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1. The TT Club: Forty Years Young

Paul Neagle, chief executive of TT Club, invites everyone to celebrate:

'The TT Club was born in the City of London 40 years ago - on 6th June 1968 to be precise - in the Thomas Miller offices in St Mary Axe, a site now occupied by the Swiss Re building dubbed 'The Gherkin'. It was originally known as the Through Transit Club, and was formed in order to cover the liabilities and assets of ship operators for the inland transit risks associated with the carriage of cargo in strange metal boxes known as containers and measured in TEUs (twenty-foot equivalent units).

With the immense growth of international trade fuelled by globalisation over the past four decades, averaging over 10% for each of the last five years, the development of the containership fleet has been relentless. In 2008 the total capacity of that fleet stands at well over 10 million TEUs, and order-books for new ships are full for the next three years. The fleet will move around 120 million containers this year and TT will cover approximately 70% of them. China has been the main engine of trade growth over the last decade, and in 1997 the Managers opened representative offices in Beijing and Shanghai to add to the existing network of offices around the globe.

TT Club's history has followed the industry's development in many other ways. The Club introduced container terminal and depot cover in 1969 to provide insurance for the maritime and inland infrastructure that was required to load and unload the ever-growing box fleet, and expanded this sector to include port authorities in 1988. Freight forwarders and NVOs (non-vessel operating carriers) was a third sector of involvement for the Club and the cover was expanded to include Logistics operators in 2005. More recently, the Club has 'stepped out of the box' and now insures increasing numbers of bulk cargo operators too.

Today the TT Club is financially strong with a very high level of solvency, and has a solid reputation as a market leader in its sector. It also has a highly skilled, experienced, dedicated and motivated work force throughout the world. The Managers would like to thank the Club's Members, brokers and suppliers for their support and contribution to our success, and to join with us in celebrating this important milestone in the Club's history.' 

2. TT Club Sea waybill (Series 500)

In order to meet a demand from Members, the TT Club has developed a Sea waybill. This TT Club Sea waybill Series 500 follows the structure of the TT Club Bill of lading Series 100 as far as possible. It works on two principles: (i) voluntary incorporation of Hague/Hague-Visby and US COGSA (to that extent, this Sea waybill 'pretends' to be a Bill of Lading); and (ii) incorporation of the CMI Uniform Rules for Sea Waybills (reflecting the effective approach of the BIMCO Combiconwaybill).

The main difference between a sea waybill and a bill of lading is that a waybill is not a document of title; this enables the consignee to obtain delivery without surrender of an original carriage document. Members have the option to use the Bill of lading Series 100 or the Sea waybill Series 500, depending on commercial requirements. If no document of title is needed, Members are encouraged to use the Sea waybill Series 500 and discouraged from attempting to transform the Bill of lading Series 100 into a waybill, for instance, by stamping it as 'express'. Members who issued a waybill will be aware that they (or their agent) must obtain clear identification from the person who claims delivery of the cargo.

Members can use the following web link (and path) to download the TT Club Sea waybill (Series 500) from the Club's website:

www.ttclub.com

(-> Log in at 'My TT Club' -> Legal -> Model Conditions)

The CMI Uniform Rules for Sea Waybills can be accessed on the website of the Comité Maritime International (CMI):

<http://www.comitemaritime.org/cmidoocs/rulesaway.html> 

3. Supreme Court of South Korea backs 'Himalaya clause' in favour of container terminal

Sandro Chu, Senior Claims Handler in the Thomas Miller (TT Club) Hong Kong office, reports on an important legal development in South Korea.

The case of Nice Trade v UPS SCS Korea (and others) concerned the carriage from Shanghai to South Korea of five wooden cases of 'IPP-027', a material used in the manufacturing process of glass lenses. The cargo contained organic peroxides susceptible to spontaneous combustion unless carried at low temperature. The shipping line carried the cargo by reefer container and maintained the requested low temperature of -18°C. However, it failed to notify the cargo's low temperature requirement to the terminal which discharged and stored the cargo on arrival in South Korea. The shipping line merely attached the IMDG Code label to the container.

As the terminal had not been told of the low temperature requirement and had not paid sufficient attention to the IMDG Code label, it believed that the cargo did not require temperature control and stored the reefer container at the temporary storage area for general dangerous cargo. The cargo of 'IPP-027' caught fire which caused its total loss. The South Korean importer claimed KRW 25,569,960 (approx US\$22,200) plus interest.

The District Court held that the shipping line could limit its liability to the South Korean importer to 500 SDR per package (2500 SDR), i.e. KRW 3,489,675 (approx US\$3,030) pursuant to the Korean Commercial Court (KCC). The court stated that the importer had title to sue the shipping

line as holder of the bill of lading, but it did not provide details on how the importer became the holder of the shipping line's master bill of lading.

The terminal sought to limit its liability to the importer by relying on the 'Himalaya clause' in the shipping line's bill of lading (a 'Himalaya clause' extends the carrier's benefits under his bill of lading conditions to other parties). The importer claimed that the terminal's failure to store the container at the required low temperature amounted to reckless conduct, but the District Court held that the terminal acted with negligence (or even gross negligence), which did not prevent the terminal from relying on the 'Himalaya clause'. This allowed the terminal to limit its liability to the same extent as the shipping line.

The Korean Supreme Court, the highest court of South Korea, in its judgment of 27 April 2007 first clarified that Article 789-2 of the Korean Commercial Code (KCC) entitled 'employees' and 'agents' to invoke the defences and limits available to the carrier, but added that Article 789-2 KCC did not also protect 'independent contractors' who perform their own business activity at their own discretion without direct instruction and supervision from the carrier. The Korean Supreme Court then upheld the District Court's findings that the terminal could rely on the 'Himalaya clause'. The court explained that a 'Himalaya clause' on the back of a bill of lading was commonly used in international shipping and that this clause took into account the specific risks of ocean transportation. It also held that a 'Himalaya clause' did not infringe the principle of 'good faith and sincerity'.

Sandro Chu comments: 'This judgment is important because this is the first case where the Korean Supreme Court dealt with a 'Himalaya clause' and affirmed its efficacy since the amended Korean Commercial Code came into force in 1993. However, terminals can only then successfully rely on the Himalaya clause in a bill of lading if the clause is properly drafted, i.e. it includes the terminal operator and/or independent contractor. Although South Korea is not a 'case law' jurisdiction with strict rules on precedents, judgments by the Korean Supreme Court are generally followed by the subordinate courts.'

Thus, the Club recommends that Members who act as subcontractors of South Korean shipping lines (or other shipping lines who issue bills of lading subject to South Korean law) endeavour to ensure that the protective effect of the 'Himalaya clause' in the shipping line's bill of lading extends to the Member. A clause that requires the shipping line to include in its bill of lading a 'Himalaya clause' which also protects terminals should be included in the service agreements between terminal and shipping line. 

4. Additional Protocol to CMR concerning the electronic consignment note (e-CMR)

On 27 May 2008 seven countries signed an Additional Protocol to CMR which will provide the legal framework for the electronic CMR consignment note (e-CMR).

The United Nations Economic Commission for Europe (UNECE) expects that the electronic CMR consignment note, known as 'e-CMR', will lead to streamlined procedures and securer data exchange, in particular by reducing the scope of error in dealing with identification and authentication of signatures.

To date, the Additional Protocol has been signed by Belgium, Finland, Latvia, Lithuania, the Netherlands, Norway, Sweden and Switzerland; expected to sign in the near future are Albania, Armenia, Hungary, Montenegro, Russia, Slovakia and the United Kingdom. The convention will come into force on the ninetieth day after five countries have deposited their instruments of ratification or accession.

a) Electronic CMR consignment note

The Electronic CMR consignment note is issued through electronic communication by the carrier, the sender or any other party interested in the performance of a CMR carriage contract (Article 1 of the Additional Protocol to CMR). It contains the same data as the CMR paper consignment note (Article 4). For its authentication the parties are required to use a 'reliable electronic signature' (Article 3).

The use of the electronic CMR consignment note requests the consent of all 'parties interested in the performance of the contract' (Article 5). The phrase 'parties interested in the performance of the contract' comprises not only the sender and carrier who concluded the carrier contract, but also the consignee and subsequent carriers, if any (Martius, European Transport Law, 2007, at p 307). Thus, the electronic CMR consignment note might first become popular with parties who have close regular contacts (of course, many parties to advanced carriage and logistics contracts already use electronic means to manage their goods movements).

b) Other electronic communication under CMR

Apart from the CMR consignment note, any demand, declaration, instruction, request, reservation or other communication relating to the performance of a CMR carriage contract may be made out by electronic communication (Article 2). Martius (at pp 311-312) states that, in contrast to the use of the electronic consignment note (Article 5), a party can use electronic means without the consent of the other 'interested parties' for other communication such as notification of loss or damage under Article 30 CMR.

The following web links might be of interest to readers:

- United Nations Economic Commission for Europe: press release of 27 May 2008:
http://www.unece.org/press/pr2008/08trans_p05e.htm

- Report of the UNECE Inland Transport Committee of 5 May 2008 (**the full text of the 'Additional Protocol' to CMR is Annex V at pages 36-42**):
<http://www.unece.org/trans/doc/2008/itc/ECE-TRANS-200e.pdf>

- Professor Loewe's famed CMR commentary of 1975:
<http://www.unece.org/trans/doc/2006/sc1cmr/commentary.pdf>

5. UNCITRAL draft convention on carriage contracts: web link to the convention text

Further to TT Talk Edition 108, item 2, readers were unable to reach the text of the UNCITRAL 'Draft convention on contracts for the international carriage of goods wholly or partly by sea' through the direct web link to this pdf document. We apologize and recommend the following approach:

First, go to:

http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html

Then, click on the first link on the list entitled 'A/CN.9/645 - Report of Working Group III (Transport Law) on the work of its twenty-first session'. The actual text of the convention is the Annex at pages 60-81 

6. Conclusion

Please note that our London office will be moving to 90 Fenchurch Street, London, EC3M 4ST with effect from Monday, 4th August 2008. Telephone and e-mail details will remain unchanged.

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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