SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Summary judgment

On 8/7/2009, the Hong Kong High Court issued a summary judgment against a forwarder for US$186,055 plus interest in a case of cargo delivery without production of original bill of lading.

By a Bill of Lading dated 23/10/2008 the forwarder acknowledged receipt from a seller of goods of 12 containers of 10,200 cartons of canned peach halves for carriage by sea from Qingdao (PRC) to Manzanillo (Mexico). The Bill of Lading named the buyer as consignee and a customs broker as notify party. On about 22/11/2008 the forwarder's Mexican agent caused the cargo of peach halves to be delivered to the buyer in Manzanillo without production of an original Bill of Lading. The buyer never paid the seller for the goods. By Writ dated 17/4/2009 the seller sought damages of US$186,055 from the forwarder for misdelivery of the goods to the buyer without production of an original bill of lading. The seller sought summary judgment against the forwarder. This case concerned a straight bill of lading, the buyer having been named as consignee on the face of the bill. Recently, in *Carewins Development (China) Ltd. v. Bright Fortune Shipping Ltd.* FACV No.13 of 2008, 12/5/2009, the Court of Final Appeal affirmed that in such situation, absent an effective exemption clause, a carrier is liable for breach of contract or in conversion if it releases goods without production of an original bill of lading. Accordingly, no exemption clause being relied on in the case in question, the forwarder had to be liable to the seller for breach of the contract evidenced by the Bill of Lading and for conversion of the relevant cargo.

How did the forwarder seek to excuse its conduct?

First, the forwarder suggested that the cargo was released to the buyer "with the express and/or implied consent of the seller". That consent was said to be evidenced by e-mail exchanges between Mr. Yang of the seller and Conamar of Ramon dated 26/11/2008 and 8/12/2008. Conamar appeared to have been the seller's Mexican agent in dealings with the buyer.

The 26/11/2008 e-mail read:-

> "Dear Ramon,
> Finally I am able to calm down since the shipping line has released the cargo to Stern. Now we have to review our biz with stern, or let's say how to repair the relation which certainly has been damaged...."

The 8/12/2008 e-mail reads:-

> "Dear Ramon,
> Pls inform Stern that I understand that they need time to finish those job. That's why I asked them to pay 20% or 30% of invoice amount this week and the rest we can wait till they have a final solution. They can give us final solution till end of Dec, no problem. After receiving 20% I will be patient. Hope you have a positive answer from them on Wednesday, or I have to do something here.
> looking forward to hearing from you.
> best regards
> yang"

The Judge did not see how these e-mails constituted evidence of a viable defence. The Judge assumed that the e-mails concerned the cargoes which were the subject of this action. The mere fact that the seller was prepared to negotiate terms with the buyer for the delayed payment of the misdelivered cargoes

would not mean that the seller had excused the forwarder's wrongful release of the goods to the buyer. The goods having been wrongly delivered to the buyer, the seller might seek to make the most of a bad deal by trying to get payment from the buyer if only by instalments. That would be a wholly commercial approach to what had occurred. But one could not infer from any negotiations with the buyer that the seller had consented to the forwarder's act of converting the goods in the first instance. The 2 events, the forwarder's conversion of the goods and the seller's subsequent negotiations with the buyer about payment, were unrelated matters. If anything, the inference to be drawn from the 26/11/2008 letter was how incensed the seller must have been as a result of the misdelivery of the goods to the buyer contrary to normal practice. As a result, the seller lost any security interest it might have had in the goods and became constrained to negotiate payment from the buyer without the leverage to be had from (say) the ability to exercise a lien over the goods. The Judge added that it was pure speculation on the forwarder's part that some sort of settlement had been reached between the seller and the buyer in relation to payment for the goods converted. All the e-mails suggested was that the seller and the buyer were talking about settlement. There was nothing to show that anything concrete was ever achieved. On the contrary, the seller had affirmed that the amount claimed remained unpaid. Thus, this ground did not constitute an arguable defence.

Second, the forwarder referred to clause 6 of the Bill of Lading. That provided that the Bill was subject to:-

> "(a) the provisions contained in any international Convention or National Law which provisions ... cannot be departed from by private contract to the detriment of the Merchant; and
>
> (b) would have applied by force of law if:-
>
> (i) the Merchant had made a separate and direct contract with the carrier ... in respect of the particular stage of transport where the loss or damage occurred and ...
>
> (ii) such contract was governed by the law of the State in which the loss or damage occurred, or in which the port of shipment is situate as the case may be."

According to the forwarder, by reason of clause 6, section 134 of the Navigation and Trade Law of Mexico was applicable to the Bill. The latter law provided for the application of the Hamburg Rules to shipments into Mexico. The forwarder thus relied on Hamburg Rules 1978 Art. 4. That provides:-

> "(1) The responsibility of he carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.
>
> (2) For the purpose of para. (1) of this Article, the carrier is deemed to be in charge of the goods:-
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> (a) from the time he has taken over the goods from:-
>
> (i) the shipper, or a person acting on his behalf; or,
>
> (ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;
>
> (b) until the time he has delivered the goods:-
>
> (i) by handing over the goods to the consignee; or
>
> (ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or
>
> (iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.
>
> (3) In paras. 1 and 2 of this Article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee."

It was the forwarder's case that, by the Hamburg Rules, the forwarder's responsibility for the goods ceased upon their being handed by the forwarder to the customs broker for customs clearance in Mexico. The goods had to go through customs. So, the argument ran, the handing over of the goods to a customs broker was a handing over to a third party to whom the goods had to be handed over within the terms of Art. 4(2)(b)(iii) of the Hamburg Rules. In support of this, the forwarder exhibited an e-mail from its Mexican lawyers as follows:-

> "Please be advised that although Mexican law does not provide literally that all cargo coming to Mexico from a different country must be handed over to a customs broker in Mexico, Mexican law does indeed establish that those importing or exporting goods into or from Mexico are obliged to furnish to the

customs house, only through a customs broker or customs agent, an import (or export) declaration. Therefore, due to the fact that it is only possible to import goods into Mexico with a customs broker or customs agent it is to be construed that such goods must be handed over to the customs broker or customs agent and just after the goods have been duly imported, these can be handed over to the consignee.

In view of the above, in our opinion, the carrier fulfilled its delivery obligation in terms of what the Hamburg Rules established (rules which are applicable in Mexico) Rules, once the cargo was handed over to the customs broker, as we understand that happened.

On the other hand, please be advised that our Customs and Foreign Trade Department has mentioned to me that it is possible to track down the final destination of any goods that have been imported into Mexico so if you like we can try to track the specific goods that were lost.

Should you have any further questions or need additional information, please do not hesitate to contact us."

The Judge did not accept the forwarder's reasoning. The Judge assumed (without necessarily accepting) that, in some way or other, Mexican law and (in consequence) the Hamburg Rules applied. Where goods are exported from one state to another, the goods will usually have to clear customs in the importing state. Such clearance is typically compulsory. If the Hamburg Rules had the effect for which the forwarder was contending, that would mean that in every case where goods have to be cleared through customs, the Hamburg Rules should have the effect of overriding and negating a carrier's obligation to deliver the goods to an identified consignee. That would be an absurd result. On this basis alone, the construction of Art. 4 posited by the forwarder could not be right.

When one clears customs, there are effectively 2 possible modes of proceeding. First, insofar as the carrier is responsible for effecting clearance, the goods are returned to the carrier or the carrier's order upon effecting clearance. The carrier would then hold the goods until delivery to the consignee in exchange for an original bill of lading. Simply, because goods are "handed over" to customs at a port cannot be the end of the story. On this scenario, the goods are handed back to the custody or control of the carrier once customs have been cleared for delivery by the carrier in accordance with the terms of a bill of lading. A second possibility is that a consignee is responsible for clearing the goods through customs. In such case, typically the goods are deposited in a customs warehouse by the carrier in exchange for a warehouse receipt. The carrier then transfers the receipt to a consignee who claims the goods from the carrier upon production of an original bill of lading. This is sometimes referred to as an "attornment" by the carrier to the consignee. Armed with the receipt, the consignee clears the goods through customs (paying any relevant storage charges) and collects the goods. Again, in this situation, the goods will not be released to the consignee by the customs, except upon an authorisation by the carrier.

It seemed to the Judge that Art. 4(2)(b)(iii) contemplates the situation where, by law, the carrier is required to hand over the goods to some third party in circumstances whereby the carrier's obligations to on-deliver the goods to a consignee are plainly extinguished. Such a situation might arise where, for instance, customs seize goods as contraband. The carrier is then bound in such case to hand over the goods to customs and can no longer fulfil the contractual obligation to deliver because (as far as the relevant national law is concerned) title in the confiscated goods has vested in the state. The "handing over" to the third party is the end of the story. This is perfectly consistent with international commercial practice and commonsense in a way that the reading of the Hamburg Rules advocated by the forwarder could not be. The Bill of Lading evidenced a contract by which the forwarder as bailee agreed with the seller as bailor to deliver the goods to the buyer on production of an original Bill of Lading. Plainly, the Hamburg Rules do not extinguish such obligation. On the contrary, in accordance with Art. 4(2)(b)(i), the forwarder's responsibility for the goods continued until delivery to the consignee in accordance with the terms of the Bill of Lading. The Judge saw nothing in the e-mail from the forwarder's Mexican lawyer that contradicted what the Judge had just set out. As evidence of Mexican law, the e-mail from the Mexican lawyers seemed to the Judge of no probative value. No specific provisions or case precedents of Mexican law were identified. Further, the opinion was far too tentatively expressed. Thus, this ground did not constitute an arguable defence.

Third, the forwarder faintly queried the seller's title to sue. There was nothing in this ground. The seller stood in the position of bailor and the forwarder as bailee. Normally, a bailee cannot question its bailor's title. In the circumstances of this case, as an unpaid seller, the seller had a security interest over the goods. It could exercise a lien over the goods or demand their return. By causing the goods to be handed to the buyer, the forwarder acted in a manner which was contrary to the seller's rights and converted the goods. The forwarder therefore had to be liable to account to the seller for the value of the goods at the time of their conversion.

In summary, the forwarder had no arguable defence as far as liability to the seller was concerned.

The commercial invoice value of the converted cargoes was US$188,700 FOB Chinese port. To this, the seller added the cost of insurance (US$500) and deducted a pre-payment by the buyer of US$3,145. That left outstanding a balance of US$186,055, which was the sum claimed here. The forwarder suggested that it was not liable for such sum because of alleged evidence that 60% of the goods misdelivered were oxidised. The forwarder said that buyer's sub-buyer (Chedrani) rejected the goods for this reason. The evidence for the 60% oxidisation was a double hearsay statement from the forwarder's Mexican agent's Ms. Escobar. Ms. Escobar was said to have been informed by Mr. Mendoza of the buyer that Chedrani rejected the cargo because it was 60% oxidised. Such evidence was again of no probative value. It was in effect little more than an assertion that the converted goods were oxidised. By converting the goods, the forwarder acted as a despoiler. The forwarder had made it impossible for the seller to get its hands on the goods and show that the same were not oxidised. In such circumstances, the law presumed against the despoiler that the goods were not defective. There had to at least be an evidential burden on the forwarder as a despoiling bailee to show that the goods were defective. A bare, unparticualarised hearsay statement was insufficient to overcome the presumption against the seller. The forwarder was unable to displace the burden of adducing a prima facie case imposed upon it as bailee. Consequently, the seller was entitled to judgment for the full amount claimed.

There was judgment in the seller's favour against the forwarder for US$186,055. Interest ran on that amount from 22/11/2008 (the date of conversion) to the date of the judgment at 1% over US$ prime. Thereafter, interest runs on the judgment sum at the judgment rate until payment.

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

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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.