

30 November 2011  
Ref : Chans advice/131

To: Transport Industry Operators

**Forwarders' Standard Trading Conditions Seminar  
9 November 2011 – Q & A**

The 10<sup>th</sup> annual SMIC seminar on Forwarders' Standard Trading Conditions wrapped a decade of unabated effort hammering for the freight industry's attention to loss prevention by proper freight documents. The topic had attracted over 300 participants to attentively listening for 3 hours in the YMCA Assembly Hall. We thank them all for the patience.

We apologize for the overrun. We were not able to address all queries made from the floor. There were 13 questions and all of which have been answered separately by emails. These Q&As are compiled in this issue of Chans Advice for sharing among its readership.

**Q1. For uncollected cargo, did you ever know any case that consignee purposely abandoned the cargo without paying shipper, and sent a proxy to bid for the abandoned cargo at a lowered value?**

A1. We have not come across this kind of case. However, this kind of matter is possible when the carrier sells the uncollected cargoes. In fact, the carriage contract terms in the market in general do not restrict the carrier to sale of the uncollected cargoes to any particular parties. In other words, the contract terms can allow the carrier to sell the uncollected cargoes to the party offering the highest price, and that party can be the consignee or the shipper.

**Q2. It happens, and not uncommon in mainland China that the indemnity from the Insurer is inadequate and the Insured, a forwarder or the cargo owner, are compelled to sue for "more" from the Insurer. Would you please share some court cases and the verdicts for our reference?**

A2. We have not come across this kind of court case in China. However, our monthly newsletters wrote about some Hong Kong Court cases in the past. Chans advice/22 talked about a High Court case that a shipper fought against a cargo insurer on the issue whether the marine cargo insurance policy Institute Cargo Clauses (A) did cover the carrier's cargo misdelivery against forged bills of lading. Chans advice/26 was about another High Court case that a cargo insurer refused to pay a cargo damage claim to a shipper on the grounds of material non-disclosure, breach of warranty and lack of insurable interest. Chans advice/30 chatted about a High Court case that a cargo insurer rejected a cargo total loss claim case by reason of a breach of warranty relating to the carrying vessel's ISM Code compliance. Chans advice/92 & 97 discussed a High Court and Court of Appeal case that the shipper sued the cargo insurer for covering a cargo theft committed by the consignee.

**Q3. A container was found with seeds fr shpt ex Guangzhou to Australia. Shipper's container are mostly customs detained upon arrival. Shipper is claiming our company for inqualified container that caused indirectly her commercial loss, eventhough shpts go via other forwarders. Container concerned: provided by carrier; shipper stuffed the goods.**

A3. Since the laden container was detained by the Australian Customs due to seeds found in the container, the most important point is which party had caused the problem of leaving the seeds in the container. Since the cargo stuffing was done by the shipper, and the shipper had not raised any complaint that any seeds were found in the container prior to the stuffing operation, that would mean

the empty container was free of seeds at the time when the shipper was to do the stuffing operation. The burden of proof should therefore be on the shipper to submit sufficient evidence to prove the problem of having seeds in the container was caused by the carrier, and hence the liability to be borne by the carrier. If the shipper cannot do this, the carrier should be able to deny liability because of the lack of evidence, and you should be able to reject the shipper's claim.

**Q4. How to identify valuable cargoes? In terms of the invoice value?**

A4. It all depends on the contract terms between forwarders and their customers defining what are the valuable cargoes. It is common to find in the contract terms that bullion, bank notes, coins, bonds, securities, precious stones, jewellery, antiques are defined as the valuable cargoes. It is not common in the contract terms to have the valuable cargoes defined on the basis of cargo value.

**Q5. Can claims set off the survey fee and freight charge if damage caused by Forwarder / Airlines?**

A5. It again depends on the contract terms of the forwarders / airlines. It is common to see the forwarders' / airlines' contract terms in the market stipulating that no claims (i.e. including survey fees) can set off against freight charges no matter the cargo damage was caused by the forwarders / airlines or not.

**Q6. Most of the vendors will return mate receipt when they exchange document with service provider (NVOCC). This practice seems not apply in South China and it become an industry practice. I would like to know what is the background and the risk for NVOCC.**

A6. The mate receipt is the carrier's confirmation of having received the cargoes from the shipper for shipment. There are also many different names for this document e.g. dock receipt, warehouse receipt, terminal receipt... They are all talking about one thing i.e. the carrier's warehouse or terminal has received the cargoes from the shipper and then issues a written receipt to the shipper to prove this fact. The shipper will then present this kind of receipt to the carrier e.g. the NVOCC so that the carrier knows the situation that the cargoes have already been received by its warehouse or terminal, and then the carrier can proceed to issue its bill of lading to the shipper. If the shipper does not return the mate receipt to the carrier, the carrier needs to confirm with its warehouse or terminal as to whether the cargoes have in fact been received prior to the carrier's issuing its bill of lading to the shipper. Otherwise, the carrier runs the risk that it has issued its bill of lading saying to ship the cargoes to the consignee on the one hand when the cargoes have in fact not even been received by the carrier on the other.

**Q7. Background info: Forwarder received shipper's cargoes 3 years ago, pending for instruction for shipment. No instruction has ever been given. Shipper lose cargo receipt issued by forwarder. No STC of forwarder. Cargoes were obsolete stock now. Product no longer in production. New product is under production. Product if sold is subject to one year guarantee. Value of cargo was say HK\$1,000 p/set. Forwarder now received claim from shipper for invoice value. As forwarder, how to proceed with the matter and how to assess the shipper's claim?**

A7. Since the forwarder actually received the cargoes three years ago, the shipper's loss of the cargo receipt (i) cannot change the fact that the cargoes have been received and (ii) will not prejudice the shipper's position. Even the forwarder has no STC, the forwarder can still base on e.g. its bill of lading terms to handle this matter if it was the agreement of the parties that the forwarder's bill of lading would have been issued if there had been no such an incident of the shipper's failure to give the shipment instruction. It looks like the fault lies with the shipper because it has failed to give its shipment instruction to the forwarder. Accordingly, the forwarder should have no liability, and should base on e.g. its bill of lading terms (i) to claim against the shipper for all the losses e.g. the three years' storage charges and (ii) to sell or dispose of the cargoes (if there are appropriate bill of lading terms allowing the forwarder to do so). On the other hand, the shipper's unreasonable claim against the forwarder for the cargo invoice value should be flatly rejected.

**Q8. How to settle claim if cargoes was caused damage / loss in-land transit if shipment under FCA/FOB?**

A8. FCA or FOB is the contract term of the sale of goods contract between the seller and the buyer. Under the FOB term, the risks and title of the goods should pass to the buyer when the goods are loaded on board the vessel. Under FCA term, the risks and title of the goods should pass to the buyer when the goods are received by the carrier. If the inland transit is the one before the cargoes are loaded on board the vessel or before the cargoes are received by the carrier, the seller should claim against the inland transit operator for the cargo losses or damage in accordance with the inland carriage contract terms. However, if the inland transit in question is the one after the cargoes are loaded on board the vessel or after the cargoes are received by the carrier, the buyer should claim against the inland transit operator for the cargo losses or damage based on the carriage contract terms.

**Q9. Can we put FIATA Rule as our Co., STC?**

A9. We think so after you study the FIATA Rules and find that they suit your businesses and operations. However, you may have to obtain FIATA's prior approval for your using its FIATA Rules.

**Q10. Our company is a worldwide freight forwarder, if we do not make our own standard STC, can we apply local freight forwarder association's STC in each countries? Appreciate if you could let me know your comment.**

A10. Yes, you can do so if you study and find the local forwarder associations' model STCs suit your businesses and operations. However, this approach does not give your group's companies a standard set of terms and conditions of STC. Each company in your group has its own set of different STC terms and conditions. Moreover, some local forwarder associations may not have a model STC. Anyway, you may need to obtain the local forwarder associations' prior approval for using their model STCs.

**Q11. For offshore shipment, can we include some wording into STC in order to ensure the instruction party has the obligation to settle the payment?**

A11. If the forwarder's STC defines clearly the Customer as including (i) the person at whose request or on whose behalf the forwarder provides services, (ii) the shipper, and (iii) the Consignee, this should allow the forwarder to make the instruction party of the offshore shipment as the Customer, and therefore the instruction party as the Customer has to pay the service charges. Moreover, the forwarder can rely on the particular lien to withhold the cargo delivery until all the outstanding service charges are settled.

**Q12. If uncollected cargo, the final dest. local chgs, storage chgs... transportation fee... our overseas agent has the right to re-debit us?**

A12. We assume you are the forwarder having issued your Bill of Lading for the shipment. Since the parties at fault for the incident of uncollected cargoes are the shipper and the consignee but not your overseas agent, your agent should have the right to seek indemnity from you if it has suffered losses of paying extra costs resulting from the incident of uncollected cargoes, and you as principal have the liability to indemnify your agent for such kinds of losses not caused by your agent's mistake nor negligence.

**Q13. When the shipping company provided equipment for the shipper to stuff cargoes, and the cargoes did not exceed the equipment's max-payload; however, the container was subsequently found damaged. Does the shipping company have the right to claim against the shipper for compensation? For example, one 40' HQ, the cargoes of toys weight 3,000kg, the cargo unstuffing equipment weight 1,500kg, but the container floor suddenly fell off and damaged during the container devanning operation. It looked like the container was damaged because it was too old. However, the shipping company demanded the cargo owner to pay compensation for the container damage on the ground that the cargo owner had negligence, is the shipping company's claims reasonable or legally valid?**

A13. It depends on the expert evidence as to whether the container floor damage was caused by (i) the container's own inherent vice and defect problem or (ii) the improper cargo unstuffing operation. Since the container floor damage happened during the container devanning operation, the burden of proof would be on the consignee to submit an independent surveyor's report to prove the container's inherent vice or defect problem if the consignee wants to deny liability for the container damage claim. If the consignee cannot submit expert evidence to prove the container's inherent vice and defect problem, it is likely the shipping company's container damage claim should be able to succeed legally.

Forwarders attended the seminar would have been alerted the importance of STC incorporation as a necessary supplement to House Bills of Lading, and House Air Waybill. They are not substitute but necessary adjuncts to other forwarder transport documents. STC are necessary because without which a forwarder would not be able to contain its liability before a conventional transport document is issued and after it is expired.

The protection to forwarders by good STC is PROVEN, as illustrated clearly by two important judgments.

1. the Franc Maas V Samsung, English High Court Judgment dated 30/6/2004, and
2. the Rohlig V Rock Unique, English Court of Appeal Judgment dated 20/1/2011.

Without the above cases, the importance of STC to a forwarder may not be immediately apparent. Without STC, however, the financial consequence could be disastrous to a forwarder.

STC Incorporation is easy if you do understand how they work; difficult if you don't.

STC incorporation completes the active risk management cycle by proper documents.

Before the unexpected hit you unguarded, SMIC would suggest

1. forwarders who DO NOT have STC yet to quickly have one.
2. forwarders who do have STC to review their current STC.
3. forwarders should make sure that their STC are properly incorporated.
4. finally, forwarders should convince their customers to buy marine cargo insurance.

If you need SMIC assistance in any or all of the above areas, please feel free to call Carrie Chung at 2299 5539 or George Cheung at 2299 5533 for a quotation.

Simon Chan  
Director  
E-mail: [simonchan@smicsl.com](mailto:simonchan@smicsl.com)

Richard Chan  
Director  
E-mail: [richardchan@smicsl.com](mailto:richardchan@smicsl.com)

10/F., United Centre, Admiralty, Hong Kong. Tel: 2299 5566 Fax: 2866 7096

E-mail: [gm@smicsl.com](mailto:gm@smicsl.com) Website: [www.sun-mobility.com](http://www.sun-mobility.com)

CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS

---

True professional dedication endures the test of time. SMIC devoted a great deal of time in fostering awareness of the importance in transport document constructions. In the last decade SMIC seminars covered HBL, HAWB, FCR, Claims handling, international sea, and air freight conventions. The same last decade also witnesses 120 issues of effort written Chans Advice circulated monthly to about 20,000 readers who read them for more than 2,400,000 times.

Discerning forwarders realize the importance to boost up loss prevention and claim handling ability for long term profitability. SMIC's ability in helping forwarders achieving that goal is proven – SMIC forwarders are fortified by in depth transport legal knowledge truly essential for successful loss prevention. Such ability is not convincing without the test of time. Drop us a line for a try.