Welcome to the latest edition of TT Talk, number 47 in the series

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1. Sea carrier's liability when cargo temporarily off-loaded

A carrier can rely on the terms of the US Carriage of Goods by Sea Act (US-COGSA) to limit liability for damage while the cargo was temporarily on shore during restowing operations at an intermediate port, the US Court of Appeals for the fourth circuit, sitting in Norfolk Virginia, has decided.

The case arose from the movement of a drilling rig from Baltimore, Maryland, to Arica, Chile. The seller, Schramm, engaged the services of Shipco, an NVOCC, to arrange transport of the rig, which was loaded on a 40' flatrack. Shipco subcontracted the actual sea carriage to CAVN. On its way south, the vessel called at Charleston, SC, where the master decided that the flatrack should be moved to a better position, to protect the cargo against pilferage. The unit was landed and placed on a chassis. While it was being moved along the quay, the rig fell off and was severely damaged. Cargo insurers paid USD 176,750 and then sought recovery from Shipco. Shipco sought to rely on US COGSA which applies to all foreign-bound shipments carried under bills of lading from US ports; alternatively it maintained that the clause paramount in the bill of lading conditions, which extended the application of COGSA to periods on the terminals at ports of loading and discharge, also applied to this landing at an intermediate port. As the drilling rig was a single unit, the carrier's liability was limited to USD 500. Unsurprisingly, the cargo insurers disagreed; they sued Shipco and a number of other parties involved in the movement.

After some initial hesitation, the first instance judge agreed with Shipco and awarded damages of USD 500 to the claimants, who appealed. Having examined the facts, the court of appeal noted that COGSA applied from the port of loading to the port of discharge. It held that "port of discharge" meant effectively the port of destination, at which the cargo was finally discharged and handed over to the consignee. It also pointed out that temporary landing of containers at intermediate ports, to facilitate handling of other units or for restowing, was a normal part of modern shipping operations. If the claimants' view were correct, it would mean that there would be gaps in the operation of COGSA during the course of a single journey. The court could not agree with this.

Claimants also contended that the clause paramount in the bill did not protect Shipco, as it was not in physical control of the cargo during the restowing. The court gave this argument short shrift, saying that the claimants had got it completely back to front. There was no doubt that Shipco was legally in control of the cargo during the (planned) journey from Baltimore to Arica and the purpose of the clause paramount was to extend, not restrict, the operations of US COGSA.

The court agreed with the lower court's decision and dismissed the appeal.

Harry Higham from the Club's office in New Jersey comments that this is the latest in a line of unsuccessful attempts by cargo interests to break the package limitations under COGSA where containers have been off-loaded and re-stowed at an interim port, as in this instance. The courts have upheld the package limitation, even on behalf of the intermediate stevedore who damaged the goods during such a re-stowing operation. Harry notes that for this defense to be successful the bill of lading must contain a properly-drafted clause paramount and a proper Himalaya clause. He also points out that in some cases, cargo interests have tried to argue that the discharge portion of the operation, during which the damage occurred, constituted an unreasonable deviation due to the goods being off-loaded at

a port other than the one noted on the bill of lading, thus abrogating US COGSA. To date, they too have been unsuccessful.

The full decision can be obtained from the court's website at
http://pacer.ca4.uscourts.gov/opinion.pdf/031075.P.pdf

2. More on FCRs
Harry Lee from Hong Kong adds a note to the item in TT Talk 46 about forwarders' certificates of receipt:

Another crucial difference between the FCR and a bill of lading is that the former normally incorporates the forwarder's own (or his national association's) standard trading conditions. A bill of lading used for maritime transport is almost always automatically subject to one of the international conventions (Hague, Hague/Visby or Hamburg Rules). Trying to use an FCR as a bill of lading - a purpose for which it was not designed - can lead to serious discrepancies between the two sets of conditions. It is our experience that where there is a gap between liability regimes, a forwarder is likely to fall through it.

3. How thin is your protection?
Our friend Peter Zambito from the New York law firm of Dougherty, Ryan, Giuffra, Zambito & Hession points out that judges in US courts, as well as their counterparts in other countries, take considerable exception to clauses on bills of lading or other transport documents that are extremely difficult to read. The courts will ask whether the customer had a "fair opportunity" to read and review the conditions. If the "small print" really is so small that it is illegible, the courts will in general not allow the carrier to rely on the terms. However, the test of "difficulty to read" goes beyond the question of illegibly small print. Even if the print is large enough, if it does not stand out against the colour of the paper, the judges may rule that it was unreasonable for the customer to have to strain his eyesight by trying to read the lengthy terms and conditions. Peter also notes that where bills of lading are printed on very thin paper, the details that have been typed on the front (shipper, consignee, cargo etc) are often visible on the reverse, making parts of the conditions effectively illegible.

Being, of necessity, drafted in legal language (and generally in English) conditions are difficult enough for the layman to understand; the courts believe that his task should not be made more difficult by poor printing. There is therefore a risk that bill of lading conditions, however carefully and expensively crafted by teams of lawyers, may be negated by the simple matter of printing technology and ultra-thin paper.

We urge you to look at your bill of lading document and give it a subjective appraisal: are the conditions on the reverse really easily legible? One test is to make a photocopy of the conditions: if you cannot get a decent copy it is certainly time to think about reprinting. A second test is to do some "consumer checks" in your own office: ask colleagues (with varying degrees of eyesight) to give you their opinion on legibility. If the conditions cannot easily be read, there is a fair chance that they will not stand up in court!

As noted, many of the problems arise with ultra-thin paper. While there was a clear reason for this grade of paper in the days when six or more copies of the bill had to be bashed out on a manual typewriter, using interleaved carbon paper and all the dexterity of a steam hammer, there is much less need for it now in an age of computer printing. Do you still need to use very lightweight paper? Or could you upgrade to something heavier at very little expense?

4. Countdown to ISPS: US Coastguard to inspect foreign ports and terminals
On 15th April, the United States Coast Guard announced that it has set up an international port security programme to help the US and its maritime trading partners better protect the global shipping industry. Key elements of the programme include a team of inspectors who will visit around 45 countries a year, and port security liaison officers permanently stationed in various locations. The teams and the permanent inspectors will be visiting ports to check on implementation of standards, providing technical assistance and sharing information about best practices. They will also be working with the governments

of the host countries to discuss its maritime security regime and to verify the effectiveness of that country's monitoring and approval processes.

The USCG also warns that ships coming from ports that are either not participating in, or are not compliant with, the international code may be delayed when attempting to enter a US port. Ships may be boarded at sea and their movements could be controlled by armed escorts. Comprehensive security searches may be conducted at sea or in port and ships could be denied entry into US waters altogether.

This programme is designed to complement the Container Security Initiative (CSI), under which the United States' Customs and Border Protection has stationed officers in a number of major ports and is working in conjunction with the host countries' customs authorities to identify and target containers that could present a terrorist risk.

Further details can be obtained from the Department of Homeland Security's website on https://www.piersystem.com/external/index.cfm?cid=651&fuseaction=EXTERNAL.docview&pressid=36578

5. 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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