

Valuable Cargoes: How Can They Best Be Carried?

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Pharmaceuticals and other high value cargo such as premium electronic and computer equipment are generally not sold “by the kilo”, but when such cargo is lost or damaged in transit the carrier will most likely seek to limit liability by reference to a, probably very low, limit of liability assessed on a per kilo basis.

For example:

- Air Carriage: Warsaw / Montreal Convention – up to 19 SDRs per kilo.
- International Road Carriage in Europe CMR Convention – 8.33 SDRs per kilo*
- Sea Carriage: Hague Visby Rules – 2. SDRs per kilo*

**The Hague Visby Rules also have a “per package” option and the CMR Convention has the possibility to break limit in the event of wilful misconduct. These are considered later.*

The goods owners will normally have cargo insurance, which if the loss or damage is covered, will probably make good the financial loss of the cargo owner. However – and this applies particularly with thefts – damage can be done to a company’s commercial reputation for example by stolen goods being sold into the market having first being stored by thieves and/or their accomplices in poor conditions-perhaps a damp warehouse. Also if goods are stolen or a consignment damaged then this could damage relations with the customer who will not receive goods on time and may miss a crucial market-such as the Christmas period.

In relation to this type of cargo much can go wrong. It will be susceptible to moisture and perhaps extremes of heat or freezing conditions. For example, many pharmaceuticals have stipulated temperature ranges within which they have to be carried and if that does not occur the cargo may be rendered unusable.

Computer equipment maybe fragile and sensitive to shocks, if it is dropped or badly shaken it may

become damaged or even irreparable. Attention must be given to specifying the type of vehicle or container. If temperature control is necessary then carrying temperature and ventilation requirements should be clearly recorded in writing.

Premium electronic products are attractive to thieves as they have a high value, they are relatively easy to dispose of and turn into hard cash. Many are packed in such a way that if stolen a vehicle can be easily and quickly unloaded without the need for any special equipment. The goods will be vulnerable to “attack” from organized thieves who may, if the opportunity arises, be prepared to use violence to achieve their ends. Loss prevention and security instructions with these types of cargo must therefore be aimed at limiting the opportunities for such attack planning the journey so as to limit, as far as possible, occasions when a loaded and vulnerable vehicle is parked in any public place – especially at night as thefts are most likely to occur when the vehicle is stationary, parked in a public place.

Outline of Points to Consider

1. Who will be carrying the goods over the journey?
 - a. Will subcontractors be used and;
 - b. by what means will the goods be carried?
2. What conditions will generally be applicable to the envisaged transit either
 - a. Compulsorily?
 - b. By contract?
3. What special instructions will be given to the carrier and how, to whom and in what form, will these instructions be given; and how will they be recorded?
 - a. Security precautions
 - b. Special handling instructions
 - c. Special interest
4. Are the conditions suitable or do standard terms need to be further or (re) negotiated or supplemented?

1. Who will be carrying the goods over the journey?

a. Will subcontractors be used?

Often it is obvious that the party contracted by the goods owners contract to carry the goods will not actually perform the entire or any of the actual carriage. This is true when that party is a NVOCC, the issuer of a House Air Waybill or a freight forwarder. However it might not be so obvious when the carrier concerned is a container line operator (but uses the vessel of another line to carry the goods) or is a road carrier who actually has the capability to undertake the journey but himself decides to subcontract.

The owners of valuable cargo should therefore give thought to who will be used to perform the actual carriage. Whether the carriage is by land, sea or air, or a combination of these, does the contracting carrier's right to subcontract need to be limited, or restricted to the use of specific carriers? This is particularly the case in the road transport industry in Europe where the load can be subcontracted several times and with each subcontract control becomes more difficult to exercise and any instructions given to the contracting carrier may not be passed on down the line. Further the load may end up for example, in the hands of a small carrier with no insurance, operating on the edge of legality who may be associating with thieves whose drivers may be of dubious or questionable character and whose vehicle maybe maintained to a poor standard.

Statistics show that the majority of cargo losses occur whilst carriage is performed by sole proprietors who may or may not be insured. Where a long term contract is being placed the cargo owner, who probably has a strong bargaining position, should start setting the agenda by insisting that certain rules and obligations be accepted by the principal carrier with whom they contract. For instance the cargo owners could insist that their principal road hauler is simply not permitted to subcontract any part of the carriage. Alternatively subcontracting could be permitted, but only on the basis that the principal road carrier accepts full liability for all loss and damage occurring during any period that the goods are in the custody of a subcontractor. Another alternative would be to allow subcontracting but only limited to subcontractors who have been expressly approved by the goods owners.

b. By what means will the goods be carried?

If the cargo is to be carried by air from city A to city B it is often the case that the air carrier in fact carries the cargo by air from city A to city C and then completes the journey from city C to city B by road. Is this acceptable to the goods owner or unacceptable because it increases the risk of theft or damage?

If the carriage is by sea, what route will the sea carrier take and are trans shipments involved? Often, especially with containers travelling long distances, the carriers operate a spoke and hub service which could inevitably mean that the containers will be trans shipped. Is the resulting journey time acceptable?

With road carriage there are known "black spots" where thefts are most common. Should the carrier be required to avoid these areas altogether, or at least be instructed to not stop in these areas?

2. What conditions will generally be applicable?

a. Compulsorily

Generally, depending on the mode of transport, in international carriage the liability of the carrier will be regulated by Convention: this applies to carriage by land, sea or air and these Convention terms are compulsorily applicable. Normally Conventions seek to regulate the carriers' minimum liability. Accordingly, thought must be given to what liability will be provided under those Conventions, depending on the mode of transport and whether this offers sufficient compensation in the event of loss or damage.

There are options in all circumstances to declare a special value, but this will invariably involve a further cost to the cargo owners who have probably already taken out cargo insurance.

b. By contract

There is however a distinction here between a "one off" carriage and carriage carried out under a long term contract involving many similar journeys. In a long term contract a number of conditions will in any event be a subject of negotiation and possibly the goods owners are in a position to insist on

conditions which might increase the carrier's liability or the circumstances in which that liability arises. This is certainly going to be the case where the conditions apply by contract. Often those conditions apply solely because they are standard trading conditions of the carrier and so incorporated into the contract by default. In a "one off" situation a carrier is unlikely to be willing to depart from his standard conditions, but in a long term contract service standards and perhaps limits of liability are matters open for negotiation.

The types of condition which might be negotiated are, for example, jurisdiction clauses, notice periods, and the ability on the part of the carrier to deviate / subcontract. We consider this further in 4 below.

3. What special instructions will be given to the carrier and how, to whom and in what form, should those instructions be given; and how will they be recorded?

a. Security precautions

With valuable cargo we have already referred to the increased risks involved from theft. It is a fact that most thefts occur when the vehicle is stationary, parked in a public place. Hi-jacking of moving vehicles do occur but are relatively rare. So attention needs to be given to route planning to ensure the numbers of overnight stops are limited and that other periods where the vehicle is stationary are kept to a minimum. A requirement could be inserted that during any overnight stops the vehicle is parked in a secure car park and not simply by the side of the road at the driver's discretion. We have seen a number of thefts where loaded vehicles waiting over night outside a warehouse to discharge or off load have been broken into and/or goods been stolen.

Security precautions could form their own paper, however we find it surprising that, even in cases where there are long-term contracts for the carriage of valuable goods, often there are very few security requirements inserted into the contracts. Mostly it seems this is left entirely to the carrier.

b. Special handling instructions

Similarly given that these types of cargo are going to be fragile or moisture / heat / cold sensitive thought needs to be given to what handling instructions are

to be given according to the nature/ subject matter of the particular cargo.

It is one thing to give special instructions of whatever type; it is another thing to prove that they were given. Frankly any instruction given orally is going to be extremely hard to rely on. There is ample opportunity for denial that such an instruction was ever given and proof will possibly come down to one man's word against another. This is not a sensible way to do business.

Whilst an instruction can be recorded in writing it does need to be properly recorded in a place from which it can be retrieved. Many times one is told when investigating this type of claim that "yes, we gave written instructions in a letter or some note, but no we cannot now trace that."

Accordingly the best place to put any special instructions is in the contract (if a long term one) and in the shipping instructions or any other written document which is both given to the carrier and a copy preserved somewhere where it can be retrieved if the need arises.

It is also important that the written instruction is given to a person within the carrier's organisation who has authority to receive it, act upon it and bind the carrier to observing and / or carrying out that instruction. An acknowledgement of the instruction should be required in writing and be recorded again in a place where it can be easily retrieved.

4. Are the conditions suitable, or do standard terms need to be re negotiated or supplemented?

If the carrier has a "per kilo" limit, is this acceptable both in terms of its value and as a formula for assessing the carrier liability? As stated above the Hague Visby Rules contain an option to calculate the carrier's liability on a "per package" basis. Would such an alternative be practical and worth inserting where the carriage does not involve sea carriage? Under the CMR Convention the carrier loses the right to limit liability altogether if he, his servants, agents or any other person of whose services he makes use to perform the carriage are guilty of wilful misconduct. Unfortunately the CMR Convention leaves open to the Court seized of the case to decide whether particular conduct amounts to "wilful misconduct". This produces

substantially different results depending on the jurisdiction and which national law is being applied and therefore leads the parties to rush to obtain the most beneficial jurisdiction by issuing pre-emptive proceedings. In order to avoid this certain actions/ failings on the part of the carrier could be specifically agreed to constitute “wilful misconduct”. For example, if special instructions are given to the carrier not to park overnight by the side of the road it could be expressly agreed that this would constitute “wilful misconduct” so if a loss in these circumstances occurred the carrier would not be able to rely on their limitation clauses. So a list of actions / omissions could actually be inserted in the contract it being thus agreed that loss or damage arising through any of them will constitute “wilful misconduct”.

Further, it could be agreed in relation to forms of transport other than those covered by the CMR Convention that the carrier loses the right to limit liability in the event of “wilful misconduct”. If this is to be done then it is important that the condition also states whose conduct will be relevant. In this respect the CMR Convention is quite clear and wide in it’s scope as it lists the carrier, his servant / employee or any other person who the carrier makes use of (so including any subcontractor) in order to perform the carriage.

Another problem which can arise, especially in relation to road carriage, is where the carrier and particularly any subcontractor used have no liability insurance. A term could be inserted to the effect that any carrier used has to have a certain level of liability insurance in place and the policy must be produced for inspection before the sub contractor can be used.

A specially negotiated contract should also include a jurisdiction clause convenient to the goods owner especially when international carriage is envisaged.

Tony Thomas

Email: tony.thomas@thomasmarinelaw.com
Mobile: + 44 (0) 7831 866839

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The Future

What, if any, changes to the various Conventions are envisaged in the future?

Sea carriage – in the medium term, the Rotterdam Rules will possibly replace the Hague Visby rules. If they do the same formula for assessing the level of liability will be retained except that the per kilo limit will be raised to 2 SDRs to 3 SDRs (and the package limit to 875 SDRs from 666.67).

Air carriage – the Montreal Convention contains in Article 24 provisions to periodically review the limit every 5 years, however this review is only inflation linked. The most recent review raising the limit to 19 SDRs per kilo took place in 2009.

Road carriage – in relation to international road carriage within European there is no change in sight to the CMR convention.

So no radical change is anticipated in the conditions which are compulsorily applicable to the various means of transport.

Conclusion

Where a long term contract is negotiated with a carrier many terms will be open for negotiation. We have considered a number of those opportunities above.

However, even in relation to “one off” shipments where the carrier will probably not be open to negotiate the main liability terms particular care must be taken to ensure that any special instructions given are properly recorded in writing-preferably on the transport documents themselves, firstly to try to ensure that those instructions are actually followed and secondly that they are easily and quickly accessible and possible to refer to in the event that things go wrong.

Tony Thomas - 01/09/2010

Linley Taylor

Email: linley.taylor@thomasmarinelaw.com
Mobile: + 64 (0) 21 277 7227