Welcome to TT Talk

No. 95 in the series

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1. Security for airfreight and the AIMSS

The Airfreight Industry Minimum Security Standards (AIMSS) initiative is effective, practical and economical.

The AIMSS programme was borne out of the stark reality that the airfreight industry, as well as the law enforcement agencies, also had a major role to play in reducing the high level of organised crime activity in and around London Heathrow airport. The programme has been developed by, and as a direct result of, the close co-operation between the Metropolitan Police, British Airways, the Technology Asset Protection Association (TAPA), the British Airports Authority (BAA), HM Revenue & Customs, the Road Haulage Association (RHA), the Airline Operators Committee Cargo (AOCC) and the British International Freight Association (BIFA)

The AIMSS Document, in particular, clearly sets out the recommended minimum standards of security for warehousing, road transport and staff recruitment. It comprises of advice and a self assessment template that prepares the like of airlines, freight forwarders, customs brokers, hauliers and warehouse operators for accreditation by a police crime prevention officer. Already, over 130 companies based in the Heathrow area have been awarded an AIMSS certificate of accreditation valid for two years. This permits the recipient to use the AIMSS logo on their letterhead.

Most of the recommendations of the AIMSS do not require vast capital investment. The Club highly recommends that operators in the air cargo industry participate in the AIMSS programme and thereby enhance industry security and customer confidence.

More information is available on the AIMSS website:

http://www.aimss.info/index.html

2. Lien – Make sure it is "right" before exercising your right

A lien means the right to detain possession of somebody else's property as security for a debt. It is an aggressive but difficult tool. Transport operators must understand how to exercise a right of lien properly, or they may face claims for unlawful detention of the goods. The Club would like to offer the following advice.

The concept of lien originated from the common law. At common law, a sea carrier, for example, has a lien for unpaid freight. A repairer's lien against the vehicle owner for outstanding charges is another well-known example. However,

the common law right of lien is very restrictive. In the maritime context, it is only for unpaid freight, general average, and costs incurred in preserving the goods; and it can only be exercised against that consignment over which the freight is outstanding (that is, it is a “particular” lien). As regards freight forwarders, it is more limited still; the law recognises no general right of lien: as a mere bailee for reward (e.g. a land carrier or a warehouse operator) who does not improve the goods (by contrast with a car repairer) he does not have a right of lien unless his contract expressly provides for one.

In the light of this situation, transport operators often create their own right of lien by contract and in terms wider than the common law lien. Thus standard conditions, bill of lading terms or industry association conditions normally contain a lien clause. This is a contractual lien.

Some points to remember in this regard. Firstly, there is no lien if no debt is due. Transport operators must consider any existing credit terms or payment conditions, before taking lien action. Also, a mere claim or dispute not yet adjudicated by a court is not a debt.

Retaining possession is the essence of lien. This can be done via one's agent or subcontractor but exclusive control must be present. A delivery of the goods to any third party, or any waiver of the right of lien, invalidates a lien. A common waiver situation is when a bill of lading is stamped "freight prepaid". In such a case, the carrier is usually prevented from exercising a lien for outstanding freight against a third party consignee who has bought the goods in reliance on the “freight prepaid” statement in the bill.

Another basic requirement is to communicate the demand of lien to the person whose property is to be held. This is logical, as any unexplained denial of delivery amounts to unlawful possession. An operator need not state the exact amount for which the lien is exercised, although an unreasonable overstatement may prejudice his position. We recommend that the demand be made in writing, with express reference to the lien clause being relied on.

As we have said above, the common law lien is very restrictive. A good contractual lien clause will therefore cover as many types of sums due as possible. Basically, the words "any amount due" or "all sums payable", would suffice to cover other charges in addition to unpaid freight. This also contractually extends the lien to charges other than those relating to the consignment being liened. It makes it thus a “general”, rather than a “particular” lien.

It is worth noting that a lien confers no right of sale of the goods being held, no matter how long the amount has been outstanding and the goods been kept. Therefore, it is common for the lien clause to include an express right of sale. Nevertheless, we do not recommend any contractual right of sale be exercised without the transport operator first consulting its liability insurers or legal advisors. This is because a contractual right of sale must be exercised with reasonableness.

Another very important point to note is that the transport operator is not able to recover the costs of exercising a lien (e.g. storage costs) unless the lien clause specifically provides for this. A recent High Court case in England, Jarl Tra v Convoys [2003] 2 Lloyd's Rep, 459, even suggests that very clear wording must be present in the contract. [For a note on this case, see DMC’s CaseNotes @ http://www.onlinedmc.co.uk/jarl_tra_v__convoys.htm.

However, just having a well drafted and powerful lien clause in the contract is far from enough. The biggest uncertainty is that the contractual lien is only effective against the customer with whom the contract was made, but not the whole world. The customer may not be the actual owner or assignee of the goods, as when a warehouse operator contracts with the shipping line only and not directly with the cargo interests. The disadvantages of this doctrine, known as the “privity of contract” principle, have been reduced to some degree by the development of the concept of bailment on terms. In Jarl Tra v Convoys, a subcontractor's general lien clause was held to be valid against a third party cargo owner whose contract with the main contractor contained a "liberty to subcontract on any terms" clause. As a result, the third party was deemed to have known or consented to the general lien clause in the subcontractor’s terms. However, there is no guarantee that this crucial link in the contractual chain will be present in every case.

Also, foreign jurisdiction is another factor to consider. Not all countries recognise a right of lien. Disregard of the local law and regulations may expose a forwarder to unwanted legal consequences.

Finally, the transport operator should not forget that it has a continuing responsibility to care for the goods under lien and may therefore be liable for loss or damage to them whilst in the operator's custody. The Club covers the liability of its members for loss or damage of goods held under lien. However, it is subject to the applicable insurance limits. For expensive cargoes especially, the Member who does has an insurable interest should take out cargo insurance After all, it is still the responsibility of the member to make sure that the course of action he follows is proper.

3. Hong Kong has joined the Montreal

The Club's Hong Kong office would like to bring to all readers attention that on the 15th December 2006 the Government of Hong Kong enforced the Carriage by Air (Amendment) Ordinance 2005 - Montreal Convention. Essentially this relates to the application of the Montreal Convention to international carriage by air.

Hong Kong follows China who joined in 2005.

Readers may have been aware from our previous editions that the Montreal Convention is more favourable to air carriers in terms of the liability regime for cargo damage, loss, or delay. For example, carriers will be able to limit liability due to breach of duty. Non-compliance with the old documentation requirement to issue an air waybill with a "Hague notice" (to unequivocally warn customers of the Warsaw limitation) does not now deprive the carriers of liability limitation.

This should be welcomed by Hong Kong air freight operators in the technical aspect.

4. Tackling uncollected cargoes

Many Members and operators are constantly plagued by uncollected / unclaimed cargoes, which may bring about considerable bills on warehousing, container "demurrage" (i.e. late-return charges), and disposal costs. In the worse situations, it may get the transport operator involved in customs problems. Also on the overall account is the hidden time cost incurred in getting rid of the uncollected shipments.

The Club's insurance cover and worldwide claims network have long been providing Members protection on those costs which arise due to the consignee's total failure to collect cargoes. However, this is only second to a system of procedures to avoid and tackle the problem. We would like to offer the following advice:

First and foremost, you should maintain an attended record of shipment accomplishment, especially for sea shipments, making sure that shipments are delivered within the normal transit time. Any outstanding delivery is always on easy checking. One way to this end is to have a system of report on the status of surrendering of bills of lading issued or handled. You should bear in mind that at law, the shipping lines have no duty to notify shipment arrival.

The Club has recognised certain types of "problematic" cargoes. Scraps, resins, and paper wastes to unfamiliar places, are prone to be abandoned. Counterfeit products from time to time are left unclaimed, not because they are not wanted, but because the import " channel" is not organised. If you have experienced problems with particular cargoes, customers, or destinations, you should put your operation and sales on alert.

A shipment is deemed to be "unclaimed" when upon a reasonable period of time (say after the "container demurrage free period"), the intended consignee has manifested no intention to demand for or take delivery. Pro-activity is indispensable in resolving problems, if an unusual late collection has taken place, you should do the following without delay:

(1) Talk to your customers (both the shippers and the intended receivers if known) and demand immediate instructions either to change consignee or destination, or to arrange for re-shipment, or even to abandon it.
(2) Promptly notify the Club or your insurers and prepare for the information showing the details of the cargo and contacts of your destination agent and customers.
(3) Ask your destination branch or agent to keep clear records of all accounts in relation to the unclaimed shipment; inform and update your customers of those charges.

(4) Consult and arrange with your agent for a more economical alternative storage if possible.

It is worth noting that under a bill of lading contract, the shipper at common law retains certain contractual responsibilities even though the shipment has commenced. Those responsibilities include payment for freight and general indemnity to the carrier. Expenses arising from dangerous goods and unclaimed cargoes are covered under the general indemnity, and so it is therefore, the shipper who should be contacted when seeking solutions or redress.

Lastly, do not sell any unclaimed cargo without the approval of your customers or before consulting your insurer. If your customers have agreed to abandon the unclaimed cargoes for your disposal, ask them to put their intention into writing with agreement on full indemnity, and to return to you the original bill of lading.

5. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information about any of them, or have any comments you would like to make, please email the editor at tt.talk@ttclub.com. We look forward to hearing from you.

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TT Talk is a free electronic newsletter published as occasion demands, by the TT Club, International House, 26 Creechurch Lane, London EC3A 5BA, United Kingdom.

You can also read this newsletter and past issues on our website: http://www.ttclub.com

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