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To: Transport Industry Operators

HVR cover cargo delivery?

In his Judgment of 27/7/2006, Judge Stone of the Hong Kong High Court explained that the Hague Visby Rules did not cover the cargo delivery.

The claim related to a shipment of footwear goods by a Hong Kong exporter from Hong Kong to Los Angeles, California. The footwear products had been sold by the exporter to its buyer in Los Angeles. The buyer placed with the seller an order for the purchase of certain footwear products, and the seller arranged for the manufacture, in China, of these products. After the completion of manufacture, the seller made arrangements for the transportation of the finished goods from the PRC factories to Hong Kong, and for making the further arrangements for the shipment of goods from Hong Kong to Los Angeles. In this regard, a 'Shipping Order' was completed by the seller according to the instructions of the buyer, which document then was returned to the forwarders specifically appointed by the buyer, and original bills of lading thereafter were issued by the forwarders. These bills of lading named the buyer as the consignee *without* the words 'To Order', and thus fell within that classification known as 'straight' bills of lading. The goods of these 'straight' bills then were shipped to Los Angeles on board an ocean carrier - in this case Sinotrans or Evergreen - contracted with by the forwarders. Upon arrival at the port of Los Angeles, the arrangements for the handling of the containers thus shipped were undertaken by the forwarders' agent. It was that in March / April 2003 the seller gave instructions in relation to the shipment from Hong Kong to Los Angeles of containers of footwear products; the bills of lading issued were 'straight bills'. The 23 containers were delivered to the warehouse of the buyer, situated about an hour away by road from the port of Los Angeles, through the forwarders' agent, and *absent* presentation by the buyer, the consignee, of an original bill of lading relating to the containers thus delivered. As a consequence the buyer had not paid the seller for the goods which were shipped, and the seller, which alleged misdelivery, sought to recover the invoice price of these goods of US$873,028 under the contracts of carriage represented by the 23 bills of lading as issued by the forwarders.

The forwarders said that the seller had no cause for contractual complaint; the forwarders had delivered the goods to the consignee under the bills of lading, the buyer, which was precisely the entity to whom they should have been delivered, and the fact that such delivery occurred *otherwise* than against production of an original bill of lading was nothing to the point within the specific context of a 'straight' as opposed to an 'order' bill. The forwarders argued that the seller's case was premised upon the argument that all contracts of carriage evidenced by 'straight' bills of lading were subject to an invariable rule that the carrier might release the goods to the named consignee only against presentation of an original bill of lading - the so-called 'presentation rule'. However this, the forwarders said, fundamentally was to misunderstand the true situation, and the suggestion that the obligation in the terms alleged by the seller was to be implied into all contracts evidenced by 'straight' bills was contrary to established principles of contract law, where the implication of a term in a contract was necessary to give business efficacy to the contract. In this connection, the forwarders drew a clear distinction between 'order' bills and 'straight' bills. In the case of an order bill, the forwarders argued, without seeing the original bill, a carrier could not tell to whom the goods were to be delivered, and therefore required to inspect the original bill to see what indorsements, if any, it contained. This explained, the forwarder suggested, the implication into a contract of carriage evidenced by an order bill that the original bill had to be produced in order to obtain delivery, so that once an order bill was produced, the carrier was entitled to accept the bill of lading as the shipper's order to deliver to the holder of the original bill. This, the forwarder said, conformed with the long-standing, and unquestioned practice, for there to be delivery to the holder of an original 'order' bill of lading. However, 'straight' bills by their very nature were different, the forwarders argued. A straight bill did not have the transferable character of an order bill in the sense that any holder thereof was capable of claiming possession of the goods shipped under the bill. A straight bill was 'transferable' only in a very limited sense that it might be transferred from the shipper to the named consignee. In effect, therefore, the bill itself contained the shipper's order in relation to the delivery of the goods: by naming the consignee, the shipper ordered the carrier to deliver the goods to that consignee and to no other person, and the carrier's obligation to deliver the goods to the person designated by the shipper stemmed solely from the shipper's instruction. The forwarders argued that a contract by which a carrier (A) promised a shipper (B) to deliver goods to the named consignee (C) identified in a straight bill of lading had perfect efficacy without any requirement on the part of the consignee to produce the contract document; accordingly a contract evidenced by a straight bill of lading did not need any term to be implied in

relation to the production of the bill of lading on delivery in order to be operative and to have business efficacy. The forwarders maintained that since order bills and straight bills were different in kind, it was "inevitable" that different rules would and should apply, and the shipper had a choice whether he wished to use an order bill or a straight bill. Moreover, the forwarders submitted, the decision in the Singapore case *Voss* did not stand for the proposition that the presentation rule applied to all straight bills; as the Singapore Court of Appeal had noted, at the end of the day "the issue must be resolved on the basis of contract law and the intention of the parties."

The Judge rejected as firmly as he might the proposition that the 'presentation rule' did not apply to straight bills of lading. The Judge failed to see why there should, in effect, be one rule for 'order' bills and one rule for 'straight' bills. The Judge would be inclined also to agree with the observation of Lord Bingham in *The "Rafaela S"* (*op cit*, at 354, paragraph 20) that were it necessary to do so, he would hold that production of the bill was a necessary pre-condition of requiring delivery even where there is no express provision to that effect. True it was that the bills of lading contained only the first sentence in the time-honoured language used within the attestation clause, namely, "In Witness Whereof, the carrier by its agents has signed three (3) original Bills of Lading all of this tenor and date, one of which being accomplished the others to stand void" and not the usual following sentence, namely, "One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order." However, the Judge did *not* accept the forwarders' contention that in light of the omission of this second sentence, this clause could not have the contractual effect of imposing the presentation rule upon the forwarders under the relevant contracts of carriage. The Judge had concluded that on the facts of this case the obligation of the carrier was to deliver the goods to the buyer only against production of the bill of lading. It followed, therefore, that subject to the other defences raised, in the Judge's view the forwarders were *prima facie* in contractual breach in failing so to do.

The forwarders' next submission was more promising. It was that if they acted in *prima facie* contractual breach, the forwarders nevertheless were entitled to rely upon the exemption clause contained within Clause 2 of the Terms and Conditions on the reverse of the bills of lading.

The relevant clause stated as follows:

> "2.(a)…The liability (if any) of the [forwarders] in respect of the Goods during the period commencing with their being loaded onto any sea going vessel and continuing up to and during discharge from that vessel or from another sea going vessel into which the Goods shall have been transshipped shall be determined in accordance with the provisions of the Carriage by Goods by Sea Act of the United States of America approved April 16, 1936 which shall be deemed to be incorporated herein…
>
> (b) Save as provided in (a) hereof, the [forwarders] shall be under no liability in any capacity whatsoever for loss or misdelivery to the Goods however caused whether or not through the negligence of [the forwarders] [their] servants or agents or subcontractors or for any direct or indirect loss or damage caused by delay or for any indirect or consequential loss of damage…

In light of the terms of Article III, rule 8 of the Hague-Visby Rules, which states :

> "Any clause, covenant or agreement in a contract of carriage relieving the carrier from liability for loss or damage to, or in connection with, goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be void and of no effect…"

The initial element of this debate inevitably focused upon the ambit of the applicability of the Rules to the instant contracts of carriage, these Rules being made part of Hong Kong law by section 3 of the Carriage of Goods by Sea Ordinance, Cap. 462, the effect of which is thus to give statutory force to a mandatory contractual regime. The scope of the disagreement under this head was straightforward. The seller argued that contractual Condition 2 should be subject to the provisions of Article III, rule 8, and thus that the purported exemption clause was out of play, whilst to the contrary the forwarders contended that the Rules had no application after the goods in question had been discharged from the ship, and thus that the contractual clauses in question remained relevant.

In this connection the forwarders pointed out that Article I(d) of the Hague-Visby Rules expressly provides that:

> "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship",

whilst Article II provides :

> "Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"

and Article VII further states:

> "Nothing herein contained shall prevent a carrier or shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea."

The forwarders said that the alleged loss did not arise until *after* the goods had been handed over to the land carrier, and had been hauled by road a considerable distance from the discharge port - the evidence was that the premises of the buyer was about a one hour drive inland. Accordingly, said the forwarders, the misdelivery alleged occurred at the very end of the combined transport operation, and clearly was *subsequent* to the discharge of the goods from the ship upon which the goods had been carried to Los Angeles. Therefore, the forwarders continued, Clause 2 remained

relevant and operational, and in terms of their construction entirely clear, and that in circumstances such as these the court undoubtedly should give effect to the expressed intention of the parties.

This was a difficult area. The point at which the mandatory regime of the Rules ceased, and private contractual obligations resumed sway, was not one always susceptible to easy answer.

In the Judge's opinion the correct analysis was that the misdelivery took place at the point when the goods initially were delivered, absent production of the bill of lading, into the hands of the agents of the buyer. The fact that thereafter the goods were transported to the actual premises of the buyer about an hour's drive inland struck the Judge as nothing to the immediate point, although the Judge accepted that if the forwarders were to be correct in this characterization, the answer would be clear, in that on any view there could and would be no question of extending the applicability of the Hague-Visby Rules to cover such misdelivery occurring after overland transport *ex* the discharge port. If the view the Judge had taken as to point of misdelivery be correct, then the debate reverted to the difficult issue of whether such misdelivery at the port fell within the operational ambit of the Hague-Visby Rules - and hence the preclusionary effect of Article III, rule 8 in relation to the contractual exemption and limitation clauses within the bills of lading.

As to this, the forwarders' position logically had to be that notwithstanding that rejection of their classification as to the time and place of such misdelivery (that is, inland at the buyer's warehouse), nevertheless even *if* the misdelivery occurred at the discharge port (as the Judge had held to be the case), 'discharge' finally had been completed when the goods - or, more precisely the container containing the goods - safely had been deposited on the wharf, or, at the latest, within the relevant storage area. To the contrary, the seller put its case expressly on the basis that on the facts of this case the misdelivery took place when the "care and custody element of the Hague Rules was still in force", citing in this connection Article II of the Hague-Visby Rules.

In terms of the operational scope of the Rules, the Judge agreed with the approach which was taken at first instance by Hirst J in the Commercial Court in *The "Captain Gregos"*, [1989] 2 Lloyd's LR 63.

In *The "Captain Gregos"* Hirst J expressed the matter thus (*op cit*, at 69):

> "The first question which I have to decide is whether delivery is in any way within the scope of the art. II "package". *Article II describes the various stages at which the carrier bears responsibilities and liabilities, and is entitled to rights and immunities; this begins with loading and ends with discharge of goods, with the intermediate stages of handling, stowage, carriage, custody, and care in between. All these are functions of transportation beginning at the moment when the goods start to be put on board, and ending with the moment when they are finally unloaded. The "package" so described thus seems to me to be inherently inapt to embrace delivery, which imports concepts of possessory or proprietary rights, alien in my judgment to these carefully listed transportational stages. This view seems to me to be reinforced by the definition of "Carriage of goods" in art. I(e).* Once the conclusion is reached that delivery is outside the scope of art. II, which is of course the key article, it must inexorably follow that misdelivery of whatever kind is outside the scope of Article III, r.6, since the carrier is under no "liability" in that respect. There is, moreover, in consequence no need for any saving clause comparable to art. IV rule 5(e)…"

In the Judge's view there was in principle no justification for extending the concept of 'discharge' beyond final unloading to embrace every act up to and including delivery of the goods, which would be tantamount to regarding the carrier both as carrier and warehouseman, and which not only would extend the Rules to the entire contract of carriage, including a period of storage ashore, but also possibly might serve to confuse the proper ambit of the Hague-Visby Rules with, for example, particular contractual provisions often found within contracts of carriage by sea entitling the carrier to warehouse the goods, usually at the merchant's risk and expense, if the consignee did not take delivery. It seemed to the Judge that Article II, which states the scope and purpose of the succeeding articles, and Article III, rule 6 required to be read consistently and together, and the Judge had concluded, therefore, that the seller's primary submission that in this case the misdelivery took place when the "care and custody element" of the Rules was still in force was plainly wrong.

If this analysis be correct the operational ambit / reach of the Rules did *not* extend to the misdelivery on the facts, and thus the attention of the court had to switch to the provisions of the particular exemption clause, quoted above, which was invoked by the forwarders and which remained unaffected and unrestricted by the terms of Article III, rule 8.

The seller's short response to the issue of the purported contractual exemption was this exemption clause did not assist the forwarders, given that the fundamental requirement to deliver the cargo only against an original bill supported the further proposition that it was permissible as a matter of construction to limit the ambit of a particular clause in light of that fact. This formulation in the Judge's view required to be approached with some caution in light of the rejection of the doctrine of fundamental breach by the House of Lords in the series of cases beginning with *Photo Production Ltd v. Securicor Ltd* [1980] AC 827, in which case Lord Diplock observed (at 851):

> "In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of implied and secondary obligations."

It was clear that contracting parties might agree to conditions of carriage which protected the carrier against liability for loss which might defeat the main object of the contract of carriage, the proviso being only that such an agreement had to be made manifest in clear and unambiguous terms. In the Judge's judgment there was no wider principle to the effect that the terms of an exemption clause otherwise clear and unambiguous on its face necessarily would be 'read down' by reason of the fact that it purported to exclude liability for misdelivery, which in effect was what the seller came very close to submitting. There was no doubt but that with the demise of the doctrine of fundamental breach, in 'misdelivery cases' there had been a judicial inclination in particular cases to limit the reach of exemption clauses purporting to exempt liability for such misdelivery when the wording (and perceived ambiguity) of the clause in question so permitted. In truth, however, these cases represented but examples of the wider (and wholly unexceptional) proposition that in terms of the construction of exemption clauses very clear wording was necessary to avoid liability for breach of an obligation considered to be of fundamental importance to the contract, Lord Hobhouse expressing the position in *The "Starsin"* [2003] 2 WLR 711 (HL), at para. 144, in the terms following:

> "Before examining the decided cases and the principles which they disclose, it is as well to bear in mind a basic rule of construction of contracts of carriage. If a party, otherwise liable, is to exclude or limit his liability or to rely on an exemption, he must do so in clear words. Unclear words do not suffice: see, eg *Pera Shipping Corpn v Petroship SA (The "Pera")*, [1985] 2 Lloyd's Rep 103. Any ambiguity or lack of clarity must be resolved against that party…"

The exemption argument in each case had to depend upon the wording of the particular clause when construed within the factual matrix of the particular case. In the Judge's view there was no power to 'read down' such clauses in instances wherein the contracting parties expressly had stated in clear and unambiguous language that on the occurrence of the events specified therein that there would be no consequential liability for loss of the goods, and it followed that the Judge was unable to agree with the application of that which sometimes had been referred to as the 'main object principle of construction'. As Marks J neatly expressed the position in *Kamil Export (Aust.) Pty Ltd*, (*op cit*, at 552) - a case in which this issue was discussed at length by the court - "It is accepted that an exemption clause may operate to defeat the main object of a contract. It does so if it is to be so understood. The question is whether it says so." Did it say so in this particular case? In the Judge's view it did, and the Judge found that there was no room, within the clause as drafted, to hold otherwise. Clause 2(b), which was the clause in question, seemed to the Judge to permit of little doubt or ambiguity. In the Judge's judgment this was not a case wherein the words used in the clause left it open to the court to move to limit its ambit in light of the fundamental obligation within contracts of carriage by sea to deliver only against presentation of an original bill of lading, and thus to exclude from the operation of the clause the delivery by the defendants or their agents to the consignee absent production thereof. To the contrary. This clause was couched in clear terms, with express reference to misdelivery "howsoever caused", and whether in the result such clause operated so as to defeat the main object of the contract struck the Judge as nothing to the point *if* that was the construction *required* to be given to the words in question and where that was the logical operation which might be ascribed to the clause. Were this court to ignore that which these words clearly and unambiguously said this would, it seemed to the Judge, effectively be to introduce by the back door the discredited doctrine of fundamental breach. Whilst each case must depend upon its own facts and each exemption clause its particular terminology, in the case in question, the court was driven to the conclusion that in this instance this exemption clause, properly construed, indeed was applicable, and thus that the forwarders had to succeed on the argument in terms of the exclusion of liability by virtue of the operation of the exemption contained within clause 2 of the Terms and Conditions. In this context it was difficult to disagree with the forwarders' parting shot that if the clause was found to be applicable in the circumstances and were not to be upheld, it was not easy to conceive of any clause which could exclude liability for misdelivery.

Resolution of this issue, however, in itself compelled the court to hold that the forwarders had been successful in defending the seller's claims in these actions, which accordingly had to be dismissed.

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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