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### 1. UK - Deregulation of Freight forwarding insurance

We believe the following 'Applied law briefing No.24' (of February 2009) by Nick Hutton and Craig Neame, partners in the logistics & multimodal transport team at Holman Fenwick Willan (London), is of great interest to forwarders in the UK:

**'In this newsletter we examine the result of the Government's consultation in respect of the deregulation of freight forwarding, removal and self-storage insurance.'**

The deregulation of this type of insurance is expected to come into effect from **6 April 2009**.

Following representations made to the Government by the freight forwarding industry initiated by concerns that other EU Member States were not regulating freight forwarders' insurance activities and the consequent effect regulation was having on the industry's competitiveness, the Government announced its intention in late 2006 to exempt the insurance activities of freight forwarders from regulation by the Financial Services Authority ('FSA').

As a result of this move, the practice of freight forwarders and storage firms extending 'open cover' insurance to commercial customers was the subject of a 2007 statutory instrument. Retail 'open cover' was not deregulated at the time however because of the perceived risk of consumer detriment.

This further deregulation follows HM Treasury's consultation on the topic which was launched on 19 June 2008 and closed on 12 September 2008. HM Treasury published their report this month.

### Proposed options

The consultation document outlined three options ranging from no change to the status quo, to the Government's favoured option whereby it would remove from the scope of FSA regulation the practice of freight forwarders and storage firms extending 'open cover' insurance policies to include the goods of retail customers in exchange for a premium. HM Treasury and the FSA would also work with the relevant trade associations to ensure that they had in place suitable

codes of practice that would minimise consumer detriment, this to include joining the Voluntary Jurisdiction of the Financial Ombudsman Service.

The consultation document made it clear that the third option was the Government's preferred option because it believed there would be a net benefit for industry and consumers.

The responses received from the industry were universally in favour of this option, some with additional proposals as to how it might best be implemented.

### **Cancellation of permission**

As a result of this deregulation, if your firm is authorised to transact open cover freight forwarding and storage business and does not transact any other regulated activities, you must apply to the FSA to cancel your permission before **31 March 2009** to avoid paying full fees for 2009/10. You will then be able to conduct regulated business until 6 April 2009 and not be liable for the full fees for 2009/10.

The FSA make it clear that if a cancellation application is received after 31 March 2009, the firm will be liable for the full year's fee. They also note that it is important that the firm identifies itself as a freight forwarder and/or storage firm on the cancellation form by ticking box (i) and indicate 'Freight Forwarder' under question 4, page 4.

A link to the cancellation form is here:

[http://www.fsa.gov.uk/pubs/other/cancellation\\_form.pdf](http://www.fsa.gov.uk/pubs/other/cancellation_form.pdf)<sup>TTT</sup>

## **2. US COGSA v Carmack - Ninth Circuit on the ocean carrier's liability**

TT Talk Edition 114 discussed several decisions by the District Court of the Southern District of New York (SDNY) and the Court of Appeals for the Second Circuit. In *Rexroth Hydraudyne v Ocean World Lines* the Second Circuit held on 6 November 2008 that an NVOCC, an ocean carrier and the latter's US agent could all rely on bill of lading clauses which extended the application of US COGSA to the land portion, with the result that these defendants could avoid unlimited liability under Carmack.

The latest significant case on the conflict between US COGSA and Carmack is the decision of 17 February 2009 in *Regal-Beloit Corporation v Kawasaki Kisen Kaisha* by the Ninth Circuit. As this court includes all US states on the US West Coast its decisions in shipping matters carry much weight.

In *Regal-Beloit*, carriage was first by sea from Shanghai to Long Beach (California), then onwards by rail when the cargo was damaged in a train derailment in Oklahoma. The ocean carrier issued a multimodal ('through') bill of lading directly to cargo interests. Significantly, no NVOCC was involved (like in *Sompo*, see TT Talk Edition 114). The Ninth Circuit held that Carmack applied to the ocean carrier, who was therefore bound by the mandatory Carmack rules on jurisdiction and unable to rely on the Tokyo forum selection clause in its multimodal bill of lading.

The ocean carrier tried to rely on the favourable decision by the Second Circuit in *Rexroth*. However, the Ninth Circuit held that *Rexroth* differed from *Regal-Beloit*, in that in *Rexroth* cargo interests had contracted with an NVOCC who, as a middleman, had arranged for ocean and inland rail carriage and had not physically handled the cargo. The Ninth Circuit pointed out that, in contrast, the ocean carrier in *Regal-Beloit* did handle the goods and performed itself the sea portion of the carriage (as the damage to the goods occurred during the rail portion, it is maybe somewhat surprising that the Ninth Circuit attributed such importance to the ocean carrier's role during the sea portion).

The Ninth Circuit in *Regal-Beloit* emphasized that it applied Carmack to the ocean carrier, because cargo interests 'dealt directly' with the ocean carrier. Thus, in a situation where the ocean carrier does not issue its own multimodal bill of lading directly to cargo interests, but instead to an NVOCC (who in turn issues its multimodal transport document to cargo interests), an ocean carrier might escape Carmack, even in the Ninth Circuit. The Ninth Circuit said that it did not read *Rexroth* to 'categorically exclude' ocean carriers from Carmack liability, which does not amount to a rejection of the Second Circuit's reasoning in *Rexroth*.

**There are no indications in *Regal-Beloit* that the Ninth Circuit would submit an NVOCC to Carmack.** The Ninth Circuit felt that nearly all the Second Circuit's reasoning in *Rexroth* pertained to the NVOCC and that even if the Ninth Circuit were to accept the Second Circuit's reasoning, it would not apply to the ocean carrier's arguments in *Regal-Beloit* where there was no NVOCC acting as a middleman between the ocean carrier and cargo interests.

However, it is highly significant for the NVOCC whether the ocean carrier to whom he subcontracts is liable under Carmack. The ocean carrier's multimodal bill of lading may well contain an indemnity clause which is onerous on the NVOCC. Thus, NVOCCs may want to ensure that their own carriage documents contain a suitably worded circular indemnity clause which would force cargo interests to hold the NVOCC harmless for any liability in excess of the US COGSA amounts.

The Ninth Circuit emphasized that Carmack is merely a set of default rules reaffirmed that a carrier can avoid the unpleasant liability under Carmack if it offers to its customer what is called 'Carmack protection'. The court mentioned that 49 U.S.C. § 10502 required the carrier to offer Carmack terms, but that Carmack terms did not necessarily have to appear in the parties' written agreement. It also briefly considered whether the ocean carrier could achieve 'Carmack protection' with a bill of lading clause which allowed him to subcontract with rail carriers 'on any terms whatsoever'. As the Ninth Circuit felt it was improper for it to decide whether the parties' 'negotiation and acceptance of their numerous, cross-referenced agreements' included an offer of Carmack terms, it sent the case back to the District Court.

United States Circuit Courts currently use different approaches to solve the conflict between US COGSA and Carmack and regularly reach conflicting results (the Fourth, Sixth, Seventh and Eleventh Circuits require for the application of Carmack a separate domestic 'bill of lading'). It is hoped that one of the Circuit Court cases on the conflict between US COGSA and Carmack will reach the United States Supreme Court so that much needed consistency and clarity can be restored.

Based on its decision in *Norfolk Southern Railway v James Kirby* that the multimodal transportation contract to the USA had an 'essentially maritime nature' and that the shore was 'an artificial place to draw a line' and on the general principle in the Rotterdam Rules that one and the same liability regime should apply to all modes of carriage, the Supreme Court would hopefully conclude that NVOCCs and ocean carriers who assume liability under a multimodal bill of lading are not Carmack carriers.

Please use the following web link for the full text of the Ninth Circuit's judgment of 17 February 2009 in *Regal-Beloit Corporation v Kawasaki Kisen Kaisha Ltd*:

<http://www.ca9.uscourts.gov/datastore/opinions/2009/02/17/0656831.pdf> 

### **3. Hong Kong: 'HAFFA Form of Trading Conditions' (December 2008 Edition)**

HAFFA, the Hong Kong Association of Freight Forwarding and Logistics, revised its 1997 Standard Trading Conditions and has produced the 'HAFFA Form of Trading Conditions' (December 2008 Edition). The 1997 HAFFA Standard Trading Conditions have been widely used in practice, not only in Hong Kong, but also for commercial activities involving the People's Republic of China (because the 1997 HAFFA Standard Trading Conditions were already well drafted, the TT Club would accept any continuous use of them by Club Members). This new 2008 'HAFFA Form of Trading Conditions' will be of interest to all involved in drafting or using forwarding or logistics conditions.

a) 'Only' a 'Form of Trading Conditions' - each HAFFA member must enter its name and liability amounts

The HAFFA 2008 'Form of Trading Conditions' is not a set of ready-to-use standard trading conditions. HAFFA explains in a 'Memorandum to Members' that the 2008 'HAFFA Form of Trading Conditions' is prepared solely for the information and reference of HAFFA members. It is not binding on HAFFA members and HAFFA 'makes no recommendation as to its use or adoption'. It is believed the reason for HAFFA's cautious approach is that a Competition Ordinance is about to enter into force in Hong Kong. By offering merely a 'Form of Trading Conditions' without stipulating liability limits in the way the 1997 HAFFA Standard Trading Conditions did, HAFFA may aim to avoid any allegations that it might support anti-competitive practices. Thus, HAFFA members are free to make changes to the template that is this 2008 'HAFFA Form of trading conditions'.

In contrast to the 1997 HAFFA Standard Trading Conditions, the 2008 'HAFFA Form of Trading Conditions' contains spaces in important provisions. The following information will have to be added individually by each HAFFA Member:

- Name of HAFFA member company (clause 1.1);
- HAFFA member's rate of interest (clause 11.6); and
- **Liability limits per (i) kg, (ii) cubic metre and (iii) event (clause 20.4).**

**A HAFFA member who uses the 2008 'HAFFA Form of Trading Conditions' without adding its name (in clause 1) and limits of liability (in clause 20) may well face unlimited liability.**

TT Club Members who intend to use the 2008 'HAFFA Form of Trading Conditions' are requested to obtain the Club's approval for their individual liability limits per kg, cubic metre and event (in clause 20.4).

b) Valid incorporation

What amounts to valid incorporation of standard trading conditions depends on the requirements of the applicable law. The comments in this paragraph 'b)' assume that Hong Kong law applies. If a law with stricter requirements on incorporation might apply (e.g. PRC law if the Member contracts with a customer based in China), the forwarder has to ensure that he complies with that law.

Because the 2008 HAFFA 'Form of Trading Conditions' does not contain any liability limits, the following attempts of incorporation are unsafe:

- 'Company X conducts all business subject to the HAFFA Form of Trading Conditions (December 2008 Edition)'; or
- 'Company X conducts all business subject to the latest version of the HAFFA conditions'.

Valid incorporation has to be considered separately depending on whether the forwarder (i) uses the 2008 'HAFFA Form of Trading Conditions' and simply inserts the information in clauses 1.1,

11.6 and 20.4 as required, or (ii) drafts its own standard trading conditions based on the 2008 HAFFA 'Form of trading conditions'.

(i) **If the forwarder uses the 2008 'HAFFA Form of Trading Conditions'** and simply inserts the information in clauses 1.1, 11.6 and 20.4 as required, **the forwarder needs to bring to all his customers' attention what individual liability amounts he inserted in clause 20.4.** A text along the following lines might be sufficient under Hong Kong law:

'[Company name inserted] conducts all business subject to the HAFFA Form of trading conditions (December 2008 Edition), copy available on request. The liability of [Company name inserted] under clause 20.4 is limited as follows: limit per kilogramme: HK\$ [amount inserted], limit per cubic metre: HK\$ [amount inserted], limit per event (or series of events arising from or attributable to one common cause): HK\$ [amount inserted].'

If a forwarder wants to incorporate the 2008 'HAFFA Form of Trading Conditions' into a framework contract, it should be attached to the framework contract with all spaces completed as necessary.

(ii) Conversely, a forwarder may draft its own standard trading conditions based on the 2008 'HAFFA Form of Trading Conditions'. Under this possibility, the forwarder does not refer to the 'HAFFA Form of Trading Conditions (December 2008 Edition)', but instead to his own standard trading conditions. TT Club Members who choose this approach are requested to submit their standard trading conditions to the Club for approval. The full text of the approved standard trading conditions should then be sent to all existing customers and to new customers at the latest when the first agreement is concluded.

#### c) Logistics

The HAFFA Memorandum notices that freight forwarders are now providing 'a more comprehensive chain of logistics services'. Thus, the definition of 'Services' includes 'inventory and management control' and 'tracking and tracing' (clause 1.1) and, for services 'on a continuing basis', the customer is requested to provide a forecast of cargo throughput (clause 8.1(n)). Yet the 2008 'HAFFA Form of Trading Conditions' is not a fully fledged set of logistics conditions, and Club Members who conclude complex long-term logistics agreements may want to include other forms such as the TT Club Series 600 Logistics Conditions.

#### d) Operator's role as agent or principal (carrier)

Under the 1997 HAFFA Standard Trading Conditions the forwarder provided its services 'as agents' unless the forwarder issued a FIATA air waybill or FIATA FBL as 'carrier' or was held by a court to have acted as a carrier (a similar approach is taken for instance in the TT Club Series 400 Freight Forwarders' Conditions and the Standard Trading Conditions of the Singapore Logistics Associations).

The 2008 'HAFFA Form of Trading Conditions' maintains the principle that 'all Services to Customer are provided by Company as agent' (clause 4.4), but (similar to clause 4(A) of the 2005 BIFA conditions) also states that 'the Company reserves to itself the discretion to provide any services as a principal or to procure as an agent the provision of the required services by third party(ies)' (clause 4.1). Arguably clause 4.1 somewhat weakens the presumption in clause 4.4 for the forwarder's role as an agent.

Like the 1997 HAFFA Standard Trading Conditions, Clause 4.3 of the 2008 'HAFFA Form of Trading Conditions' still list three factors each of which should not by itself indicate that the forwarder acts as a principal. Two of these factors, charge of an inclusive price (clause 4.3(a))

and consolidation with other goods (clause 4.3(c)) are conclusive indicators of the forwarder's status as carrier under other legal systems (e.g. sections 459 and 460 of the German Commercial Code).

As the third such factor, the 2008 'HAFFA Form of Trading Conditions' substitutes 'the supply by the Company of its owned or leased equipment and/or facilities' for 'the company issuing its own transport document including house air waybill or air consignment note or house bill of lading or freight forwarder cargo receipt'. The 2008 'HAFFA Form of Trading Conditions' addresses in clauses 4.2(b) and 4.4(a) how the forwarder's involvement in issuing the carriage document determines his role.

Pursuant to clause 4.2(b), the forwarder will be liable as a principal, (i) if he issues his 'own bill of lading or waybill or cargo receipt as a carrier' or (ii) if he 'enters into a separate contract and under the Separate Terms company contracts as a principal'. Arguably, regarding (i), a mere 'cargo receipt' should not evidence a carriage contract hence the forwarder who issues the cargo receipt should not have to do so as a carrier. On (ii), it is not entirely clear whether the situation described in (ii) could be interpreted as meaning that the forwarder is liable as a principal beyond the scope of that 'separate contract', in which case situation (ii) is potentially unpredictable for the forwarder.

Clause 4.4(a), on the other hand, states that the forwarder provides services as an agent if he 'procures the issue of a third party bill of lading (air or sea or road) or other transport document (including but not limited to cargo receipts under the Montreal Convention) containing or evidencing a contract of carriage between a third party and Customer (whether or not the same is expressly signed/ issued by Company as agent of the third party'. It is not clear why the reference to 'cargo receipts' is qualified by the phrase 'cargo receipts under the Montreal Convention', i.e. does not apply to all cargo receipts the forwarder issues.

#### e) Further noteworthy new (or modified) provisions

Here is a brief selection of other notable changes in the 2008 'HAFFA Form of Trading Conditions':

- Uncollected cargo: the presumption that the goods are duly delivered and that the forwarder shall have no further liability in respect of the goods is extended from storage to situations where the forwarder sells, disposes of or abandons the goods (clause 16.8(b));

- Delivery of cargo against forged or fraudulent documents: delivery to a person who presenting a forged or fraudulent document purporting to be an original bill of lading shall be deemed due delivery of the goods, if the person who releases the goods had no actual knowledge (i) that the document was forged or fraudulent, and (ii) that the person presenting the forged or fraudulent document had no right to possess or dispose over the goods (clause 18.3);

- Limitation of maritime claims: where another party is able to rely on the 'applicable International Convention on the Limitation of Liability for Maritime Claims or applicable national law', the forwarder's liability 'shall be limited to that proportion of the limitation fund as allocated to the Goods concerned' (clause 6.6);

- Jurisdiction, indemnification provision: if the Customer (or Owner) does not bring proceedings against the forwarder in Hong Kong, the Customer (Owner) shall indemnify the forwarder 'from and against all consequences thereof including, without limitation, legal costs and expenses' incurred by the forwarder (clause 22.3); incidentally, after the decision by the European Court of Justice (ECJ) in 'The Front Comor' of 10 February 2009, some wonder whether London

arbitration clauses should also provide for an indemnification if proceedings are commenced in breach of the arbitration clause.

Please use the following web link for the 'HAFFA Form of Trading Conditions' (December 2008 Edition) and the HAFFA 'Memorandum to members':

<http://www.haffa.com.hk/hftc.html> 

#### **4. 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](mailto:tt.talk@ttclub.com). We look forward to hearing from you.

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