Intermodal liability

Who's responsible for freight between modes?

By Marvin Huberman | June 24, 2009

"Everything should be made as simple as possible—but not simpler."—(Albert Einstein)

At the risk of oversimplification, I will say it right now: from a legal point of view, the issues concerning liability for freight charges and cargo loss or damage in the context of intermodal transit—whether it involves truck, rail, ocean or air, whether it is domestic or international—are complex.

Relationships between shippers, carriers and transportation intermediaries that arrange deliveries are often very difficult to sort out. The terms and conditions of intermodal contracts are often set out on the back of the 'through' bill of lading forms issued by carriers. These standard agreements generally govern the rights and liabilities of parties involved in the intermodal transportation of goods.

Intermodal rail and motor carriers often make contractual agreements with the international forwarders or the initiating carriers arranging the move to limit their liability.

When marine is involved, ocean bills of lading frequently indicate the inland pick-up point as the origin and the delivery point as the destination. They also tend to include a Himalaya clause, which is a provision that extends ocean cargo liability limitations in the bill of lading to the surface portion of the shipment.

This may seem straightforward, but make no mistake: when cargo is lost or damaged during mode-to-mode transportation—particularly at the transfer point—the contract disputes can get very messy.

Recent court decisions on liability for botched intermodal shipments in Canada, the US and Europe should cause all parties in the supply chain—shippers, carriers, freight forwarders, brokers, 3PLs and insurers—to re-think their risk.

Questions, questions, questions

It's not easy to know who's responsible for your shipments.

Here are just some questions you might want to ask to determine your risk.

Are you bound (or is your carrier protected) by a limitation of liability provision in a bill of lading?

Are the terms of the limiting provision incompatible or inconsistent with the 'through' contract?

Was your attention drawn to the limiting conditions? Are there any statutory prohibitions against such limitation of liability provisions?

Do you know the proper process for interpreting the scope of Himalaya clauses contained in your bills of lading?

Does the Himalaya clause—or another limitation of liability clause contained in a bill of lading or other document—identify the intended beneficiary clearly?

Is it necessary to have a privity of contract between the parties in order to limit liability?

Was a transportation intermediary, such as an international freight forwarder, acting as your agent when it contracted a carrier for carriage?

Is the agreement between the shipper and the carrier of origin a ‘through’ arrangement?

Does the ‘through’ bill of lading include limitation clauses expressed in the bills of lading issued by successive carriers?

Can the originating carrier rely on exculpatory provisions put forward by subsequent carriers?

By contrast, can connecting carriers shelter under provisions in the initial bill of lading?

Is the connecting carrier in fact an employee or agent of the initial carrier, thus rendering inoperative the triggering clauses of a ‘through’ bill of lading?

Finally, what law of which jurisdiction in respect to the intermodal transportation of goods applies?

What are the time periods within which claims and lawsuits must be made?

Action items

If these questions leave you perplexed, don’t worry—you’re not alone. Like I said, it’s quite complicated. Thankfully, there are things you can do to address potential problems related to this thorny issue before they arise.

Organize your files. Write down and keep copies of relevant facts and documents. Have written agreements and documentation related to freight contracts and bills of lading duly prepared, signed and witnessed.

Carefully analyze the facts relating to the terms and conditions of the contract of carriage—whether it be oral, written, established by past conduct or a combination of the three.

Once you’ve done that, scrutinize international bills of lading and other shipping documents to determine the potential liability of each party for loss or damage sustained during intermodal transportation.

Obtain expert legal advice to review shipping documentation and transportation practices. A lawyer can also prepare and advise on appropriate bills of lading agreements and other pertinent documentation.

Get the proper insurance coverage.

Finally, do all of the above before freight is delivered to a carrier or an intermediary—not after it is unloaded in damaged condition.

These steps will help you keep it simple, shipper! You can avoid some major headaches if you’re organized, prepared and have a clear plan of action.