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To: Transport Industry Operators

### **Cargo claim handling for forwarders**

We have received a lot of cargo claims from our forwarder clients in the recent months. In this issue, we would like to discuss in general how the forwarders should handle the cargo claims.

#### **One Stop Services**

Forwarders are usually providing one stop door to door services. Such would involve the use of different modes of transport (by sea, land and/or air) and multiple handling (e.g. stuffing, unstuffing, warehousing, loading and unloading) and also various local & overseas agents & subcontractors (e.g. CFS, CY, shipping companies, trucking companies and airlines). It is unavoidable that some mistakes, omissions, negligence, or misconducts will be made by the forwarders' employees, agents or subcontractors. As a result, the forwarders have to handle many claim cases e.g. cargo damage (e.g. sea or fresh water damage, crush damage), losses (e.g. theft, robbery, overboard), delay, misdeliveries (e.g. release of goods without presentation of B/L) or misdirection, customs fines.

#### **Accident Occurrence, Notification & Survey**

After an accident or incident has happened e.g. cargo loss, damage, delay, misdirection, misdelivery; general average or salvage; error or omission; customs fines, the forwarder should at once notify its transport liability insurer to avoid late notification (which is a breach of transport liability insurance policy terms and conditions). Survey investigation may then be conducted to verify the cargo loss, damage and its extent (also in money terms). The surveyor should also find out the possible causes of cargo loss, damage and whether there are any defences e.g. cargo inherent vice or insufficient packing and whether there are any other parties liable e.g. CY, CFS, warehouse, haulier, shipping company or airline. Such would be useful for handling the cargo claim properly in the future.

#### **Cargo Insurance**

The shipper and consignee should be encouraged to claim against their cargo insurance for quicker & fuller compensation (usually 110% insured value). This would also reduce the commercial pressure on the forwarder. It is common to hear an angry shipper or consignee threaten to stop all new business unless the forwarder pays the cargo claim in full immediately. This difficult situation could be avoided when the cargo owner has bought the cargo insurance and received the fuller and quicker compensation from the cargo insurer. Thereafter, the cargo insurer may take the recovery action against the forwarder.

#### **Document & Information Collection**

Before the forwarder knows whether to pay and how much to pay in a cargo claim, it needs to get some supporting documents to make the decision. It has to look at the contract with its clients e.g.

HB/L, HAWB, FCR, and Standard Trading Conditions to check whether the claimant is one of its clients. If the claimant is a cargo insurer, it has to produce the subrogation letter to prove that it already got the cargo owner's rights after making compensation in accordance with the cargo insurance policy. Forwarders always think that they can have recourse action against their sub-contractors. Although this does not always materialise, it sometimes does succeed. However, some documents like MB/L, MAWB or charter party have to be examined to see what are the contract terms with the sub-contractors. The survey report as mentioned above will be useful in determining the extent of cargo loss or damage, considering the possible defences and identifying the liable party. The claimant has to submit the cargo commercial invoice to prove its claim amount. The forwarder should also ask for the cargo packing list. One use of this is for calculation of liability limitation amount which is usually based on the cargo weight or package. The stuffing and devanning reports should be collected, if available. However, they are usually self-serving documents i.e. they usually are written in a way to protect the interests of the party issuing the reports and therefore do not have much use in determining the liability. So it is also advisable to ask for the stuffing and devanning photographs.

### **Liability Assessment**

With the necessary documents and information collected, the forwarder will come to the important stage of liability assessment.

#### Any fault

The first important question is "Is there any fault, omission or negligence on the part of the forwarder, its employees, agents or sub-contractors?". If negative (e.g. act of God, force majeure, improper or insufficient cargo packing, or inherent vice of the goods), the forwarder should reject the cargo claim.

#### Suit time limit

The next very crucial issue is "Has the claim been time-barred?". If yes, the forwarder should reject the claim. The suit time limit is the period of time within which the legal action must be commenced. Once this has expired, the claim is no longer protected by law no matter how strong its merits are. Further dealings with the claimant in an already time-barred claim may risk the forwarder being held as having waived the time-bar defence. Three month suit time extension is usually granted by the forwarder upon the claimant's request if the claim has not yet been time-barred. However, the forwarder should first obtain suit time extension from the shipping company, airline or other sub-contractors. Otherwise, this may give rise to an unfavourable situation that the claim against the forwarder is still valid whereas the forwarder's indemnity claim against the liable subcontractor has already been time barred. Forwarders usually have 9 month suit time limit in their contracts with customers. However, such is sometimes overruled by international conventions' suit time limits e.g. the Hague Visby Rules (1 year) or the Montreal Convention (2 years).

#### Notice time limit

The other time limit is the notice time limit which is the period of time within which the claim notice must be sent to the carrier. The Montreal Convention has the notice time limit of 14 days for cargo damage and 21 days for cargo delay, failure to comply with which will allow the carrier to time-bar the claim. However, other Conventions' (e.g. the 3 day notice time limit under the Hague Visby Rules) or contractual notice time limits usually could not really time-bar a claim. Failure to give the claim notice will give the carrier the prima facie evidence that the goods have been delivered in good order and condition. However, such prima facie evidence can be rebutted by some other better evidence e.g. an independent Surveyor's report proving the cargo loses or damage.

## Law & jurisdiction

Another defence may be the law and jurisdiction clause in the contracts e.g. B/L or AWB stipulating the claims against the carriers must be determined by a particular country's laws and courts. However, many countries' courts do not recognise this kind of foreign law and court clause. Anyway, it is still better to have it in the contracts with customers as this sometimes may help the forwarder stay or dismiss the court case which is commenced in a wrong forum.

## Liability limitation

If all the above possible defences cannot help the forwarder to avoid liability in a particular claim case, then there is still the last hope of limiting its liability. For example, it is common to see the liability limitation of US\$500 per package or US\$3 per kilogram of the gross weight of the goods lost or damaged in the contract of carriage of goods by land. The Montreal Convention governing the international air carriage would limit the carrier's liability to 22 SDR per kilogram of the gross weight of the goods lost, damaged or delayed. The Hague Visby Rules relating to the international carriage by sea would limit the carrier's liability to 666.67 SDR per package or 2 SDR per kilogram of the gross weight of the goods lost or damaged whichever is the higher. SDR means the Special Drawing Rights as defined by the International Monetary Fund.

## Burden of proof

On the question of burden of proof, the rule is usually that the party which puts up an argument has the burden to submit the evidence to prove it.

## Negotiation

After assessing whether the forwarder in the claim case has liability or not, there comes to the negotiation stage. The forwarder should mark "Without Prejudice" at the top on its correspondence with the claimant. In brief, this means the email, fax or letter is on the without prejudice basis and should not be disclosed to the court in the future legal proceedings.

## Settlement

The forwarder should make no liability admission or settlement agreement unless with its transport liability insurer's prior approval. Otherwise, the transport liability insurer may decline to cover the forwarder's liability in the claim case. Any settlement offer should include an expiry date for the claimant's acceptance e.g. within 14 days. Any claim settlement should be on the full and final settlement basis and conditional upon the claimant's agreement to issue a Release/Indemnity letter to the forwarder.

## Reimbursement

The liability insurer reimburses the forwarder the agreed settlement amount subject to the deductible & limit in the transport liability insurance policy.

## Recovery

If there is enough evidence, the recourse action should be taken by the forwarder together with its liability insurer against the liable parties, usually the subcontractors e.g. CY, CFS, warehouse, haulier, shipping company or airline. If successful, this will improve the claim record & reduce the loss ratio of the transport liability insurance and hopefully will maintain the renewal premium at an acceptable level. However, it is often quite difficult to get sufficient evidence to claim a particular

party e.g. a forwarder issued its CFS/CFS HB/L whereas shipping company issued its CY/CY MB/L, the forwarder usually would not have enough evidence to pinpoint which subcontractor had caused the cargo loss or damage; and thus the indemnity claim has to be dropped after the forwarder has paid the claim to the claimant.

## **Loss Prevention**

The transport liability insurance should be for the protection purpose. If the forwarder has too many claim cases, such would increase its transport liability insurance premium (in other words, the operations costs or competitiveness would be adversely affected) and also damage its image and reputation. The long-term solution should be "to prevent the loss from occurring". It is not difficult to name a few loss prevention measures: learn lessons from own and others' mistakes; remove loopholes from the existing system; provide staff with more and better training; use professional & reliable agents & subcontractors which also have bought transport liability insurances. Lastly, having contract terms with customers that reasonably exempt and limit the forwarder's liability is also a very important measure to reduce the forwarder's loss even if an accident really happens. Otherwise, the forwarder has to face the full claim amount without any chance to limit or exempt liability once it is proved that there has been negligence on the part of the forwarder, its employees, agents or sub-contractors.

Please feel free to contact us if you have any questions about the cargo claim handling for forwarders.

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