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To: Transport Industry Operators

All Risks Cargo Insurance

It is always a good loss prevention measure that the shipper and the consignee buy cargo insurance so that they may obtain compensation from the cargo insurer in case of loss of or damage to the goods. In his Judgment dated 17 / 1 / 2003, Judge William Stone of the High Court of the Hong Kong SAR held a cargo insurer liable to pay US$817,906.77 plus interest and costs to a shipper for a cargo damage case.

This case was about a shipment of a complex plastic moulding machine from Hong Kong to Xiamen in 1998. The goods arrived in Xiamen by sea on 19 / 4 / 1998 and was transported to the consignee's nominated warehouse by road on 23 / 4 / 1998. The goods fell off the trailer into the middle of a road in Xiamen as the carrying vehicle swerved in an attempt to avoid a taxi. Considerable damage was caused to the machine. After repair, the machine was resold to another buyer for US$555,400, a considerable dimunition from the original purchase price, leaving a loss on resale of US$344,600. The cost of repairs was US$434,925. On 19 / 6 / 1998, the insurer rejected the shipper's claim.

The insurer said that the shipper had not disclosed some material circumstances, namely the machine had been exhibited and thus was not new and there had been damage to the packaging on the Hong Kong – Xiamen leg of the machine's journey. In considering the established principle of material non-disclosure, one has to bear in mind that a material circumstance is one which would have an effect on the mind of a prudent insurer in estimating the risk and that the insurer has been induced by such non-disclosure to enter into the policy on the relevant terms. The Judge accepted the shipper's evidence that it had told the insurer that the machine was exhibition machinery prior to and at the time of placing the risk.

On the memo bill of lading issued by the ocean carrier on 17 / 4 / 1998, damage was noted to the wooden boxes housing the machine. The Judge accepted the shipper's evidence that it knew nothing whatever about this at the time. There was no question of the shipper possessing knowledge of a material fact and failing to disclose it to the insurer. There was also no evidence to suggest that the damage existed at the time of the inception of the risk. The Judge therefore rejected the material non-disclosure defence.

The All Risks policies bore on their face: "Warranted that this is a container load shipment". This gave rise to the second main line of defence. Pursuant to section 33(3) of the Marine Insurance Act 1906, a promissory warranty is a condition which must be exactly complied with whether or not material to the risk. Otherwise, the insurer is discharged from liability as from the date of the breach of warranty.

The machine itself was packed in two wooden boxes, with the auxiliaries being packed into two containers. The shipper instructed a forwarder to ship the goods from Hong Kong to Xiamen. The forwarder issued its clean bill of lading. Prior to loading the two wooden boxes and the two containers on board, the forwarder decided to devan the containers and to carry the auxiliaries break bulk. This devanning took place without the knowledge of the shipper.

On the face of the policies, there was reference to the cargo composition of two cases and two containers only. The Judge interpreted the warranty as a warranty that part of the consignment (the auxiliaries) was to be shipped in containers for the voyage from Hong Kong to Xiamen. According to section 33(3) of the 1906 Act, the discharge from liability of the insurer for less than exact compliance is subject to any express provision in the policy. The policies included Clause 8.3 of the Institute Cargo Clauses (A) providing that the insurance should remain in force during any variation of the adventure arising from the exercise of a

liberty granted to shipowners or charterers under the contract of affreightment. Clause 7(a) of the forwarder's bill of lading allowed the forwarder to carry the goods in any commercially reasonable manner and by any reasonable means including the right to transship goods using other carriers, conveyances or containers. Accordingly, by devanning the two containers prior to loading on board and shipping the auxiliaries break bulk on a break bulk vessel, the forwarder purported to exercise the liberty contained in Clause 7(a) of its bill of lading. The Judge accepted the contention that the breach of warranty without the knowledge or instruction of the shipper occurred pursuant to the exercise of a liberty granted to the shipowner and that the insurance thus remained in place as the breach was within the parameters contemplated by Clause 8.3 of the Institute Cargo Clause (A). The breach of warranty defence also failed.

According to section 6 of the 1906 Act, the assured must be interested in the goods, the subject matter of the insurance, at the time of the loss. The insurer submitted that the shipper ceased to be interested in the goods by the time of the loss. The shipper was the CIF seller of this machine, the bill of lading had been indorsed and transferred to the buyers, and the machine was on its way to the buyer's warehouse in Xiamen at the time of the accident. The insurer put forward that only the buyers had an insurable interest at the relevant time. The insurance policy was not indorsed or assigned by the shipper to the buyers. Section 5(2) of the 1906 Act provides that a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof. The shipper submitted that the existence of an insurable interest was to be tested by whether or not the relationship between the assured and the subject matter of the insurance was sufficiently close to justify his being paid in the event of its loss or damage. The shipper clearly had an insurable interest in the machine at the time of the loss, bearing in mind that the contract of sale was not a classic CIF contract. Within 90 days after delivery at Xiamen, there was to be an inspection of the machine. If the machine failed that inspection, the shipper was to take it back. Accordingly, at the time when the machine fell off the lorry into the road in Xiamen, the shipper stood to benefit from the safe arrival of the machine and to suffer detriment if the machine was lost or damaged. Even if this were really a normal CIF contract, the Judge agreed that the shipper must have contracted to provide an insurance policy for the value of the cargo and thus expressly or impliedly must have agreed with the buyers to assign the insurance policy. According to section 50 of the 1906 Act, a policy can be assigned after loss. In this situation of a prior agreement, it thus remained open to the shipper now to assign the policy to the buyers. The judge had little hesitation in finding that the lack of insurable interest defence was not well founded.

The Judge held the insurer liable to pay the shipper for both the repair cost and the dimunition in resale value.

To better protect their interests, we recommend the cargo interests pay more attention to the issues of material disclosure, warranty clauses and insurable interest when they place the cargo insurances. Please feel free to contact us if you have any questions or you want a copy of the Judgment.

Simon Chan and Richard Chan

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.

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