DANGEROUS CARGO; A MINEFIELD FOR CARGO INTERESTS & THEIR INSURERS

INTRODUCTION

The carriage of dangerous goods remains a legal minefield for cargo interests and their insurers in relation to their potential exposure to liability. The 2005 case of '*Primetrade v Ythan Limited*' highlighted the possibility of liabilities attached to a bill of lading being transferred to a receiver of goods or to an intermediate holder of a bill. This article seeks to elaborate on the situations where this becomes a possibility and the need to seek specialised legal advice at the earliest opportunity.

It is estimated that more than 50% of the cargoes transported by sea today may be regarded as dangerous, hazardous and/or harmful and need to be handled with special care. Figures show that some of the most common claims resulting from the carriage of dangerous goods arise from the carriage of bulk cargo, these are not only high in number but also in value.

Problems may arise with the carriage of dangerous goods for any number of reasons, the most common of which being the pressure to work on cargoes before hatches have been properly ventilated or due to ship's monitoring equipment not being maintained. This area is particularly pertinent in the current climate as 2010 saw the commissioning of around 1,300 bulk carriers and as from January 2011 the International Maritime Solid Bulk Cargo Code ("IMSBC") becomes mandatory under chapter VI of the International Convention for the Safety of Life at Sea ("SOLAS").

DANGEROUS GOODS

Concern in relation to the carriage of dangerous substances is demonstrated by the number of conventions that cover safety, although not all provide a definition of 'dangerous goods'. Neither SOLAS nor the Hague/Hague-Visby Rules nor the Hamburg Rules define dangerous goods, they either refer to relevant codes or give some examples. The main code used to define dangerous goods is the International Maritime Dangerous Goods Code ("IMDG Code").

The IMDG Code classifies dangerous goods in different classes, subdivides a number of these classes, defines and describes characteristics and properties of the goods which would fall within each class or division. There are nine main classes of dangerous goods under this code:

1. Explosives
2. Gases
3. Flammable Liquids
4. Flammable Solids or Substances
5. Oxidizing Substances
6. Toxic and Infectious Substances
7. Radioactive Materials
8. Corrosives
9. Miscellaneous

The International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk ("IBC Code"), International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk ("IGC Code") or the IMSBC Code do not define dangerous goods either, but they do list certain substances according to their hazards.

Apart from the obvious problems that may be caused by explosive, flammable and toxic cargoes, bulk cargoes present their own unique dangers that may either affect the stability of the ship, in certain cases causing the ship to capsize, or corrode the hull of the vessel.

RECEIVERS AND THEIR INSURERS ASSUMING THE LIABILITIES OF THE SHIPPER

Although the charterer will remain responsible under the Charterparty, owners may have an additional claim against the shipper named in the bill of lading. Under the Carriage of Goods by Sea Act 1992 ("COGSA") title to sue is not linked to property in goods but to the 'lawful holder' of the bill of lading by virtue of sections 2(1) & 5(2) of COGSA. Section 2(1) of COGSA reads:

(1) Subject to the following provisions of this section, a person who becomes—

(a) the lawful holder of a bill of lading;

…

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

A '*lawful holder'* of a bill of lading is determined by section 5(2) which provides:

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or , in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

The transfer of the right to sue the carrier under section 2(1) of the Act, from one holder of a bill to another, has the effect of extinguishing the contractual rights of the shipper or of any intermediate holder of the bill. However, the liabilities associated with the contract of carriage are not transferred simultaneously with the title to sue. The innocent receiver will only assume the liabilities under the carriage contract if they or their underwriters:

(a) takes or demands delivery from the carrier of any of the goods to which the document relates;

(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

In any of the above circumstances that receiver shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract in accordance with section 3(1) of COGSA. This means that the owner will have the ability to sue the receiver for damages.

WHAT CONSTITUTES MAKING A CLAIM UNDER SECTION 3(1) OF COGSA

This has been discussed in some depth in the cases of "*the Berge Sisar" [2002] 2 AC 205* by Lord Hobhouse and by Mr Justice Aikens in the *Ythan.* Lord Hobhouse looked at the intention of the draftsmen in section 3(1) to ensure mutuality of contractual relationship, as such a 'holder' of a bill of lading cannot come under the liabilities imposed by section 3, unless he is a person with a right of suit that has been vested to him under section 2(1). It must be an action that is a positive step by that person to whom rights have been vested "*to avail himself of those contractual rights against the carrier*". Lord Hobhouse sets out at paragraph 33 of his speech:

"to 'make a claim' may be anything from expressing a view in the course of a meeting or letter as to the liability of the carrier in issuing a writ or arresting a vessel"

In the Ythan case the underwriters had taken steps to obtain a security from the Owners' P&I Club, they had been successful in this regard as the club was concerned that other vessels in the same management as the *Ythan* would be arrested. The question before Mr Justice Aikens was whether this amounted to making a claim in accordance with section 3(1). It was held that it was not. The reason being that a request for security for a claim, even though successful, is different in character from an arrest of a vessel in support of a claim. An arrest is a formal use of court procedures in support of a claim, whereas a Letter of Undertaking is a contractual arrangement.

INSURANCE CONSIDERATIONS

The shipment of dangerous cargo is an increasing problem, not only because of the frequency of explosions and other problems on certain ships, such as container ships, but also because the third party claims flowing from dangerous cargo are not insured by the standard Institute Cargo Clauses ("ICC"). Indeed, if the incident is caused by the wilful misconduct of the shipper or insufficient packing, the shipper may not have even be able to claim for loss of his cargo.

By way of further example, in the scenario where a cargo blows up causing extensive damage to the vessel, surrounding cargo and potentially injuring the crew, the cargo receiver may be liable and without insurance because the standard ICC only provide a policy of indemnity and not liability.

Underwriters must be careful to ensure they do not cause the 'innocent' receiver who had taken up the bills of lading to be faced with huge multimillion-dollar claims, not only from the shipowner and time charterer, but also the other cargo interests whose cargo was damaged by the explosion.

CONCLUSION

With the ever increasing variety of chemicals and other noxious substances being carried it sea, the strict liability of the shipper (or receiver), who maybe totally innocent, and the lack of insurance cover for this unlimited liability means that the impact of a dangerous cargo on an unsuspecting party can be considerable and unforeseen. Although prevention is always better (and cheaper) than the cure, the incidence of these claims is on the increase. It is therefore essential that proper and adequate documentation be provided to the Master, at the time of loading (as required by the IMDG code) and the shipper/charterer takes every precaution to ensure that his cargo is safe for the intended voyage and adequately describes it including details of its IMDG classification. The cargo should also be well packed and labelled and every effort made to alert (in writing) the carrier as to any special characteristics of the cargo.

This article is intended only to give general guidance and you should always consult a lawyer with any particular problem you may have.

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