**Marine insurance seminar 11 October 2023: Logistics insurance options and pitfalls**

The Norton Rose Fulbright SA marine insurance seminar held in Johannesburg was designed to shed light on the numerous aspects involved in the insurance of cargo and logistics operators as the cargo passed through various contractors’ hands between being discharged in a container from a ship until delivery of the unpacked contents of the container inland. This was against the backdrop of continuing consolidation in the logistics sector, massive aggregation of risks due to the growth in warehouse sizes and port delays, restrictive contractual terms and the wide range of products available.

This note is designed to remind attendees of the more important issues covered and should not be taken as formal advice on any particular aspect of this sector.

Under South African law, parties are free to contract on any terms they want provided they are not illegal or contrary to public policy. There is still no statutory regulation of the terms of logistics contracts in South Africa, so most companies have used this freedom to exclude, transfer or limit their liability. Many logistics providers have opted to contract for their services on the basis of STCs modelled on the FIATA or SAAFF STCs.

Most logistics operators subcontract many of their services which means that cargo interests and the various insurers involved must familiarise themselves with the inevitably complicated contractual chain. The importer may appoint a clearing agent who in turn, acting as an agent or a principal, appoints a road transporter from the ship’s side to a bonded warehouse, a warehouse to unpack the container and store the goods and a further road haulier to carry the goods to final destination.

Although South African courts allow for freedom of contract, exclusion or limitation clauses are always interpreted very strictly and hold the parties to the precise meaning of the clauses used. This has been confirmed by the Constitutional Court in the recent Schenker judgment. The court, whose judgements are binding on all other courts in SA, held that Schenker was entitled to rely on an exclusion of liability clause where the cargo owner had failed to follow the terms of the agreement relating to declaration of high value cargo, even in circumstances where the theft was caused by the employee of the warehouse operator. The Constitutional Court also held that such exclusion clauses are not against public policy and are Constitutional.

A practice has developed in terms of which many of those parties carry insurance which may result in a particular cargo or risk potentially being insured a number of times.

The logistics operators and carriers may have liability insurance which would cover them for their legal liability arising out of contract, delict/negligence or statute. The operator and insurer needs to make sure that they understand what liabilities may arise and in doing so need to properly understand the full contractual chain because risks may flow up and down that chain in the form of exclusions or indemnities.

Broadly speaking, a cargo interest with an insurable (financial) interest in the cargo can insure the cargo under a standard “goods in transit” policy or in terms of a stock throughput policy (to cover longer storage periods) and for operators to insure their liability and/or insure goods in their possession as a bailee. As a bailee, the transporter and warehouse operator do not own the cargo, but are entitled to insure, under South African law, the full value of the cargo. They are however obliged to account to the cargo owner for any indemnification paid to the bailee.

Insurers must take care that they indemnify the correct party under the appropriate insurance. This is particularly so when there is the prospect of a recovery. Insurers are only subrogated the rights that the indemnified insured had, If the insured had no rights of recovery, then the insurers will be left with a hollow right of recourse because they have effectively made an ex gratia payment.

To prevent this, all of the parties in the logistics chain need to understand where risk in and to the particular cargo lies insofar as the purchase and sale of the cargo is concerned, and insofar as the contractual terms for carriage and storage are concerned.

One of the statutory liabilities that may arise is under the Customs & Excise Act in terms of which SARS is entitled to look to various parties in the logistics chain for payment of import duty and VAT where the goods are not cleared inwards by the South African importer. This would include, depending on where the cargo is when it disappears, the shipping line, the road haulier, the bonded facility and all of those parties’ agents.

The effect of all of the above is that insurers and brokers, need to scrutinise all of the contracts involved in the purchase and the transport/storage of cargo to ensure they properly understand the risk each party in the chain has accepted and wishes to insure.