The ASL Power
[2002] SGHC 164

Case Number : Adm in Rem 65/2000

Decision Date : 29 July 2002

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : S Appadurai and Tan Hui Tsing (Joseph Tan Jude Benny) for the plaintiff; Loo Dip Seng, Goh Wee Ling and Mathiew C Rajoo (Ang & Partners) for the defendant

Parties : —

Admiralty and Shipping – Bills of lading – Passing of title to goods – ss 2, 5 Bills of Lading Act (Cap 384, 1994 Rev Ed)

Commercial Transactions – Sale of goods – C & F contracts – Whether title to goods passes on shipment or payment

Conflict of Laws – Choice of law – Letter of undertaking from defendants to apply Singapore law – Whether letter of undertaking binding on plaintiffs

Conflict of Laws – Choice of law – Tort – Double-actionability rule – Whether claim actionable as a tort in Singapore

Conflict of Laws – Choice of law – Tort – Lex situs principle – Goods in transit

Judgment

Cur Adv Vult

GROUNDS OF DECISION

The facts

1. C M Van Sillevoldt Specerijen BV (the plaintiffs) are a Dutch company which deals in the processing and sale of pepper. The Owners of the **ASL POWER** (the tug) are Capitol Marine Pte Ltd (the defendants) which tug, at the material time, was chartered to Sindo Damai Marine Pte Ltd (the Third Party) to provide towing services to the Third Party's dumb barge **INTAN 6** (the barge).

2. By a contract dated 23 April 1999 (the contract), the plaintiffs bought from an Indonesian company PT Putrabali Adyamulia (the sellers) 45 metric tons of muntok white pepper to be shipped from Pangkal Pinang, Indonesia to and be delivered at, Rotterdam, The Netherlands. Negotiations for the contract on the sellers' behalf were conducted by Keijzer & van Schilt (the brokers) while the plaintiffs negotiated through their representative Henricus Peter Tijssen (Tijssen). The contract was only one of several the plaintiffs had made over the years with the sellers, transacted through the same brokers. The brokers became the sellers' exclusive agents for Europe in 1999.

3. Under the contract, the first shipment of 15 metric tons (the cargo) was scheduled to be delivered in January 2000, with the balance to follow in two (2) shipments in the subsequent two (2) months. The contract was on C & F basis; other terms relevant for our purpose are as follows:

> (i) Payment: Cash against documents at first presentation, buyer bank must release payment to seller bank maximum 14 days after B/L date. Any delay payment automatically buyer's bank have to pay the interest charges 11% per year and added to the invoice value. Sellers guarantee to

present full set of documents to buyers bank within 14 days after B/L date.

(ii) This contract is made upon the terms and conditions including the rules of arbitration and appeal (of which the parties admit they have knowledge and notice) of contract no. 5 of the International General Produce Association

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4. The cargo was shipped by the sellers through Sea Hawk Freight Pte Ltd (Sea Hawk) who issued an ocean bill of lading dated 27 January 2000 (the bill of lading) for combined transport or port to port shipment. The cargo was stuffed into a container and carried on the barge from Pangkal Pinang to Singapore after which it would be shipped on the vessel **HANJIN DALIAN** for the voyage to Rotterdam. The barge towed by the tug left the port of Pangkal Balam for Singapore on or about 30 January 2000. Unfortunately, due to heavy seas and gale force winds (according to the tug Master's report) encountered during the course of the voyage, the barge sank on 1 February 2000 and the containers on board, including that with the cargo inside, were lost. On 2 February 2000, the brokers notified the plaintiffs of the loss.

5. After the cargo had been loaded onto the barge and the bill of lading (3 sets) was issued by Sea Hawk, the sellers forwarded (on or about 22 February 2000) the bill of lading together with other documents such as the commercial invoice and packing list through Rabobank Duta Indonesia (the sellers' bank) to the plaintiffs' bank Mees Pierson (Mees Pierson), for the purpose of negotiating the letter of credit (for US$91,500) which the plaintiffs had established for the contract. The bill of lading named the plaintiffs as the notify party while the consignee was stated as *'to order of Rabobank Duta Indonesia'*. The cargo was insured by the plaintiffs.

6. Notwithstanding the loss of the cargo, the sellers received payment under the plaintiffs' letter of credit. The plaintiffs in turn claimed on their insurers (Central Beheer) and were eventually paid US$100,650 for the value of the cargo, plus 10% for loss of profit. Hence, this claim is a subrogated right of the said insurers.

The pleadings

7. The plaintiffs filed this action on 3 March 2000. To pre-empt the arrest of the tug or her sister ships, the defendants' protection and indemnity club (the P&I Club) furnished security to the plaintiffs for this claim by way of a letter of undertaking dated 19 April 2000. The P&I Club agreed therein to submit to Singapore jurisdiction and agreed that Singapore law would apply, for any claim arising out of the loss of the cargo.

8. In the (amended) statement of claim, the plaintiffs alleged that they were the owners of the cargo at the time the barge sank. The plaintiffs pleaded that the defendants owed them a duty of care in tort to take reasonable care of the cargo, which duty they breached when the cargo was lost due to the sinking of the barge.

9. In the (amended) defence, the defendants pleaded that they were neither the carriers of the cargo nor the issuers of the bill of lading; neither were they involved in nor responsible for, the loading of the cargo or other containers on the barge. They averred that the tug was chartered to the Third Party to tow the barge from Pangkal Balam to Singapore. Consequently, the defendants pleaded, they had no contractual or other relationship with the plaintiffs such as to give rise to a duty of care. In the alternative, if such a duty of care did exist, it extended only to the provision of towing services

for the barge which the defendants did provide.

10. In the further alternative, the defendants pleaded that in providing towing services to the barge, the tug's crew were the servants or agents of the Third Party. Hence the defendants were not in breach of any duty as alleged or at all.

11. Numerous other alternative defences were raised by the defendants which for purposes of this trial, are not necessary to be dealt with for reasons which will appear below.

12. Shortly after the defendants had entered an appearance to the writ of summons, the defendants filed a Third Party Notice and subsequently, joined the Third Party to these proceedings.

13. By an order of court dated 3 December 2001 made pursuant to the defendants' application for further directions, it was ordered that the following preliminary issue be first tried and determined before a trial of the plaintiffs' claim on its merits:

Whether the plaintiffs were on 1 February 2000, the date of loss of the cargo in respect of which action is brought, the owners of the said cargo and/or have title, interest or *locus standi* to sue the defendants in tort for the loss thereof or to maintain the present action?

The evidence

14. The preliminary issue only concerned the plaintiffs and the defendants, not the Third Party. For determination of the preliminary issue, both sides called expert testimony on Indonesian law.

(i) the plaintiffs' case

15. Besides their expert, the plaintiffs called a witness of fact. He was Tijssen, who was in charge of purchasing. Tijssen (PW1) testified that the plaintiffs gave written instructions to Mees Pierson on 23 February 2000 (1AB46), to release payment to the sellers on their letter of credit; presumably payment would have been released a day later. Tijssen referred to a letter (dated 3 February 2002) from Mees Pierson, forwarding to the plaintiffs documents which the bank had received, for purposes of negotiating the letter of credit. The documents included the bill of lading which reverse side (see 1AB12) had by then, been endorsed by Mees Pierson and the sellers' bank. After recording receipt of the documents, the plaintiffs returned them to Mees Pierson (on or about 4 February 2000) save for the bill of lading which they retained (and which reverse side they also endorsed), to enable them (through their agents) to obtain delivery of the cargo from the shipping line, upon the arrival of the vessel **HANJIN DALIAN** at Rotterdam.

16. Although he was said to be a witness of fact, it was very clear from Tijssen's cross-examination that, apart from negotiating the contract on the plaintiffs' behalf and perusing the documents for negotiation of the letter of credit, Tijssen had no personal knowledge of either the events leading to and the loss, of the cargo or, of what transpired between the sellers and the brokers at the time the contract was negotiated. No representative of the plaintiffs visited Indonesia after the sinking. Consequently, the court could not have regard to what was told to Tijssen by Mr Apeldoorn from the brokers' office, including Apeldoorn's telephone assurance (given sometime in 1999) that the sellers had agreed that property and title in the cargo would pass to the plaintiffs upon shipment, notwithstanding the express payment terms stated in the contract. Unfortunately, no representative from the sellers' or brokers' office(s) came forward to testify either. Indeed, counsel for the plaintiffs informed the court that the brokers refused to testify (N/E 27). Cross-examined on the payment terms, Tijssen had said payment had nothing to do with ownership of the cargo but, he

confirmed he had no direct contact with the sellers. However, the plaintiffs and even the brokers, had always regarded the cargo as the plaintiffs' once it was shipped. Tijssen testified that the second and third shipments of the pepper were received by the plaintiffs as scheduled.

17. As earlier stated, each side called experts who testified on Indonesian law. The plaintiffs' expert was Achmad Suhardi Kartohadiprodjo (Achmad) who is a partner in a law firm in Jakarta and has been in practice since 1969. In arriving at his opinion that property in the cargo passed to the plaintiffs upon shipment and hence they had title to sue, Achmad (PW2) looked at:

> (i) the contract;
>
> (ii) the International General Produce Association Rules, contract no. 5 (the IGPA Rules);
>
> (iii) the commercial invoice issued by the sellers;
>
> (iv) the bill of lading;
>
> (v) the letter dated 3 February 2000 from Mees Pierson to the plaintiffs;
>
> (vi) a fax advice from the sellers' bank to Mees Pierson enclosing the draft shipping documents.

However, Achmad was not shown or told about the letter of undertaking from the P&I Club, until informed by counsel for the defendants, in the course of his cross-examination.

18. In arriving at his conclusion that the plaintiffs had title to the cargo at the time of the loss, Achmad said he had to satisfy himself (which he did) that:

> (i) the plaintiffs were entitled to avail themselves of the rights and obligations under Indonesian law;
>
> (ii) the plaintiffs would have been entitled to bring this action in Indonesia;
>
> (iii) Indonesian law would apply.

19. It would be appropriate at this juncture, to set out the salient Articles (as translated) of the Indonesia Civil/Commercial Code which Achmad (and the defendants' expert) relied on:

Civil Code

612 -- The delivery of movable goods, with the exception of those which are intangible, shall be made by means of their simple delivery by the owner or on his behalf, or by the delivery of the keys to the building where the goods concerned exists.

Such delivery is not required in the event that the goods to be delivered is, by virtue of another title, already under the control of the person who is to receive the delivery of such goods.

1457-- A sale and purchase is an agreement whereby one party binds himself to deliver a good whereas the other party binds himself to pay the price agreed upon.

1458 -- A sale and purchase shall be deemed as having taken place between two parties as soon as the said parties reach an agreement as to the good and the price, even though the good concerned has not been delivered and the price concerned has not been paid.

1459 -- The ownership title to a sold good is not transferred to the purchaser as long as the said good has not been delivered in accordance with the provisions of Article 612, 613 and 616.

Commercial Code

504 -- A shipper may request a carrier to issue a bill of lading on received goods which are going to be delivered, by withdrawing a Mate's Receipt, if the Mate's Receipt has been issued.

On the other hand a carrier is responsible to inform on all information required to fill in the bill of lading.

517(a)--The delivery of a bill of lading before goods is delivered is considered as the delivery of the said goods.

20. Cross-examined, Achmad revealed that whilst he was familiar with bills of lading and sale of goods transactions and he had handled 1-2 shipping claims to-date, he specialised more in aviation law/aircraft leasing. Achmad explained that in determining Indonesian law applied to the contract, he looked at the connecting factors namely, the sellers were an Indonesian company, the cargo was Indonesian and, the accident/loss happened in Indonesian waters.

21. Achmad opined that a buyer and seller to a transaction can always agree to foreign law being applied instead of Indonesian law. If there was a dispute, Indonesian law would recognise foreign law if parties had agreed foreign law would apply, unless it was contrary to the public policy of Indonesia. Achmad agreed that Article 1459 of the Civil Code does not say that when delivery of goods is made, ownership passes. He did not dispute that the parties had agreed English law would apply to the contract, pursuant to cl 25 of the IGPA Rules.

22. It was Achmad's view that a bill of lading performs three (3) functions:

(i) it is evidence of a contract of carriage;

(ii) as a cargo receipt for shipment;

(iii) as a document of possession

and a bill of lading needs to be presented to obtain delivery of the cargo from the carrier at the port of final destination.

23. Questioned, Achmad said delivery to the carrier of the cargo would constitute delivery under Article 612 of the Civil Code, the reason being that the carrier acts as agent to the buyer and the seller's obligations would cease once delivery was effected and, control of the cargo passes to the buyer or his agent. The position would not be any different even if the bill of lading was issued to the seller by the carrier as, that is only an administrative matter. However, retention of the bill of lading by the seller does not mean there was no delivery to the buyer as, Article 612 has to be read with Article 1459 on the issue of title. If the carrier is not the buyer's agent, the seller's obligations would cease once he transfers delivery to another party. Achmad explained that Indonesian law is akin to French law under which, upon conclusion of a sale, transfer from the seller to the buyer is completed.

24. Achmad's testimony was to the effect that, physical possession/transfer of the cargo

determined who has title to the bill of lading, not transfer of the shipping documents per se. According to him, once the cargo was released to the carrier, the plaintiffs had title to sue. Achmad drew a distinction between claims in tort (which was the plaintiffs' claim) where Indonesian law applied and claims in contract where the contractually agreed law (English law) would apply. Hence, under contract law, if the plaintiffs did not pay for the cargo, the sellers could retake possession, under Article 1267 of the Civil Code, by dissolution of the contract by a court of law.

(ii) the defendants' case

25. The defendants' expert Arsul Sani (Sani) was the defendants' only witness. Not unexpectedly, he disagreed with Achmad's views. Sani has fifteen (15) years' practice in various fields of law, including commercial litigation (in maritime and sale of goods disputes). His views were sought and he gave his opinion, on the following questions:-

> (i) where an Indonesian party enters into a contract with a Dutch party to sell goods to the latter and it is expressly agreed in the contract that the same shall in all respects be governed by English law, whether English law or Indonesian law governs the contract?
>
> (ii) on the assumption that Indonesian law governs the contract, when does property in the goods pass to the buyers under the contract?

26. Besides Articles 612 and 1459 of the Civil Code, Sani also relied on Articles 1338, 1457 and 1458 thereof as well as Articles 504 and 517A of the Commercial Code and, cl 25 of the IGPA Rules for his opinion that:-

> (i) English law was the law binding the sellers and the plaintiffs. Both parties had agreed that English law would apply to the contract. In accordance with the principle of freedom to make contracts under Article 1338 of the Civil Code, English law would determine at which point title or property would pass to the plaintiffs;
>
> (ii) as a consequence of the principle of freedom to make contracts, the provisions on contract law such as Article 1459 assume the character of optional law and are not applicable to this case;
>
> (iii) assuming Indonesian law governs the contract and applying Articles 612, 1457 and 1459, transfer of title/ownership in the goods will pass from the sellers to the buyers after delivery of the goods to the buyers has taken place. However, where goods are to be delivered by sea carriage, then delivery of the goods as provided by Article 612 will be considered as taking place by delivery of the bill of lading, as provided in Article 517A;
>
> (iv) even if Indonesian law governs the contract, title and ownership in the cargo was transferred to the plaintiffs as

> buyers not earlier than 22 February 2000, (that being the date when the bill of lading was delivered to Mees Pierson by the sellers' bank).

In other words, Sani answered the preliminary issue in the negative. His opinion was premised on the bill of lading having been delivered to Mees Pierson on 22 February 2000 with payment for the cargo being made by the plaintiffs against the shipping documents subsequently. When cross-examined, Sani was told that Tijssen received the bill of lading on 4 not 22 February 2000; in that case, he said title would have passed to the plaintiffs on 4 February 2000.

27. The basis for Sani's opinion that the parties had agreed English law was the applicable law is cl 25 of the IGPA Rules which states:-

> Domicile: This contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance the Rules of the Association. The serving of proceedings upon any party by sending same to their last known address together with leaving a copy of such proceedings at the offices of the Association shall be deemed good service, rule of law or equity to the contrary notwithstanding.

read with Article 1338 of the (Indonesian) Civil Code which states:-

All agreements that have been constituted legally shall be law to those having undertaken these. Such agreements cannot be revoked other than by bilateral consent, or on grounds that are provided by law. These agreements shall be carried out in a bona fide manner.

28. Sani pointed out that Indonesian law draws a distinction between passing of title and passing of risk. Under a C & F contract, although risk in the cargo passes to the buyer upon shipment, the seller retains ownership/title until the buyer makes payment. Delivery of the bill of lading constitutes '*delivery*' under Article 612 and delivery is not dependent on payment being made for the cargo. However, if the carrier is appointed by the buyer, then delivery takes place when the cargo is handed over to the carrier. Otherwise, the carrier would be the seller's agent save where the bill of lading is endorsed by the seller, which endorsement amounts to an assignment of rights. The seller's rights would pass to the endorsee or holder of the bill of lading, from the date of endorsement. I should point out that in re-examination, Sani clarified this statement; he said the seller would not have lost his rights if endorsement of the bill of lading was for some purpose other than passing of rights such as, in order to obtain payment for the cargo.

29. As for the carrier, Sani said it owed a duty to the seller to carry the cargo and discharge it at the discharge port in good order and condition whilst, to the consignee, the carrier owed a duty to deliver the cargo.

30. Sani had placed reliance on Article 1792 of the Indonesian Civil Code which states:

A mandate is an agreement by which one person empowers another, the latter accepting such power, to carry out some business for and in the name of the principal

for his view that a carrier who is appointed by the seller at the buyer's request, remains the seller's

agent, unless the seller identifies himself to the carrier as the buyer's proxy. In the context of Indonesian law, Sani described Mees Pierson as the agent of the plaintiffs for purposes of receiving and retaining the bill of lading and other documents and, to make payment on their behalf.

31. I had earlier made my observation (para 16) on the shortcomings in Tijssen's testimony. Consequently, the court was left with only the testimony of the two (2) experts for determination of the preliminary issue.

The submissions

32. In determining the preliminary issue, the first question that needs to be answered is, what is the law applicable to this claim? Is it Indonesian law as the plaintiffs assert or, English law as the defendants contend.

33. The starting point would be to look at the contract itself, which salient clauses I have already set out in para 3 above. Then, there are the terms of the IGPA in particular cl 25 (see para 27 *supra*). Reading the two (2) terms/clauses, it seems to me that the parties to the contract had indeed agreed that English law should apply to any dispute between them. However, the dispute before this court is <u>not</u> between the sellers and the buyers but, between one party to the contract (the buyer/plaintiffs) and an outsider (the defendants), with whom under English and Singapore law, the plaintiffs have no privity of contract. The question which arises is, would that make a difference?

34. The only document which connects the plaintiffs and the defendants is the letter of undertaking furnished by the P & I Club which paras 2, 3 and 4 (see 1AB52) read as follows:

> 2. We agree to submit ourselves to the jurisdiction of the High Court of Singapore in respect of any claim arising against us pursuant to this undertaking and guarantee to obey any order or judgment of the High Court in Singapore in respect of the premises as if our head offices were within the jurisdiction of the said court and when and so far as it may be necessary that any instrument or order issued from the High Court in Singapore or any appeal therefrom should be served on us in proceedings to be taken for the enforcement of the undertaking and guarantee hereby given, we agree and consent that the service of such instrument or order on us by leaving the same at the registered office of Spica Services (S) Pte Ltd shall be in all respects as operative and effective as if the same were our principal office and such instrument or order had been served on the Officer in charge of the same.
>
> 3. We confirm that we have instructions from our Member [the defendants] that they warrant that ASL PROGRESS was not on a demise charter on 1 February 2000 and that the owners of ASL PROGRESS shall unconditionally submit to Singapore jurisdiction for the determination of the claim arising out of and in connection with the above incident, with Singapore law to apply.
>
> 4. We further undertake that we will, within 14 days of the

> receipt from you for a request to do so, instruct solicitors to accept on behalf of the owners of the ASL PROGRESS service at your option of in personam or in rem proceedings brought in connection with the above incident and we warrant that we have received irrevocable authority from the owners of ASL PROGRESS to instruct solicitors as aforesaid and to give this letter of undertaking in these terms.

35. The plaintiffs had attempted (through Achmad's testimony) to argue that the letter of undertaking would not bind them as it was not a document entered into between themselves and the defendants. With respect, that argument is not tenable, as is clearly reflected in the above extracts — the letter of undertaking was addressed to the plaintiffs by the P&I Club on behalf of the defendants. The defendants had provided consideration to the plaintiffs for not arresting the tug and or any other vessels they owned; the plaintiffs cannot be allowed to resile from their position or renege on the terms and conditions spelt out in that document for the provision of the P&I Club's undertaking.

36. Another argument raised by the plaintiffs (again through Achmad's testimony) for their contention that Indonesian not Singapore, law applied was that this claim was in tort, not in contract. That statement itself seemed to suggest that the plaintiffs conceded that contractual claims would be subject to Singapore/English law in which case, passing of title would be governed by the Sale of Goods Act Cap 393 (the Act).

37. Indeed, both parties had relied on ss 17, 18 and 19 of the Act for opposite arguments on whether title in the cargo did or did not pass to the plaintiffs upon shipment; the sections state:

Property passes when intended to pass

17 — (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

Rules for ascertaining intention

18 — Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1 — Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2 — Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done.

Rule 3……

Rule 4…….

Rule 5(1).....

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract.

Reservation of right of disposal

19 — (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or to other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal.

38. Applying s 17(2) of the Act, the plaintiffs' counsel submitted that, this being a C & F contract, the title/risk in the cargo would have passed to his clients once the cargo was loaded on board the barge. A C.I.F contract by definition (see *Benjamin's Sale of Goods* 5 ed p 1247 para 19-001) is an agreement to sell goods at an inclusive price covering the cost of the goods, insurance and freight. The essential feature of such a contract is that a seller, having shipped or bought afloat, goods in accordance with the contract, fulfills his part of the bargain by tendering to the buyer the proper shipping documents; if he does this, he is not in breach even though the goods have been lost before such tender. In the event of such loss, the buyer must nevertheless pay the price on tender of the documents and his remedies, if any, will be against the carrier or against the underwriter, but not against the seller on the contract of sale. A C & F contract is similar save that the buyer not the seller, is responsible for insuring the goods.

39. It bears remembering that, in a C.I.F or C & F contract, the duties (see *Benjamin's Sale of Goods* p 1255 para 19-010) of the seller are:

a. first to ship (or procure a shipment of) goods in accordance with the contract and, where necessary, to appropriate such goods to the contract;

b. secondly, to procure or prepare the proper shipping documents;

c. thirdly, to tender these documents to the buyer or as the buyer directs

.

The seller is not under any duty to ensure the actual physical delivery of the goods at the C.I.F/C & F destination, though he is under a duty not to take active steps to prevent such delivery.

40. The defendants however relied on s 19 of the Act read with the contract's payment term: *cash against documents* for their argument that the sellers had reserved their rights and title to the cargo until the plaintiffs made payment which, by the plaintiffs' own evidence, could not have been earlier than 23/24 February 2000. Even accepting Achmad's testimony, assuming Tijssen/the plaintiffs received the bill of lading from Mees Pierson on 4 February 2000, title would have passed to the plaintiffs only as from that day. Consequently the defendants submitted, when the barge sank three (3) days earlier (1 February 2000), the plaintiffs did not have title to the cargo and had no locus

standi to sue for its loss. In this regard, *Benjamin's Sale of Goods* said (at p 1135 para 18-158):

In overseas sale, the passing of property thus depends on the provisions of the contract, the form of the shipping documents and, the way in which the documents have been dealt with.

41. The above submissions would be relevant only if Singapore or English law applied. Hence, I would first have to consider the plaintiffs' argument that there is a difference between claims in contract and tort and, that Indonesian law applied to the latter/this claim because of the various connecting factors with that country. In making that submission, the plaintiffs were in effect relying on Rule 116 of *Dicey & Morris' The Conflict of Laws* (13 ed). The defendants on the other hand relied on the exception to Rule 116 and on Rule 118 of the same book as well as two (2) cases (*Red Sea Insurance Co Ltd v Bouygues SA* [1994] 3 All ER 749; *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579) for their contrary argument.

42. Rule 116 of *Dicey & Morris* (p 963 para 24R-001) states:

The validity of a transfer of a tangible movable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed by the law of the country where the movable is at the time of the transfer (*lex situs*).

(1) A transfer of a tangible movable which is valid and effective by the law of the country where the movable is at the time of the transfer is valid and effective in England.

(2) Subject to the Exception hereinafter mentioned, a transfer of a tangible movable which is invalid or ineffective by the law of the country where the movable is at the time of the transfer is invalid or ineffective in England.

Exception

— If a tangible movable is in transit, and its situs is casual or not known, a transfer which is valid and effective by its applicable law will *semble* be valid and effective in England.

Further reliance was placed by the defendants on the following commentary on the **Exception** in the book (at p 969 para 24-017):

The lack of English authorities on the transfer of goods in transit is probably due to the commercial practice of transferring them by means of documents of title such as bills of lading.

43. It is interesting to note that in the footnote to the above commentary, the authors referred to *Benjamin's Sale of Goods* paras 25-98 onwards. I append herewith the relevant extracts from the passages in *Benjamin's Sale of Goods* starting with para 25-098:

The *lex situs* principle.

It is established in modern conflicts law [the author referred in turn to *Dicey & Morris]* that from the point of view of proprietary rights the law governing particular transfers of title to goods, whether by sale or otherwise, is in general the *lex situs*……

Para 25-100: **Goods in transit**.

The *lex situs* principle is subject to an important limitation: it does not apply when at the relevant time the goods are "in transit". The phrase "in transit" in this particular context within the conflict of laws has not been authoritatively defined, though it seems clear that the "transit" in question has a different point of

commencement, and a different endpoint, from the "transit" during which the English remedy of stoppage in transit can be invoked by a seller. It is submitted that, for the purpose of conflict of laws, goods are "in transit' when, while being carried from one country X to another, Z, they are for a time not situated in any country at all (being, for example, on a ship on the high seas), or are only casually and fortuitously in an intermediate country,…In such circumstances, the *lex situs* principle is inapplicable; even if the goods can be said to have a legal *situs* at all, the fortuitous nature of such *situs* and the fact that it may not be known to the relevant parties make the principle inappropriate……

Para 25-101: **The proper law of the transfer**.

Where goods are in transit, the role normally played by the *lex situs* is taken over by other laws;…..one of these laws which may act as a "substitute" for the *lex situs* requires preliminary explanation. This is "the proper law of the transfer"; it means, broadly speaking, the law having the "closest and most real connection" with the transfer of property rights which takes place by virtue of the sale. The proper law of the transfer is ascertained by a process similar to that employed in ascertaining the law governing the contract of sale, according to common law rules, though without (it is submitted) taking account of any purported choice by the parties in the contract of sale itself. In many cases, it will be the same law as the law governing the contract of sale itself.

44. The defendants relied on Rule 118 as, the bill of lading had been endorsed to the plaintiffs by the sellers' bank and Mees Pierson; the Rule (at p 977 para 24R-046 of *Dicey & Morris*) states:

(1) As a general rule,

> (a) the mutual obligations of assignor and assignee under a voluntary assignment of a right against another person (the debtor) are governed by the law which applies to the contract between the assignor and assignee; and
>
> (b) the law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

(2) But in other cases (*semble*), the validity and effect of an assignment of an intangible may be governed by the law with which the right assigned has its most significant connection.

45. The two (2) cases cited by the defendants concerned what is generally referred to as the double-actionability rule. *Red Sea Insurance Co Ltd v Bouygues SA* was an appeal to the Privy Council from the Hong Kong Court of Appeal whilst *Parno v SC Marine Pte Ltd* was a later decision of our appellate court.

46. *Red Sea Insurance* was a dispute relating to a joint venture for construction of buildings in Saudi Arabia; the respondents (from Hong Kong) were members of the joint venture, which was subject to Saudi Arabian law. When structural damage was discovered in the buildings, the respondents issued proceedings in Hong Kong claiming an indemnity for loss and expense incurred in respect of repairing or replacing the structural damage. The insurers resisted the claim and counterclaimed against those respondents known as the PCG consortium (who had contracted to supply precast concrete units for the project) alleging that, PCG had supplied faulty precast units and, if the insurers were liable under the policy of insurance for the loss suffered by the other respondents, they were entitled to recover the amount of such loss by way of subrogation to the other respondents' rights. PCG applied to strike out the counterclaim as disclosing no reasonable cause of action on the basis that under Hong Kong law, the insurers could not claim to be subrogated

unless they had paid the respondents other than PCG, which they had not done. The insurers thereupon applied for leave to amend in order to claim that the relevant law was that of Saudi Arabia, under which the insurers were entitled to sue PCG direct for the damage caused to the other respondents. The judge held in favour of the respondents and struck out the counterclaim and refused the insurers leave to amend. The Hong Kong Court of Appeal allowed the insurers' appeal to the extent of setting aside the order striking out the counterclaim but upheld the decision refusing leave to amend, on the ground that the insurers could not sue PCG directly for negligence relying solely on the law of Saudi Arabia, the *lex loci delicti*, since the law of Hong Kong, the *lex fori*, did not recognise any such direct liability in tort. The insurers appealed in respect of that ruling.

47. In allowing the appeal, the Privy Council inter alia held:

> (i) As a general rule, an act done in a foreign country was a tort and actionable as such in England only if it was both actionable as a tort according to English law and actionable according to the law of the foreign country where it was done. The rule of double actionability was not however inflexible, and it was possible to depart from it on clear and satisfying grounds in order to avoid injustice by holding that a particular issue between the parties to litigation should be governed by the law of the country which, with respect to that issue, had the most significant relationship with the occurrence and with the parties. That exception to the general rule could be applied not only to enable a plaintiff to exclude the *lex loci delicti* in favour of the *lex fori* but also, in an appropriate case, to rely on the *lex loci delicti* if his claim would not be actionable under the *lex fori*.
>
> (ii) In the circumstances it was clear that all the significant factors in the claim had either occurred in Saudi Arabia or were connected with that country or were governed by the law of Saudi Arabia.

48. Counsel for the defendants also drew my attention to the following passage (at p 763) from Lord Slynn's judgment:

> The appeal in this case is based on a number of factors relied on by the appellant, which need to be considered in the light of what has been said. Thus the policy of insurance was subject to Saudi Arabian law, the project was to be carried out in Saudi Arabia and the property was owned by the government. The main contract, the supply contract and HOK + 4 Consortium's service contract are all subject to the law of Saudi Arabia and were to be performed there. The breaches and the alleged damage occurred in Saudi Arabia. The expense of repairing alleged damage occurred in Saudi Arabia. The appellant though incorporated in Hong Kong, had its office in Saudi Arabia.

for the reasons that lead the Privy Councillors to allow the appeal.

49. The local case *Parno v SC Marine Pte Ltd* concerned a contract of employment between the appellant and respondents, whereby the appellant (an Indonesian) was engaged as a rigger on a dumb barge, which was Singapore-registered. While the dumb barge (and the appellant) was engaged in pile-driving operations off the coast of Rangoon (Yangon), Myanmar, an accident occurred which resulted in the appellant sustaining serious injuries. The appellant sued the respondents for damages for the injuries he suffered, alleging they were caused by an unsafe system of work, based on breach

of provisions in the Factories Act Cap 104 and under common law. The trial judge found that the Factories Act did not apply but that the respondents had breached their common law duty to take reasonable care for the appellant's safety, although he also concluded that the appellant was to blame. The appellant appealed against both the finding that the Factories Act was inapplicable and on the apportionment of liability. The appeal was allowed in part (on the apportionment of liability which was adjusted to against the respondents). The Court of Appeal inter alia (per Chao JA) held:

> (i) the applicable choice of law rule in Singapore with respect to torts committed overseas was that the wrong had to be of such a character that it would have been actionable if committed in Singapore and that the act could not have been justifiable by the place where it was done. It was also incontrovertible that the exceptions to the double-actionability rule was part of our law.
>
> (ii) As neither party had pleaded Myanmar law with respect to the alleged negligence or raised any point of Myanmar law, it was the Singapore common law of negligence which applied. The *lex loci delicti* was treated as the same as the *lex fori*

The decision

50. Before I make my determination on the preliminary issue, I need to refer to the pleadings. In the (amended) statement of claim, the plaintiffs did not plead that Indonesian law applied. Indeed, all that was pleaded (in para 2) was:

It was the intention and understanding of the parties that title would pass upon shipment, and the plaintiffs aver that title passed accordingly

.

I had earlier observed (para 16), this plea was not proven as no representative of either the sellers or the brokers testified to corroborate what Tijssen said he had been told by the brokers. In this regard, I reject the submission of counsel for the plaintiffs, that the court can consider what Tijssen said he was told by the brokers' Mr Apeldoorn (that the title/property in the cargo would pass to the plaintiffs upon shipment), under s 94(b)(f) of the Evidence Act Cap 97. Firstly, the testimony was hearsay and of no probative value whatsoever and secondly, it would be inconsistent with the express terms of the (C & F) contract relating to payment.

51. I should point out that it was only in the (re-amended) Reply, that the plaintiffs for the first time, raised the issue of Indonesian law being the applicable law; in para 3 they alleged:

The sale contract between PT Putrabali and the Plaintiffs was expressly subject to English law. The Plaintiffs will aver that title to the goods passed to the Plaintiffs under the sale contract at time the cargo was shipped on board the board the "Intan 6" as this was the intention and understanding between PT Putrabali and the Plaintiffs with regard to the passing of property under the contract. In any event, even if (which is denied) title had not passed to the Plaintiffs by the time that the cargo was lost, the proper law of the tort is Indonesian law. As a matter of Indonesian law, property in goods passes and/or a party obtains title to sue in respect of loss or damage to goods as from the time that that party becomes contractually obliged to pay the purchase price of the goods, i e. in the case of goods sold on costs and freight terms, upon shipment of the goods.

52. In response to the above pleading, the defendants applied to court for and obtained, leave to file a Rejoinder wherein they pleaded (in relation to para 3 of the Reply) that the defendants had furnished security for the plaintiffs' claim on the basis that Singapore law/jurisdiction would apply. They averred that the plaintiffs were estopped/precluded from relying on Indonesian law. The defendants relied on Articles 1320 and 1338 of the Indonesian Civil Code as well as on Articles 504 and 517a of the Commercial Code. They added that even if Indonesian law applied (which they denied), property in the cargo did not pass to the plaintiffs upon shipment, relying on the terms of the contract.

53. I need to digress at this stage and refer to three (3) other cases cited by the parties. The first is *The Ciudad de Pasto* [1988] 2 Lloyd's LR 208, relied on by the defendants for their proposition that title in the cargo did not pass to the plaintiffs on shipment, because the sellers had reserved their rights, under the terms of the contract.

54. That case concerned a shipment of prawns which a Colombian company Vikingos (Vikingos) sold on FOB terms to a Japanese company Colombia Fisheries (the second plaintiffs), which had a separate sales contract for the prawns with another Japanese company Mitsui (the first plaintiffs). Vikingos had an arrangement with the United States subsidiary of the first plaintiffs whereby the subsidiary would advance 80% of the value of the prawns when they were ready for shipment. On 29 August 1980, the prawns were loaded onto the defendants' vessel *Ciudad de Pasto* at Cartagena, Colombia bound for Yokohama, Japan. The shipment was made under five (5) bills of lading issued by Vikingos which named the first plaintiffs as the notify party. On 8 and 9 September 1980, the prawns were transhipped onto another vessel of the defendants the *Ciudad de Neiva* which carried the consignment to Yokohama where, it was discharged onto an insulated barge cooled with dry ice. When the consignment was eventually landed, 13.7% was found to be damaged. The issue for determination was whether, as at September 1980, the plaintiffs had any title to sue the defendants (the writ was issued in 1982). The English Court of Appeal inter alia held, that title in the prawns passed to the second plaintiffs and remained in them until after completion of discharge at Yokohama; as between the second and the first plaintiffs, the evidence was clear that the first plaintiffs did not acquire their title at any time earlier than the arrival of the goods in Japan and their involvement at earlier stages was as agents for the second plaintiffs; the consignment was bought FOB by the second plaintiffs so that title passed to the second plaintiffs at the time of shipment. Further, by the bills of lading, the prawns were deliverable to the order of the sellers; consequently, the prima facie presumption which (unless displaced), meant that the property in the prawns did not pass to the buyers until the balance of the price (20%) had been paid. Vikingos took bills of lading to their own order and in accordance with the presumption, they retained the property in the prawns until the balance of the price had been paid. It was not proved that this occurred before the prawns were damaged.

55. The defendants urged the court to follow the decision in *The Seven Pioneer* [2001] 2 Lloyd's LR 57, a New Zealand case. There, the plaintiffs had an agreement with an Indonesian company (Indocement) for the purchase of cement which it on-sold to various customers in other countries. The purchase was on FOB terms out of Jakarta, the cargo would be shipped in June 1998 and Indocement would be both supplier and shipper of the cement. The agreement provided that the plaintiffs would pay against receipt of bills of lading from Indocement. Four (4) bills of lading were issued for the June 1998 shipment naming Indocement as shipper and the plaintiffs as consignee, and expressed to be governed by Indonesian law. The cement was shipped on board *The Seven Pioneer* which vessel had been voyage-chartered by the plaintiffs from its head-charterers, a Scottish company. The bills of lading were signed by the local agents of the vessel's owners as agents on behalf of the master of the vessel. During the voyage, heavy seas were encountered and the cargo was damaged. The plaintiffs never paid for the shipment nor had they ever been an indorsee or holder

of any of the bills of lading. The defendants (shipowners) maintained that the plaintiffs had no claim against the vessel and the question framed for the court's consideration was, did the plaintiffs have sufficient interest to sue the defendants whether in tort or contract?

56. In answering the question in the negative, Hansen J inter alia held:

> where the contract provided for payment against the bill of lading the normal inference should be that the seller had reserved the right of disposal until payment in accordance with the contract had been made; there was nothing in the terms of the contract or the circumstances of this case to displace that inference; however, the bills of lading were never released to the plaintiffs and the plaintiffs acquired no rights to the bills of lading until payment was made; therefore Indocement retained a right of disposal over the goods and property did not pass to the plaintiffs under New Zealand law; the plaintiffs did not have a sufficient interest in the goods at the time they were damaged to found a claim in negligence.

The judge relied on Article 1338 of the Indonesian Civil Code as affirmation of the right of contracting parties to contract out of the general law.

57. The plaintiffs on their part relied on *East West Corporation v DKBS 1912 and Another; Utaniko Ltd v P & O Nedlloyd BV* (2002) 582 LMLN for their entitlement to sue.

58. In the *East West* case, the plaintiffs (2) were related parties who sold goods to a Chilean company Gold Crown (GC). In 1998, they agreed to sell further consignments to GC on terms of cash against delivery. The plaintiffs shipped goods to Hong Kong in containers on liner services for delivery in Chile. Those that were carried by the defendants in the first action (Maersk) were shipped between September and October 1998 and those carried by the defendants in the second action (P&O) were shipped on 5 February 1999. The plaintiffs had made arrangements with their bankers for the shipping documents to be remitted to banks in Chile so that the documents would only be released on payment. Liner bills of lading were duly issued for each of the nine (9) shipments and delivered to the plaintiffs. The plaintiffs were named as the shippers in each bill of lading and the notify party was GC. The goods were consigned to the order of named Chilean Banks in all the bills of lading, save one (1) of the Maersk bills, where the goods were simply consigned to a named Chilean bank and not to its order. Those banks were to act as the correspondents of the plaintiffs' bankers to obtain payment from GC in return for the bills of lading. The bills of lading were endorsed by the plaintiffs and sent by the plaintiffs' bankers to their correspondent bankers in Chile for them to obtain payment. In accordance with the customs laws of Chile, as duty had not been paid in advance, the containers had to be placed on arrival in a licensed customs house. After customs duties had been paid, four (4) of the seven (7) containers carried by Maersk were released (to GC's customs agents) in November 1998, two (2) after 19 January 1999 and one (1) on an unknown date. The containers carried by P&O were released on 15 March 1999.

59. Although GC made some payment to the plaintiffs, they did not pay for the goods in two (2) of the containers carried by P&O and in seven (7) of the containers carried by Maersk. The banks were requested to return the bills of lading (which were subject to English law) to the plaintiffs which they did without endorsing them back. The plaintiffs commenced proceedings on the basis that the carriers had delivered the cargo without presentation of the bills of lading. One (1) of the four (4)

defences raised was that the plaintiffs had no title to sue on which issue Thomas J held:-

In relation to all the bills of lading (other than the Maersk bill), the Chilean banks to whom the bills of lading were sent initially were the consignees identified in the bills of lading within the ordinary meaning of those words in the Carriage of Goods by Sea Act 1992. Accordingly, the banks became the lawful holders in accordance with s 5(2)(a) of the 1992 Act, and the plaintiffs' rights were extinguished under s 2(5)….Nor were the rights of suit extinguished transferred back to the plaintiffs when the bills of lading were delivered back to the plaintiffs. The reason was that when the bills were delivered back to the plaintiffs they were never endorsed by the banks to them…However, the plaintiffs did have title to sue in negligence based on their proprietary interest in the goods. Such a claim was outside the scope of and independent of the 1992 Act. In relation to the Maersk bill, that was a 'straight' or 'non-negotiable' bill, and therefore the plaintiffs' rights were not extinguished by the provisions of the 1992 Act. The bill was not a document of title at common law and the transfer did not operate as a transfer of constructive possession. The carrier was bound to deliver to the consignee without presentation of the bill. Thus, on issue one (1), the plaintiffs did have title to sue.

Counsel for the defendants sought to distinguish the above case from ours. He pointed out that although the shipper plaintiffs had lost their rights under the bills of lading, they nevertheless had title to sue as ownership did not pass to GC; he submitted that The Bills of Lading Act Cap 384 does not deal with the proprietary rights of parties.

60. I now return to the question raised earlier — is there a difference between making a claim in tort and in contract? If the answer is in the positive, then the plaintiffs' argument that, the sinking of the barge/loss of the cargo is more closely connected with Indonesian law is certainly persuasive, based on the 'overwhelming circumstances' test propounded in the *Red Sea Insurance* case. Conversely, if the answer is in the negative, the preliminary question would in consequence also be answered in the negative as, the parties had agreed to apply English law, pursuant to cl 25 of the IGPA. It would follow that, based on the endorsements in the bill of lading and in accordance with ss 2(1)(a), 2(5) and 5(2)(a) of the Bills of Lading Act (Cap 384) which are *in pari materia* with the same sections of the (United Kingdom) Carriage of Goods by Sea Act 1992, title in the cargo would only have passed to the plaintiffs after the sinking of the barge, namely on or about 22 February 2000, when they become the holders for value of the bill of lading, after Mees Pierson paid the sellers/the sellers' bank on the letter of credit.

61. The sections of the Bills of Lading Act/Carriage of Goods by Sea Act referred to above are set out below:-

> 2 (1) Subject to the following provisions of this section, a person who becomes —
>
> (a) the lawful holder of a bill of lading;
>
> shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.
>
> ……
>
> …….

> 5) Where rights are transferred by virtue of the operation of subsection (1) in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives —
>
> (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage;
>
> but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.
>
> 5 — (2) References in this Act to the holder of a bill of lading are references to any of the following persons:-
>
> (a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
>
> and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

62. Having reviewed the cases cited by both parties, I am of the view that the parties should be held to their agreement under the IGPA Rules to apply Singapore/English law to this claim. The cargo was sold C&F to the plaintiffs; the sellers were responsible for shipment and hence, the carrier was the seller's agent under Article 1792 of the Indonesian Civil Code. Consequently, title did not/could not have passed to the plaintiffs until after they had paid for the cargo, well after the bills of lading were endorsed to them for the purpose of taking delivery. Even if Indonesian law applies to the claim because:

(i) the cargo was purchased from an Indonesian seller, and

(ii) was lost in Indonesian waters;

the fact remains that Article 1338 of the Indonesian Civil Code allows the parties to contract out of Indonesian law. Moreover, even Article 517(a) of the Indonesian Commercial Code states that delivery of a bill of lading before goods are delivered is considered as delivery of the said goods.

63. As for the testimony of Achmad and the plaintiffs' argument that, there is a difference between claims in contract (where English law is to be applied) and tort/negligence (where Indonesian law applies because of the connecting factors with Indonesia), I do not think that proposition of law is supported by the decision in the *East West* case. It should be noted that in that case the Maersk bill of lading was an exception to the rule that, endorsement of the other bills of lading passed title to the banks named as consignees therein. Here, the bill of lading named the plaintiffs as the notify party, while the sellers' bank was named the consignee or to order. Mees Pierson was obliged to pay the sellers' bank within 14 days of receipt after the bill of lading date (27 January 2000) namely by 9

February 2000. As it was, the plaintiffs paid on or about 23 February 2000. The sellers had clearly reserved their title. Even if it can be said that mere delivery of the bill of lading constituted passing of title, on the plaintiffs' own testimony, the bill of lading was only received by them on or about 4 February 2000. Whether the claim lies in contract or in tort, the plaintiffs have no locus standi to sue unless they were the owners of the cargo as at the date of the loss.

64. As for the references to Rule 116 in *Dicey & Morris* by the plaintiffs, it would appear from both *Benjamin's Sale of Goods* and the exception to Rule 116, that the *lex situs* principle would not apply to goods in transit.

65. If the double-actionability rule is applied, the plaintiffs would again fail as, the claim in tort would not have succeeded either in Singapore or in England. Consequently, I answer the preliminary issue in the negative and hold that the plaintiffs had no title to the cargo and hence, no right of action as at 1 February 2000, against the defendants. Accordingly, the plaintiffs' claim is dismissed with costs to the defendants.

Sgd:

LAI SIU CHIU

JUDGE