

30 September 2009  
Ref : Chans advice/105

To: Transport Industry Operators

**Cargo release w/o B/L**

On 4/9/2009, the Hong Kong High Court held a forwarder liable to compensate US\$1,320,935.20 to the shipper for release of the goods without presentation of the Bill of Lading.

By 14 Bills of Lading issued between March and July 2008, the forwarder as carrier acknowledged the receipt from the shipper of various cargoes. Under the Bills of Lading, the cargoes were to be carried by sea from Hong Kong or ports in the Mainland to Vostochny and then carried by land to Izhevsk. The Bills of Lading were consigned "To Order". At all material times the shipper was the holder of the original Bills of Lading. The buyer was identified as Notify Party in the Bills of Lading. The forwarder's Russian agents released the relevant cargoes to the buyer without presentation of the Bills of Lading. The shipper claimed against the forwarder for such release. It was the shipper's case that the forwarder should only have released the cargoes against the presentation of the Bills of Lading. The shipper sought summary judgment against the forwarder for the invoice value of the goods released together with interest.

A carrier who releases goods without presentation of a Bill of Lading does so at its peril. Such release is wrongful and would in the ordinary course of events entitle the shipper of the goods to sue the carrier for damages in conversion and for breach of the contract evidenced by the Bill of Lading.

But the forwarder submitted that it should not be held liable for a variety of reasons. In the Judge's view, none of the grounds raised by the forwarder had merit.

First, the forwarder suggested that the shipper acquiesced in the delivery of the cargoes without production of the relevant Bills of Lading. This was because on 128 previous occasions goods had been released to the buyer without presentation of original bills. The forwarder argued that the shipper had actual or constructive knowledge of such deliveries without bills. If so, according to the forwarder, by not complaining about the past misdeliveries, the shipper had to be taken to have waived the right to object to future misdeliveries by the forwarder.

The argument was nonsense. The shipper denied knowledge of the past misdeliveries. But assuming that it knew of them, the Judge could not see how knowledge of the past misdeliveries without making complaint could logically amount to a representation by the shipper that the forwarder could in the future misdeliver goods without presentation of a Bill of Lading.

Second, the forwarder argued that the shipper was not the owner of the misdelivered goods. The forwarder suggested that property in the goods had passed to the buyer before the same arrived in Izhevsk. The forwarder based its suggestion on an alleged Master Sales Agreement between the shipper and the buyer stipulating that "the Buyer becomes the owner of the goods at the shipment date specified on the waybill".

Assuming (without accepting) that property had passed to the buyer, the Judge did not see how such fact would absolve the forwarder. As holder of the Bills of Lading, the shipper was entitled to require the forwarder to deliver the goods to the shipper or its order. By misdelivering the goods, the forwarder acted contrary to such entitlement. The shipper would therefore have causes of action against the forwarder for breach of the contract or terms of bailment evidenced by the Bills of Lading. As a person with the right to demand possession of the goods (regardless of whether the buyer owned the same or not), the shipper would also have a cause of action against the forwarder in conversion for interfering with such right of possession. The relevant cargoes having been sold on D/P terms, the Bills of Lading

were to be released to the buyer by the shipper's bank only against payment. Even if the shipper was no longer the owner of the goods by the time of their arrival in Izhevsk, the shipper retained a security interest in the consignments. This was because the shipper maintained actual or constructive possession of the goods as a result of the D/P arrangement. Such security interest would enable the shipper (for example) to exercise a lien over the goods until payment. As a result of the misdelivery, the shipper lost that security interest. Prima facie, the value of the security interest was the invoice value of the goods misdelivered.

To bolster its argument, the forwarder submitted that the shipper, although named as shipper, might only have been an agent for the buyer. The forwarder supposed that, the relevant goods having been sold FOB, the shipper would merely have arranged for their shipment as the buyer's agent.

This submission was equally nonsense. It was pure speculation. There was no evidence of any agency. In any case, the argument (if correct) would make just about every seller of goods under a FOB contract the agent of the buyer. The forwarder was effectively saying that an FOB seller who took out a Bill of Lading in its name had to surrender the same to the buyer as principal even where the latter had failed to pay. As the shipper pointed out, the absurd result of the forwarder's argument was that an FOB seller would have absolutely no protection in the event of a release without presentation of a Bill of Lading.

Third, the forwarder said that by cl.18.3 of the Bills of Lading damages were limited. The clause provided that in the case of Combined Transport, if it "[can]not be proved where the loss or damage occurred compensation shall not exceed US\$2 per kilogram". US\$2 per kg of the misdelivered goods would amount to less than their invoice value.

The Judge disagreed with the forwarder. Clause 18.3 was ambiguous. It had to therefore be construed "contra preferentem", that is, against the forwarder on whose standard form cl.18.3 appeared. By its terms, cl.18.3 only applied where cargoes had been "lost or damaged". The goods had certainly not been "damaged". Had the cargoes been "lost"? That depended on what "lost" in cl.18.3 meant. Did "lost" in cl.18.3 only refer to the inadvertent loss of goods or does it also include the loss of goods to the shipper through their being deliberately handed over to a third party without presentation of Bills of Lading? Given that by the Bills of Lading the forwarder undertook to hand over the cargoes to the holder of the Bills of Lading, it was hard to see how "lost" in cl.18.3 could extend to a deliberate misdelivery of goods contrary to the Bills of Lading. It would need far clearer words if cl.18.3 was intended to have such perverse effect. Accordingly, at best "lost" in cl.18.3 could only cover the inadvertent loss of cargoes. That was not the situation where the goods were deliberately lost through misdelivery without presentation of Bills of Lading. It followed that cl.18.3 could not apply.

None of the proposed defences had merit. There was no arguable defence to the shipper's Claim. Summary judgment was granted for the invoice value of the goods misdelivered (US\$1,320,935.20). Interest would run on that amount from the date of the Writ until 4/9/2009 at 1% over US\$ prime. Thereafter interest would accrue 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.

Simon Chan  
Director

E-mail: [simonchan@smicsl.com](mailto:simonchan@smicsl.com)

Richard Chan  
Director

E-mail: [richardchan@smicsl.com](mailto:richardchan@smicsl.com)

10/F., United Centre, Admiralty, Hong Kong. Tel: 2299 5566 Fax: 2866 7096

E-mail: [gm@smicsl.com](mailto:gm@smicsl.com) Website: [www.sun-mobility.com](http://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.