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1. Locking lights on spreader frames

When ICHCA International in its International Safety Panel (ISP) recently considered the situation regarding locking lights on spreader frames, it became apparent that a variety of different colour combinations are in use.

In order to ensure safe operations and to avoid confusion, it is clear that the colour combinations (whatever they are) should be the same wherever a driver operates and whatever equipment is being used with such spreaders. Consequently, the International Safety Panel has adopted the following simple statement:

'This Panel considers that the colours of spreader frame locking lights on container lifting frames of cargo handling equipment should be standardised throughout a terminal. If drivers are liable to operate such equipment in more than one terminal, the colours of spreader frame locking lights should be standardised throughout all those terminals. The ultimate aim should be to internationally standardise the colours of all spreader frame locking lights.'

The ICHCA International Safety Panel invites those concerned to consider this statement and to take the actions they consider necessary. 

2. Amendments to the Maritime Chapter of the Commercial Code in South Korea

Hyopsung Shipping Corporation, the TT Club's Network Partner in Korea, alerted us to a circular by the law firm Kim & Chang (Seoul) on amendments to the Maritime Chapter of the South Korean Commercial Code. These amendments include the following points:

- Carriage of goods by sea:

The Maritime Chapter will resemble the Hague-Visby Rules to a larger extent. The amendments increase the package limitation to 666.67 SDR and introduce a weight liability limit of 2 SDR per kilogram (in contrast to the other changes, this weight limit will only come into force on 3 August 2010); the carrier will be liable for the higher of the two amounts. Furthermore, an indemnity claim against a third party will not be extinguished before the lapse of three months commencing on the

day when a complaint has been filed or when the person who brings the indemnity claim has settled the claim.

- Sea waybill; electronic carriage documentation

The parties can agree that the carrier issues a sea waybill instead of a bill of lading. Moreover, the parties have the option to use an electronic bill of lading by way of registration at a registry designated by the Minister of Justice. Such an electronic bill of lading will have the legal effects of the traditional paper bill of lading. Like a bill of lading, a sea waybill, too, can be issued in electronic form.

- Multimodal transport

The amendments also introduce a provision on liability for multimodal transport, defined as including carriage other than by sea. If the location of the loss or damage can be established, the legal rules which govern that portion of the carriage will apply to the loss or damage. Conversely, if it is not clear during which portion of the carriage the loss or damage occurred, or if the nature of the loss or damage does not permit the allocation of the loss or damage to a specific portion of the carriage, the carrier's liability will be determined pursuant to the legal rules applicable to the portion of the carriage that is of the longest distance; if the distances happen to be identical or if it is not possible to determine which portion of the carriage is the longest, the legal rules which govern the portion of the carriage with the highest carriage charges will apply.

Promulgation date of the amendments was 3 August 2007 hence these amendments will come into force on 3 August 2008 (one year from the promulgation date), except the newly introduced weight limitation of 2 SDR per kilogram for sea carriage which will only become law on 3 August 2010 (three years from the promulgation date). 

3. Supply Chain Security - ISO 28000 & the regulatory context

In TT Talk Edition 102 (16 October 2007) Hart Security introduced the new ISO 28000 security management standard. A longer description of the business benefits offered by engaging in this standard was set out in House-to-House December 2007. This article continues the theme by identifying how this management standard fits into the current regulatory arena.

The adoption of ISO 28000 requires a company continually to assess the security environment in which it operates to determine the adequacy of security measures in place to protect its business interests and ensure compliance with international regulatory requirements (ie. ISPS Code and other international supply chain security initiatives such as the EU Authorised Economic Operator or AEO). If any security vulnerabilities - strategic or operational - are identified in the assessment process a company will have the ability to implement effective mechanisms and processes to address these gaps, utilising the ISO security management system.

One of the main purposes of ISO 28000 is to be a common value-adding, verifiable, internationally recognised standard that bridges governmental and industry-driven supply chain initiatives and it currently stands alone in being able to fulfil the requirements for reciprocity between them. ISO 28000 is based on all currently prevalent and relevant global security initiatives, including C-TPAT (US Customs-Trade Partnership against Terrorism), AEO and the World Customs Organization's 'Framework of Standards to secure global trade'.

Indeed, a major port operator has already been able to satisfy the US Customs & Border Protection that it meets the requirements of C-TPAT through its ISO 28000 certification. The European Union's AEO initiative also recognises the ISO standard as providing the requirements for the Safety & Security certificate.

The standard therefore does not duplicate security legislative codes, but rather complements international code requirements and additionally demonstrates continued compliance in these regulatory areas. ISO 28000 has been designed to be fully compatible with other ISO management standards. By applying a process approach and the 'Plan-Do-Check-Act' methodology to address potential risks to the supply chain, ISO 28000 is consistent with other management system standards such as ISO 9001 (Quality Management) and ISO 14001 (Environmental Management). Companies which already have other ISO systems in place may be able to use them as a foundation for developing a security management system.

ISO 28000 offers a systematic approach to security management that can both improve operational capabilities and increase confidence on the part of customers and regulators. All businesses that are reliant on the supply chain for business continuity will benefit by adopting the sound management principles in ISO 28000. 

4. Terminal Operator's liability for 'indirect or consequential' loss

In the English case of *Ferryways NV v Associated British Ports ('ABP')*, the chief officer of the vessel 'Humber Way' who was supervising the loading and unloading operations at Immingham (UK) was hit and killed by a 'tugmaster' vehicle (a tractor unit used for containers). The 'tugmaster' was driven by an employee of an ABP sub-contractor.

A contract had been in place between Ferryways and ABP under which ABP agreed to provide to Ferryways 'berthing, cargo handling and transit services' based on its 'Standard Terminal Operator's and Stevedore's Conditions'. Ferryways BV as the deceased crew member's employer (another issue in this court case) was liable to his next of kin and was looking to recover this loss from ABP. While ABP conceded that the negligence by the 'tugmaster' driver was a breach of duty by ABP under its contract with Ferryways, it argued that its liability was excluded because under clause 9(c)(vi). The pertinent parts of clause 9 of the ABP written conditions read:

'9. Exclusion and Limitations of Liability

(a) (.....)

(b) (.....)

(c) Where the Company is in breach of its obligations in respect of the Services or under any Contract or any duties it may have as bailee of the Goods it shall have no liability to the Customer in contract, tort, negligence, breach of statutory duty or otherwise for any loss, damage, costs or expenses of any nature whatsoever incurred or suffered by the Customer which is of an indirect or consequential nature including without limitation the following (.....)

(vi) the liabilities of the Customer to any other party.

(d) (.....)

(e) Nothing in this Clause or Clause 10 shall exclude or limit the liability of the Company for death or personal injury resulting from the Company's negligence.'

The main point of contention was the interpretation of the expression 'of an indirect or consequential nature' in clause 9(c). ABP argued that in the contract between Ferryways and ABP, the parties had in effect given their own definition of indirect or consequential losses, namely, such losses as include, without limitation, the losses listed in clause 9(c), one of which was 'the liabilities of the Customer [i.e. Ferryways] to any other party' (at 9(c)(vi)).

Teare J in his judgment of 14 February 2008 in the England and Wales High Court first referred to a string of English Court of Appeal cases going back to 1934 which turned on the construction of the words 'consequential' or 'indirect and consequential' used in exemption clauses - for example: *Croudace v Cawoods* (1978) where 'consequential loss or damage' was held not to cover any loss which directly and naturally resulted in the ordinary course of events from the breach. The judge concluded that the words had 'an acquired and well-recognised meaning'.

Next, Teare J found that the scope of excepted losses in clause 9 had to be determined by the true construction of the clause. However, he qualified this by emphasising that such an exemption clause of this type must be expressed in 'clear and unambiguous language'. It would require 'very clear words indeed' to indicate that the intention of the parties was to exclude losses outside the well-recognised meaning of 'indirect and consequential' established by the Court of Appeal. He stressed that the use of the term 'indirect' implied a distinction from 'direct' losses, i.e. from losses which are the 'direct and natural' result of the breach.

Teare J also rejected ABP's argument that the phrase 'including without the limitation the following' clearly indicated that the parties were defining 'indirect or consequential losses' in their own way.

The judge concluded that the losses which Ferryways claimed from ABP, namely liability for the death benefit and repatriation expenses, were the direct and natural result of ABP's breach of contract, and therefore were not excluded by ABP's written conditions.

In addition, Teare J made the following three pronouncements:

Firstly, the requirement in the ABP Conditions that Ferryways notify the claim within 14 days of the incident applied. But that due to this brief period a 'very detailed' notice could not be required and that ABP, by actually replying and denying its liability, recognised Ferryways' notification.

Secondly, Ferryways could not rely on the Unfair Contract Terms Act 1977. Teare J found that the conditions were reasonable for these purposes. He particularly relied on the fact that the stevedoring agreement was 'freely negotiated' between the parties. Ferryways had 'a full opportunity' to consider the ABP terms and conditions and to suggest amendments to them.

Thirdly, in an 'obiter dictum' Teare J said that clause 9(e) (cited above) was not a reason why ABP should not be able to limit its liability in the present case. He preferred ABP's view that clause 9(e) only applied to ABP's liability to pay damages to the estate of a person who has died, and not to its liability to another party.

Terminal operators, unlike carriers, are not subjected to international carriage conventions which apply by mandatory force of law. Naturally, they will seek to limit their liability to the largest extent allowed by the applicable law. However, even the most elaborate written conditions obviously require occasional adjusting.

Please use the following web link for the full text of Teare J's judgment in *Ferryways NV v Associated British Ports* of 14 February 2008:

<http://www.bailii.org/ew/cases/EWHC/Comm/2008/225.html>

5. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information about any of them, or have any comments you would like to make, please email the editor at tt.talk@ttclub.com. We look forward to hearing from you.

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for the TT Club

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