THE HIGH COURT

[2021] IEHC 304

RECORD NO. 2018/10961 P

BETWEEN

TEVA (CANADA) LIMITED

PLAINTIFF/RESPONDENT

AND

PANALPINA WORLD TRANSPORT (IRELAND) LIMITED

DEFENDANT/APPLICANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 30 April 2021

Summary

1. This is a motion brought by the defendant seeking an order pursuant to the inherent jurisdiction of the court declining jurisdiction to hear and determine this action in favour of the courts of the Hong Kong Special Administrative Region. Alternatively, an order is sought striking out the proceedings for want of jurisdiction. It was explained at the hearing that the second relief was based on the argument that the proceedings fail to disclose a cause of action.

2. In short, I conclude that the sea waybill at issue in this case, which contains an exclusive jurisdiction clause in favour of the courts of the Hong Kong Special Administrative Region, is very strong evidence of the contractual terms agreed between the parties. In circumstances where the waybill itself identifies that the shipper accepts and agrees to all the terms of the waybill, where no issue was raised by the plaintiff on receipt of the waybill and where no other contract has been put forward by the plaintiff, I find that the terms identified in the waybill constitute the contract between the parties.

3. The rules on specific notification of an exclusive jurisdiction clause identified at Article 25 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)("Recast Brussels Regulation") do not apply here, as the clause confers jurisdiction on a non-EU state and therefore does not come within Article 25. The exclusive jurisdiction clause displaces the normal obligation under the Regulation to sue the defendant in its place of domicile.

4. Finally, I refuse the plaintiff's application that the Irish courts should hear and determine these proceedings despite the exclusive jurisdiction clause, on the ground that Ireland is the *forums conveniens*. For the reasons I explain below, I am not satisfied there is a close connection between the proceedings and Ireland or that the plaintiff has shown cause as to why the proceedings should be heard in Ireland.

Facts of the case

5. The relevant actors in this case span three continents. The claim relates to the carriage and or storage of a consignment of 19 pallets of Novo Salbutamol, a pharmaceutical product. The product was shipped from the port of Cork to the port of Montréal in November/December 2017 with the place of delivery to be Toronto. The plaintiff alleges that during the journey the product was exposed to temperatures outside the acceptable range due to failings on the part of the defendant.

6. The plaintiff is a large pharmaceutical company that is incorporated in Toronto. It is described as the consignee on the waybill. The shipper identified on the waybill is a related company, Ivax Pharmaceuticals Ireland. The carrier is identified as Pantainer (HK) Ltd incorporated in Hong Kong. On the face of the waybill the defendant is identified as an agent for Pantainer (HK) Ltd. The ship owner is Mediterranean Shipping Co. Ltd, a company incorporated in Switzerland.

7. It has not been explained in these proceedings how a contractual nexus exists as between the plaintiff, Teva Canada Ltd., and the defendant since Ivax Pharmaceuticals Ireland is the shipper, and Teva is the consignee. Generally, it is the shipper and not the consignee who contracts with the carrier for the transportation service although there are exceptions to this. However, a term on the face of the waybill identifies that it is the shipper that is the contracting party, albeit for itself and on behalf of the consignee. Equally it is unclear to me why the disclosed agent – Panalpina World Transport Ltd. - for the carrier, Pantainer (H.K.) Ltd (a company incorporated in Hong Kong) has been identified as the defendant rather than the carrier itself.

8. In short, a contract of carriage is normally between the shipper and the carrier, yet neither of those parties are named in the proceedings.

9. Turning to the nature of the claim made by the plaintiff, the endorsement of claim in the plenary summons pleads that the plaintiff's claim is for damages for breach of contract and/or negligence and/or breach of duty (including breach of duty as bailee) of the defendant in or about the carriage/storage of the pharmaceutical goods which were shipped by sea under bill of lading MSCUCK304354 from Cork to Toronto. No statement of claim has been filed by the plaintiff. It was explained by counsel that it was not proposed to file a statement of claim until this motion was decided, as if the motion was decided against the plaintiff the statement of claim would be "moot". That seems to be an undesirable economy: in a jurisdiction motion, the court must arrive at a decision based on the material before it. The absence of a statement of claim or any exhibits to the affidavit of Ms. Noble evidencing the contract meant that I had to proceed largely on the material put forward by the defendant.

Outline arguments of the parties

10. In short, the defendant asserts that the contract between the parties, as evidenced by waybill number SNN318158, contains an exclusive jurisdiction clause granting jurisdiction to the courts of Hong Kong Special Administrative Region. On that basis, it requests this court to decline jurisdiction.

11. The plaintiff asserts that the terms identified in waybill SNN318158 cannot be part of the contract between the parties, given that the waybill was uploaded only on 4 December 2017, a day after the ship sailed and that it was not provided to the plaintiff when it concluded the contract with the defendant on or before 23 November 2017.

12. Importantly, although the plaintiff argues that the waybill does not contain the contractual terms, it does not identify any contractual terms or any contract between the

parties, despite referring to a bill of lading in the endorsement of claim. However, neither in the pre-motion correspondence between solicitors, nor in the replying affidavits sworn by Helen Noble, solicitor and SC, of 10 September 2019 and 10 September 2020, nor in written or oral submissions was there ever any further reference to that bill of lading and it was never produced. On enquiry from me as to what contractual terms the plaintiff argued for, it was explained by counsel that there was no obligation on the plaintiff to specify the contract between the parties and that the defendant bore the burden of proof in relation to its application to invite the court to decline jurisdiction. A similar approach was taken in the affidavits and correspondence by Ms. Noble. It is certainly correct that the defendant bears the burden of proof in this motion, at least up to the point it establishes the existence of an exclusive jurisdiction clause, at which point the burden shifts if the plaintiff wishes to persuade me to allow the proceedings to be heard in Ireland.

13. However, to determine the motion, I must take a view as to the applicable contractual terms governing the relationship between the parties. In the affidavit of Ms Noble, solicitor for the plaintiff, Senior Counsel, she refers to the plaintiff's "pleaded" case by which I take to mean the bill of lading identified in the endorsement of claim. At paragraph 58 of the legal submissions filed on behalf of the plaintiff, it is stated that there are multiple competing terms in the various documents applicable to the journey the subject of these proceedings. But the plaintiff has comprehensively failed to identify any competing term or competing contract.

14. The plaintiff makes an alternative argument to the effect that, if the exclusive jurisdiction clause is part of the contract, I should nonetheless exercise my discretion and refuse to stay the proceedings in Ireland on the basis that Ireland is the forum conveniens for these proceedings, laying particular emphasis on the fact that the defendant is domiciled here.

The waybill and its notification to the plaintiff

15. In this case, the waybill, after identifying certain conditions referable to the face of the waybill, contains the following words:

> *"… subject to the terms and conditions hereof INCLUDING THE TERMS AND CONDITIONS CONTAINED IN THE REVERSE SIDE HEREOF AND THE TERMS AND CONDITIONS OF THE CARRIER'S APPLICABLE TARIFFS. The Shipper (for itself and on behalf of the Consignee and the other Merchants and warrants that it has authority to do so) hereby expressly accepts and agrees to all of the terms and conditions of this waybill, whether printed, written or otherwise incorporated notwithstanding the non-signing of the Waybill by the Shipper. Merchant's attention is drawn to the fact that the terms and conditions of this Waybill CONTAIN PROVISIONS EXEMPTING OR LIMITING CARRIER FROM LIABILITIES OR REQUIRING MERCHANT TO PROVIDE INDEMNITIES IN CERTAIN CIRCUMSTANCES".*

16. The exclusive jurisdiction clause, which is on the reverse side of the waybill, is in the following terms:

"28.2 All claims, suits, proceedings or disputes howsoever arising in connection with or arising out of this Waybill and/or the contract contained in and/or evidenced by this Waybill against Carrier shall be determined exclusively by the Court of the Hong Kong Special Administrative Region to which jurisdiction Merchant irrevocably submits".

17. In the affidavit grounding the motion of 27 June 2019, Mr Doherty, business unit manager of the defendant, avers that the waybill including the terms and conditions on the back of same, was uploaded by the defendant to an information and document sharing system in operation between the parties known as the TIS (Teva information system) on 4 December 2017 at 11.31 by Maria Hannon of the defendant. She is described as being the "*customer rep Panalpina*". In the computer printout exhibited, the document is described as a "*House bill of lading*" belonging to a document group entitled "*waybill, bills of lading and consignmer"*. It appears from the computer records exhibited that the ship left Cork on 3 December 2017, arriving Antwerp on 7 December 2017 and the estimated arrival time to Toronto was 26 December 2017. It is not disputed by the defendant that the bill of lading was therefore uploaded by it after the ship left Cork.

18. Prior to that, on 23 November 2017, a message is uploaded to the same TIS system as follows "*Hello Panalpina IE, can you please arrange and advise schedule ASAP Setpoint +22c vents closed. Solas provided to CT by shipper. Express B*L". The plaintiff contends the contract was made on that date.

19. The position advanced by the plaintiff as to when it became aware of waybill SNN318158 and the exclusive jurisdiction clause contained therein may be described, at best, as confused. On 10 May 2019 solicitors for the defendant wrote to the solicitors for the plaintiff, enclosing a copy of waybill SNN318158 and asserting that Ireland was not the appropriate jurisdiction given that, by agreeing to the terms and conditions of waybill SNN318158 and 318149, the plaintiff had submitted to the exclusive jurisdiction of the Hong Kong courts. (Only waybill SNN318158 was exhibited and waybill 318149 was not the subject of argument at the hearing).

20. By letter of 13 May 2019, the solicitors for the plaintiff, Noble Shipping Law replied stating *"we are instructed that this is the first time our client has been provided with the reverse side of the waybills SNN318158 and 318149 and it is the first time they have been made aware of any exclusive jurisdiction clause."*

21. In the grounding affidavit of Mr. Doherty, waybill SNN318158 was exhibited along with the computer records showing the date it was uploaded to the TIS. On 10 September 2019, Ms. Noble, solicitor, swore an affidavit replying in substance to the affidavit of Mr Doherty. It is a notable feature of this case that no affidavit has been sworn by any representative of the plaintiff. Where there is a conflict about factual issues related to substantive issues in the proceedings, as opposed to procedural issues arising in the litigation, it is important that the person closest to the facts swears the affidavit. That will not usually be the solicitor representing a party. Otherwise, issues of hearsay are likely to arise. Moreover, if a factual conflict arises on the affidavits, and cross examination

ensues, the proximity of the person to the relevant facts will be highly relevant when deciding whose evidence to prefer. No explanation is given here as to why a person from the plaintiff company with direct knowledge could not swear an affidavit. As will be seen, the indirect nature of the evidence provided in this case gave rise to problems.

22. At paragraph 5 of the affidavit of 10 September 2019, Ms. Noble refers to her letter of 13 May where she stated that the first time the plaintiff had been provided with the reverse side of the waybills and been made aware of the exclusive jurisdiction clause was on 10 May 2019. However, at paragraph 7, she avers as follows: "*I say that the reverse terms of the waybills, in particular the jurisdiction clause, were not communicated to the plaintiff prior to the shipment of the goods and were not communicated at the time the contract for the shipment was concluded*". She goes on to say that as a matter of Irish law the exclusive jurisdiction clause cannot be said to have been incorporated into the contract of carriage and therefore the plaintiff cannot be said to have submitted to the exclusive jurisdiction of the courts of Hong Kong.

23. At paragraph 8 she says that the exclusive jurisdiction clause is onerous, that it was not a clause that could have been anticipated or expected by the plaintiff and that the defendant should have taken steps to draw this onerous clause to the plaintiff's attention.

24. The averment at paragraph 7 is of significant concern to me. When read closely it is clear that the plaintiff's position is now not that it first obtained the reverse side of the waybills when they were sent by the defendant's solicitors on 10 May 2019, which was the clear position adopted in the reply from Noble Shipping Law on 13 May 2019. Rather, it appears from paragraph 7 and was confirmed by counsel at the hearing in response to questions from me that the entirety of the waybill was uploaded and received by the plaintiff on the date identified in the affidavit of Mr Doherty i.e. 4 December 2017. What is most surprising is that reference is made at paragraph 5 of the affidavit to the letter where it is stated that the plaintiff had only seen the reverse side of the waybills on 10 May 2019. Only a careful reading of the affidavit disclosed that in fact, that was not the correct position and that the plaintiff was now accepting it had obtained the waybill on 4 December 2017. As will be seen below, the date upon which the plaintiff received the entirety of the waybill is an important date in deciding the applicable contractual terms. Therefore, it was incumbent upon Ms. Noble to ensure that her affidavit was clear in this regard and to explain that the plaintiff was now resiling from its original position that it only received the reverse side of the waybill for the first time in May 2019 and identifying why the error occurred. Unfortunately, that was not the position adopted.

25. This error was repeated in the legal submissions filed. At paragraph 35 it is stated that the first time "*the relevant page was produced*" was after the proceedings had issued. Reference is made to the affidavit of Helen Noble, solicitor. At paragraph 39 the inaccuracy is repeated again where it is stated that "*the relevant page was only produced after these proceedings had issued and on Defendant evidence was uploaded after ship sailed".* As a senior counsel, Ms. Noble has a particular obligation to the court to ensure

that the material placed before the court is clear and accurate and that counsel are properly briefed.

Applicable legal principles

26. The defendant argues as a matter of law that, although the term relied upon was only notified to the plaintiff after the ship had sailed, nonetheless following *Halsbury's Laws of England - Carriage and Carriers* (Volume 7 (2020)), where there is a bill of lading relating to the goods, the terms of the contract on which the goods are carried are *prima facie* to be ascertained from the bill of lading (paragraph 437).

27. In fact, although the case law opened to me discusses bills of lading, and the defendant treated the waybill as akin to a bill of lading, there are subtle differences between the two types of documents. Sea waybills have their own chapter in the 2020 volume of *Halsbury* and are defined as *"a document which contains or evidences an undertaking by the carrier to the shipper to deliver the goods to the person who is for the time being identified as being entitled to delivery after production of proof of identity at the port of discharge*". Waybills are stated to *"provide evidence of the terms of the contract of carriage agreed between the shipper and the carrier and act as receipts for goods*" (paragraph 487, Halsbury 2020).

28. The defendant relied upon the case of *Leduc and Company v. Ward and Others* [1886-90] All E.R. Rep 266 in support of the assertion that where there is a bill of lading, the terms of the contract on which the goods are carried are *prima facie* to be ascertained from the bill of lading. Lord Esher MR refers to the case of *Glyn Mills Currie & Co v. The East and West India Dock Company* (1882) 7 App. Cas. 591, where Lord Selbourne observed that the primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is "*to express the terms of the contract between the shipper and the shipowner".*

29. Lord Esher observes that, except in the case of a charterparty, the bill of lading is, as between the shipowner and the shipper, the contract for the carriage of goods reduced into writing and that "*it is impossible to say that a bill of lading does not contain the terms of the contract of carriage*".

30. In *Sewell v. Burdick*, (1884) 10 App. Cas. 74, referred to in the passage from *Halsbury* cited above, Lord Bramwell, commenting on a statutory provision which referred to the contract "contained" in the bill of lading, states that "*to my mind there is no contract in it. It is a receipt for the goods, stating the terms of which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given."*

31. In *Armour and Company Limited v. Leopold Walford (London) Limited* [1921] 3 K 473, a booking slip had been provided to the defendants before shipping which stated that all engagements were made subject to the conditions of the bills of lading. The bill of lading was given to the plaintiff the day after the goods shipped. McCardie J. noted that a bill of lading was not, as between shipper and shipowner, conclusive of the true contract. For

example, it may be inconsistent with a prior express written bargain as to the terms on which goods shall be carried.

32. Importantly, he quoted a passage from Lord Justice Kennedy in *Halsbury's Law of England*, vol. 26, p.148 which says that the bill of lading was to be regarded as evidence only of a pre-existing contract and a person might be entitled to repudiate the terms on the grounds that he did not know and could not reasonably be expected to know of their existence, his assent to those terms was not to be inferred from his acceptance of the bill without objection.

33. McCardie J. went on to say that he doubted whether that passage adequately distinguished between the mere physical receipt of the bill of lading and the mental acceptance of this, whether it had or had not been fully read by the shipper. He recalled that the Statute of Frauds did not ordinarily apply to a contract for carriage by sea and that the bargain could be collected from various documents or other sources. He went on to say:

> *"Whatever the prior express bargain has been, a shipper is free to accept any bills of lading he chooses. If therefore he has chosen to receive without protest a bill of lading in a certain form he should ordinarily be bound by it, for as Mr Carver well observes in [s. 56 of Carriage by Sea 6th edition], "Where that has been done it is difficult to suppose that the document can be treated as not being what it seems to be … The practice of looking to it as the contract may be said to be uniform… the scarcity of authority is in truth a strong confirmation of the view that it is the contract: for it shows that in practice the point has not been considered open to question".*

34. Those authorities, although of some antiquity, seem to me to express a decided view that the bill of lading is very strong evidence of the contractual terms, unless overridden in advance by explicit contractual terms or unless objected to by the shipper. Given the similarity between bills of lading and waybills, I treat that case law as equally applicable to waybills. No attempt has been made by the plaintiff to distinguish the case law on that ground.

35. The plaintiff relied upon case law in relation to the necessity of bringing an exclusive jurisdiction clause explicitly to the notice of the party bound by same. However, that case law arises in the context of the Recast Brussels Regulation. It is therefore necessary to consider the impact of the Regulation in the circumstances of this case.

Relevance of Recast Brussels Regulation

36. The plaintiff makes the argument that, under the Recast Brussels Regulation, the Irish courts have jurisdiction under Article 4 (1), i.e. a defendant within the EU is to be sued in the Member State in which it is domiciled. I readily accept that one starts with the proposition that the proceedings ought to be heard in the place where the defendant is domiciled. However, an applicable exclusive jurisdiction clause will displace that jurisdiction. It is of course the case that the Recast Brussels Regulation provides for

prorogation of jurisdiction under Article 25 where the parties have agreed to an exclusive jurisdiction clause. However, it is equally well accepted that Article 25 only expressly applies to EU jurisdiction agreements i.e. those where the parties have agreed that the courts of a Member State have jurisdiction to settle disputes. That is not the case here. The courts selected by the parties are those of the Hong Kong Special Administrative Region.

37. The mandatory rules of jurisdiction imposed by the Recast Brussels Regulation, including those in respect of domiciled persons, do not apply to exclusive jurisdiction clauses that confer jurisdiction on third countries i.e. non-EU states. That is made clear by Case 387/90 *Coreck Maritime GmbH v. Handelsveem BV and Others* [2000] ECR I – 9337. At paragraph 19 the CJEU held as follows:

> *"Article 17 of the convention [the precursor to Article 25] does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits (Report by Professor Schlosser on the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the enforcement of judgments in Civil and Commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ 1979 C 59, p. 71, paragraph 176).)."*

38. The relevant paragraph of the Schlosser Report observes as follows:

> *"[176] (a) In cases where parties agree to bring their disputes before the courts of a State which is not a party to the 1968 Convention [i.e. the Brussels Convention, predecessor to the Brussels I Regulation] there is obviously nothing in the 1968 Convention to prevent such courts from declaring themselves competent, if their law recognizes the validity of such an agreement. The only question is whether, and if, in what form such agreements are capable of depriving Community courts of jurisdiction which is stated by the 1968 Convention to be exclusive or concurrent. There is nothing in the 1968 Convention to support the conclusion that such agreements must be inadmissible, in principle. However, the 1968 Convention does not contain any rules as to their validity either. If a court within the Community is applied to despite such an agreement, its decision on the validity of the agreement depriving it of jurisdiction must be taken in accordance with its own lex fori. In so far as the local rules of conflicts of laws support the authority of provisions of foreign law, the latter will apply. If when these tests are applied the agreement is found to be invalid, then the jurisdictional provisions of the 1968 Convention became applicable".*

39. The plaintiff also relies upon decisions of the CJEU and of the Irish courts in relation to incorporation of exclusive jurisdiction clauses, arguing that the requirements under EU law have not been met in the instant case. It is undoubtedly the case that Article 25 and its predecessors establish a regime designed to ensure that there has been specific

consent to the exclusive jurisdiction clause and set out the means by which such consent may be proved (see in this respect the decision of Carroll J. in *Hanley v. Someport-Walon* [1995] 2 I.R. 132 and the decisions of the CJEU referred to therein.) In that decision she held that the plaintiff had not established that there was a consensus between the parties for the inclusion in the contract of the jurisdiction clause. It is worth noting however that, on the facts of that case, Carroll J. found that the defendant had not had sight of the booking note that contained the relevant clause until after the plenary summons had issued. Accordingly, she concluded that the defendants were not aware of the jurisdiction clause nor could it be said that they ought to have been aware of the existence of the clause.

40. That is quite different to the facts of this case as identified above, where it is now clear that the plaintiff received the waybill, including the terms and conditions on the back, on the morning of 4 December 2017, just after the ship sailed, and raised no query or objected to any term contained therein.

41. In any case, because of my conclusion that this is not a case to which Article 25 applies, I do not consider that the requirements of Article 25 in relation to proof of notification are applicable. Rather, in the words of the CJEU in *Coreck*, I should determine whether the exclusive jurisdiction clause is part of the contract between the parties by reference to the "*applicable law*", in this case being Irish common law principles, as informed by the line of UK judgments discussed above. Those principles indicate that a sea waybill, including the exclusive jurisdiction clause contained therein, is excellent evidence of the contract unless the plaintiff can show that other contractual terms displaced it. No obligation was identified to me under common law that required, in the circumstances of this case, that the exclusive jurisdiction clause be brought explicitly to the attention of the plaintiff.

Application of principles

42. Applying the above principles, I find that the exclusive jurisdiction agreement is part of the contract between the parties, along with the other terms identified on the reverse of waybill SNN318158, for the following reasons.

43. First, by way of general observation, as observed by McGuinness J. in *Clare Taverns trading as Durty Nelly's v. Charles A. Gill trading as Universal Business Systems & Ors* [2000] I.R. 286 (albeit in the context of considering the Recast Brussels Regulation), the practice of printing general conditions of sale on the reverse side of invoices and similar documents with a reference on the face of the document to the said conditions is a common commercial practice in international trade.

44. Second, as identified in the case law, a waybill is excellent evidence of contractual terms.

45. Third, in this case, as identified above, the waybill explicitly identified on its face (not on its reverse side), that the shipper itself and on behalf of the consignee and others expressly accepts and agrees to all of the terms and conditions of the waybill, notwithstanding the non-signing of the waybill by the shipper. It is now accepted that the plaintiff received the waybill when uploaded on 4 December 2017. The goods were not

delivered until 26 December 2017. That wording put a particular onus on the plaintiff to object to the terms if it contended that a contract had already been agreed between the parties that contained terms different to that in the waybill. No objection was made to those terms until Ms. Noble swore her affidavit in September 2019, almost two years later.

46. Fourth, as a company experienced in shipping goods around the world, the plaintiff would have been well aware of the necessity of conditions relating to applicable law and jurisdiction. Contrary to what is said by Ms. Noble in her 2019 affidavit at paragraph 8, I do not accept that the exclusive jurisdiction clause could not have been anticipated or expected by the plaintiff. As observed by Fennelly J. in *Leo Laboratories Limited v. Crompton B.V. (formerly Witco B.V.0029* [2005] 2 I.R. 225 "*It is a very general practice of suppliers in international trade to impose conditions relating to applicable law and jurisdiction*" (para. 34).

47. Finally, the plaintiff has not put forward any other contract as between the parties. As identified above, although reference was made to a bill of lading in the endorsement of claim, there was no identification of any provision of same and it was not exhibited. Ms. Noble says in her affidavit that it clear from the computer print-out exhibited by Mr. Doherty that the defendant was engaged on or before 23 November 2017. That is the date upon which a message was uploaded to the TIS by a Laura Rodriguez (in respect of whom no information is provided), quoted above, whereby the plaintiff was asked to "*arrange and advise schedule ASAP setpoint + 22c vents closed*". It is not at all clear from that entry what is being arranged: I am asked to surmise that it applies to the carriage of the goods the subject of these proceedings without any evidence in respect of same. No further detail about the nature of the contract or the terms is provided. Therefore, even if this entry is treated as evidencing some dealings between the parties, it could not advance a contention that there was a completed contract with identified terms that overrides the waybill.

48. In any case, the plaintiff does not go that far, preferring to rest on the assertion that it is not obliged to identify a contract. That is true: but in the absence of such identification, I am satisfied that the sea waybill is excellent evidence of the contractual terms between the parties and that the plaintiff has not rebutted same.

49. For all those reasons, accordingly, I find that the exclusive jurisdiction clause contained in the waybill applies as between the parties.

Previous dealings between the parties

50. I should note that initially the case was made by the defendant that the plaintiff had received waybills with the same conditions and therefore there was a course of dealing between the parties. However, the plaintiff correctly pointed out that those waybills were sent under cover of letter which identified that the shipment was being undertaken pursuant to the standard trading conditions of the Irish International Freight Association. Those conditions contain a jurisdiction clause conferring jurisdiction on the Irish courts. In the replying affidavit of Ms. N of 10 September 2020, she averred that "*in all previous*

dealings the Defendant had made it clear it provided services subject to Irish trading conditions namely the terms and conditions of the Irish International Freight Association which contain an exclusive jurisdiction clause in favour of the Irish courts". However, in the written submissions it was stated that for *"the avoidance of doubt, it is not pleaded that the contract governing this particular shipment necessarily relied upon IFFA terms"* and at the hearing, there was no suggestion that IFFA terms governed this shipment. The defendant suggests that this is because under those terms, these proceedings would be out of time having regard to the short limitation period contained in those terms. I have no evidence before me as to the IFFA terms and therefore can make no finding in that regard. In any case, in the circumstances, the defendant cannot rely upon a course of previous dealing.

Delay

51. The plaintiff has complained of delay on the part of the defendant in bringing the motion and says that the defendant is disentitled to relief in all the circumstances. It does not seem to me that there was any significant delay on the part of the defendant. The plenary summons was served in December 2018. A conditional appearance was filed by the defendant in March 2019. The defendant issued the instant motion on 29 June 2019. The delay in getting the motion heard was not the responsibility of the defendant.

Acquiescence on the part of the defendant

52. It is also submitted in the legal submissions filed on behalf of the plaintiff that there has been an acquiescence to the jurisdiction of the Irish courts because the defendant has brought a motion seeking to strike out the proceedings for want of prosecution for failure to deliver a statement of claim. In any jurisdictional challenge, a defendant can be treated as having waived its objection by taking a step in the proceedings and submitting to the jurisdiction of the Irish courts. However, the motion for want of prosecution was not before me and the papers were not provided to me for that motion, apparently by agreement of the parties who decided that the jurisdictional motion would be heard first and the strike out motion afterwards. I do not know, for example, whether that motion was brought explicitly on the basis of contested jurisdiction. I was told nothing about the strike out motion except that the parties had come to an agreement on the deferral of the hearing of same. Nor is there any reference to this issue in the affidavit of Ms Noble or the grounding affidavit of Mr Doherty. Without having the motion before me, I cannot adjudicate upon the acquiescence argument. In those circumstances it does not seem to me that I ought to deny the defendant relief on this ground.

Irish conflict of law principles on declining jurisdiction

53. Proceeding on the basis that the parties have an exclusive jurisdiction clause in their contract that confers jurisdiction on the courts of Hong Kong Special Administrative Region, I must now consider whether I should nonetheless decline a stay of the proceedings in favour of the Hong Kong courts, as urged upon me by the plaintiff.

54. The relevant principles are identified by Binchy in his textbook *Irish Conflicts of Law,* second edition, as relied upon by the defendant in this respect. Binchy observes that it is quite common for international contracts, particularly of a commercial nature, to contain

such a choice of forum clause (page 163). He goes on to observe that: "*Even in non-Order 11 cases where the defendant has been served within the jurisdiction and the Court's jurisdiction is clear cut, the Court still has a discretion to stay Irish proceedings if the parties have agreed to the exclusive jurisdiction of a foreign forum. Indeed, once the fact of the agreement has been established, the principle pacta sunt servanda places a heavy burden on the plaintiff … to show that the choice of forum clause was to be disregarded and that the Irish proceedings ought to be allowed to continue*" (page 163).

55. The factors identified by Binchy governing the exercise of the court's discretion identify that the discretion should be exercised by granting a stay on the Irish proceedings unless strong cause for not doing so is shown. The burden of proving such a strong cause is on the plaintiff. In exercising its discretion the court should take into account all relevant circumstances including the country in which the evidence on the issues of fact is situated, whether the law of the foreign court applies, the relative convenience and expense of trial in the competing courts, the connections of the parties with a particular country, whether the defendants genuinely seek trial in the foreign country and whether the plaintiff would be prejudiced by having to sue in the foreign court.

Application of conflicts of law principles

56. The plaintiff argues that, even if the court finds an exclusive jurisdiction clause contrary to its submissions, the *forum conveniens* is Ireland, identifying that:

    a. The goods originated in Ireland;

    b. The port of loading and taking on board the goods was in Cork;

    c. The Defendant is domiciled in Ireland with its registered office in Dublin;

    d. The deponent of the Defendant's primary grounding Affidavit, Mr. Tom Doherty, is in Ireland, describing himself as "Business Unit Manager of Smithstown Industrial Estate, Shannon, Co. Clare";

    e. Emails sent by the Defendant, which are exhibited to the Affidavits of Tom Doherty, contain signatures bearing the addresses respectively of:

        i. Smithstown Industrial Estate, Shannon, Co. Clare
        ii. Northwood House, Northwood Crescent, Northwood, Santry, Dublin 9.

57. Taking each of those arguments in turn, I have no evidence where the goods originated from. They may have been in transit. They were certainly shipped from Ireland but that is all I am told. I agree that the goods were shipped from Cork, that the defendant is domiciled in Ireland and that Mr. Doherty gives an Irish address. Those facts give the plaintiff a reason to argue for jurisdiction in Ireland but are far from conclusive.

58. I do not agree that the *forum conveniens* is Ireland. This is a truly international situation. As described above, the plaintiff consignee is incorporated in Toronto, the shipper (not a party) is an Irish company, the carrier (not sued) is Pantainer (HK) Ltd, incorporated in Hong Kong, the disclosed agent of Pantainer (HK) Ltd, the defendant, is Irish and the ship

owner is a Swiss company. The alleged cause of deterioration of the goods was the failure to store them at the requisite temperature, identified on the waybill as being +22°C. The location of the alleged mis-storage of the goods is not disclosed by the plaintiff but it presumably took place either during the sea voyage or the land voyage between Montreal and Toronto. The plaintiff does not identify what relevant evidence the defendant can give in respect of the allegedly negligent act.

59. In those circumstances, contrary to what is asserted by counsel for the plaintiff, it does not appear to me that the key facts centre around Ireland at all. There is no evidence as to what issues of fact will require to be determined, who the witnesses are likely to be, how Ireland is a convenient forum having regard to the issues and witnesses required, or what is the applicable law. Specifically, given that the crucial evidence is likely to be in respect of the storage of the goods and the temperature at which they were stored, it is difficult to see the link with Ireland. Nothing that has been adduced persuades me that Ireland has a close connection to the dispute.

60. On the other hand, given that Pantainer (H.K.) Ltd., (identified by the waybill as the contracting party) is a Hong Kong company, there is a logic to the jurisdiction clause that nominates the courts of Hong Kong as having jurisdiction to settle disputes. No prejudice accruing to the plaintiff in having the dispute adjudicated upon in Hong Kong has been identified.

Conclusion

61. According to applicable principles, I ought to exercise my discretion to grant a stay unless a strong cause for not doing so is shown. The burden of proving same is on the plaintiff. No factors have been identified to me that would suggest that Ireland is a convenient jurisdiction or that there is a strong cause to refuse to stay the proceedings in Ireland. Equally, no factors have been identified suggesting that the defendants are seeking procedural advantage by relying on the applicable jurisdiction clause or that the plaintiff would be prejudiced by having to sue in Hong Kong. In all the circumstances it seems to me an appropriate case in which to decline jurisdiction to hear this action in favour of the courts of Hong Kong Special Administrative Region as per the exclusive jurisdiction clause.

Costs

62. I propose that the costs of the motion and of the proceedings should be borne by the plaintiff given that it has been unsuccessful, to include reserved costs to be adjudicated upon in default of agreement.

63. If either of the parties wish to argue for a different decision on costs, submissions of no more than 1,500 words should be filed within two weeks of the date of delivery of this judgment identifying the reasons for same. If no submissions are received I will make an order in the terms proposed.