

A Note from the Editor

Gung hey fat choi - Happy New Year to all of our readers in this year of the snake. For those who were not aware, Chinese New Year was celebrated at the end of last month. It is appropriate, therefore, that TT Talk starts with a contribution from Hong Kong about the enhancement of arbitration awards between Hong Kong and the Mainland (China).

As you can see from the Contents, there are articles too about claims handling, a further note about being aware of fraud and news about new appointments and changes to ClaimsTrac.

I do hope you enjoy reading this issue. Please do not hesitate to contact me if you wish to discuss any matter further or comment on any of the articles.

Shirin Haque
Editor

Reciprocal enforcement of arbitration awards between Hong Kong and the Mainland

China's accession to the World Trade Organisation will mark a big event not only on the Mainland but also for Hong Kong. It was generally perceived that after the accession the cross border trade between the Mainland and Hong Kong would rise. For the cross border trade to be successful, one of the crucial factors will be the convenience and certainty for the parties to enforce their legal rights.

After 1 July 1997, the People's Republic of China (PRC) has resumed sovereignty over Hong Kong and the unprecedented concept of 'one country two systems' was introduced. The PRC therefore ceased to be a foreign state to Hong Kong. One of the ramifications was that the laws and regulations governing relationships between states would not apply to Hong Kong and the Mainland. As a result, legal vacuum may exist and this problem must be addressed.

One of the examples is the enforcement of the Mainland arbitration awards in Hong Kong and vice versa.

Prior to the Handover, an arbitration award obtained in the Mainland could be enforced through the machinery provided under the New York Convention. Both the PRC and Hong Kong (as a territory of the United Kingdom) were parties to the Convention.

The Convention governs relationship between two different states. Article I(1) of the New York Convention stipulates that:

'This Convention shall apply to the recognition and enforcement of arbitrage awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought '.

Therefore, the awards need to be 'international' in nature in order for the New York Convention to apply.

After July 1997, an arbitration award obtained in Hong Kong could not be enforced as a Convention award, at least on a theoretical basis, because Hong Kong ceased to be a foreign state to the Mainland (and vice versa).

As far as Hong Kong is concerned, the only alternative left would be to enforce a Mainland award by a common law action in Hong Kong. This is, however, far from satisfactory. The party seeking to enforce the awards needs to start a fresh legal action in Hong Kong by issuing a writ of summons and to seek damages in the usual way for the breach of contract i.e. non-compliance with the award. This procedure will take a longer time and will be more costly.

The political reality was that both Hong Kong and the Mainland would continue to apply the New York Convention. There was, however, an urgent cry for a legal regime to resolve these uncertainties.

The uncertainties were finally resolved by an arrangement made between Hong Kong and the Mainland governments on 21 June 1999. The effect of this arrangement is that the arbitration awards made in Hong Kong are to be enforced in the Mainland as if the New York Convention would apply, and vice versa. Such arrangement was brought into legal effect, in Hong Kong, by the Arbitration (Amendment) Ordinance 2000, and, in the Mainland, the Explanatory Document of the PRC Supreme Court No. 3 of 2000 issued on 24 January 2000.

To enforce a Mainland Award, the party seeking such enforcement must produce (section 40 of the Arbitration Ordinance):

the duly authenticated original award or a duly certified copy of it;
the original arbitration agreement or a duly certified copy of it; and
if the award or agreement is in a language or languages other than either or both of the official languages, a translation of it in either of the official languages certified by an official or sworn translator or by a diplomatic or consular agent.

A 'Mainland Award' is defined as 'an arbitrage award made on the Mainland by a recognised Mainland arbitrage authority in accordance with the Arbitration Law of the PRC.'

The following are the grounds for refusing to enforce a Mainland Award:

A party to the arbitration agreement was under some legal incapacity;
The arbitration agreement was invalid;
One party was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present its case;
The award deals with a matter beyond the scope of the reference;
The tribunal was not properly constituted;
The award has not yet become binding on the parties; or
The underlying dispute would not have been determined by arbitration by the courts of Hong Kong or would have been contrary to Hong Kong public policy.

In the Mainland, the grounds for refusing to enforce a Hong Kong award are the same except that the Mainland can refuse to enforce an award because of 'social public interest'. Also, time limits for enforcement of an arbitrage award is six months for personal claims and one year for a company and/or legal entity. No such time limit was imposed in Hong Kong.

This new arrangement has provided continuity and certainty to both Hong Kong and the Mainland. Certainty is one of the essential elements for the existence of an effective legal system and is also one of the virtues of the rules of law.

Contributor: Catherine Wong, Solicitor, Sinclair Roche & Temperley - Hong Kong

forwarderlaw.com

This is the comprehensive resource for legal information on freight forwarding and is edited by Peter Jones.

On this site you will find an on-line database of forwarding conditions.
commentary to keep you in touch with developments in the law and internet sites on transport matters

resolve disputes without litigation!

Risk manager legal information that forwarders need to manage their business.

recent cases on the law of international transport

The recent 'must reads' are: Privacy Laws and Forwarders

Dual Agency House Bill of Lading
The Evolution of the House Bill of Lading
The House Bill of Lading
FIATA FCR and Bulk Steel Shipments
CIFFA comments - a potential multimodal convention

You can either access this site directly: <http://www.forwarderlaw.com>

From Athens to Amsterdam and Back

The Club continues to be amazed at the way some insurers manage to make simple things complicated. For instance, if you had a lorry load of defrosting produce in Athens, where would you look for help? No doubt your reply would be "somewhere in Greece": it is unlikely that you would think that your nearest source of assistance would be in Amsterdam. Yet this is just one of the strange behaviour patterns we have witnessed in past months.

OK, the question may have been simple but, as usual, the transport arrangements behind it were fairly complex. A TT member in Spain had a load of frozen produce to move to Athens. He subcontracted the movement and, as frequently happens with transport operations within the European Union today, the load ended up being moved by a haulier from another member state - in this case an operator from Holland. Somewhere in Italy the refrigeration equipment broke down, and by the time the lorry arrived in Athens the goods were already beginning to defrost.

At this stage, two phone calls were made: his Greek agent telephoned the TT Club member's office in Spain, while the driver alerted his insurers in Holland. What happened afterwards was however wildly different. The TT Club member called the Network Partner in Barcelona, asking for assistance, who immediately contacted the Club's representatives in Piraeus with details of the Greek agent and the nature of the problem. Within two hours of the first call, a Greek surveyor was on his way to the warehouse where he could inspect both the cargo and the truck. He was then able to make immediate arrangements for the goods to be protected. There was no sign of a surveyor from the haulier's insurance company.

Two days later, as the Club's surveyor was putting the finishing touches to his report, including the photographs which he had just had developed, he got another call from the warehouse. Could he come back again, please? Why? Well, the haulier's surveyor had just arrived, having flown in all the way from Amsterdam. Fortunately for the haulier's insurers, the Club's man had been on the spot, as otherwise the cargo would have been well and truly defrosted and probably unfit for human consumption by the time their chap had arrived.

Of course, the Club doesn't have surveyors on tap in every single location all over the world but, unless you are going to have an accident in the headwaters of the Amazon or the middle of the Sahara, we think we can generally do better than having to fly someone on a 6,164 kilometre round trip just to undertake a simple cargo survey on a broken down reefer unit...
Contributor: Andrew Trasler, TT Club - London

New Look to Member Services

Please do go to the new look Member Services on our website. This has replaced the old TM-Online.com, which was the way you used to enter this "private" part of the TT website. All existing registered users have been automatically transferred over, so there is no need to re-register. You will be able to access a number of new offerings by going to this Member Services section. These already include "TT Club Forum", designed as a discussion forum to exchange ideas and information and the "Member Handbook", which gives you all the basic information you need about the TT Club's services and insurance cover.

There are a number of other pieces that are in the pipeline for the secure area of the website, including a "beta" release at the beginning of March of ClaimsTrac version 3. This is a

substantial reworking of the Club's very popular claims review and analysis tool. In part, the very success of the system has required a new infrastructure to be built. The Club has, however, taken the opportunity to respond to feedback in a number of important aspects. In particular, there is a clearer separation between "search" and "analysis" functions, with the latter having considerably enhanced "drilling" capability. All results can now be output to other applications in summary and detail format.

As ever, the access to this secure area needs collaborative control - each user is required to register and the list of those who can access any particular piece of information is visible. Any changes should be advised to the Club as soon as practicable.

If you do find any problems using the system or registering, please send an e-mail to: registrations@ttclub.com
Contributor: Peregrine Storrs-Fox, TT Club - London

Snakes, Planes and Machinery

What is the connection between a 2 metre long wooden snake, an aircraft engine and some damaged machinery in Mexico?

The answer is that they were all items of cargo which became the subject of legal arguments in the United States, and in each case the carrier had to pay the claim in full. Because of slipshod paperwork, none of the carriers was able to rely on the usual limitations of liability. The wooden snake case could cost the carrier and his insurers (not, we hasten to add, the TT Club) a cool \$3 million. A very expensive mistake indeed, but one which could easily have been avoided had the right document been issued at the time.

Our friend, Peter Jones gives more details on his Forwarderlaw website at: <http://www.forwarderlaw.com/cases/spiralaw.htm>

These stories once again highlight the absolute importance of making sure your clients are aware of your terms and conditions of business. All documents leaving your office - letters, faxes, e-mails, quotations, collection orders, delivery notes, requests for instructions ... must make reference to your conditions. It is also a good idea to post relevant terms and conditions on your website, especially if you are accepting booking information by that medium. And do make sure that documents are issued to cover the job you have been asked to do.

Contributor: Andrew Trasler, TT Club - London

Japanese Scam

Those who read the last issue of TT Talk will know that we highlighted the problems of Nigerian letter and e-mail fraud. I thought that our readership would be interested in knowing that the Club was approached by a Japanese purporting to be a bank. We were told that a sum of money had been left in the bank and that if we sent in our bank details, etc. that the outstanding money would be paid. Needless to say, nothing was done about the e-mail but do please remember to be careful to whom you give out your details and also be wary of anyone offering money for nothing!

Contributor: Shirin Haque, TT Club - London

New Appointments

We have three new appointments to announce in this issue.

Ian Lush joined at the beginning of January and is our Marketing Director. He has a background in both logistics and marketing. He will be responsible for all aspects of publicity which includes press relations, advertising, sponsorship, major exhibitions and conferences.

Louise Bradley has come back to the Club for the new position of Director of e-Commerce. During the past three years she has worked with the Miller's New Business Development Team. Louise will be developing various e-commerce initiatives.

Finally, George Fawcett is to assume increased responsibilities in the ship operator category and he will be giving up some of his management responsibilities. George's new role will also encompass ensuring the cover and service in the ship operator category is developed, including the increased involvement in the service delivery of TTRMP. He will also seek to promote the Club at international groupings relating to container operations.
Contributor: Shirin Haque, TT Club - London