SUN MOBILITY
Insurance and Claims Services Limited

29 April 2014
Ref : Chans advice/160

To: Transport Industry Operators

Carrier's claims against shipper

The Hong Kong District Court issued a Judgment on 8/4/2014 holding that the one year's suit time limit under the Hague Visby Rules does not apply to the carrier's claims against the shipper. [DCCJ 4438/2013]

This was a case involving two freight forwarders: KFIC Logistics and Fastport Cargo. As evidenced by a facsimile transmission ("the Fax") dated 9/9/2010, KFIC Logistics retained Fastport Cargo ("the Contract") to ship from Hong Kong to New York, USA 40 drums of goods ("the Goods") described and/or represented by KFIC Logistics in the Fax as "HAIR FRESH SUPPLY" ("the Representation"). But unbeknown to Fastport Cargo, the Representation was untrue. The Goods were in fact garlic oil. In performing the Contract, Fastport Cargo in turn retained Capital Express, a company incorporated in the USA, to ship the Goods to New York. In reliance of the Representation, Fastport Cargo entered into a bill of lading ("the Bill of Lading") with Capital Express on or about 13/9/2010 describing and/or representing the Goods to be "HAIR FRESH SUPPLY". The Goods, together with other goods ("the Other Goods"), were shipped by Capital Express to New York in the same container ("the Container"). The Goods "contaminated" the Other Goods in the Container. Upon arrival in New York, it was discovered that the Other Goods were "damaged" by the odour of the Goods ("the Contamination").

As a result of the Contamination, Fastport Cargo, Capital Express, together with other 4 defendants, were sued by VX Intimate by way of summons dated 6/10/2011 in a civil action under Index No 11 CIV 7068 in the United States District Court, Southern District of New York for damages exceeding US$300,000.00 ("the US Claim"). Both Fastport Cargo and Capital Express had incurred legal expenses in retaining US lawyers to act for them in the US Claim. Fastport Cargo had paid US$3,908.50 to its US lawyer whereas Capital Express had paid US$7,380.00 to its US lawyer. Eventually both Fastport Cargo and Capital Express, upon legal advice, settled the US Claim with VX Intimate. Fastport Cargo and Capital Express each made payment of US$8,000.00 to VX Intimate. Under the Bill of Lading, Fastport Cargo was responsible for indemnifying, and Fastport Cargo had indemnified, Capital Express of the sum of US$8,000.00 paid to VX Intimate in the US Claim and the legal fees of US$7,380.00 paid. Accordingly, Fastport Cargo had suffered loss and damages of US$27,288.50 (being the sum of US$3,908.50, US$7,380.00, US$8,000.00 and US$8,000.00).

By reason of the aforementioned, Fastport Cargo claimd against KFIC Logistics for US$27,288.50 with interest and costs. By way of summons ("the Summons") dated 30/12/2013, KFIC Logistics applied to strike out the Statement of Claim dated 15 November 2013 on the grounds that it was frivolous or vexatious and/or it was otherwise an abuse of the process of the court pursuant to O 18, r 19(1)(b) & (d) of the Rules of District Court and the inherent jurisdiction of the court.

The principles applicable to striking out are well-established as set out in *Hong Kong Civil Procedure* 2014 Vol 1:-

> "It is only in plain and obvious cases that the court should exercise its summary powers to strike out … any pleading under this rule. There should be no trial upon affidavit. Disputed facts were to be taken in favour of the party sought to be struck out. Nor should the court decide difficult points of law in striking out proceedings. The claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out. If the court does not think the matter to be clear beyond doubt or if it fails to be satisfied that … the proceedings are frivolous or vexatious, then, there should be no striking out …
> It is for the party seeking to strike out an indorsement on a writ or pleading to demonstrate that the case is a plain and obvious one in which the other party's claim is bound to fail" (see paragraph 18/19/4 at pp 426-427).
> "The object of the rule is to stop cases which ought not to be launched – cases which are obviously frivolous or vexatious, or obviously unsustainable …
> The expression 'frivolous or vexatious' includes proceedings which are an abuse of the process … A proceeding is frivolous when it is not capable of reasoned argument, without foundation or where it cannot possibly succeed. A proceeding is vexatious when it is oppressive and/or lacks bona fides" (see paragraph 18/19/8 at pp 428-429).
> "Paragraph (1)(d) [of O. 18, r. 19 of the Rules of High Court] confers upon the court in express terms powers which the court has hitherto exercised under its inherent jurisdiction where there appeared to be 'an abuse of the process of the Court'. This term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery, and will, in a proper case (… where the claim is time-barred …),

summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation" (see paragraph 18/19/10 at pp 430-431).

KFIC Logistics argued that Fastport Cargo's claim against KFIC Logistics in the action was frivolous or vexatious and/or it was otherwise an abuse of the process of the court because it was time-barred, either by way of an implied contractual term or by virtue of the Hague Rules as amended pursuant to section 3 of the Carriage of Goods by Sea Ordinance (Cap 462).

KFIC Logistics advanced the time-bar argument by way of an implied contractual term as follows:-

(1) Both Fastport Cargo and KFIC Logistics were fellow freight forwarders;
(2) On 9/9/2010, KFIC Logistics placed a shipment order with Fastport Cargo by the Fax and subsequently concluded with Capital Express as the principal of Fastport Cargo on 13/9/2010;
(3) No terms and conditions had been expressly discussed and agreed in the above transaction.
(4) The terms and conditions which governed [Fastport Cargo] and [KFIC Logistics] were thus implied (necessary for the business efficacy); some, though not all, of which were evidenced (evidence only) in the back sides of bill of ladings which should be issued by [Fastport Cargo] to [KFIC Logistics] ("DBL"), and/or issued by Capital Express (via Fastport Cargo) to KFIC Logistics, and/or issued by any other sub-bailee(s)' to [Fastport Cargo], when sub-bailment was impliedly consented (otherwise Capital Express could never be engaged by [Fastport Cargo]);
(5) One of the implied terms and conditions was that each and every complaint related to any shipment had to be made within one year ("the one-year limitation clause"), which should/might be evidenced in the back side of DBL and/or in the back side(s) of any other sub-bailee(s)'s bill of lading(s) (which had never been provided by [Fastport Cargo] to [KFIC Logistics]);
(6) Fastport Cargo had however only commenced the action against KFIC Logistics after the expiration of the one-year limitation period. The delay involved was more than 2 years and was inordinate and inexcusable; and
(7) Fastport Cargo's pursuit of the action against KFIC Logistics regardless of the time-bar was frivolous or vexatious and/or it was otherwise an abuse of the process of the court.

First of all, it was unclear whether, as submitted by KFIC Logistics, no terms and conditions had been expressly discussed and agreed when KFIC Logistics retained Fastport Cargo to ship the Goods on 9/9/2010. As submitted by Fastport Cargo, only the front side of bill of lading had been faxed by Fastport Cargo to KFIC Logistics. Disputed facts are in any event to be taken in favour of the plaintiff as the party sought to be struck out.

The question was whether the one-year limitation period could be implied into the Contract to bind Fastport Cargo when commencing the action against KFIC Logistics.

KFIC Logistics stressed that the one-year limitation period should be implied because it was "necessary for the business efficacy". The requirements for implying a term in a written contract are well-established. Lord Simon of Glaisdale in *BP Refinery (Westernpoint) Pty Ltd v Shire of Hastings* (1978) 52 ALJR 20 stated at p 26 (quoted by the Court of Final Appeal with approval in *Kensland Realty Ltd v Whale View Investment Ltd & Another* (2001) 4 HKCFAR 381):

> " … for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".

The Judge bore in mind that it was for the party seeking to strike out a pleading to demonstrate that the case was a plain and obvious one in which the other party's claim was bound to fail. KFIC Logistics however had failed to show how the one-year limitation period had met the requirements above to be made an implied term of the Contract to render Fastport Cargo's claim against KFIC Logistics in the action time-barred.

KFIC Logistics' argument was that the one-year limitation period should/might be evidenced as contained on the back sides of the bill of ladings issued by Fastport Cargo to KFIC Logistics, by Capital Express (via Fastport Cargo) to KFIC Logistics and/or by other sub-bailee(s).

Fastport Cargo exhibited a full and complete pro-forma bill of lading prepared by Capital Express. Fastport Cargo pointed to clause 9 thereof as what KFIC Logistics should have in mind. It read as follows:-

> "NOTICE OF LOSS TIME BAR
>
> (1) Unless notice of loss of or damage to the Goods and the general nature of it is given in writing to the Carrier at the place of delivery be lose [sic] or at the time of the removal of the Goods into the custody of the person entitled to delivery thereof under this Bill of Lading or if the loss or damage be not apparent within seven consecutive days thereafter such removal shall be prima facie evidence of the delivery by the Carrier of the Goods as described in this Bill of Lading.
> (2) Subject to paragraph (3) below, the Carrier shall be discharged of all liability under this Bill of Lading unless suit is brought and written notice thereof given to the Carrier within nine months after delivery of the Goods. In the case of total loss of the Goods the period shall begin to run two months after the Goods have been received for transportation.

(3) Notwithstanding paragraph (2) above if the whole of the carriage undertaken by the Carrier is limited to the carriage from a CY or CFS in or immediately adjacent to the sea terminal at the port of discharge the Carrier shall be discharged from all liability whatsoever in respect of the Goods unless suit is brought within one year of their delivery or of the date when they should have been delivered".

As submitted by Fastport Cargo, clause 9, on its plain wording, however concerned claims against a carrier.

Clause 14, on the other hand, concerned a shipper's responsibility. It was significant to note that the clause contained no limitation on claims against a shipper contrary to KFIC Logistics' submissions. It read as follows:-

"(1) The Shipper warrants to the Carrier that the particulars relating to the Goods as set out overleaf have been checked by the Shipper on receipt of this Bill of Lading and that such particulars and any other particulars furnished by or on behalf of the Shipper are correct.

(2) The Shipper shall indemnify the Carrier against all loss, damage and expenses arising or resulting from inaccuracies in or inadequacy of such particulars. The right of the Carrier to such indemnity shall in no way limit his responsibility and liability under this Bill of Lading to any person other than the Shipper".

The Judge rejected KFIC Logistics' argument that there was an implied term in the Contract to the effect that Fastport Cargo should claim against KFIC Logistics within one year or otherwise it would be time-barred for Fastport Cargo to do so.

KFIC Logistics argued further or alternatively that Fastport Cargo's claim against KFIC Logistics in the action was subject to the Hague Rules as amended. Section 3 of the Carriage of Goods by Sea Ordinance provides that subject to subsection (3) the Hague Rules as set out in the Schedule shall have the force of law.

KFIC Logistics quoted Article III under the Schedule:-

"6. … Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen …" ("Paragraph 6"); and

"6bis. An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself" ("Paragraph 6bis").

As submitted by Fastport Cargo, the plain wording of Paragraph 6 made provision for clams against a carrier and the ship in respect of the goods.

KFIC Logistics argued: "Indeed, though, paragraph 6 of Article III of the Hague-Visby Rules is silent on whether the one-year limitation could apply for claims against shipper, reading in conjunction with the wordings – '[a]n action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph' – in paragraph 6bis, one would convince [sic] that paragraphs 6 and 6bis meant to apply one-year limitation to claims against shipper as well (in accordance with the business efficacy)".

The Judge failed to see why by reading Paragraphs 6 and 6bis in conjunction the Judge should be convinced that the one-year limitation period under Paragraph 6 should apply to claims against shipper as well. As submitted by Fastport Cargo, the Hague Rules as amended would have contained express provision to cover claims against shipper had there been intent to do so. In the premises, KFIC Logistics had failed to show that Fastport Cargo's claim against KFIC Logistics in the action was time-barred by operation of Paragraph 6. To conclude, KFIC Logistics had failed to show that Fastport Cargo's claim in the action was time-barred such that it was frivolous or vexatious and/or it was otherwise an abuse of the process of the court. KFIC Logistics' application to strike out the Statement of Claim was unmeritorious. Accordingly, the Judge dismissed the Summons with costs to Fastport Cargo, with certificate for counsel as agreed between the parties.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com