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Legal Lookout

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Paying to play: Considerations transportation intermediaries should consider before contractually accepting cargo liability.

Virtually all ocean freight forwarders and surface freight brokers have to decide whether to accept liability for their shipper customers' cargo claims. The issue arises in two contexts: (1) when a shipper, typically a high-volume, likely very profitable customer, proposes to its prospective ocean forwarder or surface broker a master contract providing that the intermediary will be primarily liable for cargo loss; and (2) a shipper makes a cargo claim to the forwarder/broker, saying something along the lines of "pay or we'll take our business elsewhere."

Generally speaking, ocean freight forwarders and surface freight brokers are not liable for loss, theft, destruction, damage or delayed delivery of cargo unless their own wrongdoing causes the loss. This most typically arises when an intermediary books a customer's shipment with an incompetent carrier, such as one that's not properly licensed, adequately insured, or doesn't have adequate equipment and means to undertake the shipment; or when it provides the carrier improper shipper instructions or other directives needed for the transport. If an intermediary tells a motor, rail or ocean carrier that a shipper's cargo requires refrigeration at 5° Fahrenheit when the shipper told the intermediary it should be set at 5° Celsius, well, you get the picture.

Note that this concept doesn't apply to non-vessel operating common carriers and surface freight forwarders, those species of transportation intermediary that can indeed be held liable for cargo loss even if they didn't cause the loss. But that's another article.

What if the ocean freight forwarder/surface broker didn't do anything wrong, or in the case of shipper's proposed brokerage contract, hasn't even booked a load yet? The decision is more of a business issue than a legal one. Legally speaking, accepting liability for events you cannot control or for which you are not culpable makes no sense. What transportation lawyer would say otherwise?

But intermediaries facing this dilemma know that business, start to finish, is all about risk. Many consider acceptance of contractual liability for potential cargo claims a somewhat-manageable uncertainty akin to the ebbs and flows of transportation demand. Sometimes an account is too juicy to refuse, and sometimes a business operating in a competitive industry needs to be flexible. Standard intermediary insurance policies don't cover cargo losses for which the insured isn't legally liable. While insurance products for contractually assumed cargo liability are available, they can be expensive and tricky to procure.

Acceptance of the risk isn't always a yes-no contractual matter. Many of those shipper-proposed brokerage agreements not only hold the intermediary liable for cargo claims, some disavow COGSA and Carmack defenses that ocean carriers, motor carriers and railroads would enjoy if the claim were made directly against them. In other words, the intermediary could be held liable under its brokerage contract, but be limited in its ability to seek indemnity from the carrier that actually caused the loss. Some shipper-designed contracts even go so far as to hold intermediaries liable for full cargo invoice whether or not it's completely destroyed, and even consequential damages on the level of profits a shipper might lose, for example, by way of a delayed construction contract. Thus, if ocean forwarders and surface brokers are inclined to stick their necks out in the name of business opportunity, at a minimum they should be aware of, and try their darnedest to reduce, the contractual consequences they might face for cargo loss.

Nor should intermediaries accept cargo liability, even for a claim a shipper makes with no contractual entitlement, dismissing it as no big deal. It might seem like good business sense to pay a good customer a one-time $500.00 cargo claim to keep it happy and avoid administrative issues with having to process a claim through the wrongdoing carrier. But by paying out that claim, the intermediary sets a precedent whereby its shipper can legitimately claim an understanding that its service provider generally accepts cargo liability. When along comes the big six figure claim from that same shipper, the intermediary is harder pressed to point to law providing that it's not liable.

In this context, best practices include stating in contracts (which can be through their incorporated terms and conditions), that the intermediary is not liable for cargo loss, and that any claim payment is made strictly as an accommodation. You might restate that in a letter accompanying the check, or even on the check itself.
While most business enterprises want to protect their legal interests, business realities in the intermediary world complicate the analysis. But an analysis should still be undertaken, and forwarders/brokers should assume liability only with their eyes open.