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To: Transport Industry Operators

**Lien**

The Hong Kong High Court issued a Judgment on 9/2/2010 holding a carrier entitled to rely on its bill of lading clause to lien the cargoes for the damages, costs, expenses, charges resulting from the shipper's overloading the cargoes in the containers. [HCA 1579/2008]

This was a claim by the shipper under a bill of lading for damages in respect of the carriage of a number of reefer containers from Hong Kong to Haiphong, Vietnam. The shipper complained that the carrier refused to release the cargo upon arrival in Haiphong and one of the containers which was not shipped on the vessel in Hong Kong, but instead did so only against the payment of or security for certain charges and extra fees, which the shipper claimed should not have been raised.

On about 20/7/2008, the shipper entered into a contract with a Vietnamese company to ship a quantity of frozen meat from Hong Kong to Vietnam. The shipper engaged a freight forwarder as its shipping agent in respect of the frozen meat. Between 25 and 30/7/2008, the forwarder, acting on behalf of the shipper, made bookings with SYMS HK for the shipment of seven reefer containers from Hong Kong to Vietnam. Each of these bookings was effected by a document headed "Shipper Order". SYMS HK then issued booking orders to confirm those bookings. The forwarder tendered the booking orders and, on about 1/8/2008, collected seven empty reefer containers from a terminal in Tsing Yi operated by CMCS into which the frozen meat was loaded for carriage. After loading, the reefer containers were sealed by the shipper and returned to the terminal, whereupon dock receipts were issued to the forwarder. Upon tender of the dock receipt and the submission of further information and payment of freight, a bill of lading was issued to the shipper in respect of the cargo of frozen meat. The further information in question included a description of the cargo and its weight, which information was provided by the forwarder. The bill of lading that was issued was numbered No. SYHJVHPV2830005 and dated 1/8/2008. The carrying vessel named in the bill of lading was the M/V PIRA BHUM. During the process of loading the cargo on board the vessel on 2/8/2008 at Tsing Yi, one of the reefer containers, namely container No. GESU 9211539, was being moved by a container lifting truck crane. In the course of being so moved, the lifting truck toppled over forwards. As a result of this both the lifting truck and the container sustained damage. An inspection of the damage and a survey was conducted on 2/8/2008. Since the container was damaged, the cargo contained in it had to be re-loaded into another reefer container. This new reefer container remained at the cargo terminal at Tsing Yi to await further instructions from the shipper. It was SYMS HK's case that the cause of the accident was that the container was overweight. The other six reefer containers, having been duly loaded, were carried by the vessel to Haiphong, Vietnam, under a replacement bill of lading dated 2/8/2008 and also numbered No. SYHJVHPV2830005. Upon arrival of the vessel at Haiphong, these six containers were weighed by the carrier's local agent. It was SYMS HK's case that they were found to be overweight when weighed. Accordingly, the six containers were not released pending the payment of further charges in respect of their carriage.

The shipper commenced legal proceedings on 25/8/2008. By an inter partes summons dated 27/8/2008, the shipper applied for a mandatory injunction requiring SYMS HK to release the cargo held in Haiphong. On about 3/9/2008, upon the agreement of the consignee to pay an additional sum of US\$34,050, the six reefer containers situated at Haiphong were released. On about 4/9/2008, upon the shipper's agreement to pay HK\$63,749 as security for fees and expenses incurred in respect of the handling of the damaged container, that damaged container was released to the shipper in Hong Kong. The shipper claimed that SYMS HK received the cargo of frozen meat as contractual carrier under the bill of lading and therefore as bailee of the cargo for reward. The shipper claimed that SYMS HK acted in breach of its contractual obligations and in breach of its duties as bailee for reward in refusing (until 4/9/2008) to release the six containers shipped to Haiphong. It also claimed that SYMS HK acted in breach of contract and in breach of its duties as bailee for reward in refusing to release the goods in the damaged container. The shipper claimed to recover the sums it and its consignee were required to pay in order to secure the release of the containers in Haiphong and the damaged container in Hong Kong.

For its part, SYMS HK denied that it was the contractual carrier under the bill of lading. Furthermore, SYMS HK claimed that the cargo in the damaged reefer container weighed 36,180 kgs, which was in excess of the permissible limit. It claimed that the carrier was entitled, pursuant to clause 23 of the bill of lading, to exercise a lien on the cargo in the damaged container in respect of the damage caused and other expenses and costs incurred. It was also SYMS HK's case that the charges levied in Haiphong in respect of the six containers discharged from the vessel there were proper overweight surcharges and scale fees. It was the SYMS HK's case that the initial refusal to release the cargo in Vietnam did not amount to a breach of contract or duty as bailee because it was justified under a contractual right of lien pursuant to clause 23 of the bill of lading.

The issues for determination were:-

- (1) Whether SYMS HK was the contractual carrier under the bill of lading or bailee for reward in respect of the cargo?
- (2) Whether, if SYMS HK was the contractual carrier or bailee of the cargo, it was entitled to exercise a lien over the cargo pursuant to clause 23 of the bill of lading?
- (3) Whether SYMS HK was liable to the shipper and, if so, for what damages?

The first issue: was SYMS HK the contractual carrier or bailee for reward?

The shipper accepted that SYMS HK was not named as carrier under the bill of lading. Instead, the shipper accepted that SYMS Shandong was named as the carrier. However, the shipper suggested that SYMS HK's principal, SYMS Shandong, was only identified "at the very last moment when the Bill of Lading was issued". The shipper contended that the previous communications including the shipper orders and booking confirmations were all between the shipper and SYMS HK so that SYMS HK was the proper party to the contract and was therefore in fact the carrier.

In the Judge's judgment, the shipper's case on this issue did not withstand analysis. There could be no doubt that SYMS HK was in fact an agent acting for and on behalf of SYMS Shandong as its principal. SYMS HK had entered into an agency agreement with SYMS Shandong dated as of 1/4/2008, whereunder SYMS Shandong appointed SYMS HK as its general agent for all its owned and/or chartered vessels including any slots or space charter agreement serving various countries in Southeast Asia and all other services involving the port of Hong Kong. It is trite law that when an agent makes a contract with a third party, purporting to act solely on behalf of a disclosed principle, whether identified or unidentified, he is not liable to the third party on that contract. It did not matter that the shipper might have been unaware that SYMS HK was acting as agent for SYMS Shandong. What was relevant was the state of knowledge of the forwarder, as agent for the shipper, since the forwarder was duly authorised to enter into a contract of carriage on behalf of the shipper in respect of the cargo. Prior to the shipper's shipment, the forwarder had dealt with SYMS HK on between 10 and 20 transactions over a period of about two years. The evidence of the previous dealings between the forwarder and SYMS HK included documents relating to a previous shipment on board the vessel MV ALICE, which involved similar documents and procedures. This was not a matter of imputation of an agent's knowledge to its principal. Rather, as Hoffmann LJ (as he then was) pointed out in *El Ajou v. Dollar Land Holdings plc & another* [1994] 2 All ER 685 at 702c-g, the agent's knowledge affected the terms or performance of the contract which he concluded on behalf of his principal. The forwarder's knowledge that SYMS HK was acting as an agent only for SYMS Shandong was the basis for treating the contract as one made between the shipper and SYMS Shandong and not with SYMS HK.

The Judge accepted and found as a matter of fact that, in concluding the contract on behalf of SYMS Shandong, SYMS HK had disclosed to the forwarder, as agent for the shipper, that SYMS HK was acting as agent solely on behalf on its principal, SYMS Shandong. In this regard, the evidence was, in the Judge's opinion, very clear.

First, each of the shipper orders submitted by the forwarder to SYMS HK contained the following express provision: "Carriage of cargo is subject to the terms and conditions of the Carrier's Bill of Lading and the applicable tariff". The reference to the "Carrier" in the shipper orders could be contrasted with the reference in the same document to "the Company": the latter clearly referred to SYMS HK and this, in the Judge's view, at least put the forwarder on notice that the carrier under the bill of lading would be a different party. Secondly, and, in the Judge's opinion, critically on this issue, the bill of lading issued in respect of the shipment clearly defined and identified SYMS Shandong as the carrier. This fact was common ground. Thirdly, the invoice issued by SYMS HK to the forwarder dated 2/8/2008 in respect of the shipment expressly stated: As agents only for SYMS Shandong. Whilst that document post-dated the conclusion of the contract of carriage, the forwarder had booked shipping space through SYMS HK previously on board the M/V ALICE and had received an invoice dated 14/6/2008 containing the same statement.

Looking at the evidence as a whole, it was plain, in the Judge's opinion, that the contract was made by SYMS HK as agent only for SYMS Shandong. The Judge concluded on the first issue that SYMS HK was not the contractual carrier under the bill of lading or bailee for reward in respect of the cargo.

*The second issue: if SYMS HK was the carrier of the goods, was it entitled to exercise a lien over them?*

The Judge's conclusion on the first issue was sufficient to dispose of the case in favour of SYMS HK. However, since the second issue was argued, the Judge proposed also to state his conclusion on it.

Under the terms of the bill of lading, the shipper made certain warranties regarding the goods to be carried and accepted responsibility for the particulars relating to the goods as set out on the front of the bill of lading and also agreed to indemnify the carrier against loss, damage or expense arising or resulting from inaccuracies in those particulars. The relevant clauses are set out below:-

"3) WARRANTIES.

The Merchant represents, warrants and agrees that:

- (a) The Goods and any Container loaded by the Merchant are packed and secured in such a manner as to be handled in the ordinary course of transportation without damage to the Goods, Vessel, Containers or other property or persons ..."

"13) MERCHANT'S RESPONSIBILITY AND INDEMNIFICATION.

...

2. The Merchant further warrants to the Carrier that the particulars relating to the Goods as set out on the front of this Bill of Lading have been checked by the Merchant on receipt of this Bill of Lading and that such particulars and any other particulars furnished by or on behalf of the Merchant and are adequate, accurate and correct ...
3. The Merchant shall indemnify the Carrier against all loss, damage and expenses arising or resulting from inaccuracies in or inadequacy of such particulars ..."

"15) MERCHANT-PACKED CONTAINERS.

1. If a Container has not been filled, packed, stuffed or loaded by the Carrier, the Carrier shall not be liable for loss of or damage to the contents and the Merchant shall indemnify the Carrier against any loss, damage, liability or expense incurred by the Carrier, if such loss, damage, liability or expense has been caused by:
  - (a) the manner in which the Container has been filled, packed, stuffed or loaded; ..."

The containers were loaded by or on behalf of the shipper. Each of the shipper orders submitted by the forwarder on behalf of the shipper contained a notation stating: "SHIPPER CONFIRM THE RF WOULD NOT OVER 34MT AND THEY PROVIDE THE L/G. PLEASE ACCEPT THT SHIPPER DOES NOT PROVIDE MEASURED RECEIPT." Furthermore, in an e-mail from the forwarder to SYMS HK dated 1/8/2008, containing shipping instructions, the instructions stated the weight of each of the seven containers to be 28,000 kgs. This weight was used to calculate the gross weight of the seven containers as stated in the original bill of lading relating to the seven containers, namely 196,000 kgs.

The evidence adduced by SYMS HK included a survey report compiled by Hench dated 4/8/2008 on behalf of SYMS HK. This evidence was that the damaged container contained a weight of cargo of 36,180 kgs. Hench's survey report expressed the opinion that the cause of the shipper's container toppling over when it was being lifted by the lifting truck "could be attributed to the over-weight/over-loaded of cargo inside the container". A survey report dated 5/8/2008 was also prepared by Delta on behalf of CMCS, the operator of the container terminal at Tsing Yi. That report assessed the weight of the damaged container to be 40,910 kgs. Delta also expressed the opinion that the lifting truck toppled over because the container was in excess of the maximum weight limit of the lifting truck. As a result of the toppling over of the lifting truck and the damage to the container, claims and charges were incurred. By a letter from SYMS HK to the forwarder dated 5/8/2008, SYMS HK advised the forwarder that CMCS, the terminal operator, was claiming repairing charges for the lifting truck and various other fees and expenses and that SYMS HK was claiming repairing charges for the damaged container as well as other fees and expenses. The total amount of the claims was HK\$515,966.29. Subsequent to the arrival of the vessel at Haiphong, arrangements were made to weigh the six containers which had been discharged there. Instead of their declared weight of 28,000 kgs each, the six containers were respectively found to weigh from 35,400 kgs to 41,140 kgs. The Carrier was accordingly entitled to charge an overweight fee of US\$3,000 and a scale fee of US\$110 in respect of each of the six containers.

The Judge found that the cause of the accident and the damage to the container and the lifting truck was the fact that the container was overweight.

The relevant clause of the bill of lading governing the carrier's lien provides as follows:-

"23) LIEN.

The Carrier shall have a lien on the Goods and any document relating thereto, which shall survive delivery, for all sums earned or due or payable to the Carrier under this and/or any other contract with the Merchant, or on account of the Goods or carriage, storage or handling of the Goods, including but not limited to, general average contributions, freight, delivery, destination, demurrage, detention, port and/or handling charges, to whomever due and/or for the cost of recovering the same and/or any fines or penalties levied against the Carrier by reason of any acts or omissions for which the Merchant is responsible. Carrier may at its sole discretion exercise its lien at any time and at any place, whether the contractual transportation is completed or not. For the purpose of such lien the Carrier shall have the right to sell the Goods, by public auction or private treaty without notice to the Merchant at any time and at any place at the sole discretion of the Carrier. The Carrier shall be entitled to claim the difference in the event that the sale proceeds fail to cover the full amount due to the Carrier."

The shipper submitted that the words in the above clause "all sums earned or due or payable to the Carrier" should be construed as sums representing remuneration for service and that "on account of the Goods, or carriage, storage or handling of the Goods, ..." should be construed as expenses for managing the goods themselves for the purpose of their carriage. The shipper submitted that fines or penalties were different from damages and that if the parties intended that damages suffered by the carrier due to fault on the part of the shipper were to be covered by the lien, it would have been quite simple to include the words "damages and loss".

The Judge rejected the shipper's argument in this regard. Clause 23 fell to be construed in accordance with its natural and ordinary meaning. In the Judge's judgment, the sums claimed in respect of the damaged container and the damage to the lifting truck, arising as a result of the shipper misstating the weight of the cargo on the bill of lading and submitting containers which exceeded the stipulated weight limit, constituted sums "due or payable to the Carrier under this and/or any other contract with Merchant". Similarly, in the Judge's judgment, the overweight fees and scale fees for the other six containers constituted sums "due or payable to the Carrier under this and/or any other contract with the Merchant" and/or "due or payable to the Merchant ... on account of the Goods or carriage, storage or handling of the Goods". The Judge added, for the sake of completeness, that an argument of the shipper that the carrier should not have detained all the containers in the exercise of the lien, since the value of the goods in total was worth HK\$4 million, which was far in excess of the sums claimed and in respect of which the lien was being exercised. The Judge rejected this argument also. The judge did not see any basis for construing clause 23 as being restricted as to the amount or value of the goods over which the carrier was entitled to exercise a lien.

In the circumstances, if, contrary to the Judge's conclusion on the first issue, the Judge had concluded that SYMS HK was the contractual carrier, the Judge would have held that the initial refusal to release the cargo was justified by the carrier's exercise of a lien over the goods pursuant to clause 23 of the bill of lading.

*The third issue: whether SYMS HK was liable to the shipper and, if so, for what damages*

In the light of the Judge's conclusions on the first two issues, it followed that, in the Judge's judgment, there was no liability on the part of SYMS HK to the shipper as claimed in this action. The question of damages due from SYMS HK to the shipper did not therefore arise.

The Judge therefore dismissed the shipper's claim against SYMS HK. The Judge made an order *nisi* that shipper pay the costs of the action to SYMS HK, to be taxed if not agreed.

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 robust freight industry in 2009 did not sustain well to the last quarter of 2010 as worldwide governments were not in unison in their fiscal policies. 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.