THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

MISCELLANEOUS APPLICATION NO 394 OF 2010

(ARISING OUT OF CIVIL SUIT No 161 OF 2010)

TRANSTRAC LTD}…… APPLICANT

DAMCO LOGISTICS UGANDA LIMITED}…….RESPONDENT

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

RULING

The applicant's in this application objects to jurisdiction under 9 rule 3 of the Civil Procedure Rules and seeks a declaratory order that the High Court has no jurisdiction over it in respect of the subject matter of the claim or the relief or remedy sought by the respondent in the action against the applicant in High Court Civil Suit No. 161 of 2010 and for orders that the respondent's third-party notice/claim for indemnity and or contribution against the applicant in High Court Commercial Division Civil Suit No. 161 of 2010 be dismissed with costs and for costs of the application.

The grounds of the application are that the respondent who is the defendant in High Court Commercial Division Civil Suit No. 161 of 2010, took out a third-party notice dated 28th of June 2010 against the applicant seeking indemnity/contribution in the amount of US $ 303,330 based on contract. That the contract between the applicant and the respondent is to be governed, construed and enforced in accordance with English law and the parties submitted to the exclusive jurisdiction of the English courts and therefore the High court has no jurisdiction in the matter.

The application is supported by the affidavit of Geoffrey Bihamaiso , the managing director of the applicant/third-party company. In paragraph 2 of his affidavit he

avers that the 2nd of July 2010 the applicant/third-party received a third-party notice seeking indemnification/contribution to the respondent/defendant of United States dollars 303,330 and costs being the value of goods in container number MSKU 433207 – 7 that was robbed in transit. He avers that the basis of the defendant/respondents claim for indemnification/contribution is based on an agreement dated 29th of October 2004 which was attached to the respondent/defendant's application for issuance of third-party notice against the applicant. This agreement is attached and marked as annexure "B" to the affidavit of the applicants managing director who avers in paragraph 4 of his affidavit that he is advised by his lawyers that under clause 16 of the agreement, the law of the contract was English law and the parties contracted to submit to the exclusive jurisdiction of the English courts. Therefore the High Court has no jurisdiction over the applicant in respect of the subject matter of the claim or the relief or remedy sought in the action by the respondent/defendant.

The respondent did not file an affidavit in reply. At the hearing Counsel Dan Wegulo represented the applicant while counsel Tumusinguzi represented the Respondent.

Submissions of Counsel

The applicant's Counsel repeated the averments in the ground of the application. The gist of the applicant's case is that the Respondent took out a 3rd party notice seeking indemnification or contribution from the applicant. The foundation of the claim sought by the 3rd party is a contract attached to paragraph 3 of the affidavit in support of the application. Clause 19 of the contract annexure "B" to the affidavit in support of the chamber summons provides that the parties submit to the exclusive jurisdiction of the English courts. The applicants counsel's contention is that the parties freely entered into a contract where they provided for resolution of disputes in very clear terms whose effect was to oust the jurisdiction of the High Court. Counsel referred me to the case of **Uganda Telecom vs Rodrigo Chacon T/A Andes Alpes trading** and the judgment of Hon. Lady Justice Stella Arach, judge of the High Court as she then was. He submitted that in that case the learned judge dealt with a clause in a contract where the

parties agreed that all their issues would be resolved exclusively by English courts. On the basis of the clause in the contract, she held that the high court did not have jurisdiction in the matter dismissed the suit with costs. Counsel prayed that I follow this authority and dismiss the third party notice.

Tumusinguzi, counsel for the Respondent opposed the application. Firstly he informed court that the Respondent did not put in an affidavit in reply because they considered that the application would turn on points of law. He submitted that prima facie the parties are entitled to honour their contract and this is termed prima facie jurisdiction. However this rule is not cast in stone. The courts do not simply shut out the parties on the basis of a clause submitting to the exclusive jurisdiction of a foreign court. That's not the law. The law is that court has discretion to look at the convenience of each case and decide on balance of convenience where the matter should be tried. Quoting from **Fehmarh (1958) 1 WLR page 159,** the Respondent's counsel submitted that in that case English importers were resident in England, while goods were carried on a German ship and the cargo was from Russia. The contract under the BOL provided that courts in Russia will have jurisdiction. When the goods arrived in England and were contaminated, the plaintiffs took action in an English court. The defendant raised a point that the action in England be stayed under the clause submitting to the jurisdiction of the Russian courts in the contract. Court considered several factors i.e. the fact that the owners of the cargo were based in England, issues like where the witnesses would come from, and whether the dispute was closely connected to England or Russia. The Court of Appeal concluded that the dispute was more closely connected with England and judge trial rightly exercised discretion and decided that matter be tried in England despite the clause in the agreement.

The Respondent's Counsel also referred me to **Dicey on Conflict of Laws 9th edition page 223**. The authors clearly state that when a court is deciding to stay proceedings they look at following issues: (1) in which country the evidence is available and the relative convenience of a trial abroad. (2) whether the defendant genuinely desires a trial in a foreign country or is seeking procedural advantage. Applying the rationale to the facts of this case counsel submitted that all the parties are based in Uganda. All witnesses as far as pleadings are

concerned are based in Uganda. The convenience of having trial in Uganda is stronger than having it outside the country.

Counsel pointed out that the authorities look at 3rd parties. A 3rd party is where the main suit is between current respondent and another party. The applicant comes in by way of 3rd party notice. The plaintiff is not a party to this agreement. What this means is that if the application is allowed, the main suit will be heard in Uganda and then third party heard in UK. The convenience of having a trial in one place avoids costs and conflicting decisions. As far as the case of **Uganda Telecom vs Rodrigo Chacon T/A Andes Alpes trading** and the judgment of Hon. Lady Justice Stella Arach is concerned, Counsel for theh Respondent submitted that the court never addressed itself to the issue of discretion which the court has. And the fact that the clause must not be looked at as if were cast in stone. He submitted that the cases relied on showed that courts have got discretion in the matter. Last but not least he submitted that the authority was persuasive and not binding on me and prayed that I dismiss the applicant's suit.

In rejoinder, the applicants counsel conceded that the courts have discretion whether to hear the case or not. He disagreed with the respondent's submission that it was more convenient to have this matter entertained by this court because there was no affidavit in reply to support the facts the respondents may rely on to make this assertion. He contended that the respondent's counsel has not demonstrated how the respondent will be inconvenienced the case is heard in UK. He submitted that the respondent in this matter who is also the defendant is seeking indemnification or contribution. Indemnity is a cause of action on its own. If this court in any event finds that the defendant is liable in the main suit, it can file a suit in a proper forum that is the United Kingdom for the indemnity.

It is not true that in the cited case of Rodrigo, the court did not consider the question of discretion. The issue was considered at page 2 and the court went ahead to consider the unlimited original jurisdiction of the High Court under the Judicature Act which courts guard jealously. That notwithstanding the court considered the principle of freedom of contract and found that such a clause submitting to exclusive jurisdiction of the High court should be clear and in

uncertain terms. Counsel further disagreed with the assertion of the Respondents counsel that the High Court case of Rodrigo was persuasive authority. He submitted that there is a principle that the decision of the High Court should stay (Stare decicis). The decision of the court in the Rodrigo case is on a matter identical to this court. He has not demonstrated why court should depart from its earlier decision. He reiterated his earlier prayers.

Ruling of Court

I have carefully considered the submissions of the counsels and perused the pleadings of the parties and attachments thereto. The basis of the applicant's objection to jurisdiction is founded on clause 19 of annexure "B" to the affidavit in support of the chamber summons. Clause 19 of the agreement annexure "B" to the affidavit in support of the chamber summons reads as follows:

19. "GOVERNING LAW AND DISPUTE RESOLUTION.

> This agreement shall be governed, construed and enforced in accordance with English law and the parties submit to the exclusive jurisdiction of the English courts."

As far as the contractual clause avoiding jurisdiction is concerned the applicants counsel referred me to the case of **Uganda Telecom versus Rodrigo Chacon t/a Andes Alpes Trading HCMA 337/08 arising from High Court Civil Suit No. 644 of 2007**. In that case the applicant objected to jurisdiction under order 9 rule 3 (1) (g) and sought for orders declaring that the High Court had no jurisdiction over the Defendant in respect of the subject matter of the claim in the suit. In the agreement concerned the parties agreed under clause 10 thereof that "This agreement shall be construed in accordance with English Law and subject to the exclusive jurisdiction of the English Courts." Hon Justice Stella Arach Amoko held and I quote:

> This clause is clear and certain. Under this clause the parties have not only chosen English law to govern the agreement, but have unequivocally submitted to the exclusive jurisdiction of the English courts. In the circumstance, I agree with Mr. Nyakairu that the high Court of Uganda has

> no jurisdiction to adjudicate this dispute, the parties having chosen the exclusive jurisdiction of the English courts. The fact that the agreement was negotiated, performed and possibly breached in Uganda is immaterial, according to the authorities referred to herein.... In conclusion, however, giving the words in clause 10 of their agreement their natural and ordinary meaning, and in the absence of any reason why the clause should be set aside, I hold that the clause has ousted the jurisdiction of this court."

The basis of the high court ruling in that case is an agreement between the parties to submit to the exclusive jurisdiction of a foreign court. In my humble opinion, the learned hon. Judge in the above case though coming to a conclusion with which I agree, went further than I would have to hold that the contract between parties ousted the jurisdiction of the High Court. The authorities reviewed by the learned judge had interpreted clauses in contracts of the parties providing for the exclusive jurisdiction of a foreign court. I only disagree very slightly with the holding of the High Court in the Rodrigo case that a contract between two parties can oust the jurisdiction of the high court. The basis of the court decision in the cases is the enforcement of a contract between the parties. The principle involved is the same as that of an arbitration clause. The courts enforce the contract of the parties to submit their dispute to arbitration. The High Court in such cases has discretion whether to exercise jurisdiction or not depending on the circumstances of both parties and the principles submitted by the Respondents Counsel with which I agree. This discretion gives the High Court the right to decide whether it may stay proceedings pending arbitration. The analogy between arbitration clauses and clauses submitting to the exclusive jurisdiction of a foreign court is analysed by **Dicey and Morris on the Conflict of Laws 9th Edition at page 223** in which the learned authors give the rationale for stay of proceedings on the basis of a clause submitting to the exclusive jurisdiction of a foreign court. They state:

> "The courts power to grant a stay under this rule is discretionary but, once the contract has been proved, the onus inducing it not to do shall rests on the plaintiff, and not, as in the case of *lis alibi pendens,* on the defendant. This is because the ground on which the court grants a stay is not that there is vexation and oppression but that the court makes people abide by their

> contracts. It has often been said that the parties submission to the jurisdiction of the foreign court is tantamount to a submission to arbitration within the meaning of section 4 (1) of the Arbitration Act 1950. (the Fehmarn [1957] 1 WLR 815, at 819)"

I agree with this analysis which is also consistent with the judgement of the Learned Lady Justice Stella Arach in **Rodrigo** though the basis of the analysis by Dicey and Morris on the conflict of laws 9th edition is a rule of court. They quote this rule 30 at page 222:

> "where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of the foreign tribunal, the court would stay proceedings instituted in England in breach of such agreement, unless the plaintiff proves that it is just and proper to allow them to continue."

An agreement between parties does not oust the jurisdiction of the High Court, which jurisdiction is constitutional and statutory. It has been held that not even an Act of Parliament can do this. For this proposition of law reference may be made to the holding of the court of appeal in **David Kayondo v Cooperative Bank Civil Appeal No. 19 of 1991.** In this case it was held that a section of the Co-operative societies Act which provided that disputes shall be referred to arbitration did not oust the jurisdiction of the court. Recently, under the 1995 Constitution it has been emphasised that not even an Act of Parliament can oust the unlimited original jurisdiction of the High Court. Article 139 (1) of the Constitution provides that: *The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.* This is reproduced by the section 14 of the Judicature Act cap 13 laws of Uganda which provides: "Jurisdiction of the High Court. (1) the High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law."

The Supreme Court in the case of **Uganda Projects Implementation and Management Centre versus Uganda Revenue Authority Const Appeal No. 2 of 2009. Kitumba** JSC who delivered the judgment of court held at page 21 that the original jurisdiction of the High Court cannot be ousted by Parliament:

> "Judicial review of administrative action is, in my view, original jurisdiction of the High Court and cannot be taken away by any other law because it is conferred on it by the Constitution, which is the Supreme Law of the land. ***See Article 2 of the Constitution***…"

In yet another case the Supreme Court agreed with the Court of appeal that the unlimited original jurisdiction of the High Court cannot be ousted by an Act of Parliament because of the Supremacy of the Constitution. This is in the case of **Commissioner General Uganda Revenue Authority versus Meera Investments Ltd Supreme Court Civil Appeal No. 22 of 2007** Hon. Justice Kanyeihamba JSC who delivered the judgment of the Supreme Court agreed that an Act of Parliament cannot oust the jurisdiction of the High Court at pages 12 of the judgment of court: *"In my opinion the learned Justice of Appeal is correct on this interpretation of the constitutional provisions Vis–avis Acts of Parliament.*

Consequently all the court does is to interpret the contract of the parties and enforce it where they have agreed that all disputes arising under the contract would be referred for adjudication to a foreign court or tribunal. I agree with counsel for the Respondent that the high Court retains jurisdiction whether to refer the matter or dismiss the case pursuant to the contract of the parties. At this stage and for reasons that I will state below, it is not necessary for me to comment on the circumstances in which the court will exercise discretion or whether this is a proper case for the exercise of the courts discretion. What needs to be emphasized is that the High Court interprets the contracts and may in its discretion exercise jurisdiction in the matter.

Secondly because the foundation of the court's decision is a contract between the parties, it can only be invoked by parties to the contract. In this case annexure "A" to the applicants application is the relevant contract and was executed on the 29th of October 2004 between **Maersk Uganda limited** having its registered office at

5th Street industrial area ("Maersk logistics"); and **Transtrac Ltd** having its registered office at PO Box 12028 Kampala ("Carrier). In the context of the agreement each party is called a "party" and together the "parties"). Civil suit No. 161 of 2010 from which the third party proceedings were taken is however between DIAN G.F INTERNATIONAL LTD as plaintiff and DAMCO LOGISTICS as the defendant. The plaint describes the defendant as a common carrier. In the application for third party, the defendant sought indemnification from Transtrac Limited on the basis of clause 6 of the agreement.

The background to the agreement stipulates that “Maersk logistics intends to appoint “carrier” to provide the services (as defined) subject to and in accordance with the terms and conditions of this agreement”. In the agreement "customer" is defined to mean any person for whom Maersk logistics agrees to provide or arrange transportation, forwarding or similar services including any part of the services or similar services;" the liability and indemnity clause is clause 6 of the agreement which provides under Clause 6.1 as follows:

"6.1 Carrier shall be responsible to both Maersk logistics and any customer for any loss, damage or delay caused by the loss, theft, or damage to any goods, containers and/or documents during the period that any such goods, containers and/or documents are in the custody or control of the carrier, his subcontractors or agents, and the carrier hold harmless and indemnify Maersk logistics and any customer from any and all responsibility and liability arising out of such laws damage or delay."

Apparently, the defendant in the main suit brought the third party proceedings in its capacity as “any customer” envisaged under clause 6.1 of the agreement. However neither the defendant nor the plaintiff in the main suit, are a party to the relevant agreement quoted above.

The Applicant can only invoke clause 19 against a party to the contract who has commenced proceedings in a court in breach of the undertaking of the parties to submit all disputes to the exclusive jurisdiction of the English Courts. He cannot invoke this agreement against the Respondents to this application. The rationale for this is very simple and clear. It is termed a fundamental principle of law that

only parties to a contract or who are privy to the contract may enforce its provisions. The doctrine of privity of contract is a well known common law doctrine reviewed by the House of Lord in the case of **Scruttons Ltd vs Midland Silicones Ltd [1962] 1 ALL ER 1** per Viscount Simonds that it is a fundamental principle that only a person who is a party to a contract can sue on it at pages 6 – 7

> When A and B have entered into a contract, it is not uncommon to imply a term in order to give what is called "business efficacy" to it—a process, I may say, against the abuse of which the courts must keep constant guard. But it is a very different matter to infer a contractual relation between parties who have never entered into a contract at all. In the present case the cargo owners had a contract with the carrier which provided amongst other things for the unloading of their cargo. They knew nothing of the relations between the carrier and the stevedores. It was no business of theirs. They were concerned only to have the job done which the carriers had contracted to do. There is no conceivable reason why an implication should be made that they had entered into any contractual relation with the stevedores.
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> But, my Lords, all these contentions were but a prelude to one which, had your Lordships accepted it, would have been the foundation of a dramatic decision of this House. It was argued, if I understood the argument, that if A contracts with B to do something for the benefit of C then C, though not a party to the contract, can sue A to enforce it. This is independent of whether C is A's undisclosed principal or a beneficiary under a trust of which A is trustee. It is sufficient that C is an "interested person". My Lords, if this is the law of England, then, subject always to the question of consideration, no doubt, if the carrier purports to contract for the benefit of the stevedore, the latter can enforce the contract. Whether that premise is satisfied in this case is another matter, but since the argument is advanced it is right that I should deal with it.

> Learned counsel for the respondents met it, as they had successfully done in the courts below, by asserting a principle which is, I suppose, as well established as any in our law, a "fundamental" principle, as Viscount Haldane LC called it in Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd ([1915] AC at p 853), an "elementary" principle, as it has been called times without number, that only a person who is a party to a contract can sue on it. "Our law", said Lord Haldane, "knows nothing of a jus quaesitum tertio arising by way of contract". Learned counsel for the respondents claimed that this was the orthodox view and asked your Lordships to reject any proposition that impinged on it. To that invitation I readily respond. For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of those principles is the task not of the courts of law but of Parliament. Therefore I reject the argument for the appellants under this head and invite your Lordships to say that certain statements which appear to support it in recent cases such as Smith v River Douglas Catchment Board and White v John Warrick & Co Ltd must be rejected."

I agree with the so called orthodox or fundamental view and the plain meaning of clause 19 of the relevant agreement which I will again quote: "This agreement shall be governed, construed and enforced in accordance with English law and the parties submit to the exclusive jurisdiction of the English courts", that it is only the parties who submit to the exclusive jurisdiction of the English courts and it is parties to a contract who can sue on it. By the same token, the applicant can only invoke clause 19 against Maersk Limited and not a customer, even if the customer envisaged in clause 6 of the agreement claims a benefit under it. This was stated by the Supreme Court of Uganda in **Shiv Construction vs Endesha Enterprises Ltd [1999] 1 EA 329**. In the case the parties entered into a contract to form a joint

venture company. Among the issues was whether a beneficiary who was not a party to the contract could sue on it. The Supreme Court of Uganda held that though a contract for the benefit of a third party did not enable the third party to assert rights arising under it, the contract remained enforceable between the promisor and the promisee. Moreover, in proper cases a court could make an order of specific performance in favour of third parties at the instance of one of the contracting parties.

In a similar vein, clause 19 of the agreement to submit to the exclusive jurisdiction of the English Courts cannot be invoked against the Respondents who are not parties to the agreement. The fact that they may take benefits from the contract is immaterial for purposes of enforcement of clause 19 of the agreement in the circumstances of this case. Having stated that only the parties to the contract can invoke clause 19 against one another and not against 3rd parties who may take a benefit under the contract, I have not decided whether the 3rd party notice was lawfully brought under the fundamental principle of law that only a party to an agreement may invoke its provisions. This is addressed in the main suit. For the reasons stated above, I dismiss the applicant's application with costs.

Ruling delivered in open court the 8th of April 2011

Hon. Mr. Justice Christopher Madrama

Delivered in the presence of:
Joseph Luswata - holding brief for Barnabas Tumusingizi
- Dan Wegulo for applicant - court clerk.
- O Tambo

8/4/2011

Hon. Mr. Justice Christopher Madrama