SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Switched B/L & B/L indorsement

The Singapore Court of Appeal issued a Judgment on 14/9/2005 holding that a bank in a cargo misdelivery case (US$556,514.08) involving the issue of switched B/L had the right to sue the vessel owner despite the original B/L in the hands of the bank having no shippers' indorsement. (CA8/2005)

This was an appeal against the decision of the Singapore High Court dismissing the appeal of the bank UCO Bank against the decision of the senior assistant registrar striking out UCO Bank's action against the vessel owner based on four bills of lading ("B/L" or "bill" as may be appropriate). The ground for striking out was that UCO Bank did not have the right to sue on the B/Ls. The Court of Appeal heard and allowed the appeal thus restoring the action for further hearing.

The background

UCO Bank was the Singapore branch of an Indian bank. Golden Shore was the owner of the vessel, *Asean Pioneer* ("the Vessel"), which issued four B/Ls, dated 22 to 31/12/2000, to cover four shipments of Sarawak round logs carried on board the Vessel from East Malaysia to Kandla, India. The shippers named on each of the four B/Ls were Shin Yang Trading Sdn Bhd, Millenwood Sdn Bhd, The Sarawak Company (1959) Sdn Bhd and Rapid Wealth Sdn Bhd respectively. All the four B/Ls were made out to "the order of UCO Bank" and the notifying party was specified to be "SOM and UCO Bank". "SOM" was the abbreviation for "SOM International Pte Ltd", a Singapore company. SOM was a customer of UCO Bank. The four shipments were financed by way of three letters of credit ("LCs") issued by UCO Bank, which LCs were subject to the provisions of the Uniform Customs and Practice for Documentary Credits (1993 Revision) ("UCP 500"). The Vessel arrived at Kandla, India, on 15/1/2001. However, unbeknown to UCO Bank, SOM had arranged with the vessel owner to issue switched bills of lading ("switched B/L") for the four shipments, with SOM being named as the shipper. The vessel owner did not retrieve the original B/Ls before issuing the switched B/Ls. Apparently, SOM promised the vessel owner that it would obtain and surrender the original B/Ls later. As security, SOM provided a letter of indemnity to the vessel owner. Shortly thereafter, SOM indorsed the switched B/Ls over to various buyers and the eventual holders of the switched B/Ls obtained delivery of the cargo from the vessel owner. In the meantime, the shippers presented drafts drawn under the LCs, together with the four original B/Ls and other requisite shipping documents, to three different branches of the Hongkong and Shanghai Banking Corporation Limited ("HSBC") in Hong Kong for negotiation. For this purpose, the shippers did not indorse any of the original B/Ls either in blank or specifically in favour of HSBC. Thereafter, upon presentation by HSBC of the B/Ls and the other requisite documents, UCO Bank duly reimbursed HSBC the full amount payable under the three LCs, which in total came to US$556,514.08. Accordingly, UCO Bank, which had at all material times held the original B/Ls in its possession, sued the vessel owner for failing to deliver the cargo and sought damages of US$556,514.08. SOM had not reimbursed the UCO Bank the amount which the latter had paid to HSBC under the three LCs. UCO Bank applied for summary judgment. At the hearing of this application, the vessel owner made an application under O 14 r 12 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) that the court determine a preliminary question of law, namely, whether UCO Bank had the title to sue under the original B/Ls.

Section 2(1)(*a*) of the Bills of Lading Act (Cap 384, 1994 Rev Ed) ("the Act") allows the lawful holder of a B/L to sue on it even though he is not a party to that contract. The provision reads:

> Subject to the following provisions of this section, a person who becomes the lawful holder of a bill of lading shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

The holder of a B/L is defined in s 5(2) of the Act to mean the following:

> References in this Act to the holder of a bill of lading are references to any of the following persons:
> *(a)* a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
> *(b)* a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;
> *(c)* … [not relevant]
> and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

The basis upon which the vessel owner challenged UCO Bank's right to sue was the fact that upon the shippers' negotiation of the B/Ls to HSBC, the shippers did not indorse the B/Ls over to HSBC, either specifically or in blank, and there was, in turn, also no indorsement by HSBC to UCO Bank. In view of these circumstances, the vessel owner contended that UCO Bank had not become a lawful holder of the B/Ls within the meaning of ss 2(1) and 5(2) of the Act. The argument of the vessel owner was that in the absence of an indorsement by the shippers, no rights of suit were transferred to and vested in

the negotiating bank, HSBC, and, accordingly, UCO Bank could be in no better a position. The point made by the vessel owner was that for a case to fall within s 5(2)(*a*), the B/L must be transferred directly from the shipper to the named consignee. The vessel owner submitted that in the present circumstances, the person entitled to sue on each of the B/Ls was the shipper pursuant to s 2(4) of the Act.

Decision below

The judge below recognised that the B/Ls in question were order bills in the conventionally negotiable format. She accepted that ordinarily such a bill, upon being transferred to the named consignee, would give the consignee the right to sue without any indorsement from the shipper. However, she felt that the interposition of HSBC as the negotiating bank altered that position. The judge said at [2005] 2 SLR 735 at [13]:

> The shippers did not use HSBC as their agent to present the documents for collection of payment. The shippers, having sold the drafts to HSBC as the negotiation-bank, were not looking to be paid under the letters of credit by the issuing bank. HSBC, as the negotiation-bank, paid the shippers. The negotiation-bank's presentation of the drafts and shipping documents to the [appellant] for reimbursement was made under a different and independent contract between HSBC and the [appellant].

She also held that the proper manner to go about effecting the transaction between the shippers and HSBC would have been for each shipper to indorse the B/L over to HSBC. She said at [14]:

> There is nothing in principle against the shippers indorsing and delivering the original bills to HSBC even though they were initially made out to the order of the [appellant]. The rationale is that the consignee is not a party to the contract of carriage evidenced by the bill of lading; the mere naming of a party in the bill as consignee gives that party so named no rights under the contract …
>
> The consequence of the shipper changing the named consignee by indorsement is that a bill of lading made out to order of a consignee may be varied by indorsement so as to take the case out of s 5(2)(a) into s 5(2)(b) …

The judge concluded that as the rights to the B/Ls were never transferred to HSBC by indorsement, there was nothing that HSBC could transfer to UCO Bank. In this connection, she also relied on s 1(2) of the Act. In her view (at [15]), "the situation does not right itself just because the [appellant] happened to be named consignee" and "have the documents in hand". The appellant did not "become" the "lawful holder of a bill of lading" within the meaning of s 2(1)(*a*) of the Act.

Court of Appeal's analysis

The Court of Appeal examined s 1(2)(*a*) upon which the judge placed considerable reliance. The Court of Appeal quoted what she said at [15]:

> For the purposes of the Act, in the hands of HSBC (neither as consignee or indorsee), the original bills would not fit within the definition of "bill of lading" in s 1(2) although they were described as such by name. It is because they were "incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement". As they would not count as "bills of lading", they could not be the means upon which rights of action could be transferred under the Act. HSBC would not have qualified as a holder so much so that when HSBC sent the documents to the plaintiff, it was not passing on anything like a "bill of lading" as defined by s 1(2)(a).

Section 1(1) of the Act provides that it applies to, *inter alia*, "any bill of lading". Section 1(2)(*a*) states:

> References in this Act to a bill of lading do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement.

Section 1(2)(*a*) is really a definition section, setting out the scope of the Act. What it says is that the Act does not apply to a B/L which is not transferable either by indorsement or, in the case of a bearer bill, by delivery without indorsement. As far as the four B/Ls in the case in question were concerned, being "to order" bills, they were clearly transferable. Thus, they would be governed by the Act. The nature of a B/L was determined as at the date of issue. Its nature did not change by subsequent events. Accordingly, the Court of Appeal was of the opinion that s 1(2)(*a*) could have no relevance to the very issue of this appeal. The four B/Ls stated that the goods were deliverable to "the order of UCO". Once the named consignee, UCO Bank, came into possession of the B/Ls, the consignee would, pursuant to s 5(2)(*a*) of the Act become the lawful holder of the B/Ls even without any indorsement by the shipper. Charles Debattista, *The Sale of Goods Carried by Sea* (Butterworths, 2nd Ed, 1998) ("Debattista") states at para 4-29 that in such a situation no indorsement by the shipper is required:

> [No] initial endorsement by the shipper is required to kick-start the bill of lading into life. Section 5(2)(a) … includes within the definition of a 'lawful holder of a bill of lading': 'a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates.' There is here no mention of endorsement, solely of 'possession of the bill' and hence of delivery of the bill. Thus, while the intermediate buyer would need to endorse the bill itself if it wished to sell the goods on in transit, it could not reject the bill of lading against its own seller, the shipper, on the basis that the latter had itself not endorsed the bill.

The vessel owner sought to rely on the last sentence of the above passage from Debattista to suggest that the author had confined the application of s 5(2)(*a*) to a situation where the shipper and transferee were immediate parties. While the Court of Appeal was in agreement with the statement in that sentence, the Court of Appeal was unable to agree with the vessel owner's submission that it meant that for a case to fall within s 5(2)(*a*) the shipper must transfer the B/L directly to the named consignee. In the Court of Appeal's opinion, all it seemed to say was that the shipper need not indorse the bill to the named consignee for the rights of suit to be transferred to the consignee and that the consignee would not be entitled to reject the bill on the ground that there was no indorsement as no indorsement was needed. The wording of s 5(2)(*a*) is clear. A person who is the consignee of a B/L and is in possession of the bill shall thereby become the lawful holder of the bill, so long as he comes into possession of the bill in good faith. The concept of "good faith" was taken in *The Aegean Sea* ([19] *supra* at 60) to connote honest conduct.

The vessel owner placed much importance on the word "becomes" in s 2(1). It argued that because of that word, it was "necessary to consider in what way that party 'becomes' a lawful holder, *ie*, how and from whom he acquires the bill of

lading". In the Court of Appeal's opinion, the vessel owner had read too much into a simple word like "becomes" which clearly meant "to come to be". In this regard one must bear in mind the object behind s 2(1) of the Act which is to transfer the right to sue of the shipper (who is the original party to the contract of carriage as reflected in the B/L) to those categories of persons set out therein. It is to promote international trade and to facilitate the enforcement of rights by third parties against the carrier. The first person who will be holding the B/L will undoubtedly be the shipper or his agent. When someone else should come into possession of the B/L through a transaction or an act of the shipper, that person will become the holder. The Court of Appeal could not see how it could reasonably be suggested to also include "the way" in which that person obtained the B/L. In the context, the word "becomes" related to a state of circumstances. The named consignee could come into possession of a B/L either directly from the shipper or in any other way. It was obviously to preclude the case where possession was obtained unlawfully, or by other improper means, that s 5(2) prescribes that the person (be he the named consignee or an indorsee) must become the holder in "good faith".

Reverting to the case in question, upon receipt of the four B/Ls from HSBC, the UCO Bank had become the lawful holder of the four bills as it had satisfied all the requirements specified in s 5(2)(*a*), namely:

(a) it was in possession of the bills;
(b) it was the named consignee on the bills; and
(c) it was in possession of the bills in good faith.

Nowhere in the Act is it prescribed that the manner in which a named consignee received the bill is relevant.

The Court of Appeal would hasten to add that the reference in s 2(1)(*a*) to "lawful" could not mean more than what is prescribed in s 5(2), *ie*, that a person becomes a lawful holder if he has become the holder in good faith. There was no doubt that UCO Bank had become the holder of the four B/Ls in good faith, pursuant to the financial arrangements it had made with SOM. The shippers had negotiated the B/Ls with HSBC pursuant to the LCs. HSBC presented the B/Ls and other documents to draw on the LCs. As between the shippers and HSBC, as there was no indorsement of the B/Ls to HSBC, which would give the latter the right to receive the goods and, in turn, the rights of suit, it would be fair to infer that the parties did not intend to transfer the rights to receive the goods to HSBC. In the circumstances, what was clearly intended was that HSBC would tender the B/Ls and other relevant documents to UCO Bank, the issuing bank and the named consignee on the B/Ls, to draw on the LCs. UCO Bank was obliged to pay and would have had no business to ask if HSBC was presenting the documents as a negotiating bank or a collecting bank.

The judge had quite rightly pointed out ([13] *supra* at [14]) that "there is nothing in principle against the shippers indorsing and delivering the original bills to HSBC even though they were initially made out to the order of [UCO]": see *Carver on Bills of Lading* (Sweet & Maxwell, 2001) at para 1-012. That was certainly an option available to the shippers and HSBC if they had wanted to go about their transactions in that way. HSBC could then have further indorsed the B/Ls to UCO Bank. If that route had been taken, UCO Bank would have become the lawful holder pursuant to s 5(2)(*b*). The fact that the shippers and HSBC did not chose that route did not mean that s 5(2)(*a*) could not apply. It simply meant that the shippers did not intend to change the named assignee. The fact that HSBC would have, pursuant to the negotiation of the documents presented by the shippers and the terms of UCP 500, a distinct and separate cause of action against UCO Bank upon presentation of the documents, could in no way mean that UCO Bank had not become a "lawful holder". The independent cause of action which HSBC had against UCO Bank was pursuant to the terms of the LCs. The existence of this right could, in no way, negate the rights which would vest in UCO Bank pursuant to s 5(2)(*a*), read with s 2(1).

In the Court of Appeal's opinion, the court would be doing violence to the plain wording of s 5(2)(*a*) if it should accept the construction contended for by the vessel owner. How the named consignee obtained the B/L was not relevant provided that it was obtained in good faith. Both the LC and the B/L (as defined in the Act) are essential devices to promote international trade. The court should not unnecessarily introduce restrictions which would have the opposite effect.

The Court of Appeal allowed UCO Bank's appeal.

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.