

misappropriation

Copenhagen

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Menu of the day

- Facts
- Characteristics
- Definition
- Open discussion
- A solution

What's the problem

- Widespread use of the notion
- Legal vacuum
- No uniform understanding
- Umbrella for 'undercover' risks
- Unawareness till the moment...

To start with

- Misappropriation results in a partial or total disappearance of cargo in a warehouse
- Facts and cases?
 - YES worldwide
- Statistics?
 - NO
- Affecting our (marine) markets?
 - YES
- Any (un)known experience?
 - PROBABLY YOU WILL



Case

- Cargo stored in warehouse or storage facility under regular contractual terms
- Cargo stored at the buyer's (paid) at the seller's (unpaid) premises
- Cargo stored at a third party warehouse/storage facility under Collateral Management Agreement (CMA)
- Contract of bailee

Typical Characteristics

- On land storage
- Contractual relationship
- Cause
- Cargo
- Actors
- Duration & Impact
- Others



On land

- Storage
 - Long term / strategic
 - Beyond ordinary course of transit
 - Deliberate
 - assured is contracting party
- Physical premises
 - Public/Private/Customs
 - Silo / warehouse / land tanks / others

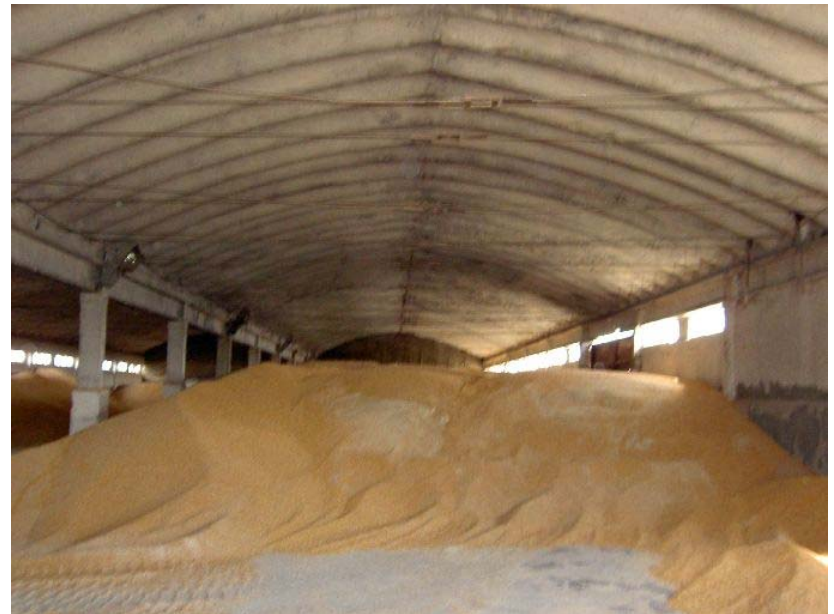


Contract

- Assured is a contracting party under a :
 - Sales contract / Purchase order
 - Storage agreement
 - Collateral Management Agreement (CMA)
 - Warehouse Receipts
- Legal validity or in accordance to the customs of the trade/business
- Modality:
 - Written or
 - Verbal
- Proof

Cause

- Of a subsidiary order
 - Financial default of contracting party
 - Fraudulent
 - Unreliable contractors
 - Financial or contractual default
- Organized crime or bribe



About the Cargo

- Commodities & Raw materials
- High valued
- Not identified & commingled
- High volumes
- Easy processing
- used as collateral for securing loans/credit lines or others



The actor

- Contractual party
 - Private Persons & Cies
 - National authorities
 - Governments
- Intentional
- Malevolently
- Organized
- Managing infrastructure

Duration & Impact

- Continuous crime
 - No single or occasional event
 - Sequential
- Low frequency – High severity
 - Maximum recoverable policy values
 - X 1000's MT
 - X 1(0).000.000 USD/€ per event



Other risk increasing factors

- Type of Commodity
- Countries / Regions
- Unknown contracting parties
 - Seller's
 - Buyer
 - Warehouse
- Condition of location
- Legal system



Retrospective issues

- Did we had a clear picture of the risk
 - Managing warehousing risk
 - Contractual relationship
- Should 'theft' not be reconsidered as a potential major loss
 - Classical theft case vs misappropriation
- Full understanding and assessment:
 - appetite for or aversion to write
- Do you really want to underwrite an atypical marine risk

A need for uniform interpretation

- Broad interpretation of theft and related risks = uncertainty
- Rules of professional ethics forces underwriters to create transparency for the assured
- Definition and clear contractual terms still are the best guarantee
- Respect of contractual freedom = 'will of contracting parties'
- Mission statement to offer solutions and security

Scenario

1. Use or disposal of the insured cargo
 - Contracting party
 - Intentionally
 - Contrary to the purpose or the instructions
 - Given by assured
2. Legal or Physical Delivery of the insured cargo

A definition

1/2

the use or disposal of the insured goods, in **bad faith**, by a contracting party of the assured and/or the policy holder or by the servant of the **contracting party, contrary to** the purpose for which he has received the insured goods, or in disregard of the instructions given to him by the assured/policy holder and/or by any other natural and/or legal person authorized to give such instructions;

Clause CE 212 ABAM-BVT


A definition

2/2

the physical or legal delivery, in **bad faith**, of the insured goods to any natural and/or legal person by a contracting party of the assured and/or the policy holder or by the servant of the contracting party, when this contracting party or this servant was **aware or reasonably should have been aware** that this natural and/or legal person was not entitled to the delivery of the insured goods

Clause CE 212 ABAM-BVT

Misappropriation & theft : a debate

- ICC A clauses are self-explanatory as to the physical disappearance of cargo to be considered as 'Theft'.
- Based upon 'English Theft Act 1968' theft :
 - Dishonestly appropriating property
 - Permanent depriving
- Various legal tradition, codification and jurisprudence with regard to misappropriation and theft
- ICC C + TPND
- Antwerp Marine Policy 20.04.2004: included  not excluded – misappropriation not equal to theft

Other issues open for debate

- Non-Delivery
- Shortage
- Willful Misconduct
- CNED
- Contract Frustration



Offering Solutions

- Exposure vs Experience
- Prevention
 - Physical
 - Contractual
- Policy transparency
 - Reproduction intention contracting parties
- Other markets



Exposure

- Financial impact
- Different Risk assessment
 - Financial reliability of (un)known contractors
 - Risk of contractual default
 - Risk of contract frustration
- Other markets
 - Appropriate assessment tools and financial leverage
- Experience – limited vs Exposure – Latent

Risk Mitigation

- A mindset of the underwriter
 - Risk awareness
 - Defining
 - Negotiating
- Prevention
 - Legal
 - Physical
 - Contractual

Risk Prevention

1/2

- Legal
 - Local legal system and jurisprudence
 - Validity of documents and contracts
 - Warehouse receipts
 - Forwarders Certificate of Receipts
- Contractual
 - Liabilities
 - Procedures
 - Insurance
 - Guarantees

Risk Prevention

2/2

- Physical inspection of location
 - Country and Region
 - Condition and suitability
 - Protection and Safety
 - Procedures
 - Local management
- Physical inspection of cargo
 - Present
 - House holding
 - Stock control/management
- Permanent monitoring



