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To: Transport Industry Operators

**MTD & Time bar**

In its Judgment of 20/10/2004, the English High Court held that a carrier under its multimodal transport documents ("MTDs") could rely on the 9-month time bar clause to reject a cargo misdelivery claim.

In or about February 2002, the carrier contracted with a shipper to carry eight boxes of bronze tubes from Mumbai in India to Stafford, England via Avonmouth for delivery to or to the order of a receiver. The contract of carriage was contained in or evidenced by two MTDs dated 2/2/2002 issued by the carrier to the shipper pursuant to the Indian Multimodal Transportation of Goods Act 1993. On the face of the MTDs, the carrier's obligation as Multimodal Transport operator ("MTO") was to deliver the goods in exchange for one of the three originals issued in the case of each MTD.

On the reverse of each of the MTDs were Standard Conditions governing MTDs issued in accordance with that Act. The pertinent Conditions were as follows:

"12 Liability for loss or damage when the stage of transport where loss or damage occurred is known:-

(1) When the [MTO] is liable to pay Compensation in respect of loss of or damage to the goods between the time of taking them into his charge and the time of delivery and the stage of transport where such loss or damage occurred is known, the liability of the [MTO] in respect of such loss and damage shall be determined by the applicable Indian law if the loss and damage occurs in Indian [sic] or by the provisions of the applicable law of the country where the loss or damage occurred...

22 Limitation of action:

Any action relating to multimodal transport under these condition [sic] shall be time barred if judicial proceedings have not been instituted within a period of nine months after:

- (1) the date of delivery of the goods, or
- (2) the date when the goods should have been delivered, or
- (3) the date on and from which the party entitled to receive has the right to treat the goods as lost.

23 Jurisdiction:

In judicial proceedings relating to the contract for [MTD] under these condition the plaintiff, at his option, may institute an action in a court which according to the law of the country where the court is situated, is competent and within the jurisdiction of which is situated one of the following Places

...:

- (c) the place of taking charge of the goods for multimodal transportation or the place of delivery thereof.."

Clauses 22 and 23 of the MTDs essentially mirror the terms of sections 24 and 25 of the Indian Multimodal Transportation Act of 1993 and thus reflect the relevant Indian law.

Having taken charge of the goods, the carrier shipped them at Mumbai on the vessel PERSEY for carriage to Avonmouth. The vessel arrived at Avonmouth and the goods were discharged

on 9/4/2002. What happened thereafter was that the ship's agents, evidently at the request of the receiver, authorized the release of the goods without production of the original MTDs. The receiver then arranged to collect the goods from Avonmouth on 17/5/2002. The shipper alleged that this release was without its knowledge and consent and that the receiver had not paid for the goods, which had been sold on cash against documents terms. Accordingly, the shipper alleged misdelivery and conversion of the goods.

The English Court clearly had jurisdiction over the claim. First, the effect of clause 12 of the Standard Conditions governing MTDs was to provide for a floating proper law which was objectively ascertainable, the English law was the law of the country where the loss or damage occurred. Undoubtedly, the shipper's complaint related to alleged misdelivery in England, so England was the country where the loss and damage occurred. Accordingly, the English Court had jurisdiction. Second, the English Court had jurisdiction by virtue of clause 23 of the Standard Conditions, the Jurisdiction clause.

Furthermore, the Deputy High Court Judge Julian Flaux QC was satisfied that England, not India was the proper and appropriate forum for the proceedings. Although both the carrier and the shipper were Indian companies, the alleged misdelivery occurred in England. If the carrier's claim against the other liable parties e.g. the shipping company and its agent had to proceed, the bulk of any evidence would come from England. Since the object of the carrier's claim against the shipper is to obviate the need for any such trial because the Court was invited to declare that the carrier was not liable to the shipper, the Judge had no doubt that England was the appropriate forum for the determination of the issue between the carrier and the shipper. Furthermore, since the contract(s) of carriage were governed by English law so far as the dispute was concerned, that was a further reason why the English court was the appropriate forum.

Clause 22 of the Standard Conditions was in very wide terms referring to any action relating to the multimodal transport and thus encompassing whatever claim the shipper might make in respect of the misdelivery, whether framed in contract or in tort. Since the essential complaint of the shipper was that the goods were wrongfully delivered to the receiver other than against production of original documents, the relevant sub-paragraphs of clause 22 of the Standard Conditions would seem to be either (2), the date when the goods should have been delivered, which would be some time in April 2002 or (3) on the basis that it was the shipper who was entitled to receive the goods if the receivers did not produce original documents. It would follow that the shipper was entitled to treat the goods as lost from the moment when the receiver was permitted to collect them from Avonmouth and take them away. That occurred, at the very latest on 17/5/2002, probably somewhat earlier. It necessarily followed that the 9-month period for the bringing of an action under clause 22 expired, at the latest on 17/2/2003. Once that date had passed, any right of the shipper to bring an action against the carrier was extinguished. No authority was needed for this self-evident proposition. The English courts would construe time bar clauses as extinguishing the right to bring a claim rather than as having some lesser effect.

Since the relevant contracts of carriage were MTDs, the Hague or Hague-Visby Rules and the 12-month time limit under those Rules were of no application, but even if they were, that time limit would have expired, at the latest, on 17/5/2003.

It followed, given that no proceedings were commenced by the shipper anywhere in the world before that date, that whichever time limit were to apply, any claim was time barred at the

latest in May 2003 and the right to bring any claim was then extinguished. No proceedings were in fact commenced by the shipper until one in India commenced on 30/1/2004, which were thus way out of time.

The Court has jurisdiction to grant negative declaratory relief and whether it should do so in any particular case is an issue of discretion. Although in the exercise of its discretion, the Court will be cautious, it will grant such relief if it considers that a useful purpose will be served in doing so and the case is otherwise appropriate.

The Judge had no doubt that to grant the negative declaratory relief which the carrier sought would serve a useful purpose and would be entirely appropriate. The Judge reached this conclusion for three principal reasons:

1. Any claim by the shipper was time barred and the shipper had no answer to this.
2. If the effect of a judgment on the merits so declaring was to preclude the shipper from continuing with its claim against the carrier in India, that would reflect appropriately that the shipper had no answer to the time bar argument and should prevent the shipper from further pursuing any proceedings in India.
3. Another important and useful effect of such a judgment was that it would not be necessary for the carrier to pursue its claims against the other liable parties, which were all contingent upon a liability to the shipper. If there was no such liability, those other claims would fall away.

For all these reasons, the Judge was satisfied that the carrier was entitled to the negative declaration it sought. The carrier was under no liability to the shipper because any claim by the shipper (including but not limited to the claim in the High court of India) was time barred.

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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Multi-modal transportation involves far more complicated liability regime than port-to-port or airport-to-airport carriage. Pure international sea or air transport often affords better protection by international conventions. Conversely, multi-modal transport entails a variety of operational risk elements on top when the cargo is in-transit warehouse and during overland delivery. Fortunately, these risks are controllable but not without deliberate efforts. Sun-Mobility is the popular risk managers of many multi-modal operators providing professional assistance in liability insurance, contract advice, claims handling, and as a matter of fact risk consultant for their staff around-the-clock.