SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

B/L construction

In his Judgment of 5/10/2005, Judge William Stone of the Hong Kong High Court demonstrated the importance of bill of lading construction.

The case concerned a claim for misdelivered goods under a freight forwarder's bill of lading. The Shipper was a Hong Kong company which made and exported novelty cameras. The cameras in question were fixed film units done up with the cartoon character 'Shrek' insignia. The freight forwarder was a Hong Kong company which the shipper used to effect carriage of 55,000 'Shrek' fixed film cameras from Hong Kong to Le Havre, France. These cameras were under two contracts for sale and purchase on FOB terms between the shipper and a French buyer. The payment terms under the contracts were "LC at sight". On 10 August 2001 the shipper issued its commercial invoice to the French buyer for US$143,815, with the remark "Please T/T USD 143,815 immediately". On 17 August 2001 these cameras were shipped in a container aboard a vessel "Hyundai Federal" operated by Mitsui. Mitsui issued to the freight forwarder (who was named thereon as 'Shipper' "O/B [the name of the shipper]") a Non-negotiable Way Bill, and in turn the freight forwarder issued to the shipper a 'To Order' bill of lading, in which the shipper was named as 'Shipper' and the French buyer as 'Notify Party'. After arrival of the container at Le Havre on or about 5 September 2001, on 10 September 2001 this consignment of cameras was released to the French buyer *without* production of the bill of lading, by the forwarder's French agent. An email from the forwarder's French agent dated 7 November 2001 referred to this incident as "an unintentional mistake" and that "unfortunately [it] was an isolated case of an oversight on Christelle's part", the latter being the employee of the forwarder's French agent. The French buyer refused to pay the purchase price of the goods thus obtained from the forwarder's French agent.

Accordingly, the shipper sued the freight forwarder under the contract of carriage entered into between itself and the freight forwarder. The claim was for the invoice value of the cameras of US$143,815 together with interest and costs. The shipper's claim against the freight forwarder was on the basis that the release of the goods without production of the bill of lading was a breach by the freight forwarder of the contract of carriage evidenced by the bill. The claim also was pleaded in conversion and bailment.

The freight forwarder's first line of defence was that it did not undertake to carry the goods as contractual carrier.

Clause 10 of the reverse side terms of the freight forwarder's bill of lading said:

> "Notice is hereby given that the Company is a private 'freight forwarder' and/or 'forward agent'. All transactions and contracts which are entered into with the Company incorporate the company's printed terms and conditions herewith contained and the Company does not accept any liability of a common carrier."

In terms of the Conditions therein referred to, the freight forwarder emphasised Conditions 3(i) and 3(ii) :

> "(i) The Agent is not a carrier (common or private, actual or contracting), and may on its sole and absolute discretion refuse to other (sic) its service to any person. The Agent does not contract hereunder for the carriage of goods.
>
> (ii) The Agent is a forwarding agent whose principal business is to act as an agent in arranging for the transportation of goods on behalf of Customers from Hong Kong to overseas destinations principally by means of air and sea transportation."

The freight forwarder's bill of lading was signed without qualification under the legend [the name of the freight forwarder], and the Place and Date of Issue was 'Hong Kong 17 August 2001'. Opposite the signature of the freight forwarder there appeared the statement:

> "In witness whereof we have signed three(3) original Through-Bill of Lading if not otherwise stated above, one of which being accomplished the other(s) to stand void"

Thereunder appeared the name of the freight forwarder's employee who prepared the document.

Finally, at the head of the document, underneath the freight forwarder's name, title and Hong Kong address, appeared the following significant statement:

> "We hereby certify having taken over from the aforementioned shipper in external apparent good order and condition the consignment detailed below for irrevocable transportation according to consignee order. One of these Through-Bill of Lading must be surrendered duly endorsed in exchange for the goods."

The freight forwarder argued that its only obligation was limited to *arranging* for the carriage of goods, and that in so arranging such carriage, it engaged the actual ocean carrier, who was responsible physically for carrying the goods by sea from Hong Kong to Le Havre. The contractual relationship between the shipper and the freight forwarder could only properly be described as an agency relationship, a view which was reinforced by the terms of Clause 10 and Clause 3 on the reverse side of the bill. Thus, the freight forwarder must be the "Agent" to which reference was made on the reverse of the bill in Clause 3, the 'bill of lading' as issued by the freight forwarder should be regarded as but a forwarder's receipt for the goods, which the freight forwarder had taken over in order to arrange shipment. This contention was reinforced by the fact that the freight forwarder had charged no freight for the carriage of these goods, and in fact the only remuneration received by the freight forwarder was the sum of US$150 payable in terms of profit share by the forwarder's French agent, and a small sum in respect of container handling fees and export handling charges. Thus, the freight forwarder concluded, in making the contract of carriage with the ocean carrier the freight forwarder had acted as agent on behalf of the shipper, and, there could be no liability of the freight forwarder under any contract of carriage.

The Judge firmly rejected this contention. The Judge found that the freight forwarder was the contractual carrier under its bill of lading issued to the shipper. It was as plain as a pikestaff that this was the position. The freight forwarder had issued its bill of lading to the shipper, had secured a Mitsui Lines vessel to effect the ocean carriage, and had caused these goods to be delivered to its agent – which wrongly had permitted delivery to the buyer absent production of an original bill of lading, an action which directly contravened the specific statement on the face of the freight forwarder's bill of lading that "One of these Through-Bill of Lading must be surrendered duly endorsed in exchange for the goods." The freight forwarder's signature on the bill was unqualified, making it clear that the freight forwarder signed *qua* principal. In itself, the use of the term "forwarder" or "forwarding agent" does not mean that a party is not signing as principal, and it is well-established on the authorities that a freight forwarder indeed can (and often does) contract as such. First, the signature on this bill of lading was in no sense equivocal, the freight forwarder signed this bill absent qualification, this must indicate implicit agreement that ostensibly inconsistent clauses on the reverse must be regarded as overridden. Second, and putting to one side the curious fact that the term "The Agent" remained *undefined* on the reverse side of the bill, whereas the freight forwarder was defined as "The Company" – in any event the Judge would firmly decline to accept any submission based upon the small (and, in this instance, virtually illegible) print on the reverse of this document in light of the clear statements appearing on its face. According to the observations of their Lordships in the *The "Starsin"* [2003] 2 WLR 711 (HL), when a bill of lading contains on its face an apparently clear and unambiguous statement of who is the carrier it is difficult to accept that a shipper would expect to have to resort to the detailed conditions on the reverse of the bill in an attempt to discover with whom he was contracting.

The Judge also accepted the submission of the shipper that the argument advanced on behalf of the freight forwarder that it did not contract as principal raised the question as to the identity of the contracting party if in fact it was not the freight forwarder; in particular, who was it, if not the freight forwarder, who had contracted to fulfil the obligation, prominently stated on the face of this bill of lading, not to release these goods save against production of an original bill of lading? Certainly it was not Mitsui, the ocean carrier, whose obligation under its waybill terminated when the goods were delivered to the forwarder's French agent, and it could hardly have been the negligent agent. The Judge held that this was a 'To Order' bill of

lading issued by the freight forwarder, as principal, to the shipper. The goods represented by this bill of lading clearly were not to be delivered to any person save upon production of one of the originals, and if possession was parted with absent such production, then liability inevitably would follow. Were the position to be otherwise, international carriage of goods could no longer function with the degree of certainty which international commerce demands.

The freight forwarder then submitted that it could rely upon the exclusion clause contained in Condition 24(i)(a) of its bill of lading conditions and also the limitation provision contained in Condition 24(iii)(b).

Clause 24(i)(a) read:

> "The Agent shall not be liable to the Customer or the consignee or the Owner :
> (a) for loss or damage (physical or otherwise), including but not limited to loss or damage resulting from non-delivery of the goods or mis-delivery of the goods to a wrong party, caused by any failure to carry out or negligence in carrying out the Customer's or the Consignee's or the owner's instructions, or by any failure to perform or negligence in performing the Agent's obligations (whether such obligations arise by contract or otherwise), unless such loss or damage is due to the willful misconduct of the Agent or its own servants and to circumstances within its control...."

whilst Clause 24(iii) read:

> "In no case whatsoever shall any liability of the Agent, howsoever arising and notwithstanding that the cause of loss or damage (physical or otherwise) be unexplained, exceed
> (a) the invoice value of the relevant goods calculated on f.o.b. basis, or (b) a maximum of Hong Kong $500.00 (Dollars Five hundred) in respect of any one consignment or any package of goods whichever shall be the lesser."

On this basis, the freight forwarder should not be held liable for the misdelivery by the forwarder's French agent. And as for the quantum limit, Condition 24(iii) was intended to set the limitation figure at a maximum of HK$500 in respect of any one consignment or package, with the result that in this case the maximum financial liability would be HK$344,000 (688 cartons times $500 per carton). And in any event, the freight forwarder further maintained that the shipper was not entitled to claim the invoice value of these goods, namely US$143,845, and that the correct measure of damage in cases of misdelivery was the sound arrived value, and that no attempt had been made by the shipper properly to prove such sound arrived value.

The Judge was unable to see why the court should be precluded from accepting the invoice value as evidence of the sound arrived value and the Judge rejected the freight forwarder's submission. It is well settled that exemption clauses are to be construed strictly, and that very clear wording is necessary to escape liability for breach of an obligation considered to be of fundamental importance to the contract. Moreover, consistent with the 'contra proferentem' principle, any ambiguity in an exemption clause will be resolved against the party seeking to rely upon it. The term "Agent" was nowhere defined in the bill, and could, perhaps, refer to the forwarder's French agent, or to an agent signing the bill, if it had been signed "As Agent", or to the sea carrier engaged by the freight forwarder to perform the carriage. The freight forwarder itself was defined (at Clause 1 on the reverse of the bill) as "the Company", and it seemed strongly arguable that its definition as "the Company" indicated that "the Agent" was another entity. The Judge further accepted the shipper's contention that the reference to "mis-delivery to a wrong party" within Clause 24(i)(a) was insufficient to make it clear to users of the carrier's services that the carrier specifically was seeking to exclude liability for releasing goods absent production of a bill of lading, given that, for example, such term also could be taken to refer to misdelivery to a wrong carrier or warehouseman or haulier. If the freight forwarder was to be regarded as "the Agent", the terms of Clause 24(i)(a) would be in direct conflict with the provision on the face of the bill that "One of these Through-Bill of Lading must be surrendered duly endorsed in exchange for the goods", and also with the description of the document as a bill of lading; there must here be implicit agreement that special words override inconsistent standard printed conditions. Therefore, that the Judge was against the freight forwarder in terms of the argument based upon Clause 24(i)(a). The Judge formed a like view with regard to Clause 24(iii), which was the quantum limitation relied upon by the freight forwarder. It was clear that the phrase "whichever is the lesser" related to the lesser of the two limits specifically referred to in subparagraph (b) one amount calculated per consignment and the other calculated per package, and not to the limit based on invoice value. Thus, the limit specified

in subclause (a) applied, namely the invoice value of the relevant goods calculated on an f.o.b. basis – which represented the normal measure of loss in claims for delivery of goods without production of a bill of lading.

The printed conditions on the reverse of the freight forwarder's bill of lading – which in novel fashion was divided into two parts, namely 'Interpretation' and 'Conditions of Contract' – struck the Judge as muddled and imprecise in addition to harbouring patent inconsistency with those provisions appearing on the face of this bill; also, and not least, these conditions posed a very real problem of legibility. The impression created was as if someone had surrounded himself with differing precedents and thereafter attempted to incorporate into this one document exemptions of every stripe without any real attempt to harmonise the concepts gathered therein – the absence of any definition of "Agent" was perhaps the prime example of this difficulty.

It was because, as a matter of construction, the Judge found no difficulty in rejecting the exclusion / limitation arguments propounded by the freight forwarder, that the Judge considered it unnecessary specifically to deal in the judgment with the shipper's 'back up' argument involving reliance upon the Control of Exemption Clauses Ordinance, Cap.71. However, whilst there was no need to make a decision on the point, suffice to say that the shipper's extended argument relating to the applicability of CECO to the element of the freight forwarder's contractual obligation *not* forming part of the sea carriage did not strike the Judge as obviously incorrect, and that there was at least room for argument that there was no reason why CECO should apply to on-carriage after the end of sea carriage but not also to activities (for example, warehousing, destuffing of containers, delivery arrangements) occurring after the conclusion of such sea carriage. And certainly, if and in so far as CECO were to apply, the court would have had little hesitation in characterizing as unreasonable the particular exemption clauses invoked by the freight forwarder during argument in this case.

The Judge found the shipper's claim against the freight forwarder to be established.

The order of the court was as follows:

(i) Judgment was to be entered in favour of the shipper against the freight forwarder in the sum of US$143,815.00;

(ii) There was to be an order *nisi* that the freight forwarder was to pay interest on the said sum, such interest to run from the date of the institution of proceedings herein until the date of judgment at the rate of 2% over US dollar prime rate from time to time prevailing;

(iii) There was to be an order *nisi* that the freight forwarder was to pay the shipper the costs of the action upon a common fund basis, such costs to be taxed if not agreed.

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

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