

## FORWARDERLAW E-NEWS January 28, 2006



### Findings of Fact

Managers who have been involved in litigation and a trial will understand the uncertainties of finding out the truth in a court room drama staged sometimes years after the event. Experienced counsel explain to their clients that nothing is more subjective than the search for the truth from a mass of conflicting testimony given by witnesses who often have some personal stake in the outcome.

The search for truth is also difficult when the essential facts are not known. Here one judge might prefer one result that another will reject. The lack of essential facts arose in the case involving the loss of three parcels of valuable electronics from the possession of a courier company. The Court of Appeal and the Trial Judge took opposite view of the evidence. And the result was that the courier company had to pay by a factor of 400!

Read [Appeal Court whacks courier company with large liability!](#)

### When is a legal decision a precedent?

The case of Bhatia v Alcobex was a source of many useful legal conclusions, including an observation that the nine-month time bar was effective to bar a claim on a FIATA Multimodal Bill of Lading by the shipper. But does that mean that the world can treat the finding as a precedent, so that other courts (at least in the same jurisdiction) will reach the same result ?

Not necessarily and here's why: [Read Common Law Legal Precedents for Dummies!](#)

### Illegality under Chinese Law

The Forwarderlaw Member for China, George Wang, and his colleague Perry Cai of the Ho Tian Law Office in Beijing have brought surfers up to date on an issue that has caused many problems for the NVOCC industry in China. As commented in Forwarderlaw, China has moved to regulate the transport intermediary industry, requiring surety bonds and the filing of the form of bill of lading that will be used by NVOCC's. Some NVOCC's have not complied completely with these regulations but continue to carry on business including the issue of bills of lading. Should cargo interests have a right to recover damages regardless of the bill of lading conditions because the NVOCC did not file the bill of lading form?

Read the results of the most recent decision by the Chinese Courts. Go to ["Does an NVOCC's breach of a Regulation governing International Maritime Transportation nullify its right as issuer of a bill of lading under Chinese Contract Law?"](#)

### **English Court considers the role of continental Forwarders**

The FIATA Legal Handbook on Forwarding (3d) comments on continental practice in the following terms:

"The codes of civil law countries identify two types of commercial representation: mandate and commission . . . The essential characteristic of the contract of commission is that a Commissionaire acts as both principal and agent. It is an agent as regards its customer, but a principal to contracts with carriers that it makes to discharge its mandate to the customer" (p. 37)

Another issue that arises is whether as principal the commissionaire is acting as a CMR carrier. An English court was required to decide in what role a forwarder was acting.

[Read CMR Carrier or Commissionaire de Transport?](#)

### **Putting Kirby v. Norfolk Railway in Perspective**

Forwarderlaw and many other industry sources have commented on this case as it found its way up to the Supreme Court of the United States. Steve Block, the West Coast Member in the United States, is the author of this thoughtful article on the longer-term trends that will follow from this decision. Steve observes:

"History has demonstrated that business positions and bargaining power, often driven by volumes needed or offered, can influence or dictate the result of liability disputes more than controlling law. In this regard, the state of the law may be irrelevant. Perhaps the court was mindful of this in using the vague term "legal backdrop" to describe its opinion. Nonetheless, it is important, indeed crucial, that the law's role as governing protocol not be diminished. In that sense, Kirby is vastly significant as an expression of the law's concurrence with transportation's evolution and industry trends."

For other insightful conclusions, surfers will wish to read the rest of Steve's article: [The U.S. Supreme Court Blesses Industry's Trend Toward Intermodalism](#)

### **General**

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