SMIC SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Sale of uncollected cargoes

On 7/3/2006, the High Court of Hong Kong ordered the sale of an uncollected cargo of cement on board a ship that was at Port Harcourt, Nigeria.

The registered owner of the ship M/V "New Market" ("the Vessel") entered into a voyage charterparty on about 23/9/2005 for a voyage from one safe port/one-two safe berth Taizhou or Zhangjiaggang or Nantung Port, China, to one safe port/one-two safe berths Port Harcourt, Nigeria. The charterparty was evidenced by a fixture note incorporating the "GENCON" form 1994.

The charterparty contained, among other provisions, the following:

> Fixture note
> "2. CGO: 30,000MT 10 PCT Moloo Cement in bulk;
> 21. Arbitration/GA if any to be settled in HKG, English law to apply;
> 24. Others as per GENCON CP Revised 1994."
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> GENCON 1994
> "8. Lien clause: The Owners shall have a lien on the cargo and on all sub-freights payable in respect of the cargo for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party including costs of recovering same.
> 10. Bills of Lading: Bills of Lading shall be presented and signed by the Master as per the 'Congenbill' Bill of Lading form, Edition 1994, without prejudice to this Charter Party or by the Owners' agents."

The Vessel arrived at Taizhou, China, on about 10/10/2005. Notice of Readiness was tendered at 19:30 hours. An initial draft survey was conducted at 19:45 hours. The Vessel began to load cargo on 11/10/2005 at 16:00 hours and loading was completed at 04:40 hours on 15/10/2005. The final draft survey was conducted at 06:50 hours and the Vessel departed at 11:30 hours on the same day. On or about 15/10/2005, the Chief Officer signed and issued a Mate's Receipt on the shipowner's behalf stating that 29,594 metric tons of Ordinary Portland Cement Quality Conforming to GB175-1999 PO 42.5 R in Bulk +/- 10% ("the Cargo") were loaded on board the Vessel. On or about 15/10/2005, a Bill of Lading No. XIAOMAGE002 ("the B/L") was issued at Taipei, Taiwan, as per the "Congenbill" 1994 form on the shipowner's behalf pursuant to the terms of the charterparty. The shipowner had been advised by its Nigerian legal counsel that the original B/L was held by Access Bank in Nigeria.

The B/L contained the following terms, among others:

> "Bill of Lading;
> To be used with charter parties;
> Code name 'Congenbill';
> Edition 1994;
> All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

As shown in the B/L, the seller was the shipper of the Cargo and Access Bank and the buyer were the consignee and notifying party respectively.

On 24/11/2005, the Vessel arrived at the port of discharge at Port Harcourt, Nigeria. Notice of Readiness was tendered at or around 00:44 hours on 25/11/2005 and the Vessel was at that time ready to discharge the Cargo. A Ship Entry Notice was issued by the Nigerian Ports Authority approving the entry of the Vessel into the port. However, the Cargo had not been discharged until 7/3/2006.

The documentary evidence showed that on or about 12/9/2005, the buyer applied to Access Bank for a letter of credit ("L/C") to be opened on its behalf. The beneficiary under the letter of credit was the seller. The seller issued an invoice to the buyer on 9/9/2005 demanding payment of the Cargo in the sum of US$2,250,000.

Since the Vessel arrived at the port of discharge on 24/11/2005, no attempt had been made by either Access Bank or the buyer to present the original B/L and to take delivery of the Cargo. On 9/12/2005, the shipowner sent a notice of protest to put the charterer on notice that the Vessel was still waiting for berthing due to the failure of Access Bank and the buyer to take delivery and urge the charterer to make all necessary arrangements. The shipowner also expressly reserved its rights to bring a claim against the charterer in respect of any claims, demurrage, losses and costs arising from such failure. The shipowner had also written to the seller and Access Bank urging them to present the original bill of lading and take delivery of the Cargo. However, the seller and Access Bank had given no response.

The shipower had obtained an expert report from Captain Eric Edmondson dated 27/2/2006, which described the dangers that would be faced by the Vessel as a consequence of the long period that the Cargo had been on board. The Cargo itself was of a perishable nature. Further, the presence of the Cargo would endanger the Vessel if it were kept on board for any longer.

It would accordingly appear to serve the interests of all parties if the shipowner was to be able to order the Vessel to proceed to the next convenient port where the Cargo could be discharged and sold immediately.

The shipowner intended to commence arbitration proceedings in Hong Kong against the charterer pursuant to the terms of the charterparty. It also intended to commence arbitration proceedings against the seller, Access Bank and buyer pursuant to the terms of the B/L, which incorporated the terms of the charterparty including the arbitration clause. The shipowner's claims against these parties would include a claim for a declaration that these parties had abandoned the Cargo; a claim for a declaration that the shipowner was entitled to exercise a lien over the Cargo and the proceeds of sale thereof; and also a claim for demurrage in respect of the substantial period that the Vessel had been delayed.

As the arbitral tribunal had not been formed, the court had jurisdiction under Section 2GC and Article 9 of Schedule 5 of the Arbitration Ordinance to grant interim relief for the Cargo to be sold. The particular interim relief was an order for sale and the court had power to grant it under Order 29, rule 4 of the Rules of the High Court. Section 2GC and Article 9 of Schedule 5 of the Arbitration Ordinance and Order 29 rule 4 of the Rules of the High Court provide as follows:

> "2GC. (1) The Court or a judge of the Court may, in relation to a particular arbitration proceeding, do any of the following-
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> (b) in relation to relevant property-
>
> (i) make an order directing the ... sale of the property by ... a party to the proceedings ...;
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> Article 9. Arbitration agreement and interim measures by court
>
> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.
>
> (Order 29, rule 4) Sale of perishable property, etc.
>
> (1) The Court may, on the application of any party to a cause or matter, make an order for the sale by such person, in such manner and on such terms (if any) as may be specified in the order of any property (other than land) which is the subject-matter of the cause or matter or as to which any question arises therein and which is of a perishable nature or likely to deteriorate if kept or which for any other good reason it is desirable to sell forthwith."

The power to order sale under Order 29, rule 4 allows the court to prevent injustice which would arise if the goods, which are liable to deteriorate or perish, are allowed to do so, with the consequence that they will become of no value while the dispute between the parties is pending.

The originating summons had been served on the charterer, seller, Access Bank and buyer in accordance with the order of Tong J dated 24/2/2006. None of them had filed any acknowledgement of service indicating that they intended to oppose the shipowner's application for interim relief sought in the originating summons. The buyer on 7/3/2006 appeared by solicitors and sought an adjournment, which the Court declined. On 1/3/2006, the charterer had sent an acknowledgement of service by fax to the shipowner's solicitors indicating that it did not intend to contest these proceedings.

On 27/2/2006, the buyer's Nigerian lawyers, Olumide Sofowara's Chambers, sent a fax to the shipowner's solicitors which stated:

> "… Our Client has received your letter dated 24th February 2006 in respect of same and wishes to point out that the inability to discharge the cargo of cement from the vessel was not due to the fault of the consignee or charterer, but due to what could be referred to 'as restraint of princes (sic)'. Our Client got the Nigerian Government's approval to import the cargo of cement on board the vessel under reference and several others and after the vessels arrived at the Port of Port-Harcourt in Nigeria, they were prevented from discharging by a Presidential order. It is noteworthy that the Chinese Ambassador to Nigeria even intervened in the matter and the representative of the vessels is aware of efforts being made to discharge the vessel as well as others laden with cement meant for our Client.
>
> Since efforts are still on to ensure that the matter is resolved with the President, it is hoped that the vessels should commence discharging as soon as possible in the next few days. We therefore see no immediate reason to commence arbitral proceedings with all its attendant expenses. Because of our expectations, we have not assigned our interest in the cargo to anyone, and in any event, the Bank that financed the transaction has not yet endorsed the Bill of Lading to us. We have also not given anyone authority to assign our interest to a third party… "

The shipowner's solicitors then sought advice from its Nigerian correspondents, and on 2/3/2006 the Nigerian correspondents replied to the shipowner's solicitors in the following terms:

> "I have read Mr Olumide Sofowara's fax and I am at a loss as to the source of his information. The position remains the same. I am aware that IBETO [the buyer] are still lobbying the Government. No one can predict the outcome and I would not recommend that we postpone proceedings. The only vessel, "JORITA", that IBETO was able to bring along side has been ordered to leave with her cargo. I will make further inquiries and will revert to you."

Since then, there was no further development which would indicate that the Cargo could be discharged before it became deteriorated.

In the premises, as the immediate discharge and sale of the Cargo would be in the interests of all parties, the Court therefore considered it just and right that the Court should allow the shipowner to sell the Cargo and to pay the proceeds of sale into court. The Court therefore ordered in the following terms:

(1) The shipowner be at liberty to sell the Cargo consisting of about 29,594 metric tons of Ordinary Portland Cement in bulk, on board M/V "New Market", without prejudice to the rights of the parties to this action and, after sale, to pay the proceeds, after deducting the expenses of sale, into the court where such proceeds be retained pending the outcome of the arbitration proceedings between the shipowner and the charterer, seller, Access Bank and buyer or further order of the court; and

(2) the costs of this application be paid by the charterer, seller, Access Bank and buyer to the shipowner in any event and such costs to be taxed.

Please feel free to contact us if you have any questions or you would like to have 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

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.