

19 February 2008  
Ref : Chans advice/86

To: Transport Industry Operators

**False trade description goods (II)**

Remember Chans advice/84 that the Hong Kong Court of Appeal held a ship agent not guilty of importing goods to which a false trade description was applied? Following that Judgment, the Hong Kong High Court on 25/1/2008 held another ship agent not guilty of the same offence.

On 17/8/2006, the ship agent was convicted of an offence of "attempting to import goods to which a false trade description was applicable". The magistrate fined the ship agent \$80,000. The ship agent appealed on several grounds, one of which was in summary, that the magistrate erred in holding that the ship agent was not entitled to rely on the statutory defence provided by section 12(2)(a) of the Trade Descriptions Ordinance, Cap.362 ("the Ordinance"). On 12/12/2006, the High Court adjourned the hearing pending the outcome of the appeal in HKMA144/2006 of *HKSAR v. Kong Hing Agency Ltd*, which was the case in Chans advice/84 ("Kong Hing Appeal").

On 7/12/2007, the Court of Appeal consisting of the Chief Judge, Tang VP and Yeung JA handed down the Reasons for Judgment in the Kong Hing Appeal, allowing the appeal and setting aside the conviction.

Section 12(2)(a) of the Ordinance provides:

- "(2) Any person who imports or exports any goods contrary to subsection (1) commits an offence unless he proves that—  
(a) he did not know, had no reason to suspect and could not with reasonable diligence have found out that the goods are goods to which a false trade description or forged trade mark is applied ..."

In the Kong Hing Appeal, the Court of Appeal applied the law to the fact involving a shipping agent who has no actual knowledge or suspicion that the containers carrying the goods bore or might bear a forged trade description or forged trademark.

The High Court was of the view that the magistrate was in error in the case in question (in fairness, as all magistrates in Hong Kong prior to the Kong Hing Appeal) when he took the view that the statutory defence of reasonable diligence under section 12(2)(a) was not available to the ship agent. Applying the law set out in the Kong Hing Appeal, the statutory defence ought to have succeeded. Accordingly the ship agent's appeal succeeded and the conviction should be allowed on that ground. The order of the High Court was that:

- (1) the conviction be set aside;
- (2) the sentence be quashed;
- (3) the fine of \$80,000 be returned to the ship agent; and
- (4) costs (to be taxed if not agreed) of and incidental to the appeal and the trial below to the ship agent.

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.