SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

# COGSA package limitation

The Hong Kong High Court issued a Judgment on 7/6/2011 explaining the concept of the package limitation of the United States Carriage of Goods by Sea Act. [HCAJ 181/2008]

This was the hearing of preliminary questions of law. The amount at stake in this case being relatively small, it was hoped that the answers to these questions would lead to the speedy resolution of the parties' dispute.

The forwarders received the cargo interests' road-working machinery for carriage from Baltimore (USA) to Valencia (Spain). The machinery was damaged when it was being hauled from one dock to another in the course of trans-shipment in Antwerp. There was no dispute that the United States Carriage of Goods by Sea Act (COGSA) applied.

The machinery was shipped "as is". It was free-standing, neither having been enclosed in some larger case nor placed on top of some form of pallet. The main question was whether the machinery itself constituted a "package" within the meaning of the "per package" limitation in COGSA s.13 and cl.28 of the relevant Bill of Lading.

In the event that the machinery was not "packaged," COGSA s.13 stipulates a limit "as per customary freight unit". The subsidiary question was whether, freight having been charged per cubic meter of the machinery, the "customary freight unit" in this case was the cubic meter (as suggested by the cargo interests). The alternative (as suggested by the forwarders) was that the "customary freight unit" was the single unit of the machinery.

The cargo interests claimed damages of about US$53,000. If the machinery was not packaged and if the "customary freight unit" was the cubic meter, the limit imposed by COGSA s.13 would be well above their claim. On the other hand, if the machinery constituted a single package or freight unit, the COGSA limit would be US$500.

<u>Main question: Package?</u>

The forwarders accepted that the machinery was not externally packed or crated in any way. They argued that the machinery was a package, because in the course of shipment it was "folded up for transport".

In support of their case, the forwarders relied on *Fireman's Fund Ins Co. & Tall Pony Productions Inc v. Tropical Shipping and Constr Co* (2001) 254 F 3d 987 (11th Circuit). There the Court held that a mobile stage which was folded up when transported constituted a package within the terms of COGSA. In that case, the stage could be cleverly folded down into a shape which apparently enclosed its machinery. That enclosed space could then be hauled by a trailer.

In the Judge's view, *Fireman's Fund* was clearly distinguishable from the present circumstances.

At the time of the accident, the engine of the machinery here was turned on. That was necessary in order to release its front hydraulically operated stability legs. Unfortunately, the same hydraulic system

operated the machinery's grizzly assembly. The release of the stability legs also caused the grizzly grid of the machinery to extend upwards. This situation went unnoticed, so that the grizzly hit the tunnel ceiling in the course of moving from dock to dock.

In the ordinary course of event, the grizzly ought to have been transported in a retracted (as opposed to extended) position. But that hardly implied that the entire machinery then became some sort of self-enclosed package like the mobile stage in *Fireman's Fund*. All the retraction of the grizzly meant was that the grizzly was down and the machinery could be safely moved about with minimum risk of hitting some low-lying structure on the road.

It seemed to the Judge that, as submitted by the cargo interests, the more apposite case was *Tamini v. Salen Dry Cargo* (1989) 866 F 2d 741 (5th Circuit). In that case, a portable rotary drilling rig was somewhat covered by external sheathing. Nonetheless, the Court (both below and on review) did not think that the rig was a package. This was despite the rig having been described as a "package" in the Bill of Lading. See *Tamini* at 743.

The Bill of Lading in the case in question also described the machinery as constituting "1 package" or "1 piece". But this could not be conclusive. The meaning of "package" in COGSA is a matter of law. The Bill of Lading may or may not have used the word "package" in the same sense that the word was intended to be used in COGSA. The Judge was consequently unable to draw any conclusion from the description of the machinery as a "package" on the face of the Bill of Lading.

The Judge would answer the main question: "No, the machinery was not packaged and did not constitute a "package" within COGSA s.13."

Subsidiary question: Customary freight unit?

On this, it was hard to see how the machinery, a unique piece of equipment, could constitute a "customary" freight unit.

In the Judge's view, freight having been charged "per cubic meter," the applicable customary freight unit must be the cubic meter and at the time of contracting the parties must have regarded it as such. The Judge would answer the subsidiary question accordingly.

Conclusion

The cargo interests' claim was well within the limit stipulated by COGSA.

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.