Welcome to TT Talk, No. 81 in the series.

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1. European judgment clarifies liability for customs duties

The European court of justice, in handing down its decision in Unamar and Seaport Terminals v Belgium, has clarified the provisions of the EU customs code relating to the responsibility for duty when uncleared goods are lost in storage or transit.

A consignment of Brazilian cigarettes unloaded at Antwerp went missing from the quayside while the goods were waiting to be "assigned a customs-approved treatment or use" (that's Euro-speak for old-fashioned "customs clearance"). The Belgian court held that both the carrier and the terminal were jointly and severally liable for the import and excise duties. Both parties appealed, and the appeal court sought guidance from the ECJ on the proper interpretation of the customs code and who was responsible for paying the customs debt.

Article 203 of the EU customs code sets out a number of different people who can be held responsible to pay the duty and tax when uncustomed goods are lost or stolen, including "the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed" and (rather hopefully) those who participated in or were aware of the illegal removal. In practice of course, it is only rarely that people in the latter group are traced, and customs authorities therefore look to other, more substantial companies or organisations listed in article 203 to recover the duty and taxes. The question the court had to decide was which of the companies was the one "required to fulfil the obligations" in accordance with article 203: was it the company in physical control of the goods (Seaport Terminals) or the company responsible for making the customs declaration (Unamar)? Or could they be jointly liable?

The court held that, once goods have been unloaded, the obligation for the customs debt lay with the person or company who had physical control of the cargo. In reaching this decision, the ECJ has clarified that the liability to pay a customs debt does not necessarily have to be concurrent (ie joint and several), but that it is sometimes appropriate for liability to lie solely with one party, because the risk passes consecutively when custody is passed from one person to another. As a result of this judgment it is more likely that, when goods go missing while in temporary storage, the terminal operator will be faced with sole liability.

In the past, customs authorities have tended to take action against the company which had lodged the summary declaration. If they then tried to recover the costs from the terminal operator, they would generally find that the amount they could recover was limited by the terminal's contractual conditions. The ECJ's judgement makes it clear that the operator of the terminal or warehouse where the goods had been held when the loss occurred will be liable to the customs authority direct for the unpaid duty or tax. Any limits of liability in the operator's trading conditions will be of no effect, because the authority's claim is not based on contract but arises under statute.

Although the duty demand arises because of the terminal's own negligence, it may - under some circumstances -be possible for the terminal to claim the charges back from its client.

This will very much depend on the terms of the contract between the two companies, the effect of national law, and of course on commercial relationships.

The ECJ's decision can be found on its website under:
http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-140%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

2. Exclusion clauses - recapping the basics

While on the subject of exclusion clauses. we are grateful to our friends at Australian lawyers Phillips Fox for this timely reminder about the importance of proper drafting of such clauses. The following comments are based on Australian law and practice and while the principles are generally applicable in other jurisdictions, members else where should seek legal advice locally on issues of incorporation and validity.

Any regular player in the transport industry, particularly one involved in road transport, will know the importance of a contractual term limiting or excluding liability for damage, but not all exclusion clauses are the same. Simply having a statement on a consignment note, for instance, that reads "WE ARE NOT LIABLE FOR ANY DAMAGE" is no guarantee of an effective avoidance of liability.

A properly worded exclusion clause which is incorporated into the contract of carriage between road carrier and client, will greatly diminish the prospects of a successful recovery action and bring the carrier a sigh of relief.

A legalistic explanation for an exclusion clause is that it operates to exclude, restrict or qualify a carrier's liability in the event of its breach, or circumstances which would, apart from the clause, amount to a breach of the contract for carriage. An exclusion clause is attempting to reverse the natural order of liability. In other words, if goods were destroyed the normal expectation would be that whoever was responsible for the damage would be responsible. Exclusion clauses attempt to exclude that responsibility and for that reason courts will often be reluctant to enforce them. Consequently, for a clause to be effective, it must specifically set out the type of negligence and actions for which the carrier is trying to avoid or exclude liability.

Many smaller road carriers place their reliance on ineffective exclusion clauses or fail to ensure that their exclusion clauses are actually incorporated into the contract for carriage. Some carriers still assert: "WE ARE NOT COMMON CARRIERS", often coupled with "We do not accept liability for any loss." That type of clause is almost certain to fail.

While it is possible to argue that even a badly worded exclusion clause can be effective, the general test to see whether an exclusion clause would be enforced by a court is to see whether it specifically includes an intention to exclude liability for negligence (even negligence by the carrier's own staff), breach of bailment, breach of contract and any other cause of loss howsoever caused. The effect of such a clause is to remove any doubt on the construction question. If this specific wording is not used, a customer is legitimately able to question the scope and effectiveness of the clause.

The second critical issue is the incorporation of the exclusion clause, and the other terms and conditions, into the contract for carriage. In order to be able to rely on an exclusion clause, the carrier must have undertaken all reasonable steps to bring the existence of its terms and conditions to the customer's attention. The use of phrases such as "All business is subject to our standard terms and conditions" on quotations, consignment notes, letterheads and invoices is a good test to see whether the carrier's clients were given notice of its terms. The terms and conditions should then be provided in full on first contact with any new client and

printed on the reverse of any invoice, letterhead or consignment note. If this has not occurred, there is an argument that the terms did not form part of the contract.

The Club would add that, if your sub-contractor does come up with some seemingly simple and all-embracing exclusion of liability, it would be very worth while checking the extent of his own liability insurance before doing any business at all. Liability insurers know that the courts are unlikely to uphold such clauses, leaving the sub-contractor exposed to a full-value claim without any valid limitations of liability: they therefore take care to see that their insureds have effective clauses in their contracts. The fact that a company is trying to incorporate worthless clauses may therefore mean that it simply hasn't gone to the trouble of arranging insurance at all. In our book, that's a pretty good reason to steer clear.

The full text of Phillips Fox's e-bulletin can be read on the firm's website at http://www.phillipsfox.com/vbscript/displaydoc.asp?ndocid=115249492

3. UNECE considers dangerous goods in European tunnels ...

Seven years ago, in March 1999, 39 people were killed when a heavy goods vehicle caught fire in the Mont Blanc tunnel between France and Italy; two years later another 11 people died when two vehicles collided and caught fire in the Swiss Gotthard tunnel. The incidents demonstrated the dangers of tunnel transit and, although neither incident involved the carriage of dangerous goods, the authorities realised that there were no standard rules governing movements of hazardous materials through tunnels.

The WP15 working party on hazardous goods transport of the UN Economic Commission for Europe (UNECE) has since been grappling with the problem. The Hazardous Cargo Bulletin, which has been monitoring progress, reports that at a recent meeting of WP15, which aimed to finalise provisions for the carriage of dangerous goods in road tunnels, delegates voted to publish the new system of tunnel classification on 1 January 2007 with the next edition of ADR.
However, some member states are still clearly not happy with the provisions as they now stand and others, having explained the need for a lengthy transitional period so as to have time to undertake the necessary risk assessments, felt that the proposed implementation date of 1 January 2010 is too soon.

There is a further problem in that, in order to be published in a consolidated version of ADR 2007, the text will need to be agreed and tunnel codes ascribed to all substances in the Dangerous Goods List by May at the latest. It seems likely that debates will continue, although other users of road tunnels might hope that the issue is resolved speedily.

4. ... and proposes new rules for paints and aerosols

Hazardous Cargo Bulletin also reports that WP15 is currently considering a French proposal to introduce new marking and documentation requirements for limited quantity loads of 12 tonnes or more (ie large numbers of small containers of paint, aerosols etc, loaded in one transport unit.)

The French paper, based on a 2001 report by INERIS, states that the risks inherent in large volumes of dangerous goods carried under limited quantity exemptions are such that some sort of special marking is warranted. Trade associations representing paint, adhesive and aerosol shippers and their carriers, are fiercely opposed to the plan, contending that the reasoning of the proposal is flawed and that the measures that could result would impose significant additional costs for shippers and carriers.

Companies likely to be affected by the French proposal are urged to give it immediate attention and to make their views known to their national delegate. The French paper is

posted on the UN ECE website at http://www.unece.org/trans/doc/2006/wp15ac1/ECE-TRANS-WP15-AC1-2006-12e.pdf.

5. Transport Logistics: past, present and future

Your editor who, before he discovered the broad sunlit uplands of the TT Club, had grafted at the coalface of freight forwarding for rather longer than he cares to admit, is always rather amused when asked what book he could recommend to someone who wanted to "learn all about the freight industry". He wondered how big such a mighty tome would have to be to cover such a huge and complex industry.

Now Issa Baluch, chairman and CEO of the Dubai-based Swift Group, has gone some way to filling the gap, in his new book "Transport Logistics: past, present and predictions". Mr Baluch is well-equipped to deal with the subject, having started his career as a humble tally clerk with the Gulf Agency company in Dubai and rising "through the ranks" within seven years to become the general manager of the company's freight forwarding arm. He is now chairman and CEO of the Swift Group in Dubai and a former president of FIATA.

In his book, Mr Baluch studies ten historical projects, ranging from the construction of the great pyramids to the dotcom revolution. All demanded careful transport logistics management, but some were successes and others failures. Whether these projects were related to construction, engineering, military actions, or humanitarian relief, they all transport logistics and placed great demands on logistics managers. The second part of the book examines various aspects of today's dynamic freight logistics industry, from IT-based supply chain integration and value-added service offerings to the problems of cargo security in global transport. Finally, Mr Baluch examines the freight logistics industries of Egypt, China, South Africa, India and Dubai, before, in the book's third section, taking a look at the future of the transport logistics industry.

Further details can be found on http://www.transportlogistics.com/home.htm from where the book can also be ordered.

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.

Andrew Trasler
Editor
On behalf of
TTMS (UK) Ltd, London

David Martin-Clark
Legal Editor
Shipping & Insurance Consultant
Maritime Arbitrator
Commercial Disputes Mediator

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