SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Terminal cargo misdelivery

On 25/2/2010, the Hong Kong High Court held a Rotterdam terminal liable to the cargo interests for misdelivery of one container laden with Sony Play Stations. (HCAJ 106/2008)

On 9/8/2007 the cargo interests consigned 11 containers (including Container HLXU 506006-7) to a forwarder for carriage from Shanghai to Tilburg via Rotterdam. The contract of carriage was evidenced by an Express Cargo Bill of Lading (B/L). The containers were stuffed with Sony Play Stations. Container HLXU 506006-7 is hereinafter referred to as Container X. The forwarder sub-contracted the sea carriage of the goods from Shanghai to Rotterdam to a shipping company. The containers having arrived in Rotterdam on 3/9/2007, they were stored at the Rotterdam terminal pending customs clearance. Such storage with the Rotterdam terminal was effected by the shipping company pursuant to a pre-existing Terminal Contract between (among other lines) the shipping company and the Rotterdam terminal. The forwarder's Rotterdam agents cleared the consignment through customs and obtained the requisite customs clearance document (known as "the Sagitta"). The agents also arranged for the containers to be carried from Rotterdam to Tilburg by barge through inland waterways. The containers (including Container X) became registered in the Rotterdam terminal's barge system. On 5/9/2007 Nico (a trucking company's driver) arrived at the Rotterdam terminal, presented a copy of the Sagitta, gave the release number for Container X, and asked for Container X to be released to him for on-carriage by truck. The trucking company had obtained the copy of the Sagitta from (and had been instructed to collect Container X from the Rotterdam terminal by) unknown criminals claiming to act for a non-existent company (i-Tronics). The Rotterdam terminal employee handling Nico's request was a trainee named Jimmy. When Jimmy attempted to comply with Nico's request, he discovered that Container X was registered for delivery via the Rotterdam terminal's barge system and not the Rotterdam terminal's trucking system. At that stage, the Rotterdam terminal's internal procedures required Jimmy to check with others whether Container X had in fact been re-routed from the barge to the trucking system. However, Jimmy did not carry out any checks. Instead, he re-routed Container X to the trucking system himself. He then issued Nico with the data card needed to obtain release of Container X from the Rotterdam terminal. Nico drove Container X to the persons who had instructed the trucking company. The latter unloaded Container X from Nico's lorry and disappeared with the contents of Container X. Container X was later found abandoned.

By a Writ issued on 10/7/2008 the cargo interests claimed the value of the lost goods from the forwarder, forwarder's agents and shipping company. On 4/9/2008 the cargo interests applied to amend the Writ to include the Rotterdam terminal, trucking company, Customs broker and three other parties as Defendants to the action. The Court gave leave for the Writ to be amended on 5/9/2008. On 1/10/2008 the cargo interests obtained leave to serve the Amended Writ on (among others) the Rotterdam terminal and MTC (one of the Defendants) in the Netherlands. The Rotterdam terminal was served with the Amended Writ and supporting documents on 22/5/2009. This was done pursuant to Article 5 of the Hague Convention 1965. Paragraph 4 of Article 5 allows a document to be served "by delivery to an addressee who accepts it voluntarily". The Rotterdam terminal was served by courier delivery of the relevant packet of documents to the Rotterdam terminal's post department. The packet was accepted by Kuipers, an employee working in the Rotterdam terminal's post department. It appeared that (through some mix-up) the packet included a cover sheet which was addressed to MTC rather than the Rotterdam terminal. The cover sheet meant for the Rotterdam terminal wrongly found its way into a similar packet sent to MTC. The Rotterdam terminal did not give notice to defend despite service of the Writ on it. A default Judgment for liability was made in the cargo interests' favour against the Rotterdam terminal on 19/11/2009 with damages to be assessed. The Rotterdam terminal contended that the Judgment should be set aside because service was irregular or because the Rotterdam terminal had a defence with a real prospect of success on the question of liability.

The Rotterdam terminal argued that service on it was improper and so should be set aside as of right. The Rotterdam terminal submitted that service was irregular because of the error in the cover sheet and because, Kuipers having accepted the packet from the courrier delivery person without any opportunity of examining the

contents of the packet, Kuipers could not be said to have "voluntarily" accepted service of the documents on the Rotterdam terminal's behalf.

In the Judge's view, service was regular and there was nothing in the improper service argument. First, the mistaken cover sheet was a trivial error. There could have been no doubt in the Rotterdam terminal's mind (once it looked through the documents) that it was being sued by the cargo interests in Hong Kong in connection with the matters set out in the Amended Writ. The cover sheet could not have misled the Rotterdam terminal in any way. The Rotterdam terminal's own evidence established that, having examined the documents, it was under no illusion as to what was happening. On the contrary, the Rotterdam terminal straightaway requested its lawyers (Schipper Noordam) to advise on what to do. Second, Kuipers accepted the packet without complaint or protest. He then forwarded it to the appropriate person for consideration. On any view, Kuipers accepted delivery "voluntarily" in the sense that he did what he did without coercion and of his own free will or choice. The Judge added that there was nothing in the evidence adduced by the Rotterdam terminal supporting its bare allegation that Kuipers had no opportunity to inspect the contents of the packet before acceptance.

The Rotterdam terminal submitted that the cargo interests' suit against the Rotterdam terminal is time-barred. For this the Rotterdam terminal relied on clause 3 of the B/L. Clause 3 provided that:-

> "The Carrier shall be discharged of all liability under this Document unless suit is brought within 9 months after:-
> (i) the delivery of the Goods or,
> (ii) the date when the Goods should have been delivered,
> unless international Conventions of statutory regulations compulsorily applicable in the individual case are stipulating a longer term of prescription."

The Rotterdam terminal argued that, although not a party to the B/L, the Rotterdam terminal was entitled to rely on clause 3 by reason of clause 17(C) of the B/L. Clause 17(C) was a Himalaya clause which (the Rotterdam terminal said) extended the benefits of exemption and limitation clauses in the B/L (such as clause 3) to sub-contractors and sub-sub-contractors of the forwarder.

However, the Judge thought clause 3 did not provide the Rotterdam terminal with an arguable defence. Assume (without necessarily accepting) that clause 17(C) enabled the Rotterdam terminal to rely on clause 3. There would remain the question whether clause 3 applied to the present case. The Rotterdam terminal accepted that the situation did not fall under limb (i) of clause 3. It was true that, in a manner of speaking, Container X and its contents were "delivered" to Nico on 5 September 2007. But plainly the word "delivery" in limb (i) must mean "delivery in accordance with the terms of the B/L". Otherwise, one would have the absurd result where the Rotterdam terminal could just "deliver" the goods to a stranger and claim that time for suit began to run from the date of such wrongful release. The Rotterdam terminal must then establish that limb (ii) of clause 3 was applicable. But what was the date "when the Goods should have been delivered"? The Rotterdam terminal said that 5/9/2007 or thereabouts is the relevant date for limb (ii). But the Judge did not think that was right. By analogy with the way in which "delivery" was used in limb (i), the word "delivered" in limb (ii) must have the sense of "when the Goods should have been delivered in accordance with the terms of the B/L". See *Cheong Yuk Fai v. China International Freight Forwarders (HK) Co. Ltd.* [2005] 4 HKLRD 544 (at para. 58 *per* Yuen JA). That meant on the facts of the case in question that limb (ii) referred either to a reasonable time:-

(a) after the cargo interests demanded that the forwarder (or its agent) deliver Container X and its contents to the cargo interests in Tilburg; or,
(b) after the forwarder (or its agent) notified the cargo interests that Container X and its contents were at the cargo interests' disposal and available for collection in Tilburg.

Neither eventuality materialised. Container X never reached Tilburg. The forwarder (or its agent) never notified the cargo interests that Container X had reached Tilburg and never called upon the cargo interests to take delivery of Container X in Tilburg. The cargo interests, on the other hand, never demanded that the forwarder (or its agent) deliver up Container X to the cargo interests in Tilburg. It followed that, on the facts, limb (ii) was as inapposite as limb (i). The 9 month limit was never triggered. On its true construction, clause 3 afforded no defence for the Rotterdam terminal.

The Rotterdam terminal faintly suggested that the Rotterdam terminal had a defence because the Rotterdam terminal was not negligent in releasing Container X to Nico. But the Rotterdam terminal's negligence or lack of it was not a relevant issue. Conversion is a tort of strict liability. A person X converts Y's goods by handing those goods to a person Z who is not entitled to possession of the same. This is regardless of whether X was or was not negligent in handing the goods to Z. In any event, it seemed to the Judge negligent for a bailee or sub-bailee in the Rotterdam terminal's position to have released Container X to Nico without following the Rotterdam terminal's own internal procedures. In accordance with those procedures, Jimmy ought to have checked whether Container X had been re-routed from the barge to the trucking system. He did not do so, apparently because the volume of cargoes being processed at the time was such that there would be massive delay in the Rotterdam

terminal's operations if he had checked. Jimmy took a short-cut. In that case, Jimmy might have been reckless (not just negligent) as to the risks involved and the possible adverse consequences of not checking.

For those reasons, the Rotterdam terminal had no real prospect of success on the question of liability.

The Rotterdam terminal relied on clause 7.4.3 of the Terminal Contract between the shipping company and the Rotterdam terminal. That provided:-

> "Parties shall attempt to resolve any dispute or claim arising out of or relating to this Terminal Contract through an Alternative Dispute Resolution (ADR) procedure recommended to the Parties by the Nederlands Mediation Instituut (NMI) in Rotterdam.
>
> If the matter has not been resolved by an ADR procedure within 6 (six) months after the initiation of the procedure, the Parties shall refer the dispute to Arbitration in Rotterdam in accordance with the Rules of the Nederlands Arbitrage Instituut (NAI) in Rotterdam.
>
> A dispute shall be deemed to exist if one of the Parties declares this to be the case. The Terminal Operator is entitled to waive the provisions of this clause in respect of claims for unpaid and undisputed invoices, in which event the competent civil court of Rotterdam shall have jurisdiction."

The Rotterdam terminal submitted that it was entitled to rely on clause 7.4.3 by application of the doctrine of "sub-bailment on terms". In short, the B/L authorised the forwarder to engage bailees and sub-bailees as necessary in carrying out the requisite carriage from Shanghai to Tilburg. Container X having been sub-bailed by the shipping company to the Rotterdam terminal on the terms of the Terminal Contract, it must be presumed that the cargo interests were also bound by terms in the Terminal Contract.

Assume (without necessarily accepting) that there had been a sub-bailment with the Rotterdam terminal on terms set out in the Terminal Contract. Even on that assumption, the Judge did not see why clause 7.4.3 should be applicable to the current dispute between the cargo interests and the Rotterdam terminal. On its own terms, clause 7.4.3 was explicit. It did not apply to everyone. It was restricted in its application to "the Parties". The latter was a precisely defined term. According to clause 2.1 of the Terminal Contract, the expression referred to "the signatory Lines to this Terminal Contract, which were the constituent members of the Grand Alliance and the Terminal Operator". None of the cargo interests are "signatory Lines". None of the cargo interests were members of "the Grand Alliance". Obviously, none of the cargo interests were the Rotterdam terminal, "the Terminal Operator". The Rotterdam terminal suggested that the word "Parties" must be understood to include all those to whom the terms of the Terminal Contract might apply by reason of the "sub-bailment on terms" doctrine. But why should such an understanding be imported here? The convoluted gloss on "Parties" advocated by the Rotterdam terminal was not so necessary for the commercial efficacy of the Terminal Contract that it should be read in as self-evident. Nor was there anything in the Terminal Contract expressly indicating that, despite clause 2.1, "Parties" should be given some wider meaning in a particular context. On the contrary, the specificity of clause 2.1 suggested that as far as clause 7.4.3 was concerned, the signatories to the Terminal Contract intended the arbitration requirement to apply to themselves alone. A stay to arbitration of the dispute between the cargo interests and the Rotterdam terminal was accordingly refused.

The Rotterdam terminal's application to set aside the Interlocutory Judgment was refused. The Rotterdam terminal's application for a stay to arbitration was likewise dismissed. There would be an Order Nisi that the Rotterdam terminal pay the cargo interests' costs, such costs were to be taxed (if not agreed) in any event.

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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Thanks to the colossal injections by worldwide governments, the fourth quarter of 2009 imparted some hope as we saw both seafreight and airfreight cargo rush in the last quarter created temporary space shortage. Whether the robust trend will continue is uncertain as worldwide governments are not in unison in their fiscal policies. The "visible" hand will still haunt the economy in 2010.

During time of uncertainty, we believe the number of E&O, uncollected cargo and completion of carriage claims will be unabated. If you need a cost effective professional service to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.