Welcome to the latest edition of TT Talk, number 57 in the series

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Two items of information from the United States this week:

1. ISPS enforcement leaves bitter taste

One of the first people to be trapped by the rigorous US enforcement of the ISPS code was not some international terrorist mastermind but a hapless Venezuelan exporter of citrus fruit who was hoping to sell his produce in the United States. Five container loads of lemons were shipped from La Guaira to Newark but, while the ship was still at sea, the US Coast Guard received an anonymous tip-off alleging that the fruit was contaminated by an unknown biological agent. Even though there was no corroboration for this information, the USCG took no chances. The ship was held at anchor for almost a week while the coast guard's Atlantic Strike Team undertook extensive checks, none of which revealed the presence of any biological hazard. The ship was eventually allowed to berth under supervision. The containers were screened using the customs agency's Vehicle and Cargo Inspection System (VACIS) and were then fumigated with chlorine dioxide to destroy any biological agents that might have been present. The lemons were then destroyed at a local incinerator; the coast guard originally considered destroying the refrigerated containers as well, but fortunately it relented and allowed the containers back into service.

The total costs of the entire operation are unclear, as they were borne by many different organisations, but they will have been substantial. It is assumed that the original tip-off was a malicious hoax.

It is alas a sign of the times that, whereas a few years ago, such a tip-off might have led to a thorough screening of the consignment by public health officials, the current "take no risks whatsoever" attitude means that perfectly healthy cargo has to be destroyed, as well as, perhaps, some uncontaminated, but rather expensive, containers on the basis of uncorroborated information. The kids who once got their kicks by making hoax calls to the fire station can now graduate to a bigger and more expensive stage on which to exercise their misguided talents.

2. US Supreme Court rules on intermodal contracts

Meanwhile, rather more encouraging news comes from Washington, where the Supreme Court of the United States, in a rare foray into the world of non-vessel-operating carriers, has clarified an important area of law for NVOCs and delivered an important judgment on the application of the Himalaya clause.

As TT Talk reported just over two years ago in issue 25, the US federal appeals court for the 11th circuit had decided the case of James Kirby v Norfolk Southern Railroad in favour of the claimants. The supreme court has now overturned that decision.

Kirby had contracted the movement of ten containers of machinery from Australia to the USA to an NVOC, International Cargo Control (ICC), which in turn contracted with Hamburg-Sued (HS). Both ICC and HS issued through bills of lading covering the journey up to the inland destination, Huntsville, Alabama. After the cargo was discharged at Savannah, HS handed it to the railroad company for on-carriage to destination. There was an accident on the rail section, and the cargo

suffered USD 1.5 million-worth of damage. Both carriers' bills of lading contained Himalaya clauses which, although drafted differently, alleged an indemnity for any sub-contractor and fixed the amount of compensation for loss or damage, wherever it might arise.

Kirby sued the railroad company, which sought to rely on one or other of the Himalaya clauses. The appeals court held that the wording of the NVOC's Himalaya clause did not cover the railroad company, and that there was no privity of contract between Kirby and the railroad. The court also held that the Himalaya clause was essentially something based in maritime law and was unwilling to extend its operation to areas well away from the "marine interface". As a result the railroad could not limit its liability; it subsequently appealed to the supreme court.

The supreme court's unanimous decision was delivered by Justice Sandra Day O'Connor on November 9 and is interesting because of its practical approach to disputes arising from modern transport operations. As one commentator has noted, the court stepped back from inspecting the trees to look at the forest as a whole.

Was the claim a maritime one?
Kirby had started the action under the state law of Georgia relating to contracts, but under the US constitution matters relating to maritime and admiralty claims belong exclusively to federal jurisdiction. The court therefore first had to determine whether this was a maritime case or, as Kirby contended, a claim against the railroad arising out of land transportation, and therefore subject to state law. It decided that the dispute had "a more genuinely salty flavor", and was therefore, as Justice O'Connor stated, "a maritime case about a train wreck".The court recognised that the boundaries between maritime and non-maritime cases were difficult to draw, but in its view, courts should approach this question on a conceptual rather than a spatial basis. Therefore although the contract involved some inland transportation, that did not alter its essentially maritime nature.

The court noted the massive change in transport brought about by containerisation ("the single most important innovation ... since the steamship replaced the schooner") and multi-modal operations. It was actually in the shipper's advantage to conclude a through transport contract, rather than have to try to organise all the different sections individually: the overland movement was not incidental to a maritime contract but an essential part of it. There was a federal interest in maintaining uniformity of approach in maritime matters and for that reason federal jurisdiction must prevail: to apply state law would undermine that uniformity.

Did the NVOC's Himalaya clause protect the railroad?
Turning to the question of the application of the Himalaya clauses, the court interpreted them both liberally and criticised the narrow, restrictive, approach used by the appeals court. It was clear that, given Huntsville's inland location, the parties must have expected that the final leg of the journey would be by land transport; that therefore the services of a land carrier would be engaged; and that such a carrier would come within the clearly-expressed extent of the Himalaya clause.

There was clear privity of contract between Kirby and ICC; between ICC and HS; and between HS and the railroad: but did the Himalaya clause in the HS bill of lading protect the railroad from a claim by Kirby?

The court agreed held that the railroad could rely on the terms of the HS bill. Kirby, it decided, had effectively given ICC a limited agency to make arrangements on reasonable or industry-standard terms with other transport companies in order to complete the primary contract. It was not necessary for there to be strict privity of contract between the shipper and the actual carrier for the latter's terms to be applicable.

Again, the court took a practical approach in reaching its decision: it recognised that the contractual partner of the ocean carrier was quite often not the cargo owner, but an intermediary such as an NVOC. The shipping line would not even know how many other intermediaries there were in the chain, or what the arrangements might be between any of them. It was an impossible imposition on the shipping line to investigate each of these contractual chains. If, because its client was an intermediary, the ocean carrier could not rely on its bill of lading terms, it would probably want to charge higher freight rates to compensate for the additional risk.

Finally the court noted that its decision produced an equitable result. It was still open for Kirby to sue ICC - indeed, proceedings had already begun in Australia - and that ICC should bear responsibility for any gap in liabilities between the two contracts.

The court's decision is a welcome clarification of US law on multimodal contracts of carriage.

For aficionados, the full transcript is available from the Supreme Court's website at http://a257.g.akamaitech.net/7/257/2422/09nov20041130/www.supremecourtus.gov/opinions/04pdf/02-1028.pdf

A commentary also appears on David Martin-Clark's website DMC's CaseNotes: http://www.onlinedmc.co.uk/norfolk_southern_v__kirby.htm

3. All risks or heavy weather?

As most readers of this magazine will know, most cargo insurance is covered on "all risks" terms. This description is an accepted market term and means, effectively, that the insured is covered against any risk that can happen during the named voyage or journey (save for those specifically excepted by the policy). The risks are so extensive and so varied that to describe them all might require something the size of a telephone directory, so the term "all risks" is a convenient form of commercial shorthand. But is everything that happens during a journey covered within this description? The short answer to that question is "No": there are certain things that the cargo underwriters will not cover even under this generous heading. One of the principal exclusions is inadequate packing of the cargo being transported. Clearly insurers are there to provide financial protection against risks: they do not cover racing certainties. Part of the bargain between the insured shipper and the cargo insurer is that the goods are properly packed to meet the known and expected perils of the voyage: if the shipper fails to pack properly, then the insurer will refuse to pay for the damage.

This principle was reiterated very strongly in a recent decision of Mr Justice Moore-Bick in the London Commercial Court in the case of Mayban v Alstom. Alstom sold a number of transformers to Malaysia, including the one in question, a 350-tonne monster built in the UK. Moving such a beast by road was pretty well out of the question, so it was shipped from Birkenhead (near Liverpool) to Rotterdam, where it was transhipped to a large container vessel for carriage to Singapore. Loading at Birkenhead was supervised by two surveyors and the master, who agreed on the securing arrangements. At the time (the end of January 2002), bad weather was forecast for the Irish Sea and there was some discussion as to whether the vessel should sail, and if it did, whether the master could or would find shelter. In the event the ship left harbour but soon ran into gale and storm-force winds and heavy seas, which continued for an almost unbroken period of almost 48 hours (even reading the dry prose of the court transcript may leave you seasick!). In spite of this battering, when the transformer arrived in Rotterdam it was still firmly secured in its original position. Even when the cargo was loaded on the much larger container vessel for carriage to Singapore, the perils were not over, as the ship also met heavy weather at the western end of the English Channel and into the eastern Atlantic. When the transformer finally reached its destination, it was found to have extensive internal damage, costing around USD 1.8m to put right. Naturally Alstom claimed on its all-risks insurance for the repair costs, but its

insurers, Mayban, rejected the claim. Relying on expert evidence, they alleged that the damage was caused by an inherent weakness in the transformer structure and that the damage had been caused by the "working" of the machine itself in the heavy weather. Eventually the insurers sought a declaration from the court that they were not liable for the repair costs.

Mr Justice Moore-Bick agreed with the insurers. It was the duty of the manufacturers or shippers to prepare their cargo for shipment in such a way that it would withstand the stresses and strains expected during transport. While the weather had been severe, it was not unexpectedly so: storms of this strength and duration occurred frequently in the areas concerned during the winter months. The damage had not been caused by an external accident but by the way the transformer had been manufactured and made ready for transport. The machine had, in effect, damaged itself in entirely foreseeable sea conditions.

A full transcript of the judgment is available from the UK court service's website http://www.courtservice.gov.uk/View.do?id=2507&searchTerm=insurance&ascending=false&index=0&maxIndex=141

and you may also find a more detailed notes in a comment on DMC's CaseNotes:
http://www.onlinedmc.co.uk/mayban_v__alstom.htm

4. World's largest container crane produced in Shanghai

Following the item in TT Talk No. 53 about vertical tandem lifting, Andrew Kemp in the Club's Singapore office draws our attention to the imminent arrival of a crane that can lift two 40' units simultaneously.

The Chinese news agency Xinhua reported recently that the Shanghai-based Zhenhua Port Machine Company (ZPMC) has completed construction of this giant crane, the first of its kind in the world. The crane, the largest and most advanced container-lifting machine in the world, will be exported to the United Arab Emirates (UAE) by the end of this year.

The enterprise has exported more than 1,500 cranes to 70 ports in 37 countries, taking more than half the global market for port machinery. It now manufactures one crane every two and a half days and is expected to achieve a production value of USD 1 billion in 2004.

ZPMC General Manager Guan Tongxian said that the company expects the newly-developed crane to bring "new momentum" to the global port industry. He gave no details of the contract with the UAE or other market responses to this latest addition to their range of equipment.

5. 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.

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