



TT Live – Series 1: episode 6 – 16/12/2020 Incorporating standard trading conditions (English Law)

Mitigating the risks

In the final episode of our contractual challenges series, Mike Yarwood, Managing Director Loss Prevention, talks with Geraldine Savin, Senior Claims Executive for the TT Club about the importance of incorporating standard terms and conditions (STCs).

Mike: “Welcome to this edition of TT Club’s Podcast “TT Live”. In this edition, we are going to focus on the subject of standard trading conditions, what function they serve, their importance and how to adequately incorporate them to ensure you are able to rely on them when required. I am joined today by my colleague Geraldine Savin at TT Club.

The logistics industry is fraught with potential risks, disputes and claims are perhaps inevitable. The exposure to claims can be minimised, however, by maintaining robust management controls. These controls extend not only to the physical steps taken to improve operational safety and security, but also to ensuring, from the outset, that adequate contractual protections are in place.

The logistics industry is underpinned by a multitude of complex contractual relationships. Some of these contracts will be governed by mandatorily applicable international conventions or local laws, which will specify the rights and liabilities of the parties and which cannot be varied by agreement.

In other situations the parties may be free to contract on any terms they choose. The parties may negotiate complex written agreements, and in some cases, the party providing the service may seek to simply rely upon its standard trading conditions (STCs). It is important to bear in mind that local laws may place different limits on the freedom to contract, but generally, it is the reliance upon STCs that causes the most problems in practice.

A businesses standard terms and conditions are a primary risk management tool setting out the terms under which they interact with their customers and setting clear expectations of each party. Of importance for the supply chain stakeholder is the ability to defend or limit liability in the event of a claim.

As we will explore in this Podcast, the ability to rely on the provisions of standard terms and conditions, is not a given.

I should highlight that this session focuses solely on the incorporation issue from the perspective of English law. It is important to bear in mind that other jurisdictions may have significantly stricter requirements and, accordingly, stakeholders should ensure that specific legal advice is sought regarding their particular national requirements in the jurisdictions in which they operate.

Geraldine, welcome and thank you for joining us for this session. This is a subject which continues to be discussed, there will be very few if any freight operators out there who don’t have a set of standard trading conditions, however disputes continue, particularly around incorporation.”

Geraldine: “Thank you. Yes this is a subject which continues to present challenges to freight operators. It is clearly important to ensure that you select an appropriate set of standard trading conditions, arguably of greater importance however is ensuring that those STCs are sufficiently incorporated into your various dealings.”



Mike: “I couldn’t agree more, so starting at the very beginning, from a practical perspective, how as a freight operator do I choose which STCs to adopt? There are obviously a large number of organisations who have standard form wordings, although there is an option to create your own bespoke wording. What are the primary aspects to consider?”

Geraldine: “A businesses STCs as you mention, are a primary risk management tool. It is therefore important to ensure that the adopted STCs are appropriate and fit for purpose. The terms will need to be representative of the services you are providing. It is prudent to ensure that the STCs adopted are based on the law and jurisdiction of your country. This will assist in dispute resolution and places you in a more certain position. In some countries, there are statutes laws that apply in absence of STC, but it can be good to have your own STC that would complete or adapt to your services the statute laws if it is permitted by the law.”

Mike: “In terms of resilience, is there benefit in adopting a set of well-established STCs?”

Geraldine: “The simple answer here is yes. While bespoke STCs might serve their purpose, the clauses of well-established STCs are likely to have stood the test of time and have been litigated on numerous times, providing case law examples. This can make the challenge of dispute resolution more straightforward/the outcome more certain.”

Mike: “Can more than one set of STCs be adopted?”

Geraldine: “Yes, a business can elect to adopt multiple STCs, although in practice it is not recommended to adopt two sets of STCs for the same or overlapping services, as this can provide uncertainty which can impact on the ability to rely up on the same. By way of example, it might be appropriate to adopt separate STCs for national road haulage, international freight forwarding and warehousing.”

Mike: “I recall handling a case that involved damage to a cargo during unloading from a truck into a warehouse, the party I was seeking recovery from were providing both the haulage and storage services and sought to rely on a very restrictive set of warehousing STCs, I argued that the less restrictive road haulage terms were applicable. Where cases like this are concerned, which potentially rests in both sets of STCs, how is liability determined?”

Geraldine: “Of course, from time to time this type of incident occurs and can be more challenging to resolve. Where businesses do use separate STCs for different services, while on the face of it they could benefit from lower limits of liability while providing certain services, there is a requirement to ensure that the different services are clearly defined. In your example, in practice, to rely on the more restrictive warehousing terms, the operator could consider issuing separate booking details and invoices for the haulage and storage services, thus assisting to define exactly which STCs apply at the point of loss.”

Mike: “The ability to use many standard STCs are a benefit of membership of a particular organisation. This likely involving an application process, a subscription fee and acceptance of the organisation. Where a freight operator seeks to adopt a particular set of STCs, but either are never a Member of the underlying organisation or their membership has lapsed, how does this effect their position? Do the STCs become null and void?”

Geraldine: “There are two different legal relationships here and thus two different sets of consequences.

The relationship between the Freight forwarder and the Organisation and the one with the Freight forwarder and their customer. In your example, if the freight



forwarder is using the material of this organisation without their agreement or endorsement, the freight forwarder might face civil liability. However, this should not have any effect on the validity of those STC in the contractual relationship between the Freight forwarder and their customer.”

Mike: “Having considered then which STCs to adopt and ensuring that they are appropriate, next we need to consider how to ensure that they can be relied up on to protect your business in the event of a dispute or claim.”

Geraldine: “Correct, having an excellent set of Standard Terms and Conditions (Terms) in your desk drawer or on your website, is all very well, but unless you have incorporated them into your dealings with your customer, they will not form part of your legal relationship with your customer and you will not be able to rely on the terms should a dispute arise.”

Mike: “OK, so having potentially invested time and money in selecting the most appropriate STCs, there is a risk that you cannot rely on them unless they are sufficiently incorporated. Therefore, selection and adoption are effectively the starting point.”

Geraldine: “Yes very much so. There are a number of reasons why a set of STCs may not be relied up on in practice, (i) the business fails to incorporate the STCs before the contract is concluded; (ii) the language of the STCs is unclear or ambiguous; and/or (iii) the relevant local law considers the terms to be unfair or unreasonable and sets them aside. Incorporation though is a fundamental aspect.”

Mike: “Several years ago, there would have been a clear requirement to have a physical document signed by the customer; this provides a degree of certainty in evidencing incorporation. In today’s business environment, that of course is not always possible or practical. Not least, the speed at which contracts are now entered has increased. Does having a signed document remain the most robust means of ensuring incorporation?”

Geraldine: “Yes it is. A signed document provides clear evidence that the terms have been received, considered and agreed in the context of the services provided. It should be highlighted however that the STCs must be incorporated before the contract is concluded. The current speed of business transactions does not lend itself to this method of incorporation.”

Mike: “Having a physical document signed would certainly present a challenge where an urgent adhoc shipment is concerned... So are there alternative ways of successfully incorporating STCs which can be considered?”

Geraldine: “The party seeking to rely on its STCs must bring them to the attention of the other party before the contract has been concluded. That is, before one party accepts the other party’s offer. Notice given after the contract has been concluded is ineffective. The party seeking to rely on its STCs has the legal burden of proving that they have been properly incorporated.

The only cast-iron way of ensuring that the STCs apply is to get express agreement from the other party. For example, this would require the other party to sign a copy of the STCs or another document that refers to their applicability, or an email setting out the express agreement to the STCs. In practice, this very rarely happens. In some countries, it is however the only way that is recognized by the court.

In many cases, you will not receive a signed version back or even acknowledgement. However, as long as you can show that a copy was provided or

made available they should still be effective. Simply because they are not signed or acknowledged, does not preclude them from being part of the agreement.

Often, a party refers to the applicability of its STCs by reference, either at the foot of an email or on the front face of contractual documents such as bills of lading, delivery notes, invoices etc. Commonly, the notice reads something like:

“All business is carried out subject to our Standard Trading Conditions, a copy of which is available on request”

OR

“All business is carried out subject to our Standard Trading Conditions, a copy of which is found overleaf”

OR

“All business is carried out subject to our Standard Trading Conditions, a copy of which is available on our website”

This is a perfectly acceptable method of incorporation, but it is not without its dangers, because there is very often a degree of uncertainty.”

Mike: “Therefore, there are practical alternatives. You mentioned earlier that the STCs must be incorporated before the contract is concluded. It must be quite difficult to establish when STCs were received/accepted by the customer when using the “by reference” method.”

Geraldine: “A contract is concluded as soon as one party accepts the other party’s offer. For example, if a potential customer seeks a price to move cargo from A to B, the operator’s quote would likely amount to the “offer” and as soon as the customer agrees, be it over the phone or in person, there is “acceptance” and a legally binding contract has been entered. Therefore, if the operator failed to advise the customer that the contract was subject to STCs before the customer accepted the price, any follow-up email confirming the agreement and referencing the STCs would be ineffective. This is because the notice has come after the contract has been concluded.

It might be possible for example to evidence that STCs were received before the contract was concluded through time and date stamped emails, where reference was provided.

It is also important to ensure that the terms of the notice have been met. If, for example, the operator emails its customer the face of a transport document, such as a delivery note, which states that the STCs are set out in full on the reverse, the STCs will not have been incorporated until the operator sends a copy of the reverse side of the document. In this instance, the customer has been denied the opportunity to read the terms.”

Mike: “Timing then is clearly of importance. You mention there about providing the actual STC wording. This is quite an obvious requirement, however, I recall seeing a number of cases whereby reference was made that they exist, however when you search for them, they are not where suggested and are not easy to locate.”

Geraldine: “This is less of an issue with documents such as delivery notes, provided of course that the terms are actually printed on the reverse side. However, other areas where STCs are said to be hosted can provide challenges. Utilising web-based platforms and social media to do business for instance comes with obvious advantages, but with regards to incorporating STCs, it has its own peculiar problems. It is important

to remember that the same general principle applies - if an operator fails to do what is reasonably sufficient to inform the other party of the applicability of its STCs before the acceptance of the offer, the STCs will not be incorporated into the contract. Commonly, the operator will provide a link to its website, but no obvious route to the STCs or otherwise a long list of potentially applicable STCs. If the website does not clearly state which terms apply, the customer has not been given sufficient notice of the terms in place.”

Mike: “I have seen many examples of this where multiple terms are hosted on a single webpage, it can be very unclear. We discussed earlier about selecting the appropriate STCs, so where it is appropriate to have more than one set and it makes sense to host these on the same page of the website for instance, how can one ensure incorporation?”

Geraldine: “Very often, operators trade on different sets of STCs for each separate area of business undertaken. For example, different STCs are used for freight forwarding, warehousing, carriage and logistics services. All too frequently however, the operator does not specify which STCs apply to which service. To provide greater certainty of incorporation it is vital to ensure that each set of STCs are unambiguously defined. When sending details out over email to a customer, rather than providing a web link to the page that hosts all, provide a link, which directs them to the specific applicable STCs or consider sending these as an attached .pdf file.”

Mike: “In several of the businesses I worked in there was a host of different individuals in either sales teams or operations who could effectively enter the company into a contract. Arguably, today this issue is accentuated further with the prevalence of e-transactions. A degree of governance and training has to be required to ensure that everybody within the organisation is trained and aware of these risks.”

Geraldine: “Yes, this is true. Robust governance and management controls are vital. Identifying and training those responsible for entering the company into a contract is critical to ensure consistency in approach and adherence to company policies. It may also be prudent to have a clear escalation process to ensure that any deviations are authorised and finally an audit process to monitor compliance.”

Mike: “STCs then if sufficiently incorporated can serve to provide certainty and protection to a freight operator. If a customer or claimant can evidence that the STCs were not incorporated, what happens then?”

Geraldine: “The effect is that the freight operator would not be able to benefit from the terms. This might include the provided limitation of liability or the specified time bar. Essentially, there is the potential for unexpected financial exposures, which might not be covered under their liability insurance programme.”

Mike: “There can be some serious consequences to not getting this right.”

Geraldine: “Absolutely. It is not just about winning the contract and getting business through the door. An operator needs to ensure that any breach of contract on its part does not have the potential to attract existential level liabilities.

Remember, STCs can act as both a sword and a shield. They will set out the operator’s rights against the customer and may give wider remedies than the local law, for example, enhanced rights to lien and sell cargo. They are also likely to shorten the relevant limitation period, meaning that claims have a much shorter tail, and of course, drastically limit the operator’s financial liability.”

Mike: “We touched up on liability insurance a few moments ago, how does this fit into the discussion around incorporation of STCs?”



Geraldine: “It is crucial to bear in mind that most liability insurance products provide cover based only upon the limits set out in the approved STCs. This means that if an operator fails to do what is necessary to incorporate the STCs, its insurance will only cover the liability under the STCs. This can leave the operator exposed to any liability in excess of the STC limits. This could be significant and will almost certainly exceed the profit for the job. Remember, incorporation of STCs is a key tool to protect one’s business; if there is any doubt that they have been incorporated, the Courts are likely to give the customer the benefit of the doubt and rule against the operator.”

Mike: “How do STCs interact with international conventions such as CMR?”

Geraldine: “While an agreed and sufficiently incorporated set of STCs will set various limits on liability and outline applicable terms such as time bars, where applicable, an international convention will always supersede STCs. For example, an international shipment by road in Europe will always be governed by CMR rather than the agreed STCs.”

Mike: “Geraldine, thank you for sharing your expertise on this interesting subject, do you have any final thoughts or considerations that stakeholders should be mindful of when considering incorporation of STCs?”

Geraldine: “Thank you, just to reiterate that incorporation of STCs is a key tool to protect one’s business; if there is any doubt that they have been incorporated, in the event of a dispute, the Courts are likely to give the customer the benefit of the doubt and rule against the operator, so it is vitally important that stakeholders get this right.”

Mike: “In conclusion, selecting and adopting an excellent set of Standard Trading Conditions, is just the starting point. Having such a set of conditions in your desk drawer or on your website is great, but unless sufficiently incorporated you will not be able to rely on the terms should a dispute arise. It is therefore very important that you incorporate your STCs into your dealings with your customers and before the contract is concluded.

Should you require further information or guidance on this subject, please don’t hesitate to contact TT Club at riskmanagement@ttclub.com.

Thank you once again to our guest speaker today, Geraldine Savin and thank you for tuning in. This brings to a conclusion our contractual challenges interview series. Thanks to all of our guest speakers through the series.

Please continue to follow our Podcast channel. We will look to release further interviews through 2021 on a variety of subjects, in the meantime please do let us know if there’s any particular subject matter that you feel would be useful for us to cover, it would be great to hear from you...”