

To: Transport Industry Operators

## **Straight Bill of Lading (II)**

In Chans advice/01 dated 18/12/2000, we reported a Hong Kong High Court Judgment dated 14/7/2000 holding that the carrier could deliver the goods to the named consignee without the production of the straight Bill of Lading. However, in its Judgment dated 3/10/2002 on another case, the Singapore Court of Appeal took a different approach.

This was a shipment of one convertible Mercedes Benz motor car (model CLK 320) from Hamburg to Busan on 28/8/2000. The carrier issued its Bill of Lading naming the seller as the shipper and the buyer as the consignee but without the words "to order". Soon after the vessel arrived at Busan, the carrier released the motor car to the named consignee without production of any Bill of Lading.

The price of the car was DM108,600. A down-payment of DM48,500 was made by the consignee. After receipt of the goods, the consignee did not pay the balance of the purchase price. The shipper holding the three originals of the Bill of Lading demanded payment of the same from the carrier.

A Bill of Lading making goods deliverable to a named consignee and nothing more means that the goods can only be delivered to the named consignee and no one else. The named consignee will not have the option of transferring the Bill of Lading to another person. This is known as a straight Bill of Lading. The carrier argued that a straight Bill of Lading was non-negotiable, and being unindorseable to a third party, it was to be equated to a sea waybill. It is settled law that the carrier is to deliver the goods to the named consignee without presentation of the sea waybill provided that the named consignee can prove its identity.

The shipper argued that a straight Bill of Lading, while it shared the characteristic of non-transferability with a sea waybill, was nevertheless not a sea waybill. The function of the Bill of Lading as a document of title was distinct from its negotiable quality. Even a Bill of Lading which was not made negotiable operated as a document of title, because the named consignee could only claim delivery of the goods from the carrier if it could produce the Bill of Lading. While a straight Bill of Lading and a sea waybill were very similar documents, they were not identical and the production of a straight Bill of Lading was necessary to obtain delivery.

The Singapore Court of Appeal held:

1. Ordinarily, the main characteristics of a Bill of Lading are twofold. First, it is negotiable (i.e. transferable). Second, it is a document of title, requiring its presentation to obtain delivery of the goods. In the case of a straight Bill of Lading, while the characteristic of transferability is absent, there is no reason why one should thereby infer that the parties has intended to do away with the other main characteristic i.e. delivery upon presentation.

2. There is much to commend the rule that even in respect of a straight Bill of Lading, presentation of it is a pre-requisite to obtaining delivery. This rule is certain and simple to apply. It would prevent confusion and avoid the carrier having to decide if a Bill of Lading is a straight Bill of Lading or an order Bill of Lading and run the risk of making a wrong decision. It makes commercial sense to have a simple rule that in the absence of an express term of the contract, the carrier must only deliver the goods to the holder of the Bill of Lading even if it is a straight Bill of Lading.

Accordingly, the Singapore Court of Appeal held that in respect of a straight Bill of Lading, the carrier should only deliver the goods against its presentation.

We would also like to repeat our recommendation that the carrier should only release the goods upon production of original Bill of Lading no matter it is a straight or to order Bill of Lading. Please feel free to contact us if you have any questions or you want a copy of the Judgment.

Simon Chan and Richard Chan

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### **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."