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Ref : Chans advice/199

To: Transport Industry Operators

**District Court's jurisdiction**

The High Court of Hong Kong issued a Judgment on 22/5/2017 holding that the District Court has jurisdiction to determine bill of lading and bailment cases. [HCAJ 150/2014]

Introduction

The forwarders as defendants applied for the transfer of the case from the High Court to the District Court. The plaintiffs were the cargo interests i.e the shippers, consignees, sellers and subrogated insurers of a cargo of 2,867 cartons of frozen salmon fillet strips, which were carried in 3 containers on board 3 vessels, successively, from Ustka, Poland to Lat Krabang, Thailand. The forwarders were said to be the contractual carriers under the bills of lading and bailees for reward of the cargo.

Under the bills of lading the carriage was by multimodal transport. It was alleged the cargo was damaged in the course of sea transit from Gdynia, Poland to Singapore, in that one of the containers was found to be defective upon arrival in Singapore and therefore replaced, but the cargo inside that container had been damaged due to exposure to improper temperature during the sea carriage.

The forwarders were said to have caused the damage "[n]egligently and/or in breach of their duties as bailees and/or as carrier for reward and/or in breach of the contract contained in or evidenced by the Bills of Lading and/or in breach of its duties and/or obligations under the Hague-Visby Rules as set out above, in particular Article III Rule 2 ...".

The loss claimed was particularised as the 2 sums of JPY8,475,704 and BHT90,971.40, which together were equivalent to approximately HK\$629,000, and thus within the monetary limit of the District Court's jurisdiction of HK\$1 million.

S 43 of the District Court Ordinance (Cap 336) provides:

"(1) The Court of First Instance may, either of its own motion or on the application of any party, order the transfer to the Court of all or part of an action or proceeding, other than a counterclaim, which appears to the Court of First Instance likely to be within the jurisdiction of the Court.

(2) An order may be made under this section at any stage of the proceedings of the motion of the Court of First Instance itself or on the application of any party.

(3) The Court of First Instance is required to make an order under this section unless it is of the opinion that, by reason of the importance or complexity of any issue arising in the action or proceeding, or for any other reason, the action or proceeding ought to remain in the Court of First Instance."

The cargo interests opposed the application for transfer. First, they contended the case did not fall within the jurisdiction of the District Court because (i) the District Court had no Admiralty jurisdiction; and (ii) the District Court had no jurisdiction to determine a claim in bailment.

Secondly, it was argued that the cargo interests had a right to bring the action in the Court of First Instance by virtue of s 12B of the High Court Ordinance (Cap 4).

### Admiralty jurisdiction

It was submitted on behalf of the forwarders, correctly in the Judge's view, that while s 12A of the High Court Ordinance sets out the Admiralty jurisdiction of the Court of First Instance and the plaintiffs' claim here falls within s 12A(2)(g) "any claim for loss of or damage to goods carried in a ship" and (h) "any claim arising out of any agreement relating to the carriage of goods in a ship ...", there is nothing in that Ordinance to suggest that the Court of First Instance has *exclusive* jurisdiction over such a claim. The phrase in s 12A(1) that "[t]he Admiralty jurisdiction of the Court of First Instance shall consist of" is apt to confer jurisdiction but not *exclusive* jurisdiction. Where the legislature has sought to give a particular tribunal exclusive jurisdiction, this is done in clear and express terms; see eg s 7 of the Labour Tribunal Ordinance (Cap 25) and s 5 of the Small Claims Tribunal Ordinance (Cap 338). There is nothing similar to confine the matters falling within s 12A to the exclusive province of the Court of First Instance.

The matters referred to in s 12A – under the general heading of Admiralty jurisdiction – are wide ranging and varied in nature. There are no doubt certain claims there that lie outside the jurisdiction of the District Court, though this is not because s 12A excludes the jurisdiction of tribunals other than the Court of First Instance, but simply because those claims do not fall within the terms of the statute that confers jurisdiction on the District Court. Conversely, there were in the Judge's view undoubtedly *in personam* claims in s 12A that fell within the jurisdiction of the District Court because, for example, they were founded on contract, quasi-contract or tort and the amount claimed did not exceed the monetary limit. The fact that a ship or bills of lading feature in such claims did not, in the Judge's view, deprive the District Court of jurisdiction. Thus, in *Pacific Bridge Services Ltd v Wide Tech Shipping Ltd* (unrep, HCA 12492/1999; 25 October 2000), Waung J, a most experienced Admiralty judge, ordered the transfer to the District Court of a High Court action involving a defence of time-bar under the Hague-Visby Rules even though, it would appear, the action was within the Admiralty jurisdiction of the Court of First Instance. Likewise, in *The APL Malaysia* (unrep, HCAJ 152/2010; 3 February 2012) at §40, Master de Souza said that the District Court regularly tried disputes involving loss or damage to goods carried on ships (which would fall within s 12A(2)(g)).

The relevant question in the case in question was whether the cargo interests' claim fell within the terms of the statutory provisions conferring jurisdiction on the District Court (especially s 32 of the District Court Ordinance), and not whether it falls within s 12A of the High Court Ordinance.

### Jurisdiction in relation to bailment

This was the other point made by the cargo interests on jurisdiction, namely, that the cargo interests' action involved, amongst others, a claim in bailment, which (the cargo interests submitted) did not clearly fall within s 32(1) of the District Court Ordinance, which provides: "The Court has jurisdiction to hear and determine any action founded on contract, quasi-contract or tort where the amount of the plaintiff's claim does not exceed \$1,000,000." The cargo interests submitted it was doubtful if a claim in bailment was "founded on contract, quasi-contract or tort". The cargo interests referred to *Palmer on Bailment* (3rd ed), §§1.001 & 1.047, as well as the *dictum* of Windeyer J in *Hobbs v Petersham Transport Co Pty Ltd* (1971) 124 CLR 220, 241 that "it may well be that the duty of the bailee to use due care does not arise from contract or tort".

To determine what an action is founded on, the court has to look at the substance of the matter rather than the form. The foundation of an action consists in those facts which are necessary to maintain it: *Bryant v Herbert* (1877) 3 CPD 389. Where both causes of action were relied upon, it seems to the Judge there was no reason in the general law or in the District Court Ordinance why

an action could not be poised both in contract and in tort. For the purposes of s 32, it is unnecessary to distinguish between contract and tort.

The Judge accepted that a bailment might arise in the absence of contract. However, the case in question was concerned with a case of contractual bailment. There was a contract of carriage contained in or evidenced by the bill of lading of which the bailment was an incidence. Insofar as the cause of action was breach of the duties arising from the contract of carriage, the action should in the Judge's view be regarded as founded on contract.

It is true that a bailee, even without a contract, is subject to a duty to take reasonable care to keep the goods safe, which is more onerous as regards burden of proof than the general duty of care under the law of negligence, because if the goods are lost or damaged whilst in his possession, he is liable unless he can show that the loss or damage occurred without neglect or default or misconduct of himself or his servants: *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 726. The Judge also recognised that modern exposition tended to regard such a duty as arising from bailment as distinct from contract and tort. But it by no means followed that an action for breach of such a duty could not be said to be founded on tort for the purposes of the District Court Ordinance.

As Greer LJ said in *Jarvis v Moy, Davies, Smith, Vandervell & Co* [1936] 1 KB 399, 405:

“where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract.”

Similarly, in *Chesworth v Farrar* [1967] 1 QB 407, after the plaintiff had occupied the premises of one Farrar for some years as a statutory tenant, Farrar recovered possession pursuant to a judgment obtained against the plaintiff. After Farrar died, the plaintiff sued the administrators of his estate claiming damages for loss of her goods whilst in Farrar's possession at the premises, alleging that Farrar had become bailee of her goods. Edmund-Davies J, following *Turner v Stallibrass*, held (at 416D) that: “the claim rests basically upon the simple fact of possession of the plaintiff's goods and is independent of the circumstances which gave rise to that possession. If this is right, it follows that the claim is one ‘in respect of a cause of action in tort’ ...”

One thing that is clear from the legislative history is that no discernible reason in logic, policy or practicality exists for claims in bailment to be carved out specifically and excluded from the civil jurisdiction of the District Court. Rather, it seemed to the Judge that the general intent was that the District Court should have jurisdiction over claims arising from the common law of personal obligations which was covered by contract and tort: see *Bryant v Herbert, supra*, at 390.

The Judge concluded that for the purpose of s 32 of the District Court Ordinance, an action in bailment should, depending on the facts of the particular case, be characterised as a claim founded on contract or on tort or on both. Accordingly, the claim in bailment posed no obstacle to the transfer of the action in question to the District Court.

#### S 12B(1) of the High Court Ordinance

The cargo interests submitted that by virtue of s 12B(1) of the High Court Ordinance, they had a right to bring an Admiralty claim in the Court of First Instance, and that this right could not or should not be frustrated by an order for transfer to the District Court. The Judge thought this contention was misconceived. S 12B is concerned with the mode of exercise of Admiralty jurisdiction and, in particular, whether an action may be brought in personam or in rem and, if in rem, against what ship and property. Thus s 12B(1) provides that an action in personam may be

brought in the Court of First Instance in all cases within the Admiralty jurisdiction of this court. It stands in contrast to s 12B(2)–(5) which provides that an action in rem may be brought only in certain limited cases and against specified ships or property. In the Judge’s opinion s 12B(1) did not confer an absolute right for the plaintiffs to insist on their claim being heard and determined by the Court of First Instance, or detract from the provisions on transfer of proceedings in s 43 of the District Court Ordinance.

#### Reasons against transfer

The cargo interests submitted that, in any event, the High Court should exercise its discretion against ordering a transfer. While s 43(1) confers a discretion by using the word “may”, s 43(3) makes clear that the High Court is required to order a transfer unless the case ought to remain in the High Court “by reason of the importance or complexity of any issue arising” or “for any other reason”. The burden was on the cargo interests to demonstrate that the case positively *ought* to remain in the Court of First Instance.

Importance and complexity are matters of degree. The cargo interests pointed to a number of issues joined on the pleadings in relation to the application of the Hague-Visby Rules such as whether the forwarders could be bailees of the containers without being bailees of the cargo inside and whether the Rules only applied to the sea carriage. As to the latter point, the forwarders clarified that the forwarders were merely contending that the Hague-Visby Rules applied *compulsorily* only to sea carriage; there was no dispute that they could apply more widely by agreement express or implied. The Judge did not think they were so important or complex as to show that the case ought to be tried in the High Court. In *Pacific Bridge Services Ltd, supra, Waung J* considered that the fact there may be a point of law involved, and the Admiralty judge may be able to deal with it somewhat faster, is no reason for the court to refuse the transfer. The Judge also disagreed with the cargo interests’ submission that judges of the District Court could not be expected to have any knowledge of the Hague-Visby Rules. As the authorities show, cargo claims have frequently come before the District court.

As for the “any other reason” limb of s 43(3), the cargo interests submitted that it was not limited to situations of an exceptional nature and that the existence of the Admiralty List in the Court of First Instance with a specific judge in charge of it was a reason for retaining the case in the High Court. The Judge did not think this was a sufficient reason.

#### Disposition

For all the above reasons, the Judge ordered the action to be transferred to the District Court.

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

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