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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 44 of 2022

BETWEEN:

[1] H&M IMPORTS Plaintiff / Applicant

-and-

[1] DATELINE TRANSAM LIMITED
[2] NYK BULK & PROJECTS CARRIERS LTD
[3] MINISTRY OF REVENUE & CUSTOMS
[4] TANIELA VAITOHI (trading as Vaitohi Enterprises)

Defendants / Respondents

First and Second Defendants' challenge to jurisdiction

RULING

BEFORE:	LORD CHIEF JUSTICE WHITTEN QC
Appearances:	Ms M. Mangisi for the Plaintiff
	Mr R. Stephenson for the First and Second Defendants
	No appearance for the Third or Fourth Defendants
Hearing:	1 July 2022
Ruling:	11 July 2022

The principal parties

1. In this proceeding, the Plaintiff is a car dealership business conducted by Samuela Mafileo which imports motor vehicles from Japan. The First Defendant ("***Dateline***") is the Tongan shipping agent for the Third Defendant ("***NYK***") which is a Japanese shipping carrier.

Background

2. The following background is derived from the Statement of Claim and the affidavits of Taniela Vakalahi (the Plaintiff's office manager) sworn 23 May 2022, and Joe Passi (Dateline's General Manager) sworn 9 and 24 June 2022.

3. The Plaintiff agreed to purchase an Isuzu Elf tow truck from Imperial Solutions ("***Imperial***") of Japan for US$16,000 inclusive of cost and freight. Imperial

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engaged NYK to ship the vehicle from Japan to Tonga.

4. On or about 13 November 2021, NYK issued a copy of a non-negotiable bill of lading naming the Plaintiff as consignee.

5. On 11 January 2022, the vehicle arrived in Tonga.

6. On 8 March 2022, Imperial issued a pro forma invoice to the Plaintiff for the sale of the vehicle.

7. On 17 March 2022, Imperial issued a demand for payment of the purchase price. The Plaintiff responded that it was not then able to attend to payment due to "national lockdowns and restrictions on movements".

8. On 21 April 2022, the Plaintiff, through its bank, transferred the purchase price to Imperial. At about the same time, Mr Vakalahi attended Dateline's office where he presented the Plaintiff's copy of the bill of lading, the invoice, Imperial's letter of demand and proof of Plaintiff's transfer of the funds, and requested that Dateline, as agent of NYK, facilitate the release of the vehicle to the Plaintiff.

9. Through a series of e-mail exchanges between 26 and 30 April 2022, NYK refused to hand over the original bill of lading naming the Plaintiff as consignee on the basis that it had been instructed by Imperial that the Plaintiff was indebted to Imperial for over USD$100,000 in respect of a number of other committed purchases of vehicles.

10. On or about 18 May 2022, Imperial instructed NYK to change the consignee on the original bill of lading to the Fourth Defendant's business ("***Vaitohi***").

11. On 20 May 2022, Dateline informed the Plaintiff that NYK had done so. In other words, Imperial apparently purported to on sell or transfer the vehicle to Vaitohi.

The Plaintiff's claim

12. On 24 May 2022, the Plaintiff commenced these proceedings as against Dateline and NYK in which it is alleged, in summary, that:

    (a) Dateline and NYK are liable for failing to release the vehicle;

    (b) NYK is liable for refusing to release the original bill of lading naming the Plaintiff as consignee; and

(c) NYK knew or ought reasonably to have known that changing the name of the consignee on the bill of lading was unlawful.

13. As a result, the plaintiff seeks a declaration that any lien over the vehicle is unlawful and an order that it be released to the Plaintiff. Alternatively, the Plaintiff claims damages for the amount it paid for the vehicle plus loss of profit.

14. Meanwhile, the vehicle has remained at the wharf in the custody of the third Defendant ministry. As at the date hereof, Vaitohi has not yet demanded its release.

Interim injunction

15. The Plaintiff also filed an ex parte application for an injunction restraining Dateline from releasing the vehicle to any other person and NYK from disposing of it.

16. On 27 May 2022, an interim injunction was granted and the continuation of the injunction was listed to be heard on 10 June 2022.

Challenge by Dateline and NYK to jurisdiction

17. On 9 June 2022, Mr Stephenson, for Dateline and NYK, filed an application pursuant to Order 7 rule 2 of the *Supreme Court Rules* challenging the jurisdiction of the Court ("***jurisdictional challenge***").

18. The basis for the jurisdictional challenge is that clause 3 of the standard terms and conditions of the subject bill of lading provides, relevantly, that:

> "*3. Governing Law and Jurisdiction*
>
> *(1)... for shipments worldwide the contract evidenced by or contained in this Bill shall be governed by Japanese law and all actions against the Carrier (NYK) in respect of the Goods or arising out of the carriage shall be brought before the Tokyo District Court in Japan to the exclusion of any other Courts, whilst any such actions against the Merchant may be brought before the said Court or any other competent court at the Carrier's option."*

19. Clause 1 of the said terms defines "Carrier" as NYK and "Merchant" as including the shipper, consignor, consignee, owner and receiver of the goods and the holder of the bill and any person acting on their behalf.

20. On that basis, Dateline and NYK contend that the proper forum for adjudication

of the matter is the courts of Japan.

21. On 10 June 2022, directions were given for the further conduct of the jurisdictional challenge, including notice being given to Imperial, and the interim injunction was extended with the Third and Fourth Defendants being joined for that purpose.

Plaintiff's opposition

22. By notice filed on 17 June 2022, the Plaintiff opposes the application and submits that this Court has jurisdiction in respect of the claim, primarily on the basis of ss 7(2)(c) of the Tonga *Carriage of Goods by Sea Act* 2008 ("***TCGSA***") which provides:

> (2) Any stipulation or agreement (whether made in the Kingdom or elsewhere) shall be illegal, null and void and of no effect in so far as it purports to —
>
> ...
>
> (c) preclude, lessen or limit the jurisdiction of the courts of the Kingdom in respect of a bill of lading or a similar document of title or a non-negotiable document described in section 4(b)(iii) relating to the carriage of goods from any place within or outside the Kingdom to any place in the Kingdom.

23. The Plaintiff initially further submitted that:

    (a) the purpose of clause 3 of the bill of lading seeks to resolve disputes "in respect of the Goods or arising out of their Carriage". The "Plaintiff does not dispute the Goods nor its Carriage into the Kingdom. Therefore, the clause does not encompass the claims at issue";

    (b) the Plaintiff is, technically speaking, the unknown third party at the time of the entering into the basic transaction. The bill of lading entered into by the Carrier and the Merchant (Imperial) is a contract for the benefit of the Plaintiff as a third party only after the discharge of the vehicle in Tonga; and

    (c) if the Court finds that the clause is mandatory, it is unreasonable and unjust.

24. During oral argument, Ms Mangisi:

    (a) informed the Court that:

(i) she had been advised by Vaitohi that it had relinquished its interest in the vehicle and wanted to be dismissed from the proceeding;

(ii) the vehicle remains at the wharf; and

(b) conceded that as the Plaintiff's claim is against NYK as the Carrier, clause 3 of the bill of lading does apply;

(c) but submitted that the TCGSA also applies.

25. In relation to the proper forum for the dispute, Ms Mangisi submitted that Japan is not the proper forum because:

(a) any judgment obtained by the Plaintiff in Japan cannot be enforced in Tonga;

(b) potential delays in having the matter determined in Japan could result in the vehicle depreciating; and

(c) the Plaintiff's witnesses are located in Tonga and "do not have any Japanese language".

Dateline and NYK's reply

26. In reply, Mr Stephenson submitted, in summary, that:

(a) as Dateline is the disclosed agent of NYK and NYK is the disclosed agent of Imperial, at common law, neither Dateline nor NYK can be held liable to the Plaintiff;[1]

(b) Imperial is the proper Defendant (although if joined, would be likely to bring a substantial counterclaim for the amounts allegedly owed to it by the Plaintiff);

(c) the TCGSA:

(i) has no application in this case where the governing law of the bill of lading is specified to be that of Japan;

(ii) does not restrict the governing law;

(iii) applies the Hague Visby Rules to the subject contract of carriage as

[1] Citing Halsbury's Laws of England, 4th Edition, para. 855 at page 514.

evidenced by the bill of lading;

(d) Article 10 (c) of the said Rules provides that the bill of lading can provide that the rules of the Convention or legislation of *any State* giving effect to them may govern the contract;

(e) Tonga and Japan are contracting States to the Hague Visby Convention;

(f) clause 2 of the bill of lading provides that it shall have effect subject to the *International Carriage of Goods by Sea Act* 1957 of Japan, unless it is judged by a competent court that any other legislation of a similar nature to the Hague Rules compulsorily applies to the Bill;

(g) the TCGSA does not contain any provision by which it compulsorily applies to the Bill of Lading;

(h) s. 7 of the TCGSA does not prohibit the governing law of the Bill of Lading being the law of another State;

(i) ss 7(1) of the TCGSA provides, relevantly, that all parties to a Bill of Lading relating to the carriage of goods from any place in the Kingdom to any place whether in or outside the Kingdom are deemed to have intended to contract according to the laws in force at that place of shipment;

(j) the TCGSA is silent on the law applying to Bills of Lading relating to carriage of goods from any other place (such as Japan) to Tonga;

(k) in that event, the governing law is as provided by the Bill of Lading which is that of Japan;

(l) the TCGSA is not in force in Japan; and

(m) as the bill of lading specifically provides that the governing law is the law of Japan and the court of jurisdiction is the District Court of Tokyo, this Court does not have jurisdiction in this case.

27. In the alternative, Mr Stephenson submitted, by reference to the principles in *Spiliada Maritime Corp v Cansulex Limited*,[2] that the Court should exercise its common law discretion to find that the clearly appropriate forum for the dispute is Japan, principally because the governing law is that of Japan.

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[2] (1986) 3 All ER 843

28. Further, as to Ms Mangisi's submission that any judgment obtained by the Plaintiff in Japan could not be enforced in Tonga, Mr Stephenson relied on the doubt expressed by the Court of Appeal in *Wolf v Strauss* [2011] TOCA 4 to effect that a judgment of a country or court to which the *Registration of Foreign Judgments Act*[3] does not apply may still be enforced by common law proceedings in the Supreme Court of Tonga.

Consideration

29. Order 7 rule 2 of the *Supreme Court Rules* provides:

> **0.7 Rule 2. Challenge to jurisdiction**
>
> A defendant who wishes to dispute the jurisdiction of the Court in an action may, within the time limited for service of a defence and before taking any other step in the action, apply to the Court for —
>
> (a) an order setting aside the writ or service of the writ;
>
> (b) an order declaring that the writ has not been duly served;
>
> (c) the discharge of any order extending the validity of the writ out of the jurisdiction;
>
> (d) the discharge of any order extending the validity of the writ for the purpose of service;
>
> (e) an order to preserve or release any property seized or threatened with seizure in the action;
>
> (f) a declaration that the Court has no jurisdiction in respect of the subject matter of the claim or the relief sought in the action; or
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> (g) such other relief as may be appropriate.

30. The legal foundation for applications of this kind, like their cousin, the anti-suit injunction, is the contractual jurisdiction of the court to keep parties to their bargain and its inherent jurisdiction to protect its processes and prevent their abuse.

31. Jurisdiction is concerned with the competence of a court to determine a dispute, regardless of the choice of law, and involves the exercise of judicial discretion to exercise jurisdiction regardless of the chosen jurisdiction.

32. Prima facie, the Court has jurisdiction where the subject matter of the dispute and one or more parties are located within Tonga. That jurisdiction may extend

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[3] As prescribed by the Reciprocal Enforcement of Judgments (Extension to Countries and States) Order.

to parties outside Tonga where the Court has the power to order service overseas.

33. This application, the evidence and the parties' submissions present the following issues for determination:

(a) Does clause 3 of the bill of lading apply to the Plaintiff's claim?

(b) If so, does the choice of Japanese governing law exclude the operation of ss 7(2)(c) of the TCGSA?

(c) If not, does ss 7(2)(c) of the TCGSA render the choice of exclusive jurisdiction in clause 3 void?

(d) If so, is this Court a *forum non conveniens*?

(e) If it is, should this Court exercise its discretion to stay the proceeding on the basis that the Tokyo District Court is a clearly more appropriate forum?

Does clause 3 of the bill of lading apply to the Plaintiff's claim?

34. Ms Mangisi's concession has (correctly, with respect) answered this question in the affirmative.

35. For completeness, however, I make the following observations:

(a) clause 1 of the bill provides, relevantly, that the Merchant, which includes the Plaintiff as original consignee, accepted all the terms and conditions of the bill as if it had been signed by him;

(b) the Plaintiff sues on the bill (on the presumed basis that, at common law, delivery of the bill amounts to delivery of the article[4]);

(c) the claim is clearly an action "against the Carrier (NYK) in respect of the Goods";

(d) Dateline is sued solely in its capacity as NYK's disclosed agent;

(e) the allegations against Dateline do not give rise to any independent cause of action;

(f) as the Plaintiff contends that NYK has failed to discharge or facilitate delivery of the vehicle to the Plaintiff, arguably, the claim arises out of the

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[4] *'Alatini v LDS Church* [1990] TOLawRp 9; [1990] Tonga LR 1 citing Halsbury's Laws (4th Ed) Vol. 36 para 114.

carriage of the vehicle; and

(g) the real gravamen of the Plaintiff's complaint is that NYK, on instruction from Imperial, changed the consignee on the bill to Vaitohi and refused to release the original bill naming it as the consignee.

36. For those further reasons, clause 3 of the bill of lading applies to the Plaintiff's claim.

Does the choice of Japanese governing law exclude the operation of ss 7(2) of the TCGSA?

37. Clause 3 provides that the contract evidenced by or contained in the Bill shall be governed by Japanese law. The Bill specifies its applicable sources of law as "the Act" and the Hague Rules Legislation. The Act is defined as the Japanese *International Carriage of Goods by Sea Act* 1957. The Hague Rules are defined, relevantly, as the International Convention for the Unification of Certain Rules relating to Bills of Lading.

38. In *Kalokalo v Faka'osifolau* [2012] TOSC 66, Scott LCJ noted in respect of a similar dispute concerning a choice of law and forum clause in a bill of lading, that:

> *[10] ... It is well established that the parties to a contract may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them and the law which is applicable to such disputes (see generally, Rule 34 Dicey & Morris Conflict of Laws 11th Edn)."*

39. However, in that decision, which post-dated the commencement of it, his Honour did not refer, and presumably was not directed, to the provisions of the TCGSA.

40. The long title to the TCGSA describes it as an Act relating to the carriage of goods by sea and to give effect to the international convention for the unification of certain rules relating to acts of lading. Section 4 of the TCGSA incorporates and gives effect to the Hague-Visby Rules. The Rules are a mandatory framework of rights and obligations that apply to the carriage of goods by sea and specified maximum exclusions of liability. The Rules apply to the instant bill of lading. Outside of the basic framework, the parties to a contract of carriage are free to negotiate additional terms as they wish. The Rules neither prescribe

nor constrain parties in relation to agreeing on their choice of governing law for a dispute (the *lex causae*) or the jurisdiction or forum in which any such disputes are to be litigated.

41. Subsection 7(1) of the TCGSA provides, relevantly, that all parties to a bill of lading ... relating to the carriage of goods *from any place in the Kingdom* to any place whether in or outside the Kingdom are deemed to have intended to contract according to the laws in force at that place of shipment.

42. However, the TCGSA is silent on choice of governing law provisions in bills of lading relating to the carriage of goods from any place *outside* the Kingdom. As a matter of interpretation, the express limitation in ss 7(1) would tend to suggest that Parliament intended that parties to a bill of lading relating to the carriage of goods from *outside* the Kingdom are free to contract according to the laws in force at the place of their choosing. Accordingly, there is no statutory impediment to the relevant parties here agreeing on the bill of lading (and by extension, claims in respect of it) being governed by Japanese law.

43. As such, the Japanese *International Carriage of Goods by Sea Act* will apply as well as other laws of that country relevant to the dispute arising from the bill. Japan is also a party to the Hague-Visby Rules. Otherwise, and apart from Mr Stephenson's reference in his written submissions to articles 1 and 16 of the Japanese Act, no evidence on those laws was adduced on this application. Notwithstanding, and for the purposes of this issue, I have had regard to an English version of the Japanese Act,[5] which notably:

    (a) applies to the carriage of goods by ships for which the port of loading or port of discharge is located outside Japan, and to the liability of a carrier and its employee to compensate for damage in tort (article 1);

    (b) does not contain any privative jurisdictional clause such as ss 7(2)(c) of the TCGSA; and

    (c) incorporates by reference certain articles of the Japanese *Commercial Code* and *Civil Code*.

44. There is a superficial attraction to the proposition that the parties' choice of

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[5] https://www.japaneselawtranslation.go.jp/en/laws/view/4019/en

Japanese law governing the bill means that they also agreed that any relevant Tongan law, including as to jurisdiction, would be excluded. In this regard, the distinction between the choice of governing law provision in clause 3 and the choice of jurisdiction provision is important. In my view, it does not necessarily follow that the choice of governing law in respect of the bill excludes the operation of ss 7(2) of the TCGSA. They deal with different subject matter.

45. Choice of law can determine the validity and enforceability of the contract[6] and its terms[7] and the extent of the rights and obligations which are not expressly set out.[8] Further, the contract is unenforceable if it is illegal under the proper law or if it is illegal under the law of the forum.[9]: "Choice of law, jurisdiction and ADR clauses" by John Levingston, 6th annual Contract Law Conference, 26-28 February 2008.

46. A choice of jurisdiction clause evidences the parties' agreement as to where any specified dispute is to be determined. Here, clause 3 stipulates that all actions against NYK in respect of the Goods or arising out of the Carriage shall be brought before the Tokyo District Court in Japan, to the exclusion of any other Courts, whilst any such actions against the Merchant may be brought before the said Court or any other competent court at NYK's option.

47. Section 4 of the Tonga *Supreme Court Act* provides, relevantly, that the Court shall have jurisdiction to hear any proceedings, other than proceedings which by law, are within the exclusive jurisdiction of another court or tribunal.

48. Any attempt to enforce the contractual law choice of jurisdiction in clause 3 of the bill here, specifying the Tokyo District Court in Japan to the exclusion of any other Courts, conflicts with ss 7(2) of the TCGSA.

Does ss 7(2)(c) of the TCGSA render the choice of exclusive jurisdiction in clause 3 void?

49. The Hague-Visby Rules do not contain any mandatory provisions on jurisdiction. As a result, ship owners have historically felt able to stipulate their own choice of law and jurisdiction within their bill of lading terms. Although

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[6] *Saxby v Fulton* [1909] 2 KB 208,
[7] *Re Missouri Steamship Co* (1889) 42 Ch D 321 (CA)
[8] *The 'August'* [1891] P 328
[9] *Boissevain v Weil* [1950] AC 327

freedom of contract therefore exists under the Hague and Hague-Visby Rules and the carrier's bill of lading terms might therefore be expected to be enforced, however unfavourable to shippers, national legislation sometimes sets out jurisdiction provisions which allow courts to hear a shipper's claim even though the claim is not brought in the carrier's chosen jurisdiction. Thus, in a number of jurisdictions such as Australia, New Zealand, Canada and South Africa, clauses ousting the national jurisdiction are often treated as invalid. English courts have tended to uphold the carrier's bill of lading terms, provided they are unambiguous and comprehensive. [10]

50. Subsection 7(2) of the TCGSA seeks to preserve the jurisdiction of the Tongan courts in respect of actions, relevantly, concerning bills of lading. On a plain reading, ss (2)(c), unlike ss (1), is not limited to shipments from within Tonga and is expressly stated to apply to bills of lading relating to the carriage of goods from any place within or outside the Kingdom to any place in the Kingdom.

51. The provision is in very similar terms to ss 11(2) of the Australian *Carriage of Goods by Sea Act* 1991. Both provisions do not confer jurisdiction on the domestic courts. Rather, they acts as mandatory rules preventing the court's existing jurisdiction from being ousted.

52. It is necessary to first demonstrate that this Court has jurisdiction in respect of the bill of lading before asking whether its jurisdiction may be ousted. That requires consideration of whether the Court has both subject matter jurisdiction to decide the substantive issues in dispute, and personal jurisdiction over the parties to the dispute.[11] Here, the vehicle in is Tonga. Personal jurisdiction over a foreign defendant is governed by the rules of court regarding service out of the jurisdiction. As the claim is brought in respect of an apparent breach of contract committed within the jurisdiction, s 6 of the *Supreme Court Act* and Order 12 rule 1 of the *Supreme Court Rules*, confer personal jurisdiction on this court in respect of the claim against NYK. None of the relevant parties here submitted otherwise.

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[10] https://logistics.org.uk/compliance-and-advice/water/long-guides/choice-of-law-and-jurisdiction

[11] Drew James, 'Cargo Claims in Australia; Establishing Jurisdiction' (1995) 11 Australian and New Zealand Maritime Law Journal 23, 24

53. In "Choice of Law and Forum Clauses in Shipping Documents — revising section 11 of The Carriage Of Goods By Sea Act 1991 (Cth)",[12] the author observed that:

> *"Australian courts have held that in order for s 11 to be effective and to prevent parties to a contract from avoiding its operation, it must apply regardless of the applicable law.[13] The Parliament, in enacting s 11, has displaced the default rules relating to private international law.[14] Where s 11 applies, a claimant may bring an action in an Australian court, where they would otherwise be prevented from doing so, due to a choice of forum clause in the contract.[15] In this respect, s 11 is a mandatory rule of the forum.[16] Mandatory rules are municipal laws that demand application in a particular forum.[17] A court subject to such laws has no choice but to apply them, 'irrespective of the parties' contractual choice'.[18] This applies even where the forum would otherwise apply the law of another state to resolve the dispute.[19] They displace the traditionally accepted principles relating to choice of law analysis.[20] Mandatory rules vary in form and can impact on any of the stages of resolution of international disputes.[21]"*

54. In my view, and by analogy, the above approach and principles are apposite to the mandatory terms of ss 7(2) of the TCGSA.

55. Accordingly, insofar as it purports to exclude the jurisdiction of this Court, ss 7(2) of the TCGSA renders clause 3 of the bill of lading void.

[1212] Simon Allison, (2014) 40(3) Monash University Law Review 639.

[13] Mary Keyes notes there 'are very few cases' in which s 11 is relied upon. However, when it does arise, 'courts always retain jurisdiction in accordance with [the] statutory direction': Mary Keyes, Jurisdiction in International Litigation (Federation Press, 2005) 125, citing Hi-Fert (1998) 89 FCR 166; Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [No 5] (1998) 90 FCR 1. See also Kate Lewins, The Trade Practices Act (Cth) 1974 and Its Impact on Maritime Law in Australia (PhD Thesis, Murdoch University, 2005) 5.

[14] Davies, Bell and Brereton, above n 22, 403 [19.42].

[15] Peter Nygh, Autonomy in International Contracts (Clarendon Press Oxford, 1999) 230; Reid Mortensen, Richard Garnett and Mary Keyes, Private International Law in Australia (LexisNexis Butterworths, 2nd ed, 2011) 444–5 [17.12].

[16] Lewins, 'Maritime Law and the TPA', above n 97. Lewins noting 'Parliament has attempted to enshrine the mandatory status' of such rules using 'provisions designed to overcome attempts to avoid them': at 79. See also Wilson (1954) 94 CLR 577, 585 (Fullagar J); Richard Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?' (2009) 5 Journal of Private International Law 161, 166.

[17] Lewins, 'Maritime Law and the TPA', above n 97. Mandatory rules 'need not be encapsulated in statutes, but they are increasingly so. Statutes intended to be of mandatory status usually indicate their intent to take effect regardless of the proper law of the contract': at 95.

[18] Davies, Bell and Brereton, above n 22, 402 [19.40].

[19] Peter Megens and Max Bonnell, 'The Bakun Dispute: Mandatory National Laws in International Arbitration' (2007) 81 Australian Law Journal 259. 'There has been a reluctance on the part of many arbitrators to apply the notion of mandatory national laws to arbitrations, because they have considered themselves bound to give effect to the expressed intentions of the parties': at 262.

[20] Lewins, 'Maritime Law and the TPA', above n 97, 95; Michael J Whincop and Mary Keyes, Policy and Pragmatism in the Conflict of Laws (Ashgate Publishing Company, 2001) 52.

[21] Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melbourne Journal of International Law 205: 'They can be either procedural, for example requiring due process, or substantive, such as certain tax, competition and import/ export laws. Unsurprisingly, it is the application of substantive mandatory rules that creates the most controversy': at 206.

Forum non conveniens

56. But that is not the end of the matter.

57. Forum non conveniens is the private international law doctrine which recognises that courts have a discretionary power to decline jurisdiction when the convenience of the parties and justice would be better achieved by resolving the dispute in another forum: *Voth v Manildra Flour Mills* (1990) 171 CLR 538.

58. Notwithstanding the above finding that the Court here has jurisdiction, the nature of the claim, the domiciles of the parties and the other terms of their agreement gives rise to the question posed in *Wolf v Strauss* [2011] TOCA 4 at [5], namely:

> *"... whether the Supreme Court should exercise an undoubted discretion it has to stay the proceedings on the basis that they should be heard and determined elsewhere. The first step in determining such an application is to ascertain whether the Supreme Court of Tonga is an inappropriate forum or the forum non conveniens because there is another forum which is clearly more appropriate. If there is a clearly more appropriate forum elsewhere, the second step is to consider whether the Supreme Court should nonetheless exercise its discretion against staying the proceedings because it is in the interests of justice to allow the plaintiffs to continue the proceedings in Tonga."*

59. The leading common law authority on *forum non conveniens* is *Spiliada Maritime Corp. v Cansulex Ltd* [1987] AC 460. The law was summarised by Lord Goff of Chieveley at 476 to 478 as follows:

    (a) The stay will only be granted on this ground where the court is satisfied that there is some other available forum which has competent jurisdiction where the case may be tried more suitably for the interests of all parties and the ends of justice.

    (b) The burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. The evidential burden, however, rests on the party who asserts the existence of certain matters that will assist in persuading the court to exercise its discretion.

    (c) The burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is

another available forum which is clearly or distinctly more appropriate than the English forum. In all the English cases where a stay has been granted, there has been another clearly more appropriate forum.

(d) The court will first look to see what factors indicate that another forum would be more appropriate or is a forum "with which the action had the most real and substantial connection", including the availability of witnesses, the law governing the relevant transaction and the places where the parties respectively reside or carry on business.

(e) The stay will ordinarily be refused if the court concludes there is no other available forum which is clearly more appropriate.

(f) The stay will ordinarily be granted if the court concludes that there is some other available forum clearly more appropriate to hear the matter. However, the stay may nonetheless be refused if, having regard to the interests of justice, it is appropriate for the stay not to be granted.

60. The Court of Appeal in *Wolf v Strauss* confirmed that the principles in *Spiliada* apply in Tonga and that the authorities identify other matters in addition to those referred to above including where the relevant events occurred.

61. The *forum non conveniens* principle is not a mere general discretion, the application of which may vary according to the differing subjective views of different judges creating a danger of legal uncertainty. On the contrary, the principle applies a structured discretion, the details of which have been refined in the decided cases, in a readily predictable manner. Accordingly, this Court should be astute in ascertaining whether the dispute has its closest connection with this jurisdiction. Claims for which the connections to Tonga are 'merely casual or adventitious' ought not be heard here: *Brownlie v FS Cairo (Nile Plaza) LLC* [2022] 2 All ER (Comm) 1; [2021] UKSC 45.

62. While matters of practical convenience for the conduct of the litigation can feature large in the exercise of the discretion, the discretion is not so limited. As Lord Goff made clear in *Spiliada*, the Latin tag is something of a misnomer, for the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. In applying the principle, the ultimate objective is 'to

identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice'.

63. In determining the *forum conveniens*, the court must define, at the outset, what is "the case" to be tried. It must also be conscious that doing so runs the risk that the court will, by choosing a particular definition, prejudge the outcome of the forum conveniens analysis: *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] UKSC 37 at [94].

64. As presently pleaded, the cause or causes of action upon which the Plaintiff bases its claims are not entirely clear. The claim against Dateline is that it knew or ought to have known that the Plaintiff was the 'rightful consignee', that NYK was liable for the 'successful release of the cargo' to the Plaintiff and that Dateline failed 'to make the necessary arrangements to release the cargo' to the Plaintiff. The claim against NYK is that it refused to release an original bill of lading to the Plaintiff showing it as the consignee, that it knew or ought reasonably to have known that changing the name of the consignee on the bill was 'unlawful' and that it is liable for the 'unlawful withholding' of the vehicle from the Plaintiff. The bases for the allegation of unlawfulness of both the alteration to the bill and an alleged lien (which does not identify which party is asserting it or on what basis) are not pleaded.

65. The relief sought includes a declaration that the lien is unlawful, an order to release the vehicle to the Plaintiff and an order for payment of the costs of the vehicle's storage. Alternatively, the Plaintiff claims damages in the amount it says it paid for the vehicle and loss of anticipated profit on the sale of the vehicle.

66. Mr Stephenson submitted, without demurrer, that the claims are *in personam.* However, in my view, the pleading, at least by the prayer for relief, potentially presents an mix of claims *in personam* and *in rem.* The distinction is important. Claims in personam apply to a specific person. Claim in rem apply to specific property or "all the world". An in personam judgment is enforceable against the person wherever he/she is. On the other hand, if the lawsuit is to determine title to property (in rem), then the action must be filed where the property exists and is only enforceable there.

67. Despite the imprecision in the pleading, I consider the clearest distillation of the nature of the claims is that they are rooted in the bill of lading and alleged breaches by Dateline and NYK of the terms of it (even though no specific provision within the bill has been pleaded). In that sense, the claims are best characterised as in personam.

68. Factors in favour of the proceeding being determined in Tonga are that Dateline carries on business here and that the vehicle is here. If it be the case, as Ms Mangisi stated, that Vaitohi has relinquished its interest in the vehicle, then the fact that that business is (or was) carried on in Tonga is of little moment.

69. Factors in favour of the proceeding being determined in Japan include that NYK is based there, as is Imperial, which, if the litigation proceeds, will invariably be involved at some stage, and the bill of lading was issued from Japan.

70. As to the other factors submitted by the Plaintiff against Japan being the proper forum:

    (a) The Court of Appeal in *Wolf v Strauss*[22] doubted the proposition that any judgment obtained in a country not listed in the *Reciprocal Enforcement of Judgments (Extension to Countries and States) Order* would, of itself, limit the right of the beneficiary of such a judgment to enforce it, under the common law, by proceedings in the Supreme Court of Tonga.[23] The *Registration of Foreign Judgments Act* merely provides, subject to qualifying provisions of the Act, for the mandatory registration of judgments, to which the Act applies, obtained in countries and courts specified in the Order. It does not contain any provision which seeks to alter or exclude the common law nor does it expressly or impliedly prohibit other judgments being enforced in Tonga. While s. 10 confers power on Cabinet, where it considers that the treatment in respect of recognition and enforcement accorded by the courts of a country to judgments by the Tongan Supreme Court is substantially less favourable than that accorded by the Tongan Supreme Court to judgments of superior courts of that country, to order that no proceedings shall be entertained in the Supreme Court for the recovery of any sum alleged to be payable under a judgment

[22] [15]
[23] Henry v Geoprosco International Ltd [1976] QB 726 at 751.

given in a court of that country, no such Order has yet been issued.

(b) There was no evidence before me as to the likely timeframe for determination of the dispute by the Tokyo District Court or whether that is likely to be significantly longer than if the proceedings are heard and determined before this Court. Any concern about delays in the determination of the proceeding, in either forum, resulting in depreciation of the vehicle, are or may be accommodated by the Plaintiff's alternative claim in damages.

(c) That the Plaintiff's witnesses are located in Tonga and "do not have any Japanese language" is likely to apply conversely to NYK (and Imperial).

71. In my view, the determinative factor in this balancing exercise is the choice of governing law.

72. Of particular relevance to the instant case, will be the question of whether, pursuant to Japanese law, Imperial, through NYK, was lawfully entitled to change the name of the consignee on the bill.

73. Ordinarily, in the absence of proof to the contrary, the Court is entitled to presume that the content of the applicable foreign law is materially similar to the domestic law on the matter in question: *Wolf v Strauss*, ibid, [16]; *McGregor Consultant and Management Services Ltd v Kama* [1984] TOLawRp 6; [1981-1988] Tonga LR 90.

74. However, there is no warrant for applying the presumption of similarity unless it is a fair and reasonable assumption to make in the particular case. The question is one of fact: whether, in the circumstances, it is reasonable to expect that the applicable foreign law is likely to be materially similar to Tongan law on the matter in issue (meaning that any differences between the two systems is unlikely to lead to a different substantive outcome). As a matter of broad generalisation, it is more likely to be appropriate where the applicable foreign law is another common law system. Further, reliance on the presumption is always a matter of choice and is only ever a basis for drawing inferences about the probable content of foreign law in the absence of better evidence: *Brownlie*, ibid, [108]ff.

75. Theoretically, at least, there is no impediment to this Court deciding issues

concerning the bill in accordance with Japanese law. It is not uncommon for Courts in nearby jurisdictions, when determining issues in accordance with foreign law to do so with the aid of expert evidence in relation to that law.

76. However, as a matter of practicality, the issues in this case, as presently pleaded, are likely to involve more than an interpretation and application of the Japanese Act. That is because the Act itself imports various provisions of the Japanese Commercial and Civil Codes. There was no evidence adduced by the Plaintiff on this application, by way of expert evidence, or otherwise, as to the prevailing Japanese law and whether it is similar to the law in Tonga on the relevant issues. Japan is not a common law system. Those features alone strongly suggest that it would be neither fair nor reasonable to presume similarity.

77. Further, there was no evidence as to the existence or availability of any Japanese law experts in Tonga. To have to bring any such expert/s from overseas to Tonga will invariably add time, cost and inconvenience to the conduct of the litigation here.

78. For those reasons, I consider that the Tokyo District Court is the clearly more appropriate forum and that it is in the interests of justice for the action to be heard in that Court.

Injunction

79. Given that Plaintiff's alternative claim in damages will, if successful, be an adequate remedy, none of the active parties opposed the dissolution of the interim injunction.

Result

80. The First and Second Defendants' application is granted.

81. Notwithstanding that this Court has jurisdiction over the proceeding, in the exercise of its discretion, this Court is a *forum non conveniens* and, as result, the proceeding before this Court is stayed.

82. The injunction issued on 27 May 2022 is dissolved.

83. Given the relative novelty of the issues raised and the mixed outcomes, my

tentative view is that each party to the application should bear its own costs. Any application for a different costs order is to be filed within 14 days of the issuing of this Ruling.

84. Subject to any such application, the file will now be closed.

NUKU'ALOFA
11 July 2022

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE