SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Terminal cargo misdelivery (II)

Remember our last Chans advice / 111 that the Hong Kong High Court held the Rotterdam terminal liable for the misdelivery of one container of Sony Play Stations? On 1 / 3 / 2010, the Court issued a further Judgment holding the Rotterdam terminal liable to pay the cargo value of Euros 950,071.20 as compensation to the cargo interests. (HCAJ106 / 2008)

By way of damages, the cargo interests claimed the invoice value (Euros 950,071.20) of the Sony Play Stations stuffed in Container X. The carriage involved in this case was what the B / L called a "combined transport". The B / L provided as follows:-

" **17(B). Combined Transport**

2) The Carrier shall, however, be relieved of liability for any loss or damage if such loss or damage arose or resulted from:

...

k) any other cause or event which the Carrier could not avoid and the consequences whereof it could prevent by the exercise of reasonable diligence.

....

18. Limitation Amount

18.1 When the Carrier is liable for compensation in respect of loss or damage to the Goods, such compensation shall be calculated by reference to the invoice value of the Goods plus freight charges and insurance if paid.

...

18.3 If in case of Combined Transport it can contrary to 17(B) II above not be proved where the loss or damage occurred compensation shall not exceed US$2.— per kilogram of gross weight of the goods lost or damage unless a higher compensation is provided by applicable compulsory law. If it can be proved where the loss or damage occurred and if no compulsory law applies, compensation shall not exceed US$2.— per kilogram of gross weight of the goods lost or damaged. "

The principal submission of the Rotterdam terminal was that it was entitled to rely on the 2nd paragraph of B / L cl.18.3. The Rotterdam terminal was so entitled by reason of B / L cl.1.3 which defined the expression "Carrier" to include the forwarder's "agents, servants and subcontractors". If cl.18.3 applied, then the cargo interests would only be entitled to damages of US$24,392 (i.e., US$2 per kg. x 12,196 kgs.).

Assuming that the Rotterdam terminal was right in reading "Carrier" as encompassing the Rotterdam terminal, even then, the Judge did not think that the 2nd paragraph of cl.18.3 was sufficiently unambiguous to cover the present situation.

First, it was unclear whether the words "loss or damage" in the 2nd paragraph:-

(1) only referred to loss or damage occasioned through no-fault of a Carrier; or,

(2) also extended to loss or damage occasioned through the Carrier's negligence, recklessness or deliberate fault.

It would be remarkable if, where a Carrier was at fault through negligence or recklessness, the Carrier could limit its compensation to a sum which has no bearing to the actual value of the goods lost or damaged. The US$2 per kg limitation in the 2nd paragraph produced a compensation which was derisory in relation to the actual value of the goods lost. Despite cl.18.1 which referred to compensating a party by reference to the invoice value of goods lost or damaged, could the 2nd paragraph of cl.18.3 really be clawing back on cl.18.1 by only offering a minimal sum even when the Carrier was at fault? It was possible. But, given the principle of reading a contract *contra preferentem*, much clearer words would need to be inserted into cl.18.3 before the Court could construe the provision as having the effect for which the Rotterdam terminal contended. Ambiguities in the

clause were to be construed against the Carrier seeking to rely on the same. Therefore, just read in isolation, cl.18.3 did not seem wide enough to cover the situations where loss or damage was caused through the negligence or recklessness of a Carrier.

Second, cl.18.3 could not be read in isolation. The conclusion just reached above was confirmed (at least as far as recklessness was concerned) by B/L cl.23.2. Cl.23.2 stated that the Carrier:-

> "shall not be entitled to the benefit of limitation of liability provided for in clause 18.3, if it is proved that the loss or damage resulted from an act or omission of the Carrier itself done with intent to cause damage or recklessly and with knowledge that damage would probably result".

The Judge thought that the Rotterdam terminal through its employee Jimmy was not just negligent, but reckless in ignoring its own internal procedure. Jimmy ought to have checked that Container X had been transferred from the Rotterdam terminal's barge system to its trucking system. Because of the volume of containers having to be processed at the time, Jimmy did not so check. He took a short-cut and simply re-routed Container X to the trucking system. The Rotterdam terminal must have envisaged that there would be a probable risk of misdelivery in such situations. Otherwise, why did its internal procedures require a check? The Rotterdam terminal did not adduce evidence suggesting that Jimmy was unaware of the risk of misdelivery involved in doing what he did or that the Rotterdam terminal was oblivious to the real possibility of misdelivery if the internal procedure of a check was not followed. In those circumstances, the Court could be bold and presume that the Rotterdam terminal must have been fully aware of a probable risk of misdelivery to an unauthorised person if no check with its barging system staff was undertaken. It appeared that short-cuts similar to that which Jimmy took were routinely taken by the Rotterdam terminal staff without mishap in the past. But that slack practice was only postponing the inevitable day when the obvious risk of misdelivery to an unauthorised person would materialise. That the Rotterdam terminal got away with slackness in the past did not make what it did less reckless.

Third, the Judge did not read cl.23.2 as implying that negligence by the Carrier was covered by the limitation in cl.18.3. The more plausible reading of cl.23.2 was that it merely emphasised that cl.18.3 did not cover the extremely serious situation where the Carrier had been reckless. If cl.18.3 was truly meant to cover fault situations (such as negligence), one would at least expect comprehensive expressions such as "loss or damage whatsoever" or "loss or damage howsoever arising" to appear in the provision. The Rotterdam terminal referred the Judge to cl.17(B)(2)(k) which excluded liability for "loss or damage" due to some unavoidable cause or event "the consequences whereof [the Carrier] could not prevent by the exercise of reasonable diligence". The Rotterdam terminal suggested that since, by cl.17(B)(2)(k) the Carrier was absolved of liability altogether where it was not at fault, cl.18.3 must at least have been intended to operate in the different situation where the Carrier was at fault by reason of negligence. The Judge was unable to accept this argument. In particular, the Judge did not think that cl.17(B)(2)(k) absolved liability in all no-fault situations. Clause 17(B)(2)(k) seemed to the Judge only to concern situations of frustration or *force majeure*. Where there was "loss or damage" due to such unavoidable circumstances, the Carrier was not to be liable. The expression "the consequences whereof [the Carrier] could not prevent by the exercise of reasonable diligence" merely stressed that the relevant *force majeure* event must be truly unavoidable or unforeseeable. The Judge did not think that cl.17(B)(2)(k) went so far as to absolve a Carrier in all situations where there was a lack of fault on the Carrier's part, even in the absence of frustration or *force majeure*. Thus, for example, conversion is a tort of strict liability. One might commit conversion innocently, despite having taken all reasonable care, by (say) surrendering cargo to a fraudster who has presented a skilfully forged bill of lading. The Judge did not think that cl.17(B)(2)(k) excluded the Carrier's liability in such case where there was no question of *force majeure*. It followed that cl.18.3 might possibly simply apply to no-fault situations which were not covered by cl.17(B)(2)(k).

In summary, the Rotterdam terminal having been not just negligent but also reckless, cl.18.3 did not apply to limit its liability to the cargo interests. Even if the Judge was wrong about the Rotterdam terminal having been reckless, the Judge would still decline to treat cl.18.3 as limiting liability where the Rotterdam terminal was at the very least negligent.

The forwarder shipped the cargo interests' containers (including Container X) from Shanghai to Rotterdam through the shipping company. The forwarder received a Sea Waybill as evidence of the contract of carriage. Sea Waybill cl.5(1) provided:-

> "**Port to Port Shipment**
>
> (a) When loss or damage has occurred between the time of loading of the Goods by the Carrier at the Port of Loading and the time of discharge by the Carrier at the Port of Discharge, the responsibility of the Carrier

shall be determined in accordance with German law, making the Hague-Visby Rules compulsorily applicable to a Bill of Lading....

(b) Howsoever the Carrier shall be under no liability whatsoever for loss of or damage to the Goods occurring, if such loss or damages arises prior to loading on or subsequent to the discharge from the vessel....

...."

In the alternative, the Rotterdam terminal submitted that it was entitled to rely on cl.5(1)(b) of the Sea Waybill. This was possible by reason of a Himalaya clause found in cl.4 of the Sea Waybill. On that basis, the misdelivery of Container X having taken place after its discharge from the vessel in Rotterdam, the Rotterdam terminal contended that it was not liable for anything at all.

Sea Waybill cl.4 conferred on the Carrier's agents or bailees the benefit of exemptions and limitations accorded to the Carrier by the Sea Waybill. Assuming for the purposes of argument that cl.4 allowed the Rotterdam terminal to rely on provisions in the Sea Waybill, despite that, the Judge did not think that cl.5(1)(b) applied to give the Rotterdam terminal the wholly surprising result of total immunity from liability. Whatever it might mean, cl.5(1)(b) could not be conferring total immunity for any loss howsoever caused following discharge. Cl.5(1)(b) needed to be read in the context of the Sea Waybill as a whole.

Sea Waybill cl.3(2) provided:-

"(a) The Goods ... will be delivered after payment of freight and other charges to the consignee, or to such person who identifies himself as being a representative of the consignee, and such delivery shall constitute the performance of this contract.

(b) The Carrier shall be under no liability for wrong delivery if he can prove that he has exercised reasonable care to ascertain that the party claiming delivery is in fact entitled."

Logically, delivery to a consignee must follow discharge from a vessel. Since cl.3(2)(b) provided that the Carrier was liable for misdelivery where it had not "exercised reasonable care to ascertain that the party claiming delivery is in fact entitled," cl.5(1)(b) could not be granting immunity in such situation. Notwithstanding its apparently wide wording, cl.5(1)(b) must have a significantly more restricted ambit. On pain of contradiction and incoherence, the Carrier could not rely on cl.5(1)(b) to cut down on the plain meaning of cl.3(2). It was unclear just what the restricted ambit of cl.5(1)(b) was intended to be. But for the purposes of these proceedings, it was not necessary to determine the term's scope. That was because the Rotterdam terminal did not take all reasonable care to ascertain that Nico was entitled to receive Container X on the cargo interests' behalf. On the contrary, the Rotterdam terminal acted recklessly in releasing Container X without first checking with its barge system personnel. Cl.5(1)(b) was not applicable to the circumstances in question.

The Rotterdam terminal's submissions for a reduced assessment of quantum failed. There was judgment in the cargo interests' favour for the invoice value of the goods in Container X (Euros 950,071.20). The cargo insurer paid the invoice value of the goods plus a 10% uplift by way of compensation for the lost Sony Play Stations. The rationale behind the 10% uplift was unclear on the evidence. The Judge therefore was not able to award more than the invoice value of the goods.

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.