

FORWARDER LAW

Changes in the Facts proved in evidence change the results reached by different courts. Lawyers are well acquainted with that reality, which is the reason why lawyers place emphasis on getting the facts straight. And it also explains why a case goes against a carrier in one claim, but in the next case a similar claim is tossed out – and the decisions appear contradictory.

In a case reported by Forwarderlaw, decided by the English Court of Appeal, in a Judgment delivered on 12 February 2003, in East-West Corporation v. DKBS 1912 and AKTS Svenborg: Utanko Ltd. v. P&O Nedlloyd B.V. liner bills of lading were duly issued for consignments exported from China to be imported in Chile. In September and October 1998 (in the case of Maersk Line) and February 1999 (in the case of P&O Nedlloyd), the claimants shipped goods in containers from Hong Kong to San Antonio in Chile, by liner services operated by Maersk Line (DKBS 1912 and AKTS Svenborg) respectively P&O Nedlloyd. Liner B/L's were duly issued for the consignments, naming the claimants as the shippers and Gold Crown as the notify party. The goods were consigned to the order of various banks in Chile and the B/L's were duly endorsed by the claimants and sent by the claimants' bankers in Hong Kong to their correspondent bankers in Chile, with instructions only to release them against payment. Pending the payment of import duties, the goods were in accordance with Chilean customs law, placed in a licensed customs warehouse and after customs duties were paid and the goods in the containers were released to the customs agent of the notify party Gold Crown. Gold Crown did not pay for the goods in two of the containers carried by P&O and seven of the containers carried by Maersk Line. The Chilean banks were requested to return the B/L's to the claimants, which they did, however, without endorsing them back. Since the B/L's contained an English law and jurisdiction clause the claimants brought suit in the English High Court against the carriers on the grounds that they had delivered cargo without presentation of the original B/L's. This case determined that the carriers were responsible for misdeliveries from the Chilean customs warehouse, since they had failed to instruct the warehouse operators or the relevant container operator to ensure that delivery was given only against presentation of an original B/L. The carriers had undertaken in the B/L's that delivery should be against presentation of an original bill and they should have ensured that they could discharge that

obligation by an appropriate contract with the customs warehouse operators and the container operators. The Court of Appeal decided that the carrier was liable for misdelivery when the warehouse released the goods to the importer who had arranged for customs clearance.

A misdelivery claim also came up before the courts of the Netherlands in the case of Sonex Ltd. v. P&O Nedlloyd B.V., where the carrier P&O Nedlloyd had carried two containers from Hong Kong to Arica, Chile. On-carriage to Bolivia was not agreed. Both containers were discharged in transit at Arica with the final destination of Bolivia, as per the instructions of the shippers, Sonex Ltd., a Hong Kong company. Sonex Ltd. had sold the goods to the Bolivian company Casa Roberto, which appeared in the B/L's as notify party. Both B/L's were issued to order. At the time the goods were in transit to Bolivia they were handed over by P&O Nedlloyd to the Chilean customs service in accordance with statutory Chilean regulations. The Chilean customs service then delivered the goods to the Bolivian customs agency, who on their turn offered the cargo for inland transport to the Bolivian authorities in Santa Cruz / La Paz, Bolivia. However, the goods never arrived there and the empty containers were finally returned to P&O Nedlloyd. Sonex brought suit against P&O Nedlloyd in Rotterdam under the B/L's containing a choice for Dutch law and jurisdiction of the Rotterdam Court. Sonex' claim was for alleged misdelivery and breach of the contract of carriage. The B/L's contained a clause:

"20. *Notification and delivery ...*

(6) If, at the place where the Carrier is entitled to call upon the merchant to take delivery of the Goods under Clause 20 (2) or (3), the Carrier is obliged to hand over the Goods into the custody of any customs, port or other authority, such hand-over shall constitute due delivery to the Merchant under this Bill of Lading".

P&O Nedlloyd made the same assertions as had been submitted to the English Court of Appeal. Only this time the carrier was successful in avoiding liability for the loss.

What changed?

The claimant Sonex sighted the English Court of Appeal decision in *East-West Corporation v. DKBS 1912* and sought to rely on it before the Court of Rotterdam. However, the *East-West Corporation* case was in respect of the delivery of goods in

Chile after 19 December 1997, whereas the delivery of the cargo in the Sonex case concerned cargo that had been delivered before that date. On 19 December 1997 the Chilean law on state-owned port companies changed which encompassed the splitting-up of the former state-owned company Emporchi into 10 separate state-owned companies whilst at the same time privately owned companies were allowed to obtain permits to become licensed customs warehouse companies. Until the entering into force of this law of 19 December 1997 Emporchi had been the monopolist allowed to take delivery of cargo at all the Chilean ports. At the time of the delivery by P&O Nedlloyd in the Sonex case the carrier lost control of the cargo to Emporchi, but under Chilean law had no right to refuse delivery to the warehouse. Under these circumstances the Rotterdam Court held that the carrier could rely on the B/L clause 20 (6). At the time the misdelivery in the East-West Corporation case occurred, Chilean law had changed, and the Judge decided, based upon evidence of Chilean law, that the carrier had to place the containers in the custody of the warehouse, but could still control the release of the goods to the importer. The Rotterdam Court also decided that a clause that treated a delivery of the goods into the custody of any customs, port or other authority, is not in itself unfair or unreasonable. Sonex Ltd. has appealed from the decision of the Rotterdam Court so we may not have heard the last on the subject.