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Ref : Chans advice/75

To: Transport Industry Operators

## Summary Judgment

On 16/11/2006, the Hong Kong District Court issued a summary judgment against a forwarder for US\$114,706.80 plus interest and costs in a case of cargo delivery without production of the original Bill of Lading.

This concerned a sale of goods contract. In May 2005, the seller received an order from the buyer for the purchase of 30,186 pieces of ladies jeans ("the Goods"). Both the seller and the buyer agreed the selling price of the Goods at US\$114,706.80. This sale was evidenced by an invoice dated 30/5/2005. On about 29/5/2005, the Goods were delivered into the custody of the forwarder, as the carrier, who packed the Goods inside 9 containers for shipment to the United States. On about 1/6/2005, the seller came to the forwarder's office and paid the forwarder the relevant freight and charges for the shipment of the Goods. The forwarder handed over to the seller the original Bill of Lading No. AHK50602006A ("the Bill of Lading"). There was no adverse clausuring in the Bill of Lading. The Bill of Lading named the seller as the Shipper, "to order of HBZ Finance Ltd." as the Consignee, and the buyer as the Notify Party. The Goods under the Bill of Lading were shipped from Hong Kong to the United States in mid June 2005. The buyer then informed the forwarder that the buyer had lost the Bill of Lading and asked the forwarder to release the Goods to the buyer. Subsequently, the buyer provided 3 advertisements in newspaper saying that the original Bill of Lading was lost by the buyer. In late June 2005, without taking instruction from the seller, the forwarder released the Goods to the buyer upon securing a letter of "Indemnity and Guarantee" issued by Israel Discount Bank of New York dated 15/6/2005, holding the forwarder harmless from the release of the Goods.

In March 2006, the seller sent letters to the forwarder asking for return of the Goods on the ground that the shipper was the holder of the original Bill of Lading. The forwarder failed to do so as the Goods had been released.

The seller took out the legal action on 18/5/2006. On 15/7/2006, the seller took out the summons for a summary judgment against the forwarder under Order 14 of the Rules of the District Court. The seller said the Goods were released without production of the original Bill of Lading. The forwarder, as a carrier for reward and/or as a bailee of the Goods, was in breach of its duty to take reasonable care of the Goods and to deliver the Goods according to the terms of the Bill of Lading. The claim was therefore based upon the forwarder's fault or negligence in unauthorized release of the Goods without collecting the original Bill of Lading and/or seeking instructions from the seller.

The forwarder only disputed its liability, not the quantum. The forwarder's case was that the forwarder had not done any business with the seller before. The forwarder only knew about the buyer at the material times. In early June 2005, the forwarder received a shipping order from the buyer concerning shipment of the Goods. The buyer informed the forwarder that it would send the seller to collect the Bill of Lading and pay the relevant charges. The forwarder did not know who the seller was. All along the forwarder took instructions from the buyer, which they regarded as the "shipper". The Goods were duly shipped and arrived at Long Beach, USA, the Port of Discharge in about mid-June 2005 in good order and condition. Upon arrival of the Goods, the forwarder received instructions from

the buyer requesting the forwarder to release the Goods with the representation that the Bill of Lading was already lost. The buyer also produced a letter of "Indemnity and Guarantee Delivery without the Bill of Lading" issued by Israel Discount Bank of New York dated 15/6/2005. In reliance of the representation and the said letter of Indemnity and Guarantee, the forwarder released the Goods to the buyer in late June 2005.

The forwarder argued that the "Shipper" of the Goods was the buyer, not the seller. The forwarder submitted that the forwarder only followed the instruction of the "shipper" to release the Goods without production of the original Bill of Lading and was therefore not negligent or in breach of its duty. The forwarder said the case was "peculiar and mysterious". The forwarder even went so far as to suggest that there was a conspiracy between the seller and the buyer to defraud the forwarder. In support of this contention, the forwarder produced a letter dated 27/3/2006 issued by Messrs. Tam, Pun and Yipp, solicitors for the buyer, to Messrs. Y.S. Lau & Partners, solicitors for the seller. The letter suggested that there was a trading dispute between the seller and the buyer over the Goods delivered by the forwarder. The forwarder suggested that the forwarder was kept in the dark and did not know what was going on between the seller and the buyer. The whole picture was not clear and could only be resolved at trial by making inquiry with the seller, the forwarder, and the buyer.

The following are well-known principles applicable to O.14 applications:

- (a) The defendant shoulders the burden to satisfy the Court that he has a real or bona fide defence (i.e., that there are triable issues), or that there ought for some other reason to be a trial of the plaintiff's claim.
- (b) O.14 is for clear cases, i.e. cases in which there is no serious material factual dispute and, if a legal issue, then no more than a crisp legal question as well decided summarily as otherwise. The procedure is inappropriate where the plaintiff's entitlement to recover any sum is made subject of any serious dispute, whether of law or fact.
- (c) Although the mere assertion in an affidavit does not, ipso facto, provide leave to defend, the Court will not embark upon a mini-trial of the action on paper and leave to defend will be granted unless the defence raised so incredible or so contradicted by contemporaneous documents or circumstances that it becomes clear that the defence is a sham.
- (d) The test is not whether the defendant's assertions are to be believed, rather it is whether those assertions are believable, i.e. capable of being believed. If so, the defendant must have leave to defend.

It is trite law, and undisputed by the forwarder, that when a bill of lading has been issued, the carrier is under the obligation to deliver the goods at the port of destination to the holder of the bill upon presentation of the original bill.

The main defence, as suggested by the forwarder, was the dispute as to whether the seller was the shipper. The forwarder said, all along, they took instructions from the buyer, which the forwarder regarded as the shipper. The forwarder released the Goods, though without presentation of the Bill of Lading, under the instructions of the "shipper". The forwarder was therefore not in breach of its obligation in the contract of carriage. In the Court's judgment, the identity of the shipper could not be disputed in this case. It was not disputed that the Bill of Lading was prepared and issued by the forwarder as the Carrier. The seller was named as the shipper in the bill. The dispute whether the employee of the seller, who came to pay the freight and relevant charges, had disclosed her identity as representative of the seller was immaterial. The forwarder had exhibited the instructions by fax dated 6/6/2005 that they received from the buyer. That document also stated clearly that the shipper was the seller. On the documentary evidence, it was ludicrous to suggest that the seller was not the shipper or that the forwarder did not know the seller's status as the shipper.

In any event, the forwarder was bound under the contract of carriage and/or had a duty as a bailee and/or as a carrier for reward to deliver the goods only upon production of the bill.

The forwarder had suggested that there might be a conspiracy between the seller and the buyer to defraud the forwarder. In the Judge's view, that serious allegation had been made without any basis, and against the affidavit of the forwarder, who said that the forwarder was given to understand that there were trading dispute between the seller and the buyer.

The forwarder raised a defence, namely, the exemption clause under Article IV 2(i) of the Hague-Visby Rules.

"Article IV (Hague-Visby Rules)

1.....

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from -  
(i) Act or omission of the shipper or owner of the goods, his agent or representative.

....."

The forwarder said it was an omission of the seller for not keeping the forwarder informed that the seller was in possession of the original Bill of Lading. This proposition was raised without authorities in support. In the Judge's view, no such duty arised from the contract of carriage. Given the historical and commercial background of the use of a bill of lading, there cannot be such a duty on the shipper who would not expect the carrier to release goods without his instruction in the absence of the original bill of lading.

The forwarder complained that the forwarder was kept in the dark and did not know what was going on between the seller and the buyer. The forwarder said the whole picture could only be resolved at trial. In the Court's judgment, any trading dispute between the seller and the buyer, as the forwarder alleged, was no defence to the head action between the seller and the forwarder.

In the Judge's view, the defences raised by the forwarder were bound to fail. There could not be any argument that the forwarder, as carrier of the Goods releasing the Goods without production of the original Bill of Lading, was negligent and/or in breach of its duty as carrier and bailee. The Judge was satisfied that the case was one of the few cases suitable for summary judgment. The quantum was not in dispute and was supported by the Goods' value in the invoice. There was therefore judgment for the seller against the forwarder in the principal sum of US\$114,706.80. The Judge also ordered interest on the principal sum from date of writ at judgment rate until payment. The Judge also made costs order nisi that the costs of the legal action be paid by the forwarder to the seller, to be taxed if not agreed. The costs order nisi would become absolute after 14 days from date of handing down of the judgment.

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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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.