



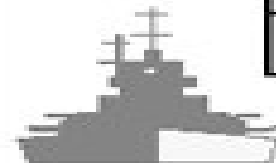
Law of Arbitration

DR. ZULKIFLI HASAN

19th October 2011

Week VI

BILL OF LADING FOR COMBINED TRANSPORT SHIPMENT OR PORT TO PORT SHIPMENT



Shipper
Domeg (Pty) Limited
Adderley Road, North End
Port Elizabeth

Consignee or Order
To order (1)

B/L No.
PLZAA329

Reference No.

Notify Party/Address *It is agreed that no responsibility shall attach to the Carrier or his Agents for failure to notify. (See clause 20 on reverse)
Hardware Supplies Limited
Cross Avenue
New York

Place of Receipt
(Applicable only when this document is used as a Combined Transport Bill of Lading)

Ocean Vessel
Transvaal (2)

Voyage No.
1378G

Port of Loading
Port Elizabeth (3)

Place of Delivery
(Applicable only when this document is used as a Combined Transport Bill of Lading)

Port of Discharge
New York (3)

Marks and Nos.: Container Nos.:
MK 252 (4)
Container No. GSTU 2150221
Seal No. 388487

Number and Kind of Packages; description of Goods
1 20 DC Container(s) STC:
500 Hacksaws Model TS 2
with Safety Guard
5 Packs (5)

Gross Weight
280 kg

Measurement
0.0000

L/C No. 188688/DLC (6)
Shipped on Board (7)
on 10 August 2002

*Total No. of Containers/Packages received by the Carrier
1 / 0

Movement
USE-FCL

Freight and Charges (indicate whether prepaid or collect): **Freight Prepaid (8)**
 Origin Inland Haulage Charge
 Origin Terminal Handling/LCL Service Charge
 Ocean Freight
 Destination Terminal Handling/LCL Service Charge
 Destination Inland Haulage Charge

Received by the Carrier from the Shipper in apparent good order and condition (unless otherwise noted herein) the total number or quality of Containers or other packages or units indicated in the box opposite entitled "Total No. of Containers/Packages received by the Carrier" for Carriage subject to all the terms hereof (INCLUDING THE TERMS ON THE REVERSE HEREOF AND THE TERMS OF THE CARRIER'S APPLICABLE TARIFF) from the Place of Receipt or the Port of Loading, whichever is applicable, to the Port of Discharge or the Place of Delivery, whichever is applicable. One original Bill of Lading must be surrendered, duly endorsed, in exchange for the Goods. In accepting this Bill of Lading the Merchant expressly accepts and agrees to all terms and conditions whether printed, stamped or written, or otherwise incorporated, notwithstanding the non-signing of this Bill of Lading by the Merchant.

Freight payable at
Port Elizabeth

Place and Date of Issue
Port Elizabeth / 12 August 2002 (9)

Number of Original Bills of Lading
3 / Three (10)

IN WITNESS of the Contract herein contained the number of original stated opposite have been issued, one of which being accomplished the other(s) to be void.
 For the Carrier:
For "On" Ship (11)
As Carrier

DC. Johnson

CONTENTS

- Commencement
- Appointment of Arbitrators
- Qualifications
- Duties

Proceedings?

- i. Appointment of arbitrator (S.13)**
 - parties appoint an arbitrator (mutual consent / own choice)
 - arbitrator accept the appointment
 - qualifications in accordance with arb. Agreement (if fails to meet the requirements he should excuse himself)

- ii. Preliminary meeting**
 - procedures, dates of hearing, inspection of relevant papers, documents, etc
 - dates of hearing (S.26)

- iii. Principles of natural justice (S.20)**
 - fair (should not hear one party only)
 - should not communicate with either party w/out the knowledge of the other party
 - maintain the privacy and confidentiality of the proceeding (but must not exclude persons invited to assist a party in presenting its case)

- iv. Procedure (S. 21,22,24)**
 - as provided in the arbitration agreement

- v. Submission (S.25,27)**
 - parties prepare submission

- vi. Closing a case**
 - inform parties of his intention to close the case

- vii. Seeking legal advice (S.28)**
 - with the consent of the parties

- viii. Evidence (S.29)**
 - award shall be based on the evidence

Commencement

- The first formal step
- Correct procedural steps, The date must be ascertained
- If there is condition precedent, the parties must fulfill the CP before they may commence the arbitration
- In accordance with specific arbitration rules or an agreed procedure
- Normally by request or notice or application or statement of claim
- (i) Making claim or the serving of a request for arbitration or the appointment of arbitrator-
- (ii) Filing a notice with the institutional arbitration.

Commencement Date

- Absence of commencement date: date to request dispute to be referred to arbitration.
- Request Notice:- To appoint an arbitrator or to submit dispute to institutional arbitration.
- The arbitration is deemed to have commenced when one party to the AA serves on the other parties a notice requiring the other to submit the dispute to the arbitrators.
- S6 of AA2005.

Time Limitation

- If the terms of AA provide for reference of a dispute to arbitration within specified time period, then such dispute must be commenced within the time time prescribed.
- Parties are free to vary the limitation period.

Consequence of the Expiry of a Contractual Limitation

- May provide a defence
- May bar a claimant's right to bring a claim or may extinguish it

Sample of AA

“ All differences arising out of this policy should be referred to arbitration. If the company should disclaim liability to the insured for any claim and such claim was not referred to arbitration within 12 calendar months from the date of such disclaimer, then the claim should for all purposes be deemed to have been abandoned”

Extension of time

- The consequence of the expiry of a contractual limitation period may be avoided if: -
- 1. Court's discretion: Undue hardship
- 2. arbitration clause confers discretion on the arbitrator
- 3. if the conduct of the other party precludes his relying on the time bar against the claimant.
- S45 AA 2005: High Court has the power to extend the time which has expired if it is in the opinion that undue hardship would otherwise be caused and also depending on the circumstances of the case.
- The claimant must take all reasonable steps to get his application for an extension before the Ct as soon as possible and cannot deliberately delay.

What amounts to undue hardship??

- It would not be considered undue hardship where one party tries to commence arbitration after the lapse of time due to his own fault.
- Greater hardship than the circumstances warrant.
- If the result of claimants being perhaps a day late is so oppressive, so burdensome and out of proportion to the fault.

*Phoenix Shipping Pty v General Feeds
Inc [1997] 2 Lloyd's Rep 703*

- **Allowed extension of 23 months. The delay was caused by unexplained failure of the claimant's solicitor's system of time bar logging and misunderstanding within the office.**

Pegasus v. A. King & Sons Ltd
[1967] 1 All ER 934

- **Undue hardship means excessive. It means greater hardship than the circumstances warrant.**
- **Excusable mistake**
- **Disproportionate loss likely to be suffered by the claimant**
- **Mistake shared by or contributed to by the other party**

The Jocelyne [1977]

2 Lyod's Rep 121

- **Undue hardship can be summarised as follows:**
- **Undue hardship should not be construed too narrowly**
 - 1) **It means excessive hardship.**
 - 2) **In deciding whether to extend time or not, the Court will look at all relevant circumstances of a particular case. The following matter should be considered:**

- i) Length of delay**
- ii) Amount at stake**
- iii) Whether the delay was due to the fault of the claimant/circumstances outside his control**
- iv) If it is due to the fault of the claimant, the degree of such fault**
- v) Whether the claimant was misled by the other party**
- vi) Whether the other party has been prejudiced by the delay – degree of that prejudice**

Other cases

Safety Insurance Company Sdn Bhd v. Chow Soon Tat [1975] 1 MLJ 193

'Inordinate delay on the part of the respondent in making application for extension of time is not the only factor to be considered.'

Labuan Wood Product [1991] 2 CLJ 1004

The interest of justice requires that the P be given extension of time and to refuse it would cause undue hardship to the P.

Requirement

- It has to be made promptly

Raymond & Reid v. Granger

A delay more than three months after the breakdown of negotiations for arbitration, w/out explanation for this delay prompted the court to refuse extension.

Factors for Extension of Time

- 1) Degree of blameworthiness of the party claiming under arbitration to appoint an arbitrator w/out delay**
- 2) Amount involved in the arbitration**
- 3) Extent of the delay**
- 4) The fact that the claimant has been misled**
- 5) Due to circumstances beyond their control, parties failed to appoint an arbitrator within the prescribed time in the agreement**

Ouster Clause

- ✓ **Parties to a contract cannot oust the jurisdiction of the court by providing so in the agreement**
- ✓ **Implication: Illegal, void, contrary to public policy**
- ✓ **S.41 of Arbitration Act 2005 – ref to HC for issues on questions of law**

Scott v Avery Clause

- A contract between two parties that they will submit any dispute between them to arbitration before taking any court action.
- This clause makes arbitration a condition precedent to any court action.

Scott v. Avery(1856) 10 ER 1121

- ✓ **“No person can oust the jurisdiction of the court, however it may be valid for the parties to provide that no action shall start until the disputed matters are put into arbitration.”**
- ✓ **If there is Scott v. Avery clause, it has been held as a valid ground for stay of court action.**
- ✓ **Such a clause will be a defence to any action brought before a court.**

WHETHER COURT HAS POWER TO IGNORE SCOTT V. AVERY CLAUSE

- ✓ **Scott v. Avery Clause may be overriden by the court based on the following reasons:**
 - i) **Authority of arbitrator is revoked**
 - ii) **Where the court removes the arbitrator**
 - iii) **Where the parties themselves waived it**
 - iv) **Where the disputes is outside the jurisdiction of arbitrator**

Appointment of Arbitrators

- Why? To resolve dispute i. proficiently, ii. economically iii. Expeditiously than the court
- Arbitrators may have been identified prior to the AA or to be nominated once a dispute has arisen.
- The nature of rship btn arbitrators and parties is contractual

Procedure

- The parties may name the arbitrator in the AA, May name the sole arbitrator, May agree to refer dispute to Institutional Arbitration.
- The parties may have to contact the arbitrators and to get their consent.
- The arbitrators then give consent and set out the basis on which he is prepared to accept the appointment.
- In practice:- the claimant to submit to the respondent a name or list of arbitrators indicating their experiences, qualifications. If the respondents agrees, the parties will send a written invitation to accept the reference.

Appointment By Parties

- **The parties to an arbitration agreement may appoint the arbitrators.**
- **They are: -**
 - ✓ **free to choose any number of arbitrators**
 - ✓ **S 13 (2)- Appointment of arbitrators need not be in a particular form**
 - ✓ **Arbitration agreement may contain the name of arbitrators, rules for selecting arbitrators, number of**
 - ✓ **S 12- Number of Arbitrators (S.12)**
 - ✓ **S 13- Method of selection of arbitrators**

Appointment by Third Party

- a neutral third party
- ✓ Director of KLRCA (S.13(4), S.13(5), S.13(6))
- ✓ S.13(8) – Dir KLRCA shall have due regard to :
 - 1) Qualifications
 - 2) Other considerations that are likely to secure the appointment of independent and impartial arbitrator
 - 3) International arbitration – advisability of appointing an arbitrator of a nationality other than those of the parties

Appointment by the HC

- **S.13(7) – where the Director of KLRC is unable to act/fails to act under subsections (4), (5) and (6), any party may apply from the High Court for such appointment.**

SOLE ARBITRATOR

S 13(5)

Either party may apply to the Dir KLRCA for the appointment of an arbitrator where

- (a) Parties fail to agree on the procedure (S.13(2)) and**
- (b) Parties fail to agree on the arbitrator**

THIRD ARBITRATOR

S.13(3)

- **If parties fails to agree in the procedure**
- **Each party shall appoint 1 arbitrator**
- **The two appointed arbitrators shall appoint third arbitrator as the presiding arbitrator**

QUALIFICATIONS OF AN ARBITRATOR

- ✓ **Can be of any nationality and need not be legally trained**
- ✓ **No specific requirement under the AA 2005.**
- ✓ **parties are free to choose an arbitrator, who is competent to act and does not suffer from any disability.**
- ✓ **disabilities may include lunacy or physical disabilities.**
- ✓ **persons who have special qualifications may be appointed**
- ✓ **Eg: judge, advocates and solicitors, retired government officers, chartered accountants.**

Duties of An Arbitrator

- **i) Uphold the principle of natural justice**
- **Ii) He should decide only disputes submitted to him**
- **iii) He should comply with the terms of submission.**
- **Iv) He should decide according to law**

Principles of natural justice

- **S.20:**

- Fairly**

- ✓ **should not favour one party over the other.**
 - ✓ **must not hear one party to the dispute or witness in the absence of another, except in such few cases where it is so provided.**
 - ✓ **he must not receive information from one side which was not disclosed to the other party.**

Principles of natural justice

Judiciously

- ✓ must observe the fundamental rules which govern proceedings.
- ✓ must follow the rules of administration of justice- misconduct/breach of his duty.

Turner v. Builders Federal [1988] 2 MLJ 502

“...an arbitrator must always act judicially with a detached mind and with patience. He must not take an adversarial role and his response must be always measured and circumspect”

Comply with the terms of submission

He should comply with the terms of submission.

✓ **Where the submission states his power and duties, he should abide by them.**

eg: Inspection of certain premise within a certain period of time

According to law

- **He should decide according to law, and not solely on what he considers fair and reasonable under circumstances**