Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd [2002] SGHC 286

Case Number : Suit 1361/2001

Decision Date : 03 December 2002

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Gan Chee Seng and Anna Quah (Ang & Partners) for the plaintiffs; Prakash P Mulani and Katherine Teo (J Koh & Co) for the defendants

Parties : —

Contract – Incorporation of terms – Whether conditions on separate document incorporated into contract

Contract – Unfair Contract Terms Act – Whether limitation period clause and limitation of liability clause reasonable

Evidence – Interpretation – "Ordinary course of business" – s 32 Evidence Act (Cap 97, 1997 Rev Ed)

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1. The defendants, Trans-Link Exhibition Forwarding Pte Ltd ('Trans-Link'), are, as their name implies, in the business of freight forwarding and transportation. They contracted with the plaintiffs, Press Automation Technology Pte Ltd ('Patec'), to transport a machine to an exhibition hall in Bangkok. While the machine was in the custody of the defendants, it was damaged.

2. Patec, claiming that the damage resulted in the total loss of the machine, commenced this action to recover the sum of US$178,091.75 being the value of the machine less its salvage value. They also claimed survey fees.

3. Although Trans-Link did not admit in its defence that the machine was damaged in the way asserted by Patec, the main points of the defence are:

> (1) that Patec's claim is time barred because it was not commenced within nine months of the damage to the machine;
>
> (2) that in any case Trans-Link's liability is limited to $100,000.

These two defences arise from clauses 27 and 30 of the Singapore Freight Forwarders' Association Standard Trading Conditions (1986) ('the SFFA Conditions'). Trans-Link claimed that the SFFA Conditions were incorporated as part of its contract with Patec. Trans-Link further said that it could rely on clauses 27 and 30 although these clauses restrict its liability for breach of contract because the clauses satisfy the test of reasonableness under the Unfair Contracts Terms Act (Cap 396) ('UCTA').

4. It has been agreed by the parties that I should decide the issues raised by the defence first and that, if I resolve these in Patec's favour, the issue of the loss actually suffered by Patec should be sent for assessment.

The background

5. The facts are largely undisputed. Patec had agreed to participate in the 14th International Machine Tools & Metalworking Machinery Trade Exhibition and Conference to be held at the Bangkok International Trade & Exhibition Centre ('BITEC') in November 2000. As a consequence, it was approached in August and September 2000 by three freight forwarding companies offering to transport its exhibit to

BITEC and back. One of these was Trans-Link.

6. Patec had discussions with these three forwarders and eventually decided to employ Trans-Link. Trans-Link gave Patec three quotations for their services. These were dated 28 September 2000, 2 October 2000 and 5 October 2000 respectively. Each quotation was accompanied by Trans-Link's standard form Combined Invoice & Packing List and its Confirmation of Acceptance (CoA).

7. Each quotation contained the statement 'All business is transacted only in accordance with the Singapore Freight Forwarders Association Standard Trading Conditions (1986). Copy is available upon application.'

8. The CoA contained the following terms:

> '1) STANDARD TRADING CONDITIONS
>
> > All business is only transacted in accordance with the Singapore Freight Forwarders Association (SFFA) Standard Trading Conditions. Copy is available upon application.
>
> 2) TERMS OF PAYMENT
>
> > …
>
> 3) INSURANCE
>
> > As our tariff is computed on the basis of volume or weight and has no correlation with the value of exhibits, it follows that the cost of insurance cover is not included in our charges. …
>
> 4) REQUEST FOR INSURANCE
>
> > …
>
> 5) EXHIBITOR'S ACCEPTANCE
>
> > Use of TRANS-LINK EXHIBITION FORWARDING PTE LTD's services – be it partly or full – and any requirement for additional services at any time before, during or after the exhibition express orally and/or in writing and/or by conduct, implies acknowledgement and acceptance of the Standard Trading Conditions and the foregoing terms numbered 1, 2, 3 and 4 above.'

Clause 1) above, which is in almost identical terms to the clause referring to the conditions that appears in the quotation, was referred to by the parties as the 'incorporating clause'.

9. On 9 October 2000, Patec accepted Trans-Link's quotation of 5 October 2000 whereby Trans-Link offered to transport one Patec Brand Press Machine weighing 30,000 kg from Patec's premises to BITEC and back to Patec's premises at a lump sum of $12,000. Patec's acceptance of the quotation was effected by its signing of the CoA. The signed CoA was then sent back by Trans-Link to Patec by facsimile transmission.

10. There was no course of dealing between Patec and Trans-Link prior to this engagement. Trans-Link did not forward the SFFA Conditions to Patec and Trans-Link's representatives did not draw the attention of Patec's representatives to clauses 27 and 30 of the conditions.

11. On 25 October 2000, Trans-Link took delivery of the machine from Patec's premises. The machine was then in good condition. The machine was shipped from Singapore on or about 30 October on board the vessel *Asia-Express*. It arrived at BITEC on 10 November 2000. The machine suffered damage on 12 November 2000 in Bangkok and whilst it was in Trans-Link's custody. The machine was subsequently transported back to Patec's warehouse in Singapore by Trans-Link.

12. This suit was started on 29 October 2001. The nine month period from the date of delivery to BITEC expired on 10 August 2001.

The issues

13. The following are the issues that I have to decide:

> (1) whether Patec has to prove that the damage to the machine arose out of the negligence of Trans-Link and, if so, whether the evidence of the first witness, Ms Pilai Klongpitayapong, and the report adduced by her are admissible;
>
> (2) whether the SFFA Conditions formed part of the contract between the parties;
>
> (3) if the second issue is answered in the affirmative, whether clause 30 of the SFFA Conditions which imposes a nine-month period for the bringing of legal proceedings against Trans-Link satisfies the test of reasonableness under UCTA; and
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> (4) if the third issue is answered in the negative, whether clause 27 of the SFFA Conditions satisfies the test of reasonableness under UCTA and, therefore, Trans-Link's liability to Patec is limited to S$100,000.

(i) The plaintiffs' burden of proof

14. Trans-Link did not present the court with any evidence on the accident to the machine. In its final submissions, it stated that it required Patec to prove its case of negligence in respect of the accident. Patec had attempted to show the circumstances in which the damage was sustained by adducing the evidence of a surveyor appointed to investigate the accident.

15. Ms Klongpitayapong is the managing director of McLarens (Thailand) Ltd. She testified that on 24 November 2000, her company received instructions from Patec's insurers in Singapore to inspect one damaged machine at BITEC and to interview witnesses to determine the cause of the damage. Ms Klongpitayapong assigned one Chatri Chaimee, a surveyor working for McLarens, to conduct the inspection. Mr Chaimee later reported his findings to Ms Klongpitayapong and as he could not speak or write English, Ms Klongpitayapong prepared the survey report reflecting these findings. On completion of the report, she reviewed its contents with Mr Chaimee and he confirmed that the contents were correct. Ms Klongpitayapong then signed the report. A copy of the report was attached to her affidavit of evidence-in-chief.

16. Mr Chaimee did not give evidence. Ms Klongpitayapong testified that he had left the employ of McLarens and that although she had tried to contact him and ask him to come to court, her attempts had been unsuccessful. She had spoken to him once but he was not willing to testify. She did not know his present whereabouts.

17. The report contained the only evidence that Patec was able to adduce as to the circumstances in which the machine was damaged. Trans-Link objected to the admission of the report on the basis that it was not based on Ms Klongpitayapong's personal knowledge but was derived from information received from Mr Chaimee. It submitted that the report could not be admitted under s 32(b) of the Evidence Act (Cap 97) on the basis of a commentary from *Halsbury's Laws of Singapore* (vol 10) at pps 206 and 207 which reads:

> 'Under Section 32(b) of the Evidence Act, a written statement made by a person who cannot be called as a witness in the prescribed sense in the ordinary course of business is a relevant fact. … A document used in commerce, written or assigned by him and the date of a letter or other document usually dated, written or signed by him is also relevant.
>
> …
>
> The section envisages evidence of written statements made in the ordinary course of business; oral statements made in the ordinary course of business are inadmissible under the section.'

Trans-Link argued that this meant that for s 32(b) to apply to the report, the report must have been written by Mr Chaimee himself in the first place. As the report had been prepared from an oral statement taken from Mr Chaimee, it was inadmissible.

18. I do not accept the above submission. As Patec pointed out, the wording of s 32 does contemplate the admission of oral statements. The section reads:

> '32. Statements, *written or verbal*, of relevant facts made by a person who is dead or who cannot be found, … are themselves relevant facts in the following cases:
>
> …
>
> (b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgement written or signed by him, or of the date of a letter or other document usually dated, written of signed by him' (emphasis added)

19. A plain reading of s 32(b) envisages the admissibility of verbal statements made by a person in the ordinary course of business although that section does give examples of particular documents, made in the course of business, that would be admissible. The enumeration of these various documents in sub-paragraph (b) does not detract from the general description at the beginning of the section which clearly states that both oral and written statements may be admitted. This position is recognised by *Sarkar's Law of Evidence* (15th Ed), vol 1 pg 684. The passage from *Halsbury's Laws of Singapore* relied on by Trans-Link did not cite any case in support.

20. Thus, in determining whether the statement is admissible, the manner in which it was made is not relevant. What is relevant is whether the statement was made in the ordinary course of business. In this instance, it was Mr Chaimee's duty as a surveyor to investigate and report on matters such as the incident in question. He was also required to put up a report on his investigations. Making reports whether verbal or written would therefore be part of his ordinary duties. In this case, however, he would not have been able to put up a report in English as must have been required by the instructing insurers from Singapore as he was not conversant with the language. Ms Klongpitayapong's unshaken evidence was that she prepared the report because of her knowledge of English but that it was based on Mr Chaimee's statements and that when the report was completed, he confirmed its contents to be correct. It appears to me that Mr Chaimee's oral statements were made in the ordinary course of his business and that of his employers and that the report should be admissible on that basis. Trans-Link did not dispute that the other requirements of s 32 had been met ie that Mr Chaimee was a person who could not be found.

21. Accordingly, I hold that the report made by Mr Chaimee is admissible.

22. In any case, Trans-Link had waived its right to object to the admissibility of the survey report by agreeing that it should be included as part of the Agreed Bundle without making any reservations on admissibility. The effect of the parties' agreement to the inclusion of the report as one of the agreed documents is that they had agreed that it would be admissible without formal proof. Whilst Trans-Link was free to

ask questions relating to the report and would not be barred from making submissions on the truth of its contents, the report would stand as evidence in court once it had been admitted as part of the Agreed Bundle. That this is the rule is plain from the following passages of the judgment of Lai Kew Chai J in *Goh Ya Tian v Tan Song Gou* [1981] 2 MLJ 317:

> 'In *Yap Choo Hoo v Tahir bin Yasin*, it was held by Mr Justice Sharma that a document even forming part of an Agreed Bundle has got to be proved, although it need not be formally and strictly proved. Even if one understands the qualification of this decision (as to which I am not sure), I must respectfully disagree with his reasoning which was delivered orally. …
>
> … The learned judge failed to appreciate that the documents are admitted into evidence without formal proof. They do form part and parcel of the evidence. … The party having agreed to the document is perfectly entitled to rebut or reduce the evidential or probative effect of the contents of the document by other evidence. What is clear is that the documents in the Agreed Bundle are admitted into evidence by consent without production of the maker or the originals and the contents do form part of the evidence before the court.' (at p 318-319)

23. In the report it was stated that the surveyor had attended at BITEC on 24 November 2000. He found the damaged machine on a wooden pallet and covered by a tarpaulin sheet pending shipment back to Singapore. One Mr Wittaya of Trans-Link Express (BKK) Ltd informed the surveyor that he had witnessed the accident. The truck carrying the machine had arrived at exhibition hall no. 103 on 10 November and the cargo had remained on the truck until 12 November 2000. On that date, the truck driver had removed the chains securing the machine and had then driven the truck into the hall at about 2200 hours. In the course of entering the hall, the truck made a right turn and the machine fell off the trailer and onto the ground.

24. Trans-Link admitted that the machine had been damaged while it was in its custody. The evidence contained in the report was sufficient to show negligence in the transport of the machine into the exhibition hall. No one was called from Trans-Link's associated company in Thailand to refute that evidence. I was satisfied that Patec had discharged its burden of proof. In any case, Trans-Link as bailee of the machine was under a duty to keep it in the same good order and condition as it was when it was received into Trans-Link's care. Having admitted that the damage was sustained while the machine was in its care, Trans-Link had the burden of showing that the damage did not result from any breach of duty on its part. Trans-Link made no effort to discharge that burden.

(ii) Did the conditions form part of the contract?

25. It is Trans-Link's submission that the SFFA Conditions were incorporated in the contract between the parties by Patec's signature of the CoA on 9 October 2000. As can be seen from 8, that document contains an express clause stating that Trans-Link does business on the terms of the SFFA Conditions and a further clause acknowledging that use of Trans-Link's services implies acknowledgement and acceptance of the SFFA Conditions. The SFFA Conditions were printed on a separate document which was not supplied to Patec in the course of the parties' negotiations. It should be noted, however, that Patec did not ask for the SFFA Conditions either, although each document sent by Trans-Link to Patec contained a clause giving notice that business was transacted only in accordance with them. Patec's witnesses conceded that this clause was legible, clear and appeared in bold on all correspondence from Trans-Link. Mr Yeo Kim Chye, a director and the executive vice president of Patec, who had experience in signing contracts on behalf of Patec, also agreed that even if the terms of the conditions had not been read, they nevertheless applied to the contract by virtue of clauses 1 and 5 of the CoA.

26. Trans-Link relied on the case of *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 as authority for the proposition that a person who signs a contractual document is bound by its terms even though he has not read them. It also cited the local authority of *Consmat Singapore (Pte Ltd) v Bank of America National Trust & Savings Association* [1992] 2 SLR 828 where LP Thean J held:

> 'The plaintiffs' contention that cl 3(c) was an onerous and unreasonable provision and that the defendants had not taken fair and sufficient steps to draw the plaintiffs' attention to that clause was unsustainable because the plaintiffs, having

signed the general agreement must be taken to have read and understood the terms thereof. The plaintiffs signed the general agreement and accepted it without modification. It was too late therefore for the plaintiffs to complain that cl 3(c) had not been brought home to them.'

27. The difficulty, if any, arises because, unlike in the *Consmat* and *L'Estrange* cases, the SFFA Conditions were not contained in the document that Patec signed but were contained in a separate document altogether and this document was not given to Patec. Trans-Link contended that this made no difference because the signed document, the CoA, clearly incorporated the SFFA Conditions. It cited two cases in support.

28. The first is *Rapiscan Asia Pte Ltd v Global Container Freight Pte Ltd* [2002] 2 SLR 325 which also dealt with the incorporation of the SFFA Conditions. Rajendran J held that a clause very similar to the incorporating clause in the present case was sufficient to incorporate the SFFA Conditions as part of the contract between the parties there. While the case notes do not expressly say so, it appears that in *Rapiscan* a copy of the standard terms had not been given to the customer as only quotations were sent to the customer. The judge observed:

'Every page of the two quotations faxed to OSM by Global on 4 and 5 December 2000, had printed on it the following qualification:

> All business and transactions entered into by or on behalf of the Company is subject to the Singapore Freight Forwarders Association Standard Trading Conditions [the SFFA Conditions], copy available upon request.'

It was submitted, on behalf of Global, and I accept that submission, that in view of the fact that it was made known to Rapsican, before Global agreed to undertake the shipment, that the shipment was subject to SFFA Conditions, the contract of carriage that was entered into was subject to those conditions.'

29. In the second authority, *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1987] (unreported decision of the Queen's Bench Division) reference was made to another unreported case which held that reference to a term in a contractual document is deemed reasonable notice of the term. In *Circle Freight*, Stuart-Smith J said:

'My attention has been drawn to decision of Court of Appeal in a case called *Keaton, Sons & Co V Carl Prior Ltd* (unreported), a decision of Ackner, LJ, Gough, LJ and sir Roger Ormrod, given on 14th March 1985. That was a case which, in fact, involved the IFF conditions. At first sight it lends considerable support to the plaintiffs' contention because of the factual similarities. In that case the Court of Appeal reversed the trial judge and found that the IFF terms had been incorporated.

In my judgment there is an important distinction between that case and the present one, which is this. Before the contract was entered into in that case, the freight forwarders sent a letter to the defendants indicating that all business was to be transacted in accordance with the standard trading conditions of the company. That was a circular letter which was sent to all members of the association (of which the defendants were a member) to indicate how the transport of the goods would be arranged. More importantly, the letter was followed by a further circular letter which described the package deal which was open for acceptance by the plaintiffs. That document itself also contained the clause to which I have referred. I should have added that the clause contained the words "copies application" which, presumably, means "copies on application". The actual terms relied upon were not,

> in that case, as in this case, ever sent to the other contracting party. The contract was then made following a visit by the defendants' representative to the plaintiffs' premises, where they discussed the arrangements, and instructions were given to move the machinery in question. *It seems to me to be clear that the letter – the package deal – was a contractual document*, the contract in question being partly in writing and partly oral as a result of the meeting between the parties. *In that case, therefore, the clause which incorporated the conditions was contained in one of the contractual documents.* In this case that is not so. There were no contractual documents here. The contract was entirely oral and made on the telephone.' (Emphasis added)

30. Patec did not dispute that the CoA contained clauses which incorporated the SFFA Conditions. Their contention was that the incorporating clause was insufficient to incorporate clauses 27 and 30 because those are particularly onerous or unusual clauses or are clauses which involve the abrogation of a right given by statute. Patec submitted that where clauses of this nature are concerned, they cannot be incorporated by reference by one party unless that party has brought them fairly and reasonably to the attention of the other party.

31. Leaving aside, for the time being, the issue of whether either clause 27 or clause 30 of the conditions or both are unusual or particularly onerous or involve the abrogation of a statutory right, I will first consider whether the authorities cited by Patec in support of their contention apply in a case where a set of conditions has been specifically incorporated in a contract by a document signed by the party whom it is sought to bind.

32. Patec first cited 12-015 from *Chitty on Contracts* (1999) vol 1 which states:

> '**Onerous or unusual terms.** Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention. "Some clauses which I have seen," said Denning LJ, "would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.'

Chapter 12 of *Chitty* deals with the express terms of a contract and Part 1 of this chapter is entitled 'Proof of Terms'. Paragraph 12-015 appears under section (b) of Part 1 and the first paragraph in that section, 12-008 reads:

> '**Contracts in standard form**. A different problem may arise in proving the terms of the agreement where it is sought to show that there are contained in a contract in standard form, ie in some ticket, receipt, or standard form document. If a party signs a contractual document he will normally bound by its terms. More often, however, the document is simply handed to him at the time of making the contract and the question will then arise whether the printed conditions which it contains have become terms of the contract. …'

After that general statement, the section goes on to deal with the principles to be applied in answering the question whether printed conditions on a separate document handed to a party have contractual force. Paragraph 12-015 dealing with onerous or unusual terms is a part of that discussion. As can be seen from the foregoing, this entire discussion takes place in the context of a situation in which a document containing terms is handed over physically at the time the contract is made and the party receiving it would be, most often, in the position of wanting to make an immediate contract and would not have had previous contact or negotiations with the other party. Nothing would be signed by the recipient of the document. That is not the situation which applied in this case as the parties here were in contact with each other for more than a month before concluding the contract and during that period active negotiations on the main terms of the contract took place.

33. The quotation from Lord Denning which appears in 12-015 is taken from the case of *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461. In this case the plaintiff sent some casks of orange juice to the defendant warehouseman for storage. On receipt of the goods, the defendant issued a receipt for them called a 'landing account' which stated on its face that the defendant's conditions as printed on the back of the document covered the goods in storage. One of these printed conditions exempted the defendant from liability for loss of the goods even when the loss arose from the defendant's negligence. This was a classic case of an attempt to incorporate standard form conditions into a contract by way of an unsigned document handed over at the time of making the contract.

34. Denning LJ's observation was adopted in the English Court of Appeal decision in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 where it was held that where clauses incorporated into a contract contained a particularly onerous or unusual condition, the party seeking to enforce that condition had to show that it had been brought fairly and reasonably to the attention of the other party. That too was a case where no written contract was signed and the conditions were handed over at the time the contract was made. What had happened was that the plaintiffs who ran a photographic transparency lending library, delivered to the defendants 47 transparencies on loan after receiving a telephone enquiry from the defendants. The transparencies were accompanied by a delivery note containing nine printed conditions and the issue was whether one of them which imposed punitive fees for transparencies not returned within 14 days of delivery had been incorporated as part of the contract.

35. The *Interfoto* case was distinguished by Thean J in *Consmat* on the basis that the contract in *Consmat* was signed. Goh Joon Seng J, however, applied *Interfoto* in *Hakko Products Pte Ltd v Danzas (Singapore) Pte Ltd* [2000] 3 SLR 488 where the defendant freight forwarder sent the plaintiff a quotation for transport of the plaintiff's machine from Germany to Singapore. At the bottom of the quotation appeared a clause, the incorporating clause, that read 'All business transacted in accordance with SAAA's standard trading conditions. Copy available on application.' The plaintiff accepted this quotation and the machine was damaged in transit. The issue was whether clauses 15 and 16 of the SAAA's standard trading conditions, which operated to restrict the defendant's liability for damage, applied to the contract. Goh J noted that the incorporating clause was in very small print and was not legible and thus the plaintiff had not seen it. He held, on the basis of *Interfoto,* that the incorporating clause and the exemption and limitation of liability clauses should have been brought to the plaintiff's attention and as they had not they were not part of the contract. It appears to me that *Hakko's* case is distinguishable from the facts before me because the incorporating clause here was admittedly legible and also there is no indication from the report of *Hakko's* case that the plaintiff there signed any document equivalent to the CoA here.

36. More helpful to Patec is a pair of Canadian cases. The first is *Tilden Rent-A-Car Co v Clendenning* [1978] 83 DLR 3d 400 where Mr Clendenning on hiring a car from Tilden signed a hire contract but did not read it. Mr Clendenning elected to pay an additional premium for 'collision damage waiver' which he understood to amount to full insurance for damage to the vehicle. The contract provided in fine and faint print that this waiver would not apply if the car was driven by a person who had consumed intoxicating liquor. Mr Clendenning drove the car while intoxicated and caused it damage. Tilden then sought to recover the cost of repairing the car and relied on the fine print at the back of the contract. Its case was dismissed at trial on the ground that the explanation of the waiver given by Tilden's employees on previous occasions on which Mr Clendenning had dealt with them had amounted to a misrepresentation. Tilden's appeal was also dismissed with the Ontario Court of Appeal holding that a signature can only be relied on as manifesting assent to a document when it is reasonable for the party relying on the signed document to believe that the signor really did assent to its contents. In a transaction such as a car rental contract, where the plaintiff emphasises in its advertising the speed and ease of the transaction, it can be held to know that its customers do not really assent to all the provisions of the documents they sign, and in such circumstances the plaintiff cannot rely on unusual and onerous printed terms not drawn to the customers' attention.

37. In the other case, *Trident Holdings Ltd v Danand Investments Ltd,* 21 C.L.R. 240 and, on appeal 39 B.L.R. 296, Trident submitted a quotation to Danand in relation to some construction works. The parties then sat down to negotiate and, during the course of the meeting, Danand suggested various changes to the quotation both in relation to language and in relation to the items of work to be done and price. The changes and added language were all hand-written by Danand's representative and initialled by both him and Trident's representative. The quotation had a portion captioned 'Acceptance' followed by appropriate acceptance language with a place for signature. This was not signed by Danand's representative. At the end of the discussion each party kept a copy of the initialled quotation and Danand's representative wrote on his copy 'Contract to follow', these words being a reference to a standard form of contract used by Danand. The standard form contract document was never signed and the issue that arose was whether a contract had nevertheless come into existence.

38. In the Ontario District Court, the court of first instance, it was held that the proposal in the form in which it emerged from the

meeting itself embodied a complete contract. The work to be done was specified and there were no major terms left to be negotiated. Execution of a further contract was not a condition of the bargain. The standard form contract which included certain clauses on which Danand wished to rely did not apply since that form of contract was not signed or presented for Trident's signature. On appeal, the Ontario Supreme Court held:

> 'The contract that the parties signed was found by the trial judge to embody a complete contract. If Danand wished to have all of the special terms of its standard form contract incorporated into the contractual relationship (some of them, such as the one under consideration, being very disadvantageous to the party contracting with one of Mr. Greenspoon's companies), it should have seen to it that this form was signed. Until this was done, there was a contract with no need to import any additional terms and I do not think that there was any reasonable basis for doing so. The evidence which could be brought to bear on the matter of implication, such as that which was submitted to relate to the previous courses of dealing, is not sufficiently cogent. Further, the fact that Mr. Di Battista would probably have signed the standard form contract is not sufficient to import the term in question into the contract that in fact was made. Mr. Di Battista gave evidence that he was ignorant of the term. (per Morden J.A. at 30)

Patec submitted that applying *Trident Holdings Ltd*, the conditions here had to be signed before Patec could be bound by clauses 27 and 30.

39. Having considered the authorities, I am of the opinion that the fact that the incorporating clause here was contained in a document that was signed by Patec, resulted in the conditions being incorporated as part of the contract between the parties notwithstanding that Patec did not have a copy of them and had not read them. I hold that the conditions were incorporated as a whole and that the line of authorities that decides that onerous and unusual conditions cannot be incorporated unless the attention of the party sought to be bound has been specifically drawn to them does not apply to a case like this where there is a signed contract with an explicit incorporating clause. As far as the authorities are concerned, as I have shown above, all those that apply the specific notice requirement for onerous clauses are cases in which there was no signed contract. The only exception is the *Tilden* case. I do not consider the *Trident* case an exception as the contract that was found to exist by the court was a contract which was concluded partly orally and partly in writing and the written part did not contain an express incorporation clause referring to Danand's standard term contract. The court there, as was clear from the judgment of the Court of Appeal, was asked to make a finding of incorporation by implication which would be supported by evidence on a previous course of dealing.

40. Whilst *Tilden* directly supports Patec's position, I decline to follow it. In my judgment, it is not in accordance with the common law position in England and in Singapore. Where a party has signed a contract after having been given notice, by way of a clear incorporating clause such as the one used in the present case, of what would be included among the contractual terms, that party cannot afterwards assert that it is not bound by some of the terms on the ground that the same are onerous and unusual and had not been drawn specifically to its attention. Contracting parties must have a care for their own legal positions by ascertaining what terms are to be part of a contract before signing it. If they do not do so, they will be bound by those terms except to the extent that the UCTA offers them relief. In *AEG (UK) Ltd v Logic Resource Limited* [1995] (unreported decision of the Court of Appeal), Hobhouse LJ expressed the opinion that whilst in the past there may have been a tendency to introduce more strict criteria in relation to the question of whether particular terms had been incorporated into a contract by reference:

> '… this is no longer necessary in view of the Unfair Contract Terms Act. The reasonableness of clauses is the subject matter of the Unfair Contract Terms Act and it is under the provisions of that Act that problems of unreasonable clauses should be addressed and the solution found.'

Whilst Hobhouse LJ was in the minority in that case (one which involved conditions printed at the back of a confirmation of order document), I respectfully agree and adopt his view which accords with common sense.

41. In the result I hold that all the SFFA Conditions including clauses 27 and 30 were incorporated as part of the contract between Patec

and Trans-Link.

(iv) The requirement of reasonableness under UCTA

42. Under s 3 of UCTA, as between contracting parties where one of them deals on the other's written standard terms of business, as against that party the other cannot by reference to any contract term exclude or restrict his liability for breach of the contract except insofar as the contract term satisfies the requirement of reasonableness.

43. The test of reasonableness is provided in s 11. This, so far as relevant, reads:

> '11. – (1) In relation to a contract term, the requirement of reasonableness of the purposes of this Part … is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.
>
> (2) …
>
> (3) …
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> (4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) in the case of contract terms to –
>
> > (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
> >
> > (b) how far it was open to him to cover himself by insurance.
>
> (5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.'

44. From the section it is clear that the onus of proving that any particular restrictive clause in a contract is reasonable lies on the party so asserting, in this case, Trans-Link. Secondly, the time for determining the reasonableness of the term is the time when the contract is made and not the time when it is breached nor the time when the issue arises in court.

45. Section 11 was considered in *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1999] 1 SLR 214. Warren Khoo J held there that the fact that the parties were business or commercial entities dealing with each other in the course of business per se did not go towards satisfying the reasonableness requirement. The mere fact that a party had apparently willingly entered into a contract containing exclusion and limitation terms also did not prevent him from subsequently raising questions of reasonableness. Further, a provision that was commonly found in an industry may be reasonable by reason of it being in common use; but it could also be unreasonable nevertheless. The question whether a contractual term satisfied the requirement of reasonableness depended on the facts of each case. In principle, a term which had been found to satisfy the reasonableness requirement in one case may not satisfy it in another.

46. Trans-Link made an argument that because Patec clearly had notice of the application of the SFFA Conditions to the contract by way of the incorporating clause which was repeated seven times in each quotation which was forwarded to Patec and its representatives showed a blas attitude to the content of the SFFA Conditions, being content to sit back and wait for Trans-Link to highlight the conditions to

them, the Court ought to allow enforcement of the conditions. Counsel went so far as to submit that preventing enforcement of the SFFA Conditions would amount to relieving parties who have been incompetent in contractual negotiations of their contractual responsibility and transferring the burden of such responsibility to the Courts.

47. I cannot accept that argument. *Kenwell's* case is clear authority for the principle that even if a party knowingly enters a contract with a restrictive condition he will still be able to seek the protection of UCTA. That principle emanates from the language of UCTA itself as the statute was passed to allow parties to contracts to be relieved of the burden of unfair contractual terms provided the contracts concerned fall within the legislation. Since this contract is covered by s 3 of UCTA in that Patec dealt on Trans-Link's written standard terms of business, Patec is entitled to require Trans-Link to establish that the exclusion and limitation clauses pass the reasonableness test.

(v) Are clauses 27 and 30 in accordance with international and local custom/practice?

48. As part of its case that the clauses concerned are reasonable, Trans-Link sought to establish that they are in accordance with international and local custom/ practice. I will consider this issue first as it relates to both clauses before going on to consider the clauses individually as, in other respects, the bases for promoting the reasonableness of each of them are different.

49. As evidence of the applicable international and local practice, Trans-Link adduced testimony from Mr Ronald George Willis, Mr Lim Hwee Hong Stanley and Mr Nicholas Charles Sansom.

50. Mr Lim is in the freight forwarding business. In 1992, he became chairman of the SSFA. He remains the chairman of the association under its new name of Singapore Logistics Association ('SLA'). Mr Lim testified that the SLA currently has 265 members and represents the majority of established logistics providers in the Singapore freight forwarding industry. It is a member of FIATA, the international federation of national freight forwarding associations. According to Mr Lim, the SFFA Conditions were drawn up in 1986 and were modelled on the standard trading conditions of the British International Freight Association ('BIFA'). In the year 2000, the SLA adopted an amended set of conditions which I shall refer to as the SLA Conditions. Clauses 27 and 30 of the SFFA Conditions also appear in the SLA Conditions and the wording of both sets of clauses is identical save that in cl 27 of the SFFA Conditions liability is limited to $5 per kilogram whereas in the equivalent of the SLA Conditions, liability is limited to $1 per kilogram. The maximum liability of $100,000 remains the same in both cases.

51. Patec submitted that Trans-Link had failed to establish that it was the custom of freight forwarders in Singapore to carry on business on the basis of the SFFA Conditions. It pointed out that under cross-examination Mr Lim agreed that in the year 2000, the SLA had recommended that its members adopt the new SLA Conditions and that as far as he knew most members were using them rather than the SFFA Conditions. Although Mr Lim acknowledged that he was not aware how many of the SLA's members were still using the SFFA Conditions in the year 2000, he agreed with the assertion put to him by Patec's counsel that it was not the custom in 2000 for freight forwarders in Singapore to trade on the SFFA Conditions. He did, however, maintain that in 2000 it was the custom for freight forwarders to trade on the SLA Conditions.

52. Patec did not adduce any evidence of its own in relation to the custom followed by freight forwarders in Singapore. The furthest it went was to adduce evidence of the previous contracts that it had with its regular freight forwarder, one Mr Eric Wong. These contracts did not contain any standard terms and conditions excluding or limiting liability. On the other hand, it should be noted that before Patec concluded the contract with Trans-Link it had also conducted negotiations with a freight forwarding company named R.E. Rogers Singapore (Pte) Ltd ('Rogers'). Rogers sent Patec a number of quotations and a confirmation of acceptance form. In each of its quotations, a clause at the bottom appeared which stated: 'All business is handled in accordance with our terms and conditions of trading. Copy available upon request'. The confirmation of acceptance form had wording that was practically identical to the wording of Trans-Link's CoA. In particular, clause 1 read 'All business is only transacted in accordance with the Singapore Logistics Associations (SLA) Standard Trading Conditions (1986). Copy is available upon application'. It would appear that Rogers traded on the updated SFFA Conditions in the form of the SLA Conditions.

53. From the evidence of Mr Lim and the other evidence available to me in the case, I conclude that in the year 2000, there were freight forwarders in Singapore who adopted the SLA Conditions and there were others who adopted the SFFA Conditions. There were some who did not adopt either but companies that were members of the SLA were likely to be using either the current or previous standard form terms and conditions. Whichever set of conditions was applied, they contained time bar and limitation of liability clauses.

54. Mr Willis was called to give evidence on the international practice of freight forwarders. He is currently the vice president of BIFA and a member of the FIATA Advisory Body Legal Matters. He testified that both the nine month time bar and the limitation of liability provisions contained within the SFFA Conditions are internationally accepted customs of trade, approved by two independent bodies, namely ICC and UNCTAD. He confirmed that such restrictive clauses appear in the BIFA standard terms and conditions which were initially compiled in full co-operation with the British Shippers Council and are registered with the British Office of Fair Trading. These restrictions appeared in every set of freight forwarding conditions that he had ever seen and he considered them both justified and reasonable. Patec did not adduce any evidence at all on the international position.

55. I am satisfied that internationally it is the practice of freight forwarders to trade on standard terms which include time bar periods and limitation of liability clauses. I am also satisfied that in Singapore it is the practice of freight forwarders generally who are members of the SLA, to also trade on either the SLA Conditions or their predecessor, the SFFA Conditions. This holding is, of course, not the end of the matter because I have to consider whether each of the disputed clauses is reasonable in the specific circumstances of the contract between Patec and Trans-Link.

(vi) Is clause 30 reasonable?

56. Clause 30 of the SFFA Conditions reads:

> 'The Company [Trans-Link] shall be discharged of any liability whatsoever unless:
>
> (i) Notice of any claim is received in writing by the Company or its agent within 14 days after the date specified in (b) below,
>
> (ii) suit is brought in the proper forum and written notice hereof received by the Company within 9 months after the date specified in (b) below.
>
> (b)(i) in the case of damage to Goods, the date of delivery of the Goods, and in the case of loss of the Goods, the date the Goods should have been delivered.
>
> (ii) in the case of delay or non-delivery of the Goods, the date that the Goods should have been delivered.
>
> (iii) in any other case, the event giving rise to the claim.'

Bearing in mind that the normal limitation period when goods are damaged due to a breach of contract is six years, a time bar period of nine months is a substantial restriction of the rights of the party whose goods have been damaged.

57. Mr Lim asserted, in relation to clause 30, that the nine month time bar is a necessary feature in multimodal transport. It has been adopted by many internationally accepted multimodal terms and conditions. He explained that in the freight forwarding business, it is common for more than one mode of transportation to be required and for the freight forwarder to subcontract segments of the journey to third parties. Often, the subcontracts with third parties are subject to rules applied by international conventions which in themselves contain time limits for the commencement of suit. In the case of carriage of goods by sea, for example, suit must be commenced within one year of loss of damage pursuant to the provisions of the Hague Rules or the Hague Visby Rules. Accordingly, a nine month time bar in a contract between the freight forwarder and its customer is crucial to ensure that the freight forwarder has sufficient to consider and investigate any claim by its customer and protect its position against subcontractors if necessary. The nine month time bar is not therefore an arbitrary limitation period adopted and imposed by the freight forwarding industry.

58. Mr Willis echoed Mr Lim's views. He stated that the nine month time bar is a world-wide standard within the freight forwarding industry as is evidenced by its inclusion as clause 17 in the FIATA Multimodal Transport Bill of Lading and clause 10 in the FIATA Model Rules for Freight Forwarding services. The UNCTAD/ICC Rules for Multimodal are contained in ICC Publication 481 also have a nine month time bar. Mr Willis also confirmed the rationale given by Mr Lim for the adoption of the nine month time bar.

59. On the other hand, there are various international transport conventions that provide lengthier time bars. Under the United Nations draft Convention on International Multimodal Transport of Goods, the suggested time bar period is two years and there are conventions relating to international carriage of goods by road and by rail which provide for a one year time bar. The time bar for air carriage under the Warsaw Convention is two years. Mr Willis' response when he was asked why the forwarder adopted a nine month time bar period in the light of the longer time bar periods for different types of travel was that it was clearer for the forwarder to have a nine month period rather than something dependent on his subcontract with the actual carrier. Such a provision would also put the cargo interest in a worse situation because he would have to work out which time period was applicable depending on whether the cargo was damaged during air, sea or land carriage and the facts might not be clear.

60. All of the above are general considerations. Trans-Link have to satisfy me that in the particular circumstances of this case, nine months, which is five years and three months shorter than the statutorily bestowed time period, is a reasonable period. Patec submitted that there were two justifications for the period. The first was that the nine month period was, according to the evidence, necessary to protect their right of recourse against the third party actual carrier should the loss or damage occur whilst in the custody of that carrier.

61. The carriage in this case involved land transport in Singapore for which the six year period would otherwise be applicable, a sea journey to Bangkok from Singapore for which the applicable time bar provision would be found in the Carriage of Goods by Sea Act (Cap 33), and land transport in Bangkok and the sea voyage back to Singapore. No evidence was adduced as to the time bar period in Bangkok for claims of this kind or as to any time bar period either statutorily or contractually applicable for the sea voyage back to Singapore. In the latter case either the Hague Rules or the Hague Visby Rules would most probably apply but Trans-Link did not produce evidence on this.

62. Patec submitted that there was no evidence that there was a one year time bar applicable to any stage of the contemplated carriage. As far as the sea carriage was concerned, the only evidence available was as to the carriage from Singapore and under our Carriage of Goods by Sea Act, the Hague Visby Rules would be compulsorily applicable to that carriage. Patec contended that whilst the general time bar provided by the Hague Visby Rules is one year, in the case of an indemnity action, Article III r 6*bis* would apply. This reads:

> 'An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than 3 months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.'

If this rule is applicable then even if Trans-Link was sued by its client after the expiry of the one year time period, it would still have a further three months thereafter in which to sue the ocean carrier.

63. Trans-Link submitted that r 6*bis* only applies to carriers who have subcontracted the carriage to a second carrier under a bill of lading. In support, it cited the following passage from *Scrutton on Charterparties and Bills of Lading* (20th Ed) at p 437:

> 'Since the Rules apply directly only to contracts covered by a bill of lading, this new Rule is intended presumably to deal with situations where the carrier under a particular bill of lading is himself in the position of shipper or consignee under another bill of lading, for instance where there has been transhipment for part of the voyage. For the indemnity period in Rule 6b is to apply, it is only necessary that the contract under which the recourse claim is brought should be subject to the Rules, and it does not matter that the contract under which the underlying claim was brought was not so subject.'

A similar passage in *Chorley and Giles' Shipping Law* was also quoted by Trans-Link. It should be noted, however, that in both extracts whilst the writers cite the situation of transhipment as the situation which the rule seeks to cover, neither of them expressly states that a freight forwarder who seeks to obtain an indemnity against a contractual liability to his customer (which liability arises out of a contract which is not a bill of lading) cannot rely on that rule when seeking to enforce the bill of lading contract between himself and the actual carrier.

Further, while Lord Brandon in the case of *The Xingcheng* [1987] 2 LLR 210 remarked that the case to which r 6*bis* applied was a transhipment type case, he also stated that there was no express requirement in that rule that the liability to the cargo owner in respect of which one shipowner claimed an indemnity against another must also arise under a contract of carriage to which the Hague Visby Rules applied and that there was no good reason why such a requirement should be implied (at p 213). *The Xingcheng* was decided some five years after *The Vechscroon* [1982] 1 LLR 301. In the latter case, a transport company had contracted to carry goods from Ireland to Paris in a refrigerated vehicle and whilst this vehicle was on board a ferry, it overturned and the goods were damaged. The transport company paid the owners of the goods and claimed an indemnity from the ferry owner. The ferry owner raised an argument of time bar under the Hague Rules but it was held that the Hague Visby Rules applied to the carriage and because of the operation of r 6*bis* the action was not time barred. This case was not disapproved of in *The Xinghcheng*. I find it of assistance that the transport company in that case was able to rely on r. 6*bis* to extend the time for bringing the indemnity action beyond the one year time limit under Article III r. 6 even though it was not itself a shipowner or sea carrier. This case shows that, as the generality of its language implies, the operation of r. 6*bis* extends beyond the transhipment situation.

64. Trans-Link has not satisfied me that in the circumstances of this contract between itself and Patec it was necessary for Trans-Link to put a nine month time bar in place in order to protect its right of recourse against the third party actual carrier should the loss or damage have occurred whilst the goods were in the custody of the third party. The only evidence that any part of the carriage was subject to a time bar period of less than six years related to the carriage from Singapore to Bangkok. As that leg was covered by the Hague Visby Rules, had the damage occurred while the goods were on board the *m.v. Asia Express*, Trans-Link would have been able to rely on r. *6bis* to extend the time in which it could claim an indemnity from the owners of that vessel and would not need the protection of a nine month time bar period for that purpose.

65. The next justification for the nine month time bar period related to insurance. In this respect, Trans-Link relied on the testimony of Mr Nicholas Charles Sansom, the managing director of Thomas Miller (South East Asia) Pte Ltd, the managers of the Singapore branches of The Through Transport Mutual Insurance Association (EurAsia) Ltd ('TT Club') and the Untied Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd ('UK P&I Club'). The TT Club and the UK P&I Club provide insurance coverage for shipowners. Mr Sansom testified that the TT Club recommends that its members have a nine month time limit in their trading conditions. He stated that a time limit means that an estimate for a potential claim can be removed from an insured's claims record once time has expired. The existence and value of estimates on a claims record have a significant and direct effect on premium and therefore a time limit helps to reduce insurance costs. In cross-examination, Mr Sansom agreed it would still be possible to obtain insurance even if the freight forwarder contracted on terms that provided for a longer time bar period. He also said that the additional premium for an extended time bar period would not result in the premium being so prohibitive that the freight forwarder could not do profitable business after that. In the case of the TT Club, if a freight forwarder asked the Club for cover when its contract provided for a 12 month time bar period there would be no additional premium charged initially but this might result in additional premium later if the absence of a nine month time bar made the member's claims record worse. Mr Sansom was not able to give very definite evidence of the link between increased premium and a longer time bar period because in the organisations he represents the premium charged to each member is calculated on that member's claims record which results from a number of factors and not only the time bar period provided for in the contract of carriage. All he could say was that the time bar could possibly play a part.

66. In the light of Mr Sansom's evidence, Trans-Link submitted that although the absence of a nine month time bar may not immediately impact the amount of premium payable by the freight forwarder, it will ultimately have a bearing on the premium subsequently payable by the freight forwarder. The inability of a freight forwarder to seek recourse against the actual carrier will deteriorate the freight forwarder's claims record.

67. At the material time, Trans-Link did have insurance covering any liability it incurred in the course of its business. It did not call any evidence from this insurance company. I was not told by its insurer that it was a condition of the cover that a nine month time bar be imposed. Nor was any evidence given that that particular insurance company would have charged a prohibitive rate of premium had it been asked to cover business that had a longer time bar period. Trans-Link, at the request of Patec, disclosed a copy of the insurance renewal certificate issued for the year 2000. That certificate showed that Trans-Link had cover for bailee liability of up to US$1 million per incident with a deductible of US$4 million. There was nothing in the certificate to indicate that Trans-Link was required to trade on the SFFA Conditions in order to obtain cover. The actual insurance policy was produced in the course of the trial but it was not established to my satisfaction that by virtue of that policy coverage would only attach if Trans-Link traded on the SSFA Conditions. It therefore appears to me

that Trans-Link has not shown, on the balance of probabilities, that in the year 2000 it required a nine month time bar in order to insure itself, at reasonable rates, for liability incurred as a bailee.

68. Overall, I am of the view that Trans-Link has not discharged the onus of showing that the nine month time bar period imposed by cl 30 is reasonable in relation to the contract for the carriage of the Patec machine from Singapore to Bangkok and back again. As cl 30 has not been shown to be reasonable, it follows that Patec's claim is not time barred.

(vii) Is clause 27 reasonable?

69. Clause 27 provides that in respect of any goods lost, damaged, misdirected or misdelivered, the liability of Trans-Link is limited to the least of (i) the value of the goods, (ii) $5 per gross kilogram of the goods or (iii) $100,000. Under cl 28 compensation is to be calculated by reference to the invoice value of the goods plus freight and insurance if paid. Clause 29 is also relevant in this connection. It provides that: 'by special agreement in writing and on payment of additional charges, higher compensation may be claimed from [Trans-Link] not exceeding the value of the goods or the agreed value, whichever is the lesser'.

70. In this regard, Mr Sansom's evidence was that financial limitations of liability are essential to world trade. Without limitations of liability, transporters of cargo (including freight forwarders) might not be able to obtain liability insurance. Even if available, the insurance would be very expensive and it may not be possible to pass the additional cost to the cargo owner. Cargo interests are able to protect their interests by taking out cargo insurance. The liability of a transporter of cargo will usually be subject to a financial limit which varies depending on the mode of transport and the country of the transporter. In Mr Sansom's view, the limitation of liability under the SFFA Conditions was not unreasonable or exceptional.

71. Mr Willis gave evidence on the limits of liability imposed under other sets of standard terms and international conventions. He said that the present international standard of forwarders' limitation is based upon the Special Drawing Right ('SDR') and stands at 2 SDRs per kilogram. This limit is found in both the FIATA Model Rules and the BIFA 2000 terms. 2 SDRs per kilogram presently amounts to approximately $3.52 per kilogram and is therefore a lower sum than the $5 per kilogram offered under cl 27.

72. In its submissions, Patec specifically drew attention to the higher limit of 17 SDR ($49.58) per kilogram imposed for air cargo by the Warsaw regime and the limit of $1,563.65 per package or $4.69 per kilogram, whichever is the higher, imposed by the Hague Visby Rules. It also submitted a table showing the limitation limits under nine different regimes, most of which were higher than that provided by cl 27. Patec submitted that the limitation amount provided for under cl 27 was not reasonable in comparison with these other limits.

73. Trans-Link argued that it would be wrong to judge the reasonableness of cl 27 by comparing it with the other limits available under the various transport conventions. If Patec's argument was to be accepted, then all conventions should have the same liability limits and this could not be so in the international transport industry simply because different conventions cater for different cargo and different circumstances. Thus, Trans-Link submitted, it would only be relevant to look at limitation of liability clauses of other associations of freight forwarders. The FIATA limit was 2 SDR, the BIFA was also 2 SDR and the Hong Kong Freight Forwarders' Association limit was HK$10 ($2.50) per kilogram. Further, the Hague Visby Rules provides for a 2 SDR limit. When all these limits are compared with the $5 per kilogram limit under cl 27, the latter is clearly seen to be reasonable.

74. The need for a limitation of liability clause in the freight forwarding context was considered in the English appeal case of *Overseas Medical Supplies Limited v Orient Transport Services Limited* [1999] EWCA Civ 1449. In that case, the reasonableness of cl 29(A) of BIFA, which was a financial limitation clause, was considered by the court. The defendant was contractually obliged to arrange for insurance on behalf of the plaintiff but failed to do so. The defendant then sought to rely on cl 29(A) to limit its liability. The court held that whilst the financial limitation clause was not reasonable in respect of the forwarder's obligation to insure (which was in issue), it was reasonable in respect of the forwarder's general liability. Potter LJ cited the following part of the trial judge's (Judge Kenney) decision with approval:

> 'In the transport business, as I have said, losses are common and frequently unavoidable. That is not so in arranging insurance of the kind with which we are concerned here. The scope for things to go wrong is vastly less and there is usually an opportunity to put things right, because the arrangements have to be settled

> prior to the commencement of the risk. Equally, in my judgment, fairness and reasonableness of limiting liability in each case cannot be equated. In the transport business owner and carrier are likely to be insured. The owner's insurance which is indemnity insurance, would be cheaper than the carrier's liability insurance. Sorting out the carrier's liability for loss can be a complex, uncertain and expensive process. Therefore limitations or even exclusions of liability for the carrier are apt to be considered reasonable.'

75. It is clear from the foregoing that limitation of liability clauses are wide spread in the transport industry. Some of them have even been given the force of law like the Hague Visby Rules and the Warsaw regime. The limits applicable vary widely but as far as freight forwarders are concerned, the limit in cl 27 appears to be at the higher end of the scale. It is also important that cl 29 envisaged a situation in which in consideration of a special payment the limit would be increased to the value of the goods. Clause 27 therefore was capable of adjustment by a monetary means. It is clear from the CoA that Trans-Link's freight for the carriage was based on the weight of the goods. In such circumstances, it is reasonable that its liability is also based on weight and that if the customer desires an increased liability on the part of the forwarder, it should also have to pay an increased tariff.

76. Patec argued that cl 27 was unreasonable because Trans-Link was insured and there was no evidence that Trans-Link had insufficient resources to satisfy Patec's claim. It must, however, be emphasised that Patec was itself insured. It was expressly stated in the quotation and at cl 3 of the CoA that it was Patec's responsibility to arrange insurance to cover the machine during transport to the exhibition, display at the exhibition and during its return voyage. Patec accepted that it could have asked Trans-Link to arrange the insurance for a higher freight. That option was rejected. More importantly, Patec's insurance was a cargo policy and, as recognised in the *Overseas Medical Supplies* case, would most likely be cheaper than the liability policy which Trans-Link had taken out. Therefore, there was never the possibility that Pateck would be left without recourse for the full damage. On this basis, it was reasonable for Trans-Link to limit its liability in accordance with the terms of cl 27.

77. Patec also submitted that it only had a limited choice of contractors for on-site handling at BITEC. It argued that Trans-Link was in a strong bargaining position since the other companies who offered similar services traded on similar trading conditions. It also submitted that it had no opportunity of entering a similar contract with anyone else without the exemption clause. There was no effective or practicable free choice available to it to select freight forwarders on terms other than the SFFA Conditions.

78. The evidence, however, was that whilst there was limited choice for on-site handling at the exhibition hall, there was full freedom of choice for Patec in respect of the transport of the machine up to the door step of BITEC. In fact, had Patec wanted to avoid the SFFA Conditions entirely, it could have engaged its usual land contractor Mr Eric Wong who appeared to trade without any limiting terms and conditions. Patec's decision to engage Trans-Link was, however, according to its evidence, viewed as a commercially sensible decision as it obtained a complete package from Trans-Link. Patec did not consider Eric Wong for this reason and it rejected the competing bid from Rogers who was also offering a complete package because Trans-Link's prices were more competitive. The decision to engage Trans-Link was therefore a calculated one with a view to minimising costs and in the interest of practicability and convenience given the various options available to Patec. I accept Trans-Link's submission that when a party chooses to engage a forwarder out of convenience and price, it can hardly be said that the forwarder had the superior position alleged by Patec. Patec did have bargaining power and it chose Trans-Link as its freight forwarder after carefully considering its other options.

79. In the light of all the circumstances of this contract, I find cl 27 to be reasonable. Trans-Link is entitled to limit its liability to $100,000.

Conclusion

80. There will be judgment for Patec in the sum of $100,000. I will hear the parties on costs.

Sgd:

JUDITH PRAKASH

JUDGE