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Ref : Chans advice/97

To: Transport Industry Operators

### **Cargo insurance covers buyer's theft (II)**

Remember Chans advice/92 that the Hong Kong High Court on 3/4/2008 ordered a cargo insurer to compensate a seller for US\$329,712.80 being the loss of goods stolen by the buyer? The cargo insurer appealed. On 18/12/2008, the Hong Kong Court of Appeal dismissed the appeal.

On the appeal, the cargo insurer was seeking the Court of Appeal to hold the following facts:

1. There was no pre-planned theft.
2. Any theft took place at Sharjah and not Khor Fakkan.
3. The buyer was not in possession of the bill of lading prior to 5/1/1999.
4. Khor Fakkan was the final warehouse.
5. The movement of the goods from Khor Fakkan was not part of a theft.
6. The forwarding of the goods to Sharjah was natural and inevitable.

In the Court of Appeal's view, the High Court judge was quite entitled to draw the inferences which he did and, indeed, the inferences appeared to be logical and supportable. The starting point must be the holding by the High Court judge that the Habib Bank had received the 3 original bills of lading. The High Court judge reached that conclusion despite the fact that the court in Sharjah had held that the Habib Bank had received only 2 original bills of lading.

Logically, following from the High Court judge's finding as to the 3 bills of lading, the inevitable conclusion must be that somebody in the Habib Bank had passed one of the original bills of lading to the buyer. Given the fact that the buyer did not have an account with the Habib Bank, the next logical conclusion must be that the passing of that bill of lading was done dishonestly. That led, inevitably, to the conclusion that the theft of the container was planned by the buyer with the complicity, or at the very least the assistance, of the person or persons in the Habib Bank. Whether that person or persons was dishonest or was tricked into passing over the bill of lading mattered not.

Likewise, given the fact that the buyer would not have been able to unload the container at Khor Fakkan and that it was much more convenient to do so at Sharjah, the forwarding of the container from Khor Fakkan to Sharjah must have been part of the process of the buyer's dishonestly obtaining the goods. In this respect it appeared to the Court of Appeal to matter very little by what means the buyer was able to arrange for the transfer of the goods to Sharjah. The cargo insurer was at great pains to try to establish that the buyer had used a copy of the bill of lading that had been faxed by the seller to the buyer. That might be so, but it did not seem to the Court of Appeal to make any difference as to whether the buyer used a faxed copy, that had been sent to it for its information, and not for its use, or whether it used a dishonestly obtained original bill of lading.

Neither, it seemed to the Court of Appeal, did it make any difference that the container would have been forwarded to Sharjah even if the contents of the container were not eventually stolen. The simple reason was that forwarding the container in the ordinary course of events would have been done legitimately on the instructions of those who were entitled to give those instructions. It would not have been done for the purpose of dishonestly removing the contents once the container had reached Sharjah. Hence, for

similar reasons it did not appear that it would make any difference that the buyer only obtained the original bill of lading on 5 January (the container was dispatched to Sharjah on 4 January). The buyer certainly had the original bill of lading which was used to obtain the contents of the container at the time that it completed its thievery.

There remained then the question as to whether it was open to the High Court judge to hold that the theft took place at Khor Fakkan where the goods were taken out of the container at Sharjah. In the Court of Appeal's view, the theft of the contents of the container could be considered to be a continuous act starting at the time when the buyer gave instructions in relation to the container as part of a process of stealing the contents. That clearly happened when the container was at Khor Fakkan.

The High Court judge held that the place where the container had been parked, namely in the stack S41 at Khor Fakkan, could not legitimately be characterised as a "final warehouse or place of storage". As he said, it was no more than a temporary position in an open container stack. Not only would the Court of Appeal agree with him in this respect but the matter must fall within the additional clause of the insurance policy which read:

" It is further agreed that notwithstanding the provision of clause 8 (Institute Cargo Clauses 'A') .... goods shall be considered to be in the ordinary course of transit in the following circumstances:

.....

- (ii) after arrival at country of destination whilst held at any warehouse or place of storage (not the property of the Insured or rented or leased by then) which the Insured elect to use for temporary storage, allocation or distribution prior to arrival at the consignee's or other final warehouse."

For those reasons the Court of Appeal considered that there was nothing in the point raised on behalf of the cargo insurer in this respect.

Finally, the cargo insurer sought to argue that even on the High Court judge's findings and even on the basis that the position of the container at Khor Fakkan in stack S41 was not the final warehouse for the container, its contents were not covered by the insurance. It was said that the cover had come to an end under the terms of clauses 8 and 9 of the insurance. For convenience those clauses were set out:

- " 8     8.1    This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either
- 8.1.1    on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein,
  - 8.1.2    on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either
    - 8.1.2.1   for storage other than in the ordinary course of transit or
    - 8.1.2.2   for allocation or distribution,
- or
- 8.1.3    on the expiry of 60 days after completion of discharge oversee of the goods hereby insured from the oversea vessel at the final port of discharge, whichever shall first occur.
- 8.2    If, after discharge oversee from the oversea vessel at the final port of discharge, but prior to termination of this insurance, the goods are to be forwarded to a destination other than that to which they are insured hereunder, this insurance, whilst remaining subject to termination as provided for above, shall not extend beyond the commencement of transit to such other destination.
- 8.3    This insurance shall remain in force (subject to termination as provided for above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the existence of a liberty granted to shipowners or charterers under the contract of affreightment.
- 9     If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before delivery of the goods as provided for in Clause 8 above, then this insurance shall also terminate unless prompt notice is given to the Underwriters and

continuation of cover is requested when the insurance shall remain in force, subject to an additional premium if required by the Underwriters, either

- 9.1 until the goods are sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the goods hereby insured at such port or place, whichever shall first occur,
- 9.2 if the goods are forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named herein or to any other destination, until terminated in accordance with the provisions of Clause 8 above.”

The argument was that the transit had terminated once the container had been off-loaded at Khor Fakkan. It was said that under clause 8 the insurance continued only “...during the ordinary course of transit...”. However, that, in the Court of Appeal’s view, was clearly to take the words out of context. The full context was to be understood that the termination occurred when one of the events enumerated in 8.1.1, 8.1.2, 8.1.2.1, 8.1.2.2 and 8.1.3 occur. What had to be noted in this respect was that the last of those clauses made quite clear that the cover continued even after the goods had been off-loaded. Again, the Court of Appeal considered that the matter was also covered by the additional clause cited above.

For these reasons the Court of Appeal considered that there was no ground for interfering with the judgment of the High Court judge below and that the appeal fell to be dismissed with an order of costs in favour of the seller.

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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Just as Obama displaced Bush, the Ox is bidding farewell to the Rat. We sincerely hope the Ox will bring the Bull back soon such that the world economy will again return to boom from gloom. Outlook is varied among economists as to how soon we can be elevated from the financial trough.

Unrealistic it is to expect turnaround any time soon. Before we see the lights, we see rising number of E&O, uncollected cargo and completion of carriage claims. The global credit crunch has created chain effects leading to, forced or otherwise, found or unfounded, breach of contracts and obligations along the logistics chain. Our claims team are on full gear recently in dealing with those claims with the back up from their forwarder liability insurers. Thanks to the forwarder and logistics liability insurance in place, our clients are largely unaffected, and are ready to grab new opportunities as the OX will bring.

SMIC wishes you all a very Happy Chinese New Year of the OX.