Welcome to the latest edition of TT Talk, number 46 in the series

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1. Hazmat safety: Let us have your views!

At a series of meetings held recently in south-east Asia highlighting the dangers posed by the shipment of hazardous cargoes without proper documentation, Andrew Webster from the Club's managers called upon everyone involved in the transport chain - marine carriers, terminal operators, railroads, road transporters and so on - to drop the surcharges they have traditionally levied for handling hazardous materials.

Andrew's thesis is that many shippers are likely to be deterred from declaring that their shipments are hazardous, if by so doing they attract a financial penalty in the form of a surcharge. LCL shipments are particularly vulnerable to this since the surcharge - raised on the basis of the freight for the whole container - can be very expensive if it is passed on exclusively to the shipper of a 100 kg drum. Removing the surcharges would, he believed, take away one of the disincentives to proper declaration and make it easier for carriers to police the required packing, stowing and segregation standards. At the moment, if cargo is not declared to be hazardous it is not inspected and can end up in an inappropriate stowage position. It is only by ill-luck that some of these shipments are discovered, when an incident occurs during the voyage or on a terminal. Something had to be done to try to break the current circle of blame for non-compliance, in order to bring about a major increase in safety for seafarers and ships. He asked: "what is better: to waive a few hundred dollars of revenue in dangerous goods surcharges or lose fifty million dollars-worth of ship?"

Following press reports of Andrew's presentations, a number of shipping industry figures have contacted the Club, maintaining that those views are mistaken.

The Club supports all efforts to increase safety of life of seafarers and terminal operators. We recognise that while the implementation of the IMDG code is a legal requirement, much still needs to be done to make sure that its regulations are complied with. Training and raising shipper awareness are clearly two facets that have to be addressed, as is better policing of hazardous shipments. While we see the (expensive) consequences of failures in the IMDG chain, we recognise that the readers of TT Talk collectively have a vast amount of day-to-day knowledge and experience of handling such cargoes and think that this pool of practical information should be shared between all operators. We are therefore inviting readers to write in with their comments and suggestions as to what steps could be taken to reduce the amount of non-declaration and ensure better implementation of the IMDG code.

How can hazmat shipments be better policed?
How can shippers be made more aware of their responsibilities and the legal requirements?
What steps can forwarders and warehouse operators take to ensure better compliance?

Please send your suggestions to TT Talk@ttclub.com. Please give your own and your company name: we will publish a selection of answers in a future edition of the newsletter. If you wish us to withhold your name, please say so.

2. Forwarders selling cargo insurance face new EU regulations next year

In early 2005 freight forwarders in the European Union will face stringent new regulations if they wish to offer cargo insurance to their clients. The EC Directive 2002/92 requires all member states to have introduced national legislation by the end of this year governing the regulation of insurance intermediaries. While the measure is designed to create a "level playing field" for brokers and similar companies who advise clients on the available and appropriate policies for their particular risks, one of its side-effects is to require anybody who sells insurance products - even if it is only an ancillary part of the main business - to have registration.

As with all EU directives, the Commission only requires member states to bring in appropriate national legislation to meet the requirements and achieve the objectives of the directive. It is therefore likely that the detail of individual states' legislation will differ widely. The following is based on our understanding of the legal position that will apply in the United Kingdom.

Freight forwarders who offer cargo insurance to clients, either as part of the total transportation "package" or as an "optional extra" will have to be registered with their national insurance supervisory authority (for the UK, the Financial Services Authority). Before accepting registration, the national authority will have to be satisfied that the forwarder complies with the regulations which include requirements that he has professional indemnity cover of at least EUR 1 million any one claim, up to an aggregate of EUR 1.5 million in any one year; possesses "appropriate knowledge [of the insurance products on offer] and ability"; is of good repute; and keeps client's insurance funds in a separate account from other monies. It is thought unlikely that most forwarders will be able to meet these onerous requirements.

Even if a freight forwarder advises a client that he should have insurance to cover the risks of cargo loss or damage it; he will not be able to refer the client to a specific broker to advise on an appropriate policy, unless the forwarder is authorised as an "introducer". It will be permissible for a forwarder to advise a client in general terms to discuss the question of insurance with a broker. While the requirements for introducers are not as severe as those for other intermediaries, registration will be required. Forwarders will have to be very careful how they phrase such introductions to avoid finding themselves classed as "sellers". It will be a criminal offence, punishable by an unlimited fine, for an unauthorised intermediary to provide advice about insurance products or to sell them; the insurance policy itself may also become unenforceable.

It may be possible for an authorised intermediary to license a forwarder to act as its agent, but the intermediary will have to take full responsibility for the proper training of the forwarder's staff and will also be legally and financially liable for any mis-selling or other errors committed by the forwarder in connection with the provision of insurance.

In the UK, the forwarders' association BIFA has been lobbying the Financial Services Authority to obtain some form of exemption for transport companies who sell their clients cargo insurance as an adjunct to their main activity. Unfortunately their attempts so far have been unsuccessful. If other EU states adopt the same stringent requirements as the UK, in some countries - where forwarders are required by the terms of their standard trading conditions to offer insurance protection against loss or damage in transit - there could be an interesting clash between the need to abide by the terms of the contract and the need to stay within the law.

TT Talk will be reporting on developments over the next six months. Members who have any immediate concerns are advised to contact either their national forwarders' trade association or their broker.

3. Forwarders' Certificates of Receipt

One of the questions members frequently ask the Club is about the difference between a forwarder's certificate of receipt (FCR) and an NVOC (non-vessel-operating carrier) bill of lading.

Although the two documents look very similar and can have similar functions, they are legally very different.

There is a common misconception about the status of an FCR, as we have seen numerous examples in claims files of FCRs being issued "to order". An FCR is what it says: a certificate issued by a forwarder confirming that he has received the stated cargo in apparent good order and condition from the named shipper and that he is holding them for irrevocable dispatch to the named consignee. Delivery of the goods to the consignee does not depend on the surrender of the FCR to the forwarder or his agent, so an FCR is NOT a negotiable document of title.

The FCR is intended to bridge a gap that often appears in international transactions. For instance, a forwarder may be engaged by a project manager to assemble a shipment from a number of different suppliers. An individual supplier may be selling on Ex Works (EXW) terms and is therefore entitled to be paid as soon as he has delivered the goods to the forwarder. Under normal circumstances the shipper would receive a bill of lading which would enable him to call on the letter of credit. However, the forwarder may require some time to get the shipment organised (perhaps there are other things to do as well, such as packing), and maybe he does not wish to issue his own "received for shipment" NVOC bill. As the actual carrier has not yet taken charge of the cargo, he cannot issue a bill of lading either, leaving the shipper facing some delay before he gets paid. The FCR can fill that gap: it gives the buyer the assurance that the seller has handed over the cargo and cannot get it back. The buyer can therefore release the funds to the seller, in return for the FCR (or he can tell the bank to accept an FCR under the letter of credit). Once the FCR has been handed over in exchange for payment, the seller has effectively assigned the benefit of the contract to his customer and has no further right to stop or delay the transport.

An FCR never represents or evidences a contract of carriage by sea, as a bill of lading does, although naturally forwarders should assume a duty of care for the goods in their custody and control. The FCR can also be evidence of a contract of forwarding/cargo handling. An FCR is seldom, as recognised by a common law judge, a "stand alone receipt" with the forwarders being a mere "conduit".

The FCR is also commonly used in trades where a middleman is involved, who wishes to hide the names of his supplier and his customer from each other. The shipper hands the goods to the forwarder who can then issue an FCR confirming that he has received the goods. This allows the middleman to pay the shipper and receive the FCR in return. As soon as the forwarder gets the original FCR back from the middleman, he will be able to issue his NVOC bill of lading to him, confirming the contract of carriage and enabling the middleman to control the delivery to his customer. Because the supplier still retains the right to give new instructions to the forwarder - provided that he surrenders the original FCR - forwarders must wait until they have the FCR safely back in their possession before issuing or releasing the relevant bills of lading to the middleman.

In issuing an FCR, the forwarder gives an undertaking that the cargo will not be returned to the shipper: this is an important element underpinning the trust that can be placed in the document. Once the FCR has been transferred to the buyer in exchange for payment, the seller no longer has any further power over the shipment. As noted above, the shipper who has received an FCR can only cancel or revise the forwarding instructions if he returns the original document to the forwarder.

An FCR does not encompass any right to a claim for the surrender of the goods, but merely confirms that the forwarder has received them with certain irrevocable forwarding instructions agreed with the consignor or consignee. Only ONE original document needs to be issued (unless a copy is required) and it should be marked "Non-Negotiable" to avoid disputes;

In view of the widespread misunderstanding of the nature of this document, members are well advised to make sure that their clients, requesting an FCR, are aware of its proper use and its limitations.

More on this subject can be found on Peter Jones's website http://www.forwarderlaw.com/ to which we are indebted for much of the information on which this summary is based.

4. And finally ...

ility, a website dedicated to issues of safe handling of hazardous materials includes this tantalizingly incomplete note in its monthly round-up of accidents on http://www.saunalahti.fi/ility/HInt%20Editorial.htm :

"And speaking of repeat accidents, the only difference between the February 21 accident in Lauf an der Pegnitz, near Nürnberg, Germany, and that in Helsinki, Finland, on March 8, 2003, is that in the latter incident everyone had their clothes on. "

5. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information on them, or have any comments you would like to make, then e-mail the Editor at tt.talk@ttclub.com. We look forward to hearing from you.

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