

# Is an FOB seller which receives a bill of lading bound by its jurisdiction clause?

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## Facts

## Decision

## Comment

The Maritime and Commercial Court recently considered whether a freight on board (FOB) seller which had received a bill of lading as a receipt for delivery of cargo was bound by said bill of lading's jurisdiction clause.<sup>(1)</sup>

## Facts

A German seller of ship propellers sold three propellers to a South Korean buyer under FOB Hamburg Port terms.

The buyer entered into a contract of carriage with a Danish contracting carrier for the transport of the propellers to Busan. The carrier subcontracted the transport to a shipping line.

The seller contracted a local Hamburg freight forwarder to assist with arranging delivery of the propellers to the vessel. The loading of the propellers was to be performed using a floating crane and the freight forwarder advised the carrier, in an email of 15 November 2018, that the:

*[f]loating crane costs in Hamburg are being split between FOB side and vessel side. From place of rest up to FOB is for the land side, whilst hooking off in vessels hold and trip back to place of rest is for ships' side account. This is customs of the port in Hamburg, all carriers are fully aware.*

In response, the carrier denied that the buyer would accept to bear any part of the floating crane costs. In the carrier's opinion, all of these costs, including the crane demobilisation costs, were to be borne by the seller as "cargo is considered booked under FOB Hamburg terms, all tariff costs for loading onboard by floating crane will be debited to suppliers side, as per contracted terms".

In December 2018 the carrier forwarded three bills of lading – one for each propeller – to the freight forwarder. The bills of lading stated that "the Merchant", by approving the bills of lading, became bound by their terms, including their jurisdiction clauses which stipulated that disputes arising thereunder were subject to Danish jurisdiction. The bills of lading also stipulated that the merchant was further obliged to pay all "dues, duties, taxes and charges" which might be claimed by the carrier.

In the bills of lading, the 'merchant' was defined as follows:

*Wherever the term "Merchant" is used in this Bill of Lading it shall be deemed to include the Shipper, the receiver, the consignee, the holder of the Bill of Lading and the Owner of the cargo.*

The freight forwarder shipped the bills of lading to the seller and the seller's bank but did not express any opinion with regard to their terms. Subsequently, the propellers were loaded on board the vessel and the carrier claimed payment of €16,500 (corresponding to the floating crane costs that were chargeable to the vessel pursuant to the floating crane operator's tariff). It followed from the tariff that costs were charged to both the FOB side and the vessel side when a floating crane was mobilised and demobilised in order to load cargo.

In support of its claim, the carrier submitted that the seller of the propellers was liable to pay all costs relating to their loading on board, including the costs which the floating crane operator had charged to the vessel. However, no evidence was presented that the carrier had paid the €16,500 or been invoiced by the shipping line. As such, the seller refused to pay the claimed amount and the carrier instigated legal proceedings before the Maritime and Commercial Court.

The seller denied that legal proceedings in relation to the claim could be heard in Denmark and submitted that

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it was not bound by the jurisdiction clauses in the bills of lading. The seller further submitted that the costs that had been incurred in relation to services performed by the crane operator subsequent to the loading of the propellers, in accordance with the FOB clause, were for the buyers account; thus, the carrier should pursue such a claim against the buyer.

## **Decision**

The court found that legal proceedings could be heard against the seller before the Danish courts based on the jurisdiction clauses in the bills of lading. The court reasoned as follows:

*The [Freight forwarder] has on behalf of the [Seller] approved the draft, standard B/L which the [Carrier] forwarded to the [Seller] for approval and no reservations were made in this regard with respect to the scope of the approval. The [Seller] was named as "shipper" in the B/L and the court finds that the [Seller] against this background is bound by the jurisdiction clause in section 3 of the B/L which states that the place of jurisdiction for disputes as between the "shipper" and the [Carrier] is where the [Carrier] has his principal place of business. This applies irrespective whether the [Seller] as consignor by being named as "shipper" in the B/L also becomes obliged as sender of the goods.*

The court further found that the seller was not obliged to pay the claimed amount to the carrier as the carrier had not proven that it had paid the amount or invoiced the seller for such amount.

## **Comment**

This decision addresses the question of whether a consignor which is not a party to a transport contract but merely delivers cargo to the ship that will perform the voyage may be legally obliged and bound by a jurisdiction clause in a bill of lading issued by the carrier by receiving the bill of lading as a receipt for the delivery of the cargo. The decision gives rise to the following questions:

- Is a consignor (ie, FOB seller) included in the definition of 'merchant' in a bill of lading which states that "merchant" includes the shipper? Arguably, 'shipper' means the party which enters into the transport contract with the carrier (ie, the sender).
- Is a consignor under any legal obligation to consider whether a bill of lading's terms (ie, contract of carriage clauses) can be approved when the bill of lading, as far as the consignor is concerned, is only a receipt for the delivery of the cargo?
- Does a consignor have any legal possibilities to demand that bill of lading terms should be amended? As a bill of lading constitutes a contract between the sender (ie, FOB buyer) and the carrier to which the consignor is not a party, it seems doubtful whether a consignor, as a general rule, is entitled to demand any such changes.

*For further information on this topic please contact [Jesper Windahl](mailto:jw@wsco.dk) at WSCO Advokatpartnerselskab by telephone (+45 3525 3800) or email ([jw@wsco.dk](mailto:jw@wsco.dk)). The WSCO Advokatpartnerselskab website can be accessed at [www.wsco.dk](http://www.wsco.dk).*

## **Endnotes**

(1) Maritime and Commercial Court, 11 January 2021, Case BS-23440-2019-SHR.

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