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To: Transport Industry Operators

False B/L

On 27/7/2007, the English Court of Appeal disallowed the shipowners' appeal and held the shipowners liable in a case involving the use of a false bill of lading by some fraudsters.

This is a case in which cargo-owners sued shipowners for conversion and breach of contract in relation to a consignment of copper stowed in 18 containers shipped at Durban for delivery in Shanghai. Fraudsters arranged to create and present a false bill of lading against which the shipowners gave a delivery order on 24/10/2005 entitling the fraudsters to delivery from the Hudong Container Terminal warehouse, in which the goods had been stored after arrival on 23/10/2005. Customs at Shanghai would not permit cargo to be taken out of the container terminal in the port without payment of customs duty and VAT and production of a delivery order stating that payment had been so made. The fraudsters had paid the customs duty and their delivery order has been endorsed by Customs to that effect. On 25/10/2005 the cargo-owners presented their (genuine) bill of lading and the shipowners were able to ensure that delivery to the fraudster did not take place. Although the shipowners gave another delivery order to the cargo-owners, that delivery order had not been stamped with any record of duty having been paid and the cargo-owners could not therefore obtain delivery from the warehouse. This impasse continued and existed. In these circumstances the cargo-owners sued the shipowners and obtained an order from Aikens J ordering the shipowners to deliver the cargo or pay the full value of the cargo. From that order the shipowners appealed contending that their liability was only a limited one. This depended on whether the shipowners' liability was governed by the Hague Rules or the Hague-Visby Rules ("HVR") or the terms contained in the bill of lading.

The bill of lading relevantly provided:-

> "(a) For all trades, except for goods shipped to and from the United States of America, this B/L shall be subject to the 1924 Hague Rules with the express exclusion of Article IX, or, if compulsorily applicable, subject to the 1968 Protocol (Hague -Visby) or any compulsory legislation based on the Hague Rules and/or the said Protocols. Where Hague-Visby or similar legislation is compulsorily applicable, the Hague-Visby 1979 Protocol ("SDR" Protocol) shall also apply whether or not mandatory."

Thus for the voyage from Durban in South Africa to Shanghai in China at least the 1924 Hague Rules would apply. The question was whether for that trade the Hague-Visby Rules would apply.

The Hague-Visby Rules could only apply if it was "compulsory" to apply them. It could only be "compulsory" to apply the HVR if it was a relevant law that "compels" that application. The only possible laws to which it was necessary (or indeed possible) to look were the law which governed the contract of carriage (English law by virtue of clause 2(a) of the bill of lading) or the lex fori (the law of the place in which the litigation took place, also English law). As a matter of substantive English law the Hague-Visby Rules only apply if:-

(a) the bill of lading is issued in a "contracting State"; or
(b) the carriage is from a "contracting State"; or
(c) the contract contained in or evidenced by the bill of lading provides that the Hague-Visby Rules are to govern the contract.

None of these conditions were satisfied because (1) although South Africa has enacted the Hague-Visby Rules it has never signed the 1968 Protocol and is, therefore, not a "contracting State" and (2) the bill of lading had not provided that the Hague-Visby Rules were to govern the contract but only that they were to govern the contract if compulsorily applicable which, as a matter of English law, they were not.

If the law of the place where the action was brought compelled the application of the HVR that would be the end of the matter. However, English statute law does not make the HVR compulsorily applicable.

The Court held that the scheme of the bill of lading was that the shipowners, as a matter of contract, accepted Hague Rules (1924) obligations but only accepted HVR obligations if they were forced to do so. They could only be forced to do so if the proper law of the contract compelled it (or, if the place where the cargo-owners chose to sue them compelled it). Neither law compelled it and they were not contractually obliged further than the law compelled. Although South Africa has enacted the HVR, it is for some reason not a "contracting State". The reason for this is puzzling but irrelevant. The fact was that the HVR were not compulsorily applicable and that was the end of the matter.

Clauses 4(ii) and (iii) of the bill of lading provided:-

> "(ii) The responsibility of the Carrier is limited to that part of the Carriage from and during loading onto the vessel up to and including discharge from the vessel and the Carrier shall not be liable for loss of or damage to the goods during the period before loading onto and the period after discharging from the vessel, howsoever such loss or damage may arise. Loading and discharge take place when the goods pass the vessel's rail or ramp.
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> (iii) When the goods are in the custody of the Carrier and/or his subcontractors before loading and after discharge, whether being forwarded to or from the vessel or whether awaiting shipment landed or stored, or put into hulk or craft belonging to the Carrier, or pending transhipment, they are in such custody for the risk and account of the Merchant without any liability of the Carrier."

Clause 7 of the bill of lading provided, inter alia:-

> "The vessel may commence discharging immediately on arrival without notice to the consignee or any other party . . . . on to quay or into shed, warehouse, depot, ... vehicle, vessel or craft as the Carrier or his agents may determine. Such discharge shall constitute due delivery of the goods under this Bill of Lading . . . . Whether the vessel's tackles or shore cranes or other means be employed in the course of delivery onto Quay or otherwise, any loss of, of damage to the goods .. . shall, after the end of the Hague Rules period, be at the sole risk of the consignee in every respect whatsoever . . . ."

These clauses made it clear to the Court that the parties did not intend the Hague Rules to apply after discharge from the vessel. The fact that clause 7 referred to loss "after the end of the Hague Rules period" showed that there was to be a period when the Hague Rules did not apply but which would otherwise be a time when the shipowners might still have the obligations of a bailee in respect of the goods and could agree that the terms of that bailment were not to be those of the Hague Rules. The shipowners' purported disclaimer of liability for what happened after discharge did not make any difference to that intention.

The bill of lading clause 4(ii) and (iii) and 7 would not suffice to excuse the shipowners from their act of conversion and their breach of contract in issuing delivery orders to the fraudsters without the production of the bill of lading. That was all the more the case when one read the last provision on the front page of the bill of lading which stated that 3 original bills of lading covering the cargo had been issued and then provided that if the bill of lading was negotiable (which it was):-

> ". . . the goods will only be delivered if one original bill of lading, properly endorsed by the shippers and/or the Bank concerned (and not by the Notify Party) is surrendered the others being considered null and void."

Thus the basic obligation to deliver against an issued (genuine) bill of lading was given its own prominence on the very front of the bill.

The shipowners sought to rely on another clause of the bill of lading altogether. Again it was elaborate and scarcely legible. It provided:-

> "22. CLAIMS VALUATION, PACKAGE LIMITATION TIME-BAR. The indemnity payable by the Carrier for non-delivery of the cargo in whole or in part is calculated at the option of the Carrier on the basis of the

invoice value or on the basis of market values at destination, less duties and expenses saved due to the shortage, except in USA jurisdiction where the sound market value at destination shall be considered. In any event the Carrier's liability shall not exceed the usual sound market value of the goods at the time and place of shipment. However, should the invoice value of the goods be lower than the usual sound market value at the time and place of shipment, the Carrier will only pay the invoice value. For lack of any usual sound market value or invoice value, this provision shall apply to the common value accordingly. Neither the Carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding the limitation allowed under the Hague Rules or the Hague-Visby Rules/SDR limitation or the COGSA limitation, depending on which of these is contractually or compulsorily applicable, per package or unit, unless the nature and the value of such goods have been declared by the Merchant before shipment and inserted in the Bill of Lading. However, declaration of value for the purpose of calculation of freight shall not be considered a declaration in the above sense. This limitation of liability shall apply to all contractual claims as well as to any claims arising from other causes. In so far as goods are shipped to or from the United States, the Carrier's liability shall be limited to $500 per package or customary freight unless excess value is inserted on the face hereof and extra charge paid. The words "customary freight unit" shall mean (under COGSA) the unit of weight or measurement customarily used to calculate freight. Where the goods have been packed into sealed containers by or on behalf of the Merchant, it is expressly agreed that each container shall constitute one package for the purpose of application of limitation of the Carrier's liability, since the Carrier cannot verify its contents. If the Merchant has a shortage in goods or numbers shipped under a Bill of Lading, the Carrier shall have the option to deliver as substitute any surplus goods of similar kind or quality. Notice in writing of loss or damage must be given to the Carrier's Agent at the Port of Discharge or Final Destination, promptly after delivery of the goods, and in any case within 3 running days from the date of delivery as defined in Clause 7, and the Carrier to be invited to participate, at his option, in a joint survey. The cargo is otherwise prima facie considered delivered by the Carrier in the same condition as described in the B/L. Claims are to be addressed to the MSC Agent supported by, at least, the following documents: claim narrative identifying clearly the claimant and providing evidence on his title to sue, Original B/L Commercial Invoice of damaged goods, Letter of Subrogation, if any, survey reports. In any event, the Carrier shall be discharged from all liability if suit is not commenced within one year after delivery of the goods or the date that the goods should have been delivered, for claim related to loss or damage during the carriage by sea and nine months for claims related to loss or damage during non-water inland port [sic: probably "non-water transport" is intended]. Agreed claims will be settled by the carrier only once with one of the parties that is entitled to sue, i.e. with the Shippers POL or with the Consignees at the POD, but not with both. Settlement of an agreed claim by the Carrier with either of the above discharges the Carrier from all and any liability for the same loss or damage under this B/L."

At first sight the clause seemed to be concerned with the quantum of non-delivery (not misdelivery) claims The first sentence said that the carrier had the option of limiting such claims to the invoice value, except in the United States of America. The second sentence limited that figure by reference to the sound market value at the place and time of shipment. The third sentence then said that the invoice value was to prevail if lower than the sound market value. The fourth sentence was almost incomprehensible but still applied to the quantification of claims for non-delivery. Then, without any reference to misdelivery, the clause continued in its fifth sentence by providing for the Hague (or Hague/Visby) package limitation "in any event". The natural reading was to apply that to non-delivery as with the previous 4 sentences. The sixth sentence related to declaration of value for the purpose of calculating freight. The seventh sentence then provided for the package limitation to apply to all contractual claims as well as to any claims arising from other causes.

There was then a special provision for United States cargo in the eighth sentence. The ninth sentence was irrelevant but the tenth sentence provided that a container was to constitute one package, however many packages there might be inside the container. If the shipowner could rely on the fifth and seventh sentences, therefore, they would be able to limit their liability for breach of this highly important obligation to £ 1,800 in all. The eleventh sentence was irrelevant. The twelfth sentence required notice in writing of loss or damage to be given within 3 days of the date of delivery as defined in clause 7 otherwise according to the thirteenth sentence the delivered condition of the goods was prima facie assumed to be the condition as stated in the bill of lading. The fourteenth sentence specified the documentation required in support of any claim. There wais then an important fifteenth sentence which provided that the carrier was in any event to be discharged from all liability if suit was not commenced within one year for claims

related to loss or damage during the carriage by sea. This time limit provision, therefore, only related to loss during the carriage and could not apply to a claim for failure to deliver against production of the bill of lading once the sea carriage was over. That would make it all the more surprising if the package limitation provision was intended to apply to such claims. The sixteenth and seventeenth sentences of the clause needed no examination.

If the Hague Rules applied to the actual carriage up to and including discharge, clause 22 must be intended to deal with matters arising before or after the Hague Rules period save where (as in the case of the time-bar) it expressly provided otherwise. Nevertheless this melee (or perhaps congeries) of provisions contained in clause 22 was not, in the Court's judgment, apt to limit liability for the essential obligation to deliver against original bills of lading. Any exemption or limitation of liability for such a breach had to be clearly expressed and clause 22 did not clearly do so. (It might be noted that the exception clause in The New York Star [1981] 1 WLR 138, 146G expressly referred to "misdelivery".) There were other obligations to which the fifth and seventh sentences could apply, particularly if one were to conclude that the exclusion in clauses 4 and 7 were not apt to exclude cases where a claimant could show that the shipowners had been negligent. In these circumstances the shipowners' construction of the clause would appear to undervalue the importance which both parties must have been taken to have attached to the shipowners' obligation to deliver against presentation of original bills of lading.

The cargo-owners had sought to deal with the problems facing them as a result of the non-receipt of the cargo and, in particular, the losses they had incurred in keeping an open position in relation to the copper which they bought from their purchaser. The Court held that hedging losses as such were not foreseeable by the shipowners and were thus not recoverable. The form of judgment given against the shipowners provided that, if the shipowners do not deliver the cargo, they are to be liable to pay the value of that cargo at the date of judgment. The Court considered that this was the figure which would most fairly compensate the cargo-owners for their loss as a result of the shipowners' conversion of the goods. If the events of which the claimant cargo-owners complain had all happened in England, an order would probably have been made for the sale of the cargo pendente lite and no doubt judgment would have been given for the figure fetched at the time of sale (together with interest). The fact that such an arrangement had not occurred in China and that the goods could not, apparently, be released until a decision of the Chinese court was obtained (facilitated or otherwise by the judgment in these English proceedings) was not suggested to be the fault of the claimants. Indeed no suggestion had ever been made that the claimants had failed to mitigate their loss whatever that loss might have been. Once judgment was satisfied, the shipowners would have title to the goods and could sell them to the fraudsters or any one else and they would no doubt obtain the value at the time of that sale. In these circumstances the fairest way to compensate the claimants was to award them the value of the cargo at the time when Aikens J gave 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.