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LIABILITY OF FREIGHT FORWARDERS

By John W. Bromley

Liability of Freight Forwarders

The modern world of shipping has changed radically over the course of the last several decades. Containerization dominates the transport of goods other than bulk commodities. With the increase in the global movement of goods, particularly containers, has come the increased use of freight forwarders to arrange shipment of those goods around the world. As a result, the legal relationship of a freight forwarder with its customers and, in particular, its liabilities towards its customer have become increasingly important and complex.

A freight forwarder is not a new entity but rather one that has existed for many years. In general, freight forwarders arrange on behalf of a shipper or receiver or owner of goods for the movement of goods from point A to point B. They deal with warehousers, custom authorities and other third parties such as truckers or air carriers. In doing so, they can be operating in one of two ways. They can be the agent of the shipper or owner of the goods, contracting with third parties for the movement of the goods on behalf of the owner. Alternatively, they can contract directly with the owner of the goods for the handling and carriage of the goods and, as such, be a principal. The difference is crucial in determining the liabilities of a freight forwarder.

Therefore, the first question to be asked in determining the liability of a freight forwarder is in what role was the freight forwarder acting in any given situation?

In the past, more often than not the freight forwarder was an agent. It simply made the arrangements with the actual carrier on behalf of its customer for the movement of goods.

In *Jones v. European and General Express Company Ltd.* (1920), 4 LI.L Rep. 127, Mr. Justice Rowlatt described a freight forwarder as follows:

> "It must be clearly understood that a forwarding agent is not a carrier. He does not obtain the possession of the goods and he does not undertake to deliver them. All he does is to act as an agent and make the necessary arrangements, so far as is necessary, between the ship and railway or anything else. His liability depends upon his failing to carry out the duties I have just described."

In many cases, the freight forwarder performs precisely the activities stated by Mr. Justice Rowlatt. However, in today's shipping world, a freight forwarder usually does much more than that. For example, it often takes goods from different shippers, stores them, consolidates them in one container and makes arrangements with. the ocean carrier for the shipment of that container. Upon arrival it will often do the reverse as well as obtaining customs clearance of the goods. It will

sometimes issue a forwarder's bill of lading, also referred to as a house bill of lading, for the carriage of those goods.

In those situations, has the freight forwarder taken on the responsibility of a carrier with the incumbent liabilities or has at least taken on the duties of a bailee by taking possession of the goods? In short, has the freight forwarder become a principal?

The distinction is very important as the duties and liabilities of a principal are much different than the duties and liabilities of an agent. In general, an agent is only required to use proper care in making arrangements for movement of the goods. It must find competent carriers or handlers on behalf of their principals for the carriage and handling of the goods and give them appropriate instructions for the carriage and handling.

For example, in *Gillette Industries Ltd. v. W. H. Martin Ltd.* [1966] 1 Lloyd's Rep. 57, a freight forwarder was found liable as an agent for the failure to exercise reasonable care as a professional forwarder when selecting a trucking company to deliver goods within England. The freight forwarder selected a trucker with whom he was not familiar and the court found that his failure to check the driver's credentials further than he did was negligent. The freight forwarder was therefore found liable for the losses sustained when the truck was subsequently found empty.

It is helpful at this stage to consider the nature of agency in general before seeing how it relates to the role of a freight forwarder. Professor Fridman in his Law of Agency (1996, 7th edition) at page 11, defines the agency relationship as follows:

> "Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to effect the principal's legal position in respect of strangers to the relationship by the making of contracts or disposition of property."

Therefore, an agent has the power to bind his principal to a contract made with a third party. Normally, an agent would not be a party to that contract; rather, its principal, through the agent has a direct contractual relationship with the third party. In the maritime context, for example, it means there is a direct contract between the owner of the goods and the ocean carrier where the carriage of the goods has been arranged by a freight forwarder acting as an agent.

An agency arrangement can arise in several ways but in the context of a freight forwarder, it almost invariably arises by contract. The contractual relationship between the parties is what governs their rights and liabilities. Whatever the task is that he has been hired to perform, he must do so with due care and skill. As long as he performs with normal care and skill in regard to the nature of the business and has acted in a reasonable manner, the agent is not liable. (See *Gillette Industries, supra*).

If a freight forwarder is acting as a principal, its rights and liabilities will be different. It goes without saying that it must perform its contract, whatever it might be, or it will be liable. To take the simplest case, if a freight forwarder, as principal, has contracted to move goods from one place to another then, if the goods arrive in a damaged condition or not at all, the freight forwarder would be liable to the owner of those goods for those losses even though other parties handled all of the transport.

Conversely, if the freight forwarder has simply been hired to make arrangements for that transport then the freight forwarder will only be liable if it made those arrangements with less skill then a reasonable agent would have done so. For example if it hired a carrier which had a well established reputation of not being able to perform a tasks assigned, then the freight forwarder would likely be liable. (See *Gillette, supra*).

There are no set rules to be applied in determining whether the freight forwarder is acting as agent or principal. The facts of each case will determine the outcome. However, there are, generally speaking, five criteria which are customarily looked at in making the determination. As summarized by Tetley in Marine Cargo Claims, 3rd edition, page 694, they are:

a) the manner in which the forwarder characterizes its obligations in the contract documents;
b) the manner in which the parties have dealt with each other in the past;
c) whether a bill of lading was issued;
d) whether the shipper knew which carrier would actually carry the goods; and
e) the mode of payment: did the forwarder charge an amount calculated upon the freight and other expenses and then charge a further amount or a percentage as its fee? Or did the forwarder charge an all-inclusive figure?

Dealing with each criteria in turn, the following points are important:

a) If the freight forwarder has a specific contract with the shipper which sets out the roles and obligations of the freight forwarder then, absent evidence or indicia to the contrary, that contract will govern his obligations. In fact, in such an event, it does not matter whether you classify the freight forwarder as an agent or a principal, as the contract itself specifies the obligations of the parties. A breach of those obligations would be a breach of contract, whether an agent or a principal. In Canada, the CIFFA conditions or similar terms are often the contractual terms.

While the terms of an individual contract must be looked at in each and every case, there is no doubt that a court would be influenced by the representations made by a freight forwarder either generally or to a particular customer as to what exactly what role a freight forwarder contracted to perform.

The exact terms of the representations made by the forwarder can have important implications. Freight forwarders quite naturally, often promote their abilities to make life easier for their customers in handling, packing, storage, and transmitting goods anywhere around the world. As such they often print brochures stating what they can do. These representations can establish a standard of care that their customers may rely upon and which the courts may also look to, whether as principal or agent.

If a particular industry or trade has well established procedures for the handling and shipping of goods, those procedures can be of considerable assistance to a court in determining the nature of the relationship between the freight forwarder and its customer. For example, if it is well established in a particular industry that carriers invoice freight forwarders and look to the freight forwarders for payment and not to the ultimate customers, then that is an indication that the freight forwarder was acting as principal and not as an agent in the relationship.

b) The prior course of dealing between the parties is of course very relevant because it can assist in showing what the intentions of the parties were with respect to their respective roles based on their past dealings.

If the freight forwarder is trying to rely on its standard terms and conditions, the prior course of dealings with the parties can be crucial in that reliance. In *Crompton Saage Ltd. v. Lep International Inc.*(1994 CarswellBC 2319 (B.C.S.C.)), the court found that the standard

terms and conditions under which the freight forwarder operated governed the relationship between the parties. Because of the extensive dealings on standard terms between the principal of the plaintiff and the freight forwarder over the course of the years the court found on basic contractual principles that the plaintiff could not escape from those terms and conditions simply because it had not read them.

c) If the freight forwarder issues it own house bill of lading then of course the terms of that bill of lading will govern the relationship. It may also have the effect of making the freight forwarder a carrier and therefore liable as a principal for the carriage of the goods.

If, however, the freight forwarder simply receives an ocean bill of lading on behalf of its customer so that the customer has a direct contractual relationship with the ocean carrier, then the freight forwarder would most likely be an agent and only liable for failure to carry out its duties as discussed above. This scenario, particularly with large freight forwarding companies, is increasingly rare.

d) If the shipper knows in advance that a particular carrier, other than the freight forwarder, is going to carry the goods, then that is some indication that the freight forwarder is acting only as an agent. However, this consideration, in my view, is not as powerful as the others, in that if the shipper is relying on the freight forwarder to take responsibility for getting the goods from point A to point B, then the fact that is knows that the freight forwarder will subcontract that task does not change the obligations or the role of the freight forwarder.

e) A freight forwarder may receive its compensation by means of a commission calculated upon the basis of the expenses of the transport. Such a commission must be disclosed by the agent to its principal as an agent owes a fiduciary duty to its principal not to profit secretly from its activities for the principal. However if a freight forwarder simply quotes a price to its customer then negotiates a lesser rate with the ocean carrier then, generally speaking, that freight forwarder will be acting as a principal, vis-a-vis the owner of the goods. If it is not accounting to the owner for its profits on the transaction and in fact does not reveal the source of its income to the owner, then this is important indicia that it is acting as a principal in the relationship.

There are many cases which examine the role of the freight forwarder. This paper will only look at a few as illustrative of the issues.

In *Marsden Excelsior Ltd. v. Arbuckle, Smith & Co. Ltd.* [1971], 2 Lloyd's Rep. 306, the English Court of Appeal had to deal with the question of whether freight forwarders were liable for damages sustained by the shippers of a product from England to Austria. The shipper arranged with the defendant freight forwarder Arbuckle for the shipment of the piece of equipment from Rotterdam to Austria. The freight forwarder did not have any ships or means of transport of its own. It made transport arrangements with others.

On behalf of the shipper, Arbuckle obtained quotations for the shipment though part of the carriage was actually subcontracted. Arbuckle added 10 percent on to the quote received. In the end result, the subcontractor negligently did not check to see whether the equipment could be carried over the roads in Europe without strengthening bridges on the route. Bridges had to be strengthened at some considerable cost in order to effect delivery. The plaintiff/shipper then sued the freight forwarder on the basis that it was the actual carrier. They argued that the freight forwarder was the head contractor who made the contract of carriage whereby it promised to carry the goods from Rotterdam to Vienna and by subcontracting, Arbuckle could not avoid its liabilities. Arbuckle said it was simply a freight forwarder acting as agents for the shipper. If the plaintiff was right, Arbuckle would have been liable.

One factor against Arbuckle was the fact that it had added 10 percent on to the price that was originally quoted to it by the actual carrier. As stated previously, a principal does that and not an agent particularly when the agent does not disclose that it had done so. Arbuckle did not disclose that it had done this.

Arbuckle's explanation for the inclusion of the 10 percent was to cover any price fluctuations from the date of the quotation to the date of carriage. It said that if the actual amount turned out to be less than the quotation and the amount of the reduction would be refunded to the shipper. The court found that the additional 10 percent did not alter the fundamental nature of the arrangements between the parties and that Arbuckle was simply a forwarding agent. It had hired what appeared to be competent subcontractors and there was nothing to indicate that the people it hired were not able to do the job or would do it in a negligent manner. The court held that:

> "It would be unjust to make Arbuckle responsible in this court for the fault of Schmidbauer (the subcontractor), unless it could be clearly shown that they knew of Schmidbauer's failings and ought to have done more before".

In the modern role of a freight forwarder, it is not uncommon for it to be both a principal and an agent for different aspects of the transport of the goods. For example, it may store the goods in its own warehouse during which it generally acts as a principal. However it may arrange for the carriage of the goods by sea thereafter at which point it may be acting as an agent.

The case of *"MAHENO"* [1977], 1 Lloyd's Rep. 81, highlights the dual role. That case involved the theft of goods carried in the hands of the ocean carrier. The question was whether the defendant freight forwarder had simply arranged for the transport of the goods or whether it was the carrier itself. The court found that the plaintiff did not expect that the defendant would actually carry the goods by sea. The contract itself between the parties envisioned that the defendant would enter into a contract of sea carriage as agent for the shipper and therefore held that the defendant was not liable for the loss as it had exercised its obligations as an agent properly.

This finding was made despite the fact that the freight forwarder had consolidated various shipments in one container and had issued a consignment note. Moreover, it had packed the container and discharged the container from the vessel and provided storage service as a principal. The court felt however that the consignment note was not a document of title as delivery would have been refused by the shipping company if only the consignment note had been produced.

It found that the loss occurred while the goods were in the hands of the ship. It found that the defendant had taken all reasonable precautions in packing to guard against theft. The court said:

> "Although the plaintiff alleged in its claim that the defendants were in default in certain respects as I mentioned earlier in this judgment, it is my opinion on the totality of the evidence, and especially that from Mr. Smith, that the defendants took all reasonable precautions to guard against the danger of theft. By this it means that I am satisfied, first, there was no negligence in the way that the goods initially were packed; secondly, that reasonable precautions were taken in Australia for the security of the container, laced, roped and banded as it was; and thirdly, that it would be unreasonable to insist on a particular form of stowage in the vessel when that function was the responsibility of the sea carrier."

In Canada, freight forwarders often contract on the basis of the Canadian International Freight Forwarder Association (CIFFA) standard trading conditions. The latest version of the conditions cover three pages of small print and contain 21 clauses. They attempt to determine by contract the duties and liabilities of a freight forwarder in Canada. Clauses 1, 3, 4 and 6 say:

"1. Role of Forwarder ("the Company")

The Company offers its services on the basis of these conditions that apply to all activities of the Company in arranging transportation or providing related services, such as, but not limited to, warehousing and any other kind of logistics services. The Company may provide its services as either principal or agent. The Company acts as agent of the Customer, except

a) where it issues a transport document or electronic record evidencing its obligation for the delivery of goods, or
b) to the extent it physically handle goods by its own employees and equipment in the course of performing any service in which cases it acts as principal,

but whether acting as principal or as agent these conditions govern the rights and liabilities of the Customer and the Company.

Advice and information that is not related to instructions accepted by the Company is provided gratuitously and without liability. Advice is for the Customer only and is not to be furnished to any other party without prior written consent.

. . .

3. Role As Agent

When acting as an agent, the Company acts solely on behalf of the Customer in engaging the services of third parties on the usual terms and conditions on which the third parties offer such services for the carriage, storage, packing or handling of any goods, or for any other service in relation to them, thereby establishing a direct contract between the Customer and the provider of such services capable of being enforced by the Customer as principal, whether or not the Customer is identified in the contract. The Company shall on demand by the Customer provide evidence of any contracts made on its behalf.

4. Other Services

Where requested by the Customer the Company may

a) issue a transport document or electronic record by which it as principal undertakes carriage of particular goods; or
b) guarantee in writing proper performance of the terms of any contract between the Customer and a third party whose services the Company has engaged on behalf of the Customer. As guarantor the Company is liable only to the same extent as the third party whose actions have been guaranteed, as may be limited by the conditions on which that party customarily offers it services.

Where it issues a transport document or electronic record, or provides a guarantee, the rights and obligations of the Company will be governed by the special conditions therein in addition to these Conditions. In the event of any inconsistency the special conditions prevail.

. . .

6. The Company's General Responsibilities

A. The Company shall exercise reasonable care in the discharge of its obligations including the selection and instruction of third parties that provide any services engaged on behalf of the Customer.

B. The Company shall arrange transport and any related services within a reasonable time after receiving the Customer's instructions.

C. If it has reasonable grounds for departing from any of the Customer's instructions, the Company can do so without prior authorization from the Customer, but must act with due regard to the interests of the Customer, and, as soon as possible, inform the Customer of its actions and any additional charges resulting therefrom."

Clause 15 says:

"15. Limitation of Liability

Compensation for any claim for which the Company is liable shall not in any event exceed 2 SDR (SDR = Special Drawing Rights) per kilo of the gross weight of the goods that are the subject of the claim. Without prejudice to any other conditions herein or other defences available to the Company, in no circumstances whatsoever shall the Company be liable to the Customer or owner for

a) consequential or indirect loss, including loss of market, except as provided for in paragraph (b);

b) loss of, damage to or consequential or indirect loss caused by delay or deviation in connection with the transport of goods in a sum in excess of twice the difference between the charges invoiced by the Company and amounts paid by the Company to third parties for transport or other service related to those goods;

c) amounts in excess of a maximum recoverable of 75,000 SDR's per transaction."

The case of *Crompton Saage Ltd. v. Lep International, supra,* dealt with the standard terms and conditions as they were previously. The allegations against Lep were that it had contracted with Crompton Saage to pack and arrange for the carriage of handsaws from England to Vancouver. The goods arrived damaged in Vancouver because of poor packaging. The defence of Lep was that it had not been hired to pack the goods as the customer was going to make arrangements to do that on his own. Alternatively, Lep said that if it was supposed to pack the goods, it was acting as an agent and

that Crompton Saage's remedy was against the actual packer in England directly pursuant to clause 28 of the standard terms and conditions as they then were. (now clause 3)

The court found that Lep had agreed to pack the handsaws; not the customer. It also found that Lep had held itself out as a principal with respect to the issue of packing and was directly liable. Based on the course of dealings between the two companies, it also found that the CIFFA standard terms and conditions with respect to limitation of liability applied and that damages which otherwise would have been approximately $100,000.00 with consequential loss would only be awarded at $20,500.00 as consequential loss is excluded in the CIFFA terms (then clause 35(D), now clause 15).

The case illustrates how a freight forwarder can be an agent for some purposes and a principal for other purposes. Lep was a principal for the purposes for packing but an agent for the purposes of arranging carriage of the goods. It also illustrates the importance of determining the role of the freight forwarder in any given transaction, as well as the actual cause of loss and its location.

Many of the cases that involve the question of what is the role of the freight forwarder deal with the problems that arise when one of the parties to the transaction becomes insolvent leaving somebody unpaid. The question is whether payment to the freight forwarder is a discharge of the obligations of the shipper to the carrier for payment of freight or whether non payment by the shipper to the freight forwarder allows the carrier to sue the freight forwarder directly for payment of the freight.

The answer to the question in the context of an insolvent party involves consideration of the same factors that would determine the liability of a freight forwarder as a principal or an agent.

In *Earl Paddock Transportation Inc. v. Accuride Canada Inc.* (1991), 3 OR (3d) 493, the plaintiff was a trucking company that dealt with a freight broker by the name of Freight Express. The defendant had asked Freight Express to arrange delivery of certain cargo and Freight Express contacted the plaintiff to make those shipments. The plaintiff invoiced Freight Express and Freight Express subsequently invoiced the defendant. The defendant paid Freight Express but thereupon Freight Express went bankrupt before the plaintiff was paid. The plaintiff, not surprisingly, sought relief against the defendant for the amount outstanding.

The court looked at the past dealings between the parties and in particular relied on the fact that the plaintiff had billed Freight Express. It found that the plaintiff had expected to be paid by Freight Express and in fact it was customary in the industry for the freight broker to pay the carrier. The

court also attached importance to the fact that the plaintiff had dealt with freight brokers before and knew that it was a custom in the industry for the carrier to bill the freight broker and the freight broker in turn to bill the shipper. On the basis of the industry practice and on the facts of that case, the court found that the plaintiff could not recover from the shipper and dismissed the action.

To the same effect is the case of *Lyn-Pax Trucking Ltd. v. Doc Warehouse & Distributing Inc. and Nabisco Brands Ltd.* (1991) 2 B.C.L.R. (2d) 132. In that case, the plaintiff sued Doc and Nabisco for their freight charges. Doc had approached Nabisco and offered to carry its goods in western Canada. Nabisco was aware that Doc did not have any trucks on its own and would have to hire others to carry the goods. Doc hired the plaintiff. The plaintiff without exception billed Doc and not Nabisco for their services. Nabisco always paid Doc for the services.

When Doc went bankrupt, the plaintiff was owed monies. It sought recovery from Nabisco. The court examined the circumstances including the fact that the plaintiff had always been paid by Doc and the plaintiff always looked to Doc for payment. Doc was always named as the carrier in the bills of lading prepared by Nabisco and Nabisco never knew or cared which carrier was actually carrying its goods. It left the responsibility for choosing the carrier with Doc. In light of those facts, the court had little difficulty in finding that there was no contact expressly or implied between the plaintiff and Nabisco. The plaintiff contracted expressly with Doc. Doc was not acting as agents for Nabisco and the plaintiff knew that.

A similar case is *Rudie Wilhelm Warehouse Co. v. Mitsubishi Canada Ltd.* (1991) 3 B.C.L.R. (2d) 97. In that case, the defendant contracted with the freight forwarder to transport goods. The freight forwarder contracted with a trucking company who sub-contracted with the plaintiff. The defendant paid its freight forwarder who paid the trucking company. The trucking company did not pay the plaintiff and subsequently went out of business. The court found that payment by Mitsubishi to its freight forwarder did not constitute payment to the plaintiff. However, the court found that the plaintiff contracted with the trucking company and not with the defendant and that the defendant was not the trucking company's principal. The court was assisted in that determination by evidence from the freight forwarder that it in fact was acting as a principal in the transaction.

The most recent case to deal with the point is *Dan Gamache Trucking v. Encore Metals Inc.* (2008) B.C.S.C. 343. In that case, the defendant contracted with Matrix to provide transport for steel products. Matrix contracted with various trucking companies to transport those goods. The trucking

companies invoiced Matrix for its services and Matrix, in turn, would invoice Encore. The Matrix invoices included amounts for warehousing and reloading, as well as for the shipping services.

Matrix went bankrupt and the plaintiff truckers endeavoured to recover their freight charges from Encore. The plaintiffs endeavoured to establish an agency relationship between Encore and Matrix. The court looked at the factors set out by Tetley in Marine Cargo Claims. The court looked at the invoices issues by the plaintiffs, the practice in the industry and the expectations of the parties as to who would pay who for what. On that basis, the court found that Matrix was acting as a principal in contracting with the trucking companies and dismissed the action.

In conclusion, while the concept of a freight forwarder is an old one, the role of the freight forwarder has changed as of the different methods of transport have thrust them into new areas and responsibilities: ones which sometimes gives rise to mutually inconsistently legal relationships. In each and every case, the factors surrounding the arrangements between the parties must be looked at very carefully in order to determine the roles played in each part of the transaction.

History

John Bromley has been recognized as one of the top maritime lawyers in Canada and among the best 300 in the world (International Who's Who of Shipping and Maritime Lawyers, 2008). He has also been recognized as a leading practitioner in the field by the 2008 Canadian Legal Lexpert Directory.

John's practice runs the entire range of marine liability and insurance matters, including giving pragmatic, efficient advice to clients to help them avoid litigation. John also advises a number of clients on charterparty issues arising from national and international sea trade. He has acted as counsel before all levels of Courts in British Columbia, as well as the Federal Court, Federal Court of Appeal, and the Supreme Court of Canada. John has also acted as counsel in numerous mediations and arbitrations and has acted as an arbitrator. From both experience and background, he has a practical familiarity with matters arising from rail transportation.

John has delivered papers at a variety of conferences including:

Asia Pacific Institute 1991

Fourth International Maritime Law Conference 1994

Fifth International Maritime Law Conference 1996

ICMA XV 2004

Pacific Admiralty Seminar 2006

as well as numerous addresses on various marine and insurance matters to the Education Seminars of the Marine Insurance Association of British Columbia, the Canadian Board of Marine Underwriters, the Toronto Loss Group and the Canadian Maritime Law Association.

Memberships
Canadian Bar Association

Maritime Law Section, former Chair

Canadian Maritime Law Association

Vancouver Maritime Arbitrators' Association

Canadian Board of Marine Underwriters

Marine Insurance Association of British Columbia (former Executive member)

Association of Average Adjusters of Canada (Associate member)

Volunteer Groups
Canadian Diabetes Association (National Chair 2000 -- 2002)

Vancouver School Board Modern Languages Advisory Committee (2006-2007)