

Welcome to the latest edition of TT Talk, number 25 in the series.

Contents

1. Maritime Security in the United States - The Trade Act of June 2002 and the 24 hour Advance Notice Rule.
2. New UK Warehousing Association Conditions
3. Himalaya Clause fails to protect inland carrier in the United States
4. Hong Kong Marine Department gets tough
5. Conclusion

Before we begin, the Editor would particularly like to thank those readers who emailed him with comments on TT Talk 24. It is good to know that TT Talk is getting people talking!

1. Maritime Security in the United States - The Trade Act of June 2002 and the 24 hour Advance Notice Rule.

We are grateful to the US law firm, Haight Gardner Holland & Knight, for drawing to our attention the likely impact of the Trade Act - signed into law on June 4 2002 - on the foreign trade of the United States. In a notice recently posted on their website at <http://www.hklaw.com> they report that the US Customs Service is now authorized to require that information pertaining to cargo destined for importation into the United States or exportation from the United States, (such as cargo manifests), be transmitted to them via an EDI system at least 24 hours beforehand. No marine terminal operator may load such cargo unless the carrier confirms that the cargo has been properly documented. The vessel carrier must notify Customs of any cargo tendered that has not been properly documented. Civil penalties may be imposed up to the greater of the value of the cargo or the cost of the transportation. Cargo that is not properly documented and remains at the marine terminal for more than 48 hours is subject to search, seizure, and forfeiture.

The 24 hour prior notice requirement is giving rise to widespread concern, both within and outside the US. Lloyd's List reported, in an article dated 12 September 2002, that the European Commission was calling for a transitional period for the implementation of the scheme, fearing that the changes will "seriously disrupt EU transport operations without necessarily giving the US the security assurance it seeks". The article quotes Dr. Guenter Burghardt, the EU ambassador to the US as saying: "The proposed rule will have an enormous impact on logistics processes worldwide. The whole logistics chain - starting with the exporter and ending at the consignee in the US - will have to change its business procedures. It would also lead to a serious loss of flexibility in the logistical process". The Commission envisages that just-in-time deliveries and change of destination during transport will no longer be possible, while European ports will face severe congestion as cargo builds up due to the 24 hour ruling. "Transport costs will increase," Dr. Burghardt adds, "as more partly loaded vessels will sail and storage costs will also increase".

Calls for a delay in implementation have also been made by the World Shipping Council in Washington - an association representing the liner shipping industry, whose member lines operate more than 90 percent of the industry's vessel tonnage serving the foreign commerce of the United States. In comments dated 9 September 2002 on Customs' proposals for detailed regulations under the Act, the Council emphasised the serious impact on trade that the proposals would have and asked for a delay of twelve months before implementing any rules that were ultimately made.

Similar concern has been expressed at the Tripartite Shippers' Meeting held in New Orleans between 12 and 14 September 2002. Shippers' councils from North America, Europe and Asia issued a declaration calling on policy makers to be careful, when developing new security safeguards, "not to unnecessarily compromise or undermine the efficiency and reliability of the transportation industry or incur unnecessary costs."

Industry associations are also worried. We understand that FIATA is in discussion with US Customs, over the issue whether the NVOCC can transmit details of customers and cargoes directly to Customs, rather than via the ocean carrier.

2. New UK Warehousing Association (UKWA) Conditions of Contract, 2002

We are grateful to Julia Marshall, a solicitor with the UK firm of Hill Dickinson, for this note on the new UKWA Conditions, which first appeared in the HD newsletter, Marine & Transit, of August 2002. We quote extracts below.

"February 2002 saw the launch of a new set of UKWA terms.... The new set will avoid confusion. Because of the launch it is appropriate to revisit the liability regime and other provisions in UKWA and to note any changes arising out of the revision.

Liability is generally as before, although the wording of clause 3 has altered:

- liability is only accepted where the customer can demonstrate negligence or worse fault;
- liability is generally limited to £100 per tonne weight of that part of the goods in respect of which a claim arises;
- limits may be increased by the customer giving at least 7 days notice to the warehouse keeper in advance of the required date of the increase. The **notice** must specify the **limit required** and the **nature** and **value** of the goods. The customer must also pay within 7 days of demand, the cost of the warehouse keeper insuring this increased liability;
- no loss of profit or other indirect or consequential loss is payable in any circumstances;.....
- notification of claims remains 21 days generally but 7 days only where sub-contract carriage is involved. Customers should be especially alert to the 7-day period. Note the time limit runs from the date the cause of the claim comes to the customer's knowledge or the date of delivery to the customer whichever is the later. This is more certain than the time-bar wording in the next sub-clause;
- the time-bar for legal proceedings remains at 9 months. Within that 9-month period, starting from **the date of the event giving rise to the claim** (which could be difficult to determine), legal proceedings must be issued and served.....

Clause 11 makes it clear that the conditions apply to loading and unloading as well as the transfer of goods; otherwise clause 11 is as before.

It is worth all parties remembering that where there are limitations and other restrictive conditions such as time-bar provisions, the party seeking to rely upon them must prove their application. The new UKWA conditions of contract have been registered with the Office of Fair Trading (OFT). This means that the OFT has examined them and found them not to be in restraint of trade. It does not mean, as is sometimes erroneously thought, that the OFT considers them reasonable in the light of the Unfair Contract Terms Act 1977. That decision in any particular context is for the courts.

The conditions have reserved copyright: only members of UKWA are entitled to use them."

3. Himalaya Clause fails to protect inland carrier in the United States

In a recent decision in the case of James Kirby Pty Ltd v Norfolk Southern Railway Company, the United States Court of Appeals for the Eleventh Circuit has held that the 'Himalaya' clause in the FIATA FBL was insufficiently precise in its wording to enable a railroad sub-sub-contractor to take advantage of the US500 package.

Importantly, the court acknowledged that the Himalaya clause would have been effective if it had specifically referred to inland carriers. For more detail on the case, refer to the note on the case at the website DMC's CaseNotes at

http://www.onlinedmc.co.uk/kirby_v__norfolk_south'n.htm

4. Hong Kong Marine Department gets tough

Our Hong Kong office has drawn attention to a news release issued recently by the Hong Kong Marine Department's Harbour Patrol Section ('HPS'). The press release stated:

"The Marine Department's Harbour Patrol Section (HPS) has taken rigorous action to crack down on vessels committing offences such as overloading, speeding and trading with forged documents. HPS conducted about 18,000 vessel inspections in Hong Kong waters and instituted over 1,500 prosecutions against offenders last year. It prosecuted 80 overloading cases last year, including some 50 Mainland cargo vessels (MCVs), compared with 29 cases in total in 2000....

Crackdown on vessels trading with forged documents resulted in the detention of 10 MCVs. Four were handed over to the Guangdong Maritime Safety Administration and the HKSAR Government confiscated six, which were abandoned by their crew.

HPS also prosecuted some 20 MCV masters who were illegally engaged in shuttling cargo in local waters, breaching conditions of their entry permits and causing disturbance to the daily operations of local-licensed vessels.... "

The Marine Department's own website carries amazing pictures of a barge with about 170 TEUs loaded on it. The newsletter (page 8 is the relevant one) is available on

<http://www.info.gov.hk/mardep/hkmmn/hkmmn0203.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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