



The Sea Master: When are trade finance banks subject to arbitral jurisdiction under bills they no longer hold? Is there any wriggle room?

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- ❖ Trade finance banks provide short-term, “self-liquidating” loans to commodity traders.
- ❖ Advance funds for the trader’s purchase against a pledge over the bill of lading and goods.
- ❖ Pledge secured by becoming the lawful “holder” of the bill of lading as a result of obtaining possession of the bill and:
 - ❖ Being the named consignee under that bill (§5(2)(a) *COGSA 1992*); or
 - ❖ Having that bill indorsed to it (§5(2)(b) *COGSA 1992*).

COGSA 1992 – Transfer of Rights & Imposition of Liabilities

- ❖ Upon becoming a bill of lading's lawful holder, the holder has "*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*" (§2(1) COGSA 1992).
- ❖ Rights of previous lawful holders, including the original contracting party/holder, are extinguished by that transfer (§2(5) COGSA 1992).
- ❖ A lawful holder becomes subject to liabilities under the bill of lading only if it: (i) takes or demands delivery; (ii) makes a claim; or (iii) took or demanded delivery before acquiring rights under the bill (§3(1) COGSA 1992).

The Sea Master: The Facts

- ❖ Arab Bank (Switzerland) Ltd (“the Bank”) financed its customer’s/the charterers’ purchase of soyabeanmeal against receipt of indorsed bills of lading.
- ❖ Upon their on-sale falling through, charterers negotiated an addendum to the C/P to permit issuance of a switch bill for carriage to a different discharge port.
- ❖ The new switch bill was issued in place of the old bills held by the Bank at the Bank’s counters in Zurich.
- ❖ New switch bill named the original shippers as “shipper” and was consigned “*To the order of Arab Bank (Switzerland) Ltd*”.

- ❖ Demurrage incurred at the discharge port.
- ❖ Charterers failed to pay and then disappeared.
- ❖ Owners claimed that demurrage from the Bank arguing, *inter alia*, that the Bank (i) was the original party to the switch bill of lading contract or (ii) had become subject to liabilities under that bill pursuant to §3(1) of *COGSA 1992*.
- ❖ The Bank challenged the tribunal's jurisdiction.
- ❖ Tribunal held that it had no jurisdiction as the Bank was not the original contracting party and had not become subject to the switch bill's liabilities pursuant to §3(1).

The §67 Court Challenge

- ❖ Owners challenged the award on jurisdiction under §67 of the *Arbitration Act 1996*.
- ❖ Only argument advanced was that the Bank was the original party to the switch bill of lading.
- ❖ At the start of the hearing, Popplewell J suggested that the tribunal had jurisdiction even if the Bank was neither the original contracting party nor a party subject to the liabilities pursuant to §3(1) COGSA 1992.
- ❖ He therefore requested argument on that point.

- ❖ The Bank argued that it could not be under an obligation to arbitrate the dispute because:
 - ✧ Since §3(1) did not apply, it had no duty to arbitrate under the switch bill;
 - ✧ §2(1) only granted rights and did not impose any obligations; and
 - ✧ In any event, pursuant to §2(5), the Bank no longer had any rights under the switch bill as they had been transferred to the ultimate buyer/receiver.

- ❖ The Bank also relied on the obiter decision of Aikens J in *The Ythan* (2006).

- ❖ Describing it as “*attractive in its simplicity*”, Popplewell J rejected the Bank’s argument.
- ❖ Instead, he held that the tribunal had jurisdiction over the bank even though the bank possessed neither rights nor obligations under the switch bill at the time the arbitration was commenced.
- ❖ He concluded that the effect of the bank becoming a lawful holder of the switch bill “*was to subject the Bank to an obligation to arbitrate disputes falling within the scope of the arbitration clause it contained*”
- ❖ That was so even though the bank had ceased to have any rights of suit under that bill.

- ❖ How can §2 of COGSA 1992 be said to impose “*an obligation to arbitrate*” on the Bank when it deals only with “*rights of suit*”?
- ❖ §§ 2 and 3 draw a clear distinction between rights and obligations.
- ❖ Bank did not even have any rights under the switch bills at the time.
- ❖ Aikens J’s analysis in *The Ythan* vs. Popplewell J’s in *The Sea Master*?



Thank you for you for listening

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