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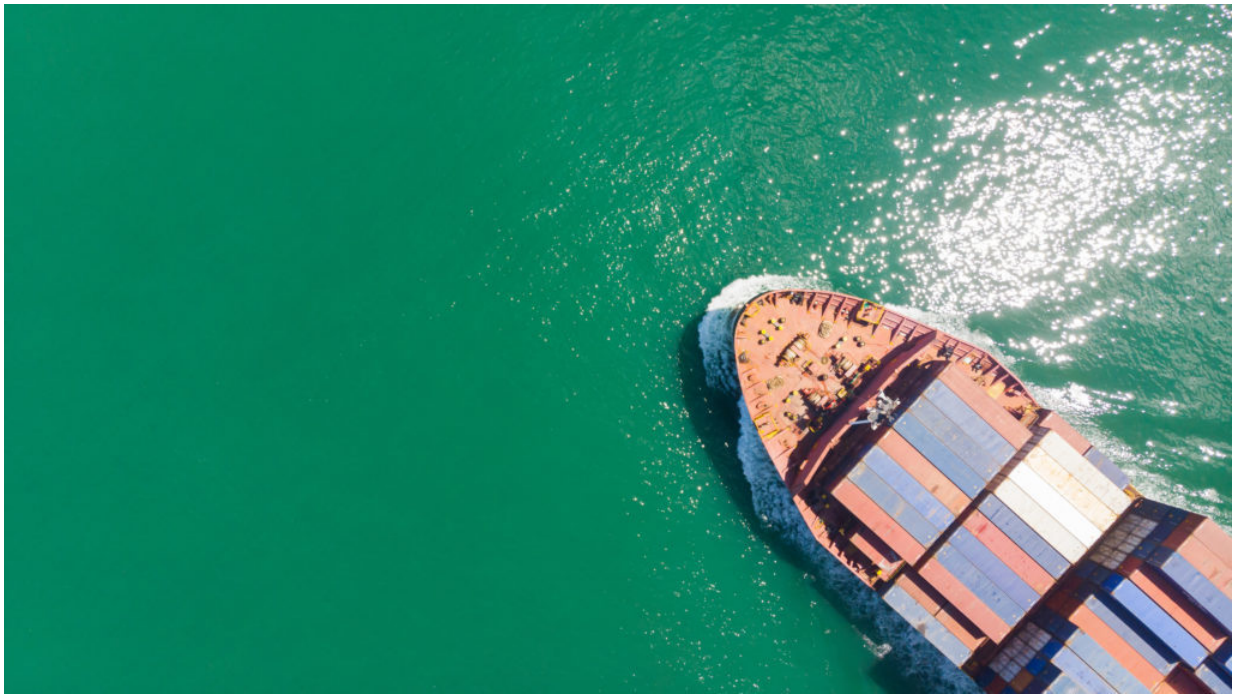
When the fine print matters in freight contracts

Andrew Hudson (Rigby Cooke Lawyers) · Thursday, December 5th, 2019 · # CBFCA, #BOL, #FPS



The decision of the Victorian County Court in *Technology Swiss Pty Ltd and Ecology SRL v Famous Pacific Shipping Pty Ltd* which was delivered on 30 September 2019 and published on 13 November 2019 has already received some attention and commentary within industry.

Much of the attention has focussed on one of the outcomes of the decision which allowed the incorporation of the terms and conditions of the freight forwarder including a limitation of liability condition which reduced the award for damaged cargo.

Looking beyond the outcomes of the decision

However, there were other aspects of the decision which warrant equal consideration including recognition that the decision is limited to its relevant facts and cannot be taken as a wholesale endorsement of the incorporation of terms and conditions of trade in all circumstances. Freight forwarders and others involved in moving cargo need to be careful to ensure that they benefit from their terms and conditions. Similarly, those whose cargo is being moved need to be aware of governing terms and conditions of trade, including limitation of liability provisions to manage their risks of carriage and secure appropriate insurance.

Discussion with CBFCA members

I had deferred immediate comment on the decision as I have been 'on the road' delivering legal forums to members of the Customs Brokers and Forwarders Council of Australia (**CBFCA**) and wanted to listen to the views of those members as I discussed the decision in the forums. As you would expect, members were pleased with the outcome which supported their use of terms and conditions of trade but agreed with the importance of steps that needed to be taken to ensure that the terms and conditions of trade become properly incorporated.

Background to the decision

The facts of the matter are set out in some detail in the decision, but for current purposes, the following essential points can be highlighted as follows:

- The goods being transported were a number of 'fog cannons' used to spray mist to suppress the dispersal of dust in mining and demolition operations.
- The first plaintiff had sold the goods to a purchaser in Bangkok, Thailand and had arranged for the transport of the goods by the defendant (**FPS**).
- On arrival in Bangkok, the goods were found to have been badly damaged due to having been improperly secured in the containers. The goods could not be repaired and was sold for scrap; and
- The plaintiffs sued FPS to recover the value of the goods and associated costs and losses.

Summary of outcomes of the decision

The outcomes of the decision can be summarised as follows:

- The Court held that the terms and conditions of FPS were adequately incorporated into the freight contract although they had not been provided by FPS and even though the plaintiff had not accessed them. In this case, the terms and conditions were referred to in the 'sign off' block and 'footer' of FPS emails which was in the extensive exchanges between FPS and the plaintiff. Importantly the provisions not only referred to the terms and conditions but that they included provisions limiting or excluding liability.
- The Court held that the terms of the Bill of Lading (**BOL**) issued for the shipment were not incorporated into the freight contract to limit liability. That finding was based on the BOL only being provided after the date that the shipment left, that it had not been issued by FPS but by some other company in the group and that the BOL referred to terms on the conditions 'on the reverse' which were not actually on the reverse, and there was no other way to identify them. This conclusion avoided the need for a finding on the application of the Hague – Visby convention, although the Court expressed the view that it would probably not apply.
- One of the limitation of liability provisions in the FPS terms and conditions was enforced to limit liability to the replacement cost of the goods plus the cost of freight and insurance. There was no recovery of consequential losses; and
- A further provision of the terms and conditions seeking to limit liability to a much lesser amount based on the weight of the goods (US$2 per kilogram) was precluded due to the drafting of the limitation of liability provision. That provision had the effect that if an invoice was provided for the goods, then liability would only be for the value of the goods plus freight and insurance (if paid). In support of that decision, the Court held that limiting the claim to US$21, 600 based on the weight of the goods compared to the invoice value would have been 'absurd'.

Lessons from the decision

The following lessons can be drawn on a practical basis:

- Please have terms and conditions of trade and make sure they are comprehensive, work for the company, are communicated to customers and approved by insurers.
- Over time thanks to investment by the CBFCA we have drafted 'Standard Terms and Conditions of Trade' for use by CBFCA members along with associated documentation. We have also drafted versions required for specific client needs. The decision emphasises the need for such terms and conditions.
- Most 'freight contracts' do not operate based on a formal agreement between the parties and are comprised by exchanges of emails and discussions. However, that is not always the case, and occasionally customers or their freight providers have more formal agreements in place which govern commercial and legal arrangements. Such was the case in the High Court case of *Siemens v Schenker* when a long-standing 'overarching agreement' agreement between the parties which included a limitation of liability provision was found to apply to all freight being carried.
- The decision is of the Victorian County Court, which is jurisdiction is not often cited in legal debates and would not be binding on superior counts. However, in this case, it is a comprehensive decision drawing heavily on decisions of superior courts and would be given more weight
- Each choice will be governed by its specific facts and should not be taken to apply or be binding in all other cases, even with similar facts or circumstances. It would fall to be governed by relevant decisions and legal findings of fact.
- Where freight is organised through emails and telephone conversations or other means, a provider or freight will often try and limit liability by reference to 'standard terms and conditions' which 'can be found at the company's website' or 'at a link' or are 'available on-demand'. Such arrangements can work if the references are clear enough, actually exist at the links or are actually provided on request. The longer the exchanges by email, the more likely would be the inclusion of the terms and conditions. There needs to be real discipline in these practices. Of additional assistance was that the 'sign off' indicated that the terms and conditions included limitations and exclusions from liability – which should have put the customer on notice. Choosing not to review them will not save the customer from being bound by them.
- There are other ways to incorporate terms and conditions – for example, in the CBFCA's standard 'Authority to Act' there is reference to terms and conditions being included by reference.
- Attempting to limit liability through BOL (or similar) is more difficult. The relevant BOL would need to be provided before departure of the ship and have proper references to the terms and conditions of that BOL. They would also need to be issued by the party providing the freight to the customer or otherwise be incorporated by reference in the standard terms and conditions of the party arranging the freight. That requires a clause setting out the precedence of clauses in the various documents as between the BOL and other terms and conditions.
- There must be some doubt on the enforceability of the very low-level liability provisions based on the weight of the goods as opposed to their invoice value. This is especially the case where the value of the goods being carried is actually known and provided to the parties carrying the goods.
- Parties who are seeking the provision of freight must pay careful attention to 'standard' terms and conditions and other provisions which may govern the freight of their goods. While they are rarely (if ever) open for negotiation, it is important to know their terms to assist in managing risk and procuring appropriate insurance. However, many large corporates are able to dictate their own terms and conditions of carriage with their freight forwarder or other service provider.

- The application of International Conventions governing sea or air carriage, including limitation of liability provisions can be difficult although seemingly they should only apply where the party is actually the carrier of the goods.

There are no absolute answers

Many of the questions I am asked focus on the application of standard terms and conditions of trade, whether for liability or other provisions. There is no one answer to that question as it will be driven by relevant fact situations and conduct of the parties. However, this decision does confirm an approach in earlier decisions that the contents of a contract are those agreed to by the parties or which are implied by their conduct or normal practice in the relevant industry. This approach would allow terms and conditions to be incorporated by reference in emails so long as the text is clear (including general reference to terms and conditions and comment that the conditions include limitations or exclusions of liability). Of course, such terms and conditions must exist at the links where customers are directed.

If you have any questions or would like advice, please contact us.

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