CLIENT ALERTS & INSIGHTS

Delay Damages - Transportation & Logistics Rules for Legal Exposure and Contract Risk

ATA At-The-Bar Column

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Every minute matters when delivery timing is a live-or-die issue for many industries served by transportation providers. In automotive logistics line-down scenarios can be devastating to business operations. In healthcare logistics the outcomes can be far worse for loved ones. Still, the question of whether those occurrences mean that the customer has compensable damages is entirely different. This article provides basic rules of the road for delay damages following surface and air transportation or logistics services.

Legal Liability for Delay - Most transportation laws include the concept that a service provider can possibly owe a shipper damages on certain facts of a delayed delivery. For example, interstate motor carriage the word “delay” is include in the Carmack Amendment at 49 USC § 14706. For motor carriage the performance standard has long been “reasonable dispatch” since weather, compliance with hours-of-service rules, and other factors may understandably interfere with performing against expectations. International air transportation the Montreal Convention devotes an entire section to delay at Article 19. Limitations under the law for this exposure are just as important as its existence. For air carriage the performance expectation is to safely operate while taking all reasonable measures necessary to avoid delay.

Limitations of Liability for Delay - In the end, if there is valid and timely filed claim then the shipper must prove quantified loss at the time of occurrence. Damages are determined as actual loss up to the applicable limitation. For motor carriage the bill of lading or contract will likely contain a per-shipment or per-pound limitation such as $100 USD per truckload. For air carriage the Montreal Convention today establishes 26 Special Drawing Rights (SDR), which is around $35 USD, under Article 22. Many contracts, bills of lading, and waybills will include damages waivers to exclude other attenuated losses such as lost profits, indirect damages, consequential damages, or incidental damages. Some terms and conditions will waive liability for delay altogether. Service providers also have defenses available to avoid liability entirely such as the traditional force majeure events that may be available under contract or under “Act of God” or other relevant defenses provided by applicable law.

Contractual Frameworks for Delay - Procurement teams in companies that rely on delivery timing will often build that concept into RFI, RFP, or RFQ requests and the contracts that follow. Determining approach to those terms, and what is acceptable, can be challenging for each side of the transaction but it does allow for exploration of what is achievable and what will happen when exceptions occur. For example, the contact can specify exactly what events are considered compensable delay (such as a line-down event) and what events are excluded. The way that each side will communicate with one another, the timing of those communications, and the solutions that will be implemented can then be established. Those solutions could include replacement transportation or replacement parts. On the question of damages, it could be simplified by using a round-number for "liquidated damages" or by calling out how damages will be calculated and the monetary limit. Sophisticated procurement teams pay track delivery timing in KPIs with bonus/malus (carrot and stick) features or may build these into SLAs.

It is healthy for both shipper and service provider to be clear-eyed about delay. None of these items need to be adversarial at the outset. This is fundamentally a fact question to explore what service levels may be achievable, what could go wrong, how the parties work together, and how the cost of service is determined. For supply chain professionals working within an enterprise shipper it can also mean closely reviewing inventory levels and slack to avoid the negative impacts of delay, or for that matter supply shock, if unforeseen events happen. This is all a meaningful exercise for best-in-class supply chain management. As is always the case, strong service providers can be valuable consultative resources along the way.

Claims do happen as do the denials, settlements, and lawsuits that are necessary for resolution. This is a fact of life for both shipper and service provider. Since we can't avoid it the best next step is setting ground rules for how parties work together in good times and bad, particularly around delay for time-sensitive industries, so that expectations are understood and we avoid surprises in performance or claims response.