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Chapter 6: Forwarders' Liability Insurance

Objectives:

1. To understand the legal role and risk exposures of freight forwarder
2. To know the general make-up of a liability policy and type of liability covers available

1. Role of Logistic Service Providers

Recent developments in international logistics chains bring the traditional intermediaries and service providers in danger of being bypassed, due to both organisational and/or technological reasons. First, a need for an integrated approach to logistic chain has been already recognised in theory and practice. Multinational firms in the industry or retail sector i.e. show an increasing demand for complex transport and logistics service like worldwide door-to-door delivery or one-stop shopping. Second, the employment of new technologies in connection with the Internet cause a deep change in the relationships along the logistic chain due to a change in intermediation. This can be reflected by framework developed based on many studies of entrepreneurial networks in international business to provide some insight in the complex relationships between shippers, freight forwarders and other intermediaries or service providers along the international logistic chain.

Implementation of the Logistics Solutions to gain business benefits for global supply chains by fostering interoperability between the partners to overcome barriers of scalability and achieve visibility.

Logistic Services Providers play a significant role in today's Consumer Packaged Goods (CPG) supply chain in managing the internal and external goods flows for Retailers, Manufacturers and Material Suppliers. In many of these relationships, trading partners are faced with different business scenarios and data interchanges, especially when they move into more advanced interactions with Logistic Service Providers.

Therefore these partners need solutions based on common business processes, common communication and identification solutions to be able to overcome barriers of interoperability and scalability. These solutions will lead to more transparency of operations and visibility of the flow of goods and ultimately take out unnecessary cost of the supply chain.

The foundation for the solution is the development of a framework of common business processes and related data communications interchanges and driving alignment on all levels of these interoperations from master data alignment to financial settlement. This framework is the LIM, the Logistics Interoperability Model.

It is for this reason that the Singapore Freight Forwarders Association was re-named the Singapore Logistics Association in the new millennium, to reflect the expanded

role of the freight forwarder to meet all the logistical needs of his customer. The freight forwarder is no longer known as the forwarder, but the Logistics Service Provider (LSP).

The freight forwarder's legal status has therefore changed, from being an agent who procures a contract of carriage, to being a carrier or principal in relation to his customer. Whether the forwarder is the agent or the principal vis-à-vis his customers largely depends on the facts and circumstances surrounding each case.

The extent & type of liability insurance

Marine Liability exposures may include any of the following:

Ship Repairers

Many repairers have their own yards where all repair work is performed. In some instances, repairs can be accomplished at the pier or wharf where the vessel is located.

Stevedore's Legal Liability

Under a CGL (Casualty Policy) a stevedore can obtain coverage for many of the exposures encountered; however, the Care, Custody and Control exclusion in that policy does not give him protection for damage to the area of the ship or the dock in which the stevedore may be working. In order to provide this coverage, the Stevedores Liability policy was established.

This type of coverage is designed to cover the Insured's liability for loss or damage to ships and their cargoes and damage to wharves, piers and docks while the ship is being loaded and unloaded.

Terminal Operators Legal Liability

The prime purpose of this type of insurance is to provide coverage against liability for loss or damage to cargo on docks, piers, wharves or terminals while in the custody of the terminal, dock, wharf, or pier operator. Freight terminals may be operated by steamship companies, port authorities or virtually any owner or lessee of waterfront property.

At the terminal, vessels can dock and cargo can be loaded, unloaded, and/or temporarily held in storage awaiting further transit. Frequently, the Terminal Operator's coverage will extend to include the loading and unloading. A further element of exposure might be his obligation to provide safe berth for vessels. This type of liability cover is frequently all-inclusive and there may be overlapping of coverages with the Comprehensive General Liability policy.

The Terminal Operator's Policy form must be designed to provide clear-cut coverages and specific exclusions. Throughout the market there are countless forms in use and all are tailor made to suit the specific need of the specific Terminal Operator.

Wharf Owners Liability

This insurance is designed to cover the client's liability for physical loss or damage to vessels, equipment and their cargoes, freight or other interest while in the Insured's custody at landing or mooring facilities owned or operated by the Insured.

Marina Operator's Legal Liability

This coverage is designed to protect the Marina Operator for property damage which may occur to private pleasure vessels in his care, custody and control. Insurance provide cover for the following business of the Insured:

- Repair
- Alteration
- Service
- Maintenance
- Storage
- Mooring
- Hauling or launching
- Fuelling

This type of insurance is an extended cover of the SPLL, that is to say, besides including the Legal Liability of the Insured for operations arising out of repairs, it also covers storage and mooring.

Boat Dealer's

The policy is designed to provide coverage on boats demonstrated on the water for a prospective buyer as well as those vessels transported from the manufacturer for the purpose of sale. This type of coverage is usually written together with a Marina Operators Legal Liability policy.

Charter's Legal Liability

The coverage insures a vessel charter against his legal liabilities to third parties arising out of his negligence and for which he is responsible under the charter party signed between him and the ship owner, subject to the various limitations in the insuring conditions. The three types of charter's legal liability policies include: Time, Voyage, and Bare boat (Demise).

Excess Coverages

Coverages provided under this category, usually follow the original primary policies. Common classes of risks associated with this type of coverage include the following:

- Protection and Indemnity
- Charter's Legal Liability
- Wharf Owners Legal Liability
- Stevedore's Legal Liability
- Ship Repairer's Legal Liability

2. The legal regimes in which the LSP operates

In Singapore, a large number of LSPs are members of the Singapore Logistics Association (SLA) or the Singapore Air Cargo Agents Association (SAAA). Some are members of both associations.

By being a member of the associations, the member is entitled to utilize the standard trading conditions of the associations in their course of business. We shall focus on those of the SLA.

The SLA standard trading conditions have gone through a number of changes, the last being 2004. As the risk exposures of the LSP are high, the purpose of the trading conditions is to protect the member. The following are some of the principal clauses, which seek to protect the member and limit their risk exposures:

- Any claim against the member must be notified to the member within 14 days from the time of taking delivery of the goods
- The member's maximum liability for their negligence is limited to S\$5.00 per kg of gross weight of the goods lost, damaged or mis-delivered or mis-directed, and up to a maximum liability of S\$100,000 in respect of any one claim
- The 9 months' time bar provision i.e. any claim against the member must be made within 9 months from the date of delivery of the goods or the date from which the goods ought to be delivered.

Any dispute between customers of the SLA member would be dealt with by reference to standard trading conditions. It must be noted that the trading conditions are contractual in nature and cannot however, supercede statute or international conventions.

Where LSP issues his own house bill of lading or house air waybill, he would be subject to the international regimes, which govern such documents. For example, if the loss was found to have occurred during ocean transit, it would compulsorily be subject to the Hague-Visby Rules. In such an instance, the LSP cannot rely on the SLA standard trading conditions, which provide for a lower limitation or a shorter time bar period.

3. Common instances of liability

In the course of his work, the LSP can become liable for any of the following:

- Loss or damage to cargo
- Delay, mis-direction or mis-delivery of cargo
- Failure or omission to follow specific instructions e.g. storage of goods in covered warehouse, stating wrong carrying temperature for reefer cargo
- Improper release of good e.g. release of cargo without production of original bill of lading, release of cargo without the proper bank endorsement
- Issuing clean bill of lading in exchange for letter of indemnity although cargo was damaged at time of receipt by them
- Loss of important documents such as bill of lading
- Inappropriate or improper stowage arrangement e.g. containerized cargo

- Mis-labelling of cargo e.g. cross-labelling causing cargo to be lost or mis-shipped
- Inappropriate or improper preparation of customs documents e.g. wrong declaration of import/export value
- Negligent selection of sub-contractor e.g. selection of trucker who does not have experience handling certain types of heavy machinery
- Giving inappropriate/wrong instructions to sub-contractors
- Bodily injury or damage to third party property when handling cargo or equipment e.g. forklift collided with third party vehicle

(This list is merely illustrative and is not meant to be exhaustive.)

4. The risk exposure of the LSP

In view of the different roles played by the LSP, legally he can be liable under 4
circumstances:

- In contract
- In bailment – contractual or quasi-contractual
- In tort under the law of negligence
- Under statute

4.1 Contractual liability / Incorporation of standard trading conditions

A contract is formed by an agreement between 2 parties for a benefit called consideration. Generally, only the parties to the contract can sue upon the contract. The LSP contracts with his customers on an everyday basis and for the services he renders, he charges a service charge. In most instances, there is no formal contract signed between the LSP and his customer. It is thus very important for the LSP to ensure that he incorporates the SLA trading conditions into his contract with his customers, to enable him to seek protection under those conditions.

How does he do it? The mere fact that the LSP is a member of the SLA is not sufficient to incorporate the SLA standard trading conditions. He should make express reference to SLA standard trading condition on the LSP's letterheaded paper, faxes, quotations, emails, delivery orders, warehouse receipts, etc. The phrase "All business are transacted in accordance with the standard trading conditions of the SLA, copy available upon request, is often sufficient reference.

On letter headed paper and faxes, preferably the reference to SLA standard trading conditions should be on a conspicuous place such as the top part of the paper or at the sides. In some instances, the reference to standard trading conditions is printed on the bottom of letterheaded paper and when the document is faxed, sometimes the reference is cut off.

The LSP can also be liable in contract where he issues his house bill of lading. For instance, he issues his bill of lading showing "CFS Singapore/CFS Bangkok", he is in fact contracting to carry the goods from Singapore container freight station to Bangkok container freight station. For any loss that occurs within such a period, the

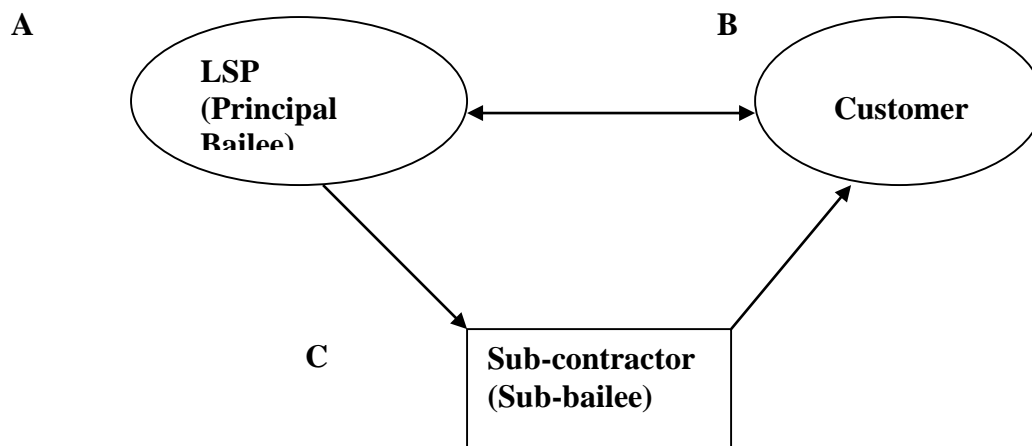
LSP is contractually bound to settle the claim of the customer or the consignee to whom the bill of lading was consigned.

4.2 Bailment

The freight forwarder is often entrusted with goods (and sometimes transportation equipment), which he holds in his care, custody and control, in which case, he becomes a bailee. A bailee is someone who voluntarily takes property into his custody, whether for reward or otherwise. By taking possession, the law imposes a duty on the bailee to ensure safe-keeping of the goods. The bailee must carry out his duty with reasonable care and skill and he would be answerable for the negligence or intentional acts of his employees (vicarious liability) or of his sub-contractor or agent.

A bailee cannot escape liability in relation to his principal bailor, by delegating his task or entrusting the goods to another. A sub-bailee can be liable to the owner of goods although there is no direct contractual relationship between him and the owner 5.

The following diagram illustrates the basic duty of the bailee towards the cargo owner:



As an illustration, A was instructed by his customer B to truck cargo. A in turn instructs his sub-contractor, C to carry out the task. Whilst the goods were in C's custody, the truck overturned and the goods were damaged.

A cannot escape liability when faced with B's claim because he is the principal bailee who was entrusted with the task of trucking the goods. He can try to push the blame to his sub-contractor C, but at law, he is still liable.

B can choose to go after A or C or Both. He can however choose to claim against C on the basis that he was the actual bailee who had custody of the goods at the time of the loss.

4.3 In Tort

A tort is a wrongful act against a third party and the LSP can be liable in the following scenarios:

- **Negligent handling of goods**
The LSP to whom goods have been entrusted, owes a duty of care to persons whom it would reasonably foresee to be affected by his actions in respect of the goods. In the absence of a contract between him and the cargo owner, he can still be liable to the owner of the goods by reason that the goods were in his care, custody and control.
- **Negligent Error or Omission**
The LSP can cause financial loss to a third party consignee which is the rightful cargo owner, as a result of his negligence in releasing goods without the production of the original bill of lading, to a wrong party.
- **Conversion**
Conversion is a tort committed against an owner of goods, by interfering with his rights as cargo owner. Conversion occurs where property is wrongfully taken or parted with, sold retained or dealt with in a manner inconsistent with the owner's title or right to the goods.

A good example is the wrongful exercise of a lien by a LSP. To illustrate, the customer of the LSP did not pay him. As a result, he decides to sell the goods of the customer which he held in his warehouse. However, it turned out that the customer were not the owners of the goods, but an agent of the actual owner. The actual owner sues the LSP for conversion.

Another example is interfering with the shipper's / seller's **right of stoppage transitu**. To illustrate, an importer instructs the LSP to collect goods from overseas. The LSP collected the goods and whilst in transit, the shipper who suspects that he would not be able to obtain payment for the goods, decides to recall the goods. He then exercised his right of stoppage in situ under the sales contract with his buyer and instructed the LSP not to hand over the goods to the importer. The LSP refused to comply and handed over the goods to his customer, the importer. LSP is sued for conversion, for interfering with the shipper's rights of stoppage in situ.

- **Liability towards a third party due to his negligence / public liability**

By virtue of being an occupier of a building or warehouse, the LSP can become liable towards third parties who enter the premise (e.g. slippery floor causing third party to fall and sustain injury)

In the process of handling goods and equipment, the LSP could cause damage to third party property or bodily injury e.g. operation of a forklift, crane, truck and container, damage to public property, etc

4.4 Under statutes – Custom fines and duties

As the LSP is the party that deals directly with the authorities in relation to documentation and clearance, the customs and port authorities often look to him when something goes wrong. These parties being government bodies, and constituted by an Act of Parliament, are given wide powers of imposing fines and penalties. The following are some of the possible scenarios of unintentional breach of statutes, regulations and law:

- Where the cargo value is wrongly declared, the LSP may be levied a fine since he declares it on behalf of the shipper.
- When the goods are wrongly declared (though innocently) by the LSP and violated customs regulations. For example, LSP was advised by his customer that the goods were consumer goods stowed inside a container. However, upon checking by customs, it was found that the container was stowed with contraband.
- Container packed by the LSP, sprang a leak in the port premises. It was discovered that the contents were dangerous goods. The LSP was thus fined for their negligent act by the port authority.

5. The liability policies necessary for the LSP

Depending on the nature of his business and the work involved, it is necessary for the LSP to cover the following exposures:

1. Liability towards cargo and transportation equipment
2. Liability towards a third party for property damage, death and personal injuries
3. Liability towards authorities for fines and duties imposed by them
4. Liability for errors and omissions in taking instructions, making incorrect statements in documentation and for delays in performing his contractual obligation
5. Legal cost incurred in the defence of his claims
6. Costs and expenses incurred in investigating the claim, including mitigating his losses

There are 2 covers offered by the commercial insurance market:

- Bailee's liability policy
- Transport liability policy or Multimodal Operator's Liability policy – which is an integrated product catering to the needs of transport specialists.

Bailee's Liability Policy

A bailee's liability policy is designed with the trucking company and the warehouseman in mind. By virtue of them having custody and possession of goods, the trucker and warehouseman, becomes the bailee at law.

This policy generally covers the insured's legal liability for physical loss of or damage to customer's property whilst in their care, custody and control. A typical example reads as follows:

"The Company will indemnify the insured for sums which they shall become legally liable to pay as damages for loss of or damage to goods (excluding goods belonging to the insured) handled and/or transported by the insured or whilst stored in warehouses operated by the insured.

It is to be noted that this policy is primarily designed to take care of the LSP's legal liability towards cargo. Hence, damages to container and trailers of the insured's customers would not be covered, as these are not goods. *It is therefore necessary for the standard bailees policy to be extended to cover the transportation equipment.*

A more restrictive policy, still in use in the market, covers named events:

"...legal liability for damage to goods caused by Fire or Accidental, External, Visible and Violent Means."

Such a bailee's liability policy is to be avoided, simply because it does not adequately cover the risk exposure of the trucker or warehouseman. A simple example is damage due to rain, as the trucker could not cover the tarpaulin in time during the road transit on an open truck. Such an incident would not be covered under this rather limited policy.

Like any other liability policy, the policy pays for defence cost which is included in the policy limit. For example, the policy limit is S\$100,000. The damage to the goods for which the insured is legally liable is S\$80,000. The customer sues the LSP and he has to incur S\$30,000 to defend the claim. The policy pays up to the limit and the LSP has to contribute the additional S\$10,000, which is not insured.

A bailee's liability policy is often restricted in terms of geographical limits. Most of them cover only operations within Singapore.

Like any other policies, the bailee's liability policy also carries exclusion, the common ones being:

- Loss of or damage to accounts, bank notes, letters of credit, bullions, cash, jewellery, precious stones, works of art
- Loss caused by insufficient packing
- Loss of market, loss of use, consequential loss or interruption of business
- Loss arising out of dishonesty of the insured, his employees or persons to whom the goods have been entrusted (i.e. fidelity losses)
- Loss of or damage to goods carried out in a controlled atmosphere or in refrigerated, frozen, chilled or insulated condition due to loss of refrigerant or controlled temperature or variation of temperature, unless caused by direct fire, lightning storm or by the collision or overturning of the conveying vehicle
- Theft or attempted theft or unexplained shortage from unattended vehicles

- Liability assumed under any agreement (i.e. contractual liabilities e.g. agreement to deliver within specific dates, or time or pre-agreed value of cargo)
- Loss or damage resulting from war, strikes and civil commotion

Where the LSP carry valuable goods (e.g. gold, work of arts), he has to declare this to the insurer and request for extension of cover for such item. Where the insurer agrees to cover, it is likely that they will apply a sub-limit to such extensions.

There is one very important thing to note in a standard bailee's liability policy. It is market practice to impose a warranty that the insured incorporate the SLA standard trading conditions or trading conditions not wider than those of the SLA. By using the SLA standard trading conditions, the LSP's risk exposure is very much reduced. It follows that the insurers insuring the LSP using such a warranty will also have a lower risk exposure.

A policy warranty has already been explained in chapter 6 on cargo insurance. Briefly, this means that if the LSP did not incorporate the standard trading conditions, the insurer has the right to discharge his liability under the policy from the date of the breach of warranty. It is thus of utmost important that the LSP incorporates the standard trading conditions in the course of his business. See 4.1 as to how this is carried out.

5.1 Transport Liability or Multimodal Transport Operator's liability policy

This is a niche product, specially designed to cater to the needs of the expanded role of the LSP. There are very few insurance companies offering this product and the coverage varies.

The basic coverage is cargo liability of the LSP, covering the insured's liability towards cargo as a bailee, or as a house or multimodal bill of lading / air waybill issuer. By issuing the bill of lading as the principal, the insured becomes contractually liable toward the cargo owner as the carrier under the Hague-Visby Rules or under the Warsaw Convention (where he issues a house air waybill). The LSP assumes the duty of the carrier under those conventions and he is also protected by the defences and limitations afforded by the rules.

See illustration:

X issues a house bill of lading contracting to transport one pallet of disc drives, valued at US\$100,000 and weighing 50 kg from Singapore to Jakarta. Whilst in the port premises in Jakarta, the pallet was stolen. X's bill of lading incorporates the Hague-Visby Rules which allow him to limit his liability to S\$1,563.65 per package or \$4.69 per kg which is the higher.

X can thus avail himself to the protection granted by the Hague-Visby Rules and seek to limit the claim against him to S\$1,563.65. X's insurer's in defending X will also seek to limit the consignee's claim to this amount.

In addition to cargo liability, the policy is likely to cater for the following coverages:

- Third party liability

- Error & Omissions
- Fines & Duties
- Cost and Expenses

Some policies are package policies i.e. the coverages are sold as a package, whereas others allow the LSP to buy in the policy extensions.

Tutorial Questions

1. What are the traditional and the modern roles of the logistic services provider?
2. What are the liability exposures of the logistic services provider as agent and as principal?
3. What part do standard trading conditions play in assisting the logistic services provider in defending claims?
4. What sort of insurance coverage does the logistic services provider requires for their business?
5. What does a typical transport liability insurance cover?
6. Can freight forwarder avail themselves to the Hague-Visby defences?
7. What are the problems faced by recovery agents in pursuing subrogated cargo claims against freight forwarders?
8. Is it possible at all to break package or weight limitations?
9. What are the issues faced by freight forwarders and their claims handlers in defending claims against cargo interests?
10. Are there any common grounds between freight forwarder's interest and cargo interest?