

Le Rendez-Vous De L'Assurance Transports – Cannes 2011

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Carrier's / Port operator's responsibilities and liabilities in China

The Carrier

Who is the carrier?

- Carrier: means the person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper;
- Actual carrier: means the person to whom the performance of carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted under a sub-contract.

For which period is the carrier liable?

- For goods carried in containers: the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge.
- For non-containerized goods: the period during which the carrier is in charge of the goods, starting from the time of loading of the goods onto the ship until the time the goods are discharged.
- The carrier is free to enter into any agreement concerning carrier's responsibilities with regard to non-containerized goods prior to loading onto and after discharging from the ship.

The responsibilities of the carrier

- The carrier shall before and at the beginning of the voyage, exercise due diligence to make the ship seaworthy, properly man, equip and supply the ship and to make all parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
- The carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.
- The carrier shall carry the goods to the port of discharge on the agreed or customary or geographically direct route. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an act of deviation.

The liability of the carrier

- The carrier shall be liable for the loss of or damage to the goods, during the period the carrier is in charge of the goods, except as otherwise provided for in the China Maritime Code (CMC).
- The carrier shall be liable for the loss of or damage to the goods caused by delay in delivery due to the fault of the carrier, except those arising or resulting from causes for which the carrier is not liable as provided for in the CMC.
- The carrier shall be liable for the economic losses caused by delay in delivery of the goods due to the fault of the carrier, even if no loss of or damage to the goods had actually occurred, unless such economic losses had occurred from causes for which the carrier is not liable as provided for in the CMC.

Exemption of liability

The carrier is not liable for the loss of or damage to the goods during the period of carrier's responsibility arising or resulting from any of the following causes:

- (1) Fault of the Master, crew members, pilot or servant of the carrier in the navigation or management of the ship;
- (2) Fire, unless caused by the actual fault of the carrier;
- (3) Force majeure and perils, dangers and accidents of the sea or other navigable waters;
- (4) War or armed conflict;
- (5) Act of the government or competent authorities, quarantine restrictions or seizure under legal process;
- (6) Strikes, stoppages or restraint of labour;
- (7) Saving or attempting to save life or property at sea;
- (8) Act of the shipper, owner of the goods or their agents;
- (9) Nature or inherent vice of the goods;
- (10) Inadequacy of packing or insufficiency of illegibility of marks;
- (11) Latent defect of the ship not discoverable by due diligence;
- (12) Any other causes arising without the fault of the carrier or his servant or agent.

Package Limitation of Liability

- The carrier's liability for the loss of or damage to the goods shall be limited to an amount equivalent to 666.67 SDR per package or other shipping unit, or 2 SDR per kilogramme of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods had been declared by the shipper before shipment and inserted in the bill of lading, or where a higher amount than the amount of limitation of liability set out above had been agreed upon between the carrier and the shipper.
- The carrier's liability for the economic losses resulting from delay in delivery of the goods shall be limited to an amount equivalent to the freight payable for the goods so delayed. Where the loss of or damage to the goods has occurred concurrently with the delay in delivery, the limitation of liability of the carrier is as provided for above.
- If claims for compensation have been separately made against the carrier, the actual carrier and their servants or agents with regard to the loss of or damage to the goods, the aggregate amount of compensation shall not be in excess of the limitation amount as provided for above.

Exceptions of limitation

- The carrier is not entitled to the benefit of the limitation of liability provided for in the CMC if it is proved that the loss, damage or delay in delivery of the goods resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.
- The servant or agent of the carrier is not entitled to the benefit of limitation of liability provided for in the CMC, if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the servant or agent of the carrier done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

Time limitation

- The carrier is not liable for compensation if no notice of the economic losses resulting from delay in delivery of the goods has been received from the consignee within 60 consecutive days from the next day on which the goods had been delivered by the carrier to the consignee.
- The limitation period for claims against the carrier with regard to the carriage of goods by sea is one year, counting from the day on which the goods were delivered or should have been delivered by the carrier.
- Within the limitation period or after the expiration thereof, if the person allegedly liable has brought a claim of recourse against a third person, that claim is time-barred at the expiration of 90 days, counting from the date on which the person seeking recourse settled the claim, or was served with a copy of the process by the court handling the claim against him.
- The limitation period for claims in charter parties is two years, counting from the date on which the claimant knew or should have known that his right had been infringed.

Global limitation of liability

The shipowners, charterers, ship operators and salvors can limit their liability for the following maritime claims whatever the basis of liability may be:

- (1) Claims in respect of loss of life or personal injury or loss of or damage to property including damage to harbour works, basins and waterways and aids to navigation occurring on board or in direct connection with the operation of the ship or with salvage operations, as well as consequential damages resulting therefrom;
- (2) Claims in respect of loss resulting from delay in delivery in the carriage of goods by sea or from delay in the arrival of passengers or their luggage;
- (3) Claims in respect of other loss resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage operations;
- (4) Claims of a person other than the person liable in respect of measures taken to avert or minimize loss for which the person liable may limit his liability in accordance with the provisions of the CMC, and further loss caused by such measures.

Exceptions of limitation

A person liable is not entitled to limit his liability if it is proved that the loss resulted from his act or omission done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

The Supreme People's Court Guide Notes 2010

- The ship operator means registered operators of the ship or persons entrusted by owners to use or control the ships but not including non-vessel operating common carriers.
- If the liable party does not raise the defence of limitation of liability, the maritime court may not apply limitation on its own initiative. If the liable party does not raise the defence of limitation before judgement at first instance, and a defence is only filed at second instance or on retrial, the people's court should bar any such defence.
- Where different defendants in the same maritime accident apply to different maritime courts for the constitution of the limitation fund before filing a claim, the maritime court which registers the case later should transfer the application to the maritime court which first register the case.
- The limitation of liability for ships with a gross tonnage not exceeding 300 tons and for those engaging in transport services between the ports of the PRC is to be calculated at 50% of the limits for international ocean-trading vessels.

The port operator's liabilities

- No clear definition or rules as to the legal status and liability of port operators in the current Chinese maritime legislation and regulations.
- Recent jurisprudence and reported cases show that port operators are not regarded as agents or servants of the carriers or as actual carriers in law.
- The prevailing view is that port operators cannot rely upon the limitation of liability given to the carrier/their agents or servants in the CMC. The Himalaya Clause in the Bill of Lading contracts does not apply to port operators.
- Most courts take the view that port operators are independent contractors of the carrier. Unless the cargo interests have contractual relationship with the port operators, they can only claim in tort against the port operators for loss of or damage to their cargo.
- The port operators bear the apportioned liability in tort to the cargo interests. The relevant provisions in the Tort Liability Act 2010 apply.
- The limitation clauses (if any) in the contract between the carrier and the port operator are not binding on the cargo interests nor do they restrict cargo interests from claiming their loss to the fullest extent against the port operators in tort.

PICC Insurance Clauses 2009

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- PICC issued its own marine insurance clauses in the 1980s and these have recently been revised and updated to be compliant with the Insurance Act 2009. The main structure and contents of the clauses remain the same as the previous clauses.
- The PICC Insurance Clauses are widely used in the marine insurance policies issued by Chinese insurers. They are also known as the Chinese Insurance Clauses (CIC). The structure of certain clauses are different from the London Institute Clauses. The meaning of certain terms are also to be clarified by the Chinese courts for the benefit of the international market.
- International reinsurers need to be careful with the PICC Insurance Clauses when arranging their treaty and facultative reinsurance with the Chinese cedants.

Our international practice



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 ** Ogilvy Renault and Deneys Reitz to join Norton Rose Group on 1 June 2011
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