Seaworthiness of Containers

A Shipping Container - The box that single handedly changed the globalisation and the economical landscape of the entire world as we know it now..

I had previously shared a video of How containerization shaped the modern world. It is the duty of the shipping lines, container operators and depots to ensure and maintain the Seaworthiness of these containers..

I am sharing below another quality article from NAU Pte Ltd ("NAU"), a claims correspondent/consultancy firm based at Singapore dealing with Transport Liability, P&I and H&M Claims..

Hope this article will give you an insight into the importance of maintaining the seaworthiness of containers..

Seaworthiness of Containers

Author: M Jagannath
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This article discusses on the duty of Container Operators to provide "seaworthy" containers and its effect under the contract of carriage. It also touches on the possible consequences for insured cargo interests should they not inspect the containers to consider their suitability prior to loading their cargoes.

1. While use of containers for shipping cargo has been on for some centuries, Malcom P McLean in 1955 changed the global face of shipping by introducing the system of “intermodalism”. It is believed that now more than 60% of the value of goods shipped by sea is carried in containers. This article focuses on what probably would be “seaworthiness” for containers in sea carriage, its impact on cargo claims and suggestions on how Container Operators (dealing in full container loads) can deal with this issue.

2. If the cargo in containers are insured, they would be invariably insured under one of the Institute Cargo Clauses 1/1/82 or 1/1/09 forms (while the ICC 1/1/09 is not a new set of clauses, they are certainly more favourable to the cargo interests). Both the 1/1/82 and 1/1/09 wordings exclude loss damage or expense to the cargo arising from unfitness of container ( In the 1/1/82 wordings Cl 5.1 states …unfitness of vessel craft conveyance container or liftvan for the safe carriage of the subject-matter insured… and in the 1/1/09 wordings Cl 5.1.2 states …unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out prior to attachment of this insurance …). Considering the wordings in these clauses, it appears to us that this relates to the “seaworthiness” of the containers.

3. What is seaworthiness?

   i. Seaworthiness was defined in McFadden v Blue Star Line [1905] 1 KB 697 by Channell J as “A vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it…Would a prudent owner have required that it (i.e. the defect) should be made good before sending his ship to sea, had he known of it? If he would, the ship was not seaworthy…”

   ii. Art III Rule 1 of The Hague and Hague/Visby Rules states that the “The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to(a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

   iii. The UK Marine Insurance Act 1906 Section 39 states:
   (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
   (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.
   (3) Where the policy relates to a voyage which is performed in different
stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

iv. S 40 (2) of the UK Marine Insurance Act 1906 also states that “In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy”.

v. After considering the common law (McFadden v Blue Star Lines), the prevailing cargo conventions (which is generally either the Hague or the Hague/Visby Rules) and the UK Marine Insurance Act 1906, it appears to us that “seaworthiness” would depend on the characteristics of cargo and container i.e. the protection required for the cargo, the voyage and with the duty attaching to the Owners at the beginning of the voyage. As the cargo conventions define the duty for a carrier, if the Container Operators contract as carriers, they would be entitled to the same responsibility together with the defences available under the cargo conventions.

4. With respect to Owners duty to exercise due diligence at the beginning of the voyage, certification of a recognised class is generally considered as one of ways to determine as to whether Owners have fulfilled their duty. However, this is not absolute as a court would look at the complete circumstances to determine whether Owners have fulfilled their obligation (and thus be allowed the benefit of the exclusions available under the cargo conventions). When the carrier supplies his own containers, does this duty extend to containers? The late William Tetley in his book Marine Cargo Claims (Third Edition – the latest edition is Fourth Edition) in page 647 mentions “They must of course inspect the condition of the container itself, if only the outward condition, should the container have been packed and sealed by the shipper…. When the carrier supplies a container it must of course be in good order and condition and the carrier is responsible for damage to cargo regardless of whether it is the shipper or the carrier who packs and seals the container”

5. Similar to the Class Inspections, Container Operators could provide evidence that their containers are well maintained and are in conformity with the International Convention of Safe Containers 1972 (“CSC”). The CSC make it a requirement for containers to have a CSC Safety Approval Plate which is valid for five years from the date of manufacture, followed by either a Periodic Examination Scheme (“PES”) (regular inspections organised by the container
owner every 30 months, starting no later than 5 years after the date of manufacture) or an Approved Continuous Examination Program (ACEP). Both PES and ACEP require that the container be marked with the dates of the inspection. Although the CSC was introduced for the safety of persons working around them, we believe that evidence provided by appropriate inspections would amount to best practices (such as Class certification) such that the burden would shift to the cargo interests to provide evidence that the containers were not actually seaworthy despite the inspections.

6. The contract (say the bills of lading) between the Container Operator and the cargo interests may contain an exculpatory clause avoiding liability due to the “unseaworthiness” of the container. However, as Article 3 Rule 8 of the Hague and the Hague/Visby Rules state “Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect”, Container Operators will not be able to reduce their exposure below the levels as provided under the Hague or Hague/Visby Rules (unless other cargo conventions are applicable). However, if the containers are used before or after for domestic movement after the sea carriage, the exculpatory clauses may be of assistance in minimising the exposure to the Container Operators in the periods before / after the sea carriage provided the losses can be proved to have occurred during this portion of the voyage.

7. The contract of carriage may also provide a duty to the cargo interests to inspect the container prior to using the same for carriage of goods. While this may certainly be of assistance to shift the duty to the cargo interests in that they must inspect the container prior to loading of their cargoes and should be responsible for finding obvious defects in the container. However, if the defects are latent or unable to be noted in a perfunctory inspection, the cargo interests would have a defence given that as the containers were supplied by the container operators, they (cargo owners) would not be expected to have detailed knowledge of the containers. Moreover, as mentioned in 6) above, if the damage occurs during the sea carriage, then this “duty” may be caught under Art III Rule 8 such that it may not have any effect.

8. With respect to other cargo conventions such as Convention on the Contract for the International Carriage of Goods by Road commonly known as the “CMR Convention” or the Convention concerning International Carriage by Rail commonly known as “COTIF”, while these may have provisions with respect to the duty of a Container Operator for providing a “seaworthy” container to the cargo interests, we have not considered these conventions as our article is predominantly for the carriage of goods by sea.

9. As mentioned in 2. above, cargo interests may be without any cargo insurance cover should the container be unfit at the time of loading the cargo and the insured were aware or should have been aware of the unfitness i.e. they have blind eye knowledge (for what is blind eye knowledge, see The Star Sea 1 Lloyds Rep 389 at 414). Hence, cargo interests involved in loading of cargo,
particularly if they have insurance cover, must inspect the container to ascertain the fitness of the container for the voyage intended. If the container is not fit, they must reject the container and seek another suitable container from the Container Operator. Otherwise, while the cargo interests may certainly pursue the container operator for recovery, they may not have the benefit of the cargo insurance cover to assist them.

10. In conclusion:
   i. Container Operators must:
      1. Ensure to have a system in which their containers are regularly checked to ensure that they are “seaworthy”. In addition, they should ensure that they fulfil the requirements under the CSC convention and which may act as an evidence to substantiate the “seaworthiness” of the containers.
      2. Review their contracts to consider whether they are able to exclude / limit liability for the domestic movement prior / after sea carriage.
      3. Notify cargo interests that they must inspect the containers prior acceptance (and seek receipts by way of a signed Equipment Interchange Receipts) and provide for the carriage contract to allow them (Container Operator) to exclude / limit liability for any losses arising out of unfit containers.

   ii. Cargo interests must inspect the container prior to loading of the cargo so as to ensure that the containers are fit for their intended use.