Misdelivery and Package Limitation  February 2007

The consequences of misdelivering cargo can be particularly severe for carriers. Importantly, liability arising from misdelivery is not recoverable as of right under the rules of P&I Clubs within the International Group. To make matters worse, it has traditionally been thought that a carrier cannot limit his liability under the Hague or Hague-Visby package limitation provisions in cases of misdelivery.

However, the recent authorities suggest that a carrier may in fact now be able to limit his liability where cargo has been misdelivered. In this article these developments, and a number of other issues that may assist carriers faced with such claims are considered.

It is perhaps appropriate to mention at the outset that subject to the terms of the contract of carriage (which will frequently provide that the Master is to deliver the cargo in return for a Letter of Indemnity), a carrier cannot be obliged to deliver cargo without production of a Bill of Lading, at least without the intervention of the Court (Mots Exports Limited v Maersk) [2000] 1 Lloyds Rep 211).

If cargo is misdelivered, however, the position now appears to be that a carrier will be liable, regardless of the circumstances of the misdelivery. That will be so even where cargo is released against a forged Bill of Lading without negligence on the part of the carrier (Mots Exports).

In view of the foregoing, a carrier’s ability to limit his liability for misdelivery becomes particularly important. There does not appear to be any English authority on whether the limitation provisions of the Hague or Hague-Visby Rules (“the Rules”) apply to a case of misdelivery following discharge. In the above regard, two issues arise.

The first issue arises as a result of the importance of the obligation not to deliver without presentation of a Bill of Lading. Historically, the courts have been reluctant to permit defendants in breach of important contractual obligations to rely upon exclusion or limitation clauses. The doctrine of “fundamental breach” was developed whereby exclusion or limitation clauses were held to be unavailable to a party in breach of such obligations. Thus, in “The Chandrast” [1989] 2 Lloyds Rep 494, where the cargo was damaged as a result of being wrongly stowed on deck, the Court held that the carrier could not limit his liability under article IV Rule 5 of the Hague Rules.

However, “The Kapitan Petko Vovoda” [2003] 2 Lloyds Rep 1. In that case, which also involved wrongful stowage on deck, the Court of Appeal considered that the words “in any event” in Article IV Rule 5 of the Rules do not prevent a carrier from excluding his liability by agreement in respect of loss or damage to the goods “prior to the loading on, and subsequent to the discharge from, the ship”. The question therefore arises as to whether the carrier can limit his liability under the Rules in circumstances where the misdelivery takes place after discharge.

The second issue arises from the temporal element of the Hague/Visby Rules. Article IX(c) and (d) provide that the Rules apply to contracts of carriage by sea “from the time when the goods are loaded on, to the time they are discharged from, the ship”. Furthermore, Article VII confirms that the Rules do not prevent a carrier from excluding his liability by agreement in respect of loss or damage to the goods “prior to the loading on, and subsequent to the discharge from, the ship”. The question therefore arises as to whether the carrier can limit his liability under the Rules in circumstances where the misdelivery takes place after discharge.

The competing arguments are summarised in the decision of the Court of Appeal of New South Wales in “The Zhi Jiang Koi” [1991] 1 Lloyds Rep 493. On the one hand, the language used in the above Articles supports the argument that the Rules do not apply to events occurring before loading and after discharge. This approach was adopted by the Court of Appeal in “The Captain Gregoros”[1990] 1 Lloyds Rep 310.

On the other hand, arguably the Rules apply to the whole of the contract between Shipper and carrier and since the carrier’s contractual obligations include those as bailee up to and including the time of delivery, the immunities provided by the Rules have a corresponding reach. Thus in Pyrene Co Limited v Soindia Steam Navigation Co Limited [1964] 1 Lloyds Rep 321 the Court stated that Rules attach not to a period of time, but “to a contract or part of a contract”.

Therefore, it is arguable that:

Under a port-to-port Bill of Lading (not involving combined transport), Article IV Rule 5 probably does apply to misdelivery after discharge. Any other conclusion involves too mechanical an application of the temporal element of the Rules, which after all strictly speaking apply to contracts rather than periods of time.

Under a combined transport Bill of Lading I think that Article IV Rule 5 would not apply to misdelivery after the commencement of the land leg.

The upshot of the above is that if 12(1) above is correct, a carrier will in principle be entitled rely on the package limitation provisions in the Rules in a case of misdelivery under a port-to-port Bill of Lading. Furthermore, if 12(2) is correct, a carrier may by agreement limit or even exclude his liability for misdelivery after commencement of the land leg of a combined transport Bill of Lading. However, carriers should be cautious to ensure that any such agreement is sufficiently clearly worded to apply to a case of misdelivery.

Assuming the carrier is entitled to limit under the Rules, the next question is, to what extent. Under Article IV Rule 5 of the Hague Rules, the limit is £100 per package or unit. Pursuant to Article IX, that figure refers not to sterling, but to the gold value of £100 ascertained in accordance with the Coinage Act 1971, which is very considerably higher than £100 sterling. Where COGSA 1924 or the Hague Rules as in the 1924 Convention are incorporated into a Bill of Lading with paramount effect, a term limiting liability to £100 sterling will be null and void under Article III Rule 8 (“The Rosa S” [1969] 914 419). In consequence, the Hague Rules package limitation will often not assist a carrier.

However, Bills of Lading commonly contain a general paramount clause providing that “the Hague Rules contained in the International Convention … dated Brussels 26th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply ….”.

The difficulty this wording gives rise to in relation to the word “compulsorily”. In particular the Hague Rules do not provide for compulsory application by reference to the place of destination.

Nonetheless, in the Australian case of Hi-Fert Pty Limited v United Shipping Adriatic Inc New South Wales, the Court considered that the scheme of the above provision was as follows: [1998] 89 Federal Court Reports 166,
have the Hague Rules been enacted in the country of shipment? If so, the Rules as enacted apply to the Bill of Lading.

If the Hague Rules have not been enacted in the country of shipment but have been enacted in the country of destination, then the Hague Rules, as enacted in the country of destination, apply to the Bill of Lading.

If the Hague Rules have not been enacted in the country of shipment or destination, then the terms of the Convention apply to the carriage under the Bill of Lading.

This decision may be of considerable assistance to a carrier where, for example, the cargo was shipped from a non-Hague Rules country to a Hague Rules country such as, say, Nigeria. In that case, Articles IV Rule 5 and IX of the Schedule to the Nigerian Act of 1923 would apply, namely the gold value interpretation of 200 Naira per package or unit, which would be very considerably less than the gold value of £100.

The meaning of the phrase "per package or unit" was also clarified in the recent Australian decision *El Greco v Mediterranean Shipping* [2004] 2 Lloyds Rep 637. The case is potentially helpful to a carrier. In essence, unless a Bill of Lading "enumerates" the packages or units in a container, and indicates how they have been packaged or unitised, the container itself will be the package for limitation purposes.

In summary, contrary to previous thinking it now appears at least arguable that a carrier may rely on the Hague/Hague-Visby package limitation provisions in misdelivery cases. Furthermore, the extent to which a carrier can limit his liability may be greater than it first appears. For these reasons the consequences of a misdelivery claim may no longer be quite so severe as they were.

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