AUSTRALIAN TRANSPORT OPERATORS

Is it the end of the road for the "all care, no responsibility" consignment note?

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Berkshire Hathaway Specialty Insurance

Australian domestic transport operators are in a unique position.

Since they are not subject to any specific carriage of goods legislation, they are free to contract out services as they see fit. This has led to the widespread use of the "all care, no responsibility" consignment note, which favours transport operators by excluding all liability, including where damage to goods has been caused by the transport operator's own negligence, recklessness or wilful misconduct.

LIABILITY

At all times and in all circumstances and for all purposes the Goods shall be and remain at the sole risk of the Customer and the Carrier shall be under no liability whatsoever for any loss of Goods, or non-delivery, mis-delivery, delay in delivery or, damage to or deterioration, evaporation or contamination of Good occassioned during Carriage or otherwise or for any Consequential Loss arising from any reason whatsoever, including without limiting the foregoing, arising from negligence or breach of contract or wilful act or default on the part of the Carrier or otherwise.

At the opposite end of the spectrum, large corporate users of transport services often seek to impose onerous terms on transport operators on a "take it or leave it" basis.

This wide variation in contractual responsibilities has created a difficult and uncertain environment for transport operators in Australia, both in terms of ensuring profitability and arranging adequate liability insurance protection. In contrast, transport operators in the United States, Europe and New Zealand are subject to various statutory regimes which impose a minimum standard of liability on the transport operator -- but then allow the operator to cap its liability according to a specified formula (based on a dollar value per unit received/damaged or on the weight of the cargo).

Generally, these regimes seek to strike a balance between the interests of the contracting parties. They also provide the parties with greater certainty when seeking to price freight rates. From an insurance perspective, they allow greater certainty in the pricing of insurance and allocation of risk between cargo owner and transport operator, which often leads to more competitive insurance terms.

Currently, the only limitation on an Australian transport operator's freedom to contract arises from the carriage and storage of "consumer" goods, where the Competition and Consumer Act 2010 (Cth) (i) implies a guarantee from the transport operator to exercise due care and skill in the performance of their duties and (ii) imposes a prohibition against "unfair contract terms" in consumer contracts.

However, this is about to change.

In October 2015, the Federal Government passed legislation (*Treasury Legislation* Amendment [Small Business & Unfair Contract Terms] Bill 2015) that will extend the unfair contract terms regime -- which at present only applies to standard form "consumer" contracts -- to encompass standard form contracts involving a "small business." The legislation is to take effect on 12 November 2016, and is likely to have a major impact on the transport sector in which standard form contracts currently exclude the transport operator's liability.

The probable result is that transport operators in Australia will no longer be able to rely on an "all care, no responsibility" style of contract for services offered to consumers or small businesses.

Many transport operators will need to amend their standard terms of contract to not contravene the new legislation. However, we caution against any dramatic changes in acceptance of risk: Transport operators should not increase their liability in standard form contracts without first considering what is a fair acceptance of risk, taking into account freight rates, insurance cost and competitiveness.

WHICH CONTRACTS WILL BE AFFECTED?

From 12 November 2016, an "unfair term" in a standard form small business contract entered into, varied or renewed will be void and unenforceable.

The new legislation defines a "small business contract" as one in which:

(a) at the time of agreement, at least one party is a business that employs fewer than 20 regular staff; and
(b) the upfront price payable:
  a. does not exceed $300,000 (if the contract duration is 12 months or less); or
  b. does not exceed $1,000,000 (if the contract duration is more than 12 months).

There are some exceptions to this, including contracts for the carriage of goods by ship, which are already subject to a comprehensive legal framework.

WHAT IS AN "UNFAIR TERM"?

A term will be "unfair" if it:

(a) would cause a significant imbalance in the parties' rights and obligations;
(b) is not reasonably necessary to protect the legitimate interests of the party relying on it; and
(c) would cause a detriment to a party if applied or relied on.

When considering whether a term is unfair, a Court is required to consider whether it is transparent, by being clear, legible and readily available to the other party. If held to be unfair, the term will effectively be removed from the contract and the remainder of the parties' agreement will remain in place only if it can operate without that term.

The legislation provides some examples of terms that might be caught under this expanded regime, however, it is the Courts that will ultimately decide what is deemed unfair as disputes come before them.

When navigating this new terrain, a transport operator should consider whether its standard form contracts contain terms that:

(a) exclude liability beyond industry norms (e.g., excluding liability for the company's negligence or forms of misconduct);
(b) require a full and complete indemnity irrespective of fault;
(c) impose time limitations on claims that are overly onerous on customers (e.g., claims to be time-barred and liability to be extinguished within a short period such as seven days, one month etc.);
(d) permit the company to vary its contracts with customers unilaterally or without notice; or
(e) impose liability upon the customer in circumstances that are outside the customer's control.

IMPLICATIONS FOR THE TRANSPORT SECTOR: NAVIGATING THE NEW REGIME

The new unfair contract terms legislation will apply to small businesses across Australia and has not been specifically tailored to any particular industry. However, it has the potential to have an especially significant impact on the transport sector, where standard form contracts are common.

Nevertheless, we recommend that transport and logistics operators adopt a measured approach to amending existing standard form contracts. Importantly, transport operators should not overreact by accepting full responsibility for loss or damage to cargo in their care, custody and control.

In order to prepare for the new regime, transport and logistics operators should consider the following:

(a) seek advice from a qualified transport or corporate lawyer;
(b) adopt an open and transparent approach to advising customers of your standard form contracts;
(c) if a company contracts with both small and larger businesses, consider:
    i. adopting customer questionnaires to determine if a customer qualifies as a small business,and whether to offer separate and distinct contracts for small businesses and other businesses; or
    ii. implementing cascading terms that apply differently to consumers, small businesses, and other customers (as it may be difficult to determine which customers are – or may become -- small businesses);
(d) structure contract clauses to allow severability if deemed unfair;
(e) modify terms that may be considered unfair for small businesses. Specific consideration should be given to:
    i. "all care and no responsibility"
    ii. exclusions for negligence or breach of contractual terms;
    iii. unreasonable indemnity clauses;
    iv. time bars; and
    v. loss of rights for failure to comply with notice clauses;
(f) consider adopting a liability framework for standard form small business contracts that includes:
    i. accepting liability for loss and/or damage to cargo caused by your negligence but excluding liability for causes outside your reasonable control (e.g., force majeure);
    ii. excluding liability for indirect or consequential loss; and
    iii. limiting the amount of liability to a financial level based on a reasonable formula (i.e., a fixed amount per kilogram of cargo, per unit of cargo, or per incident);
(g) consider reviewing pricing of services to reflect any enhanced business risk and possible higher insurance premium; and
(h) if issuing multi-modal bills of lading, consider how the terms will apply to each component of carriage, and whether those terms should be amended for particular sectors of the carriage.

At the same time, transport operators should not accept a contract drafted by a client without carefully considering its liability provisions. If they do, they may unwittingly agree to compensate clients for the full value of goods, consequential loss of income and liquidated damages, as well as other financial penalties. In some extreme cases, transport operators are asked to provide a warranty that goods will be delivered in the same condition as received, effectively assuming strict liability.

The commerciality of the cargo transport transaction is relevant. Generally, value of cargo has no bearing on cost of freight. Underlying all transport services is the assumption that the owner of the cargo will bear the risk of ownership of the goods as opposed to the risk of transport of those goods. The risk to the goods increases during transit and only this increased risk should be passed to the transport operator. There are many examples of losses caused to cargo during transit where the transport operator should have no responsibility – inherent vice of the goods, inadequate packaging by the shipper, damage caused by third parties, or any other cause outside the reasonable control of the transport operator. These are all inherent risks of ownership that should remain with the cargo owner; the owner can control those risks with cargo insurance, which is designed to insure owner's risk of goods during transport.

Contracts which impose strict liability on the transport operator may breach the conditions of the transport owner's liability insurance policy – a major issue that can leave an operator denied indemnity if such contracts were not disclosed to the insurer.

When a transport operator is at fault, should it accept liability for the full value of the goods damaged? We suggest not. Current market freight rates are not nearly sufficient to allow transport operators to absorb the risk of the full value of cargo. This position is well supported internationally by various national legislation and international conventions that enshrine the proposition that transport operators should be liable for damage to goods where they are at fault, provided such liability is limited to a financial formula based on either the weight or number of units in the consignment.

In Conclusion: The Way Forward

The new regime in Australia may revitalise discussions about the country's lack of comprehensive transport operators' liability regulation.

In our view, both Australian domestic transport operators and cargo owners may be better served if the Australian government considers a specific carriage of goods regime. There are some sound precedents in international regulations that balance the interests of the cargo owner and the transport operator. In fact, the New Zealand Carriage of Goods Act provides a suitable template for Australia to consider.

In the meantime, a risk conscious business should carefully consider the terms of the contract it enters into with customers, specifically the liability, indemnity and insurance terms. Being mindful of the issues raised in this article and understanding principles of risk allocation in contracts will give transport operators an edge in re-establishing contract equilibrium, while ensuring compliance with the impending new legislation.

When dealing with these contractual risk issues, a transport operator should feel well supported by its insurance providers, and discussion between insured, broker and underwriter is encouraged.

At Berkshire Hathaway Specialty Insurance (BHSI), we have invested heavily in our expertise and understanding of the risks faced by the transport and logistics industry. We have built products, claims management, and risk management advisory services specifically for this industry. Our logistics liability insurance product is a comprehensive liability insurance solution created expressly for the transport and logistics industry, and provides protection for both the legislative and contractual liability exposure discussed in this article.

Should you have any queries or wish to discuss the above, please contact your insurance broker or Barton Phillips, Anouk Sireude or Laetitia Roney of Berkshire Hathaway Specialty Insurance.

BARTON PHILLIPS

Head of Transport & Logistics
Level 18, 123 Eagle Street
Brisbane QLD 4000
Office: 02 8002 2138
Mobile: 0498 989896
barton.phillips@bhspecialty.com

ANOUK SIREUDE

Marine Claims Manager
Level 23, 420 George Street
Sydney NSW 2000
Office: 02 8002 2146
Mobile 0439 588 470
anouk.sireude@bhspecialty.com

LAETITIA RONEY

Manager Marine and Transport Liability
Level 18, 123 Eagle Street
Brisbane QLD 4000
Office: 02 8002 2139
Mobile: 0400 888 763
laetitia.roney@bhspecialty.com

Berkshire Hathaway
Specialty Insurance

www.bhspecialty.com