

Shippers armed for legal battles

No longer treated as wards of a court, shippers are recovering more from carriers in cargo lawsuits.

BY ROBERT MOTTLEY

Literally tens of millions of dollars are lost every year through shipper misinformation involving insurance claims.

The most costly traps for shippers are failure to file lawsuits for cargo claims within a required period, and in not writing carrier contracts with up-front language that protects cargo.

"There is a revolution taking place right now. The manner, approach and tenor of how carriers do business is beginning to change," said David T. Maloof, managing partner of Maloof & Browne LLP in New York and a second-generation cargo law specialist. "With deregulation, the courts have put in the shippers' lap both the power to be effective in dealing with carriers, and the power to be ineffective."

No longer do courts treat shippers as their wards. "Twenty years ago, you'd see decision after decision where a court would say, 'a carrier's contract with a shipper is contract of adhesion — so we are not going to enforce this clause, or that one,'" Maloof said.

Courts today are saying "even though carriers are giving shippers form contracts, both sides had better start reading them — because we're going to enforce the small print," Maloof said.

"That has created, in some cases, tremendous inequities where a shipper has a million-dollar loss and a grossly negligent carrier pays only a thousand dollars.

"There have been so many incidents of that nature that finally, one by one, shippers are waking up and saying, 'we're going to put into these contracts what we want. If a carrier offers inequitable terms, we won't

use that carrier.'

"More and more, courts are saying that 'the contract is what you make it,' within the context of a legal statute," he said.

Equitable Exceptions. Shippers have never known how much room they have to negotiate within a statute, because carriers naturally have been reluctant to encourage thinking in that direction, Maloof said.

"The majority of our business involves assessing the limitations of liability under the Warsaw Convention for air transport, the Carmack Amendment for trucking, and COGSA (Carriage of Goods By Sea Act) for ocean carriage. That's the fertile seedling ground for cargo damage claims," he said.

"Carriers will almost never voluntarily agree that a limitation doesn't apply. They have a psychological problem with doing that, even when a case is black-and-white obvious.

"They think COGSA's present \$500 package limitation is virtually a constitutional amendment. They don't understand that sometimes it applies, and sometimes it doesn't. There are many exceptions which the courts have carved out, for reasons of equity."

One example of such an exception is the on-deck deviation doctrine. If a carrier puts cargo on deck without a shipper's approval, unless it's a closed container, the typical rule is that the carrier cannot enforce the package limit of liability. The thinking is that the carrier so deviated from the contract that the contract is no longer a fair basis for the arrangement.

Time Limits. Under COGSA, for international shipments, "you have one year after delivery to a fit and safe pier in which to file a lawsuit," Maloof said.

"If you start doing inland claims, you get a rude awakening. The Carmack Amendment, covering domestic trucking losses, allows for limitations as low as nine months in which to file a claim. That three-month gap is often a source of throwing cases into the garbage," Maloof said.

"It's even worse when you get to domestic air transportation, which is completely deregulated," he said. Some of the domestic air carriers have time limits to file a claim as short as three or four months.

Once a filing date is clear, the next step for a shipper or his insurer is to substantiate the actual cargo loss or damage. Proof of loss, in a claim of any size, would typically start with a marine surveyor's report which gives the background of the incident causing the loss, along with pertinent personnel interviews and an inspection of the damaged cargo.

Additional proof would comprise receipts from a carrier demonstrating damage, invoices, packing lists, bills of lading, anything to confirm that the cargo was actually in the carrier's hands, and can determine the value of the cargo. Also useful are salvage bids, describing what — if anything — the cargo would sell for in its damaged condition.

What happens if a marine surveyor doesn't complete a substantiating report within a filing date? "The time to file a claim is not extended because you don't have information," Maloof said.

"That is a hard and fast rule enforced by the courts. If you don't have all of the data, then you have to get off the best claim letter you can within the prescribed time limit."

Many claims are filed prior to having all of their supporting information in place, in order to get in under the wire.

"You may not have an assessment of the damage. But you almost always know who damaged the goods, what the bill of lading date was, what the bill of lading number was, where the cargo was shipped from and where it was being sent — basically, what happened," he said. "That's all you need to file a claim, plus an estimate of the damage," he said.

"Typically, if a claim amount is erroneous, there is no real penalty. You can change it later."

How Lapses Occur. Why do shippers suffer from misinformation? "The ones I meet with tell me that their companies have legal staffs, but they are lean and mean and no one has any background in transportation," Maloof said.

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When a shipper or insurer is aware of money being lost, a top-ranking executive may say, "let's hire someone to stop this from happening," he said. "When they are simply not recovering money, it's a much bigger step for a company to say, 'let's hire an attorney for \$100 grand so that we can maybe get back money.'"

"Yet for that \$100 grand, they might be able to recover a million dollars each year," he said.

Recovery statutes appear simple, on the surface, because basic tort law is often straightforward. However, "the nuances of when you can recover more than limitations of liability that appear in contracts and when you can't, as well as knowing which circuit courts around the country apply which rules — because they often apply them differently — requires someone with specialized legal knowledge. A logistics manager doubling as a paralegal can't cut it."

When shippers and insurers try to settle their issues themselves, or use a legal generalist, "they get bluffed by the carriers," Maloof said.

"The carriers will tell them that whatever limitation appears in the contract is always enforced. The carriers will say that with a straight face, and the shippers will believe them. Carriers will also argue that they didn't actually damage the goods, which puts the ball in the shippers' corner. Claims recovery is a battlefield, and it isn't for the fainthearted or the partially informed."

Changing Legal Climate. Historically, admiralty law firms in New York fall into two camps. There are firms that press cargo claims, and those that represent carriers in lawsuits resulting from cargo claims. That's still largely the case, although today, there's some crossover. Even as recently as 20 years ago, it would have been unheard of for one admiralty firm to handle cargo claims and represent carriers.

How long does it take for a cargo claims case to go through the courts? "Today, cases are moving faster than ever. It's unbelievable how quickly they can move," Maloof said.

Many courts around the nation move more quickly than the federal southern district of New York, the Mecca for many marine lawsuits. "I'm in court now in the eastern district of Virginia, which has what is called a 'rocket docket.' No matter what — in that court — your case will be at trial in six months. If you argue for an extension, and the court will turn you down unless truly egregious circumstances justify it," Maloof said.

In addition, most courts now have some type of mediation process, or they refer a case in its early stages to a magistrate for settlement. Many cases are settled within one or two months of being filed.

"If a cargo claims case is below a certain size, there really has to be compromise on both sides, because expenses will soon exceed the value of the lost or damaged cargo," he said.

As far as Maloof is concerned, arbitration is the worst alternative. "In New York, maritime arbitration can be slower than the courts. You have to pay the arbitrators, their fees are hefty, and you have virtually no appeal."

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"With courts, you know what you are getting. You have the right to appeal. You know you have an impartial judge. These days courts may be even faster."

Rationale For Recoveries. Maloof said that "insurance companies do not put the resources into subrogation that it deserves. Insurers tend to under-assess their ability to make recoveries, which they see as the back end of the insurance process. If they were to expend more funds in standing up to carriers, they could recover three to five times the money they put in."

Although insurers are the catalysts for most cargo lawsuits, more shippers are pursuing claims.

"To the extent that shippers have uninsured losses, and the extent they have losses that exceed their insurance, they should be vigorously pursuing recoveries. And they should be doing it from all phases, particularly with respect to theft," he said.

"They should be active on the loss prevention side, which means auditing their carriers, to be sure the transport providers they hire have adequate and professional security measures in place."

Shippers should "also proactively negotiate contracts with carriers to insure that if

there is a theft, they will obtain compensation. And when they suffer a theft, they should pursue their rights in a court of law against carriers."

Theft currently has reached epidemic proportions in some areas of inland shipments. "That's primarily because international arrangements are often made to steal electronics and other high tech, high-value (goods) in this country," Maloof said, "so that shippers are getting hammered with multimillion dollar losses."

Many insurers have been hit so hard that they've set such high deductibles to the extent that shippers are self-insured. For example, if the insurer's deductible is \$250,000, the practical effect is that 99 percent of the cargo losses insured will now fall under that limit.

Assessing Risk. A number of inland shippers refuse to insure cargo themselves, which leaves them at the mercies of their carriers' own insurers. "That's because shippers perceive premiums as being too high, vis-à-vis a prior loss record," he said.

Also, some shippers won't pay additional valorem rates for full coverage even if they are contracting to transport expensive, delicate or unwieldy cargo. That lapse has led to horror stories, such as the one about a \$1.5 million drill press being washed overboard and the recovery from the carrier's insurer under COGSA being only \$500, because the unit was considered a single package.

"The question there was how much did the shipper know about the risk of that cargo being damaged?" Maloof said. "If a shipper doesn't have that data, or sufficient internal resources to assess the risk, he may not make an economically reasonable decision, which might logically be to declare a higher value, because you are shipping something so valuable — and in the case of project cargo, like a million-dollar generator, so difficult to move — that the chances of damage may be substantial."

"You may even incur losses beyond the cargo, such as losses to a contracted project. We've had cases where a foreign shoreside project couldn't be completed, because a critical piece of cargo had been damaged during ocean transit. That sort of loss is typically not covered by marine insurance."

Can such project losses be recovered in court? "That gets into the law of consequential damages. You could have to establish that the defendant — usually a carrier — had a reason to know that the delivery time was critical and there could be such harm if he didn't make delivery. Consequential damages are a higher threshold to recover, but not impossible," he said. ■