

## **Welcome to TT Talk, No. 80 in the series.**

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### **1. Hong Kong holds terminal liable for air cargo thefts**

Our colleague in Hong Kong, Patricia Ng, reports on a recent decision of the territory's High Court in a case concerning two cargo thefts incident that happened in 1997 and 1998 at the old Kai Tak airport.

On 8 November 1997 an airfreight consignment of 2000 mobile telephone handsets with an invoice value of HKD 4.13 million (USD 532,000) packed in wooden crates and weight 2.78 tonnes arrived at the airport from Sweden. It was stolen later that day from the warehouse of Hong Kong Air Cargo Terminals Ltd (HACTL).

Some ten weeks later, on 17 January 1998 a further consignment of 4500 mobile telephones with an invoice value of HKD 12.352 million (USD 1.6 million) arrived at Kai Tak: it was stolen the following day from the HACTL warehouse at the airport.

HACTL had been responsible for processing all import cargo at Kai Tak: Normally after completion of the customs formalities, it handed over the consignment to whoever turned up bearing a "Shipment Release Form" (SRF). In both these cases, thieves had presented forged SRFs and had been permitted to take the cargo.

The owner of the cargo sued the airlines, the handling company and the two freight forwarders concerned. With a high value at stake, six defendants and two separate (but linked) thefts, the case was extremely complex, which accounts for the long time it has taken to come to trial.

The primary issue for decision was whether the cargo owner could successfully break the limits of liability laid down in the 1955 Warsaw/Hague convention or the 1961 Guadalajara convention, both of which have been incorporated into Hong Kong law by the Carriage by Air Ordinance.

At trial, counsel acting for HACTL in the trial made a significant concession by accepting that the theft of the first case could have been perpetrated with the "inside involvement" of an HACTL employee. The court confirmed that the two conventions provide the claimant's sole and exclusive right to seek compensation against the carriers, and that the circumstances of the theft enabled them to break the Article 22 limit against both the actual and the contractual carriers

In the second case, the court also found that there was an agency relationship between HACTL and both the carriers concerned, and that neither of the carriers was able to rely on the limit laid down in article 22.

Having held the carriers liable the court then ordered that, as HACTL was liable and, because of the provisions of article 25 (a), unable to invoke the article 22 limit, it should compensate the carriers in full for the compensation they had to pay to the cargo-owner.

The full transcript of the judgment can be read on the HK judiciary website <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>: quote action Nos. HCCL 202/1999 or HCCL 2/2000

## **2. Ships that go bump in the night (or any other time!)**

Our colleagues Marcus John and Iain Sharples in Sydney write about the problems of enforcing claims on those (hopefully rare) occasions when ships cause damage to terminal property during berthing/unberthing, loading and discharge operations. Emergency response to any personal injuries or pollution clean up will be of immediate concern but the subsequent financial cost to the terminal can also be substantial.

Financial losses can include temporary and permanent repairs to, or replacement of, equipment, clean up costs, business interruption and increased costs of working (for example the hiring of additional equipment or personnel in order to maintain productivity). These can be multi-million dollar losses and it is very important that the terminal protects its recovery rights against the ship.

When one party causes damage it is usually possible to issue legal proceedings and, if the claim is successful, have the judgement enforced. The difficulty with claiming on a ship is that the "defendant" is constantly on the move and may change ownership. Indeed the ship may be owned by a "one-ship company" so when it is sold there are no assets to pay a claim. This means that a successful judgment against a ship may not be enforceable and it becomes worthless. The terminal is left bearing the losses incurred with no recourse against the party that caused the damage.

Although the terminal is usually insured against damage to equipment and the consequential losses arising, it is in its interests to protect the insurer's position. Indeed it is usually a policy requirement to do so, and of course, whatever insurers can recover will usually have a favourable impact on the loss record. There is also the terminal's own deductible and, possibly, any uninsured losses to consider. A ship that is at fault for damage to the terminal's equipment should be immediately held responsible for the losses arising.

Regardless of the circumstances of the incident and the amount of damage apparent at the time it is worthwhile taking steps to protect the terminal's position. The best method is to obtain financial security from the ship owner by bank guarantee or a letter of undertaking (LOU) from the ship's protection and indemnity (P&I) club. Security can be obtained for any sum in most jurisdictions - there is no minimum amount.

It is often possible to arrest a ship that has caused damage to property or people, but the rules differ from one jurisdiction to another. This prevents it leaving the berth or port, so the shipowner will therefore almost always be anxious to avoid it. On the other hand, getting an arrest warrant is sometimes difficult and can have unwanted legal consequences if it is not done correctly. That is where the P&I club's LOU (or the first-class bank guarantee) comes in, as the claimant can accept it in return for an agreement not to arrest the ship.

The amount of security given cannot generally be increased after the letter is issued so the terminal will not get any more security than the amount stated in the LOU. Therefore the security agreed should be adequate to cover the highest claim amount reasonably contemplated, including interest and costs as well as the actual damage.

When a settlement is agreed or judgment in court is obtained, possibly several years down the track, the terminal can obtain the funds on demand directly from the party that issued the LOU, irrespective of whether or not the shipowner is still in business. Without the LOU it would not be possible to claim direct upon the shipowner's P&I club.

When an incident occurs that causes damage to terminal equipment the Club recommends the following steps taken:

Tell your local TT Club contact about the incident immediately as they will be able to assist.

Hold the ship responsible for the damage by a letter delivered to the master, with a request for confirmation the ship will indemnify the terminal for the losses arising;

Estimates of the likely losses will normally be required. Appointed surveyors may provide independent evidence of the extent of the losses. Lawyers may also be appointed to take statements if the cause of damage is potentially contentious.

You should note that when an incident occurs action must be taken as soon as possible to obtain security and that will almost always be before the ship leaves the port. Once the ship has sailed it may be too late!

When security has been put in place the TT Club contact can assist you in pursuing your recovery claim against the ship, provided the potential loss is likely to be above your deductible (assistance on below deductible claims handling can also be arranged).

### **3. Truck crime: the good news ...**

Good news reaches us from the United States where reader Alan Spear, reports that there has been a remarkable reduction in cargo crime, mainly as an indirect consequence of some of the 9/11 initiatives and the greater surveillance and improved security awareness that they have engendered.

He tells us that the state of Florida reports a reduction of more than 60% in cargo crime over the past year and that the government of Brazil also reports a sharp decline. Mr Spear's own company statistics show fewer (but larger and more focused) cases.

However, Mr Spears also points out how far there is still to go:

Total amount of cargo imported through US ports: 17.6 million tonnes

Total number of trucking companies operating in the USA: 540,000

Proportion of US traffic carried by truck: 85%

Number of people employed by trucking companies: 4 million

Number of police officers in the United States employed full-time on cargo crime: 75

### **4. ... and the bad**

Meanwhile, in the UK, Truckpol has sent out another reminder of just how inventive the criminal fraternity can be, when it comes to separating goods from their rightful owners: A trucking company received instructions over the phone to collect a consignment of suits from an address in London's west end. When the driver turned up, the shopkeeper denied all knowledge of the collection and was about to turn the driver away when his own phone rang. The caller said that he was from the police and that the driver was taking part in a deception operation designed to catch a criminal gang. The shopkeeper was told that he should give the driver some suits but was assured that the vehicle would be under constant police surveillance and that the suits would be returned to him at the end of the operation. He therefore loaded 150 suits - worth some UKP 1000 (USD 1750) each - into the vehicle. Needless to say, that was the last he ever saw of his suits: the innocent driver reported that they had been transhipped to another vehicle in east London.

### **5. Seminars on cargo security**

As regular readers of this newsletter will know, there are increasing concerns about the safety of the transport chain and the potential threats that arise from devices being smuggled into countries, packed deep within a container. Two conferences in the next three months will look at the problems from different perspectives:

The first is being held in London on 27 and 28 March 2006 on the theme of cargo and container traceability, looking at RFID and tracking technologies in freight and logistics security.

Although not a new concept, the use of RFID and other tracking technology has matured, creating increased security, lowered costs and earlier usage. The development of radio, wireless and satellite technology allows for real time tracking and monitoring of cargo - a crucial step in providing confidence and improvements in the freight chain. This conference examines the key developments of international security directives and how this technology is coming of age.

Further details can be obtained from the conference website:

[http://www.lloydslitevents.com/NASApp/cs/ContentServer?pagename=marlin/home&MarlinViewType=MARKT\\_EFFORT&siteid=3000000235&marketingid=1132659958045&proceed=true&MarEntityId=1139999368486&entHash=10271296304](http://www.lloydslitevents.com/NASApp/cs/ContentServer?pagename=marlin/home&MarlinViewType=MARKT_EFFORT&siteid=3000000235&marketingid=1132659958045&proceed=true&MarEntityId=1139999368486&entHash=10271296304)

The Household Goods Forwarders Association of America, Inc. (HHGFAA) will be holding an international seminar in Hong Kong on May 5-6, discussing cargo security for single event shipments the forum will focus on the increasingly unpredictable nature of single event (one-off) international movements of containerized goods and commodities shipments and the effect of progressively stringent security regimes being employed in the United States and around the world.

Details are available on the Cargo Security website at

<http://www.cargosecurityinternational.com/free.asp?id=6354>

## **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](mailto:tt.talk@ttclub.com). We look forward to hearing from you.

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