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To Deliver or not to Deliver?

Legally uncertain situations can be liability traps for the freight carrier

by
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While the liability of the freight carrier for damage and loss in transit is usually calculable by reference to the existing maximum amounts and the corresponding insurance policies, particular care should be taken in delivering the goods. Omissions and mistakes in this connection will often trigger unlimited liability for the carrier, either because they are considered to establish gross negligence or because the damage caused is not considered damage to, or loss of, the goods. At the same time, the carrier's liability insurance will often not cover such damage, or not cover it in full.

First of all, the carrier has to ensure that the goods are delivered to the recipient specified in the consignment note. Special caution should be exercised in countries where scams in this context are common. When delivering goods in such countries, the carrier will often be deemed to have acted with gross negligence if he or she fails to verify the recipient's identity and this results in loss of the goods. As a result, the carrier will become liable to pay compensation in full. Furthermore, where liability accrues in such circumstances it is unlikely to be covered by the relevant insurance policy.

The maximum liability amounts are also not applicable if the carrier fails to collect a "cash on delivery" charge stated in the consignment note before handing over the goods. The carrier has to compensate the damage arising from such omission up to the amount of this charge. At the same time, failure to collect the cash on delivery is typically not covered by the carrier's liability insurance.

Unlimited liability may also be triggered if the carrier fails to follow instructions issued by the sender; for example, if the sender has prohibited the handing-over of the goods to the consignee. As a rule, the sender can demand that the goods be delivered to a different place or recipient, or that the transport be stopped while the goods are in transit. The latter often occurs in cases where the consignee has fallen into bankruptcy. If, in such circumstances, the carrier hands over the goods regardless of the instructions received from the sender, this usually triggers unlimited liability towards the sender. Again, in such cases it is unlikely that the carrier's liability insurance will provide coverage.

As a rule, the sender has to produce the first copy of the consignment note in order to give new instructions to the carrier. If this copy was handed over – for example, to the consignee or the consignee's bank – the sender will no longer be able to prevent the delivery. In addition, the sender's right to give new instructions ceases when the right of disposal has been transferred to the consignee. This usually occurs if the consignee has received the copy of the consignment note designated for him or her, or if the goods have arrived at the place designated for delivery and the consignee has demanded that the goods and the consignee's copy of the consignment note to be delivered to him or her.

If, in case of ambiguous instructions by the sender and the consignee, the carrier is in doubt as to whose instructions to obey, it is advisable to seek legal advice since mistakes in this connection may lead to liability either towards the sender or towards the consignee. In this context, it is not usually possible for the carrier to avoid liability by pleading lack of knowledge of relevant aspects of the law.

If there is an obstacle to handing over the goods – for example, because the consignee does not fulfil the conditions set for the delivery – the carrier normally has to obtain instructions from the sender. On no account should

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the goods be simply unloaded and left. The carrier may indeed without prior instruction from the sender unload the goods, with the result that the transport is considered to have ended. After that, however, the carrier must hold the goods on behalf of the entitled person or instruct a reliable third party to do so. If the goods are perishable and will lose their value with longer storage, or if the storage expenses would be out of proportion to the value of the goods, the carrier may, in the absence of conflicting instructions by the entitled person, sell the goods and deduct freight costs and his or her own expenses from the proceeds of the sale.

The detailed conditions for storing or selling the goods depend on the national law applicable at the designated place of delivery. It is obvious that this kind of situation is particularly challenging for foreign carriers who are not familiar with the applicable national rules. It is advisable to seek legal advice in order to avoid unforeseen liability.

This is also true for exercising liens or rights of retention pertaining to the goods. In doing so the carrier/freight forwarder may infringe the rights of the sender or of third parties and as a result become liable towards such parties.

In decision KKO:1991:99, for example, the Finnish Supreme Court had to decide a case where a Swiss company had sold goods to a Finnish buyer, at the same time retaining title to the goods until full payment. The Swiss seller had stopped the delivery of the goods before the Finnish freight forwarder had forwarded them to the Finnish buyer because the buyer had fallen into bankruptcy. Thereafter, the freight forwarder sold the goods based on a lien agreed with the buyer on outstanding amounts from prior dealings. The court ordered the freight forwarder to compensate the damage incurred by the Swiss company due to the sale of the goods.

These issues are frequently hard to assess, particularly in international cases. It is often difficult for freight carriers to establish whether the sender's security rights – such as retention of title, for example – have been validly agreed upon, and whether and to what extent they remain valid in the country of delivery. Therefore, before taking any measures, it is advisable to seek appropriate legal advice.