Welcome to the latest edition of TT Talk, number 62 in the series.

1. House of Lords goes straight to the point

The long odyssey of the good ship Rafaela S, which started in Felixstowe in January 1990, has finally come to an end with a ruling by the House of Lords.

Four containers of printing machinery, carried on the ship as part of a through movement from Durban, South Africa, to Boston, Massachusetts, were found to be damaged on arrival. The carrier, Mediterranean Shipping Co. SA, ("MSC") had issued a bill of lading for the consignment, showing the buyer, J.I. MacWilliam of Boston, as the consignee. In other words, the bill was classed as "straight" or "non-negotiable". When presented with a claim, MSC contended that, because it was a straight bill, the document did not fall within the compulsory application of the Hague-Visby Rules. Article I(b) of the rules states that they apply "only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea…" MSC argued that, because it was not negotiable, a straight bill of lading was not "a document of title" and was therefore outside the scope of the rules. As a result, they said, the contract was subject to the United States' COGSA, giving a maximum compensation of USD 2,000 instead of the rather more generous USD 150,000 available under the Hague-Visby rules.

The case went before arbitrators, who agreed with MSC; and from there to the Commercial Court, which also found in the carrier's favour. As reported in TT Talk No. 34, the appeal court overturned the lower court's decision; MSC then appealed to the House of Lords. In a unanimous decision delivered on February 16, the House upheld the appeal court's judgment.

The House considered the document issued by MSC. It was headed "Bill of Lading"; it contained clauses referring to "this bill of lading"; it bore the usual time-honoured attestation clause found on bills of lading ("the number of bills […] has been signed, all of this tenor and date, on of which being accomplished, the others to stand void"); and it contained the sort of clauses usually found on bills of lading. In short it looked like a bill and it smelt like a bill: therefore, the judges concluded, it was a bill. They found it rather strange that MSC was trying to deny that their document was not a bill, or would only be a bill if it were addressed "to order".

Lord Rodger of Earlsferry pointed out that the objective of the framers of the Hague (and Hague-Visby) rules had been to create a uniform set of minimum contractual standards, principally to protect third parties who became parties to the contract at some stage during the transport. Contracts of carriage were normally created between the shipper and the carrier, yet it was effectively the consignee who carried the risk of loss or damage. In the era before the Hague rules, he might find that his right to compensation had been severely restricted – or even excluded entirely – by onerous conditions agreed between the carrier and the shipper. It was mainly to deal with this ill that the rules were formulated. Lord Bingham noted that, while the focus of the Hague rules discussions had been on order bills, straight bills of lading were in relatively common commercial use at the time and the rules contained nothing that excluded them. Lord Nicholls of Birkenhead said that there was no reason why the rules should deny compensation to a consignee under a straight bill, when he would have got it had the bill been transferred to him by endorsement.

The words "or any similar document of title" was intended, their Lordships decided, to extend rather than restrict the class of documents to which the rules applied: they were used

deliberately to frustrate any attempt by carriers to circumvent the application of the rules by inventing some new form of document. However the judges drew a distinction between a bill of lading and a waybill.

The transcript of the judgment can be found on http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd050216/mac-1.htm

A note on the decision is also available on our legal editor's website DMC's CaseNotes http://www.onlinedmc.co.uk/

2. Mobile phones and mobile cranes don't mix

In recent months a number of claims have been reported to the Club arising from collisions involving cranes, RTGs, straddle carriers, fork-lift trucks and other handling equipment. In several of them, it is thought that the driver had been distracted by using a mobile (cell) phone in the cab; in one instance, unbelievably, in composing a text message.

It is widely recognised that the use of mobile phones is a dangerous distraction; in many countries people are banned from using them while driving on the public highway. The risks to operators of heavy machinery have possibly been less recognised up to now, maybe because the drivers themselves are relatively isolated in cabs where they cannot be observed, maybe because these lumbering giants are not perceived to present the same kind of risk as a fast-moving car. Yet the dangers are real, and the consequences can be severe: in one case a straddle carrier toppled over as the result of a collision, seriously injuring the driver.

Stevedores and other personnel working on the terminal are also at risk - or they could put their workmates' lives in jeopardy - if they are distracted from their job by a mobile phone. Handling containers requires constant all-round observation and attention to the working environment: it is not the time to be involved in discussions about domestic matters or after-work activities.

The Club is recommending all members to review their own working practices relating to employees' use of mobile phones, and to consider introducing procedures to discourage or prohibit their use in operational areas.

3. Who pays for delays?

The shipping and maritime law community is beginning to pay more attention to an issue that arises from ISPS and the enforcement of other security
legislation: who pays when a ship and its myriad cargoes are delayed by government officials acting on suspicion of some danger which turns out to be unfounded?

Where blame can be apportioned the tried and tested rule - that the responsible party pays - still holds good. Indeed, the rule will be found expressed in most contracts of carriage or affreightment. So, if the ship is detained because its ISPS documentation is incorrect or inadequate, the shipowner bears the cost but if it was the shipper's declaration of the cargo he loaded that caused the problem, the buck (or, more likely, the hundreds of thousands of bucks) will stop with him.

But what happens where the cargo has been properly declared and blame cannot be apportioned? Readers will be familiar with the case, reported in TT Talk No. 57, of the consignment of south American lemons: someone (falsely) claimed they posed a bioterrorism hazard and, as a result, the carrying ship was delayed for several days. Something similar happened two years ago, when the 2680-TEU Palermo Senator was denied entry to New York for three days because an inspector had detected radio-active emissions from a

container. It was established that the cargo of ceramic tiles contained natural amounts of low-level radiation from the clay used in their manufacture.

Keeping a several-thousand TEU ship and its crew idle for several days is an expensive business and, inevitably, its owners and the thousands of shippers and consignees who have suffered as the result of the delay will be looking for compensation. But could you really say that in the above cases the shipper of the lemons or the manufacturer of the clay tiles should bear the entire financial responsibility?

In a recent article in the Journal of Commerce, Peter Tirschwell, vice-president and editorial director of Commonwealth Business Media's magazine division, looked at the issues and cast doubt on some of the legal steps now being proposed by carriers and shipowners to impose obligations on shippers. He wrote that one prominent maritime lawyer is advising his ocean carrier clients to amend their bill of lading conditions to require a much greater degree of disclosure in cargo declarations. The lawyer suggests that shippers should report to the ocean carrier any characteristics in their cargo that might cause a security problem, even if it is otherwise legal, properly declared and manifested. He does however acknowledge that this will not be a solution in all circumstances, as the security authorities sometimes do not even reveal the specific reasons for their suspicions and the consequent detention of the ship.

Others disagree with the proposal. Tirschwell quotes another attorney, Tom Willoughby of Hill Rivkins and Hayden LLP, as saying “it is hard to imagine how something that turns out not to have been a problem to begin with can be laid at cargo's door. [Carriers] are in the business of carrying commodities, and they are presumed to have knowledge of this sort of thing. They are free to accept the cargo or reject [it].”

We cannot ignore the risk that a terrorist group might misuse one of the hundreds of thousands of containers being landed daily for its own sinister ends. But the organisations responsible for security need to maintain a balance if they are not to alienate the shipping community.

One wonders how much a cargo-owner would have to declare. It requires a remarkable amount of prescience to know exactly what might worry or alarm an inspector in some far-off port. How far should shippers be able to rely on an inspector’s ordinary knowledge of cargoes and commodities? Or should they declare everything, even that which is blindingly obvious? On a recent flight, the attendant gave me one of those cellophane-wrapped packets of peanuts to go with my in-flight drink. Printed on it was the legend: “DANGER: may contain nuts”. Will shippers in future have to issue similar warnings about their products?

This is clearly an issue that affects and divides shipowners, NVOCs and cargo-owners. What are your views on it? TT Talk welcomes contributions to the debate: please send your views to tttalk@ttclub.com. We will publish a selection of views in a future edition. If you wish to remain anonymous, please say so in your email.

4. How many boxes, how many moves?

A question frequently asked is: just how many shipping containers are there in the world? Our friends at ICHCA International have tried to provide a definitive answer based on best estimates from a number of industry sources. They estimate that there are about 10.85 million maritime containers currently in use, split roughly 49:49 between 20-foot and 40-foot units (with 45-foot containers accounting for the remaining 2%). In TEUs, the total figure is 16.4 million. There are another roughly 834,000 TEU of “non-maritime” containers.

ICHCA International also estimates that there are between 275 and 300 million container movements in the world in a single year.

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 tttalk@ttclub.com. We look forward to hearing from you.

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