Logistics

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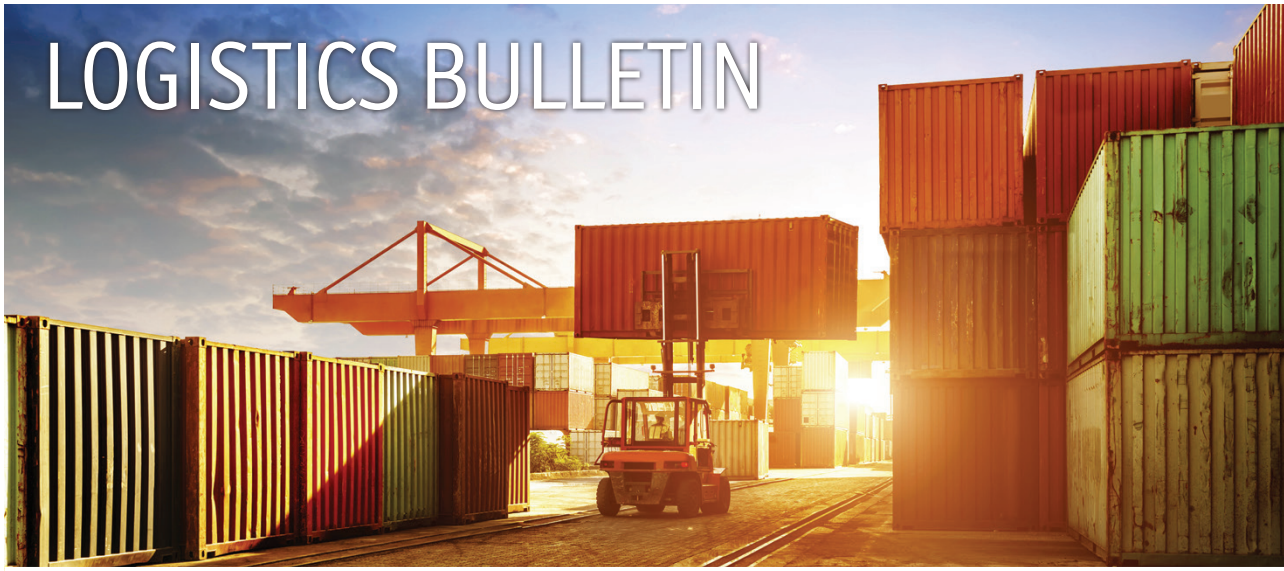
LOGISTICS BULLETIN



Welcome to the November edition of our Logistics Bulletin.

In this edition we begin by reviewing the potential implications of the Insurance Bill for logistics companies. The Insurance Bill has recently been introduced into parliament and, if passed, will make some major changes to the English law of marine insurance. We analyse the key provisions of the Bill and how they could affect logistics companies.

We also report on the future of Chinese ports, in light of new guidelines published this summer by the Chinese Ministry of Transport (MOT), which aim to improve the range and sophistication of services currently offered by Chinese ports.

Logistics contracts such as Warehousing Agreements and Customer Framework Agreements often provide that in the event of a dispute under the Agreement, parties must engage in attempted settlement discussions before commencing arbitration proceedings. A recent English Commercial Court case has considered dispute resolution clauses requiring friendly discussions before arbitration and has decided these can be legally enforceable. We look at the implications.

The new Code of Practice for the packing of cargo transport units (CTUs) has been approved and is expected to be officially published shortly. It looks set to be generally welcomed by the industry. We look at the main requirements of the Code.

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The new Insurance Bill: implications for logistics

Since 2006, the Law Commission has been undertaking a consultation process for the reform of English insurance contract law and during the summer published its draft Insurance Contract Law Bill (the Bill).

At present, an insured has a duty to disclose all material facts prior to the conclusion of a marine insurance contract. The draft Bill replaces this.

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The draft Bill may result in major changes to current insurance law, and would represent the first ever time that insurance law has been substantively altered in one sweep (the Marine Insurance Act 1906 being a codifying act which simply put the pre-existing common law position into the statute books). Using a new procedure whereby Law Commission draft Bills can enter into force as long as they have a broad consensus in Parliament, the draft Bill could come into force before the dissolution of the current government in March 2015.

The draft Bill proposes many changes that will apply to both marine and non-marine insurance and impact on insurance procurement, and the handling of claims, which is relevant to buyers and providers of property and liability insurance. However, there were several changes which were a part of the Law Commission's consultation process that did not make it into the draft Bill, which raises the question as to whether the proposed reform is substantial enough.

What made it into the draft Bill?

Non-disclosure

At present, an insured has a duty to disclose all material facts prior to the conclusion of a marine insurance contract. The draft Bill replaces this. Under the proposed new regime the insured only must make a *"fair representation of the risk"* to potential insurers.

The draft Bill also provides for remedies for the breach of the *"fair representation"* requirement. In the case of deliberate or reckless breach, an insurer will be entitled to avoid the insurance contract. In other, more innocent breaches, an insurer's remedy would be linked to what the insurer would have done had the information been disclosed – for example, the insertion of additional terms, or payment of an increased premium.

Warranties

The current law in relation to warranties in marine insurance contracts often comes as some surprise when explained to those new to insurance. A warranty in a contract of marine insurance must be strictly complied with by an insured and failure to do so will result in the insurer being automatically discharged from further liability under the insurance contract, even if the breach of warranty is not causative of a loss. Take, for example, a warranty that *"all insured locations will be fitted with working intruder detection systems"* – if the system breaks, but is subsequently repaired, the insured would have failed to comply with this warranty, and under the current law the insurer would be able to avoid liability for the claim under the policy – despite the fact that the system had been repaired before a loss.

The draft Bill provides that a breach of warranty will no longer result in insurers being discharged of liability from the time of the breach, rather that liability under the policy is suspended until the breach is remedied.

What did not make it into the draft Bill?

Damages for late payment of claims

The Law Commission had considered giving insureds an entitlement to damages for losses suffered as a result of an insurer's failure to pay a valid insurance claim within a reasonable time – a remedy which has not previously been available to insureds. However, because it was not considered that this was suitable for the special procedure for non-controversial Bills, this has not made it into the draft Bill.

Warranties

In addition to the reform of warranties that have made it into the draft Bill, the Law Commission had also considered

amending the effect of warranties, such that an insurer would not be able to avoid cover in the event of a breach of warranty if a loss was caused by a risk of a type not intended to be covered by the warranty. Again, it was considered that this amendment was not suitable for the special procedure and has not made it into the draft Bill.

Summary

By and large, the Law Commissions proposals will make insurance contract law slightly more favourable to insureds, with an application of fairness and common sense to disclosure and warranties. However, insureds should not treat this as a relaxation of the current law. We suggest that they should continue to work on the basis of the duty of upmost good faith, and make sure their brokers are provided with as much information as possible prior to placing insurance. The insureds must also ensure that they are fully familiar with the terms of their insurance.

Although perhaps an opportunity for more progressive reform may have been missed, the fact that there has been some change and review will probably be in insurers minds when handling claims and therefore have some effect.

The Law Commission has stated that it will continue to work with stakeholders to find a workable solution on the outstanding points, as a result this Bill, if passed, may not be the end of insurance contract law reform.

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The future of Chinese ports

Last year, Chinese ports occupied seven of the top ten places amongst leading ports in terms of box throughput according to a statistical report published in Lloyd's List on 29 August 2014, with Shanghai named as the leading box port of the year once again as in 2012. Besides the well-known ports in Shanghai, Qingdao, Tianjin, Tangshan and Dalian, there are new northern Chinese ports, namely Rizhao, Yantai and Dandong, making it to the top 100 ports for the first time. Among which, the ports of Rizhao, Dandong and Dongguan all achieved double-digit growth in the year 2013. China thus remains at the forefront of the global ports business despite reports of a slowdown in the Chinese economy in recent years.

But according to guidelines published by the Ministry of Transport of the People's Republic of China (MOT) on 10 June 2014[1] (the Guidelines), that is not enough. In the past, the government's policy towards port development has mainly been driven by increasing annual TEU throughput (volume-handling). The newly published MOT Guidelines emphasise that development should shift away from mere quantitative increases in terms of throughput of the kind seen in recent years, to greater qualitative improvements in the level and sophistication of services the ports can offer. The core idea is that each major port will become a more sophisticated service centre (or hub). The Guidelines, which are likely to presage more detailed plans in the near future, encourage Chinese ports to make further investments in Shanghai and the future free trade zones in Guangdong and Tianjin[2] to strengthen competitiveness through:

- Upgrading port transportation systems.
- Promoting the development of green ports.
- Enhancing the safety at ports.
- Promoting more effective logistics, data processing and communications for more efficient port operations.

The formal establishment of the Pilot Free Trade Zone in Shanghai (the FTZ) on 29th September 2013 has marked a crucial step in this development.[3] The old special economic zones, most famously created in Shenzhen, were created back in the 1990s to allow foreign companies to invest in and build factories in China.

The core idea is that each major port will become a more sophisticated service centre (or hub).

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1 http://www.moc.gov.cn/zfxxgk/bnssj/syj/201406/t20140610_1630894.html

2 http://www.china-briefing.com/news/2014/01/23/china-approves-12-new-regional-free-trade-zone-proposals.html

http://www.china-briefing.com/news/2014/01/27/chinas-mofcom-denies-having-approved-12-new-regional-free-trade-zones.html

3 http://business.time.com/2013/09/30/shanghai-has-a-free-trade-zone-so-now-what/



Now this old regime is being re-utilized again as a new idea for bringing forward and promoting cross-border settlement and liquidity of the RMB.

Business entities incorporated locally or overseas (from the banking, leasing, logistics, e-commerce, insurance and/or trading industries) may establish their branch offices in the FTZ and may trade with less stringent financial restrictions, greater freedom and preferential tax treatments. For logistics companies and the port operators, the Chinese government is prepared to open up trades in the FTZ by implementing simpler customs, immigration and quarantine procedures.

These measures will obviously support the opening up of various services sectors at designated ports with lower costs and efficiency. Presumably, these will also attract a wave of investments in the Shanghai FTZ and as well in the Yangshan Bonded Port Area.

All of these changes are expected to create new business opportunities for financiers, insurance providers and logistics companies. Our Shanghai office would be pleased to assist with enquiries on setting up for business in the Shanghai FTZ.

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Research by Irene Tse, Trainee Solicitor.

Dispute resolution provisions in logistics contracts: friendly discussion before arbitration?

Long-term, complex or high value logistics contracts such as Warehousing or Customer Framework Agreements often contain a provision obliging the parties to engage in certain steps before the commencement of proceedings in the event of a dispute under the Agreement. Must parties comply with a clause requiring them to engage in "friendly discussion" before commencing arbitration? In light of the recent English High Court decision in *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*[1], which boldly departs from the approach normally taken by the English courts, they may now be obliged to do so.

In 2010, Prime Mineral Exports Private Limited (PMEPL) commenced ICC arbitration proceedings against Emirates Trading Agency LLC (ETA) under a long-term contract (LTC) relating to the purchase of iron ore. ETA subsequently applied to the High Court under s.67 of the Arbitration Act 1996 challenging the tribunal's jurisdiction based on the contention that the LTC contained a dispute resolution clause requiring the parties, as a condition precedent, to engage in time-limited friendly negotiations before referring the dispute to arbitration.

The LTC clause in question stated as follows: *"In the case of any dispute or claim arising out of or in connection with or under this LTC...the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any Party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim. If no solution can be arrived at between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration."*

ETA contended that the condition precedent to engage in time-limited negotiations had not been satisfied before arbitration proceedings were issued. PMEPL in turn argued that the dispute resolution clause was a mere agreement to negotiate, rather than a condition precedent, and too incomplete and uncertain to be enforceable. But if it was enforceable, it was PMEPL's position that it had been complied with.

The Court held that the LTC dispute resolution clause was enforceable, but that it had been satisfied by the parties' pre-issue negotiations. Having distinguished a number of English authorities, which would otherwise have bound the Court, the Judge found the clause to be complete (with negotiations subject to the "identifiable standard" of good faith, namely fair, honest and genuine discussion), certain (due to the inclusion of a time frame and clear terms), and, overarchingly, in the public interest.

Interestingly, the Court appeared to be persuaded by international case law relied upon by ETA in support of their argument that the condition precedent was enforceable, most notably the Australian case of *United Group Rail v Rail Corporation New South Wales*[2], which concerned a similar clause requiring the parties to undertake *"genuine and good faith negotiation with a view to resolving the dispute"*.

1 [2014] EWHC 2104 (Comm).
2 (2009) 127 Con LR 202.

Emirates Trading Agency LLC v Prime Mineral Exports Private Limited will clearly be of interest to all parties with contracts containing tiered dispute resolution clauses requiring pre-emptive friendly negotiations in good faith, and within a limited period of time. The judgment demonstrates that an agreement to discuss settlement can be binding, although it remains to be seen whether the Court's reasoning will be adopted by other judges interpreting similar dispute resolution clauses.

Nevertheless, what is clear from this judgment is that certainty in the parties' intentions and the wording of the clause is key. (For example, the Judge drew a distinction between the inclusion of the words *"may"* and *"shall"* in the clause and the parties' obligations in relation to the dispute resolution process as a result.) Therefore, a party seeking to negotiate a clause which starts the dispute resolution process with "friendly" (and potentially time-limited) discussions should try to agree clear wording setting out a straightforward procedure and unambiguous time frame. Parties to existing contracts which contain time-limited dispute resolution clauses need to be aware that such clauses may now impose condition precedents to be satisfied before issuing legal proceedings.

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The new CTU Code

The 1997 IMO/ILO/UNECE "Guidelines for packing of cargo transport units (CTUs)" (1997 Guidelines) are being replaced by the new IMO/ILO/UNECE Code of Practice for the packing of CTUs (CTU Code), which is fairly comprehensive in nature. It imposes key common sense requirements upon many parties, including:

- Arrange for a safe working environment.
- Check that the CTU and any securing equipment are in sound condition.
- Select the most appropriate CTU type for the specific cargo.
- Pack dangerous goods near the doors of the CTU where possible.
- Do not concentrate heavy cargo over small areas of the floor.
- Do not use securing or protection equipment which is incompatible with the cargo.
- Affix required placards, marks and signs on the exterior of the CTU.

In order to counter an 'out of sight, out of mind' culture, the CTU Code sets out a clear chain of responsibility. This chain attaches specific obligations to the various parties in the maritime supply chain: consignor, packer, shipper, road haulier, rail haulier and consignee. This is a positive change, as where the cause of the cargo damage can be identified then authorities will more easily be able to impose liability on a particular party. It is hoped that the increased likelihood of accountability will promote higher standards of CTU transportation.

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The CTU Code will be one step behind a mandatory UN instrument. It has been approved by the United Nations Economic Commission for Europe (UNECE) and received approval by the International Maritime Organisation's (IMO) Maritime Safety Committee earlier this year. The International Labour Organisation (ILO) approved the CTU Code earlier this month and accordingly the CTU Code will be officially published[1] and replace the 1997 Guidelines. Critics however argue that as a code of practice it has little weight within the industry.

Nevertheless, it is hoped that legislators around the world will acknowledge the benefits of the CTU Code and enshrine its recommendations into domestic law, or at least use the CTU Code as evidence of best practice when CTU claims arrive at court. Bill Brassington, a consultant to the CTU Code notes that, *"Codes of practice are intended to assist governments and employers in drawing up regulations and can be used as models for national legislation."*

The CTU Code will enhance the safety not only of employees who come into direct contact with CTU but also the safety of the cargo that is transported within them. If weight is distributed more evenly and cargo is properly secured in the CTU then it is likely that vehicle rollovers and consequential injuries and fatalities will fall drastically and reduce

1 Currently available on the United Nations Economic Commission for Europe ("UNECE") website in English at www.unece.org/fileadmin/DAM/trans/doc/2014/itc/id_07_CTU_Code_January_2014.pdf

the frequent occurrence of damage to cargo. The need to properly pack a CTU cannot be stressed enough and failure to distribute and secure cargo appropriately will more than likely result in loss or damage to the cargo.

The economic consequences of this are not insignificant and shippers thus have a vested interest in the correct packing of their cargo to minimise losses and claims they make per shipment. Efforts to improve safety standards without legal intervention have failed to make much progress thus far. It is for this reason that the movement towards the introduction of the CTU Code to promote safer packing of CTUs is to be welcomed. This measure should promote more responsible operating and facilitate safer environments throughout the maritime supply chain. This will have the positive effect of enhancing the economic efficiency of trade as the percentage of cargo that is damaged should drop significantly.

All concerned with the transportation of CTUs should welcome the introduction of the CTU Code as it signals a change in the way those within the maritime supply chain operate. This is arguably a change that is long overdue and should bring with it visible and extensive benefits.

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A new London aircraft policy: AVN1D

There are several standard aircraft liability policies in the London market. One such policy, AVN1C, has been replaced by AVN1D, which is simpler and more reader-friendly. The new policy creates more certainty by introducing new definitions and expanding old ones. Further, it adds new sections such as 'Choice of Law and Jurisdiction', a provision relating to theft of aircraft and extended the 'Defence and Settlement' conditions, thus affording a greater degree of control to the insurance market. Most importantly, AVN1D has been updated to echo the wording used in current standard airline policies and international conventions, and to take account of the industry's developments.

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