

To: Transport Industry Operators

Refusal to release cargoes w/o B/L

The Hong Kong District Court issued a Judgment on 8/2/2011 holding a Hong Kong forwarder liable for its refusing to release the cargoes to a consignee without production of the original straight Bill of Lading. [DCCJ 3467/2009]

A straight Bill of Lading ("**Bill**") was issued by World Road on 12/10/2008 for 28 cartons of computer display cards ("**Goods**") for shipment from Korea to Hong Kong. The Bill specified that application should be made to the Hong Kong forwarder for delivery of the Goods. The shipper delivered the Goods to World Road for onward delivery to the named consignee in Hong Kong. World Road entrusted the Goods to its agent, the forwarder in Hong Kong, for delivery to the consignee. When the named consignee demanded delivery of the Goods from the forwarder, the forwarder refused to release the Goods to the consignee, but returned the Goods to World Road instead. Legal proceedings were consequently instituted by the consignee against the forwarder to seek damages, being the value of the Goods in the sum of US\$65,926.

The forwarder claimed that the instructions it had received from World Road were that the Goods should only be released to the consignee against production of the original Bill, and that the original Bill was never produced by the consignee. The forwarder accordingly claimed that the consignee had not been able to prove that it was entitled to the Goods, and that the forwarder had acted in accordance with the instructions received from World Road when it returned the Goods to World Road in Korea on 2/1/2009.

The consignee admitted that it had not produced any original Bill, as it had never received it. It claimed that the Bill was never signed by World Road, and that the common contractual intention of the shipper and World Road was to treat the Bill not as a bill of lading, but as a sea waybill only evidencing the contract between the shipper and World Road to ship the Goods to the consignee. The consignee claimed that it was entitled to immediate possession of the Goods even without production of the original Bill.

Is the Bill a bill of lading or a sea waybill?

It was argued on behalf of the consignee that the parties had never intended the Bill to operate as a bill of lading. The shipper explained that it had been doing business with the consignee for more than 7 years, and that World Road had been the courier for shipment of the goods between the shipper and the consignee for the past 4 years. The shipper claimed that World Road had handled all the shipping procedure required for the shipper's shipment of goods, and that in the period of 4 years, neither the shipper nor its consignees had ever been asked to present the original of any bill of lading for collection of the goods in question. The shipper accepted that it had left all the shipping and delivery procedures to World Road and it had not stipulated the documents required for the delivery of the goods. Although the Bill called itself and carried the label "bill of lading", the consignee highlighted the fact that the Bill was not signed by the issuer, World Road. The shipper was never given the original or any copy of the Bill. That did not cause any concern to the shipper, as the price for the Goods had been settled between the shipper and the consignee by offsetting a debt due from the shipper to the consignee.

The forwarder claimed that according to World Road, the shipper had never collected the original Bill from World Road. However, according to the consignee's evidence, when the forwarder refused to deliver the Goods upon their arrival in Hong Kong even no freight charges were due from the consignee, the consignee had attempted to meet with World Road to collect the original Bill and to resolve the matter, but World Road refused even to meet with the consignee and the shipper.

In any event, the original signed copy of the Bill had never been produced, whether at trial or in the course of the legal proceedings. It was argued on behalf of the consignee that this supported the shipper's evidence that there had never been any practice throughout the course of dealings between the shipper and World Road for the original bill of lading to be produced as a condition for delivery of the goods carried, and further, that this constituted evidence of the fact that the Bill was **not** a bill of lading. The consignee also highlighted the fact that the Bill was expressed to be non-negotiable, and for delivery to the named consignee only.

The mere fact that the Bill does not specify that the Goods are consigned to the consignee's or the shipper's order cannot *per se* be taken to mean that the Bill is not a bill of lading. What are conventionally known as "straight bills" are nevertheless bills of lading, and it has been clearly held by the Court of Final Appeal in *Carewins Development (China) Ltd. v. Bright Fortune Shipping Ltd.* (2009) 12 HKCFAR 185 that the presentation rule, under which a carrier should only make delivery against presentation of the original bill, applies to a straight bill of lading, even if it contained no attestation clause.

It was also argued on behalf of the consignee that despite the fact that the usual form of attestation clause for a bill of lading was shown on the face of the Bill, it was not signed by or on behalf of World Road. The consignee argued that there was therefore no evidence that the attestation clause had been incorporated or was intended to be incorporated by the parties into the Bill or the contract between the shipper and World Road for carriage of the Goods. The consignee had emphasized that the

traditional practice of issuing a set of three original bills and the inclusion by signature of the "time honored language used in the attestation clause", as emphasized in the passages of the judgments in *Carewins* and *The Rafaela S*, were all absent.

There was force in the consignee's argument that the attestation clause might not have been incorporated into the contract evidenced by the Bill since it was not signed. However, it is clear from the judgment of Ribeiro PJ in *Carewins* that save perhaps in exceptional circumstances, production of the original bill of lading applies to a straight bill of lading *even if it contained no attestation clause*. The mere failure to include or incorporate the attestation clause was not, in the Judge's judgment, sufficient to demonstrate that the Bill was not, or not intended to be, a bill of lading. Lord Bingham observed in *The Rafaela S* that where the court is considering a bona fide mercantile document issued in the ordinary course of trade, it will ordinarily be slow to reject the description which the document bears. On a balance of probabilities, bearing in mind the contents and provisions of and the language used in the Bill, the Judge was not satisfied on the available evidence that the Bill was not a bill of lading. If the Bill was a bill of lading, as the Judge had found, then presentation of the original Bill was required, as held in *Carewins*.

In the Judge's judgment, the shipper's evidence on the course of dealings between the shipper and World Road was more relevant to the question of whether the shipper and World Road would strictly enforce the presentation rule requiring production of the original Bill.

Was the consignee entitled on any ground to the release of the Goods without production of the original Bill?

There was clear evidence in this case that on 29/11/2008, the shipper had issued instructions in writing to the forwarder to release the Goods to the consignee immediately. Despite the forwarder's insistence that the Goods could only be released to the consignee upon production of the original Bill, the forwarder had to acknowledge that under a bill of lading, one of the ways by which goods could be released if the original bill was not presented was by "tele-release".

The shipper's letter to the forwarder of 29/11/2008 was in unambiguous terms, comprising the shipper's instructions to the forwarder that the Goods should be released. Bearing in mind the forwarder's acknowledgment that the production of the original bill of lading was aimed at protecting the interests of the shipper to secure payment for the Goods, there was no valid justification on the forwarder's part to refuse delivery on receipt of the shipper's instructions for release. The only explanation given by the forwarder was that the release did not come from the forwarder's principal, World Road. In the Judge's Judgment, that did not afford any good reason for the forwarder to withhold delivery to the shipper.

In fact, the forwarder accepted that World Road was not the owner of the Goods. On 25/11/2008, World Road had also acknowledged in writing to the shipper, with copy of the communication to the forwarder, that World Road had no reason to hold the Goods. Despite the forwarder's acceptance that the forwarder had no right to the Goods, the forwarder ignored the shipper's instructions, withheld delivery to the consignee, and instead shipped the Goods to World Road on 2/1/2009.

The Judge found therefore that by virtue of the written instructions issued by the shipper to the forwarder dated 29/11/2008, authorizing the release of the Goods to the consignee, the consignee was entitled to the release of the Goods from the forwarder without production of the original Bill. The forwarder, as World Road's agent, was not entitled to withhold the release of the Goods to the consignee notwithstanding the consignee's failure to produce the original Bill, as presentation of the original had obviously been waived by the shipper.

Conclusion

The Judge was satisfied from the evidence that as the consignee named in the Bill and as acknowledged in the letter from the shipper to the forwarder of 29/11/2008, the consignee had the immediate right to possession of the Goods at the material time. The shipper had also accepted in evidence that the consignee had settled the price of the Goods, and was at the material time the owner of the Goods. By retaining and withholding delivery of the Goods to the consignee, and arranging for the shipment and delivery of the Goods to World Road, the forwarder had converted the Goods. The forwarder was accordingly liable for the value of the Goods, and there was no evidence to dispute or challenge that the value was US\$65,926. There would accordingly be judgment in favor of the consignee in the sum of US\$65,926, with interest. The Judge would further make an order nisi that the costs of the legal action were to be paid by the forwarder to the consignee, to be taxed if not agreed, with certificate for counsel.

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.