

# A cautionary tale of flat racks



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In a case where cargo damage occurs due to insufficient lashing of flat racks, which party should be held responsible? This article looks at the considerations.

## The scenario

A shipper sends flat racks already laden with large, high value pieces of machinery, to the load port terminal. Prior to loading on board the ship, the flat racks are sighted by the officer in charge of the loading operations. On a visual inspection, the packing and lashing appear adequate. The cargo is loaded on board and a clean bill of lading is issued. During the voyage, the ship encounters rough weather, causing the lashings on one of the flat racks to give way and the cargo to topple onto other laden flat racks.

## The claim

Cargo damage results and the receiver claims against the cargo insurance policy. The cargo underwriters then pursue a recovery against the carrier in the local court at the port of discharge. By application of the local law and practice, the carrier is found liable for the cargo damage.

After negotiations, the carrier amicably settles the cargo insurers' claim. So far, the tale is unremarkable.

## The indemnity

Next, the carrier seeks to recover from the shipper by way of an indemnity founded upon the terms of the contract of carriage which is properly subject to English law. The technical evidence suggests that the cargo damage may well have been caused by improper and insufficient lashing by the shipper.

The terms of carriage, evidenced by the bill of lading, include an indemnity clause, which provides that where the carrier has not filled, packed or stuffed the container:

- a) The carrier is not liable for loss, damage or delay to the cargo *caused by matters beyond his control* including the manner in which a *container* has been filled, packed or stuffed; and
- b) The shipper shall indemnify the carrier for any loss, damage, liability of expense whatsoever and howsoever arising, caused by the manner in which *the container* has been filled, packed or stuffed.

Flat racks are ideal for large and heavy cargoes that cannot be loaded into containers. They consist of a floor structure with a high loading capacity composed of a steel frame, a softwood floor and two end walls, which may either be fixed or collapsible.

### The issues

In order for the carrier to succeed in its claim for an indemnity against the shipper, it has to satisfy the following conditions:

- i) That the definition of 'container' extends to and applies to flat rack containers; or
- ii) That the lashing of the flat rack container at the time of loading was a matter beyond the carrier's control.

It is not clear whether these conditions are satisfied in a scenario such as this, and a case could be made for both the carrier and the shipper.

In favour of the shipper, it could be argued that the definition of 'container' is not extensive enough to include flat rack containers. Following this reasoning, the carrier would then be obliged to show that it had no control over the lashing of the flat rack, in order to satisfy the requirements of the above indemnity provision. This means that the carrier has to show that it was not reasonably able to spot the improper and insufficient lashing that the shipper had supplied. In this case, the carrier's officer in charge of the loading operations may well be deemed to have had the opportunity to, and should have spotted the poor lashings.

In favour of the carrier, there is an arguable view that the definition

of 'container' is wide enough to include flat rack containers. Once the carrier is able to show that it did not fill, pack or stuff the containers carrying the cargo, the indemnity provision seems to be satisfied. This more liberal position takes into consideration the commercial realities of transporting flat racks. In practice, the shipper presents the flat racks at the terminal and if the visual inspection by the officer-in-charge of loading operations shows no obvious damage to the exterior packing of the cargo, the carrier loads the flat racks 'as is'. According to this view, it is commercially impractical and contrary to international practice to require carriers to perform in-depth inspections over each flat rack tendered to the extent that the carrier would be obliged to ascertain the sufficiency of the lashings so supplied.

### Lessons learnt

No court has ruled upon which interpretation of the indemnity clause should prevail, as far as we know. To ensure that members do not inadvertently suffer losses due to a shipper's negligence, it is recommended that key definitions, including whether 'container' includes a 'flat rack' container, and the indemnity provisions in the contract of carriage be reviewed, and if necessary amended, in order that they are sufficiently unambiguous and protective of the member's interests as intended.

