SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Change B/L's consignee

The English High Court issued a Judgment on 26/2/2010 holding that a shipping company could follow the shipper's instructions to change the consignee and the destination in its bill of lading and that the original consignee became having no title to sue. (2010 WL 606031)

This was an application by A.P. MOLLER-MAERSK A/S, a Danish company ("Maersk") for summary judgment against the defendants that there was no real defence to its claim for two declarations. The claim related to the terms of a bill of lading under which a large quantity of tiles was shipped from China to Benin in 30 containers and whether that bill of lading was any longer capable of giving rise to any legal rights. There were three defendants. The first defendant Sonaec Villas appeared not to be a legal entity separate from the second defendant. It was the name of a development in Benin for which the goods in the container were destined. The second defendant Sonaec was the Benin holding company which ran and owned the development. The development was a set of villas to be built by Sonaec for the CEN-SAD Heads of State and Government meeting. The third defendant, Mr Fadoul appeared to be the beneficial owner and controller of Sonaec.

The relevant history was as follows. Yekalon, a Chinese company, sold the tiles to Sonaec. Under the contract of sale payment was to be made by Sonaec partly by a cash payment of 15% in advance and partly by a letter of credit. Delivery was to be FOB in accordance with Incoterms 2000. The goods were booked on board Maersk's liner service in China through High Goal. On 17/1/2008 Maersk issued a bill of lading ("the First Bill"), which was given to High Goal. The shippers named in the bill were B & D Co Ltd p/c ("*pour compte de* ") Vernal & Yekalon. Vernal was a subsidiary or associate company of Sonaec. The port of loading was Sanshan, China and the port of discharge was Cotonou in Benin. The consignee was Sonaec Villas in Cotonou, Benin. The notify party was Vernal P/C Sonaec Villas. Clause 26 of the First Bill provided, omitting terms relating to the carriage of goods to and from a port in the USA, as follows.

> "In all other cases, this bill of lading shall be governed by and construed in accordance with English law and all disputes arising hereunder shall be determined by the English High Court of Justice in London to the exclusion of the courts of another country".

Shortly after the First Bill was issued a dispute arose in China as to who was its lawful holder. Yekalon, who had not been paid, asked High Goal for it. High Goal refused on the basis that they had received instructions from B & D. Yekalon made an application in the Guangzhou Maritime Court against High Goal for delivery up to them of the original Bills of Lading and a declaration that Yekalon were entitled to possession of the same. Following an inter partes hearing the judge held that Yekalon was entitled to the Bills of Lading This decision was confirmed by the same judge by a Decision of Reconsideration dated January 31 2008 in which it was held (*inter alia*) that " *as the owner and the shipper of the cargoes Yekalon is entitled to have the B/L* ".

The Decision of Reconsideration recorded (in translation) the argument of High Goal that:

> "It is alleged by [High Goal] that the cargoes were booked by B & D Company to ship. [High Goal] then booked with Maersk (China) Shipping Co Ltd to ship the cargoes. B & D Company paid the ocean freight in full. There is no relationship between Yekalon and [High Goal], neither is there any relationship between Yekalon and Maersk (China) Shipping Co Ltd, or their agent. [High Goal] shall deliver the B/L to B & D Company."

The operative part of the Decision recorded:

> "According to the prima facie evidence provided by Yekalon, Yekalon is the owner and shipper of the cargoes. The carriers have already issued the B/L, which is under the control and custody of [High Goal]. And [High Goal] also confirmed in their application form that Yekalon is one of the shippers. Yekalon is entitled to have the B/L. It is proper for Yekalon to ask for delivery of the B/L from [High Goal]"

As a result of the order in the Chinese proceedings the First Bill was given up to Yekalon. Some time before 18/2/2008, Maersk was told by Yekalon that it had not been paid under the Contract of Sale. Yekalon then surrendered the three originals of the First Bill to Maersk and, at Yekalon's request, a new Bill of Lading was issued to the order of Yekalon ("the Second Bill"). The destination on the Second Bill remained the same as on the First Bill. Yekalon sought to agree payment with Sonaec. Such payment was not forthcoming and Yekalon sought and found an alternative buyer, Hondugres. On or about 18/2/2008, Yekalon therefore surrendered the Second Bill to Maersk and new Bill of Lading was issued by Maersk which identified Hondugres as the consignee with delivery in Honduras ("the Third Bill "). Maersk proceeded to deliver the cargo to Hondugres in Honduras, in accordance with the terms of the Third Bill.

On or about 27/2/2008, Sonaec commenced proceedings against Maersk Benin SA, Maersk's agent in Benin, and others. On or about 5/3/2008 it commenced proceedings against Maersk itself. In those proceedings Sonaec, relying upon a photocopy of the First Bill contended that it was the owner of the cargo described therein because the sale contract was FOB and the goods had been loaded on the vessel. It stated that is was therefore entitled to delivery of the goods from Maersk. In the judgment of the Court it is described as the consignee of the goods.

Maersk's position was this:

i. Insofar as Sonaec claimed any rights under the First Bill, such claim fell within the exclusive jurisdiction clause in the First Bill; bringing proceedings in Benin was in breach of that exclusive jurisdiction clause; and
ii. Any rights which Sonaec had had under the First Bill had in any event been brought to an end when the First Bill had been cancelled by the rightful shipper, Yekalon, and replaced.

Despite these submissions, on or about 10/3/2008, the Benin Court made an interim ruling requiring Maersk to ship the cargo described in the First Bill to Sonaec in Cotonou and, pending such delivery, imposed a daily fine on Maersk of approximately US$ 4,800 per day. Maersk then appealed the decision on jurisdictional grounds. But the appeal was dismissed, apparently on a technical point of procedure.

At the hearing of enforcement proceedings issued in Benin against the principal of Maersk's Benin agents to enforce the decision (which was still only an interim decision), Maersk disputed the Court's jurisdiction and argued that its actions in delivering the cargo to Honduras was predicated on the Chinese Court's order i.e. that Yekalon was entitled to the First Bill and was the shipper of the goods. Apparently the lawyer for Sonaec declared himself to be professionally embarrassed as he had not previously heard of the Chinese court's order. He withdrew from the case and requested that the Judge make no order. He requested that the Benin court withdraw the application for enforcement of the fine. However, since then Sonaec has renewed its application before the Benin Court.

The first declaration which Maersk sought was a declaration that all disputes arising under the First Bill were to be determined by the English High Court of Justice in London (to the exclusion of the jurisdiction of the courts in any other country) in accordance with clause 26 of the First Bill of Lading. It was quite clear that that was the position in English law under the First Bill. The language of clause 26 provided in unequivocal terms for English law and exclusive English jurisdiction (unless the carriage was to be to or from a port in the USA which this carriage was not).

It was necessary to refer to the provisions of the Carriage of Goods by Sea Act 1992 . That provides, so far as relevant:

(1) This Act applies to the following documents, that is to say–
(a) any bill of lading;
(b) any sea waybill; and
(c) …
(2) References in this Act to a bill of lading–
(a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but
(b) …
(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but–
(a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and
(b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.
2 Rights under shipping documents
(1) Subject to the following provisions of this section, **a person who becomes** –

(a) the lawful holder of a bill of lading;
(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or
(c) …
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.
(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives–
(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or
(b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;
but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill…

The First Bill was not marked to order but did contain or evidence a contract of carriage and identified a person to whom delivery of the goods was to be made i.e. the named consignee, which the Judge took to be the same as Sonaec (not least because Sonaec was the claimant in Benin). As a result, if Sonaec was not an original party to the contract of carriage, sections 1.1 (2) (a) and 1 (3) are applicable so that, for the purposes of the Act, the First Bill was to be treated as a sea waybill. Section 2 (1) provides that the Sonaec had "*transferred to and vested in [it] all rights of suit under the contract of carriage as if [it] had been a party to that contract* ". Accordingly at some stage Sonaec had vested in it all rights of suit under the contract of carriage. Those rights were rights which were exclusively to be adjudicated upon by the English High Court. Accordingly, if Sonaec was not an original party, it became a party to the First Bill, including clause 26 which provided that disputes under it should be determined in England.

The Judge decided that, in English law, by which the First Bill was expressly governed, the First Bill was subject to the exclusive jurisdiction of the High Court in England & Wales and any claim under it must be brought here.

The second declaration sought related to the question whether the defendants had any title to sue in any event under the First Bill. Maersk contended that they did not.

The First Bill was a "straight" bill of lading in that it contained or evidenced a contract of carriage for delivery to a named consignee and was not marked "to order". For the purposes of the 1992 Act, it was, thus a "*sea waybil*l". Under section 2(1) (b) of the Act rights under a sea waybill and the contract of carriage contained in or evidenced thereby are '*transferred*' to the named consignee as soon as the bill is signed. But a shipper who is and remains party to the contract of carriage does not lose his right viz-a-viz the carrier to divert the goods, as he may wish to do if he is not paid for them. This is made clear by Carver on Bills of Lading, 2nd Ed, at paragraphs 8-013 and 8-014:

"**8-013: Rights of original shipper** . Section 2(1) refers to rights of suit being "transferred" to the person to whom delivery is to be made under a sea waybill. If full force were given to the word "transferred", then A (the shipper) would lose his rights under the contract of carriage when C (the consignee) acquired such rights; and since in our example the contract contained in or evidenced by the sea waybill from its inception provided for delivery to C, it might seem at first sight to follow that A lost his rights under the contract as soon as it was made. Quite apart from the logical difficulty of such a concept, the reasoning would also give rise to the practically undesirable consequence of depriving A of the rights which a shipper has at common law of redirecting the goods; and we have seen that the Act is intended to preserve and does preserve this right. It does so by providing in s.2(5) that the operation of s.2(1) "shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill…

8-014: Change in consignee . Where goods are shipped by A in B's ship under a sea waybill naming C as consignee, A may exercise his power to redirect the goods by substituting D for C as consignee. Where A does this, C ceases to be, and D becomes, "the person to whom delivery… is to be made by the carrier" so that rights under the contract of carriage are vested in D by virtue of s.2(1) and any rights which were previously vested in C become extinct under s.2(5)…".

Maersk submitted that, logically, if A, the shipper, had the right to redirect the goods by changing the terms of the original sea waybill so as to substitute a different named consignee, he must also have the right to agree with B, the counterparty to the contract of carriage, to terminate that contract and substitute a new contract of carriage (by way of a new bill of lading) with a new named consignee. This was precisely what happened in the case in question when the First Bill of Lading was cancelled by Yekalon and Maersk and replaced with the

Second and later the Third Bill of Lading.

Maersk relied on the summary of the law contained in chapter 3 (written by Professor Charles Debattista), page 101 of Southampton on Shipping Law (2008), published by the Institute of Maritime Law, where he says:

> "It is clear that the main advantage of sea waybills and straight bills is that rights of suit against C [Carrier] can travel from S [Shipper] to B [Buyer/Consignee] without physical transfer of the sea waybill of the straight bill of lading by S to B. There are, however, three possible consequences of the use of such documents which need to be weighed up against this advantage. First, because B's rights of suit against C depend exclusively on its being named as consignee on the document, those rights of suit vanish as soon as B stops being named as consignee – and S can, so far as concerns its contracts of carriage with C, name another person as consignee at any time until the goods are discharged: B's rights of suit against C are consequently precarious in that S can deprive B of such rights through the simple expedient of giving alternative delivery instructions to C…"

Thus, insofar as any of the defendants ever acquired any rights under the First Bill by virtue of the operation of section 2(1) of the 1992 Act, any such rights were lost when that First Bill was cancelled and replaced at some point prior to 18/2/2008.

The Judge accepted the submissions which Maersk made. In particular, if the shipper was entitled to direct delivery to a different consignee, he could direct delivery to himself. There could, therefore, be no reason why he could not agree with the carrier to replace the First Bill with another one. The Chinese court refused to order delivery up of the First Bill to B & D but ordered High Goal to hand over the complete set of papers concerning the First Bill and the containers listed in it to Yekalon, on the footing that Yekalon was the shipper of the containers and entitled to the First Bill. The First Bill was not a mere piece of paper. It was or represented the contract of carriage with Maersk. It did so by order of the Chinese court. The fact that it was compelled to do so did not alter the fact that the surrender took place. In those circumstances Yekalon became the party entitled to the rights of shipper under the Bill (those rights being subject to clause 26). Those rights included a right to order the goods to be delivered otherwise than to the named consignee and to agree to the issue of a substitute Bill, as in the event occurred. The order of the Chinese court made all the difference. Accordingly Maersk was, in the Judge's judgment, entitled to the second declaration, namely that any rights which any of the defendants might have had under the First Bill were brought to an end prior to 18/2/2008 when the First Bill was cancelled and replaced with the Second, and later the Third Bill of Lading. There was no real defence to Maersk's claim to such a declaration nor any compelling reason why the Judge should not grant it.

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.