

KNOWLEDGE IN TRANSIT



DON'T RELY ON CARRIERS FOR COMPENSATION

Ocean, air and road carriers can limit their liability for cargo loss or damage. This means those relying on carriers for compensation could find themselves falling short, particularly in the case of high valued but relatively light weight cargoes.

RECOVERIES FROM CARRIERS

Throughout the transport chain it is common for carriers to limit their liability, often to an amount far less than the value of the cargo that they carry. At first glance this may seem harsh. After all if a carrier damages cargo then surely they should provide compensation. However given the vast amount of cargo being carried on modern ships and aircraft, caps on liability are necessary to provide a balance between compensation for the cargo owner and the risk/reward of running a transport business.

For example, if a ship owner were responsible in full for all the cargo on a ship (the largest of which can hold nearly 20,000 containers) the risk of a loss running in to the tens of billions of dollars would not only be uninsurable but would also be so great that it would serve as a disincentive for those wishing to enter the shipping business.

Ultimately the best way to spread the risk is for each cargo owner to arrange their own insurance and for carriers to pay a reasonable level of compensation in keeping with the commercial reality of a finite supply of money for such compensation.



OVERSEAS SHIPMENTS

Carriers involved in transporting cargo overseas, be it by sea, air, road or rail, are often protected by conventions which limit their liability to an amount far less than the value of the cargo and is often based on the weight of the cargo. The extent of the limitation will vary according to the countries involved and the mode of transport.

LIMITED LIABILITY

For example, a shipment by sea between Australia and the UK will be subject to the amended Hague Visby Rules 1968 (SDR Protocol 1979). If a car weighing 1,000 kilograms and valued at \$100,000 is damaged the carrier's liability under this convention will be the greater of either AUD 3.50 per kilogram* or AUD 1,167 per package or unit. In this case the carrier's maximum liability for the car will be AUD 3,500; enough to cover minor damages only.

DEFENCES AVAILABLE TO CARRIERS

Besides monetary limitations the conventions also provide circumstances where the carrier will be entitled to avoid liability absolutely. For example they may be able to avoid liability if it can be shown that unavoidable damage occurred despite all precautions being taken by the carrier to protect the cargo.

DELAY IN REPORTING CLAIMS

Unlike cargo insurers who will generally only penalise an insured for a late reported claim to the extent that the insurer has been prejudiced by the late reporting, carriers may benefit from an absolute time bar (generally 9 or 12 months) after which time all late reported claims will be automatically declined.

ROAD TRANSPORT WITHIN AUSTRALIA

Road carriers in Australia fall into two camps:

1. those who use standard terms and conditions (consignment notes) and customer contracts to limit their liability, and
2. those who have no terms and conditions and may be liable without limitation for loss or damage arising from a breach of their duty of care.

It can be surprising to learn that road carriers in Australia are entitled to limit their liability to zero. As such, cargo owners run a financial risk if they believe that the transport company will compensate them for any claims. It is common that road carriers reject claims citing such grounds as 'not being common carriers' and that their services are provided on the basis of 'all care and no responsibility'. Many court cases have shown that it is extremely difficult for a claimant to succeed in their attempt to overturn a carriers' terms and conditions that limit their liability.

'SMALL BUSINESS' AMENDMENT TO THE AUSTRALIAN CONSUMER LAW

The Australian Consumer Law (ACL) gives the courts the power to declare that a term is 'unfair'. If a term is found to be unfair, it will be void.

From 12 November 2016 unfair contract provisions in the law that previously only protected consumers (e.g. mobile phone contracts, gym memberships etc.) will now be expanded to include small businesses.

This will impact transport companies and warehouse keepers using standard contracts and consignment notes.

WHAT CONTRACT TERMS MAY BE CONSIDERED UNFAIR?

- Exclusions of liability for loss of or damage to goods in transit or storage, including where the loss or damage is caused by negligent or wilful acts
- Exclusions of liability for consequential loss
- Limits on liability for loss of or damage to goods in transit or storage
- Extensions of contractual benefits to subcontractors (Himalaya clauses)
- Reduced time limits for notification of claims and for the commencement of legal proceedings.



*SPECIAL DRAWING RIGHTS

The liability limits of overseas shipping companies are often expressed in Special Drawing Rights (SDR). An SDR is calculated using the combined values in U.S. dollars of a basket of major currencies (USD, JPY, EUR, GBP). The SDR currency value is calculated daily and the valuation basket is reviewed and adjusted every five years.

1 SDR is approximately equivalent to AUD 1.75.

ROAD TRANSPORT IN OTHER COUNTRIES

Statutory limitations apply in many countries which limit liability for road carriers to either an amount per kilogram or per package. For example, in New Zealand, road carriers are protected by law and are only liable to NZD2,000 per unit of goods.

BUT THE CARRIER HAS GIVEN ME A CERTIFICATE OF CURRENCY...

As with most insurance products, carriers load insurance is for the benefit of the named insured – the carrier. The certificate of currency shows the carrier has insurance covering the carrier; the cargo owner will be unlikely to be a named insured under the policy so in the absence of any overriding contractual agreement the cargo owner may find themselves wanting if they are relying on the carrier's own insurance to cover them.

In circumstances where a customer asks to be named on a carrier's policy, they will generally be noted for 'their respective rights and interests' or not noted at all. However, regardless of whether a customer is noted on the carrier's policy or not, it is important to realise that the customer does not have any rights under the policy unless they are actually listed as a named insured.

CARRIER'S INDEMNITY

Cargo owners are increasingly putting pressure on carriers to assume responsibility for loss or damage caused by the carrier's negligence. This is more prevalent in the larger corporate style accounts where carriers indemnify cargo owners for damage either fully or partially.

Importantly, the cargo owner won't be dealing with their own insurer for claims but rather the contracting carrier or occasionally the insurer of the carrier. Differences in insurance conditions can occur such as the carrier's policy settling on market value whereas a policy taken out by the cargo owner may be easier to arrange on an agreed value or new for old replacement value basis. Carriers won't always be legally liable for loss or damage to cargo and may be in a position to choose whether to accept or deny a cargo claim. This is prevalent with so called "goodwill" policies which give the carrier the option of either paying or denying claims based on commercial reasons. The carrier could either deny the claim on the basis of their restrictive terms and conditions (consignment note) or because they weren't negligent in causing the loss or damage. For instance it could be argued that a carrier is not negligent in the event of a rollover caused by a brand new tyre blowing out or a third party discarding a cigarette which causes a fire.



CARRIERS PROVIDING INSURANCE

Unless a carrier holds an Australia Financial Services License or is an Authorised Representative of a Licensee it is illegal for them to arrange insurance on behalf of others. Due to this licensing burden, rather than offering to arrange transit insurance some carriers instead provide a 'Transit Warranty' for a limited amount (say \$1,000). As such warranties are not approved insurance products claimants may find themselves with limited recourse if the carrier is slow in paying or if they simply refuse to pay due to warranty restrictions.

It is also worth checking the charge for such transit warranty 'insurance' as the price may work out significantly higher over a year than arranging an annual cargo cover with an insurer.

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