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Welcome to TT Talk

No. 118 in the series

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1. More on thefts of containers in Hong Kong

TT Talk Edition 112 (item 1) of 21 October 2008 reported the thefts of reefer containers in Hong Kong. A few days ago Sandy Ip, Claims Executive in the Thomas Miller (TT Club) Hong Kong office, alerted us to the theft of 45 foot dry containers.

In this latest case, the shipping line was approached by a shipper who booked six 45 foot dry containers all in one order. The shipper was a new client. In spite of this, the shipping line neither visited the shipper's premises to check whether he might be genuine nor obtained a bank guarantee for the value of the containers. Instead, the shipping line released all six containers to the shipper's named trucking company on the day of the order.

The shipper and all six containers disappeared three days later without a trace. The shipping line reported the case to the police who started a criminal investigation and made known that other carriers had reported similar thefts recently.

It is likely that such thefts will be attempted much more frequently in the current economic downturn. In Hong Kong, thefts specifically of 45 foot dry containers are increasing.

Most carriers have drafted internal procedures on the handling of larger bookings from new customers, but it is essential that these procedures are actually put in place. Sandy Ip comments: 'In order to prevent this type of container theft, we strongly urge operators to communicate procedures to all employees who deal with customers'.

The TT Club's sheet 'Stop Loss 7 - Container Loss' provides more information on how to prevent container theft. It can be downloaded free of charge from the Club's website in English, Russian and Chinese:

http://www.ttclub.com/TTClub/public.nsf/HTML/CWOG-6Y6G9A?OpenDocument

In summary: 'know your customer'. A Member who has reliable information on its customers will much better be able to protect its own assets.

2. UK - deregulation of freight forwarders' retail cargo insurance

TT Talk Edition 117 (item 1) of 25 March 2009 reported the deregulation in the UK of retail cargo insurance that can be offered by freight forwarders and storage firms. Craig Neame, partner at HFW (London), kindly referred us to the newly published 'Financial Services and Markets Act 2000 (Exemption) (Amendment) (No. 2) Order 2009', Statutory Instrument 2009 No. 264, **which entered into force on 6 April 2009**:
www.opsi.gov.uk/si/si2009/uksi_20090264_en_1

In 2007, Statutory Instrument 2007 No.1821 exempted freight forwarders and storage firms from the general prohibition imposed by the Financial Services and Markets Act 2000 concerning cargo insurance offered to commercial customers. The new Statutory Instrument 2009 No. 264, by deleting the passage 'who is not an individual' from the definition of 'customer', i.e. by defining customer simply as 'a person who uses the service of a freight forwarder or storage firm', widens this exemption to insurance offered to retail customers. The 'Explanatory note' states that Statutory Instrument 2007 No. 1821 extends the exemption so that freight forwarders and storage firms 'may extend rights under their insurance policies to both their commercial and their retail customers' without becoming subject to regulation under the Financial Services and Markets Act 2000.

3. Wheel maintenance on cargo handling machinery

ICHCA International recently published Information Paper 38a/2009 as an addition to the paper on Split Rim Wheels which was included in TT Talk Edition 115 (item 2) of 27 January 2009. The new Information Paper is as follows:

'Information Paper 38/2008 gave details of a fatal accident arising from work on a split rim wheel on an item of mobile cargo handling machinery and referred to the fact that this arose from a known hazard. The Information Paper said that such assemblies can come apart due to a variety of reasons including:
- Damaged or mismatched rim parts
- Corroded or dirty rim parts
- Failure to deflate tyre before removal
- Incorrect tyre size
- Over inflating tyres
- Fitting tubed tyres on a rim designed for tubeless tyres
- Removing the nut which holds the wheel rim together (on some designs of split rim).

It has been pointed out to ICHCA International that there is another cause of wheel accidents which, although not directly related to split rims, is concerned with wheel maintenance.

All maintenance provisions regarding wheels involve regularly ensuring that they remain securely attached to the vehicle/machine. Ideally, this should be checked by the use of a torque wrench set to the value established by the manufacturer. However, it has been known for fitters to give the wheel nuts yet another tightening movement on them instead as a substitute. This can have the effect, over a period of time, of overstressing the studs and that has resulted in the studs failing and in at least two instances reported to ICHCA International causing a wheel to come off when in use.

The only way to avoid such an occurrence is to ensure that a torque wrench is used for such checks, ensuring that it is set to the manufacturer's recommendations and it is recommended that those members concerned review their procedures and arrangements accordingly.'

4. New Zealand Court of Appeal divided on 'navigation or management of the ship' defence

a) Introduction

The 'Tasman Pioneer' grounded in 2002 in a narrow passage between the two Japanese Islands of Biro Shima and Shikoku. It was held, with regard to this grounding, that the ocean carrier could rely on Article IV rule 2(a) of the Hague-Visby Rules, which states that 'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) Act, neglect, or default of the master, mariner, pilot, or the servant of the carrier in the navigation or in the management of the ship'.

However, it was the master's conduct after the grounding that caused controversy. Apparently, in an attempt to save his own career, he tried to conceal the occurrence of the grounding, in particular deliberately failed to alert the Japanese coast guard. His conduct after the grounding resulted in the loss of deck cargo for which cargo interests claimed a sum in excess of US$3 million.

b) Williams J in the New Zealand High Court

Williams J in the New Zealand High Court held in 2007 that the carrier was not entitled to the protection of Article IV rule 2(a), because the master did not act in good faith. The judge found that the defence of 'Act, neglect, or default (...) in the management of the ship' was based on the underlying premise that the master's actions 'must still have been undertaken in furtherance of the master's paramount duty of safely caring for the ship, cargo and crew'.

This requirement of good faith caused a lively debate amongst commentators. David Martin-Clark in his DMC's Case Notes said: '(...) can it really be good law that the subjective motivation of the master can change the quality of an act in the navigation or management of the ship so as to render it not such an act from the point of view of the Hague/ Hague-Visby Rules? Is this in fact another example of 'hard cases' making 'bad law'?'

c) Court of Appeal - Baragwanath J

In its judgement of 9 April 2009 the New Zealand Court of Appeal upheld Williams J's decision by a 2:1 majority (Baragwanath J and Chambers J; Fogarty J dissented) and referred the case back to the High Court. The majority in the Court of Appeal reached the same conclusion as Williams J, but without resorting to his 'good faith' argument.

Baragwanath J felt that the Hague/ Hague-Visby Rules had to be construed as a comprehensive international convention, without constrains by any prior domestic law. He conceded that the rise of the United Kingdom in shipping continued until after the First World War and that the United Kingdom remained influential in the drafting of the Hague Rules, but felt it would be an error to 'heark back' to the old English common law and that the time had come to 'bury' authorities which predate the Hague Rules. The Hague Rules differed on purpose significantly from the lack of restrictions of the common law and aimed to prohibit exorbitant exemption clauses. He held that the carrier could not rely on Article IV, rule 2(a), because the master's conduct after the grounding was 'fundamentally at odds with the purpose of both the contract of carriage and the legislative regime'.

Baragwanath J also added that the defence of 'error in the navigation or management of the ship' was not included anymore in the new 'Rotterdam Rules' (though he stressed that this fact was not part of his reasoning - of course, there was no room for this defence in the Hamburg Rules 1978 either).

d) Court of Appeal - Fogarty J

Fogarty J dissented and would have allowed the carrier's appeal. His approach to interpreting Hague/ Hague-Visby differed fundamentally. Baragwanath J and Fogarty J both referred to the 'Bunga Seroja' (1998) where the High Court of Australia found that the Hague Rules had to be read (1) as a whole, (2) in the light of the history behind them, and (3) as a set of rules devised by international agreement as regulating contracts governed by several quite different legal systems. Baragwanath J said that points (1) and (3) were indisputable, but that point (2) 'presented more difficulty' Fogarty J, in contrast, relied heavily on point (2).

Whereas Baragwanath J advocated an interpretation of the Hague/ Hague-Visby Rules 'without constraints by any prior domestic law', Fogarty J cited McHugh J in the 'Bunga Seroja' saying that it seemed likely that the English common law rules provided the conceptual framework for the Hague Rules and that the Rules should therefore be interpreted with that framework in mind. He examined the deliberations of the Hague Conference in 1921 and found that the contents of Article IV rule 2 were largely taken from provisions which had commonly appeared in British bills of lading, in particular the phrase 'act, neglect or default' which was qualified only by 'in the navigation or management of the ship'.

Fogarty J also emphasized that the interpretation should be 'wholly faithful to the text'. He held that the 'natural meaning' of the phrase 'act, neglect or default of the master' included intentional conduct, because there was nothing in Article IV rule 2(a) which would suggest that its application depended on the master's motive. The word 'act' was neutral as to quality and applied independently of culpability.

e) Conclusion

One can argue that it would be unjust if a carrier could escape liability in situations where the master deliberately puts his own personal interest above the one of ship and cargo. But if the application of Article IV rule 2(a) should be contingent on the master's intention when navigating and managing the ship, it will be necessary to determine in each case whether his conduct was acceptable. This may introduce uncertainty and increase legal costs.

The judgment by the Court of Appeal illustrates that judges might take widely differing (and even conflicting) approaches to the interpretation of the Hague/ Hague-Visby Rules. It raises rather more questions than it answers.

Please use the following web links for the full texts:

- Decision by Williams J (New Zealand High Court) of 31 August 2007 in New Zealand China Clays Ltd v Tasman Orient Line CV:
  http://www.maritimelaw.org.nz/0907.html

- Judgment by the New Zealand Court of Appeal of 9 April 2009 in Tasman Orient Line CV v New Zealand China Clays Ltd:
  http://www.maritimelaw.org.nz/0209.html
  http://www.courtsofnz.govt.nz/

5. Conclusion

We hope that you will have found the above items 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.

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Editor for the TT Club

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