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SAMPLE REPORT

Kallang Shipping v. Axa Assurances Senegal

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Description of the Case:	Damages for procuring the unlawful arrest of a vessel - Insurance Company - Breach of the London Arbitration provisions in a contract – Contracts of Carriage – Bills of Lading – Conduct – Voyage - Charterparty
Case name:	*Kallang Shipping SA Panama v Axa Assurances Senegal & Anor*
Date of Judgment:	19th November 2008
Court:	Queen's Bench Division
Judge:	Jonathan Hirst QC
Citation:	[2008] EWHC 2791 (Comm)

Background: The Claimants, Kallang Shipping Co. SA ("the Owners"), claimed that the arrest of the "Kallang" ("the vessel") at Dakar in Senegal at the suit of the second Defendant, the receivers, Comptoir Commercial Mandiaye Ndiaye ("CCMN"), was a breach of the express and implied terms of the London arbitration clause incorporated in the contracts of carriage. The Owners contend that the breach was induced or procured by the first Defendant, the cargo insurers, Axa Assurances Senegal ("Axa Senegal") against whom they claim damages. They also alleged that Axa Senegal interfered with their business relations with CCMN and that both Defendants conspired to do these things

At all relevant times the vessel was entered with the American Steamship Owners Mutual Protection and Indemnity Association ("the American Club") for P&I risks.

On 1 February 2005, the Owners and Brobulk Limited ("Brobulk") had entered into a time charter on the NYPE form for a time trip from Montevideo to Dakar. Also on 1 February 2005, Brobulk Ltd had entered into a voyage charter with Voest-Alpine Intertrading AG on the Gencon form. It was agreed that, in return for payment of freight, the vessel would load a cargo of bagged rice at Montevideo and carry it to Dakar. On 15 February 2005, agents acting for the Master issued 14 bills of lading acknowledging receipt of the rice cargo in apparent good order and condition for carriage to a West African Port.

Damage to the cargo was discovered after it was unloaded. Both the Owners and CCMN contended that the other was responsible for the majority of the damage. In March 2005, Axa Senegal had demanded a letter of undertaking, to be replaced by a bank guarantee when the final figures for the alleged loss had been ascertained. It also contended that it was not party to the London arbitration clause. The American P&I club refused the request but stated that it would provide a letter of undertaking in its usual form, subject to English law and London arbitration. Axa Senegal applied the next day to the Senegalese court for the sum alleged to be due because of the cargo damage, and also applied for the vessel to be arrested if the sum was not forthcoming. The Senegalese court made an order authorising the arrest of the vessel, which the Defendants executed. The Owners obtained an injunction from the English court preventing the Defendants from proceeding under the bill of lading contracts otherwise than via London arbitration, and permitting service out of the jurisdiction by the Owners of arbitration claim forms on the

Defendants. Thereafter, the American Club issued a "competent court or tribunal" letter of undertaking in the amount of CFCA 25 million and the vessel was finally released from arrest at on 24 March.

Issue: The main issues before the Court were:

1. Was an arbitration clause incorporated into the bills of lading, and if so which;
2. What role did Axa Senegal play? Was it merely acting on behalf of CCMN or was it the driving force in its own right;
3. What knowledge did Axa Senegal have of the arbitration clause and its incorporation into the bill of lading contracts; and
4. Whether Axa Senegal cause or procure CCMN so to act and was its conduct such as amount to a wrongful inducement or procurement of any breach of the express or implied terms of the arbitration clause?

Held: The Court found that there were two charterparties dated 1 February 2005 and each had an English arbitration clause but in slightly different terms. The Court stated that the relevant charterparty was a voyage charter dated 1 February 2005 since the bills of lading also provided that freight was payable as per the charterparty. According to the Court, that was naturally a reference to the voyage charter under which freight as opposed to hire was payable. Further the terms of the voyage charter are more naturally germane to a bill of lading. According to the Court, it was clear that the intention was to incorporate the terms of the voyage charter, including its arbitration clause, into the bill of lading contracts.

The Court while dealing with the second issue, stated that it was satisfied on the evidence that Axa Senegal was the driving force in arresting the vessel and using the arrest as a means of forcing Senegalese jurisdiction. The Court found that Axa Senegal was not taking instructions from CCMN or even consulting with it and nothing had been disclosed by either Defendant that any such communication took place. The Court stated that Axa Senegal was exercising its rights under the cargo insurance policy to take control of claims handling even prior to settlement of the insurance claim. According to the Court, Axa Senegal's motives were twofold. First it did not like having cargo claims decided in London arbitration. Second, its chances of affecting a substantial recovery would be much greater if the Hamburg Rules were applied, as they would be by a Dakar Court, rather than the terms of the bills of lading, and the Hague-Visby Rules which would be applied by London arbitrators applying English law. The Court found that it was Axa Senegal that finally decided on 23 March that it would have to modify its position and accept the letter of Undertaking from the American Club. As a result of Axa Senegal's decision, the vessel was released from arrest the next day.

The Court while dealing with the third issue, stated that Axa Senegal from the outset, knew that the bills of lading purported to incorporate a charterparty arbitration clause. It was possible, but unlikely, that the charterparty would turn out not to contain an arbitration clause. The Court found that on 15 March, Axa Senegal was sent a working copy of the voyage charter. According to the Court, once Axa Senegal had been provided with the working copy of the charterparty, it knew that it was almost certain that there was a binding London arbitration clause. The Court took the View that, if Axa Senegal was in any serious doubt, it could have checked with the shippers and sellers to CCMN.

The Court while dealing with the fourth issue, applied *OBG Ltd v. Allan*[1] and stated that, in order for a tortious claim for wrongful inducement or procurement of breach of contract to succeed, it must be established that

[1] *OBG Ltd v. Allan* [2007] UKHL 21 [2008] 1 AC 1

the defendant knew that he was inducing a breach of contract; and intended to do so.

The Court on its findings stated that Axa Senegal plainly had sufficient knowledge as from the afternoon of 15th March. As from 10th March, Axa Senegal knew that it was possible but by no means clear that the London arbitration clause in the time charterparty was incorporated. The Court found it striking that Axa Senegal did not make any of the obvious enquiries that were open to it via CCMN to establish for sure what the position was. However, the Court found that Axa Senegal's attitude seemed to have been to wait and see whether the Owners could prove what the position was. According to the Court, it was a fair inference on the facts and in the absence of any proper evidence from Axa Senegal that it was determined to try and avoid the arbitration clause, whatever it was, and that it made a conscious decision to make no enquiries of its own.

With regard to intention, it was clear that Axa Senegal was determined, if it could, to use the arrest as a means of forcing the Owners to give up the right to have any dispute arbitrated and to accept Senegalese jurisdiction. According to the Court, the breach of the London arbitration clause was an end in itself. That counted as an intention to procure a breach of contract.

Therefore, according to the Court, Axa Senegal's conduct, knowledge and intent was such as to make it liable for the accessory tort of procuring CCMN's breach of the contract to arbitrate all disputes in London.