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International Trade, Customs & Export Law

40
YEARS
1977 - 2017

MINIMIZING RISK OF
CLAIMS AND LAWSUITS:
HOW TO COVER YOUR BASICS

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An industry that continues to grow...

- Ship owners
- Operators/charterers
- Contractual carriers/consolidators
- Forwarders
- Intermediaries (brokers, agents, etc.)
- Service providers (surveyors, consultants, etc.)
- Ports and terminals
- Cargo interests



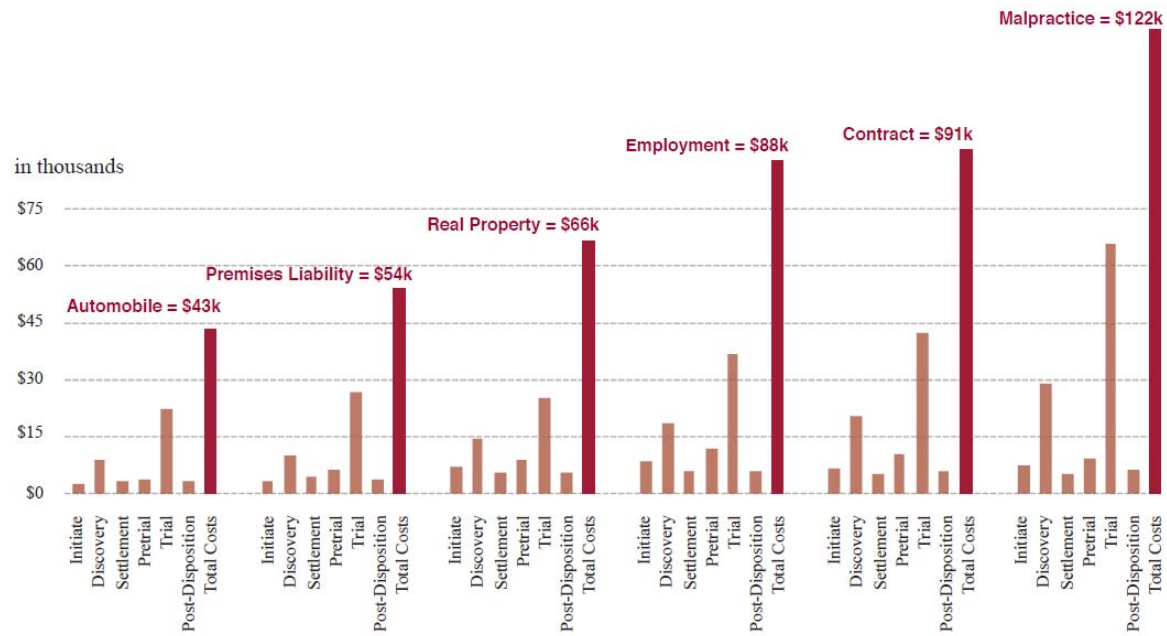
Logistics: It's a Risky Business

- Day-to-Day Risks:
 - Customer demand changes
 - Unexpected transit delays
 - Problems with suppliers, which delay critical components
 - Theft
 - Production problems
 - Warehouse issues
 - Cyber security



Why should I care?

Figure 2: Median Costs of Litigation by Case Type



Hannaford-Agor, Paula and Nicole L. Waters, [Court Statistics Project](#), *Estimating the Cost of Civil Litigation*, Vol. 20, January 2013.

DON'T BE A VICTIM OF COMPLACENCY!



The Problem with Predictions

- “In all my experience I have never been in any accident of any sort worth speaking about. I have seen but one vessel in distress in all my years at sea...I never saw a wreck and have never been wrecked nor was I ever in any predicament that threatened to end in disaster of any sort.”

- Edward John Smith – Captain, Titanic



We've never had a problem before...



Compliance = Mitigating Risk

- National, state, local regulatory requirements
- Industry standards
- Internal corporate policy
- Contractual obligations



Other Ways to Minimize Risk

- Third Party Risk Assessments
- Insurance
- Standard Operating Procedures
- Competent Partners



**“Our corporate hierarchy is layered like a lasagna.
That’s why they call me the Big Cheese.”**

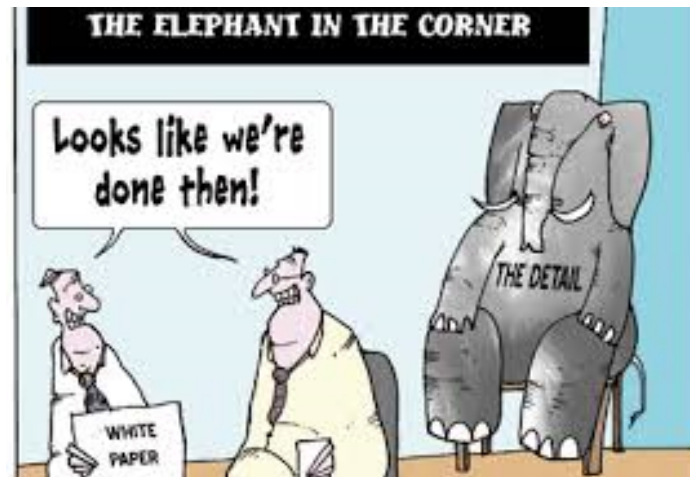
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Contract Basics



Contract Benefits

- CONTRACTING ADDS STABILITY
- Benefits of well-drafted contracts include:
 - Cost control and predictability
 - Limitation of risk/liability
 - Customization to address commercial needs and requirements
 - Clarity of expectations



Contract Basics

- Do laws govern the services?
- Regulation may apply to contract movements – depends on transportation mode.
 - Rail contracts are outside of the STB jurisdiction
 - Truck contracts may include waiver of regulation, except for registration, insurance and safety
 - Ocean contracts for containerized freight are regulated by the FMC
 - Some contracts may incorporate specific regulations (e.g., Carmack, safety)

Contract Framework

- Structure and terms may vary based on several factors:
 - Mode of transport
 - Geographic scope (domestic vs. international)
 - Types of services (transportation, logistics, customs)
 - Inclusion of subsidiaries and affiliates
 - Corporate objectives (e.g. uniformity in terms)
 - Corporate resources (e.g. contract administration)
 - Government regulation
 - Market conditions (capacity, demand, competitive landscape)
- No one-size-fits-all approach
 - Provide negotiation guidelines
- Structure should be developed to satisfy primary business and service needs

Contracting Basics: Contracting Parties

- Define the role of the contracting parties
 - Who is the Shipper?
 - Does it include the parent, affiliate, subsidiary or other related entities?
 - Does it include franchisees?
 - Who is the carrier?
 - Is it an agent, freight forwarder, vessel/aircraft owner or broker?
 - Does it include parent, affiliate, subsidiary or other related entities per common ownership?



Contract Basics: Scope and Requirements

- What does each agreement mean and is it written?
 - A “Master Agreement” that governs a long-term relationship
 - A single document that governs a particular transaction
 - Bill of lading
 - Loading confirmation
- Clearly define scope of services
 - Mode of transport
 - Type of service (e.g. transportation, brokerage, freight forwarding)
 - Geographic scope (e.g. interstate, intrastate, international)
 - Exclusivity



Contract Basics: Rates

- All rates should be mutually agreed upon in advance of services.
- All rate increases, surcharges, accessorials, bunker and fuel factors and other costs and expenses should be clearly addressed.
- Ability to modify the agreement to adjust rates as needed.



Contract Basics: Minimizing your Risks

- INDEMNIFICATION

“It is the express intent of the parties to this agreement that carrier will indemnify the shipper for all loss, damage and claim of any kind arising out of this contract.”

- If you use “arising out of” language, you may be contracting to indemnify more than that which is covered by your insurance!

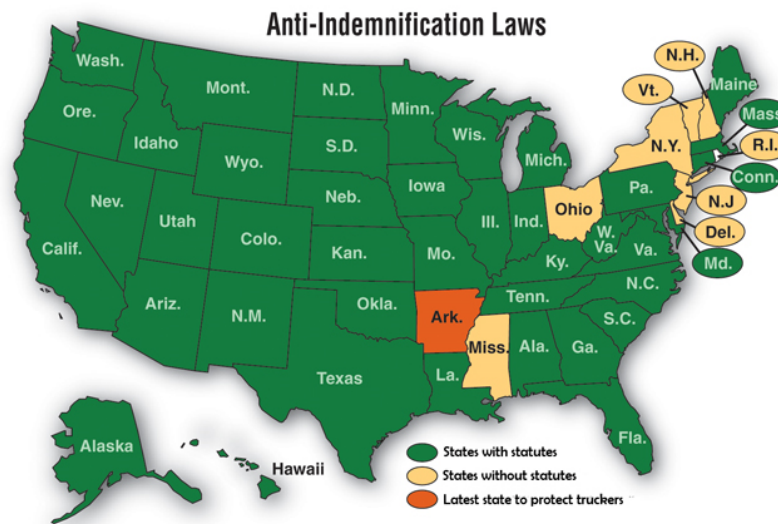
“Each part will indemnify and hold harmless the other from all loss, liability or claims to the extent same is caused by a negligent or willful act or omission of their respective employees, agents or subcontractors in the performance of this contract.”



Contract Basics: Minimizing your Risk

- ANTI-INDEMNIFICATION

PROHIBITS INDEMNIFICATION PROVISIONS REQUIRING THE CARRIER TO INDEMNIFY THE SHIPPER FOR DAMAGES THAT ARE CAUSED BY THE NEGLIGENCE OR WRONGFUL ACTS OF THE SHIPPER.



Contract Basics: Information Provided by Your Customer

SERVICE AGREEMENT

This Agreement is made effective as of March 24, 2015, by and between ABC Corporation, incorporated in the state of Florida, with its principal place of business at 1234 Palm Tree Way, Orlando, Florida 33312, and Exclusive Transport (USA) incorporated in the state of Wyoming, with its principal place of business at P.O. Box 323, Chicago, IL 60102

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in their respective names by their duly authorized representatives as of the date first above written.

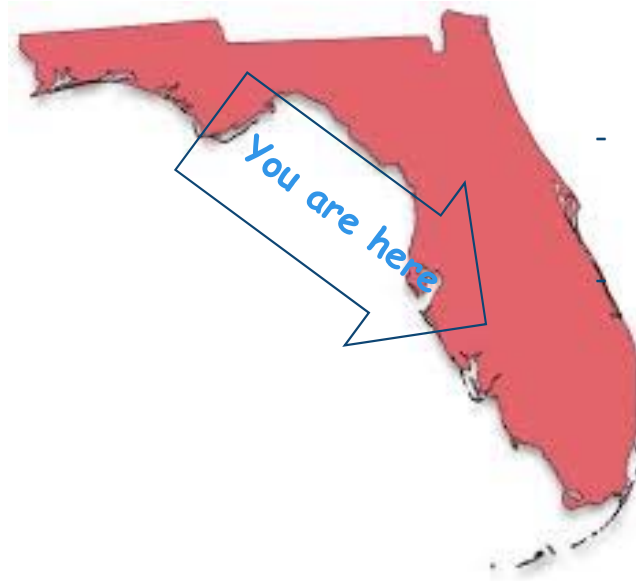
ABC CORPORATION
BY: *Michelle L. Moya*

Company Name: E.T., Inc.
BY: *[Signature]*



Contract Basics: Jurisdiction/Governing Law

- Don't get stuck in an inconvenient forum!



- Mediation or alternative dispute resolution is preferred for both parties.
- "General principles of federal transportation law, jurisdiction and venue shall apply."
- Some companies prefer to select local jurisdictions, but local does not always mean better!

Licensing, Authority and Safety

- Service providers should warrant that they and their subcontractor have and will maintain all necessary licenses, permits, etc. at no additional cost
- Monitor compliance on your own or require immediate notice of revocation or adverse action
- Consider termination upon breach of licensing, authority and safety fitness requirements

Shipper-Driven Contracts: Problem Areas

- Waiver of statutes and regulations
- Indemnification clauses
- Special and consequential damages
- “Additional insured” language
- The right of setoff
- Salvage/no duty to mitigate
- Shipper load and count/concealed damage waivers
- No penalties for nonpayment
- Arbitration provisions
- Integration clauses
- Nonrecourse provisions
- Intermediary as carrier’s agent
- Back-solicitation provisions
- Use of SMS methodology
- Brokering without permission
- Additional cargo liability

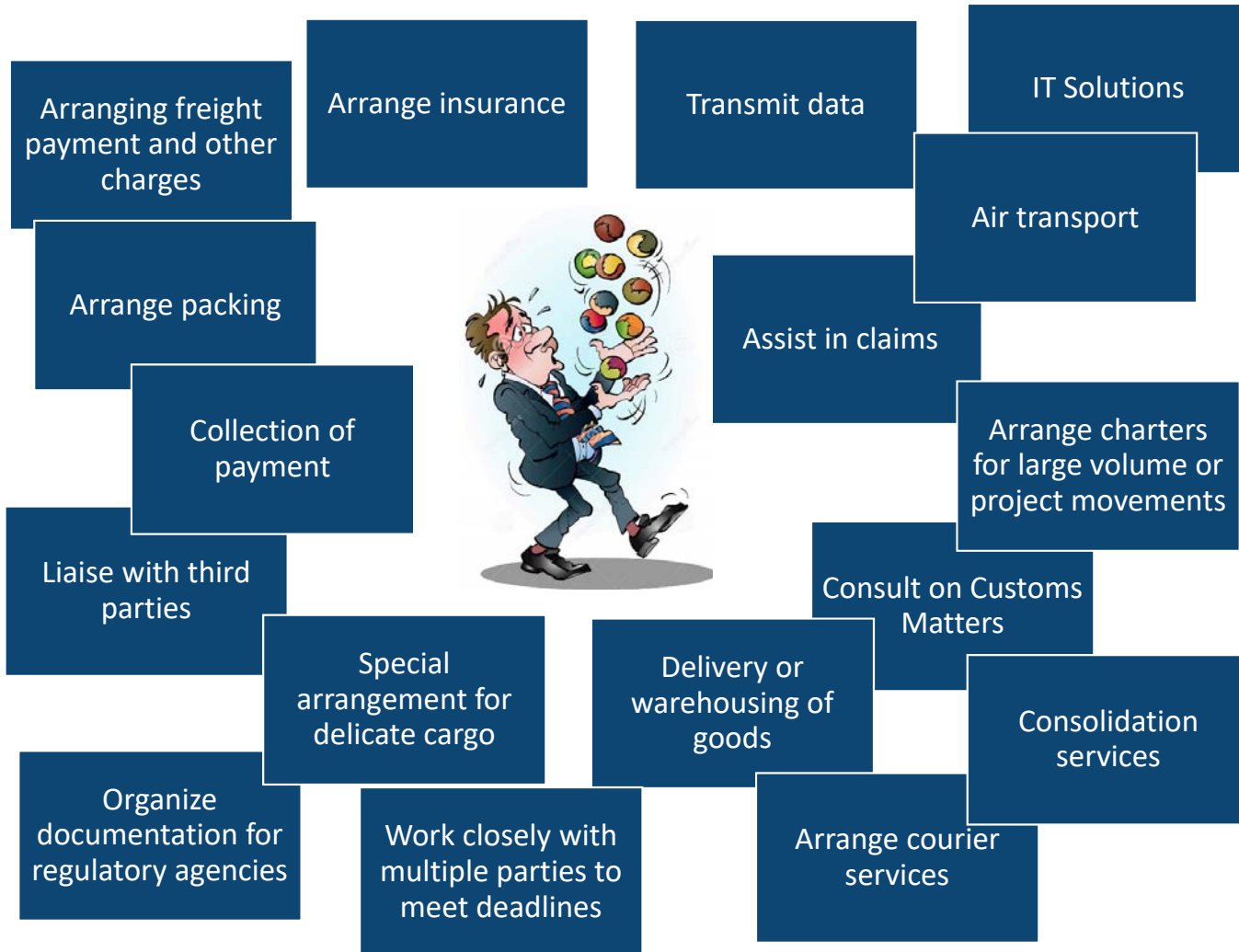
Shipper-Driven Contracts: Best Practices

- Never accept carrier or transportation service provider duties
- Do not accept direct liability for cargo loss or damage
- Avoid cargo liability beyond carrier's insurance
- Do not permit unilateral offset of cargo claims against freight charges due
- Do not accept SMS vetting in credentialing carriers
- Limit indemnification "to the extent" of your negligence

Shipper-Driven Contracts: Best Practices

- Do not accept direct liability for the retained carrier's safety compliance
- Do not waive shipper's duty to mitigate damages
- Avoid promising more than reasonable dispatch or micromanagement of carriers in transit
- Avoid fixed rate guarantees and long term commitments

The Forwarder's Role



Where the Problems Lie...

- Brokers market themselves as carriers
- Carriers hire other carriers to handle excess capacity
- Shipper wants indemnity for everything
- Brokers erroneously assume carrier duties in shipper contracts



Too Many Hats!

- Holding self out as carrier
- Authority
- Website
- Brochures (truck photos)
- Terminology



Hey Joe — which hat are you planning on wearing today?

Carmack Amendment

- To make a prima facie case under the Carmack amendment, a plaintiff must show:
 - 1) delivery to the carrier in good condition;
 - 2) arrival in damaged condition; and
 - 3) the amount of damages caused by the loss.
- Once the prima facie case is established, liability attaches unless the carrier can establish one of several affirmative defenses. These available affirmative defenses are that the damage was caused by
 - the act of God;
 - the public enemy;
 - the act of the shipper himself;
 - Public authority; or
 - the inherent vice or nature of the goods.
- The burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability.

Liability under the Carmack Amendment

- Carmack subjects motor carrier transporting cargo in interstate commerce to strict liability for “actual loss or injury to property.” *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964).
- Strict liability imposed by Carmack is for actual loss or injury to the property, subject to right of motor carrier to limit liability as provided by statute. Section 14706(a)(1) provides, in part, that:

[t]he liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading . . .



Liability under the Carmack Amendment

- Carrier's liability and duties under Carmack are determined pursuant to bill of lading used in shipment of the goods, and limits are based on carrier's rates or tariffs. 49 U.S.C. §§14706, 13501 (2005).
- Recovery under Carmack is not limited to damaged goods. The phrase in Section 14706(a): "liability imposed . . . is for the actual loss or injury to the property . . .," has been interpreted by courts to cover more than mere physical loss or damage to goods. Includes any injury to tangible or intangible property rights and economic loss not directly related to physical damage.
 - Restore innocent party to the position the party would have been in if the contract had been fully performed.
- If the loss is a complete loss, the general measure of damages under Carmack is the fair market value at the place of destination.
 - Not the replacement cost!

Limiting Liability under the Carmack Amendment

- In order to effectively limit liability a carrier must:
 - Maintain a tariff in compliance with the requirements of the Interstate Commerce Commission;
 - Give the shipper a reasonable opportunity to choose between two or more levels of liability;
 - Obtain the shipper's agreement as to his choice of carrier liability limit; AND
 - Issue a bill of lading prior to moving the shipment that reflects such an agreement.



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Who are you? (Broker liability as a carrier)

- Brokers are not liable where their status is clear
 - Chubb Group of Insurance Companies v. H.A. Transportation Systems, Inc., 243 F. Supp. 2d 1064 (C.D.Cal. 2002)
 - Rexroth Hydrauline v. Ocean World Lines, Inc., 2008 U.S. App. Lexis 23078, 547 F. 3d. 351 (2d. Cir. 2008)
 - Professional Communications, Inc. v. Contract Freighters, Inc., 171 F. Supp. 2d. 546, 550 (D. Md. 2001)
 - Milan Express Co., Inc. v. Western Surety Co., 886 F, 2d. 783, 784 (6th Cir. 1989) - Role of broker defined

Who are you? (Broker liability as a carrier)

- Courts have imposed liability if a broker acts like a carrier or accepts duties as a carrier
 - Broker named as carrier on Bill - Zima Corp. v. M.V. Roman Pazinski, 493 F.Supp 268 (SDNY 1980)
 - Shipper's "Understanding" – Custom Cartage v. Motorola, 1999 WL 965686*9 (N.D. Ill. 1999)
 - Broker bills for freight charges, not showing broker status – Delta Research Corporation v. EMS, Inc. 2005 WL 20900890
 - Viasystems Techs. Corp., LLC v. Landstar Ranger Inc., 2012 US Dist LEXIS 171133 (E.D. Wis. 2012) – broker registered as a carrier and not as a broker
 - Hewlett-Packard v. Brother's Trucking and Salem Logistics, 373 F. Supp 2d 1349 (S.D. Fla. 2005) (status as a broker or carrier not clear where broker stated that they "provide control and the very latest systems in transportation" and "consistent and timely transit")

Who are you? Best Practices

- Segregate Your Warehousing, Carrier, and Brokerage Operations; Segregating different service offerings in different entities forces an operator (and its sales force) to think clearly about the services that it is offering and to document those services accordingly; also helps profit and loss analysis
- Review not only your contracts but your practices for indicia of “control” if you are brokering loads
 - Fines
 - Monitoring of Driver
 - Constant communication with Driver
- Remember 49 USC 13904(b) -Broker cannot hold out to provide transportation unless it is also licensed and registered as a carrier



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Other Considerations

- Do not identify as the carrier on the bill of lading and don't allow the carrier to affix broker's name as the carrier on the bill of lading.
- Don't refer to carriers as "partners" in marketing materials or on website. Avoid making claims about "control over all aspects of the operation."
- Don't assign the carrier driver routes or otherwise route loads. Refrain from scheduling pickup and delivery times whenever possible.
- Don't instruct the drivers to call you first if an incident occurs.
- Don't claim that you have "control over all aspects of the operations"

Example of Clarity in Role and Scope

"Broker agrees to arrange for transportation services as more fully set forth in Appendix A ('Services'). Broker's responsibility under the Agreement is limited to arranging for, but not actually performing, transportation of the Goods."

Brokers: Best Practices

- Be an “arranger” not a provider of transportation
- Accept only the statutory duties of a broker.
- Do not accept direct liability for cargo loss or damage or safe operations of the contracted carrier’s equipment.
- Do not indemnify shipper for all loss to cargo. Require filing of claims with carrier and claims adjustment.
- Warrant only that claims for which the retained carrier is adjudged liable will be paid subject to an agreed limitation.
- Require payment of freight charges without offset.

Independent Contractors

- Generally, one who employs an independent contractor is not liable for the harm caused to another by independent contractor's negligence.
- “Nothing herein shall be deemed to create the relationship of employee and employer, principal and agent, partnership, or of joint venture. Carrier shall provide Services as an independent contractor and as such, will have sole and exclusive control over the manner in which it or its employees or agents perform Services under this Agreement. Carrier assumes full responsibility for Carrier's employees' and agents' performance of Services hereunder. Neither party shall be liable for any debts or obligations incurred by the other, except as is expressly provided in this Agreement.”
- Not only for risk of loss, but tax purposes as well!

Independent Contractor or Employee?

- Courts will look at CONTROL!
 - Ownership of the equipment
 - Nature of the work
 - Skill required to perform the work
 - Differences of payment and income tax withholding
 - Supervision and direction of the work
 - Right to discharge
 - Right to termination of contract
 - Terms of the agreement



Cargo Loss and Damage Cheatsheet

LEGAL AUTHORITY	C.O.G.S.A.	Visby Amendment	Warsaw	Carmack
LIMITATIONS OF LIABILITY	(\$500US) per “package” or “customary freight unit” unless a higher value is declared. “Customary freight unit” is used in US only for goods not shipped in packages.	Special Delivery Rights (SDR) of International Monetary Fund 666.67 units per package or 2 units per kg = whatever is higher.	limits damages to \$20/kg or 9.07/lb unless the consignor has made a special declaration of value and paid a supplemental sum based on that value, or unless there is willful misconduct. Amended by Montreal Protocol to 17 SDR per kilogram. Hague Protocol establishes limit of 250 francs per kilogram.	Actual loss or injury to the property, but can be limited by contract to value declared for property on shipping documents

When you have a claim: Best Practices

- Claim Requirements
 - Time Limits
 - In the absence of a contractual provision, tariff may apply
 - Best practice: draft a time limit chart for each carrier in your routing guide
 - Right to Setoff
 - A broker may stand “in the shoes” of the shipper (49 U.S.C. 14706)
 - Salvage Rules
 - Concealed Damage
 - Don’t accept responsibility for loading and counting



You've Been Sued! What should you do?

- If you receive a claim, your next steps should be as follows:
 - Find out if the cargo owner has cargo insurance;
 - File claims for loss or damage of goods against carrier and other parties;
 - Know the timelines!
 - Retain copies of all documents – including the terms and conditions and correspondence; and
- Give notice to your insurance company and your lawyer.



You've been sued! What should you NOT do?

- DO NOT:
 - Make a payment
 - Assume any (additional) obligations
 - Admit liability/make written statements
 - Make any changes to the file
 - Allow inspection of your files
 - Discuss the claim with anyone (with exceptions)
 - Forget the deadlines
 - Check the tariff
 - OVERREACT TO THE CLAIM!

What about insurance?

The Case of the Missing Lions

- Suit against Customs Broker (and carrier)
- Potential Liability: 6 figures
- Liability determined: \$0.00

- This case involved:
 - Litigation in Maryland
 - Insured in Seattle
 - 3 in person depositions in Maryland
 - 2 in person depositions in Seattle
 - A taxidermist in Montana
 - 65-page court decision



Conclusion

- Basic Steps to Risk Management
 - Identify
 - Prioritize
 - Mitigate



THANK YOU!

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