THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

CIVIL SUIT NO 161 OF 2010

DIAN GF INTERNATIONAL LTD} ..... PLAINTIFF

VERSUS

DAMCO LOGISTICS UGANDA LIMITED}..... DEFENDANT

AND

TRANTRAC LTD)..... THIRD PARTY

BEFORE HONOURABLE JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The plaintiff is a limited liability company incorporated under the laws of Uganda and brought a lawsuit against the first defendant DAMCO Logistics Uganda limited claiming a sum of US$303,330, interest, damages and costs of the suit. In the plaint the plaintiff avers that the defendant is and was at all material times a common carrier of goods for hire and by an oral agreement on or about 31 March 2010 between the plaintiff and the defendant, the defendant undertook to safely and securely ship 306 bags of Nile Perch Fish Maws belonging to the plaintiff from Kampala to Vietnam. The defendant duly received the fish maws but in breach of the agreement, the defendant did not safely and securely carry the said goods or deliver the same to Vietnam within a reasonable time or at all but wrongfully failed to deliver the said goods and the defendant has wholly lost the same. The plaint avers that on 6 April 2010 the defendant's employee and/or agent who wrote to the plaintiffs principles advising them that the container number MSKU4332077 was found empty en route to Kenya. Consequently the plaintiff demanded for refund of money but the defendant refused/neglected to pay the said sum. The plaintiff avers that at all material times the goods were under the care, custody and control of the defendant. The plaintiff therefore avers that the plaintiff has been deprived of

the goods and its value and suffered loss and damage for which it holds the defendant liable.

The defendant filed a written statement of defence in which denied liability. It avers that the goods were transported at "owner's risk" in accordance with the defendant's terms and conditions. The defendant further alleges that the terms were brought to the knowledge of the plaintiff and that it was aware of their application. The defendant further pleads that the goods were robbed from the driver at gunpoint and accordingly the exemption clause of carrying the goods at owner's risk kicked in and became effective. Secondly, that the defendant could not reasonably foresee that the goods would be stolen at gunpoint while on transit. Consequently the defendant pleaded that it was not liable for whatever loss that may have occurred if at all, and is exempted from such a liability by virtue of an exclusion clause. The defendant filed third party proceedings against the third-party Transtrac Ltd in which it claimed indemnity against liability. Transtrac Ltd the third-party filed its third parties written statement of defence. The third-party agreed with the defendants defence as contained in the written statement of defence and particularly the defendant's standard trading conditions

Alternatively the third-party pleaded that it was contractually bound to take out that maintain a valid insurance policy for cargo loss and damage in respect of its dealings with the defendant and show the same to the defendant on demand. The third-party had a valid insurance policy with a maximum limit per conveyance of US$55,000. The third-party further did not submit to the jurisdiction of the court. The third-party objected to jurisdiction and objection was overruled on 8 April 2011 and the suit proceeded for hearing on its merits.

The plaintiff, the defendant and the third-party filed a joint scheduling pre-trial bundle in which the following facts are agreed:

1. The plaintiff contracted the defendant to transport its consignment of Nile Perch fish maws from Kampala to Vietnam.
2. On March 31, 2010 the defendant took delivery of the said consignment at the plaintiff's warehouse on Sir Apollo Kaggwa road.
3. The plaintiff loaded the consignment in container number MSKU 433207 – 7.

4. The defendant acknowledged receipt of the consignment.
5. On April 6, 2010 the defendant's employee and/or agent wrote to the plaintiffs principals advising that the container number MSK 243 3207 – seven was found empty en route to Nairobi.
6. The defendant did not deliver the container as contracted by the plaintiff.
7. The defendant and the third-party executed a contract dated 29th of October 2004.

The issues for trial

1. Whether or not the defendant is liable for the loss of the goods?
2. What is the amount of the loss suffered by the plaintiff?
3. Whether the third-party is liable to indemnify the defendant?
4. Remedies available to the parties?

The joint scheduling memorandum was signed by the parties on 14 November 2011. At the hearing Kiwanuka Kirwowa of Messrs Kiwanuka and Karugire Advocates represented the plaintiff while Barnabas Tumusinguzi of Messrs Sebalu & Lule Advocates, represented the defendant. Dan Wegulo of Messrs Wegulo and Wandera Advocates, represented the third party. The plaintiff called one witness, PW1 Mr. Lin Qian Jian the plaintiffs MD. Defendant called DW1 Mr. Andrew Ejotu the accounts manager of the defendant. The 3rd party also called one witness TPW1 Mr. Geoffrey Baitwa the third party's MD. At the close of the respective cases of the parties learned counsels opted to file written submissions. Written submissions which were filed in the following order:

Plaintiff will filed written submissions on the court record on the 23rd of November 2011 which were presumably served on the Defendant's and 3rd party's counsels. The defendant also filed submissions in support of the liability of the third party on the 29th of November 2011. Thereafter the third party Messrs Tractrac Limited filed written submissions on the question of third party liability on the 9th of December 2011. The defendant filed additional written submissions in opposition to the plaintiff's submissions on the 13th of December 2011. The plaintiff replied to these submissions on the 19th of December 2011. The defendant also replied to third party submissions and

filed the same on court record on the 21st of December 2011. The submissions of the counsels are reproduced as nearly by starting with the plaintiff's submissions and response of the defendant and thereafter the question of third party liability is addressed separately.

Submissions of the plaintiff

The Plaintiff claim against the Defendant is for a sum of USD 303,330 (United States Dollars Three Hundred and Three Thousand Three Hundred and Thirty), interest, damages and costs of the suit. Counsel for the plaintiff contended that the Defendant was at all material times a Common Carrier of goods for hire who by an oral agreement on or about the 31st of March 2010 undertook to safely and securely ship 306 bags of Nile Perch fish maws, belonging to the Plaintiff from Kampala to Vietnam and on 31st March 2010 the Defendant loaded the goods in container no. MSKU 433207-7 dully acknowledged the goods and an equipment and interchange condition report was issued by Maersk Container service. In breach of the agreement and duty, the Defendant wrongfully failed to deliver the said goods and has wholly lost the same depriving the plaintiff of the goods and plaintiff has suffered loss and damage for which hold the Defendant liable as prayed for.

Counsel submitted that the Defendant admits having taken the goods for transportation to Vietnam but denied liability for the loss of goods on transit contended that the agreement of transportation was subject to the Defendant's terms and conditions that exempt the loss the plaintiff suffered. The liability of the Defendant is further excluded by the exclusion clause of "all cargo is handled, transported and stored at "owner's risk" which was brought to the notice of the Plaintiff by email before the contract was concluded and also that the loss was not occasioned by the negligence of the Defendant but by circumstances beyond its control as it could not reasonably foresee that the goods would be stolen at gun point. In the alternative the defendant claimed indemnity from Trantrac Limited who was joined as a third party.

Issue No. 1. WHETHER THE DEFENDANT IS LIABLE FOR THE LOSS OF THE GOODS:

Counsel for the plaintiff submitted that the defendant is liable to the plaintiff for the loss of goods claimed in the suit. In that it is not in dispute that the Plaintiff contracted the Defendant to transport its consignment of Nile Perch

Fish Maws from Kampala to Vietnam on March 31, 2010. The Defendant took delivery of the said consignment at the Plaintiff's ware house on Sir Apollo Kaggwa road and the same was loaded in container no. MSKU433207-7 and receipt thereof acknowledged by the Defendant. On April I6, 2010 the Defendants employee and/or agent wrote to the Plaintiffs principals advising that the cargo was found empty en route to Nairobi and as such the Defendant did not deliver the container as agreed.

The Defendant admits the Plaintiffs averments save for the value of the goods and its liability as it contends that it is exempted from such liability by virtue of the exclusion clause that the goods are transported at "OWNER's RISK" in accordance with the terms and conditions of service duly notified to the Plaintiff by an email communication. Counsel submitted that the Defendant is a common carrier with an implied duty to carry the goods safely after the goods were entrusted. A common carrier is that person who is ready to carry for hire as a business and not as a casual occupation accordance with the case of **Belfast Ropework Company** versus **Bushell (1918) 1 KB 210.** Counsel contended that the evidence of PW1 the plaintiffs MD was that they never executed a written contract with the Defendant and were not notified of any terms and conditions of service. As far as Exhibit D2 is concerned PW1 and Jabez got to know about it in the beginning of April 2010 upon being given a copy at the Defendant's office but it did not have the email address of PW1 or Mr. Jabez another official of the plaintiff at the material time.

DW 1 testified that in 2010 he interacted with the Plaintiff who was dealing in mainly fish maws exports and that he mainly dealt with PW1 Lin and also Jabez. He testified that Mr. Jabez would come to him with a view to obtaining the most favourable shipping rates. And that most of the time Mr. Jabez would walk into his office and after agreeing on the rates he would prepare a quote in Microsoft word and print a copy. He testified that the rates would show the charges and also show the terms and conditions under which we are carrying the goods and period of validity of the quotation and that this kind of interaction with Jabez took place every two or three months. He testified that Exh. D2 (ii) at page 24 of the trial bundle shows two emails which he had sent to Mr. Jabez on January 12th 2010 and April 16th 2010 and that Google desk top is a search engine installed on their system which helps to show archived email especially one more than a year back.

He testified that the email is addressed to Dian GF on 12th January 2010 writing to Jabez offering him services through one of the shipping lines and that goods

are transported at the owners risk and it was communicated to Plaintiff and that he personally sent the email to Mr. Jabez. However, in cross examination he testified that Exh. D2 (ii) page 24 does not show the email address that he used and it does not show the email address of the recipient. Counsel contended that the defendant wanted this court to believe that they were carriers by contract under the terms stipulated in Exhibit D2 (ii) and Exhibit D3 and having communicated the same to the Plaintiff by email. Counsel contended that the evidence on record does not prove that the email Exh. D2 (ii) was ever delivered to the Plaintiff. Counsel relied on the case of SECURICORCOURIER (K) LTD versus BENSON DAVID ONYANGO and MARGARET R. ONYANGO CIVIL APPEAL NO. 323 OF 2002 COURT OF APPEAL, NAIROBI it was held that and the exemption clause has to be brought to the attention of the person against whom it is to operate at the time of making the contract and it becomes part of the contract. Reference was made by the court to *Thornton vs. Shoe Lane Parking Ltd*. [1971] 2 Q.B. 163; *Interfoto Picture Library Ltd vs. Stiletto Visual Programmes Ltd*. [1989] 1 Q.B. 433) that an exemption clause can be incorporated in a contract by, *inter alia*, signature or notice."

Counsel submitted that persons who rely on a contract to exempt themselves from their liability must prove that contract strictly and the only way was by handing to him at the time of the contract a written notice specifying its terms and making it clear to him that the contract was on those terms and no other. Proof of delivery is a method to establish the fact that the recipient received the contents sent by the sender. When the sender sends documents through mail there is a possibility of the same not reaching the intended recipient. Legal complications arise if the recipient company refutes receiving an email.
Emails are not easily admissible in evidence because they can be altered after sending copies of the same are not necessarily proof of delivery to the specific recipient. Learned Counsel for the Plaintiff relied on the opinion in BACK TO THE FUTURE: LORRAINE V. MARKEL AMERICAN INSURANCE CO. AND NEW FINDINGS ON THE ADMISSIBILITY OF ELECTRONICALLY STORED INFORMATION on the American position at page 366. It was observed that electronic evidence comes in many forms and it is no secret that someone highly adept with computers has the ability to make viewers see whatever he or she wants them to see. The common law rule that acceptance of an offer takes place when notice of it is posted and not when it is received by the offeror does not apply in the era of electronic email, since the sender needs to demonstrate proof of receipt, when the email was sent and other matters of authentication. Unfortunately, as with physical letters, proof of sending is not proof of receipt.

In the landmark case of LORRAINE versus MARKEL AMERICAN INSURANCE COMPANY, 2007 WL 1300739 in defining court admissibility standards for email and burden of proof it was observed that,

> "For email evidence, the burden of proof lies with the party who wishes to employ an email record as evidence of an electronic transaction and therefore such records must be in a court admissible format. This will require independent verification of the components mathematically associated to wit;
> (a) The original message content and all attachments:
>
> The uniform time (not the sender's desktop computer time) of transmission (sending and receipt) of the message and
>
> (b) The underlying transmission metadata that for court purposes serves as the recorded digital snap shot of both servers' sender and recipient! Collection transaction data that under terms of electronic law meet the test of legal delivery".
>
> " ... for an underlying email record (sent email or received reply email) to be court admissible in a situation where the integrity of the content or time of receipt is challenged, the record must be capable of third party verification of delivery/ receipt times, associated content and associated transmission meta-data, with each capable of independent verification".

Learned Counsel submitted that in BACK TO THE FUTURE: LORRAINE V. MARKEL AMERICAN INSURANCE CO. AND NEW FINDINGS ON THE ADMISSIBILITY OF ELECTRONICALLY STORED INFORMATION page 366 it was established that a "A piece of paper or electronically stored information, without any indication of its creator, source or custodian may not be authenticated ..." Counsel further relied on OPEN MEMO TO MARK ZUCKERBERG, CEO, FACEBOOK FROM ZAFAR KHAN, CEO, Post where it was observed that a printed email (from ones' sent folder, inbox or archive) can easily be denied admission into evidence by simply challenging contents authenticity, time of sending or whether the email was in fact delivered and secondly a copy of an email sent to yourself or another person has no bearing as to whether a copy was also delivered to your intended recipient. Thirdly electronically stored copies of an email in an archive of the sender or recipient only provide a record of what the archiving party "claims" to have happened. Even if the archiving parties can forensically prove the content in their archive is authentic, they will be unable to prove delivery or timing of receipt should

the recipient claim non-receipt. Learned plaintiff's counsel submitted that exhibit D2 (ii) which the Defendant relies on as prove of notice of the terms of carriage to the Plaintiff does not show the sender, recipient, date of sending or even the time. On the other hand exhibit D2 (i) which is another email sent to the Plaintiff clearly shows the sender, recipient, date of sending or even the time. Counsel asked the court to reject the explanation afforded by DW1 that the emails were archived and that is why they do not show the sender, recipient, date or time as a complete falsehood. He contended that there is no evidence of the witness' expertise in interpreting electronic documents or their meta mathematics.

Counsel contended that the Defendant who wishes this court to find that he gave the Plaintiff notice of the terms and conditions of service by email has failed to discharge the burden of proving that the email communication was sent to, leave alone received by the Plaintiff. The defendant did not exercise diligence of a common carrier.

Counsel further submitted that instructions and/or contractual obligations/ engagement give rise to an obligation to take reasonable care. (Halsbury's Laws of England 3rd Edition Vol. 4 p. 137). Counsel referred to the testimony of DW1 on the loss of cargo, the email from Nakiyingi Rebecca and employee of the Defendant informing the plaintiff of the loss and the agreed facts establishing the loss of cargo en route to Mombasa. He contended that DW1 did not know where Nakiyingi got the information contained in her email Exhibit 02 (i) but believes investigations were carried out but did not know what happened. In re- examination he testified that the goods were stolen in the custody of the third party, the carrier and that the third party would be in the best position to explain what happened.

In this respect TPW1 testified that the cargo was not delivered to Mombasa as agreed because the vehicle was attacked by some people who put the occupants at gun point in another small car and drove off and the truck was driven off by a third party. In cross examination by counsel for the Plaintiff he testified that Exh 05 is dated 13th April 2010 about seven (7) days after the loss of the cargo and long before the police report was issued and that he was not at the scene and was just told about what transpired and the police report which was presented does not have the details of what happened at the scene. Counsel attacked the testimony of DW1 and TPW1 as to what happened to the goods in question as inadmissible hearsay evidence. He contended that the defendant did not adduce any evidence as to whether it exercised any

diligence as expected of it. Counsel submitted that this is habitually done in the same or similar circumstances to establish the test of reasonable care and the court should not excuse obvious failure to make some inquiry or take some precaution.

DW1 testified that since that incident there has been no problem as they have put in place special arrangements including special escorts and moving in convoys. In this respect TPW1 testimony agreed that he was aware of measures put in place to ensure safety of cargo which included the convey system; using of escort vehicles by company staff and or police. That “it is possible to secure the goods on transit if you are asked to do so.” Counsel also referred to the further testimony of TPW1 that before they employ any of the measures to secure the cargo they first have to know the cargo and its value.

Counsel for the plaintiff therefore concluded on this point that the evidence adduced showed that the loss could have been averted by exercise of due diligence and care. TPW1 had testified that it was their business to carry for hire goods for whoever wished to have his goods forwarded. Counsel concluded that the defendant was at all material times a common carrier and liable as such for loss and damage without proof of negligence. A common carrier **in** essence is an insurer of the safety of the goods against everything extraneous which may cause loss or injury. A common carriers liability extends to circumstances where loss or injury is caused wholly by negligence of other persons over whom he has no control.

In the alternative and without prejudice counsel submitted that the that, even if the court found that the terms and conditions were applicable in the circumstances, the exclusion clause is not available to the Defendant by reason of fundamental breach of the contract. He contended that by the Defendant entering into the contract with the Plaintiff, it undertook to exercise due care in the transportation of the Plaintiff's cargo. The contract was to transport the cargo to Vietnam and failure to do so amounted to a fundamental breach of the terms of the contract. Counsel referred to SDV TRANSAMI (U) LTD versus NSIBAMBI ENTERPRISES CIVIL APPEAL NO. 59 OF 2006 (CA), the judgment of the court of appeal at page 10 that to the effect that for an exemption clause must be enforced by court, if they are clear unambiguous and accepted by the parties. If the act complained of does not amount to a fundamental breach of the contract or where there is negligence. The court found that failure to deliver the cargo coupled with failure to adduce evidence showing that the failure was due to reasons beyond control or negligence of the consignee was

a fundamental breach. They noted that there was no evidence showing that the loss was due to an act of God or beyond the control of its agents. The appellant was in fundamental breach of contract and not protected by the exemption clause.

Counsel further contended that by having a general clause that "goods are transported at “OWNERS RISK" would erode the fundamentals of the agreement to transport between the parties. By this clause the Defendant would owe the plaintiff no duty and this fundamentally alters the relationship between the parties. Possession and risk would pass to the Defendant at the time of handover and acceptance of the goods. Risk cannot remain with the Plaintiff after the goods have been handed over to the Defendant. Counsel relied on the cases of EXPRESS TRANSPORT CO. LTD VERSUS BAT TANZANIA LIMITED (1968) EA 443 where it was held that an exemption clause excluding liability would be construed as relating only to that liability which would arise without negligence unless liability for negligence is expressly excluded.

In conclusion counsel submitted that the defendant was at all material times a common carrier and no contract was required to establish its liability with an implied duty to exercise due care and also to insure and ensure the safety of the goods against any damage. The defendant was liable for the loss and that there was no notice of the exemption clause to the plaintiff and therefore the Defendant cannot rely on it.

In reply the written submissions of the defendant on issue No. 1 are:

While it is true that PW1 testified that they had been no written Contract between the Defendant and the Plaintiff, this has to be seen in the context of what as a lay person he was meaning in the context of a document signed by both parties. However, it is not true to assert there was no written correspondence between one Jabez an officer of the Plaintiff and DW1. From the outset, it is clear that Jabez was never called as a witness to deny whether or not he ever received the email correspondence. PW1 could not competently testify on whether or not Jabez ever received the said email. It was never the contention of the Defence that PW1 ever received this email and as PW1 correctly stated in examination in chief, his email address is not there. The evidence of PW1 in relation to whether or not the email was received is very instructive in that he admitted that Jabez received the email. In cross-examination, it was clear from PW1 that he knew Jabez who was his Export Manager and co-ordinated the export business between the Plaintiff and the

Defendant and had been assigned to deal and did go to Damco to handle matters related to the export of the goods. Counsel submitted that Jabez was better placed to deny that he ever received the email than PW1 given the nature of his work. Secondly counsel submitted that the email in question was admitted by consent and the plaintiff ought to have objected to the email at the time of the consent is he had any serious objections to it but he did not. PW1 may have known about the email in 2010 April 2010 but he could not speak for Mr. Jabez.

As far as proof of the contents of the email are concerned counsel submitted that the contents thereof do relate to the transaction in issue, and the details have a full bearing on the nature of transaction in issue. Counsel further submitted that the fact that the email address was not indicated was well and ably explained by DW1. That the email Exh. D2 (i) was received by the Plaintiff's agent one Jabez, and the moment the Defendant adduced the evidence that the email was sent with the conditions, the burden shifted to the Plaintiff prove that it was never received. Consequently in "conformity with the **SECURICOR COURIER K LTD** case, cited by Counsel for the Plaintiff, the Exclusion clause was brought to the attention of the Plaintiff and is accordingly enforceable.
As far as alteration of the email of giving notice to the plaintiff is concerned counsel for the defendant submitted that no evidence was led to show that the email was altered after being sent. Moreover the email had already been admitted in evidence and, therefore, the issue of its admissibility does not arise. As far as the article "BACKTO THE FUTURE" relied on by Counsel for the Plaintiff is concerned the defendants counsel contended that it cannot be relied on and is easily distinguishable because authentication of emails which Counsel for the Plaintiff says is a requirement and should have been done in this case is a requirement under United States Federal Law (see page 367) of the said Article and specifically this is a requirement under **Rule 961 of the Federal Rules of Evidence of the United States of America** as evidenced on Page 367 of the said Article. Counsel contended that unless Counsel for the Plaintiff is able to show a local Ugandan Statute in pari materia, this Court cannot apply provisions of the United States Federal law.

Counsel submitted that the Plaintiff denied receiving the email but having proved that the email was sent, the burden shifted to the Plaintiff to show that it was not received. The plaintiff chose not to call Mr. Jabez who received the mail as a witness and contended that there was no justifiable reason shown,

given the amount claimed why he could not be called back from China to testify.

As to the submission of the plaintiff's counsel that the evidence of DW1 and TPW1 as to what happened to the goods was hearsay, defendants counsel submitted that this was an attempt to pour cold water on the contention of the Defendant and Third Party evidence as to what happened to the goods. However, documentary Exhibit TP2 was admitted by consent in evidence without objection by Counsel for the Plaintiff and it demonstrates what happened to the goods. Secondly, Counsel for the Plaintiff did not object to the said evidence and did not show in his cross-examination how this evidence was false or demonstrably unreliable.

Counsel distinguished the case of SDV Transami (U) Limited vs. Nsibambi Enterprises, relied on by Counsel for the Plaintiff to show that because there was a fundamental breach, the Defendant was liable. In the **SDV Transami (U) Limited -vs- Nsibambi Enterprises** case, there was negligence on the part of the Carrier who loaded the Container in a manner that subjected the same to tipping over, and falling and damaging the goods. There is no claim in the suit that the Defendant was negligent, and indeed no negligence was pleaded against the Defendant. The Judges of Appeal noted there was a duty to deliver the goods as per Contract between the parties unless for good reason ... (page 10) of the Judgment:

> *"Had it been shown that the Appellant or its servants were diligent and had fulfilled their obligations, I would have accepted Counsel's submission that the exemption absolved the Appellant of any liability".*

The Judge went further;

> *"No evidence was adduced by the Appellant to show that damage to the Respondent's cargo was not due to a fault on its part or that what was required of it was done but still the accident occurred'.*

Relating the observations of the Judge of Appeal to the facts of this case, it is clear that the loss of the goods in this case was occasioned by circumstances beyond the control of the Defendant. The Defendant and its agents did what was required of them but still the goods got stolen, as the stealing could not have been reasonably foreseeable and, the theft was beyond the control of the Defendant.

The case of SDV Transami (U) Limited -vs- Nsibambi Enterprises, on the contrary supports the Defendant's contention as the circumstances that would have entitled the Appellant to exclude liability are on all fours with those in

this case and as such the Exclusion clause should be enforced by this Court. As far as the case of **Express Transport Co. Ltd -vs- BAT Tanzania Limited,** the following extract from the case has been made by Counsel for the Plaintiff:

> *"Any clause excluding liability would be construed as relating to only that liability which would arise without negligence, unless it was quite clear that liability for negligence was also excluded."*

Counsel contended that this statement is distinguishable from the facts of this case because, the liability in question was without negligence, and as observed earlier no negligence has been imputed or been pleaded against the Defendant. In the case of **Stella Twinebirungi-vs- Akamba Public Service Ltd. Civil Sit No.24 of 2004,** Justice Geoffrey Kiryabwire, accepted and allowed the enforcement of an Exclusion clause exempting liability where the same had been brought to the attention of the Plaintiff. Counsel submitted that in this case the Exclusion clause was brought to the attention of the Plaintiffs, and they have not brought any evidence to rebut that assertion, and accordingly the Exclusion clause kicks in to exclude the Defendant from liability.

In rejoinder on issue No. 1 the plaintiff counsel submitted as follows:

Counsel submitted that the defendant is liable to the plaintiff for the loss of goods. The instructions to carry the goods are not denied. The loss of the goods is not denied. As such the Defendant admits that the terms of the contract were breached. The defendants position is that they were carriers by contract under the terms stipulated Exhibit D2 (ii) and Exhibit D3. Counsel contended that in the instant case there was no signed agreement and no terms are incorporated unless reasonable steps have been taken to draw them to the attention of the other party prior to or at the time of the agreement and this is the position of the law as set in **PARKER V SOUTH EASTERN RLY [1877] 2 C.P.D 416. He submitted that r**elying on the above cited cases the Plaintiff has to unequivocally agree to be bound by the terms being advanced by the Defendant.

Learned Counsel further submitted that the burden to prove that the terms and conditions of service were communicated to the Plaintiff lay upon the Defendant who has failed to prove that the same were brought to the attention of the Plaintiff. The burden of proof is upon the defendant as stipulated under section 8 (2) of the Electronic Transactions Act, Act 8 of 2011.

Furthermore section 103 of the Evidence Act but the burden of proof of any particular fact on the person who wants to assert the fact to the court and the circumstances of the case it was upon the defendants to prove that the purported email was sent and received. Citing TREITEL ON CONTRACT, TWELFTH EDITION at page 240 para 7-003 a party who wishes to rely on an exemption clause must show that the clause has been incorporated into the contract. In the case of LACEYSFOOT WEAR V BOWLER INSURANCE [1997] 2 LLOYDS a condition will be incorporated into a contract only if the latter party knew the document contained it or reasonable notice of it was given.

Counsel submitted that an exclusion clause is an integral part of the contract and such a term must thus be brought to the attention of the other party as per SPURLING LTD V BRADSHAW [1956] 2 ALL ER 121. According to Lord Denning MR if the clause is of such a nature that the party adversely affected would not expect it then the other party cannot incorporate it just by handing over or displaying the document but must make it conspicuous. Counsel further submitted that according to SCHMITTHOFF EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE, at page 67 in instances where there is an agreement and the seller wants to incorporate standard terms into the contract, the seller must obtain the buyers UNQUALIFIED CONFIRMATION before carrying out the contract especially when such negotiations are carried out by correspondence. The evidence on the record does not prove that the email Exh. D2 (ii) was delivered to the Plaintiff or that the alleged terms were ever brought to the attention of the Plaintiff.

As far as the testimony of Jabez is concerned counsel submitted that he has left the company and it was not possible to call him to testify and further still in the circumstances of the case it was not necessary to bring the evidence of Jabez Lin as the defendant had failed to prove that he delivered the communication to the Plaintiff or even Jabez Lin himself.
As far as admission of exhibit D2 (ii) is concerned counsel submitted that the document was not admitted as having been delivered and the question before court is whether the said exhibit was brought to the attention of the Plaintiff. The document presented before court had no recipients' address and no evidence at all that it was in fact sent.

As far as the email exhibit D2 (ii) is said to contain the defendants terms and conditions of service, counsel submitted that acceptance will only be held to have occurred when the email is received by the offeree. In BERNUTH LINES LTD V HIGH SEASSHIPPING LTD [2006] 1 All ER (Comm) 359 it was held that it

was not sufficient in proving delivery of email by clicking on the send icon automatically that it amounts to good service. The email must of course be dispatched to what is, in fact the email address of the intended recipient. It must not be rejected by the system. Counsel contended that the Defendant can only rely on that email when it can prove by some cogent and reliable evidence that the addressee received the email. Furthermore in ENTORESLTD V MILES FAR EASTCORPORATION [1955]2 QB 327, it was held that where a contract is made by instantaneous communication, the contract is complete only when the acceptance is received.

Counsel reiterated his submissions as regards the evidence of what transpired at the scene of the alleged loss that it was hearsay. Counsel submitted that the Defendant had the burden to prove that it acted diligently and that the loss was caused by circumstances beyond their control but this was not done and the only evidence on record is that the Defendant undertook to safely and securely deliver the Plaintiff's cargo. In fact TPW1 testified in cross examination that the loss could have been avoided if for example they had employed the services of an escort showing clearly that the theft was foreseeable and that it could be avoided. Counsel further relied on the case of CANADA SS LINES V THE KING [1952] AC 192, it was seen that if there is a realistic possibility that a party can be made liable irrespective of negligence, an exemption clause will not normally be construed so as to cover liability for negligence. This means that even when the defendants claim they were not negligent, the fact that the relationship between the plaintiffs and the defendants was one similar to a common carrier relationship, they would be liable even without negligence.

Judgment on issue No. 1

I have had time to consider the lengthy written submissions of counsels for the parties, the pleadings and evidence on record. Counsel's for the plaintiff, the defendant and the third-party filed a joint trial bundle in which they agreed on questions of facts namely: That the plaintiff contracted the defendant to transport its consignment of Nile Perch Fish Maws from Kampala to Vietnam and on the 31 of March 2010 the defendant took delivery of the said consignment at the plaintiff’s warehouse on Sir Apollo Kaggwa road in Kampala. The goods were loaded in container number MSKU 433207 – 7 and the defendant acknowledged receipt of the consignment. The defendant informed the plaintiff that the goods were robbed en route to port. On the 6th of April, 2010 the defendant's employee and/or agent wrote to the plaintiffs

principals advising that the container number MSK 243 3207 – 7 was found empty en route to Nairobi. Consequently it is an agreed fact that the defendant did not deliver the container as contracted by the plaintiff. It is also an agreed fact that the defendant and the third party executed a contract dated 29th of October 2004 and perusal of the contract inter alia shows that it has an indemnity clause indemnifying the defendant against certain third party claims stated therein.

It is not in issue that the plaintiff contracted the defendant to transport fish maws to Mombasa in Kenya en route to Vietnam from the plaintiff's warehouse on Sir Apollo Kaggwa road in Kampala. The goods were loaded on container number MSKU 433207 – 7 on the 31st of March 2010. It is not a contested fact that the goods were lost en route in Kenya. The defendant's main defence is that the goods were transported at the owners risk pursuant to an exemption clause found under its standard trading terms and conditions for the provision of the services of transportation of the goods in issue. Consequently one issue is whether the exemption clause relied on by the defendant exempted the defendant from any liability for loss of the plaintiff's goods. The sub issue to this is whether the exemption clause in the defendant's standard conditions were ever brought to the attention of or communicated to the plaintiff at the time the contract for the transportation of the goods in question was executed. Another sub issue in the question of whether there was communication of the exemption clause relates to the admissibility of e-mail allegedly used in communicating to the plaintiff, the terms and conditions of the defendant for the transportation of the goods in question. It is also not in dispute that the defendant had a separate agreement with the third-party in which there is a clause making the third-party liable to indemnify the defendant from third-party claims in certain circumstances which forms the basis of the submissions between the defendant and the third party in this matter. However before the court can determine whether the third-party is liable, the primary issue that has to first be determined is whether the defendant is liable for the loss of the goods of the plaintiff.

This issue primarily and firstly rests on whether there was any communication of the exemption clause asserted in defence of the claim by the defendant. In considering this issue there is no need to determine on merits whether the asserted exemption clause covered the situation at hand. However before

delving into this issue it is proper to first establish the time when the exclusion clause was allegedly communicated without prejudice to controversies relating to its admissibility in evidence and therefore determination of its effect on the merits. This is because for the asserted exclusion clause to apply, it has to be shown that it was communicated at the time when the contract was made and not after.

Analysis of evidence:
PW1 Lin Jian 46 years the MD of the plaintiff testified for the plaintiff and on the issue of when the email communicating the terms of the defendants exemption clause or standard terms of reference was made his testimony is that the plaintiff had been dealing with the defendant since February 2009 so that between February 2009 and January 2010, the defendant had transported 36 containers on behalf of the plaintiff. PW1's testimony is that there was no written contract between the plaintiff and the defendant in these transactions. That the defendant did not supply the plaintiff with any terms of reference. As far as the transaction in question is concerned it was for transportation of cargo worth US$ 303,330. The price agreed for transportation included the cost of sea freight plus 15%. The invoice for the cargo is dated 31st of March 2010 which invoice was given to the defendant carrier for shipment. On cross examination by learned Counsel Barnabas counsel for the defendant, PW1 testified that he knew Jabez who is an employee of the Plaintiff Company and works as an export manager. Mr. Jabez was involved in the export process of the goods and coordinated between plaintiff and defendant. Jabez was at times assigned to go to the defendant and attend to matters regarding export of goods. He was known to the defendant's staff. At the time of the testimony Mr. Jabez had finished his employment with the plaintiff and gone back to China in October 2010. However in January 2010 Jabez was in Uganda and working for the plaintiff and involved in coordinating exports. PW1 agreed that the email at page 24 of the trial bundle is dated 16th April 2010 and was sent to both him and Mr. Jabez and they had different email addresses. Was the email dated 16th April 2010 communicating the terms of the contract of carriage and the specific exemption clause therein? PW1's testimony is that the freight charges were US$ 2,000 and included inland transport to Vietnam and port changes. DW1 the account manager of the defendant Damco Logistics testified that he was an in-house sales agent for export and logistics in the year

2010 involved in giving quotations to clients and making phone calls to establish client satisfaction. He used to deal with PW1 and Mr. Jabez from the plaintiff company. Jabez would tell DW1 whether the rates for services provided by the defendant were acceptable or too high and DW1 tried to give him the best rates in the market after consulting and they would then reach an agreement. The rates would include charges for tracking to Mombasa and show the conditions under which the services were given by the defendant and the period of validity of the rates printed out for Mr Jabez as well. Upon expiry DW1 would communicate new rates. His testimony is that the rates would expire and Jabez came to him every two months. Most relevant to the question of when the alleged exemption clause was ever communicated, DW1 testified that at page 24 of trial bundle, he sent two emails to Mr. Jabez one dated January 12th 2010 and another dated the 16th of April 2010. Testified that the email of 12th January 2010 was written by DW1 to Jabez offering freight rates for fish maws to Vietnam and the amount was US 2000 per container and includes all the listed items at page 25 of the trial bundle. This document is exhibit D2 (ii) and at page 2 of the document it provides that "All business is subject to the DAMCO Standard Trading Conditions. All cargo is handled, transported and stored at owner's risk." The email does not indicate whether the standard trading terms and conditions of the defendant were attached to the email or handed over to the plaintiff in a hard copy.

The plaintiff's counsel attacked the email on the ground of its authentication in that it could not be verified when it was sent and whether it was received and other matters as submitted by counsel. The defendant's arguments were that the law relied on to make the attack on email was a statutory rule under American Federal law and unless there was as statute in pari materia in Uganda for the case law quoted to be considered relevant or persuasive. I have considered the submissions of the counsels on the question of admissibility of the email in question. I make particular reference to the submissions of the plaintiff's counsel on authentication and the defendants reply on the case law thereof being irrelevant. I do not agree that the case law is irrelevant because the **Electronic Transactions Act 2011, Act 8 of 2011** applies modern practices in this case at the point of admissibility of evidence as far as requirements for authentication is concerned. Secondly the principles upon which email evidence may be admissible are analogous to the traditional grounds under the

Evidence Act cap 6 Laws of Uganda for the admissibility of documentary evidence. Therefore even without a statute the principles developed in America can be of persuasive value as far as the analogy with the traditional grounds are concerned.

According to Jie ZHENG in an article **"Email Evidence Preservation, How to Balance the Obligation and the High Cost: Lex Electronica, Vol 14 n 2:**

> "To be admitted as evidence, an electronic message must first be authenticated or identified. Authentication is the process by which the authenticity, or genuineness, of the document is established. Whether the document is what it purports to be is a matter of conditional relevance i.e. the document is relevant only if the document is what it purports to be.
>
> E-mails are composed of a "header" and "body". While the body of the email contains the individual text composed by the sender, the header listing the sender's name and address, the recipient's user name and address, the transmission date and time and the subject matter of the mailing. If email is produced by a party from the party's files and on its face purports to have been sent by that party, these circumstances alone may suffice to establish authenticity. Authentication should be made through a knowledgeable witness who can identify the authorship as well as the documents appearance, contents, substance, internal patterns, or other distinctive characteristics. Given that most emails contained certain identifying markers, such as the address from which they were sent, the name of the sender, or the company name, that information, coupled with their production during discovery, should be enough to satisfy the authentication requirements.
>
> However, new technology requires new rules of authentication of emails, which lead to the uncertainties of authenticity for an email evidence on a case by case basis…"
>
> 2. Admissibility of email evidence
> At page 7
> "…Electronic evidence, as a type of "documentary evidence" must satisfy the same rules as are required for traditional documentary evidence to be admitted into evidence. It is subject to civil discovery in the same manner as paper documents.

> The best evidence rule requires that a party adduce the best evidence available, which in respect of documentary evidence, means that the original of a writing be offered into evidence. When introducing this rule to electronic evidence, it is required if that whether a computer printout is an "original" or "copy". The requirement of originality for paper document is applied differently in email evidence. If data are stored in a computer or similar device, any printout readable by sight, shown to reflect the data accurately, is deemed as "original".
>
> To admit emails into evidence, the proponent must show the origin and integrity of emails. He must show who or what originated the email and whether the content is complete in the form intended, free from error or fabrication. In discovery, the proponent needs to prove that the hard copy of the email evidence is consistent with the one in the computer and includes all the information held in the electronic document."

The articles in a nutshell summarises the requirements for the admissibility of email evidence under the new Ugandan **Electronic Transactions Act 2011, Act 8 of 2011**. This Act came into force on the 15th of April 2011 under statutory Instrument 2011 No. 36, the Electronic Transactions Act, 2011 (Commencement) Instrument, 2011.

The statute defines under section 2 (1) thereof "Data" to mean electronic representations of information in any form and "data message" to mean data generated, sent, received or stored by computer means a stored record. Under the Act "electronic communication" means a communication by means of data messages and "electronic record" means data which is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device and includes a display, print out or other output of that data.
The legal effect of electronic records under section 5 of the Electronic Transactions Act provides that information shall not be denied legal effect solely on the ground that it is in the form of a data message (i.e. email). The information has to be in a form of in which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as long as the information is reasonably capable of being reduced into electronic form by the party incorporating it. For a written document the requirements of the law are met where the information is accessible in the form of a data message and accessible in a manner which is usable for

subsequent reference. The Electronic Transactions Act also provides for authenticity of data messages under section 7 thereof which provides:

> "7. Authenticity of data message.
> (1) Where a law requires information to be presented or retained in its original form, the requirement is fulfilled by a data message if—
> (a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and
> (b) that information is capable of being displayed or produced to the person to whom it is to be presented.
> (2) For the purposes of subsection 1(a), the authenticity of a data message shall be assessed—
> (a) by considering whether the information has remained complete and unaltered, except for the addition of an endorsement and any change which arises in the normal course of communication, storage or display;
> (b) in light of the purpose for which the information was generated; and
> (c) having regard to all other relevant circumstances."

It follows that before admissibility the document has to meet the requirements of authentication or identification. This is a process of verification that establishes that the document is what it purports to be. I.e. that the email was made by the author indicated therein and is unaltered except for the change in the document generated automatically such as adding the date and time in case of email and address. As far as admissibility and weight of evidence of electronic data is concerned section 8 of the Electronic Transactions Act 2011 gives the principles thereof and provides that rules of evidence shall not be applied to deny admissibility on the ground that it is merely a data message or electronic record where it is the best evidence that the person adducing the evidence could reasonably be expected to obtain or on the ground that it is not in the original form. The burden is on the person adducing the data message to prove its authenticity by adducing relevant evidence therefore that the document is what it purports to be. Where best evidence is the evidence required, the rule of best evidence is fulfilled upon proof of the authenticity of the electronic records system in or by which the data was recorded or stored. In assessing the evidential weight the court shall have regard to the reliability of the manner in which the data message was generated, stored or communicated; the reliability of the manner in which the authenticity of the data message was maintained; the manner in which the originator of the data message or electronic record was identified; and any other relevant factor.

The authenticity of the electronic records system such as a computer is presumed in the absence of any evidence to the contrary where there is evidence that the system was operating properly. Where the record is stored by a party adverse to the production of the email or data message; evidence is led that the record was stored in the usual and ordinary course of business by a party who is not a party to the suit. The Act specifically provides that it does not modify the statutory or common law rules for the admissibility of evidence.
Section 8 (7) of the Electronic Transactions Act 2011 provides that:

> "8. (7). This section does not modify the common law or a statutory rule relating to the admissibility of records, except the rules relating to authentication and best evidence."

There was an attempt by DW1 to authenticate the email exhibit D 2 (ii) by admitting to its authorship and how he retrieved it from a Google system for retrieval of archival emails. The relevant email is dated 12th January 2010 and purports to incorporate the defendant's standard terms and conditions and also give notice that goods are transported at the "owner's risk". The relevant part of the email reads as follows:

> "Rates are valid until 31 March, 2010. The quoted rates are likewise subject to force majeure including but not limited to war, destruction of infrastructure, etc.., in which case we reserve our right to quote new rates duly reflecting such a different environment and scenario.
> All cargo is handled, transported and stored at owner's risk. Wherefore clients are recommended to insure their goods. (We can however get you a separate quotation for your insurance after you give us details of the value of the cargo and its volume and tonnage)
> All charges are to be paid prior to shipping of cargo, after which the bill of lading can be issued to you. We issue the original bill of lading once the vessel on which your container is loaded has sailed off Mombasa.
> Which trust you find a value proposition was competitive and we look forward to the business.
> Yours faithfully"
> Andrew Ejotu
> DAMCO/sales
> DAMCO LOGISTICS Uganda Ltd"

There are several things to note about exhibit D2 (ii). The email does not have the header which would have contained the time and date when it was transmitted. And at the bottom of the page there is another date of the 17th of April, 2010 and the full line reads as follows: http://127.0.0.1:4664/preview?event_id=6&q=dian+rates&s=fojhSh8...4/17/2010. This code appears at each page of the email in issue. DW1 testified in cross examination that he had obtained this document through a Google search engine on the 17th of April 2010. The search revealed two documents namely exhibit D2 (i) and D2 (ii). Exhibit D2 (i) is revealed by the header to be from Nakiyingi Rebecca Rebecca.Nakiyingi@damco.com However D2 (ii) does not have the sender or receivers email addresses, neither does it have a date of sending. The email in contention is exhibit D2 (ii). Secondly D2 (i) though clearly dated and with senders address shown does not have the electronic data signature reproduced below as:
http://127.0.0.1:4664/preview?event_id=6&q=dian+rates&s=fojhSh8...4/17/2010, displayed at the bottom of the printout. It is therefore doubtful whether these two exhibits D2 (i) and D2 (ii) were accessed or printed out using the same process, search engine or computer devise. I agree with the plaintiffs that the process of authentication of exhibit D2 (ii) does not meet the requirements of section 7 of the Electronic Transactions Act cap 2011 and the case law cited. I am not persuaded that authentication by DW1 shows that this information was available through a process which ensured that it remained unaltered as it was in the original when it was sent. There is no satisfactory explanation by DW1 why the Google search engine was able to display the date it was sent and the address of the sender of the email in exhibit D2 (i) but this was not displayed in the case of exhibit D2 (ii) which is the email communicating the exclusion clause. However PW1 seems to have admitted that he and Jabez received the purported email when he was cross examined. As far as authentication relating to the receipt of the email is concerned, PW1 admits D2 (i) and says they received the other email exhibit D2 (ii) for the first time in April 2010. One may argue that the data displaying the sent/received email is with the plaintiff and adverse to the plaintiff and therefore deemed authenticated by showing it was sent under section 8 of the Electronic Transactions Act 2011. However the email does not have sufficient header/footnote automatically generated references for a conclusion to be made on this issue. I have taken into consideration submissions of the defendants Counsel that exhibit D2 (ii) was admitted as an exhibit by consent. Indeed the email was admitted by consent during the conferencing of the suit inter parties and therefore objection to admissibility is

belated. Submission can only be taken on the weight to be attached on exhibit D2 (i) and (ii) as they are already part of the evidence.

Therefore even if email exhibit D2 (ii) is taken into account on the basis of its admission in evidence by consent as submitted by the defendant, it has not been demonstrated that exhibit D3 was ever brought to the notice of the plaintiff by either emailing it as an attachment/soft copy or giving the plaintiff a hard copy. Secondly the issue of whether the email was sent or received remained triable. PW1 testified that the plaintiff had no written contract with the defendant. Email exhibit D2 (ii) which I have quoted shows that the goods were transported at owners risk and the owner had a duty to insure the goods. There is no evidence that exhibit D3 in any form was ever given to the plaintiff though the plaintiff is shown to have received email exhibit D 2 (ii) giving notice of the standard trading terms of the defendant.

Resolution of issue No. 1

Halsbury's laws of England fourth edition volume 9 page 242 paragraph 367 provides that despite the lack of any general power to strike out exclusion clauses, the courts have inter alia and where appropriate, applied general rules of the law of contract in order to control the possibilities of abuse inherent in complete freedom of contract: (1) The party seeking to rely on an exclusion clause must show that it was incorporated as a term of the contract, which usually involves the taking of reasonable steps to bring it to the notice of the other party. (2) An exclusion clause is to be construed strictly against the party who introduces it and seeks to rely on it and this is known as the *contra proferentem rule*. Furthermore at page 243 paragraph 368 it is written that for exclusion clauses to be effective it must as a general rule be incorporated in the contract at the time when the contract is made and it is insufficient if the clause is put forward at a later stage. **This principle is stated in the case of Olley v Marlborough Court Ltd [1949] 1 All ER 127** where the plaintiff booked a room in the defendant's hotel and later saw a notice in the hotel room exempting the defendants from liability for articles lost or stolen. The decision of the Court of Appeal, per Singleton LJ at page 133:

> "If the defendants, who would prima facie be liable for their own negligence, seek to exempt themselves by words of some kind, they must show (i) that those words form part of the contract between the parties and (ii) that they are so clear that they must be understood by the parties in the circumstances as absolving the defendants from the results of their own negligence.

This statement of law was applied with approval by Lord Denning MR in **Thornton v Shoe Lane Parking Ltd [1971] 1 All ER 686** at page 689 when he stated:

> "None of those cases has any application to a ticket which is issued by an automatic machine. The customer pays his money and gets a ticket. … The contract was concluded at that time. It can be translated into offer and acceptance in this way. The offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms as long as they are sufficiently brought to his notice beforehand, but not otherwise. He is not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late. … In the present case the offer was contained in the notice at the entrance giving the charges for garaging and saying 'at owners risk', ie at the risk of the owner so far as damage to the car was concerned. The offer was accepted when the plaintiff drove up to the entrance and, by the movement of his car, turned the light from red to green, and the ticket was thrust at him. The contract was then concluded, and it could not be altered by any words printed on the ticket itself. In particular, it could not be altered so as to exempt the company from liability for personal injury due to their negligence."

The underlying principle is that an exemption clause must be communicated effectively at the time the contract is made and not after it was made. In theory the offeree would have a chance before consummation of the contract to reject the exclusion clause. The exemption clause is also deemed to be part of the contract. The evidence before court does not show that exhibit D3 was ever handed over to the plaintiff in any form. It does not show that the plaintiff accepted the terms and conditions if at all communicated through counter correspondence. No evidence shows that the plaintiff knew of the terms and was therefore bound by exhibit D3 which is a unilateral document spelling out the terms and conditions of the defendants services. Principles applied are found in Halsbury's laws of England (Supra) paragraph 369 at page 244 that for an exclusion clause to be incorporated into a contract, the party against whom

it is to operate must be given reasonable notice of its existence. Whether such notice has been given is determined according to the following principles: "

(1) If the party against whom the clause operates has actual knowledge of the clause at the time when the contract is concluded he is inevitably bound by it.
(2) When there is no actual knowledge, the party against, the clause operates will not be bound if he has no reason to believe that the document containing the clause contained contractual terms.
(3) If the party against whom the close operates has reason to believe that a document given to him contents contractual terms it may be borne by those terms, including any exclusion clause, even though he does not choose to read the document; if the document contains what is reasonably necessary to bring the terms to the attention of the reader, the recipient will be bound but he will not be bound if he does not do so."

In the case of **Atlantic Shipping and Trading Company Limited v Louis Dreyfus and Company [1922] AC 250**, the requirement that an exemption clause must clearly state what is exempted was followed. It was held that un-seaworthiness was no where mentioned, nor is liability for consequences of it excepted under any term.

In this case the question is whether liability for loss through robbery as alleged was expressly excluded premised on the email communication that the cargo was transported at owner's risk. Any ambiguity is to be construed in favour of the party against whom it is to operate and general words of limitation will not usually be construed so as to cover serious or fundamental breaches going to the root of the contract. General words will have no application to liability for negligence, but will prima facie be construed as to protect the defendant from a strict form of liability (i.e. on warranty) In the case of **White v John Warwick Ltd (1953) 2 ALL ER 1021** the exemption clause relied on provided that

> "Nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machines hired nor for any third-party claims, nor loss of any goods, belonging to the hirer, in the machines."

When the plaintiff was injured while riding the bike as a result of failure to maintain the machine in good condition and a defect in the bike, Singleton LJ said at 1025:

> In the circumstances of the present case the primary object of the clause, one would think, is to relieve the owners from liability for breach of contract or for breach of warranty. Unless, then, there be clear words which would also exempt from liability for negligence, the clause ought not to be construed as giving absolution to the owners if negligence is proved against them. The result is that clause 11 ought not, I think, to be read as absolving the owners from liability for negligence if it is proved that the injury which the plaintiff sustained was due to lack of that care which one in the owners' position ought to take when supplying a tricycle for the use of a hirer. If that is proved, then the owners do not escape liability by reason of clause 11.

Can it be said that robbery in this case fell within a strict form of exclusion from liability under the clause? The expressions excluding liability have to be considered. The first is that goods are transported at "Owner's Risk" and this was expressed in email exhibit D2 (ii). The second exclusion clauses are found under exhibit D3 which is the Defendant's Standard Trading conditions and is quite comprehensive but not proved. It provides as follows:

> "45
>
> (a) Except in so far as otherwise provided by these conditions, the company shall not be liable for any loss or damage whatsoever arising from:
>
> (i) the act or omission of the customer or any person (other than the company) acting on their behalf;
>
> (ii) compliance with any instructions given to the Company;
>
> (iii) insufficiency of the parking or labelling of the goods except where such service has been provided by the company;
>
> (iv) handling, loading, stowage or uploading of the goods by the customer or any person (other than the company) acting on their behalf;
>
> (v) inherent vice of the goods;
>
> (vi) riots, civil commotion, strikes, block out, stoppage or restraint of labour from whatsoever cause;
>
> (vii) acts of war or terrorism;
>
> (viii) fire, flood or storm;

(ix) the breakdown of, accidental to, failure or interruption of or reduction in the mains electrical supply to the company and/or subcontractor; or

(x) any cause, which the company could not avoid, and the consequences whereof it could not prevent by the exercise of reasonable diligence.

(b) Where under sub clause 44 (a) above the company is not under any liability for loss or damage caused by one or more of the causes, events or occurrences above, the company shall only be liable to the extent that the causes, events or occurrences for which it is liable under these conditions have contributed to the loss or damage. The burden of proof that the loss or damage was due to one or more of the causes, events or occurrences specified in sub clause 45 (a) above shall rests upon the company save that when the company establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the causes, events or occurrences specified in (a) (iii) to (a) (v) of sub clause 44 (a), it shall be presumed that it was so caused. The customer shall, however be entitled to prove that the loss or damage was not in fact caused wholly or partly by one of the causes, events or occurrences listed under sub clause 44 (a)

46. Neither the company nor the customer shall be liable for any indirect or consequential loss or damage, loss of market, loss of business, loss of use, loss of profit, or the consequences of delay or deviation, howsoever caused.

47. Subject to the exclusions of liability elsewhere in these conditions, and to the extent only that it is proved that the claim arises from the negligence of the company, the company shall be liable for the type of loss or damage set out below subject to financial limits stated:"

There is no evidence as I have held above, other than a reference to Exhibit D3 in email exhibit D2 (ii) that these terms were actually given to the plaintiff in soft or hard copy. The e-mail relied on by the defendant does not even indicate where the plaintiff could access the standard trading terms of the defendant. PW1 denied that the plaintiff had a written contract with the defendant. DW1

did not establish that these standard trading conditions were ever availed to the plaintiff in whatever form or that the plaintiff's officials had accessed them at the material time of the contract formation. There is also no evidence that the plaintiff had been availed the terms during previous dealings. Was it displayed or handed over? Since there is no evidence to that effect D3 cannot be considered as having been effectively communicated to the plaintiff.

In conclusion there is no proven exclusion clause that exempts the defendant specifically from liability for loss of the goods through robbery. I will premise my findings on the words "Owner's Risk". As we have noted above the general rules of construction are that an exclusion clause requires clear words to exclude liability which would otherwise arise. (**Halsbury's Laws of England vol 9 page 246 paragraph 370**.) Any ambiguity is to be construed against the party putting forth the clause for his protection. General words of exclusion will not usually be construed so as to cover serious or "fundamental" breaches going to the root of the contract. However the term fundamental breaches going to the root of the contract cannot be construed to mean loss occasioned by an act beyond the control of the defendant.

Arguments advanced by both counsels have revolved around the question of whether the loss was occasioned by the negligence of the defendant. The defendants counsel submitted that no negligence was pleaded or proved. It is an agreed fact that there is a police report showing that the cargo of the plaintiff was robbed en route to Mombasa. Secondly, the defendant's case is that the loss occurred due to factors beyond its control. The plaintiff's case in the plaint is that the defendant is a common carrier of goods for hire. And the defendant breached the duty to convey the cargo to Vietnam, in that the defendant did not safely and securely carry the said goods or deliver the same to Vietnam within a reasonable time or at all, but wrongfully failed to deliver the goods and has wholly lost the same.

The plaintiff's counsel attacked the defendant's submission that the goods were robbed on the grounds of the evidence being hearsay evidence and inadmissible. DW1 testified that the goods were in the hands of the third party by the time they were stolen. He also testified that the third party had not compensated the defendant for the loss of the goods. On re-examinations DW1 testified that the third party was in a better position to investigate the

loss of the cargo. Before I conclude this matter, TPW 1 relied on a police report exhibit TP 2 dated 19th of October, 2010 for the assertion that the goods were robbed. The document is a Police report showing that five suspects were arrested and charged with robbery. The goods had not been recovered. Exhibit TP4 which is a transit transport work order clearly intended the work of transportation of the plaintiff's goods to be subcontracted to the third party Transtrac. The exhibit reads: "please receive the above-mentioned goods given in good order and append your signature below to signify acceptance of all the conditions laid down in the separate trucking agreement signed between our two companies at the rate mentioned above". Transtrac is the third party in this matter. The separate trucking agreement was not adduced in evidence.

In cases of this nature, where the plaintiff proves that it handed over possession of the goods to the defendant, and that goods did not reach their destination, the onus of proof shifts to the defendant to prove why the goods did not reach their destination. This was the holding in the case of **Hough land vs. Low (Luxury Coaches) Ltd (1962) 2 ALL ER 159** where the managers of a coach for an old peoples outing lost the plaintiff's luggage. On appeal, it was held at page 162:

> WILLMER LJ. ... In my judgment, this appeal fails on the facts. In saying that I do not think that it makes any difference whether the case is put in detinue, or whether it is treated as an action on the case for negligence. Whichever be the correct approach, it has been admitted in argument that the plaintiff, by proving the delivery of the suitcase at Southampton and its non-return on the arrival of the coach at Hoylake, made out a prima facie case. That prima facie case stands unless and until it is rebutted. The burden was on the defendants to adduce evidence in rebuttal. They could discharge that burden by proving what in fact did happen to the suit-case and by showing that what did happen happened without any default on their part. ... Alternatively, the defendants could discharge the burden on them by showing that, although they could not put their finger on what actually did happen to the suit-case, nevertheless, whatever did occur occurred notwithstanding all reasonable care having been exercised by them throughout the whole of the journey."

As far as exclusion clauses are concerned, the fact that the carriage of the cargo of the plaintiff was subcontracted to a third party introduces another dimension as far as the exemption clauses are concerned. The question of assignment of the contract of carriage was not fully argued. According to Halsbury's laws of England volume 9, 4th edition pages 257 at paragraph 382 a general rule is that if a third party is to be affected by the exclusion clause must either be a party to the contract containing the exclusion clause or to some other contract containing the same term. The general rule that the contract is binding between the parties would apply. Lord Denning considered the availability of an exemption clause to a defendant in the case of **Morris vs C.W. Martin and Sons [1965] 2 ALL ER 725 at 734**

> Now comes the question: Can the defendants rely, as against the plaintiff, on the exempting conditions although there was no contract directly between them and her? There is much to be said on each side. On the one hand, it is hard on the plaintiff if her just claim is defeated by exempting conditions of which she knew nothing and to which she was not a party. On the other hand, it is hard on the defendants if they are held liable to a greater responsibility than they agreed to undertake. As long ago as 1601 Lord Coke advised a bailee to stipulate specially that he would not be responsible for theft; see Southcote's Case, a case of theft by a servant. It would be strange if his stipulation was of no avail to him. *The answer to the problem lies, I think, in this: the owner is bound by the conditions if he expressly or impliedly consented to the bailee making a sub bailment containing those conditions, but not otherwise.* (Emphasis added)

Whereas it is clear that the goods got lost while in the custody of the third party, what must first be appreciated is that the issue should be whether it was contractually proper to assign the contract to a third party. Notwithstanding this issue, there is no evidence that the plaintiff consented to a subcontract of the carriage of its cargo. The risk if any had passed on to a third party under terms to which it is not a party or privy. It is therefore sufficient for the plaintiff to prove that it had given custody of its goods to the defendant for safe conveyance to Vietnam. It is my finding that the defendant has not proved in evidence that it has exercised due diligence and care in the handling of the

plaintiff's cargo. Taking into account the fact that the cargo was assigned to a third party for conveyance as under the contract between the plaintiff and the defendant, the question of reliance on the original exemption clause if at all applicable should not arise on the basis of the evidence on record. The defendant has not discharged the burden that its agent the third-party exercised due care and diligence in the conveyance of the plaintiffs goods. I agree with counsel for the plaintiff, that no evidence was adduced as to what measures the defendant took to convey the plaintiff's cargo safely. As noted above, the burden had shifted to the defendant to prove that it had taken all necessary precautions to ensure that the goods would be secure after the plaintiff proved that it passed possession to the defendant. To make matters worse, TPW1 testified that precautions could have been taken if specifically requested for the goods to be escorted. It was upon the defendant who subcontracted the contract to the third party to request for such an escort if at all it was necessary depending on the nature of the cargo. No evidence was adduced to the effect that necessary precautions were taken and none can be inferred. The fact that the goods have been robbed has not been sufficiently established by the evidence on record. What has been established is that certain suspects were charged with robbery. The defendant's witness did not know what actually happened and the e-mail informing the plaintiff merely mentions that there was information that the goods were lost en route to Mombasa. Moreover the drivers or people in the vehicles allegedly attacked were not called to testify. This is not sufficient to discharge the burden on the defendant. In the premises it is my finding that the defendant is liable for the loss of goods of the plaintiff.

The second issue

What is the amount of the loss suffered by the plaintiff?

Counsel for the plaintiff submitted that the plaintiff lost the purchase price of the cargo of USD 303,330 plus the 15% profit margin. The value of the Cargo was declared in the commercial invoice Exh. P4 at USD $303,330 the price at which the fish maws were purchased in Uganda. The plaintiff already had had a buyer for his consignment in China at the price arrived at by adding the purchase price in Uganda of USD 303,330 plus the cost of freight and 15% profit. In cross examination by the Third party PW1 testified that the value on the invoice was the purchase price in Uganda less the freight and profit. He

testified that the consignee was the Plaintiff's agent and not the purchaser who was a Chinese called Lin Hai Chin. That Exh P3 Page on 9 dated 3rd April 2010 is a customs declaration by Maersk Uganda Limited (same as Damco, the Defendant) and the value declared therein is US$ 303,330. On further cross examination by the third party PW1 testified that the Defendant obtained a commercial invoice Exh P4 page 10 for the value of the consignment and the agents of the Defendant did the clearance at customs and filled in the customs declaration Exh. P3 page 9. Counsel for the plaintiff submitted that the evidence of the Plaintiff was unchallenged and uncontroverted and prayed that the court finds as submitted above.

For its part the defendant's counsel submitted that the Plaintiffs are not entitled to any remedies and that any loss is excluded by the exclusion clause. Without prejudice counsel for the defendant submitted that if the Court were to find that the Plaintiffs are entitled to compensation then the following should be taken into account. That the claim for a profit marks – up to 15% should be rejected. This is because profit is a special damage and this was never pleaded, and even no evidence was led in examination in chief on this. It only came in evidence from the cross-examination of Counsel for the Third Party. The need for pleading and proof of special damages has been ably laid down in **Kampala City Council vs. Nakaye** [1972] EA 446(2), **Connie Kabanda-vs. Kananura Melvin Construction Co. Ltd- Civil Appeal No** 32 of 1992. Counsel contended that while Counsel for the Plaintiff has made an observation on proof, one can only prove what one has pleaded. No proof was established on general damages and none should be awarded. As far as interest is concerned counsel for the defendant submitted that interest on general damages is awarded from the date of judgment and not from the date of filing the suit, because interest cannot begin to run on a figure that has not been assessed yet.

The plaintiff in rejoinder agreed that damages are pecuniary recompense given by process of law to a person for actionable wrong that another has done him. General damages are such as the law will presume as a natural or probable consequence of the act complained of. Special damages are such as the law will not infer from the nature of the act and must be claimed specially and proved strictly. In the case of **Uganda Telecom v. Tanzanite Corporation**

[2005] EA 351, it was held that the general intention of the law in giving damages for breach of contract is that the plaintiff should be placed in the position as he would have been in had the contract been performed. Therefore the plaintiff is entitled to the value of the cargo being USD 303,330 (United States Dollars Three Hundred and Three Thousand Three Hundred and Thirty)

The plaintiff has also secured a buyer for the cargo who was ready to pay the purchase price in Uganda of USD 303,330 (United States Dollars Three Hundred and Three Thousand Three Hundred and Thirty) plus the cost of freight and 15% profit. Owing to the fact that the Plaintiff did not pay the freight he would not be entitled to the refund of the same. Has the Defendant performed the contract the plaintiff would have earned a profit of 15% to give a total value of about US$348,830 (united States Dollars Three Hundred and Forty Eight Thousand Eight Hundred and Thirty). Counsel further agreed with the principles for the award of special damages and added that they need not be supported by documentary proof according to **Kyambadde v. Mpigi District Administration [1983] HCB 44. PW1** had testified that in addition to the price of cargo admitted in evidence the buyer for the cargo agreed to pay 15% of the purchase price and this not challenged. In **Dodd v. Nandha** [1971] EA 58 the court accepted the evidence on the value of the lost vehicle on the ground that the same was not challenged.

Counsel relied on the testimony of PW1 testified that he was expecting a profit of 15% of the purchase price which is about US$ 50,000 (United States Dollars Fifty Thousand) and this represents a good measure for general damages.

As far as interest is concerned counsel relied on section 26 of the Civil Procedure Act, Cap 71 that it is in the discretion of the court and should reflect the principle that the defendant took and used the plaintiff's money and benefited. See **Premchandra Shenoi & Another V. Maximov Oleg Petrovich** S.C.C.A No.9 OF 2003. The played prayed for interest at on special damages at commercial rate which stands at about 13% from date of default which is 31st March 2010 till payment in full. The Plaintiff further prays for interest on general damages at court rate at the court rate of 6% from the date of filling the suit on May 2010 till payment in full.

Judgment on Quantum of loss suffered by the plaintiff

I have carefully weighed the submissions of both counsels and the evidence on record. Exhibit P4 shows that the value of the cargo is United States dollars 303,330. This has not been disputed by the defendant. PW1 who is the managing director of the plaintiff testified that the value quoted above is the value of the product as purchased from sellers in Uganda. At the time of the purchase the plaintiff already had a buyer for the cargo. The freight charges were United States dollars 2000 and included inland transport to Vietnam. Freight charges had not yet been paid. The shipper is the plaintiff and the consignee is in Vietnam. The quotation of the goods was made to an agent of the plaintiff in Vietnam whereas the intended buyer of the goods was **Lin Hai Jian a third party**. Under paragraph 3 of the plaint the plaintiff claims United States dollars 303,330, interest, damages and costs of the suit. Under paragraph 6 of the plaint, the value of the goods was claimed as special damages at United States dollars 303,330. The fundamental principle in assessing damages laid down by the East African Court of Appeal in the case of **Dharamshi vs. Karsan [1974] 1 EA 41** is the common law doctrine that Courts are guided in awarding damages by the principle of *restitutio in integrum*. . .” This means that the plaintiff has to be restored as nearly as possible to a position he or she would have been had the injury complained of not occurred. Using this principle, the plaintiff would be entitled to an award of special damages of United States dollars 303,330. On the merits this has not been disputed by the defendant. However, the principles upon which awards are made for loss of cargo are spelt out by **McGregor On Damages** 15th edition page 681 paragraph 1101 where it is stated that: "*the normal measure of damages for non-delivery is the market value of the goods at the time and place at which they should have been delivered less the amount it would have cost to get them into the place of delivery.*” The place of delivery was Vietnam. The market value is to be taken at the contract place of delivery by the carrier and not the place where the goods were delivered to the carrier. The cost of carriage must be deducted. This is based on the assumption that the carriage freight has not been paid.

In this case as had been noted by PW1 the managing director of the plaintiff, freight charges had not yet been paid. Freight charges were supposed to be paid after the cargo had been loaded on a ship in Mombasa and the Bill of

lading issued. The plaintiff has proved the claim for special damages and is awarded special damages of United States dollars 303,330.

As far as the above principles are concerned there is no dispute. What is in contention is whether the plaintiff should be paid 15% in addition to the award of special damages. No evidence was led as to what the market price of the goods would have been in Vietnam. The evidence of PW1 is that there was a buyer at 15% in addition to the freight charges and the purchase price of the goods. It is a general principle in the award of damages that valuation is at the date of Judgment. In theory therefore special damages of a higher figure for the cargo could have been claimed. McGregor on damages has included the principle that valuation is at the place of contractual delivery of the goods. In other words, had the goods been delivered to Vietnam, they would be sold at the market rate prevailing in Vietnam at the time when the goods were due for delivery in the year 2010. The question raised by the defendant is whether this has been pleaded in the plaint based on the principle of pleadings that what is not pleaded cannot be granted. The plaintiff sought special damages of United States dollars 303,330, general damages interests and costs of the suit. Following the principles explained in McGregor on Damages above valuation of the goods at the time and place of contractual delivery thereof would have justified an award of 15% in addition to the price paid for the goods by the plaintiff. A claim for the value of the goods is a claim for special damages.

However, the plaintiff claimed 15% as anticipated profits in general damages. According to Halsbury's laws of England the terms "pecuniary" and "non-pecuniary" damage refer to any "financial disadvantage, past or future, whether precisely calculable or not". Consequently "past loss of earnings and an assessment of loss of future earnings, loss due to damage to a chattel, loss on breach of contract for the sale of goods, and loss of profits constitute pecuniary damage." The claim of 15 % above the price of purchase is a claim for loss of profits due to loss of the goods. Again paragraph 812 of Halsbury's laws of England (supra) distinguishes between special damages and general damages thus: "the distinction between the two terms is also drawn in the relation to proof of losss: here, general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms, what is special damages, in this context, are those losses

which can be calculated in financial terms." "A third distinction between the two terms is in the relation to pleadings; here, special damages refers to those losses which must be proved, whilst general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the plaintiff is required only to assert that such damage has been suffered." The evidence shows, that the plaintiff anticipated profit and loss of the goods is the natural and probable consequence for the loss of the pecuniary damages suffered by the plaintiff. The principle of restitutio in integrum does not bar the court from awarding pecuniary damages as general damages. In the premises, the plaintiff is awarded general damages of United States dollars 45,500.

Interest is awarded on the sum of 303,330 United States dollars at the rate of 8% from May 2010 to the date of Judgment. Additionally, interest is awarded at 6% per annum from the date of Judgment till payment in full on the decreed sums.

Whether the third Party is Liable to indemnify the defendant

Counsel for the Defendant Barnabas Tumusinguzi submitted by way of background that the basis of the claim for indemnity of the defendant by the Third Party is premised on a contract dated 29th October 2004 made between the Third Party and then MAERSK UGANDA LIMITED, which, through change of name, is currently DAMCO LOGISTICS UGANDA LIMITED, the Defendant herein. The agreement is the basis of this Defendant's right to claim the indemnity on the basis of the Provisions of Order 1 rule 14 (1) of the Civil Procedure Rules. The Defendant relies on the following clauses in the agreement, Exhibit D1, for the claim for indemnity.

Clause 6(1) provides as follows:

> "Carrier shall be responsible to both Maersk Logistics and any customer for any loss, damage, or delay caused by the loss, theft or damage to any goods, containers and or documents during the period that any such goods, containers and or documents are in the custody or control of the Carrier, his sub-contractors or agents and Carrier shall hold harmless and indemnify Maersk Logistics and any customer from any and all responsibility and liability arising out of such loss, damage or delay".

In this clause the Third Party undertook to indemnify the Defendant. On this, there is no doubt or argument. Counsel submitted that liability is triggered in the event of loss arising out of theft, or loss of the goods. Counsel further submitted that the third party's contention is that the goods were "robbed" and "not stolen" outside the scope of the word theft and therefore does not lead to liability of the third party to indemnify the defendant. Learned counsel relied on the definition of theft in Black's Law Dictionary defines that it is: *"The felonious taking and removing* of *another's personal property with intent* of *depriving the true owner* of *it"*. He contended that it is the taking, removal and deprivation of the goods that is critical. The means of how the goods were stolen would not be relevant in the circumstances of the case. Counsel relied on Exhibit P2, the Police Report which describes the act that of loss of the goods as "theft" of the 18 tonnes of Cocoa Beans and 5 tonnes of fresh fish maws and argued that this corresponds with what Clause 6.1 quoted above provided for.

Secondly learned counsel for the defendant submitted that the Third Party's contention is that if they are liable then, they are liable to the extent of USD.55,OOO (United States Dollars Fifty Five Thousand) being the insured value per consignment. They also indicated that they brought the policy to the attention of the Defendant who did not raise any objection and or request the Third party to increase the amounts under the policy and finally that the defendant had not declared the value of the goods.

As far as insurance cover is concerned, learned counsel argued that the Insurance policy cover was exhibited in Court Exhibit TP1 and has as the insured party Messrs "THREE WAYS SHIPPING SERVICES LIMITED" and not the Third Party TRANSTRAC LIMITED. It is clear that the Third Party and the party that transported, the party that owned the Truck from the evidence of PTW1 are all owned by TRANSTRAC, a sister company but not the Third party company. It follows that all the evidence that was led based on the policy exhibit TP1, should all be disregarded as there was strictly speaking no Insurance that had been undertaken in compliance with the provisions of clause 8.1 of the Contract between the Third Party and the Defendant or that if such Insurance had been taken out, then no evidence has been adduced to show that it was indeed taken out. Counsel further relied on clause 8.3 of the

agreement between the defendant and the third party which provides that: "Such Insurance or the limits of such insurance shall not be construed to limit Carrier's liability". He argued that when asked in cross examination whether this clause did not mean that the taking out of Insurance did not limit his company's liability TPW1 initially replied 50/50 not exactly and then subsequently said he did not know. He submitted that the clause is clear and unambiguous and basically means that, whether insurance has been taken out and whether the Insurance that has been taken out has a limit, such taking or limits on such insurance could not in any way limit the Carrier's liability. This means that whether or not the value of the goods had been declared or not, whether or not Insurance had been taken out for the full replacement value of the goods, this would not in any way limit the liability of the Third Party to indemnify the Defendant for the full value of the goods.

Thirdly counsel submitted that given the contention in the evidence of the third party witness that the Defendant should have advised the value of the goods to help in the adjustment of the Insurance, counsel argued that in light of the evidence adduced this was not tenable.

The company had taken out Insurance once covering a whole year (in a different company's name). He did not indicate that every time he took out goods whose value was over the single transit limit, he took out fresh Insurance and again, he conceded that there was no way his customers could know the prospective values of the goods they were to request him to carry for him months in advance. However, most importantly to the extent that he admitted that he was transporting goods over the transit threshold and yet had not increased the cover, any time he did transport them, shows that his contention that had he been advised of the value of the goods before hand, he would have increased the level of cover, is not an argument that can be sustained on the facts.

Learned counsel for the defendant submitted that the decided cases on the subject of Indemnity are to the effect that for one to claim indemnity, the subject matter in the suit must be the same subject in the third party proceedings according to the case of **Yafesi Walusimbi -vs- Attorney General [1959] EA 223**. The subject matter in the main suit is the same in the Third Party proceedings. A third party claim must be based on a Contract express or

implied. See (a) **Sango Bay Estates -vs- Dresdner Bank AG. No**.[1970] EA 307; (b) **Eastern Shipping Company Limited -vs- Quah Beng Kee** [1924] AC 177; (c) **Birmingham And District Land Company -vs- London And North Railway Company Vol**.34 CHD 261 and (d) **Speller & Co -vs- The Bristol Steam Navigation Company Vol**. 13 QBD 96. The defendant's right to seek indemnity arises from the Contract dated 29th October 2004 between the Thirty Party and the Defendant.

Counsel for the defendant then contended that: (a) The basis for indemnification of the defendant by the third party is the contract between the Third Party and the Defendant; (b) The circumstances under the said contract for indemnification exist and; (c) The Defences that have been raised by the Third party as to why he cannot indemnify the Defendant cannot be sustained.

Counsel prayed for a finding that the Third party is liable to indemnify the Defendant for whatever amounts this Court decrees the Defendant to pay the plaintiff plus the costs of the suit.

For its part counsel for the Third Party Mr. Dan Wegulo agreed that the basis of the third party proceedings commenced by the defendant against the third party is based on the contractual obligation of the third party to indemnify the Defendant for loss of cargo claimed in the suit.

Counsel submitted that the Third Party is not liable to indemnify the Defendant for the loss of cargo because the loss was occasioned by a violent robbery which does not give rise to liability and which the Third Party could not have averted despite exercising reasonable care. Alternatively counsel submitted that in the event that the Third Party is found to be liable, its liability should not exceed USD 55,000. The Defendant barred by the doctrine of estoppels from demanding from the Third Party indemnity exceeding the said amount.

The Third Party's TPW1 Mr. Geoffrey Baitwa the Managing Director evidence is that the Third Party in pursuance of the agreement between the parties received from the Defendant Container No. MSKU 433207-7 whose cargo it loaded on truck registration No KBF 384D on the 01.04.2010 for transportation to Mombasa. TPW1 was informed that the truck was attacked by armed people just before Nairobi, Kenya who put the driver of the truck together with

the turn man at gunpoint and robbed the cargo. The truck was later recovered without the cargo. The matter was reported to the Kenya police and the police report was admitted in evidence as EXH TP2. Counsel argued that the exhibit clearly indicates that the there was robbery where the plaintiffs cargo aboard truck no. KBF348 D was taken and suspects listed as (1) Robert Navibia Misigo (2) Linus Nyongesa Wanzala (3) Peter Muigai Mburu (4) Snamadu Nyonjo and (5) Solomon Otieno Odhiambo were charged with robbery. None of the suspects was an employee of the Third Party. Counsel invited the court to find that in the absence of any evidence to the contrary the loss of the said cargo was a direct result of the robbery.

Counsel argued that robbery was not included among the grounds upon which the third party could be held liable to indemnify the defendant under the contract dated 29.10.2004 EXH D1 between the third party and the defendant and clause 6 thereof. Clause 6.1 clearly provides events in which the Third Party would be liable and reads as follows:

> *6.1 Carrier shall be responsible both to Maersk Logistics and any customer for* ***any loss,*** *damage or delay* ***caused by the loss, theft or damage to goods,*** *containers and/or documents during the period and carrier shall hold harmless and indemnify Maersk logistics and any Customer from any and all responsibility and liability arising out of such loss, damage or delay.*
>
> *6.2 Carrier shall assume the responsibility of a bailee during such period of custody or control*

Counsel argued that the Third Party could only be liable for any loss occasioned by theft, or damage and clearly robbery is not one of the events in which the Third Party could be liable to indemnify the defendant. Counsel submitted that the Defendant made no distinction between theft and robbery to which he disagreed on the following grounds. WORDS AND PHRASES legally defined, 3rd Ed vol 4 R-Z makes a distinction between robbery and theft and defines robbery at page 107 as:

> “a felonious and violent taking of any goods from the person of another, putting him in fear"; from which it is evident, that to constitute the crime of robber, three ingredients are necessary. First a felonious intent, or

animus furandi: Secondly, some degree of violence, or putting in fear: and thirdly, a taking from the person of another.'

At page 291 'theft' is defined (page 14, herein);

> "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the owner of it ..."

Consequently learned counsel for the third party argued that robbery and theft are two separate and distinct offences and supported his contention with the words of Edmund Davies LJ at page 293 (Words and Phrases supra)

> " ..... I dissent from the view that criminal law should be treated as irrelevant merely because a document is commercial. After all, criminal is still law and so are its definitions and rules."

Learned Counsel further relied on the text book **The Interpretation of Contracts** 2ND **ED. By Kim Lewinson Q.C. London Sweet & Maxwell** 1997 quote:

> *"Where parties have entered into written agreements, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound"*

He invited the court to find that theft and robbery are different offences, the operative clause of the agreement i.e clause 6.1 is clear that the Third Party's liability could only inter alia arise in the event of loss occasioned by theft and there is no mention of robbery.

As far as indemnity on the ground of "any loss is concerned, counsel submitted that the word loss should **not be given** the widest meaning as submitted for the Defendant as this will make it uncertain, it would imply that the Third Party is liable for loss in any event including loss arising from force majeure which is excluded in the agreement.

Counsel contended that for the court to discern the kind of loss for envisaged, the agreement ought to be construed as a whole and therefore invited the court to read the provisions of clause 6.1 and 6.2 in particular:

...."Carrier shall assume the responsibility of a bailee during any such period of custody or control"

Quoting **Chitty on Contracts** 28th **Ed. Vol.2 Specific Contracts London Sweet** & Maxwell **1999** Counsel submitted that a private carrier who accepts carriage of goods for profit has only obligations under the contract which governs the carriage. Secondly in exercising reasonable care and diligence the carriers liability is not strict.

Counsel submitted that the unchallenged evidence of TPW1 is that since the execution of the agreement in 2004 third party had never lost any goods belonging to the Defendant. He further told court that the Defendant did not bring to the attention of the Third Party directly or otherwise the nature and value of the goods in issue. He further stated that the Third Party neither undertook all reasonable care whilst the goods were in its custody but could neither have foreseen the risk of a robbery nor warded off the same. In re-examination the same witness told court that the Third Party could have taken further steps to ensure more safety of the goods according to their nature and has it been informed i.e. by providing convoys, using trucks with trackers and police escorts. The defendant did not request for additional security measures and the Third Party cannot be held liable for any loss of the same.

In the alternative and without prejudice to denial of liability, it is the Third Party's contention that its liability, if any is restricted to US.D 55,000. This is by way of estoppels. Under clause 8.1 of the exhibit D1 the Third Party is obliged to provide evidence of an insurance policy prior to the commencement and to maintain the same of full insurance coverage to include a minimum cover for *inter alia* cargo loss and/or damage. Each cover shall be for an amount per incident which is acceptable to the Defendant.

TPW1 testified that he was aware of the clause and indeed the Third Party at all material times ensured that there was a valid insurance policy i.e. EXH TP1 was the valid policy. EXH TP1 a goods in transit renewal endorsement was issued to Threeways Shipping Services Limited by Lion Assurance Company Limited. The period of insurance was from 21.05.2009 to 20.05.2010 and it covered "all risks of physical loss to the whole or part of the property declared

in the course of transit by means of conveyance declared during the loading and unloading risks".

The policy is limited to US.D 55,000 per conveyance/transit and to the East African Region. TPW1 further explained that Threeways Shipping Services Ltd is a sister company to the Third Party which owns the trucks and that Transtrac is a trading company. TPW1 informed court that he had provided a copy of the said endorsement renewal to the Defendant who did not raise any objection and or request the Third Party to increase the amounts under the policy and this evidence remained unchallenged. Counsel contended that this evidence fulfilled the requirements of clause 8.1. to insure the goods.

He asserted that the duty of the carrier under clause 8.1 was to provide evidence of insurance cover and there is no requirement that such insurance ought to be in the name of the Third Party. The cargo in issue was at all material times aboard truck no. KBF 384D registered in the names of Threeways Shipping Services (K) Ltd as per Exhibit P5 and as such the goods were insured. He contended that the Defendant is estopped both from objecting to the insurance policy and claiming any amount of money in excess of US.D 55,000 from the Third Party as indemnity for the undelivered goods.

Clause 8.1 obliged the Third party to take out *"full insurance coverage ..."each cover shall be for an amount per incident which is acceptable to Maersk Logistics"*

Counsel submitted that the phrase "...*full* insurance *coverage* ...." is uncertain for reasons that it is meaningless, it has no application in the circumstances in which it was written. Whereas the Third party was obliged to take "...*full* insurance *coverage* .... *"it* was impossible for it to do so for the following reasons;

i. The agreement did not specify any limits in terms of the value of goods to be transported under the agreement.
ii. There is no evidence of communication or notice of the maximum value of goods to be transported.
iii. With regard to the specific goods in issue, there was no declaration of the value to the Third Party.

Counsel submitted that the third party could only take out "*full insurance coverage*." if it had notice of the maximum value of the goods it was bound to transport at any given time under the agreement of transport but no evidence of such notice was proved in evidence. Quoting the **Interpretation of Contracts by Lewinson** (supra) page 211 a phrase maybe rejected as meaningless if it has no application in the circumstances of the case and invited court to reject the above cited phrase.

Counsel further submitted that TPW1 testimony is that the Third Party took out a policy of insurance and has had the same renewed by way of a renewal endorsement exhibit TP1 which was presented to the Defendant as evidence of a valid policy. Instructions to transport the cargo were given by the defendant through a work order exhibit TP4 and that the defendant did not declare the value of the goods to the Third Party. If the Third Party knew the value of the cargo, it would have taken the necessary steps to make arrangement to insure the same. Counsel submitted that the doctrine of estoppels was applicable in this case for the assertion that the defendant accepted the insurance cover that the TP had notified to it. Counsel relied on the doctrine of estoppels explained in **Halsburys Laws of England 4th Ed** Vol 16 **Para 955. Estoppels** may arise by express representation or conduct which includes negligence and silence. Upon notice of the insurance cover counsel contended that the defendant did not question it or object and went ahead to give the third party goods worth 303,330 US$ without notifying the Third party of the same when it clearly limit of the insurance policy.

The Third Party acted on the representation of the Defendant by accepting goods of a value exceeding the maximum cover in the insurance policy thereby changing its position in by increasing its exposure to its prejudice. Consequently the third party's counsel contended that the Defendant is bar by estoppels from denying that the insurance policy taken out by the Third Party was acceptable under clause 8.2 of the contract. Secondly the Defendant is barred by estoppels from demanding from the Third Party any amount of money exceeding US.D 55,000 as indemnity for loss.

The Defendant invoked clause 8.3 and submitted that in any event the taking out of insurance is irrelevant in determining the Third Parties liability while the third party's counsel disagreed with the interpretation and submitted that the

intention was to reduce the liability of both parties. The intention of both parties was that the Third Party (carrier) takes out an insurance policy. Counsel submitted that the commercial purpose of insurance is to reduce liability by arranging for compensation in an event leading to loss. Defendant's submission that whether or not the value of the goods had been declared or not, whether or not insurance that had been taken out for the full value of the goods, this would not in any way limit the liability of the Third Party to indemnify the Defendant for the full value of the Goods. Counsel contends that this undermines the very essence of insurance and does not make any business sense. Counsel prayed that the court on the basis of **The Interpretation of Contracts** 2nd **Ed by Kim Lewinson Q.C.** para 6.13 pages 189-191 finds that clause 8.3 is of no binding effect on the parties. Counsel prayed that this court dismisses the Defendant's claim for indemnity against the Third Party and in the alternative if judgment is entered it should not exceed USD. 55,000.

The Defendant's Counsel in rejoinder responded that the Insurance was to be taken out by the Carrier, who is the Third Party in this case in the names of the Third Party. This was never done. Therefore there was a valid policy for Threeways Shipping and not the Third Party and no evidence was led to show that this policy was capable of assignment or that the same was indeed assigned to the Third Party. The argument that the Third Party and Threeways Shipping company Ltd are sister companies is not relevant. 'There is nothing in Law or under the Companies Act called “sister companies”. The Third Party is a Body Corporate capable of contracting in its own corporate name and no reason was ever given why the Third Party never took out the Insurance in its own names as required under the provisions of Exhibit "Dl".

Secondly phrase “Full Insurance Cover” means insurance that covers the loss as fully as opposed to that which would cover a portion of the loss. The definition is not rocket science and counsel relied on Black’s Law Dictionary, 8th Edition, where full coverage is defined as “*Insurance protection that pays for the full amount of a loss with no deduction'*.

Therefore the Invitation to the Court to have the phrase rejected is not justifiable especially since it appears to be informed by a lack of understanding of its true meaning and import. Thirdly it is alleged that out an Insurance policy in the names of Threeways Shipping Exhibit TPl but a reading of the

Exhibit shows that the name of the Third Party is not mentioned anywhere on the Policy as the Insured, beneficiary, or even loss payee in the event of a loss and there is no contractual nexus between the Third Party and Threeways Shipping in the Insurance contract that would form the basis of a claim by the Third Party.

On the question of the term “robbery” as opposed to the term “theft” counsel submitted that the contract being construed is a business contract must be construed in a commercial sense. Counsel contended that it cannot by any stretch of imagination be said that when the parties wrote to the agreement, they envisaged a scenario where in the event of loss they would have to be bogged down by the finer distinctions of Criminal Law as to what constitutes Robbery and what constitutes Theft.

The most important aspect and what the parties were looking at, is that goods could be stolen and what would happen if the same were stolen. In both Theft and Robbery, the central point is that the owner of the goods is deprived of the ownership of those goods, irrespective of the manner of the taking. This was done in this case. The owner of the goods was deprived permanently of the goods. Counsel submitted that bring about the finer distinction between "Theft" and "Robbery", is a conclusion that flouts business common sense and should be rejected. He prayed that the court finds the third party liable to indemnify the Defendant.

Judgement on the question of indemnity by the Third Party

I have carefully considered the lengthy submissions of the third party and the defendant. The dispute revolves around interpretation of clause 6 in the agreement dated 29th of October 2004 and exhibited as exhibit D1. There are two main grounds of contention. The first is that clause 6.1 does not include robbery, among the grounds upon which the third-party is liable to indemnify the defendant in the event that it was the cause for the loss of cargo. Secondly, the defendant contends that the third party is in breach of contract for not taking out a full insurance coverage for the goods. On the other hand and in the alternative the third-party submits that if it is to be held liable at all, it's liability is limited to a sum of United States dollars 55,000. I will first set out

clause 6 of exhibit D1 which was not set out in full by the parties. It provides as follows:

"

6. liability

6.1. Carrier shall be responsible to both mask logistics and any customer for any loss, damage or delay caused by the loss, theft, or damage to any goods, containers and/or documents during the period that any such goods, containers and/or documents are in the custody or control of the carrier, his subcontractors or agents, and carrier shall hold harmless and indemnify mask logistics and any customer for any and all responsibility and liability arising out of such loss, damage or delay.

6.2. The period of carriers custody or control shall include the period between the time of acceptance of the goods by the carrier, its employees, agents or subcontractors or employees of such agents or subcontractors until the time of delivery of the goods in accordance with the masts written instructions as evidenced by the written receipt thereof by the customer or other party. It shall also include constructive custody or control by operation of the applicable law. Carrier shall assume the responsibility of a bailee during any such period of custody or control.

6.3. Carrier shall not permit any container and/or goods to leave his custody or control without express written permission from mask logistics, and then only to the extent of such permission.

6.4. Carrier shall assume liability for, defend, indemnify and hold harmless the customer and mask from any liability incurred as a consequence of any action of carrier, its employees, agents or subcontractors or employees of such agents or subcontractors and shall provide the customer and/or mask logistics with whatever evidence either or both of them require in order to bring any claim against contractor and/or to assess their possible exposure for any liabilities.

6.5. Carrier is liable to reimburse Maersk logistics or any customer the full replacement value of any goods and/or container which are lost or damaged whilst in its custody or control.

6.6. Carrier has not ownership in any goods or containers (unless the containers are supplied by carrier) and shall exercise no lien or charge over any goods or containers.

6.7. Carrier has no right whatsoever to sell or otherwise dispose of the goods without the prior written consent of Maersk logistics.

6.8. No warranty or representation, express or implied, is made by mask logistics in relation to the fitness or condition of the goods or containers or any part of them. Carrier shall be solely responsible for checking any goods or containers deliver to it by mask logistics for its customers or their shippers.

6.9. Where applicable and without reducing the liability of carrier under this agreement, the liability of mask logistics to carrier if any, shall be in accordance with its standard terms and conditions

As far as the words "for any loss, damage or delay caused by the loss, theft, or damage to any goods, containers and/or documents" in clause 6.1 of the agreement is concerned, the words "*any loss*, *damage or delay*" describe the kind of incident that may happen to the goods or cargo conveyed by the carrier. In other words, there may be "any loss". This may mean part of the goods may suffer loss, or any conceivable loss suffered in the relation to the cargo. In the same vein the words "*damage or delay*" are used in sense that the goods may suffer "damage" or the goods may suffer "delay". To read these words again in context, one may say "where the cargo conveyed by the carrier suffers any loss, damage or delay". Then the rest of the sentence comes into play i.e. describing the cause of the loss, damage or delay. The anticipated causes of "any loss, damage or delay" are "loss, theft, or damage to any goods, containers and/or documents. The words "caused by the loss, theft, or damage" give rise to 3 general causes of liability or responsibility. Counsel for the third party was concerned by the fact that the word "loss" is so general. I think the word "loss" put in context means loss caused by any other causes other than theft or damage. Hypothetically, it may cover a situation where the goods fall of the vehicle used to convey the cargo. It may cover loss caused by misplacement of the goods. I do not agree that it covers loss which is expressly excluded in the contract such as force majeure or other occurrences that are expressly excluded in the contract. In fact the contract should be read as a whole to mean that where certain events are expressly mentioned as excluding

liability of the third-party or any party, it cannot be written in the word "the loss" provided as a cause under clause 6.1 of the agreement exhibit D1. Because robbery is not an excluded cause for liability, it can be covered by the word "the loss" referred to above. I therefore don't need to consider whether the word "theft" is a generic term that incorporates in it "robbery" as a form of theft. Secondly, I have taken into account the submissions of the plaintiff that robbery of the plaintiff's cargo has not been proved in this court.

According to the pleadings and testimony of TPW1, the loss occurred due to an alleged robbery. I must add, that I have already held in agreement with submissions for the plaintiffs counsel that no evidence was led that there was an actual robbery. Exhibit TP2 which is the police report dated 19th of October 2010 is entitled "police report". It is head noted CID Email and may have arisen from that office. The document is not a charge sheet. It shows that five suspects were charged and produced at Makindye Principal Magistrate's Court on robbery charges. Three witnesses in brackets stated to be for the third-party testified. None of these witnesses were called by the third-party. Instead it is the third parties managing director who appeared as TPW1. He received the report of what could have happened but this cannot substitute first hand testimony of the people who witnessed the alleged incident. It follows, that the submissions of the third-party is premised on an assumption that robbery was proved in evidence. Even on the ground that exhibit TP 2 was admitted by consent of the parties, none of the witnesses or the authors of the report were ever called. What is even material is that it is a document purporting to emanate from outside the jurisdiction of this court in that it emanates from a foreign country.

Section 77 (1) (d) of the Evidence Act, provides for proof of official documents emanating from a foreign country. It provides:

> 77. Proof of other official documents.
>
> (1) The following public documents may be proved as follows—
>
> (b) the acts of the executive or the proceedings of the legislature of a Commonwealth or foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy

certified under the seal of the country or sovereign, or by a recognition thereof in some law of Uganda;

(d) public documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper of the document, with a certificate under the seal of a notary public, or of a foreign service officer, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

In the first place the document was not certified by the legal keeper of the document neither was it notarised by a Notary Public. Even if it was a Ugandan document, in the absence of the officer who issued it, in the very least it should have been certified as a true copy of the original. Consent to admit the document by the parties cannot stop the court from being cautious about a document coming from a foreign country purporting to be part of the official record or report of an event that happened in a foreign jurisdiction.

Be that as it may, the word "theft" has been used in the context of civil liability. It cannot be given a technical and exclusive definition. First of all, the word robbery was not used in the contract. I must also add that the word "stealing" was not used. The Cambridge International Dictionary of English defines theft as "dishonestly taking something which belongs to someone else and keeping it; stealing." On the other hand, the word "steal" has a separate definition and means "to take something without the permission or knowledge of the owner and keep it.... "steal" can also mean to do something quickly but trying not to be seen doing it."

In any case, if the word "theft" is given a technical meaning as provided for under the criminal law, it would not exclude other kinds of causation of loss under the general phrase "caused by the loss". The words "the loss", is alternative to or additional to the word "theft" and "damage". Because the phrase "the loss" is not defined, it covers other situations not expressly excluded by the contract. In view of my finding that the loss of the plaintiff's cargo is a loss envisaged by clause 6.1 of exhibit D1 it follows that the carrier who is the third-party is responsible to both Maersk Logistics and any customer for the loss.

As far as the contractual liabilities and rights of the parties are concerned exhibits TP4 which gave rise to the contract of carriage of the goods in question between the defendant and the third-party shows that there was supposed to be a separate trucking agreement signed between the companies. No evidence was led to the effect that such a trucking agreement was ever signed between the defendant and the third-party and no trucking agreement was adduced in evidence. As to how such an agreement would have affected the rights and obligations of the parties remains unknown.

As far as the submission limiting liability of the third-party to a sum of United States dollars 55,000 is concerned, this submission is inconsistent with clause 6.5 of exhibit D1.) 6.5 expressly provide that the carrier is liable to reimburse Maersk logistics or any customer the "full replacement value of any goods and/or container which are lost or damaged whilst in its custody or control."

This is not only complementary but also in addition to clause 8.1 which provides that the carrier shall maintain full insurance coverage with a reputable insurer for all services it provides under the agreement. It is not necessary to go into lengthy written submissions of the parties on the question of insurance because I was not addressed adequately neither was evidence adduced on who is the insured. It is not indicated whether the insurance is of a customer of third-party or insurance of the third-party itself. Reading clause 8.1 carefully, the insurance was to cover the services provided by the carrier who is the third-party in this action. Two points may be made. The first point is that breach of the agreement by the third-party entitles the defendant under clause 8.4 to treat the breach as a material breach of the agreement which would entitle it to terminate the agreement immediately and without liability. The second point is that insurance inures for the benefit of the insured and is considered commercial prudence.

According to Mc**Gregor on Damages 15th edition (Sweet and Maxwell) Paragraph** 1482 page 928, as early as 1874 it was decided in the case of **Bradburn v. G.W. RY. (1874) L.R. 10 Ex. 1** that, where the plaintiff had taken out accident insurance, the moneys received by him under the insurance policy were not to be taken into account in assessing the damages for the injury in respect of which he had been paid the insurance moneys. This decision was endorsed in the case of **Parry v Cleaver [1969] 1 All ER 555**. The argument in favour of non

deduction is that even if in the result that the plaintiff may be compensated beyond his loss, he has paid for the insurance moneys, and the fruits of this foresight should in fairness ensure to his and not the defendants benefit. In any case the contract of insurance would be between the third-party and the insurance company and would be governed by the clauses in the specific agreement which would spell out the level of liability, the grounds of liability and who should be indemnified. The person indemnified may be a third-party. Generally speaking however, the insurance cover would help the third-party against facing the loss alone. In the absence of the actual insurance contract adduced in evidence only general conclusions and theoretical assumptions may be made.

Exhibit TP1 which is entitled "Goods in Transit Renewal Endorsement" has the name of the insured as Three Ways Shipping Services Ltd. The insurance cover was on "All risks of physical loss and/or damage to the whole or part of the property declared in the course of transit by means of conveyance declared including loading and unloading risks." I have not lost sight of the third parties submission that the goods were conveyed in the vehicle of Three Ways Shipping Services Ltd. Such a submission introduces yet another fourth party to this story. The relationship between the third-party and Three Ways Shipping Services Ltd was not adequately established in evidence. Secondly, I have already held that the third-party and the defendant were supposed to execute a separate trucking contract for the carriage of the goods of the plaintiff. No evidence was led to establish whether such a separate trucking contract was ever signed between the parties. If it was ever signed it is unknown what effect it would have had in the relationship between the parties. As I have noted exhibit TP 1 policy number BI/GIT/POL/0001355 has the name of the insured as "Three Ways Shipping Services Ltd" as the doctrine of the insurance law clearly shows as discussed above, the relationship between the third-party and Three Ways Shipping Services Ltd is a matter between the third-party and the fourth party. If such an insurance policy was of any use, it will have the effect of coming in to aid of the third-party. However, in practical terms, Three Ways Shipping Services Ltd is not a party to this suit. Secondly, the insured is Three Ways Shipping Services Ltd and it is the only person who can assert rights to indemnity in the event that the insurable risk occurs. In any case, the contract of insurance which will spell out the terms of the insurance contract has not been proved in evidence assuming

that the contract was between the third-party and the insurance company to insure Three Ways Shipping Services Ltd.

Failure to insure the goods can only be a breach of contract with the defendant or be to the disadvantage of the third-party in that the insurance company will not come to its rescue to pay all or any sums of money which may be claimed as a result of the loss of cargo as envisaged by the defendant's contract with the third-party. Counsel submitted at length that clause 8.3 of the contract should be struck out. I do not agree. Clause 8.3 of exhibit D1 is consistent with the legal doctrine that payment by an insurance company cannot be deducted from the benefit that may accrue to an insured person. In any case it is of no relevance to those parties who are not privy to the contract of insurance except where they are third party beneficiaries under the contract. Even then in a case like the current case only a person who is privy to the contract of insurance between living persons or persons with legal capacity is the only person who can seek to enforce the same.

Secondly insurance cover does not limit the liability of the person who is liable and his or her liability is determined by the law. In this case, because the insured is allegedly the third-party, any money that the insurance company would pay would only assist it meet its liabilities under exhibits D1. This is the crux of the insurance policy if any, to assist the insured against the risk of loss of goods while in its custody which risk may lead to pecuniary damages or loss. The question of liability for the loss is considered separately from the question of indemnity and is based on liability for loss under the general law such as contract or bailment. On the other hand whether the insurable risk occurred is primarily a question of construction of the contract of insurance. The award of a court of law in assessing damages under the general law determining the question of liability cannot deduct possible money to be paid by insurance that covers the loss from the quantum of award on the ground that insurance will cover some of the quantum. Consequently the question of limitation of liability to USD$ 55,000 is untenable as I shall show below.

As I noted earlier in this judgment, the remedy of the defendant for failure to insure the goods by the third-party only gives the defendant a right to treat the contract as breached and a right to avoid the contract. Clause 8.4 clearly

stipulates that failure to insure the goods would entitle the defendant to terminate the agreement without any liability.

In the premises, it is the judgment of this court that the third-party is liable under exhibit D1 to indemnify the defendant for the loss of goods under clause 6.1. The quantum of indemnity is provided for under clause 6.5 which is the full replacement value of any goods or containers lost while in the custody of the third party. The costs of the suit are awarded to the plaintiff and shall be borne equally by the defendant and the third party on a 50% to 50% basis.

Judgment delivered in open court the 17th day of February 2012.

Honourable Justice Christopher Madrama

Judgment delivered in the presence of:

Thomas Ocaya holding brief for Kirwowa Kiwanuka for the plaintiff,

Nicholas Holding brief for Barnabas Tumusinguzi for the defendant,

Dan Wegulo appears for the third party,

Representative of Plaintiff Mr. Jiang in court.

Honourable Justice Christopher Madrama