SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Terminal cargo misdelivery (III)

Remember our Chans advice/112 that the Hong Kong High Court held the Rotterdam terminal liable to pay the cargo value of €950,071.20 for the misdelivery of one container of Sony Play Stations? On 2/4/2013, Judge To of the Hong Kong High Court issued another Judgment holding that the forwarder was entitled to limit its liability to US$24,392 in accordance with its B/L terms. [HCAJ 106/2008]

This was the hearing of the cargo interests' summons dated 5/8/2011 seeking summary judgment against the forwarder pursuant to Order 14 rule 1 of the Rules of the High Court.

The background

On 9/8/2007 the cargo interests consigned 11 containers (including Container HLXU 506006-7) to the forwarder for carriage from Shanghai to Tilburg via Rotterdam. The contract of carriage was evidenced by an Express Cargo Bill of Lading (B/L). The containers were stuffed with Sony Play Stations. Container HLXU 506006-7 is hereinafter referred to as Container X. The forwarder sub-contracted the sea carriage of the goods from Shanghai to Rotterdam to the shipping company. The containers having arrived in Rotterdam on 3/9/2007, they were stored at the Rotterdam terminal pending customs clearance. Such storage with the Rotterdam terminal was effected by the shipping company pursuant to a pre-existing Terminal Contract between (among other lines) the shipping company and the Rotterdam terminal. The forwarder's Rotterdam agents cleared the consignment through customs and obtained the requisite customs clearance document (known as "the Sagitta"). The agents also arranged for the containers to be carried from Rotterdam to Tilburg by barge through inland waterways. The containers (including Container X) became registered in the Rotterdam terminal's barge system. On 5/9/2007 Nico (a trucking company's driver) arrived at the Rotterdam terminal, presented a copy of the Sagitta, gave the release number for Container X, and asked for Container X to be released to him for on-carriage by truck. The trucking company had obtained the copy of the Sagitta from (and had been instructed to collect Container X from the Rotterdam terminal by) unknown criminals claiming to act for a non-existent company (i-Tronics). The Rotterdam terminal employee handling Nico's request was a trainee named Jimmy. When Jimmy attempted to comply with Nico's request, he discovered that Container X was registered for delivery via the Rotterdam terminal's barge system and not the Rotterdam terminal's trucking system. At that stage, the Rotterdam terminal's internal procedures required Jimmy to check with others whether Container X had in fact been re-routed from the barge to the trucking system. However, Jimmy did not carry out any checks. Instead, he re-routed Container X to the trucking system himself. He then issued Nico with the data card needed to obtain release of Container X from the Rotterdam terminal. Nico drove Container X to the persons who had instructed the trucking company. The latter unloaded Container X from Nico's lorry and disappeared with the contents of Container X. Container X was later found abandoned.

On 19/11/2009, judgment was entered against the Rotterdam terminal in default of notice to defend. Its application to set aside that interlocutory judgment was dismissed by Judge Reyes on 25/2/2010 ("First Judgment"). On 1/3/2010, Judge Reyes gave judgment on quantum awarding the cargo interests damages in the amount of €950,071.20 plus interest and costs ("Second Judgment"). The Rotterdam terminal paid the judgment sum on 9/3/2010 but appealed against both judgments. The appeals were set down for hearing on 7/9/2010. In the meantime, the parties negotiated and settled the appeal in the sum of €800,000, representing a principal sum of €616,000 and a contribution of €184,000 in interest and costs. The surplus of the amount paid to the cargo interests was returned to the Rotterdam terminal. The appeal was dismissed by consent. The cargo interests then sought to recover the balance of their claims from the forwarder in the sum of €428,000, equivalent to the surplus returned to the Rotterdam terminal.

Cause of action extinguished defence

As result of the First Judgment and Second Judgment, the Rotterdam terminal paid the full amount of damages claimed in the amount of €1,056,810.87 including interest and costs to the cargo interests on 9/3/2010; and then filed a notice of appeal two days later. After that the parties entered into a series of negotiation and reached agreement to settle the appeal. On 24/8/2010, they obtained an order by consent from Rogers JA to dismiss the appeal upon the cargo interests refunding all sums over and above the sum of €800,000 to the Rotterdam terminal. The net result was that the cargo interests' claim against the Rotterdam terminal was settled in the amount of €616,479 with a contribution of €183,521 as interest and costs. The cargo interests then sought to recover the balance of their loss in the amount of €440,331 against the forwarder.

The forwarder argued that as judgment for the full amount of damages claimed had been obtained against the Rotterdam terminal and paid to the cargo interests in full satisfaction of the judgment including interest and costs, the cargo interests' claim was extinguished against all defendants, including the forwarder. The forwarder emphasized on the significance that the payment was made before the Rotterdam terminal filed its notice of appeal. The forwarder further submitted that the cause of action thus extinguished did not revive as a result of the cargo interests voluntarily refunding part of the judgment sum to the Rotterdam terminal and in so doing the cargo interests were effectively giving away their own property.

In Judge To's view, the only question raised by this defence was whether it was reasonable so to settle.

The cargo interests submitted that once judgment was given, the judgment debtor was at liberty to pay the judgment sum to stop interest from accruing and then appeal. Judge To agreed. Interest at judgment rate was higher than the returns from most of the investment products available in the financial market. The payment by the Rotterdam terminal before filing its notice to appeal was but a neutral event and attracted no significance which the forwarder sought to emphasize. On the facts, the Rotterdam terminal's payment under protest of an appeal was but provisional satisfaction pending appeal and negotiation. The cargo interests explained the basis of the settlement. Based on the Hague-Visby Rules, the cargo interests considered the Rotterdam terminal's offer reasonable and attractive. Though fully confident of their chance of success, bearing in mind the uncertainty of litigation and the costs of two appeals which would not be fully recovered from the Rotterdam terminal, the cargo interests made a practical management decision to settle by forgoing about one third of the damages in exchange for a dismissal of the appeals and then to pursue against the forwarder for the balance of their loss. The explanations tendered by the forwarder were credible and full of common sense. Even if the cargo interests were to wholly succeed on both appeals and awarded costs, bearing in mind the disparity between actual costs and taxed costs, the cargo interests would probably be better off settling than contesting and running the risk of uncertainty in litigation. This was not a case of a plaintiff, having obtained full satisfaction, made a gift of his fruit of litigation and then sought double recovery.

The reasonableness of the decision to settle had to be assessed as at the time when the decision was made. In Judge To's view, having regard to all the circumstances, it was reasonable to have settled the appeal. As result of the settlement, the cargo interests avoided the costs and uncertainty of an appeal and preserved the two judgments of Judge Reyes. The net effect was that though the cargo interests obtained judgment against the Rotterdam terminal in the full amount of €950,071.20 plus interest and costs, they only recovered €616,000 plus €184,000. The cargo interests were not making a gift of their fruit of litigation to the Rotterdam terminal and then sought double recovery against the forwarder. The cargo interests were undoubtedly entitled to recover the balance of their claims from the other co-defendants. There were no triable issues, whether of fact or of law, raised by this defence. There was no evidence to contradict the reasonableness of the cargo interests' decision to settle. Were this issue to proceed to trial, the same evidence and arguments would be presented and the outcome would be just the same.

Failure to mitigate loss defence

The forwarder renewed its attack on the settlement by arguing that in voluntarily giving up a significant proportion of the amount they had received in satisfaction of the judgment, the cargo interests failed to mitigate their loss. The forwarder argued that it would have been reasonable for the cargo interests to defend any appeal brought by the Rotterdam terminal rather than commencing the litigation against the

forwarder. The forwarder argued that the cargo interests seemed to have erroneously formed the view that the Rotterdam terminal had a meritorious argument on appeal by relying on the Hague-Visby Rules.

It is a well settled principle that a victim is under a duty to mitigate his loss and may not recover such of his loss which he could reasonably have mitigated. But that does not mean he should, for the benefit of some other co-defendants, pursue litigation against a particular co-defendant against whom he had obtained judgment to the bitter end without regard to the expenditure in terms of time and costs. It is all a matter of balancing. He has to balance the chance of success, the costs involved, the means of the various co-defendants in satisfying judgment and the relative ease with which he could recover from the various co-defendants.

Weighing all those issues, the cargo interests considered the offer on the basis of the Hague-Visby Rule very reasonable and attractive. Obviously, the cargo interests thought if insisted to recover beyond that limit which the Rotterdam terminal considered reasonable and the norm, the Rotterdam terminal would proceed with the appeal to try its luck. Thus, the cargo interests' decision to settle was out of the consideration for the chance of success, the legal costs particularly those which would not be recoverable, and the limit of the Rotterdam terminal's willingness to compromise. It might well be that as between the forwarder and the Rotterdam terminal, the latter was more to blame. That was a matter to be resolved among the Defendants. It was not for the cargo interests to do justice among those parties. On balance, from point of view of the cargo interests, Judge To considered the decision to settle the appeal reasonable.

Limitation of liability defence

The forwarder contended that its liability was limited to US$2 per kilogram gross weight of the stolen goods under clause 18.3 of the B/L. The compensation to which the cargo interests would be confined under this clause was US$24,392 or €18,863.30 which was 1.9% of the invoice value of the goods. The cargo interests' contention was that the limitation under Clause 18.3 did not apply where the loss and damage was occasioned by the forwarder's negligence. This dispute fell to be decided on the true construction of the B/L, particularly, Clauses 18.3, 18.4 and 23.2.

Clause 18 and 23.2 provide as follows:

"18.1 When the Carrier is liable for compensation in respect of loss or damage to the Goods, such compensation shall be calculated by reference to the invoice value of the Goods plus freight charges and insurance if paid.

18.2 If there be no invoice value of the Goods, the compensation shall be calculated by reference to the value of such Goods at the place and time they are delivered to the Merchant in accordance with the contract or should have been so delivered. The value of the Goods shall be fixed according to the commodity exchange price or current market price, by reference to the normal value of Goods of the same kind and quality.

18.3 If in case of Combined Transport it can contrary to 17(B) II above not be proved where the loss or damage occurred compensation shall not exceed US$2., - per kilogram of gross weight of the goods lost or damage unless a higher compensation is provided by applicable compulsory law.
If it can be proved where the loss or damage occurred and if no compulsory law applies, compensation shall not exceed US$2., - per kilogram of gross weight of the goods lost or damaged.

18.4 Higher compensation may be claimed only when, with the consent of the Carrier the value of the Goods declared by the Merchant has been stated in this Bill of Lading and the ad valorem freight rate is paid to the Carrier. In that case the amount of the declared value shall be substituted for the limits laid down in this clause. Any partial loss or damage shall be adjusted pro rata on the basis of such declared value.

18.5 The Carrier shall not, in any case, be liable for an amount greater than the actual loss to the person entitled to make the claim."

"23.2 The Carrier shall not be entitled to the benefit of limitation of liability provided for in clause 18.3, if it is proved that the loss or damage resulted from an act or omission of the Carrier itself, done with intent to cause damage or recklessly and with knowledge that damage would probably result".

In his Second Judgment on quantum, Judge Reyes found in favour of the cargo interests against the Rotterdam terminal. His reasons were as follows. It was unclear whether the words "loss or damage" in Clause 18.3 only referred to loss or damage occasioned through no fault of the carrier or also extended to those occasioned through the carrier's negligence, recklessness or deliberate fault. Given the principle of reading a contract *contra proferentem*, much clearer words, such as "whatever" or "howsoever arising" etc would need to be inserted into the clause to cover loss and damage caused by the carrier's negligence. He considered Clause 23.2 as merely emphasizing that Clause 18.3 did not cover the extremely serious situation where the carrier had been deliberate or reckless. He did not read Clause 23.2 as implying that negligence by

the carrier was covered by the limitation in Clause 18.3. Clearly all these dicta were *obiter*. The *ratio decidendi* was that the Rotterdam terminal was disentitled by Clause 23.2 from relying on the limit under Clause 18.3 by reason of its reckless conduct or that of its employee.

The cargo interests relied heavily on Judge Reyes' construction of the two clauses in the Second Judgment. The cargo interests relied on the *contra proferentum* rule of construction and emphasized on the absence of express reference to mis-delivery or clear language such as "whatsoever" or "howsoever arising" in Clause 18.3. The cargo interests argued, quoting *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd* [2006] SGHC 28 per Phang J at §27, that Clause 18.3 was total exclusion of liability in disguise and fell to be construed to the exacting standard to which exclusion clauses were subject. The cargo interests also argued, quoting *MacDonald, Exemption Clauses and Unfair Terms*, 2nd Ed p 50 to p 62, that given the absence in Clause 18.3 of express reference to negligence or conversion or synonyms thereof, the clause was not to be taken to extend to liability for negligence.

On the other hand, the forwarder argued that the approach of the courts to limitation provision was different from the approach to provisions which purported to exclude liability absolutely. The forwarder referred to the following dictum of Lord Wilberforce in *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 WLR 964 at 966G-H:

> "Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure."

Lord Fraser of Tullybelton was of the same opinion. He said at 970C-F:

> "There are later authorities which lay down very strict principles to be applied when considering the effect of clauses of exclusion or of indemnity: … In my opinion these principles are not applicable in their full rigour when considering the effect of clauses merely limiting liability. Such clauses will of course be read contra proferentem and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses. The reason for imposing such standards on these clauses is the inherent improbability that the other party to a contract including such a clause intended to release the proferens from a liability that would otherwise fall upon him. But there is no such high degree of improbability that he would agree to a limitation of the liability of the proferens, especially when, as explained in condition 4(i) of the present contract, the potential losses that might be caused by the negligence of the proferens or its servants are so great in proportion to the sums that can reasonably be charged for the services contracted for."

Exclusion or exemption clauses are different in nature from limitation clauses. The effect of the former is to exclude a contractor from the consequences of his conduct, be it deliberate, reckless, negligent, inadvertent or faultless. Such a clause is contrary to the general principle that a person is responsible and liable for the loss caused by his acts or omissions or breach of his contractual obligations. It is simply absurd where someone pays for the skill of another to perform certain services, that other will not be liable for the damage caused by his failure or negligence in performing those services. Exclusion clauses are often the result of unequal bargaining power, which is the imbalance which the strict principles developed by the courts were designed to redress. Limitation clauses, on the other hand, are different in nature. They do not exclude liability, but only limit the extent of the liability. They are largely creations arising out of cost and risk considerations. For example, an operator of a laundry business only charges a small fee for laundering clothes, but runs the risks of having to pay compensation for loss and damage to the clothes of his customers as a result of his negligence, inadvertence or causes for which he is not to blame. Some clothing could be very expensive. Under such circumstances, compensation would be way out of line with the relatively small fee he charges. Such risk is also out of proportion with his anticipated profit. Without somehow limiting the extent of his liability or unrealistically increasing his fees, the risk inherent in the business may make the business not worth operating and the services may not be available to the public. In more sophisticated businesses, eg the jewelry business, the limitation clause is sometimes fortified by insurance. A client presenting an expensive jewel for mounting may be informed of a limitation clause and advised to insure for damage or loss during the course of the work. This example demonstrates the purpose of exclusion and limitation clauses is to allocate the burden of insurance: see *Photo Production v Securicor* [1980] AC 827. Limitation clause spread the risk of loss between the contracting parties, while keeping the cost of the services low. They are the result of commercial reality. That is why they are regarded with less hostility by the courts. Genuine limitation clauses will be given effect to by the courts. Judge To agreed with the approach in *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*.

Judge To accepted that even if Clause 18 was a genuine limitation clause it must be construed *contra proferentum* and be subject to the same strict rule of construction. Judge To noted the absence of words such as "whatever" and "howsoever arising" in the second paragraph in Clause 18.3, and indeed throughout the entire clause. Judge To also agreed that Clause 18.3 should be read together with Clause 23.2. When read together with Clause 23.2, such absence supported the inference that the limitation did not apply to loss or damage caused by negligence, recklessness and deliberate conduct of the carrier as was held by Judge Reyes in the Second Judgment. Clause 23.2 avoided or annulled the limitation in Clause 18.3 if the loss or damage resulted from acts or omissions of the carrier itself committed under two different mental states: (1) with intent to cause damage or (2) recklessly and with knowledge that damage would probably result. Judge Reyes thought that was not a situation of *expressio unius exclusion alterius* and that Clause 23.2 merely emphasized two most serious situations where the carrier had been reckless, but in fact covered all situations of loss or damage caused by negligence, recklessness and deliberate conduct of the carrier.

Though Clause 18.4 was quoted in the Second Judgment, no argument was actually advanced by counsel on behalf of the Rotterdam terminal. That was understandable as the cargo interests had not paid the higher ad valorem freight rate and Clause 18.4 had no application. However, the presence of this sub-clause in the B/L was not without significance and should not be overlooked in construing Clause 18.3 or Clause 18 as whole. The B/L must be construed as a whole together with all the relevant clauses in the light of the factual matrix. The compensation regime was that the consignor had two options. He might opt to pay the ordinary or lower freight rate and be bound by the limitation clause in Clause 18.3 limiting his compensation to US$2 per kilogram of gross weight of goods lost or damaged. Alternatively, he might opt to declare the value of his goods, pay a higher freight at ad valorem rate and have the comfort of being paid the full value of his goods under Clause 18.4 in case of loss or damage, whatever the cause. This second option was in effect a freight plus insurance option.

With this overall view of the regime in mind, Judge To looked at Clause 23.2 again from the point of view of the construction. This clause was carefully worded to dis-entitle the carrier from the benefit of the limitation under two situations. These two situations were also very narrowly defined. They were acts or omissions of the carrier itself committed with two specific states of mind: (1) intent to cause damage; and (2) recklessly and with knowledge that damage would probably result. Given such express and clear wording, it would be very difficult to enlarge the mental state of the carrier beyond these two expressed states of mind to one where such specific intent was totally missing as in case of negligence. To do so would require adding to the clause words referring to negligence which were not there or deleting all reference to the two mental states which was there. This was tantamount to re-writing the entire clause and not construing it. And when that was done, what purpose would be left to Clause 18.4? The limit under Clause 18.3 would not apply to loss or damage howsoever arising as result of the carrier's conduct, whether deliberate, reckless or negligent. What did consignors pay the higher ad valorem freight rate for? Clause 18.4 would be rendered redundant. The wordings in Clause 23.2 could not be clearer. It annulled the limit under Clause 18.3 if the loss or damage was caused by the carrier's conduct committed under either of the two mental states and no more. It would be unnecessary, and indeed superfluous, to add a phrase expressly excluding negligent conduct. Clause 18.3 was also very clear. The limit applied across the board to all loss and damage, even without words such as "whatsoever" or "howsoever arising". It was only expressly excluded by the terms of Clause 23.2. When the drafting style was thus understood, Judge To thought these two clauses could not be clearer. There was no room for the use of words such as "whatsoever" or "howsoever arising". No inference could be drawn for their absence. Clause 23.2 only had the effect of avoiding or annulling the limit under Clause 18.3 for loss or damage caused by deliberate or reckless conduct of the carrier, but not negligent conduct. Loss or damage caused by any other acts or omission of the carrier, including negligent conduct, should be subject to the limit under Clause 18.3 if the consignor opted to pay the ordinary freight rate or subject to the declared value if the consignor opted to pay the ad valorem freight rate. This was a very simple regime which could be readily understood. This compensation regime was precisely the kind of situation where the maxim, *expressio unius exclusion alterius* applied, otherwise Clause 18.4 would be rendered wholly redundant and consignors would be paying the higher freight rate for nothing. Clause 18 was a genuine limitation clause which the court would give effect to.

When viewed as a limitation clause, the above construction of Clause 23.2 along with Clauses 18.2 and 18.3 resulted in a compensation regime which was absolutely reasonable. A consignor might ship some very valuable goods, say gold bars instead of playstations. He opted to pay the regular freight, which covered the

cost of the freight and usual profit for the carrier. He got an assurance that the carrier would not do any deliberate or reckless act to cause him loss or damages. The carrier got his usual business profit for the carriage. He was under a duty to exercise due diligence. In view of the relatively low freight charge, it would be unreasonable to require him to fully indemnify the consignor of the loss of his cargo, even if occasioned by carrier's own negligence. By agreement, the parties agreed to limit the carrier's liability under Clause 18.3. On the other hand, the consignor might opt to declare the value of his cargo and pay the higher ad valorem freight rate and be ensured of full compensation for all causes of loss and damage. Alternatively, he might, as what the cargo interests did in the case in question, opt to pay the ordinary freight rate and insure his cargo with a third party insurer. But, it would be Wednesbury unreasonable, if unknown to the carrier that the cargo contained very valuable goods and for the very low freight rate that it received, the carrier was required to fully indemnify the consignor for loss, even if caused by its negligence. Just imagine in the case in question, were the cargo consisted of gold bars of equal weight instead of playstations, the carrier would be asked to pay compensation of US$625 million for a negligible freight rate. Had the true value of the cargo been declared, the carrier might require the consignor to pay the ad valorem freight rate and step up its security measures, or insist on the limit of its liability or refuse to take the carriage altogether.

The claims in question were in fact subrogated claims by the cargo underwriters. Judge To thought the cargo interests appreciated the true meaning and consequence of all these clauses. Obviously, they knew they were not fully covered by the compensation under Clause 18.3 even if such loss and damage were caused by the negligence of the forwarder. That was why they took out insurance with the cargo underwriter. They chose not to declare the value of the containers and avoid paying the ad valorem freight rate, presumably because the terms of the insurance were more preferable. The B/L Clauses clearly expressed the parties' commercial intention and also clearly intended the commercial purpose of allocating the burden of insurance to the cargo interests.

Judge To did not think the construction that he adopted was in anyway inconsistent with Judge Reyes' Second Judgment. This was because Reyes J made a finding that the loss was caused by the Rotterdam terminal's deliberate or reckless conduct. Clause 23.2 clearly applied. Whatever the learned judge said about extension of that clause to cover the carrier's negligence conduct was *obiter*. That aspect of the construction was not even argued. The significance of Clause 18.4 was not considered. Judge To did not feel uncomfortable to differ from those *obiter* dicta.

The forwarder was entitled to the partial defence of limitation of liability and was bound to succeed.

Conclusion

Judge To dismissed all the defences raised on behalf of the forwarder, except the partial defence of limitation of liability, which in Judge To's view was bound to succeed. On the basis of the limit under Clause 18.3, the cargo interests were entitled to judgment in the sum of US$24,392 or €18,863.30. In their summons, the cargo interests claimed the sum of €428,000. There were no factual disputes outstanding. The legal issues had been fully argued. It would be contrary to the underlying objective of Order 1A and a waste of time and costs to have the matter adjourned for assessment of damages when all the legal arguments would have to be repeated and the result would inevitably be the same. Having reached the conclusion that the forwarder had no defence on liability and having so construed the B/L, it was only appropriate that judgment be entered for quantum as well. Accordingly, Judge To entered judgment for the cargo interests against the forwarder in the sum of €18,863.30 with interest at judgment rate from 7/1/2011 and with an order *nisi* that the forwarder should pay the cargo interests' costs of the action to be taxed at the District Court scale, if not agreed.

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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