

CARGO & FREIGHT TEAM BULLETIN

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BIFA conditions can apply even when a delivery is unintended

Matrix Europe Limited and Another & Uniserve Holdings Limited and Others

Matrix sold a consignment of mobile telephones to Hong Kong buyers, and instructed freight forwarders Birkart to arrange carriage by air. Birkart engaged road carriers Cheadle to collect the goods from Matrix's premises, and Cheadle subcontracted to an owner-driver, Mr Trevor Lancashire.

Birkart claimed to have instructed Cheadle to deliver the goods to the premises of Robins Transport, Wythenshawe. However, Mr Lancashire delivered to the wrong place, a warehouse operated by Uniserve which was also in Wythenshawe. Uniserve's premises were burgled and the goods were stolen.

Matrix sued Uniserve for the loss, and Uniserve claimed against Birkart, seeking damages for breach of warranty of authority and an indemnity in respect of any liability it might have to Matrix. The indemnity claim was based on Uniserve's argument that its dealings with Birkart were subject to the BIFA conditions. Birkart replied that Uniserve were accidental sub-bailees and that no conditions were incorporated or to be implied into that sub-bailment.

The Court had to consider two preliminary issues:

- Was delivery to Uniserve's premises unintended by either party?
- If so, could such delivery have been subject to the BIFA conditions?

The case is unusual in that Andrew Smith J was not asked to decide whether the BIFA conditions actually applied, but only whether they could have done. Therefore the Judge had to grapple with various issues of fact and law within an almost theoretical framework, which he several times observed might not best serve to resolve either the main or the related indemnity proceedings.

The Court heard evidence on the relationship between the parties and the arrangements made in this case. Before this loss Uniserve had been providing warehouse services to Birkart for about a month. Uniserve knew that Matrix were one of Birkart's customers, and on two occasions before the delivery in question had dealt on Birkart's behalf with Matrix goods. It was accepted that Uniserve were not expecting the goods and had no record of the intended delivery, but they urged that unexpected deliveries were not unusual.

On the first issue the Court decided that Birkart did not intend to deliver the goods to Uniserve – rather (and surely straightforwardly) they intended them to go to Robins Transport. However, the Court found that Uniserve intended to accept delivery of the goods.

On the second issue, Birkart contended that because they did not intend to deliver the goods to Uniserve, the BIFA terms could not apply because there was no contract relating to that delivery. Uniserve responded that the BIFA conditions applied because (i) there was an "umbrella" agreement between

the parties that the terms would apply to all goods held by Uniserve and/or (ii) there was an agreement specifically in respect of this delivery. The Judge found that the delivery could have been subject to the BIFA terms.

Birkart argued that the umbrella agreement could only apply where Uniserve had taken goods pursuant to an actual agreement, so a key issue was whether there was any agreement for Uniserve to take delivery of these goods where their acceptance of the delivery was intended but delivery to them *at all* was not.

The Judge was not persuaded that just because delivery was unintended there could be no contract. He recognised that as Birkart had not intended to deliver to Uniserve, any expressly concluded agreement was unlikely. However, he observed that an agreement could have been concluded through an agent acting with ostensible authority. Birkart retorted that such a conclusion could only be reached where they had held out the agent as having authority. The Judge agreed, but observed that when collecting goods a driver could, or at least might, have a limited discretion as to how to deal with them, and would not rule out the possibility that such included deciding which warehouse in Wythenshawe should receive them.

Birkart also argued that, on a proper construction of the BIFA conditions, they could only apply to the provision of services by a freight forwarder to a customer, and could not apply to a contract between a freight forwarder and a company like Uniserve, which provided storage services or similar. The Judge rejected that and ruled that the proper way was to construe the contract as a whole, rather than allow incorporation to be based on aptness: if in the end the BIFA conditions did apply, the Court would make the "necessary adjustments in their interpretation" and apply them within the contract of which they were a part.

Birkart further argued that the BIFA conditions could not apply to an unintended delivery, as the terms provide for "services", with the "Customer" giving "instructions", and these were missing here for lack of a consensual relationship – though Uniserve had intended to accept the delivery, Birkart had not intended to render it. But the Judge also rejected that, holding that if the parties had made an umbrella agreement "the terms of which were that the BIFA terms should apply *even if there was an unintended delivery*" (our italics), the Court would give effect to it. But that assumes, not simply the existence of an agreement, but that it extended to precisely the right circumstances. Plainly, parties can agree that certain terms can apply to unintended deliveries, as to any others, but the Judge seems to presuppose that they did so here. No such argument appears from the report of the case, and the Judge's reasoning does not address the lack of consensus.

The actual decision on the second issue is of little if any general guidance, as the Court did not decide whether the BIFA terms applied, but simply whether they could have done. However, alongside the striking but largely unexplored notion of a delivery driver's discretion, freight forwarders and warehouse operators alike should be aware of at least the possibility of the BIFA conditions being held to apply, perhaps unexpectedly, in the common circumstances of unintended or otherwise misdirected delivery.

A note from Germany....

Last year the District Court of Hamburg, a court of the lowest level in Germany, issued a judgment which caused rumour in the UK that it had set aside the unbreakable limits contained in the Montreal Convention. However, the Hamburg Court did not actually set those limits aside – it simply stepped round them.

Cargo interests sued their freight forwarder, rather than the actual air carrier. The freight forwarder incorporated the ADSp conditions into its contract. These contain a similar limitation figure to the Montreal Convention, but permit a higher recovery in cases of wilful misconduct. The Court found that as the ADSp conditions were incorporated, cargo interests were entitled to rely on them and break limit. According to the judgment, by incorporating the ADSp conditions (and in a case of wilful misconduct) the freight forwarder waived the right to rely on the 17 SDRs limitation under Article 25 of the Montreal Convention. However, it is not clear from the judgment whether the freight forwarder had issued a house air waybill : in England at least, such would certainly have given rise to an argument that he contracted as “carrier”, and could therefore rely on the Montreal limits.

While the Hamburg Court did not seek actually to imply any provision into the Montreal Convention allowing the limits to be broken, it has nevertheless achieved that in this case, and by what some might see as odd reasoning. This decision has been criticised in Germany, and it is thought by many that it is unlikely to be followed.

We would like to thank Dr Christoph Horbach of Jovy Horbach Henriksen, Hamburg for his assistance with this article. Dr Horbach can be contacted by email at c.horbach@jhh-law.de or by telephone on 00 49 40484046-30.

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Cockroaches, Collisions and Courts

A recent and novel attempted application of the Dutch Civil Code and collision rules.

While the problems addressed by phytosanitary certificates and fumigation are well-known, insect infestation bringing about a collision is surely an unfamiliar notion, and more the distillation of a science fiction scriptwriter than material for an Admiralty assessor. However, though tackling legal interpretation rather than any startling and unearthly entomology, the Dutch Courts in a recent case based in Rotterdam had to consider whether a local lightning vessel, contaminated by infestation from the cargo of an ocean vessel, could pursue the latter under the Dutch collision rules.

Local laws prescribe collision liability in some circumstances where there has been no mechanical impact at all, for example perhaps where a vessel explodes, or fire spreads from it and damages adjacent or nearby vessels or structures. The claimant owners argued that this doctrine applied to what was in effect cross-infestation from one vessel to another, but the Judge and later the Appeal Court disagreed.

While unusual cases like this frequently have much news but little precedent value, they nevertheless serve to remind all involved in the international sale and carriage of goods that local regulations can often plausibly and sometimes successfully be applied beyond their immediate and obvious scope, and that sound relevant advice should be obtained at all times.

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Limits of liability for cargo claims

(based on the value of the SDR as at 05.02.08)

By sea (Hague-Visby Rules)	By air (Montreal Convention)
£1.61 per kg or £535.71 per package	£13.66 per kg
By road (CMR)	BIFA
£6.69 per kg	£1.61 per kg

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