

**Welcome to the latest edition of TT Talk, number 30 in the series.**

## **Contents**

1. Straight bills of lading and surrender bills of lading - feedback from readers
2. Chassis operations in California, USA - the effect of the "Romero" Act
3. Nine-month contractual limitation in forwarders' standard trading conditions
4. EUROWATCH is one to watch!
5. Conclusion

### **1. Straight bills of lading and surrender bills of lading - feedback from readers**

Alexander Robertson, Insurance & Claims Manager for Green Africa Shipping (Pty) Ltd, agents for Evergreen in Zambia, has reminded us that the Glossary of Maritime Law Terms, published by Professor William Tetley of McGill University Montreal, contains the following definition of a Straight Bill of Lading:

"Straight bill of lading - A non-negotiable bill of lading as described in the United States Pomerene Act of 1916 (49 U.S. Code App. 81-124, recodified in 1994 as 49 U.S. Code 80101-80116) (infra). A "straight bill" states that the goods are consigned or destined to a specified person. It is marked "nonnegotiable" or "not negotiable" on its face. It may be transferred by its holder by delivery, accompanied with an agreement (express or implied) to transfer the title to the bill or to the goods it represents. A straight bill cannot be negotiated free from existing equities; its endorsement confers no additional rights on the transferee. (Tetley, Marine Cargo Claims, 3 Ed., 1988 at pp. 190-191, 950-951, 995-997). Note: The 1994 recodification of the Pomerene Act changed the term "straight bill of lading" to "non-negotiable bill of lading". See 49 U.S. Code 80103(b). The term "straight bill is also sometimes used outside the United States. See The Brij [2001] 1 Lloyd's Rep. 431 at p. 434 (Hong Kong High Ct.). "

On surrender bills of lading, Norio Kuwabara of the International Freight Forwarding division of Sankyū in Japan, sent us the following email:

"I would like to inform you on the surrender b/l as follows: This year I encountered a request from the shipper that, out of three original b/l's covering a consignment from Japan to Hong Kong, one b/l should be SURRENDERED here in Japan in compliance with the letter of credit which he received from an Australian bank. I declined his request because the company as a carrier would have had to send it to the destination for a final endorsement by the consignee named in the the b/l. The company cannot take a risk in mailing such a b/l. The FULL set of three Original b/l's must be surrendered at origin so that the consignee named in the b/l can take delivery of the cargo. The b/l under the Japanese commercial laws is always a negotiable document even if it is a straight consignment b/l. Of course it can be changed to a non-negotiable b/l by putting the word "NON-NEGOTIABLE" on it. The US Bill of Lading Act requires, on the other hand, that a straight consignment b/l must be non-negotiable. In sum, the jargon, SURRENDER b/l, not widely accepted now, should not be used in the banking community. Instead they need to show in the letter of credit which document it requires, a non-negotiable b/l or a negotiable b/l."

Surely the last advice must be the best - that the sellers and the buyers agree precisely what type of contract of carriage they require, and then specify it in the letter of credit.

### **2. Chassis operations in California, USA - the "Romero" Bill**

Harry Higham, of Thomas Miller Americas in New Jersey, has provided us with the following update, based on information received from Sam Delich, of San Francisco attorneys, Flynn, Delich and Wise, the TT Club's retained counsel in chassis liability policy matters.

"Much speculation and anxiety in the world of Intermodal Transportation can be attributed to the recent passage of the above Bill by the California State Legislature, now codified as

California Vehicle Code Section 34505.9 (the 'Bill'). This is particularly so as it may apply to the interchange of chassis at ocean marine terminals, by or on behalf of their providers (registered owners or lessors of intermodal chassis subject to inspection pursuant to the Bill) and their users (any motor carrier and/or its sub-haulier engaged to transport a chassis subject to inspection pursuant to the Bill).

While the concern appears to center around the portion of the Bill which attempts to void, as against public policy, any indemnity provisions concerning defects in the physical condition of a chassis in any Equipment Interchange Agreement or other contract between the providers or ocean terminals conducting the inspections and the users, the Bill also contains provisions regarding access to records and tagging at the terminals and the issuance of citations for operating defective chassis on the highways of the State of California. Understanding the application of all of these features of the Bill clarifies the Legislature's intent in enacting the Bill.

Before passage, the transactions which the Bill encompasses were governed by California Vehicle Code Sec. 34505.5, which also deals with inspections and records, but does not attempt to void indemnity provisions of agreements between parties as does the Bill. More importantly, the Bill does not amend or repeal all of Sec. 34505.5. The application of the Bill is, by its preamble, made applicable in its entirety only if an ocean marine terminal in the State of California chooses to qualify to conduct an intermodal roadability inspection program under the Bill. If such an ocean marine terminal does not so choose, the Bill cannot affect any indemnity provision or clause of any contract as previously noted.

Where a marine ocean terminal does not so elect to qualify, certain provisions of the Bill still have effect, in part, as to the present manner of conducting business, because the Bill does amend Sec. 34505.5 with respect to putting a red tag on a chassis, which fails inspection, in a conspicuous location so that it may be viewed from the rear of the chassis; ensuring that records of the manner and conduct of inspections of chassis are to be available to named interested parties during normal business hours; and that any citation issued for a defective condition found in a chassis, which violates State or Federal law, can be issued by the officer responsible for enforcement, to either the provider/terminal or the user depending on the determination of the officer as to the defect being a condition existing at terminal inspection or caused by the failure of the driver to operate a commercial vehicle in a safe manner.

If an ocean marine terminal in California does not elect to be governed by the Bill and thereby maintains its status under Sec. 34505.5, no indemnity provision in any applicable contract can be voided by law, but the terminal must revisit its tagging and record keeping procedures. The issuance of citations concerning chassis conditions found outside the terminal may or may not be of concern. These citations usually result in monetary fines, the amount of which depends upon the seriousness of the violation.

In order to explain the situation more fully, the TT Club's New Jersey office is arranging a seminar on the Bill, as well as on the potential activities of other state legislatures and private associations in the near future. Further details will be announced in a later edition of TT Talk."

### **3. Nine-month contractual limitation in forwarders' standard trading conditions**

Harry Lee, of the TT Club's Hong Kong office, has sent us the following commentary on a recent case in Singapore, in which the 9-month time limit for suit under the Singapore Freight Forwarders Association (as it then was - now it is called the Singapore Logistics Association) Standard Trading Conditions was held to be unreasonable and therefore unenforceable.

"In the last issue we talked about the English decision of *Granville Oils v Davies Turner*, which held that the nine-month contractual time bar clause under the BIFA Conditions was 'unreasonable' under the Unfair Contract Terms Acts 1977 (UCTA) and therefore invalid. Coincidentally, the decision of the High Court of Singapore in December 2002 in

the case of Press Automation Technology Pte Ltd ('Patec') v Trans-Link Exhibition Forwarding Pte Ltd (2002) has delivered another blow to the possibility of forwarders relying on standard contractual limitation clauses in trading conditions adopted by their local trade association. In the Trans-Link case, the court held that the nine month time bar included in the Singapore Freight Forwarders Association ("SFFA") Conditions did not pass the "reasonable test" under the Singapore equivalent of the UCTA. Trans-Link had contracted with Patec to transport a machine for an exhibition from Singapore to Bangkok. The machinery was severely damaged on arrival in the exhibition hall whilst still in the custody of Trans-Link. The contract between Patec and Trans-Link was held to be subject to the SFFA Conditions. Trans-Link sought to rely on (1) the time bar defence under clause 30 of the SFFA Conditions and, alternatively, (2) clause 27, which provided for a "weight" based liability limitation of S\$5 per kilogram.

The court held that (1) clause 30 was unreasonable, having regard to the particular circumstances of the case, for the purposes of the UCTA and was therefore invalid; and (2) clause 27 was valid and binding, thus allowing Trans-Link to limit their liability to S\$100,000 (the claimed amount was US\$178,000).

Several points are noteworthy as a consequence of these decisions:

(1) although the UCTA does not, by its terms, apply to contracts of carriage by sea, the decisions may impinge on the validity of nine-month time bar clauses (either contained in company trading conditions of trading or in a bill of lading) which are expected to apply in cases where the claim occurs outside the carrier's period of responsibility under the Hague/Hague-Visby Rules.

(2) in Press Automation's Case, in arriving at their conclusion that clause 30 time bar was unreasonable, the court compared the nine-month time bar with the limitation periods available to Trans-Link for possible recourse actions against their third party subcontractors (i.e. the period of six years under the common law and the period of one year, as extended under Article III Rule 6 *bis* under the Hague-Visby Rules, for carriage by sea.) Against these tests, the court held that the nine-month limit was too short for the plaintiffs. The court said "Trans-Link has not satisfied me that in the circumstances...it was necessary...to put a nine month time bar in place in order to protect its right of recourse against the third party actual carrier...". In focusing on the periods available for recourse, the court did not consider the other valuable functions of a time-bar clause - namely to speed up settlement of claims; achieve international uniformity; prevent unreasonable reliance on "notice-of-claim" provisions requiring proceedings to be issued in a short time period; and to achieve finality.

(3) interestingly the Singapore court gave effect to the liability limitation clause 27 of the SFFA. The court accepted the principle that in international transport, a financial limit was needed. In the present case, the court was satisfied that the limitation formula in clause 27 was reasonable as it was "at the higher end of the scale" in comparison with other statutory and commercial regimes. This consideration apart, it is difficult to reconcile the court's reasoning on clause 27 with that on clause 30.

You can access a note of the Patec case at the website DMC's CaseNotes @ [http://www.onlinedmc.co.uk/patec\\_v\\_\\_translink.htm](http://www.onlinedmc.co.uk/patec_v__translink.htm)

#### **4. EUROWATCH is one to watch!**

John Nicholls, the TT Club's Loss Prevention Officer, has provided us with the following report on EUROWATCH:

"EUROWATCH is a service that the TT Club recommends to its transport operator members. Its objective is to provide a 24 hour 'access to police' service, based on the driver's home language, enabling owners and drivers to contact and pass critical

information to the police in the countries that the vehicle is transiting. This service passes data from the transport companies' tracking systems directly to the police via the internet, to assist in the apprehension of criminals and the recovery of stolen property. Any commercial vehicle operator can register for the system, providing they have a standard GPS-based system in operation. The registration fee is approx €250 per vehicle per annum and TT Club members are entitled to a 20% discount on the first year's registration.

In a press release dated 26 November 2002, EUROWATCH stated that, in its first six months of operation, the service was used to combat international crime on six occasions, resulting in more than Euro 2 million of goods and vehicles being recovered by owners and police in five countries. The goods included mobile phones, cigarettes and luxury goods. One particular incident was described as follows:

"On 25th November 2002, three Mercedes S220e cars were driven away from car hire premises in Marseilles, France. It transpired that all three vehicles were hired using false names and addresses, and were then driven at high speed through France towards the border with Spain. EUROWATCH was notified of the theft shortly after the cars crossed into Spain, as a EUROWATCH customer was tracking two of the cars. The Spanish police were contacted and deployed several cars and a helicopter to follow the vehicles until it was thought safe to stop them. Both vehicles were recovered and two individuals were arrested. It is assessed that they were heading to a ferry port on the South coast of Spain for transportation to Africa. The third car, which was not covered by EUROWATCH, was not recovered."

Interestingly the two cars that were recovered had Navtrak units fitted to them, the third car did not. [Navtrak operates a passive GPS based system that covers the whole of Europe. Their system is activated by a telephone call or the advanced system can self-activate when an Automated Driver Recognition card is not present when the vehicle or trailer is moved.]"

## **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](mailto:tt.talk@ttclub.com). We look forward to hearing from you.

David Martin-Clark  
Editor  
Shipping & Insurance Consultant  
Maritime Arbitrator  
Commercial Disputes Mediator

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