

## Welcome to the latest edition of TT Talk, No. 63 in the series.

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### 1. Time-bar clause upheld

In TT Talk No. 61, our legal editor David Martin-Clark reported on a case where a widely-drafted exclusion clause had been upheld by the English High Court. We are indebted to the London law firm of Holmes Hardingham for drawing our attention to another case in the Commercial Court where a widely-drawn clause - here relating to a time-bar - has been upheld. It is also a reminder to check the time-bar provisions in contracts, and to make sure you do not lose a claim through slothfulness.

Bhatia Shipping contracted with Alcobex for the carriage of a consignment of goods from Mumbai, India to the UK. Bhatia issued two multimodal transport documents (MTDs) to Alcobex, under which it undertook to deliver the goods in exchange for one of the three originals issued in the case of each MTD. However, when the consignment arrived in the UK it was released, on or before 17 May 2002, to the consignee without presentation of any of the original documents: as a result, Alcobex was not paid: it alleged misdelivery and conversion of the goods by Bhatia and instructed lawyers in India, but no proceedings were issued at that time.

Clause 22 of the conditions on the reverse of each MTD provided that "any action relating to multimodal transport ....shall be time-barred if judicial proceedings have not been instituted within a period of nine months after:

- (1) ...
- (2) the date when the goods should have been delivered, or
- (3) the date on and from which the party entitled to receive has the right to treat the goods as lost."

Another clause provided in effect that any action could be brought in either India or England.

On 4 April 2003, Bhatia started proceedings in England against Alcobex seeking a declaration that it had no liability, because the time-bar had become operative. Nearly ten months later, on 30 January 2004, Alcobex started its own legal action against Bhatia in India. Bhatia elected to go to trial in England in order to get an order that was enforceable in India. The court agreed that clause 22 was in "very wide terms" but that it encompassed whatever claim Alcobex might make in respect of the misdelivery, whether in contract or in tort.

As the claim was essentially for wrongful delivery, the time-bar had to be calculated in accordance with either sub-clause (2) or (3). The start date was, at the latest, 17 May 2002 and it therefore became effective on 17 February 2003. Because Alcobex had not started legal action before that date, its claim was extinguished.

Generally, courts have shown themselves more willing to uphold clauses setting down a time bar than they have with clauses limiting or excluding liability. The rationale behind this is that time-bars achieve finality and protect a carrier against stale claims. Time-bars put the onus on the claimant to get moving but they can also usually be extended by mutual agreement after an incident has occurred.

More on [http://www.onlinedmc.co.uk/bhatia\\_shipping\\_v\\_\\_alcobex\\_metals.htm](http://www.onlinedmc.co.uk/bhatia_shipping_v__alcobex_metals.htm)

## **2. Port Security concerns**

The Club's investigation department, Signum Services Ltd, has alerted us to a smuggling operation in south-east Asia, in which containers are given fake identities.

The gang obtains a container from a shipping line in the usual way but loads contraband cargo into it. The cargo is declared as something else and is ostensibly destined for a distant port; however the container has to be transhipped at a specified transit port in a third country. It is this third country that is the true destination of the contraband. In the third country, the gang obtains a second container from which it removes all the identity marks, including the CSC plate, and replaces them with ones corresponding to the first container; it is then stuffed with the cargo as originally declared. A shipping line seal is then attached in the usual way: although it is similar in appearance, its number does not correspond with the one shown on the shipping documents.

After the first container has arrived at the transit port, the second container is brought illegally into the port area and switched for the first one. Fake release documents are also created to enable the first container (with the contraband cargo) to be removed. The second container is then picked up by the intended vessel and shipped to its destination. Should anyone note the seal change, an inspection of the contents will show that they are in conformity with the bill of lading.

Signum points out that the scam can only work with the connivance of several people at the transit port, who have possibly been bribed to ignore the mysterious comings and goings of ostensibly the same container. It is thought that the change of the second container's identity takes place in workshops that also deal with legitimate container repairs, since all the numbers (including the ones on the roof) are replaced in a professional manner, so that they appear genuine. The CSC plate, on the other hand, can be more readily identified as a forgery, as it is often stuck on with mastic, rather than riveted.

The fact that this kind of operation is possible in ports supposedly subject to rigorous ISPS procedures and controls shows just how much more needs to be done to ensure the safety of the transport chain. If it is possible to extract a container-load of cigarettes or liquor from a theoretically secure terminal area, it would also be possible to insert a container loaded with something more deadly into the transport chain, using exactly the same methods.

One worrying result of this container switch is that, when the first container has been emptied, its identity too can be changed, before it is re-used for some other criminal activity.

## **4. Air Advance Manifest System: quantities to be reported**

The US Customs and Border Protection service has posted information on its website, setting out the criteria for the number of packages to be recorded as part of the Air Advance Manifest System (Air AMS). Full details can be found in the form of an answer to a frequently-asked question on : [http://www.cbp.gov/linkhandler/cgov/import/communications\\_to\\_industry/advance\\_info/air\\_faq\\_cargo.ctt/air\\_faq\\_cargo.doc#\\_Toc87343707](http://www.cbp.gov/linkhandler/cgov/import/communications_to_industry/advance_info/air_faq_cargo.ctt/air_faq_cargo.doc#_Toc87343707)

Readers will be aware of the problems encountered in enumerating packages for carriage by sea, in steering between the rocks of the AMS (requiring enumeration of sometimes quite small packages) and the shoals of the Hague-Visby rules (where liability is calculated on the number of packages affected). Fortunately the problem does not arise to such an extent in air carriage, as the limitations of liability under both the Warsaw and the Montreal Conventions are calculated only on the basis of weight.

## **5. Cyanide shipper fined**

News reaches us from New Zealand of the prosecution of a company for shipping dangerous goods on one of the ferries between the North and South Islands. B.J.Dakin of Canterbury was fined NZD 20,000 (about USD 14,500) for breaches of safety regulations. It had despatched 13 tonnes of cyanide, cyanide waste products and chromic acid in insecure and uncertified plastic containers from Christchurch to Wellington. Alarmingly, it was only after the ferry crossing - when the cargo had arrived at Lower Hutt - that the danger was discovered, and then only as the result of a handling accident.

## **6. Longshoreman leakage threatened port shutdown ...**

By way of contrast to the last item, the note in TT Talk 60 about how melting snow caused a hazmat incident in Pontoon Beach, Illinois rang bells for a reader in Seattle, Washington. A surveyor, he recalled how he had been contacted by a local terminal operator to investigate reports that a container was leaking hazmat liquid. He told the terminal manager not to call the authorities until he had checked the situation and determined the origin of this leakage. As has previously been reported in this newsletter, hazmat incidents can be very disruptive - and therefore very expensive - to normal operations. Fortunately the terminal heeded the advice and did nothing more than clear the immediate area before the surveyor arrived. It took him five minutes to identify that the leaking substance was urine, and that the source was most probably "a bladder failure on the part of one of our longshoremen, too lazy to find a urinal".

## **7. 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](mailto:tt.talk@ttclub.com). We look forward to hearing from you.

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