

A Note from the Editor

Welcome to the tenth edition of TT Talk and I do hope you all enjoy reading it. I am particularly grateful to Mary Thomson of Ng & Partners in Hong Kong for her article on changes in the Electronic Transactions Ordinance there.

You might also like to know that the TT Club's 1999 Annual Report and Financial Highlights are available from the Club's offices or can be viewed via its website: www.ttclub.com. The Club achieved an encouraging level of new business acquisitions, with gains outstripping losses by around 26% in premium terms and by 15% in number. The level of claims incurred during 1999 showed a marked improvement over the previous year. The results shown in the Club's Financial Statements issued in May 2000 therefore mask something of the true strength of its finances and its position in its market sector; overall the Club continues to prosper.

Please feel free to contact me if you wish to comment on any of the articles.

Shirin Haque
Editor

Taking advantage of contractual terms?

Two recent cases - *Prebena Wire Bending Machinery Co v Transit Worldwide Corp and Universal Maritime Service Corp* (US District Court, SDNY, 28 May 1999) and *Kodak -v- Racine Terminal (Montreal) Ltd* (Federal Court of Canada, 9 March 1999) - reviewed the extent to which a stevedore may benefit from the limitation of liability contained in the ship's bill of lading. In both matters stevedores had damaged cargo, but the operators sought to limit liability by reference to the carrier's conditions of carriage which, they argued, were extended by the Himalaya clause to protect the carrier's servants or agents. In both cases, the courts rejected this argument.

Both courts held that, in order for there to be an effective Himalaya Clause, there had not only to be a contract between the carrier and the cargo-owner incorporating such a clause, but there also had to be a contract between the carrier and the sub-contractor, in which either the owner promised or the sub-contractor demanded, protection of the carrier's Himalaya clause. This is, of course, one of the four criteria set out by Wilberforce LJ when he considered Himalaya clauses in *Scruttons -v- Midland Silicones*.

In neither of the two cases under consideration could the defendant terminal/stevedore company produce evidence of such a contract. In the Racine case, there had been a contract between Manchester Liners and Racine, but this had not been renegotiated by or formally transferred to OOCL when they took over the old ML services.

An example of the provisions would be:

"(a) In the event of any claim or dispute arising under these Conditions the User shall not claim or otherwise proceed against any party other than the Terminal Operator, including but not limited to any servant, agent or subcontractor of the Terminal Operator. In case the User does so, any such servant agent or subcontractor shall be entitled to the benefit of these Conditions to the same extent as the Terminal Operator and the User will indemnify the Terminal Operator against any liability or loss, which the Terminal Operator may incur as a result.

(b) All Bills of Lading or other contracts of carriage signed by or on behalf of the User, or under which the User is liable as a carrier, shall include a clause providing that all defences and limits of liability contained therein shall also apply in any action against the Terminal Operator."

In addition, the stevedore may need specifically to accept such bill of lading protection in the provision to make this effective in the US. Different jurisdictions take different views of the "sub-bailment on terms" doctrine and you may therefore need to seek specific advice "locally". The Club would be pleased to assist any Member in ensuring that your contracts with your shipowner/carrier clients are effective in

incorporating a provision extending the carrier's conditions to cover loss or damage arising under your custody and control.

Contributor: Peregrine Storrs-Fox, TT Club - London

E-Commerce and Hong Kong's electronic transactions ordinance

In simple terms, e-commerce is the production, advertising, sale and distribution of products via telecommunication networks. It encompasses many diverse activities including electronic trading of goods and services, on-line delivery of digital content, electronic fund transfers, electronic bills of lading, commercial auctions, on line sourcing, direct consumer marketing and after sales service. It is the explosive growth of trade through electronic means that has caught the attention of businesses and governments.

In Hong Kong, the Government has pledged itself to be a leading player in the digital world of the 21st century. The Hong Kong Government has taken proactive steps in the wide adoption of IT within Government to improve the efficiency in quality of service delivery. The IT initiatives include Electronic Service Delivery Scheme, Public Key Infrastructure (PKI), Common Chinese Language Interface as well as the legal framework for electronic transactions. In seeking to establish a clear legal framework to enhance certainty and security in the conduct of electronic transactions, the Hong Kong Government has, as of 7 April 2000, brought into law the whole of the Electronic Transactions Ordinance enacted on 7 January 2000. The scope of the legislation is to provide legal recognition to electronic records and digital signatures as that of their paper-based counterpart and further to facilitate and promote the operation of Certification Authorities (CAs) in order to provide a secure environment for the conduct of electronic transactions.

Businesses in the transport chain operating electronically face a bewildering legal landscape, but the main issues in practice include the formation and validity of contracts; their governing law and jurisdiction; fraud. The basic building blocks for legal and enforceable electronic business transactions and the regulation of ordinary commerce over the Internet are contained in the first part of the Ordinance:

- where the law requires information to be given in writing, that requirement is met by electronic records;
- where the law requires information to be retained or presented in the original form, that requirement is met by retaining or presenting the information in the form of electronic records;
- where the law requires the signature of a person, that requirement is met by a digital signature;
- contracts shall not be denied legal effect solely on the ground that electronic records are used in their formation;
- electronic records shall not be denied admissibility as evidence in court on the sole ground that they are electronic records.

The legislation therefore provides for the validity of electronic contracts. Unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of electronic records. Rules are set out to establish when and where a record is sent and received, subject to agreement otherwise by the parties. This is important to issues of governing law and jurisdiction. The rules are broad enough to cover "click-wrap contracts" where the originator simply clicks a button to accept an offer on a web-site. This is because the law does not require signature for the conclusion of a contract and the acceptance of an offer is effective without the need for a signature provided that it is a final and unqualified acceptance of the terms of the offer. However, problems may arise where the computer automatically but mistakenly accepts an offer by the originator where he in fact has no intention to contract, and the contract is nonetheless formed and becomes enforceable.

The second part of the Ordinance sets up the regime for the recognition of certification authorities to issue digital certificates. The Postmaster General is the first recognised certification authority. Suitable applicants may apply to become recognised certification authority. A digital signature under the Ordinance must be supported by a recognised certificate and must be generated within the validity of that certificate. The Ordinance adopts the PKI encryption system. The role of certification authorities will be

to ensure that electronic records are authentic and have not been altered during the process of transmission.

Contributor: Mary Thomson, Ng & Partners - Hong Kong

New German Transport Law

In July 1998 a new Transport Law was introduced in Germany. The *Transportreformgesetz* replaced the previous provisions of the commercial code and was designed to create a uniform liability regime for all domestic transport operations, whether by road, rail or inland waterway. Unfortunately this noble aim rather foundered on the rocks of different interest groups, with the result that the old system - which, although it had its faults, did provide a clear framework for each individual mode of transport - has been replaced by a rather more complicated system.

Carriers' liabilities are now set at 8.33 Special Drawing Rights (SDR) per kg for any freight operation, but individual operators are allowed to derogate from this standard by using their own trading conditions. Operators and their clients can agree on whatever amount they wish, within a band ranging from 2 SDR to 40 SDR per kg.

The full text of the new law, in both German and English, is available from the German Association for Transport Law's website at <http://www.transportrecht.org/>

Contributor: Andrew Trasler, TT Club - London

Warsaw Seminar

The Directors and Managers of the TT Club will meet for their June Board Meeting on 20-22 June in Warsaw, Poland to discuss the present business of the Club and to devise strategies for the Club's future. This presents an opportunity to bring together the TT Club's Directors and the Polish transport community, to exchange ideas and to shape jointly the Club's future direction.

Warsaw has been chosen as a venue for the Board Meeting to demonstrate the TT Club's commitment to the Polish transport market. European integration is becoming more of a reality and Poland will be one of the first Eastern European countries to join the European Community.

To discuss these issues, the TT Club and its partner and representative in Poland, Commercial Union Polska, are organising a seminar on the 21 June that will run alongside the TT Directors' Meeting. The seminar, followed by a reception for the participants and the Directors, will discuss topics of the developments of the Polish transport in the light of European integration, the situation in the Polish road transport and issues of risk assessment.

Contributor: Dorota Jilli, TT Club - London

Container Pilferage (Pharmaceuticals) in Marseilles

We have recently been made aware of an investigation into a serious case of pharmaceuticals pilferage in Marseilles, France, which has revealed some disturbing practices. It would appear there is an organised system of delivering empty containers (declared as full) to the port. Once in the port, allegedly with the help of port employees and forklifts, these containers are filled with goods pilfered from other containers. The containers are then shipped to their port of destination where the pilfered goods are collected by the parties involved (in this case West Africa). Similarly, the pilfered containers are shipped to their destination with the subsequent claim for loss on the carrier.

Under French Law it is not possible for cargo interests to proceed directly against the stevedores when a contractual (bill of lading) situation exists. The carrier's only possibility to avoid a claim of this type is to present a recourse action against the stevedores. This is hampered by a further problem in Marseilles:

surveillance videotapes of the areas concerned, are not being kept long enough by the port before being erased.

We would strongly recommend that secure stowage for your containers is requested in Marseilles prior to/after discharge, and ensure that your staff is fully aware of this current problem.

Contributor: John Savignon, UK P&I Club - London

Any Fool Can Stuff a Container.....

The UK P&I Club has produced two new videos "*Container Matters*" and "*Any Fool Can Stuff a Container*". The first of these is designed for shipowners or operators and looks at the proper stowing of containers on ships. The second is aimed at those who load cargoes into containers (transport and logistics operators, shippers and warehouses) in an effort to stem the tide of losses caused by bad packing, stowing and stuffing. The TT Club has collaborated with both productions, and we have a supply of "*Any Fool...*" You can order a copy of "*Any Fool*" from our website or copies of both from the UK Club's website: www.ukpandi.com

Contributor: John Nicholls, TT Club – London

LRQA in Hong Kong

I am pleased to announce that Lloyd's Register of Quality Assurance (LRQA) has confirmed our continued compliance with ISO9002 during their regular maintenance audit. This was one of the regular six monthly surveillance visits by LRQA. On this occasion the Hong Kong and London offices were visited - Hong Kong back in early April. LRQA is the authority, which grants our ISO 9002 quality certificate.

Since many systems, procedures and forms continue to change, our passing with no corrective actions is particularly pleasing.

The next surveillance visits will involve the New Jersey and London offices and will take place in September and October 2000.

Contributor: Marion Mitchell, TT Club - London