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To: Transport Industry Operators

Forwarder's Standard Trading Conditions

The Hong Kong High Court issued a Judgment on 3/2/2017 holding Natural Dairy liable to pay HK\$4,360,948.38 to Schenker being the outstanding freight charges. In the Judgment, the Judge also explained the principles regarding the meaning of notice of the forwarder's standard trading conditions. [HCA 1755/2011].

Between April and August 2011, Schenker arranged and provided or arranged to provide services for a number of goods shipments, namely:

- (1) 34 shipments by sea from Tauranga, New Zealand to Fuzhou, China;
- (2) 27 shipments by air from Auckland, New Zealand to Fuzhou, China;
- (3) 2 shipments by sea from China to Tauranga, New Zealand;
- (4) 1 booked shipment by sea from Shanghai, China to Tauranga, New Zealand, which was cancelled;
- (5) 1 shipment by air from Shanghai, China to Auckland, New Zealand.

Sixty-five invoices were raised in respect of these shipments. Thirty-five invoices were paid. Two of the invoices, issued to a company called Super Worth, for the shipments by sea from China to New Zealand, were not pursued at trial. Of the remaining twenty-eight invoices, Schenker alleged that two were partly paid and twenty-six were unpaid. The total claimed by Schenker was \$4,360,948.38.

Schenker alleged that it provided its services pursuant to an agreement reached and/or confirmed between Schenker and Natural Dairy in about March or April 2011. Insofar as the agreement was made orally, Schenker relied on various meetings between Schenker and Natural Dairy held at Schenker's office in Hong Kong in or about February to April 2011. Schenker alleged that the agreement was also evidenced in writing and referred to various correspondence exchanged between the parties from November 2010 to September 2011 and Schenker's quotations and invoices, house air waybills and house bills of lading and payment by or for Natural Dairy. Schenker also alleged that its Standard Trading Conditions formed part of the agreement. Schenker alleged that, in breach of the contract, Natural Dairy had failed to pay the remaining twenty eight invoices.

The Judge found that an express, verbal agreement was concluded in a meeting on 29 March 2011 between Schenker and Natural Dairy. Prior to that meeting, Schenker had provided Natural Dairy with its quotations for ocean freight. At the meeting, Natural Dairy confirmed Schenker's engagement for shipment of Natural Dairy's cargo and said that Natural Dairy would be responsible for the payment of freight charges. Moreover, evidence of the agreement was found in the numerous emails, quotations and invoices. The subject of correspondence was "shipping line enquiry <Natural Dairy>". There was a reference to debiting "Natural Dairy" in Hong Kong. Schenker confirmed in the email, dated 1 April 2011, that "Natural Dairy" in Hong Kong would pay for the ocean freight. Quotations were addressed to Natural Dairy. Later emails also provided evidence of an agreement. Thereafter, invoices were issued by Schenker to Natural Dairy without complaint or objection from Natural Dairy.

The Judge considered that, objectively, the parties evinced in their exchanges an intention to conclude a contract. From the emails exchanged and the quotations and invoices issued to Natural Dairy without complaint, a reasonable man, versed in business, would have understood from the exchanges between Schenker and Natural Dairy that Natural Dairy was the counterparty and responsible for the freight charges claimed. This objective approach was applied in *Maple Leaf Macro Volatility Master Fund & anor v Rouvroy & anor* [2009] 1 Lloyd's LR 475.

The principles regarding the meaning of notice of trading conditions is summarized in *Chitty on Contracts* Vol 1, 32nd ed, para 13-013. If a person knew that writing or printing referred to conditions, he is bound. 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, the conditions will become the terms of the contract between them.

Natural Dairy agreed that shipping companies and freight forwarders normally had their own terms and conditions but Natural Dairy did not agree that it knew that Schenker's quotations and emails referred to its standard terms and conditions, saying that normally for such terms one would need to go to the website or ask for a copy.

There were scores of quotations and emails referring to Schenker's standard terms and conditions, which were received by Natural Dairy. At the bottom of Schenker's emails was the following remark: "All services and transactions are subject to the Trading Conditions of the Company. Detailed information is available at [Schenker's website] or upon request." When shown copies of quotations and emails referring to Schenker's terms and conditions, Natural Dairy said that normally nobody would ask for a copy and that, because each email referred to the terms and conditions, people would think it superfluous. Natural Dairy's answers were disingenuous. The Judge did not believe that Natural Dairy was not aware of the notice of terms and conditions stated on the quotations and emails; Natural Dairy was trying to avoid its liability by saying, in effect, no one would bother to read them. The statement on the quotations and emails was sufficiently clear to have drawn attention to the terms and conditions and that they were something that should be read. Quotations and emails referring to the terms and conditions had been sent to Natural Dairy and the terms and conditions had been brought to Natural Dairy's notice before the contract was made.

The Judge found that Schenker's standard terms and conditions were conditions of the contract between Schenker and Natural Dairy.

The particular terms upon which Schenker relied made Natural Dairy liable for freight charges even if it was only acting as an agent. Clauses 1.3 and 7.1 of the trading conditions provide that the "Customer" is jointly and severally liable with the Owner of the goods to pay for freight charges, even if the Customer is acting as the agent. The term "Customer" means any person at whose request or on whose behalf Schenker provides a service.

Natural Dairy's referred the Judge to *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 in support of a submission that it was incumbent on the party relying upon a trading condition to fairly and reasonably bring notice of the condition to the counter party, if the condition is onerous and unusual. Natural Dairy submitted that the term making all agents liable for freight charges was onerous and unusual. The Judge could not see how such a term was onerous.

Indeed, in *Australian Tallow & Agri Commodities Pty Ltd v Malaysia International Shipping Corporation* [2001] NSWCA 16, the New South Wales Court of Appeal recognized such terms, holding that:

- (1) *Prima facie*, at common law, where a party contracts as an agent for a principal, the contract is that of the principal and the agent may neither sue nor be sued.

- (2) But this general principle is subject to important exceptions, one of which is that the parties can provide, by their express contract, that the agent shall be liable, either concurrently with or to the exclusion of the principal.

The Judge found that the trading conditions formed part of the contract between the parties and provided that Natural Dairy was liable for freight charges.

The Judge gave judgment for Schenker in the sum of HK\$4,360,948.38 together with simple interest on that sum at the rate of 2% per month, which rate is pursuant to clause 10.8 of the trading conditions, from the date of Schenker's demand letter, 6 September 2011, until the date of the Judgement and thereafter interest at the statutory rate of interest until satisfaction. The Judge also made an order *nisi* Natural Dairy to pay Schenker's costs of the action to be taxed 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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