SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Incoterms CIP

On 28/4/2010, the English Court of Appeal issued a Judgment concerning a dispute under a sale of goods contract based on the Incoterms 2000 Carriage Insurance Paid (CIP) in relation to failure to arrange a contract of carriage on usual terms and a valid contract of cargo insurance. (Case No: A3/2009/1654)

The facts

In October 2006, the buyers, a Croatian geophysical company, agreed to buy on CIP terms Tripoli three four-wheel drive Land Rover ambulances from the sellers, a British company which specialised in the provision of such vehicles. The purchase price was £74,952 inclusive of various fees. The CIP terms were those set out in INCOTERMS 2000. The sellers agreed with a freight forwarders based in Surrey to arrange the shipment to Tripoli and the insurance. The agreement between the freight forwarders and the sellers was on British International Freight Association Standard Trading Conditions 2005 (BIFA terms). The buyers requested that the cargo shipped should be "RO-RO", roll on, roll off. The freight forwarders sought to arrange the carriage with Brointermed Lines Limited (the carriers) which operated a RO-RO and liner service from northern European ports including Harwich to Libya; the freight forwarders had not used the carriers before. On 14/11/2006, the carriers sent the freight forwarders a booking confirmation confirming that the ambulances would be shipped on the *Green Island* from Harwich with an estimated sailing time of 30 November. The booking confirmation stated:

> "ALL VEHICLES WILL BE SHIPPED WITH "ON DECK OPTION" this will be remarked on your original bills of lading."

The three ambulances were shipped on board the *Green Island* at Harwich for shipment to Tripoli on 29/11/2006. The *Green Island* was a Portugese general cargo ship of some 7,617GRT built in 1996. Although unsigned copies of the Bills of Lading were sent to the freight forwarders on 29/11/2006, signed copies were not sent until 4/12/2006. Clause 7 of the bill of lading contained the liberty clause:

> "7. Unitization, Optional Stowage
> (1) Goods may be stowed by the Carrier in containers.
> (2) Goods, whether or not packed in containers, may be carried on deck or under deck without notice to the Merchant. All such goods (other than live animals) whether carried on deck or under deck, shall participate in general average and shall be deemed to be within the definition of goods for the purpose of the Hague Rules and shall be carried subject to these rules.
> Notwithstanding the foregoing in the case of goods which are stated on the face hereof as being carried on deck and which are so carried, the Hague Rules shall not apply and the Carrier shall be under no liability whatsoever for loss, damage or delay, howsoever arising."

The bill of lading was claused on its face with a description of the vehicles as "unpacked (new) vehicles", other details of the vehicles, two short non-responsibility clauses for loss of moveable parts and matters such as scratches and the following:

> "Cargo stored on open area on the quay and, therefore, subject to adverse weather conditions before loading."

As the shipment was from a UK port, the Hague-Visby Rules as set out in the Carriage of Goods by Sea Act 1971 were compulsorily applicable. On receipt of the original bills of lading on 4/12/2006, the freight forwarders declared the shipment under their open cover with the Royal and Sun Alliance (the insurers); as the cover applied to all shipments within its scope, late declarations were permitted. The freight forwarders issued a certificate of marine insurance under the open cover on 4/12/2006, backdating it to 29/11/2006 as that was when cover incepted. The certificate stated that the ambulances were insured on the terms of the Institute Cargo Clauses (A), but with the following additional condition:

> "Warranted shipped under deck."

Cover on the terms of the all risks (A) clauses is all risks cover and did cover loss by being washed overboard; cover on the terms of clauses (C) is much more restricted and does not cover goods being washed overboard. The freight forwarders gave the warranty as they considered that the ambulances had been shipped under deck. As the bills of lading had not been claused on their face to show shipment on deck, they considered that they had been shipped under deck. The ambulances were, in fact, shipped on deck, apparently lashed to containers; they were unpacked and unprotected. Two of the three were washed overboard in the course of the voyage in the Bay of Biscay. The loss was discovered by the buyers on the arrival of the vessel in Tripoli. As the buyers needed ambulances for their business and they were unavailable at Tripoli, ambulances were hired.

The claims made by the buyers

The buyers initially sought to claim under the insurance for the insured value of the two ambulances (£57,890), but the insurers declined to pay as there had been a breach of the warranty of under deck shipment. The buyers then claimed against the carriers under the bill of lading in Libya. This claim was settled by the carriers paying £50,000 but legal costs of some £25,400 were incurred by the buyers in obtaining this settlement. The payment by the carriers was many times the package limitation under the Hague-Visby Rules. The buyers then brought proceedings against the sellers under their CIP contract in the London Mercantile Court in April 2008 claiming the insured value of the two ambulances (£57,890) and the hiring of replacement vehicles (£91,867.23) but giving credit for the net recovery from the carriers. They claimed that the sellers had failed to procure effective insurance. The sellers joined the freight forwarders as Part 20 defendants.

After a trial of some two days, HH Judge Mackie QC found on 10/7/2009 in favour of the buyers in their claim against the sellers and in favour of the sellers in their claim under Part 20 against the freight forwarders. He concluded that:

i) The contract of carriage would not be on usual terms if it permitted on deck shipment. The contract of carriage did permit on deck shipment, as the terms of the booking confirmation did not preclude the right of the carrier to carry on deck. The sellers were therefore in breach of their obligation under the contract of sale, but the freight forwarders had been negligent in procuring the contract of carriage on these terms.
ii) The freight forwarders should not have given the under deck warranty in the contract of insurance merely on the basis that the bills of lading were not claused; they should have checked the position before giving the warranty. They were therefore in breach of the duty of care they owed to the sellers.
iii) The sellers were liable to the buyers as they had failed to provide a valid contract of insurance and that this breach had caused the loss.

He awarded damages calculated on the basis of the insured value of the two vehicles lost, the cost of freight and insurance for the replacements and hire for part of the period claimed with credit being ordered against that sum for the amount recovered from the carriers less part of the legal costs. This amounted in total to about £37,000. The sellers and the freight forwarders appealed.

The contract between the buyers and the sellers

The contract between the buyer and the seller was set out on the seller's invoices and subject to INCOTERMS 2000. The relevant part of the INCOTERMS provided as follows:

> "A3 Contracts of carriage and insurance
> a) Contract of carriage
> The seller must contract on usual terms at his own expense for the carriage of the goods to the agreed point at the named place of destination by a usual route and in a customary manner. If a point is not agreed or is not determined by practice, the seller may select the point at the named place of destination which best suits his purpose
> b) Contract of insurance
> The seller must obtain at his own expense cargo insurance as agreed in the contract, such that the buyer, or any other person having an insurable interest in the goods, shall be entitled to claim directly from the insurer and provide the buyer with the insurance policy or other evidence of insurance cover.
> The insurance shall be contracted with the underwriters or an insurance company of good repute and, failing express agreement to the contrary, be in accordance with minimum cover of the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses …"

The meaning of "minimum cover" was explained:

> "Since the seller takes out insurance for the benefit of the buyer, he would not know the buyer's precise requirements. Under the Institute Cargo Clauses drafted by the Institute of London Underwriters, insurance is

> available in "minimum cover" under Clause C, "medium cover" under Clause B and "most extended cover" under Clause A. …Minimum cover is however unsuitable for sale of manufactured goods where the risk of theft, pilferage or improper handling or custody of the goods would require more than the cover available under Clause C. Since CIP, as distinguished from CIF, would normally not be used for the sale of commodities, it would have been feasible to adopt the most extended cover under CIP rather than the minimum cover under CIF. But to vary the seller's insurance obligation under CIF and CIP would lead to confusion and both terms therefore limit the seller's insurance obligation to the minimum cover. It is particularly important for the CIP-buyer to observe this: should additional cover be required, he should agree with the seller that the latter could take out additional insurance or, alternatively, arrange for extended insurance cover himself

It was therefore the obligation of the sellers to procure a contract of affreightment on terms usual in the trade for the carriage of the ambulances. The sellers were under an obligation to obtain a contract of insurance on the Institute Cargo Clauses (C). These were absolute obligations.

The contract between the sellers and the freight forwarders

The obligation of the freight forwarders to the sellers was, subject to BIFA terms, to use all proper care in arranging the contract of carriage and insurance in accordance with the requirements of the CIP terms; they were under no obligation to supervise the carriage or the performance of the insurance contract.

Was a contract of carriage obtained on usual terms?

Although it was common ground that the term in the booking confirmation expressly permitted on deck shipment and therefore confirmed the rights under clause 7(2) of the bill of lading, the argument before the court was directed to whether it only permitted on deck shipment if the bills of lading were so claused on their face. The Court of Appeal had to consider whether the agreement contained in the booking note operated to prevent the carrier from exercising the liberty under the first part of clause 7(2) to carry on deck. Although no doubt the booking note could have been drafted in clearer terms, in the Court of Appeal's judgement anyone in the trade reading the booking confirmation would have understood it to mean that if the goods were to be placed on deck, the face of the bill of lading would be so claused. The Court of Appeal therefore concluded that there was a prior antecedent agreement to the effect that if the vehicles were to be carried on deck, that would be noted on the face of the bill of lading and to that extent, therefore, the liberty to ship on deck without notice to the shipper was circumscribed. Under the contract of affreightment between the carrier and the shipper there was no right to carry on deck. On this first issue, therefore, the Court of Appeal concluded that the appeal of the sellers and the freight forwarders should succeed.

Was a contract of insurance obtained as required by the CIP terms?

On the written terms of INCOTERMS 2000 the insurance cover that the sellers were obliged to provide was cover on the terms of the Institute Cargo clauses (C). They did not cover loss by being washed overboard by perils of the sea. However the insurance in fact provided was insurance on all risks (A) clauses, but subject to the warranty of under deck shipment. As the ambulances were shipped on deck, the warranty should not have been given as the warranty was broken. There was accordingly never any valid insurance in force under which the buyers could have claimed from the insurers. Even though this put the sellers in breach of their obligation to provide a valid insurance, the sellers and the freight forwarders contended that this caused the buyers no loss, as the buyers were only entitled to cover on the terms of the (C) clauses which would not have covered the loss.

Were the freight forwarders in breach of their duty of care to the sellers?

It was clear that the freight forwarders acting with due care and a seller discharging its obligation under INCOTERMS 2000 should not have given that warranty, unless the contract of carriage provided clearly for under deck shipment or prohibited on deck shipment. The Court of Appeal considered that the contract prohibited carriage on deck. But should the freight forwarders also have checked with the carrier before giving the warranty? It is clear that the giving of a warranty involves the maker of that warranty guaranteeing to the insurance company that the state of affairs contained in the warranty is in fact true. If the statement is not true, even if it is not causative of the loss, the law is clear that the insurer is discharged from liability as from the date of the breach (see s. 33 of the Marine Insurance Act 1906).

The Court of Appeal are of the views that the freight forwarders' duty was to procure a contract of carriage in accordance with the instructions of the client and that the freight forwarders were not in any way responsible for the supervision of the carriers' performance of the contract of carriage or for the carriers' failure to perform it. Nonetheless, the freight forwarders were negligent in giving the warranty. It seemed to the Court of Appeal clear that it was incumbent on the freight forwarders, who were in no different a position to insurance brokers, to check that the facts they were warranting were true were in fact true. The Court of Appeal concluded that where the freight forwarders had not dealt with the carriers before, they simply could not rely upon the fact that they had arranged a contract with the carriers that, if performed in accordance with its terms, would have resulted in the matters warranted being true being true. The consequences of a breach of warranty were so severe, the warranty should not have been given without due care being taken to check that the cargo was under deck. The freight forwarders should not have given a warranty in relation to a fact without taking reasonable steps to check that that fact was accurate.

Did the sellers' breach of their obligation in respect of the provision of insurance cause any loss?

However, even though the freight forwarders were negligent in giving the warranty, and the sellers in breach by not providing a valid insurance (as it contained the warranty which had been immediately broken), they both contended that there was no loss. Under INCOTERMS the sellers were only obliged to provide cover on Institute Clauses (C) which would not have covered the loss that in fact occurred. Thus, even though an invalid insurance had been provided, a valid insurance would not have covered the loss and so the breach had caused no loss. The sellers were not responsible for the carriers' breach of the contract of carriage in stowing the ambulances on deck.

The London Mercantile Court, however found that the sellers were in breach of their obligation to provide insurance because they failed to obtain a contract of insurance that matched the contract of carriage. The Court of Appeal did not consider that the obligation of the seller, where there was an express contractual stipulation as to the terms of the insurance to be obtained, was to obtain insurance that in fact matched the carriage actually performed. The obligation of the sellers in this case was the obligation set out in the INCOTERMS CIP terms. There was therefore an express obligation which overrode any implied obligation. The Court of Appeal therefore concluded that the appeal should be allowed on the second issue.

Conclusion

The Court of Appeal was unable to uphold the London Mercantile Court's findings on the issues in relation to the bills of lading and the matching of insurance and the contract of affreightment. Although in the Court of Appeal's view the warranty should not have been given in the contract of insurance and the freight forwarders were negligent, this caused no loss, as the Court of Appeal was unable to uphold the London Mercantile Court's decision that the sellers had agreed to provide cover on all risks (A) clauses. The Court of Appeal would allow the appeals of the sellers and the freight forwarders.

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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The unprecedented injections by worldwide governments saw both seafreight and airfreight cargo rush in the last quarter created temporary space shortage in 2009. The robust trend did not continue well as worldwide governments were not in unison in their fiscal policies. The "visible" hand still haunted the best part of the 2010 economy. The worldwide government interference in 2011, such as the U.S. QEII, is likely to impact the worldwide movement of freight even more.

As uncertain as it was the economy in 2010, we believe the number of E&O, uncollected cargo and completion of carriage claims will continue the major concerns for transport operators in 2011. If you need a cost effective professional solution 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.