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15TH ANNUAL MEMBERS' MEETING

Foreign Jurisdiction Clauses, Himalaya Clauses and “Practical Justice” – Conflict of Laws and Israeli Legal Approach



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Himalaya and Jurisdiction Clauses

– Colliding Interests

- ❑ It is long lasting Israeli legal tradition to recognize, uphold and enforce exclusive jurisdiction clauses.
- ❑ The “Himalaya” clauses, named after the famous *Adler v Dickson (The Himalaya) [1954]* case, assigns the liberties, immunities, exemptions and defences which stand to the carrier to its servants, agents and sub-contractors.
- ❑ Where the Jurisdiction clause is agreed between specific known parties, by virtue of the Himalaya clause such jurisdiction clauses (as well as other terms) may apply between parties which are not necessarily known in advance.

Himalaya Clause v. Jurisdiction Clause

- ❑ It is often argued that the Himalaya clauses are designed to allow the servant/agent/sub-contractor of the carrier which issued the bill of lading, to enjoy substantial defences and rights but not the procedural rights contained in the bill.
- ❑ Historically Israel's admiralty law and practice are derived from the English law as was in force during the 19th Century. In *The Mahkutai* LLR [1996] the English PRIVY COUNCIL held that Ship owners may not rely on an exclusive jurisdiction clause in a charterer's contract (bill of lading), which is a private agreement between the named parties alone.

THE “THOR HORIZON” CASE

- ❑ In a recent ruling in the matter of *CONTRASTOCK OY v. the m/v THOR HORIZON* [2018], the Israeli Supreme court dealt with an appeal on the Admiralty court’s decision to allow a ship owner to invoke an exclusive jurisdiction clause through the Himalaya clause found in the bill of lading issued by the charterer of the vessel as a carrier.
- ❑ The plaintiffs in this case were the shipper and consignees of timber imported from Finland to Israel. The Vessel was owned by a Singaporean owner and time chartered to Swedish carrier which issued the B/L and was the contractual carrier. The B/L contained an exclusive jurisdiction clause and a “Himalaya Clause”.

Himalaya Clause – the Israeli law's approach

- ❑ The Admiralty court held that the right to enforce a jurisdiction clause at the request of a ship owner which did not issue the B/L, through the Himalaya Clause, is possible and can not be disregarded as a mere “procedural” issue. In the specific circumstances of the THOR HORIZON the wording of the Himalaya clause was found to allow the ship owner any right contained in the B/L, including the jurisdiction clause.
- ❑ The Supreme court held that the jurisdiction clause found in the bill of lading is exclusive, confirmed the Admiralty court's ruling and noted that the Israeli law's approach differs from the English one, in the sense that the Himalaya clause may apply in the benefit of the ship owner even if its not a direct party to the contract of carriage.
- ❑ In this precedential case, the Supreme court navigated the Israeli ruling towards expanding the defences and rights granted to ship owners, and continued the development of the Israeli admiralty and maritime ruling as separate and independent.

“PRACTICAL JUSTICE”

- ❑ An alternative argument raised by the plaintiffs was that any claim brought by them in the agreed jurisdiction (London) is subject to statute of limitations and is time barred. Therefore, enforcing the jurisdiction clause will be unjustified.**
- ❑ The Supreme court (by majority) accepted this alternative argument, overturned the Admiralty court’s decision and ordered that the proceedings in Israel will not be stayed due to the exclusive jurisdiction clause.**
- ❑ The reasoning of the Supreme court was that “Practical Justice” suggests that the plaintiff should not be punished simply for not initiating timely proceedings before the foreign court. This approach coincides with the English case of *Spiliada Maritime Corp v Consulex Ltd* [1986].**

SUMMARY

- ❑ In this case the Israeli Supreme court introduced a new ambiguous term which allows the courts to decide in disputes on the basis principle of “practical justice” thus disregarding previous binding precedents.

This is risky and slippery road which significantly diminishes the legal certainty and will cause confusion in future cases.

- ❑ Nevertheless, the THOR HORIZON case is a significant precedential achievement for vessels calling Israeli jurisdiction, which can now rely on exclusive jurisdiction clauses, even if same are found in a contract of carriage made by a charterer.