ARTICLE

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Negotiating Your Supply Chain

For many businesses, an efficient logistics supply chain is a key indicator of its overall profitability and ongoing success. The ability to get the goods to market is paramount!

Many supply chains incorporate both the domestic and international carriage of goods and warehousing. Each of these three aspects is complex and together they touch on numerous areas of the law. When structured correctly, both transport and logistics providers and their customers benefit from long term relationships that provide stability to their respective businesses.

All issues, both commercial and legal, can be negotiated when the parties sit down to discuss a supply chain contract. Below are some of the key legal issues that commonly arise when contracts are considered.

Exclusivity

Most supply chain contracts are concluded on the basis that the customer appoints the carrier exclusively. This is acceptable provided that sufficient safeguards are built into the contract to allow the customer to use an alternate provider in certain circumstances. Examples of when a customer may need to 'step outside' the contract include when a force majeure event (act of God) impacts on the ability of the carrier to perform the contract or when the customer requires the carrier to transport or store goods or provide services for which it does not have the capability.

Having a mechanism built into the contract enables the parties to set the parameters of their relationship and avoid disputes. Most importantly, it also means the customer's business does not grind to a halt.

Price review mechanism

Supply chain contracts commonly operate over several years and therefore, it is usual to have a review of performance and rates during the course of the contract. Some options for rate reviews include an agreed formula, a fixed percentage increase/decrease, a CPI adjustment, determination by an independent third party or a performance based KPI review. Agreeing in advance on the basis for conducting rate reviews can minimise disputes and provide certainty for both parties.

Chain of Responsibility

The introduction of 'Chain of Responsibility' laws means all parties in a supply chain that contribute to a loss are likely to bear some responsibility. A service provider is primarily liable to ensure its employees and agents comply with all relevant laws. However, if the customer

places demands on the service provider (such as requiring it to meet unreasonable delivery windows), this may result in the carrier breaching other laws (such as occupational health and safety requirements) and, if an incident or loss occurs, the customer may be held liable (with or without the carrier) for any injury, damage or loss that results.

From the carrier's point of view, having a clause in the contract requiring the customer not to make unreasonable demands may allay concerns. On the other hand, a customer may want to insert a warranty from the carrier that it will comply with all relevant laws in providing the services. Finding a balance between the parties on this issue is very important.

Indemnity and insurance

Understandably, carriers will attempt to limit their liability as much as possible while customers will try to push liability on to the carrier wherever possible. Often, the middle ground will be to delineate those circumstances in which the carrier (and any of its subcontractors) is directly liable (for example, in the case of wilful misconduct or reckless or negligent acts or omissions).

Liability for indirect and consequential losses is also a common sticking point between the parties. Carriers will generally seek to exclude these losses because they represent potentially large contingent liabilities. However, for customers, indirect losses can be substantial and an important part of their business. One solution is for the parties to agree to minimum and/or maximum claim amounts before any consequential losses may be covered.

For both parties, it is important to ensure appropriate insurance is in place and to have their respective insurers examine any contract before it is executed in case the terms of the proposed contract result in rights of subrogation being lost under insurance policies.

Exit arrangements

It may seem odd to be determining an exit strategy for the contract before it has even begun, but working through these issues up front often assists with an orderly transition on the termination or expiration of the contract and can result in less disruption to both parties' businesses.

We often suggest parties map out a process for the orderly handover of the customer's goods, records, information and premises (if applicable) to ensure the business of the customer is not adversely affected.

It is also useful to consider whether the parties can terminate the contract if certain events occur. One example is a situation where the parties fail to agree on new rates. Having the process and a workable timeline set out will assist the parties to ensure termination is as amicable as possible.

Dispute resolution

There are occasions when the parties need to resort to formal means to settle issues arising during the term of the contract. Agreeing to a procedure to settle disputes can reduce the likelihood of the parties heading directly to court, which is costly and unlikely to foster a workable ongoing relationship (although an appropriate provision allowing the parties to go to court for urgent interlocutory relief is advisable).

We often see parties agreeing to an internal process by which a dispute is referred to more senior personnel within each business to try to resolve the issue commercially. It is also important to put timeframes in place so the process does not drag on.

If the internal process fails to defuse the dispute, mediation can be a useful next step. A mediation clause typically specifies timeframes, selection of a mediator, how the mediation is conducted, the costs involved and confidentiality. In some cases, particularly in international freight contracts, arbitration may be the preferred means of dispute resolution.

Summary

The issues set out in this article are examples of common 'negotiation' points in supply chain contracts. If the parties address such issues at the start of their business relationship, they may be better placed to avoid protracted or costly disputes later.

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