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We are delighted to dedicate most of TT Talk Edition 127 to an article by Conte Cicala (who is a Partner in the San Francisco office of Flynn, Delich & Wise LLP) on Delivery under 'Straight' bills of lading under United States law. A 'straight' bill of lading names the consignee, i.e. is not made out 'to order'.

Naturally, US law does not apply to every case of delivery under a 'straight' bill of lading to a US based consignee (but, conversely, may apply to delivery outside the US). Take, for example, the case of *Carewins v Bright Fortune Shipping* (see TT Talk Editions 90, 100 and 119), where all three Hong Kong courts, applying Hong Kong law, held that presentation of a 'straight' bill of lading was required for delivery. In *Carewins*, footwear products were shipped from Hong Kong to Los Angeles and then delivered by the carrier's agent to the consignee without surrender of the 'straight' bill of lading. While such delivery was in accordance US trade custom, it was misdelivery under the applicable Hong Kong law.

Conte Cicala's article is aimed at anyone involved in transports which might be governed by US law or might come before a US court and for which a 'straight' bill of lading is issued.

1. Delivery under 'Straight' bills of lading under United States law

I. Introduction

Ocean carriers are often caught between cargo interests fighting over whether, and to whom, cargo may be released. Where shipment is made pursuant to a traditional negotiable or order bill of lading, the rules are relatively straightforward. But when the shipment is made pursuant to a non-negotiable/straight bill of lading ('Straight B/L') or pursuant to 'sea waybill', the question becomes far more complex, especially in light of the inconsistent treatment of Straight B/L's and sea waybills from nation to nation (endnote 1). It comes as no surprise, then, that this topic has been frequently revisited by TT Talk (endnote 2).

II. Relevant United States Law

In shipments to or from the United States, there are two main statutory regimes to consider when examining this question (3). The first is a federal statute, known as the 'Federal Bills of Lading Act' or 'Pomerene Act' 49 U.S.C. § 80101 *et seq.* ('FBLA'). However, the FBLA applies only to exports, not imports. With respect to imports, although some authorities have stated that the governing law is that of the country of issue (see, e.g., **Gilmore & Black, The Law of Admiralty** 95), others have held that the relevant law is the Uniform Commercial Code ('UCC'). See, e.g., *National Union Fire Ins. Co. of Pittsburgh v. Allite, Inc.*, 430 Mass. 828, 833-35 (Mass. 2000). The UCC is not a national law per se, but rather a model code adopted, in generally similar form, by all 50 states and the District of Columbia.

Under the FBLA (4), a carrier is permitted, but not required, to deliver to the named consignee not in possession of an original Straight B/L. However, if it does so after being instructed not to do so by someone with a right to possession, or with information that it is delivering it to someone not entitled to possession, it becomes liable for damages to the person with title or right to possession of the cargo.

Similarly, the UCC provides (5) that a carrier may also deliver to a consignee not in possession of the original Straight B/L if (i) the bill of lading does not provide otherwise; and, (ii) if there are not contrary instructions from the consignor (shipper).

III. Carrier's Right to Delay Delivery and Seek Interpleader

Unfortunately, in a situation where multiple parties are presenting what may seem to be reasonable claims or demands to the cargo, discretion is typically the last thing a carrier wants. Rather, the carrier wants certainty: clear direction on what to do, in order to resolve the problem quickly and without winding up defending a consignee's lawsuit for conversion, or a shipper's suit for misdelivery, or both!

Fortunately, both the FBLA and UCC contemplate that competing claims to freight will from time to time arise, and have expressly provided for a carrier's right to delay delivery for a reasonable time to sort things out and, if necessary, pursue an interpleader action, which deposits the goods in the custody of the court and forces the cargo interests to fight it out amongst themselves. 49 U.S.C. § 80110(d); Cal. Comm. Code § 7603. Often, the prospect of an interpleader, coupled with a rapidly growing carrier's lien for detention/demurrage, is enough incentive for the various cargo interests to sort out their differences. But the first step when competing claims to cargo arise should always be to contact your insurer and attorney.

IV. Limiting Carrier's Own Discretion By A 'Presentation Clause'

Before problems arise, a carrier can also try to impose some certainty by way of its B/L. An approach that many have taken is to include in their B/L a clause which requires surrender of an original B/L before delivery will be made (sometimes called a 'presentation clause'). Neither the FBLA nor the UCC bars use of such a clause in a B/L (6). The law is clear that such clauses are valid and, in effect, 'force' the carrier to require surrender of the original B/L before delivery. This is because failure to do so will expose the carrier to a claim for breach of contract. The Southern District of New York provided an instructive review of the relevant law:

In *Pere Marquette R Co v. J F French & Co.*, 254 U.S. 538, 41 S.Ct. 195, 65 L.Ed. 391 (1921), where the bill of lading had contained the clause 'The surrender of this original bill of lading properly endorsed shall be required before delivery of the property', the Supreme Court held that this provision resulted in liability on the carrier who delivered the goods without insisting on the production and surrender of the bill of lading where the shipper suffered a loss as a result. The Court pointed out that ' [s]uch liability arises, not from the statute [the predecessor to the Pomerene Act], but from the obligation which the carrier assumes under the bill of lading.' 254

U.S. at 546 (emphasis added). Similarly, in Iowa Beef Processors, Inc. v. Grand Trunk Western R.R. Co., 493 F.2d 665 (6th Cir.1974), where the bills of lading required the defendant to obtain them prior to delivery to the consignee, defendant was held liable because it ‘breached the condition of the bill of lading.’ 493 F.2d at 666 (emphasis added). In Allied Chemical Int’l Corp. v. Companhia de Navegacao Lloyd Brasileiro, 775 F.2d 476 (2d Cir.1985) the Second Circuit pointed out that ‘[d]elivery to a person not entitled to the goods without production of the bill of lading is prima facie a conversion of the goods and a breach of contract.’ 775 F.2d at 482 (emphasis added) (quoting 2 T.G. Carver, Carriage by Sea ¶ 1593 (13th ed.1982)). In B.M.A. Industries, Ltd. v. Nigerian Star Line, Ltd., 786 F.2d 90 (2d Cir.1986), the Second Circuit affirmed a grant of summary judgment by this court to the plaintiff for breach of contract by the carrier who delivered the cargo against a warehouse delivery order instead of the original bills of lading where the bills stated, ‘Cargo to be released only against submission of original duly endorsed bills of lading.’ 786 F.2d at 91. In C-ART, Ltd. v. Hong Kong Islands Line America, S.A., 940 F.2d 530 (9th Cir.1991), again like here, bills of lading stated delivery was to be made only ‘upon surrender of the original, properly endorsed bill of lading.’ 940 F.2d at 532. The Ninth Circuit, quoting the Second Circuit in Allied Chemical with approval, explained simply that the carrier, which had delivered the goods in exchange for a corporate guaranty rather than the actual bills of lading, was liable to the shipper for breach of contract.

Porky Products, Inc. v. Nippon Express U.S.A. (Illinois), Inc., 1 F.Supp.2d 227, 231 (S.D.N.Y. 1997), *aff’d*, 152 F.3d 920 (2d Cir. 1998)(emphasis in original). That Court emphasized that ‘whether the bills were negotiable or nonnegotiable is relevant to a statutory claim for conversion under the Pomerene Act, but not relevant to a breach of contract claim.’ *Id.* at 232.

In light of the foregoing law, a carrier can protect itself from uncertainty by including a presentation clause. Doing so does come with tradeoffs. For example, the contractual duty to require presentation will at times prevent delivery when it would otherwise be lawful. Also, demanding presentation of an ‘original’ could create commercial and even legal problems if the carrier has - in contradiction to its B/L terms and conditions - been party to a course of dealing in which paperless or ‘express’ releases have been permitted. Again, discuss your company’s specific circumstances and practices with your attorney and insurer when you consider whether the benefits of a presentation clause will outweigh the detriments.

V. Conclusion

United States law does not always provide clear answers for an ocean carrier presented with competing instructions or claims from cargo interests, but it does provide a set of tools to manage the carrier’s risk, both before and after problems arise. Consider with your attorney whether a ‘presentation clause’ would benefit your ‘straight’ bill of lading form. And when problems do arise, promptly notify your insurer and attorney, to determine whether the circumstances warrant a delay in delivery or even the commencement of an interpleader action.

Endnotes:

- Endnote 1

Some countries draw a distinction between a straight B/L (which in those countries is treated as a document of title) and a sea waybill (where it is not). However, in the U.S., a carrier’s duties with respect to delivery are the same, because straight B/Ls are not documents of title:

‘A carrier which has issued a non-negotiable bill of lading normally discharges its duty by delivering the goods to the named consignee; the consignee need not produce the bill or even be in possession of it; the piece of paper on which the contract of carriage is written is of no importance in itself.’

Lunsford v. Farrell Shipping Lines, Inc., 1992 A.M.C. 68 (S.D.N.Y. 1991), citing Gilmore and Black, *The Law of Admiralty* §§ 3-4 (2d ed. 1975).

- Endnote 2

See, e.g., TT Talk Edition 119 (16 June 2009), Edition 100 (15 August 2007), Edition 90 (26 September 2006), and Edition 35 (24 July 2003).

- Endnote 3

When drafting B/L clauses, a third statute, the U.S. Harter Act, should also be borne in mind, since it prohibit any clause in a B/L which exculpates a carrier from its obligation to make 'proper delivery'. 46 U.S.C. § 190.

- Endnote 4

Specifically, the FBLA provides:

Sec. 80110. Duty to deliver goods

(a) General Rules.--Except to the extent a common carrier establishes an excuse provided by law, the carrier must deliver goods covered by a bill of lading on demand of the consignee named in a nonnegotiable bill or the holder of a negotiable bill for the goods when the consignee or holder—

- (1) offers in good faith to satisfy the lien of the carrier on the goods;
- (2) has possession of the bill and, if a negotiable bill, offers to indorse and give the bill to the carrier; and
- (3) agrees to sign, on delivery of the goods, a receipt for delivery if requested by the carrier.

(b) Persons to Whom Goods May Be Delivered.--Subject to section 80111 of this title, a common carrier may deliver the goods covered by a bill of lading to—

- (1) a person entitled to their possession;
- (2) the consignee named in a nonnegotiable bill; or
- (3) a person in possession of a negotiable bill if--
 - (A) the goods are deliverable to the order of that person;or
 - (B) the bill has been indorsed to that person or in blank by the consignee or another indorsee.

[...]

Sec. 80111. Liability for delivery of goods

(a) General Rules.--A common carrier is liable for damages to a person having title to, or right to possession of, goods when--

- (1) the carrier delivers the goods to a person not entitled to their possession unless the delivery is authorized under section 80110(b)(2) or (3) of this title;
- (2) the carrier makes a delivery under section 80110(b)(2) or (3) of this title after being requested by or for a person having title to, or right to possession of, the goods not to make the delivery; or
- (3) at the time of delivery under section 80110(b)(2) or (3) of this title, the carrier has information it is delivering the goods to a person not entitled to their possession.

[...]

- Endnote 5

7303 (a) Unless the bill of lading otherwise provides, a carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods, without liability for misdelivery, on instructions from:

- (1) the holder of a negotiable bill;
 - (2) the consignor on a nonnegotiable bill, even if the consignee has given contrary instructions;
 - (3) the consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the tangible bill or in control of the electronic bill; or
 - (4) the consignee on a nonnegotiable bill, if the consignee is entitled as against the consignor to dispose of the goods.
- (b) Unless instructions described in subdivision (a) are included in a negotiable bill of lading, a person to which the bill is duly negotiated may hold the bailee according to the original terms.

- Endnote 6

The UCC specifically contemplates that the B/L might alter the delivery obligations. It further states that a carrier may deliver to a consignee of a straight B/L 'in the absence of contrary instructions from the consignor'. A clause requiring surrender of a B/L would, in our view, be considered such a contrary instruction.

2. Conclusion

We hope that you will have found the above item interesting. If you would like to have further information about any of them, or have any comments you would like to make, please email the editor at tt.talk@ttclub.com. We look forward to hearing from you.

Peter Stockli
Editor
for the TT Club

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