1895] 2 QB 539 (CA), page 549.

3 Paragraph 154.

4 *The Portsmouth* [1912] AC 1, page 8.

5 *Caresse Navigation Ltd v Office National de l'Electricite (The Channel Ranger)* [2015] 1 Lloyd's Rep 256, para 15.

6 Sir Guenter Trietel and FMB Reynolds, *Carver on Bills of Lading* (1st Edition, Sweet and Maxwell, 2001) para 3-028.

7 *The Delos* [2001] 1 Lloyd's Rep 703 paras 7 and 12; *The Rena K* [1978] 1 Lloyd's Rep 545; [1979] QB 377 at pages 390 to 391; *The Navios Koyo* [2022] 2 Lloyd's Rep 105, paras 20 and 21.

8 *The Channel Ranger*, para 19.

9 *Pride Shipping Corporation v Chung Hwa Pulp Corporation (The Oinoussin Pride)* [1991] 1 Lloyd's Rep 126, pages 130 to 131; *The Rena K* [1979] 1 QB 377 at page 390; *Daval Aciers d'Usinor et de Sacilor v Armare SA (The Nerano)* [1996] 1 Lloyd's Rep 1, page 5; *The Dolphina* [2012] 1 Lloyd's Rep 304, para 130.

10 Paragraph 101.

11 Paragraph 102.

12 [1984] 1 Lloyd's Rep 169 at page 171, approved by Males J in *Viscous Global Investment Ltd v Palladium Navigation Corporation (The Quest)* [2014] 2 Lloyd's Rep 600, para 18.