Welcome to this edition of TT Talk, No 87 in the series.

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1. Club warns on logistics liability and insurance

In a speech to the Logistics Law seminar in London, Mike Foster Claims Director based in the Club's London office, has warned that logistics operators should make sure that their insurance cover is adequate. The reason for this, he explained, was that insurance providers are finding it difficult to keep up with the pace of change in terms of complexity of risk in the logistics and transport industry, and many are still basing their principal insurance product for this sector on a model of the freight forwarding industry that is up to thirty years old.

The basic premise of those policies was that forwarders would incorporate their standard trading conditions and could then limit liability in the event of an accident, with the business actually retaining very little of the risk. "But for the logistics operator", Mike continued, "the bounds are not so set. Liability for goods does not cease at the customer's gate: it may extend to delivery to a production line. The operator may even be part of the extended production line, with pre-delivery inspections now trumped by minor assembly work. What implication does this have for risk and insurance?"

Responding to the changes in logistics operators' liabilities, the Club has developed model contract conditions to assist its logistics operator members to minimise risks in their contracted services. "The logistics operator needs a process that continually assesses his exposure to risk in the light of the contracts that he is considering and the activities he may undertake," Mike explained, and "in turn, the insurer of logistics operators needs to be able to verify the assessment of risk, using as his starting point the obligations in the logistics contract. "

Mike recommended that, when considering the section of the contract that addresses liability for goods, logistics operators should keep some guiding principles in mind:

- They should find out the cost that the risk represents before pricing the contract.

- It is unlikely that the contract will be back-to-back with their carriers and other sub-contractors in accepting liability on an "all risks" basis. The gap in liability may be profound.

- All 'risk' related issues should be on the table in contract negotiations so that the true operational risks are clearly understood.

2. Canadian court rules on railway liability

The Federal Court of Canada has just issued an important decision in Boutique Jacob v. Pantainer dealing with a shipper's direct right of action against railways in Canada which may well have significant implications for ocean carriers.

Boutique Jacob had contracted with Pantainer for the carriage of a containerload of fashion goods from Hong Kong to Canada. Pantainer subcontracted the door-to-door carriage to OOCL who issued its own through bill of lading. When the container arrived at Vancouver, OOCL handed it over to the Canadian Pacific railroad for rail haulage and final delivery in Montreal under the terms of a contract which included limits on the railroad's liability. The train carrying the container derailed and the cargo was badly damaged. Jacob sued all three companies.

The court held that Pantainer could limit its liability under the terms of its bill of lading, as could OOCL, but decided that the railroad could neither limit its liability under the terms of its contract, nor could it benefit from the "Himalaya" clause in either Pantainer's or OOCL's bills of lading.

The reason for this was that, in Canada the railway companies as common carriers are subject to a statutory liability regime, with a minimum duty of care set down in the Transportation Act 1996 subject to certain liability exemptions. According to the act, this liability regime can ONLY be amended by express consent, ie by written agreement with the immediate contracting party. As such, the court held that under the terms of the act, the amended liability regime only affected the parties to the contract, that is CPR and its customer, the shipping line (OOCL). The agreement / contract could not affect the rights of the third parties, such as Boutique Jacob, who could still benefit from the statutory scheme. The court also pointed out that to allow the application of the Himalaya clause in favour of the railway company would "defeat the purpose" of the act and "would make no sense".

The court held that it was entirely admissible for Boutique Jacob to jump over the intervening contractual carriers and sue the actual carrier under the terms of its statutory obligations. The decision means that the legal position in Canada is is different from that in the United States, where the Supreme Court held in 2004 (in Kirby - v - Norfolk & Southern, see TT Talk No 57) that, in very similar circumstances, the railroad could rely on the "Himalaya" clause in the NVOC's bill of lading. The reason for this difference is there is no equivalent in the USA of the statutory liability regime for railroads under the Canadian Transportation Act.

We understand that the railroad is appealing the decision; TT Talk will bring you news of the appeal court decision in due course.

A "Himalaya" clause is, of course, only effective if there is also a circular indemnity arrangement in the same contract, so that if a client, by suing a sub-contractor, succeeds in breaking the limitation of liability in the main contract the excess compensation can be claimed all the way back along the contractual chain, ending up with the original claimant cargo-owner who thus ends up with the liability regime of his original contract. Readers will recognise that this is an extremely messy, complicated and expensive procedure; the main benefit of the "Himalaya" and circular indemnity clauses is their use as a deterrent to claimants.

The Club's advice to members is to check that their contracts - not just bills of lading, but any other contracts of carriage - contain effective "Himalaya" clauses and circular indemnities. The Club's recommended bills of lading meet this criterion but if you have any concerns about your own documents, you should consult the Club's legal advice team.

The full text of the decision may be read on: http://decisions.fct-cf.gc.ca/fct/2006/2006fc217.shtml

3. More on General Average (1)

Following the article in TT Talk 85 on General Average, two members have been in touch with questions:

One member ("A") was acting as an NVOC and had issued his own bill of lading for the consignment in question, but had actually sub-contracted the movement to another NVOC ("B") who had consolidated the consignment in his own container service. The ship was involved in an incident, as a result of which the owners declared general average. The letter from the adjusters requesting a GA guarantee came down the contractual chain to A, who passed it on to his client. The client's marine insurers provided the guarantee. So far, so good, but then B demanded his own GA guarantee from A and refused to release the consignment until a guarantee had been given. Member A wanted to know how to react.

The Club's view is that B had absolutely no right to claim a GA guarantee. B had suffered no loss ("general average sacrifice") which is the basic premise for a GA claim. Furthermore, as neither A nor B was the cargo-owner, neither of them had an obligation to provide a guarantee. The guarantee had actually been provided by the party with the obligation (the cargo-owner) to the party who had suffered the loss (the ship operator), and the cargo had been released by the average adjuster.

B's refusal to release the goods at destination amounted to interference with the cargo-owner's rights to take possession, and could have serious legal consequences. Members of the Club who find themselves in the position of A should contact their usual claims handler for advice.

4. More on General Average (2)

Another member operating a container consolidation service asked what the position is if one cargo-owner (out of say fifteen with consignments in a container) refuses or is unable to give a guarantee to the average adjuster.
The result of this is that, while there are fourteen consignees who have made all the necessary arrangements, they still cannot get hold of their consignments because of the (in)action of the fifteenth, and until No. 15 provides the guarantee, the adjuster will not release the container. That could mean fourteen very unhappy customers, but fortunately the Club has a solution for members facing this kind of problem.

In such circumstances, the Club is prepared to issue a guarantee to the adjusters for the remaining consignment, to enable the container to be released. However, the obligation of the fifteenth consignee remains and the Club will insist that his consignment is detained until such time as he gives the necessary guarantee. The other fourteen consignments can, of course, be released, and the container returned to the shipping line, while No. 15 sits in the warehouse at its owner's risk and expense.

The position of the NVOC is different here from that in the answer to the first question. In the first scenario, the cargo-owner had provided an acceptable guarantee, whereas in the second he had not. Both ocean carriers and NVOCs normally have contractual powers to hold (lien) a consignment until the GA guarantee is in place and accepted, but lose them as soon as this has happened.

5. Windy season predicted in 2006

Following the note in TT Talk No. 85 on the Club's new windstorm brochure, timely news arrives from the university of Colorado about the frequency of storms in 2005 and their predictions for 2006.

In 2005 there were 28 tropical storms, of which fifteen were hurricanes. The usual average is six hurricanes a year between June and November. The hurricanes killed 2795 people in the Americas and the Caribbean, and caused damage estimated at $135 billion.

For this year the university predicts that there will be seventeen named tropical storms, of which nine will be hurricanes (and five of these will be category three storms). Of the past eleven hurricane seasons, nine have been above normal. We are 50% more likely to have a hurricane of the strength of Katrina than we were twenty-five years ago.

See also the National Oceanographic Administration's wesbite on www.noaa.gov/

And in case you are interested, here are the names chosen for this year's Atlantic hurricanes:
Alberto - Beryl - Chris - Debby - Ernesto - Florence - Gordon - Helene
Isaac - Joyce - Kirk - Leslie - Michael - Nadine - Oscar - Patty - Rafael
Sandy - Tony - Valerie - William

A reminder that the loss-prevention advice on windstorms is available for download from the Club's website www.ttclub.com. Non-members can purchase a copy from the same site using secure payment methods.

6. and finally ...

Regular readers will know that TT Talk occasionally brings you stories of bizarre incidents involving animals. After the wild boar which gained posthumous fame in the English High Court, and the cat that survived a 30-day journey in a container from China, we are indebted to the Allegheny Times in the USA for the following headline which makes some of our stories pale by comparison:

POWER OUTAGE IN BEAVER FIXED, BUT SQUIRREL WAS BEYOND REPAIR

(The town of Beaver, Pennsylvania, lost its electricity supply when a squirrel gnawed through the main power cable. The electricty company's linesmen traced the fault and repaired it, but reported that the squirrel's meal had been its last.)

7. 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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