

Customs and Global Trade Update

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Hutchison Ports dispute a timely reminder for customs brokers/freight forwarders to review their terms and conditions

Few industries are impacted by industrial action as often or as significantly as freight and logistics. Industrial action slows supply chains, increase costs and can cause significant losses. Now the dust has settled on the recent Hutchison industrial dispute, the key question is: will your terms and conditions protect you from claims by your customers?

HOW COULD YOU BE LIABLE

When goods cannot be cleared through a port there are three main potential areas of liability:

- » Storage, container detention and other charges associated with the delayed clearance of the goods;
- » Economic costs incurred by the consignee of the goods from not having access to the goods; and

- » Loss of perishable goods caused by the delayed clearance.

As a broker/forwarder you may be directly contractually liable to the service provider for the storage and other fees associated with the delay. You will of course try to pass these fees onto your client.

You may also be directly liable for claims by the consignee or owner of the goods for losses they suffer associated with the delay. These claims are likely to be based on what service/delivery times you contractually promised -for instance, if you promised to deliver the goods by a certain date or for a certain price.

There may also be potential exposure in negligence. This exposure is not great in the case of losses caused by industrial action unless you knew of the industrial action and did not take any reasonable measures to reduce its impact (such as changing the discharge port).

IT SEEMS UNFAIR THAT THE BROKER/FORWARDER COULD BE LIABLE

It is inherently unfair that a broker/forwarder could be liable for the impact of industrial action. However, your client will think it is just as unfair that they carry the loss. The individual workers will not be sued and the port operator will almost certainly have contractually excluded their liability. In these circumstances, it may come down to a fight between you and your client.

HOW TO MANAGE THE RISK

These risks are not new and your terms and conditions should address these risks as follows:

- » Clearly state that you enter into contracts with third parties as the agent of your client and it is your client that is liable for third party charges; or alternatively;
- » Clearly state that your client must indemnify you for costs you incur in performing the services, such as third party costs;
- » Exclude all liability for losses caused by industrial action (often included as part of the force majeure clause); or
- » Exclude liability for losses caused by delays, your negligence or actions of others that are outside your control.

These clauses will often be effective in limiting your liability, provided you can prove that the terms and conditions formed part of the agreement with the customer.

In the case of the recent Hutchison industrial dispute, it is worth noting that the picket line was formed by workers and members of the community. Terms and conditions should be reviewed to ensure they exclude community protest action, not merely "industrial action".

DO YOUR T&CS FORM PART OF THE CONTRACT?

Almost all brokers/forwarders have written terms and conditions. They may appear on your website or be printed on the back of invoices. However, these acts alone will rarely result in the terms and conditions being binding on your customer.

Merely sending a copy of your terms and conditions to your client is not enough. It is necessary to prove that your customer was aware of your terms and conditions and accepted them before your services were performed.

An effective way of ensuring this is by:

- » Providing your clients with a letter enclosing your terms and conditions and advising that all services will be carried out pursuant to those terms and conditions;
- » Requiring the client to sign a letter acknowledging the receipt and acceptance of the terms and conditions;
- » Retaining a copy of the signed acceptance of the terms and conditions on file; and
- » You objecting to any client terms and conditions that may be provided to you (such as on a client purchase order).

It is hard to predict in advance the events, like industrial action, which will have you running for a copy of your terms and conditions. However, it is clear that many in the logistics sector base their pricing on a low-liability service offering. If you couldn't offer your current pricing and carry all associated risks, you cannot afford to take chances with your terms and conditions.

Hunt & Hunt have drafted terms and conditions for various service providers involved in international trade. It is our industry knowledge that allows us to draft terms and conditions that protect you against the risks unique to your business. Please contact one of our Customs and Global Trade specialists to discuss.

Please contact a member of our team for more information.



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