



Knowledge really is power

What to do when your supplier doesn't measure up

Sir Francis Bacon's famous phrase "Knowledge is power" provides a good message for shippers, and a secret for success. But there is a proviso: the knowledge acquired by the shipper must be effectively used.

When you as a shipper hire a logistics service provider to perform motor carrier or other transportation services, you do so under a contract of carriage. At minimum, you expect that a) the carrier and its employees and/or independent contractors will lawfully and responsibly perform the transportation service in accordance with the contract; b) the cargo will be safely transported to its proper destination on time; and c) you will be compensated accordingly when the cargo is lost or damaged. Similar expectations apply to warehouse contracts.

Unfortunately, these expectations are often unmet. Carriers frequently fail to properly perform the transportation services under the contract. Cargo is lost or damaged, or delivered late, resulting in damages to a shipper's bottom line and public image. These damages in turn force shippers to address the liability of carriers and warehouse providers for cargo loss, damage and delay claims. Disputes arise, tempers flare and lawsuits are launched.

Shippers operate in a highly litigious and fast-paced business environment. Since your liability risks are complex and unpredictable, they are difficult to limit by contract or control with insurance coverage. Although courts have expanded the scope of liability for loss and damages in this area, they have also upheld carriers' limitations of liability against shippers.

Proceed wisely

It is in this high-stakes arena that incorrect decisions can be devastating and even fatal to your continued business operations. Correct choices and a proper evaluation of current and emerging liability risks must be based on knowledge. This gives you greater power in attempting to reach your objectives.

So what knowledge do you need to prove a service provider has failed to deliver?

You must tell the story of what went wrong, based on facts. You must analyze the contract and every relevant document pertaining to it, as well as documentation pertaining to the subject transaction and the parties involved. You should then prepare a chronological sequence of events.

With this information, you will be in a much stronger position to properly evaluate liability risks and to strategically assess all the legal possibilities. At this point, you may wish to seek legal and financial advice to identify, particularize and quantify your damages. Your lawyer can then give you information on your potential courses of action, including your possible defence and the costs and benefits of pursuing a case.

Protect yourself

Taking matters to court is not likely your ideal scenario. Thankfully, there is much you can do to protect yourself against liability. Again, this comes down to knowledge.

First, know the law. Understand the applicable contractual and statutory provisions that may govern each party's rights and obligations. Accept that

duties may be owed to the provider under certain contract, tort, equity or statutory obligations.

Understand how services performed by carriers or 3PLs for shippers are to be properly provided. For example, the law may impose an obligation to use reasonable skill and care under the circumstances as a duty in tort law, or as a term implied in the contract of carriage.

A carrier's duty of care is determined by the application of the law of torts, including negligence, and by various statutes and regulations. In addition, carriers may be liable for damages for nuisance, for the incorrect transport of dangerous/hazardous goods and for excessive freight charges.

A warehouse provider, as a bailee for hire, is expected to exercise such care, diligence and skill as are exercised in the ordinary and proper course of similar business. The warehouse provider may be liable to the shipper for injury to the cargo arising from its own negligence, based on the general rule that one who received property from another as bailee, agent or employee must restore or account for that property to the party that owns it.

Once you understand this, use what you know. You must evaluate where your contracts expose you to current and emerging risks.

From there, look at ways of limiting your risk exposure by renegotiating parts of your contracts. Try to shift the onus onto carriers or 3PLs to provide greater protection and to take due care. Preserve the option of receiving full value for cargo loss, damage or delay, while understanding the applicable limits on liability and/or damages. You can also seek indemnity clauses in contracts to hold yourself harmless from legal liability.

As a final step, it's wise to purchase insurance that protects your interests and provides you with coverage for direct physical loss or damage to the cargo without the need to prove liability.

By following this advice, you will hopefully be off the hook the next time something goes wrong with one of your shipments. MM&D

*Marvin J. Huberman, LLM
(www.marvinhuberman.com) is a lawyer,
mediator and arbitrator based in Toronto.*