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To: Transport Industry Operators

**LOI**  
**Cargo release w/o B/L**

The Hong Kong High Court issued a Judgment on 11/8/2009 holding a shipping company could rely on two letters of indemnity to seek compensation of US\$253,655.50 from a forwarder and a trading company in a case of cargo release without production of original bills of lading. [HCA 208/2008]

This was the trial of the shipping company's claim against the forwarder and the trading company for the sum of US\$253,655.50 as its loss in relation to the release of 2 containers of goods ("the Cargoes") in Hong Kong. The Cargoes were released to the forwarder without the production of the original bills of lading, but against 2 letters of indemnity signed by the forwarder in favour of the shipping company. The forwarder then subsequently passed the Cargoes to the trading company for further handling and disposal. On the face the letters of indemnity, each of it was signed and stamped with the forwarder's company chop.

The shipping company's causes of action against the forwarder and the trading company were premised on the letters of indemnity, and alternatively conversion. The forwarder's pleaded defence was that it issued the letters of indemnity as an agent for and on behalf of the trading company, and that the shipping company and its Hong Kong agent were aware of the same. Thus, the forwarder was not liable under the letters of indemnity. The forwarder also denied that there was any conversion of the Cargoes. The trading company's pleaded case was however that the forwarder was not its agent in signing and issuing the letters of indemnity. It also denied any conversion of the Cargoes.

The forwarder and the trading company were previously separately legally represented. Some time before the trial, their respective solicitors had ceased to act for them. The trading company attended the trial through its representative, one Ms Lung. The forwarder however did not attend the trial by any representative.

The shipping company had called Mr Yung as its witness to give evidence at trial. Mr Yung was the sales manager of the shipping company's Hong Kong agent and was familiar with the subject matter transaction. The trading company had called Ms Lung to give evidence at trial. She was the manageress of the trading company and had handled the release of the Cargoes at the material time.

**The parties**

The shipping company was a shipping line established in Taiwan. The forwarder was apparently a forwarding agent in Hong Kong. The trading company was incorporated on 11/5/2007, and its "boss" was one Mr Zhang.

Prior to the trading company's incorporation, Mr Zhang had entered into an oral agreement with Ms Siu of the forwarder to engage the forwarder to handle the cargoes imported to Hong Kong by Mr Zhang and to be delivered at his instruction. Under the above oral agreement ("the Oral Agreement"), the forwarder would provide the following services:

- (1) The forwarder would deal with and handle all relevant procedures, including customs clearance procedures, required to enable the forwarder to take delivery of those cargoes.
- (2) The forwarder would deal with and handle all documents necessary for and relevant to taking delivery of the cargoes and the related clearance matters.
- (3) Mr Zhang would reimburse the forwarder of any fees, charges and expenses incurred in discharging its services.
- (4) Mr Zhang would also further pay a handling charge of HK\$200 for the forwarder's services in respect of each delivery of imported cargoes in Hong Kong.

Before the incorporation of the trading company, in relation to the cargoes imported to Hong Kong to be dealt with by Mr Zhang's business, he would use the forwarder's name as the consignee under the relevant bills of lading. After the incorporation of the trading company, it would use its own name as the consignee for cargoes to be imported and dealt with by its business. However, for those cargoes that were traded by Mr Zhang before the trading company's incorporation, the trading company would for convenience continue to use the forwarder as the

consignee in those bills of lading, and would continue to engage the forwarder to take delivery of those cargoes for it.

### *The transactions involving the Cargoes and their release*

The Cargoes were 2 containers of copper scrap bars and metal scrap shipped on board the vessel "YM Hiroshima" from Haifa, Israel to Hong Kong on 28/5/2007. The undisputed value of the Cargoes was US\$253,655.50. The seller of the Cargoes was Jack Engle in the United States, and the buyer was System Solding. System Solding apparently had further sub-sold the Cargoes. Mr Zhang was the in between trader whereby the Cargoes were sold to an ultimate purchaser in the Mainland, and the Cargoes were to be shipped to the port of Sanshui in the Mainland after they had arrived in Hong Kong. As the Cargoes were traded just before the trading company's incorporation, the forwarder was initially engaged pursuant to the Oral Agreement to take delivery of the Cargoes when they arrived in Hong Kong, and the forwarder was thus named as the consignee under the relevant 2 bills of lading ("the B/Ls") relating to the Cargoes. The Cargoes arrived in the Hong Kong port in the end of June 2007. In around the middle of July 2007, under a mistaken belief by Mr Yung that the original B/Ls had been surrendered to the shipping company, he notified a Ms So of the forwarder (as the named consignee) of the arrival of the Cargoes, and asked her to complete the necessary documentary procedures for their collection. Ms So then contacted Ms Lung, notifying her about the arrival of the Cargoes, and asked Ms Lung to go to the shipping company's Hong Kong agent to complete the documentary procedures to facilitate the collection of the Cargoes. Ms Lung went accordingly. She brought with her the company chops of both the forwarder and trading company.

When Ms Lung arrived at the office of the shipping company's Hong Kong agent, she was asked to sign, amongst others, the letters of indemnity (which were standard documents prepared by the shipping company) to facilitate the release of the Cargoes. She did so, first with the company chop of the trading company, because she understood that the Cargoes were the trading company's. However, she was then told by the shipping company's Hong Kong agent that, as the consignee under the B/Ls was in the name of the forwarder, the Cargoes could only be released to the forwarder and the letters of indemnity had to be signed by the forwarder. Ms Lung then called Ms So and asked whether she could also sign for the forwarder with the forwarder's company chop. Ms So confirmed that Ms Lung could do so. Ms Lung thereafter crossed out the trading company's company chop mark and her signature on the 2 letters of indemnity, and initialled on the amendments. She then further stamped the forwarder's company chop on the letters of indemnity and signed.

After the completion of the documentary procedures, on around 16/7/2007, the Cargoes were first collected by the forwarder's staff at the container terminal, and later delivered to the trading company by the forwarder's staff. The trading company took control of the Cargoes, and as the shipper, eventually arranged them to be shipped to the port in Sanshui in the Mainland in early August 2007.

Later, Jack Engle informed the shipping company that it had not received payment for the Cargoes and threatened to sue the shipping company for the Cargoes' full value plus other fees and expenses. Mr Yung then contacted Ms Siu of the forwarder to investigate the matter and to enquire the whereabouts of the Cargoes. Ms Siu orally informed Mr Yung that the forwarder only collected the Cargoes on behalf of the trading company and had passed them to the trading company. In February 2008, the shipping company brought the legal action against the forwarder and trading company under the letters of indemnity and for conversion. On 8/7/2008, the shipping company and its Hong Kong agent entered into a settlement agreement with Jack Engle, agreeing on a without admission of liability basis to pay Jack Engle US\$253,655.50 (i.e., the full value of the Cargoes) as full and final settlement of all of Jack Engle's claim as shipper for damages, compensation and costs it might have against the shipping company and its Hong Kong agent arising out of or connected with the delivery of the Cargoes.

### *Whether the letters of indemnity were issued by the forwarder as an agent for and on behalf of the trading company*

The 2 letters of indemnity were made on the face of them in favour of the shipping company and were identical in their terms. The relevant terms are as follows:

"We hereby request you [i.e., the shipping company] to deliver such good to [the forwarder] without presentation of the original Bill of Lading.

In consideration of your complying with our above request we hereby agree as follows:

1. To indemnify [the shipping company] and hold [the shipping company] harmless in respect of any liability loss or damage of whatsoever nature, which [the shipping company] may sustain by reason of delivering the Cargoes to [the forwarder] in accordance with our request.
2. To pay [the shipping company] on demand the amount of any loss or damage which the Master and/ or Agents of the Vessel or any other of [the shipping company's] servant or agent may incur as a result of delivering the Cargoes as aforesaid.

3. In the event of any proceedings being commenced against [the shipping company] or any of [the shipping company's] servants or agents in connection with the delivery of the Cargoes as aforesaid, in provide [the shipping company] or them from time to time on demand with sufficient funds to defend the same.  
..."

Given the background of the Oral Agreement, the fact that it was the trading company which had imported the Cargoes to Hong Kong as the trader, the way in which the letters of indemnity were signed by Ms Lung albeit using the company chop of the forwarder, the Judge was satisfied that it was proved on the balance of probabilities that the letters of indemnity were signed by the forwarder as an agent of the trading company. This was so because it was more likely than not that the forwarder was only (and would have only agreed to) signing the letters of indemnity for and on behalf of the trading company. The Judge's reasons were as follows.

First, the Cargoes in fact belonged to the trading company. In the premises, the Judge could not see any good reasons why the forwarder would have agreed to sign the letters of indemnity on its own, thereby assuming potentially significant liability, simply to enable the Cargoes to be released. This was particularly so as the forwarder was only to be paid a small sum (as per the Oral Agreement) for its service to take delivery of the Cargoes.

Secondly, Ms Lung in fact signed the letters of indemnity initially with the trading company's company chop, as the Cargoes belonged to it. It was only because the consignee on the B/Ls was (for historic reasons and convenience) in the name of the forwarder that the letters of indemnity had to be amended to appear to be signed by the forwarder to enable the Cargoes to be released. Thus, the trading company intended to sign the letters of indemnity on its own in the first place.

The Judge therefore found as a matter of fact that the letters of indemnity were signed by the forwarder for and on behalf of the trading company. The Judge found that the shipping company and its Hong Kong agent were *not* aware of the fact that the forwarder signed the letters of indemnity as an agent for and on behalf of the trading company. In other words, insofar as the shipping company and its Hong Kong agent were concerned, the forwarder signed the letters of indemnity for an undisclosed principal.

#### *Whether the forwarder and/or trading company were liable to the shipping company under the letters of indemnity*

The law of agency in the situation of undisclosed principal is clear: both the agent and the principal are liable to the other contracting party. As commented by the learned authors of Bowstead & Reynolds on Agency (18<sup>th</sup> ed) at para 9-012:

"Undisclosed principal. Where the principal is undisclosed at the time of contracting, the contract is made with the agent, and he is personally liable and entitled on it. The principal also may intervene to sue, and may be sued, but the latter only subject the general rule that nothing must prejudice the right of the third party to sue the agent if he so wishes. This therefore case where both agent and principal are liable and entitled."

As the Judge had already found that the letters of indemnity were signed without the forwarder disclosing the trading company as its principal, they were therefore *both* liable under the letters of indemnity. The Judge therefore found that the forwarder and trading company were jointly and severally liable to the shipping company under clauses 1 and 2 of the letters of indemnity for their loss and damage in relation to the release of the Cargoes.

#### *Whether there was conversion of the Cargoes by the forwarder and/or trading company*

Conversion is an act of deliberate dealing with a chattel in a manner inconsistent with another's right whereby that other is deprived of the use and possession of it. The principal ways in which a conversion may take place can be set out as follows:

- (1) When property is wrongfully taken or received by someone not entitled to do so;
  - (2) When it is wrongfully parted with;
  - (3) When it is lost by a bailee in breach of his duty to the bailor;
  - (4) When it is wrongfully sold, even without delivery, so as to pass good title to the buyer;
  - (5) When it is wrongfully retained;
  - (6) When it is wrongfully misused or destroyed; and
  - (7) When the defendant, without physically interfering with it, wrongfully denied access to it to the claimant.
- See: Clerk & Lindsell on Torts (19<sup>th</sup> ed), paras 17-07 – 17-08.

"Wrongfully" for these purposes means without the actual permission of the owner. When the owner intends to transfer dominion to the defendant or otherwise to sanction the defendant's action, there is no conversion, and this remains so even though the defendant or some party is guilty of fraud. Thus, it has been said that obtaining

deception is not conversion, where the victim's proper course is an action in deceit: Clerk & Lindsell on Torts (19<sup>th</sup> ed), para 17-08.

Applying the above principles, the Judge was *not* satisfied it was proved that the Cargoes had been converted by either the forwarder or the trading company. The Cargoes were in fact released to the forwarder with the shipping company's consent, albeit subject to the letters of indemnity. The shipping company thus intended to transfer the possession of the Cargoes to the forwarder for its dealing. There was therefore no question of the forwarder obtaining the Cargoes without the permission of the shipping company. In the circumstances, the Judge was also not satisfied that it was shown that the forwarder had *deliberately* dealt with the Cargoes with an act inconsistent with the shipping company's right over them:

- (1) There was no evidence to show that the forwarder knew or ought to have known that the purchase price of the Cargoes had not been paid.
- (2) Further, the forwarder obtained the possession of the Cargoes with the permission of the shipping company, and the shipping company consented to the forwarder's unrestricted dealing with the Cargoes as the consignee.

There was thus no conversion of the Cargoes by the forwarder.

The same applied to the trading company. It had obtained possession of the Cargoes from the forwarder knowing that they were released with the permission and consent of the shipping company. There was no restriction on the release that the forwarder could not part possession of the Cargoes to another party. In fact, the reverse was more likely to be correct, since the Cargoes were released to the forwarder as the consignee and it must be intended in the release that the forwarder could deal with them freely. As such, in the Judge's view, the trading company must be seen to have obtained possession of the Cargoes also with the consent and permission of the shipping company. Further, there was similarly no suggestion that the trading company knew that the purchase price of the Cargoes had not been paid. In the circumstances, it was not proved that the trading company had obtained the Cargoes without the permission of the shipping company or that it had *deliberately* dealt with the Cargoes in a manner inconsistent with the shipping company's rights. There was also no conversion of the Cargoes by the trading company.

### Quantum

The undisputed value of the Cargoes was US\$253,655.50. The shipping company and its Hong Kong agent settled with Jack Engle in relation to the latter's claim in relation to the misdelivery of the Cargoes. The settlement sum was US\$253,655.50. The settlement was evidenced by a written Receipt and Release/Settlement Agreement dated 8/7/2008. In the Judge's view, it was reasonable for the shipping company and its Hong Kong agent to settle the claim by Jack Engle in the said settlement sum. This was so because the shipping company and its Hong Kong agent, in delivering the Cargoes without the production of the original B/Ls albeit subject to the letter of indemnity, did not appear to have a good defence to Jack Engle's claim as shipper. The settlement sum therefore represented the shipping company and its Hong Kong agent's loss and damage in releasing the Cargoes against the letters of indemnity.

The forwarder and trading company were held jointly and severally liable to indemnify the shipping company the sum of US\$253,655.50 plus interest and costs.

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.