



## Clear as mud

### How courts interpret shipping contracts

The late humourist Will Rogers got it (mostly) right when he declared: “The minute you read something and you can’t understand it, you can almost be sure that it was drawn up by a lawyer. Then if you give it to another lawyer to read and he don’t know just what it means, why then you can be sure it was drawn up by a lawyer. If it’s in a few words and is plain and understandable only one way, it was written by a non-lawyer.”

It’s fun to joke, but misunderstanding a contract is no laughing matter.

What if the language of a contract, including a bill of lading or a contract of carriage, is unclear and could have more than one meaning? What if the words used are imprecise or ambiguous and the real intentions and expectations of the parties can’t easily be determined?

What if the business relationship between the parties fragments or ruptures, and differences arise over a party’s performance or efforts expended under a contract? What if a party has breached an agreement and a civil action is commenced in court?

Lots of shippers have to deal with these questions more often than they’d like. Contracts with carriers, 3PLs and other service providers are complex and deserve meticulous attention. To make sure you’re signing the right kind of deal, it is useful to understand the legal implications at play.

#### What the law says

It helps to understand how the courts determine and give effect to the meaning of business contracts. They base their decisions on the words, phrases and sentences used in the contract itself, as well as other communications—verbal and non-verbal—made in its negotiation, formation and performance.

Often, the courts turn to the principles of contractual interpretation.

In a recent decision, the Ontario Court of Appeal succinctly summarized key principles that apply to the interpretation of commercial contracts.

Broadly stated, a commercial contract is to be interpreted:

- As a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

- By determining the intention of the parties in accordance with the language they have used in the written document, based upon the cardinal presumption that they have intended what they said;
- With regard to objective evidence of the facts underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and
- To the extent there is any ambiguity in the contract, in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.

Where the language of a written contract is clear, extrinsic evidence is not admissible to alter, vary, interpret or contradict the words used in the contract.

If there is ambiguity, the courts may have regard to the surrounding circumstances underlying the negotiations, provided objective evidence of this is available.

Finally, in certain circumstances, the court can consider not only the particular contract that is being interpreted, but other surrounding contracts as well. A good example of this occurs in large commercial transactions—like a major freight buy—where several agreements essentially form components of one larger transaction. Where each agreement is entered into on the faith of the others being executed, and where it is intended that each agreement forms part of a larger composite whole, the courts may use those related agreements to interpret the contract at issue. This helps establish what the parties really intended the contract to express.

The principles of contractual interpretation help lead the courts to the true intent and reasonable expectations of the parties at the time of entry into the contract against its objective contextual scene. Using these principles, the courts strive to produce a fair and sensible commercial result.

#### Remember, they’re just guidelines

These and other interpretive principles are only guidelines to help steer businesspeople in the right direction; they are not rigid rules of law to be mechanically applied according to some fixed formula.

Each case presents its own facts and circumstances. Although to some degree previous judicial decisions about the meaning of one contract may affect a decision on another, the ultimate decision must depend on the language of the particular contract in question, interpreted in the light of the commercial context in which it was made.

Ultimately, you want to make sure that your shipping contracts—whether drafted by lawyers or others—are clear and reflective of your true intents and expectations. This will make them much easier to interpret should a dispute occur. By taking this approach, the courts, and shippers, can effectively overcome the two things that are wrong with most legal writing: style and content.

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