SUN MOBILITY
Insurance and Claims Services Limited

29 May 2009
Ref : Chans advice / 101

To: Transport Industry Operators

HVR cover cargo delivery? (V)

Remember Chans advice 68, 79, 83 and 100 about the cargo misdelivery claim case of US$873,028? The Hong Kong Court of Final Appeal issued its Judgment on 12/5/2009 dismissing the forwarders' appeal with costs.

Two main issues called for decision on the appeals. First, where goods were shipped for carriage by sea under a straight bill of lading for delivery to a named consignee, did the carrier attract liability for delivering the cargo to that consignee without production and surrender of the bill of lading? Secondly, if the answer was prima facie "yes", were the forwarders in the case in question exempted from liability by the relevant exclusion clause in the bills of lading?

The seller sold a large consignment of 23 containers of footwear to the buyer. The seller shipped the goods to the buyer in Los Angeles. The sale was on FOB terms with payment to be made by telegraphic transfer after shipment and with the original bills of lading to be sent to the buyer by speed post after the seller's receipt of such payment. The terms of the bills of lading issued by the forwarders (evidencing shipment on board on 29/3/2003 and 12/4/2003 respectively) were identical for all material purposes. In each case, the seller was named as the shipper and the buyer as the consignee and also the notify party. Since words like "or order" or "its assigns or order" were not inserted after the buyer's name entered as consignee, the bills were "straight bills of lading" and were not negotiable in the sense of being freely transferable to subsequent holders by indorsement and delivery. It was this feature of the bills of lading that gave rise to the first main issue on the appeal. On arrival, the containers were handled by the forwarders' Los Angeles agent. It was not entirely clear what occurred when the goods arrived in Los Angeles. However, it appeared that the containers were discharged into the custody of the forwarders' LA agent, cleared through US Customs by it and then transported by it to the premises of the buyer situated about an hour's drive inland. In this way, the buyer obtained the goods without having presented any bill of lading covering the consignments. The buyer never paid the seller for the goods. The proceedings in question were brought by the seller against the forwarders alleging that their delivery of the goods to the buyer without requiring production of the bills of lading constituted a breach of contract and conversion resulting in loss to the seller in the total amount of US$873,028, representing the invoice value of the goods and their sound arrived value. The High Court held at first instance that delivery of the goods by the forwarders to the buyer without presentation of the straight bills of lading amounted prima facie to a breach of the contract of carriage but that the exemption clause contained in clause 2(b) of the bills of lading operated to exempt the forwarders from liability. The High Court therefore dismissed the seller's actions. The Court of Appeal agreed with the High Court that delivery without production of the straight bills was a breach of contract and conversion. However, it gave judgment for the seller holding that the exclusion clause in the bill of lading did not exempt the forwarders from liability. The appeal by the forwarders was brought by leave of the Appeal Committee.

Bills of lading have been in use as mercantile documents essential to international trade for at least two centuries. As Lord Steyn points out in The "Rafaela S", the main characteristics of the modern bill of lading are threefold:

> "It operates as: (a) a receipt by the carrier acknowledging the shipment of the goods on a particular vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage, which will usually have been concluded before the signing of the document; (c) a document of title to the goods which enables the consignee to take delivery of the goods at their destination or to dispose of them by the endorsement and delivery of the bill of lading."

The fact that a bill of lading is in law a document of title to the goods shipped is central to its use in international trade. This was explained in a well-known passage from the judgment of Bowen LJ in Sanders Brothers v Maclean & Co, in the following terms:

> "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

The great majority of bills of lading discussed in the authorities are in the form of "order bills" designed to permit their transfer by indorsement and delivery down a chain of sub-buyers, if so desired. This is achieved by the shipper specifying in the bill of lading (often at the consignee's request) that the goods are consigned to the shipper's or consignee's order. This is in contrast to the "straight bills" which were issued in the case in question. Bills of lading operate to meet the needs of the export trade. They enable the seller and the buyer to deal in the shipping documents as representing the goods which are the subject-matter of the sale. A seller, and if the transaction is financed by a bank, his bankers, will generally wish to be assured that the overseas buyer will pay for the goods before they are released to him. This can be achieved by transferring the bill of lading to the buyer only if and when payment is assured. Conversely, the buyer will generally not wish to make payment unless he is assured that the goods have been shipped and that he will be entitled to take delivery from the carrier on their arrival. He receives such assurance by the transfer to him of the bill of lading. Once constituted holder of the bill he can require delivery from the carrier, or if it is in negotiable form, decide instead to on-sell the goods while they are still afloat by indorsing and delivering the bill of lading to the sub-buyer. The bill of lading also protects the carrier who needs assurance that he is delivering to the person properly entitled to possession of the goods and that he will obtain a good discharge. Such assurance is obtained by the receiver producing and surrendering the bill of lading.

Given the crucial importance of the bill of lading in such transactions, it is not surprising that it has long been established law in relation to order bills that the carrier is both entitled and bound to refuse to release the goods shipped to a person claiming delivery save against production of an original bill of lading covering those goods. As Leggatt LJ points out in Kuwait Petroleum Corporation v I & D Oil Carriers Ltd, (The "Houda"): "It is an incident of the bill of lading contract that delivery is to be effected only against the bill of lading." And as Lord Denning famously said: "It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading." This requirement has often been called "the presentation rule". It is stringently enforced. Thus, where a carrier delivered the goods without negligence against forged bills of lading as a result of a deception practised on it, this was held to afford it no defence against an action by the holder of the bills suing on the contract or in conversion. As Rix J explained: "If a shipowner was entitled to deliver goods against a forged bill of lading, then the integrity of the bill as the key to a floating warehouse would be lost." The stringency of the presentation rule is well-illustrated by London Joint Stock Bank v British Amsterdam, where the sellers of a cargo of oil caused the oil to be poured into the buyer's drums and the bill of lading to be issued showing the buyers as the shippers consigning the oil to their own order, the sale being on FOB terms for cash against documents. The sellers retained the bill of lading pending payment of the buyers' draft. However, the buyers obtained the oil without production of the bill of lading on giving the carriers an indemnity. Channell J held that the sellers' manner of shipping the oil resulted in the passing of the property in the cargo to the buyers. Nevertheless, he held that the effect of the sellers retaining the bill of lading until the draft was paid was that they had a lien on the oil and that the buyers were not entitled to possession before payment. The carriers had therefore unlawfully released the same.

The forwarders submitted that the presentation rule was necessary as a matter of business efficacy only in relation to order bills since one faced in such cases the possibility that the named consignee might have transferred the bill of lading to a subsequent holder so that the carrier could not ascertain the identity of the person entitled to delivery without production of the original bill of lading. In contrast, the forwarders argued, no such difficulty arose in relation to straight bills since they were not negotiable and identified on their face

the person to whom the goods were consigned. It followed that in making delivery to the named consignee without requiring production of the straight bill of lading, the carrier was doing no more than carrying out the shipper's instructions in accordance with its contractual obligations. Reliance was placed on the decision of Waung J in The "Brij", in which his Lordship decided that "... the essence of Straight Bills is that they are not negotiable and the contractual mandate is to deliver to named consignee without the production of the original document", citing a passage in the then current edition of Benjamin on Sale of Goods in support.

In the Court of Final Appeal's view, the forwarders' argument is unsound and must be rejected. In the first place, there was no valid reason why the essential characteristic of a bill of lading as a document of title should depend on whether it is negotiable and it was wrong to suggest that the absence of negotiability rendered the requirement of production of the original bill an "empty formality". The shipper's ability to withhold the bill of lading – the metaphorical key to the warehouse – pending payment by the consignee is a highly important feature of the recognized mercantile arrangement. This applies just as much to the relationship between shipper and consignee under a straight bill as between the parties to an order bill. It is true that a carrier is able to see who is the intended consignee on the face of the bill, but that does not mean that he is justified in assuming that such person is entitled, as against the shipper, to possession of the goods. If the named consignee is unable to produce the bill of lading it may very well be because he has not paid for the goods and is not entitled to possession. The fallacy of the suggestion that the presentation rule lacks a commercial rationale in relation to straight bills was recognized by Lord Bingham of Cornhill in The "Rafaela S":

> "I can see no reason not to give effect to the requirement that an original bill be surrendered in exchange for the goods. This provision is of course even more efficacious in the case of an order bill, since until such a bill is presented the carrier will not know the identity of the party entitled to delivery, and it has long been the 'undoubted practice' to deliver 'without inquiry' to the holder of such a bill of lading: Glyn Mills Currie & Co v East and West India Dock Co (1880) 6 QBD 475, 492; (1882) 7 App Cas 591, 603. But the requirement does not lack a commercial rationale in the case of a straight bill: the shipper will not wish to part with an original bill to the consignee or buyer until that party has paid, and requiring production of the bill to obtain delivery is the most effective way of ensuring that a consignee or buyer who has not paid cannot obtain delivery. In this case, therefore, as in the case of an order bill, the bill is 'a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be': Sanders Bros v Maclean & Co 11 QBD 327, 341, per Bowen LJ."

Secondly, it was in the Court of Final Appeal's view clear that the terms of the bills of lading issued in the case in question demonstrated a contractual intention that delivery should only be made against presentation of the original bills, i.e., that they should be treated no differently from order bills in that context. If the parties had intended that there should be no need for production of the bill, they could easily have chosen to utilise a sea waybill which permits delivery merely on proof of the recipient's identity. But an inspection of the bills issued by the forwarders revealed that they were documents having all the features of a bill of lading intended to function as a receipt for the goods shipped, as a memorandum of the contract of carriage and, most importantly, as a document of title. Each document called itself a "bill of lading" with a bill of lading number. It had the word "ORIGINAL" prominently on the form. It set out the details of the goods covered, the port of loading and the port of discharge with freight payable at destination. On its reverse, it contained detailed terms regarding the conditions of carriage usually found in bills of lading. And most significantly, it contained an attestation clause stating as follows:

> "Received for shipment in apparent good order and condition. Terms of this Bill of Lading continued on reverse side hereof.
>
> In Witness Whereof, the carrier by its agents has signed three (3) original Bill of Lading all of this tenor and date, one of which being accomplished the others to stand void."

The existence of bills in a set of three poses potential problems. What happens if after having delivered the goods to one receiver against production of one bill from the set, a second would-be receiver tenders another original bill from the same set and demands the goods? The solution which has evolved is for an attestation clause to be incorporated in the bill of lading making it clear that the carrier obtains a good discharge upon "accomplishing" one original bill, with the other bills in the set thereupon standing void. By "accomplishing" is meant completing performance of the contract of carriage by delivery against surrender of one original bill of lading. The attestation clause is therefore a contractual provision which only makes sense in a context where the parties intend the bills to be presented to the carrier as the justification for release of the cargo to the holder of the bill. This was also recognized by Mance LJ (as Lord Mance then was) in Motis Exports Ltd v Dampskibsselskabet Af 1912 Aktieselskab:

> "The 'accomplishment' of one of the original bills whereupon any other(s) stand void contemplates delivery against its presentation."

It followed, in the Court of Final Appeal's view, that it was necessarily implicit in the parties' incorporation of the attestation clause in the straight bills in the case in question that they intended the bills to be produced as the basis for obtaining delivery of the goods and that accomplishment of one original rendered the others in the set void. But the Court of Final Appeal would add that, perhaps save in exceptional circumstances, the presentation rule would be an incident of the contract evidenced by a straight bill even if it contains no attestation clause. In so far as it was held in "The Brij" that a carrier is entitled to deliver the goods to the consignee named in a straight bill without production of the bill of lading, that case was wrongly decided and must to that extent be overruled.

In The "Rafaela S", Lord Bingham pointed out that production of the straight bill of lading is a requirement for taking delivery in other jurisdictions including Germany, Scandanavia, the Netherlands and France. In Beluga Shipping GmbH & Co v Headway Shipping Ltd, the Federal Court of Australia also recognized the presentation rule, adopting the approach in The "Rafaela S". The United States exceptionally has a statutory provision which allows carriers to deliver to the consignee named in a straight bill without production of the bill.

Straight bills of lading share all the characteristics of order bills save only that after transfer by the shipper to the named consignee, straight bills are not "negotiable" in that they are not further transferable by indorsement and delivery so as to constitute third persons holders of the bill. Straight bills therefore function, in the Court of Final Appeal's opinion, as the carrier's receipt for the goods shipped; as a memorandum of the terms of the contract of carriage; and as a document of title to the goods, enabling the consignee to take delivery at their destination against production of the bill. It is the Court of Final Appeal's view that as a matter of principle and in the light of persuasive authority, it is the law of Hong Kong that a carrier of goods shipped under a straight bill of lading is potentially liable for breach of contract or in conversion if it releases those goods without production of the original bill of lading. In the case in question, by delivering the goods to the buyer without surrender of any bill of lading, the forwarders were, unless exempted from liability by the exclusion clause relied on, liable to the seller for breach of contract and conversion.

At the trial it was in dispute as to whether the alleged misdelivery took place before or after completion of discharge. If before discharge, Art III r 8 of the Hague-Visby Rules, given force of law by section 3(2) of the Carriage of Goods by Sea Ordinance, would deprive the forwarders of the benefit of the exclusion clause. Different views were taken on this question in the courts below with the High Court holding that misdelivery had occurred after discharge and the Court of Appeal taking the contrary view. This was no longer a live issue as the seller did not seek to support the Court of Appeal's conclusion and conceded that delivery occurred after discharge. The forwarders were therefore not prevented by the Ordinance from relying on the exclusion clause. The question was whether, on its true construction, it was effective in exempting them from liability for the misdelivery.

Clause 2 of the bill of lading materially provided as follows:

> "2. CARRIER'S RESPONSIBILITY
>
> (a) Subject to Clause 8 and 9 hereof [relating to containers packed by the Merchant and the Carrier's containers] the liability (if any) of the carrier in respect of the Goods during the period commencing with their being loaded onto any sea going vessel and continuing up to and during discharge from that vessel or from another sea going vessel into which the Goods shall have been transhipped shall be determined in accordance with the provisions of the Carriage of Goods by Sea Act of the United States of America approved April 16, 1936 which shall be deemed to be incorporated herein and in accordance with the terms and conditions of the Bill of Lading or other contract of carriage of the sub contractor responsible for the carriage of such Goods by sea, all of which terms and conditions to the extent that they are not in conflict with the express provisions of this Bill of Lading, are incorporated herein.
>
> (b) Save as provided in (a) hereof the Carrier shall be under no liability in any capacity whatsoever for loss or misdelivery of or damage to the Goods however caused whether or not through the negligence of the Carrier, his servants or agents or sub contractors or for any direct or indirect loss or damaged caused by delay or for any indirect or consequential loss or damage.
>
> (c) In the event of any loss or misdelivery or delay in deliver[y] of or damage to the Goods occurring between the time that the Goods are received by the carrier at the Place of receipt and the time of delivery at the Intended Place of delivery the onus of proving that such loss misdelivery delay in delivery or damage (or any part thereof) occurred during the period specified in Clause (a) hereof shall be upon the Merchant. In the event that the Merchant is unable to discharge such onus of proof the Carrier shall be under no liability for such loss misdelivery delay in delivery or damage to the Goods (or any part thereof) in accordance with (b) hereof.

The forwarders relied on clause 2(b) and in particular on the words "... the Carrier shall be under no liability in any capacity whatsoever for ... misdelivery of ... the Goods however caused whether or not through the negligence of the Carrier, his servants or agents or sub contractors ..." The contention was that these were exempting words of such a wide compass that they unambiguously excluded any possible liability for misdelivery on the part of the carriers in the circumstances of the case in question, in particular, by delivery to the buyer without presentation of a bill of lading. That was in essence the construction accepted by the High Court.

After having navigated through the now discredited doctrine of fundamental breach, the English courts have settled on the principle that the effectiveness or otherwise of an exemption clause, especially involving a commercial contract where there is no inequality of bargaining power, is purely a matter of its construction. The correct approach in this context was summarised by Lord Wilberforce in Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd, in the following terms: "Whether a clause limiting liability is effective or not is a question of construction of that clause in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and in such a contract as this, must be construed contra proferentem. I do not think that there is any doubt so far. But I venture to add one further qualification, or at least clarification: one must not strive to create ambiguities by strained construction, as I think that the appellants have striven to do. The relevant words must be given, if possible, their natural, plain meaning." That position is very similar to that taken in Australia where the courts had spared themselves the fundamental breach diversion. In Darlington Futures Ltd v Delco Australia Pty Ltd, in a joint judgment of all its members, the High Court described the proper approach as follows: "These decisions clearly establish that the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in case of ambiguity."

Two related aspects of the principle so expressed should be underlined. First is the emphasis it lays on the requirement that the exempting words be devoid of any ambiguity, with the clause being construed against the person relying on the exemption. Secondly, the principle stresses the need to construe the clause in the context of the contract as a whole, taking into account its nature and object. As Lord Wilberforce pointed out in the Suisse Atlantique case, the principle is "that the contractual intention is to be ascertained ... not just grammatically from words used, but by consideration of those words in relation to commercial purpose ..." It will often be the case that an exemption clause uses very broad words which, viewed simply as a matter of language, may be thought apt to exclude all conceivable liability. But the process of construction does not stop there. Wide words of exemption will often cover a whole range of possibilities, some of which will be consistent with maintaining the contractual obligations which reflect the main purpose of the parties' agreement, and some of which would negate those obligations and effectively deprive the contract of any compulsory content. In such cases, the clause is construed contra proferentem to ascribe the narrower meaning to it in order to sustain the purpose and legal effect of the parties' contract.

As Lord Diplock pointed out in Photo Production Ltd v Securicor, the court's premise in the construction exercise is that the parties intended their agreement to have contractual force:

> "Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract ..."

Such legal characteristics embrace well-established implied incidents of commercial (and other) contracts:

> "Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear."

However, emphasising that the matter is ultimately a question of construction, his Lordship added:

> "But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only."

The last passage just cited contains a reference to the rule that ambiguities will be resolved against the contract breaker. The exemption clause is given effect as excluding liability for the breach only where the words are "clear and fairly susceptible of one meaning only". If it is also fairly susceptible of a meaning which does not exclude liability for the breach in question, it is that narrower, contra proferentem meaning which the court will ascribe to the term.

The Court of Final Appeal's view is that, save for the absence of onward negotiability, a straight bill of lading has the same characteristics as an order bill. It is in the Court of Final Appeal's view clear that the requirement

of delivery only against production of the bill of lading is a cardinal purpose of both straight and order bills. This is so since the presentation rule underpins the ultimate purpose of the contract which is for the cargo to be delivered to the person properly entitled to receive it. It would hardly be performance of the contract for the carrier to take the cargo all the way to the destination only to deliver it there to someone not authorized to receive it, having failed to require that person to produce the "key to the warehouse". That the presentation rule represents one of the main purposes of the bill of lading contract in the context of construing an exemption clause was recognized by Clarke J in The "Ines":

> "One of the key provisions of the bill of lading, so far as the shipper is concerned, is the promise not to deliver the cargo other than in return for an original bill of lading. That principle protects the shipper from fraud. It also protects the ship owner. The parties would not in my judgment be likely to have contracted out of it. Thus clear words would be required for them to be held to have done so. The clause should be construed so as to enable effect to be given to one of the main objects and intents of the contract, namely that the goods would only be delivered to the holder of an original bill of lading."

How then did clause 2(b) fare upon application of this principle? The clause materially provided as follows:

> "Save as provided in (a) hereof the Carrier shall be under no liability in any capacity whatsoever for ... misdelivery of ... the Goods however caused whether or not through the negligence of the Carrier, his servants or agents or sub contractors ..."

As the seller accepted, purely as a matter of language, the words of clause 2(b) were apt to excuse misdelivery of the goods by releasing them to the buyer without presentation of the bill of lading. However the construction exercise did not stop there. The language of clause 2(b) had to be construed taking into account the contract's nature and purpose. An essential purpose of the contract was that the goods should be delivered by the carrier only against surrender of an original bill of lading. If, therefore, clause 2(b) was given a construction reflecting the full width of the words used, it would mean that the carrier could with impunity consciously disregard that primary contractual purpose by releasing the goods well knowing that the recipient had not provided any bill of lading relative to the cargo. That was a construction which the court inclined against as it would deprive the shipper of an essential protective obligation and seriously undermine the purpose of bills of lading. One had to therefore ask whether clause 2(b) was wholly unambiguous in conferring such a purported exemption on the forwarder. Was it clear and fairly susceptible of that one meaning only? Or was it also fairly susceptible of a meaning which did not result in the negation of that primary contractual purpose? In the Court of Final Appeal's view, it was plain that clause 2(b) was susceptible to more than one meaning and that it could be given adequate content as an exemption clause which operated without nullifying the cardinal obligation embodied in the presentation rule. Given its natural and ordinary meaning, the word "misdelivery" was capable of covering a range of situations which all involved the cargo being delivered to the wrong person. But many of those situations would not involve a conscious disregard of the presentation rule on the carrier's part. Thus a carrier might be deceived into releasing the cargo without negligence against a well-executed forgery of the bill of lading, as occurred in the Motis Exports case. As the court there held, such a misdelivery attracts liability. It was accordingly one category of misdelivery in respect of which a clause like clause 2(b) might exclude liability without involving any negation by the carrier of the basic contractual purpose. One could think of various other situations where a cargo was misdelivered by some mishap to the wrong recipient, possibly through the negligence of the carrier, but again without consciously violating the presentation rule. Examples included misdeliveries resulting in loss where, for instance, the carrier delivered the wrong cargo against presentation of a bill of lading or where, having been presented with the correct bill of lading, the goods were then released to the wrong delivery agent or delivered to a wrong address, and so forth. Cases such as these constituted a separate category of misdelivery, this time involving negligence on the carrier's part, but still without involving any conscious disregard of the presentation rule. Construing clause 2(b) contra proferentem would involve attributing to the parties the limited intention of exempting the carrier from liability in cases like those mentioned above, being a construction giving adequate content to the exclusion clause while maintaining the central contractual purpose. Such a construction would hold the clause to be insufficiently explicit to cover the breach of the presentation rule in the case in question to avoid depriving the contract of carriage of one of its essential purposes and to avoid a result which the parties were inherently unlikely to have intended. It is the Court of Final Appeal's view that such a construction was warranted in the case in question.

One could also arrive at the conclusion that clause 2(b) is materially ambiguous by another route. As has been pointed out in certain bailment cases, the word "misdelivery" contains within itself a linguistic ambiguity. Thus, in Alexander v Railway Executive, goods were accepted for deposit in a railway parcels office on terms which included a clause exempting the defendant from "loss, misdelivery or detention of, or damage to .... property" worth more than £5 unless a declaration of value was made at the time of the

deposit. An unauthorised person was given access to the plaintiff's goods without production of the deposit ticket. To the extent that the decision was based on the fundamental breach doctrine, it is obviously not good law. However, Devlin J relevantly went on to identify an ambiguity in the word "misdelivery", distinguishing between mistaken or inadvertent misdelivery on the one hand and a deliberate misdelivery on the other, construing the exclusion clause contra proferentem as applying only to the former class of "misdelivery". His Lordship stated:

> "... the question which arises is whether a delivery to Colmar, in the circumstances of this case, can rightly be regarded as a 'misdelivery' within the meaning of that word as it is used in condition 2. No doubt, if 'misdelivery' means any delivery to the wrong person and includes a deliberate delivery to the wrong person, then the case is covered. It may well be true to say that in many cases that is the right meaning of the word 'misdelivery' and it appears to be a dictionary meaning. There is no authority which is directly in point.
> The alternative argument is that misdelivery, in its natural and ordinary meaning, conveys to the ordinary man that there has been some mistake or inadvertence. ... I am disposed to think that, while in certain contexts the word 'misdelivery' may bear the wide meaning, it is restricted in its more natural and popular meaning to a wrong delivery involving some form of mistake or inadvertence, and that it is intended to cover the sort of situation where a package is delivered to the wrong address by error or inadvertence, or where the wrong article is handed out over a counter or in a cloakroom. No principle is more firmly settled than that, when one is construing exceptions to the general liability of a carrier or a bailee, those exceptions are to be construed strictly, so that if a word is capable of bearing two meanings, the narrower meaning should be adopted. I think that where 'misdelivery' is used in an exception designed to protect a bailee, it does not cover more, and would not be regarded by the ordinary man who read such conditions as covering more, than what might be called accidental misdelivery by mistake or error. Consequently, if a bailee in such circumstances wants to protect himself against every sort of wrongful delivery, however deliberately made, he must use clear and express terms to that end."

This approach was also adopted by Sachs J in Hollins v J Davy Ltd, where, having held that there had indeed been a "delivery" of a car in a car park to an unauthorised person, his Lordship stated:

> "What, upon that footing, is the meaning of the word 'misdelivery' in condition (B)? To my mind a reasonable man reading it in this contract would interpret it as referring to any delivery made in error to a wrong person or to a wrong place. Equally, he would exclude from its meaning deliveries to a wrong person or a wrong place made deliberately."

Adopting this line of reasoning, the word "misdelivery" in clause 2(b) was capable of being read to mean a delivery made in error to a wrong person or to a wrong place, expressly extended by the clause to cover negligent errors, but not covering a conscious delivery to a recipient without presentation of an original bill of lading.

It was accordingly the Court of Final Appeal's view that applying the foregoing principles, clause 2(b) did not exempt the forwarders from misdelivery in the case in question. The Court of Final Appeal therefore dismissed the forwarders' appeal with costs.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

Simon Chan
Director
E-mail: simonchan@sun-mobility.com

Richard Chan
Director
E-mail: richardchan@sun-mobility.com

10/F., United Centre, Admiralty, Hong Kong. Tel: 2299 5566 Fax: 2866 7096
E-mail: gm@sun-mobility.com Website: www.sun-mobility.com
CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS

It goes without saying the economy is heading further south as 2009 sets sail into the second quarter.

Unrealistic it is to expect turnaround any time soon. Before we see the lights, we see rising number of E&O, uncollected cargo and completion of carriage claims. The global credit crunch has created chain effects leading to, forced or otherwise, found or unfounded, breach of contracts and obligations along the logistics chain. Our claims team are on full gear recently in dealing with those claims.

If you are in need of a cost effective service in defending claims lodged against you, SMIC is just a phone call away.