SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Delay & Tort

In its Judgment dated 2/5/2003, the Civil Court of the City of New York held a shipping company not liable for delay in accordance with its bill of lading terms.

The cargo insurer as subrogor of the cargo owner commenced this action against the shipping company for damages allegedly caused by the shipping company's late delivery of cargo from Europe to the United States. Specifically the cargo insurer alleged that the cargo owner had to re-manufacture a portion of the shipment in reliance on an allegedly negligent misrepresentation that the container in which the goods were located had been stolen.

The cargo owner was engaged in the business of selling, manufacturing and installing custom made doors and windows. In or about 9/2/2000, the cargo owner contracted with the shipping company to carry containerized cargo of custom made windows and doors from Germany to New York. The terms of such contract were contained in the shipping company's bill of lading. The vessel arrived in New York on 17/2/2000, but the container was not unloaded. The shipping company, by a letter faxed on 23/2/2000, notified the cargo owner that the container had not been located. The shipping company again contacted the cargo owner by fax received on 29/2/2000, reporting the container still missing, and informed it that the carrier "has asked another twenty-four hours before officially reporting this container stolen. All parties will be notified in the morning of 29/2 if the box has been located or not." The shipping company on 27/3/2000 confirmed that the container was located and would arrange for its delivery. The container had not been unloaded in New York City in February as originally thought, but remained on the vessel, first sailing to Japan and then California, before eventually being delivered. There was no claim of any damage to the cargo.

The shipping company argued that the claim was governed exclusively by Carriage of Goods by Sea Act (COGSA) and the express terms of the bill of lading. The shipping company's bill of lading, explicitly stated

"The Carrier does not undertake that the Goods shall arrive at the Port of Discharge or Place of Delivery at any particular time or to meet any particular market or use… the Carrier shall in no circumstance be liable for any indirect or consequential loss or damage caused by delay… Save as otherwise provided herein, the Carrier shall in no circumstances be liable for direct or indirect or consequential loss or damage arising from any other cause."

The cargo insurer conceded that COGSA governed the claim and that COGSA permitted an ocean carrier to disclaim liability for damages resulting from delay in delivery of cargo. The cargo insurer did not dispute the fact that the bill of lading explicitly provided that the shipping company did not promise delivery on a specific date or to meet any other deadline. However, the cargo insurer argued that the shipping company was barred from disclaiming liability for damages resulting from delay in delivery according to COGSA, based on the doctrine of deviation at sea. COGSA provides specially that any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of COGSA or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Under the doctrine of unreasonable deviation, where a carrier's performance in shipping goods deviates unreasonably from the terms agreed to in a bill of lading, the carrier is deprived of all limitations on liability on the ground that such deviations ousted the contract of carriage and made the carrier fully responsible for the cargo as an insurer. A deviation is unreasonable where "in the absence of significant countervailing factors, the deviation substantially increases the exposure of cargo to foreseeable danger that would have been avoided had no deviation occurred. A carrier's unreasonable deviation must be both voluntary and intentional.

Here, there was no allegation that there was a voluntary deviation in the ship's route. Rather, the cargo was inadvertently left on the vessel and carried along on its route until it was eventually discovered and delivered to the cargo owner. The shipping company had no intention of diverting the cargo, and indeed was actively searching for it. Thus, there was no unreasonable deviation within the meaning of COGSA.

The cargo insurer also claimed that as a result of the cargo owner's good faith belief that the container had been stolen and its reliance on the shipping company's statements to that effect, it had to reproduce its custom made cargo, and was thus damaged. The cargo insurer's claim was predicated on the alleged material misrepresentation made by the shipping company in its 29/2/2000 fax that the subject cargo container was stolen.

A cause of action in negligence "cannot be the basis of liability where the defendant's sole legal duties to the plaintiff arose entirely out of contract. A breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. The legal duty allegedly breached must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected with and depend upon the contract. "Merely charging a breach of a 'duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim.

Here, the parties' agreement was for the transport and delivery of goods, and the parties' legal duties and correlative responsibilities arose entirely from that agreement. The Court noted that the bill of lading, while stating that it did not guarantee delivery by any particular date, specially disclaimed any loss "in any circumstance" including "indirect or consequential loss or damage caused by delay." The cargo insurer had failed to identify an independent duty on which to base its tort claim. The cargo interests, by proceeding on a tort theory of liability, seeked to circumvent the provisions of the contract to which it was a party. The cargo insurer's causes of action laying in tort were dismissed.

Even if the court were to entertain the cargo interests' tort claim, the alleged "misrepresentation" – a statement contained in a 29/2/2000 fax stating that the carrier "has asked another twenty-four hours before officially reporting this container stolen" – would be insufficient to support a claim for negligent misrepresentation. Here, the statement that the carrier was requesting 24 hours before taking further action was not alleged to be false. Further, the only reliance on that statement that was foreseeable, was that there would be a follow-up in twenty four hours to determine the carrier's ultimate action.

The Judge Hon. Eileen A. Rakower J.C.C. ordered the cargo insurer's claim against the shipping company dismissed.

Please feel free to contact us if you have any questions or you want to have a copy of the Judgment.

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