Welcome to TT Talk

No. 97 in the series

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1. "Without Prejudice" and "Privileged" Correspondence - Feedback from the Middle East

Chris Mills, a partner in the Dubai office of Clyde & Co, writes in reply to the item on this topic that appeared in TT Talk Edition 94, as follows. The clear message is that, in the Middle East, one has to be very careful when making admissions or offers of settlement in writing.

"Whilst what you say is true in many countries, it is not universally so. In the Middle East, for example, where I am practising, the tag "without prejudice" carries no "protection" from such correspondence subsequently being adduced in evidence in any litigation. Indeed, often there are certain admissions made in such correspondence which would not openly be made and, in those circumstances, one might be sure that such correspondence will come back to haunt the writer of it! The mere making of an offer, even without any express admissions of liability, may be interpreted by courts in this region as being an admission of liability, leaving the court only to determine quantum!

In the circumstances, we always advise clients who might end up litigating in this region never to put any proposals for settlement in writing and for all such exchanges to be undertaken verbally until the point in time that agreement as to terms of settlement has been reached. Even then, the terms should be recorded in a Settlement Agreement document to be signed by both parties (ideally simultaneously) and the offer should not be confirmed unilaterally by the paying party.

As for "privileged" correspondence and reports, while I would advocate that any such documents ought, as a matter of course, to be marked as you suggest, such documents not being so marked is not as significant a problem in the Middle East as elsewhere, by virtue of the fact that the obligations of "discovery" as known in the common law jurisdictions do not apply here. There are exceptions to the following (on occasions, for example, it is possible to seek something akin to specific discovery), but generally speaking, a party to litigation produces only that which it wishes to produce."

2. Loss of B/L - mere advertisement doesn't help! - Feedback from Spain

The item on this topic that appeared in TT Talk Edition 96 has prompted considerable feedback from readers. A correspondent engaged in the logistics business in Spain emailed the following question:
"Would also like your opinion regarding lost bill of lading as follows:

- The article said that, if the Carrier releases cargo without firm evidence of the consignee's right to take delivery, the carrier does so entirely at its peril. Is there any alternative which we may consider firm evidence other than production of original blading? What can be regarded as firm evidence?
- Bank guarantee: most important point is related to amount/period, which is usual point of discussion in our daily work. Could you please advise us what period/amount is to be covered by mentioned LOI/is recommended by TT Club?

Peter Stockli, the Club's Legal Counsel, gave this advice in response:
"If cargo interests want delivery of the goods, only production of the bill of lading itself will do. Please note the standard phrase in the attestation clause on the front of many bills of lading (such as the current TT Club 100 Series bill of lading): "One of the original bills of lading shall be surrendered to the carrier or his agent at destination before the cargo shall be released".

As you know, the bill of lading is the document of title to the goods. It only becomes "spent" once the goods it covers have been delivered to the person entitled to delivery. This requirement that the bill of lading has to be presented for delivery protects the carrier. In some jurisdictions it is possible to have documents of title annulled by the authorities, but this involves a cumbersome process and, to our knowledge, is practically unheard of in the case of bills of lading.

As you have already mentioned, the solution in practice is for cargo interests to provide a bank guarantee to the carrier. The TT Club recommends that this bank guarantee covers 200% of the CIF value of the goods. How long this bank guarantee remains in force depends on the law applicable to the bank guarantee; the TT Club routinely requests that such bank guarantees are made subject to English law and jurisdiction, in which case the limitation period for the guarantee is six years."

Feedback from Canada
A Canadian reader emailed us asking whether it would be good enough to get the approval of the seller in order to release cargo for which the original bill of lading was not available. The problem with this solution is that, in the case of a negotiable bill of lading, the seller (whom we assume to be the shipper) may have been paid - and be prepared to tell you this! - but the bill may then have been negotiated to a third party, who has not been paid and who is relying upon the bills of lading as his security. In practice, it is often difficult, if not impossible, for the carrier to track down the party who, at any given point in time, is the bill of lading holder.

And who pays the costs?
Still on the subject of lost bills of lading, another reader has asked who pays the costs of delay at the port of discharge when a bill cannot be presented because it was lost in transmission from the vessel to the forwarder. Ian Hyslop, the TT Club's Legal Director replies as follows:

"The easiest solution is to avoid the costs by offering the vessel an indemnity, guaranteed by a bank, in order to allow immediate delivery of the cargo. Of course this procedure requires the utmost caution and carries certain technical risks. The Club will advise its Members in this situation, and will cover resultant liabilities - as long as we approve the arrangements in advance.
But if the cargo cannot be released against an indemnity wharfage or storage costs will clearly build up, and the port will look to someone to pay them. It is likely that the port will look first to the vessel or its agent, as the most convenient targets - particularly if the agent has made a deposit on which the port can draw down. However an obvious alternative scenario is that the port will lien the cargo against payment of its costs by the party entitled to collect it.

We assume that the forwarder has issued a bill of lading indicating its customer as shipper and was expecting to receive an ocean bill from the vessel on which it would be indicated as shipper and consignee. Three candidates present themselves for ultimate responsibility for the costs resulting from the loss of the ocean bill: the cargo owner, the forwarder and the vessel.

The Cargo Owner
The cargo owner may of course be the "real" shipper or the "real" consignee, depending on whether ownership has passed - or may be both if the carriage is between branches of the same company. It may also be the forwarder's customer, and is likely to be either the shipper or the consignee under the forwarder's bill of lading. In any case, the

cargo owner appears "innocent" in the sense that it was in no way implicated in the loss of the ocean bill, and was not party to it.

The Forwarder
As is often the case, the forwarder finds itself in the middle. It is unlikely that it will be directly liable for costs, but it is likely to be the target of indemnity claims from both sides:
(i) Most contracts of carriage, as evidenced by bills of lading, include a provision allowing the vessel to treat cargoes as delivered, and store them at shipper's and/or consignee's risk and expense, if the consignee does not take delivery when called to do so. The vessel is therefore likely to seek indemnity from the forwarder under the ocean bill.
(ii) The forwarder is obliged under the forwarder's bill to deliver the cargo to the consignee. It can therefore expect an indemnity claim from the cargo owner under the forwarder's bill. (Of course, depending on the terms of the transaction, the consignee may claim from the shipper who will in turn claim from the forwarder.)

The Vessel
In principle, the vessel will almost invariably be within its rights, or be legally obligated, to decline to release the cargo if the bill is not presented. But it does not follow from this that the vessel can hold someone else liable for the consequences. Firstly, it is by no means clear that a provision in an ocean bill, of the type referred to above, which makes the shipper and/or consignee liable when delivery is not taken, applies where the consignee is not entitled to delivery because it does not have the bill in its possession. (And it might also be argued - but not necessarily with success -that since the forwarder as shipper never received the ocean bill, its terms to do not apply. Secondly, although direct legal authority seems to be lacking, it should follow from the law of contract that the vessel is liable to issue and deliver the bill to the forwarder as shipper. This is supported by the shipper's right to require a bill under Article 3 of the Hague-Visby rules.

It is therefore likely that, in the scenarios contemplated above, if the vessel incurs costs it cannot pass them on to the other parties, and if either of the other parties incurs costs it can pass them on to the vessel.

This brief analysis perforce makes certain assumptions. But we hope it is useful and would welcome comment from readers on it.

3. Recovery of container detention charges by delivery agents - Feedback from Montreal

A former President of FIATA, the International Federation of Freight Forwarders Associations, has emailed us from his office in Montreal to say that he found this item - which appeared in Edition 96 - of such interest that he intended to share it with all the members of CIFFA, the Canadian International Freight Forwarders Association.

4. Some General Average Practice - the MSC Napoli

Readers may be interested in the following article on this well-advertised casualty. The article appeared in the March 2007 edition of BIFALink, the monthly magazine published by the British International Freight Association.

"At the BIFA Secretariat we are receiving many calls regarding the MSC Napoli which has been abandoned off the Devon coast following damage to the ship’s hull and the crew abandoning the ship in mountainous seas.
The MSC Napoli was carrying 2,394 containers of which 103 were lost from the vessel, most during the violent storm of last week. Work continues to recover the containers and 70 have now been accounted for (50 recovered from the beach and 20 located in shallow water and awaiting recovery). A total of 33 containers have yet to be accounted for (source – press release 24 Jan 2007 from vessel owner Zodiac). The damage and looting to the beached containers has been extensively covered both on television and in the national press. Furthermore there are many containers that are still in place on the wreck and may be salvaged. It is possible that a General Average may be declared.

So what actions should you be taking if you have placed cargo on the vessel?
The processing of claims cannot begin until a number of actions are completed by the salvaging company, the receiver of wrecks, the vessel owners etc. Current estimates are that this process will take some months to be finalised. Shippers with insurance cover will only have their claim progressed once the full extent of the maritime loss is

established and properly declared. Shippers without insurance cover will be entitled to claim for loss in accordance with the terms and conditions agreed in their contract. At this stage any affected party should lodge a letter with the insurance company and their contracted carrier notifying reserves to claim pending further clarification on whether a loss has occurred.

What if a General Average is declared?
General Average is a process whereby the parties whose interests have been sacrificed or who have incurred extra expense, are recompensed by the contribution of those whose interests have been saved. If a General Average is declared you may be asked for an indemnity or a deposit. Any standard marine policy will include General Average losses so if the goods have been insured the importer should obtain a General Average guarantee from the insurers. If no insurance has been organised then a cash deposit will be needed. Whatever the position your first action upon receiving notification that a General Average has been declared for a vessel is to give immediate notice to your customer. The appointed average adjusters will need to be in possession of a completed guarantee and bond form or cash deposit before release of cargo so it is vital that your customer takes immediate action.

This is a major incident and you should emphasise to your customers the need for patience as there will be a lengthy official investigation held prior to any hand over to insurers for claims settlement. This could take many months as the vessel needs unloading first to establish proof of loss or damage to cargo that was being carried onboard."

5. 9-month Time Limit in Waybill upheld by Belgian Court

An NVOC TT Club Member operating from Belgium has recently successfully defended a claim in respect of the loss of containers overboard from the deck of a container ship. The basis of its defence was a nine-months time limit for suit included as one of the provisions on the reverse of its contract of carriage. The Commercial Court of Antwerp noted that the contract of carriage in this case - which concerned a consignment shipped from Belgium - was sent electronically. This meant that there were no hard copy originals and no signature by the carrier. In the absence of these features, the Court held that the contract was a sea waybill. As a sea waybill is not a bill of lading, the Court accepted that Art. 91 of the Belgian Maritime Law (which makes the Hague-Visby Rules compulsorily applicable) did not apply. In consequence, it upheld the validity of the nine-month time bar clause. Had the Hague-Visby Rules applied, the nine-months time limit would have been struck down, as being in conflict with the one-year time limit provided in Art.III Rule 6 of the Rules. The Claimants are appealing the decision.

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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