

Protecting Carriers' Interests in Customer-Drafted Contracts

Henry E. Seaton, Esq.

AEMCA Webinar

August 24, 2016

Before you start, do you have the following important documents?

- Service Terms and Conditions
- Credit Applications
- Standard Bills of Lading and Load Confirmation Sheets

Why are your own contract terms and conditions important?

- To establish standard service offering.
- To limit your liability for cargo loss or damage.
- To establish your payment terms and conditions.
- To be sure your accessorial charges are established.

- There are 21 provisions in typical Shipper and Broker contracts which financially impact a carrier's bottom line.
- These provisions can be divided into 5 issues:
 - (A) General contract terms and accessorials
 - (B) Cargo issues
 - (C) Payment issues
 - (D) Risk transfer issues
 - (E) Law venue and contract construction

(A) General Contract Terms and Accessorials

(1) Integration clause:

(a) The contract contains all of the terms and conditions and cannot be modified.

(b) Your response:

- (i) Agree the contract is all that there is, but be sure your accessorial charges, service terms and conditions and the terms of the Standard Bill of Lading regardless of the use of other shipping documents, are included.
- (ii) Provide that the load confirmation sheet agreed to prior to dispatch contains any modifications.

(2) Waiver of statutes and regulations (14101(b)):

- (a) Shipper wants complete waiver of all carrier rights and remedies

- (b) What carriers lose:
 - (i) Cargo claims
 - (ii) Salvage
 - (iii) 61 BOL remedies
 - (iv) Recourse and more

(3) Waiver of Tariffs and Rules & Conditions:

- (a) Shipper does not include accessorial.
- (b) A well written rules tariff incorporates all accessorial and payment issues which contract does not cover.
- (c) Make short list of non-negotiated major issues.

(B) Cargo Issues

(4) Waiver of Carmack:

- (a) Shipper insist cargo rules and statutes do not apply.
- (b) Your response: Carmack is an accepted method of handling cargo claims and coextensive with your insurance.
- (c) It should be incorporated as a claims handling provision because:
 - (i) It is uniform in its application;
 - (ii) Has established case law;
 - (iii) Is evenhanded; and
 - (iv) Allows simplified resolution regardless of where loss occurs.

(5) No duty to mitigate / shipper with sole discretion to salvage:

(a) Your response:

- (1) Your insurer requires inspection and salvage.
- (2) A broken seal does not make a cargo claim.

(6) Special and consequential damages:

- (a) Shipper often includes language making you responsible for shutting down the plant, lost sales, etc.
- (b) Your response: These losses are uninsurable, indefinite and beyond the scope of federal claims law.

(7) Concealed damages and waivers:

(a) Shipper wants you to admit a concealed damage occurred on your watch when it was not disclosed at time of unloading.

(b) Your response:

(i) A clear delivery receipt gives you the presumption of delivery in good order.

(ii) They can file a concealed damage claim but must prove that the damage should not occur before or after the shipment was placed in transit.

(8) Cargo liability limitation: **VERY IMPORTANT**

(a) Shipper wants you to have unlimited liability for cargo beyond acceptable limits.

(b) Your response:

- (i) Our standard pricing is for shipments limited to \$100,000 per shipment.
- (ii) That must be in the contract as limiting our liability or we will have to adjust the rates accordingly.

(c) Caveat:

- (i) Do not think a limit of required cargo insurance limits your liability.
- (ii) Express language must be in the contract.

(C) Payment Issues

(9) Unilateral offset of freight claims against freight charges:

- (a) Many shippers want to be judge and jury of cargo claim.
- (b) Your response: We will offer simplified arbitration for disputed claims, but freight charges must be paid timely without offset.

(10) No penalty for late payment:

(a) Many shippers want interest free loans, protracted credit terms and no interest and attorney's fees.

(b) Your response:

- (i) Our standard payment terms are 30 days with interest and attorney's fees for late payments.
- (ii) Standard credit terms in credit application can be modified only in return for guaranteed volume shipments.

(11) Waiver of liens:

- (a) Most shippers and brokers want lien waiver.
- (b) Your response: Lien is remedy to ensure payment of freight charges in standard terms and conditions.
- (c) Federal statutory lien gives possessory lien for shipments on load-by-load basis.
- (d) Most carriers put contractual liens in effect so that they may collect past freight charges.
- (e) Important relief if shipper declares bankruptcy.

(12) Waiver of recourse (in broker contract):

- (a) Brokers do not want you contacting their customer for payment.
- (b) Brokers are required by regulation to receive payments in trust and transmit them to you.
- (c) Many brokers do not maintain constructive trusts and try to hang carriers out to dry by pledging receivables, etc.
- (d) Carriers have important recourse to consignors under the bill of lading.
- (e) Negotiate terms providing carrier preserves recourse pursuant to bill of lading if broker does not pay invoice within 10 days notice of default.

(D) Risk Transfer Issues (Vicarious Liability/Indemnity and Insurance)

(13) Overly broad indemnity language:

- (a) Broker wants you to hold it harmless from all risk including third party liability and its own negligence so long as the cause of action “arises out of the transportation services provided.”
- (b) Your insurance only covers you if you are negligent or at fault.
- (c) Your response: Limit indemnity for loss or damage (other than to cargo) “to the extent caused by the negligent or willful act of carrier.”

Note: Anti-indemnity statutes preclude shippers from requiring you to indemnify them for their own negligence in most states.

(14) Additional insurance language:

- (a) Many shippers and brokers insert insurance provisions requiring terms like “waiver of subrogation,” “additional named insured,” etc.
- (b) These provisions can amount to “buy me insurance” and a way to circumvent the anti-indemnity statutes.
- (c) Your response:
 - (i) We will provide you with a Certificate of Insurance and warrant that we have BI and PD insurance with the federal filing that makes you an automatic insured.
 - (ii) We will also warrant we have all risk cargo insurance and workers compensation and commercial general insurance.

*Note: If you have greater limits of insurance available,
use as a bargaining tool where possible.*

(15) Coercive transit times and penalties:

- (a) Shippers, particularly expeditors, want guaranteed deliveries and penalties.

- (b) Your response:
 - (i) The agency's new coercion rules prohibit them from contractually insisting or penalizing you for not making timed deliveries.
 - (ii) You can warrant best efforts only, consistent with drivers' hours of service and transit time conditions.
 - (iii) Shipper and carrier can be fined or subject to whistleblower suits.
 - (iv) Use of telemetrics will allow you to give them status reports and transit time information.

(16) CSA performance standards:

- (a) Many shippers require more than you being “licensed, authorized and insured to operate on the nation’s roadways.”
- (b) Insist “licensed, authorized and insured” is the legal standard for qualifying carriers. (See FAST Act and *NASTC et al. v. FMCSA*)
- (c) These additional operating standards can backfire on shippers, opening the door to increased up-supply chain liability on their part.
- (d) Because they expect you to indemnify them for your negligent involvement in an accident and you do not want to open the door to plaintiff’s bar using SMS methodology to increase your liability and up-supply chain risk.
- (e) CSA has been taken down by Congress’ directive and is recognized as a totally fallacious system by most sophisticated shippers.

(17) Shippers ask you to:

- (a) Promise to give them the “lowest rate”; and
- (b) Agree to lower your rate to meet competition upon demand.
- (c) Your response: Unless there is a dedicated traffic and a long term contract we don't consider these provisions.

(18) Must take all, no increase:

(a) Guarantee to accept all freight at agreed rates.

(b) Your response:

(i) Watch out for long term contracts that lock you in at rates you cannot change.

(ii) Handle a dedicated contract separately.

(19) Covenants Not to Compete in Broker Contracts:

- (a) Brokers want to preclude you from doing any business with their customers.
- (b) Modify contract to limit it to your solicitation of customers for traffic first handled and provide that nothing in covenant shall preclude you from responding to unsolicited RFP at any time.

(E) Law, Venue and Contract Construction

(20) Homer Provision/Venue:

- (a) Many shipper and broker contracts state that the law of their home state will apply and that all cases must be litigated there.
- (b) Your response:
 - (i) Insert instead that “general principles of federal transportation law, jurisdiction and venue shall apply”
 - (ii) Accident and cargo losses should be litigated in the jurisdiction most convenience for the parties.
 - (iii) Avoid states like California and New York and preserve federal jurisdiction for cargo claims.

(21) Arbitration

- (a) Many shipper and broker contracts require arbitration and mediation rather than litigation to resolve disputes.

- (b) Your response:
 - (i) Modify arbitration provisions to delete any “homer” requirements and to provide for TLA ADR, not AAA – it is cheaper.
 - (ii) Litigation involving payment issues which are due, owing and uncontested/arbitration and mediation only slows down collection.
 - (iii) Expressly provide that each party will bear their own legal fees.

Bankruptcy

- Good guys finish last.
- Extending credit beyond terms is lethal because in bankruptcy not only do you not get paid for what you hauled prior to bankruptcy, you may have to give back what you were paid in the last 90 days as a preference.
- The value of recourse: ACI and Transadvantage
- The value of spreading liens: Expeditors

Questions