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IL DIRITTO MARITTIMO

RIVISTA TRIMESTRALE DI DOTTRINA GIURISPRUDENZA LEGISLAZIONE
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FONDATA NEL 1899 DA FRANCESCO BERLINGIERI

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GIURISPRUDENZA DI HONG KONG (CINA)

HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE 5 OTTOBRE 2005

STONE, J.

VASTFAME CAMERA LIMITED c. BIRKART GLOBISTICS LIMITED E ALTRI

Nave "*Hyundai Federal*"

[1] Spedizione – Spedizioniere-vettore – Polizza di carico intestata allo spedizioniere

Nell'agosto 2001 la Vastfame Camera Ltd. di Hong Kong, che aveva venduto a una società francese 55.000 macchine fotografiche, incaricò uno spedizioniere, la Globistics Limited di curare il trasporto della merce da Hong Kong a Le Havre. La merce venne caricata dalla Globistics sulla m/n *Hyundai Federal* della Mitsui OSK Lines (Asia) Ltd. che emise una polizza di carico nella quale la Globistics figurava quale cariatore. La Globistics a sua volta emise una polizza di carico indicando la Vastfame quale cariatore.

La polizza recava nell'intestazione il nome della Globistics che ne era la firmataria e attestava la ricezione della merce. Sul verso conteneva una clausola del seguente tenore:

"Notice is hereby given that the Company is a private 'freight forwarder' and/or 'forward agent'. All transactions and contracts which are entered into with the Company incorporate the company's printed terms and conditions herewith contained and the Company does not accept any liability of a common carrier."

Le condizioni generali della Globistics a loro volta contenevano la clausola seguente:

"(i) The Agent is not a carrier (common or private, actual or contracting), and may on its sole and absolute discretion refuse to other (sic) its service to any person. The Agent does not contract hereunder for the carriage of goods.

(ii) The Agent is a forwarding agent whose principal business is to act as an agent in arranging for the transportation of goods on behalf of Customers from Hong Kong to overseas destinations principally by means of air and sea transportation."

La Globistics trasmise la polizza emessa dalla Mitsui ad un suo agente a Le Havre che la consegnò all'acquirente che ritirò la merce senza provvedere al pagamento del prezzo alla Vastfame. Quest'ultima convenne in giudizio dinanzi alla High Court of the Hong Kong Special Administrative Region la Globistics Limited e il suo agente di Le Havre, Moiroud S.A.

- [1] *Ove una polizza di carico rechi l'intestazione della stessa società che l'ha sottoscritta e attesti la presa in consegna della merce il vettore deve essere individuato nel firmatario e a nulla rileva il fatto che nel verso della polizza sia contenuta una clausola che qualifica l'emittente del titolo quale spedizioniere, precisando che l'emittente non assume la responsabilità di vettore e richiama le sue condizioni generali nelle quali è precisato che la*

Omissis. – 46. In light of all the evidence I find that Birkart was the contractual carrier under the bill of lading issued by Birkart to Vastfame. In my view it is as plain as a pikestaff that

this is the position, and in the circumstances it is somewhat surprising that a vigorous defence in this case has been conducted on the basis that Birkart was not the contractual carrier.

[1] **Dual role of freight forwarder in misdelivery of cargo: contracting in the capacity as both agent and principal?**

Introduction

The increased activity of freight forwarders and the expanded diversity of their work are striking facts of modern carriage of goods. This increase is a result of the container revolution; the emergence of multimodal systems of inland carriers, terminal owners and sea carriers, the long term over-availability of tonnage in the world shipping market coincidental and the rapid and unprecedented development of the global logistics industry. Freight forwarders have fitted into this new global logistics order and hence their new importance.

Freight forwarders, despite or perhaps because of their new-founded fortune, are faced with a dilemma – will they present themselves as “principal contractors” or as “agents”? At times, they even flirt with the term “carrier”.

Dual Role of Freight Forwarder

The freight forwarder traditionally acts as an agent who arranges for the shipments of goods belonging to his customer, the shipper. The freight forwarder as agent arranges for transportation, pays freight charges, insurance, packing, customs duties etc., and then charges a fee, usually a percentage of the total expenses. All the costs are (or should be) disclosed to his customer, the shipper.

Sometimes, the freight forwarder has acted as principal contractor arranging the carriage in his own name. The fees payable by the shipper is a straight freight charge. He then arranges to pay lower freight rates to the carrier and obtains his profit from the rate difference between the two. Very often, the freight forwarder consolidates the cargoes of a number of shippers into a single container, resulting in savings which benefit the freight forwarder and the shippers. On these occasions, the freight forwarder’s responsibility to the shipper is often that of a carrier.

Whether acting as agent or principal, the freight forwarder (as normal in commerce) usually attempts to contract out of as much responsibility as possible. This has often resulted in very confusing standard trading conditions where the two contradictory roles and kinds of responsibility – of the agent and of the principal – are set out.

Agent or Principal?

Whether the freight forwarder is contracting as an agent or a principal will depend on the facts of each case and on the law in the particular jurisdiction in question. One must look at all the circumstances of the arrangements between the freight forwarder and the shipper, including but not limited to contract, telephone calls, correspondence, tariff, bill of lading issued (if any), previous dealings, etc. between the freight forwarder and sub-carriers, as well as the correspondence between the freight forwarder and the shipper, consignment note and bill of lading.

Merely because a freight forwarder issues a document entitled “bill of lading” may not necessarily mean that the freight forwarder is a carrier. The forwarder might have issued a bill of lading and the ocean carrier issued an ocean bill of lading as well. The contract between the

47. It is difficult to grasp how a Commercial Court, faced with a bill of lading issued by Birkart bearing on its face the terms hereinbefore described, could arrive at a contrary conclusion.

48. So far as Vastfame was concerned, as indeed Ms Lam stated in evidence, Birkart contractually was charged with effecting the carriage of these cameras from Hong Kong to Le

shipper and freight forwarder, however, might have explicitly provided that the latter acted only as agent. Furthermore, the forwarder might have been paid a commission from the shipper or a brokerage from the carrier rather than making a profit from a difference in the freight rates.

The significance of whether the freight forwarder is contracting as an agent or as a principal is that should the former be the situation, the freight forwarder will not be liable for any breach of terms of the shipment contract between the shipper and the carrier. Should the latter be the situation, the freight forwarder will be so liable. This may be especially significant should misdelivery of the shipper's cargo have taken place, which is a serious (or fundamental) breach of the shipment contract.

Freight forwarders as carriers

A freight forwarder will be held to be the contractual carrier of goods where a bill of lading issued by the freight forwarder expresses on its front page an intention that the freight forwarder will be the contractual carrier.

The case *Vastfame Camera Ltd v Birkart Globistics Ltd* (reported also in *American Maritime Cases [2005 AMC Page 2864 – 2879]* and *Hong Kong Cases [2005] HKC Page 117 – 135*) may shed some light on the issue. This case involving the mis-release of a consignment of "shrek" cameras made in China and exported with destiny to Le Harve, France. The Hong Kong claimant exporter, contracted with the French buyer, HPI France, for the sale of 55,000 cameras and invoiced HPI the sale price of US\$143,815.00. The payment terms under the contracts were "LC at sight" but these were later changed to "cash against documents".

The claimant exporter then arranged with Birkart Globistics Limited ("Birkart Globistics") being an international freight forwarder, to carry the cameras from Hong Kong to Le Havre, France. Birkart Globistics issued a house bill of lading to the claimant, consigned "to order", naming Vastfame as "shipper" and HPI as "notify party". On arrival, the consignment of cameras was released to the buyer by Birkart Globistics's local French representative, Moiroud SA, without them demanding surrender of the bill. The claimant exporter, being the cargo owner, was never paid and sued the Defendant freight forwarder, Birkart Globistics, for wrongful delivery of cargo described in a bill of lading issued by the freight forwarder and claimed Birkart Globistics for the full invoice value.

Birkart Globistics defended the claim on the 1st basis that it was not the contractual carrier of the cargo. Birkart Globistics's bill of lading named the claimant exporter as "shipper" and the consignee was noted as "to order". The bill of lading was signed by Birkart Globistics in its own name and bore the usual statements concerning shipment of the cargo onboard the carrying vessel in good order and condition. The terms on the reverse side of the bill of lading, however, differ from the document's front side. Clause 10 of the fine print on the reverse side denied that it acted in the role as a contractual carrier by stating:

"Notice is hereby given that the Company is a private 'freight forwarder' and/or 'forward agent'. All transactions and contracts which are entered into with the Company incorporate the company's printed terms and conditions herewith contained and the Company does not accept any liability of a common carrier".

Essentially, Clause 10 stated that Birkart Globistics was an agent only, and was not the carrier of the cargo described in the bill of lading. Not content with this blunt statement, the fine print included other "Conditions", specifically Clause 3(i) and 3(ii) which stated:

Havre, and once this had taken place, Vastfame clearly had no interest, in context of an FOB contract and a bill stamped 'Freight Collect', in how the goods were to get to France – as long, of course, as they arrived safely.

49. Pursuant thereto Birkart had issued the bill of lading to Vastfame, had secured a Mitsui Lines vessel to

effect the ocean carriage, and had caused these goods to be delivered to its international partner and agent, Moiroud – which, as we now know, was the entity which, wrongly (and to its considerable embarrassment, as is apparent on the face of discovered Moiroud/Birkart email correspondence) had permitted delivery to the

"(i) The Agent is not a carrier (common or private, actual or contracting), and may on its sole and absolute discretion refuse to other (sic) its service to any person. The Agent does not contract hereunder for the carriage of goods."

"(ii) The Agent is a forwarding agent whose principal business is to act as an agent in arranging for the transportation of goods on behalf of Customers from Hong Kong to overseas destinations principally by means of air and sea transportation."

Applying the principles set out by the 'House of Lords in England in the well-known English case the 'Starsin' [2003] 2 WLR 711, the learned Judge Stone held that the inconsistent terms on the reverse side of the forwarder's bill of lading were not sufficient to overcome the intention manifested on the front of the bill that the forwarder was intended to be the contractual carrier of the cargo. An important matter noted by Justice Stone was that the ocean carrier's waybill, issued to the forwarder by Mitsui OSK Lines, recorded Birkart Globistics as "Shipper" of the cargo.

Birkart Globistics also defended the claim on the 2nd basis by making a good attempt in contending that its house bill of lading was not a document of title but nothing more than a receipt for the goods coupled with an authority for it to enter into a contract for their carriage. However, this argument was rejected by the learned Judge Stone and the house bill of lading was held to be a document of title.

Judgment was given against Birkart Globistics for the full invoice value, but, as Moiroud had been responsible for the mis-release, it was held completely liable and ordered to compensate Birkart Globistics in full.

Lesson to be learned by any cargo owner:

The broad and wide terms at the reverse side of the Bill of Lading may not be as scary as they claim to be during a legal claim by a misdelivered cargo owner against freight forwarder.

Lesson to be learned by any freight forwarder:

Freight forwarders must bear this decision in mind in formatting and preparing their house bill of lading. In particular, freight forwarders must consider whether or not the front of the bill of lading sufficiently notifies the shipper of the forwarder's status as agent only. Any document named "bill of lading" issued by a freight forwarder is not lightly to be viewed otherwise than a document of title.

WILLIAM K.W. LEUNG*

* William K. W. Leung & Co. (Website: www.jlw.com), Solicitors for Hong Kong Claimant Exporter, Vastfame Camera Limited ("Vastfame").

buyer, HPI, absent production of an original bill of lading, an action which directly contravened the specific statement on the face of the Birkart bill of lading that "One of these Through-Bill of Lading must be surrendered duly endorsed in exchange for the goods."

50. Small wonder, therefore, that when Vastfame was apprised of the situation of the wrongful delivery, in email correspondence with Moiroud, that the Vastfame staff initially had failed to comprehend what had occurred: "please let us know you released the cargo against what docu?? original b/l?? bank indemnity??", and later "why u released cargo to cnee without original b/l??", and still later again, this time from the head of the Vastfame shipping department "Do you take a joke with me? What's wrong? Full set of original are still hold on my hand, but you have released the goods to the consignee. Do you know how about goods releasing procedure??"

51. When viewed against these contemporary exchanges, it might be thought that Mr Wright's suggestion that neither Birkart nor Vastfame had intended that Birkhart would assume the obligations of a contractual carrier represents a submission that fails to command much resonance.

52. On behalf of the plaintiff, Ms Lam, whose evidence I accept, was in no doubt of the position, and in cross-examination she found it difficult to comprehend the nature of the contrary case being suggested to her in the prevailing circumstances.

53. In this regard, however, the *viva voce* evidence was *not* in conflict. For her part, Ms Au, of the Birkart sales staff, also made no bones about the position.

54. She specifically accepted in her evidence that indeed this *was* a bill of lading, describing it in terms. In cross-examination she further accepted that Birkart had issued the bill as principal, and that Moiroud was Birkart's agent in relation to ensuring that goods were

released only against an original bill.

55. This evidence is consistent with the fact that Birkart's signature on the bill was unqualified, making it tolerably clear that Birkart signed *qua* principal. In itself, the use of the term "forwarder" or "forwarding agent" does not mean that a party is not signing as principal, and it is well-established on the authorities that a freight forwarder indeed can (and often does) contract as such.

56. I bear in mind in this context, of course, that Mr Wright strongly advances the 'forwarding agent' argument on the strength of, for example, the content of Clause 3 of the 'Conditions of Contract' on the reverse of the bill, the terms of which have been quoted above. There seem to me to be two answers to this.

57. First, the signature on this bill of lading is in no sense equivocal, and it strikes me that in a circumstance in which, as here, Birkart has signed this bill absent qualification, this must indicate implicit agreement that ostensibly inconsistent clauses on the reverse must be regarded as overridden. Second, and putting to one side the curious fact that the term "The Agent", upon which reliance here is placed, remains *undefined* on the reverse side of the bill – an omission of which Mr Stokes, for the plaintiff, makes much, not least because Birkart is defined as "The Company" – in any event I would firmly decline to accept any submission based upon the small (and, in this instance, virtually illegible) print on the reverse of this document in light of the clear statements appearing on its face.

58. On this issue I bear in mind the observations of their Lordships in the *The "Starsin"* [2003] 2 WLR 711 (HL) to the effect that when a bill of lading contains on its face an apparently clear and unambiguous statement of who is the carrier it is difficult to accept that a shipper would expect to have to resort to the detailed conditions on the reverse

of the bill in an attempt to discover with whom he was contracting. As Lord Steyn noted (*op cit.*, at 728), when commenting on the problem of an inconsistency as to identity of carrier between that which appears on the face of the bill and that which is "tucked away in barely legible tiny print on the back of the bill of lading":

"How is the problem to be addressed? For my part there is only one principled answer. It must be approached objectively in the way in which a reasonable person, versed in the shipping trade, would read the bill. The reasonable expectations of such a person must be decisive. In my view he would give greater weight to words specially chosen, such as the words that appear above the signature, rather than standard form printed conditions. Moreover I have no doubt that in any event he would, as between provisions on the face of the bill and those on the reverse side of the bill, give predominant effect to those on the face of the bill. Given the speed at which international trade is transacted, there is little time for examining the impact of barely legible printed conditions at the time of the issue of the bill of lading. In order to find out who the carrier is it makes business common sense for a shipper to turn to the face of the bill, and in particular to the signature box, rather than clauses at the bottom of column two of the reverse side of the bill."

"Taking advantage of their knowledge of the way in which the market works two commercial judges –

Coleman J and Rix LJ in the Court of Appeal – adopted the mercantile view. The majority in the Court of Appeal – Sir Andrew Morritt VC and Chadwick LJ – in effect gave preponderant effect to the boilerplate clauses on the back of the bill. In my view it would have an adverse effect on international trade if the latter approach prevails... As Rix LJ [2001] *Lloyd's Rep* 437, 451 observed, commercial certainty and indeed honesty is promoted by giving greater effect to the front of the bill of lading..."

59. I would respectfully adopt this approach. I also accept the submission of Mr Stokes that the argument advanced on behalf of Birkart that they did not contract as principal begs the question as to the identity of the contracting party if in fact it was not Birkart; in particular, who was it, if not Birkart, who had contracted to fulfil the obligation, prominently stated on the face of this bill of lading, not to release these goods save against production of an original bill of lading? Certainly it was not Mitsui, the ocean carrier, whose obligation under its waybill terminated when the goods were delivered to Moiroud (as Ms Au accepted in her testimony), and it could hardly have been Moiroud, Birkart's obviously negligent agent.

60. At the end of the day there is no reasonable conclusion, on this evidence, other than that this was a 'To Order' bill of lading issued by Birkart, as principal, to Vastfame. I so hold. (*Omissis*).