

LLOYD'S LAW REPORTS

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**PART 1 The "Mahkutai" [1996] Vol. 2
PRIVY COUNCIL**

Nov. 20, 1995: Apr. 22, 1996

THE "MAHKUTAI"

Before Lord GOFF OF CHIEVELEY,

Lord JAUNCEY OF TULLICHETTLE,

Lord NICHOLLS OF BIRKENHEAD,

Lord HOFFMANN and

Sir MICHAEL HARDIE BOYS

Bill of lading - Jurisdiction clause - Himalaya clause - Dispute under bills of lading to be determined in Indonesia - Shipowners not party to bills of lading - Cargo damaged by seawater - Cargo-owners brought action in Hong Kong - Shipowners applied for stay of action - Whether shipowners could invoke exclusive jurisdiction clause under Himalaya clause or under bailment.

By a time charter dated Oct. 11, 1989 the appellant shipowners let their vessel Mahkutai to the charterers (Sentosa) for a period of 12 months later extended by a further 12 month period.

By a voyage charter evidenced by a fixture note dated Jan. 15, 1991 Sentosa as disponent owners let the vessel to Indonesian timber exporters PT Jabarwood

(the shippers) for the carriage of a cargo of plywood from Jakarta to Shantou in the People's Republic of China.

On Jan. 17, 1991 a shipping order was issued by Sentosa's general agents Gesuri Lloyd directing the vessel to receive the cargo of plywood from the shippers for carriage to Shantou subject to Sentosa's form of bill of lading.

On Jan. 19 Sentosa's bill of lading was issued the material clauses of which provided inter alia:

4(ii) ... every ... servant agent and sub-contractor [of the carrier] shall have the benefit of all exceptions limitations, provisions, conditions and liberties herein benefiting the carrier as if such provision were expressly made for their benefit ... 19 Jurisdiction clause.

The contract evidenced by the Bill of Lading shall be governed by the Law of Indonesia and any dispute arising hereunder shall be determined by the Indonesian Courts according to that law to the exclusion of the jurisdiction of the Courts of any other Country.

The vessel arrived at Shantou on Feb. 16, 1991. A cargo survey was carried out and the cargo-owners claimed that plywood in one of the holds had been damaged by seawater. On completion of discharge at Shantou the vessel proceeded to Hong Kong for the discharge of other cargo.

On arrival of the vessel at Hong Kong the cargo owners issued a writ claiming damages arising from damage to the cargo by reason of breach of contract, breach of duty or negligence and caused the vessel to be arrested. To obtain release of the vessel the shipowners provided security for the cargo-owners' claims.

On Dec. 5, 1991 the shipowners issued a summons seeking a stay of proceedings either on the ground of breach of cl. 19 in the bill of lading or on the ground of forum non-conveniens.

-----Held, by SEARS, J., that although the

ship-owners were not parties to the bill of lading they were entitled to invoke cl. 19 either as a contractual term or as one of the terms in which the goods were bailed to them; and there was no good cause justifying a refusal of a stay.

The cargo-owners appealed.

-----Held, by H.K. C.A. (LITTON, J.A. and MAYO, J., BOKHARI, J.A. dissenting) that the shipowners were not parties to the bill of lading and there was no bailment on terms including the exclusive jurisdiction clause, the appeal would be allowed.

The shipowners appealed the main issues being whether the shipowners, who were not parties to the bill of lading contract, could invoke as against the cargo-owners the exclusive jurisdiction clause contained in that contract, the bill of lading being a charterers' bill issued by their agents to the shipowners. The shipowners claimed to be able to do so either under the Himalaya clause incorporated into the bill, on the principles established by the Privy Council in *The Eurymedon*, [1974] 1 Lloyd's Rep. 534; and *The New York Star*, [1980] 2 Lloyd's Rep. 317, or alternatively on the principles of bailment.

-----Held, by P.C. (LORD GOFF OF CHIEVELEY, LORD JAUNCEY OF TULLICHETTE, LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN and Sir MICHAEL HARDIE BOYS), that (1) an exclusive jurisdiction clause could be distinguished from terms such as exceptions and limitations in that it did not benefit only one party, but embodied a mutual agreement under which both parties agreed with each other as to the relevant jurisdiction for the resolution of the disputes; it was a clause which created mutual rights and obligations (see p. 9, col. 1);

(2) such a clause should not be an "exception, limitation, condition or liberty benefiting the carrier" within the meaning of the clause (see p.9, col. 1);

(3) the word "provision" must have been inserted with the purpose of ensuring that any other provision in the bill of lading which, although it did not strictly fall within the description "exceptions, limitations ... conditions and liabilities", nevertheless benefited the

carrier in the same way in the sense that it was inserted in the bill for the carrier's protection, should ensure for the benefit of the servants, agents and sub-contractors of the carrier; it could not therefore extend to include a mutual agreement such as an exclusive jurisdiction clause which was not of that character (see p.9, col. 2);

(4) the function of the Himalaya clause was to prevent cargo-owners from avoiding the effect of contractual defences available to the carrier by suing in tort persons who performed the contractual services on the carrier's behalf (see p. 9, col. 2);

(5) the Himalaya clause did not have the effect of enabling the shipowners to take advantage of the exclusive jurisdiction clause in the bill of lading (see p.10, cols. 1 and 2);

(6) the bill of lading under which the goods were shipped on board contained a Himalaya clause under which the shipowners as sub-contractors were expressed to be entitled to the benefit of certain terms in the bill of lading but did not include the exclusive jurisdiction clause; in these circumstances it was impossible to hold that by receiving the goods into their possession pursuant to the bill of lading the shipowners' obligations as bailees were effectively subjected to the exclusive jurisdiction clause as a term on which they impliedly received the goods into their possession; any such implication must be rejected as inconsistent with the express terms of the bills of lading; the appeal would be dismissed (see p.8, col. 2; p. 10, col. 2; p. 11, col. 1).

The following cases were referred to in the judgment of the Board:

Alder v. Dickson, (C.A.) [1954] 2 Lloyd's Rep. 267;
[1955] 1 Q.B. 158;

Bandt v. Liverpool Brazil and River Plate Steam Navigation Co. Ltd., (C.A.) (1923) 17 L1.L.rep. 142;
[1924] 1 K.B. 575;

Dresser U.K. Ltd. V. Falcongate Freight Management Ltd. (C.A.) [1991] 2 Lloyd's Rep. 557; [1992] Q.B. 502;

Elder Dempster & co. Ltd. V. Paterson Zochonis & Co. Ltd., (H.L.) (1924) 18 L1. L.Rep. 319; [1924] A.C. 522; (C.A.) (1922) 13 L1.L.Rep. 513; [1923] 1 K.B. 420; Forum Craftsman, The (C.A.) [1985] 1 Lloyd's Rep. 291;
Johnson Matthey & Co. Ltd. V. Constantine Terminals Ltd., [1976] 2 Lloyd's Rep. 215;
London Drugs Ltd. V. Kuehne & Nagel International Ltd., (1992) 97 D.L.R. (4th) 261;
New Zealand Shipping Co. Ltd. V. A.M. Satterthwaite & Co. Ltd. (The Eurymedon), (P.C.) [1974] 1 Lloyd's Rep. 534; [1975] A.C. 154;
Pioneer Container, The, (P.C.) [1994] 1 Lloyd's Rep. 593; [1994] 2 A.C. 324;
Port Jackson Stevedoring Pty. Ltd. v. Salmond and Spraggon (Australia) Pty. Ltd. (The New York Star), (P.C.) [1980] 2 Lloyd's Rep. 317; [1981] 1 W.L.R. 138; [1979] 1 Lloyd's Rep. 298;
Scruttons Ltd. v. Midland Silicones Ltd., (H.L.) [1961] 2 Lloyd's Rep. 365' [1962] A.C. 446;
Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd., (H.L.) [1912] A.C. 1;
Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd., (1988) 165 C.L.R. 107;
Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd., [1956] 1 Lloyd's Rep. 346; (1956) 95 C.L.R. 43.

This was an appeal by the appellants, the owners of the Indonesian vessel Mahkutai from a decision of the Court of Appeal of Hong Kong (Litton J.A. and Mayo, J., Bokhari J.A. dissenting), who by a majority reversed an order by Mr. Justice Sears granting the shipowners a stay of proceedings brought in Hong Kong by the respondents the owners of cargo lately laden on the vessel on the ground that the proceedings had been brought in contravention of an exclusive jurisdiction clause under which any dispute was to be determined in the Court of Indonesia.

Mr. Peter Gross, Q.C. and Mr. Duncan Matthews (instructed by Messrs. Sinclair Roche & Temperley) for the appellants; Mr. Richard Aikens, Q.C. and Mr. Alan Roxburgh (instructed by Messrs. Crump & Co.) for the respondents.

The further facts are stated in the judgment of the Board which was delivered by Lord Goff of Chieveley.

Judgment was reserved.