Welcome to TT Talk

No. 93 in the series

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We would like to send our readers good wishes for the coming year. May it be good to all of us!

1. Update those trading conditions - or face unexpected consequences!

In a decision of 11 July 2006, the Landgericht Karlsruhe (the Regional Court) ruled on the effect of references in a carrier's conditions to outdated conventions. The case in question concerned a contract for the carriage of jewellery worth EUR 5,467.00 from Germany to Holland. Carriage (via Paris airport) was performed by road and air. It is believed that the cargo disappeared from the carrier's transit warehouse in Paris, but the carrier was unable to shed light on the precise location of the loss. The carrier's conditions stated that liability would be limited to either a) the amounts pursuant to the "Warsaw Convention" or CMR, or b) EUR 22.00 per kg, whichever was the higher.

Even though the carriage took place after the 1999 Montreal Convention had come into force in the countries concerned, the judge held that the Montreal Convention did not actually apply: in the judge's view, the reference in the carrier's conditions to liability amounts of the Warsaw Convention and of CMR included a reference to the provisions in these Conventions which allow cargo interests to break the carrier's liability limits (Article 25 of the Warsaw Convention and Article 29 of CMR). The judge viewed these references as an agreement of higher liability limits pursuant to Article 25 of the 1999 Montreal Convention ("A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever") with the result that the carrier could not rely on the unbreakable 17.00 SDR limit in Article 22(3) of the 1999 Montreal Convention, but was liable for the full value of the cargo.

The decision by the Landgericht Karlsruhe has become final; it is not clear why the carrier did not appeal against the decision, the reason for this may have been the low amount of the claim. We are grateful to Angela Schütte of Hamburg law firm Grimme & Kollegen for having brought this case to our attention.

Peter Stockli, the TT Club's Legal Counsel, based in London, comments:
"It is open to debate whether the judge was correct in holding that the 1999 Montreal Convention did not apply at all, but this decision is important for TT Club Transport Operator Members because it demonstrates that outdated conditions, which still refer to the Warsaw Convention, may rob the carrier of the unbreakable liability limit of 17.00 SDR in Article 22(3) of the 1999 Montreal Convention. We believe that a number of Transport Operator Members may still be trading under standard trading conditions that contain a clause paramount that refers to the 1929 Warsaw Convention or to the 1955 Warsaw/Hague Rules, when a reference to the 1999 Montreal Convention would be more advantageous in general, thanks to the unbreakable liability limit in Article 22(3) of that Convention. In the light of the decision of the Landgericht Karlsruhe, Members would be wise to check that their trading conditions are right up to date."

2. Cover Breakthrough

In a Circular dated 1 December, the TT Club announced a new cover for Nuclear and Bio-Chemical Terrorist Risks. The Circular reads in part:

"A unique facility offering cover up to a targeted aggregate pool limit of US$100m for 2007 has been set up by the Club. It offers Club Members protection for liabilities, loss and damage to assets and business interruption claims arising out of the discovery of or emission from a nuclear, bio-chemical and or radiological terrorist attack - a so-called 'dirty bomb'. The cover is in two sections: (A) Cover up to US$25m each incident for liability, physical damage and/or business interruption arising out of the discovery of or emission from a device directly affecting a Member's insured facility, and: (B) Cover of up to a maximum of US$5m each year for contingent business interruption losses suffered by a Member as a direct consequence of an incident in another location anywhere in the world.

This new facility for Club Members (which guarantees a minimum of US$50m aggregate pool limit) provides cover for a risk that is generally excluded from all commercial insurance policies. It offers valuable protection against the possibility of a 'dirty bomb' being secreted in a container or discovered in a port or terminal, or for a Member's financial loss suffered as a result of significant trade disruption."

The Circular goes on to explain that the Cover will be offered as a separate twelve month entry for each Member commencing on 1st January 2007. If the annual aggregate limit of cover for the pool is exceeded, claims payments will be reduced pro-rata (with claims under (A) taking priority). Members interested in the cover are invited to approach their broker or their local TT Club office for a quotation.

The idea of offering cover based on an annual aggregate limit for all claims from all insureds can be viewed as a logical development from the Club's War Risks on Land cover, which has been in operation now for over twenty years. This, too, enables Club Members to be insured against risks that the commercial market normally excludes, subject to an annual aggregate limit for all claims from all Members. TTT

3. UCP (Uniform Customs and Practice) 600

On 15 November 2006, Vlad Cioarec, the International Trade Consultant to the ForwarderLaw website for Romania, posted a most informative article on that site entitled

"What forwarders and carriers should know about the UCP 600"

Some extracts from that article are set out below. To read the article in full, go to:

http://www.forwarderlaw.com/library/view.php?article_id=410

"On 25 October 2006, ICC Banking Commission approved revised rules for documentary credits that will come into effect on 1 July 2007.
The articles setting the requirements for transport documents have been re-drafted to avoid confusion over the identification of carriers and agents. On this matter, UCP 600… provides that:
"If an agent signs a transport document (Bill of Lading, multimodal transport document, air transport document) on behalf of a carrier, the agent must be identified as agent, and must identify the carrier on whose behalf it is signing, unless the carrier has been identified elsewhere on the face of transport document (Bill of Lading, multimodal transport document, air transport document)."
If an agent signs the bill of lading/ or multimodal transport document on behalf of the master (captain), the agent must be identified as agent and the name of the master (captain) on whose behalf it is signing must be stated."
The reference to multimodal transport operator has been dropped and UCP 500 Art.30 "Transport Documents issued by Freight Forwarders" eliminated so that for traders dealing on L/C terms the freight forwarders may issue transport documents only as carrier (NVOCC) or as agent of carrier….

Hence, the elimination of UCP 500 Art.30 from the new UCP will not affect the use with documentary credits of documents issued by forwarders as long as such documents comply with UCP requirements for content and signature.…

The reason for these changes was to avoid the problems created by freight forwarders issuing cargo delivery orders in the form of Multimodal Transport Bills of Lading. Such documents generally referred to as "House Bills of Lading"** are issued by freight forwarders not as contracting carriers but as double agents, on the one hand for the carrier, on the other for the shipper. They are not recognized as documents of title so that they are of little use to holders paying by documentary credits. The elimination of UCP 500 Art.30 will not affect, however, the use of NVOCC Bills of Lading or FIATA Bills of Lading**, since these documents are issued by forwarders "as carriers".
It will also not affect the use of FIATA FCR (Forwarder's Certificate of Receipt) and FCT (Forwarder's Certificate of Transport) documents since these are not considered transport documents….

UCP 600 recognizes the practice of shipping lines to use one form of Bill of Lading for both port-to-port shipments and multimodal shipments by eliminating the requirements of UCP 500 that the Bill of Lading bear the heading either "Marine/Ocean Bill of Lading" for port-to-port shipments or "Multimodal Transport Bill of Lading" for multimodal shipments. This change avoids misunderstanding that did arise from the combination in one document of different terms of carriage, namely the terms for sea carriage with terms for multimodal transport.
Changes have also been made to the requirements for Charter Party Bill of Lading which need no longer indicate the name of carrier and for the release (sic) of time charterers can also be signed by "a charterer or a named agent for or on behalf of a charterer." In Charter Party Bill of Lading, the port of discharge may also be shown as a range of ports or a geographical area….
The acceptance of Charter Party Bills of Lading indicating alternative ports of discharge will benefit those involved in string trading dealing on L/C terms as there is no need for L/C amendments anymore.
Another provision… is that Bills of Lading need no longer bear the clause "Clean" to comply with documentary credits that require "Clean on Board Bills of Lading"".

**Commenting on this article, Peter Stockli, the TT Club's Legal Counsel, based in London points out that the term 'House Bill of Lading' also includes contracts of carriage, under which the issuing freight forwarder undertakes a liability as a carrier, acting as a principal rather than an agent. He also points out that the TT Club 100 Series bill of lading remains suitable for documentary credit purposes under UCP 600, as it contains the term 'Carrier' in the box where the Member prints its name (address) and logo.

4. "Be Careful about Carewins

In Edition 90, the Club reported the Hong Kong High Court's decision in Carewins v Bright Fortune Shipping, in which the freight forwarder successfully relied on a bill of lading clause to exempt itself from liability for release of cargo without production of the original bill of lading. Upon receipt of feedback from some curious readers, Harry Lee of the TT Club's Hong Kong office reminds transport operators that the ruling must not be treated as a judicial guarantee that this type of clause can always protect the carrier. Transport operators should protect themselves by implementing proper cargo delivery procedures.

The present position is that case law concerning the scope of the Hague/Hague-Visby Rules (which apply to nearly all bills of lading) with respect to misdelivery happening after the goods have been physically discharged, is conflicting. If the Hague / Hague-Visby Rules were held to apply to misdelivery after discharge, the defendant in the Carewins case would not have been entitled to rely on the bill of lading clause. The judge's reluctant conclusion was that the Hague-Visby Rules cease to apply at all once the carrier has completed the actual discharge operation. While this proposition is quite safe in respect of post-discharge events in relation to physical loss or damage, it is vulnerable to be overruled when it comes to delivery absent production of bill of lading. The point is that the obligation to deliver goods (and to do so against production of the bill of lading) is part and parcel, and indeed a fundamental part, of the contract of carriage by sea, to which the Hague-Visby Rules apply. Until the sea carrier delivers up the goods according to its obligations, it has not completely discharged its duties under the contract and the Hague-Visby Rules.

As such, Carewins is a controversial judgment at first instance in Hong Kong, delivered with some reluctance and depending, to an extent, on an overruled English first instance decision. In fact, the claimant in Carewins has already filed an appeal against the decision.

Furthermore, a carrier who deliberately misdelivers cargoes may, if this is proved by the claimant, be fully liable for the losses inflicted in actions for conversion or fraud.

Litigation is contentious, costly and risky. When things are within carriers' control, they should manage their risks sensibly and understand the consequences of not doing so."

5. 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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Acting Editor
On behalf of
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