SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Which currency to claim?

The High Court of Hong Kong issued a Judgment on 3/2/2012 concerning which currency (US$ or Euro) should be the proper one for the cargo owners in a shipment to claim against the forwarder for compensation in a cargo damage case. [HCAJ 152/2010]

INTRODUCTION

By an interlocutory judgment dated 13/10/2011, the cargo owners obtained judgment with damages to be assessed and costs against the forwarder. They now sought final judgment for damages following assessment by the court against the forwarder.

BACKGROUND

A contract of carriage under an Express Cargo Bill dated 11/10/2009 was entered into between the cargo owners and the forwarder pursuant to which the forwarder agreed to deliver a cargo of 775 cartons containing 4,650 cans of a specialty medical food for treatment of children with epilepsy to Baltimore, USA. The cargo supplied from a warehouse in Germany was consolidated with other unrelated goods in a container for shipment. The container was loaded on board the "APL Malaysia" at Bremerhaven, Germany. The Express Cargo Bill was issued clean, acknowledging that the cargo had been received in good order and condition for shipment. The container was discharged on 20/10/2009 at Port Newark, New Jersey, USA. The cargo was devanned on 22/10/2009. The unloading report did not indicate any damage to the cargo that was later transported to another warehouse in Baltimore, MD. It was first discovered with wet damage prior to delivery by the truck driver on 30/10/2009. The Release document signed by the driver on the same day noted "Mildew on ctns. Ctns wet and crushed. Damaged". The cargo owners contended that the cargo was damaged whilst in the custody and care of the forwarder.

THE CARGO OWNERS' CLAIMS

The cargo owners sought compensation for loss suffered in respect of 529 cartons or 3,174 cans of baby food in the amount of US$44,410.06 as converted from Euro, the currency of the consignment and the cost of the survey.

The forwarder accepted liability for the total loss of 437 damaged cartons. Liability for the remaining 92 cartons was refuted. The forwarder submitted that the cargo owners had failed to prove that these 92 cartons were either damaged, or if they were, that the damage was caused by the act or neglect of the forwarder. The survey fees were unchallenged.

The cargo owners had requested that the judgment for the damages to be assessed be entered in US dollars. The forwarder contended that damages should be awarded in Euro as the invoice was so denominated.

Then there was the dispute on the appropriate scale of costs with the cargo owners urging costs to be awarded on the High Court scale and the forwarder submitting that District Court costs should be ordered. Ancillary thereto, was the further dispute as to the time costs and indemnity costs sought by the cargo owners.

THE EXTENT OF DAMAGE

The survey report described the consignment as medical food contained in cartons made of corrugated cardboard paper. Each carton had 6 cans that were basically cardboard tubes with foil lining and tin tops and bottoms. The cartons were stacked on wooden pallets and shrink wrapped. The pallets bore a sticker marked "Quarantine". At the time of inspection, the damaged product had been hand sorted and placed in quarantine as required. The damage according to the surveyor was caused by exposure to fresh water or moisture during the transit from New Jersey to Baltimore prior to delivery to the consignee. More particularly, when the cargo was transported from the New Jersey warehouse, rain was recorded on October 24 and 27 both in NJ and MD. The report revealed that the cartons had dried, but showed evidence of moisture exposure and wrinkling in varying degrees. The cartons had evidence of minor exposure where they had minor water stain or wrinkling to heavy exposure where they were

heavily stained and partially collapsed. Black mildew was evident on the cartons. In all, a total of 437 cartons were segregated as wet for which the forwarder had accepted liability.

The shipment consisted of 775 cartons. After hand sorting and removal of the 437 damaged cartons, the balance of the consignment of 338 cartons were accepted by the consignee. These cartons were on the interior stacking and lower in the pallet. They had not been exposed to moisture. The 338 cartons considered good or undamaged were dispatched to the customer. A week thereafter, a few customers complained of the cans being rust stained or exhibiting rust development. A further inspection was conducted (the 2nd survey on16/12/2009, some 26 days after the 1st survey on 20/11/2009) and new damage was uncovered. Of these 338 cartons, 65 were segregated as "possible damage/reject although there was no sign of any wetting on exterior or interior. Since customers had already complained of cans showing rust development on cans which were originally considered good, they decided not to take any chance of shipping those 65 cases as good but considered them as reject". The 65 cartons were said to be "apparently good but possibly reject by consignee". Sample cans from this lot were inspected. They exhibited no sign of wetting inside or out or of any rust or rust development except deep print marks of can bottom rims on cardboard boxes. 23 cartons of the same lot of 338 were "segregated as damaged. Although exterior and interior of cardboard boxes indicated dry and without any sign of wetting, individual cans exhibited very minor rust development on can rims or bleeding of minor rust spots through labels".

The forwarder submitted that absent wetting on the cardboard cartons, it was inherently unlikely that any minor rusting was caused by rainwater as alleged. Silver Nitrate test indicated that the moisture exposure could have been from rain or condensation. It was contended that condensation damage was an equally plausible and probable scenario for which the forwarder would not be liable. It was further submitted that if condensation was a likely cause, there was no evidence that it had occurred when the cartons were in the forwarder's custody through any neglect or omission on its part. The Court agreed.

The cargo owners bore the burden of proving their damages. This they had done only in respect of the 437 cartons for which liability had been conceded. Accordingly the Court should assess damages limited to this number of cartons.

THE DENOMINATION OF THE AWARD

The goods were invoiced in Euro. The damaged 437 cartons each containing 6 cans costing 9.3874 Euros per can had a value of 24,613.76 Euros. That without more represented the damages recoverable by the cargo owners. However the cargo owners had sought an award denominated in US currency. The forwarder disagreed, arguing that a Euro award was appropriate.

The proper test to determine this issue was to be found in *The Folias* [1979] AC 685. Damages for breach of contract in respect of sums expended in foreign currency should be calculated in the words of Lord Wilberforce at 701B-C:

> "in the currency in which the loss was felt by the plaintiff or 'which most truly expresses his loss.' In ascertaining which this currency is, the court must ask what is the currency, payment in which will as nearly as possible compensate the plaintiff in accordance with the principle of restitution, and whether the parties must be taken reasonably to have had this in contemplation."

The cargo owners submitted that although the invoice was expressed in Euro, the consignee was located in the US where the goods were destined to be sold in US dollars and the cargo underwriters had settled the claim in US dollars. US dollars would have to be sold for Euros by the assured/ buyer to settle the invoice. Accordingly, the loss would have been felt in that currency.

The forwarder countered that the consignee Nutricia North America had not been described as the Plaintiffs on the amended writ. Rather the Plaintiffs were said to be "THE OWNERS OF AND/OR OTHER PERSONS ENTITLED TO SUE IN RESPECT OF THE CARGO LATELY LADEN ON BOARD THE SHIP…" Nothing was known of the corporate identity of the Plaintiffs and there was no evidence of their usual operating currency. The Plaintiffs' addresses on the amended writ are in the USA, Netherlands and Germany, the latter two being in the Euro zone.

As the evidence stood, a cogent case for an award in US dollars had not been substantiated. The Court was not persuaded on balance that the loss suffered by the cargo owners would necessarily have been felt in that currency. The Court therefore awarded damages of 24,613.76 Euros to the cargo owners for the damaged goods, the currency of the invoice with interest at Euro prime rate plus 1% from 30/10/2009 to the date of the Judgment and thereafter at judgment rate until full payment. To that must also be added the survey expenses of US$2,260.40 that had not been challenged. This head of claim should also be converted into Euros and shall carry the same Euro rate of interest from 2/3/2010 (the date of the survey report) to the date of the Judgment and thereafter at judgment rate until full payment.

COSTS

There were two distinct issues in contention in this regard. Firstly, the cargo owners had sought indemnity costs and secondly, they had pursued costs on the High Court scale, it being said that this action was on the Admiralty List. The forwarder contended otherwise on both matters.

As to indemnity costs, the cargo owners had relied on four matters they say cumulatively would entitle them to a more generous level of costs. They referred to abortive negotiations at settlement. Attempts at settlement always encouraged by the courts particularly in the post CJR culture often produce no dividend. Outright refusal to even attempt to do so with no good reason, however, would attract criticism that may be reflected in costs. In the Court's view, there was no merit on this point. The second point referred to the forwarder ignoring the proceedings and then belatedly seeking to set aside the judgment in default only to abandon that attempt. The forwarder submitted that such conduct was hardly vexatious, scandalous, malicious, oppressive or for an ulterior motive. The Court concurred. Thirdly, the cargo owners described the forwarder's conduct throughout as "come and get us approach" and that was vexatious to them. The Court was of the view that the forwarder was entitled to put the cargo owners to strict proof and that was what took place. There was no substance in this complaint. The last criticism hardly warranted any consideration, it being a reference to the many writs allegedly issued against the forwarder. Even if there was evidence to support this averment, the Court held that it was irrelevant to these proceedings.

The cargo owners cited *Choy Yee Chun (The representative of the estate of Chan Pui Yiu) v Bond Star Development Ltd* [1997 HKLRD 1327, a case where the plaintiff was entirely oppressive and vexatious in the conduct of the suit. There were no such features in the case in question.

The case for indemnity costs failed.

As for the scale of costs, the cargo owners argued that the suit being an Admiralty claim fell within the exclusive jurisdiction of the High Court. Additionally, as interlocutory judgment had been granted with costs, it must be inferred that costs should be on the High Court scale.

No such inference could be drawn as was evident from *Lai Ki V B+B Construction Co Ltd & Ors* [2003] 3 HKC 322 and the more recent decision of the Court of Appeal in *Ng Shing Yan Vincent v Poon Kin Pong* (CACV 170/2009). Costs are always a matter of discretion. In the instant case, even on full liability which the cargo owners failed to establish, the claim would have fallen well within the District Court jurisdiction of HKD 1 million. There was simply no reasonable prospect of achieving an award in excess of the District Court limit. Section 12A of the High Court Ordinance (Cap. 4) does not provide that the Court of First Instance has exclusive jurisdiction in Admiralty matters, or more particularly to hear and determine claims for loss of or damage to goods carried on ships. The District Court has regularly tried disputes involving loss or damage to goods in similar situations: see for instance *Forsa Multimedia Ltd v C&C Logistics (HK) Ltd* DCCJ 3467/2009, *Red Chamber Co v Lau Siu Man* DCCJ 2790/2009, *Kind Respect Ltd v Apex Logistics Ltd* DCCJ 502/2004. The fact that a ship or bills of lading featured made little difference to jurisdiction provided that the claims did not exceed the District Court's limit. The Court ordered that the cargo owners' costs of the suit and of the assessment should be party and party against the forwarder on the District Court scale.

The forwarder justifiably complained to having been brought before the High Court at additional expense when the matter was entirely suitable to be heard below. It sought costs on the issue limited to jurisdiction. That being a distinct dispute, the Court saw no reason not to grant costs to the forwarder who had succeeded in demonstrating that the High Court scale was inappropriate and was patently so when the writ was issued. It should have costs on the High Court scale 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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