Welcome to TT Talk

No.100 in the series

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1. Hong Kong Court of Appeal rules on presentation of straight bills of lading

In TT Talk Edition 90 the Club reported that the Hong Kong court of first instance (Stone J) held in Carewins v Bright Fortune Shipping that the 'presentation rule' applied also to 'straight' bills of lading. The facts of the case were that for the shipment of footwear products from Hong Kong to Los Angeles the parties used bills of lading which named the American buyer as 'consignee' without the words 'To order'. This form is characteristic of a 'straight' bill of lading as opposed to an 'order' bill (item 2, just below, states the facts in more detail and analyses the misdelivery aspect).

In its judgment of 13 July 2007 the Hong Kong Court of Appeal confirmed that the carrier breached the contract of carriage and committed the tort of conversion by delivering the footwear products without production of the 'straight' bills of lading. Thus, the 'presentation rule' applies to 'straight' and 'order' bills of lading in the same way.

The presentation rule has two aspects, it binds both consignee and carrier. It means that the consignee cannot demand delivery of the goods without surrendering the 'straight' bill of lading, but also that the carrier cannot deliver without the bill being returned to him. The court expressly rejected as 'hair-splitting' the carrier's argument that a carrier does not need to require production of the 'straight' bill of lading at delivery.

The Hong Kong Court of Appeal rebuffed the carrier's argument that there was 'no good reason' for the presentation rule for 'straight' bills. The court emphasized that presentation of a bill of lading not only identified the person to whom delivery should be made, but could serve other functions. Referring to Lord Bingham in The Rafaela S, the court explained that the requirement of production of the bill of lading would ensure that a buyer, who had not yet paid his seller, could not obtain delivery of the goods. Applying the presentation rule to 'straight' bills of lading did not cause any more inconvenience than there would be in the situation with 'order' bills.

Most bills of lading have in their attestation clause (the text on the front of the bill usually in the bottom-right corner) a phrase which expressly requires presentation of the bill for delivery such as 'One of the original bills of lading must be surrendered duly endorsed'. In Carewins v Bright Fortune Shipping this phrase was missing, yet the Hong Kong Court of Appeal concurred with the Singapore Court of Appeal in Voss v APL (2002) and obiter dicta in the UK House of Lords in The Rafaela S (2005) that presentation of a 'straight' bill of lading was required even without an express presentation requirement in the bill.

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.

The last point to note is that the carrier in Carewins v Bright Fortune Shipping argued that the parties had actually agreed that he was entitled to deliver the goods to the consignee without requesting presentation of the 'straight' bills of lading, yet (before the court of first instance) the carrier was unable to provide proof of such an agreement. **The Club strongly recommends to Members who assume liability as carrier not to agree to delivery of the goods without presentation of the straight bill of lading as such an agreement would conflict with the presentation rule.** If the parties prefer delivery without production of the carriage document, they should not use a 'straight' bill of lading, but instead a simple sea waybill.

The full texts of this judgement can be found under the following web link (which is given also at the end of item 2, below):

http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=57758&QS=%28carriage%29&TP=JU

2. Misdelivery of cargo in the Courts of Appeal of Hong Kong and England & Wales

a) Carewins v Bright Fortune Shipping (Hong Kong Court of Appeal, 13 July 2007)

Carewins sold footwear products to Artist Fashion in Los Angeles. Bright Fortune Shipping assumed liability as carrier subcontracting the ocean carriage to a shipping line. Upon arrival at the port of Los Angeles, the arrangements for the handling of the containers were undertaken by a company called TUG pursuant to an agency agreement with Bright Fortune Shipping. Carriage from the port of Los Angeles to Artist Fashion's warehouse was one hour by road. After the arrival of the footwear products at Artist Fashion's warehouse, Burberry sued Artist Fashion for trade mark infringement. The footwear products were seized and never returned to Artist Fashion, who did not pay Carewins for the goods. As the contracting carrier Bright Fortune Shipping delivered the goods without requesting the bills of lading, Carewins sued Bright Fortune Shipping for the invoice price claiming misdelivery.

The carrier's bill of lading in clause 2(b) expressly excluded liability for misdelivery: '(…) the carrier shall be under no liability in any capacity whatsoever for loss or misdelivery of or damage to the goods however caused whether or not through the negligence of the carrier, his servants, agents or sub contractors (…)'.

As reported in TT Talk Edition 90, the court of first instance (Stone J) considered whether the carrier's liability for misdelivery was governed by the (mandatory) Hague-Visby Rules or by the parties' contract as evidenced in the bill of lading. The judge found that 'discharge', at which point the application of the Hague-Visby Rules ended, occurred before clearance of the footwear products by US customs, and that the misdelivery only took place later when the carrier delivered the goods to TUG, i.e. before the land carriage. The judge then held that the exclusion of liability for misdelivery was 'couched in clear terms, with express reference to misdelivery howsoever caused' hence the exclusion clause in the bill of lading protected the carrier. Accordingly, he dismissed Carewins' claim.

However, the Hong Kong Court of Appeal allowed Carewins' appeal for two reasons. First, the court dissected clause 2(b) of the bill of lading and held that the scope of the wide term 'however caused' was being reduced by the addition 'whether or not through the negligence'. The Court of Appeal stated that misdelivery could be committed in ways that do not involve any consideration of negligence or non-negligence and that Carewins v Bright Fortune Shipping was such a case because the carrier misdelivered the goods intentionally despite non-production of the 'straight' bill of lading. Accordingly, the court held that clause 2(b) did not cover misdelivery in the way it actually occurred and added that had the carrier's conditions simply stated 'misdelivery (…) however caused', i.e. without referring to negligence, they might have been sufficiently clear to exclude the carrier's liability for misdelivery. The Court of Appeal interpreted clause 2(b) fundamentally different from Stone J at first instance who had said it was difficult to disagree with the

carrier that, if this particular clause were not to be upheld, it would not be easy to conceive of any clause that could exclude liability for delivery.

Secondly, the Hong Kong Court of Appeal scrutinized how clauses 2(a) and 2(c) of the bill of lading conditions related to each other and to the information on the front of the bill. Clause 2(a) stated that the carrier was liable subject to US COGSA between 'loading' and 'discharge', but clause 2(c) defined the period of liability as 'between the time the Goods are received (…) and the time of delivery'. Emphasizing the need to read the carriage contract as a whole, the court went on to examine the front of the bill, where 'Port of Discharge', 'Place of Delivery' and 'Final Destination' were all identically described as 'Los Angeles, CA'. The court deemed this reference ambiguous because the phrase might be referring either merely to the port area of the city of Los Angeles or to the entirety of Los Angeles as a port city.

From the manner in which these boxes on the front were completed in this case, the court concluded that the periods of loading-discharge and receiving-delivery in clauses 2(a) and 2(c) on the back were in fact the same and that it was plausible that the parties regarded 'discharge' and 'delivery' as equivalent operations. Consequently, the court held that 'delivery' occurred within the period of loading-discharge of clause 2(a) which meant that US COGSA applied to the misdelivery. As the COGSA limit of US$500 per package fully covered the invoice value of the goods, the Court of Appeal awarded US$873,028. Again, compare the reasoning by the Court of Appeal with Stone J at first instance who felt that there was in principle no justification for extending the concept of 'discharge' beyond final unloading as this would be tantamount to regarding the carrier both as carrier and warehouseman.

The Court of Appeal reversed Stone J's first instance judgment based on its interpretation of the carrier's bill of lading, which meant that the court did not need to deal in its judgment in detail with the geographical scope of the Hague-Visby Rules and the validity of limitation clauses which defeat the main purpose of a carriage contract.

b) MSC v Trafigura Beheer (England and Wales Court of Appeal, 27 July 2007)

Aikens J at first instance stated the facts in his judgment of 26 April 2007. A total of 18 containers which held 360 tones of copper cathodes (worth some US$2 million) were shipped from Durban to Shanghai. The true consignee tried to obtain delivery orders for the cargo, but was told they had already been issued to someone else. Investigations revealed a fraud (further on this, please see item 5, below). Luckily the carrier was able to instruct the container terminal not to release the containers from the terminal without further instructions. Due to legal proceedings in China, the containers remained in the Shanghai container terminal. The consignee sued the carrier in England for delivery of the cargo or for damages for the conversion of the cargo.

The England and Wales Court of Appeal first held that the Hague Rules applied to the sea carriage as a matter of contract. After that, the court considered whether the Hague Rules also applied after discharge of the cargo from the vessel, i.e. to the period when the containers remained in the Shanghai container terminal. Based on an examination of authorities including Pyrene v Scindia (1954) and the Court of Appeal judgment in The Captain Gregos (1990), the court held that for periods outside the actual carriage the parties are free to agree on terms other than the Hague (or Hague-Visby) Rules.

Then the Court of Appeal scrutinized the bill of lading conditions in spite of their 'elaborateness and illegibility' and held these conditions indicated that the parties did not intend the Hague Rules to apply after discharge of the goods from the vessel. One reason for this finding was that clause 7 of the conditions referred to loss 'after the end of the Hague Rules period'.

Having found the Hague Rules inapplicable to the post-discharge period, the Court of Appeal considered whether the carrier was entitled to rely on any exclusions or limitations of liability in his bill of lading conditions. The carrier sought to rely on clause 22, described by the court as 'elaborate and scarcely legible', where the 5th and the 7th sentence (of 15 sentences in total) limited his liability to Hague Rules level. However, the Court of Appeal held that any exemption or limitation of liability for the essential obligation to delivery against an original bill of lading had to be clearly expressed and that the 'melee' of provisions contained in clause 22 did not achieve this purpose – this long clause did not even expressly refer to 'misdelivery'. Thus, the Court of Appeal held the carrier liable for the invoice value of the goods, but not for cargo interests' hedging losses because these were not foreseeable to the carrier.

c) Comparison

In both cases the carriers were held liable for the full invoice value of the goods, and lost owing to the manner their bills of lading conditions were worded. A comparison of the chances of the carriers in the two court cases might conclude that the task of the carrier in Carewins v Bright Fortune Shipping was, for different reasons, both easier and more difficult: easier because the pertinent bill of lading provision in his bill of lading was reasonably concise and expressly referred to misdelivery, and more difficult because he was looking to exclude, rather than merely limit, his liability.

No doubt these two cases will cause some carriers to review how their bill of lading provisions can better protect them against claims for misdelivery, but these two Court of Appeal cases might actually illustrate that some courts are reluctant to allow carriers to escape liability for their fundamental obligation to deliver the cargo in the manner they agreed. TT Talk Edition 93 already indicated that a carrier cannot be sure that an exemption clause in his bill of lading will protect him from liability for misdelivery; for this reason, **the Club recommends that Transport Operator Members protect themselves in any case by implementing proper cargo delivery procedures.**

The full texts of these two judgements can be found under the following web links:

- Carewins v Bright Fortune Shipping, Hong Kong Court of Appeal, 13 July 2007

http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=57758&QS=%28carriage%29&TP=JU

- MSC v Trafigura Beheer, England and Wales Court of Appeal, 27 July 2007

http://www.bailii.org/ew/cases/EWCA/Civ/2007/794.html

3. Attempted fraud with electronic carriage documents

A remarkable aspect in MSC v Trafigura Beheer (discussed in item 2, just above) was, in the words of Aikens J, the 'international conspiracy' to steal the 18 containers.

As Aikens J stated in his judgment at first instance of 26 April 2007, the shipper's agent provided the information for the 'shipper', 'consignee' and 'notify party' boxes for the production of the genuine bill of lading. The bill was generated in a 'template' bill of lading displayed on a computer screen. An authorised employee of the carrier signed the genuine bill of lading as agent for the ship's master, next the bill (in a set of three originals) was released to the shipper. When this genuine bill of lading was produced, the carrier also entered details of the cargo, shipper, consignee and notify party on a computerised version of the vessel's cargo manifest.

At that point the fraudsters started interfering. They used employees of the carrier's agents in Durban to produce a fraudulent second set of bills of lading, where a Shanghai company was falsely named as the consignee. The vessel's cargo manifest was also altered in order to tally with the information in this fraudulent bill of lading. The false bills of lading were then sent to the fraudsters in Shanghai, who succeeded in obtaining a deliver order for the containers from the carrier's local agent. Based on this delivery order the fraudsters paid customs duty and VAT on the cargo and thereby obtained permission by the customs authorities to discharge the 18 containers from the container terminal. However, before the fraudsters had an occasion to take the containers away, the true consignees applied for delivery orders, which lead to investigations that uncovered the attempted fraud. Had the true consignee requested delivery orders a day or two later, the fraudsters' sting to obtain the cargo worth some US$2 million might have worked.

Aikens J said that the fraudulent set of bills of lading and the change to the ship's cargo manifest did not raise any suspicions because the bills of lading and the manifest were produced electronically. This comment raises the question whether electronically produced carriage documentation is more susceptible to fraud than traditional paper documents. The fraudsters' sting was a daring attempt that required careful planning and involved operations both in South Africa and China. **The Club asks Terminal Operator and Transport Operator Members to be aware that criminals might attempt to commit sophisticated frauds with falsified documents and to take all practical steps possible to avert such frauds.**

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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