

Misdelivery claims in Hong Kong

The Court of Final Appeal (the highest court in Hong Kong) recently handed down an important decision on claims concerning misdelivery of cargo in *Carewins Development (China) Limited v Bright Fortune Shipping Limited* (FACV No.13 of 2008, 12 May 2009). The Court has commented on the nature of straight bills of lading and the application of exemption clauses in contracts of carriage.

Background

The Defendants were freight forwarders who issued bills of lading to the Plaintiff for the carriage of consignments of footwear from Hong Kong to Los Angeles. The Defendants issued 'straight' bills of lading – that is, the consignee was named in the bills of lading and the words 'to order' did not appear. Accordingly, the bills were not negotiable. The cargo was delivered to the consignee in Los Angeles without production of the original bills of lading. Shortly after delivery took place, the cargo was seized in the United States due to an alleged trade mark infringement. The consignee did not pay the Plaintiff for the cargo.

The Plaintiff commenced proceedings in Hong Kong against the Defendants for misdelivery, seeking damages for the invoice value of the cargo. At first instance the Defendants succeeded (Justice Stone allowed the Defendants to rely on the exemption clause in the bills of lading), but the Plaintiff successfully appealed to the Court of Appeal. The Defendants subsequently appealed to the Court of Final Appeal.

Issues

The Court of Final Appeal considered the following two issues.

1. Where goods are shipped for carriage by sea under a 'straight' bill of lading for delivery to a named consignee, does the carrier attract liability for delivering the cargo to that consignee without production and surrender of the original bill of lading?
2. What is the application of an exemption clause in the contract of carriage, which purports to exclude liability for loss or misdelivery "however caused whether or not through the negligence of the Carrier"?

Prior to the hearing in the Court of Final Appeal, the Plaintiffs conceded that the claim was not subject to the Hague-Visby Rules, because delivery of the cargo occurred after discharge (and, therefore, outside the scope of the Rules).

Straight bills of lading

The Defendants argued that straight bills of lading are not documents of title and so the carrier can deliver the cargo to the consignee without production of the original bills of lading. Because the carrier already knows the identity of the consignee, the Defendants argued, the original bills are not required.

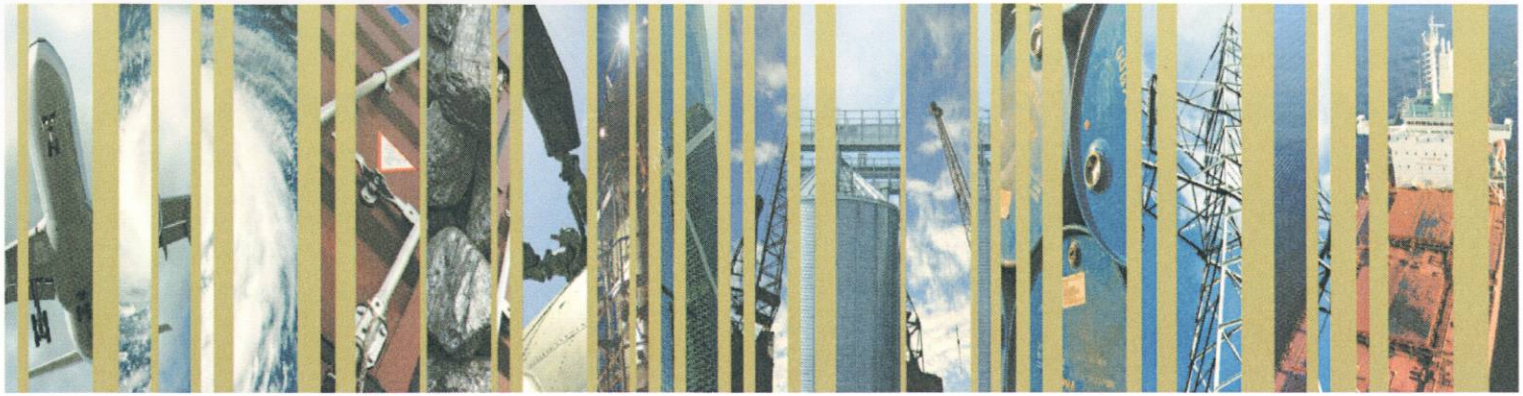
The Court disagreed. In his leading judgment, Justice Ribeiro held that it is wrong to suggest that just because a straight bill of lading is not negotiable, the requirement of production of the original bill of lading is merely an 'empty formality'. He said:

"[T]he shipper's ability to withhold the bill of lading - the metaphorical key to the warehouse - pending payment by the consignee is a highly important feature of the recognised mercantile arrangement."

Consequently, the carrier should not assume that the consignee is entitled, as against the shipper, to possession of the goods without production of the original bill of lading. The 'presentation rule' (i.e. the requirement to produce the original bill of lading in order to take delivery of the cargo) applies to straight bills of lading just as it applies to negotiable bills of lading.

In support of this conclusion, Justice Ribeiro referred to the attestation clause of the bills of lading, which provided: *"In Witness Whereof, the carrier by its agents has signed three (3) original Bills of Lading all of this tenor and date, one of which being accomplished the others to stand void."*

Justice Ribeiro said that the attestation clause only makes sense if the parties intend the bill of lading to be presented to the carrier in



order to obtain release of the cargo. If the parties intended not to require production of the original bill of lading, they could have chosen to use a sea waybill which permits delivery merely on proof of the recipient's identity.

The Court's decision confirms that a straight bill of lading is a document of title. This protects the interests of both shippers (who may not have been paid for goods received at the port of discharge) and banks (who may be holding documents under letters of credit).

The decision finally resolves any uncertainty concerning the status of straight bills of lading in Hong Kong. In *The Brij* [2001] 1 Lloyd's Rep 431, the Court of First Instance held that the carrier did not need to demand sight of the original straight bill before delivering the cargo to the consignee. The Court of Final Appeal has overruled *The Brij*, finding in favour of requiring production of the straight bill and following the English House of Lords in *The Rafaela S* [2005] 2 AC 423 and other common law decisions from Singapore and Australia. Consequently, if a carrier delivers cargo to the consignee under a straight bill of lading without requiring production of the original bill, it may commit a breach of contract or the tort of conversion and be liable to the shipper for damages.

Application of exclusion clauses

The Defendants argued in the alternative that even if the 'presentation rule' applies to straight bills of lading, they were entitled nevertheless to rely on an exclusion clause in the bills of lading to defeat the Plaintiff's claim for misdelivery of the cargo. The exemption clause provided:

"Save as provided in (a) hereof the Carrier shall be under no liability in any capacity whatsoever for loss or misdelivery of or damage to the Goods however caused whether or not through the negligence of the Carrier, his servants or agents or sub contractors..."

The Court did not accept the Defendants' argument. The Court held that the exemption clause in the bills of lading did not cover claims for misdelivery resulting from the carrier's failure to require production of the original bills.

In reaching his decision, Justice Ribeiro referred to general principles of construing commercial contracts. First, he said that an exemption clause should be construed against the person relying on the exemption, with an emphasis on the exempting words being devoid of ambiguity. Second, he said that the exemption clause should be construed in the context of the contract as a whole, taking into account its nature and object.

What happens if wide words of exemption are used in an exemption clause? Justice Ribeiro answered the question as follows.

"Wide words of exemption will often cover a whole range of possibilities, some of which will be consistent with maintaining the

contractual obligations which reflect the main purpose of the parties' agreement, and some of which would negate those obligations and effectively deprive the contract of any compulsory content. In such cases, the clause is construed contra proferentem [against the person relying on the exemption] to ascribe the narrower meaning to it in order to sustain the purpose and legal effect of the parties' contract."

How do these principles apply to an exemption clause which excludes the carrier's liability for misdelivery whether or not caused by negligence?

Justice Ribeiro said that the requirement of delivery against production of the original bill of lading is a 'cardinal purpose' of both straight and negotiable bills. This is because the ultimate purpose of the contract of carriage is for the cargo to be delivered at destination to the person properly entitled to receive it.

In reviewing the exemption clause in the bill of lading, Justice Ribeiro said that it was capable of more than one meaning and, accordingly, did not unambiguously cover claims for misdelivery of cargo resulting from the non-production of the original bill of lading. For example, negligence in misdelivery could relate to delivery of cargo against fraudulent bills of lading or delivery to the wrong delivery agent. By contrast, Justice Ribeiro said that the exemption clause was insufficiently explicit to cover the conscious delivery of cargo without production of the original bill of lading.

The Court left open the possibility of allowing an exemption clause to exclude a carrier's liability if sufficiently clear language is used. For example, the Court may have reached a different decision if the exemption clause sought to exclude liability for misdelivery "*however caused (including as a result of the party who takes delivery of the Goods failing to surrender the original bill of lading) whether or not through the negligence of the Carrier*".

Conclusion

The Court of Final Appeal's decision confirms the following.

1. The carrier should only deliver cargo against production of the original bill of lading, whether or not it is a straight or negotiable bill.
2. Exemption clauses in contracts of carriage must be precisely drafted if they are to exclude liability in relation to key obligations of the contract, such as delivery only to the person properly entitled to receive the cargo. If the exemption clause is broad and ambiguous, the Court may limit its application and conclude that it provides no defence to the shipper's claim.

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