SMC SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Hague Visby Rules Article III paragraph 6 bis

The English Court of Appeal gave a Judgment on 6/7/1987 explaining how to calculate the suit time limit for the indemnity claim under the Hague Visby Rules. ([1987] 1 W.L.R. 1213)

By a writ issued in the High Court of Hong Kong (Admiralty Jurisdiction) on 31/3/1983 the owners of the ship *Xingcheng* began an action in rem against the ship *Andros.* The Andros' owners entered an appearance in the action and caused security to be provided for the Xingcheng's owners' claim in order to avoid the arrest of the *Andros.* No statement of claim was served by the Xingcheng's owners and on 29/11/1985 Mr. Registrar Barnett made an order that the action be dismissed for want of prosecution. The Xingcheng's owners appealed against the order of the registrar to Mayo J. who by order made on 16/1/1986 dismissed the appeal. The Xingcheng's owners appealed against the order of Mayo J. to the Court of Appeal of Hong Kong, which on 16/5/1986 dismissed the appeal. The Xingcheng's owners brought a further appeal to Her Majesty in Council.

On 30/8/1981, 1380 cartons of men's clothing ("the goods") were shipped on board the *Xingcheng* at Shanghai for carriage to Melbourne. Five bills of lading ("the through bills of lading") were issued on behalf of the Xingcheng's owners in respect of that shipment. In them the shippers were described as China National Textiles Import and Export Corporation ("CNTIEC") and the goods were stated to be consigned to shippers' order. The through bills of lading expressly provided for transshipment of the goods at Hong Kong. While they contained many terms according with the Hague Rules 1924, they did not incorporate, nor were they by law made subject to, the Hague Rules 1924 as amended by the Brussels Protocol 1968 ("the Hague-Visby Rules"). The Xingcheng arrived at Hong Kong on 9/9/1981. There the goods were discharged from that ship, packed into containers and re-shipped on board the Andros for on-carriage to Melbourne. Five further bills of lading ("the on-carriage bills of lading"), corresponding to the five through bills of lading, were issued on behalf of the Andros' owners in respect of that re-shipment. In them the shippers were described as China Merchants Steam Navigation Co. Ltd. on behalf of CNTIEC and the goods were stated to be consigned to the holders of the corresponding through bills of lading. China Merchants Steam Navigation Co. Ltd. were the agents of the Xingcheng's owners. The on-carriage bills of lading stated that the goods were shipped in apparent good order and condition. They were further, by virtue of the Carriage of Goods by Sea (Hong Kong) Order 1980, compulsorily made subject to the Hague-Visby Rules. On 21/10/1981 the *Andros* arrived at Melbourne where the goods were discharged. On discharge some of the goods were found to be in a damaged condition.

On 8/9/1982 CNTIEC began an action in personam against the Xingcheng's owners as first defendants and the Andros' owners as second defendants in the High Court of Hong Kong. In that action ("the main action"), CNTIEC claimed nearly Australian $160,000 in respect of the damage to the goods, together with interest and costs.

On 31/3/1983 the Xingcheng's owners began in the High Court of Hong Kong the Admiralty action in rem against the *Andros* ("the recourse action"). The claim endorsed on the writ was in wide terms, which included, but were not necessarily limited to, an indemnity by way of damages for breach of contract or for negligence in respect of damage done to the goods while in the custody of the Andros' owners for the purpose of their on-carriage from Hong Kong to Melbourne. The nature of the Xingcheng's owners' claim was clarified by a draft statement of claim which they put in evidence. As a result of considering that

draft statement of claim the English Court of Appeal was satisfied that the nature of the Xingcheng's owners' claim was for an indemnity by way of damages, either for breach of the contracts contained in or evidenced by the on-carriage bills of lading, or for negligence, in respect of their liability to CNTIEC in the main action. Whichever way the claim was put the terms of the on-carriage bills of lading, including the Hague-Visby Rules as compulsorily applied to them by the law of Hong Kong, would govern it.

On 23/4/1985, CNTIEC discontinued the main action as against the Andros' owners leaving it on foot against the Xingcheng's owners only.

The grounds on which the registrar and Mayo J. held that the recourse action should be dismissed for want of prosecution were, first, that the Xingcheng's owners had been guilty of inordinate and inexcusable delay in serving a statement of claim, and, secondly, that the Andros' owners had been prejudiced in their defence to the action by that delay. In the Court of Appeal of Hong Kong the Xingcheng's owners relied on two grounds of appeal. The first ground was that the finding that the Andros' owners had been prejudiced by the delay was not justified. The second ground was that, if the recourse action were to be dismissed, the Xingcheng's owners, not being out of time, would be entitled to bring a fresh action in respect of the same claim: in these circumstances, on the principle laid down by the House of Lords in Birkett v. James [1978] A.C. 297, 322, per Lord Diplock it was a wrong exercise of discretion to dismiss the recourse claim. This second ground (the "Birkett v. James point") had not been raised before the registrar or Mayo J., but was allowed to be raised for the first time in the Court of Appeal of Hong Kong, which however finally rejected both grounds of appeal.

The Andros' owners conceded before the English Court of Appeal that, if the Xingcheng's owners were right on the Birkett v. James point, the appeal must succeed, irrespective of the other point on prejudice. The Xingcheng's owners' case on this point was founded on the provisions relating to the time allowed for the bringing of claims contained in the Hague-Visby Rules, to which the on-carriage bills of lading were compulsorily made subject. Article III paragraphs 6 and 6*bis* of the Hague-Visby Rules provide so far as material:

> "6... Subject to paragraph 6 *bis* the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered…
>
> 6*bis.* An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

The Xingcheng's owners put forward four contentions. The first contention was that the recourse action was "An action for indemnity against a third person" within the meaning of that expression in paragraph 6*bis* above. The second contention was that the time allowed by the law of the court seized of the case, namely, the High Court of Hong Kong, for bringing such an action was six years from the date on which the cause of action accrued. The third contention was that that period of six years had not run out. The fourth contention was that, having regard to these matters, the Xingcheng's owners were entitled to succeed on the Birkett v. James point. Since the Andros' owners were no longer the owners of the Andros and there was no sister ship of hers to be proceeded against in an action in rem, any fresh action brought by the Xingcheng's owners would have to be an action in personam against the Andros' owners. Under the Limitation Ordinance of Hong Kong, section 4(1)(a), the time allowed for bringing an action founded on simple contract or tort, which is what any fresh recourse action brought by the Xingcheng's owners would be, is six years from the date on which the cause of action accrued. On any view of the date of accrual of such cause of action, the Xingcheng's owners were in time to bring an action in personam in respect of it.

The Court of Appeal of Hong Kong would have accepted the whole of the contentions put forward by the Xingcheng's owners but for one crucial matter. That was that, in the view of that court, paragraph 6 *bis* only applied to a case in which not only the claim for indemnity was made under a contract subject to the Hague-Visby Rules, but the claim in the main action in respect of which indemnity was sought was also made under a contract subject to those Rules. The judgment of the Court of Appeal of Hong Kong said:

> "The through bills are not expressed to incorporate the Hague-Visby Rules and there is no evidence before us as to the general application of such Rules in China. Nonetheless the applicability of Hong Kong law to the through bills has not been the subject of argument. Hong Kong law only gives these Rules the force of law in relation to contracts for the carriage of goods by sea which, by article 1(b), must be covered by bills of lading or their equivalent and where the port of shipment is Hong Kong or where the bill 'expressly provides that the rules shall govern the contract.' Carriage of Goods by Sea Act 1971 section 1(3) and (6). Rule 6 *bis*, to the material part of which rule 6 is subject, is therefore so to be construed as to include 'the carrier and the ship' within the meaning of the words 'a third person' and 'the person bringing such action for indemnity.' 'Indemnity' will then mean 'an action by A claiming from B. full compensation for money payable to C under a bill of lading subject to the Hague-Visby Rules.' We cannot so construe rule 6*bis*as to give it a life of its own independent of rule 6. That being the case and the plaintiffs having failed to satisfy us that the through bills were subject to the Hague-Visby Rules we find the plaintiffs bound by rule 6 rather than by rule 6*bis* in relation to the onward bills and, a fortiori, that they could not now commence a fresh action based on them whether in rem or in personam."

The English Court of Appeal could not accept either the reasoning or the conclusion contained in the passage from the judgment of the Court of Appeal of Hong Kong set out above. In the English Court of Appeal's opinion, paragraph 6bis of article III created a special exception to the generality of paragraph 6. Paragraph 6bis, must, therefore, in a case to which it applied, have a separate effect of its own independently of paragraph 6. The case to which paragraph 6bis applied was a case where shipowner A, being under actual or potential liability to cargo owner B, claimed an indemnity by way of damages against ship or shipowner C. If that claim by shipowner A against ship or shipowner C was made under a contract of carriage to which the Hague-Visby Rules applied, then the time allowed for bringing it was that prescribed by paragraph 6bis and not that prescribed by paragraph 6. There was no express requirement in paragraph 6bis that the liability to cargo-owner B in respect of which shipowner A claimed an indemnity against ship or shipowner C must also arise under a contract of carriage to which the Hague-Visby Rules applied. Nor did the English Court of Appeal see any good reason why, when such a requirement was not expressed, it should be implied.

This matter was the only ground for the Court of Appeal of Hong Kong's rejection of the Xingcheng's owners' case on the Birkett v. James point. The Andros' owners, however, put forward four main arguments in support of the view that, even if the Court of Appeal of Hong Kong was wrong on that matter, the Xingcheng's owners' case still failed.

The Andros' owners' first argument was that the expression "the time allowed by the law of the court seized of the case" used in paragraph 6 *bis* of the Hague-Visby Rules referred to a time specifically prescribed for recourse claims under those Rules rather than for recourse claims generally. The law of Hong Kong had not made any such specific provision and therefore the time of three months referred to in paragraph 6bis should apply. The English Court of Appeal did not accept that argument because it would involve reading in to paragraph 6*bis* a considerable number of words which it does not contain.

The Andros' owners' second argument was that the intention of paragraph 6*bis* was to allow a time for bringing a recourse action of no more than three months in any event. In support of this contention it was said that, in the light of the negotiations leading to the signing of the Brussels Protocol 1968, it was highly unlikely that the states which were parties to the Protocol could have intended that, while the time allowed for direct claims under paragraph 6 was only one year, the time allowed for recourse claims under paragraph 6*bis* should be as much as six years, or even more if the law of the forum so provided. The English Court of Appeal doubted the propriety of seeking to construe a provision in an international convention by reference to the negotiations leading to its being signed, except possibly in the case of an ambiguity which could not be resolved in any other way. So far as paragraph 6*bis* was concerned, however, the English Court of Appeal could perceive no ambiguity of any kind. The words used in both the English and French texts were as clear as they could possibly be: their effect was to make the period of three months from the dates stated the minimum, and not the maximum, time to be allowed.

The Andros' owners' third argument was that the Xingcheng's owners' claim was really based on damage done to the goods during the time between their discharge from the Xingcheng and the time of their re-shipment on board the Andros as a result of the containers into which the goods were packed not being

clean. If that was so, three consequences followed. First, the damage occurred at a time when the Hague-Visby Rules had not yet begun to apply. Secondly, because those Rules had not yet begun to apply, the Andros' owners were protected from any liability in respect of the goods by clause 5 of the on-carriage bills of lading entitled "Period of Responsibility." Thirdly, the time allowed for the Xingcheng's owners to bring their claim was governed by clause 19 of the on-carriage bills of lading, which provided for a prescription period of only one year. In the English Court of Appeal's view this argument was fallacious. The Xingcheng's owners' claim was founded on two principal matters: first, that the on-carriage bills of lading stated that the goods were shipped in apparent good order and condition, and, secondly, that the goods out-turned damaged. These matters raised a prima facie case that the goods were damaged after their re-shipment on board the Andros. On the footing that the recourse action proceeded, it would be open to the Andros' owners to plead, by way of defence, that the damage to the goods was done before their re-shipment on board the Andros, so that clauses 5 and 19 of the on-carriage bills of lading applied to defeat the Xingcheng's owners' claim. The circumstance that the Andros' owners could raise that defence, however, was not a ground for saying that the Xingcheng's owners' claim, as framed by them, was not a claim founded on the applicability of the Hague-Visby Rules.

The Andros' owners' fourth argument was that the Xingcheng's owners could only claim as agents for CNTIEC, so that the nature of their claim could only be a direct claim for damage to the goods and not a recourse claim in respect of their liability to CNTIEC in the main action. Here again, however, the Xingcheng's owners' claim was not framed in that way, and, while the Andros' owners could rely on this point by way of defence to the claim, that did not alter the nature of the claim as framed.

The English Court of Appeal was of opinion that all four arguments put forward by the Andros' owners were unsound, and that the contentions put forward by the Xingcheng's owners and referred to earlier were correct and must prevail.

Having regard to the English Court of Appeal's opinion on the Birkett v. James point it became unnecessary for the English Court of Appeal to deal with the Xingcheng's owners' other ground of appeal relating to prejudice.

In the result the English Court of Appeal would humbly advise Her Majesty that the appeal should be allowed, that the judgment of the Court of Appeal of Hong Kong given on 16/5/1986 and the orders of Mayo J. and Mr. Registrar Barnett made on 16/1/1986 and 29/11/1985 respectively should be set aside, and that the Andros' owners' application for dismissal of the recourse action for want of prosecution, should be dismissed.

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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