The coronavirus and freight forwarding

How managing the spread of coronavirus is impacting freight forwarders and logistics operators

Introduction

This briefing considers the potential impact on ocean freight and supply chain management activities of freight forwarders and logistics operators should steps to curtail the spread of coronavirus continue to disrupt the movement of goods. While key concerns will distil to delays and potentially cargo deterioration, the following provides some guidance on the potential risks to freight operators and how to mitigate them.

Ocean container supply chains include physical, clerical and data entry processes, many of which involve people congregating and interacting in large concentrations.

Physical cargo packing operations inherently involve human interaction. Similarly, clerical and data entry processes are normally executed in the offices of a range of supply chain stakeholders, including forwarders, ships agents, terminals, banks and customs authorities. Apart from data entry and validation activities, and despite increasing levels of digitisation, the industry continues to have moderate reliance on transferring and dealing with physical documentation.

Currently, many businesses in China have implemented “working from home” procedures. Despite IT functionality, where offices remain closed for protracted periods, it is likely that customs and transport documentation will be disrupted, potentially leading to problems delivering cargo at destination.

Impacts on freight forwarders and logistics operators

Commercial Impact
Any reduction in goods handled and shipped could have a significant impact on customer revenue. There is also the risk that key customers will lean on forwarders to provide, without a contractual obligation to do so, more expensive "workarounds", such as airfreight and using non-core ocean service providers to perform voyages.

In general, apart from office closures in China, many companies have implemented restricted travel regimes. As a result, expected business travel related to securing transactions or continuing servicing relationships are likely to be disrupted. Inevitably, remote conferencing technologies provide a measure of continuity. It will be important to maintain clear and open communications.

Legal Assessment
Special Contracts
Whilst much of the forwarding industry operates without specially negotiated contracts (relying on incorporation of standard trading conditions), some forwarders have in place

supply chain or freight management agreements with their key customers. In such cases, it is necessary to review all specific customer contracts for ocean-related services and identify the obligations on the supplier to perform in contexts such as the coronavirus. Is the forwarder or its agent required to issue FCRs[1] and/or bills of lading? Is the operator required to undertake consolidations? Is it responsible for export customs formalities, etc.? Some agreements are based on the customer's standard purchasing terms and may consequently be very customer friendly with few exclusions to benefit the supplier. As well as identifying obligations, forwarders should identify any "force majeure" clauses in their agreements and preemptively send notices to customers setting out the problems in China and invoking their force majeure right to be discharged from their obligations to perform.

Industry Standard Terms

Where an operator trades on industry standard terms (such as national association forwarding conditions), it is prudent to send force majeure notices. Further, while the precise date of the commencement of the situation may be open to argument, taking on new transactions relating to a supply chain reliant on fulfilment in China requires detailed scrutiny and probably specific legal advice.

Communications to customers

It is crucial for freight suppliers to keep their customers abreast of all problems experienced by other stakeholders in the given supply chain, such as vendors, hauliers, lines, agents and terminals. To rely upon a force majeure clause or to be discharged of an obligation under general law, an operator needs to evidence that the customer's losses and any failure to perform were caused by matters genuinely and reasonably outside its control. Suppliers will generally be contractually required to consider and implement any reasonable "workarounds" if they involve modest additional cost.

Communications to other supply chain stakeholders

Freight forwarders and logistics operators need to maintain a paper trail to minimise the risk of claims and to evidence that they did everything reasonable to avoid the customer's losses. Keep written records of communications with supply chain stakeholders and contractors and send them notices holding them to their contractual obligations. A high-level summary of the steps taken and problems encountered should be included in communications to customers.

Destination Problems

Clearly, it is not only problems in China itself that should be considered. If original bills are not produced and/or not couriered to destinations, there is the risk that forwarders, purchasers and lines will have to find "workarounds".

If a line issued an original bill of lading to the Chinese agent or network office of the customer's forwarder but it has not found its way to the destination forwarder/agent owing to reasons outside its control, then as a "workaround", the line is likely to demand a letter of indemnity (LOI) at destination prior to delivering the container to a party who is unable to present the original bill.

Failure to provide a line with an LOI could delay the goods being released and lead to container detention charges being incurred. This can easily turn into a large sum if the line exercises a lien and stores the container at the terminal for a long time. Given that the freight forwarder will want to pass all costs payable to the line onto the customer, it should keep the customer informed about all detention and hold the customer responsible for it. If large detention sums are demanded, legal advice should be sought.

The requirement for an LOI should not generally arise if the line has only issued a waybill. Forwarders and logistics operators may find it advisable therefore, where possible, to instruct lines only to issue waybills.

As well as original line bills not arriving at destination, there is also the risk of house non-vessel operating carrier (NVOC) bills not arriving. Particularly in the circumstances of the coronavirus, but also generally, operators are advised to take great care before releasing goods without the receiver presenting an original house bill. Insurance coverage will be prejudiced where claims arise from intentional release of cargo without presentation of an original bill. Legal advice should be obtained and, if the operator agrees to accept an LOI from the customer/receiver, it should ensure that the wording clearly responds to the risks arising and the party issuing the LOI is good for its money. LOIs should be signed by a first class bank as the party providing the indemnity or as guarantor of the customer as the indemnifying party. If the customer/receiver refuses to provide an acceptable LOI, legal advice should be sought.

It is also possible that customers/receivers abandon cargo at destinations if bills are unavailable, “stop” instructions have been issued by vendors and/or substantial detention charges have accrued. Forwarders should work proactively to avoid the costs, customs complications and operational problems arising from abandoned cargoes; specifically, avoid the temptation of doing nothing in the hope that the problem will resolve itself.

Claims in China

There is a risk of claims from sellers against forwarders and logistics operators and/or their Chinese agents/network offices. If sellers fail to get paid owing to clerical or data entry problems, or because the buyer has received the goods but failed to pay, they are likely to claim against the party issuing the forwarder’s cargo receipt (FCR) or NVOC bill in China. Before any goods are released to receivers, operators should check that sellers have not issued stop notices to them or their Chinese agents/network offices or intimated a claim should the goods be released. LOIs provided by buyers/receivers should expressly cover this risk. If stop notices or claims have been intimated then operators are advised to seek legal advice.