

Multimodal Transport of Goods and Their Need of Insurance

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Abstract: The transport industry has drastically changed during the past Three decades, with the advent of containerization and the subsequent development of multimodal transport.

These changes, moreover, have been matter of concern due to the complex issues arising out in the legal and insurance field. Thus, in the legal field attempts have been made to set up a uniform regime of liability applicable to the carrier, in order to avoid the fragmentation resulting from different regimes concerned with each mode of transport. Besides, in the insurance field insurers have been coping with what an author described as the "multimodal modle of conflicting laws and regulations", where the insurers try to cover the risks of door-to-door movements by a combination of transports.

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I. INTRODUCTION

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Transport technologies in the 1990s are based on containerization and electronic data interchange (EDI) backing a rather complex network of multimodal operations.

Multimodal transport or combined transport is the transportation of goods under a single contract, but performed with at least two different modes of transport; the carrier is liable in a legal terms for the entire carriage, even though it is performed by several different modes of transport.

Another very popular term of Transport is Intermodal it is defined as the movement of cargo from origin to destination by several modes of transport where every mode is responsible for their own carriage, each with its own independent contract. While In simple terms, Multimodal is using various modes of transport but with one transport bill of lading. there is no requirement of seprate contract.

Multimodal transport operator (MTO) A carrier who concludes multimodal transport contracts; i.e., contract involving transport by more than one mode of carriage, and for which MTO accepts liability as a carrier Nevertheless, there is still a remarkable mis-match between developed and developing countries insofar as containerization and multimodal transport is concerned. Although there has been an increase in the use of containerization, multimodal transport in developing countries is not a widespread practice. In fact, the physical limitations of infrastructure, equipment and technology to move goods; inadequate institutional and legal transport environment discouraging transport operators to accept responsibility for multimodal transport services, and complicated import and export procedures (in particular Customs formalities) make it quite difficult the growth of intermodalism in these countries.

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Despite the above, however, there are reasons to believe that this panorama could change in the coming years because of the privatization undertaken in the context of structural adjustment programs or stabilization reforms, which are a component of IMF conditionally or a precondition for obtaining World Bank loans. This process is introducing significant reforms in the transport sector as well as commercial ports characterized by deregulation, decentralization of port authorities or privatization of port services, whereby it might be expected that the introduction of new technologies through private sector investments, and different management practices by the reformed port authorities will lead to a new era for this industry, improving the traditional role played by commercial ports in the transport chain of developing countries.

It should be thought that privatization or decentralization in developing countries, will make it easier or at least feasible the introduction of new technologies within the ports; however, this will also bring new risks in respect of which terminal operators and port authorities will have to make sure that proper measures are rightly placed in order to face them. After all, as pointed out recently by an expert, many operators in those countries are facing the difficult task of managing safe, efficient and profitably cargo handling facilities by using an outdated infrastructure and inadequately trained personnel.

Whatever the outcome of all this process might be, it is obvious that such changes will impose on marine terminal operators the necessity of evaluating the risks involved in terminal operations -in particular those derived from containerization- and the setting up of loss prevention programs.

In addition, the adoption of reliable insurance programs will be a paramount element, in particular to Public Port Authorities when it is taken into account that in many cases reforms introduced in developing countries are aimed to make such ports accountable, profitable or at least financially independent. This means that central governments will not be willing -in theory- to grant subsidies to cover financial deficits and those risen from uncovered risks.

It follows that all the parties involved in multimodal transport such as the vehicles carrying goods, vessels, owner or lessees of containers, forwarding agents, shipowners, stevedores and terminal operators need some sort of insurance cover against their liabilities or for loss or damage to their property, this simply because they cannot rely on their rights of recourse against those operating a combined transport chain.

The present paper is concerned with the insurance cover available in particular to marine terminal operators, and its significance for developing countries. However, a few words seem to be appropriate for clearness' sake. Where the term "Marine Terminal Operator" is employed this is referred not only to private companies operating such a terminal by way of leasing or similar agreements, but also it is referred to Public Port Authorities running the terminal, where applicable.

II. MULTIMODALISM AND NEW RISKS

Containerization has had upon the transport industry a tremendous impact. The development of multimodalism, moreover, has eroded the rigid boundaries that have traditionally separated sea, rail and truck transportation; such distinctions between various segments of the transport industry are rapidly becoming blurred, so that the trend seems to be towards an age of "total transportation companies" able to offer integrated water, rail and truck service.

Nevertheless, the changes taking place at the transport industry have given rise to new problems in the legal and insurance field. Firstly, because the laws governing the rights and liabilities of carriers and shippers were developed separately for each mode of transportation, during decades when those transportation segments were viewed as distinct; and secondly, because even though containerization has contributed to speed transits so that goods are in transit for shorter times, and thus underwriters period of risk is reduced as well as the incidence of loss/damage, the container revolution has also brought with it a new set of risks greater than those associated with break-bulk practices.

It is in the context of these constrains that marine terminal operators must carry out their activities. There is little doubt that marine terminals play a new role nowadays, when ports have ceased to be a mere gateway through which cargoes and passengers are transferred from ship to quay and vice versa, to become a transport and distribution service center. It should be borne in mind that these terminals are the result of the necessity to create technical and organizational units, in order to tackle the complexities involved in the handling of containers, complexities that do not exist in a conventional or traditional general berth.

It follows that container terminals because of its capital intensive nature and complex operations, are subject to greater financial risks than the ones conventional berths are exposed to. Terminal operators are basically stevedores and warehouse keepers who enter into a contract of service and work for a principal. Nevertheless, they are cargo handlers who have invested heavily in equipment and are exposed to extensive liability because of the mechanical handling they perform, and the great accumulation of cargo in their custody.

As a consequence of this terminal operators may face a variety of claims which taking into consideration the value of modern containerships, container handling equipments, containerized cargo as well as

the risk of personal injuries are likely to reach significant monetary levels. Therefore, terminal operators are required to assess objectively the risks involved in their business, and to take out adequate insurance cover.

2a. Terminal Operations And Its Legal Implications³

There is no doubt that the introduction of modern technologies within the maritime industry, has led to the almost total extinction of firms operating exclusively as stevedores or warehousemen, giving rise to the growth of terminal operators carrying out a wide range of activities. Unlike stevedores or warehousemen who are concerned with specific activities (i.e. handling and storage) these terminal operators have to be viewed as working in a much wider scope of operations, undertaking not only those services but also many others such as the movement of cargo from quay to the storage side and vice versa, stuffing and stripping of containers, repairs of them, etc. Accordingly, the expression terminal operator in the context of this paper comprises one primarily but not exclusively, concerned with the handling and temporal storage of goods. In view of the former then common law principles relating stevedores and warehousemen, have been assumed to be also applicable to these terminal operators.

2b. Applicability In India⁴

Indian Parliament passed a new legislation in support of multimodal transport and legitimised the concept of single contract and several risk and liabilities, this legislation named multi modal transport Act 1993. If there is more than one mode of transport then there multimodal Transport of Goods Act will be applicable, It has been made clear that as per Section 24 of the Multimodal Transportation of Goods Act, 1993 and rules framed thereunder, the period of limitation is nine months to file the suit after the delivery of the consignment goods. In the instant case, it is not in dispute that the suit was filed after nine months from the date of taking delivery of goods, hence the suit was barred by limitation, under the Multimodal Transportation of Goods Act⁵

U/s 26 Of Multi modal transport law If dispute will arise parties may solve their dispute through arbitration. The arbitration proceeding may be instituted at such place or in accordance with such procedure as may be specified in the multimodal transport document.⁶

III. Terminal Operators As Independent Contractors

Whereas in the past loading and discharge of cargoes from ships were done by the master, who acting as servant of the shipowner carried out the carrier's duty to stow it, nowadays operational and commercial reasons require the carrier to hand it over to stevedores and terminal operators who are experts in such tasks. Consequently, the carrier in order to fulfill his duties under a through contract of carriage must usually enter into third party contracts with stevedores, terminal operators and inland carriers, to ensure the effective arrival of goods to their final destination.

Although the legal status of a terminal operator -i.e. either they act as servant or independent contractor- will depend on the contractual agreement between him and the carrier, it could be said that terminal operators (likewise stevedores) are generally considered independent contractors, with entire control over the men they employ and the functions they undertake.

The fact that the legal status of terminal operators is one of an independent contractor, on the other hand, will have important consequences with regard to the defenses available to them when performing their contract, the reason being that under the Hague-Visby rules "servant or agent of the carrier (such servant or agent not being independent contractor)", are entitled to avail themselves with the defenses and limits of liability which the carrier is entitled to invoke under the rules, in the event of actions in respect of loss or damage to goods brought directly against them. This express and deliberate omission of independent contractors as

³ Economic Times ,News paper report

⁴ Bare Act of Multi modal Transport Act , 1993.

⁵ M/S.Carborandum Universal Ltd vs M/S. M.G.International ... on 30 October, 2014

⁶ M/S Rameshwar Dass & Sons (Huf) vs M/S Caravel Logistics Pvt. Ltd. & ... on 21 January, 2015

beneficiaries of the defenses and limits of liability afforded by the rules, together with the fact that under such rules "carriage of goods" comprises the period of time from the actual loading of cargo until it is discharged from the ship (enabling the carrier not to take responsibility for pre-loading or after-discharge losses howsoever caused), have left stevedores and terminal operators in a position where the protection of exemption and limitation clauses has to be achieved by way of the so-called "Himalaya" clause; however, as it will be explained later the incorporation of this clause in the bill of lading does not necessarily guarantee proper relief to terminal operators in the event of loss or damage to goods caused by them.

IV. RISK ANALYSIS AND RISK MANAGEMENT AS A TECHNIQUE TO DEFINE INSURANCE NEEDS

Terminal operators may have to take out insurance policies, either under the terms of operating agreements entered into between them and port authorities; as a result of the terms of terminal tariffs previously drafted by such authorities; according to the liability and indemnity clauses inserted in contracts agreed upon with particular users; or simply because the terminal operator not being able to bear the consequences of the materialization of one risk, decides to transfer it to a specialized company (i.e. insurance company). Besides this, a terminal operator may decide that the financial risk involved in his operations is not so great as to justify the purchase insurance and consequently he may operate on a self-insured basis.

In view of the mentioned above then the problem to be dealt with firstly is not with whom to insure the terminal operations but what risks should be underwritten and which ones should be borne by the terminal operator himself. Decisions over this particular can be reached by using a technique called "risk analysis and risk management", to be briefly described here, whereby it is attempted to make the best possible choice between any combination of contract insurance coverage; setting up of an own insurance fund and the investment in loss prevention methods and safety procedures.

The first step within a risk analysis exercise will be to identify the types of risks a terminal operator is exposed to, in order to evaluate all possible terminal operator's liabilities and the impact on his assets. Broadly speaking these risks can be classified as follows:

- Partial or total loss of, or damage to, his property.
- Loss of income through business interruption or reduction of it as a result of property.
- Loss of, or damage to, third parties and/or their property.
- Loss of, or damage to, employees and/or their property.

Once the identification and evaluation of those risks have been completed, it is the purpose of risk management to reduce the frequency as well as the severity of pure risks through the analysis of alternatives or options available to a risk manager, namely:

- a.- Avoidance: This would be the most effective solution, so the terminal operator decides that a particular activity or operation will be discontinued because of the high risks involved.
- b.- Loss control: This could be achieved basically by means of loss prevention and loss reduction in order to avoid risk occurrence.
- c.- Self-retention: The terminal operator decides to bear the risk himself by paying losses/damages whenever they occur. The retention of risk may range from no insurance at all to an insurance with a deductible or even the formation of an independent company, so-called captive insurance company.
- d.- Insurance: Where the risk is passed on to an insurance company through a contract of insurance.

Leaving aside those cases where the law requires an insurance contract to be taken out, terminal operators would have to decide whether to do so or not. It is obvious that any decision in this respect will depend on the cost of insurance premiums, the probability of risks within the marine terminal as well as the adequacy or inadequacy of existing contracts for certain risks, e.g. in France there is only one company that covers a client port for damage to port structures by ships, and only above the amount of the limited liability fund constituted by their owner.

Moreover, the financial situation of one port or terminal in particular as well as the nature of the operations undertaken, will determine the amount of insurance (if any) and in respect of which risks a fund will be set up, instead of buying insurance coverage. The Port of Rotterdam, for instance, operates as its own insurer and since it is a landlord port has not direct responsibilities concerning terminal operations, so terminal operators are the ones taking out the necessary insurance. Bordeaux, on the other hand, has multiple-risk insurance that does not cover damage relating to the operation of equipment, whereas Le Havre has an insurance covering damage beyond the shipowners' limited-liability fund. The Port of Tacoma operates on self-insured basis with regard to unemployment insurance and workers' compensation. At December 31, 1992, the estimated insurance liability was \$44,100 for workers' compensation, such cash reserves reaching \$289,877.

Therefore, the final outcome of a sound risk analysis and risk management program will be to decide about the insurance needs of a terminal operator who would have to seek proper insurance coverage either at the domestic or international market to be discussed next.

V. THE INSURANCE AVAILABLE TO MARINE TERMINAL OPERATORS⁷

Insurance coverage for terminal operators/port authorities may be found in markets of developed and developing countries. Thus, coverage is available from the American International Group, Lloyd's of London, Allianz, etc. When seeking Insurance terminal operators/port authorities have the choice of getting it either from the insurance market (i.e. insurance companies all around the world leading by Lloyd's of London) or from mutual insurance association or clubs. This section will be mainly focused on the weakness of insurance domestic markets in developing countries, and a brief overview of the coverage offered by the Through Transport Club (Protection and Indemnity Club) and Sedgwick James (Insurance Brokers), the most important organizations committed to the insurance of terminal operators/port authorities worldwide.

Domestic insurance markets in developing countries offer certain problems to terminal operators seeking insurance coverage. Thus, many companies there are unable to underwrite big individual risks such as infrastructure, aircraft, ships, industrial complexes, etc, since this deserves a professional specialization and a level of insurance capacity that are beyond the reach of these countries; in fact these markets tend to be under-capitalized and under-staffed. Consequently, they can hardly afford to be exposed to the adverse potential financial consequences of some large losses, such as weather hazards, natural catastrophes, infrastructure, large ships and aircraft, reason for which they are highly dependent on foreign insurance. Beside this, the insurance available in these markets may not cope with the particularities of the risks involved in terminal operations.

Another negative element in these markets, moreover, is the vulnerability of national currencies which may constitute an obstacle in respect of large indemnities. It should be borne in mind that there are cases where currency control represents a serious barrier for insurance practices, in particular, when contracting foreign insurance. For instance, in Ecuador, one operator was required to pay his premiums against a certified original debit note, in order to have the premiums leave the country. In other developing countries such as Colombia, Barbados and Dominica, operators have to pay a tax for having procured a foreign insurer's coverage.

VI. THE TRANSPORT CLUB

The Through Transport Mutual Insurance Association Limited (Through Transport Club) was established in 1968 by the managers of three of the largest P&I Clubs in the world, originally to insure vessel operators for risks arising out of the loss or damage to their containers and chassis anywhere in the world, whether afloat or on land. The reason for this was that P&I Clubs had been reluctant to insure liability risks which were outside of ship operations on the high seas. Even though the initial coverage was exclusively directed to vessel operators, nowadays the insurance protection provided by the Club has expanded to stevedores and terminal operators, transport operators and port authorities. The TT Club is an organization operating as a collective self-insurance and working on a non-profit making basis. In this modality of insurance the premium is called "contribution" not being fixed but variable and to be paid in advance. Besides, the level of contribution for each member is rated individually all depending on the analysis of his claim record, his exposure under user contracts, his terms and conditions of business, etc.

The TT Club policy is a "specified perils" policy in the sense that it is tailored specifically to the operators set out in the Rules. Details of the coverage terminal operators are entitled to, under the Club's protection can be appreciated in the pertinent Club Rules. In general terms an Unctad report has described the policy⁸ coverage as follows:

* Liabilities in relation to cargo.

* Liabilities for: a) physical loss of or damage to property. b) death, bodily injury or illness. c) consequential loss. d) claims in respect of removal of cargo, containers, trailers, handling equipment. e) additional costs and expenses incurred by a member in complying with an order from any authority with regard to removal of cargo, container, trailer, handling equipment. f) claims by any authority in respect of quarantine and disinfecting. g) fines and other financial penalties h) personal injury.

* Insurance of: a) containers/trailers. b) handling equipment. c) cargo. d) property.

⁷ Times of India ,

⁸ Central government policy report , 1996

* Costs and expenses a) of investigation, defense and mitigation. b) of disposing of damaged or worthless cargo. c) as a result of loss consequent upon waiver of general average. d) of repossessing leased containers. e) incurred upon interruption of business.

Discretionary insurance.

Under this the Directors of the Club have the power to pay a claim which is not specifically covered according to the terms of the member's insurance. This represents a significant difference with regard to the traditional policy, so that members are protected against gaps in the wordy of the policy and unforeseen claims. Furthermore, the Through Transport Club provides many other services such as risk management whereby the Club can review an operator's entire insurance program to ensure that he has no areas without cover; loss prevention services through the publication of a number of informational brochures and seminars addressing specific areas where loss prevention measures can be taken; security and safety surveys carried out by outside consultants and advisory services, which is given by a staff of attorneys who are able to review operating agreements, stevedore and terminal service agreements and other contracts that affect a member's business. Therefore, the advantages of using the services of a global insurer like this organization could be summarized as worldwide protection (very significant in the handling of claims), stable insurance rates, a network of experts, risk management advice, loss prevention advice and advisory services.

VII. THE SEDGWICK JAMES PLAN

Another organization which works actively with the insurance of port activities is Sedgwick James who has designed a Comprehensive Insurance Plan for port authorities. Although the Plan in questions covers the many risks associated with responsibilities that port authorities usually assume, it may afford coverage to those port authorities performing operational services, or engaged in the operation of container terminals.

It is essential to point out that Sedgwick James is a broker and not an insurance company, providing insurance and risk management services mainly to public port authorities worldwide. The Comprehensive Insurance offered by this group it is intended to provide a coverage whereby gaps between risks exposed or produced overlapping resulting from the purchase of different policies might be avoided, this by means of a number of separate programs in only one package.

The Plan in question has been conceived taking into consideration that the exposures of a port authority can be grouped into five categories, namely: a) damage to or caused by vessels owned, leased, chartered or operated by the port authority; b) damage to all other property; c) loss of revenue or business interruption; d) third party liability, removal of wreck and environmental protection and e) employers liabilities/wormens's compensation which is not covered by the plan. In the context of this work letters b) and d) deserve particular attention, since they could afford protection to a port authority engaged in the handling and storage of cargo. Thus, the Plan provides coverage for damages to fixed assets (i.e. buildings, storage sheds, warehouses, repair sheds, etc.); mobile assets (i.e. mobile cranes, portainers, trucks, etc.) and marine property such as piers, wharves, jetties, moorings, etc. All this property being covered for full replacement costs and cover provided on an "all risks" basis, including fire, lightning, explosion, aircraft, impact, storm, etc. Furthermore, the Plan furnishes coverage to port authorities for third party liabilities, e.g. those arising out from damage caused to vessels and cargoes, death and bodily injury, etc.

Together with the Comprehensive Plan for port authorities, Sedgwick James is involved in risk control services, producing reports including recommendations on how risk, losses and claims can be effectively handled.

VIII. CONCLUSION

Current port reforms in developing countries will bring the introduction of modern technologies, giving rise to new risks in respect of which proper insurance coverage is needed. It could also be assumed that these changes will lead to an increase in accidents, reaffirming so the necessity of setting a sound insurance program as well as mechanisms for risk management and loss prevention. The former is corroborated by a study concerning the cost of accidents within the port transport industry, carried out by the National Ports Council in the 1970s, which revealed that accident costs vary with the degree of mechanization. It was found, among others things, that as berth becomes more capital intensive (i.e. from conventional to container) then the total cost of accidents increases dramatically; cost of personal accidents decreases, both in magnitude and in proportion to damage accidents whereas cost of damage accidents increases, both in magnitude and in proportion to personal accidents.

Insurance practices, therefore, will be influence by the degree of modernization in operations reached by terminal operators and port authorities acting as such. Although many of the considerations discussed in the previous pages may not be applicable to ports where containerization and multimodal practices are still in early stages, there is little doubt that those considerations would allow to draw some remarks which could be taken

into account when formulating insurance programs, particularly, in developing countries undertaking fundamental changes in their port organization. These remarks, involving Port Authorities and Terminal Operators, could be summed up as follows:

8.1. Port Authorities should be aware that their role as a Landlord authority is not restricted to look after the real estate of public dominion. On the contrary, despite the fact that such authorities would not be concerned with operational aspects, liabilities of port operators/terminal operators should be clearly established as well as compulsory cargo insurance imposed, in order to guarantee to port users (which in general sense involve shippers, consignees, shipping lines, etc.) a minimum of security when using port facilities. This is particularly relevant to developing countries; thus, by handing over operational services to private sector, port authorities there have to bear in mind that their function should not be only limited to ask for indemnities (e.g. bond or surety) to safeguard the port authorities from eventual liabilities and property damage.

8.2. It is advisable for Operational and Non-Operational Port Authorities as well as Terminal Operators the setting up of one department to carry out the risk management task, after all it is not enough to determine what are the risks a Port Authority/Terminal Operator are exposed to, but also the monitoring, up-dating and re-adjustment of an initial identification of those risks. This department, therefore, would be in charge of identifying those risks requiring insurance, and those which could be tackled by means of contingency funds.

8.3. After assessing the nature and frequency of those risks, Port Authorities/Terminal Operators should make the necessary allocation for insurance and contingency funds within their budgets. In many cases it would appear that port authorities tend to rely on their ability to limit liability undervaluing the importance of it, so it is not surprising to find that 64% of the small ports (those handling less than 7.5 million tons of cargo per annum) within the European community do not have a fixed insurance cost allocation in their accounting.

8.4. Operational Port Authorities and Terminal Operators should contract with their user shipping lines under a standard contract, this would make the port authority/terminal operator responsible only for its own fault or negligence, limiting any liability in negligence to reasonable monetary levels. In addition, Himalaya and Circular Indemnity clauses should be included.

8.5. When seeking insurance Port Authorities/Terminal Operators would have to make it clear to the insurers what the real requirements are. It should be borne in mind that although insurance premiums depend on the amount of cover, the level of the deductible (i.e. the portion of damage to be paid by the policy-holder) will also influence it. Therefore, if the insurance contract is taken out against substantial risks, then it is advisable to accept a rather high deductible; if on the other hand, several small accidents are possible, the deductible should be low, like the level of cover per accident.

8.6. Port Authorities should avoid to buy multiplicity of policies which could lead to overlapping and gaps of risks. In this respect the purchase of a Comprehensive package would be advisable as a way of achieving substantial reductions in premiums, more extensive cover and minimizing gaps in coverage.

8.7. In those countries where the purchase of foreign insurance is permitted, Port Authorities/Terminal Operators should use the services of a specialized risk management or reliable international insurance broker, in order to take advantage of professional expertise rarely present in domestic markets of developing countries. Despite the fact that a national insurer will be able to satisfy the domestic needs of his client, this task becomes more complicated when dealing with major claims arising on foreign territory, where there are several nationalities involved and where different legislation have to be applied, "in such cases the 'national insurer' will usually be obliged to, sometimes due simply to a language problem, sub-contract the handling of the claim and his power of control on this matter can only be theoretical".

8.8. Whatever the foreign insurance available to a Port Authority/Terminal Operator, the services of the TT Club should be taken into account in the making of any insurance program, given the multiple advantages that a TT Club member may enjoy. After referring to others insurance options available to terminal operators, an Unctad report has stated that "it would be surprising if container terminal operators could completely rule out the risk transfer to the Through Transport Club. Developing-country operators would be well advised to consider carefully the P. & I. mutual insurance, as a cost-effective and safe way to limit liability for possible damages, risks and expenses, which are steadily increasing".

This paper has attempted an overview of one field many times neglected by those involve in the complex operations of a marine container terminal. There is little doubt that the significant financial risk terminal operators are exposed to, makes almost compulsory for them to review that attitude and take advantage of the alternatives available in the insurance market, in order to face the variety of liabilities they may face without exposing themselves to the unpredictable consequences of uncovered risks.

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