



Contracts — Be Careful What You Agree To

In these challenging economic times, one may tend to take on risks they would not ordinarily accept in order to secure business. The prospect of obtaining a large client can sometimes trump prudent decision making and agreements are made when they shouldn't. Worse yet, a contract may be signed without really knowing all of the possible ramifications and repercussions. Forwarders are often asked by shippers to sign contracts, which if signed as presented, are in conflict with their insurance policies...and such conflicts could serve to void liability coverage in the event of a claim or suit. Of equal concern is that many of these contracts are completely one-sided in favor of the shipper and/or force you to agree to levels of performance which are simply not achievable on a consistent basis. The reality is many of these contracts begin as a shipper's 'dream' contract with the full expectation an experienced logistics provider will alter the contract to service commitments that are reasonable.

For example, a forwarder may be asked to sign a contract where it must "hold harmless and indemnify" its client for virtually anything which may go wrong. Many times clients go so far as to require payment for a lawyer of their choosing in the event of a dispute or problem. This presents a number of exposures to the forwarder entering into such an agreement. Most insurance policies (specifically Errors & Omissions, Bill of Lading Legal Liability and Comprehensive General Liability) either (a) prevent an insured from holding harmless or indemnifying another without the insurance company's permission, and/or (b) prevent an insured from choosing its own counsel in the case of a legal action (let alone choosing counsel for one of its clients), and/or (c) completely exclude coverage for liability assumed under contract. Entering into these types of contracts, without first getting permission from your insurers (and without first getting the advice of legal counsel), may possibly place you in a position of having no insurance coverage in the event a client takes action against you.

It is also important to be cautious of entering into any contract that would require you to guarantee performance that is not within your company's control. For example, you may be asked to sign a contract requiring delivery of merchandise to occur within a specified time frame. Or, you may be asked to sign a contract requiring that any claim it brings for loss or damage to cargo will be resolved within a certain amount of time. Such time frames are often unrealistic and not within your control. Time limitations for filing claims may even fall outside of statutory limitations set by the trade or governing laws. Clearly, a forwarder cannot possibly guarantee when, or if, an insurance company will pay a cargo claim. Nor can you guarantee if and when a steamship company, airline or trucking company will ultimately deliver freight to a given consignee. You also cannot guarantee how customs will treat a shipment or how a third party or independent warehouseman will handle a shipment received during the course of transit. Time element insurance such as Delay and Start Up may be a better means for the shipper to address these risks.

Be cautious of signing a contract containing phrases such as 'any and all', 'always', 'immediately', 'at all times' or other types of absolute wording. Similarly, be careful with contracts that attempt to hold your company completely responsible for the actions of your 'agents', 'servants', 'sub-contractors', 'carriers' or other third parties in general. This would place an unfair or disproportionate amount of responsibility on your company—and it may be in your best interests to abstain from accepting a contract that attempts to take advantage in this manner. Instead, seek alternative language which will be satisfactory to you, to your prospective client and to your insurers.

Contracts between you and your clients are an important part of doing business, and most likely will become more important in the months and years to come. It is essential that you enter into contracts that work for you, as well as for your clients. Before entering contracts, it is essential to carefully review and challenge them internally and with your attorneys and insurers.

Minor Routine Operating Procedures Minimize the Potential for A Major Liability Exposure

Transportation intermediaries operate in an incredibly fast paced environment, where the practice of proper documentation can easily lose priority. All too often, when a dispute arises between a logistics provider and their client, we find that the logistics provider's file does not contain the adequate level of confirmation letters or other forms of documented communications needed to shed light on the dispute and potentially could have operated to absolve them of liability or responsibility.

To correct this problem, the following documentation procedures are recommended:

- When opening a new file, be sure to have the customer complete a properly worded customer profile.
- Periodically check to be sure that you have an up-to-date, properly executed power of attorney that specifically incorporates by reference and your terms and conditions of service.
- To ensure that all parties understand your terms and conditions, require a signed copy of your company's terms to be completed on an annual basis. Should your company be operating under the shipper's terms and conditions, review them annually or each time there is a significant change to the services you are providing.
- Be certain to have a shipper's letter of instructions on file.
- In the event of any uncertainty, write your customer to confirm instructions.
- Take the time to e-mail or write confirmations of discussions to clients, agents and carriers.
- Create procedures identifying when your operations staff must report a potential problem to their supervisors or risk management.
- When in doubt, seek legal advice or risk management advice from counsel rather than acting first.

While most transportation intermediaries have well designed procedures in place, it's easy to forget about them. Let this serve as a gentle reminder to review company procedures and ensure they are adhered to and enforced. While Professional Liability or Errors and Omissions insurance policies are a necessity to protect against mistakes, procedural compliance is the best policy of all.

This information is provided by Roanoke Trade Services, Inc. as a public service and for discussion of the subject in general. It is not to be construed as legal advice. Readers are urged to seek professional guidance from appropriate parties on all matters mentioned above. Insurance and surety risk management solutions for supply chains and transportation have been Roanoke Trade's focus since 1935. Roanoke Trade is a member of Munich Re and an affiliate of Watkins Underwriters at Lloyd's of London. Roanoke Trade closely follows the ever-changing government policies that affect the movement of goods, and works only with insurance companies financially rated as "A-" (Excellent) or better.

For more information, please contact us at 1-800-ROANOKE, ext. 1252 or info@roanoketrade.com