SUN MOBILITY
Insurance and Claims Services Limited

31 December 2005
Ref : Chans advice / 60

To: Transport Industry Operators

Break AWC's 250 francs/kg limit

In his Judgment of 20/12/2005, Judge William Stone of the Hong Kong High Court held a forwarder, an airline and an airport terminal liable for the full cargo invoice value of HK$16.482 million without the protection of the Amended Warsaw Convention's liability limitation of 250 francs per kg in two cases of theft of mobile phones.

On Saturday 8/11/1997 a consignment of 2,000 mobile telephone handsets, packed in wooden crates and weighing 2.78 tonnes, arrived as air cargo at Kai Tak airport on board KLM flight number KL 887. This consignment of an invoice value of HK$4.13 million was stolen later that day from the warehouse of HACTL at Kai Tak. Some ten weeks later, on Saturday 17/1/1998, a further consignment of 4,500 mobile telephones, also packed in wooden crates and weighing 4.966 tonnes, again arrived as air cargo at Kai Tak airport on board KLM flight number KL 887. This consignment, representing an invoice value of HK$12.352 million, also was stolen, upon the following day, Sunday 18/1/1998, from the HACTL warehouse at the airport.

The primary issue for decision was whether Ericsson, the cargo owners, in each instance could successfully break limit pursuant to the provisions of the Amended Warsaw Convention and of the Guadalajara Convention, whose terms have been accorded the force of law in Hong Kong by virtue of the Carriage by Air Ordinance, Cap. 500.

The plaintiffs were Ericsson Hong Kong and Ericsson Sweden. It was the latter which was sending these consignments of mobile phones to its Hong Kong counterpart. The cargoes of mobile telephones had been carried from Stockholm's Arlanda airport to Hong Kong via Amsterdam. KLM was the actual carrier under Master Airway Bill No. 074-4793 5344 dated 5/11/1997, and Master Airway Bill No. 074-4793 9396 dated 14/1/1998. The contracting carrier, which had entered into the contract of carriage with Ericsson Sweden, was ASG Sweden. It had issued House Air Waybill No. STOAA 127338 dated 5/11/1997 and House Air Way Bill No. 129673 dated 14/1/1998 with respect to the first and second consignments. ASG Hong Kong was responsible for collection of the arrived consignments of telephones, and their transmission to the designated consignee. At the material times HACTL enjoyed a monopoly over the provision of cargo handling services to airlines using Kai Tak airport. When unloaded from the carrying aircraft, all goods arriving at Kai Tak were processed utilising the services of HACTL and, after completion of the various import formalities, HACTL handed over those goods to whomever was carrying a Shipment Release Form ('SRF'), a bearer document the possession of which entitled the bearer to collect the goods itemized thereon. Under this system handing over an SRF was tantamount to handing over the cargo. This was the origin of the problem in the two cases, which arose precisely because thieves were able to get their hands upon the SRF's relating to these two consignments, in each instance to collect and thence to purloin the large quantity of mobile telephones constituting these two consignments.

By virtue of section 3 of the Carriage by Air Ordinance, Cap. 500, the Warsaw Convention, as amended by the Hague Protocol of 28/9/1955, is given the force of law in Hong Kong. Similarly, by virtue of section 10(1) of the Ordinance, Guadalajara Convention also is given the force of law. The Amended Warsaw Convention ('AWC') is set out in full in Schedule 1 to the Carriage by Air Ordinance, and the Guadalajara Convention is set out in Schedule 2. The AWC, as modified by the Guadalajara Convention, contains an exclusive code relating to compensation for damage to or loss of cargo during international carriage. The AWC and the Guadalajara Conventions not only focus upon the liability of the actual and contracting carrier for cargo loss or damage, but also further deal with the liability of the servants or agents of the contracting or actual carrier. The broad Conventional scheme is that the contracting carrier, defined in Article I (b) of the Guadalajara

Convention as "a person who as principal makes an agreement for carriage governed by the Warsaw Convention with a ...consignor or with a person acting on behalf of the ... consignor", is under Article II thereof subject to the provisions of the AWC "for the whole of the carriage contemplated in the agreement", whilst the actual carrier, defined within Article I (c) as "a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph (b)...", is liable under Article II "solely for the carriage which he performs". Article 18 (1) of the AWC imposes liability upon the carrier for damage to or loss of any cargo "if the occurrence which caused the damage so sustained took place during the carriage by air", which means that the carrier is liable, *without* proof of fault, unless he can set up one of the defences as set out in the Convention. The concomitant of this doctrine of strict liability is that Article 22 provides the statutory limit to the amount of damage which may be recovered, limiting the carrier's liability to 250 francs per kilogramme unless a "special declaration of interest in delivery at destination" has been made and a supplementary sum paid, in which case the statutorily recoverable limit is varied to a sum not exceeding the declared sum.

Article 25 reads as follows:

> "The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

Article 25A extends the right so to limit to servants or agents of the carrier, although once again this right to limit can be broken *if* it can be shown that the damage in question arose from an act or omission of a servant or agent done with intent to cause damage or with knowledge that damage would probably result. Precisely whose servants or agents are relevant to this inquiry is canvassed by the Guadalajara Convention, Article III(1) providing that "the acts or omissions of the actual carrier and of his servants or agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier", whilst Article III(2) provides in like terms for the converse situation, deeming the acts and omissions of the contracting carrier and of his servants or agents to be also those of the actual carrier, although that article imposes the limitation that no such act or omission shall subject the actual carrier to liability exceeding the limits specified in Article 22 of the AWC. Finally, Article V of the Guadalajara Convention provides that in relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier, if he proves that he acted within the scope of his employment, shall be entitled to limit his liability "unless it proved that he acted in a manner which, under the AWC, prevents the limits of liability from being invoked".

Article 29(1) of the AWC reads:

> "The right to damages shall be extinguished if the action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped."

Article 29 was applicable to the claim against KLM on the basis that KLM was an actual carrier under the Guadalajara Convention. KLM argued that the Ericsson's cause of action was time-barred in each action under Article 29(1) because no claim for damages under the AWC had been brought within the 2 year time-limit, and thus that KLM had acquired a complete and substantive defence. The history was that the leave to amend to plead the Convention causes of action had been granted by the court only on 25/3/2003 (in HCCL 202 of 1999) and on 29/4/2003 (in HCCL 2 of 2000), and that the date of the writs in each action were dated 6/11/1999 and 12/1/2000 respectively. Accordingly, KLM submitted, Ericsson's case as formulated prior to these amendments plainly had been insufficient to constitute "an action" brought within 2 years within the meaning of Article 29(1), given that the relevant factual averments against KLM *qua* actual carrier were first raised in March and April 2003 respectively. KLM further argued that in these two cases the date of arrival of the cargoes at Kai Tak had been on 8/11/1997 and 14/1/1998, and thus that the 2 year time-limit for an action for damages under the Article 18 of the AWC had expired on 7/11/1999 and 13/1/2000 respectively. Yet by these dates, KLM submitted, there never was any pleaded cause of action under the AWC or the Guadalajara Convention, the only causes of action raised within the pleadings as originally constituted being in bailment, contract and negligence. Accordingly, KLM concluded, given that there simply was no Convention claim in the original pleadings - all that there had been at the outset was "a misconceived common law action" - it would be illogical and incorrect for such common law action to suffice as an action brought within the 2 year time-limit for the purposes of Article 29(1); it was only after the

amendments had been made that the right of damages against KLM as actual carrier had been positively asserted by Ericsson, by which time it was far too late to resurrect such extinguished claim.

The Judge was unconvinced that this focus upon the content of the subsequent amendments was analytically satisfactory or correct. When it came to time-bar arguments it seemed to the Judge that the sole question to be addressed was whether the generally indorsed writs in these two actions, which were issued on 6/11/1999 and 12/1/2000 respectively, sufficed to stop time from running, and thus to prevent the operation of the time bar contained in Article 29. If the answer to this was 'yes', the time bar argument failed; if 'no', it succeeded, and the relevant claim was extinguished. The indorsements in these two cases were widely drawn, it indeed failed to make any reference to a claim under the AWC or the Guadalajara Conventions. That which they *did* include, however, was an assertion of a claim for damages, the entitlement to which was said to arise from KLM's "breach of duty ... in or about the handling, custody and care" of the two consignments of mobile phones. Ericsson submitted that the requirement of the law, pursuant to RHC Order 6 rule 2, was for "a concise statement of the nature of the claim made or the relief or remedy required in the action", and that this was precisely what these writs contained. Ericsson pointed out that the AWC, as modified by the Guadalajara Convention, clearly imposed duties on an actual carrier, one of which was the duty to pay compensation for "damage sustained in the event of ... loss of ... any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air." Thus, Ericsson asserted, time clearly had been protected. The Judge accepted this contention. In his judgment the writs herein *were* indorsed in sufficiently broad terms to include a claim under the AWC, and thus that time had ceased to run. Accordingly, the Judge rejected the contention that these claims were time-barred.

Article 22(2)(a) of the AWC imposes a limit of liability of 250 francs per kilogramme of cargo, unless the consignor has made special declarations which had not occurred in the two cases. Article 22(5) further provides that the sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of 65.5 milligrammes of gold of millesimal fineness 900, and further that conversion of such sum into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies "at the date of judgment".

Section 6(4) of the Carriage by Air Ordinance provides:

> "The Monetary Authority may specify in Hong Kong dollars the respective amounts which for the purposes of Article 22 of the amended Convention, and in particular paragraph (5) of that Article, are to be taken as equivalent for a particular day to the sums expressed in francs in that Article."

Section 6(5) further provides:

> "A certificate given by or on behalf of the Monetary Authority in pursuance of subsection (4) is conclusive evidence of the materials stated in it for the purposes of Article 22 of the amended Convention, and in particular of paragraph (5) of that Article, and a document purporting to be such a certificate is, in any proceedings, to be received in evidence and, unless the contrary is proved, deemed to be such a certificate."

However, section 20(4) of the Carriage by Air Ordinance makes specific reference to the Carriage by Air (Overseas Territories) (Hong Kong Dollar Equivalents) Order, which provides that 250 francs are equivalent to HK$135 for the purposes of Article 22 of the AWC. Thus, the argument canvassed on behalf of KLM was that as far as the AWC limit was concerned the effect of this Order was to render the carrier liable only to a sum calculated on the basis of HK$135 per kilo in terms of the total weight of the lost cargo. KLM thus maintained that the clear effect of section 20(4) of the Ordinance was that the Hong Kong Dollar Equivalents Order remained in force as if it had been made under section 6(4), that there was no provision under the Carriage by Air Ordinance that provided in which circumstance the Hong Kong Dollar Order should cease to have effect, and that there was no Certificate issued by the Monetary Authority in evidence in these proceedings. Nor had Ericsson pleaded a specific limit amount, and nor had it specifically traversed the quantum of the limit applicable under Article 22. Thus, submitted KLM the limitation sum was a matter of precise calculation, which in terms of the 1st theft was HK$375,300 [HK$135 times 2,780 kgs], and in terms of the 2nd theft was HK670,410 [HK$135 times 4,966 kgs].

To this argument Ericsson demurred. There was no tension between sections 6(4) and 20(4) of the Carriage by Air Ordinance. Ericsson submitted that the deeming provision under section 20(4) applied only if the Monetary Authority failed to exercise its power (but not duty) to issue a Certificate specifying the equivalent

amount for a particular day, and that it would be "wrong in principle" for the court to declare that limit under the AWC fell to be quantified with reference to the Hong Kong Dollar Equivalents Order in circumstances wherein the Monetary Authority might well grant a Certificate under section 6(4) for the particular date (as yet unknown) upon which judgment in this case was to be handed down, and that that was something which obviously could not be done in advance of the date of such judgment. Accordingly, the principle '*generalibus specialia derogant*', that is, special provisions override general ones, should be applied. It was known that the Monetary Authority had given such Certificates in the past, and given that there was also known to be a significant difference between the value of the franc as recently certified by the Monetary Authority when compared with the value ascribed thereto in the Carriage by Air (Overseas Territories) (Hong Kong Dollar Equivalents) Order, the only fair way of proceeding - should such transpire to be relevant - was that the court should express its view in principle in these cases, and that thereafter the Monetary Authority should be asked so to certify. The Judge agreed. The Judge considered that it would be unfortunate and illogical if machinery specifically put in place by statute to provide for a contemporary valuation of the franc should be sidestepped on the basis of the argument as advanced by KLM. That would seem to the Judge to be wrong in principle and potentially unfair. There was no reason why any pre-emptive procedure as to costs could not have been updated in terms of contemporaneous valuations by means of a 'Calderbank' letter, alternatively by means of regular adjustments of monies paid into court, depending upon the currency fluctuations of the franc against the US / HK dollar.

The theft of the first case took place on Saturday 8 / 11 / 1997. The plaintiffs' cargo of 2,000 mobile telephones had arrived at Kai Tak on board KLM 887 at approximately 0915 hours, and, after appropriate documentary processing, should have been collected from HACTL by ASG Hong Kong, at 0730 hours on the following Monday morning, which in normal course was the next designated collection time-slot reserved by HACTL for ASG Hong Kong. This did not occur. That which happened was that a valid release document, the relevant SRF, which duly had been issued for this cargo, was cancelled by a person or persons unknown, and the creation of a replacement SRF was effected, again by a person or persons unknown, which replacement thereafter was transferred into the hands of the thief or thieves who used it to obtain possession of the goods from the HACTL warehouse. Early in the trial, HACTL made a significant concession. HACTL formally accepted, on the facts, that the court *could* find that the 1st theft on 8 / 11 / 1997, which had involved the cancellation of an existing SRF and the issuance of another in its stead - which replacement had come into the possession of thieves, who then had used it to obtain the first consignment of mobile telephones - could be characterized as a theft which had occurred with the inside involvement of a HACTL employee. It seemed to the Judge that HACTL's concession that the 1st theft was the result of an inside job on the part of HACTL left little room for argument but that Ericsson indeed *was* entitled to break limit as against KLM in terms of the 1st theft. Accordingly, the Judge held that in terms of the 1st theft Ericsson was entitled to break limit against KLM, or that KLM was not entitled to invoke the AWC monetary limit against Ericsson in terms of the loss occasioned by the 1st theft. The only basis upon which Ericsson could break the Article 22 limit as against the ASG Sweden was on the basis of Article III(1) of the Guadalajara Convention, namely that the acts and omissions of the servants or agents of the actual carrier should be deemed to be also those of the contracting carrier. Accordingly, the like result enured in terms of ASG Sweden liability for the 1st theft as was the position in terms of the liability of KLM, and the Judge found that Ericsson had been successful in breaking the Article 22 limit, and that judgment in the appropriate sum was to be entered against the ASG Sweden to reflect that fact. Moreover, Ericsson pursued a direct cause of action against HACTL at common law in negligence and bailment. It was clear that HACTL could have no defence to Ericsson's direct claim in light of HACTL's concession in terms of the facts of the 1st theft. Accordingly, it followed that judgment in the appropriate sum must also be entered in Ericsson's favour in the action against HACTL; in the circumstances there could be no question of HACTL being in a position to invoke the provisions of Article 25A, and thus to avail itself of the Article 22 limit.

KLM submitted that it was entitled to an indemnity from HACTL arising in contract in respect of KLM's liability to Ericsson, and that in the circumstances HACTL was obliged to indemnify KLM. A written agreement of 22 / 7 / 1996 between KLM and HACTL provided, *inter alia,* that HACTL should be responsible for "any loss of or damage to goods or for any nondelivery or misdelivery if it is proved that the loss, damage, nondelivery or misdelivery occurred whilst the goods were in the care, custody or control of HACTL." KLM submitted that the effect of this 1996 Agreement was plain and obvious, HACTL was responsible for the loss of goods if such occurred whilst in its custody, care or control. KLM asserted that there was no requirement for KLM to establish negligence or recklessness or intent to cause damage on the part of HACTL.

Accordingly, in the case of the 1st theft (and indeed in the circumstances of the 2nd theft also) the mobile phone consignments had been physically located within the HACTL warehouses, and had been released at the HACTL collection point by HACTL employees. Thus, said KLM, given that HACTL had exercised control over both shipments prior to their erroneous release, there could be no doubt but that KLM had proved its case for an indemnity, and that HACTL therefore was liable to KLM for all losses flowing from these thefts, and that KLM contractually was entitled to recoup from HACTL such sums as had been awarded against it by the court. The Judge agreed with this submission. It followed, therefore, that KLM's counterclaim in the third party proceedings must succeed, and that KLM was entitled to be indemnified by HACTL in terms of the judgment sum awarded against KLM with regard to the 1st theft.

ASG Sweden had issued a contribution notice against HACTL in both actions. ASG Sweden submitted that it should recover contribution against HACTL on the basis of the Civil Liability (Contribution) Ordinance, Cap.377. In particular, section 3(1) of that Ordinance provides that "any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)", whilst section 4(1) provides that "the amount of contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question." Moreover, under section 4(2) the court can in an appropriate case direct that "the contribution to be recovered from any person shall amount to a complete indemnity." It is established that in the exercise of its discretion the court considers the relative blameworthiness of each party and the degree to which each party contributed to the relevant damage. Within the context of the equivalent English legislation, Hobhouse J in *Downes v. Chappell* [1997] 1 WLR 426 observed (at 445):

> "The extent of a person's responsibility involves both the degree of his fault and the degree to which it contributed to the damage in question. It is just and equitable to take into account both the seriousness of the respective parties' faults and their causative relevance."

The Judge granted the claim by ASG Sweden, the contracting carrier - which in the head action had been held liable for the loss upon the basis of the application of Article 25 of the AWC by reason of the acts or omissions of an agent, HACTL, of the KLM - for an indemnity against HACTL of that sum which ASG Sweden had been ordered to pay to Ericsson in the head action.

The theft of the second case, which took place just over two months later, on Sunday 18/1/1998, was the more complex in execution, although once again it depended upon the thieves getting possession of the all-important SRF. This second incident involved a total of 4,500 mobile phones which Ericsson had arranged with ASG Sweden to transport from Sweden to Hong Kong, and which were carried from Arlanda via Schipol to Kai Tak and had arrived on flight number 887 on Saturday 17/1/1998. These phones once again were packed in large wooden crates. At the time that this consignment was delivered to HACTL three of these crates were found to have been broken open, thereby presumably facilitating knowledge of their contents. On Sunday 18/1/1998 a man impersonating a person known as Man Kin Ying, whom otherwise was a legitimate employee of ASG Hong Kong had turned up in the afternoon at the HACTL counter and presented a false ID card and a false ASG Hong Kong chop, and duly had obtained the SRF in question from the HACTL employees on duty at the time. Once again, possession of this bearer document of title facilitated collection of this very large consignment of telephones from the HACTL warehouse collection point, there to be loaded onto a lorry and thereafter to disappear.

After reviewing the evidence, in the Judge's judgment it was abundantly clear that this second theft could not be viewed in isolation from the first, and it was equally clear that neither theft could be regarded as merely an 'opportunistic' crime: each evidently involved a significant degree of planning and preparation. Moreover, both thefts necessitated considerable familiarity with the procedures, and both thefts took place over a weekend, when ASG Hong Kong staff did not usually attend, and during that which Ericsson aptly characterized as the "window of opportunity" between Saturday night and Monday morning, when normally designated cargo collections resumed. And both thefts, of course, relied upon obtaining the all-important SRF, the bearer document which mandated production of the relevant cargo. The Judge borne in mind, further, that there had been no employment terminations by or within HACTL by the time of the second theft, which struck him as a powerful argument in favour of Ericsson's proposition that syndicate insiders within HACTL also would have been used in some capacity for the second theft. The Judge further agreed with the contention that the only parties with potential access to the elements of knowledge necessary to orchestrate the second theft were HACTL and ASG Hong Kong. All of the vital pieces of information necessary to bring

off this second theft *would* have existed within HACTL. Moreover, one vital piece of information which clearly was available to the thief/thieves, but which in the circumstances of this theft had *not* been available to ASG Hong Kong, was the specific AWB number for this second consignment, and that it was clear on the evidence that when the thief presented himself at the HACTL office, on the afternoon of Sunday 18/1/1998, he had with him a piece of paper bearing the particular AWB number of the mobile telephone consignment. ASG Hong Kong had had no prior notice of this second shipment and no reason had been put forward as to why ASG Hong Kong otherwise would have had any other means of knowing the particular AWB number of this consignment.

It followed, therefore, that if one accepted (as the Judge did) the irresistible inference that this second theft was carefully pre-planned by a thief or thieves in possession of the knowledge necessary for and relevant to such theft, and if HACTL and ASG Hong Kong were the two potential parties in the frame, and if, on the probabilities, the latter was able to be eliminated by reason of the fact that ASG Hong Kong did not receive any pre-alert in terms of this second consignment, the finger must point squarely and irreducibly to internal HACTL involvement. HACTL staff plainly had access to the ID card number of Mr Man Kin Ying, and it was accepted by HACTL that HACTL staff could have had access to the information that Mr Man was an authorized agent of ASG Hong Kong. In those days at least the manufacture of a false ID card, and a fake HAFFA chop, would not unduly have stretched the resources of organized crime. Having regard to all the circumstances of the second theft, the overwhelming probability was that, in light of the *modus operandi*, one or more employees within HACTL must have been involved in perpetrating this second theft. Self-evidently was not an opportunistic theft perpetrated by an outsider or outsiders, involving as it did intimate knowledge of HACTL procedures only available to insiders, and of the possible candidates the Judge accepted the submission that the preponderance of evidence pointed to HACTL staff after the possibility of involvement of ASG Hong Kong had been eliminated. That no-one within HACTL apparently had been arrested for this theft did not strike the Judge as of particular importance; the fact that the police had been unable to prefer a criminal charge which they would have to establish beyond a reasonable doubt should not be permitted to cloud the issue with which a civil court was concerned in terms of the application of a lesser standard of proof. For the purpose of the present claim, therefore, after considering all the evidence before the court and after reflecting on the appropriate burden of proof, the Judge found that Ericsson had succeeded in establishing the inference that this second theft necessarily occurred with the inside involvement of a member or members of the HACTL staff in employment at the time, and the Judge further held that in this exercise there was no requirement for Ericsson to establish who specifically within HACTL was to blame for that which occurred.

It followed that the Judge found that Ericsson thus succeeded in their action against HACTL, and that in circumstances HACTL was unable to invoke the Article 22 limit pursuant to the provisions of Article 25A. The conclusion reached by the court regarding the liability of HACTL for the second theft necessarily informed the case of Ericsson against KLM, the actual carrier, and ASG Sweden, the contracting carrier, respectively. Judgment was entered for Ericsson against the KLM and against ASG Sweden. It followed, in light of the conclusion that the second theft also was attributable to inside involvement on the part of HACTL, that neither KLM nor ASG Sweden was in a position to invoke the protection of the Article 22 limit. In light of the factual conclusion reached that the second theft was achieved by reason of inside involvement on the part of a HACTL employee or employees, the position was substantially the same as in the case of the first theft. Accordingly, the Judge ordered that KLM was entitled to be indemnified by HACTL in terms of that sum which KLM was ordered to pay Ericsson in terms of this second theft. For the reasons set out in the circumstances of the first case the Judge ordered that ASG Sweden be indemnified by HACTL in terms of that sum which ASG Sweden was ordered to pay to Ericsson in the head action.

Both cases before the court had been decided upon the basis that limit was to be broken on the premise that the damage complained of had occurred with the inside involvement of HACTL, and thus that the element within Article 25 of "intent to cause" damage has been satisfied.

Finally, KLM, ASG Sweden and HACTL were not happy that the sums claimed in the two actions, that was, HK$4.13 million and HK$12.432 million respectively, were based simply upon the invoice prices, and wherein the invoices were raised in circumstances in which Ericsson Hong Kong had ordered a specific number of mobile telephones of a particular type. The relevant invoice in each case was issued to Ericsson Hong Kong, and was paid, and thereafter, subsequent to the theft of the two consignments, these telephones

had been replaced by Ericsson Sweden at no charge to Ericsson Hong Kong. The argument was that the sale and purchase of these phones plainly was an intra-group arrangement, and that in these circumstances the only loss could have been that of Ericsson Sweden. It followed, it was argued, that the loss to Ericsson Sweden was the cost of the provision of replacement telephones, together with the cost of transport to Hong Kong, and that this sum, whatever it be, plainly would not be the invoice price, given that the cost of manufacture must significantly be less than the invoice value. Accordingly, so the submission continued, the documents relating to the reimbursement of Ericsson under the relevant insurance represented the best evidence of the true position, and that this amounted to HK$3,661,579 and HK$7,485,204 respectively, which sums represented the equivalent Hong Kong dollar sums at the dates that the Swedish kroner payments were made to Ericsson Sweden. In fact, in this regard HACTL noted that the claims as originally put forward to the defendants by the insurance adjusters were in these amounts.

Ericsson's submission was that Ericsson was entitled to recover the sound arrived value of the cargoes which were stolen, and that the best evidence of that value was the price which Ericsson Hong Kong actually had paid for the goods. Ericsson made two additional points: first, and clearly correctly, that the insurance arrangements, and the amounts in fact paid by the underwriters, were irrelevant, and that there might be many reasons why an underwriter would not pay the full value of the goods; moreover, the underwriters were not the plaintiffs in these cases. Second, Ericsson argued that that which had happened subsequently between Ericsson Hong Kong and Ericsson Sweden in terms of inter-company arrangements was nothing to the immediate point. Ericsson's submission was that it was the damage to the proprietary interest which the law compensated - see *The "Sanix Ace"* [1987] I Lloyd's Rep 465, a decision of Mr Justice Hobhouse, who in that case had held that it was the claimant's proprietory or possessory interest that was compensated and gave the right to recover substantial damages, and the fact that the plaintiff had contracts of sale or purchase which enabled him to collect the price from his buyer or to obtain compensation from a seller did not disentitle him from recovering full damages. In the Judge's view this principle was correct. The Judge had no difficulty in holding that the sound arrived value as represented by the invoice price was good evidence of the loss, and indeed this represented the usual approach of the Commercial Court.

The Judge borne in mind that whilst property in these telephones no doubt passed to Ericsson Hong Kong by virtue of the CIF basis of the contracts of sale and purchase, the undisputed fact was that Ericsson Sweden produced replacement consignments of mobile telephones in each case, and whilst it did not appear greatly to matter into which Ericsson pocket' the sum adjudged due was in fact paid (not least since there might well be an element of intra-corporate accounting), in the circumstances the Judge was prepared to give judgment in favour of Ericsson Sweden, in terms of the invoice value in each case, namely HK$4.13 million and HK$12.352 million.

The position overall was that Ericsson had succeeded in breaking the Article 22 limit in both actions, with judgment in the respective sums claimed to be entered in each action in favour of Ericsson Sweden against each of the KLM, ASG Sweden and HACTL, and with HACTL in each action being ordered to indemnify the KLM and ASG Sweden in the sums thus adjudged.

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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