



24 May 2017

Ref : Chans advice/197

To: Transport Industry Operators

**Uncollected cargoes – stay of proceedings**

On 12/4/2017, the Hong Kong High Court dismissed an application made by a cargo owner for stay of proceedings commenced by two forwarders in relation to an uncollected cargo case. [HCA 1927/2016]

According to the Statement of Claim filed in the legal proceedings commenced on 25 July 2016, the Plaintiffs were Mainland companies, the 2<sup>nd</sup> Plaintiff CTS Logistics being the parent company of the 1<sup>st</sup> Plaintiff Shenzhen CTS Logistics. CTS Logistics was the named issuer of 14 bills of lading (“**Bills**”) for the shipment of cargo from the USA to Gaolan in the PRC (“**Port of Discharge**”). The Defendant Dajiang Investment (which was a company incorporated and carrying on business in Hong Kong) was said to be the holder of the Bills.

The goods described in the Bills were stated to be “copper ingots” (“**Goods**”). According to the Statement of Claim, the Goods were consigned by Shenzhen Starway (“**Starway**”) to Shenzhen CTS Logistics for shipment, and Shenzhen CTS Logistics engaged the services of various carriers to ship the Goods from St Louis, the USA to the Port of Discharge. The Bills were assigned by Starway to Dajiang Investment. The Bills were made subject to the conditions of carriage printed on the reverse of the Bills (“**Conditions**”). The Conditions defined “Carrier” as the company stated on the front of the Bills as being the carrier and on whose behalf the Bills were signed. CTS Logistics was the carrier named on the Bills. The Conditions further define “Merchant” as meaning and including the shipper, consignor, consignee, the holder of the Bills and the owner of the goods.

Clause 5.1 of the Conditions provides as follows:

“The Merchant shall be deemed to have guaranteed to the Carrier the accuracy, at the time the goods were taken in charge by the Carrier of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable to the dangerous character of the goods as furnished by him or on his behalf for insertion on (the Bill). The Merchant shall indemnify the carrier against all loss, damage and expense resulting from any inaccuracy or inadequacy of such particulars. The Merchant shall remain liable even if (the Bill) has been transferred by him. The right of the carrier to such an indemnity shall in no way limit his liability under this (Bill) to any person other than the Merchant.”

The Plaintiffs claimed that whilst the Goods were in transit, they were delivered to the transit ports in Hong Kong and Shenzhen by the carriers, and for the purpose of preparing the cargo manifests and enabling the Goods to be delivered to the Port of Discharge, the carriers requested from the Plaintiffs, and the Plaintiffs in turn requested from Dajiang Investment, the following particulars (“**Shipping Information**”) of the Goods:

- (a) bill of lading number;
- (b) name and address of consignee;
- (c) number of packages;
- (d) gross weight of the cargo;
- (e) measurement of the cargo;

- (f) description of the cargo in Chinese;
- (g) contact person (including telephone number, fax number and email address); and
- (h) the name of the discharge terminal.

Despite repeated requests, Dajiang Investment allegedly failed to provide the Shipping Information to the Plaintiffs, and further failed or refused to take delivery of the goods. The Plaintiffs claimed that Dajiang Investment was in breach of clause 5.1 of the Conditions, as a result of which breach the carriers were unable to deliver the cargo of the Goods to the Port of Discharge. By reason of such breach, the Goods had been detained in the transit ports in Hong Kong and Shenzhen, and substantial storage fees were incurred and charged by the carriers against Shenzhen CTS Logistics.

By the legal proceedings in question, the Plaintiffs sought damages and an indemnity from Dajiang Investment in respect of all the loss and damage suffered by the Plaintiffs.

By their amendments to the Statement of Claim made in September 2016, the Plaintiffs included a claim by Shenzhen CTS Logistics as bailee of the Goods by virtue of Starway's consignment of the Goods. The Plaintiffs averred that Dajiang Investment became the bailor of the Goods by virtue of Starway's assignment of the Bills to Dajiang Investment, and was therefore liable for Shenzhen CTS Logistics's remuneration and for the expenses and costs incurred by Shenzhen CTS Logistics in the performance of its duties under the bailment.

After the service of the Writ and the Amended Statement of Claim, Dajiang Investment applied by summons on 30 September 2016 ("**Summons**") for the Plaintiffs' provision of security for costs in the action, in the sum of HK\$800,000. The Summons included Dajiang Investment's application for extension of time to file its defence, stated to be without prejudice to Dajiang Investment's right to apply to the court for stay of the proceedings. There was a further application made by Dajiang Investment on 29 November 2016 for extension of time to file its Defence, and on 5 December 2016, an Unless Order was made by the Court, for judgment to be entered against Dajiang Investment unless its defence was filed by 12 December 2016.

It was only on 7 December 2016, after the Plaintiffs applied for default judgment, that Dajiang Investment applied by summons ("**Stay Summons**") for the legal action in question to be stayed under O 12 r 8 RHC, on the ground that Hong Kong was not the appropriate forum, that the Guangzhou Maritime Court ("**GZ Court**") on the Mainland was the most appropriate and natural forum, and that there were existing proceedings between CTS Logistics and Dajiang Investment in the GZ Court, which was commenced by Dajiang Investment at the end of June 2016. At the same time, Dajiang Investment applied for the Statement of Claim to be struck out and for the action to be dismissed, on the ground that it was frivolous, vexatious or otherwise an abuse of the process of the court.

After reviewing the evidence and hearing submissions from the parties, Dajiang Investment's application for stay was dismissed. The following were the Judge's reasons for the dismissal.

#### Submission to HK jurisdiction

First, the Judge took the view that Dajiang Investment had already submitted to the jurisdiction of the Hong Kong Court. It was true that Dajiang Investment's application for extension of time to file its defence was made without prejudice to its right to challenge the jurisdiction of the Hong Kong Court. However, that reservation of right was made only in respect of its application for suspension of the time to file its defence. The relief sought by the Summons included the application for security in respect of Dajiang Investment's costs. Although Dajiang Investment's affirmation in support claimed that security was sought only for costs up to the hearing of the stay application, a review of the skeleton bill relied upon by Dajiang Investment showed that the

security sought was for Dajiang Investment's costs incurred and to be incurred, from the service of the Statement of Claim, to seeking further and better particulars of the Statement of Claim, and up to seeking Counsel's advice on merits and on evidence. The amount of security sought (\$800,000) and the description of the work envisaged did not support the claim that security was confined to the hearing of the application for stay of the action.

The Summons further sought the striking out of the Plaintiffs' Amended Statement of Claim and the dismissal of their action against the Defendant, unless security was provided by the Plaintiffs. Dajiang Investment itself accepted that the striking out order was sought, as an alternative relief in the Summons, should the stay not be granted.

By seeking the different and alternative relief sought in the Summons, not just for time for the filing of the defence to be suspended, but also for security for costs which extended to after the stage of the hearing of the stay application, and for striking out the Amended Statement of Claim and the action, Dajiang Investment was invoking the court's jurisdiction to obtain an interlocutory or final order requiring the opposite party to perform some act. It was more than a defensive action. Coupled with the reservation of the right to challenge jurisdiction being confined to the application made for time, Dajiang Investment had not made it clear and unequivocal that it was *not* accepting the jurisdiction of the Hong Kong court.

The Judge found that Dajiang Investment had submitted to the jurisdiction of the Hong Kong Court.

#### No arguable defence

Significantly, and even if the Judge should be wrong that Dajiang Investment had submitted to the jurisdiction of the Hong Kong Court, Dajiang Investment had failed to identify any defence on the merits, to demonstrate that there were real issues requiring resolution between the parties to the action in question, so as to justify a stay of these proceedings. In *Bayer Polymers Co Ltd v ICBC Hong Kong Branch* [2000] 1 HKC 805, the court referred to *Adria Services YU v Grey Shipping Co Ltd* (Folio 212/1993, unreported), where Clarke J (as he then was) granted Order 14 judgment notwithstanding a stay application, and explained:

"In my judgment if the plaintiffs satisfy me that the defendants have no arguable defence then, save in an exceptional case, the right course would be to refuse a stay and get judgment, because there would be no real issues between the parties which should be tried either here or elsewhere."

The same judge elaborated on this in *Standard Chartered Bank v Pakistan National Shipping Corp & Ors* [1995] 2 Lloyd's Rep 365 at 378, as follows:

"It appears to me that in a case where a defendant has no arguable defence on liability and quantum that would be a strong reason to refuse a stay because ... there would be no real issues between the parties which should be tried either here or elsewhere."

In *Bayer* itself, the court refused the stay on the same basis of the absence of an arguable defence.

The Plaintiffs' claims against Dajiang Investment, even as set out in the original Statement of Claim, were clearly stated to be for damages and indemnity in respect of Dajiang Investment's breach of clause 5.1 of the Conditions. Under clause 5.1, Dajiang Investment (as holder of the Bills) guaranteed the accuracy of all the particulars relating to the general nature of the Goods, and undertook to indemnify the carrier against all loss, damage and expense resulting from any inaccuracy or inadequacy of the particulars. The Goods were described in the Bills to be copper ingots. As a result of Dajiang Investment's breach in failing to furnish the Shipping Information as requested, a joint survey of the Goods took place in Hong Kong in May 2016 ("HK Survey"). The HK Survey revealed that 41 of the 202 containers of the Goods were found to be not copper ingots as stated on the Bills, but were "damp mud". A separate survey had also been conducted by the anti-smuggling authorities of the Mainland in May 2016. This also confirmed that 32 containers of the cargo in question contained grayish black solid substance, or granules, and not

copper ingots. As a result of Dajiang Investment's failure to provide the Shipping Information, and as a result of the discrepancies found in the surveys conducted, the Goods were detained in Hong Kong and Shenzhen, and could not be released for shipment to and delivery in the Port of Discharge. The storage charges and expenses were incurred by the Plaintiffs as a result, for which they were entitled under the guarantee and indemnity contained in clause 5.1 to seek recovery from Dajiang Investment.

Dajiang Investment had not raised any arguable defence, or real issue in dispute to the claims made by the Plaintiffs in the action in question. It only asserted that it had no obligation to provide the Shipping Information to the Plaintiffs, without further elaboration on any real or arguable basis, even after the results of the surveys conducted in Hong Kong and on the Mainland, showing the obvious inconsistencies and contradictions between the nature of the Goods as stated on the Bills and as revealed in the surveys, had been made known to Dajiang Investment.

These were sufficient, in the Judge's judgment, to dispose of the application for stay.

*The natural and appropriate forum*

Further and in any event, Dajiang Investment had failed to discharge its burden of establishing that Hong Kong was not the natural or appropriate forum for the trial of the action in question.

The Writ was properly served in Hong Kong on Dajiang Investment, which was a company incorporated in Hong Kong, and which carried on business in Hong Kong. It had a registered office address and a place of business at Hutchison House in Hong Kong. The address was used by Dajiang Investment in its contemporaneous emails and correspondence relating to the subject matter of the action in question. Even in the PRC proceedings issued by Dajiang Investment against CTS Logistics, Dajiang Investment stated Hutchison House in Hong Kong as its address. The alleged breach of Dajiang Investment, in failing to furnish the Shipping Information to the Plaintiffs or to take delivery of the Goods, took place in Hong Kong where Dajiang Investment carried on its business.

A total of 129 containers containing the Goods under 9 of the Bills were being detained in Hong Kong, where the storage charges were being incurred.

A substantial and significant part of the evidence concerning Dajiang Investment's breach was in Hong Kong. The HK Survey was undertaken by a Hong Kong company ("**Union Star**") carrying on business in Hong Kong, and a survey report was prepared by Union Star in Hong Kong. The HK Survey revealed that 41 of the 202 containers of the Goods were found to be not copper ingots as stated on the Bills, but were damp mud. The HK Survey was undertaken in the presence of not only the Shenzhen CTS Logistics's representatives, but also Dajiang Investment's business manager ("**Chen**") and employee ("**Han**"), both of whom stated their business address to be in Hong Kong. They would be witnesses to give evidence at trial.

A total of 129 containers of the Goods, including the 41 containers containing the damp mud, were being detained in Hong Kong. After the survey by the anti-smuggling authorities on the Mainland and the 3 reports made in May 2016, 73 containers of the Goods were detained in Shenzhen.

From the above matters, it could not be said that Hong Kong was not the natural or appropriate forum with the most real and substantial connection with the trial of the action. All the witnesses of Dajiang Investment were in Hong Kong. The evidence, documents and witnesses as to the HK Survey were in Hong Kong. Any further inspection of the Goods detained in Hong Kong would have to take place in Hong Kong. The Plaintiffs having served the Writ on Dajiang Investment with its place of business in Hong Kong and established jurisdiction in Hong Kong as of right,

and the burden being on Dajiang Investment to show that Hong Kong was not the appropriate forum, the proceedings commenced in Hong Kong should not lightly be disturbed.

Clause 19 of the Conditions deals with jurisdiction and the applicable law. It states:

“Actions against the carrier may be instituted only in the place where the carrier has his place of business as stated on the reverse of (the Bill) and shall be decided according to the law of the country in which that place of business is situated.”

The Plaintiffs rightly argued that clause 19 only permits actions brought against the Plaintiffs as carriers to be instituted in the place where the Plaintiffs carry on business. It is not an exclusive jurisdiction clause which obliges the parties to litigate all actions on the Mainland. Nor does clause 19 require actions brought by the Plaintiffs, against other parties to the Bills, to be instituted on the Mainland.

On governing law, even if it could be argued that the Bills were subject to the laws of the PRC, there was no reason why the action against Dajiang Investment could not be tried in Hong Kong on expert evidence of PRC law. Nor had it been shown how the relevant PRC law was different to Hong Kong law so far as issues raised in the Amended Statement of Claim were concerned.

Dajiang Investment relied on the fact that it had, at the end of June 2016, commenced proceedings before the GZ Court, claiming that CTS Logistics failed to deliver the Goods to Dajiang Investment. It claimed that 2 hearings already took place before the GZ Court.

The Judge was not satisfied that Dajiang Investment had established that the GZ Court was clearly or distinctly more appropriate to try the issues in dispute between the Plaintiffs and Dajiang Investment in the proceedings in question.

Even if Dajiang Investment could establish that the GZ Court was clearly or distinctly the more appropriate forum, the Judge accepted the Plaintiffs’ case that if the dispute between the Plaintiffs and Dajiang Investment as to the shipment of the Goods was to be tried in the GZ Court, the Plaintiffs would be deprived of a legitimate juridical advantage. Any judgment that might be made in the GZ Court in favor of the Plaintiffs, including judgment on any counterclaim that might be raised by CTS Logistics, could not be directly enforced against Dajiang Investment which carried on business in Hong Kong, or against its assets in Hong Kong. Fresh proceedings, with the consequential and inevitable delay, would have to be commenced by the Plaintiffs in Hong Kong. The Mainland Judgments (Reciprocal Enforcement) Ordinance does not assist, since the GZ Court is not a designated or recognized court under that Ordinance.

The Judge rejected Dajiang Investment’s assertion that the Plaintiffs’ claims in these proceedings were an abuse of process. The Plaintiffs pleaded a clear and arguable cause of action against Dajiang Investment, both in the original Statement of Claim and, after the amendment in September 2016, in the Amended Statement of Claim on bailment.

### Conclusion

For all the above reasons, the Dajiang Investment’s application for stay was dismissed, with costs to the Plaintiffs.

Please feel free to contact us if you have any questions or you would like to have a copy of the Reasons for the Decision given by the Judge.

Simon Chan  
Director  
E-mail: [simonchan@smicsl.com](mailto:simonchan@smicsl.com)

Richard Chan  
Director  
E-mail: [richardchan@smicsl.com](mailto:richardchan@smicsl.com)

23/F, Excel Centre, 483A Castle Peak Road, Lai Chi Kok, Kowloon, Hong Kong  
香港九龍荔枝角青山道 483A 卓匯中心 23 樓 Tel: 2299 5566 Fax: 2866 7096

E-mail: [gm@smicsl.com](mailto:gm@smicsl.com) Website: [www.sun-mobility.com](http://www.sun-mobility.com)

CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS  
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