

# Enforcement of covenant not to sue

*Ravi Aswani welcomes the clarity and good business sense delivered in Whitesea*

*Whitesea Shipping & Trading Corporation and another v El Paso Rio Clara LTDA and others* [2009] EWHC 2552 (Comm)

## The facts

The claimants, who were the registered owners and the demise charterers of the Marielle Bolten ('the vessel'), sought an anti-suit injunction against the defendants, cargo interests and subrogated insurers under four owners' bills of lading.

The defendants had commenced proceedings in Brazil against both the claimants and certain third parties. The claimants were members of a shipping pool and, pursuant to the pool agreement, a time charter of the vessel was entered into between an interim company FSPL as disponent owners and charterers, VOC. VOC in turn sub-chartered to BC on substantially the same terms.

The vessel was ordered to Brazil where she loaded cargoes for which the four bills were issued. The bills were governed by English law, contained an exclusive

jurisdiction clause in favour of the English courts, and contained a clause paramount. Additionally, they contained a fairly standard form *Himalaya* clause and a definition of "sub-contractor" in the terms shown in the box below (the numbers in brackets being inserted by Flaux J for ease of exposition).

Unfortunately, the vessel grounded off the waters of the Dominican Republic. The claimants' explanation was that either this was caused by poor weather at the time (constituting a peril of the sea under art IV, r 2 (c) of the Hague Rules) or a navigational error by the master (constituting an act of the master in navigation of the vessel under art IV, r 2(a)). In either case, the claimants stated that they had a complete defence to any cargo claim.

Salvors were appointed to refloat the vessel. The claimants had declared general average and obtained average bonds from the cargo interests and average guarantees from the cargo insurers. Following the publication of a general average



adjustment, proceedings were issued in the Commercial Court by the claimants who sought to recover certain charges as well as to obtain declarations of liability on the basis of there being no defence to such claims if the incident was caused by perils of the sea or the fault of the master in navigation.

The procedural history was rather complicated, but for present purposes the important point is that the defendants subsequently commenced proceedings against the claimants (and also the vessel's manager, VOC, BC and the claimants' P&I Club). Those proceedings contended for strict liability on the basis that the Hague Rules did not apply in Brazil.

## The issue

The claimants applied in the already extant English proceedings for an anti-suit injunction to restrain the defendants from continuing the proceedings commenced in Brazil. Although the defendants stated that the Brazilian proceedings were only made in tort and that they were issued only to protect time, Flaux J was not persuaded. In particular, he referred to the "avowed intention of the insurer defendants to pursue the Brazilian proceedings against the third parties, with a view to persuading the English court at a later stage to discharge the anti-suit injunction against the insurer defendants in respect of claims in Brazil against the claimants or to grant a stay of the English proceedings". It was accepted by the defendants before Flaux J that an anti-suit injunction should be granted against them to restrain them from proceeding against the claimants in Brazil, but this concession did not extend to the various third parties against whom the defendants had also issued proceedings in Brazil.

The claimants submitted that each of the third parties sued in Brazil was their "sub-contractor" within the meaning of cl 1f. Accordingly, the defendants were bound by a covenant to the claimants not to sue those third parties and the Brazilian proceedings were vexatious. The claimants contended that they were

## 1 Definitions

f. "Subcontractor" includes stevedores, longshoremen, lighters, terminal operators, warehousemen, truckers, agents, servants, any person, firm, corporation or other legal entity who performs services incidental to the goods and/or the carriage of the goods, including direct and indirect subcontractors and their servants and agents ...

### 3 Subcontracting

- a. The carrier shall be entitled to subcontract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by the carrier in relation to the goods.
- b. [1] The merchant undertakes that no claims or allegations shall be made against any servant, agent, stevedore or subcontractor of the carrier which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with the goods, [2] and if such claim or allegation should nevertheless be made, to indemnify the carrier against all consequences thereof. [3] Without prejudice to the foregoing, every servant, agent, stevedore and sub-contractor shall have the benefit of all provisions herein benefiting the carrier as if such provisions were expressly for their benefit, and all limitations of and exonerations from liability provided to the carrier by law and by the terms hereof shall be available to them, and in entering into this contract the carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such servants, agents, stevedores and sub-contractors.
- c. The defences and limits of liability provided for in this bill of lading shall apply in any action whether the action be founded in contract or in tort.

entitled to enforce the covenant not to sue by injunction. The defendants advanced three objections based principally on the application of art III, r 8 of the Hague Rules. The defendants did raise some further matters but the objection of interest is the one based on art III, r 8.

## Article III, r 8

Article III, r 8 of the Hague Rules of course provides as follows: “Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.”

In essence, the defendants contended that cl 3 effectively provided third parties with a blanket immunity from liability that was contrary to art III, r 8. The reasoning behind this was that the Himalaya contract between a qualifying third party and the defendants was itself a contract of carriage governed by the Hague Rules. That argument was based largely on the decision of the House of Lords in *The Starsin* [2004] 1 AC 715.

Flaux J reasoned as follows. The benefit of the covenant not to sue in cl 3 inured only for the benefit of the contractual carrier and not third parties. The defendants’ fall back position was that, based on *The Starsin*, even if the first part of cl 3 did not inure for the benefit of third parties it remained the case that any attempt to enforce the covenant by the claimants amounted to the conferring of a blanket immunity on third parties who were performing carriage obligations, and that this still fell foul of art III, r 8. This required Flaux J to analyse carefully the decision in *The Starsin*. Flaux J pointed

out that statements by the majority in *The Starsin* that the Himalaya contract was a contract of carriage for the purpose of the Hague Rules were dependent in that case upon a deeming provision in the equivalent to cl 3 which had no corresponding provision in the present case. There was a factual difference in that in *The Starsin* the shipowners were actually carrying the goods and seeking to rely upon the Himalaya contract derived from charterers’ bills of lading, such that it was a contract of carriage. However, Flaux J accepted that the ratio of the decision of the House of Lords in *The Starsin* was that the Himalaya contract was to be regarded as a “contract of carriage” due to the deeming provisions, and not because the third party (the shipowners in that case) had in fact performed carriage.

Flaux J was also unsympathetic to a policy submission made by the defendants that to construe the covenant not to sue as null and void would give effect to the purpose of the Hague Rules in preventing cargo interests from avoiding the effect of contractual defences. Flaux J took the view that acceding to the submission would have the opposite effect, especially in circumstances where the Brazilian proceedings themselves were an attempt by cargo interests to avoid the Hague Rules completely.

## Comment

Flaux J has provided some authoritative clarification on a point which at least on an academic level remained open to interpretation after *The Starsin*. That point was whether or not a third party who was not a contractual carrier and could not be contractually deemed to be a party to a Himalaya contract could be a carrier under the Hague Rules based on the Himalaya contract. If so, such a third party would be at risk of being met with art III, r 8 when

attempting to rely upon the Himalaya clause. Perhaps the very fact that nobody has apparently run this ingenious argument in the past provides an indication as to its commercial merits. The very purpose of the Himalaya clause is to protect third parties who agree to assist the contractual carrier. Many stevedoring companies require in their standard terms and conditions of business that all contracts of carriage in relation to which their services are contracted will contain Himalaya protection for them. Such stevedores and other companies who have occasion to rely upon Himalaya clauses in their everyday business will breath a sigh of relief that Flaux J has given effect to the commercial realities of maritime trade in granting the claimants an anti-suit injunction. Such parties may wish to consider whether they wish to amend their standard terms and conditions of business to provide relief against a contractual carrier issuing bills of lading containing a deeming provision which in light of *The Starsin* might create complications which the third parties in the present case were able to avoid.

It remains to be seen if this decision is appealed. For the moment, it is respectfully submitted that Flaux J’s decision accords with good business sense and settled authority. To the extent that the granting of an anti-suit injunction is an exercise of the court’s discretion, the case also provides a reminder to practitioners about the need to have as much merit as possible available to deploy in interim applications. Flaux J seemed to be rather unimpressed by the defendants’ attempts on the one hand to advance and protect the purpose of the Hague Rules (on the defendants’ own case) whilst at the same issuing proceedings in a jurisdiction where the Hague Rules did not apply.

**Ravi Aswani is a barrister at Stone Chambers**

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