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Bills Of Lading And The Trade Finance Banks – The Yue You 902 Case

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The recent Singapore case of The Yue You 902 and Another Matter (2019) SGHC 106 addressed the right of banks in seeking to enforce securities in the form of Bills of Lading (B/L). In Malaysia, there has yet to be a detailed consideration of the interplay between trade finance and B/L involving maritime claims. However, the outcome in The Yue You 902 case may prove persuasive, particularly in addressing the shortcomings of the legislation governing B/L presently in force in Malaysia.

For clarity, Malaysia and Singapore, both derive their respective legislation governing the B/L in their respective countries, directly from the United Kingdom (UK). By virtue of the Civil Law Act 1956, Malaysia adopted the UK's Bill of Lading Act 1855 as the law governing B/L here (the Malaysian Act). Conversely in Singapore, by virtue of the Application of English Law Act, the UK's Carriage of Goods by Sea Act 1924 (COGSA), was adopted as the law governing B/L in Singapore (Singaporean Act).

The Yue You 902 case was decided under the Singaporean Act and has borne witness to a sense of security for the institution relying on the B/L as an instrument of security.

Background

FGV Trading Sdn Bhd (FGV), the sellers of a cargo of 10,000 metric tonnes of refined, bleached and deodorised palm oil (the Cargo) had entered a charterparty with the Defendant shipowner for the charter of the vessel, The Yue You (the Defendant). The charterparty was entered on 11.3.2016. The Cargo was sold to Avanti Industries Pte Ltd (Avanti) who then sold it to Ruchi Soya Industries Ltd (Ruchi), the final receivers, following a contract signed between both parties on 4.4.2016.

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The sequence below lists out the timeline of events:

- a. Following contracting with Ruchi, Avanti then proceeded to contract with FGV for the purchase of the Cargo on 5.4.2016.
- b. On 12.4.2016, the Defendant received instructions for the Cargo to be transported to Mangalore, India. 14 B/L were issued on behalf of the Defendant for the Cargo. The shipper identified the consignee as "To Order".
- c. The B/L was released to FGV on 19.4.2016 following payment of freight to the Defendant.
- d. On 22.4.2016, FGV issued an LOI to the Defendant for the delivery of the cargo to Ruchi without the production of the B/L. Similarly, on the same day, Avanti issued a back-to-back LOI to FGV requesting the Defendant deliver the Cargo to Ruchi without the B/L.
- e. On 24.4.2016, The Yue You arrived at Mangalore and begun to discharge the Cargo on 27.4.2016. The Cargo was completely discharged at 8.55am local time (11.25am Singapore time).
- f. In the meantime, OCBC (the Plaintiff) received 14 B/L from FGV through Maybank on 26.4.2016 under cover of a documents against payment to collection schedule. The Plaintiff then proceeded to inform Avanti of the arrival of the documents and requested payment instructions. Avanti replied by requesting financing from the Plaintiff for the entire purchase price, by way of trust receipt loan. In return, Avanti pledged the B/Ls as security (Loan).
- g. OCBC granted the Loan on 29.4.2016 and payment was affected by OCBC at 8.32pm on the same day. However, by this point, the Cargo had been completely discharged from The Yue You for about 8 hours.

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Unfortunately, Avanti had defaulted on the Loan. The Plaintiff then, attempted to take delivery of the Cargo from the Shipowner. However, despite having the original B/L, the Plaintiff could not take delivery of the Cargo as it had already been delivered to Ruchi. Thus, the Plaintiff commenced proceedings against the Defendant for breach of contract of carriage, breach of contract of bailment, conversion and detainee.

In defence of the claims brought, the Defendant raised several defences such as:

- a. The Plaintiff had not acquired a right to sue under the Singapore Act on the basis that the Cargo had been discharged prior to the Plaintiff becoming valid holders of the B/L. Thus, argued the Defendant, the B/L had become spent prior to the Plaintiff acquiring it.
- b. The Plaintiff were not holders of the B/L in good faith under the Singapore Act as the Plaintiff had particular knowledge of Avanti's commercial practices and thus knew that the Cargo would be delivered without the production of the B/L.
- c. The Plaintiff had consented, authorised, or otherwise ratified the discharge of the Cargo without presentation of the B/L.

Decision

In regard to issue (a), the Court interestingly found that the B/L had not become spent. In reaching this conclusion, the Court relied on *BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and another, third parties)* [2003] 3 SLR(R) 611 stated as follows:

“Ang J could not have been clearer at [30] of BNP Paribas that she was making a definitive finding. The sentence “I also find that the cargo was delivered ... to persons who were not entitled to possession so much so that BNP is not a holder of spent bills of lading” could only mean that Ang J found that delivery to persons not entitled does not cause a bill of lading to be spent. The point

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made at is merely an “even if” point to fully address all possibilities. It is not language used by a judge who wishes to leave a point open.”

The above finding by the Court reflects the traditional common law position as the Cargo was not delivered to the person entitled to the possession of it under the B/L.

On issue (b), the Court disagreed with the Defendant and held in favour of the Plaintiff. The Court opined that there was no evidence that the Plaintiff had actual knowledge that the Cargo had been discharged.

Finally, in regard to issue (c), the Court found that the Defendant had not consented, authorised or otherwise, ratified the discharge of the of the Cargo without presentation of the B/L. In order to establish consent, the Court stated that something must be said or done by the Plaintiff which affected the mind of the Defendant to induce him to conclude they had consented without the production of the B/L.

In fact, in this case, the Defendant stated that there was no communication between them and the Plaintiff prior to the discharge of the Cargo. As such, it then cannot be said that there was consent by the Plaintiff.

Commentary

The decision in *The Yue You* highlights the intricacies faced by banks, particularly, in accepting the B/L as a form of security. Under the Singaporean Act above, the outcome had been acceptable, the same cannot be said conversely of the Malaysian Act.

A similar situation under the Malaysian Act would be markedly different. The contractual right would not have transferred to the Plaintiff as the B/L would have been spent prior to the delivery of the B/L to the Plaintiff as security for the loan provided. This is because under the Malaysian Act, the right of suit is transferred only when property in the goods is passed “upon or by reason of endorsement”. Where there had been no causal connection between the passage of property and the endorsement, the endorsees would be unable to enjoy the statutory rights of suit.

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Hence, at this stage, considering the B/L has already been spent and with it - goes the right of suit against the Defendant.

Thus, in the present context, the Plaintiff would lose its right in the property and the right of suit under the B/L. The Plaintiff is thus left with no alternative but to pursue a remedy under the facility agreement. However, as seen here, Avanti had already gone insolvent. Consequently, this leaves the Plaintiff and entities like it in Malaysia, who rely on the B/L as a means of security for the loans provided in a vulnerable position.

There has been calls for the Malaysian Act to be amended to reflect modern practice, but we are yet to see this happen. Perhaps, the judgement in The Yue You would prove to be the push we all seek.

Authored by Kuhan Manokaran, an associate with the firm's Shipping and International Maritime practice.

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