

To: Transport Industry Operators

Writ in Rem

Can the ship be arrested for obtaining security when there was a change of ownership after the ship had damaged the cargo? In his Judgment dated 6/11/2002, Judge William Waung of the High Court of the Hong Kong SAR said yes if the Writ in rem had been issued prior to the change of the ownership of the ship.

This case concerns a cargo of toasted extracted yellow soybean meal shipped on board a ship from Mumbai, India to Kashima, Japan in 1998. Upon discharge in Japan in November 1998, a joint survey was conducted and extensive cargo damage was found suggesting that the ship was liable for causing such damage.

The cargo owner issued a Writ in rem in the High Court of the Hong Kong SAR on 29/5/1999. The ship was arrested in Hong Kong in April 2002 pursuant to the Warrant of Arrest granted to the cargo owner by the Court. Upon security furnished, the ship was subsequently released. The new owner of the ship thereafter applied to set aside the arrest and the in rem proceedings on the ground that there was no jurisdiction in rem because at the time of the issue of the Writ in rem, namely, on 29/5/1999, the ownership of the ship had changed and that the old owner was no longer the owner of the ship on that day.

The jurisdiction in rem against a ship in Admiralty is governed by the High Court Ordinance (Chapter 4). Section 12B(4) of the Ordinance provides as follows:

1. in the case of any claim for loss of or damage to goods carried in a ship; and
2. where the claim arises in connection with the ship and the person who would be liable on the claim ("the relevant person") was the owner or charterer of, or in possession or in control of, the ship when the cargo loss or damage took place;
3. an action in rem may be brought in the High Court against:
 - a. that ship if at the time when the action is brought, the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
 - b. any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

The Judge found that there was a Bill of Sale and Acceptance of Sale dated 1/7/1999 by which the ship was sold for US\$800,000 and transferred on 1/7/1999 by the old owner to the new owner. There was no change of ownership from the time when the cargo was damaged in October/November 1998 to the time when the Writ in rem was issued on 29/5/1999. By the Bill of Sale, the property in the vessel clearly passed out of the old owner only on the 1/7/1999, very much subsequent to the 29/5/1999. This was already more than one month after the date of the Writ in rem. The owner of the ship at the time of the issue of the Writ in rem was still the old

owner. Accordingly, the Judge dismissed the new owner's application to set aside the Writ in rem and to discharge the Warrant of Arrest.

Should you have any questions or you want a copy of the Judgment, please feel free to contact us.

Simon Chan and Richard Chan

The NEW 24 Hour Advance Manifest Regulation of the U.S. Customs:

Many Sun Hing clients enquired about the captioned. For the benefit of the trade, we like to share some highlights from the Federal Register.

Effective December 2, 2002, carriers will be required to submit a cargo declaration 24 hours before cargo is laden on board a vessel at the foreign port for shipment to the US. Customs has said that it will not initiate penalties for 60 days after the new rules goes into effect for non-fraudulent violations.

This new regulation applies to all cargo shipped to the US; however, bulk cargo will be exempt from the 24 hour rule. Carriers of break bulk cargo may apply for an exemption, to be evaluated by Customs on a case-by-case basis.

NVOCCs may participate if automated. By automated, Customs means a participant in the Customs Automated Manifest System (AMS). Participation in AMS requires compatible software, and approval of Customs which includes a test of your system.

If not automated, NVOCCs may provide cargo information directly to the vessel carriers, or an automated service provider, vessel agent or port authority. A non-automated NVOCC may not use a non-automated partner. Customs will not accept non-automated cargo information directly from a NVOCC.

According to the Federal Register: "There is no requirement that NVOCCs participate in these advance manifest regulations' rather, Customs is merely affording NVOCCs the option under these regulations to provide cargo manifest data directly to Customs in order to protect what the NVOCC believes to be confidential business information. If NVOCCs do not wish to participate...the NVOCCs may properly elect to provide such information to the vessel carriers directly. . ."

NVOCCs who participate in AMS, and who want to file directly with Customs must also have a Customs Bond (in addition to their NVOCC bond). An activity code 3 International Carrier Bond is required, minimum amount \$50,000. Port directors may set higher limits.

NVOCCs who elect to provide vessel cargo manifest information to Customs electronically will be liable for breaches of the regulations, in the same manner vessels are responsible, in the amount of liquidated damages of \$5,000 for each regulation violated, in addition to other applicable penalties. Penalties would be claimed by Customs against the surety, who would be obligated to pay under the terms of the NVOCC's International Carrier Bond. In turn, the surety would claim reimbursement from the NVOCC under the indemnity agreement that accompanies all bonds. Customs is said to be formulating a policy on assessment of penalties, liquidated damages, and mitigation guidelines, but to my knowledge, it is not available yet.

A precise description of the cargo will be required. Terms such as FAK (freight all kinds), general cargo, and STC (said to contain) will be not acceptable. Eliminating the use of "STC" brings up some difficult liability issues.

Please feel free to approach us for complete details.

The full citation is from page 66318, Federal Register/ Vol. 67, No. 211/ Thursday, October 31, 2002/ Rules and Regulations, Department of the Treasury, Customs Service, 19 CFR Parts 4, 113 and 178, "Presentation of Vessel Cargo Declaration to Customs Before Cargo is Laden Aboard Vessel At Foreign Port for Transport to the United States."