A Guide to Marine Cargo Claims
The Power of Integrity
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June 2011

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what to do when your cargo is lost or damaged?

Carriage of goods by sea typically involves multiple parties and numerous related contracts. When a cargo is lost or damaged, it is not at all easy to determine who has been at fault and who should be liable. Before finding out who to blame, there is something more important that the consignee or cargo owner should do first:-

- Engage a surveyor to ascertain and collate evidence of the loss or damage;

- Notify the following parties or their agents **in writing** of the loss or damage:-
  - the **insurer**,
  - the **carrier**,  
  - the **sub-carrier or other bailee** or their agents where the goods have been shipped or handled by them before delivery to the consignee.

Unless a bad order receipt is given in the above manner, there is a presumption of good order at delivery against the consignee or on-carrier.

If the carrier has abandoned the voyage and delivers the damaged goods at an intermediate port, the insurance cover may then come to an end. The consignee must notify the underwriters at once and request the cover to continue.
what if general average has arisen?

This arises when a deliberate sacrifice or expenditure is incurred for the common safety of the other cargo interests. In a general average situation, all consignees of cargoes on board of ship will be notified as soon as possible and those consignees whose cargoes are not sacrificed and thereby indirectly benefited would likely be asked to furnish general average security by way of an average bond together with an additional security. If an underwriters’ guarantee is required as the form of additional security, those consignees should immediately inform the insurer who will then make necessary arrangements.

If a general average deposit is required, the consignees will have to pay the amount demanded in return for a receipt for it. They should then request the insurers to reimburse the amount paid.

what evidence is required?

The consignee or cargo owner has the initial burden of proving the physical loss or damage. This is usually done by proving the condition at shipment, by a clean bill of lading and bad order receipts at discharge, or in the case of non-apparent loss or damage, by a notice of loss within three days of taking delivery, unless the cargo has been the subject of a joint survey at the time of delivery. When the claimant has made a prima facie case, the
burden of proof is then shifted to the carrier who must then prove to the contrary to establish his defence.

The best way of proving loss of or damage to cargo is to immediately call for a joint survey, one which is attended by representatives of both the cargo receiver and the carrier. In addition, the following documents may be required:-

- **Policy of certificates of insurance, if appropriate**

- **Shipping documents**
  ~ Certificates of origin, condition and suitability of goods for export
  ~ Particulars of specifications, weight and / or measurement
  ~ Invoices in respect of the full interest insured
  ~ Bills of lading and charterparty, if appropriate
  ~ Letter of indemnity, if any

- **Transit ex ship to final destination**
  ~ Receipt given by the carrier on collection of the goods
  ~ Receipt given by the carrier upon delivery of the goods

- **Damaged goods**
  ~ Surveyor’s report
  ~ Details of sale, where damaged goods have been dispose of
Details of costs of reconditioning, if goods have been reconditioned

- Short delivery
  - Short landing certificates, if issued by the carrier
  - Surveyor’s report

The above list may not be exhaustive, further documents may be required if necessary.

**how to claim on policies?**

The cargo owner or claimant must check what type of insurance has been taken out. Once notified, the insurer will usually appoint a surveyor to examine the goods. Insurance can be written in one of two ways, either **all risks** or **named perils**. In the former case, the insurer agrees to indemnify for “all risks of loss or damage to the subject-matter insured” and in the latter, for loss or damage “caused by” or “attributable to” a particular peril or risk, for example “fire or explosion”, etc.

The insured is entitled to claim whether he has suffered a **total loss** in his goods, which arises when the goods insured have been destroyed, or **partial loss**. In some situations, the claimant may claim for **constructive total loss** if, for example, the goods have suffered such damage that they could not be preserved without an expenditure which would exceed their value. In this case, a **notice of abandonment** must be tendered to insurers without delay.
who is entitled to sue whom?

Once the consignee or cargo owner has ascertained the extent of loss or damage, he will when have to consider against whom he should claim for his loss. If the cargo has been insured, he, being the insured or where the benefit of the policy of insurance has been assigned to him, will have a right to make a claim against the insurer.

Independent of any insurance, the shipper, who has entered into a contract of carriage with the carrier, may reply on the contract of carriage and claim against the carrier. The terms of the contract is evidenced in the bill of lading. The consignee is not the original party to that contract of carriage. However, upon receiving the bill of lading form the shipper, he will also acquire the right to sure the carrier by reason of the transfer of the bill of lading to himself.

In some cases a forwarder may contract with a shipper in the capacity of a carrier. In such cases, the forwarder will then be liable to the shipper on the contract of carriage.

Having acquired the right to sue, we need to consider whom to sue. It is usual for claims to be brought against the contractual carrier as named in the bill of lading, who is likely to be the shipowner or the demise charterer.
A part from the contract of carriage, a person involved in the sea transport may owe a duty in tort to the cargo owner to exercise due care in handling his cargo. Such duty of care exists irrespective of whether there is any contract between the two parties (such as warehousemen or depositories, as well as carriers, a bailee) and may arise when the bailor of goods allows another to have temporary custody of them as in a typical bailment situation.

An action for negligence may lie against any person if the cargo is lost or damaged through his negligent acts or omissions, whether he be the carrier, the carrier’s servants, or independent contractors such as stevedores.

An action for conversion or wrongful interference with goods may be brought against anyone who has delivered the goods to a party not entitled to them, whether or not he may have acted in good faith and without negligence.

If the contractual carrier is not the ship owner or demise charterer, any claim against them has to be founded in tort or bailment, since there is not direct contractual relationship between the shipper and the ship owner or demise charterer. A claim in tort or bailment may sometimes deprive the ship owner or demise charterer of the protections afforded to them by the bill of lading.
any defences available to the carrier?

The Hague-Visby Rules are designed to strike a balance between the interests of the cargo owners and the carriers. The liabilities imposed on the carrier are legal minimum which cannot be reduced by any contrary agreement between the parties. The carrier may agree to undertake liability higher than the minimum set in the Hague-Visby Rules but not the other way round.

To maintain the balance, the Hague-Visby Rules set out a list of excepted perils, which the carrier may reply upon the exclude his liability for any loss or damage arising from his acts. If the carrier can prove that the loss or damage to the cargo arose from a situation falling within the list of excepted perils, that will operate as a defence to any claim brought by the cargo owner.

Examples of the excepted perils are as follows: Perils, dangers and accidents of the sea or other navigable waters; act of God; act of war; act of public enemies; act or omission of the shipper or owner of the goods; inherent defect, quality or vice of the goods; insufficiency of packing or marks, etc.
can the carrier limit his liability?

Where the carrier is liable under the Hague-Visby Rules, the quantum of liability is limited to **666.67 units of account per package or 2 units of account per kilo of gross weight** of the goods lost or damaged, whichever is the higher. The unit of account as adopted in Hong Kong is called Special Drawing Right (“SDR”), the value of which fluctuates daily but it is currently worth about US$1.50.

The number of packages or kilo of gross weight enumerated in the bill of lading as packed in such article of transport shall be deemed to be the number of packages or kilo of gross weight. If, for example, it refers to “one container said to contain 300 cartons of leather goods” each of the cartons is treated as a package and the carrier’s limit of liability will be about 200,000 SDRs.

Furthermore, when a ship owner is being sued, particularly by a large number of cargo owners, he may commence on his own motion a Limitation Action to limit his liability to all the claimants (e.g. owners of individual consignments on board) arising from a distinct incident. The purpose is to obtain a decree for limitation of liability, which is calculated by reference to the tonnage of the ship. For example, a ship with gross tonnage not exceeding 500 tons is limited to 330,000 SDRs in respect of claims for loss of life or personal injury, or 167,000 SDRs in respect of any other claims.
which jurisdiction?

Contracts of carriage, which usually contain a jurisdiction clause, will specify the jurisdiction in which claims are to be brought. Accordingly, if an action is commenced in a jurisdiction, say in Hong Kong, which is not the jurisdiction stipulated in the bill of lading, the defendant may apply to stay the proceedings.

Alternatively, where jurisdiction is stipulated to be in Hong Kong, the defendant may nevertheless seek to stay the proceedings in Hong Kong on the ground that Hong Kong is not an appropriate forum for the determination of the plaintiff’s claim, e.g. on the ground that none of the parties is resident in Hong Kong.

is there a time limit?

Should the cargo owners wish to claim against the carrier or loss of or damage to the goods, he must commence proceedings within one year of delivery or the date of the intended delivery, or the carrier may be discharged from all liability whatsoever in respect of the goods. This period may be extended by agreement after the cause of action has arisen.
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