Welcome to the latest edition of TT Talk, number 61 in the series. We especially wish our Chinese readers a happy new year. Gong xi fa cai!

Contents:

1. A Rare Exception

Our legal editor, David Martin-Clark, reports on a decision of the English High Court which provides one of those rare examples where a widely-worded exclusion clause in a carrier's bill of lading has been upheld. The case of Mitsubishi Corporation v. Eastwind Transport Limited & Others concerned damage to part of a consignment of frozen chicken parts carried on board the "Irbenskiy Proliv" from Itajai in Brazil to various ports of discharge in Japan between October 2001 and January 2002. The bill of lading was expressly subject to English law but was not subject to the Hague-Visby Rules or any other mandatory provisions governing the liability of the carrier. This meant that the parties had freedom of contract.

The reverse of the bill of lading contained 37 clauses (no mention is made of type-size!), including a "Carrier's Exemption Clause" by which the carrier "shall not be responsible for loss or damage to or in connection with the Goods of any kind whatsoever (including deterioration, delay or loss of market) however caused (whether by unseaworthiness or unfitness of the vessel….or any other mode of conveyance whatsoever, or by faults, errors or negligence, or otherwise howsoever)."

The claimants argued that the essential object of a contract of carriage is that the carrier should carry and deliver the goods; that on its ordinary and natural meaning, the wording of the exemption clause gave the carrier complete freedom whether or not to render any performance under the contract of carriage and as to how to render any performance it chose to provide. It nullified the contract and reduced it to a "mere declaration of intent". On that basis, the clause should be rejected in its entirety.

The defendant carrier argued that the question in issue was whether the clause applied to the present case and that was a matter of construction. Though exclusion clauses are construed strictly (that is, against the party seeking to rely on them), in commercial matters, where risks are normally borne by insurers, the parties should be free to apportion risks as they think fit.

The judge, Mr. Ian Glick, QC, agreed with the defendant's position, noting also that the UK's Unfair Contract Terms Act 1977 did not apply to this contract. He found that the exculpatory words, when considered in context as part of a contract for the carriage of goods, "do not operate to relieve the carrier of liability for any and every breach of contract. These words bear a restricted meaning. They do not cover, for example, loss or damage caused by dishonesty on the part of the carrier [nor that] caused by it arbitrarily refusing to ship [the goods] to the port of discharge at all."
He acknowledged that the clause shifted most risks that might result in loss of or damage to the goods from the carrier to the bill of lading holder but found that it was "not inconsistent with the purpose of a commercial contract of carriage where the bearer of a risk can insure against it."

He held accordingly that the clause protected the carrier from the damage claimed in the present case.

The full transcript of the judgment can be read on http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2004/2924.html&query=mitsubishi+eastwind&method=all

2. "Ideas that work"

In their December 2004 bulletin, our friends at ICHCA International (the International Cargo Handling Coordination Association) reported on a recent meeting of its International Safety Panel (ISP) in New Jersey. There reference was made to the US National Maritime Safety Association's Technical Committee (TC), made up of invited safety professionals from the country's ports, which normally meets four times a year. A regular feature of these meetings is an agenda item called "Ideas that Work" and involves members giving details of various ideas that have been devised and implemented in their own areas to help prevent accidents occurring. The intention was to share this very practical information with others so that, if relevant, the same improvement could be made elsewhere.

Recently, the ISP adopted the same idea and it is now a regular feature on its agenda. At the last meeting, a paper was tabled summarising some 30 different ideas that had been mentioned at the TC meetings. Two of them are reported here and more will follow as they are published by ICHCA International.

Service vehicle flag pole
Small service vehicles that have to move about container terminals are often hidden by containers and may not be seen by another vehicle (eg a container stacker or a straddle carrier) approaching an intersection. Even if containers are only stacked one high, they can hide a car or a van. However, if the service vehicle is fitted with a tall pole with a small flag or some other colourful indicator attached to its top end, its presence will be more readily identified. The height of the pole should be determined by the height of the stacks at the intersection.

Painted tyres on lift trucks
Although the large mobile pieces of cargo handling equipment used on modern terminals are of a size and presence that it would seem inconceivable that a person could fail to see them, sad experience shows that people become so familiar with these huge vehicles working around the terminal that they really do fail to take adequate notice of them. The TC therefore suggests the tyres of large cargo-handling equipment should be painted with four or more white lines, radiating out from the hub. When the wheel is moving, it does become obvious and might help to make the vehicle's presence more noticeable.
More information on http://www.ichcainternational.co.uk/

3. IMDG Amendment 32

ICHCA International also reminds us that amendment 32 to the International Maritime Dangerous Goods (IMDG) code is now available. It supersedes amendment 31 and came into general use on 1 January 2005. In accordance with the usual arrangements for the introduction of amendments, No 32 will become mandatory on 1 January 2006.

A summary of the main technical changes relevant to those in the maritime transport chain is available from Mike Compton at the ICHCA International office. All TT Club members qualify for a discount if the code and amendments are ordered through ICHCA International.

Contact Mike Compton at info@ichcainternational.co.uk

4. Containers: improper repairs threaten cargo security

The United Kingdom P&I Club recently issued a warning to its members about the consequences of improper repairs to door locking mechanisms.

In its bulletin 397 - 01/05 the Club's loss-prevention director says that it has recently learned of several incidents where products have mysteriously disappeared from sealed freight containers in transit. On investigation it was discovered that the door handle retainer plate and retainer itself on the containers had been repaired at one time or another, but that instead of fixing them with the correct "mushroom head" type of bolt, the repairers had used common hexagonal head bolts.

The result was that a seemingly sealed container could be opened in a matter of minutes using an ordinary spanner or pair of pliers, leaving the seal intact. After the cargo had been removed, the bolt was then replaced, with some putty used to hold the inner nut in place.

One of the TT Club's standard recommendations is that members should always inspect containers thoroughly before loading any cargo. The inspection should cover things like cargo residues from previous loads, protruding nails etc used to secure items on an earlier journey and include a check that there are no holes, not even pinholes, in the roof or walls. These pre-loading checks should also include one on the locking mechanism to ensure that the bolts holding it in place are correct and cannot be removed from the outside. If the container does not meet the requirements, it should be rejected. That may be a bit of a hassle in the short term, but when you think of the management time that can be tied up to no good purpose in dealing with a claim later on, it is undoubtedly a worth-while investment.

5. For Sale: Lloyd's of London

No, not the corporation that runs the insurance market, but the market-place itself. The Underwriting Room in the old Lloyd's Building is the place where thousands of insurance transactions were concluded each day. Completed in 1957, it was constructed on a truly grand scale: almost 100 metres long, it was the largest room in Europe and was finished with the finest Italian marble. Sadly, at the age of 47, the building had to be demolished but, before the wrecking crews moved in, the approximately 2200 square metres of black and white, grey and green Italian marble pillars and pilasters together with many other architectural gems were carefully removed. They are now packaged up and labelled, lying on over 100 pallets and waiting for a buyer.

So if you happen to know someone who has around UKP 250,000 (about USD 470,000) to spare and is looking to renovate a palace or wants to build a rather grand swimming pool (or if you are interested yourself), the company to contact is Drew Pritchard.
More details, including some pictures of the Underwriting Room in its heyday, can be found on: http://www.drewpritchard.co.uk/lloyds/

Readers in the UK may like to note that a series on Drew Pritchard, including the work at Lloyd's, is currently being shown on Thursday evenings on BBC2.

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 tttalk@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

TT Talk is a free electronic newsletter published as occasion demands, by the TT Club, International House, 26 Creechurch Lane, London EC3A 5BA, United Kingdom.