Welcome to TT Talk, No. 72 in the series.

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1. Court holds shipper liable for containership fire

Harry Lee reports on the recent decision of the US district court for the Southern District of New York in a case brought by the owners of the container ship DG Harmony against PPG Industries Inc, a manufacturer of sodium hypochlorite. The ship had caught fire after containers of the product shipped by the defendant had exploded. The fire burned for three weeks: the ship and almost all its cargo was a total loss. Fortunately the crew all survived.

The court in its judgment on 18 October 2005, had no hesitation to hold the manufacturer fully liable for the consequences, with strict duty being highlighted again as the major ground for liability (along with failure to warn and negligence).

Calcium hypochlorite is used for water disinfection, particularly in swimming pools. It is a highly unstable and strong oxidising substance and, in its various forms, is classified as a class 5.1 oxidising substance under the IMDG Code. It can self-decompose to generate heat can thereby create a dangerous runaway reaction.. The higher the surrounding temperature it is exposed to, the greater the rate of decomposition.

The manufacturers had declared the shipment to the carriers in accordance with the IMDG code in force at the time. (Since then, the regulations for this commodity have been amended). The carrier stowed the containers in accordance with the regulations, and the court found that no-one connected with the ship had been negligent. So what went wrong?

At the time the code only recommended that the commodity be stored away from sources of heat "where temperatures in excess of 55 deg C for a period of 24 hours or more will be encountered". The ambient temperatures in the hold rarely exceeded 40 deg C. However, the commodity had been packed straight off the production line, when it was still warm, into 145 kg (300 pound) fibreboard drums which were stacked three high in the container. The containers were unventilated but even if they had been the drums were stowed so tight that air could not circulate sufficiently to carry away excess heat. The shipper had not carried out any tests to establish whether this method was safe and had failed to consider that stowage in this fashion actually enhanced the risk of accelerating decomposition and a runaway reaction. The court held that the manufacturer had been negligent by failing to investigate the possible risks of this method of stowage.

The judge ruled that the manufacturer knew that the product was unstable, had previously experienced shoreside fires (and that the product had already been implicated in another serious vessel fire) as well as having considerable experience of its packaging and storage, and that in consequence he should have given the carriers better advice about the foreseeable risk of explosion. As the manufacturer of the product, the shipper had much more knowledge of its dangers, and should have made sure that the carrier was aware of the special risks. The shipping line's agreement to carry this commodity had been based on inadequate information from the shipper and could not be considered "informed consent". The court reiterated that shippers, when presenting dangerous goods for shipment, had a strict duty to give the carrier all the information he might require in order to give proper consent. Indeed, this breach alone would have sufficed to find the shipper liable in this case even without considering any element of negligence.

Members should be aware that this decision will impact on them if they fail to obtain full and complete information from their manufacturer clients before offering dangerous cargo to carriers.

The full decision can be read on:
http://www.tradewinds.no/multimedia/archive/00071/In_re_MV_DG_Harmony__71368a.pdf

An assessment of this case will appear shortly on David Martin-Clark's website DMC's CaseNotes.

2. New Hazmat rules in the US

We are indebted to the Hazardous Technical Information Services (HTIS) bulletin issued by the Department of Defense in Washington DC for the news that convicted spies, traitors and murderers are no longer allowed to drive vehicles carrying hazardous materials in the USA. While it is unlikely that many people in these categories will be enjoying much freedom at all in the foreseeable future, let alone the freedom to drive vehicles, there is a serious point behind the new rules.

Enacted under the provisions of the Patriot Act, the rules issued by the Transportation Security Administration stem from the post 9/11 realisation that a truckload of hazardous material in the wrong hands could cause major devastation if it were to be detonated in, say, a city centre or a military installation. (The Club has itself voiced similar concerns and urged members to exercise care over the physical security of hazmat consignments as well as their safety.)

Under the new rules, which came into force on June 1, all drivers engaged in the movement of any hazardous materials, from petrol (gasoline) tankers to dangerous chemicals and high explosives, will have to undergo FBI checks for criminal records and be fingerprinted before being granted a permit. These rules apply to anyone requesting a new permit or renewing an expiring one after June 1 and are in addition to the requirements for training in technical and legal issues relating to the safe transport of hazmat. Those with certain criminal convictions, such as those mentioned above, will be absolutely prohibited from obtaining a hazmat permit, while anyone found guilty of a less serious felony will be temporarily disqualified.

Members should of course always exercise caution when entrusting their clients' cargo to hauliers, but with hazmat shipments this recommendation is strengthened. Before asking any haulage company to move a consignment of hazmat in the USA you must check that both the company and the individual drivers concerned all hold the necessary documentation attesting to professional competence, safety skills and liability insurance, and that the drivers have the appropriate permits.

http://www.dscr.dla.mil/htis/Jul-Aug05.pdf

3. International legal rules collide: no lawyers hurt

The trouble with international transport is that it is, well, international. That's fine in the 99.9% of the movements that pass off without trouble, but when things go wrong you find that people at either end of the supply chain, each familiar with his own country's judicial systems and legal concepts, have different views as to their legal rights. An argument then ensues about the nature of the contract and the amount of compensation due.

The big international transport conventions - the Hague/Visby rules, the Montreal convention, CIM, CMR etc - were all supposed to remove the difficulties posed by different jurisdictions, by framing a uniform set of rules. For the most part they work, but there is still no international

consensus on the role of freight forwarders and NVO(C)Cs. This disputed territory leads claimants to seek out competent jurisdictions whose legal concepts are more favourable to their cause, a process known to lawyers as "forum shopping". Carriers and their insurers are alive to these tactics and will, if permitted by court rules, anticipate the claimant's action by issuing blocking proceedings in another country.

In his DMC's CaseNotes website, David Martin-Clark reports on a preliminary decision of the English Commercial Court in Royal & Sun Alliance Insurance Plc and Exel Logistique SA v (1)MK Digital SZE (Cyprus) Ltd, (2) Hi-Tec Electronics A/S and others, a case which illustrates both the complexity of some modern transport operations and the difficulty of dealing with the questions of liability and responsibility when two competing systems of jurisprudence collide head-on.

The dispute arose out of the theft of 90 pallets of mobile telephones between Paris and Calais. The consignment, worth about UKP 3.5 million (USD 6.2m), was sold on FOB Larnaca airport terms by a company in Cyprus to a buyer registered in Denmark. The consignment was then flown to Paris, where the buyer made arrangements with Exel for its onward carriage by road to the UK. Although Exel subcontracted the actual carriage, it provided its own security escort. The truck was hijacked at a service station on the A1 motorway north of Paris, while the thieves immobilised the escort vehicle by slashing its tyres.

The claimants argued that Exel's role was that of a "commissionnaire de transports" under French law, rather than as a carrier under a CMR contract. This would have removed the limits set down in the convention and made Exel fully liable for the loss. In November 2004 Exel issued proceedings in London claiming that it was entitled to limit its liability under CMR and also demanding an indemnity from the actual carrier. Three weeks later the cargo-owners issued proceedings in Paris alleging that their contract with Exel was for forwarding services rather than carriage, and was therefore not subject to the compulsory provisions of CMR. Interestingly neither side could agree on the actual destination of the cargo, with claimants alleging that it was actually going to Italy. (The fact that the lorry was heading north to Calais suggests that someone had flunked his geography homework.)

Exel objected to the French proceedings and challenged the jurisdiction of the French courts; meanwhile in Paris lawyers for the cargo-owners similarly challenged the right of the English court to decide the issue. Both the CMR and the European convention on jurisdiction (as well as the new EU directive on the issue) state that the court "first seised" of the case takes precedence over any others.

In its judgment on this preliminary point, the English court held that there was an arguable case that the contract was subject to CMR and that, under that convention's rules, London was an appropriate jurisdiction to hear the case.

For more details see
http://www.onlinedmc.co.uk/rsa_&_exel_v__mk_digital.htm#DMC/SandT/05/50

4. Hong Kong gears up to meet challenge from mainland ports

Our colleagues in Hong Kong report on recent political developments there, designed to attract more cargo to the port, and help combat the increasing threat from competitors in mainland China.

The members of the economic services panel of Hong Kong's Legislative Council (Legco) recently approved proposals calling for a streamlining of the application procedures for river trade vessels entering HK waters; lowering the permit costs by introducing a multiple-entry permit for vessels; reducing port facilities fees for ocean-going vessels; and expanding the role of the port's famous mid-stream operations by establishing new anchorages. Taken together these changes, which have been broadly welcomed by the port and maritime

industries, would mean a revenue loss to the Hong Kong government of around HKD 60.9 million (about USD 7.8 million) a year.

The Hong Kong Shipping News reports that some major companies in the sector believe that the proposals, particularly the multiple entry permit for river trade vessels will attract more shipping tonnage and more cargo to Hong Kong. Others, though, are not so sure and have expressed concerns that the proposals are insufficient to redress the cost differentials between Hong Kong and its competitors along the south coast of the PRC.

Further details available from:
http://www.news.gov.hk/en/category/infrastructureandlogistics/050725/html/050725en06002.htm

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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