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E-freight: the IATA project and its use on Warsaw Convention trade lanes

In this note we explain the objectives of e-freight, the legal and contractual framework underpinning the relationship between carriers and freight forwarders and discuss the possibility of using e-freight on non-MAP4 and MC99[1] trade lanes.

What is e-freight?

E-freight is an IATA project which aims to take the paper out of air cargo, by capitalising on the more liberal approach of MAP4 and MC99 towards paperless cargo contracting and, in particular, the use of electronic air waybills. E-freight simply makes sense as a concept; it catches up with technology and with similar trends, such as the effectively universal adoption of e-tickets. E-freight is also expected to deliver significant savings across the aviation cargo industry and to reduce its overall environmental footprint by eliminating thousands of tonnes of paper documents.

The legal basis for e-freight under MAP4 and MC99 and the legal challenges for e-freight under Warsaw/Warsaw-Hague

To participate in e-freight, a country must first pass a *High Level Assessment* (HLA) and a *Detailed Level Assessment* (DLA), which, among other things, consider whether the country's Customs can cope with electronic release of import and export cargo and goods and whether the country in question has ratified MAP4 or MC99. If neither has been ratified, that country (and carriers and other cargo operatives who operate in, to and from it) may not be able to benefit from all aspects of e-freight.

This is because both MAP4 and MC99 anticipate e-freight and the use of electronic air waybills, stating that instead of the requirements that a (paper) air waybill be delivered, *"any other means*

1 Respectively, the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, 12 October 1929 as amended by Montreal Protocol No. 4 (*MAP4*), and the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999 (*MC99*).

which would preserve a record of the carriage to be performed may… be substituted for the delivery of an air waybill"[2]. Another key point is the fact that limits of liability under MAP4/MC99 for loss of or damage to cargo are unbreakable and, whilst MAP4/MC99 each do contain requirements for the making out and content of air waybills, crucially non-compliance with those requirements does not result in loss of those limits.

By contrast, the Warsaw Convention and Warsaw-Hague[3] (the "Warsaw Regime") contain strict paper-based requirements for carriage of cargo and the content and processing of air waybills which are not readily transposed to a fully electronic cargo process. The Warsaw Regime requires that air waybills must be "made out" in three original parts; the parts are to be marked separately ("for the consignee", "for the consignor"); they are each to be signed by different parties in the cargo chain - copy one by the consignor, copy two by the consignor and the carrier, copy three by the carrier; and one copy must "accompany the cargo". Liability limits for loss of or damage to cargo under the Warsaw Regime can be broken; crucially, when compared with MAP4 and MC99, the consequence if an air waybill is not made out as required is that liability limits may be lost.

The contractual framework for e-freight

IATA has produced an industry standard agreement on Electronic Data Interchange (the "EDI Agreement"), which is intended to be entered into between carriers and freight forwarders and which documents the applicable e-freight procedures and allows for use of electronic air waybills. In particular, the EDI Agreement envisages that each shipment is initiated electronically by the freight forwarder sending an electronic shipment record containing all relevant cargo information before sending the cargo itself. The cargo contract is concluded when the carrier accepts the cargo as ready for carriage and confirms this to the freight forwarder electronically.

As originally framed, the use of the EDI Agreement was not contemplated for Warsaw Regime cargo carriage. However, following the initiative taken by certain carriers to extend the EDI Agreement to non-MC99 or MAP4 trade lanes, IATA has introduced its own Warsaw compliant solution in the form of an amendment and a new Annex D to its template EDI Agreement, thereby providing the industry as a whole with the option of a standardised approach to Warsaw Regime carriage, which is to be welcomed.

Background to Annex D

Using a creative approach to the Warsaw Regime documentary requirements and some innovative and careful contractual drafting, the EDI Agreement can be adapted so that it can, to some extent, apply to cargo shipments on trade lanes governed by the Warsaw Regime, whilst minimising the risk of liability limits being lost. This process, now incorporated in Annex D to the EDI Agreement, is based on the premise that the carrier produces the air waybill following receipt of electronic data relating to the cargo consignment, and then affixes the shipper's signature to the necessary parts of the air waybill. Careful contractual drafting provides comfort for the carrier that the shipper has authorised air waybills to be produced and signed in this way.

Although the process still ultimately requires the issuance of paper air waybill for some purposes (not least so that a paper copy can accompany the cargo on the aircraft), it nonetheless gives carriers the opportunity to standardise their operating and acceptance procedures for cargo and to maximise e-freight related savings as a result. It is noteworthy that whilst the new process meets contractual requirements and complies (with some minor adaptations) with the formality requirements of the Warsaw Regime, thereby reducing risk exposures for insurers and carriers of loss of liability limits, it still falls short of the full e-freight process as originally formulated by IATA and there remain challenges in abandoning in their entirety all paper requirements for Warsaw Regime carriage.

In adopting the EDI Agreement template currently proposed by IATA, there are a number of issues which freight forwarders and carriers alike will wish to consider:

1. Wide indemnity - the amended template contemplates a very wide indemnity in favour of the carrier. The parties will wish to satisfy themselves that they are comfortable with the allocation of risk in this regard.

2. True Shipper's identity - the proposed IATA solution contemplates that freight

2 Article 5(2) Warsaw Convention as amended by Hague Protocol and by MAP4; Article 4(2) MC99.
3 Respectively, the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, 12 October 1929 (Warsaw Convention) and the Warsaw Convention, as amended in the Hague (Warsaw Hague).

forwarders would reveal the identity of their consignor and the nature of the authority they have to act on their behalf. This from our experience is not always feasible commercially for forwarders.

3. The printing of original air waybills - our experience has shown that, once they have made the shift to e-freight operations, carriers find it difficult to print out original air waybills and the process diminishes some of the advantages of electronic contracting.

All these issues (and others) may be addressed by the parties during the contractual discussions between them so that the template document, ever-present as a worthy basis, can be adapted to suit particular individual practical and operational requirements.

Likewise, in addition to the complex regulatory environment in which e-freight resides, carriers should bear in mind that the EDI Agreement is a model agreement in many other respects - not only on those relating to carriage of goods on trade lanes governed by the Warsaw Regime - and, as such, envisages that parties to it will seek to adapt and modify certain provisions to ensure that they deal with the subject matter comprehensively and appropriately to each particular carrier's requirements. For example, parties are encouraged to consider whether they ought to strengthen clauses pertaining to data security and confidentiality, data integrity and storage. Other provisions, such as those dealing with governing law and jurisdiction or termination, might also merit revision to ensure that parties' respective positions are adequately protected.

HFW's Aerospace team continues to advise a number of clients on issues surrounding the EDI Agreement; as a forerunner to IATA's industry-wide important work in this area, we have been at the forefront in working with our clients to devise the potential for extending e-freight processes to non-MAP4/MC99 trade lanes to allow them to benefit from a limited e-freight approach on such routes whilst minimising risk exposures for carriers and their insurers.

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"IATA has introduced its own Warsaw compliant solution ... to its template EDI Agreement, thereby providing the industry as a whole with the option of a standardised approach to Warsaw Regime carriage."

Sanctions - an overview

Imprisonment, seizure of assets and exclusion from the US banking system are amongst the penalties which face companies and individuals who breach one or more of the raft of sanctions which national and international bodies have imposed against a number of countries over the past year or so. Because of their wide-ranging reach and remit, international sanctions will affect every company which is involved in any way with trade to or from a sanctioned country, such as Iran, Libya or Syria.

Buyers and sellers of logistics services are exposed to a number of particular risks, not only through their own activities, but also through the activities of those they deal with. They therefore need to have in place robust compliance procedures, carry out thorough due diligence, and, where possible, ensure that their contracts include appropriate warranties and indemnities. Those companies which have a US connection (even where that is limited to a reliance on US dollar payments) need to be particularly cautious.

This outline identifies the key risks which buyers and sellers of logistics services face, as well as suggesting a number of practical steps which they can take to minimise those risks. While it concentrates on companies who are carrying on business in the European Union, it also considers a number of issues which will affect buyers and sellers of logistics services wherever they are based.

We recommend that buyers and sellers of logistics services should carry out the following risk assessment to determine the extent to

which sanctions affect their business.

Stage 1: Identify the applicable sanction regimes

Generally speaking, a buyer or seller of logistics services will be subject to any sanctions imposed by (i) the place where they have their operations and (ii) the place where they are incorporated if different. Sanctions which are applicable to the companies and/or individuals which own or control the company may also be relevant. While the most high profile sanctions against Iran are probably those imposed by the EU and the US, national sanctions have also been imposed by, amongst others, Australia, the United Arab Emirates and Japan.

It is important to note that, in addition to the potential corporate exposure, directors and other employees may themselves be subject to sanctions imposed by their national state. This will be particularly relevant where the company employs US nationals in senior posts.

Stage 2: Identify whether the company's business itself relates to a sanctioned country

Clearly if a buyer or seller of logistics services is itself based in a sanctioned country, they will face particular difficulties, including problems making and receiving payments.

Recent sanctions have also imposed an asset freeze against designated port operators, including Tidewater Middle East Co Ltd (which has operations at seven of the main ports in Iran, including the Shahid Rajaee Container Terminal at Bandar Abbas and Bandar Imam Khomeini Grain Terminal). This may well cause problems for buyers or sellers of logistics services in respect of cargoes being imported to or exported from Iran.

Stage 3: Identify whether a particular business or transaction has a connection with a sanctioned entity

This will be relevant where a buyer or seller of logistics services is based in a country which has either enacted national legislation to give effect to a UN resolution (eg Singapore) or which has imposed restrictions of its own (eg the US and EU Member States).

Where the company is from a sanctioned country, or has connections with entities which are located or incorporated in sanctioned countries, the buyer or seller of logistics services should ensure that no payments are made to or received from a sanctioned entity, save where the necessary licence is in place. Because the prohibitions include both direct and indirect payments and because the sanctioned entities often have links with a number of other entities, it is important that detailed due diligence is carried out on all counterparties, to ensure that no prohibited payments are made or received.

Checks should be carried out against all applicable lists of sanctions targets and particular care should be taken to identify any entity which is associated with the Islamic Republic of Iran Shipping Lines (IRISL) or the Islamic Revolutionary Guard Corps (IRGC), both of which are subject to the UN asset freeze. Likewise, any connection with Colonel Gaddafi's former regime in Libya should be carefully scrutinised. The situation is, of course, highly dynamic, and the status of counterparties in sanctioned countries needs to be kept under review.

It is also important to keep in mind that the sanctioned entities may well be incorporated in countries which are not themselves subject to sanctions. By way of example, the sanctions against Iran include companies incorporated in Germany, Malta, Malaysia and Switzerland.

Even where no designated person is involved, buyers and sellers of logistics services based in the EU should ensure that all payments to or from Iranian persons (which includes people of other nationalities resident in Iran) are processed in accordance with the necessary procedures.

Finally, EU insurers may be unable to provide the usual insurance cover for voyages that may be affected by sanctions, and any insurance which is provided may include other exclusions in respect of sanctions. This may potentially give rise to problems.

Stage 4: Identify whether a particular business or transaction has a connection with sanctioned goods

Again, this will be relevant where a buyer or a seller of logistics services is based in a country which has either enacted national legislation to give effect to a UN resolution or which has imposed restrictions of its own.

Where cargoes are bound for a sanctioned country, checks should be carried out to identify the true nature (and intended use) of the cargo. Companies will already be aware of

the risks of cargoes (particularly containerised cargoes) being misdeclared to conceal their identity, and earlier this year a major liner operator discovered that one of its vessels had been misled into carrying unlawful weapons which had been stowed behind a false container wall and declared as food products. Shipowners may try to obtain appropriate warranties and indemnities from their counterparties as to the nature (and intended use) of the cargo, and those providing these warranties need to be confident that they have sufficient information to be able confidently to provide such warranties and indemnities.

If prohibited goods are being carried, it is also prohibited for EU-based shipowners to provide bunkering or ship supply services, or any other servicing of vessels to vessels owned or controlled directly or indirectly by an Iranian person, entity or body. The EU Regulation also imposes additional requirements in respect of pre-arrival and pre-departure information where goods are transported to or from Iran.

The EU sanctions include not only the usual prohibited cargoes (such as weapons or equipment which might be used for internal repression) but also, in the case of sanctions against Iran, equipment for Iran's oil and gas industry. The prohibited equipment and technology is listed in Annex VI to EU Regulation 961/2010, and relates primarily to exploration, production and refining.

In addition, every company worldwide is potentially subject to the US Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (CISADA), which is intended to have extra-territorial effect. Breach of CISADA may result in seizure of assets in the US, imposition of a ban on loans from US banks, and exclusion from the US banking system (which would prevent making or receiving any US dollar payments).

CISADA prohibits a range of activities, in order to hinder Iran's ability to import and produce refined petroleum products (diesel, gasoline, jet fuel and aviation gasoline). The prohibited activities are widely drafted, and they specifically include provision of ships or shipping services to deliver refined petroleum products to Iran. They also include provision of other goods or services which could either (i) facilitate the maintenance or expansion of Iran's domestic production of refined petroleum products or (ii) contribute to the enhancement of Iran's ability to import refined petroleum products.

The US State Department and Office of Foreign Asset Control (OFAC) are taking an increasingly robust line and they are stepping up their enforcement activities. Given the breadth of the definitions of prohibited activities, there is certainly scope for the US authorities to take enforcement action against a terminal operator if prohibited goods are being supplied to Iran.

Stage 5: Identify whether a particular business or transaction may give rise to a potential exposure for another reason

The key issue in this respect is payment in US dollars. Because it is our understanding that all US dollar payments clear through the US, our view is that US legislation will have an affect not only on US nationals and US companies (who are effectively prohibited from trading with Iran, by reason of the Iranian Transaction Regulations), but also on non-US nationals and companies which trade in US dollars, or which have some other connection with the US.

Companies which are engaged in business which has a connection with Iran may wish to ensure that payments are made in a currency other than US dollars, to make certain that there is no US connection.

Conclusion

The above summary identifies a number of the particular risks which buyers and sellers of logistics services face, through their own operations, as well as the activities of those they deal with. It highlights the need for appropriate due diligence, particularly as to counterparties, and the cargo which is being carried.

This is a complex and dynamic area, and appropriate legal advice should be taken if there is any concern about exposure to international sanctions.

A version of this article first appeared in the September 2011 issue of Port Strategy under the title "On Whose Authorisation".

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When do liens work?

With the current economic problems, lines of credit are becoming increasingly stretched and invoices can remain unpaid for longer periods of time. For logistics companies, forwarders and carriers ("operators") looking to minimise bad debt, the lien can be an effective tool in credit management; whether by the simple threat of exercising a lien or going ahead and doing so. For buyers of logistics services, the exercise of a lien can result in goods being delayed and potentially missing a market.

The temptation for an operator is to view a lien as an all singing, all dancing debt solver, but do they work and against whom?

Operators trading under the most common industry standard terms and conditions (T&Cs) might well think that their debt position is well protected but the rights to lien contained within these standard terms can sometimes not work as well in practice as might be thought. We discuss the different types of lien commonly seen and how they might work in practice.

The particular lien

A particular lien is the most basic type of lien commonly used and seeks to allow an unpaid operator to exercise a lien over goods for the debts due in respect of those goods only. However, unless the operator is contracting on payment of freight against delivery, or terms of credit have been rescinded, carried goods are often delivered to the consignee before payment of freight becomes due. Once goods have been delivered to the consignee, or are out of the operator's possession or control, the lien is extinguished.

A particular lien also has a fairly obvious shortfall in that it cannot be used to try and recover debts due in respect of other consignments. For the operator who handles many shipments for a single customer every month, this may represent only a fraction of the debt due. For the buyer of logistics services, the positive news is therefore that the scope for withholding delivery of goods by the operator is restricted to those consignments on which money is owed – also meaning that, rather than having to settle the full debt owed to an operator, they only have to pay the carriage charges on the particular goods to get them moving again – something which may be countenanced even if the outstanding charges are disputed, just to ensure that the goods are delivered on time.

If an operator's T&Cs do not contain provisions for a particular lien, all is not necessarily lost. Under English common law a carrier has a particular lien and a forwarder can have a particular lien in certain circumstances. In addition to this common law right to lien, those involved in the international carriage of goods which are subject to the CMR Convention may also have a form of particular lien by virtue of Article 13 (1) of the Convention.

The general lien

A general lien is a more versatile lien and, used properly, can put an unpaid operator in a very strong negotiating position – buyers beware! A general lien seeks to allow a lien to be exercised over goods in respect of any unpaid debts due from the owner of the goods. Pursuant to a general lien, a logistics buyer may face the prospect of having goods withheld from delivery and a demand for payment of a debt far in excess of the value of the goods in order for them to be released.

The BIFA 2005 conditions and RHA 2009 Conditions of Carriage both contain the right to exercise a general lien (at clauses 8(A) and 14 respectively), also giving the operator relying on those terms and conditions the power to sell the goods and apply the proceeds towards satisfaction of the outstanding debt (with any surplus being accounted for to the owner of the goods). Many liner and NVOC bills of lading also include general liens and rights of sale. The power of sale is not something that exists at common law and it requires a contractual provision entitling the operator to do so.

Is the general lien binding?

Many European and US retailers and manufacturers (buyers of logistics services) with a strong buying power purchase goods on FOB terms and put an operator in charge of their supply chain management, relying on them to arrange carriage of goods from the port of loading in the country of origin to the high street store or factory, often with consolidation and warehousing services in between. The operator will usually contract directly with the UK retailer/manufacturer and will seek to incorporate their own T&Cs into their dealings with the retailer.

If a logistics buyer defaults on agreed credit terms, the operator might look to use its general lien to recover unpaid debts only to find the logistics buyer arguing that the operator's T&Cs have not been successfully incorporated – and both parties may

find themselves getting into age old "battle of the forms" arguments.

Consider the situation where the logistics buyer is unable to pay its debts. The operator may then look to enforce their power of sale only to find third parties, such as the original manufacturer or a sourcing agent, claiming an interest in the goods and disputing the right to lien the goods. The third party may not have been paid for the goods by the original purchaser and, whilst they are trying to make other arrangements for the sale of the goods, they might find themselves being asked to settle the original logistics buyer's debt. Will the general lien by binding upon these third parties?

In short, the answer is that it will be fact dependant. If the operator issued its own house bill of lading to the vendor then there will be an argument that the vendor is bound by any lien clause in the bill.

An operator might also be able to argue that the vendor is bound by his T&Cs by virtue of previous notice/dealings i.e. that the third party seeking to challenge the validity of the lien was or should have been aware that the operator operated under T&Cs which include a general lien and is therefore bound by the same. One of the ways of putting FOB vendors on notice is to ensure that origin agents of customers make vendors aware of the operators role and T&Cs (by forwarder's cargo receipts for example).

There can, however, be cases where a general lien can be defeated; an operator involved in international carriage of goods subject to the CMR Convention, whilst they may have the right for a general lien included into their own standard terms, will not be able to rely on it in carriage of goods subject to the CMR Convention. This was considered in 2007 where an English court held that a general lien would derogate from a consignee's right to obtain delivery of the goods in exchange for payment of freight due on that consignment (Article 41 prevents any derogation from the provision of the Convention) and therefore the general lien contained within the RHA Conditions of Carriage 1998 was held to be invalid (*T. Comedy (U.K.) v E.M.T. Limited*). In those circumstances, the carrier was only entitled to the particular lien granted by Article 13(1).

Exercising a lien

Prior to exercising a lien, an operator should ensure that they are entitled to do so or at least have a good arguable case. Where the logistics buyer or owner of goods considers that a lien is unlawful, they are able to apply to the court for delivery up of the goods.

If there is a good arguable case that the operator is not entitled to exercise a lien, the courts will often order that the goods are delivered, subject to the owner of the goods providing suitable security for the unpaid debts, often by giving an undertaking to the court or making a payment into court. If the matters are not resolved, the court would be asked to consider the validity of the lien and, if it considers that the operator was not entitled to exercise a lien, may find the party that thought it had a lien guilty of conversion of the goods, leading to a possible claim for damages from the logistics buyer/owner of the goods.

Given the possibility that T&Cs may not have been properly incorporated, other concerns as to the limitations of a lien and the potential for facing a claim for damages, a cautious operator may be well advised to apply to the court before exercising its power of sale - this would help ensure that no nasty surprises arise at a later date. Many operators will, however, take a more robust approach depending on their risk appetite.

Summary

Whilst the particular and general lien can be effective weapons, anyone seeking to rely on them should give serious thought as to whether the right to lien the goods is effective against the person demanding delivery.

Buyers of logistics services should be aware of the lien provisions contained within their chosen operator's T&Cs, and also those of their subcontractors (who may be unpaid by the operator and exercise their own lien, causing the logistics buyer a headache not of his own making).

As always, these potential problems are best dealt with before they become an issue, whether by tidying up T&Cs or ensuring that you are winning the battle of the forms with your contractual partners; for an operator, discovering the limitations of their lien only when they are put into practice can be frustrating and expensive, for the buyer of logistics services, a lien can disrupt even the best supply chains.

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Is your “agreement” really only a quote or an offer?

Introduction

There will be many instances where parties have signed up to a document which on the face of it is an “agreement” but is it truly a legally binding contract? It may look like a contract, have the familiar format and many of the standard clauses of a contract. However, upon closer inspection of the actual legal provisions, some contracts may only amount to unilateral or standing offers.

With the basic contract that arises as a result of offer - acceptance - consideration and intention to create legal relations will not be present or readily identifiable in all circumstances. In commercial dealings involving a drawn out negotiation process, contractual arrangements are likely to be complex. There may be instances where what appeared to be a binding contract is in fact simply a unilateral offer, mere quote or standing offer. This article examines why.

Spotting a unilateral offer

A unilateral offer arises where only one party (e.g. a carrier) makes an express promise, or undertakes a performance without first securing a reciprocal agreement from the other party (e.g. the shipper). The offeree (shipper) is under no obligation to act, because no return promise has been made to the offeror (carrier). The necessary reciprocity arises on performance by the offeree (shipper) of the making of bookings or the binding undertaking to pay for the specific services.

Distinguishing a mere quote

A binding unilateral offer can be distinguished from a mere quote. The key distinction between a binding unilateral offer and a mere quote is the presence of adequate terms. A unilateral offer contains the terms upon which the offeror (e.g. carrier) agrees to be bound in the event that the offeree (e.g. shipper) performs. In certain circumstances, a document could be held to be a mere quote because it contains no terms (or uncertain or insufficient terms). It is not possible to imply the necessary terms to bring the contract into existence. Terms can be implied as being both reasonable and necessary to make a legally binding contract work. However, the first question is always whether a legally binding contract exists – implied terms cannot be added to create what would not otherwise be a legally binding contract.

There must also be sufficient consideration. A mere quote is not an offer open to acceptance and that to suggest that following receipt of a quote a shipper came under any contractual obligations to the carrier would be to read into the document provisions which are not to be found in its language. If there is no consideration moving from the shipper to support any promise made by the carrier, then as a result no contractual relationship would be intended to be created as a result of the document.

An open offer may exist where the offeror (e.g. carrier) makes a binding promise capable of acceptance by performance of a mutual obligation. On the other hand, a statement that contains no binding terms may be construed as a mere quotation. There is, however, another category of offer that can be distinguished from open and unilateral offers – the standing offer.

Beware the standing offer

It is also possible that a single contract will not arise, but rather a standing offer that gives rise to a series of contracts. A standing offer may arise where a buyer (e.g. shipper) invites tenders for the supply of goods or services of a specified description up to a maximum amount. The supplier of the goods or services (e.g. carrier) may respond with a standing offer to meet the requirement when requested. The ‘acceptance’ of the tender does not convert the offer into a binding contract or impose any liability on the buyer (shipper). At this stage, the buyer (shipper) has merely stated that it may require goods or services up to a maximum limit – the buyer (shipper) has not yet agreed to accept specific goods or services. The buyer (shipper) provides no consideration for those goods or services until it makes a promise to pay for a definite quantity.

Acceptance is complete as soon as a requisition for a definite quantity of goods or services is made. The standing offer may be revoked at any time before it has been accepted. Each requisition by the buyer (shipper) is an individual act of acceptance which creates a separate contract. However, if the supplier revokes the standing offer, he cannot be made liable for further deliveries, although he will be bound by any requisitions the buyer (shipper) has already made.

Framework agreement – contract?

Framework agreements often provide a very convenient means for parties to effectively frame their contractual relations where it is near impossible to effectively legislate for every particular eventuality or specific transaction which may be effected between them during the term of the agreement. The concept which is often adopted is that this contains the main commercial terms such as duration, termination, payment terms, service levels, liability, exclusivity and other commitments on charges and volumes along with other boiler plate provisions. The parties may also incorporate the standard terms and conditions (STCs) of a service provider and provide that in the event of any conflict that the agreement shall typically prevail over the STCs. The parties then enter into day-to-day transactions within the scope of the framework agreement following certain standard booking procedures or transactions and upon rates which are frequently set out in the schedule to such framework agreements.

Food for thought

As discussed above, there is a distinction between a single binding contract, a unilateral offer, a mere quote and a standing offer capable of creating multiple contracts. Depending on the interpretation of a given contract, it is conceivable that a framework agreement could fall into any one of these categories. Furthermore, the nature of the framework agreement affects the carrier's or logistics service provider's (LSP's) ability to withdraw the offer before an order is placed or avoid liability in respect of future orders. It is important to distinguish between situations where:

1. The carrier or LSP agrees that they will provide such services as the shipper may require from time to time.

2. The carrier or LSP agrees to be bound to execute any orders placed by the shipper and consideration is given by the shipper for the undertaking.

In the former case, the tender may be withdrawn at any time before an order is placed. In the latter example, the carrier will not be at liberty to withdraw the tender. With this in mind, it is important to consider the interpretation that may be applied to a particular framework agreement.

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Transport of dangerous goods by sea

A high proportion of goods carried internationally are potentially dangerous. To ensure they are transported safely, there are a number of international standards which specify how such goods can be handled safely. Carriers also require contractual warranties for shippers in relation to dangerous goods. In this article, we consider both.

International legal framework

The International Maritime Organisation ("IMO") is a United Nations specialised agency with responsibility for the safety and security of shipping and the prevention of marine pollution by ships. The IMO has developed two international conventions to address these issues:

- The 1960 International Convention for the Safety of Life at Sea ("SOLAS Convention").

- The International Convention for the Prevention of pollution from Ships ("MARPOL Convention").

To supplement the principles laid down in the SOLAS and MARPOL Conventions, the IMO developed the International Maritime Dangerous Goods Code (the "IMDG Code").

IMDG Code

The IMDG Code contains detailed technical specifications to enable dangerous goods to be transported safely by sea. The IMDG Code classifies dangerous goods into different hazardous risk classes (there are nine classes of dangerous goods) and identifies products by unique UN reference numbers. These nine hazard classes have been established internationally by a United Nations (UN) committee to ensure that all modes of transport (road, rail, air and sea) classify dangerous goods in the same way.

The IMDG Code covers matters such as packing, labelling (using hazard warning labels), stowage, segregation and handling, and emergency response action. The IMDG Code also includes standard documentation requirements when dangerous goods are being transported. When dangerous goods are transported, they must be accompanied by a dangerous goods transport document, which

we examine in more detail below. In addition, a dangerous goods container or vehicle packing certificate, stating that the provisions of paragraph 5.4 of the IMDG Code have been met, should be signed by the person packing or loading the freight container or vehicle.

New training provisions became mandatory from 1 January 2010 for shore based personnel. The requirement is for training commensurate with their responsibilities. Shore based personnel who require training include shippers, freight forwarders, container packers and consolidators, shipping line operations and booking staff, stevedores and port staff.

Is the IMDG Code mandatory?

As of 1 January 2004, the IMDG Code became a mandatory requirement for the SOLAS Contracting States/ Parties, of which there are 161, as at 31 October 2011, and which represent 98.91% of world tonnage (Source: IMO – Summary of Status of Convention – 31/10/2011).

Amendments to the IMDG Code

The IMDG Code is updated every two years to take account of new dangerous goods and new safety concerns. Each version of the IMDG Code is given an Amendment number to signify how many times it has been updated. This number appears at the bottom of each page together with the year of the Amendment. The previous Amendment was 34-08 which remained in force until 31 December 2011. However, from 1 January 2011, Amendment 35-10 could also be used because 2011 was a transition year which allowed the use of both Amendments in tandem. Amendment 35-10 is mandatory as from 1 January 2012.

Summary of changes in Amendment 35-10

There are many detailed changes to the Dangerous Goods List and to most chapters. Below are some of the significant additions and changes:

Additional items in the Dangerous Goods List

There are 16 new UN numbers going up to 3496, with explosives going up to 0509.

New UN numbers added in Amendment 35-10

0509 POWDER, SMOKELESS

3482b ALKALI METAL DISPERSION, FLAMMABLE or ALKALINE EARTH METAL DISPERSION, FLAMMABLE

3483 MOTOR FUEL ANTI-KNOCK MIXTURE, FLAMMABLE

3484 HYDRAZINE, AQUEOUS SOLUTION, FLAMMABLE with more than 37% hydrazine, by mass

3485 CALCIUM HYPOCHLORITE, DRY, CORROSIVE or CALCIUM HYPOCHLORITE MIXTURE, DRY, CORROSIVE with more than 39% available chlorine (8.8% available oxygen)

3486 CALCIUM HYPOCHLORITE MIXTURE, DRY, CORROSIVE with more than 10% but not more than 39% available chlorine

3487 CALCIUM HYPOCHLORITE, HYDRATED, CORROSIVE or CALCIUM HYPOCHLORITE, HYDRATED MIXTURE, CORROSIVE with not less than 5.5% but not more than 16% water

3488 TOXIC BY INHALATION LIQUID, FLAMMABLE, CORROSIVE, N.O.S. with an inhalation toxicity lower than or equal to 200ml/m3 and saturated vapour concentration greater than or equal to 500 LC50

3489 TOXIC INHALATION LIQUID, FLAMMABLE, CORROSIVE, N.O.S. with an inhalation toxicity lower than or equal to 1000ml/ m3 and saturated vapour concentration greater than or equal to 10 LC50

3490 TOXIC BY INHALATION LIQUID, WATER-REACTIVE, FLAMMABLE, N.O.S with an inhalation toxicity lower than or equal to 200ml/ m3 and saturated vapour concentration greater than or equal to 500 LC50

3491 TOXIC BY INHALATION LIQUID, WATER-REACTIVE, FLAMMABLE, N.O.S. with an inhalation toxicity lower than or equal to 1000ml/ m3 and saturated vapour concentration greater than or equal to 10 LC50

3492 TOXIC BY INHALATION LIQUID, CORROSIVE, FLAMMABLE, N.O.S. with an inhalation toxicity lower than or equal to 200ml/m3 and saturated vapour concentration greater than or equal to 500 LC50

3493 TOXIC INHALATION LIQUID, CORROSIVE, FLAMMABLE, N.O.S. with an inhalation toxicity lower than or equal to 1000ml/ m3 and saturated vapour concentration greater than or equal to 10 LC50

3494 PETROLEUM SOUR CRUDE OIL, FLAMMABLE TOXIC

3495 IODINE

3496 BATTERIES, NICKEL-METAL HYDRIDE

Note: No UN Numbers were deleted.

Other significant changes

UN 3166 and 3171 (vehicles) no longer have SP960 (not regulated). They have SP961 - exempt if on vehicle decks, but

otherwise they are regulated according to SP962. They need not be labelled, marked or placarded, but they must be on the DGN. Fuel cell powered engines and vehicles are now names under UN 3166.

A new chapter 5.5 covers provisions for UN 3359, now called a FUMIGATED CARGO TRANSPORT UNIT, collecting the text from various other places. Calcium Hypochlorites, UN 1748, 2208 and 2880 no longer have a possible corrosive subrisk. There are new UN numbers 3485-7 for these.

UN numbers 1391, 1649 and 2031 no longer have a possible subrisk 3 for the cases where the flashpoint is below 60. There are new UN numbers 3482-4 for these.

Limited quantity packages need no longer be marked with the UN number. There is a new diamond label for LQ packages, or a version with a Y inside if consigned under the limited quantity requirements for air transport. This is also the design of the placard-sized mark for CTUs containing only LQ, replacing the 'LTD QTY' mark. See chapter 3.4.

Extremely flammable substances such as UN 1131 Carbon Disulphide are no longer prohibited on ships carrying explosives. They just require a segregation value of 4. The exemptions for 1.4S, articles for life-saving purposes, 10Kg of G articles except fireworks, etc. are no longer required.

Paragraph 5.4.1.5.1 explicitly says the number, type and capacity of the inner packaging is not required.

A new paragraph 5.4.6 requires the consignor and the carrier to retain Dangerous Goods documents for 3 months.

(Source Digital IMDG Code support)

Dangerous goods transport document

Chapter 5.4 of the IMDG Code (Amdt. 35-10) requires the shipper (referred to as the consignor in the IMDG Code) who offers dangerous goods for transportation to give the carrier the information applicable to those dangerous goods. The IMDG Code states that the information may be provided on a dangerous goods transport document, which is also sometimes referred to as a dangerous goods note or a dangerous goods declaration. The dangerous goods transport document may be in any form and the IMDG Code does not preclude the use of electronic data processing (EDP) and electronic data interchange (EDI) transmission.

The dangerous goods transport document must contain all the information required by the provisions of the IMDG Code (paragraph 5.4.1.2.1 of the IMDG Code (Amdt. 35-10)). Such information includes a description of the dangerous goods and other technical details relating to the same. The dangerous goods transport document must also "include a certification or declaration that the consignment is acceptable for transport and that the goods are properly packaged, marked and labelled, and in proper condition for transport in accordance with the applicable regulations" (paragraph 5.4.1.6.1 of the IMDG Code (Amdt. 35-10)). The text of the certification is set out in the IMDG Code. The certification must be signed and dated by the shipper.

Other applicable provisions

Under English law, there is a common law implied warranty that the goods are fit for carriage in the ordinary way and are not dangerous. There is also strict liability if a shipper ships an undeclared dangerous cargo if losses result. Under some of the international conventions which apply to the international movement of goods, the carrier may have certain protection when handling dangerous goods. For example Article IV, rule 6 of the Hague Visby Rules gives the carrier certain rights when dangerous goods were shipped without the carrier's knowledge, including the right to destroy the same.

Carriers will often seek alternative or additional protection by requiring the shipper to give express warranties about the nature of the goods and indemnities should the carrier suffer financial loss as a result of knowingly or unknowingly handing dangerous goods. Shipping lines in their bills of lading terms and conditions often place onerous obligations on the shipper to seek consent prior to handing over dangerous goods, and to provide all necessary information in relation to the goods. The obligations will usually be accompanied by an indemnity should there be a failure to comply with the obligations.

Similarly, the standard terms used by freight forwarders usually include warranties and indemnities which give the freight forwarder protection which goes beyond the common law warranty and the protection afforded to the carrier under the international conventions. The freight forwarder often acts as an intermediary between the shipping line and the shipper, and therefore the freight forwarder may be required to provide the shipping line with warranties and indemnities regarding the nature of the goods, which is why the shipper's warranties

and indemnities are important. It will be the same for anyone involved in the movement and/or packing of dangerous goods, they will have a potential exposure when handling dangerous goods, and will therefore require their counterparty to provide certain warranties and indemnities.

Why is it important to declare dangerous goods?

The shipping line will use the information provided by the shipper to prepare the documentation required onboard the ship and to decide where to place the container on board the ship. Under the IMDG Code, each ship carrying dangerous goods is required to have a special list or manifest setting out the dangerous goods and marine pollutants and the location thereof (paragraph 5.4.3.1 of the IMDG Code (Amdt. 35-10)). It is therefore essential that the information provided in relation to dangerous goods is complete and accurate, particularly in view of the fact that in the container industry, once the doors of the container are closed, the shipping line or anyone else involved in the handling of the container will rarely check the accuracy of the information provided.

Misdeclaration of cargo, whether intentional or as a result of a lack of understanding of the complex dangerous goods legislation, is an ongoing problem which can have very grave consequences, such as fires and explosions on vessels resulting in loss of life and very high value losses. There are a number of examples of such incidents in the recent past. In 2002 the Hanjin Pennsylvania suffered a major explosion during her second voyage and in 2006 an explosion occurred on board the Hyundai Fortune which destroyed countless containers and resulted in a total loss of the vessel. In both instances the cause of the incident was believed to be misdeclared cargo.

In addition to the obvious damage an explosion or a fire will cause to a vessel, there is also the damage to the other cargo on board to be considered and damage to the environment. Inevitably the question of who should bear the enormous costs resulting from such incidents will give rise to debate as was the case in relation to the Aconcagua which was damaged by explosion in 1998. The Court of Appeal in December 2010 dismissed the appeal by the shipper of the cargo (calcium hypochlorite) and upheld the Court of First Instance's decision to award the time charterers damages from the shipper for breach of contract contained in the charterers' bill of lading. Ultimately though, the high losses resulting from such incidents will fall upon marine insurers.

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News

HFW hires aviation team and opens office in São Paulo

Following the conclusion of formalities, we are delighted to welcome the eight partner team formerly making up Barlow Lyde & Gilbert's (BLG) well respected global aerospace and aviation group. The eight partners will work across five office locations - London, Hong Kong, Singapore, São Paulo and Dubai - and add significantly to HFW's international commerce offering, giving it a new, leading position in the market for aerospace and aviation law.

The partners are: Sue Barham (London), Peter Coles (Hong Kong), Richard Gimblett (London and Dubai), Mert Hifzi (Singapore), Nicholas Hughes (London), Giles Kavanagh (London), Keith Richardson (Singapore) and Jeremy Shebson (London and São Paulo). In addition to the partners, 16 associates also join with them.

As a result of this team hire, HFW has opened an office in São Paulo, providing clients with core capabilities in aviation and insurance, as well as acting as a regional hub serving shipping, oil and gas, offshore, mining and commodities clients.

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