

[Title]

Delivery by Guarantee

[Deciding Court]

Tokyo District Court

[Date of Decision]

29 October 1996

[Case No.]

Case No. 1355 (wa) of 1996

[Case Name]

Claim for Damages

[Source]

*Kinyu Homu Jijo* No. 1503: 97

[Party Names]

Plaintiff                   X       The Bank of Tokyo-Mitsubishi, Ltd.

Vs.

Defendant                 Y       Kodai Company, Ltd.

[Summary of Facts]

Around January 1995, Company A and Company B in China sold frozen chickens to Company C in Japan. In order to deliver the goods, A and B entered into contracts for the carriage of goods by sea for frozen chickens with shipping company Y, with discharge ports in Japan, including Tokyo Port. At the end of January 1995, Y loaded the goods on vessels at a port in China, and, as carrier, issued shipped bills of lading for the goods to A and B, the consignors. A and B had Bank D purchase documentary drafts. Later, Bank X in Japan paid D for the documentary draft, in accordance with a letter of credit that X had issued in favor of C, and matters led to X being in possession of the bills of lading and commercial invoices, which accompanied the documentary draft, with respect to the contract for carriage in this case. The goods arrived at the ports, including Tokyo Port, around February 1995, and were discharged on the days they arrived. Y's agent, Company E, delivered the goods to C or its agent, Company F, on the days they arrived. However, these deliveries were not made in exchange for bills of lading. They were made utilizing a method called 'delivery by guarantee,' in which letters of guarantee were issued promising to deliver the bills of lading to the carrier later, as soon as they were acquired, and the deliveries of the goods were made without bills of lading. On 29 March 1995, C declared bankruptcy (the date of the petition for bankruptcy was 16 March). C could not perform the obligations to repay the expenses equivalent to the amount of the documentary drafts, and could not acquire the bills of lading. X filed this suit against Y asserting that Y delivered the goods to the buyer prior to its bankruptcy without exchanging for the bills of lading, utilizing the method 'delivery by guarantee,' and made the performance of the obligation to deliver the goods impossible. X asserted that it suffered losses as a result of Y's acts, and claimed damages.

[Summary of Decision]

Claim allowed.

“As acknowledged above, Y’s commercial agent (agency), E, delivered the goods to C or its agent F, without the bills of lading, utilizing the method ‘delivery by guarantee,’ and Y’s obligations as a carrier to deliver the goods to the holders of the bills of lading became impossible to perform. E performed the acts described above as Y’s commercial agent (agency).

Carriers are liable for damages for the loss of transported goods arising in delivering the goods incurred as a result of negligence on the part of themselves or others employed by them (Article 3(1) of the *Act on International Carriage of Goods by Sea*). The ‘others’ that the carriers ‘employ’ as described above are people that carriers employ for the purpose of the performance of their obligations; namely, persons who assist in performance. It is proper to interpret that these ‘others’ are not limited to a narrow meaning of persons who assist performance in an employment relationship with the carrier, but also include agents who carry out substitute performance, such as subcontractors, and commercial agents. (The correct view is that they differ from ‘employees of carriers’ described in Article 20-2(2), (4) and (5) of the *Act on International Carriage of Goods by Sea*). Accordingly, in this case, if the commercial agent (agency), Daito Koun Co., Ltd., were negligent and delivered the goods as described above, the carrier, Y, would not be discharged from liability to compensate losses incurred as a result of such negligence. E delivered the transported goods to C, who did not have the relevant bills of lading, without exchanging the goods for the bills of lading, and these deliveries did not discharge Y from its obligations to deliver the transported goods to the holders of the bills of lading. It should therefore be concluded that Y is liable for damages due to impossibility of performance of the relevant obligations (Article 10 of the *Act on International Carriage of Goods by Sea* and Article 584 of the *Commercial Code*).