

CA on appeal from Commercial Court (Mr Justice Potter) before Phillips LJ; Mummery LJ. 4th October 1996.

LORD JUSTICE PHILLIPS:

1. This is an appeal brought by the defendants with leave of this court from an order of Potter J dated 5 February 1996. By that order the judge dismissed an application under Order 12 rule 8 by the three defendants to set aside service of process or, alternatively, to stay the action pursuant to the provisions of the Civil Jurisdiction and Judgments Act 1982.
2. The plaintiff, Glocom, is a United Kingdom company which trades internationally in animal food stuffs. The defendants are, respectively, an English and two Dutch insurance companies who together subscribed to an Open Cover issued in Rotterdam under which Glocom were entitled to make declarations in respect of parcels of commodities that they were selling, and to complete various certificates of insurance that could then be transferred, each certificate constituting an individual contract of insurance under the Open Cover.
3. In this action Glocom claims in respect of the total loss of a parcel of cargo covered by one such certificate. It is common ground that that certificate contains provisions which amount to an agreement as to the jurisdiction in which this claim is to be brought. That agreement is effective in law pursuant to Articles 12 and 17 of the Brussels Convention which forms Schedule 1 to the Civil Jurisdiction and Judgments Act 1982.
4. The issue raised on this appeal is simply whether, on the true construction of those provisions, the agreed jurisdiction in this case is England or Rotterdam. Before turning to the relevant provisions of the certificate, I propose to summarise the context in which those provisions fall to be construed.

The Open Cover

5. The Open Cover provided that it was subject to the following conditions.
"T942 Standard Conditions for Open Covers (Cargo)
In respect of products for animal fodder industry assured has liberty to insure on either of the following options:
1/GAFTA Insurance clauses No 72 with deletion of section 1, 2 and 7.
2/GAFTA Insurance clauses no 72 with deletion of section 1 and 7.
3/GAFTA Insurance clauses no 72 thus including the risks of heating/sweating/spontaneous combustion, howsoever and whatsoever.
In respect of other products conditions to be arranged."
6. Mr Hancock, for Glocom, suggested that these provisions gave the assured the option to select GAFTA terms in place of the entirety of Standard Conditions T942. I do not believe that this is correct. T942 contains conditions appropriate to an open cover which have no counterpart in the GAFTA conditions. I consider that the two sets of conditions ought to be read together. The following conditions at T942 are relevant:

"23 Applicable Law

23.1 *This insurance is a contract of insurance which is subject to Dutch Law.*

23.2 *In case, however, that according to this Policy English or another foreign Law has been made applicable, this only means that the coverage of each sending is such as it is in a policy made out according to that foreign Law.*

24 Jurisdiction

24.1 *All disputes arising out of this policy or the separate policies issued under this Policy shall be submitted to the competent court at the place where this Policy was issued.*

10.4 *If particular sendings are required to be insured in different wordings, at different terms and conditions or subject to other Law, they shall be so insured in as far as the resulting coverage is practically identical to the coverage according to this Policy. The different wordings etc shall be expressed in the declarations, respectively in the separate policies mentioned hereafter or in the certificates of insurance.*

9 Undelivered or returned interests

If the documents of a sending insured under this Policy are not taken up or if such sending is not taken delivery of - regardless of the reason for that - or is returned, it shall remain insured during stay and/or further transport and/or return transport etc at the same terms and conditions as those at which it was insured under this Policy during the original voyage."

The Sale Contract

7. The goods to which this action relates consisted of a part cargo of 2,794 metric tonnes of tapioca pellets shipped aboard the Aquilla 11 for carriage from Kakinada in India to Ravenna in Italy. This parcel was sold by Glocom to Consorzio Agrario Provinciale ("CAP") CIF on the terms of GAFTA form No 96. Clause 19 of these terms provided:

"19 INSURANCE - Sellers shall provide insurance on terms not less favourable than those set out hereunder, and as set out in detail in The Grain and Feed Trade Association Form 72 viz:-

(a) Risks Covered-

Cargo Clauses (WA), with average payable, with 3% franchise or better terms - Section 2 of Form 72

War Clauses (Cargo) - Section 4 of Form 72

Strikes, Riots and Civil Commotions Clauses (Cargo) - Section 5 of Form 72

- (b) *Insurers - The insurance to be effected with first class Underwriters and/or Companies who are domiciled or carrying on business in the United Kingdom or who, for the purpose of any legal proceedings, accept a British domicile and provide an address for service of process in London, but for whose solvency Sellers shall not be responsible."*

The Loss

8. On 11 May 1955 the Aquilla stranded off Jeddah. Salvage attempts failed and it is alleged that the cargo became an actual or constructive total loss. CAP rejected the documents tendered under the CIF contract, including the certificate, whereupon Glocom made the claim which is the subject matter of this action as owners of the cargo and holders of the certificate of insurance.

The Certificate

9. The certificate of insurance, No S1310A included the following provisions. I shall give them my own numbering for ease of reference:

"Clause 1:

Forms of Cover, clauses or Conditions No 1,4,5,7 as stated below

Where the insurance must be placed in accordance with a standard GAFTA Contract contrary to all other stipulations in this Certificate, the insurance clauses regarding Marine SRCC and War Risks of this standard contract (last editions) and the Institute Radioactive Contamination Exclusion Clause shall apply, viz

Insurance clauses as per GAFTA form no 72

Sect. 1 Cargo Clauses (All Risks)

Sect. 2 Cargo Clauses (W.A.) - 3% Franchise

Sect. 3 Cargo Clauses (F.P.A.)

Sect. 4 War Clauses (Cargo)

Sect. 5 Strikes Riots and Civil Commotions Clauses

Sect. 6 Australian, Canadian, South African and United States of America Acts (relating to carriage of goods by sea)

Sect 7 Spontaneous Combustion (including heating, sweating or spontaneous combustion - H.S.C.C.)

Clause 2:

If according to terms of the sales contract regarding the insurance, a British domicile is required by the Holder of this certificate for legal proceedings, contrary to all other terms and conditions of this insurance, insurers accept such British domicile and for service of process provide the following address:

The Eagle Star Insurance Co Ltd

Eagle Star House

9 Aldgate High Street

London EC3N 1LD ENGLAND

Clause 3:

Disputes arising under this Certificate of Insurance shall be exclusively subject to Dutch Jurisdiction and settled by the Court at Rotterdam subject to an appeal to higher courts in accordance with the Dutch Code of Procedure."

The Issues

10. Two inter related issues are raised on this appeal:
1. Does clause 2, on its true construction, constitute an overriding agreement to English jurisdiction where as here goods are sold on terms of GAFTA form number 96? If so --
 2. Does that agreement apply while the certificate is held by the original assured as seller or only when the certificate has been transferred to the buyer?
11. As to the first issue Potter J held as follows:
- (1) Clause 19(b) of GAFTA form 96 required the seller to provide a contract of insurance that was subject to English jurisdiction.
 - (2) Clause 2 of the certificate on its true construction constituted an agreement to English jurisdiction.
 - (3) Clause 2 overrode the conflicting provisions of clause 3.
12. Mr Schaff, for the defendants, challenges the last two findings. He submits that there is no conflict between clause 2 and clause 3 of the certificate. Clause 2 does no more than make provision for service of process. Clause 3 requires that the process in question shall be that of the Court of Rotterdam which has exclusive jurisdiction.
13. I accept the submissions of Mr Hancock that this argument is unsound for the following reasons:
- (i) Clause 19 of GAFTA form 96 requires the CIF seller to provide a contract of insurance under which the buyer can serve process in London upon insurers who have, or who, for the purposes of any legal proceedings, accept a British domicile. This requirement is plainly designed to ensure that the contract of insurance is subject to English jurisdiction. Indeed, Mr Schaff did not seek to contend to the contrary.
 - (ii) It is no coincidence that the wording of clause 2 of the certificate is similar to that of clause 19(b) of GAFTA form 96. The one is designed to comply with the other. Clause 2, on its true construction, provides in effect that, if the sale contract pursuant to which the certificate is issued requires that the contract of insurance shall be subject to English jurisdiction, the insurers agree to such jurisdiction. Were this not so, every certificate issued under the Open Cover would constitute a breach of clause 19(b) of GAFTA form 96.

- (iii) The words "*contrary to all other terms and conditions of this insurance*" in clause 2 of the certificate can only refer to clause 3 of the certificate. There is no other provision to which they could sensibly relate. This reflects the fact that there would otherwise be a potential conflict between clause 2 and clause 3. Both clauses deal with jurisdiction and where clause 2 applies, it is expressly paramount.
- (iv) The suggestion that clause 2 of the certificate deals simply with service in London of Rotterdam process is commercially nonsensical. Mr Schaff told me, on instructions, that under Dutch procedure proceedings in the Rotterdam court are commenced by service on an official in Rotterdam. It follows that his suggested construction of clause 2 would achieve nothing.

14. For these reasons I have concluded that the reasons reached by Potter J are correct.

The second issue

15. Potter J dismissed Mr Schaff's argument on the second issue in but a few lines of his judgment. That argument focuses on the following words in clause 2 of the certificate:
- "If according to the terms of the sales contract regarding the insurance, a British domicile is required by the Holder of this certificate for legal proceedings...."*
16. Mr Schaff submits that this wording draws a distinction between the original assured/seller and the purchaser/transferee of the certificate of insurance. Whereas clause 2 applies as between the latter and the insurer, the relationship of the original assured is governed by the terms of the Open Cover, not the certificate issued under it.
17. Mr Schaff submits that there is an analogy between the certificate and a bill of lading issued to a charterer. Only when each is transferred does it become a binding contract in the hands of the transferee replacing the contract under which it is issued, ie the Open Cover or charter party.
18. In my judgment this analogy is inapt. An Open Cover under which declarations fall to be made and certificates issued cannot be compared to a charter party. The scheme of the insurance, reflected by the terms of the Open Cover and by the form of the certificate in this case, is that the assured under the Open Cover will first conclude a sale contract and then issue a certificate on terms that comply with that contract (see in particular clause 1 of the certificate). Those terms, including the provisions as to jurisdiction, take effect when the certificate is issued, notwithstanding the fact that the certificate will usually be held initially by the assured/seller. In the event of conflict between the terms of the certificate and the terms of the Open Cover, the former prevail as expressly provided in the Open Cover.
19. If the sale contract requires insurance subject to English jurisdiction, then the certificate from the moment of its issue provides for such jurisdiction. If goods are lost or damaged while still owned by the seller, any claim by the seller must be on the terms of the certificate and subject to its provisions as to jurisdiction. In the present case Glocom have properly commenced their action in the English Commercial Court as permitted and required by the terms of the certificate and the provisions of the Brussels Convention.
20. For these reasons I would dismiss this appeal.

LORD JUSTICE MUMMERY: I agree.

Order: Appeal dismissed with costs. Leave to appeal to House of Lords refused.

MR A SCHAFF (Instructed by Clifford Chance & Co., London EC1A 4JJ) appeared on behalf of the Applicants.
MR G HANCOCK (Instructed by Richards Butler, London EC3A 7EE) appeared on behalf of the Respondents