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Limitations on Liability in Domestic and International Shipping and an Analysis of Pitfalls in the Application of Limitation of Liability Provisions

I. Limitations on Liability: An Overview

In understanding the concept of limitation on liability provisions, the attorney, client and insured must first determine the types and quantities of goods being transported. In certain situations, depending on the size of the goods being shipped and the costs of goods being shipped, it may be beneficial for the carrier to enter into provisions to limit the liability in case the goods are damaged, destroyed or lost due to the carrier's liability. For the provisions to be valid, the carrier must attempt to agree on a sum that reasonably attempts to fix a fair value to the property or goods being shipped. The carrier must also be mindful that agreements to limit liability for injury as a result of the carrier's negligence have been generally held to be invalid.

a. Limitations for Land Carriers and Motor Transport: How Tariffs and Bills of Lading can protect a Carrier

Federal law has provided common carriers the opportunity to limit their liability through agreements with their shippers. While there is no delineated rate at which a carrier must compensate a shipper for partially or fully damaged goods, domestic interstate carriers often craft such terms in their bills of lading or tariffs. These agreements are, of course, subject to judicial review, and without knowledge of the particular requirements for enforcement of such limitations on liability, a land carrier could find themselves exposed far beyond what they expected. Generally, and subject to particular exceptions based upon the type of good in question, there are four factors that a carrier must meet in order to enforce a limitation on liability provision: 1) a tariff evincing an agreement by the parties for limited liability; 2) a reasonable opportunity for the shipper to choose between two or more levels of liability; 3) the shipper's consent to a particular level of liability and 4) proof of agreement to limited liability through a receipt or bill of lading. For most goods, an inclusion of a bill of lading and/or tariff providing the limits at which a shipper will be compensated may be sufficient. There are exceptions, however, in which these factors do not apply, depending on the location of the terminals (shipment between foreign countries via the United States may be exempt from this legal analysis) or the type of good being delivered (farming and agricultural products, e.g.). Attorneys of land carriers must be cognizant of when this factor test applies, and must also be aware of procedural rules that favor a carrier in litigation, such as removal to Federal Court, or demanding a proper notice of claim. Typically, a notice of claim is required within nine (9) months of shipment, in addition to a two (2) year statute of limitation.

b. Limitations for Air Carriers: The Warsaw Convention vs. domestic air cargo

For air carriers, the requirements necessary to enforce a limitation on liability may differ depending on their destination. While domestic carriers set their rates in a similar fashion to land carriers – negotiated through their waybills and subjected to standards of "reasonableness" – the Warsaw Convention sets a specific limit on liability, subject to a shipper paying a higher premium for a higher limit on liability. While both domestic and international air cargo limitations on liability are established by the waybill, the difference in the actual limitation on liability figures is stark. As of 2009, international air cargo was subject to a limitation on liability of approximately $23/kg. International shippers are allowed to contract for a greater value for their goods, but they are not able to contract for less than this mandated rate. Domestically, meanwhile, carriers of air cargo may freely contract for a "reasonable" limitation on liability, which could be significantly less than the mandated limits found in international air shipping. This is significant when one considers that domestic air cargo may have a limitation on liability of $.50 per pound while international air cargo may have a limitation on liability of roughly $9.00 per pound. Additionally, it is important to note that while domestic air cargo is subject only to federal common law, international air cargo comes with the added protection for carriers of a seven or fourteen day notice requirement, along with a two-year statute of limitations on claims.

c. Limitations on Liability at sea: COGSA and limitations by "package"

The Carriage of Goods by Sea Act (COGSA) typically mandates a $500 per "package" limitation on liability. This ostensibly provides predictability to carriers of goods by sea. However, certain exceptions and definitions muddy the proverbial waters for insurers and lawyers alike. The definition of "package" itself creates confusion, as that term could mean a crate or a three-ton press, depending upon a court's interpretation. Additionally, the applicability of COGSA is limited to the time during which the goods are in transit ("tackle-to-tackle"). It is important to note that, because of the highly favorable limitation on liability, carriers often attempt to expand the scope of COGSA beyond its mandated parameters. For example, "Himalaya clauses," designed to include within the parameters of COGSA those third party non-carriers, such as stevedores and terminal operators, protect those who would otherwise be exposed to greater liability than the carrier. Additionally, carriers must be mindful not to deviate in any way from the reasonable custom of shipping their goods. While the definition of deviation traditionally applied to geographic imprecision, the definition of deviation now includes improper loading or holding of the goods on the ship itself, or needing to reship the goods. Should carriers "deviate" from custom – typically defined in the bill of lading – such action could entitle the shipper to the full value of the goods that were damaged, destroyed, or lost.

II. **Pitfalls of Limiting Liability: Ensuring the validity of limited liability**

In order to take advantage of limitations on liability, carriers must be cognizant of the requirements for enforcement of such limitations. Doctrines have been judicially crafted in order to explain exactly what things such as "reasonable" and "fair opportunity" mean in the context of limiting liability. Whether requiring an offer of a higher limit on liability, or mandating that the terms be included in writing on the bill of lading, the prerequisites of limiting liability for damaged

goods are wrought with pitfalls that an otherwise unsophisticated merchant would not know existed. To know these pitfalls is to avoid them, which will mean immense savings to clients and insurance companies. An example of such a pitfall concerns the fair opportunity doctrine, which requires land carriers to provide a reasonable opportunity to a shipper to elect a high limitation on liability. Carriers need to be mindful of the factors that Courts often consider in determining whether a shipper had a fair opportunity to select a higher limitation on liability, such as whose bill of lading form was used, whether the value declared was included in the bill of lading, and the sophistication of the shipper. In the context of deviation, providing prior notice to the shipper of said deviation may absolve the carrier of increased liability pursuant to COGSA. For shippers, they can increase a carrier's liability to them simply by properly defining what a "package" is in their particular shipment. These are but some of the pitfalls that can be avoided through proper planning and strategy.

III. Structuring agreements to limit liability: What do these agreements look like?

For the carrier and the insurer, structuring the limitation on liability properly is critical to ensuring the least amount of exposure when things go wrong. There are helpful templates for carriers to use, such as the Uniform Motor Carrier Bill of Lading, which contains a paragraph stating that "The agreed or declared value is hereby specifically stated by the shipper to be not exceeding (cost) per (unit of measurement)." For the insurer, understanding what constitutes a "reasonable" limitation on liability will offer the maximum amount of protection against loss. By understanding just how much a carrier can limit their liability depending on the type of good shipped and the method of shipment, an insurer will be better able to predict their future costs, as well as offer guidance to carriers as to the best way to structure their contracts with shippers. Additionally, and most obviously, an insurer's understanding of this field will enable them to draw up insurance agreements that truly match the needs of their insured, while protecting the insurer from excessive liabilities. Additionally, separate classifications of freight may allow an insurer to further limit the liability of certain shipments, such as when the good being delivered is not a brand new item. For example, some agreements contain differing limitation on liability rates depending on the type of good or whether the good in transit is new or not. Additionally, because shipments can have multiple parts of varying degrees of worth, contracts between the carrier and the shipper will have to be made to account for the differing liability limitations on each good. Further, some carriers will specifically exclude some articles, such as cell phones, air conditioners, and cigarettes, from their normal fee schedule. Therefore, insurers will have to know each of these nuances in order to properly predict their liabilities in future instances.