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Welcome to the new format of TT Talk. We hope that you like the new layout in pdf format.

We are grateful to our friends in Hong Kong and Shanghai for four items this week.

1. Hong Kong rules on straight bills and liability for misdelivery

The Hong Kong court of first instance was recently asked to consider the question of straight bills of lading and, in particular, whether a carrier who had issued such a bill was obliged to demand surrender of an original before handing over the cargo at destination.

The background of the case was that Carewins had sold clothing to a company called Artist Fashion in Los Angeles. Carewins had employed two forwarding companies, Hecny and Bright Fortune, to carry out the transport. In accordance with the shipping instructions, the bills of lading were not consigned "To Order" but addressed to Artist. On their arrival in Los Angeles, a number of containers were released to Artist without presentation of a bill of lading. It seems that this practice may have been going on for some time, but it came to light only because, on this occasion, the Burberry company, the well-known clothing manufacturer, was alerted that the cargo might contravene its trade mark or other intellectual property rights. The containers were seized and Artist did not pay for the goods. Carewins, still holding the original bills of lading, naturally asked how it was that the goods had been released, and in due course sued both Bright Fortune and Hecny for the value of the cargo.

Having reviewed a number of recent cases on this subject, the judge agreed that, no matter whether a bill of lading was "to order" or "straight", the "time-honoured" language of the attestation clause "In Witness Whereof, the carrier by its agents has signed three (3) original Bills of Lading all of this tenor and date, one of which being accomplished the others to stand void" placed an obligation on the carrier to demand surrender of at least one of the originals, before he released the goods. He rejected as firmly as he could the contention that this "presentation rule" did not apply to straight bills: otherwise there would be two different rules for bills of lading, depending entirely on the way they were addressed.

Having disposed of that argument, the judge then considered whether the carriers' liability for misdelivery was limited by the bill of lading conditions, or by the Hague-Visby rules. He rejected the contention that the carriers' responsibilities under Article II, that he "shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried" also extended to the release of the goods once they had been discharged; to decide otherwise would be to impose obligations on the carrier relating to the safe storage etc of goods on land. The consensus of numerous

decisions was that the Hague Rules operated "from tackle to tackle" and in the judge's view delivery (or misdelivery) took place at some stage afterwards. Therefore liability for misdelivery was not to be calculated by reference to the HVR, but to the ordinary conditions of contract as set down in the bill of lading. Unfortunately for the plaintiffs, the bill of lading contained a clause "in clear and unambiguous language" under which the carriers excluded liability "for loss or misdelivery of the Goods howsoever caused ...", and therefore Carewins were not entitled to any compensation.

The full transcript may be found on the website of the Hong Kong courts at:

http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=53438&QS=%28carewins%7Cbright%7Cfortune%29&TP=JU 

2. Hong Kong and China agree on mutual enforcement of judgments

On 14 July 2006, the People's Republic of China ("PRC") and the Hong Kong Special Administrative Region ("HKSAR") signed an arrangement on reciprocal recognition and enforcement of each other's judgments in civil and commercial matters ("the Arrangement"). Under the arrangement, a party who has obtained a court judgment in civil and commercial matters in HKSAR may apply to a court in the PRC for recognition and enforcement of that judgment and vice-versa. There is currently no such mechanism in place and it is hoped that the arrangement will fill the void. 

3. SAR adopts CSC

Hong Kong is to issue new legislation to implement the International Convention for Safe Containers 1972 ("CSC") to come into force before the end of the year. The IMO convention is designed to standardise the requirements for testing, inspection and approval of freight containers. Under the planned Freight Container (Safety) Ordinance (Cap 506), owners of freight containers will be responsible for ensuring that each container has a valid safety approval plate affixed and is properly maintained. 

4. China opens doors to forwarders

From the end of this year, China's doors are fully opened to foreign investment in freight forwarding business, subject to satisfying capital requirements and other conditions. Companies will be able to establish a presence in China, either in the form of joint ventures (JV) or wholly foreign-owned enterprises (WFOEs, providing that they:

- a. have a minimum paid-up capital of USD1 million;
- b. have at least five staff members must have more than three years of working experience in international freight forwarding industry or have obtained relevant qualifications;
- c. have permanent office premises in China; and
- d. are equipped with the necessary business facilities for communication, transportation, loading / unloading, packing etc.

These JVs or WFOEs are in turn able to set up their own branches across China if the following requirements are met:

- a.. The JVs or WFOEs have been operating in China for at least one year;
- b. All registered capital has been paid up;
- c. . Payment of an additional paid-up capital of USD120,000 for each branch.

However it should be noted that in China the concept of "freight forwarding" has a narrow meaning, referring only to agency business, which is regulated by the Ministry of Commerce. If the company wishes to issue its own house bills of lading, it must register with another ministry (Ministry of Communications) and make a cash deposit of RMB800,000 (about USD100,000) as liability guarantee. A further RMB 200,000 deposit is required for each additional branch in China. 

5. US Senate votes to scan all imports, but railmen complain of security gaps

On Thursday 14 September, the US Senate voted without dissent to tighten security at American seaports by scanning nearly all incoming cargo for "dirty bombs" and other nuclear weapons. The bill, approved 98 to 0 in a pre-election push on national defence, would increase safeguards on the rail systems that pick up cargo from ports and authorise 1,000 new agents to screen containers coming off ships. But the legislation does not go as far as some Democrats demanded in requiring inspections for all US-bound cargo before it leaves foreign ports. Almost 11 million containers a year are shipped to the United States. The plan, which authorises spending USD 835 million next year, "works toward a goal of getting to 100 percent screening" of cargo leaving foreign ports, said Senator Patty Murray one of the bill's authors. Senator Ted Stevens said the measure, similar to one approved by the House of Representatives in May, was "the most comprehensive approach to border security we have taken to date."

The Senate bill requires inspections of suspicious high-risk cargo at foreign ports. It also sets up a pilot program to scan for nuclear or "dirty bomb" materials in all U.S.-bound containers at three to-be-determined foreign ports. The trial would help determine if mandatory inspections would bottle up commerce and drive up costs, as Republicans fear.

However, while the US is scanning the horizon for the possibility of dirty bombs coming in by container ship, some people are pointing out that such a bomb could easily be created on US soil, by the simple expedient of attaching an explosive device to one of the thousands of tank cars of fuel and chemicals that are routinely moved by rail within the country. Every day, trains haul explosives, atomic waste and toxic chemicals over 140,000 miles of track, often right through the middle of cities and towns. One expert has estimated that an explosion of a tanker filled with chlorine in the right (or wrong) place could kill 100,000 people within 30 minutes.

Yet in spite of the obvious dangers, security at rail yards seems very lax. Fox TV recently reported that at the Roseville Yard outside Sacramento, California, the largest rail yard west of the Mississippi river, rail cars sit idle for hours at a time. The only apparent security at this location is a few "No Trespassing" signs, but railroad officials insist the rails and the cargo are carefully monitored and guarded.

"Rail transportation is the safest transportation to move goods across the country, and now, more so because of the added security after 9/11," said Union Pacific spokesman Mark Davis. "The rail industry participates in very detailed security discussions on a daily basis with all railroads and homeland security, and we are well aware of movements and very prepared."

While there has been sabotage, Davis said there has never been an act of terrorism on America's rail system. That's proof, he said, of just how secure the railways are. But in a recent survey, most conductors said they've had no anti-terrorist training, and yards like Roseville seem to be easy targets. Without any fencing to keep people out of Roseville, it was easy for the Fox News reporter to put an object on a passing freight train. The reporter used a pen, but it easily could have been something more deadly. Tim Smith, chairman of the Brotherhood of Locomotive Engineers and Trainmen, pointed out that many of the freight cars had graffiti sprayed over them, as a further indication of the lack of security at rail yards, adding "if they've got time to paint their pictures, a terrorist's got plenty of time to plant a stack of C-4's on the side of the car and blow it up."

Critics, including many railway employees, are demanding the government and ownership step up, arguing the industry cannot turn its back on homeland security. Their fear is that it will take something like a London or Madrid train bombing to force the industry to make effective changes **TTT**

6. Readers write

Commenting on the stories in TT Talk on the mislabelling and misdeclaration of hazardous commodities, a reader in South Africa writes with his own anecdote. He is, he says, a member of a black powder (gunpowder) shooting club, firing originals and replicas of guns (muzzle loaders and early breach loaders) made in the mid to late 1800's.

He recalls that, some time ago, members of the club were each asked to test one kilogramme of black powder that had originated from somewhere in south-east Asia. To his surprise, some of the packages were labelled "MILK POWDER" while others were labelled "EGG POWDER". The misdeclarations were obviously done in order to circumvent controls and/or high freight rates on the highly hazardous (Explosive - IMDG Class 1) material. Our reader has no idea how the shipments got past Port Health and is glad that they did not mistakenly enter the food chain. 

7. Time-honoured language

We reported above on the use of the "time-honoured language" of the attestation clause in bills of lading. Just how time-honoured the language is can be seen from a bill of lading your editor recently discovered in the UK National Archives: Dated 16th January 1798 in Charleston, South Carolina, the bill states "Shipped in good order and well conditioned in and upon the good sloop James, whereof is master for the present voyage [there follows the name of the master, a description of the voyage and the numerous items of cargo] to be delivered in the like good order and well conditioned, at the aforesaid port (the danger of the seas only excepted) unto ... or to his assigns, he or they paying freight for the said goods with primage and average accustomed. In witness whereof the master or purser of the said sloop hath affirmed to two bills of lading, all of this tenor and date; the one of which two bills being accomplished the other one shall stand void."

Interestingly, as was common in those days the master was trading on his own account and was shown as both the shipper and the consignee of the goods. Presumably therefore he would have been untroubled by questions of "order" and "straight" bills and would have had no problem in presenting the bill of lading to himself or of taking delivery of the goods. That is something we shall never know, for the good sloop James was heading for a French port in the Caribbean and was intercepted by a ship of His Majesty George III. All the well-conditioned cargo was seized as contraband ... and that is how the bill of lading ended up in Britain. 

8. 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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