SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Cargo misdirection – Dhaka? Dakar?

In his judgment dated 11/2/2004, Judge A.T. Reyes in the High Court of Hong Kong held a forwarder liable in a cargo misdirection case.

On about 1/11/2001, the Plaintiff instructed a forwarder to carry a container stuffed with 129 cartons of cotton yarn from Hong Kong to Dhaka in Bangladesh. The vessel was estimated to depart Hong Kong on 4/11/2001 and arrive Dhaka on 21/11/2001. By a Bill of Lading dated 4/11/2001, the forwarder acknowledged receipt from the Plaintiff the laden container. The reverse of the Bill of Lading contained the following terms:

Clause 2.2: "Carrier means (the name of the forwarder) on whose behalf this Bill of Lading has been signed."
Clause 4.1: "Carrier is entitled to perform the transport in any reasonable manner and by any reasonable means, methods and routes."
Clause 6.4: "Carrier does not undertake that the goods shall be delivered at any particular time and shall not be liable for any direct or indirect loss caused by any delay."
Clause 16.2: "Freight shall be deemed earned on receipt of goods by Carrier, whether the freight be intended to be prepaid or collected at destination …"

Unfortunately, there was a communication problem between the forwarder and the shipping company. Instead of Dhaka, the shipping company misunderstood that the cotton yarn was to be shipped to Dakar in Senegal. It was not until after the cotton yarn had been loaded on board and the vessel had left Hong Kong that the mistake was discovered. The shipping company rejected the proposal to send the cotton yarn by air freight from Algeciras to Dhaka at the shipping company's expense. The forwarder informed the Plaintiff on 28/11/2001 that the shipping company would in any event be sending the cotton yarn to Dhaka by sea and delivery might be expected in Dhaka on 29/12/2001. The Plaintiff replied to the forwarder on 30/11/2001 that the Plaintiff would not accept the cargoes now arranged to be shipped back to Bangladesh. The Plaintiff also held the forwarder fully liable for all the losses or damages which were estimated at HK$1,200,000.

The Plaintiff refused to take delivery of the cotton yarn in Dhaka at all. This was probably because on 28/11/2001 the Plaintiff's customers had cancelled the contracts of buying the 18,000 pieces of cotton knitted sweaters at a price of HK$653,094. The 129 cartons of cotton yarn were intended to

be used to manufacture the sweaters. The cotton yarn remains in the Customs House in Bangladesh.

The Plaintiff claimed both the cost of the cotton yarn (HK$185,685.24) and the profit lost on the sweater contracts (HK$467,408.76). The forwarder counterclaimed for HK$13,355 being the ocean freight, terminal handling charges, transportation charges and documentation fee.

By the Bill of Lading, the forwarder (as bailee) acknowledged receipt from the Plaintiff (as bailor) of the cotton yarn for delivery of the same to Dhaka. The terms of bailment were evidenced by the Bill of Lading and constituted a contract of carriage. The contract was to deliver the cotton yarn by a reasonable route to Dhaka. It was not reasonable to discharge such obligation by sending the cotton yarn to Dakar and then arranging for on-shipment to Dhaka. The forwarder was accordingly held in breach of the contract of carriage with the Plaintiff contained in or evidenced by the Bill of Lading.

The forwarder relied on clauses 4.1 and 6.4 of the Bill of Lading as exonerating it from breach. The Judge did not accept that those provisions would excuse the forwarder. Clause 4.1 required the forwarder to transport goods by a reasonable route. It was not reasonable to ship goods to Dhaka by first sending them to Dakar. Moreover, the forwarder must have been under an implied obligation to see that the cotton yarn was delivered to Dhaka within a reasonable time. As a result of the deviation to Algeciras and Dakar, the time taken to bring the cotton yarn to Bangladesh could not have been reasonable. Clause 6.4 could not exclude liability in negligence in the execution of a contract.

The forwarder had no knowledge of the sweater contracts at the time when the Shipping Order was submitted by the Plaintiff or the Bill of Lading issued by the forwarder. However, there were some 9 other previous similar transactions between the Plaintiff and the forwarder whereby yarn and knitted goods were shipped to Dhaka. Prior to those 9 transactions, the forwarder visited the Plaintiff to learn more about the Plaintiff's business and ascertain ways in which the forwarder could provide freight forwarding services to the Plaintiff. The Plaintiff submitted that the forwarder ought to have known that the Plaintiff was in the business of delivering raw materials to Bangladesh for wholesale manufacture into garment wear destined for third parties. The possibility that the Plaintiff had sale contracts with wholesalers ought therefore to have been reasonably contemplated by the forwarder. If so, the forwarder ought to have realised that late delivery could lead to the cancellation of such contracts and financial loss to the Plaintiff.

The Judge did not accept the Plaintiff's argument. General discussion on the manufacture of garments from cotton yarn would lack the particularity necessary to bring the loss of profit claim. Given that the forwarder was not specifically aware of the existence of the sweater contracts or their terms, the Judge was unable to conclude that the forwarder should have reasonably contemplated that late delivery in Dhaka would result in lost profit on those sweater contracts.

Regarding the claim for the cost of the cotton yarn, the Plaintiff said that cancellation of the sweater contracts meant that the cotton yarn had become valueless. The cotton yarn was dyed to colours chosen by the customer on the basis of "lab-dip" samples. The colours were specific to the customer's requirements. If the customer could not use the cotton yarn, no one else would be interested in them.

The cotton yarn's market value upon late delivery in Dhaka was effectively nil. The measure of damages should be the difference between the market value of the cotton yarn had the same arrived on
time and the market value of the cotton yarn at the time of actual arrival. The measure should be equivalent to the invoice value of the cotton yarn. The Judge thought the Plaintiff was correct in this alternative measure. No one seemed to think that the cotton yarn in the Customs House in Bangladesh was worth bothering about. In all the circumstances, it was hard to see the cotton yarn being worth any substantial amount. The Judge concluded that the Plaintiff was entitled to damages of HK$185,685.24.

On the counterclaim, the Judge thought that the forwarder was entitled to HK$13,355 and that amount should be set off against the Plaintiff's damages of HK$185,685.24. All the items forming part of the counterclaim were incurred on or before 4 November 2001, the date when the vessel left Hong Kong. Freight was incurred on the date of shipment by clause 16.2 of the Bill of Lading. It followed that the Plaintiff would have remained liable for all items claimed by the forwarder. The Judge was not persuaded by the Plaintiff's argument that the Plaintiff should not be bound by clause 16.2 of the Bill of Lading because the Plaintiff was not fully aware of the terms in the Bill of Lading. In an ordinary commercial context, a party's failure to acquaint himself with the terms of a contract could not excuse him from being bound by those terms. The Judge concluded that the forwarder was entitled to set off their counterclaim for HK$13,355 against the HK$185,685,24 due to the Plaintiff.

The Judge gave judgment for the Plaintiff in the net amount of HK$172,330.24 (HK$186,685.24 - HK$13,355). Interest would run on that sum at 1% over Hong Kong prime from the date of writ until date of judgment and thereafter at the judgment rate.

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

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