Welcome to TT Talk

No. 110 in the series

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1. Claims by Truckers against Terminal Operators in the USA

With the growth in the number of containers being shipped and moving in and out of the US ocean terminals, more independent (third party) truckers are involved on the terminals premises in receiving and delivering the containers. This larger volume of trade can increase the probability of an incident involving independent truckers. Examples are collisions between two truckers, between a trucker and a piece of yard equipment, or alleged jostling/ bouncing (sometimes due to twist locks being engaged) when a container is being placed on or being removed from a chassis by yard equipment or a crane.

Fortunately, most of these incidents do not have severe consequences. However, even in cases where the trucker involved in the incident does not complain of injuries at the time, soon afterwards he may well be represented by an attorney and in most cases will claim that he sustained personal injury. The alleged nature and extent of the trucker’s injury is regularly more serious than one would expect, as is the level of the damages the trucker claims. Naturally, any inflated financial demands make the matter more difficult to resolve. Apart from personal injury, claims can include wage loss, property damage or down time during the truck repair period. The Club has initiated an in depth study of the causes of such incidents.

In the Club's experience, key to resolving such cases is a timely and thorough investigation by the terminal operator. Even an incident that looks minor at first and does not appear to require particular attention may still result in litigation. The Club recommends that terminals record as much detail of the incident as possible, take the contact details of the driver and of any witnesses (and, if feasible, a photocopy of their driver’s license with photo) and keep a camera readily available to make detailed photographs of the position of the vehicles at the time and place of the collision or incident and of the physical damage caused to all vehicles.

If the damage is more significant, the terminal operator should notify the Club and may wish to hire an independent adjuster who inspects the damage to the truck and provides a repair estimate for damage specifically caused by the incident in question (there may well be pre-existing damage to the truck). If an incident involves serious injury or even a fatality, it may be prudent to seek legal assistance in the investigation in order to protect the terminal's interests.

2. The expressions ‘O/B’ and ‘C/O’ on carriage documents

The Hong Kong Association of Freight Forwarding and Logistics Ltd (HAFFA) provides a number of interesting ‘Recommended Practices’ on its website www.haffa.com.hk. HAFFA RP013 examines the expressions ‘O/B’ and ‘C/O’ which are sometimes used in the ‘shipper’ or ‘consignee’ boxes on the front of carriage documents. HAFFA RP013 explains that customers from Mainland China, who do not have a presence in Hong Kong to organise or handle their exports or imports through Hong Kong, ask Hong Kong forwarders to ‘lend their names’ for use in the ‘shipper’ or ‘consignee’ box of the relevant bill of lading or sea waybill.

a) ‘O/B’
According to HAFFA RP013, the expression ‘o/b’ (eg. ABC Forwarder o/b China Trading) is the short form of ‘on behalf of’’, which indicates that ‘ABC Forwarder’ acts as agent of ‘China Trading’, ie. the expression ‘O/B’ is not likely to make ‘ABC Forwarder’ the consignee under the bill of lading or sea waybill. However, HAFFA RP013 then explains that the expression ‘O/B’ in the consignee box might suggest that ‘ABC Forwarder’ has (apparent) authority to receive the goods for ‘China Trading', his principal. In any case, HAFFA RP013 recommends that the carrier demands clear evidence of that ‘China Trading’ authorised ‘ABC Forwarder’ and equally that 'ABC Forwarder' would be well advised to obtain such clear evidence.

b) ‘C/O’
Conversely, the expression ‘c/o’ (eg. China Trading c/o ABC Forwarder) stands for ‘care of’’, which is generally used for addressing correspondence through an intermediary, in which case ‘ABC Forwarder’ acts on behalf of ‘China Trading’ for the limited purpose of receiving and passing on correspondence. With regard to release of cargo, HAFFA RP013 again recommends that the carrier demands production of a written authorisation (or other satisfactory evidence) which shows that
‘China Trading’ authorised ‘ABC Forwarder’ to take delivery of the goods. However, HAFFA RP013 warns that a carrier could argue that ‘C/O’ has the ‘wider’ meaning of ‘in the care of' or ‘in the charge of’, in which case it might justifiably deliver the goods to ‘ABC Forwarder’.

c) Conclusion
HAFFA RP013 provides welcome guidance. It appears to indicate that both ‘O/B’ and ‘C/O’ might have more than one meaning. Clearly, as HAFFA RP013 emphasised, ascertaining the meaning of ‘O/B’ and ‘C/O’ requires consideration of all relevant documents and surrounding circumstances.

One problem for a forwarder or transport operator who accepts the expressions ‘O/B’ or ‘C/O’ on his carriage document is that, while ‘O/B’ or ‘C/O’ might designate an agency contract between the two named parties, the nature or scope of this agency contract may be unclear. Arguably, the expressions ‘O/B’ and ‘C/O’ add another dimension to the already rather complex topic of cargo delivery. The Club therefore advises its Members to avoid using the expressions ‘O/B’ and ‘C/O’ whenever this is commercially viable.

Apart from complicating delivery, ‘O/B’ and ‘C/O’ might also obscure which party is entitled to sue under the carriage document, although in Freight Systems Ltd v Korea Shipping Corporation (1988) the Hong Kong High Court held that ‘Freight Systems Ltd o/b Marianne Trading Ltd’ meant that Freight Systems were acting clearly as agents and therefore could not sue for an alleged breach of bill of lading terms.

Please use the following web link for the full text of HAFFA RP013 of 13 November 2007:
http://www.haffa.com.hk/files/HAFFA_RP013_ob_co.doc

In ‘Forwarderlaw.com’, Mr Vlad Cioarec (International Trade Consultant, Romania) examines the related issue whether a forwarder, who is named ‘ABC Logistics on behalf of (name of exporter)’, is entitled to endorse the bill:
http://www.forwarderlaw.com/library/view.php?article_id=509

3. Consequential loss in contract - ‘The Achilleas’

In ‘The Achilleas’ (Transfield Shipping v Mercator Shipping), time charterers returned the vessel late forcing shipowners to cancel the subsequent charterparty which they had concluded at the lucrative daily rate of US$39,500. Shipowners then entered into a substitute charterparty but, due to a sharp fall in the market, had to settle for a daily rate of US$31,500. Shipowners sued charterers for the difference of US$8,000 between the daily rates for the entire duration of this subsequent charterparty, a total of US$1,364,584. Charterers were merely prepared to pay the difference between the market rate and the charter rate for the nine days until the late delivery, i.e. US$158.301. The 2:1 majority of the arbitration panel, Christopher Clarke J and the Court of Appeal all found for shipowners.

The dissenting minority arbitrator, Mr Christopher Moss, argued in contrast that to hold charterers liable for US$1,364,584 would impose on them a completely unquantifiable risk. It was impossible to conclude that charterers understood that they were assuming responsibility for the risk of loss of a particular follow-on fixture concluded by shipowners. Charterers had no knowledge or control over the duration of any follow-on fixture which the owners might conclude. If damages of this type were recoverable without particular knowledge sufficient to justify an assumption of risk, it was difficult to see where a line was to be drawn with the real risk of commercial uncertainty.

The House of Lords (Lord Hoffmann, Lord Hope, Lord Roger, Lord Walker and Baroness Hale) in its judgment of 9 July 2008 allowed the charterers’ appeal (Baroness Hale expressed doubts, but apparently did not dissent). Lord Hoffmann, Lord Hope and Lord Roger all employed the minority arbitrator’s argument that the risk was unquantifiable. Lord Hoffmann said that the parties would have no idea when shipowners would enter into a new charterparty or what its length or terms might be. Lord Hope and Lord Roger also emphasized that charterers had no control over the risk. Another factor was, as Lord Walker said, a gap in reasoning between the bare fact of missing a fixture and the very heavy financial loss for which the owners claimed damages.

Lord Hope explained that it was not enough for charterers to know in general and open-ended terms that there was likely to be a follow-on fixture. Charterers needed some information to enable them to assess the extent of any liability. The fact that the loss was foreseeable was not the test. The critical question was whether the parties could be assumed to have contracted with each other on the basis that charterers were assuming responsibility for the consequences of the fact that late delivery would result in missing the date for a subsequent fixture.

Charterparties are a ‘specialised subject’, in the words of Lord Roger, yet because of the Law Lords’ detailed review of Hadley v Baxendale (1854) and The Heron II (1969) ‘The Achilleas’ is likely to be highly significant for consequential loss under all types of commercial contracts. In any event, UK courts will probably be less likely to hold a party liable for consequential loss where such loss was hard to quantify or were the parties did not have full control over the loss or its extent.

‘The Achilleas’ illustrates that liabilities for consequential loss can reach large amounts. Examples of TT Club Members who might face substantial customer claims for consequential loss might be a Logistics Operator Member who delivers components late into a time sensitive manufacturing process, or a Terminal Operator Member who accidentally damages a ship during loading operations causing delay, extra costs and loss of profits. The Club recommends that Members

expressly address and regulate their liability, if any, for consequential loss in their customer contracts. A limitation or even exclusion might be achievable. Clearly worded contracts can prevent costly legal disputes and the collapse of profitable customer relationships.

Please use the following web link for the full text of the of the UK House of Lord judgment in 'The Achilleas' of 9 July 2008:

http://www.bailii.org/uk/cases/UKHL/2008/48.html

4. Thomas Miller course 'An insight into transport law and insurance'

This four-day course, to be held from 29 September to 2 October 2008 in the City of London, covers a wide range of insurance, legal, shipping and transport subjects. The course is an intensive programme emphasising the practical application of the topics covered through case study and discussion. Comprehensive course material is aimed at managerial staff and executives who are in the early stages of their careers, those who do not have specialist insurance and claims experience or those who wish to refresh their knowledge.

If you would like to obtain further information please contact Lisa Fletcher at the Thomas Miller London office either by email (lisa.fletcher@thomasmiller.com) or by phone (+44 20 7204 2322).

5. Conclusion

Please note that our London office will be moving to 90 Fenchurch Street, London, EC3M 4ST with effect from Monday, 28th July 2008. Telephone and e-mail details will remain unchanged.

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.

Peter Stockli
Editor
for the TT Club

TT Talk is a free electronic newsletter published as occasion demands, by the TT Club, International House, 26 Creechurch Lane, London EC3A 5BA, United Kingdom.

You can also read this newsletter and past issues on our website: http://www.ttclub.com

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