16 June 2009

Welcome to TT Talk

No. 119 in the series

Contents

1. Hong Kong - 'presentation rule' applies to straight bills of lading

The Court of Final Appeal of Hong Kong SAR has held on 12 May 2009 in Carewins v Bright Fortune Shipping that the 'presentation rule' applies to 'straight' bills of lading like it does to 'order' bills. This confirms the judgments by Stone J (2006) and the Court of Appeal (2007) (TT Talk Editions 90, 93 and 100). The 'presentation rule' means that, for delivery of the goods, the consignee must surrender the 'straight' bill to the carrier.

In Carewins, the parties used 'straight' bills of lading (which name the consignee) for the shipment of footwear products from Hong Kong to Los Angeles. The goods were delivered to the consignee without presentation of the bills. The Hong Kong shipper then sued the carrier for misdelivery.

In the leading judgment in the Court of Final Appeal, Mr Justice Ribeiro saw no valid reason why the essential characteristic of a bill of lading as a document of title to the goods should depend on whether or not the bill was negotiable (i.e. 'to order'). The shipper's ability to withhold the bill of lading pending payment by the consignee was 'a highly important feature of the recognised mercantile arrangement', which applied just as much between shipper and consignee under a 'straight' bill of lading as it did between the parties of an 'order' bill.

Mr Justice Ribeiro found that the 'straight' bill of lading before him had all features of a bill of lading, as it was entitled 'bill of lading', had a bill of lading number and displayed prominently the word 'Original'. Most significantly, the bill included an 'attestation clause' (the text on the front of the bill usually in the bottom-right corner) with the phrase '(...) one of which being accomplished the others to stand void'. Yet the judge added that ('perhaps save in exceptional circumstances') the 'presentation rule' would apply to a straight bill of lading even if an 'attestation clause' were missing. In any case, it did not matter that the 'attestation clause' did not include the phrase 'One of the original bills of lading must be surrendered duly endorsed'.

Confirmation of the 'presentation rule' for 'straight' bills of lading by the highest Hong Kong court is welcome news, because this endorses the now dominant global industry understanding (Carewins flew in Alistair Schaff QC who had fought for the 'presentation rule' in the 'Rafaela S').

The one very important exception on the application of the 'presentation rule' to 'straight' bills of lading are the United States (where the 'misdelivery' in Carewins occurred).

The TT Club reiterates its advice to Members not to deliver goods without presentation of a 'straight' bill of lading. Parties who prefer delivery without the need to produce the sea carriage document should use a simple sea waybill.

Carewins Development (China) Ltd v Bright Fortune Shipping Ltd, Court of Final Appeal of Hong Kong SAR, 12 May 2009:

http://www.hklii.org/hk/jud/eng/hkcfa/2009/FACV000013_2008-65720.html

2. Hong Kong - how can a carrier exclude liability for misdelivery?

The other big issue in the Hong Kong case of Carewins v Bright Fortune Shipping was the carrier's attempt to exclude liability for misdelivery. Clause 2(a) of the carrier's bill of lading stipulated liability subject to US COGSA 1936 for the period between loading onto and discharge from a seagoing vessel. Clause 2(b) excluded liability by saying:

'Save as provided in (a) hereof, the carrier shall be under no liability in any capacity whatsoever for loss or misdelivery of or damage to the goods howsoever caused whether or not through the negligence of the carrier (...)'.

While loss or damage can occur either during or before/after the period defined in clause 2(a), misdelivery would not take place before discharge from the vessel, i.e. is invariably subject to clause 2(b).

Stone J in the High Court (2006) held that the exclusion of liability protected the carrier as it was 'couched in clear terms, with express reference to misdelivery howsoever caused'. He admitted that he did not find this conclusion an attractive result 'in light of the merits as I perceive them', but felt unable to ignore what these words said 'clearly and unambiguously'. He concluded that it was difficult to disagree with the carrier that if the latter could not rely on the exemption in clause 2(b), 'it is not easy to conceive of any clause which could exclude liability for misdelivery'.

The Court of Appeal (2007) felt that clause 2(b) might have been sufficiently clear in this case had it simply excluded liability for 'misdelivery (...) however caused'. However, it held that the further phrase 'whether or not through negligence' qualified the words 'however caused', i.e. curtailed their scope, because misdelivery could also occur intentionally, i.e. without consideration of 'negligence or non-negligence'.

In its judgement of 12 May 2009, the Court of Final Appeal of Hong Kong SAR held, like the Court of Appeal, that the carrier could not rely on clause 2(b). For the proper approach of interpreting clause 2(b), Lord Justice Ribeiro (in the leading judgement) cited Lord Wilberforce who said in Ailsa Craig Fishing v Malvern Fishing (1983) that the effectiveness of a clause limiting liability was 'a question of construction of that clause in the context of the contract as a whole' and in Suisse Atlantique (1967) that contractual intention was to be ascertained 'not just grammatically from the words used, but by consideration of the words used in relation to commercial purpose'.

Then Mr Justice Ribeiro cited Lord Diplock who held in Photo Production v Securicor (1980) that a court was not entitled to reject an exclusion clause, however unreasonable the court itself may think the clause was, provided the words were 'clear and fairly susceptible of one meaning only'. A following case, Motis v Dampskibsselskabet af 1912 (2000), applied this to the context of delivery against a forged bill of lading. There Stuart-Smith LJ held that the court would lean against a clause excluding liability for a breach of fundamental importance if 'as a matter of construction (...) adequate content can be given to the clause'.

In contrast to Stone J at first instance, who deemed the words of clause 2(b) clear and unambiguous, Mr Justice Ribeiro held, in a rationale very similar to the one used by the Court of Appeal, that clause 2(b) was 'susceptible to more than one meaning', depending on whether or not there was a 'conscious disregard' by the carrier of the presentation rule. Mr Justice Ribeiro did this by considering three different 'levels' of misdelivery:
(1) No negligence on the part of the carrier, for example: a well executed fraudulent bill;
(2) An 'accident' involving negligence on the part of the carrier, for example: delivery under a bill to the wrong address; and
(3) Deliberate disregard by the carrier of its obligation to deliver against an original bill, as was the case here.
Mr Justice Ribeiro considered that clause 2(b) could be given 'adequate content' if it was construed to allow the carrier to avoid liability in cases (1) and (2) only, which were not breaches of fundamental importance. But clause 2(b) with its qualification 'whether or not through negligence' was insufficiently explicit to justify its extension to case (3) where the carrier delivered the goods consciously, i.e. where the question was not whether or not the carrier acted negligently.

Mr Justice Ribeiro reaffirmed the principle that, if wide words of exemption would effectively deprive the contract of any compulsory content, the exemption should be given a narrower meaning that sustains the purpose and legal effect of the contract. As the requirement of delivery only against production was a 'cardinal purpose' of a bill of lading, he held that exempting the carrier in all circumstances of liability for misdelivery would mean to seriously undermine the purpose of bills of lading (incidentally, this 'presentation rule' based reasoning would naturally not directly apply to sea waybills).

Carewins v Bright Fortune Shipping illustrates the very considerable difficulties carriers face when drafting causes that exempt them from liability for misdelivery. The phrase 'whether or not through the negligence of the carrier' might have been added with the intention of making doubly sure that the carrier escapes liability, possibly in knowledge of Lord Wilberforce's judgement in Ailsa Craig Fishing v Malvern Fishing (1983) that an exemption clause had to be worded most clearly and unambiguously' in order to exclude liability for negligence. Unfortunately for the carrier, this additional phrase in fact weakened clause 2(b).

For good measure, Mr Justice Ribeiro added that the word 'misdelivery' itself could be seen as ambiguous, meaning either nothing more than inadvertent misdelivery, or referring to any kind of incorrect delivery, including 'deliberate misdelivery'. Should the carrier define the term 'misdelivery' in the definition clause of his bill of lading, or would this create only more ambiguities? It seems he is caught in the dilemma of 'I've said too much, I haven't said enough'.

This case is a rather extreme application of the 'contra proferentem' rule; maybe the carrier's chances would have been better had his liability for misdelivery not been excluded, but merely limited. Great thought must be given to wording such clauses. TTT

3. Theft of a temperature-controlled trailer from a terminal

The Club has recently become aware of a case of documentary fraud to the detriment of a terminal in Europe. One morning, a temperature-controlled trailer was checked into the terminal for shipment on the cross-channel service that evening. In the afternoon, a man who claimed to work for the terminal's client called the terminal asking for the trailer not to be put aboard the vessel but instead released for road carriage. The terminal replied that a fax was required for the cancellation of the booking on the vessel and for the container's release to a vehicle.

The terminal then received a one page fax message with the client's header (contact details and logo). The hand written and signed fax message gave the correct trailer number and requested

release to a specified vehicle, which duly arrived at the terminal only a few minutes after the fax. Within ten minutes the vehicle left the terminal premises with the temperature controlled trailer. The next day it became clear that the terminal's client was unaware of the fax message and that the trailer was taken by thieves. The terminal is now facing legal action.

The TT Club's sheet 'Stop Loss 7 - Container loss' states: 'if customer checks have been performed or the customer is well known to you but the haulier is not, then contact the customer for verification of haulier'. Thus, in order to establish whether the phone call and fax really did come from its client, the terminal should have double-checked with its known contact person at its client's whether the changed instructions were genuine.

The sheet 'Stop Loss 7 - Container loss' is available free of charge from the Club's website in English, Russian and Chinese:

http://www.ttclub.com/TTClub/public.nsf/HTML/CWOG-6Y6G9A?OpenDocument

4. 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.

Peter Stockli
Editor for the TT Club

TT Talk is a free electronic newsletter published as occasion demands, by the TT Club, 90 Fenchurch Street, London, EC3M 4ST, United Kingdom.