

Cargo Theft

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Theft of cargo during its transportation has been a risk right from the time when any of its modes came into use, not forgetting that water transportation was one of the earliest along with road –atop donkeys, pulled by mules, horses, bullocks- preceding rail, air etc. Original practice was for cargo interests to travel with the cargo in the craft –as is done from villages even today, and aboard he was one close to the navigator who owned/represented owner, eventually turning out to be ‘Master’ under law with responsibilities. It was said that a portion of freight -10%- was paid to the Captain as an incentive to take care of the cargo.

Having come a long way through centuries from Sailing vessels through coal and diesel now on to LPG-LNG, and Harter Act, Hague, Hague Visby, Hamburg, Multimodal & Rotterdam (not yet in force), and through unitization onto multimodal intermodal boxing, it is fair to say that threat of theft still persists regardless of use of RFI (radio frequency identification tag). Had it not been for insurance –the mother of all: marine- the trades would not have developed or would not be able to carry on with high risks. Hence it is imperative that threat mitigation is well understood by one and all in logistic chain: afloat and shore: both ends.

As cadet on maiden voyage on a general cargo ship from India via Malaysia, Singapore and East Asia, I recall the special advice given to me and extra duties imposed to guard cartons of garments to Great Lakes to be delivered before winter of '71. Amusing it was to hear that the Aussies used to be given ‘Temptation Allowance’ to stop them from broaching cartons

of Scotch in the holds. Have heard of 4th mates (in 60s) getting abused by longshoremen and warfies for keeping a strict eye on bottled edible stuff/drinks and their tally with remarks of legally/illegally broken. Silly the least to say that boxes are stowed in slots doors facing each other to prevent prise open in transit. EIR notwithstanding, it is indeed difficult to pin point where and when the accident/spill/theft of cargo had taken place, despite RFI and CCTVs.

Case laws might be of help: In *Datec Electronics V UPS* 2007 House of Lords finding that there indeed was a contract between consignor and carrier -though under standard terms, held that carrier was entitled to refuse high value consignments- once it was accepted. Further, as cause of loss 'on balance of probabilities' was proven as theft by employee (evidenced from carrier's own CCTV) amounting to wilful misconduct, limitation was denied. However, since the parcel was accepted without knowledge about its value, similar cases may still succeed on 'no contract' argument against misrepresentation and/or mistake.

Hong Kong District Court in '08 has held a sender liable for outstanding freight charges despite sender's argument that it could not understand English or comprehend meaning of airway bill terms though it had signed on some of the airway bills (*non me, non est meum*; literally not me, not mine, pleading). The Court finding that the conditions of contract on back of the waybill had been properly incorporated, even though the customary practice was for the carrier to obtain payment for release of goods was argued by the sender who had contracted to sell on basis of buyer to pay freight, found against the sender, holding that terms contrary to express terms in contract could not be implied.

In *Brinks Global & Ors V Igrox & Anr* English Commercial Court (High Court) held that there was sufficient close connection between theft (of silver bars from a container awaiting fumigation) by an employee and purpose of employment (for fumigation) to hold employer vicariously liable, as the risk was reasonably incidental.

A freight forwarder was held **vicariously liable** for damages caused by admitted negligence of a motor carrier and its driver by Appellate Court of Illinois in 2011 in *Sperl V CHRW Inc.* (Vicarious liability holds operator liable for acts of third party as if it wore latter's shoes). Though the motor carrier was an independent contractor and there was no negligence in its selection/ retention, the forwarder was held liable as they were well involved.

US Court of Appeal 9th Cir in a historic decision in 2011 had ruled in *UPS-SCS V Qantas* that an international air forwarder should be guaranteed a right of indemnity against the ultimately responsible custodial airline (in a subrogated '06 case started on the eve of 2yr limitation per Montreal Convention). But in earlier interpretations under 'statute of repose' there were time bar issues unique to air cargo with no such analogous injustice in sea and surface carriages. This newfound indemnify right with equality between forwarders and airlines had been questioned vide *Petition for Writ of certiorari* in US SC in May '11.

As for piracy: ECA in '11 in BUNGA MELATI DUA held that hijack/piracy of cargo was not a total loss, it was not a theft and endorsed ECC's finding that ransom payment was not illegal; as such Cargo could contribute to GA.

Theft has turned criminal aka organized crime. It is the whole ship (SALEM) or box itself that goes missing, enroute or from parking lots, sometimes with the murder of the truckers. A recent report states that violent truck hijackings account for 24% of cargo theft incidents globally, while food and beverage cargoes are the current biggest targets at 27%. Trucking mode is often the most targeted at above 75% of all cargo theft incidents, with warehousing the second most vulnerable target at 19%.

Cargo interests have been cautioned citing that rapid changing modus operandi of criminal groups have made supply chains very vulnerable. It is suspect that people in the know may be cohort as the game plans of the criminals vary and change according to the mode, region, country, cargo, packing, tagging etc. As such a risk based approach need be developed was the solution along with the alarm call. The insurers and analysts have been sharing the reports to enable take proactive steps to minimize loss and damage to brand reputations.

Cargo theft crime has morphed-manifested in different ingenious methods with wrong declaration of content and weight/quantity for which carrier may not be liable, frauds in Letter of Credit, misdirecting during transshipment, on carriage at hub feeder-main line interface, LCL restuffing etc. As such all parties involved should work with abundant caution.