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To: Transport Industry Operators

Burden of proof

On 10/9/2007, Deputy Judge Wahab of the Hong Kong District Court held a forwarder not liable in a cargo missing case on the ground that the cargo interests failed to discharge the burden of proof.

The Judge dismissed the claim of the buyer and seller and made an order nisi that, save for costs already provided for, the buyer and seller were to jointly and severally pay the forwarder's costs in this case with certificate for Counsel.

The claim was for damages and related to events in the year 2004. The claim was based on the loss or pilferage of 205 sets of MP3 players (all of one type i.e. 128MB; known herein as "the Missing Goods") allegedly air-freighted from Incheon, South Korea to Hong Kong by Thai Airways. After reading the relevant papers filed (pleadings, witness statements etc.) but before taking any evidence, one question kept nagging the Judge: what was there to satisfy the Court, albeit on a balance of probabilities, that the Missing Goods were loaded onto the Thai Airways airplane ("the Plane") in South Korea ("the Question")?

After taking evidence from both sides and final submissions from Counsels, the Question steadfastly remained. Thus, the Judge could only conclude that the buyer and seller failed to prove their case. The Judge further accepted Defence evidence and found, in particular, that the forwarder discharged its duty of care as bailee in taking charge of/ storing the MP3 players from South Korea.

The buyer purchased from the seller 2,000 MP3 Players of 128MB and 1,000 MP3 Players of 256MB. The MP3 Players (including sets of "Buffer Stock" and "Dummy Mock-up"; known herein as "accessories") were to be airfreighted from South Korea to the buyer in Hong Kong. The seller used the services of a Family Express Co. Ltd. to forward the MP3 players and accessories. The MP3 players and accessories were (allegedly) packed into 65 cartons ("the 65 Cartons") and loaded onto the Plane bound for Hong Kong. The 65 Cartons arrived at the Hong Kong International Airport on 2 July 2004. They were offloaded from the Plane by ramp handlers hired by Thai Airways. The 65 Cartons were transported to the terminal of Hong Kong Air Cargo Terminals Limited ("HACTL"). There was "break down" of the 65 Cartons i.e. they were removed carton by carton from the one pallet on which they were transported (from the Plane), put in a HACTL receptacle and stored in the terminal pending collection. HACTL recorded damage to 9 cartons viz. the cartons were crushed and wet. HACTL also recorded the weight of the damaged cartons as 157 kilogrammes.

In the morning of 3 July, the forwarder sent a trucker to HACTL terminal and collected the 65 Cartons. The trucker found nothing unusual with the carton boxes. The trucker signed a Shipment Release Form for HACTL. The trucker separately put the 65 Cartons onto 3 pallets. The trucker delivered the 3 pallets with the 65 Cartons to the forwarder's warehouse in Tsuen Wan ("the Warehouse") that same morning. The forwarder checked the quantity and condition of the cartons. The 3 pallets of 65 Cartons were then placed inside the Warehouse. On 5 July, the forwarder faxed a Notice of Arrival to the buyer.

On 7 July, the buyer instructed its trucker to collect the 65 Cartons from the forwarder. The buyer's trucker went to the Warehouse. The buyer's trucker checked that the number of cartons he was collecting was correct and that there was no apparent damage to the cartons. He took delivery of the 3 pallets with the 65 Cartons on them. The buyer's trucker delivered the pallets with the 65 Cartons to the buyer that same afternoon of collection. After 5 to 6 cartons had been moved into the office of the buyer, the buyer found 1 of the cartons very light in weight. The buyer opened that carton. Goods were found missing from that carton. Loss Adjusters, Messrs. McLarens Young International, were immediately summoned; and 11 of the 65 Cartons ("the 11 Cartons") were found "with their sealing tapes at the bottom section...cut open and resealed with transparent tapes". A number of MP3 Players of 128MB were found missing from each of these cartons: 9 cartons were each found to have 20 missing; 1 had 22 missing and 1 had 3 missing. There was thus missing 205 sets of MP3 Players (i.e. the Missing Goods). The carton with 22 MP3 Players missing was found to weigh 9 kilogrammes; the carton with 3 missing was found to weigh 13.5 kilogrammes and each of the remaining 9 cartons was found to weigh 9.4 kilogrammes.

In an attempt to address the Question, the buyer and seller mainly relied on the relevant documents viz. the Packing List and the Airway Bills ("the Documents"). The quantity of MP3 players was stated in the Documents. The Documents also stated the net weight of all the MP3 players (845 kilogrammes) and the gross weight of the 65 Cartons (941 kilogrammes; 'the Gross Weight').

The Judge accepted that the prohibition against hearsay evidence is virtually purged in civil proceedings (see Evidence Ordinance, Cap. 8, Part IV). The Court, however, has the right to consider the weight to be assigned to such evidence. The Judge found himself unable to accept from the Documents that the Missing Goods were included in the 65 Cartons received in Hong Kong. There was no direct evidence before the Judge to show that the Missing Goods were packed into the cartons subsequently loaded onto the Plane. Assuming the Missing Goods were initially so packed, there was no evidence as to what happened to those cartons before they were put on the Plane (e.g. were they kept in such circumstances that the Court could infer theft of the Missing Goods did not occur prior to the Plane landing in Hong Kong?).

The buyer and seller referred to the Gross Weight. The Judge thought the buyer and seller were saying that airfreight was calculated and paid on the basis of such weight. Hence, the total number of MP3 players stated in the Documents was in the cartons loaded onto the Plane. There was, however, nothing to indicate that the Gross Weight in fact included that of the Missing Goods (this was of course apart from what the Documents themselves said). The Missing Goods could have been removed before the Gross Weight was determined. There was no evidence to indicate that the Gross Weight differed after the Missing Goods were noted in Hong Kong.

The buyer and seller pointed out that the red/ brown sealing tapes applied to the 11 Cartons had been cut and those cartons resealed with transparent tape (covering the original sealing tapes). The buyer and seller submitted that this indicated someone must have stolen MP3 Players from those cartons. That might be so but the Question remains unanswered. Could not the theft have taken place in South Korea? The buyer and seller argued that if the sealing tapes had already been cut prior to the cartons being received/ handled by anyone in Hong Kong, then surely those receiving/ handling them would have noticed it. The fact that there was no prior mention of this phenomenon indicated that the Missing Goods were on board the Plane and the Missing Goods did pass to the forwarder in Hong Kong.

There was no evidence before the Judge to explain the circumstances in which the ramp handlers dealt with the 65 Cartons. They were there just to offload goods from the Plane. Why should they care or pay attention to sealing tapes at the bottom of cartons being cut and resealed? HACTL

detected 9 of the 65 Cartons ("the 9 Cartons") having external damage i.e. they were crushed and wet. There was no evidence to show the extent of the damage. The Judge did not think HACTL staff would inspect each and every carton of goods for unusual features (e.g. sealing tapes being cut and resealed) or would they care that 1 carton was lighter in weight. Indeed, the resealing of sealing tapes or the loosening of sealing tapes might mean nothing to the unsuspecting mind. The fact that HACTL noted damage of crushing and wetness did not go towards proving that the 11 Cartons had not already been tampered with. (Nothing showed any of the 9 Cartons as being part of the 11 Cartons. McLarens Young International apparently did not find any carton crushed or wet. If otherwise, one would expect a note to that effect in the Report.)

The evidence of the forwarder's trucker was that he merely looked at the packaging for apparent damage. Though he handled each carton, it was clear that he did not hold up each carton to inspect. There was certainly no evidence that he paid particular attention to the bottom part of any carton. He was handling 65 Cartons in total. He was not informed what was in the cartons. The Judge did not think that difference in weight of the cartons would have alerted him. Hence, his evidence that he did not find anything unusual with the 65 Cartons. The Judge did not think his evidence precludes the probability of prior pilferage.

It was clear to the Judge that the forwarder did no more than take a cursory look at the packaging of the cartons arrayed on the 3 pallets. The forwarder merely had sight of those surfaces exposed for viewing. The fact that the forwarder detected nothing untoward and accepted the 65 Cartons did not really assist the buyer and seller case.

Lest there be any suspicion against them, the Judge said in no uncertain terms that he was satisfied the buyer's trucker, the forwarder and the forwarder's trucker had no involvement in the loss or disappearance of the Missing Goods. The Judge accepted the evidence called by the Defence. The Judge was satisfied that the forwarder and its trucker took care of the 65 Cartons to the extent and degree required by the law.

For the reasons stated above, the Judge could already come to a decision in this case. The Judge did not see the need to consider the various other points raised by Counsels. Such points included who was bailor and at what point in time as well as whether the limitation on liability endorsed on the Airway Bills applied.

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.