IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

MINAJ HOLDINGS LIMITED and UNION BANK OF NIGERIA PLC, Plaintiffs v. INTERNATIONAL MARITIME TRADING COMPANY LIMITED, Defendant	)	CIVIL ACTION NO. 2011-032 **ORDER DISMISSING PLAINTIFFS' FIRST AMENDED COMPLAINT**

TO: DENNIS J. REEDER, counsel for plaintiffs
DAVID M. STRAUSS, counsel for defendant

On March 7, 2011, the Plaintiffs, Minaj Holdings Limited ("Plaintiff Minaj Holdings") and Union Bank of Nigeria PLC ("Plaintiff Union Bank") (collectively, the "Plaintiffs"), filed a First Amended Complaint ("FAC") against the Defendant, International Maritime Trading Company Limited (the "Defendant"). On July 4, 2011, the Defendant filed a Marshall Islands Rules of Civil Procedure ("MIRCP") 12(b)(6) Motion to Dismiss the Plaintiffs' First Amended Complaint and, Alternatively, to Compel Arbitration for, among others, the Plaintiffs' failure to state a claim upon which relief can be granted in the FAC as it fails to state a cause of action against the Defendant. For the reasons stated below, the motion was treated as a motion for summary judgment and is hereby GRANTED.

Based on the entire record in this matter, including the three affidavits of Song Kuk Ryong, one of the directors of the Defendant, and the documents exhibited thereto, and the affidavit of Dennis Reeder, counsel for the Plaintiffs, and the documents exhibited thereto, this Court finds the following undisputed facts:

1. On July 22, 2009, Plaintiff Minaj Holdings, a Nigerian corporation, purchased 420,000 (+ or - 5%) of ordinary bags of Portland cement valued at US$39,900,000 from Rizhao Qihan International Trading Co., Ltd. ("Rizhao Qihan"), a Chinese corporation. The Defendant had no knowledge of the terms and conditions of any contract or the transaction between Plaintiff Minaj Holdings and Rizhao Qihan. See Exhibit P-R-1 attached to the August 30, 2011, Affidavit of Counsel (Dennis Reeder) Identifying Documents.[1]

2. On December 8, 2009, the Defendant, as owner of the m/v Kuk Il, and Rizhao Qihan, as shipper, entered into a Charter Party agreement, also referred to as the "Fixture Note" (the "Fixture Note"). The Fixture Note incorporated the terms of The Baltic and International Maritime Council Uniform General Charter (as revised 1922, 1976 and 1994) Code Name: "GENCON" ("GENCON 94"). [Par 3 Oct SKR Aff] For arbitration unrelated to general average, GENCON 94 provides that any dispute arising out of the Charter Party/Fixture Note should be referred to arbitration in London in accordance with the UK Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. See Par 3a Oct SKR Aff and attached Section 19 of Exhibit SKR-3.

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[1] This affidavit was filed on September 5, 2011.

3. Pursuant to the Fixture Note, the Defendant issued three original and three copies of a Bill of Lading dated December 19, 2009 (the "Original B/L"), to Rizhao Qihan for the carriage of 27,500 metric tons of ordinary Portland cement (the "Cargo") valued at US$2,612,500 on the m/v Kuk Il, which is owned by the Defendant, from Rizhao Port, China, to Port Harcourt, Nigeria. The Original B/L was signed by the General Manager of Sino-Ocean Shipping Agency Rizhao as agent for and on behalf of the Master of the m/v Kuk Il. Pursuant to the Original B/L, the Cargo was loaded onto the m/v Kuk Il, which set sail from Rizhao Port, China, on December 19, 2009, for discharge at Port Harcourt, Nigeria. As one of the "Conditions of Carriage", the Original B/L incorporated all the terms and conditions "including the Law and Arbitration clause" of the Fixture Note which, as mentioned in paragraph 2 above, incorporated the terms of GENCON 94 including the arbitration clause thereof. See Par 3, 3c, and 5 Oct SKR Aff and attached Exhibits SKR-1, SKR-2, and SKR-4.

4. Plaintiff Minaj Holdings attached a Bill of Lading dated December 19, 2009 (the "Purported B/L"), to the FAC as Exhibit P-3. The Defendant never saw the Purported B/L prior to these proceedings and the Purported B/L does not contain the signature (or genuine signature) of the Defendant or the agent of the Master of the m/v Kuk Il. See Par 4 Oct SKR Aff. Plaintiff Minaj Holdings was requested by the court to produce an original or clean copy of Exhibit P-3 showing who signed for the Master of the m/v Kuk Il, but failed to do so.

5. The m/v Kuk Il dropped anchor near Port Harcourt, Nigeria, on January 25, 2010, but was denied permission by the Federal Ministry of Finance of Nigeria and the Nigeria Customs Services to berth and discharge the Cargo at Port Harcourt because Plaintiff Minaj Holdings' approval to import cement had expired on December 31, 2008. See Par 5-8 Oct SKR Aff and attached Exhibits SKR-4 through SKR-8.

6. Due to the m/v Kuk Il being prevented from entering Port Harcourt, Rizhao Qihan instructed the Defendant to proceed to the Port of Douala, Cameroon, to discharge the Cargo to a new consignee, Societe Quifeurou Cameroun ("SQC"). Prior to such instruction, the Defendant had no knowledge of or any prior dealings with SQC. See Par 9-10 Oct SKR Aff and attached Exhibit SKR-9; Par 5 Feb SKR Aff.

7. On or about February 8, 2010, Rizhao Qihan returned the Original B/L to the Defendant for cancellation, and the Defendant issued a "Surrendered" Clean Bill of Lading to Rizhao Qihan with SQC named as the new consignee, but only after both Rizhao Qihan and SQC issued letters of indemnity in favor of the Defendant. See Par 11-14 Oct SKR Aff and attached Exhibits SKR-10 through SKR-15.

8. The m/v Kuk Il set sail on February 12, 2010, and commenced discharging the Cargo at the Port of Douala, Cameroon, at 8:45 p.m. on February 13, 2010. See Par 15 Oct SKR Aff and attached Exhibit SKR-5.

9. After a number of delays caused by rain, the m/v Kuk Il completed discharging the Cargo at 5:20 a.m. on March 5, 2010. See Par 16 Oct SKR Aff; Par 6 Feb SKR Aff and attached Exhibits SKR-16 and SKR-17.

10. None of the parties has any knowledge of what happened to the Cargo after its discharge at the Port of Douala, Cameroon. Plaintiff Minaj Holdings claims it did not receive the Cargo. See Par 17 Oct SKR Aff; Par 7 Feb SKR Aff.

11. On April 7, 2010, or more than two months after Plaintiff Minaj Holdings became aware that it could not take delivery of the Cargo because of the Federal Ministry of Finance of Nigeria's and the Nigeria Customs Services' prohibition, which prevented the Cargo from being discharged at Port Harcourt, Nigeria, Plaintiff Minaj Holdings instructed Plaintiff Union Bank to pay Rizhao Qihan US$2,612,500 for the "missing consignment." Plaintiff Minaj Holdings has not proffered a sufficient explanation as to why, despite its non-receipt of the Cargo, it nevertheless proceeded to make such payment to Rizhao Qihan. See Exhibit P-5 attached to the FAC.

12. The Defendant has no knowledge of any payments that may have been received by Rizhao Qihan from Plaintiff Minaj Holdings or SQC; of any subsequent dealings in respect of the Cargo that may have been undertaken by Rizhao Qihan and/or SQC; and why Plaintiff Minaj Holdings arranged for the payment of the Cargo to Rizhao Qihan through Plaintiff Union Bank when all parties were well aware that the Cargo could not be and was not delivered to Plaintiff Minaj Holdings. See Par 12 Feb SKR Aff.

13. On February 18, 2011, Plaintiff Minaj Holdings filed a Complaint against the Defendant seeking to recover the US$2,612,500 paid to Rizhao Qihan by Plaintiff Minaj Holdings on April 7, 2010. See original Complaint.

14. On March 7, 2011, Plaintiffs filed the FAC which added Plaintiff Union Bank as a plaintiff but did not amend whatever purported "cause of action" that was alleged therein. See FAC.

I. FAILURE TO STATE A CAUSE OF ACTION - NO PRIVITY OF CONTRACT

As matters outside the pleadings were presented and not excluded by the Court, the Court treated the Defendant's MIRCP 12(b)(6) motion to dismiss as a motion for summary judgment pursuant to MIRCP 12(b) and 56.

The alleged "cause of action" in the FAC, can be summarized as follows:

> On December 10, 2009, an Invoice for $2,612,500 was issued to Plaintiff Minaj Holdings by Rizhao Qihan, the seller/shipper of the Cargo. On December 19, 2009, Plaintiff Minaj Holdings "contracted" through its execution of a Bill of Lading to have the Cargo, which was valued at $2,612,500, delivered to Port Harcourt, Nigeria, by the m/v Kuk Il, a vessel owned by the Defendant. On April 7, 2010, on the instruction of Plaintiff Minaj Holdings, Plaintiff Union Bank paid the $2,612,500 to Rizhao Qihan. The Cargo was not delivered to Port Harcourt, Nigeria. The Plaintiffs demanded that the Defendant pay to them the amount of the Invoice, but the Defendant refused.

The aforesaid purported "cause of action" is not expressly identified in the FAC, but appears to be for an alleged breach of contract.

According to the FAC, Plaintiff Minaj Holdings contracted with and paid Rizhao Qihan $2,612,500 for the Cargo. As stated above, the Defendant entered into a Charter Party/Fixture Note with Rizhao Qihan and subsequently issued the Original B/L. However, Defendant never saw and had no knowledge of the Purported B/L. Thereafter, the Cargo did not arrive at Port Harcourt, Nigeria, due to Plaintiff Minaj Holdings' approval to import cement having expired. In the premises, while there appears to be a cause of action by Plaintiff Minaj Holdings against Rizhao Qihan for non-delivery of the Cargo, there is no cause of action by Plaintiff Minaj Holdings against the Defendant as there was no contract between them.

In *Omni Contracting Co. Inc. v. City of New York* (N.Y. Sup. Ct., 2010), the City entered into a professional service contract with PMS Construction ("PMS") for construction management and services for various citywide capital construction projects. Subsequently, PMS, as the general contractor, entered into an agreement with Omni as the subcontractor for general construction work at the Library (the project contract). The project contract contained a dispute resolution procedure which required that any disputes Omni may have be submitted to the City solely through PMS. Pursuant to the contract, Omni agreed to be bound by and to assume for PMS's benefit all contractual obligations and liabilities that PMS had assumed for the City. Omni argued that after a competitive bidding process, it entered into the contract with PMS, which was acting on behalf of the City, and that its performance under the contract was prevented or waived by defendants' actions in impeding and preventing it from completing its work by the project deadline, resulting in delay damages of $499,243.70. The

City argued that there was no privity between it and Omni since Omni had contracted with PMS, and that the documentary evidence established an absence of contractual privity between the City and Omni, thereby precluding Omni from asserting a breach of contract claim against it.

The Court stated, at page 5:

> It is well-settled that a subcontractor may not recover for breach of contract from an owner, rather than a general contractor, absent a contract or privity between it and the owner. (*CDJBldrs. Corp. v Hudson Group Constr. Corp.*, 67 AD3d 720 [2d Dept 2009]; *IMSEngrs.-Architects, PC v State of New York*, 51 AD3d 1355 [3d Dept 2008], lv denied 11 NY3d 706; *Kelly Masonry Corp. v Presbyt. Hosp. in City of New York*, 160 AD2d 192 [1st Dept 1990]; *Perma Pave Contr. Corp. v Paerdegat Boat and Racquet Club, Inc.*, 156 AD2d 550 [2d Dept 1989]). As plaintiff alleges that the project contract was breached, and as that contract is between plaintiff and PMS alone, City has established, prima facie, that plaintiff has no cause of action for breach of contract against it. (*See CDJBldrs. Corp.*, 67 AD3d at 722 [subcontractor's breach of contract claim against owners dismissed as contract was between it and prime contractor and owners were not signatories to it]; *IMS Engrs.-Architects, P.C.*, 51 AD3d at 1355 [plaintiff subcontractor's breach of contract claim against defendant landowner dismissed as plaintiffs contract was solely with general contractor and it thus lacked contractual privity or functional equivalent with defendant]; *Perma Pave Contr. Corp.*, 156 AD2d at 551 [same]; *E. States Elec. Contrs., Inc. v William L. Crow Constr. Co.*, 153 AD2d 522 [lrt Dept 1989] [same]).

Similarly, in the present case, while there is privity of contract between Rizhao Qihan and the Defendant, on the one hand, and between Rizhao Qihan and Plaintiff Minaj Holdings on the other, there is no privity of contract between the Plaintiffs and the Defendant. Therefore, in their FAC, the Plaintiffs failed to state a cause of action or claim upon which relief can be granted.

II. FAILURE TO STATE A CAUSE OF ACTION - CONVERSION OR BREACH OF BAILMENT

While the Plaintiffs did not allege conversion or breach of bailment in their FAC, the Plaintiffs asserted at page 2 of their Response to Motion to Dismiss or Compel Arbitration dated August 30, 2011,[2] that the FAC "states sufficient plausible facts to base a claim for conversion or breach of bailment . . ."

The Marshall Islands Carriage by Sea Act is applicable in the present case since the Plaintiffs attempted to assert rights pursuant to a Bill of Lading and since ocean carriage and an action against a carrier are involved.

The Carriage by Sea Act provides, in relevant part:

> §402. Definitions
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> ...
>
> (b) 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same...
>
> §407. Surrender of rights and immunities and increase of responsibilities and liabilities
>
> ...
>
> (2) The provisions of this Part shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this Part..." [emphasis added]

The Carriage by Sea Act is "analogous" to the U.S. Carriage of Goods By Sea Act ("COGSA"), and, as held in *Polo Ralph Lauren et al. vs. Tropical Shipping & Construction*

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[2] Plaintiffs failed to number the pages of their motion.

Co., Ltd., 215 F.3d 1217, 21 June 2000, the remedies provided in the COGSA should be exclusive of all other remedies including tort or common law claims such as, among others, conversion and breach of bailment. Thus, the remedies provided under the Carriage by Sea Act constitute the Plaintiffs' exclusive remedies, which would exclude the Plaintiffs' common law claims for conversion and breach of bailment. As such, the Plaintiffs do not have any plausible claim for relief arising from any alleged conversion and breach of bailment on the part of the Defendant. In light of the foregoing, the issue of standing (as named consignee on the part of Plaintiff Union Bank and as "third party beneficiary" on the part of Plaintiff Minaj Holdings) in respect of claims for conversion and breach of bailment has been rendered moot.

Even if the Carriage by Sea Act did not apply in the present case, the Plaintiffs' alleged claims for conversion and breach of bailment have no basis. First, as mentioned above, the Defendant's vessel, m/v Kuk Il, was prohibited by the Federal Ministry of Finance of Nigeria and the Nigeria Customs Services from berthing and discharging the Cargo at Port Harcourt, Nigeria, due entirely to the fault of Plaintiff Minaj Holdings. Second, the Original B/L was in the possession of Rizhao Qihan, the shipper, at the time that m/v Kuk Il was prohibited from berthing and discharging the Cargo. It is recognized at common law that a shipper, who remains in possession of an "order" bill of lading, could instruct the owner of the vessel to direct the goods to be delivered to a discharge port other than the discharge port named in the initial original bill of lading and a particular consignee instead of "to the order" of a named party as stated in the said bill of lading. *See A.P Moller-Maersk A/S (trading as 'Maersk Line) v Sonaec Villas Cen Sad Fadoul*, 2010 [EWHC 355 (Comm); [2010] All ER (D) 283 (Mar).

III. FAILURE TO STATE A CAUSE OF ACTION - THIRD-PARTY BENEFICIARY

The Plaintiffs failed to allege in their FAC any cause of action against the Defendant by reason of their being third-party beneficiaries to the Charter Party/Fixture Note between Rizhao Qihan and the Defendant. Even assuming that the Plaintiffs had stated such a cause of action, the FAC would be dismissed for the Plaintiffs' failure to arbitrate.

The terms of the Fixture Note (Paragraph Nos 23 and 24) and GENCON 94[3] (Paragraph No 19), which were expressly incorporated in the Conditions of Carriage on the overleaf of the Original B/L issued by the Defendant ("*(1) All terms and conditions, liberties and exceptions of the Charter Party dated as overleaf [which is the Fixture Note in the present case] including the Law and Arbitration Clause, are herewith incorporated*") clearly provide for the submission of any non-general average dispute arising therefrom and from said Bill of Lading, to arbitration in London.

In *Margaret Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3rd Circuit, 2004), the Court held that its "prior decisions support the traditional practice of treating a motion to compel arbitration as a motion to dismiss for failure to state a claim upon which relief can be granted." *See Nationwide Ins. Co. v. Patterson*, 953 F.2d 44, 45 n.1 (3d Cir.1991) ("Dismissal of a declaratory judgment action because the dispute covered by an arbitration

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[3] The Fixture Note incorporated the terms of The Baltic and International Maritime Council Uniform General Charter (as revised 1922, 1976 and 1994) Code Name: "GENCON" ("GENCON 94"). For arbitration unrelated to general average, clause 19(a) and (d) of GENCON 94, provides that any dispute arising out of the said charter party (*i.e.*, the Fixture Note) should be referred to arbitration in London in accordance with the UK Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force.

provision is generally effected under Rule 12(b)(6) covering dismissals for failure to state a claim upon which relief can be granted, *see, e.g., Aetna Casualty & Surety Co. v. Hameen*, 758 F.Supp. 1049 (E.D.Pa.1990)...")."

Even assuming that there is no valid arbitration agreement between Plaintiff Minaj Holdings and the Defendant because Plaintiff Minaj Holdings was not a party to the Fixture Note and not the named consignee on the Original B/L, there are a growing number of cases in the United States where signatories to arbitration agreements have been permitted to compel non-signatories to arbitrate on the basis of, among others, incorporation by reference, being third party beneficiaries, implied agency, equitable estoppel, *etc.*

In *Continental Insurance Company v. Polish Steamship Company et al.*, 346 F3d 281 dated October 8, 2003, Continental Insurance Company ("Continental"), as the subrogee of the purported owner, consignee or underwriter of the steel coils, filed suit against Polish Steamship Company ("PSC") for loss and damage to the said steel coils. PSC, in turn, filed a third-party complaint against Trans Sea Transport N.V., the charterer of the vessel ("TST") under a charter party between PSC and TST, asking that any judgment in favor of Continental should be entered against TST. TST moved to dismiss the suit on the basis of the arbitration clause in the said charter party. The District Court for the Southern District of New York dismissed the suit initiated by Continental and found that the bills of lading incorporated the charter party arbitration clause, which applied to the dispute among Continental, PSC and TST. In upholding the District Court's judgment, the United States Court of Appeals, Second Circuit held that:

> 5. It has long been clear that "[w]here terms of the charter party are... expressly incorporated into the bills of lading they are a part of the contract of carriage and are binding upon those making claim for damages for the breach of that contract just as they would be if the dispute were between the [parties to the charter agreement]." *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687, 688 (2d Cir.1952). Generally, to incorporate a charter party effectively, the bill of lading must "specifically refer to a charter party" and use "unmistakable language" indicating that it is incorporated. *See Import Export Steel Corp. v. Mississippi Valley Barge Line Co.*, 351 F.2d 503, 506 (2d Cir.1965). . .

Similarly, the Original B/L in the present case expressly incorporated the terms of the Fixture Note which, in turn, expressly incorporated the terms of GENCON 94, specifically Clause 19(a) thereof. Consequently, if Plaintiff Minaj Holdings is claiming breach of contract as a third-party beneficiary, it would be bound to arbitrate its claims against the Defendant in London as required by the contract which it claims was breached.

The Plaintiffs cannot argue, on the one hand, that Plaintiff Minaj Holdings has standing to initiate a claim against the Defendant as "*a third party beneficiary to the Bill of Lading as it is the party which was to take delivery actual [sic] of the Cargo after BNA [sic] endorsed the Bill of Lading to Minaj, transferring ownership to Minaj...*", and, on the other hand, deny any connection to the Fixture Note and the Bill of Lading in order to avoid the application of the arbitration clause incorporated therein.

To reiterate, it is settled that a third-party beneficiary who is a non-signatory to an arbitration agreement may be compelled to arbitrate. *See Todd v. Steamship Mutual Underwriting Association Bermuda Limited*, 601 F. 3d 329 (5th Cir. 2010), citing *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 1896 (2009).

Further, pursuant to the Sales Contract between Rizhao Qihan and Plaintiff Minaj Holdings, Rizhao Qihan was responsible for entering into a contract of carriage to ship the Cargo. In this regard, Rizhao Qihan was acting on behalf of Plaintiff Minaj Holdings and it is recognized that, under certain circumstances, the consignee and receiver of goods can be bound by the terms of a contract of carriage under an implied agency theory. *See In the Matter of Arbitration between Keystone Shipping Co., et. al., and Texport Oil Company*, 782 F. Supp. 28, 1992 AMC 1768 (S.D.N.Y. 1992).

IV. FAILURE TO STATE A CAUSE OF ACTION - STATUTE OF LIMITATIONS

The m/v Kuk Il dropped anchor near Port Harcourt, Nigeria on January 25, 2010, ready to discharge the Cargo. The Cargo, therefore, should have been delivered at Port Harcourt, Nigeria, on or about January 25, 2010, but the m/v Kuk Il could not berth and discharge the Cargo at the said Port due to reasons entirely attributable to Plaintiff Minaj Holdings, specifically, the expiry of its approval to import cement more than a year earlier. Even with having to sail to the Port of Douala, Cameroon and several rain delays after its arrival at the said Port, the Cargo was completely discharged within about 20 days after its arrival thereat, so the Cargo "should have been delivered" at Port Harcourt, Nigeria within the period 25 January to 13 February 2010, if not for reasons entirely attributable to Plaintiff Minaj Holdings. The original Complaint that was filed on February 18, 2011 was, therefore, filed beyond the applicable one-year statute of limitation contained in Section 404(6) of the Carriage by Sea Act.

Section 404(6) of the Carriage by Sea Act provides as follows:

§404. Responsibilities and Liabilities.

. . .

(6)...Subject to Subsection (7) of this Section, the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen. In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

A complaint is subject to dismissal for failure to state a claim if the allegations thereof show that relief is barred by the applicable statute of limitations. *See Jones v. Bock*, 549 U.S. 199 (2007).

In *Sunkist Growers, Inc v Matson Navigation Co.*, 49 Cal. App. 3d 975, the Plaintiff delivered to the Defendant at Wilmington, California, a cargo of citrus fruits which, according to the governing contract of carriage/bill of lading "should have been delivered" to Hawaii on or before December 5, 1969. The cargo was not delivered by such date in Hawaii, but was returned by the Defendant to the Plaintiff at Wilmington, California after February 2, 1970. The Plaintiff asserted that the one year statute of limitations under the Carriage of Goods by Sea Act should be counted from the date of redelivery of the cargo at Wilmington, California and, as such, its filing of the suit against the Defendant on February 2, 1971 was timely made. To the contrary, the Defendant asserted that the Act's reference to "delivery of the goods" means delivery of the cargo, according to the contract of carriage/bill of lading, at the point of destination, which, in this case, was Hawaii and since such delivery was never made, the

critical point of time under the said Act should be the date when the cargo "should have been delivered" in Hawaii. Significantly, it was held that:

> ... the statute of limitations of the act...commences running on the date of delivery of the goods or on the date the goods should have been delivered, at their destination, according to the bill of lading or other contract for their carriage.

In the present case, assuming that Plaintiffs had a cause of action against the Defendant, it must have arisen on a date between January 25, 2010, and February 13, 2010, and the FAC, which relates to the Original Complaint filed on February 18, 2011, was therefore filed beyond the applicable one-year period of limitation. Consequently, the FAC is dismissed as time-barred under the one-year statute of limitation of the Carriage by Sea Act.

Even if the Carriage by Sea Act was not applicable in the present case, the Conditions of Carriage on the overleaf of the Original B/L that was actually issued by the Defendant (the "Conditions of Carriage") provide, among others, that:

> (2) General Paramount Clause
>
> (a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading dated Brussels the 25th August 1924 as enacted in the country of shipment, shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.
>
> (b) Trades where Hague-Visby Rules apply.
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> In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 - the Hague-Visby Rules - apply compulsorily, the provisions of the respective legislation shall apply to this Bill of Lading...

Pertinently, Article III (6) of the Hague Rules provides that:

> 6...In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

Further, Article III (6) of the Hague-Visby Rules provides that:

> 6...Subject to paragraph 6*bis* the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen...

While the Hague Rules seem to limit applicability of the one-year period of limitation to claims against the carrier and the ship for loss or damage of the goods, the Hague-Visby Rules expanded such applicability to any claims whatsoever against the carrier and the ship in respect of the goods.

With regard to any claim for purported non-delivery of Cargo, both the Hague Rules and the Hague-Visby Rules provide that the carrier should not be liable for loss or damage to goods (and non-delivery thereof) that may arise or result from "arrest or restraint of princes, rulers or people, or seizure under legal process." The aforesaid covers the situation when delivery of the Cargo by the carrier is prevented by state or official authority. In the present case, the Defendant's vessel, m/v Kuk Il, was prohibited by the authorities from berthing and discharging at Port Harcourt, Nigeria due entirely to the fault of Plaintiff Minaj Holdings which failed to renew its approval to import cement with the government of Nigeria. Pertinently, Clause 8 of the Sales Contract dated July 23, 2009, between Rizhao Qihan, as the

seller, and Plaintiff Minaj Holdings, as the buyer, provides that Plaintiff Minaj Holdings had the sole responsibility:

> ...of securing all permits, licenses or any other documents required by the government of the importing nation. Seller will bear no responsibility to provide such documentation. Buyer will bear all costs associated with securing such documents and will also bear all costs and penalties if such documents are not secured.

In this regard, Plaintiff Minaj Holdings failed to perform such responsibility. As a result, the m/v Kuk Il was effectively detained by the authorities at sea around 125 miles away from the said Port for about 18 days. In light of the foregoing, any claim for purported non-delivery of the Cargo must fail.

Additionally, China, which is the country of shipment in this matter, devised its own rules using some features of the aforesaid Hague Rules and Hague-Visby Rules in the 1993 Maritime Code of the People's Republic of China ("PRC Maritime Code"). Article 257 of the PRC Maritime Code provides that:

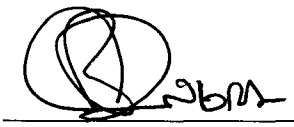
> The Limitation period for claims against the carrier with regard to the carriage of goods by sea is one year, counting from the day on which the goods were delivered or should have been delivered by the carrier...

Under the PRC Maritime Code, the one-year limitation period would apply to any claims against the carrier with regard to the carriage of goods by sea.

Therefore, whatever claims for relief sought by Plaintiffs would be time-barred whether under the Carriage by Sea Act, the laws enacting The Hague Rules and Hague-Visby Rules, or the law in the country of shipment.

For the above reasons the First Amended Complaint is dismissed for failure to state a claim upon which relief can be granted.

Dated: July 9, 2012.



Carl B. Ingram
Chief Justice