Welcome to the latest edition of TT Talk, number 36 in the series

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1. UK Budget lightens the load

The well-respected journal, International Freighting Weekly, carried an article in its 'Focus on Finance' column in its edition of 2 June 2003, on Import VAT Accounting in the UK reading as follows:

"Hidden deep in the small print of this year's UK Budget announcement was some very good news for freight forwarders, the logistics sector and importers: the requirements of the VAT Deferment Scheme will be relaxed later this year.

The current Duty Deferment Scheme requires importers to provide security for the full amount of customs duty and import VAT payable each calendar month. From 1 December, approved importers will be able to provide reduced, or in some cases zero, security in relation to the import VAT element. HM Customs & Excise will be consulting with the industry in the coming months and the approved criteria will be published in due course.

This relaxation will be welcomed by all importers and freight forwarders who have complained for many years that providing security for import VAT is unfair in comparison with the requirements for the payment of domestic VAT...

To add your voice to this debate, which could improve cash flow as well as reducing the cost of providing security to Customs & Excise, visit the Customs website

http://www.hmce.gov.uk/business/consultations/consultations.htm

2. Choice of Law & Jurisdiction Clauses - flexibility for the carrier

If you are a carrier or NVOC, it is worth thinking about the law to be applied to your contract of carriage and the place where legal proceedings may be brought against you. These issues can have a major impact on your potential liabilities.

On the general point, Harry Lee, of the TT Club's Asia Pacific Regional Office in Hong Kong, has offered the following comments:

"Most Transport Operators/Freight Forwarders trading internationally do include a choice of law and jurisdiction clause in their bills of lading terms and conditions (or other standard forms of contract), to protect their position when it comes to defending claims for loss of/damage to cargo.

Some operators prefer a single and exclusive law and jurisdiction clause to govern the whole contract of carriage - for example "this Bill of Lading and any disputes under it are to be governed exclusively by the law and jurisdiction of Hong Kong".

Others may think a slight variation of the wording to be to their advantage, by providing themselves a flexible choice of law and jurisdiction for claims against the shippers/consignees/merchants. See, for instance, the second part of this "jurisdiction clause":

"This Contract shall be governed by Hong Kong law and jurisdiction in respect of Merchants' actions against the Carrier. Any action by the Carrier to enforce any provision of this Contract may be brought before any court of competent jurisdiction at the option of the Carrier."

This last provision can avoid difficulties where the carrier brings a claim against a merchant (who might be any of cargo interests, trading companies, or forwarding counterparts) in its local jurisdiction and the merchant is not registered or domiciled within any exclusive jurisdiction named under the bill of lading.

Shippers in Singapore, for example, who are in breach of their responsibility to declare properly a dangerous cargo (which results in a huge claim for ship damage), will not be able to defend an indemnity claim brought by the carrier/forwarder by attempting to stay the local proceedings against them in favour of Hong Kong jurisdiction (as named in the contract). This is because the exclusive jurisdiction of Hong Kong only governs claims against the carriers/forwarders. When it comes to a claim against the merchant, therefore, the carrier/forwarder is entitled to choose a competent jurisdiction that is convenient for the purposes of enforcing any favourable judgement it may obtain.

"Carriers/Forwarders v. Merchants" claims are common, ranging from unpaid freights, demurrage claims and warehousing expenses for uncollected cargoes, to indemnity actions in relation to dangerous cargoes, breach of customs rules and regulations, or other third party liabilities. The recent US 24-Hour Rule imposing certain duties on shippers may become a fertile ground of for recovery claims made by carriers/forwarders.

A slight re-writing of the law and jurisdiction clause in standard contract wordings may yield considerable savings in time and legal costs, without involving the operators in much expenditure."

Editor's Note: the TT100 Standard Bill of Lading contains a jurisdiction and law clause which provides "Whenever US COGSA applies...or losses occur during inland carriage within the United States of America, this Bill of Lading is to be governed by United States Law and the United States Federal Court of the Southern District of New York is to have exclusive jurisdiction to hear all disputes hereunder. In all other cases, this Bill of Lading shall be governed by and construed in accordance with [English] law and all disputes arising hereunder shall be determined by the [English High Court of Justice in London] to the exclusion of the courts of any other country."

3. The value of a Jurisdiction Clause

Peter Jones, the Editor of the website Forwarderlaw based in Toronto, Canada, reports a recent case in which the Supreme Court of Canada upheld a Belgian jurisdiction clause in a case involving a TT Club member. He writes:

"[In Pompey Industries -v- ECU-Line] the Supreme Court of Canada recently supported an ocean carrier's efforts to enforce a jurisdiction clause in its bills of lading, reversing a judgement of the Federal Court of Appeal, which in its turn had approved decisions by two lower courts that had declined to enforce the jurisdiction clause.

The Supreme Court reaffirmed that Canadian law reflected the opinions in a 1969 English case, the ELEFTHERIA, which had put forward a "strong cause test" of jurisdiction clauses: they were enforceable unless the party resisting the application of the jurisdiction clause made out a strong cause against enforcement. The Supreme Court was much influenced by the decision of the United States Supreme Court in the SKY REEFER, which also enforced a jurisdiction clause in a bill of lading."

To read more about it, go to http://www.forwarderlaw.com/Cases/pompey.htm

Peter G. Bernard of the Law Office Bernard & Partners in Vancouver, whose partner Peter Swanson handled the ECU Line case on behalf of the Line (and of TT Club, the Line's insurers), reminds us that the facts of this case pre-existed the implementation of Canada's Marine Liability Act of August 2001 and, in particular, section 46. This section provides that where a contract for the carriage of goods by water provides for the adjudication or arbitration of claims under the contract in a place other than Canada the claimant may institute judicial or arbitral proceedings in Canada if:

1) the actual or intended port of loading or discharge is in Canada;

2) the person against whom the claim is made resides or has a place of

business in Canada; or

3) the contract was made in Canada.

These provisions do not apply to numerous other transport agreements, such as towing contracts or time

charters, so the ECU case will continue to be relevant in certain circumstances.

4. Incorporating ADSp conditions into Freighting Contracts under German law

Andrew Trasler, of TTMS (UK), always a keen watcher of the German legal scene, has sent us this piece on the "earthquake" effect on the forwarding industry of a recent decision of the German Federal Supreme Court. He writes:

quote:

For as long as most people in the business can remember, it has been an article of faith among German forwarders that their standard trading conditions - ADSp - were validly incorporated into any contract with a client, even without express notification or agreement. For the last fifteen years this happy state of affairs has rested on the solid foundations of a 1988 German supreme court decision holding that - since the conditions had been agreed between all the trade associations representing various interests (manufacturers, shippers, traders and carriers) - they were deemed to be well-known to people involved in transport operations. The concept was that "everybody knew" that all forwarders always operated under them: therefore there was no need for express incorporation, even for a new client.

These solid foundations have been shaken by a huge earthquake in the form of a new decision from the Federal Supreme Court: a legal earthquake so severe that it has almost wrecked the entire structure they supported.

In a decision earlier this year, the court had been asked to decide whether the 1998 version of the ADSp - and in particular its limits of liability - were validly incorporated in a contract between a forwarder and his client. The court decided that its 1988 decision had now been rendered invalid through the introduction of the new transport reform law in 1998 (paragraphs 413-475 of the Commercial Code). The new law sets down a "normal" level of liability (SDR 8.33 per kg) and then allows carriers, transport operators and forwarders to negotiate a deviation from the standard with their clients, so long as they remained in a "corridor" between SDR 2.00 and SDR 40.00 per kg. Pre-printed and standard conditions may only deviate from the normal level if the client has been made specifically aware of them by the use of prominent print. The court decided that these new rules also applied to the ADSp, which, because they have adopted a general level of liability of EUR 5.00 (about SDR 3.95) per kg, have deviated from the legal norm. Even though the claimant and defendant companies had been working together for some time on the basis of the old (pre-1998) ADSp, to comply with the new law the forwarder should have expressly drawn his client's attention to the new limits of liability in the 1998 conditions. Not having done so, he was liable up to the normal level laid down in the transport law.

German lawyers in the transport sector are now rapidly reappraising the legal situation and trying to work out ways of shoring up the wreckage. In the meantime, forwarders operating in Germany are urgently advised to make sure that their clients are individually told about the application of the ADSp, and have the limits of liability brought clearly to their attention by the use of bold or differently-coloured print. The only good news to come out of the decision is that forwarders do not have to print all 30 clauses of the ADSp in full on their letter paper, but only the wording of clause 23 dealing with the restrictions on liability.

Companies outside Germany trading directly with German clients must also make sure that the client is aware of the company's trading conditions and limitations of liability.

An English translation of the current (1.1. 2003) ADSp conditions is available on the website of the German Forwarding and Logistics Association (BSL) at

http://www.mnp.de/download/ADSp_2003_english.pdf

5. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information on any of 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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