

To: Transport Industry Operators

## Institute Cargo Clauses (A)

Does the marine cargo insurance cover the seller's losses resulted from the carrier's delivery of goods to the buyer against forged bills of lading? Judge William Stone of the High Court of the Hong Kong SAR said yes in his Judgment dated 24/10/2001.

The Plaintiff is an Hong Kong exporter. It insured with the defendant insurance company eight shipments of electrical goods which had been sold by the plaintiff to its Paraguayan buyer. The eight marine insurance policies were issued in 1995 upon "all risk" terms and incorporated the Institute Cargo Clauses (A).

Paraguay is landlocked, thus necessitating the import of goods via its neighbours e.g. Brazil. The goods were shipped to one of two ports in Brazil, namely either Santos or Paranagua, in the period between 13/3/1995 and 7/6/1995. After discharge at these ports, the goods were being kept in a customs warehouse until they were taken into their destination in Paraguay.

What actually happened is that the goods were all stolen by the buyer. It appears that forged bills of lading were produced to the carrier's agents by the buyer so that the buyer was able to obtain all the eight shipments absent payment. By this device, the buyer was able to sidestep the obligation to attend upon his bank in Paraguay and to obtain the original bills of lading upon making payment for the goods.

Each sale was a D/P transaction. The original bills of lading together with other relevant documents were presented by the plaintiff to its bank in Hong Kong. It is against these documents that payment by the buyer then should have been made. These documents were remaining within the banking system and eventually returned to the plaintiff when it became clear that they would not be taken up.

According to Clause 8 of the Institute Cargo Clauses (A), the insurance terminates on delivery of goods to any other warehouse or place of storage which the Assured elects to use for storage other than in the ordinary course of transit. The defendant insurance company submitted that the plaintiff had intended and chosen to store the goods in the customs warehouse not merely for purpose of customs formalities but for storage until such time the buyer paid for the goods. Therefore, the cover under the eight policies had terminated upon delivery to the customs warehouses by reason of the plaintiff's prior election that they should be stored there pending payment.

However, the Judge held that there was no election by the plaintiff for storage other than in the ordinary course of transit and that the goods at all times remained within such ordinary course. In any D/P sale transaction, there inevitably occurs a point in time and a place at which goods are being retained pending payment by the buyer and such retention will occur in a warehouse or other place of storage. To characterize this as an "election" would be wrong.

The Judge ordered the defendant insurance company to compensate the plaintiff for US\$807,253.50 plus interest and costs.

Please feel free to contact us if you have any question or would like to have a copy of the Judgment.

Simon Chan and Richard Chan

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Have you ever thought why a cargo claim would not go away easily? You get the answer if you think from the cargo interests' perspective – THEY WANT FULL SETTLEMENT and YOU HAVE TO LIMIT YOUR LIABILITY.

Solution – actively advise your client to buy All Risks Cargo Insurance; arrange for yourself a good liability insurance for protection through a professional insurance brokers also provide third party claims handling assistance. Your insurance broker should be able to help.