SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

HVR cover cargo delivery? (II)

Remember our Chans advice / 68? The Hong Kong High Court on 27 / 7 / 2006 held the forwarders not liable for the cargo misdelivery claims of US$873,028. After one year, the Hong Kong Court of Appeal issued its Judgment on 13 / 7 / 2007 allowing the seller's appeal and holding the forwarders liable.

The claim related to a shipment of footwear goods from Hong Kong to Los Angeles, California. The footwear products had been sold by the seller to its buyer in Los Angeles. The seller in March / April 2003 made 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. The 23 containers were delivered to the buyer 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, 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.

In *The "Rafaela S"* the House of Lords considered whether a straight bill was a "bill of lading or any similar document of title" within the meaning of Hague-Visby Rules Art.I(b). Their Lordships unanimously held that it was. The straight bill issued in *The "Rafaela S"* included the following attestation clause:-

> "IN WITNESS whereof the number of Original Bills of Lading stated above all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order."

Consequently, *The "Rafaela S"* establishes the following propositions (with which the Court respectfully agreed):-

(1) From at least 1873 (if not earlier) mercantile practice treated straight bills as bills of lading having the characteristic of documents of title.
(2) In the 1920s, the drafters of the Hague Rules must have been aware of this practice and would have intended the expression "bill of lading or any similar document of title" in Art.I(b) to reflect such established commercial usage.
(3) It follows that the expression "bill of lading or any similar document of title" in Art.I(b) includes straight bills of lading.

Once it is accepted that a straight bill is a bill of lading, it must be that a straight bill is a document of title in the same way that an order bill is a document of title. It must also follow that, as a document of title, a straight bill has to be produced before the named consignee can obtain delivery of the goods. This is because, just as with an order bill, a straight bill is a key to the goods or, as it is sometimes described, the key to the warehouse. To obtain the goods, one has first to produce the key. This function of serving as a document of title or "key" distinguishes a straight bill at common law from a sea waybill. It may be that, unlike the situation of an order bill, a carrier acting on a straight bill knows the identity of the consignee. But it is by no means the case that presentation of a bill of lading invariably serves only to identify the person to whom delivery should be made. Presentation of a bill of lading can serve other functions. For example, given that a straight bill is a document of title, seller (shipper) and buyer (consignee) will typically agree that property in goods is not to pass until the bill is delivered to the buyer following payment to the seller. Production of a straight bill by the consignee would prove to the carrier that the consignee has acquired a proprietary interest in the goods and is entitled to possession. As far as the shipper is concerned, the requirement of production would ensure that the buyer who

has not paid, cannot obtain delivery: see the judgment of Lord Bingham in *The "Rafaela S"* at paragraph 6. If the goods can be delivered without production of a straight bill, the carrier would have no idea whether any condition relating to the passing of property in the goods has been fulfilled. The carrier may then become liable in conversion for delivering goods to a non-owner. Production of a bill would be his assurance that any condition relating to the transfer of property in goods has been met. He would have an assurance that, in delivering the goods to the consignee holder of the straight bill, he was not converting the goods. It seemed to the Court that the presentation rule is an integral part of the usual documents against payment or letter of credit arrangements encountered in routine commercial practice.

It has been noticed that in *The "Rafaela S"* the House of Lords thought that, on a true construction of the attestation clause, the relevant bill was a document of title which had to be produced to obtain the goods. A similar approach of construction was used by the Singapore Court of Appeal in *Voss v. APL Co. Pte Ltd.* [2002] 2 Lloyds Rep 707.

Here the forwarders bills all bore the following attestation:

> "IN WITNESS WHEREOF, the carrier by its agents has signed three (3) original Bill of Lading all of this tenor and date, one of which being accomplished the others to stand void."

The Court thought that, just as in *The "Rafaela S"*, the attestation clause here clearly indicated that the forwarders bill was a document of title which needed to be produced to obtain the goods. There would be no point otherwise to having one effective and two void original copy bills of lading in respect of the forwarders straight bill. And, like the House of Lords in *The "Rafaela S"*, the Court would reject any argument along the lines that the attestation clause was to be ignored as being meaningless or inapposite in the case of a straight bill. If a bill of lading did not have to be produced by a consignee as a condition of delivery, there would be no reason to "void" or render 2 original copies ineffective. The "voiding" of 2 of the original copies must mean that only the remaining original copy bill can serve as the document of title or key to delivery of the goods. The forwarders submitted that the attestation clause here should be distinguished from that in *The "Rafaela S"*. That was because the present clause did not expressly state that "One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order." But again the Court thought that this was a distinction without a difference. As the Court explained, the voiding of 2 original copies, must have (and been intended to have) the effect that the remaining effective copy is to be surrendered in exchange for the goods.

The Court was fortified in this conclusion by the sale agreements between the seller and the buyer in respect of the goods shipped under the forwarders bills. Those sales agreements (as evidenced by the pro forma invoices for each consignment) included the following term:

> "PAYMENT TERMS:
> 1) T/T SHOULD BE WIRED AFTER THREE WEEKS OF THE SHIPMENT.
> 2) THE ORIGINAL B/L WILL BE SENT TO BUYERS' BY SPEED POST AFTER SELLERS' RECEIVE THE PAYMENT."

The bills were to be delivered to the buyer in exchange for payment and property in the goods would only have passed then. By the payment term here the parties manifested a clear intention that the forwarders straight bills were to serve as documents of title to the goods. That intention was entirely consistent with the Court's construction of the attestation clause in the actual bills.

As a matter of general principle and on a specific construction of the attestation clause of the forwarders bills, the forwarders could only deliver the goods to the buyer (as consignee) upon production of the relevant straight bills. The forwarders, however, delivered the goods to the buyer without requiring the bills to be produced. Accordingly, the forwarders acted in breach of the contracts of carriage contained in or evidenced by the forwarders bills. At all times, the effective original copies of the forwarders bills were in the seller's possession, custody or control. The seller having reserved the right of disposal of the goods by the payment term examined above, property in the goods had not passed to the buyer at the times of delivery by the forwarders. It followed that in delivering the goods without production of the relevant bills, the forwarders acted inconsistently with the seller's rights as owner of the goods. The forwarders thereby committed the tort of conversion.

The reverse of the forwarders bills provide as follows:-

> "**1. DEFINITION**
> The term 'Merchant' means the shipper, consignee, the holder of this Bill of Lading and or the receiver or the owner of the goods.
> The terms 'Place of Receipt' 'Intended Port of Loading' Intended Port of Discharge' and 'Intended Place of delivery' mean respectively the place of receipt, port of loading (Ocean Vessel), port of discharge (Ocean Vessel), and place of delivery nominated on the front hereof, and
> The term 'Goods' means the cargo received from the Shipper and includes any Container(s) supplied by or on behalf of any other than the carrier.

2. CARRIER'S RESPONSIBILITY

(a) Subject to Clause 8 and 9 hereof [relating to containers packed by the Merchant and the Carrier's containers] the liability (if any) of the carrier 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 transhipped shall be determined in accordance with the provisions of the Carriage of Goods by Sea Act of the United States of America approved April 16, 1936 which shall be deemed to be incorporated herein and in accordance with the terms and conditions of the Bill of Lading or other contract of carriage of the sub contractor responsible for the carriage of such Goods by sea, all of which terms and conditions to the extent that they are not in conflict with the express provisions of this Bill of Lading, are incorporated herein.

(b) Save as provided in (a) hereof the Carrier shall be under no liability in any capacity whatsoever for loss or misdelivery of or damage to the Goods however caused whether or not through the negligence of the Carrier, his servants or agents or sub contractors or for any direct or indirect loss or damaged caused by delay or for any indirect or consequential loss or damage.

(c) In the event of any loss or misdelivery or delay in deliver[y] of or damage to the Goods occurring between the time that the Goods are received by the carrier at the Place of receipt and the time of delivery at the Intended Place of delivery the onus of proving that such loss misdelivery delay in delivery or damage (or any part thereof) occurred during the period specified in Clause (a) hereof shall be upon the Merchant. In the event that the Merchant is unable to discharge such onus of proof the Carrier shall be under no liability for such loss misdelivery delay in delivery or damage to the Goods (or any part thereof) in accordance with (b) hereof."

The Hague-Visby Rules provide as follows:-

Article III:

"8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with the 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 null and void and of no effect. A benefit of insurance in favour of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability."

Article VII:

"Nothing herein contained shall prevent a carrier or a 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."

Article III(8) nullifies any clause in a bill of lading which provides for a lesser liability than that imposed by the Rules. But Art.III(8) is subject to Art. VII. The latter allows a carrier and shipper to agree lower limits of liability or to exclude liability altogether for the period "prior to the loading on" and "subsequent to the discharge from" the ship of goods. Any limitation or exclusion clause must, of course, comply with the common law requirement of clarity. It must be clear and unambiguous what liability is to be limited or excluded by a clause. If not, any ambiguity in a clause will be construed against the party seeking to rely on the alleged limitation or exclusion.

The forwarders contended that cl.2(b) of the bills of lading were wide and clear enough to exclude liability on the part of the forwarders for misdelivery of goods without production of bills of lading. In particular, the forwarders stressed the words "misdelivery ... however caused" in cl.2(b). Any misdelivery without production of bills of lading must (the forwarders argued) have taken place subsequent to the discharge of the goods from a vessel, either after the goods were carried over the ships rail or after the ship's tackle was removed, following unloading (discharge), from the containers stuffed with the goods.

The Court was unable to agree with the forwarders' submission. This was because the Court believed that, on a true construction of clause 2 as a whole, it did not exempt the forwarders for the misdeliveries. Put at its lowest, there were at least 2 ambiguities which were to be resolved against the forwarders.

Assume first that misdelivery must have taken place after "discharge". Clause 2(b) purported to exempt liability for "misdelivery ... however caused whether or not through negligence". Had the clause excluded liability for "misdelivery ... however caused" and stopped there, it might have been sufficiently clear that any misdelivery whatsoever was exempted from misdelivery. But the words "however caused" have been qualified by the addition of the words "whether or not through negligence". Thus, on one reading, exemption under cl.2(b) appeared to be confined to either "misdelivery … however caused … through negligence" or "misdelivery … however caused ... not through negligence". Misdelivery can be committed in ways which do not involve any consideration of negligence or non-negligence. There can (as here) be a deliberate or intentional misdelivery of goods to a party despite non-production of a bill of lading. Such misdelivery constitutes the tort of conversion in respect of which considerations of negligence or non-negligence are irrelevant. The Court did not think that

cl.2(b) could be said to cover the situation here. In this case, having been instructed by the seller to deliver only on condition of production, the carrier ignored that instruction and instead deliberately delivered without any production. What has happened here was beyond a matter of negligence or non-negligence, it was an intentional disregard of a term of the actual contract of carriage. It was possible for a clause to exclude liability for such an intentional disregard, but the clause must be crystal clear. Such clarity was essential particularly where what was sought to be excluded was precisely what the forwarders had contracted to do, viz, make proper delivery of goods. Given that it was not evident that cl.2(b) covered what happened here (namely, the deliberate misdelivery of goods without production of bills of lading, this amounting to conversion), cl.2(b) did not exclude the forwarders' liability.

The Court had so far assumed in the forwarders' favour that misdelivery took place after "discharge" from the vessel. But what does "discharge" mean? It is not a term defined by the Hague or Hague-Visby Rules. Accordingly, when does it begin or end? In *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* [1954] 2 QB 403 (at 418), Devlin J pointed out that the Hague Rules left it open to the parties to define the content of obligations such as "loading" and "discharge" in relation to a carriage of goods. He said:-

> "The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide."

By cl.2(a) the forwarders accepted liability (subject to limits in the US Carriage of Goods by Sea Act 1936 [COGSA 1936]) for what happened to goods "during the period commencing with their being loaded ... and continuing up to and during discharge..." The Court called this range of time as Period A. The initial words of cl.2(c) referred to the event of misdelivery "between the time that the Goods are received ... at the Place of Receipt and the time of delivery at the Intended Place of Delivery". The Court called this range of time as Period X. Clause 2(c) went on to say that the Merchant had the burden of showing that a misdelivery during Period X in fact took place within Period A.

The forwarders contended that Period A was a much narrower range than Period X. According to the forwarder, Period A began either when goods are hoisted on board over the ship's rail or shortly before that time when the ship's tackle was attached to a container of goods for hoisting on board. By the same token, the forwarders said that Period A ended upon discharge when the goods were hoisted over the ship's rail and placed on the quay or shortly after that time when the ship's tackle was removed from a container of goods deposited quayside. That was one possible reading of cl.2 as a whole.

But it was not the only possible reading. It was necessary to read the contract as a whole. And in the present case, construed in the context of the whole of the forwarders bill, cl.2 should, the Court thought, be read as treating Periods A and X as equivalent. To see how this arised (or, to put it another way, why there was ambiguity), it was necessary to look at the front of the forwarders bills. There one saw that the "Port of Discharge", the "Place of Delivery", and the "Final Destination" were all described in identical terms i.e. "Los Angeles, CA". The bills further identified the carriage as being "CY-CY" i.e. "container yard to container yard". The reference to "Los Angeles" as being the Port of Discharge was ambiguous in that it might be referring, on the one hand, to the port area of the city of Los Angeles. On the other hand, the reference might be to the entire of Los Angeles as a port city. In the latter case, the place of "delivery" under the forwarders bills would be the same as the place of "discharge". Within the terms of cl.2 "discharge from that vessel" in sub-cl.(a) would then equate with "the time of delivery at the Intended Place of Delivery" in sub-cl.(c). As the Court remarked earlier, the place of discharge and delivery were described in identical terms in the forwarders bills. If Periods A and X are treated as synonymous, cl.2(c) would be stipulating that the burden of proving that loss, damage or misdelivery happened within Period X (that period being the same as the range specified in cl.2(a)) was on the seller. On such reading, the forwarders would only be excluded from liability where loss, damage, or misdelivery occurred before goods were received or after they were delivered.

The "CY-CY" reference did not take matters further. This is because it was not apparent where the end container yard was supposed to be. Thus, the "CY-CY" term might concern "discharge" at a container yard somewhere in the port city of Los Angeles with "delivery" taking place at the same yard. Alternatively, "discharge" might be in the port area of Los Angeles with "delivery" ultimately taking place in a container yard somewhere else in Los Angeles.

What actually happened on delivery by the forwarders to the buyer was unclear. It appeared that the misdelivery had taken place at some point before Customs clearance in (presumably) the port area of Los Angeles. At that point, on the evidence, the buyer's agent apparently obtained delivery of the goods from the forwarders, cleared them through customs, picked them up from a port area terminal, and then took them straight to the buyer in Long Beach. If that was right, the circumstances of actual delivery corroborated the alternative reading of cl.2 proposed above. The port of discharge and place of delivery being in fact the same, it was plausible that the parties contractually regarded "discharge" and "delivery" as equivalent operations.

On the alternative reading, which the Court believed for the reasons stated to be the correct one, delivery would have been within Period A in cl.2(a) and the US$500 per package limit in COGSA 1936 should apply. Although lower than the minimum 666.67 SDR limit in the Hague Visby Rules, the US$500 limit was sufficiently generous to cover the amounts sought to be recovered. Again at its lowest, there was an ambiguity as to which reading was the correct one and cl.2 must be accordingly construed against the forwarders who were seeking to rely on the provision to exclude liability. Given that, at least on one reading of the forwarders bills, the parties contracted to treat "discharge" as including delivery, the operation of "discharge" referred to in the Hague-Visby Rules must be regarded as covering "delivery" in this particular case. This conclusion would be a consequence of Devlin J's dictum, cited above, to the effect that the parties can agree precisely what activities are to constitute "loading" and "discharging" for the purposes of the Rules. In the specific facts here, "delivery" would then not have been an event subsequent to "discharge". If the Hague-Visby Rules accordingly apply, then following *The "River Guara"* [1998] 1 Lloyds Rep 225 (CA), the package limitation relates to the number of packages within a container and not to the container itself. The Court thought that cl.2 was not in sufficiently clear terms to exclude the forwarders liability for misdelivery.

The forwarders suggested that property in the relevant goods had passed to the buyer prior to any misdelivery. This was because property would have passed when goods were unconditionally appropriated to the operative sale contracts and shipped freight collect to the buyer. The Court did not think that was right. The seller implicitly reserved the right to the disposal of the goods by stipulating that bills would only be delivered to the buyer following payment in full. This meant that property in the goods was not to pass until, having fully paid, the buyer received original bills of lading. The forwarders said that it would be odd if, the buyer having paid in full, property would still not pass until the buyer had received the bills of lading. But the Court saw nothing strange in this. It was a consequence of the simple documents against payment arrangement which the parties agreed among themselves. A more sophisticated arrangement whereby a letter of credit was employed and documents were released at the same time as payment could have been agreed between the parties. But they did not do so. The Court just added for the sake of completeness, that even if property in the goods had passed, as long as there was privity of contract between the seller and the forwarders, an award of substantial damages was possible: see *Dunlop v Lambert* (1839) 6 CL. & F. 600; *The Albazero* [1977] AC 774, at 844-849.

The forwarders delivered the goods without production of the relevant straight bills. That amounted to a breach of the contract of carriage and the tort of conversion. Clause 2 of the bills did not exclude the forwarders' liability. The seller appeals were allowed. The seller was entitled to US$873,028 (corresponding to the invoice value of the goods). The parties were to have liberty to make further submission as the appropriate interest to be awarded on the said judgment sums. There was an Order Nisi that the forwarders were to pay the seller costs on appeal and at first instance, such costs to be taxed on a party-and-party basis 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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