



Keeping it all covered

Philippa Goodrich finds that it is a wise move for a freight forwarder to keep itself protected for all insurance eventualities along the entire supply chain.

Insurance is a challenging area for freight forwarders because of their place in the middle of a project cargo deal. By virtue of that position they are very dependent on third parties getting their part of the job right, whether it is the road haulier, the stevedore or the Customs officials. As one shipping lawyer put it, "the contract is everything", that is where the liabilities arise.

The first question to tackle is, what is the role of the freight forwarder in the deal? The freight forwarding company will usually be concerned with the contract of carriage, and its contractual liability depends on whether it is acting as the agent, arranging transit on behalf of the shipper and receiver, or whether it is acting as a principal carrier – referred to as a non-vessel operating common carrier (NVOCC).

According to Brian Rom, a lawyer at the international law firm Holman Fenwick Willan, if the freight forwarder is acting as an agent it is liable under the agency agreement with its customer to arrange appropriate

carriage, but it is not directly liable under the contract of carriage for damage to cargo. It may issue consignment notes or a house bill of lading to its customer, but unlike a master bill of lading, this is not a true contract of carriage.

If the forwarder is acting as an NVOCC, however, its liabilities increase. "In this situation the freight forwarder contracts as a principal and has all the obligations that a carrier would have under the bill of lading for cargo loss and damage claims," stated Rom.

Whether the freight forwarder has taken on some of the liabilities of the carrier or not, Peregrine Storrs-Fox, risk management director of leading freight transport insurer the TT Club, said a review of the contractual responsibilities is the first step. "Project obligations may be quite varied, ranging from the pure physical requirements, to the necessary documentation, to making sure everything happens correctly," he observed.

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freight forwarder's remit, he added: "In the same way that there may be a third-party liability for anything that happens on your own property, taking contractual responsibility may give rise to further exposure at any point through the supply chain – for example, if a transformer on a low loader falls on to a car at a roundabout. Any point between the point of origin and the point of destination may be governed by the contract between shipper and forwarder, but other liabilities may arise."

His advice is to make it clear at the outset what contractual conditions apply to the cargo. Forwarders should ask themselves: "Are there gaps in the supply chain? Is it unclear what contractual terms are applying at any stage of the chain?"

Rom advised that if the freight forwarder is providing a 'door-to-door' service along the supply chain it may have to enter into multiple contracts to cover the road, rail and sea legs of the journey. It would have separate contracts with each carrier and each would be governed by different contractual terms and conditions as well as international conventions and rules.

Cargo insurance

If all liabilities are accounted for, why do lawyers advise freight forwarders to encourage their customers to take out separate cargo insurance? Storrs-Fox of TT Club, pointed out that most contracts will anticipate circumstances where the freight forwarder will not have contractual responsibility for the full value of the cargo. "The contract will typically include certain defences and limits that may restrict the amount recoverable," he said. "Equally, the freight forwarder needs to be aware that subcontractors may be able to rely on more favourable terms, such as those found in international carriage conventions."

Where do most insurance disputes arise? As forwarders will know, many disputes involve damage to the cargo during loading or unloading at the port of discharge, or damage that occurs during a sea voyage when the vessel encounters bad weather. If the freight forwarder is acting as an NVOCC or principal, a claim can be made against it as the contracting carrier. If the forwarder is simply the agent, the owner of the cargo will be entitled to look to the ocean carrier directly for redress.

How does such a dispute play out? Rom said that if the forwarder is an NVOCC, once it has issued its own bill of lading to its customer it usually obtains a back-to-back bill (on identical terms) from the shipping

Insurance

The meaning of insurance is risk management. It is a safeguard against loss of any measure taken:

line or airline. "If the NVOCC has primary liability to cargo interests for any loss or damage occurring to the goods during the carriage, it will then seek recourse against the shipping line or airline if there is damage."

Asked how this works in practice, Rom cited the example of the *Elegantiersgracht* in 2012. In this case the freight forwarder was contracted as an NVOCC/principal to ship a train consisting of eight separate cars from New South Wales to Dalian in China. The cars were in virtually pristine condition when they were loaded, but on arrival in Dalian it was reported that they were scratched and covered in rusty spots and stains. The subsequent investigation centred on a second cargo of metal sulphide that had been loaded en route and concluded that the damage to the train carriages had probably been caused by the co-loading.

The insurance chain was activated. Once the underwriters who had insured the cargo on behalf of the cargo interests accepted



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cover they pursued a claim against the forwarder, who in turn lodged a claim against the shipowner.

The possibility of a dispute arising out of damage to the cargo is something that could arguably be foreseen at the outset of a project and hedged against by taking out adequate insurance cover. However, it is worth noting that, on a more prosaic level, Rom also said that disputes often arise over whether the insurance terms adequately cover the underlying liabilities of the carrier.

This comes back to the question of how far the insurance extends. Does it cover the liability of the shipowner as a third party? The shipowner is covered under its own protection and indemnity (P&I) cargo cover, which may contain exclusions and limitations that are different to the NVOCC and freight forwarder's cover. Is there anything extra in the bill of lading that is not covered? There are numerous exclusions and limitations in the bill of lading, particularly the exclusions that apply under the Hague-Visby rules, for example monetary caps on liabilities and the one year time bar for making claims against the carrier.

Rules

Hague-Visby are the main rules that underpin the international transport of cargo by sea. They are worth a mention here because there has been an ongoing discussion about a possible replacement of the Hague-Visby with the Rotterdam Rules. These were drafted in 2009 but have yet to be ratified by a sufficient number of countries for them to come into force. Rom said the Rotterdam Rules are designed to have a far broader application than Hague-Visby, in that they apply not only on the port-to-port leg of the transportation but also on the road and rail legs. They will also shift the balance of risk from the cargo to the ship. "Carriers will be exposed to cargo claims in circumstances where they would previously have had defences," he said.

So, what then is the best way for a freight forwarder to negotiate his or her insurance liabilities? At TT Club, Storrs-Fox recommended appointing a "well-rounded" team with legal and insurance expertise early on in the process, in order to avoid signing a contract that is, in his words, "more onerous and more difficult" to insure. And he concluded: "The point is that when responding to tenders or other project contract processes, caution is required because the commercial pressures to accede to requests or assume responsibilities can be intense."

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