



***PYSDENS SOLICITORS***

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## **What Cost the Migrant Crisis to Carriers and logistics Operators?**

Inevitably the migrant crisis is causing problems to the transport corridors in the European region as border control checks are introduced to try and stem the flow. Any carriers and logistics operators using these corridors will be suffering delays to journeys. How will this affect them and their customers financially and are they protected sufficiently against any costs and expenses?

Customers may be claiming for losses arising out of delays. The first question to ask is whether the delay is in fact unreasonable or not or alternatively in breach of a specific delivery time agreed and then if it is unreasonable or in breach of agreement, whether or not there are any defences available. It will be easy to assess if a specific delivery time has been agreed and breached but not so easy to assess reasonable delay. The situation is changing constantly across the European region as individual countries seek to resolve issues with high numbers of migrants crossing their borders and it is difficult for carriers and operators to do anything about the changes once the route has been planned and is in execution. It becomes more of a tricky consideration when they are on notice of changes and able to re plan journeys to avoid problems.

Is it possible to raise a defence clause in response such as the one in the BIFA Conditions that provides for the operator to be relieved from liability in the event that they are unable to avoid any cause or event and cannot avoid the consequences of this by exercise of reasonable diligence? The CMR Convention has a similar defence available at Article 17.2. Reliance on this defence is difficult in terms of proof for the operator. For example, if they wait in line in the event of delays is this exercise of reasonable diligence or should they turn round and seek another route or indeed do so earlier before getting into a queue? It would be virtually impossible to know if taking another route would improve or worsen the situation as the position with regard to border controls is ever changing at present but there are likely to be contentious situations arising where customers are not convinced that reasonable diligence has been exercised.

Carriers and logistics operators are often in a position to rely on other helpful clauses in their conditions to protect themselves in situations such as these. By way of example, The BIFA Conditions provide an indemnity for all liability, loss, damage, costs and expenses whatsoever arising out of the company acting in accordance with the instructions of the customer. The operation of this clause is wide, but to take full benefit of it you need to keep in close contact with your customer and be ready to offer options and, in the beginning, to ensure adherence to instructions. The conditions give you full liberty as to route and procedure but if the route and procedure chosen causes problems be ready to explain the situation to your customers and to give advice on alternatives as if they choose a new route and instruct that to be taken and that is problematic as well then any cost and expense arising from that will be for their account under the indemnity clause providing the advice given is not an actionable misrepresentation.

Carriers and logistics operators may be tempted to seek to introduce waiting time costs or surcharges to cover the problems faced during the crisis but there are potential problems with this. Firstly, if you cover the problem by agreement then the indemnity cannot be relied upon and you have to ensure that the charge introduced does cover the cost to avoid any losses. It is for you to prove that the cost is a reasonable one. It may be insufficient and then you lose the benefit of the indemnity and if it is too high it could be assessed as a penalty and therefore unenforceable. It is always best to consider first if there are any mandatory or private conditions that apply which may help you to recover any costs and expenses before considering the introduction of new charges which can be damaging to client relations and are difficult to justify or to set effectively to defray the losses.

The benefits of discussing and explaining the position to customers should not be underestimated. It is an opportunity to remind them of the conditions that govern the contract of carriage and give them the opportunity to give instructions whilst reminding them of the consequences of doing so. Keeping the customer advised is more likely to avoid a breakdown in the relationship if the situation becomes protracted and the customer feels they are more in control if allowed to make a decision on potential amelioration of the problem.

Finally it is worth looking at your conditions to check if they are fit for purpose and afford the protection you need and most importantly that you have the properly incorporated the conditions into your contracts of service to ensure that you are able to rely on them if necessary. If you are offering fixed delivery times it should be made very clear that these are subject to the operation of a force majeure clause. Whilst this crisis continues it may be worth considering withdrawing any such fixed delivery time services or considering an increase in price. We, at Pysdens, are able to assist with consideration of contractual protections for those operating in the carriage and logistics sectors as well and importers and exporters who are experiencing problems in this area.

***We at Pysdens Solicitors make every effort to keep our expenses to a minimum in order to pass our savings to our clients. Our fees are very competitive which, in times of economic difficulties, is important to consider. Our policy is to resolve disputes early rather than to litigate.***

**Disclaimer: This is not legal advice. We cannot advise any party to act based on this report without first consulting a specialised solicitor. The opinions in this report are those of the writers.**

Note: In producing this press release by Pysdens Solicitors, the model published in the book entitled "GUIDELINES TO CONSIDERATION IN RESPECT OF COMMERCIAL DEALINGS" by S. Perez-Goldzveig and K.Pysden forming part of the research and development programme "COMMERCIAL GUIDE INITIATIVE" by S. Perez-Goldzveig and K.Pysden being part of "TheHouseofBranchofGold" was used with the authorisation of the authors.

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