Calculating cargo exposures for International Sea Transport Intermediaries / Operators

1. This article focusses on International transport intermediaries / operators acting as contractual carriers (who in turn, contract with an overlying or the actual/performing carrier, for the performance of the actual carriage). The aim of the article is to draw attention to the various conventions in play in International Sea Transport and the interplay between them together with the UK Marine Insurance Act 1906 so that transport intermediaries / operators can ascertain their exposure arising in the event of a major casualty and in this way assist in planning their risk management processes.

2. In order to ensure that there is parity between the cargo interests and carriers, various cargo conventions were formulated. The cargo conventions would be incorporated into the contracts of carriage either by force of law (by way of legislation in the countries from where the shipments are being effected) or by way of contractual incorporation (by way of the Clause Paramount).

3. With respect to sea transport, the cargo conventions whilst allowing the carrier to exclude liability in certain circumstances also permit them to limit liability in the event they are unable to exclude liability. The limitation is either on the basis of package (The Hague Rules) or on the basis of package and weight whichever is higher (The Hague Visby, The Hamburg & The Rotterdam Rules). The limitation figures of the various conventions are as follows

i) The Hague Rules: The Hague Rules allow a carrier to limit liability at GBP 100 per package (Art IV Rule 5). Further, Article IX of The Hague Rules mentions that the monetary units mentioned in the convention are to be taken at Gold value (see "The Rosa S" [1989] QB 419). Basis this, the package limitation would be more than the amounts available under comparable package limitation available say under The Hague Visby Rules.
ii) The Hague – Visby Rules: The Hague Visby Rules allow a carrier to limit liability to Special Drawing Rights (“SDR”) 666.67 per package or SDR 2 per Kg whichever is higher (Art IV Rule 5 a).

iii) The Hamburg Rules: The Hamburg Rules allow a carrier to limit liability to SDR 835 per package or SDR 2.5 per kg whichever is higher (Art 6 Rule 1a).

iv) The Rotterdam Rules: The Rotterdam Rules allow a carrier to limit liability to SDR 875 per package or SDR 3 per kg whichever is higher (Art 59).

v) Invariably, the contracts of carriage would be governed either by The Hague or The Hague – Visby Rules. Having said that, given that there are more than 20 signatories to The Rotterdam Rules, we anticipate that The Rotterdam Rules would soon come into play especially for shipments to and from Europe and USA.

vi) As the main conventions are still The Hague Rules and The Hague Visby Rules, by way of an example, we calculate below the workings to ascertain the limitation figure for details shown in a Bills of Lading stating as follows: “1X 20’ said to contain 200 drums of lubricating Oil weighing 27,000 kgs (gross)” Based on this, a carrier would be entitled to limit liability under The Hague and The Hague Visby Rules as follows:

a) The Hague Rules : Package Limitation – 200 cartons X GBP 100 per package = GBP 20,000 (check the Gold value as decided in The Rosa and which is estimated to be above the package limitation amount of The Hague Visby Rules. However, in some countries, the convention is legislated showing the limitation figure in their corresponding local currency i.e. no Gold value and this is certainly beneficial to the carrier).
b) The Hague – Visby Rules:

I. Package Limitation – 200 cartons X SDR 666.67 per package = SDR 133,334 (approx. USD 206,084 – conversion done used www.xe.com/ucc on the date of publishing this article)

II. Weight Limitation – 27000 kgs X SDR 2 per kg = SDR 54,000 (approx. USD 83,462).

III. The limitation amount would be USD 206,084 as this is the higher amount.

vii) A carrier could estimate their exposure by calculating the maximum amount of cargo loaded in any one vessel (commonly known as any one bottom). In this way, they would be able to work out both their potential exposures and the estimated limits of liability available to them in any one incident.

4. Limitation is a very strong defence and only in very limited circumstances, a carrier would be unable to limit liability and instead may be liable for the complete value of the cargo. This may be due to the carrier releasing the cargo without the original bills of lading or due to any conduct barring limitation (“act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result - – Art IV Rule 5 e of the The Hague Visby Rules). However, such instances would be very rare considering that one of the primary duties of the carrier is to deliver the cargo to the holder of the original bills of lading and further as this paper deals with intermediaries (who do not perform the transportation but in turn contract with overlying carriers), it is inconceivable that they (intermediaries) would have any knowledge or intent of the actual / performing carrier which would permit the breaking of limitation.

5. In addition, Owners are entitled to limit liability as provided under the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ship, 1957 (commonly known as the “1957 Convention”) and
Convention of Limitation of Liability for Maritime Claims, 1976 (commonly known as the “1976 Convention”). Both these conventions permit Owner, Charterer, Manager and Operator of the ship to limit liability on the basis of the gross tonnage of the vessel (See Article 6 (2) of the Conventions which have broadened the parties entitled to seek the benefit of these conventions). This being the case, in order for a transport intermediary to come within the ambit of the 1957 or the 1976 Conventions, they would need to fall within one of the classes i.e. Owner, Charterer, Manager or Operator. Although, there are advantages of coming within the convention, given that most transport intermediaries will not fall within one of the classes (unless they act as slot charterers and in which cases they would be considered as charterers), we are only touching on this aspect briefly.

6. The 1957 and the 1976 Conventions allow the Owner/Charterer/Manager and Operator to limit liability for all claims. In the case of a major casualty, this would be of importance as the total pay-outs would include for all claims (Personal, Property, etc) and in this way, the actual cargo pay-outs would be lesser than the amounts provided under the cargo conventions (The Hague, The Hague Visby, The Hamburg or The Rotterdam Rules). While the limitation figure under the 1957 convention is lower, it is not unbreakable vis-a–vis the 1976 convention which has a higher limitation figure but a more difficult regime to break.

7. In some jurisdictions, in order to operate as a transport intermediary, transport operators must have sufficient insurance for their role. This is not a rule for all as we are aware of other jurisdictions which have no such requirements. Prudence however dictates that one should estimate one’s potential liabilities and then decide on the best form of risk management and which should include Transport Liability Insurance. The Insurance would cover, amongst others, Cargo and Related Liabilities (in some policies commonly known as the Bill of Lading cover), Equipment, Third Party, E&O, Costs, Fines & Duties, etc.
8. The Insurance cover would provide a deductible and a limit (exposure) applicable for any one incident or occurrence ("aiooo") together with an aggregate limit for the policy year. While this article would assist in ascertaining the exposure in any one incident, Transport Operators / Intermediaries should also consider the aggregate limit available under the policy so that they do not fall uninsured due to these limits being breached.

9. Most of the Transport Liability policies would incorporate the UK Marine Insurance Act 1906.

i) S 1 of the Marine Insurance Act 1906 ("MIA 1906") states “A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure”. Hence, the parties to the contract may agree on the manner and extent of indemnity available to the Insured in case of a loss covered by the policy.

ii) S 74 of the MIA 1906 deals with Liabilities to third parties and states “Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability”.

iii) By looking at the interplay of S1 and S74 of the MIA 1906, unless the policy expressly provides otherwise, S74 of the MIA 1906 would apply to determine the indemnity available to the Insured. This being the case, if the Insured can ascertain the amounts he would be liable (irrespective of the actual claimed amounts), he could seek cover for these amounts. There would be costs incurred in defending the claim but this would in any event fall for coverage under the policy (unless they are already included in the indemnity provided under the policy).
9) In summary, to assist in the risk management process, transport intermediaries / operators should:

i) Estimate the exposure in any one vessel together with the limitation figure available under the relevant cargo conventions (The Hague Rules, The Hague-Visby, The Hamburg and The Rotterdam Rules).

ii) Ascertain whether they would come within the ambit of the Global Conventions (1957 or 1976 Conventions).

iii) Ensure that they have liability cover at least for these limits (as per i) and ii) above) so as to avoid being underinsured.

iv) Check the aggregate limit under the policy to ascertain its sufficiency.