**19 December 2008**

# Welcome to TT Talk

**No. 113 in the series**

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### 1. Slot charterers can limit under the 1976 Limitation Convention

In the complex legal proceedings concerning the beaching of the MSC Napoli in January 2007, which has given rise to claims against the owners of the MSC Napoli (Metvale) in excess of £100 million, Mr Justice Teare in the Admiralty Court (England and Wales High Court) dealt with the preliminary issues (i) whether two slot charterers (Hapag-Lloyd and Stinnes) were shipowners for the purpose of Article 1 of the 1976 Limitation Convention and (ii) if so, whether the limitation fund in the MSC Napoli proceedings could be deemed to be constituted by them.

Both these slot charterers have lodged claims against the limitation fund in respect of their claims for an indemnity with regard to cargo claims brought against them, the loss and damage of their own containers, general average and salvage claims and some transhipment claims.

Pursuant to Article 1 ('Persons entitled to limit liability'), 'the term 'shipowner' shall mean the owner, charterer, manager or operator of a seagoing ship'. Mr Justice Teare explained that the slot charter agreements between both Hapag-Lloyd and Stinnes and MSC had some features in common with a time charter, and cited CGM v Classica Shipping (Court of Appeal, 2004) which clarified that the term 'charterer' in Article 1(2) includes a time charterer.

The judge felt that the ordinary meaning of the word 'charterer' was apt to include any type of charterer, whether demise, time or voyage charterer, and that there was no reason why it should not also include a slot charterer. He reasoned that if slot charterers were not included within the definition of Article 1, slot chartering, which was an established and, to judge from its growth, an efficient way of organising the carriage of goods, would or might fall into disuse, and that a slot charterer's inability to limit liability would not encourage the provision of international trade by sea carriage, which was the object and purpose of the 1976 Limitation Convention.

While CGM v Classica Shipping left open whether the term 'charterer' in Article 1(2) of the convention included a slot charterer, The Tychy (1999) held that a slot charterer was within the phrase 'charterer of (...) the ship' in section 21(4)(b) of the Supreme Court Act 1981 relating to the arrest of ships.

Commenting on an argument presented in CGM v Classica Shipping that the 1976 Limitation Convention could not have been intended to limit the exposure of a slot charterer because it would be absurd that the liability of a mere slot charterer would have to be calculated by reference to the vessel's whole tonnage, Mr Justice Teare explained that the limit of liability under the convention was a limit in respect of the aggregate of all the liabilities of those within the definition of 'shipowner' and that the benefit of the convention's single limit may be sought be several persons such as the registered owner of the vessel, the time charterer and several slot charterers.

Having established that the Travaux Preparatoires of the 1976 Limitation Convention and its 1996 Protocol did not discuss the meaning of 'charterer' in Article 1(2), Mr Justice Teare held that on the interpretation of the term 'charterer' in Article 1(2) 'a literal meaning must give way to a purposive construction'. Thus, he concluded that 'in accordance with the ordinary meaning of the word 'charterer' and in the light of the evident object and purpose of the convention', a slot charterer was within the definition of 'shipowner' and therefore entitled to limit his liability. On issue (ii), the judge held that the limitation fund in the MSC Napoli litigation is deemed to be constituted by these two slot charterers.

Please use the following web link for the full text of Mr Justice Teare's judgment of 9 December 2008 in Metvale v Monsanto and 'All persons claiming and/or being entitled to claim damages in respect of loss damage or expense resulting from of arising out of the structural damage sustained by and/or water ingress into and/or the intentional beaching of the 'MSC Napoli' during severe weather on and after18 January 2007, her intentional beaching taking place on 20 January 2007':

http://www.bailii.org/ew/cases/EWHC/Admlty/2008/3002.html

**2. UNCITRAL Convention - 'Rotterdam Rules'**

The United Nations General Assembly adopted the UNCITRAL Convention 'on contracts for the international carriage of goods wholly or partly by sea', now known as the 'Rotterdam Rules', and authorised a signing ceremony to be held in Rotterdam on 21-23 September 2009 (UN General Assembly, document GA/10798).

However, this does not mean that the convention will enter into force in September 2009. Pursuant to Article 94(1) 'This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession'.

Thus, the convention will enter into force one year after it received the ratifications by twenty UN Member States. A Member State's signature (as may be given in September 2009) does not by itself amount to ratification. Theoretically, twenty UN Member States might ratify the convention by 30 September 2009 in which case it could enter into force on 1 October 2010, but such a rapid process is unlikely.

Apart from this ratification process, it will remain to be seen whether some countries will incorporate the 'Rotterdam Rules' into their domestic law without becoming Member States to them (as a number of countries have done in other instances, such as the Hague-Visby Rules) and to what extent courts will already consider the 'Rotterdam Rules' in judgment on rules that currently apply.

### 3. The perils of waste shipments in freight containers

'The growing volume of waste being transported internationally has led to an escalation in problems enveloping the industry. The UK P&I Club has recently released a report from its 'Carefully to Carry' committee detailing the hazards associated with and regulations surrounding the transport of unwanted substances (www.ukpandi.com/ukpandi/infopool.nsf/HTML/C2C_waste_in_containers).

Many countries have become acutely conscious of the reducing amount of landfill space. At the same time, at every level we are all more aware of the need to recycle. This has resulted in a significant trade, particularly from Europe to Asia. It is estimated that every year over 8.5 million tonnes of hazardous waste is shipped across boundaries. To some this may be a surprisingly technical area, but detailed regulations have been set out in the Basel Convention (www.basel.int). The authorities have become more vigilant as concerns rise over the flouting of regulations as well as the practical difficulties in effective waste separation.

Moreover, the safe transport of waste in containers is of increasing concern; it has the potential to cause serious danger – to lives, structures and other cargo. And the risk is far wider than what may be considered 'hazardous'; waste paper, plastics, metal, used tyres and computer hardware are amongst those that are causing major problems. While there is rightly concern over compliance with movement of waste internationally, there is growing evidence of poor operational practices. All too often the rubbish may simply be thrown into containers without any securing whatsoever. This may result in injuries when the container doors are opened – although good practice is always to use bands around the locking bars or other restraint to control the opening process. Also there is increased exposure to contamination of the container itself or surrounding cargo. Furthermore, unsecured waste cargo is likely to damage the container structure (side walls bulging etc), perhaps breach its structural integrity, and probably make it unstable during handling and movement.

It may be difficult for those involved in container movements - transport operators, shipping lines and container terminals - to control these risks when their clients are often not the originators of waste. As has been a regular theme of advice relating to cargo movement, this is another reason to 'know your shipper' – the nature and quality of their trade. The 'Carefully to Carry' article highlights the movement of waste to China and the shipper registration process implemented there (known as the AQSIQ programme, see www.worldscrap.com/modules/aqsiq). Waste cargo from an unregistered shipper is likely to be refused entry to China, leading to potentially unrecoverable expense from it being abandoned or returned to the origin.

Where it is known that waste is being moved, ensure that the relevant documents are correctly completed, and regularly validate the method of stowage and securing within the container. Be alert to specifically hazardous type of waste and be prepared to share experience with other operators – a simple 'not in my back yard' approach will not help control the transport or illegal, hazardous or simply dangerous waste.'

### 4. FCR – FIATA 'Forwarder's Certificate of Receipt' and 'Forwarder's Cargo Receipt'

A manufacturer writes that 'nowadays a lot of buyers are asking for a FCR ('Forwarder's Cargo Receipt') for sea shipments'. Of course, 'FCR' is also the long-established acronym for the FIATA 'Forwarder's Certificate of Receipt'. The use for payment of a 'FCR' instead of a transport document (for instance under a documentary credit/ letter of credit) can allow the seller to get paid more quickly. The forwarder issues the FCR to the seller in exchange for the cargo and any required documentation. The seller then obtains payment by transmitting the FCR to the buyer's bank.

The FCR is not a transport document, merely a receipt given by the forwarder to the seller in exchange for the cargo. The International Standard Banking Practice (ISBP) on UCP 600 lists both the 'Forwarder's Certificate of Receipt' and the 'Forwarder's Cargo Receipt' as documents which do not reflect a contract of carriage. Naturally, a 'Forwarder's Cargo Receipt' should not reproduce bill of lading terms. It is helpful if a FCR expressly states that under its terms the forwarder does not act as a carrier. The High Court of Delhi at New Delhi (India) held in 2006 that a forwarder could rely on such a clause.

In spite of being a 'mere' receipt and not a 'document of title' to the goods, FCRs are generally issued as an 'Original'. One reason is that the Uniform customs and practice (UCP) for documentary credits require presentation of 'at least one original of each document stipulated in the credit' (Article 17(a) of UCP 600). In case of the FIATA 'Forwarder's Certificate of Receipt', there is a second important purpose: surrender of the FCR Original is necessary to cancel or alter the otherwise irrevocable instructions to the forwarder. Some FCRs helpfully state that they are not a 'document of title' to the goods.

A forwarder does not always know which party owns the goods or has the right to control them. FCRs use various methods against this uncertainty. Under the FIATA 'Forwarder's Certificate of Receipt', the otherwise irrevocable instructions can only be cancelled or altered (provided the forwarder is still in a position to comply) if the FCR Original is surrendered to the forwarder. A Hong Kong operator in its 'Forwarder's Cargo Receipt' undertakes to act for its 'Customer', a term that does not appear on the front of the FCR but is defined on the FCR back as the person with whom the operator entered into a Service agreement. The 'Forwarder's Cargo Receipt' of a European operator envisages that the operator acts for the consignee, i.e. the FCR simply gives the consignee the irrevocable right to dispose over the goods once the operator has received them from the shipper.

Significant problems are caused by an inconsistency between the FCR and the transport document with regard to the parties entitled to control over the goods and delivery of the goods. The Notes to the FIATA 'Forwarder's Certificate of Receipt' warn the forwarder to ensure that 'the conditions of the freight documents (B/L etc.) are not contrary to the obligations [the forwarder] has assumed according to the FIATA FCR document'.

In a case decided by the Hong Kong High Court in 2000, the 'Forwarder's Cargo Receipt' and the master bill of lading issued by the shipping line named different parties as 'Consignee': the FCR named the buyer's bank, but the shipping line's bill of lading named the consignee, who was therefore able to collect the goods and then filed for bankruptcy protection. The unpaid seller could recover the money from the forwarder, who failed to ensure that the buyer could only obtain title to the goods on payment. The forwarder claimed that he had no contract with the seller, but the judge held that the seller conveyed instructions to the forwarder through the FCR (and a shipping note/ 'boat note') and found the forwarder liable (primarily for breach of bailment).

The FIATA 'Forwarder's Certificate of Receipt' is a reliable document. Conversely, there are no established standards yet for 'Forwarder's Cargo Receipts', which therefore require careful examination in each case.

## 5. Conclusion

The December 2008 edition of 'House to House' (h2h) might also be of interest to you:
http://www.ttclub.com/ttclub/public.nsf/html/JGRM-7MFDTK?OpenDocument

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.

Peter Stockli
Editor for the TT Club

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