Welcome to TT Talk

No. 98 in the series

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1. The Lost Bill of Lading - Yet More Questions and Answers

1.1 A liner agent in Sri Lanka has asked whether, in addition to taking a bank guarantee for 200 per cent of the invoice value of the goods covered by the lost bill of lading, the carrier can protect its position further by including specific clauses in its bills of lading. Peter Stockli, the Club's Legal Counsel, gave this advice in response:

"The carrier may be able to protect himself to some extent with a general circular indemnity clause in his bill of lading. An example is clause 5(3) of the TT Club Series 100 bill of lading:
QUOTE
“The Merchant shall indemnify the Carrier against any claim or liability (and any expense arising there from) arising from the Carriage of Goods insofar as such claim or liability exceeds the Carrier’s liability under this bill of lading.”
UNQUOTE
The definition of “Merchant” in the bill of lading (clause 1) is very wide, including the shipper, consignee, receiver of the goods, holder of the bill etc. If we assume that the carriage contract was concluded between carrier and shipper, it will depend on the applicable law to what extent other parties (such as the consignee) are also bound by the circular indemnity clause.

Returning to our original situation of the lost bill of lading, it is clear that even this circular indemnity clause does not afford the level of protection of a bank guarantee, because there is always the risk that the “Merchant” disappears (in particular after having successfully claimed the goods twice) or becomes insolvent."

1.2 A Logistics Operator based in Spain asks:
"At present we are facing a case in which a straight bill of lading was lost and consignees are insisting that a bank guarantee is not necessary as they expressly waive in writing to assign/grant any right to cargo. So bearing in mind question regarding straight bill of lading as a document of title as well as its necessary production/presentation, we would appreciate to learn your opinion whether we should persist on obtaining a bank guarantee when possibilities of circulating document is clearly restricted, in other words, would not a company/personal guarantee enclosing mentioned waiver suffice to solve the issue?"

Two points arise from this enquiry. Firstly, the danger to the carrier is not that the consignee assigns rights in the cargo to a third party but whether the consignee is entitled to delivery of the goods in the first place. Given that a straight bill of lading is a 'document of title' only as between the shipper and the consignee, the carrier could contact the shipper to ask him what has happened to the bills of lading. They may still be with the shipper (or his bank) because he (it) is holding

them as security for payment from the consignee. In such a case, delivery to the consignee without production of the original bill would amount to conversion of the goods by the carrier and expose him to a certain claim from the shipper (his bank).

The second point is this: whether or not to accept a company or personal guarantee from the consignee is a commercial, not a legal matter. If the carrier believes that the consignee is good for the money (bearing in mind that the claim under the guarantee may amount to twice the value of the goods in question), will remain so for the length of the likely limitation period and is in a jurisdiction where justice is accessible, then a company/personal guarantee may be good enough. But in both cases, check out the signature. The signature should be witnessed and, in the case of a company, check that the signatory has the authority to bind the company. [Editor]

2. What's in a Name?

The April 9 Edition of ForwarderLaw E-News carried an interesting article by Steve W. Block, entitled "Misleading Monikers of the Middleman". Steve Block is an attorney with the US firm of Betts Patterson and Mines, P.S based in Seattle. Extracts from the article are set out below. (For those not familiar with the slang word "Monickers", it means 'name' or 'title')

"Okay, so what exactly is a “freight forwarder”? A “transportation broker”? A “non-vessel operating common carrier,” a/k/a “NVOCC”? Do those sound like easy questions? Would you be surprised to learn there are at least four questions bundled into those three queries that are the source of some ongoing confusion and occasional heartburn in our industry? Part of the confusion derives from the term “freight forwarder” being defined one way in ocean transportation, and another way for surface and domestic water carriage. This is compounded by relatively recent statutory classification [in the US] (for administrative purposes) of freight forwarders and NVOCCs cumulatively as “ocean transportation intermediaries.” Not enough muddle? Most of these players wear different hats, operating as a freight forwarder here, a transportation broker there, and an NVOCC in the other place – often within related transactions. They can also function as “indirect air carriers” on the aviation side....

The gastronomical upset follows when liability against a middleman is asserted by a disgruntled shipper or carrier. The difference between the various species of intermediary can be significant, and how a transportation facilitator holds itself out to the public can be a factor in determining how the law will treat it. If a company calls itself a “freight forwarder” to a surface shipper and its activities support that nomination, then it can find itself stuck holding the bag for a damaged freight claim, even if it really meant to say it was a “broker.”
A related point is that the law doesn’t countenance industry-created categories of service provider. You can call yourself a “transportation consultant,” “consolidation agent,” “shipper agent,” or any of several other legally undefined terms we’ve heard, but your self-proclaimed designation doesn’t control your legal rights and obligations. The law defines a player by the activities it undertakes, notwithstanding what that player might call itself.
So here’s the deal. An ocean freight forwarder is the legal (and roughly the operational) equivalent of a surface transportation broker. These entities do not issue bills of lading taking responsibility for the safe transportation of cargo. They are “travel agents for freight,” finding appropriate carriers for their shipper customers, putting the two together and sending them on their merry way. They typically are liable for their own negligence or breach of contract only; if they pass along incorrect shipper instructions or pair a shipper with an incompetent carrier, they can be on the hook. However, they usually walk when the actual carrier loses or damages the shipper’s stuff as a result of the carrier’s fault.
NVOCCs are largely the equivalent of surface freight forwarders. These entities are “carriers to shippers and shippers to carriers.” They consolidate cargo, issue bills of lading to their customers taking responsibility for safe delivery, and are subject to cargo liability regimes in the event of a loss. They stand to make bucks based on fulfillment of their contracts with carriers, but often take the economic fall when they don’t have the freight they’ve committed during a contract’s term.
A third category of ocean transportation implementer is the “ocean freight broker,” an unregulated (but defined) entity whose role is limited to sales for another entity.
The term “freight forwarder” has become part of the shipping industry’s every-day vernacular, but whether you’re a “freight forwarder” under the law depends first on what mode of transportation you participate in, and second on what you actually do. Similar pitfalls too numerous to list here await service providers who use a one-name-fits-all designation in their marketing and business activities. Entities in this business should understand the different roles they are playing; how those roles change with different activity, and the liability that potentially lies when changing hats."

3. Liens and the CMR Convention

A recent decision of the English Commercial Court has considered the interaction between Standard Trading Conditions, such as BIFA 2005 (see Clause 8(A), which incorporate a general right of lien and the provisions for lien of the Convention on the International Contract of Carriage of Goods by Road - the CMR Convention. The case is called T. Comedy (U.K.) Limited v. Easy Managed Transport Limited, decided by Jonathan Hirst QC, sitting as a deputy judge of the High Court. [A general lien is a right to withhold delivery of a consignment as security for all debts owed by the consignee to the carrier, whether or not they relate to the consignment on which the lien is exercised. A particular lien is a similar right, but in respect only of debts of the consignee relating to the liened consignment].

On the facts of this case, the court held that the lien provisions of certain Road Haulage Association conditions were not included in the relevant contract of carriage and, if they had been, no general lien would have been applicable, since the customers of the carrier, against whom the lien was being exercised, were not the owners of the goods consigned. But, the court went on to hold, even though this was not necessary for its decision, that even if the contract of carriage had incorporated the relevant RHA Conditions, no right of general lien could have been effective since – in the context of carriage under the CMR Convention - it would have amounted to a derogation from the right of the consignee to obtain delivery under the Convention, on payment of the outstanding charges relating to that consignment only. Article 41 of the Convention applied. This article renders null and void any clause in the contract of carriage that would directly or indirectly derogate from the provisions of the convention.

The provisions in the Convention regarding delivery are set out in Article 13.1 This provides that, on arrival of the goods at destination, the consignee is entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods. Article 13.2 provides that the consignee exercising his rights under Art.13.1 shall pay the charges shown to be due on the consignment note [emphasis added] but, in the event of dispute on this matter, the carrier shall not be required to deliver the goods unless security has been provided by the consignee.

Further, in the case in question, the judge held that the carrier had no right of particular lien under Article 13.2, since the charges in question had not been entered on the consignment note, as required by Article 6(1)(i) of the Convention.

Here is a hyperlink to a fuller note on this case, which can be found on the website "DMC's CaseNotes" @www.onlinedmc.co.uk.:
http://www.onlinedmc.co.uk/t_comedy_v_easy_managed_transport.htm

This case is likely to prove highly controversial. In commenting on that case, your editor wrote:
"Whilst the judge's conclusions in relation to the incorporation and ownership issues are in themselves unexceptional, given the particular findings of fact that the judge made, his rulings on the CMR issues are more controversial.
The requirement to complete the charges box on the consignment note as a pre-requisite to the exercise of the Article 13.2 lien may – or may not - be good law but it does not reflect current commercial reality. As the judge himself recognized, that box is rarely, if ever, completed, for the sound commercial reason that the carrier does not wish his charges to be generally known. It is true that a general reference, such as "charges as agreed with sender" could be inserted in the box,– indeed the judge himself suggested that this would be sufficient compliance with Article 6(1)(i) of the Convention; but this would present another administrative requirement for the trade to fulfill.
More serious still is the judge's conclusion that any general lien clause is invalid in the context of a CMR movement, since it impinges upon the right of the consignee to obtain delivery of the goods at destination. Here he breaks new ground, since it has been generally accepted in the trade that additional conditions are permissible in the CMR context, so long as they do not specifically clash with a provision of the Convention. Such conditions have hitherto been regarded as supplementing the Convention, rather than conflicting with it. If it is indeed the case that a general lien is outlawed for Convention traffic, this represents a significant worsening of trade terms for the road carrier, and a matter of concern to his trade association.
It must be noted, however, that this part of the judgment was not necessary for the judge's decision in the case and is therefore obiter. His findings in relation to incorporation and the ownership of the goods were the key decisions in the case. Furthermore, the editor understands that the Article 13 points were first raised by the Deputy Judge himself, in the course of the hearing and were not therefore the subject of extensive oral or written submissions."

In the circumstances, your editor believes that the view taken by the judge in this case on the validity of the general lien clause (a view which conflicts with some highly regarded academic opinion) might well not be followed, if a similar issue were to arise in another case.

4. When a 'Payment In' is not a Payment

With effect from 6 April 2007, significant changes have been made to the Civil Procedure Rules in England. As a result, it is no longer necessary for a Defendant party to litigation, who wishes to protect his position in regard to costs, to make a payment into court under Part 36 - the relevant Rule. A Part 36 payment represented what the Defendant believed to be a fair valuation of the claim. If the Claimant failed to accept this money and thereafter his case settled or he was awarded less than this sum at trial, then the Claimant was obliged to pay all of the Defendant's costs incurred from 21 days after the payment had been made into Court. As Tony Allen, a Director of CEDR, the Centre for Effective Dispute Resolution, wrote in an article dated March 2007:
"One of the drawbacks for defendants over Part 36 offers has always been that... the money offered had to be paid into court to await the outcome of the case. Interest accrued on it at a reasonable rate and would normally be returned to the defendant on settlement or judgment, but this tied up huge sums of money in court, requiring investment administration by staff. A trail-blazing initiative was made by the [National Health Service] Litigation Authority, which was keen to reduce the huge sums of NHS money it had to invest in payments into court, by arguing that a Part 36 offer unaccompanied by a payment into court gave sufficient protection to claimants. The court approved this practice in the decision of Crouch v Kings Healthcare NHS Trust [2004] EWCA Civ 1332 and, as a result, following a consultation process by the [Department for Constitutional Affairs], Part 36 has been revised so as to remove the requirement that sums offered under Part 36 have to be paid into court."

Instead, Defendants will simply have to make a written Part 36 Offer to settle. This offer must specify a period of 21 days or longer (the "relevant period") within which the offer will remain open and the Defendant will be liable for the Claimant's costs if the offer is accepted. The Rules then require that an accepted offer must be paid within 14 days, or the Claimant will be able to enter judgment and the Defendant will lose the costs protection afforded by the Rules.

The Rules in relation to withdrawal and changes of Part 36 Offers have also been amended so that a Defendant can now withdraw an offer, or change it so that the terms are less favourable, without the permission of the Court if the relevant period for accepting without cost consequences (usually 21 days) has expired and if the Claimant has not accepted the offer in the meantime. A Claimant accepts a Part 36 Offer by serving written notice of acceptance and may accept such offers even after expiry of the relevant period (unless it has already been withdrawn) without the permission of the Court.

Therefore, this new procedure is helpful to Defendants as it removes the need to pay money into Court in order to protect its position on costs. It also allows tactical offers to be made and then withdrawn.

Our thanks to John Caddies, a Partner in the firm of Hill Dickinson, London, for his help in putting this Item together.

5. The IMDG Code - 2007 a Year of Transition

In this Edition and the next, we quote extracts from an article on this topic written by Norman Loiseau of Orion D/G Management Consultants Inc. and dated 19 March 2007. Norman Loiseau contributes a column on Dangerous Goods to the publication Canadian Sailings @ www.canadiansailings.com, where this article first appeared.

"A year of transition - By NORMAN LOISEAU, 19 March 2007

You have perhaps heard by now that 2007 is the year of transition – transition from the current International Maritime Dangerous Goods Code amendment (32-04) to the new amendment (33-06). To be fair though, and to understand the code, let's start at the very beginning.
Based on recommendations from the United Nations Committee of Experts on the Transport of Dangerous Goods and its model regulations, the International Maritime Organization's IMDG Code is generally accepted as the international guide for the transport of dangerous goods by sea. By agreement it is recommended to national governments for adoption or for use as the basis for national regulations. By reference, the Canadian Transportation of Dangerous

Goods Regulations (TDGR) allow and authorize the use of the IMDG Code, including inland transport to or from a vessel or marine facility.
Who is required to use the IMDG Code?
The code is required to be used not only by ocean carriers but equally by anyone howsoever connected with shipping dangerous goods internationally. It contains the specific requirements for classification, packaging, safety marks, stowage, segregation, handling, and emergency response actions. These requirements are extended to industries that manufacture or produce dangerous goods; the packages to contain them; the safety marks to properly identify them; and finally to those who prepare and offer these goods for transport, including inland transport by road or rail to or from the vessel.
Why a transition period?
Considering the extremely large number of industries that are required to comply with the code, and through extensive industry lobbying, the IMO has been required to allow a set period of time during which the various parties effect the necessary changes to conform to the provisions of the new code. One year is set aside and designated as a year for transition.
... in 2007 two variations of the code can be used: amendment 32-04 or 33-06. Only on Dec. 31, 2007, does the 32nd amendment cease to be used.
Unfortunately, there is a flaw with this approach. Consignments and compliance is initiated with the shipper, and shippers may choose to comply with either amendment – usually the one that offers the most advantage. Nowhere in the regulations is there a requirement to state which amendment one is complying with. Guessing is not an effective means of determining compliance.
Furthermore, ocean carriers must maintain both sets of regulations and duplicated computer-based systems for validation purposes and to ensure compliance in transport. One area where serious complications can arise is with consolidated containerized shipments, where multiple consignments in the same container and using either amendment pose operational issues for carriers. Another potential problem is the new segregation provisions for acids and alkalis, presenting complications for vessel stow planners."
In our next edition, we will set out the chart that Mr Loiseau has prepared, listing the major changes under IMDG 33-06

6. 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.

David Martin-Clark
Acting Editor
On behalf of
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