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THE "Q & A" ON FREIGHT FORWARDERS: WHO ARE THEY? WHAT DO THEY DO? WHEN ARE THEY LIABLE?

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INTRODUCTION

When goods are damaged during transport, the seemingly obvious targets in a subrogated action are usually the "carriers", being the parties who were contracted to handle and transport the goods. There is, however, another party who may bear responsibility for the loss, but who is often overlooked as a potential defendant - the "freight forwarder". Where property is damaged in transport, subrogation professionals should be alert to the possibility of recovering against freight forwarders who may have been involved in arranging carriage for the goods.

WHAT IS A FREIGHT FORWARDER?

A **freight forwarder** is a person or company who arranges transportation for other people's goods, usually for a fee. Since the transportation of goods between two locations will often involve multiple modes of transportation (e.g. truck, rail, ship, air), a freight forwarder will usually be involved in coordinating the transportation of goods where different carriers are required for different portions of the journey. The freight forwarder arranges for these different modes of transportation, but may not necessarily be involved in the actual carriage of the goods or handling of the freight, and may not even issue a bill of lading.¹

Freight forwarders may assume one of two legal roles: **agents** and **principal contractors**. The liability of a freight forwarder will depend on which role they assumed when agreeing to make the shipping arrangements. This characterization is not always black and white, and may require a careful factual analysis.

Freight Forwarders as Agents

In some cases, a freight forwarder may act as an "*agent*" for a shipper/owner of goods. When acting as an agent, a freight forwarder will generally not guarantee that goods will reach a

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¹ Tetley, W., "Marine Cargo Claims, 4th ed.", Chapter 33, p. 2, Publication forthcoming 2008, Castel, J.G. "The Canadian Law and Practice of International Trade, 2nd ed.", (Toronto: Edmond Montgomery Publications Ltd., 1997), p. 286.

final destination, but rather may only assume responsibility for the logistics of the delivery process. As an agent, a freight forwarder will usually operate in one of the following ways:

- (i) By receiving commissions on bookings made with the actual carriers, calculated based on the transportation services to be performed; or,
- (ii) By charging the shipper/owner a fee calculated as a percentage of the total shipping expenses.²

When the freight forwarder is acting as an agent, it is usually the shipper/owner, rather than the freight forwarder, who actually enters into the transportation contracts with the carriers. Accordingly, the freight forwarding agent should disclose all of the carriers' costs to its customer since it is the customer who ultimately selects and contracts with the various carriers.

LIABILITY OF A FREIGHT FORWARDING AGENT: The primary responsibility of a freight forwarding agent is to use reasonable care when selecting carriers to transport the goods. The freight forwarder may be held liable in tort or for breach of contract if it fails to live up to its obligations in this regard. The plaintiff, however, would have the onus of proving that the freight forwarding agent had breached this duty.

Freight Forwarders as Principal Contractors

The recent emergence of carriers who offer a package of transportation services such as door-to-door delivery, which includes packing and assembling of goods into containers and arranging for multiple modes of transportation, has led some freight forwarders to start acting as "*principal contractors*" in direct competition with carriers who offer transportation services packages.³

When operating as a principal contractor, the freight forwarder will usually charge the shipper/owner of the goods a straight freight charge for the delivery of the goods. In so doing, the freight forwarder is entering into a contract with the shipper/owner to *deliver the goods to a final destination*. In this situation, the freight forwarder is acting as a principal contractor, even though the actual carriage to that destination may be undertaken by one or more successive sub-carriers.

LIABILITY OF A FREIGHT FORWARDING CARRIER: Where a freight forwarder acts as a principal contractor rather than an agent, so far as a shipper/owner of the cargo is concerned, the freight forwarder is a carrier. A carrier has a duty to transport goods safely from the place of shipment to the place of delivery, and the shipper/owner will have a right of action against the freight forwarder on that basis.

- At common law, a public carrier has a sweeping degree of liability for any damage to property that has been entrusted to him for transit, and in some cases, his responsibility may amount to almost that of an insurer of the cargo against the loss unless it can be established that the loss falls within a relatively few classes of exceptions, namely

2. Tetley, *ibid* at p. 3; Castel, *ibid*.

3. Castel, *supra*, note 1 at p. 292.

where the damage is caused by an Act of God, the public enemy, an act or default of the shipper or owner, or natural shrinkage.

- In other circumstances, the freight forwarder may be held to the standard of a private carrier. He is responsible for any damage to property that has been entrusted to him for transit. A freight forwarder, in these circumstances, is duty bound to take the same care of the goods as would a careful and prudent person of his own property. Where goods are damaged while under his charge, he may only escape liability by establishing a complete absence of negligence for damaged goods.
- Finally, the freight forwarder may be subject to certain contractual or statutory liabilities and protections that would be imposed on actual carriers in similar circumstances, for example, where the freight forwarder has issued a bill of lading for the goods. Significantly, this may include shorter limitation periods in which to bring an action against the freight forwarder, or monetary limits on liability based on the number of packages being carried or the weight of the goods.

As a result of the legal complexities involved in determining the precise nature of liability against a freight forwarder who is acting as a principal contractor, the advice of a lawyer who is experienced in handling cargo claims is usually necessary, and should be obtained as soon as possible to protect a claim from the applicable limitation periods.

WHEN IS A FREIGHT FORWARDER A PRINCIPAL OR AN AGENT?

Whether a freight forwarder is an agent or principal will depend on the circumstances of each case, and there are no clear or hard rules for making this determination. The following are a list of some of the factors that a court may consider when attempting to determine whether a freight forwarder is an “agent” or a “principal contractor”:

- (a) How did the freight forwarder characterize its obligations under the contract?
- (b) Prior to delivery of the goods, did the freight forwarder give the customer any documentation which provided an explanation of his role in transporting the goods?
- (c) Was there a course of dealings between the freight forwarder and the customer prior to the shipment in question? How have the parties dealt with each other in the past?
- (d) Has the freight forwarder performed part of the delivery using his own employees?
- (e) Did the customer know which carriers would actually be transporting the goods? If so, did the customer choose these carriers, possibly at the time that the costs of transport were presented to him for his selection?
- (f) Did the freight forwarder issue a bill of lading to the customer?
- (g) Did the customer receive a bill of lading issued by another carrier?

- (h) Did the freight forwarder charge an amount calculated upon freight and then charge a further amount for its fee? Or did the freight forwarder charge an all-inclusive figure for delivering the goods?

AN EXAMPLE

The facts of *Bertex Fashions Inc. v. Cargonaut Canada Inc.* (“Bertex”)⁴ show how a freight forwarder can be held responsible for damage to goods during transport, even where the freight forwarder never actually took possession of the goods.

Bertex Fashions Inc. v. Cargonaut Canada Inc.

The plaintiff, a clothing retailer from Montreal, Quebec, wanted to import women’s blazers from a manufacturer in Bulgaria. The Bulgarian manufacturer agreed to pack the blazers into cardboard cartons at the factory. Meanwhile, the plaintiff made arrangements with the defendant, a freight forwarder, to have the blazers delivered from Bulgaria to Quebec.

The freight forwarder issued a bill of lading for the boxes of blazers, and then hired various trucking companies and ocean liners to act as sub-carriers and deliver the goods. These carriers were paid by the freight forwarder rather than the plaintiff. The plaintiff was not informed about any of the contractual arrangements between the freight forwarder and the actual carriers. When the cartons were delivered to the plaintiff, there were in terrible condition and a number of the blazers were missing or damaged. The plaintiff sued the freight forwarder for the loss.

At trial, the freight forwarder argued that he was just a “forwarding agent” – he had never taken possession of the goods. Since all of the actual transportation had been performed by the carriers, he argued, the plaintiff was suing the wrong person. The plaintiff should have brought the action against the carriers instead

The Federal Court found that the freight forwarder had acted in the capacity of a carrier, and so was liable as a common carrier to the plaintiff. In other words, the carrier was held liable to the plaintiff because he could not demonstrate that the damage to the blazers was the result of a fortuitous event or an act of God. The Court based its conclusion that the defendant was a carrier on the following considerations:

- On a plain reading of the bill of lading, it appeared that the freight forwarder had agreed to carry the goods from the point of shipment to the point of delivery.
- There was nothing in the bill of lading to indicate that the freight forwarder was not assuming the role of a carrier.
- The freight forwarder charged the plaintiff an all-inclusive figure (\$4,500) for its services which the court found to be in the nature of freight, not of a commission.

4. *Bertex Fashions Inc. v. Cargonaut Canada Inc.*, [1995] F.C.J. No. 827 (F.C.) at para. 45,

- The freight forwarder had selected the actual carriers.
- The freight forwarder failed to provide any information about the actual carriers to the plaintiff and the plaintiff did not know of their identity.
- The contracts with the actual carriers were never provided to the plaintiff.
- Except for the bill of lading, the plaintiff was not provided with any document explaining the nature of the services offered by the defendant.

CONCLUSION

When property is damaged during transport, the freight forwarder who arranges for movement of the customer's freight may be liable for damage to that freight, even if he does not physically handle it. Accordingly, where property is damaged in transport, subrogation specialists should be alert to recovery opportunities that may arise against freight forwarders. When acting as an agent, the freight forwarder is required to use reasonable care when selecting carriers to transport the freight. When acting as a principal contractor, the freight forwarder may be subject to the same liability as that of the carriers who transported the goods. In any event, the opinion of a lawyer experienced in dealing with cargo losses should always be obtained in order to evaluate the recovery potential of these claims.

Cozen O'Connor is internationally recognized for its ability to successfully prosecute shipping, forwarding, transporting, storage and other types of cargo losses, both domestic and international. Our lawyers' expertise in dealing with all forms of property damage disputes can be deployed for the benefit of your company to assist in the recovery of subrogated claims.

For additional information concerning
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