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1. New IATA air waybill on the horizon

FIATA REVIEW No. 68, July 2007, reports on the progress of IATA resolution 600b, which constitutes the conditions on the back of the IATA recommended air waybill. According to FIATA REVIEW, IATA resolution 600b was amended at the IATA Service Conference in Mexico in March 2007 and then circulated to all IATA members with the request to file the text of resolution 600b with their governments (in those countries where this process is required). This filing period ended on 25 July 2007.

The revised IATA air waybill will take into account the 1999 Montreal Convention, which applies compulsorily to international air carriage if this convention is in force in both the country of departure and the country of destination. As can be seen from the website www.icao.int of the International Civil Aviation Organisation (ICAO), the 1999 Montreal Convention has entered into force in 78 countries already.

FIATA report that IATA aim to declare resolution 600b effective per 1 December 2007. Once IATA recommend their revised air waybill form based on the new resolution 600b, FIATA intend to amend the FIATA air waybill for use by freight forwarders. In view of these changes, the TT Club advises its Members to keep their stock of air waybills low. The TT Club will provide further advice when more detailed information is available.

The Club welcomes the judgment by the Hong Kong Court of Appeal on the presentation of 'straight' bills of lading. The judgment not only clarifies Hong Kong law (it expressly overrules as 'wrong' the first instance decision in *The 'Brij'* (2003) which had held that a 'straight' bill of lading did not need to be presented), but also creates firm consistency with recent developments under Singapore and English law. [TTI](#)

2. Falling asleep while driving under CMR

Two important recent judgments concerned the question whether a driver who falls asleep at the wheel is liable for wilful misconduct under Article 29 CMR. Fortunately, in both cases the driver survived the accident.

a) *TNT Global SPA v Denfleet International Ltd* (England and Wales Court of Appeal, 2 May 2007)

Helen Arabanos, Claims Handler in the TT Club London office, comments:

"In TNT v Denfleet, the driver had fallen asleep at the wheel and gone off the road, causing the total loss of the cargo. The trial judge had made a finding of wilful misconduct based on the fact that the driver 'did not pass directly from alertness to sleep, but was aware that he was sleepy and made a conscious and deliberate decision to continue his journey.' The Court of Appeal drew attention to the particular facts of his case: that the tachograph had been destroyed in the fire, that the claim had not been presented until two and a half years after the incident, at which time all records maintained by the carrier had been routinely destroyed, and that there was no evidence that the driving limit had been exceeded (as it had been in Sidney G. Jones Ltd v. Martin Bencher Ltd ([1986] 1 Lloyd's Rep 54). Without this relevant evidence, the Court of Appeal held that a mere 'finding of fact as to the state of mind of the driver does not go far enough to support a conclusion of wilful misconduct'.

In accordance with Barry J's landmark case of Horabin v. B.O.A.C. (1952) which provides that 'the plaintiff must satisfy you (...) that the person who did the act knew that he was doing something wrong, and knew it at the time, and yet did it just the same or alternatively that the person who did the act did it quite recklessly (...) a state of mind of intent or recklessness is the important factor in deciding wilful misconduct. In TNT v. Denfleet the Court of Appeal decided that this intent or recklessness had not been sufficiently demonstrated, i.e. the driver's awareness that he was sleepy was not enough, on its own, to amount to wilful misconduct. However, the Court of Appeal emphasised that a 'professional lorry driver is in a different position from an ordinary driver' and that, in such cases, if 'he becomes aware that he cannot beat sleepiness, he would become guilty of (...) wilful misconduct.'"

b) German Bundesgerichtshof (Federal Supreme Court), judgment of 21 March 2007

When the 19 year old driver T drove on the German motorway on 7 December at 4.50pm, he hit another lorry in front of him. The other lorry had his warning lights on as he was at the end of a traffic jam. Driver T hit this lorry at a speed of 50 km/h (about 30 mph) without attempting to brake. It was in dispute between the parties whether on the days before the accident the driver observed the rest times required by law. When deciding whether driver T's conduct leading up to the accident amounted to the German equivalent of 'wilful misconduct' in the sense of Article 29 CMR, the Bundesgerichtshof applied the test of section 435 of the German Commercial Code (HGB), i.e. examined whether the driver caused the accident '(with intent) or recklessly with knowledge that damage would probably result'.

The Bundesgerichtshof held that the court below (the Higher Regional Court of Karlsruhe) did not commit an error in law by finding that the driver fell asleep was not the only possible explanation of the accident: instead, the accident could also have been caused by the driver's lack of concentration, by an external event which distracted the driver from the traffic or even by a sudden disturbance of the driver's consciousness. The Bundesgerichtshof further found that, even if it had been established that the accident was caused by the driver nodding off, a driver acts only then with gross negligence (as required by section 435 HGB), if it can be established that he knowingly ignored clear signs of his fatigue ('Übermüdung'). In support of this principle, the court referred to his two judgments of 5 February 1974 and 1 March 1977.

c) Comparison

In both cases, the driver's conduct did not amount to wilful misconduct under Article 29 CMR, with the result that the carriers avoided liability for the full value of the cargo. Evidence on the precise circumstances leading up to the accidents was lacking. In practice, it might be difficult to prove a driver's awareness that he was not merely sleepy, but unfit to drive (English law) or that he 'knowingly ignored clear signs of this fatigue' (German law).

However, another – arguably more important - conclusion should be drawn from the two cases. In TNT Global SPA v Denfleet International Ltd, cargo interests argued that 'the distinction which the carrier seeks to draw between being tired and being so tired as to be in danger of crashing does not arise in the context of responsible driving. One a driver is tired, his ability to drive is impaired and he becomes a source or risk to himself and others'. There is force in this. Helen Arabanos emphasizes: "the important message from the two cases is that of safety and awareness. Compliance with driving hours and rest time regulations is of utmost importance and will make a difference in deciding

cases of wilful misconduct. As ever, extra care should be taken if drivers feel that their alertness is impaired due to tiredness.”

The full text of these two judgments can be found under the following web links:

- TNT Global SPA v Denfleet International Ltd, England and Wales Court of Appeal, 2 May 2007

<http://www.bailii.org/ew/cases/EWCA/Civ/2007/405.html>

- German Bundesgerichtshof, judgment of 21 March 2007 (in German language)

<http://www.bundesgerichtshof.de/> (first go to 'Entscheidungen', then enter the date of the judgment '21.3.2007') 

3. International Standard Banking Practice on UCP 600 – freight forwarders' documents

In TT Talk Edition 99 we mentioned that UCP 600, the new 'ICC Uniform Customs and Practice for Documentary Credits' replaced its predecessor UCP 500 per 1 July 2007. UCP does not have automatic force of law, but is almost universally recognized and incorporated by the parties into their documentary credit (or 'letter of credit') contract. As announced in TT Talk Edition 99, the International Chamber of Commerce (ICC) has now issued the 'International Standard Banking Practice for the Examination of Documents under Documentary Credits' (ISBP) for UCP 600. The ICC states that 'ISBP was conceived as an intelligent checklist of procedures for document checkers to follow in examining the documents presented under letters of credit. While not a substitute for the UCP, which remains the guiding text, the ISBP demonstrates how the UCP is to be integrated into day-to-day practice'.

Freight forwarders (Transport Operators) are not themselves party to the documentary credit contracts, but become implicated because their transport documents are regularly used under the documentary credit.

a) Principle

As UCP 500 established already, a transport document issued by a freight forwarder is acceptable under a documentary credit, if the document indicates the name of the freight forwarder as a carrier or multimodal transport operator or indicates that the freight forwarder acts as agent on behalf of a carrier or multimodal transport operator.

b) Extending the principle

In addition to this general principle, the International Standard Banking Practice (ISBP) on UCP 600 specifically addresses the situation where the documentary credit contract, when calling for a transport document, contains one of the following phrases (or uses a 'similar phrase'):

- Combined carriage (Article 19 UCP 600): 'Freight Forwarder's Multimodal transport document is acceptable';
- Carriage by sea – Bill of Lading (Article 20 UCP 600): 'Freight Forwarder's Bill of Lading is acceptable';
- Air carriage (Article 23 UCP 600): 'House air waybill is acceptable' or 'Freight Forwarder's Multimodal transport document is acceptable'.

If the documentary credit contains any of these (or similar) phrases, ISBP explains in its commentary on Articles 19, 20 and 23 of UCP 600 that the document 'may be signed by a freight forwarder in the capacity of a freight forwarder without the need to identify itself as carrier or agent for the named carrier. In this event, it is not necessary to show the name of the carrier'.

As the ISBP do not define the phrase 'in the capacity of a freight forwarder', it is not entirely clear how the ISBP understand the term "freight forwarder" in this context. One possible interpretation would be that the ISBP perceive the 'freight forwarder' here as a 'forwarding agent' or other intermediary who does not assume liability as a contracting carrier.

The ISBP do not comment on Non-Negotiable Sea Waybills (Article 21 UCP 600) issued by freight forwarders; it is not entirely clear whether this is a deliberate omission or whether the ISBP intend to apply the principle expressed Articles 19, 20 and 23 UCP to sea waybill too.

With regard to 'Road, Rail or Inland Waterway Transport Documents' (Article 24 UCP 600), the ISBP clarify that the word 'carrier' does not need to appear at the signature line, 'provided the transport document appears to be signed by the carrier or an agent on behalf of the carrier, if the carrier is otherwise identified as 'the carrier' on the transport document'.

c) Documents which are not considered 'transportation documents' under UCP 600

Please note that ISBP also lists documents which 'are commonly used in relation to the transportation of goods' but 'do not reflect a contract of carriage and are not transportation documents as defined in UCP 600 articles 19-25'. As examples of such documents are listed 'Delivery Order, Forwarder's Certificate of Receipt, Forwarder's Certificate of Shipment, Forwarder's Certificate of Transport, Forwarder's Cargo Receipt and Mate's Receipt'.

The 'Forwarder's Certificate of Receipt' (FCR) and the 'Forwarder's Certificate of Transport' (FCT) are documents created by FIATA. Under a FIATA FCR the freight forwarder certifies that he is in possession of the goods with irrevocable instructions to dispatch them to the named consignee or to keep them at the consignee's disposal. By issuing a FIATA FCT the freight forwarder assumes the obligation to deliver the goods at destination through a delivery agent appointed by him, but acts as a forwarder, not as a carrier.

A 'Forwarder's Cargo Receipt', like the FIATA 'Forwarder's Certificate of Receipt', is shortened to 'FCR', which can cause confusion. 'Forwarder's Cargo Receipts' are regularly encountered in the Far East. In the Hong Kong High Court case of Hirdaramani v Orient Consolidation Services (2000), Stone J found that the 'Forwarder's Cargo Receipt' was used in place of a house bill of lading, but was not itself a document of title. However, there is no generally recognized definition of what a 'Forwarder's Cargo Receipt' precisely is.

Like the text of UCP 600 itself, the 'International Standard Banking Practice for the Examination of Documents under Documentary Credits' (ISBP) is available on the ICC website www.iccbooks.com against payment. UCP 600 connoisseurs will already know that UCP 600 t-shirts are available in four sizes - surely an inventive way to mark a new set of rules. 

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.

Peter Stockli
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For the TT Club

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