

To: Transport Industry Operators

**Cargo misdelivery v O/S freight charges**

The Hong Kong District Court issued a Judgment on 28/4/2014 dismissing a seller's cargo misdelivery claim of US\$122,302.80 against a freight forwarder and holding the seller liable to pay the outstanding freight charges of US\$28,855 to the forwarder. [DCC] 344/2010]

The freight forwarder claimed against the seller in the sum of US\$28,855 being freight charges for transportation of ladies pants ("the goods") from Shanghai to Paris via Inchon by sea-air, while the seller accused the forwarder of breach of contract by releasing the goods to the seller's buyer without production of any original bill of lading by the buyer or seller's authorisation. The seller was not paid by its buyer and thus counterclaimed against the forwarder for its loss.

On or around 15/5/2009, the buyer purchased 19,056 pieces of ladies pants from the seller at US\$6.3 each to be shipped to Paris on 16/7/2009. The seller sourced its supply from a Xiamen supplier.

It was the seller's case that the payment of the goods was settled by way of back-to-back credit arrangements. A letter of credit ("the seller LC") was issued on 27/5/2009 by the buyer's bank (HSBC) in favour of the seller. Another letter of credit ("the Xiamen supplier LC") was issued on 3/6/2009 by the seller's bank (SCB) in favour of the Xiamen supplier.

The buyer referred the forwarder to the seller for the delivery of the goods to Paris. In fact the seller had engaged the forwarder to transport their goods before.

After various email exchanges and a shipping order was sent by the seller to the forwarder by an email dated 13/8/2009 in which the seller contracted with the forwarder for the shipment of the goods by a combination of sea-air transport: from Shanghai to Paris via Inchon ("the contract"). The contact details of the Xiamen supplier were provided to the forwarder in the same email so that the goods could be delivered to the forwarder by the Xiamen supplier. On 16/8/2009, a Combined Transport Bill of Lading ("the August Combined B/L") was issued for the transportation of the goods from Shanghai to Paris via Inchon by sea-air naming the Xiamen supplier as the shipper, consignee being "To Order" and the seller as the notify party. An invoice for freight charges was issued by the forwarder to the seller on 19/8/2009. On the same day, the air waybill ("the AWB") was issued by Japan Airlines.

On 24/8/2009, the goods were released to Moiroud (the forwarder's agent) and then to the buyer without the production of a bill of lading. The seller refused to settle the forwarder's invoice for the forwarder's alleged breach of contract by releasing the goods to the buyer or its agents without production of the bill of lading.

The seller alleged that the forwarder's breach was based on the following:

- (i) As the shipping order marked the consignee as "To Order", the forwarder as carrier and/or freight forwarder would have to take instructions from the seller as to the identity of the consignee.
- (ii) 2 bills of lading should have been prepared by the forwarder for the purpose of "switching bills of lading": one for the Xiamen supplier ("the Xiamen supplier B/L") so that the Xiamen supplier could present to SCB for payment under "the Xiamen supplier LC"; the second one for the seller ("the seller B/L") so that the seller could present to HSBC for payment under "the seller LC";
- (iii) The forwarder should have provided the seller with the originals of all the transport documents, including but not limited to "the Xiamen supplier B/L" and "the seller B/L"; and
- (iv) The forwarder should only release the goods to the buyer or Moiroud against the production of the original "the seller B/L", or with express written authorisation from the seller.

The forwarder denied any breach of contract or duties but relied on the seller's two representations, parties' previous dealings and the seller's instructions to justify the release of the goods without production of the bill of lading. Besides, the forwarder also submitted that the shipment of the goods was divided into 2 parts: the 1<sup>st</sup> part from Shanghai to Inchon by sea should be governed by the law applicable to carriage of goods by sea, whereas the 2<sup>nd</sup> part from Inchon to Paris by air to be governed by the law applicable to the carriage of goods by air which does not require the production of any document for the release of the goods.

The seller pleaded that the “switching bills” arrangement was an implied term based on the information given to the forwarder for preparation of the transport documents and custom clearance documents and the forwarder’s knowledge of the back-to-back credit arrangement between the buyer and the seller and the Xiamen supplier.

Even though the forwarder knew about the issue of “the Xiamen supplier LC” for the seller’s payment to the Xiamen supplier, there was no evidence to prove that the forwarder also knew about “the seller LC” for payment to the seller by the buyer. Besides, the forwarder denied back-to-back LC arrangement at least for the previous April shipment in 2009. Therefore, the Judge did not think it was obvious or reasonable to imply that the forwarder should have known “the seller LC” and the back-to-back credit arrangement in the case in question.

The forwarder relied on the previous April 2009 shipment as the first representation, ie an express instruction from the seller to the forwarder via email on 4/5/2009 at 9:49 am to release the cargo to buyer without the original bill of lading. Such email was obviously against any implication of switching bills by past dealings as alleged by the seller.

According to the forwarder’s past experience, the seller would give express instructions to the forwarder by way of letters if switching bills required. Moreover, there is lack of evidence to show any trade custom in support of switching bills happen in most of the resale of goods for profit-making.

In the circumstances, the Judge found on balance of probabilities that the seller had failed to establish any implied term requiring the forwarder to take instructions from the seller to prepare a second bill of lading (“the seller B/L”) for switching bills without any prior express instructions from the seller.

Even though the Judge found that the seller had previously consented to the release of any goods without presentation of the original bill of lading, the Judge agreed with the seller’s submission that it did not follow that the seller must have consented to the subsequent deliveries without the original bills (*Star Line Traders Ltd v Transpac Container System Ltd & Others*, HCAJ 180/2008 at para.7).

The key issue was whether the so-called second representation amounted to an express instruction from the seller to the forwarder to release the goods to the buyer or its agent without any bill of lading. The second representation was found in the email dated 24/8/2009 at 14:51 hours, sent by the seller and its main body stated as follows,

*“We have the b/l for shipper – our factory only. We can’t send this copy to buyer. Can you send the copy of your airway bill to us, buyer will contact with your agent base on airway.”*

It was the seller’s case that the second representation was made for the purpose of ascertaining the status of the cargo. The seller only wanted to know if the goods had arrived in Paris. The seller submitted that there was nothing in the second representation which contained the word “release” or the phrase “release without the b/l”. Thus, the forwarder was not justified to assume that the seller had given a clear and unequivocal instruction or authorisation to release the goods without the original bill of lading.

The forwarder accepted that the second representation did not use such expression as “releasing the goods without the original hbl”. However, in light of the circumstances, the forwarder submitted that it was a clear instruction by the seller to the forwarder to release the Goods based on the AWB.

The seller’s email to Sylvie of the buyer dated 25/9/2009 at 1608 hours revealed that the seller had abandoned the back-to-back payment method by letters of credits but had chosen to send the documents to the buyer directly via the forwarder to catch up for the delay caused by problems in manufacturing. The relevant part of the email stated as follows,

*“... Because of the fty [factory] problems, we even had to pay the extra money to use more workers and get the goods with not too much delay. The air freight killed us. Now, we really cannot take charge of 100% of this re-packing re-ironing invoice.*

*Sylvie, we trusted you.*

*Following your request, I pushed everybody in the office like crazy to send the documents consigned to Force 13 [the buyer], not to the bank as we usually do, so that you could clear the goods quickly.*

*Because we used your nominated forwarder, you were able to get the goods without the bank endorsement.*

*So you got the goods, you did not pay Mulitex [the seller], and now you impose this huge claim on us when you know there is nothing we can do. ...”*

The following facts also corroborated the seller’s change of payment method as per the above email:

- (i) Both letters of credit expired when the Shipping Order was issued by the seller and there was no evidence in support of any extension of the 2 LCs;
- (ii) When the seller received a copy of the August Combined B/L from the forwarder’s email on 20/8/2009, the seller did not request for switching bills;
- (iii) The seller had never instructed the forwarder to issue a second bill of lading while the copy the August Combined B/L could not be sent to the buyer; and
- (iv) Instead the seller asked for a copy of AWB on 24/8/2009.

In light of the express prohibition of sending the August Combined B/L to the buyer without any instruction to prepare a second bill of lading for switching bills, coupled with the request of sending the AWB to the seller, the only reasonable interpretation of “*buyer will contact with your agent base on airway*”, must be that the buyer would contact Moiroud (the forwarder’s agent) based on the AWB to collect the goods. In the circumstances, the Judge found that the seller’s email dated 24/8/2009 amounted to an express instruction from the seller to allow delivery of the goods to a party without production of any original bill of lading.

It was the seller’s case that the forwarder was in breach of its duties as bailee of the goods by wrongful conversion of the goods. The seller submitted that bailment existed when the possession of the goods was handed over to the forwarder (the bailee) who must deal with the goods in the manner authorized by the seller (the bailor). If the forwarder delivered the goods to a person not authorized by the seller to receive it, the forwarder was liable for conversion by misdelivery.

As the Judge had ruled that seller’s email dated 24/8/2009 was an express instruction from the seller to allow delivery of the goods to a party without production of any original bill of lading. Such email allowed the forwarder to release the goods to the forwarder’s agent (Moiroud) based on the AWB, and the seller’s buyer would then contact Moiroud to collect the goods. There was no dispute as to the identity of the seller’s buyer which had already been disclosed to the forwarder by the packing list of the goods and the certificate of origin. Furthermore, there was no dispute that the goods were eventually delivered to the true buyer of the seller. Therefore, the Judge did not find that the forwarder was in breach of any duties as a bailee of the goods.

Parties asked the Court to decide whether the contract was divided into 2 parts and if so, whether the AWB and the law applicable to carriage of goods by air governed the 2<sup>nd</sup> part of the shipment.

The seller submitted that the AWB was issued by Japan Airlines to the forwarder and not to the seller. It was a contract between Japan Airlines as a carrier and the forwarder as its customer. The AWB was not a document of title as such and played no part in the contractual relationship between the parties. Accordingly, the law applicable to carriage of goods by air had no application in the contract. It followed that the international conventions had no application to the case in question either.

On the other hand, the forwarder submitted that as the August Combined B/L covered both the 1<sup>st</sup> part by sea and the 2<sup>nd</sup> part by air, it was therefore a multimodal transport document. Hence the 2<sup>nd</sup> part by air should be governed by the law applicable to carriage of goods by air. The forwarder relied on the law of the carriage of goods by air and the relevant conventions which do not require the consignee to present any document for the release of the goods to justify releasing the goods without the presentation of a B/L.

Even if the Judge agreed with the forwarder that the law of carriage of goods by air applied in the second part of the shipment and such law does not require the consignee to present the relevant document, the Judge did not think such law would go further to exempt the forwarder’s contractual duties, if any, in respect of the procedure of release of goods. In the circumstances, the Judge did not think that the forwarder could merely rely on such law to justify the release of goods without production of any B/L. The questions remained whether there were any implied terms applicable in the case in question and any express instructions given to release goods without production of any B/L. After all, the application of such law was not the real issue but seemed more likely to be an academic argument. The main issues were those which the Judge had already dealt with. Therefore, the Judge did not think it is necessary to decide on this issue further.

The Judge made the following order:

- (i) judgment be entered in favour of the forwarder for the sum of US\$28,855 with interest at judgment rate from the date of the writ until payment;
- (ii) the seller’s counterclaim be dismissed; and
- (iii) there be *order nisi* that costs of the action be to the forwarder, to be taxed if not agreed with certificate for counsel.

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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