SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Cargo release without bank's endorsement

In its Judgment dated 29/3/1996, the High Court in Hong Kong held an air forwarder under its house air waybills liable for the consignor's claim of US$177,293.45 resulting from the cargo release to the notify party without the endorsement of the bank which was named as the consignee.

In this action the seller claimed against the air forwarder for the value of 12 consignments of watches. The seller was a supplier of watches in Hong Kong. It had a buyer in Los Angeles, USA. The buyer purchased watches from the seller on C & I terms. The business between the seller and the buyer commenced sometime in April 1993. There were subsequently about 29 shipments of watches by the seller to the buyer, and all these 29 shipments were effected through the air forwarder and the 12 shipments, the subject matter of this action, were the last 12 of the 29 shipments. Whenever there were goods to be shipped by the seller to the buyer, the seller would ask the air forwarder to come to collect the goods. In respect of each shipment the seller had signed a shipper's instruction form addressed to the air forwarder to ask the air forwarder to receive the goods for shipment. For each of the shipments, the air forwarder issued an air waybill and gave the shipper's copy to the seller. Each of the air waybills named the seller as the consignor, the Bank of America as the consignee and the buyer as the notified party.

As the sales by the seller to the buyer were on D/P basis, in each instance, the seller made out a commercial invoice, a custom invoice, a packing list and a bill of exchange drawn on the buyer at sight for the amount of the invoice. The seller presented these documents together with the shipper's copy of the air waybill and an insurance certificate to its bank, the Daiwa Bank, for onward transmission to Bank of America, the banker of the buyer. In the ordinary course of events, the Bank of America would not release the air waybill or the goods to the buyer without the buyer's acceptance and payment of the bill of exchange.

The 12 consignments were shipped between 13/11/1993 and 1/2/1994. All the shipments arrived at Los Angeles safely. However, all the goods were released to the buyer by the air forwarder's Los Angeles agent without any consent or authorization from the Bank of America, the consignee named on the air waybills. The seller had not been paid by the buyer or any one in respect of these goods. There was no evidence that the seller was aware that these goods were released to the buyer until well after 21/2/1994 when the seller wrote formally to the buyer to demand payment of outstanding bills threatening to ask the air forwarder to return the goods if the bills should remain unpaid. The buyer did not accept the bill of exchange in respect of any of the shipments. The Bank of America had subsequently returned the sets of documents it received to the seller.

The carriage of goods by air from Hong Kong to the United States is governed by the unamended Warsaw Convention of 1929 and the Guadalajara Convention 1961.

The air forwarder was directed by the shipper's instruction to deliver the goods to the consignee bank at Los Angeles specially. This was a matter of importance to the seller. The seller consigned the goods to the bank as part of the D/P arrangement in order to make sure that the property in the goods and the right of disposal of the same would not pass to the buyer without payment of the price by the buyer. The seller would not have left the goods with the air forwarder if someone else was entitled to direct

the air forwarder to deliver the goods to another person without payment of the price. Having received the goods in pursuance to the terms of the shipper's instruction, the air forwarder would have to comply with the direction in the instruction. The Court held that there was a special contract of carriage made between the seller and the air forwarder in respect of each of the 12 consignments, the seller had a good cause of action against the air forwarder at common law whether it had property in the goods at the time of loss or not.

By sending the air waybill naming the Bank of America as the consignee together with the bill of exchange for the price drawn on the buyer to the Bank of America, the seller had reserved the property in the goods. This was a situation which was governed by s 21(3) of the Sale of Goods Ordinance (Cap 26) which provides:

> (3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Although s 21(3) of the Sale of Goods Ordinance speaks of the bill of lading, the Court held that the same must also apply to cases when an air waybill naming a bank as the consignee is used. Accordingly the Court held that the seller was still the owner of the goods at the time of the delivery of the same by the air forwarder's agent to the buyer.

The Court did not think that there was anything in either the Warsaw Convention or the amended Warsaw Convention which limited the right to sue to only the consignor or the consignee. Approaching the matter as a matter of principle and public policy, the Court had no doubt that there was no justification to limit the right to sue only to the consignor or the consignee. No doubt the Warsaw Convention has granted certain rights to the consignor and the consignee and have imposed certain obligations on the carrier. The Warsaw Convention does not expressly say that these rights and obligations are exhaustive. A person was entitled to enforce against a carrier his common law right as being a party to a special contract which was not a right granted by the Warsaw Convention at all. If a person could enforce his 'non convention' common law right under a special contract against the carrier, the Court saw no reason why a person should not be allowed to enforce his common law rights as the owner of the goods. The Court held that the seller had a good cause of action against the air forwarder based on the seller's ownership of the goods and this would be so even if the seller was not a party to the contract of carriage.

As the carriage was governed by the Warsaw Convention, the air forwarder would not be entitled to rely on any exemption clause or any limitation of liability clause which gave the air forwarder wider protections than what are laid down in the Convention. This is the result of art 23 of the Convention which provides:

> **Article 23**
> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this schedule shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this schedule.

Under the Warsaw Convention, the seller would have two years from the date of arrival of the goods at the destination to bring an action (see art 29) and the seller had brought this action within the two-year period. Any provisions relied upon by the air forwarder to provide for a shorter period to bring action would thus be void. In so far as the limitation of liability is concerned, under the Warsaw Convention, the limitation provided would be 250 francs (equivalent to HK$135) per kg (see art 22(2) and Carriage by Air (Overseas Territories) (Hong Kong dollar equivalents) Order 1984) which would appear to be higher than the limitation of $200 per package relied upon by the air forwarder. However the seller contended that the air forwarder was not entitled to rely on any limitation of liability at all because of art 25 of the Convention which says:

> **Article 25**
> (1) The carrier shall not be entitled to avail himself of the provisions of this schedule which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as,

in accordance with the law of the court seized of the case, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any servant or agent of the carrier acting within the scope of his employment.

The seller contended that the loss in this case was caused by the wilful misconduct of the air forwarder or its Los Angeles agent. In Rustenburg Platinum Mines Ltd & Ors v South African Airways & Ors [1977] 1 Lloyd's Rep 564 at 569 Ackner J held that 'wilful misconduct' went far beyond any negligence, even gross or culpable negligence, and involved a person doing or omitting to do that which was not only negligent but which he knew and appreciated was wrong, and was done or omitted regardless of the consequences, not caring what the result of his carelessness might be. In this case, the goods were simply delivered by the air forwarder's agent to the buyer in blatant disregard of the contractual obligation imposed by the terms of the air waybill. The Court held that such conduct on the part of the agent would amount to willful misconduct. What the agent did would simply amount to acting in concert with the buyer to give away the goods to the buyer. Whether the agent had received any assurances from the buyer that it was entitled to delivery of the goods without payment as the seller had agreed to grant it credit was immaterial. The Court did not consider that any reasonable person in the position of the agent could simply act on such representation of the person who wanted to take delivery of the goods. Accordingly the Court held that the air forwarder was not entitled to rely on any exemption or limitation of liability under the Warsaw Convention. To this extent and for this reason, any exemption or limitation clause in the shipper's instruction would be rendered null and void by art 23 and could not be relied on.

The seller admitted that it had brought proceedings in the United States against the air forwarder's agent, the buyer and a number of other persons for the recovery of the value of the 12 shipments. The cause of action there was conspiracy. However there was as yet no trial of the action in the United States and the seller had not obtained any judgment not to say satisfaction of any judgment against any one yet. In these circumstances the Court did not think the mere existence of the US proceedings on a related cause of action would be a defence to the seller's claim in this case.

The seller claimed the total invoice value of the goods for the 12 consignments. The seller was entitled to judgment in the sum of US$177,293.45. In exercise of its discretion the Court also held that the seller should be entitled to be paid interest at the rate of 8% from the date of the writ.

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

Simon Chan
Director
E-mail: simonchan@sun-mobility.com

Richard Chan
Director
E-mail: richardchan@sun-mobility.com

10/F., United Centre, Admiralty, Hong Kong. Tel: 2299 5566 Fax: :2866 7096
E-mail: gm@sun-mobility.com Website: www.sun-mobility.com
CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS
