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Welcome to TT Talk

No. 108 in the series

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1. Air waybill conditions of contract - 'Note' the difference

In TT Talk Edition 102 of 16 October 2007 we reported that IATA Resolution 600b, which provides the basis for the IATA recommended 'Conditions of contract' on the back of the IATA air waybill, would become effective on 17 March 2008. This is the web link to the announcement on the IATA website from where the full text of IATA Resolution 600b can be downloaded:

http://www.iata.org/whatwedo/cargo/resolution600b.htm

We expressed our concerns that these new conditions might not be suitable for freight forwarders (Transport Operators) who act as contracting air carriers. As a result, FIATA invited the Club to state its views on how freight forwarders could best protect their liability as air carriers through papers and discussions at and around the FIATA HQ Meeting in March 2008 in Zurich.

FIATA has now confirmed its recommendation in its publication FIATA Review (No 72 of May 2008). FIATA emphasises that, when used as a house air waybill, the conditions of contract on the back of the 'neutral' IATA air waybill, based on Resolution 600b, do not provide adequate liability protection where no international carriage convention applies.

FIATA does recommend that freight forwarders use the IATA air waybill, but also recommends that they add the following 'Note' if they use the document as a house air waybill (i.e. when they might be held to be a contracting air carrier):

If this air waybill is used by a forwarder in a capacity as contracting carrier for air transportation, any transportation or other service which is not subject to an international air carriage convention will not be subject to the terms and conditions of this air waybill but will instead be subject to the forwarder's general conditions as have already been provided to you.

The scope of this new Note is wider than the text which was used a number of years ago, because it applies not only to 'transportation', but also to any 'other service which is not subject to any international air carriage convention'.

However, simply adding the Note at the bottom of the air waybill back will not of itself afford sufficient protection. As FIATA point out, the freight forwarder must also validly incorporate into the contract the general conditions to which the Note refers.

What amounts to valid incorporation will depend on the law applying to the contract between the freight forwarder and its customer. However, the phrase 'as have already been provided to you' at the end of the Note indicates one of the measures which is required.

The TT Club strongly advises its Members to follow the approach recommended by FIATA.

2. UNCITRAL draft convention on carriage contracts: watch out, Marine Terminal Operators!

At its twenty-first session in January 2008 in Vienna, the UNCITRAL Working Group III finalised its work on the UNCITRAL 'Draft convention on contracts for the international carriage of goods wholly or partly by sea'.

Please find here the web link to the UNCITRAL 'Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008)'; the actual text of the convention is the Annex at pages 60-81:

http://daccessdds.un.org/doc/UNDOC/GEN/V08/507/44/PDF/V0850744.pdf?OpenElement

The convention would enter into force if twenty countries were to ratify it; many observers are currently reluctant to make predictions whether or when this might occur.

This TT Talk item wants to draw attention to the concept of a 'Maritime performing party', which is defined in Article 1(7) of the draft convention as 'a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area'.

As Professor Jan Ramberg explained at the FIATA HQ Meeting in March 2008 in Zurich, 'Maritime performing party' includes stevedoring companies and cargo terminals at sea ports.

If the conditions of Article 20(1)(a)+(b) are met, a 'Maritime performing party' is subject to the obligations and liabilities imposed on the carrier under the convention and entitled to the carrier's defences and limits. The convention's general liability limits in Article 61(1) of 875 SDR per package or other shipping unit and of 3 SDR per kilogram, whichever amount is the higher, also apply to the liability of the 'Maritime performing party'.

Terminal operators are currently not subject to any mandatory international convention: the carriage conventions do not apply to them and the 'United Nations convention on the liability of operators of transport terminals in international trade' (1991) has never entered into force. Many marine terminal operators are currently able to limit their liabilities to less than 875 SDR per package or 3 SDR per kilogram. The UNCITRAL 'Draft convention on contracts for the international carriage of goods wholly or partly by sea' would curtail this freedom.

The text of the convention has been circulated to Governments for comments and is scheduled to be discussed by the 'United Nations Commission on International Trade Law' at its meeting of 16 June to 3 July 2008.

3. Be careful when opening container doors

Amongst a container's weakest parts are its doors. The exposure to rain, condensation and a salty atmosphere causes the container door hinges to corrode. Such rust is not always visible, because repainting of the door hinge welds can conceal metal fatigue corrosion. Containers also sustain damage during carriage or handling when they collide with other containers or objects. Eventually, when workers open a defective container door, it comes off its hinges and can fall on anybody who is standing nearby.

Moreover, cargo and dunnage in the container can become unstable during the carriage or handling and end up exerting pressure against the container door. When the door is being opened, the cargo comes crushing down onto the worker. In one case, a huge paper reel, which had not been securely fastened, rolled out of the container and injured a stevedore fatally.

Safety requires that containers are regularly inspected and maintained. Workers who de-stuff containers must be properly trained on container handling and fully equipped with personal protective equipment ('PPE') such as a hard hat, high visibility jacket and safety boots. The workers should be aware of the nature and possible hazards of the goods. If the cargo includes chemicals, special equipment such as a breathing apparatus might be necessary. A container door that is jammed or blocked should not be opened with brute force. A worker, who attempted to open a container with a crow bar, suffered serious injuries.

A retaining strap on the outside of the container door prevents the container door from being forced open by cargo that presses against the inside of the door. The retaining strap is fastened around the door latches while the container door is still shut. After that the container door is opened and the retaining strap slowly released and eventually removed. Some workers have used equipment such as fork-lift trucks to brace the container doors, but such makeshift practices are not recommended without a full risk assessment.

Naturally, site instructions and safety procedures must be in place at the location of the container de-stuffing operations. The unloading area must be clearly marked. The surface of the location should be even (or descending slightly from the door end) without any slopes, debris or pot holes, in which case the container doors are less likely to fall open when released and any pressure on the doors from any contents inside will be reduced.

The container doors should only be opened right before de-stuffing commences. If machinery is used, everyone must keep a safe distance. A third party trucker who delivers the container to the unloading site should not be asked to help de-stuff the container, because he is unlikely to be properly trained, equipped or insured. If he has to be present at the unloading site, he is best placed and safest in his driver's cabin. The safety of every worker who opens and de-stuffs containers is markedly increased by established safety procedures and their rigorous enforcement.

4. Sea carriage in the Supreme Court of India - Japanese or Indian law?

The Indian case of Shipping Corporation of India v Bharat Earth Movers concerned the carriage of 16 packages of equipment by sea from Kobe to Madras. A survey on arrival revealed damage to part of the cargo. Bharat Earth Movers (cargo interests) claimed INR 16,72,144 (1,672,144) plus interest of 18%. The Shipping Corporation of India (carrier) sought to limit its liability.

The Supreme Court of India, the highest Indian court, first clarified that the Indian Multimodal Transportation of Goods Act 1993 did not apply to this case of unimodal (sea) carriage. It then examined the Indian Carriage of Goods by Sea Act 1925 ('Indian Act') and the Japanese

Carriage of Goods by Sea Act 1992 ('Japanese Act') and found that the 'Indian Act' stated that it applied to 'carriage of goods by sea in ships carrying goods from any port in India to any other port whether in our outside (India)', while the 'Japanese Act' asserted to be applicable 'from a loading port or to a discharging port, either of which is located outside Japan'.

As this carriage was from Kobe to Madras, the court concluded that the 'Indian Act' did not apply but that the 'Japanese Act' was clearly applicable to this situation where the carriage was to a discharging port outside Japan. The court held that the Shipping Corporation of India would be able to limit its liability and that the matter should be considered afresh.

The written text of the judgment does not reveal whether the bill of lading contained a law & jurisdiction clause and, if so, how the court examined it (the only bill of lading provisions the court cited were clauses 6 and 7 which concerned 'Liability for loss or damage where the stage is not known' and 'known' respectively, but it would appear that clauses 6 and 7 actually concerned combined carriage, in which case they were irrelevant to this sea carriage claim). If we assume that the bill of lading in this case was issued by the Shipping Corporation of India and that it contained a law & jurisdiction clause which provided for Indian law & jurisdiction (as one would expect in a bill issued by the Shipping Corporation of India), it is not entirely easy to comprehend why the court applied Japanese law in the shape of the 'Japanese Carriage of Goods by Sea Act 1992'. Admittedly, the 'Japanese Act' states that it applies to shipments to a discharging port outside Japan, but a prerequisite to the application of this act is that the carriage contract is governed by Japanese law in the first place. Because the court did not give details on what basis it came to apply Japanese law, this judgment is slightly enigmatic.

Please use the following web link for the full text of the judgment by the Supreme Court of India of 5 December 2007:

http://www.commonlii.org/in/cases/INSC/2007/1222.html

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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