Welcome to the latest edition of TT Talk, number 52 in the series
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1. Young International Freight Forwarder of the Year

The TT Club is pleased to announce that the winner of this year's "Young International Freight Forwarder of the Year" prize is Anita van Kooten. Anita is working in the project department of MAT Air & Ocean Freight in Zwijndrecht, The Netherlands, where she deals with various types of shipments for a selected group of customers.

2004 is the 6th year that TT Club has sponsored this award. This years' dissertation was on three completely different shipments (dangerous goods by sea, air freight and an overland container shipment). Anita looked at all means of transport available for this distance and type of cargo and provided alternative cost-benefit calculations.

The prize, jointly sponsored by the Club with IATA and FIATA, is worth over USD 35,000 and mainly consists of a mixture of academic and practical training. It includes two weeks at the winners choice of the Club's regional offices – London, Hong Kong or Jersey City, a week-long course at an IATA training centre and another, on transport law and insurance in London. Costs of travel and accommodation are borne by the sponsors.

Anita will receive her prize at next month's annual congress of FIATA, held in Sun City, South Africa.

We congratulate Anita on her success and wish her well in her career.

If you are interested in entering next year's competition – you must be aged under 30 and in full-time employment as a freight forwarder – you should contact your national forwarding trade association, which is a member of FIATA, CLECAT or ALACAT. Your national association will give you full details of how to enter.

2. Set good governance goals – or risk jail!

In its July bulletin, the London law firm of Lawrence Graham has highlighted the need for better corporate governance in shipping and transport companies. It notes that there is a trend towards making shipowners' and operators' personnel, as well as masters, criminally liable for their actions – with the possibility of a prison term if they are found guilty – particularly in the areas of pollution and anti-competitive agreements.

Imogen Rumbold, shipping partner of Lawrence Graham, writes that managers must have clear and unequivocal guidelines on procedures for both operational and commercial activities. More importantly, they must mean what they say and follow up what is being done if they wish to avoid being found personally responsible for any lapses.

"Good corporate governance and risk management take on a new meaning when the penalty for failure may be more than losing your job" writes Ms Rumbold. While the threat of a jail sentence

is real, it should not be taken out of proportion. She says that “everyone in the chain of responsibility, from charterer down to the seafarer, should be taking a long, cool look at their business, their agreements and their contracts. ”She concludes, “white collars can be felt as well as those of any other colour.”

The full text is available on
http://www.lawgram.com/resources/publications/Shipping_Lawgram_20_July.pdf

3. Drafting Technique Saves Money! The "Hague Price" of Gold

If the Hague rules are applied by contract, rather than statute, the carrier can define the value of the package limitation.

Harry Lee in Hong Kong writes to draw attention to this recent decision in of the Privy Council, as the ultimate court of appeal for New Zealand. In Dairy Containers v Tasman Orient Line (the “Tasman Discoverer “) the Privy Council has, in the 80th year of the Hague Rules, helpfully clarified the interpretation and application of the package limitation.

The rules are still in force in various countries and there has been considerable doubt about the amount of the carrier’s liability. Written in 1924, the original wording of the rules "100 pounds sterling per package" (in Article IV) - appears to suggest the limitation takes its nominal value as UKP100. However, in Article IX, there is mention of monetary value based on "gold value".

It was not until 1989, in the case of the “Rosa S” that the limit was finally settled as being the present value of the quantity of gold that you could have bought in 1924 with 100 pounds sterling (nowadays about USD8,000).

That decision applies to any contract, subject to English law and jurisdiction, to which the Hague rules apply by force of law. The point at issue in the “Tasman Discoverer” case was whether it also applied to contracts which incorporate the Hague rules as a matter of private agreement, instead of being enforced by statute.

Many transport operators commonly incorporate the Hague rules in their standard form bill of lading or charterparty as a matter of convenience, to avoid having to take up much printing space by listing all the liability limitations and exemptions. This is also in line with market requirements.

The key implication of the “Tasman Discoverer” decision is that, in these circumstances, the parties are allowed to replace the original limit (in terms of gold value) by another clearly defined nominal value. In the particular case, the drafter of the bill of lading clearly set the package limit as 100 pounds sterling "lawful money of the United Kingdom". The privy council gives effect to the plain meaning of the words without reservation.

The carriers were held liable for UKP 5,500. Had there been no description of the nominal value package limitation (and hence the original text of the rules been applied), the liability of the carriers would have been US$440,000 (about UKP 240,000).

The “Tasman Discoverer” illustrates the benefit of a thoughtfully qualified incorporation of a set of rules and conventions.

Readers who want to know more about the case, and about the incorporation techniques should see David Martin-Clark's Case Notes:

http://www.onlinedmc.co.uk/dairy_containers_v__tasman_orient_line_(privy_council).htm

Any member of the TT Club with an enquiry about the effectiveness of their conditions in bills of lading and other transport documents should consult their account executive. The TT Club's recommended set of bill of lading conditions (TT Series 100) sets the package limitation at US$500 to all instances where the Hague or Hague-Visby rules are not mandatory.

4. Liability for theft by employees

Is a forwarder liable for thefts from its warehouse committed by an employee?

At the end of June, the High Court in London gave another example of the effectiveness of the incorporation of trading conditions in its decision in Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd. FM had been handling consignments for Samsung for around fourteen years when, in February 2002, nearly 26,000 mobile phones, worth about USD 2 million, were stolen from their warehouse near Heathrow airport, London. There were no signs of forcible entry and police concluded that the theft had been facilitated by one or more of FM's employees. FM sued Samsung for unpaid freight and storage charges; Samsung then counter-claimed for the value of the phones.

Samsung contended that there had been an oral agreement under which FM was to provide security guards on site and that this agreement displaced any other standard terms. As there had been no guards on duty at the time of the theft, Samsung claimed that FM could not limit its liability. The judge held that, in fact, FM had validly incorporated its BIFA (British International Freight Association) standard trading conditions in its agreements with Samsung. FM had reminded Samsung on a number of occasions that it traded under BIFA conditions, and the same information was printed on every invoice it sent to Samsung. Samsung had not formally accepted the conditions, but, more importantly, they had done nothing that directly challenged their application either.

The court accepted that the robbery was most probably an "inside job", and it was severely critical of serious shortcomings in FM's security arrangements (see next item).
But did this mean that FM was vicariously liable for the willful default of its employee(s)? The court held that an employer could be vicariously liable for an employee's deliberate wrongdoing, but liability was not established merely because the employee had the opportunity – by virtue of his employment – to commit the wrongful act. However, the judge could not make a distinction between the security of the goods and that of the premises: by giving them the keys and access to the alarm system, FM had effectively entrusted each of its employees with the security of the premises. Because of this, the unknown employee(s) had been given more than just an opportunity to commit the theft: FM was therefore vicariously liable for their willful default.

Nevertheless, FM could still rely on clause 27A of the BIFA standard conditions to limit liability. The use of the words "howsoever arising" in that clause ("the company's liability howsoever arising and notwithstanding that the cause of the loss or damage is unexplained shall not exceed….") made it wide enough to include deliberate wrongdoing by FM's employees.

Finally the court was asked to decide that the BIFA conditions were unreasonable under the Unfair Contract Terms Act 1977, the main UK consumer protection legislation. The court referred to a 2003 decision of the Appeal Court in which Lord Justice Tuckey commented that he was not enthusiastic about incorporating the provisions of the act to "contracts between commercial parties of equal bargaining strength, who should generally be considered capable of [making] contracts of their own choosing and expect to be bound by their terms". It therefore concluded that the BIFA conditions were reasonable.

An abbreviated report and commentary of the judgment is available from
http://www.onlinedmc.co.uk/frans_maas_(uk)_v__samsung_electronics_(uk).htm

5. How good is your security?

The Frans Maas case reported above highlights the need for an effective review of your security systems.

The judge severely criticised many aspects of FM's security arrangements. Evidence was given that virtually all employees had a key to the premises and that they all knew the code needed to turn off the burglar alarm. The code had been changed only once in the previous two or three years. There were wholly inadequate records of security issues, so nobody knew exactly who had keys; neither was there any check that the keys were returned when someone left the company.

There had been some desultory correspondence between Samsung and FM about improving the physical security, by employing security guards or having FM's staff on duty overnight, but these had not, apparently, led to any action being taken. All in all, there was a distinct lack of a "security culture" within the company.

While the English court held that Frans Maas was still able to rely on its standard trading conditions to restrict liability, courts in other countries may not take such a tolerant view of these shortcomings. If a similar case were tried before them, they might well hold that the warehouse's security lapses and the absence of a properly managed security culture was a matter of gross negligence, and simply sweep away the company's limitation clauses. The warehousekeeper or forwarder would then be fully liable for the losses.

The Club therefore strongly recommends all members to conduct a periodic review of the security of their site. While the physical aspect (the strength of fences and doors, CCTV systems and so on) is, of course, very important, attention must also be paid to the human side.

Who has a key?
How is the issue of a key (and its return) monitored and recorded?
Who has access to which areas?
How is access controlled and recorded?

How are the alarm systems disabled and who is permitted to do it?
How often are codes changed? (And how are the new codes notified to permitted users?)
Are the alarm and CCTV systems permanently monitored?

These and many other questions should be asked regularly by senior management; or better still get an outside security adviser to carry out regular checks on systems and procedures. The important thing is that management react promptly and effectively to close any gaps identified by these checks.

6. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information on them, or have any comments you would like to make, then e-mail the Editor at tt.talk@ttclub.com. We look forward to hearing from you.

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