

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

CIVIL SUIT NO 4 AND 5 OF 2012

HUADAR GUANGDONG CHINESE CO LTD}.....PLAINTIFF

VS

DAMCO LOGISTICS UGANDA LIMITED}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from a preliminary objection to the Plaintiff's suit by the Defendant on two grounds namely that the suit is time barred and secondly that the High Court of Uganda has no jurisdiction to try the suit.

The Defendant is represented by Messieurs Shonubi, Musoke and Company Advocates and the Plaintiff represented by Messieurs Yiga Advocates. The court was addressed through written submissions on the preliminary points of law and issues in the submissions are:

1. Whether the suit is time barred.
2. Whether the High Court of Uganda has jurisdiction in the matter.

The agreed facts in the joint scheduling memorandum of the parties are that on or about 3 April 2010; the Plaintiff contracted the Defendant to transport 250 bags of dried fish maws from Kampala to Hong Kong, Haiphong, China. On 3 April 2010, the Defendant took delivery of the goods from the Plaintiff. The Plaintiff loaded the consignment in container number MSKU 314 8661. The Defendant acknowledged receipt of the consignment. Finally the Plaintiff received US\$178,920 from Lion Assurance Company Ltd.

The disputed facts asserted by the Defendant are that the Defendant safely delivered the Plaintiffs goods to Mombasa according to the agreement between the parties. In the event that any of the Plaintiffs goods were damaged or stolen while in transit or under the Defendants custody, the Plaintiff was duly compensated by Lion Assurance Company Ltd and had no cause of action against the Defendant. Secondly that the Plaintiff's suit was instituted in a wrong forum and that it is time barred according to the agreement between the parties.

On the other hand the Plaintiff's disputed facts are that the Defendant took delivery of the consignment from the Plaintiff and the consignment was found to be tampered with in Mombasa with 142 bags of sun-dried fish maws valued at US\$178,920 missing. The Plaintiff issued and

served upon the Defendant demand notices. The Plaintiff claims US\$178,920, interest, general damages and costs of the suit.

Whether the suit is time barred?

The Defendant's case is that the carriage of goods is governed by the Defendants Standard Trading Conditions which the Plaintiff fully consented to as evidenced by a signature on each page of the Standard Trading Conditions. The Plaintiff's acknowledgement of the fact that the standard terms fully governed its contract with the Defendant is further evidenced by the fact that these standard trading conditions were annexed to the Plaintiff's pleadings. Clause 51 of the standard trading conditions entitled is "Notice of claim, time bar, provides that:

"The company shall be discharged of all liability unless the suit is brought in the proper forum as specified in clause 53 and written notice thereof received by the company within nine months in the case of loss of goods or damage of goods, after delivery of the goods and in any other case, the event giving rise to the claim."

Clause 51 (b) (v) of the standard trading conditions provides that failure to Institute a suit within nine months, the claim shall be deemed to be waived and absolutely barred.

The Defendants Counsel submits that according to the final report by the General Adjusters Kenya Ltd, a copy of which is annexed to the Plaintiff's pleadings, the loss occurred on 8 November 2010. However the notice of intention to sue was served on the Defendant on 24 November 2011 and subsequently the suit was filed on 24 January 2012 14 months after the date of the loss and therefore five months later than the time stipulated in clause 51. The effect of the Plaintiff's breach of the clause is that the Defendant is discharged of all liability and any subsequent claim by the Plaintiff was waived and absolutely barred. Counsel contends that the rationale for such limitation clauses relating to the time is that it would be unfair to subject a party to a threat of being sued indefinitely. Furthermore such clauses give Defendants reasonable repose that is to protect parties from defending stale claims. It would be unfair to defeat the rationale of such limitation clauses by allowing the Plaintiff's suit yet it had unreasonably slumbered on its claim and it would be unfair to ask the Defendant to defend this stale claim.

Furthermore the Plaintiff is bound by the standard trading conditions freely entered into according to the dictum of Sir George Jessel MR in the Printing and Numerical Registering versus Sampson (1875) LR 19 Ex. 462 to the effect that contracts entered into voluntarily shall be enforced by courts of justice.

Issue 2

Whether the High Court of Uganda has jurisdiction in the matter?

Clause 54 (b) of the standard trading conditions provides:

"These conditions, and any claim or dispute arising out of or in connection with the services in respect of services provided anywhere else in the world, are subject to English law and the exclusive jurisdiction of the English High Court of Justice in London."

The Defendants Counsel submits that the clause on jurisdiction not only provided for the law that would govern the conditions, any claim or dispute with respect to the services provided but went further to specify the forum by giving exclusive jurisdiction to the English High Court of Justice in London. Counsel contends that it is well established that a clause in a contract conferring exclusive jurisdiction to English courts is valid and binding between the parties. This was the decision of the High Court of Uganda in **Uganda Telecom Limited versus Rodrigo Chacon t/a Andes Alps Trading miscellaneous application number 337 of 2008** where Honourable Lady Justice Stella Arach Amoko, a judge of the High Court as she then was, interpreted a similar clause conferring jurisdiction on the English courts. She stated that the parties had unequivocally submitted to the exclusive jurisdiction of English courts and that the Ugandan court had no jurisdiction to adjudicate the dispute. Counsel further referred to my decision in **Rapid Shipping and Freight Uganda Ltd and Another versus Copy Lines Ltd HCMA number 216 of 2012** where a similar clause in a bill of lading granting exclusive jurisdiction to English courts was considered. The court decided the case on the basis that there was no evidence of consensus ad idem because a bill of lading was a unilateral document which was only evidence of the contract but not the contract itself.

The Court of Appeal justices in **Larco Concrete Products Ltd versus Transair Ltd [1988 – 1990] HCB 80** held that in spite of the fact that the contract was made in England, it was not a sufficient factor to oust the jurisdiction of the High Court unless it has been stipulated in the agreement to that effect in no uncertain terms. The Defendants Counsel submits that on the basis of the authorities cited above, it is only the English High Court of Justice in London which has exclusive jurisdiction to hear the dispute and the High Court of Uganda lacks jurisdiction in the matter. In the premises the Defendants Counsel prays that this honourable court be pleased to strike out the Plaintiff's suit.

In reply the Plaintiff's Counsel contends that the preliminary objections do not apply to High Court civil suit number 5 of 2012.

This is because the objections are founded on what terms the purported contract dated 21st of October 2010. The pleadings of the Plaintiff however rely on a contract dated 19th of October 2010. Consequently the objections do not apply to HCCS number 5 of 2012. Paragraph 4 of the amended plaint provides that the agreement between the parties was made on 19 October 2010 when the Defendant received the consignment and issued an interchange condition report to the Plaintiff. This fact was never specifically denied by the Defendant in its amended written statement of defence and has been reiterated in the Defendant's submissions. The Plaintiff's Counsel submits that the trading terms of the contract were brought to the notice of the Plaintiff on the 21st day of October when the purported contract was delivered by the Defendant and

acknowledged by the Plaintiff. The Plaintiff's Counsel submits that it is now a well settled position of law that notice of terms to a contract should be brought to the party's knowledge at the time of execution of the contract. No excluding or limiting term is binding unless the party seeking protection of the contract had brought it adequately to the attention of the other party before the contract was made. Counsel relied on the case of **Olley versus Marlborough Court Ltd [1949] 1 All ER 127** where it was held that a party delaying on a contract to exempt himself/herself must prove that contract strictly. The standard trading terms were brought to the notice of the Plaintiff after the contract dated 19th of October 2010 cannot be incorporated into the contract and therefore cannot be seen to avail the Defendant any protection against its liability under the contract.

In any case any argument to the contrary would without prejudice require court to hear and assess evidence from either party in order to determine the appropriate contract. This would essentially mean that the preliminary objection raised by the Defendant is premature and therefore unsustainable in respect of civil suit number 5 of 2012. The Plaintiff's Counsel relied on the case of **Mukisa Biscuit Manufacturing Company Ltd versus West End Distributors Ltd [1969] 1 EA 696** at page 701 that the point of law is argued on the assumption that all the facts pleaded by the Plaintiff are correct. If the facts are to be ascertained, then it shall have the effect of increasing the costs. In the premises the preliminary objections raised by the Defendant are premature and ought to be overruled.

On the issue of whether the suit is barred by clause 51 of the standard trading terms. The Plaintiff's Counsel maintains that civil suit number 4 and 5 of 2012 are not barred. Counsel submitted that for the Defendant to effectively rely on clause 51 to be discharged from liability, it is to be established that the Plaintiff failed to bring the suit in the proper forum specified in clause 53. Secondly that written notice thereof was not received within nine months in the case of loss of goods or damage of goods, after delivery of the same and in any other case, the event giving rise to the claim. As far as the jurisdictional requirement is concerned, the clause requires the suit to be brought in a proper forum specified in clause 53 of the standard terms. Clause 53 however does not provide the proper forum but simply provides that the company had a unilateral prerogative to amend the standard trading terms. The wording of clause 51 does not effectively discharge the Defendant's liability since it first provides the Plaintiff with a proper forum to file its suit and therefore its unrestrained reference to clause 53 renders it ambiguous.

An exemption clause is to be construed strictly against the Plaintiff who introduces it and seeks to rely on it. In Halsbury's laws of England page 244 and Para 776 it is provided that where there is in doubt as to the meaning of the contract and that doubt can be removed by construing the contract against the originator, this will be done. The court should strictly construe the ambiguity in clause 51 against the Defendant. Secondly the Plaintiff's Counsel maintains that the standard trading terms are a creation of the Defendant and do not reflect the intention of the parties whatsoever because the terms were dictated against the Plaintiff by the Defendant. Counsel relied on the judgement of Lord Diplock in the case of **A Schroeder Music Publishing**

Company Ltd versus Macaulay [1974] 3 All ER 616 at 624 for the holding that standard trading terms have to be negotiated and not dictated. The Defendant unilaterally referred to the proper forum in clause 53.

Counsel submitted that adherence to the jurisdictional requirement of notice of the suit was impracticable and unreasonable due to the ambiguity of the clause and rendered clause 51 in effective to discharge the Defendants liability.

Clause 54 provides for the jurisdiction on the forum and cannot be ignored but it was unreasonable and onerous burden upon the Plaintiff to speculate on the Defendant's intentions to specifically refer to clause 53 as the resource for the proper forum despite the existence of clause 54. Furthermore clause 54 neither contains the word "suit" nor "proper forum". Adherence to the jurisdictional requirement of notice of the suit was impracticable and unreasonable due to the ambiguity of the clauses hence it rendered clause 51 in effective to discharge the Defendant's liability.

On the question of the procedural requirement of notice, clause 51 requires the Plaintiff to notify the Defendant of the suit within nine months from the occurrence in part (b) thereof. The Plaintiff's Counsel contends that the notice referred to in the clause was notice of the suit which was subsisting upon filing or commencement. The court should disregard the Defendants contention in respect to the date of receipt of the notice of intention to sue because it was not a correct interpretation of the clause and therefore immaterial.

As far as the notice of the claim is concerned, it is not disputed that the Defendant was given notice of the loss in due course. The requirement of the Plaintiff to establish that it was impossible to comply with the time limit is a question of fact that cannot be determined without presentation of evidence. In any case, the Defendant has not pleaded any prejudice occasioned to it by any possible delay in receiving notice that may have arisen. Any possible delay by the Plaintiff in issuing of a notice of claim to the Defendant is not a matter that can be determined as a preliminary point of law.

The wording of clause 51 does not restrict the time of filing a suit in the proper forum but simply states that upon the suit being instituted in the proper forum, written notice of the suit should be received by the Defendant within nine months after the date specified in clause 51 paragraph (b). The Defendant insists on the receipt of the written notice of the suit and not the institution of the suit. The question that arises then is that if the wording does not refer to the filing of the suit, then why should it refer to the time for notice of the suit? It is therefore unfeasible and difficult for the Plaintiff to comply with. Counsel further submits that clause 51 does not limit the time for filing the suit in the proper forum and therefore the notice of the suit is unsustainable. In any case the clause is subject to varying interpretations and was vague and ambiguous.

Furthermore the Plaintiff's Counsel submits that the procedural requirement under clause 51 was conditional in the computation of nine months time limit and is based on the occurrence of the

appropriate event under clause (b). This were in case of loss or damage of the goods, the date of delivery of the goods and secondly in any other case, the event giving rise to the claim. Counsel contended that the two provisions contradict each other and the computation of time in both would yield different results.

The first part specifically relates to loss of goods which is the crust of the Plaintiff's cause of action. On the other hand the second part is a general prohibition and therefore inapplicable in this case.

As far as the first part is concerned, it raises questions of fact in respect of the date of delivery of the goods. No evidence of delivery has been admitted by either party before the court. The Plaintiff suits were premised on the fact that the Defendants were in possession of the Plaintiff's goods, a fact which is not denied by the Defendant. The Plaintiff further alleged that the Defendant was in possession of the goods at the time of the alleged loss. In fact, after the loss, the Defendants pleaded the date of delivery of the goods to the final contracted destination in Hong Kong. Therefore it would be impossible for the court to reach a decision in respect to the appropriate timing of the suit without hearing evidence of the parties. Consequently application of clause 51 as a time bar is premature. Furthermore the effectiveness of clause 51 is entered by its ambiguity as far as the question of jurisdiction to file suits in the proper forum and the procedural requirement of serving written notice upon the Defendant is concerned.

In the circumstances the Plaintiff duly and timeously filed this suit in adherence to the provisions of the Limitation Act Cap 80 laws of Uganda and the Civil Procedure Rules. Consequently the court should proceed to hear the suit on the merits and overrule the objection.

The Plaintiff further submits that it was impossible for the Plaintiff to comply with clause 51.

The Plaintiff submits that the suit is premised on the carriage contract which the Defendant has admitted. The Plaintiff's goods were at all times in the custody of the Defendant. The Defendant has neglected to inform either the Defendant or the court about the date upon which the goods were delivered to their destination if at all they were delivered. The carriage contract was for the delivery of goods taken from Kampala to Haiphong, Hong Kong. Though the Defendant avers in its amended written statement of defence that it delivered the goods to Mombasa, he does not attached any proof of delivery of the goods to any place whatsoever. The contract limited time for institution of the suit on the occurrence of an appropriate event. In the case of loss or damage of goods upon the delivery of the goods, it is unjust for the Defendant to bury themselves in the barrage of their words, in a bid to discharge their liability against the Plaintiff. In the absence of proof of delivery of the goods, the Plaintiff would not be able to ascertain the time limit in the grounds and neither can the court.

Whether the High Court has jurisdiction to hear both suits?

The Plaintiff's case is that an agreement between the parties cannot oust the jurisdiction of the High Court. Article 139 of the 1995 Constitution of the Republic of Uganda gives the High Court unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or other law. Article 2 further gives the constitution supremacy and shall have a binding force on all authorities and persons throughout Uganda. The Plaintiff's Counsel submits that this was the holding of the court in the case of **Transtrac Ltd versus Damco logistics Uganda Limited in Miscellaneous Application number 394 of 2010**. The Defendant sought to rely on clause 54 of the standard terms and conditions which provides that the agreement shall be governed, construed and enforced in accordance with English law and the parties submit to the exclusive jurisdiction of the English courts. In that case it was held that the High Court retains jurisdiction whether to refer matters or to dismiss the case pursuant to the contract between the parties.

Consequently in light of the various authorities referred to in the case of **Transtrac Ltd versus DAMCO logistics** (supra), the High Court has jurisdiction to hear suits and therefore the Defendant's preliminary objection in respect thereof ought to be dismissed.

In rejoinder the Defendants Counsel submitted that the preliminary objections apply both to High Court civil suit number 4 and 5 of 2012 which are based on similar facts, between the same parties and are consolidated suits. In civil suit number 4 of 2012, the Plaintiff contracted the Defendant to transport 250 bags and fish maws. The contract was entered into on 1 March 2010. Clause 1 (c) of the contract provided that the business was subject to the standard trading conditions of the Defendant. In civil suit number 5 of 2012, the Plaintiff contracted the Defendant to transport 310 bags of fish maws. Secondly the contract was executed on 21 October 2010. Both contracts have the same standard trading conditions.

As far as the allegation that the contract was executed on 19 October 2010 and the Plaintiff became aware of the conditions on 21 October 2010 is concerned, the Defendants Counsel prays that the court relies on sections 63 and 60 of the Evidence Act to determine the question from the document itself. Counsel further submitted that both parties are bound by the terms of the contracts. The preliminary objections of the Defendant relied solely on the standard trading conditions of the two contracts which are dated 31st of March 2010 and 21st of October 2010 respectively between the Plaintiff and the Defendant that the Plaintiff voluntarily and wholly consented to.

On the issue of whether the suit is time barred, the Defendants Counsel submits that as far as clause 51 of the standard trading conditions is concerned, the Plaintiff is required to institute a suit in the proper forum and written notice thereof should be given within nine months. The clause does not provide for forum. Clause 51 deals with institution of the suit and written notice of the suit within nine months. On the other hand clause 54 provides for jurisdiction and applicable law. Consequently the argument that the proper forum is not provided for in clause 51 is misleading.

The reference in clause 51 to clause 53 was an inadvertent error. Clause 53 deals with amendments while the proper forum is provided for under clause 54. The mistake is not a sound reason for the Plaintiff not to be bound by the time limits provided for in clause 51. Clause 51 essentially provides for notice of the claim and the time bar. The mention of clause 53 does not avoid clause 54. The adherence to the obligations regarding time and notice of the suit are not impracticable or unreasonable because they are clear in requiring the Plaintiff to file the suit and give written notice all within nine months.

The Defendants Counsel reiterated submissions that notice of intention to sue was served on the Defendant on 24 November 2011 and the suit was filed on 24 January 2012. The suit was filed 14 days after the date of the loss that occurred on the November 2010 according to the final report by the General Adjusters Kenya Ltd that the Plaintiff relied on. The totality of the clause is that the institution of the suit has to be within nine months which was not done. Clause 51 when properly interpreted provides that both the suit and the notice thereof have to be served on the Defendant within nine months. This is because of the use of the conjunctive "and". If it is the written notice of institution of the suit within nine months, the Plaintiff has not complied with this provision to date. Consequently failure to give notice according to the agreement is a manifest breach of the Standard Trading Conditions and under clause 51 exonerates the Defendant of any liability.

The amendments in issue are computed from the event giving rise to the claim. The event giving rise to the claim is the loss of the goods and as such the date of delivery of the goods does not have any bearing on the time limit of nine months provided for by the standard trading conditions.

Whether the High Court has jurisdiction to handle the dispute?

As far as the question of jurisdiction is concerned, the Defendants Counsel agrees that article 139 of the Constitution of the Republic of Uganda gives the High Court original and unlimited jurisdiction to handle all matters. However the parties chose to refer any dispute arising from their own transaction to a foreign court and that clause is enforceable by this honourable court based on the facts in the suit. Both the Plaintiff and the Defendant are large companies operating globally. The Plaintiff agreed to the clause conferring jurisdiction on the English High Court of Justice.

With reference to the case of **Transtrac Ltd versus Damco logistics Uganda limited miscellaneous application number 394 of 2010**, whereas the court held that an agreement cannot oust the jurisdiction of the High Court, the court further held that it makes people abide by their contracts. Furthermore submission to the jurisdiction of the foreign court is similar to submission to arbitration under the Arbitration Act. In the case of **Transtrac** (supra) this honourable court held that the court would stay proceedings in breach of the clause referring the

parties to the exclusive jurisdiction of the foreign court unless it is just and proper to allow them to continue.

Counsel further submitted that the High Court has unlimited jurisdiction however the parties agreed to refer any disputes to a foreign court despite knowing the fact that the courts in Uganda are competent to try any dispute that could arise. The Plaintiff has not brought to the attention of the court any disability or other reason as to why it did not institute a suit in the High Court of Justice in London as expressly agreed in the contract.

With reference to the ruling of the court in **Rapid Shipping and Freight Uganda Ltd and Another versus Copy Lines Ltd HCMA number 216 of 2012**, the court disallowed objection to jurisdiction only on the basis that the bill of lading was merely evidence of the contract and there was no evidence of consensus between the parties on the jurisdiction clause.

Ruling

I have duly considered the written submissions of the parties, the scheduling memorandum setting out the agreed facts, the pleadings of the Plaintiff and authorities cited.

Paragraph 3 of the amended plaint is to the effect that the Plaintiffs claim against the Defendant is for recovery of US\$178,920, interest and damages and costs of the suit. It is averred that the Defendant is and was at all times a common carrier of goods for hire. Furthermore it is averred that on or about 3 April 2010, by an agreement between the Plaintiff and the Defendant, the Defendant undertook to safely and securely ship 250 bags of sun-dried fish maws belonging to the Plaintiff from Kampala to Hong Kong, Haiphong, China. The Defendant on 3 April 2010 loaded and received from the Plaintiff the container loaded with 250 bags of sun-dried fish maws. In breach of the agreement, the Defendant did not deliver the goods to Hong Kong thereby causing the Plaintiff loss. In paragraph 4 (f) the Plaintiff avers that while in Mombasa it was discovered that 142 bags of different grades of fish maws valued at United States dollars 178,920 were missing or stolen thereby causing the Plaintiff loss. By letter dated 14th of June 2010, the Plaintiff made a demand from the Defendant for the loss but the Defendant has failed or refused to pay any part thereof. The letter of demand is annexure "C" dated 23rd of May 2011 written by Kasekende, Kyeyune and Lutaaya Advocates to the Defendant. The letter was written on behalf of Lion Assurance Uganda Limited.

The letter annexure "C" inter alia writes that upon delivery of the container in Mombasa, Kenya, it was discovered that the container was interfered with and 142 bags of different grades of fish maws were missing or stolen. In paragraph 8 of the amended written statement of defence, the Plaintiff relies on annexure "D" which is a letter from the Defendant. Annexure "D" indicates that according to the records, the container was delivered on the 25th of May 2010 and therefore the claim was time barred under clause 51 of the standard trading terms and conditions found at www.damco.com. The original plaint was filed on 4 January 2012 and summons issued on 16 January 2012.

In the joint scheduling memorandum signed by both Counsels of the parties on 22 July 2013, there are agreed documents and facts. Exhibit PE 8 is a letter dated 14th of June 2010 by the Plaintiff to the Defendant demanding for an account for the consignment of 250 bags of fish maws. It provides that the consignee has never received the consignment and the demanded that the Defendant delivers the consignment as agreed. Exhibit P2 is the discharge voucher dated 4th of August 2010 indicating that the Plaintiff accepted US\$178,920 in respect of the damage which occurred on or about 11 June 2010. It is an agreed fact in the joint scheduling memorandum that the Plaintiff received US\$178,920 from Lion Assurance Company Ltd (see points of agreement number 5).

The Defendant relies on clause 51 of the contract to submit that the claim is time barred. Secondly the Defendant relies on clause 54 of the standard trading terms and conditions for the submission that the parties agreed to submit any dispute to the exclusive jurisdiction of the English High Court of justice.

The question of jurisdiction in my opinion is preliminary. The issue of time bar cannot be considered as it is on the merits of the claim unless and until the court has decided whether to exercise jurisdiction or whether it has jurisdiction in the circumstances of the case. Jurisdiction simply engages the issue of whether the court should hear the parties as far as the dispute is concerned. The question of time bar on the other hand requires the court to exercise jurisdiction to determine whether the Plaintiff is entitled to commence this action against the Defendant irrespective of whether it is commenced in the High Court or anywhere else.

There is no controversy about the fact that in the ordinary circumstances of the case, the High Court of Uganda would have jurisdiction to determine the dispute. Some arguments were raised by the Plaintiff about whether sufficient notice was given of the terms of the contract embodying the jurisdiction clause. I have duly perused the pleadings of the Plaintiff. Civil suit number 4 of 2012 was filed in court on 4 January 2012. Paragraph 3 thereof avers that the Plaintiffs claim against the Defendant is a common carrier is for recovery of US\$178,920 for breach of the contract dated third of April 2010 for the carriage of goods or for breach of duty by the Defendant as a common carrier for negligence the carriage of goods, general damages, aggravated damages, interests and costs of the suit. In the original plaint before amendment, the Plaintiff attacked the photocopy of the contract for the carriage of goods as annexure "A". An amended plaint was filed in court on the 10th of May 2013 under the amended plaint annexure "A" are copies of invoices. In paragraph 3 thereof, the Plaintiff had dropped out reference to the contract of carriage. The original plaint was filed by Kasekende, Kyeyune, Lutaaya and Co Advocates while the amended plaint filed by Messieurs Yiga Advocates. Order 6 rule 7 permits a party to depart from any allegation of fact by way of amendment. A careful perusal of annexure "A" of the amended plaint is however the same annexure. The difference being that the attached standard trading conditions, which had been attached to annexure "A" has to form part of it, was omitted in the amended plaint. In the circumstances, the Plaintiff is bound by the previous pleadings attaching the standard trading terms and conditions as part of the Plaintiffs averments.

Secondly and by consent of the parties in miscellaneous application number 373 of 2013 arising from HCCS number 5 of 2012, the plaint was amended with the same result. The previous annexure "A" contains an invoice with the standard trading terms and conditions annexed. However in the amended plaint annexure "A" only attaches the invoices without the contract for the carriage of goods/standard terms and conditions. Finally in miscellaneous application number 408 of 2012 and by consent of Counsels, HCCS number four of 2012 and HCCS number five of 2012 were consolidated. It is my finding that the Plaintiff cannot depart from incorporation of the standard trading terms and conditions which it had relied upon as annexure "A" which was not subsequently amended in the amended plaint but deceptively called annexure "A" as an invoice, the same interest which the standard trading terms and conditions were attached. The standard terms and conditions of carriage at the Plaintiff's document and the Plaintiff cannot depart from it.

Consequently the dispute revolves around the construction of clause 54 which provides for jurisdiction and law. Clause 54 of the standard trading conditions provides as follows:

"54.these conditions and any claim or dispute arising out of or in connection with the services:

(a) in respect of services provided in the United States of America (including carriage to, from or within the United States of America), are subject to United States law and the exclusive jurisdiction of the United States Federal Court of the Southern District of New York;

(b) in respect of services provided anywhere else in the world, are subject to English law and the exclusive jurisdiction of the English High Court of Justice in London."

The Plaintiff does not dispute the standard trading terms of the contract but submits that the terms of the contract were brought to its notice on the 21st day of October when the purported contract was delivered by the Defendant acknowledged by the Plaintiff. Consequently the first issue is whether the standard trading terms/conditions of the Defendant had been brought to the attention of the Plaintiff. The contract between the parties is not a disputed document. The first contract is dated 21st of October 2010 and endorsed by both parties. Clause C thereof provides that all business is subject to the standard trading conditions available on www.damco.com. The first contract is in respect of forwarding and shipping services of the Defendant. The second contract is dated 31st of March 2010 and unclean provides that all business is subject to the standard trading conditions available on www.damco.com. It is also in respect of forwarding and shipping services by the Defendant.

I agree with the Defendant's submissions that the document speaks for itself. The cause of action arose after 21 October 2010 and 31 March 2010. In both documents, the Plaintiff was notified of the standard trading terms and conditions of the Defendant. In other words the parties agreed that

the standard trading terms and conditions inter alia would govern the forwarding and shipping services provided by the Defendant.

In the premises, the issue for consideration on jurisdiction is based on the contractual terms. Clause 54 was incorporated in the contract between the parties. I was referred to previous decisions of this court on a similar provision and objections made to jurisdiction. I first refer to the ruling of this court in the case of Transtrac Ltd as the applicant against DAMCO logistics Uganda limited. This was in High Court, commercial division miscellaneous application number 394 of 2010 delivered on 8 April 2011. In that case the applicant objected to jurisdiction and sought a declaration that the High Court had no jurisdiction over him in respect of the subject matter of the claim for relief or remedy sought by the respondent. In that case the governing clause provided 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."

In the ruling I considered the case of **Uganda Telecom verses Rodrigo Chaco t/a Andes Alps Trading in HCMA 337 of 2008** in which Honourable Lady Justice Stella Arach, Amoko, judge of the High Court as she then was, held that the clause which provided that: "*this agreement shall be construed in accordance with English law and subject to the exclusive jurisdiction of the English courts*", was clear and certain. Under that clause the parties had not only chosen English law to govern the agreement but unequivocally submitted to the exclusive jurisdiction of the English courts. She held that the High Court had no jurisdiction to adjudicate in the dispute, the parties having chosen the exclusive jurisdiction of the English courts. She further held that the fact that the agreement was negotiated, performed and possibly breached in Uganda was immaterial. She held that the clause ousted the jurisdiction of the High Court. I agreed with the holding of the judge to the extent that the parties agreed to submit to the jurisdiction of the English courts and to refer their disputes for adjudication in that forum. I disagreed that the contract ousted the jurisdiction of the court. My decision was based on the construction of article 139 clause 1 of the constitution which confers unlimited original jurisdiction in all matters on the High Court. Furthermore the unlimited original jurisdiction is reproduced under section 14 of the Judicature Act. Furthermore I felt bound by the decision of the Court of Appeal in **David Kyadondo versus Cooperative Bank civil appeal number 19 of 1991** where it was held that the Cooperative Societies Act and the section that under which it was provided that all disputes shall be referred to arbitration did not oust the jurisdiction of the High Court. Consequently it was my finding in the case of **Transtrac versus DAMCO logistics** (supra) that the court has jurisdiction to interpret and enforce the contract of the parties in a similar way as it does with the provisions for the parties to submit their dispute to arbitration. In other words the court can insist that the parties should abide by the contract unless the Plaintiff can justify filing the action in the High Court.

A similar objection was made before me in the case of **Rapid Shipping and Freight Uganda Ltd and another versus Copy Lines Ltd HCMA 216 of 2012**. Again the applicants objected to jurisdiction. In overruling the objection, the court held that the clause providing for the submission of any dispute to the English courts was contained in the bill of lading which was a unilateral document signed by the ship owner or master or other agent of the ship owner which states that certain specified goods have been shipped in a particular ship and which purports to set out the terms on which the goods have been delivered to and received by the ship. From the authorities reviewed in that decision, the Bill of lading could be excellent evidence of the terms of the contract but it was not the contract itself. I therefore held that there was no evidence of the consensus to submit any dispute relating to the carriage of goods to the exclusive jurisdiction of the English courts and not other courts. The court therefore held that in the absence of evidence of consensus between the parties, the objection to jurisdiction was overruled for being premature.

That being the state of the law as I understand it, the above precedents are to the effect that a clause to submit to the exclusive jurisdiction of the foreign court is enforceable by the High Court of Uganda. However, the High Court does not lose its jurisdiction to entertain the action if the Plaintiff can show some just cause why the proceedings should not be stayed or dismissed.

In the case of **Uganda Telecom verses Rodrigo Chaco t/a Andes Alps Trading in HCMA 337 of 2008** honourable lady justice Stella Arach dismissed the Plaintiffs action with costs. This was based on how finding that the High Court did not have jurisdiction. In this case, the parties chose the English Courts as the forum of choice to adjudicate their dispute. The Plaintiff pleaded the same contract as the contract of carriage and is bound by its terms. The Plaintiff has not moved the court justifying filing the action in Uganda. In cases of arbitration clauses, the Arbitration and Conciliation Act gives grounds for justifying the filing of an action in the High Court irrespective of the arbitration clause. I find the rationale useful and applicable to clauses of the parties agreed to submit their dispute to the exclusive jurisdiction of the foreign court. Section 5 of the Arbitration and Conciliation Act permits the court not to refer the dispute to arbitration where the agreement is null and void, in operative or incapable of been performed. Secondly that it is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. If the matter is where advanced to this court, to justify filing this action, the court would hear the parties and consider whether not to dismiss the suit and hear the parties. The Plaintiff must show that the Defendant is using the clause to submit their disputes to the exclusive jurisdiction of the foreign court as a means of avoiding liability. Audit Plaintiff may advanced similar grounds of the agreement the man and void, in operative or incapable of been performed or that it was not in dispute contemplated for reference to the exclusive jurisdiction of the foreign court under the contract. In the absence of the above, the High Court will enforce the contract.

In those circumstances this court will enforce the terms of the contract by dismissal of the suit, because, an arbitration clause, the court cannot refer the dispute to exclusive jurisdiction of the

foreign court. It is upon the Plaintiff to file the action if it so wishes. The Defendant's objection to the suit on the ground of jurisdiction is sustained and the suit is dismissed with costs.

Ruling delivered this 15th of November 2013 in open court.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Shafir Hakim Yiga for the plaintiffs

Peters Musoke counsel for defendant is absent.

Plaintiffs in court

Christopher Madrama Izama

Judge

15th of November 2013