Roose + Partners

MARINE LAW FIRM

Charlotte Gale
Direct line 00 44 (0)203 440 3567
Mobile 00 44 (0) 7399 460 508
Email charlotte.gale@rooselaw.co.uk
Website www.rooselaw.co.uk

Cargo: lost and found

Who should foot the bill when a container falls overboard? In her interview with Jenny Rayner for LexisNexis, Charlotte Gale, Partner at Roose+Partners, considers the legal issues surrounding cargo lost at sea and explains how best to prepare for making a cargo claim.

If a container falls overboard, who is responsible for, and what are the issues surrounding claims for, lost cargo?

When cargo is carried by sea, there are numerous factors which govern who is ultimately responsible if a container falls overboard or a cargo is lost.

Looking at the situation from an English perspective, there would typically be a contract of carriage evidenced by the bill of lading between the lawful holder of the bill (usually in practice the receiver of the cargo) and the sea carrier. This would allow the lawful holder of the bill of lading (or their cargo insurers) to make a claim against the sea carrier for loss and/or damage to their cargo. The nature of the claim, and the sum that can be recovered, will be governed by the terms of the contract of carriage evidenced by the bill of lading. Frequently the contract of carriage will incorporate the terms of international conventions such as the Hague/Hague Visby Rules which unify the law in relation to bills of lading in participating states. These rules stipulate that the sea carrier must adhere to certain duties otherwise they will face liability, other than in cases where there is a defence or exception.

In addition to the sea carrier being contractually responsible to the lawful holder of the bill of lading, they would also be liable in tort and/or bailment to the owner of the cargo at the time of the loss or damage. The basis of the claim would be that the sea carrier failed to exercise reasonable care in the carriage and custody of the cargo. There may also be circumstances where the party with an interest in the cargo has chartered the vessel. If this is the case, then there would be a contractual claim against the sea carrier/the owner of the vessel pursuant to the terms of the charterparty.

If the container or cargo is carried on deck, and deck carriage is authorised by the shipper then the Hague/Hague Visby Rules will not apply. The sea carrier is nonetheless under an obligation to take proper and reasonable care so as to avoid the container falling overboard or the cargo being lost or damaged.

What bearing does the location where the cargo went missing have?

The location where the cargo went missing may have a bearing on the sea carrier's liability.

For contractual claims, it is important to check the contract of carriage evidenced by the bill of lading. It might contain an express agreement as to the jurisdiction in which claims should be brought. Where there is no agreement as to the jurisdiction for claims, from an English perspective, it would be necessary to consider the Brussels I Regulation Recast to ascertain where it is possible to bring an action against the sea carrier. Frequently this will be where the sea carrier is domiciled.

For an action in tort or bailment, if the cargo went missing in a country's territorial waters, claims may be subject to

Continued overleaf

Charlotte Gale
Direct line 00 44 (0)203 440 3567
Mobile 00 44 (0) 7399 460 508
Email charlotte.gale@rooselaw.co.uk
Website www.rooselaw.co.uk

the laws there. Further, if the cargo arrived damaged at the discharge port, an action may be brought in that jurisdiction. Claims can still be brought in other jurisdictions relevant to the parties.

Claims for loss and damage to cargo frequently involve issues of 'forum shopping', with claimants looking to bring their claims against the sea carrier in the most preferable jurisdiction.

Have there been any recent notable cases surrounding lost cargo?

One of the most recent high-profile cases is the *Hoegh Osaka*, a fully laden car carrier which developed a list when departing from Southampton in January 2015. Even though some of the vehicles were discharged in seemingly perfect condition, the cargo was declared a total loss in the eyes of the manufacturers. Roose+Partners were instructed to represent part cargo interests and advise in relation to the defence of claims for both salvage and general average contributions.

Another is the *MSC Napoli*, a container vessel which ran aground in January 2007 off the coast of Devon, having been caught in a storm which caused her to suffer structural damage. A large number of containers were washed overboard and the remainder were removed during a complex salvage operation. The claims for damage to cargo were reported to be in excess of £65m. As a matter of English law, the sea carrier was entitled to cap their liability by setting up a limitation fund. Parties with losses then made claims against the fund, but as the total losses far exceeded the value of the fund, those with damaged cargo were unfortunately not able to recover in full.

The *Socal* case in 2010 concerned a cargo of timber which was carried on deck from Scandinavia to the Middle East. Part of the cargo shifted in high seas and fell overboard. In this instance, the cargo interests had chartered the vessel so a claim against the carrier was made under the charterparty. This contained an exclusion clause which sought to exclude the sea carrier from liability for carriage of deck cargo. The court found that the exclusion clause could not be relied upon by the sea carrier as the loss was effectively caused by their negligence and by the vessel's unseaworthiness.

If the goods are subsequently washed up on shore, can whoever finds them keep them?

The position will differ depending on where the goods are washed up, but in the UK, there is a right to salvage cargo from a vessel, on the proviso that the owner of the cargo is notified so it can be returned to them. If you attempt to keep the cargo, or conceal it, then there is potential criminal liability. The relevant legislation can be viewed at section 237 of the Merchant Shipping Act 1995.

In practical terms, if the cargo is not affiliated to any particular brand, identifying the owner may be difficult, particularly if it is not clear what vessel it is from. If the cargo insurers have paid a claim, then they may also have an interest in the cargo. The Maritime and Coastgaurd Agency may be able to provide assistance should unidentified cargo be found on UK shores.

What in particular should practitioners advising in this area bear in mind?

When cargo is lost or damaged, it will frequently be insured. Involvement of the insurers from the outset is key to ensure that any insurance claim is paid and that the potential right of recovery against the sea carrier is preserved. Following notification of a loss, it is prudent to seek security for your claim from the sea carrier. This may be in the form of a bank guarantee or letter of undertaking from the sea carrier's insurer/P&I Club. All documentation relating to the cargo should be collected and retained. It is also helpful to identify who owns the cargo, has it been paid for, and who is holding the original bill of lading. It is also essential to ascertain whether there is any time limit for bringing claims against the sea carrier and which jurisdiction those claims would need to be brought in.

…and what happens if the carrier is insolvent?

It is particularly important to submit your cargo claim to the sea carrier as quickly as possible. In an insolvency situation, a liquidator will usually be appointed to take control of the carrier's assets and eventually distribute them in priority. The carrier's liquidator may impose a cut-off date for making cargo claims which is sooner than the usual 1 year time limit. Claims which are submitted quickly stand a better chance of being ranked higher in any distribution of assets. But, you should also be mindful that there may ultimately not be sufficient assets to pay your cargo claim.

There are many potential pitfalls in relation to cargo claims. If you have a cargo claim, to ensure the best possible recovery it is prudent to seek advice from those with specialist experience in this area. Roose+Partners frequently work on a 'no cure, no pay' basis for parties with cargo claims.

Interviewed by Jenny Rayner on behalf of LexisNexis.