

31 October 2011  
Ref : Chans advice/130

To: Transport Industry Operators

**Refusal to release cargoes w/o B/L (II)**

Remember our last issue Chans advice/129 that the forwarder was held liable for its refusing to release the goods to the named consignee without original straight Bill of Lading? On 12/8/2011, the Hong Kong Court of Appeal issued a Judgment dismissing the forwarder's application for leave to appeal. [HCMP 683/2011]

On 8/2/2011, the District Court gave judgment for the consignee against the forwarder in the sum of about US\$65,000, being the price of 28 cartons of computer display cards ("the goods"). Not satisfied with the judgment, the forwarder sought leave to appeal from the Court of Appeal.

The Facts

In October 2008, the shipper delivered the goods to World Road in Korea for shipment to the consignee in Hong Kong. World Road had entrusted the goods to the forwarder, its agent in Hong Kong, to handle the delivery. In connection with the aforesaid transaction, World Road had issued what was stated to be a "Bill of Lading or Multimodal Transport Document" ("the Document"). The Document carried no signature, but contained the provision that "If required by the Carrier one (1) duly endorsed original B/L must be surrendered in exchange for the goods or delivery order" ("the production clause").

When the consignee demanded delivery of the goods, the forwarder refused and returned them to World Road. It was the forwarder's case that the goods could only be released to the consignee against the production of an original bill of lading and as the consignee was unable to do so, the consignee was not entitled to the goods. The forwarder also claimed to be acting on instruction when it returned the goods to World Road in January 2009 when in fact the shipper had given clear instruction for the immediate release of the goods to the consignee in November 2008.

The consignee admitted that it was unable to produce the original Document as it had never received one, but argued that the Document was not and never intended to be a bill of lading. It was just a seaway bill evidencing the contract between the shipper and World Road to ship the goods to the consignee and that the consignee was entitled to the immediate possession of the goods without the production of the original Document. The shipper confirmed that World Road had been engaged as the courier for the shipment of goods to the consignee for the past four years and that World Road had never asked for the production of any bill of lading or other document, either from the shipper or the consignee, for collection of the goods.

The shipper had issued written instructions to the forwarder for the immediate release to the consignee on 29/11/2008. However it was thought that as the shipper owed World Road money, World Road was justified in not giving instruction for the release of the goods to the consignee. The forwarder accepted that the production of an original bill of lading was aimed at protecting the interests of the shipper to secure payment for the goods.

It appeared that the Document was not signed by World Road and in fact no one had seen any signed shipping document relating to the delivery of the goods. The shipper was not given the original or a signed copy of the Document although according to World Road, it was because the shipper did not collect it.

### The District Court's Findings

Despite the practice between the shipper and World Road that the shipper was never given the original or a copy of the signed Document, that the Document had not been signed by World Road, that the original or a signed copy of the Document had not been produced and that the production clause shown on the face of the Document was not signed by or on behalf of World Road, the District Court concluded that the Document was nevertheless a bill of lading. The District Court took the view that the court should be slow to reject the description which the Document bears when considering the nature of a bona fide mercantile document issued in the ordinary course of trade. However, on the evidence that the shipper had given clear written instructions to the forwarder to release the goods to the consignee, the District Court took the view that the requirement for the presentation of the original Document had been waived and that the consignee was entitled to the release of the goods without the production of the original Document.

### The forwarder's Argument

The forwarder argued that as a matter of law, the forwarder was entitled not to release the goods without the production of the original Document, and that such legal entitlement could not be "waived" by the shipper. The forwarder emphasized that the need for the surrender of the original Document in exchange for the goods was not solely for the protection of the shipper and therefore was not capable of being unilaterally waived by the shipper.

The forwarder referred to s 5 of the Bills of Lading and Analogous Shipping Documents Ordinance Cap 440 ("Cap 440") and suggested that the consignee was subject to the same liabilities under the Document as if it had been a party to it. The suggestion was that the consignee was bound by the terms of the production clause.

### The Consignee's Position

The consignee argued that the "presentation rule", as a contractual provision for the benefit of the shipper, could be waived.

The consignee pointed out that the forwarder had not at trial relied on Cap 440 and should not therefore be allowed to rely on it on appeal. The consignee suggested that relying on it on appeal was an abuse of the court's process. In any event, the consignee argued that as its claim was premised on conversion, Cap 440 had no relevance and even if it were relevant, it did not apply to the case in question because (1) the bill was a "straight bill" and not "a bill of lading"; (2) the production clause had not been signed and did not form part of the contract of carriage, and therefore could give rise to no obligation on the consignee's part to produce it for collection of the goods, and (3) as the forwarder had accepted that the presentation rule was for the shipper's benefit and if the rights and obligations of the shipper under the contract of carriage had been transferred to the consignee, the consignee was entitled to waive the presentation rule.

### Discussion

Despite the heading of the Document, namely "Bill of Lading or Multimodal Transport Document", it was highly questionable that it should be treated as a "bill of lading" with all its associated attributes. There was certainly no indication that it should be treated as a document of title by the parties. However it was described, the Document could not be treated as a document of title, which called for the application of the presentation rule. It was stated to be non-negotiable and therefore could not be endorsed. It could not be exchanged for other document of title, such as a delivery order. In fact, it was doubtful if a signed copy of the Document ever existed. World Road certainly had not supplied one to the shipper and was happy to conduct the transaction on that basis.

On the facts of the case, there was no risk that the named consignee had transferred the Document to a subsequent holder. The forwarder did not have to ascertain the identity of the person entitled to delivery without the production of the original Document as there was no dispute that only the consignee was entitled to obtain delivery of the goods.

In the Court of Appeal's view, the true nature and effect of the Document needed to be determined in accordance with the factual matrix of the case. As emphasized by the consignee, the production clause had not been signed. The shipper was not given the original Document, assuming it existed, and therefore the consignee would never be able to collect the goods if the forwarder's insistence for the presentation of the original Document was justified. There was no commercial rationale for the forwarder to insist on the production of the original Document in exchange for the goods and it was contrary to business efficacy to do so.

World Road had never asked for the production of the original Document in exchange for the release of the goods in all its previous dealings with the shipper.

The Court of Appeal accepted that where a bill of lading was a document of title, its production was essential for the delivery of the goods; otherwise the shipping Company might be held liable. However, despite its description, the Document was never intended to be a document of title as such. The forwarder faced no risk by delivering the goods to the consignee without the production of the original Document as the shipper had clearly instructed it to immediately release the goods.

The Document was just a contractual document and its true meaning and effect must be determined in accordance with its wordings, the surrounding circumstances, including the parties' intention. On the facts of the case, the Court of Appeal was satisfied that the forwarder could not insist on the production of the original Document as if the Document was a document of title.

The Court of Appeal was also satisfied that the forwarder could not rely on s 5 of Cap 440 for the simple reason that it had not been established that the shipper was subject to the production clause. In the Court of Appeal's view, on the proper construction of the Document, the production clause was never intended to be a term of the contract and if it had been, it was waived.

In any event, the consignee's claim was based on conversion. The forwarder not only refused to deliver the goods to the consignee, but had in fact sent them back to World Road in Korea, thus depriving the consignee the chance to reclaim them. There was no suggestion that World Road had any title or possessory rights to the goods. Even if the forwarder was right in its submission that the forwarder was entitled not to release the goods without the production of the original bill, the forwarder was not entitled to send the goods to World Road because the shipper owed it money. The goods belonged to the consignee and the forwarder had no right to take any step to deprive the consignee's ownership of the goods.

The Court of Appeal was satisfied that the forwarder had no reasonable prospect of success and there was no other reason in the interests of justice in hearing the appeal. The application for leave to appeal was therefore dismissed. The Court of Appeal also ordered the forwarder to bear the costs of the application 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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The robust freight industry in 2009 did not sustain well to the last quarter of 2010 as worldwide governments were not in unison in their fiscal policies. The worldwide government interference in 2011, such as the U.S. QEII, is likely to impact the worldwide movement of freight even more.

As uncertain as it was the economy in 2010, we believe the number of E&O, uncollected cargo and completion of carriage claims will continue the major concerns for transport operators in 2011. If you need a cost effective professional solution to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.