INSIGHT

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Calculating Limits of Liability

1. Hague-Visby Rules

On 15 May 2008 the Commercial Court in London released a judgment concerning the method by which the limit of liability under the Hague-Visby Rules should be assessed. The claim before the Court concerned a cargo of corn that had suffered some wetting in transit. Because the cargo had been shipped in bulk and there were no individual packages, the calculation under Article IV(5)(a) was required to be based on the gross weight.

The issue that arose was whether it was the gross weight of the entire cargo that had to be taken into account (as argued by the cargo owner) or just the weight of the damaged cargo, that being the position contended for by the carrier.

The Court held that the words "lost or damaged" in Article IV(5)(a) refer to two different classes of goods – those that have been lost in the sense of "vanished" or "destroyed"; and goods that have been damaged, meaning that they have survived in damaged form. The distinction between the words is not that which applies in contract and tort, where loss means economic loss and damage means physical damage.

On that basis, the limitation sum had to be calculated only by reference to the gross weight of that part of the cargo which had suffered the water damage. The remainder of the cargo was neither "lost" nor "damaged".

Serena Navigation Ltd v Dera Commercial Establishment [2008] EWHC 1036 (Comm), Commercial Court, Burton J, 15 May 2008

2. Carriage of Goods Act 1979

There is a popular misconception that the "unit" of goods for the purpose of calculating the package limitation under the Carriage of Goods Act, is whatever is shown on the consignment note. This is not necessarily so. If the two turn out to be the same, that will be purely coincidental.

Section 3(2) of the Act says that for the purpose of determining the limit of liability of any carrier, the unit of goods is the unit "as accepted for carriage by the actual carrier or, where the carriage is undertaken by more than one carrier, by the first actual carrier, whether or not that unit is subsequently packed, repacked, or unpacked, or otherwise aggregated with or segregated from any other goods, at any stage of the carriage".

This means that in any given case there must be a factual inquiry as to both the point in time that the goods were accepted by the first actual carrier, and then as what the first actual carrier received – which may or may not be the same as what is written on the consignment note. This means that while the consignment note may have some evidentiary value, what it says is not determinative of the issue.

So, in a case where the shipper booked space for one container but delivered 956 cartons and then loaded them into the container at the carrier's premises while under the carrier's partial supervision, the "unit" was considered to be each individual carton.

This can be contrasted with an earlier case where the carrier was presented by the shipper with a loaded and locked container. The unit there was held to be one container.

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In a third case, cartons of cigarettes were placed loose onto a pallet for the purpose of taking them out of the shipper's warehouse to the carrier's truck which was waiting outside. The cartons were then taken off the pallets and loaded individually. The court held that the goods were not accepted by the carrier until they were loaded into the truck, and therefore the carrier had accepted cartons, rather than pallets, for carriage.

Fair Trading Act 1986

The Fair Trading Act prohibits conduct which is misleading or deceptive, or which is likely to mislead or deceive, in relation to the price of goods or services. This was the basis of the Commerce Commission's prosecution of a number of banks and credit card companies in relation to foreign exchange conversion fees, where statements showing overseas purchases and the exchange rate used in converting those to New Zealand dollars did not properly disclose that the "exchange rate" included a fee.

In the transport area, invoices which describe payments made on a customer's behalf as "disbursements" or similar are likely to be considered misleading and deceptive if the amount paid out to a third party is less than the amount invoiced to the customer and there is no proper disclosure of any fee component that has been incorporated.

Invoices like this imply that the carrier or forwarder has simply passed on an actual cost incurred. The same situation will be created if, for example, all airline surcharges are aggregated and averaged by the carrier, leading to an undisclosed over-recovery; or if an airline levies a particular surcharge per master air waybill but the carrier adds it to every house waybill.

There is nothing in the legislation that prevents fees and handling charges from being imposed in any of these situations, provided that there is clear disclosure to the customer. The consequences for breach of the Fair Trading Act are severe. Apart from rendering offenders liable to prosecution by the Commerce Commission, refunds of any amounts unlawfully charged can be ordered to be paid, and there is also the potential for civil claims for damages.

All parties involved in the transport industry should ensure that their practices do not contravene the Act and that their trading terms contain proper disclosure of the basis on which expenses are charged out.

Cargo Insurance

The Joint Cargo Committee in London has released proposals for the revision of Institute Cargo Clauses (A), (B) and (C) and is seeking feedback. The revision document and accompanying draft clauses are available at www.lmalloyds.com. Submissions must be made by **4pm on 31 July 2008**.

Air Waybill Conditions

In our January 2008 newsletter, we noted that IATA resolution 600B would come into force on 18 March 2008, the effect being to make mandatory changes to the form of the neutral air waybill.

One of the amendments made by resolution 600B was a slight wording change to the clause that governs liability. Although that change seemed minor, the effect is that the protection given to those forwarders who issue the neutral waybill when acting as contracting carriers is no longer adequate. Essentially, the new wording creates a gap in any circumstances where an international air convention does not apply.

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IATA has now recommended that this problem be overcome by adding the following to the air waybill:

> *"**NOTE**: If this air waybill is used by a forwarder in a capacity as a contracting carrier for air transportation, any transportation or other service which is not subject to an international air carriage convention will not be subject to the terms and conditions of this air waybill but will instead be subject to the forwarder's general conditions as have already been provided to you."*

Of course, to make this fully effective, the general conditions must exist, be comprehensive, and have been provided to the contracting party. This is essential risk management which should be undertaken as a matter of course and reviewed regularly.

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