SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

O/S freight charges

The Hong Kong District Court on 17/3/2008 held a sender liable to pay the outstanding freight charges of HK$128,246.58 to an air carrier despite the sender's argument that the sender could not understand English and did not understand the meaning of the air waybill terms.

As evidenced by 11 air waybills issued by the air carrier, the sender instructed the air carrier to arrange for freight service and to deliver goods, namely masks, from Hong Kong to Taiwan. The goods were duly delivered during the period from 10/4/2003 to 16/5/2003, and that the freight charges incurred were HK$128,246.58. The air carrier claimed that the sender was liable for payment of these charges. The sender denied liability. The sender had contracted with a buyer in Taiwan to sell masks to the buyer, on the understanding that the buyer would be responsible for the transportation charges of the masks sold. It was at the request of the buyer that the masks were entrusted to the air carrier for delivery.

On the face of the air waybill, there was a column for the person using the air carrier's service to sign, with the words:

> "Use of this Air Waybill constitutes your agreement to the Conditions of Contract on the back of this Air Waybill, and you represent that this shipment does not require a US States Department License or contain Dangerous Goods."

The Conditions of Contract on the back of the air waybill contained the following terms:

> "Agreement to Terms. By giving us your shipment, you agree, regardless of whether you sign the front of this Air Waybill, for yourself or as an agent for and on behalf of any other person having an interest in this shipment, to all terms on this NON-NEGOTIABLE Air Waybill ..... No one is authorized to alter or modify the terms of our agreement. This Air Waybill shall be binding on us when the shipment is accepted...
> Your obligations. ...you are responsible for all charges, including transportation charges, and possible surcharges, customs and duties assessments including fees related to our pre-payment of the same, governmental penalties and fines, taxes, and our lawyers' fees and legal costs, related to this shipment.
> Responsibility for payment. Even if you give us different payment instructions, you will always be primarily responsible for all charges, including transportation charges, and possible surcharges, customs and duties assessments including fees related to our prepayment of the same, governmental penalties and fines, taxes, and our lawyers' fees and legal costs, related to this shipment. You also will be responsible for any costs we may incur in returning your shipment to you or warehousing it pending disposition."

It is trite law that a contracting party has no duty to explain the contents of a written document to another contracting party (Kincheng Bank v. Kao Yu Kuei [1986] HKC 212).

The air waybill relied upon by the air carrier was a standard form contract used by it. In proving the terms contained in a standard form contract which is handed to a party at the time of making the contract, the question is whether the printed conditions contained in the standard form contract have become terms of the contract. The conditions of the contract must have been brought to the notice of the party to be bound before or at the time when the contract is made. The air carrier referred the Judge to paragraph 12-013 of Chitty on Contracts 29th Edition, which reads as follows:

> "It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts regarding notice in such circumstances are three in number:
> (1) If the person receiving the document did not know that there was writing or printing on it, he is not bound.
> (2) If he knew that the writing or printing contained or referred to conditions, he is bound.
> (3) If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them."

The question whether the party tendering the document has done all that was reasonably sufficient to give the other party notice of the conditions is a question of fact in each case, to be considered in all the circumstances and the situation of the parties. On the face of the air waybill, the air carrier already specified that the use of the bill will constituted the sender's agreement to the conditions of contract on the back of the bill. The sender claimed that the terms and conditions imprinted on the back of the air waybills should not bind the sender because the sender did not understand the meaning or effect of these terms; the terms and conditions were printed in English and the sender could not understand English. It is trite law that a person of full age and understanding is bound by what he has signed, and it does not avail him to say that he did not understand, or bother to find out what the document contained, or had a subjective understanding of the contents of the document which turns out to be incorrect. (See, for example, the judgment of Riberio, PJ in Ming Shiu Chung & others v. Ming Shiu Sum & others FACV No. 25 of 2005 (23/5/2006).) For a document to be disavowed, and in the absence of fraud (which has to be pleaded with particularity and clearly proved) or misrepresentation, the law has never regarded it as enough to show that the person who signed, or accepted, a document which purports to have legal effect did not know its contents. It was immaterial that the sender was under some personal disability such as illiteracy or an inability to read or understand English. The air carrier referred the Judge to paragraph 12-016 of Chitty on Contracts, 29th Edition by way of authority. The decision in the case of Flying Transportation (Macau) Ltd. v. Pacific Air Freight (Hong Kong) Ltd.(unreported, HCA 6187 of 2000, 2003 May 2002) clearly accepts that "freight forwarding contracts and air waybills are documents of a class which a party receiving them would expect there were contractual conditions". The learned judge in the case had the following to say:

> "It is no answer for (the defendant) to say that he did not read either the notice drawing his attention to the conditions or the conditions themselves. If a businessman chooses to conduct himself without knowing the terms of his contract, that is his problem. It is up to him to find out what they are."

The Judge was satisfied on the evidence that the conditions of contract imprinted on the back of the air waybill had been incorporated into the contract of carriage. These terms clearly provided that by giving the shipment of the goods to the air carrier, the sender agreed to all the terms on the air waybill regardless of whether the front of the air waybill was signed. Even though some of the air waybills in question were not signed by the sender, this did not afford a defence to the air carrier's claim under the contract of carriage. By delivering the goods to the air carrier for carriage, the sender had by conduct accepted the terms and conditions imprinted on the back of the air waybill which the sender knew to exist.

On the face of the air waybill, there was a column for the person using the air carrier's service to complete in relation to the payment terms. This read:

> "Payment. Bill transportation charges to: 1. Sender 2. Recipient 3. Third Party 4. Cash check/cheque FedEx Account No. "

Under this column, the sender ticked "Recipient" and inserted the buyer’s air carrier account number. The sender claimed that the sender had clearly given instructions to the air carrier on the face of the air waybill that the shipping charges should be paid by the recipient of the goods. The Judge did not accept this argument. In view of the clear provision in the conditions that despite such payment instructions to the contrary, the sender remained primarily responsible for all charges related to the shipment, the sender did not have a defence to the air carrier's claim for the shipment charges. Further, on review of the note regarding "Payment" on the face of the air waybill, the instructions were simply that the transportation charges are to be billed to the recipient. The Judge did not accept that these constitute unequivocal instructions to the air carrier that the charges were to be payable only by the recipient. The note regarding "Payment" on the face of the air waybill certainly did not constitute instructions to the air carrier to collect the transportation charges from the buyer immediately upon or before delivery of the goods.

The sender claimed that the buyer had a separate account with the air carrier. The sender had agreed with the buyer that the buyer would bear the transportation charges of the goods. The sender further claimed that the air carrier had, without the sender's knowledge or consent, agreed to give 30 days unsecured credit terms to the buyer for payment, and when the buyer failed and refused to pay for the freight charges, the air carrier failed to notify the sender immediately, such that it was only in July 2003, when all the goods had been sold and delivered by the sender to the buyer, that the sender discovered that the buyer had defaulted in payment of the air carrier's freight charges. The sender claimed that the air carrier failed to take reasonable steps to mitigate its loss, such that it was precluded from recovering the outstanding freight charges from the sender. The Judge accepted the air carrier's submissions that the sender and the buyer were in law jointly and severally liable to the air carrier for payment of the charges related to the shipment of the goods. The air carrier accordingly had the right to look to either the sender or the buyer for payment of the outstanding charges. The 30 days payment

terms was entirely a matter of contract between the air carrier and the buyer. When the buyer defaulted in payment of the invoice issued by the air carrier to the buyer in respect of the freight charges, the air carrier was entitled to look to the sender for payment under the terms of the contract between the air carrier and the sender, which provided that the sender remained primarily responsible for all freight charges related to the shipment. Being entitled in law to look to either the sender or the buyer for payment, it could not be said that the air carrier failed to mitigate its loss or had acted unreasonably in electing to take action against the sender for recovery of the unpaid freight charges.

The sender claimed that the conditions relied upon by the air carrier in the contract of carriage were not enforceable by reason of the Control of Exemption Clauses Ordinance, Cap. 71 of the Laws of Hong Kong. The Control of Exemption Clauses Ordinance does not render invalid or unenforceable all unreasonable terms in a contract. It only deals with the enforceability of exemption clauses which seeks to exclude a party from liability for breach of contract, or for negligence. The clause relied upon by the air carrier sought to impose liability on the sender for payment of freight charges in return for the services rendered by the air carrier for transporting and delivering goods. The Judge held the Control of the Ordinance simply did not apply.

The sender claimed that the customary practice in the trade was for carriers to obtain payment before releasing the goods, but the air carrier released the goods to the buyer before securing payment. The Judge did not agree with this argument. How other companies contract with their clients on the payment and collection of freight charges was not relevant to the terms of the contract made between the air carrier and the sender. There was no basis to allege that the condition for payment contained in the contract between the air carrier and the sender should not be enforced by reason of customary trade practice, (on which there was no independent expert evidence, nor leave from the Court to adduce such evidence), or that a term should be implied into the contract between the air carrier and the sender that the air carrier should collect payment from the buyer before release of the goods. A term could not be implied if its effect contradicted the express terms of the contract.

The sender claimed that the air carrier had engaged or assisted in deceptive practices by releasing the goods to the buyer without securing payment from the buyer and in seeking to obtain payment from the sender. As for the serious allegation of deceit, it was not pleaded and never raised in the statements. The Judge refused to permit any evidence or arguments to be made, and likewise refused to deal with such a serious allegation which the air carrier did not have the opportunity to meet.

As much as the court lacks sympathy for people who enter into contracts without bothering to find out what the contract document contains or what it means, so does it frown upon creditors who use debt collectors to engage in unlawful acts of nuisance in the recovery of debts. However, the Judge had not been asked at trial to deal with any further continuing unlawful acts of nuisance by injunction or otherwise. Although debt collectors were engaged by the air carrier at some stage, the matter had been reported to the police and the air carrier's actions in this regard did not afford a defence to the sender to the otherwise legitimate claim made for outstanding freight charges.

The air carrier was entitled to judgment in the sum of HK$128,246.58 as claimed, with interest and costs of this action. There would be certificate awarded to counsel.

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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