

30 November 2007
Ref : Chans advice/83

To: Transport Industry Operators

HVR cover cargo delivery? (III)

Remember our Chans advice/79? The Hong Kong Court of Appeal on 13/7/2007 held the forwarders liable to pay the seller for US\$873,028 plus interest and costs in the cargo misdelivery claim. On 6/11/2007, the Court of Appeal issued a further short Judgment dealing with two points: (i) interest and (ii) the forwarders' application for leave to appeal to the Court of Final Appeal.

Interest

In the judgment handed down on 13/7/2007, damages in the sum of US\$873,028 were awarded in the seller's favour. These damages, unliquidated in nature, were in respect of the misdelivery that took place when the seller's goods were handed to the buyer without the production of the bills of lading.

In a contractual claim, interest usually runs from the date of breach (the date when the cause of action accrued) but the courts are of course entitled, in the exercise of the broad discretion they have regarding interest, to use a date which may be more appropriate, for example, where the loss does not immediately arise: see *McGregor on Damages* (17th Edition) at paragraph 15-065 to 15-066. In the present case, the cause of action (both the breach of contract and conversion) accrued at the time when the misdelivery took place (which was the time that the seller sustained its loss when it lost the relevant goods). Although there was no precise date for this, it was clear from the judgment of Stone J in the court below that this was no later than 22/4/2003. The Court of Appeal was content to use this date.

As for the rate of interest, the Court of Appeal saw no reason to depart from what is the usual: 1% above prime. Although the seller had contended for a higher rate, there was very little, if any, evidence to justify this.

Accordingly, there would be interest at the rate of 1% above prime rate for the period from 22/4/2003 to 13/7/2007 (the date when the judgment of the Court of Appeal was handed down) and thereafter at judgment rate until payment. "Prime rate" means the prime rate of lending of the Hong Kong and Shanghai Banking Corporation from time to time during the relevant period.

Application for leave to the Court of Final Appeal

The damages awarded against the forwarders being in the nature of unliquidated damages, there is no appeal as of right under section 22(1)(a) of the Hong Kong Court of Final Appeal Ordinance, Cap.484.

As for the application under section 22(1)(b) of the Ordinance, the forwarders had advanced seven grounds said to be points of great general or public importance.

The Court of Appeal refused leave under section 22(1)(b) of the Ordinance. The Court of Appeal referred to the Grounds of Appeal set out in the Notice of Motion taken out by the forwarders:

- (1) The first two grounds related to the argument on the differences between straight and negotiable bills of lading. While the Court of Appeal accepted that this did involve an area of law that is important, the Court of Appeal did not see that the contentions raised by the forwarders were reasonably arguable for the reasons gone into in the judgment given by the Court of Appeal on 13/7/2007.
- (2) The next three grounds related to the construction of the particular bills of lading that had to be considered in the case in question. The Court of Appeal saw no points of great general or public importance there: the outcome depended on the particular language used in the terms themselves. It seemed at the end of the day that the forwarders were simply contending that the Court had construed the terms too strictly.
- (3) The final two grounds dealt with the forwarders' counterclaim relating to freight. This claim was resolved on the facts. The Court of Appeal repeated paragraphs 134-144 of its Judgment of 13/7/2007. The forwarders advanced a number of points based on pleading practice and set off but, in the Court of Appeal's view, no points of great general or public importance arose there.

The forwarders finally relied on the "or otherwise" ground in section 22(1)(b) of the Ordinance. But exceptional circumstances have to be shown: see *Chao Keh Lung v Don Xia*(2004) 7 HKCFAR 260. None existed in the case in question.

For the above reasons, the Court of Appeal dismissed the forwarders' application for leave to appeal to the Court of Final Appeal.

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.