Logistics

February 2014

LOGISTICS BULLETIN

Welcome to the February edition of our Logistics Bulletin.

The regulation of container weight declarations will continue to be topical this year and we analyse the compromise approach recently decided at the IMO. We look at the weight verification methods suggested by the IMO and how regulation is likely to be implemented and enforced. We then move on to explore what happens when the cause of cargo loss or damage is unclear and look at how the courts decide between competing theories of causation in light of two recent English Court of Appeal decisions.

The negotiation of exclusion clauses can be protracted, but it remains vital not to lose sight of whether these clauses will work in practice. We look at exclusion of consequential losses and the key points parties need to keep in mind when drafting. We then review the position of negotiations "subject to contract" and how best to ensure parties to negotiation remain free to walk away until a mutually acceptable formal contract has been signed.

Finally, we look at the impact to date of the UK Bribery Act and the importance of corporate compliance in order to avoid falling foul of the Act.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin or your usual contact at HFW.

Craig Neame, Partner, craig.neame@hfw.com
Daniel Martin, Partner, daniel.martin@hfw.com
Justin Reynolds, Partner, justin.reynolds@hfw.com

holman fenwick willan hfw

Mandatory container weighing

HFW last looked at the issue of container safety and the misdeclaration of container weights in the January 2013 issue of the Logistics Bulletin, but following the conclusion of the IMO Subcommittee's meeting on Dangerous Goods, Solid Cargoes and Containers (DSC 18) on 20 September 2013, we can now provide an update on these issues.

Misdeclared container weights have been a long-standing problem for the transportation industry as they present safety hazards not only for ships and their crews but for other cargo on board as well as workers in port facilities handling containers and on roads. Incorrectly declared weights inevitably lead to incorrect ship stowage and in some cases cause, or contribute to, accidents.

This led the shipping industry to call for amendments to the Safety of Life at Sea (SOLAS) Convention by introducing mandatory weighing of all containers, a proposal supported by the World Shipping Council (WSC) and the Global Shippers Forum (GSF). Both the European Shippers Council (ESC) and Asian Shippers Council (ASC) opposed this, maintaining that it would be costly and ineffective, causing an administrative burden on shippers.

DSC 18 resolved this disagreement by proposing a compromise: shippers will be required to verify the gross weight of a container and state this value in the shipping document. Failure to provide or obtain such a value will result in the container not being loaded onto the ship. DSC 18 conceded that containers carried on chassis or trailers driven on or off Ro-Ro ships engaged in short international voyages should be exempt from the weighing process.

Incorrectly declared weights inevitably lead to incorrect ship stowage and in some cases cause, or contribute to, accidents.

MATTHEW GORE

New paragraphs will be added to SOLAS Regulation VI/2 Cargo Information to this effect.

DSC 18 suggested two methods for weight verification of containers before they are loaded on board. The first will be weighing a packed container using calibrated and certified equipment. The second will entail weighing all packages and cargo items, including the weight of pallets, dunnage and other securing material packed in the container, and then adding the tare weight of the empty container to the total weight of its contents using a certified method approved by the competent authority of the state in which the container is packed. This will have the added flexibility of not requiring every container to be weighed, thus reducing the time and cost of compliance.

Implementing either method should be relatively straightforward for shippers using audit-based system application product (SAP) systems as they will be able to adapt their existing systems to record obtaining and documenting the weight of packed containers.

DSC 18's decision has nevertheless divided opinion. The GSF and WSC are satisfied this decision provides a workable solution which can be adopted without significant costs or delays in the supply chain.

However, the International Transport Workers Federation (ITF) deemed the decision unsatisfactory, as they say it allows governments to opt out of the "gold standard" of mandatory weighing and instead adopt the lesser measure of certifying containers through an unformulated process of verifying the weight at unspecified times and places along the transport route. They say this completely undermines the proposal, as it is significantly easier to apply but has a higher error margin than the former.

The ITF also expressed concerns, (shared with the ESC) about the lack of guidance regarding who, how and at what stage the weight will be certified, to ensure a standardised manner of container weighing. Another concern is what, if any, the repercussions will be for those who misdeclare.

Some spreader manufacturers have suggested that the answer to 'how' could be found in weighing sensors, by installing sensors on spreader twistlocks to measure the weight of containers, with high accuracy, as part of the regular lift process.

Also opposing DSC 18's decision is the ESC, claiming that a significant improvement could only be made if shipowners took into due consideration during stowage planning the shipper's verified weight information, the most up-to-date information available, instead of the booking weight. The ESC also suggested DSC 18 wrongly overlooked the matter of proper stowage altogether.

Industry experts have already called for additional guidance in relation to where containers should be weighed: the shippers' premises, en-route to ports during inland transportation or at the container terminal. Initially it was thought that the weighing process had to take place at the port but that could cause pinch points, especially at congested ports. Industry representatives agreed that parties in the supply chain need to work together to reach a solution acceptable to all.

The IMO's Maritime Safety Committee is set to approve the draft amendments in May 2014 and adopt them in November 2014. These will likely take effect in July 2016, giving ample time for shippers to arrange for any necessary weight verification systems to be implemented into their supply chains.

The DSC 18 proposal is overall likely to improve container safety, despite the aforementioned perceived weaknesses. It remains to be seen how the IMO will ensure effective implementation of the new measures and importantly, how these will be enforced.

For more information please contact Matthew Gore, Senior Associate, on +44 (0)20 7264 8259 or matthew.gore@hfw.com, or your usual contact at HFW.

Cargo damage where cause of loss is unclear: can the balance of probabilities be satisfied by process of elimination?

Where cargo is lost or damaged in transit the cause of loss will often be clear. However, it is also not uncommon for there to be several different causes that could have led to the loss. For example, in one recent case which we look at below[1], several different causes were suggested for cracking in economisers, with the damage potentially having occurred due to vibration in the road transit or by wind damage on site after delivery.

In cases where there are competing explanations for a particular loss such that it cannot be said definitively how the loss was caused, the Court is left with the difficult task of determining causation. The English Court of Appeal has grappled with these issues in two recent cases and has emphasised that a claimant cannot establish its own preferred theory of causation merely by ruling out all the other causes suggested by the defendants.

First instance Court decisions

In the recent *Ace* case[1], the dispute centred around the issue of whether damage suffered by economisers, intended for use in a waste facility, was the result of vibrations caused whilst the economisers were being transported to the facility by road or by wind damage following the delivery of the economisers to the facility where they had remained on-site and been exposed to the elements for some time. Under the former set of circumstances the Chartis marine policy provided cover, whereas under the latter circumstance the Ace Erection All Risks Policy provided cover.

The English High Court held that the correct approach was to examine the theory of damage caused by vibrations during transit to determine whether it was more likely than not that this was the cause. The judge held that there was sufficient evidence to establish that the road exhibited a degree of roughness to cause the vibrations. The first instance judge therefore concluded that the damage was caused by vibrations while the economisers were on the road. The decision was appealed to the Court of Appeal and we consider that decision in detail below.

A different tack was taken by the English High Court in another recent case on competing causes of damage, which concerned a fire in a recycling centre owned by an English Council ("the Council")[2]. The Council brought proceedings against the estate of Mr Nulty, a deceased electrical engineer who had been working at the centre on the day of the fire, arguing that the fire had been caused by Mr Nulty discarding a cigarette. Mr Nulty's professional liability insurers put forward two alternative arguments regarding the cause of the fire: that it had been caused by an intruder or by arcing from an electric cable.

The Court considered the expert evidence put forward by both sides and concluded that it was highly improbable that the fire had been caused by either an intruder or by arcing from an electric cable (as argued by Mr Nulty's insurers). In contrast, the Court held that there was nothing physically or scientifically implausible

1 Ace European Group v Chartis Insurance UK [2013] EWCA Civ 224.

2 Nulty v Milton Keynes Borough Council [2013] Lloyd's Rep IR 243.

about the discarded cigarette explanation (although it was accepted that it was unlikely that an engineer would behave in this way, especially given Mr Nulty's experience and the fact that Mr Nulty had previously worked as a fireman).

The Court concluded that none of the three suggested causes were "inherently likely" to have caused the fire, but found that the two causes put forward by Mr Nulty's insurers were very unlikely and therefore the probable cause of the fire was Mr Nulty's discarded cigarette. This decision was also appealed to the Court of Appeal.

The Court of Appeal decisions – causation and Sherlock Holmes

In considering the *Ace* and *Nulty* appeals, the Court of Appeal was guided by an earlier English House of Lords decision in *THE POPI M*[3]. In that case the House of Lords specifically rejected what it referred to as the "Sherlock Holmes dictum" approach to causation, according to which "when you have eliminated the impossible, whatever remains, however improbable, must be the truth".

Ace

In the Ace case, the Court of Appeal agreed with the first instance Court's findings and held that there was enough evidence to conclude that the damage to the economisers was caused by the road's roughness. The Court of Appeal held that the Court was correct in directing that where there are two competing theories, and one had been eliminated, the other could be considered the proximate cause if there was sufficient evidence to establish this on the balance of probabilities.

Nulty

The Court of Appeal concluded that the balance of probabilities test requires "that the court must be satisfied on rational and objective grounds that the case for believing that the suggested means of causation occurred is stronger that the case for not so believing". On the question of causation where only circumstantial evidence is available, the Court considered that in these circumstances, the correct approach for the Court to adopt is to look at the whole picture, including any gaps in the evidence, and determine whether factors which support a particular explanation are fully established and what factors detract from that explanation as well as what other possible explanations might exist. Although eliminating all other potential causes may lead to the conclusion that a particular explanation is more likely than not to be true, there is no rule of law that it must do so.

Overall, while the Court of Appeal in *Nulty* did not interfere with the first instance Court's findings of fact regarding the cause of the fire, it did reject the Court's suggestion that as a matter of English law, if the only other possible causes of the fire were much less likely than the discarded cigarette theory, then the discarded cigarette theory must become the probable cause of the fire. The Court of Appeal made it clear that no such proposition of law exists as a matter of English law.

Conclusion

These cases illustrate that where the Court is faced with several competing theories of causation, in order for the claimant to succeed with its claim, the claimant must demonstrate that the particular version of events being relied on is more likely than not to have occurred. It is not sufficient for the claimant simply to show that by process of elimination, the claimant's version of events is the only remaining possible cause. Obtaining early expert evidence on causation will of course be critical in claims where competing causes of causation are suggested and the cause of loss is initially unclear.

Obtaining early expert evidence on causation will of course be critical in claims where competing causes of causation are suggested and the cause of loss is initially unclear.

CRAIG NEAME

For more information please contact Craig Neame, Partner, on +44 (0)20 7264 8338 or craig.neame@hfw.com, or your usual contact at HFW.
Research by Tessa Huzarski, Trainee.

3 *THE POPI M* [1985] Lloyd's Rep 1.



Exclusion of consequential losses

We all know how long and difficult it can be to reach agreement on the wording of an exclusion clause, but the real issue is whether it will work in practice and deliver the desired result.

From a drafting point of view the contra proferentem rule means that if a party wishes to exclude liability for its own negligence, then the clause must contain very clear language.

JUSTIN REYNOLDS

The *contra proferentem* rule

Traditionally, the courts have adopted a restrictive approach to the interpretation of exclusion clauses. When interpreting such clauses, the courts apply the *contra proferentem* rule, which means that if the wording of the clause is ambiguous, it will be resolved against the party who is seeking to rely on it.

The *contra proferentem* rule means that if a party wishes to exclude liability for its own negligence, then the clause must contain very clear language. The best way to ensure the clause excludes liability for negligence is by expressly using the word "negligence" in the clause, or a word which is synonymous with "negligence". Words such as "whatsoever" or "howsoever caused", which are sometimes found in clauses seeking to limit liability for cargo loss or damage and delay may not, depending on the wording of other parts of the contract, extend to cover the negligence of the party seeking to rely on it.

Two limb test in *Hadley v Baxendale*

When drafting an exclusion clause, it is also important to consider the different types of losses which might arise from a breach in order to ascertain which of these are covered by the clause. The decision in *Hadley v Baxendale* distinguishes between two classes of losses, both of which are potentially recoverable: (i) losses which occur "naturally" or as a result of the "usual course of things" following a breach of contract (limb one) and (ii) losses which do not arise "naturally", but are within the reasonable contemplation of both parties at the time they made the contract as being a probable result of the breach (limb two).

Markerstudy Insurance Co Ltd v Endsleigh Insurance Services Ltd[1]

In this case the court had to examine two exclusion clauses and in doing so referred to the *Hadley v Baxendale* two limb test and the *contra proferentem* rule.

First exclusion clause

The first exclusion clause read as follows: *"Neither party shall be liable to the other for any indirect or consequential loss (including but not limited to loss of goodwill, loss of business, loss of anticipated profits or savings and all other pure economic loss) arising out of or in connection with this Agreement."*

In relation to this clause the court considered the words "indirect" and "consequential" and stated that the two words are synonymous and describe losses which fall within the second limb of *Hadley v Baxendale.* The court went on to say that the words in brackets in the clause referred only to indirect losses and were examples of indirect losses and not separate or distinct types of loss.

The decision in relation to this clause seems reasonable given the use of the word "including", which indicates that the words which follow are added for illustration purposes.

Second exclusion clause

The second clause stated that *"Endsleigh will not be liable to Markerstudy [Planet] for any indirect or consequential loss or loss of profit or loss of business arising out of data input errors by Endsleigh".*

Note that this clause does not contain the word "including" and that none of the terms are in parentheses. In relation to this clause, the court had to consider whether the words "loss of profit or loss of business" were qualified by the preceding reference

1 [2010] EWHC 281 (Comm)


to "indirect or consequential losses". In other words, whether (i) the clause excluded all loss of profit or business whether direct or indirect or (ii) only indirect loss of profit or business had been excluded. The court held that the words "indirect or consequential losses" define the kind of loss which is excluded, and it decided that only indirect loss of profit or business is excluded.

The decision in relation to this clause seems unattractive given the word "including" was not used in this clause and the heads of loss look more like (and probably were intended to be) a list of stand-alone losses.

How to draft exclusion clauses?

This case could have some far reaching consequences for parties to logistics agreements and their insurers where the standard terms used or contracts entered into include an exclusion clause worded in a way which is similar to the second exclusion clause. The lesson to be drawn from the decision is that if the intention of the parties is to exclude all loss of profit, as may well have been the case here, then a carefully drafted exclusion clause should be used.

For more information, please contact Justin Reynolds, Partner, on +44 (0)20 7264 8470 or justin.reynolds@hfw.com, or Catherine Emsellem-Rope, Senior Associate, on +44 (0)20 7264 8279 or catherine.emsellem-rope@hfw.com, or your usual contact at HFW.

Subject to contract

The expression "subject to contract" is often used during contract and/or settlement negotiations. But what does it mean, when should you use it and what happens when you use it in the wrong context?

What does "subject to contract" mean?

When the expression "subject to contract" is used, it will, save in exceptional circumstances, be interpreted to mean that the parties do not intend to be bound unless and until a formal written contract/settlement agreement is executed. The expression is commonly used in connection with agreements for the sale of land, but it is not restricted to such contracts. It is also used in connection with agreements for the purchase of goods and services.

In relation to charterparties, an analogous expression is used, "subject to details", and has the same effect as "subject to contract". This will be the case even if the parties refer to a specific standard form of charterparty. For example, in *CPC Consolidated Pool Carriers GMBH v CTM Cia Transmediterranea SA (THE CPC GALLIA)*[1], it was held that the use of the phrase "Conline booking note; subject to details/logical amendments" meant that (i) until the terms and details had been agreed, no contract existed and (ii) the intention was that a formal contract would be drawn up using the Conline form, and amended if necessary to reflect the final agreement.

When should you use the words "subject to contract"?

Given the expression denotes the parties' intention not to constitute a binding contract/settlement agreement until a formal document is executed, it should be used during contract negotiations before a binding agreement is required. Similarly, if the parties are in the middle of settlement discussions, and they do not intend a settlement proposal to be an offer capable of acceptance, which once accepted will give rise to a binding agreement, they should use the expression "subject to contract"[2].

In a recent case, *Newbury v Sun Microsystems*[3], the High Court held that a letter sent to an employee containing an offer to settle a dispute for a specific sum, and a letter of acceptance from the employee, amounted to a binding settlement agreement. In this case the letter included the words, "such settlement to be recorded in a suitably worded agreement". The judge, Mr Justice Lewis, considered these words and decided that they did not mean that execution of that agreement was a condition to the creation of a binding contract. Mr Justice Lewis went on to say that, "…the letter is not expressed to be "subject to contract". Had those words been used, it would have been clear that the terms were not yet binding or agreed until a formal contract was agreed."

What happens when you use it in the wrong context?

The use of the expression "subject to contract" is a pretty good indication that the parties do not intend to be bound, however, in "a very strong

1 [1994] 1 Lloyd's Rep.

2 The parties would also generally use the expression "without prejudice" in the context of settlement negotiations.

3 [2013] EWHC 2180 (QB).

As ever, clarity of intention is vital if the risk of subsequent disputes is to be minimised.

CATHERINE EMSELLEM-ROPE

and exceptional context" the Court may infer that the parties had an intention to be legally bound by the original document, even though it is expressed to be "subject to contract", as it did in *Alpenstow Ltd v Regalian Properties Plc*[4]. The inference that the document was binding, even though it contained the words "subject to contract", was in this case made on the basis that the document laid down an elaborate timetable, imposed a duty on the purchaser to approve the draft contract (subject only to reasonable amendments) and required him then to exchange.

Another example of the courts finding that there was a binding contract can be found in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)*[5]. In this case the draft contract included a clause which was described as "the subject to contract clause". The contract was never signed nor exchanged, and a number of variations to the contract were agreed between the parties during a meeting. A dispute arose and the Court had to decide whether a contract had been concluded. Based on the fact that the price and the "essential" terms of the contract had been agreed and the subsequent conduct of the parties (variations to the contract and the fact that substantial works were carried out), the Court held that there was a binding contract.

Conclusion

The expression "subject to contract", when used in the right context, can be very useful and will (where properly used) afford the parties the comfort of knowing that they are not bound until all terms have been agreed, recorded in writing and a formal document has been signed. However, if the expression is not used or if it is used in the wrong context, then it will be a question of fact whether or not the document is legally binding. As ever, clarity of intention is vital if the risk of subsequent disputes is to be minimised.

For more information, please contact Catherine Emsellem-Rope, Senior Associate, on +44 (0)20 7264 8279 or catherine.emsellem-rope@hfw.com, or your usual contact at HFW.

4 [1985] 1 W.L.R. 721, 730.

5 [2010] W.L.R 753.

Bribery Act: is the first corporate prosecution just around the corner?

Even its most fervent supporters would accept that, at least to date, the impact of the UK Bribery Act has been relatively limited. However, there have been recent signs from enforcement agencies in the UK that things may be about to change, reinforcing the need for vigilance.

The entry into force of the Act resulted in a flurry of revised Codes of Conduct and a tightening of rules on corporate hospitality, in some cases making companies reluctant to engage in even normal and reasonable corporate hospitality, which the Ministry of Justice has always stressed was not the intention of the Act.

As such, we have seen corruption move higher up the corporate agenda, but many have said that the Act will only be treated seriously if companies see that it has teeth and is being actively enforced.

While we are still awaiting the first corporate prosecution under the Act, there have been indications from the Serious Fraud Office (SFO) recently that the position may change before too long.

In October 2013, David Green, the Director of the SFO, said the following: "More generally, the SFO currently has some 13 cases involving 34 defendants (two of which are corporates) in the Court system awaiting their trial. Eight of these trials are listed after April 2014." In the same month Alun Milford, the General Counsel of the SFO, said that "about half of our operational resource is engaged in corruption-related casework."

There appears to be no corporate prosecution against Sustainable AgroEnergy for failing to prevent corruption.

DANIEL MARTIN

There have also been developments which, while short of a corporate prosecution, show that Courts and enforcement agencies are looking closely at incidents of corporate bribery.

In August 2013, four individuals connected with Sustainable AgroEnergy plc were charged with offences under the Act of making and accepting a financial advantage. There appears to be no corporate prosecution against Sustainable AgroEnergy for failing to prevent corruption.

In October 2013, Smith & Ouzman Ltd and four individuals were charged with offences under the Prevention of Corruption Act 1906 (the offences took place between November 2006 and December 2010, so before the Act came into effect) in connection with alleged corrupt payments to win business in Mauritania, Ghana, Somaliland and Kenya.

Most recently, in a decision at the end of November a survey company was criticised by the English High Court because its surveyors contemplated bribing officials in Mumbai. The case did not turn on the bribery allegations and the court stressed that no bribes were paid. It is worth highlighting that, even if bribes had been offered or paid, all of the conduct occurred in the Spring of 2010, before the Act was passed. Nevertheless, the case is a useful reminder that, as a matter of English law, facilitation payments are bribes, however they are described (the relevant emails talked about "suitably greasing the authorities", paying "administrative charges", providing "perks" and making "gratis payments", all of which appeared to be euphemisms for bribes).

All of the above demonstrates the importance of vigilance and adopting (and enforcing) adequate procedures to prevent bribery. While everyone eagerly awaits the first corporate prosecution, no one wants to find that they are in the unenviable position of being forever known as the first company to be prosecuted. Just ask Munir Patel, the first individual to be prosecuted under the Act, who is inevitably mentioned in any discussion of the Act.

For more information, please contact Daniel Martin, Partner on +44 (0)20 7264 8189 or daniel.martin@hfw.com, or your usual contact at HFW.

hfw Conferences and events

HFW Aviation Seminar
Dubai
20 February 2014
Presenting: Sue Barham, Richard Gimblett and Mert Hifzi

12th Intermodal Africa North 2014
Africa
27–28 March 2014
Presenting: Wole Olufunwa

HFW will run its usual Multimodal Seminar programme and dates will be announced in due course.

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
United Kingdom
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888

Lawyers for international commerce hfw.com