Welcome to TT Talk

No. 104 in the series

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1. Enforcement of civil judgments in China

As Clyde & Co report in a newsletter of November 2007, amendments to the Civil Procedure Law of the People's Republic of China will come into effect on 1 April 2008. These Amendments aim to facilitate the enforcement of civil judgments in the local courts.

Under the existing law, the court which tries a case is required also to enforce its judgment. This has caused problems particularly where the defendant's assets are elsewhere. The Amendment will allow the enforcement of the judgment by another court of the same hierarchical level. If that court fails to carry out the enforcement within six months, the applicant can apply for enforcement to the court at the next higher level.

The period within which an application for the enforcement of a civil judgment must be made is extended to two years. Applicants who fail to enforce civil judgement awarded in their favour will face higher fines. The Amendment will also expand the circumstances under which courts grant a retrial. Any application for a retrial will have to be filed with the court at the next higher hierarchical level.

For details, please use to following web link to the Clyde & Co newsletter:

http://www.clydeco.com/attachments/published/2092/Civil%20Procedure%20Law%20of%20PRC%20%28Nov07%29%2Epdf

2. Sobering thoughts on Dangerous Goods

The recent ruling on a five-year long Chinese legal battle is a reminder of the importance of declaring goods correctly.

In 2000 a company based in Dalian shipped 80 barrels of Oxalyl Chloride, a highly acidic and corrosive substance, on a Malaysian Airlines Airbus flight. The cargo was misdeclared as benign 8-Hydroxyquinoline, and was loaded, shipped, and treated as ordinary cargo. The cargo leaked during the flight bound for India from Beijing. After crews detected an odour, the plane landed in

Kuala Lumpur and evacuated the passengers. The leak caused enough damage for the aircraft to be considered a constructive total loss.

The insurers of the aircraft sought recovery against the shipper, the state-run company China National Chemical Construction and won US$65 million, plus interest, in the Beijing Higher People's Court (the most senior court of Beijing municipality). This is one of the highest sums awarded in a Chinese civil court to date. The parties are entitled to appeal against the judgment.

This case emphasizes the severity of the misdeclaration of dangerous goods. Unfortunately, this is not an isolated issue, as the TT Club has highlighted previously. It echoes the 1983 'Kapitan Sakharov' incident, where a slot charterer was held liable for the loss caused by the explosion of dangerous cargo. In both cases the cargo was misdeclared and treated as ordinary goods.

The TT Club stresses the importance of packing and declaring goods correctly. Any money saved by not declaring dangerous goods is dwarfed by the potential cost of liability in the case of an accident. This is not only a question of financial gamble, but reputation risk, and the loss of life and property. All steps should be taken to ensure the safety of the cargo, the persons transporting it, and third parties on sea, land, and in the air. Furthermore, many liability policies will stipulate a lower limit than US$65 million, a sum which itself might be dwarfed by the exposure in a major shipping casualty.

3. Cargo handling at sea terminal in multimodal transport under German law

The German Commercial Code dedicates in sections 452-452d a chapter to multimodal transport. In recent years a critical question has been whether cargo handling operations at a sea terminal constitute an independent portion of a multimodal transport contract, or whether such cargo handling is still part of the preceding or subsequent sea carriage portion, which generally provides a liability regime that is more favourable to the carrier.

a) Higher Regional Court (OLG) Hamburg, 19 August 2004

The freight forwarder ('Spediteur') assumed liability as a 'carrier' for the carriage of printing machinery packed in two large boxes first by sea from Bremerhaven (Germany) to Portsmouth (Virginia, USA), then by truck from Portsmouth to Durham (North Carolina, USA). At the start of the sea carriage in Bremerhaven, the two large boxes were placed on a 'Mafi-trailer', i.e. a special low-bed trailer with small wheels and suitable for heavy loads.

On arrival at Portsmouth, a tractor unit pulled the Mafi-trailer out of the vessel and drayed it about 300 metres on the terminal premises to a warehouse where the two boxes should have been loaded onto a truck. First, the safety belts, which secured the boxes on the Mafi-trailer, were loosened. Then, in order to facilitate the loading of the boxes onto the truck, the Mafi-trailer was being realigned to the truck at which point one of the boxes fell from the Mafi-trailer to the ground and suffered damage of some EUR 237,352.

The Higher Regional Court (OLG) Hamburg held that the drayage of the Mafi-trailer from the vessel to the warehouse and subsequent realignment of the Mafi-trailer to the truck were not part of the sea portion any more, but an independent portion of the multimodal transport because the Mafi-trailer was drayed on the terminal premises over a distance of several hundred metres and because the transfer of the boxes from the Mafi-trailer unto the truck required the use of a crane and special instructions by the shipper due to the weight and measurements of the boxes. As a result, the liability limit of 8.33 SDR per kilogram (pursuant to section 431(1) Commercial Code), not the lower 2 SDR per kilogram sea carriage limit, applied to the damage. Since the value of the

heavy cargo did not exceed 8.33 SDR per kilogram, the court held the forwarder liable for the full extent of the damage.

b) German Federal Supreme Court (Bundesgerichtshof) 3 November 2005

The judgment of the German Federal Supreme Court (Bundesgerichtshof) of 3 November 2005 concerned the carriage of a geophysical field laboratory, which was built into a 30 foot special container. Carriage was first by sea from Tunisia to Genoa (Italy), then by road from Genoa to Germany. The court found that the laboratory had been damaged before the start of the road carriage, i.e. either during the sea carriage from Tunisia to Genoa or during terminal operations at Genoa.

The Federal Supreme Court upheld the finding by the Higher Regional Court Celle of 24 October 2002 (the court below) that the sea portion of the multimodal transport ended only with the loading of the 30 foot special container onto the lorry destined for Germany with the result that the carrier was liable for the damage to the special container pursuant to the lower liability limits under the sea carriage law.

The Federal Supreme Court rejected the concept that the handling operations of the special container at the Genoa sea terminal amounted to an independent portion of the multimodal transport. The court explained that unloading of the cargo from the vessel, storage and any handling on the terminal premises were characteristic of modern sea carriage by container where a very close link exists between sea carriage and cargo handling at the terminal. Referring to an article by Drews in the journal 'Transportrecht', the court also said that containers and their contents were not being examined straight after unloading from the seagoing vessel, but at the earliest when they leave the terminal at which point it is often difficult to ascertain whether the damage to the container occurred on board the vessel or during handling operations at the terminal.

The Court did not categorically exclude the possibility that cargo handling at a sea terminal could be deemed an independent portion of the multimodal transport, but merely found that this was not the case in situations (like the one in the case before the court) where 'no particular circumstances' exist.

c) German Federal Supreme Court (Bundesgerichtshof) 18 October 2007

In its judgment of 18 October 2007 the German Federal Supreme Court considered the carrier's appeal against the judgment by the Higher Regional Court (OLG) Hamburg of 19 August 2004 - see paragraph 'a)' above for the facts of the case and the judgment by the Higher Regional Court (OLG) Hamburg.

Although the drayage of the Mafi-trailer from the vessel to the warehouse covered a distance of 300 metres, the Federal Supreme Court held that it did not constitute an independent portion of the carriage. The court referred to its earlier judgment of 3 November 2005 and found the circumstances of this case did not justify a different verdict.

However, the Federal Supreme Court held the forwarder liable after all, because the court felt that the damage to the large box during the realignment of the Mafi-trailer to the truck was already part of the operation of loading the box unto the truck. Thus, ‘fine-tuning’ its judgment of 3 November 2005, the court held that the operation of loading the cargo onto the next means of carriage was already subject to the liability regime which applies to that next portion of carriage.

Incidentally, the forwarder missed his chance to limit his liability to the extent he intended, because the typeface of his bill of lading conditions did not sufficiently emphasize the liability limits (section 449(2) Commercial Code).

d) Conclusion

The German Federal Supreme Court in its judgments of 3 November 2005 and 18 October 2007 has consistently held that, in case of a multimodal transport contract under German law, cargo handling at a sea terminal does not amount to a portion in its own right. This consistency is welcome (incidentally, three of the five Federal Supreme Court judges were sitting in both judgments). While the court in its judgment of 3 November 2005 left open that terminal operations might have an independent status in 'particular circumstances' (without explaining what precise facts could amount to such 'particular circumstances'), the judgment of 18 October 2007 makes no mention any more of such 'particular circumstances', and after this judgement it is now arguably even more difficult to envisage them.

The finding in the judgment of 18 October 2007 that the loading operations unto the next means of carriage are not part of the sea portion any more but are already the start of the next portion of the multimodal transport, is surely reasonable under the facts of the case. However, this approach might lead to less clear results under different circumstances. For instance when a big gantry crane unloads a container directly from the seagoing vessel unto a flatbed truck and the container sustains loss or damage in mid-air, it would arguably be more natural to consider the unloading/loading operation by the gantry crane as the end of the sea leg, rather then the start of the road portion. There might also be room for debate in a situation where the goods are first being transferred unto a road trailer but then kept in storage at the terminal on that road trailer.

- Please use the following web link for the full text of the judgment by the German Federal Supreme Court (BGH) of 18 October 2007 (in German language):

http://www.bundesgerichtshof.de/ (first go to 'Entscheidungen', when enter in 'Aktenzeichen' the text 'I ZR 138/04')

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. We look forward to hearing from you.

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for the TT Club

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