Welcome to TT Talk No. 105 in the series

Contents

1. New Thai law on salvage

Spica Services (Thailand) have circulated a very informative summary by Pramuanchai Law Office C0 Ltd (Bangkok) on the new Thai Act on Marine Salvage, B.E.2550 (2007):

'The Thai Act on Marine Salvage, B.E. 2550 (2007)

Marine salvage is not a new matter for Thailand, but in the long history of Thai law Thailand has neither ratified any international convention on salvage, nor enacted a domestic law to govern marine salvage. Until this year, the Bill on Marine Salvage was passed and came into effect on 31 October 2007. The Act comprises of 34 Sections. This is part of the developments of Thai maritime law.

Basically, the Act is influenced by the International Convention on Salvage 1989. The purpose of enacting the Act is to establish the common practice of salvage and at the same time, to set the rights, obligations and liabilities of each party involved in marine salvage in line with the international convention. One of the crucial principles of the Act is to encourage marine salvage operations and ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger. Since the Salvage Convention 1989 was used by the draftsmen as the model of the Act, it is not surprised to note that most of the main principles of the Act are in line with the proviso of the Convention. Nevertheless, those main issues of the Act are summarized here below:

- The term 'salvage operation' is defined by Section 4 of the Act. The definition mirrors Article 1 (a) of the Salvage Convention 1989. Excluded from the Act by virtue of Section 5 are salvage operations performed in inland waters without involvement of seagoing vessels, warships, non-commercial state-owned vessels, platforms and drilling units.

- The master of the vessel has the authority to conclude contracts for salvage operations on behalf of owner of the vessel. The master or owner of the vessel has the authority to conclude such contracts on behalf of the owner of the property on board (Section 7).

- Salvage operations which have had a useful result give right to a reward (Section 12). The criteria for fixing reward for the salvor are provided in Section 13.

- Payment of rewards shall be made by all of the vessel and other property interests in proportion to their respective salved values (Section 14). But the rewards, exclusive of interest and legal cost, shall not exceed the salved value of the vessel and other property (Section 15).

- In the circumstances of Section 16 where the salvor has failed to earn a reward under Section 13 or earned it less than his expenses, he is entitled to special compensation from owner of the vessel which may be increased up to a maximum of 30% of the expenses incurred by him. The court has the power to further increase such special compensation, if considered fair and just, but the total amount of special compensation payable to the salvor shall not exceed 100% of his expenses (Section 16).

- Life salvage does not give right to the salvor to claim remuneration from persons whose lives are saved, but is entitled to fair share of the payment awarded to the salvor if the salvage is involved in both life and property salvage (Section 20).

- A salvor is not entitled to payment if he has been guilty of misconduct (Section 23) or rendered services against express and reasonable prohibition of the owner or master of the vessel or the owner of any other property in danger which is not and has not been on board the vessel (Section 24).

- A salvor is entitled to enforce maritime lien unless satisfactory security for his claim has been duly provided (Section 25).

The Act provides for a two-year time limit for claim for payment under the Act. The two-year time limit commences from the day on which the salvage operation has accomplished (Section 31). Claim arising from salvage operation under the Act is under the jurisdiction of the Central Intellectual Property and International Trade Court.'

2. CMR - Application of 1978 Protocol confirmed for Russia by Supreme Arbitration Court

Article 23 (3) of CMR 1956 stipulates a liability limit of 25 francs per kilogram of goods lost or damaged. 'Franc' is defined as 'the gold franc weighing 10/31 of a gramme and being of millesimal fineness 900'. However, 36 of the 51 CMR Member States have also signed the 'Protocol to the Convention on the Contract for the International Carriage of Goods by Road' concluded on 5 July 1978 ('Protocol 1978'), which introduced the modern liability limit of 8.33 SDR per kilogram.

Neither the Soviet Union nor the Russian Federation has ever signed the Protocol 1978. In spite of this, a number of lower Russian courts have applied the Protocol's liability limit of 8.33 SDR per kilogram. This created a situation of conflicting judgments and legal uncertainty.

On 14 December 2007 the Supreme Arbitration Court of the Russian Federation had the opportunity to rule on the question. It held that the CMR Protocol 1978 did in fact apply in Russia. The court acknowledged that neither the Soviet Union nor the Russian Federation had actually signed the Protocol 1978, but held that the Soviet Union, by signing CMR in 1983, had ratified CMR it in its entire existing form. This rationale was consistent with the need for consistency between the CMR Member States.

The Kaliningrad Arbitration Court had held at first instance that the carrier's liability was limited to 8.33 SDR per kilogram. This meant that a claim for 122,226 rubles (US$ 5015) was limited to 82,060 rubles (US$ 3367).

The Kaliningrad court was overruled by the 13th Arbitration Appeal Court, which instead applied the gold franc value. This meant that the claim for 122,226 rubles was not limited.

The decision of the Arbitration Appeal Court was reversed by the Federal Arbitration Appeal Court for the North West Region (the Cassation Court) which reinstated the SDR 8.33 limit. The Supreme Arbitration Court (at fourth instance) confirmed this finding.

Please note that the 'Arbitration Courts' in the Russian Federation are not arbitration tribunals in the western sense, but specialised commercial courts.

The decision by the Supreme Arbitration Court is binding (under Article 16 of the Arbitration Procedural Code) on all Russian courts and central and local government authorities and is, for practical purposes, unappealable.

Please use the following web link for the full text of the arbitration award by the Supreme Arbitration Court of the Russian Federation of 14 December 2007 (in Russian language):

http://www.arbitr.ru/?id_sec=353&id_doc=3530&from=%2F%3Fmakelist%3D0%26pg%3D

3. IMDG Code Amendment 33 mandatory

Amendment 33-06 of the IMDG Code became mandatory on 1 January 2008, making previous amendments redundant. All previous editions are now completely superseded and should be discarded. Only the version published in Oct/Nov 2006 is in force. Details of the changes have been published prior to the transitional year commencing in January 2007; further information, for example, can be found at http://www.hazcheck.com/general.asp?np=news_170 and http://www.hazcheck.com/general.asp?np=news_238#newstop.

While on the subject of dangerous goods, the TT Club has previously noted that, in the IMDG Code, training for shore staff who handle dangerous cargoes is currently recommended only. The Club has lobbied for this to be changed to mandate training for all shore-side personnel and the matter will be decided at the IMO's Maritime Safety Committee in May 2008.

Further, while poor training and understanding is only part of the cause of DG incidents, it is clearly key to improving safety standards throughout the supply chain. In its House to House publication in July 2007, the Club profiled the initiative of Exis Technologies and DNV (Det Norske Veritas) in relation to the development of a Standard for Certification for the Competence of Shore-Side Personnel Handling Dangerous Goods and a related e-learning tool. The accessibility to such training materials is magnified by the benefit of a uniform standard. Confidence in common safety standards is necessary for a chain that relies on trust.

Exis is also behind the established 'Hazcheck' service that provides full support in relation to all aspects of the carriage of dangerous goods, including generating documentation compliant with the IMDG Code (see www.hazcheck.com).

Further information on the IMDG Code and resources can be found on the IMO website (www.imo.org). For technical questions, the Club would also recommend contacting Mike Compton of ICHCA International (mike@portsafety.demon.co.uk).

4. Title to sue under one original bill of lading endorsed 'in blank' under Australian law

a) Summary of Hilditch v Dorval Kaiun KK

In the Australian case of Hilditch v Dorval Kaiun KK (The 'Golden Lucy I'), Hilditch, the Australian buyer, purchased from SK Corporation (Korea), the seller, a cargo of refined oil products, including 400 metric tonnes of Yubase 6 (a lubricant for motor engines). For the carriage from

Korea to Australia, SK Corporation concluded a charterparty with carriers, Dorval, supplemented by a tanker bill of lading issued in a set of three originals.

The'Golden Lucy I' carried the Yubase 6 in a number of tanks, and caustic soda in other tanks. A survey after discharge operations established that the Yubase 6 was contaminated and commercially unusable.

In his judgment of 14 December 2007, Rares J at first instance in the Federal Court of Australia found that a leak on the 'Golden Lucy I' permitted the caustic soda to admix with the Yubase 6 before the Yubase 6 passed the ship's manifold. The judge held that the damage arose from Dorval's breach of Article 3, rule 2 of Australian COGSA carefully to carry the cargo which extended to the discharge. He held the damage did not arise or result from an 'act or omission' in the sense of Article 4, rule 2(i). Dorval was therefore liable for the full value of the Yubase 6 amounting to AUD 560,013 plus AUD 77,558 interest.

b) Buyer's title to sue under a bill of lading endorsed 'in blank'

Hilditch set up a documentary credit (letter of credit) with National Australia Bank. The bank required a full set of shipped on board charterparty bills of lading made out to the order of the shipper and endorsed in blank.

As required by the documentary credit, the bill of lading was made out to the order of SK and named Hilditch as the notify party. Hilditch received one of the three bill of lading originals from the National Australia Bank . On it were two separate signatures. The first signature omitted the name of the author or any indication on whose behalf it had been signed. The second signature was placed above a stamp by the Export-Import Bank of Korea.

Dorval claimed that Hilditch had no title to sue as an endorsee of the bill of lading for the purposes of the New South Wales Sea-Carriage Documents Act 1997. Dorval further argued there was no endorsement on the one bill of lading original that Hilditch delivered to it.

Rares J referred to Lickbarrow v Mason (1794) and Sewell Burdick (1884) as authorities that under 'the law merchant', an endorsement 'in blank' of a negotiable document issued 'to order' converts the document to a bearer document. The Singapore Court of Appeal also so found in Keppel v Bandung (2002).

Rares J noted that a Dorval employee's signature on Dorval's commercial invoice matched the 'anonymous' one on the bill. The judge felt it was unlikely SK would present documents which did not comply with the express requirement of the documentary credit for a bill endorsed 'in blank' and concluded that it was obvious that the signature on the bill was a valid endorsement 'in blank'.

Further, Rares J rejected Dorval's claim that the second signature (which was placed above a stamp by the Export-Import Bank of Korea) was merely a mere administrative measure to record satisfactory examination of the documents stipulated in the documentary credit. The stamp and signature did not have any appearance of administration about them. The judge concluded that, provided the Export-Import Bank of Korea obtained property in the bill, it had also endorsed the bill in blank, as SK had previously done, thereby allowing it to be delivered as a negotiable document to the National Australia Bank.

Rares J also rebutted Dorval's argument that, for the endorsement to be valid, all three originals - not just one of them - had to be endorsed. He relied again on Sewell Burdick (1884) where Lord Blackburn conceded that he was not really aware why the shipping industry continued the practice of issuing more than one original of a bill of lading, but concluded it was important not to unsettle established principles. As Lord Blackburn pointed out, if endorsement (and delivery) of

all originals were necessary, it would be pointless to have more than one original in the first place. Rares J relied on the phrase in the bill's attestation clause '(…..) one of which being accomplished, the others to be void' and held that the bill of lading became 'accomplished' when Hilditch delivered one of the three originals to Dorval.

Thus, when Hilditch received one original of the 'order bill' converted to a 'bearer bill' endorsed 'in blank', it became a lawful holder of the bill and thereby entitled to sue Dorval.

c) Conclusions

Firstly, Hilditch v Dorval confirms that each (lawful) holder of an order bill of lading can transform an 'order bill' into a 'bearer bill' by endorsing it 'in blank'. This flexibility may suit some merchants and banks, but is potentially problematic, because any unintended recipient, finder or thief of the bill can claim under it. Gaskell, in 'Bills of lading; law and contracts', calls a 'bearer bill' a very dangerous document to let into circulation' - protection is improved if the full set of all originals is required for payment. The problem for the carrier who issued an order bill is that he has in principal no control over this transformation into a 'bearer bill'.

Secondly, Rares J established the significance of the 'anonymous' signature on the back of the bill of lading by looking beyond the bill itself and taking into account 'documents required in the documentary credit', i.e. evidence outside the carriage contract documentation.

Thirdly, the case confirms that, for the transfer of legal rights, the endorsement and transfer of one original is sufficient. However, if there are several originals, there are potentially several parties who attempt to claim from the carrier. Old English cases such as Barber Meyerstein (1870) and Glyn Mills Currie & Co v East & West India Dock Co (1882) have illustrated that several originals can cause complications.

The ICC Rules 'UCP 600' on documentary credit require that a bill of lading 'must appear to be the sole original bill of lading or, if issued in more than one original, be the full set as indicated on the transport document' (Article 20(a)(iv)), and contain equivalent provisions in respect of the Multimodal transport document, Non-negotiable sea waybill (!) and Charterparty bill of lading in Articles 19, 21 and 22 respectively (the provisions for air, road, rail and inland waters, dealt with at Articles 23-24, differ). In spite of the requirement at Articles 19-22 to provide a full set, it would appear that the parties to a documentary credit contract are free to deviate from it, if they expressly agree that presentation of a single original is sufficient. The phrase in the bill '(…) one of which being accomplished, the others to be void' appears to give a carrier some protection against claims of misdelivery.

Please use the following web link for the full text of Rares J's judgment in Hilditch v Dorval Kaiun KK ('The Golden Lucy I') of 14 December 2007:

http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/2014.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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Editor
for the TT Club

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