



Do your due diligence

Protect your supply chain from liability

“Have you seen a man diligent in his business? He will stand before kings.”

(Proverbs 22:29)

In our uncertain and challenging environment, mitigating risk is all about being diligent. This, according to Black’s Law Dictionary, means you have to be “attentive and persistent in doing a thing; steadily applied; active; sedulous; laborious; unremitting; untiring.”

Let’s move away from legal texts and talk about what diligence means in your day-to-day business.

Shippers are increasingly exposed to risk. As supply chains are outsourced and spread across the world, more opportunities for problems emerge. These problems can create costly litigation and legal liability—which can threaten the very survival of many companies.

Why is this the case? Let’s look at one sobering precedent. In the case of *Schramm v Foster*, a US federal court opened the door to increased liability for shippers, brokers and 3PLs who neglect to use “reasonable care” in hiring motor carriers. A jury determined that a company was negligent in hiring a transport carrier who caused a catastrophic motor vehicle accident that severely and permanently injured two people.

Based on a established and developing Canadian law, it is likely that a Canadian court would also hold a shipper, broker or 3PL liable for damages for negligently hiring a transport carrier.

This makes legal liability for personal injuries, death and damages resulting from a carrier’s operations a very real threat.

Simply put, shippers must develop more effective risk management programs and exercise better due diligence.

What to do

To minimize exposure to liability, every shipper or broker should take the following steps before contracting out any logistics services, and update the information regularly:

1. Verify and update on a regular basis the carrier’s operating authority and licensing data.
2. Check the safety statistics and evaluations of the carrier with whom you contract. The federal National Safety Code for Motor

Carriers includes 16 standards; ask your carrier to prove it is meeting them. Some provinces issue other ratings for carrier safety. If the carrier is based out of the US, comprehensive safety information is available on the SafeStat database maintained by the Federal Motor Carrier Safety Administration.

3. Maintain internal records about your main contact person at the organization with which you are contracting. Make sure that they are not manipulating their business practices in order to avoid poor safety ratings.
4. If your carrier does not have a government safety rating, ask why. If you still wish to contract with them, investigate and evaluate the carrier’s safety-control measures on your own.
5. Select carriers that operate according to recognized standards of care.
6. Verify on a regular basis the carrier’s insurance coverage. Don’t just take a slip of paper as proof; inquire about the financial soundness of the liability insurer.
7. Be sure to conduct appropriate background searches with respect to your carrier and its drivers/personnel.
8. Ensure your internal due diligence procedures are strictly followed, with all discrepancies recorded.
9. Include in the contract of carriage express provisions that impose stricter obligations on a carrier with respect to the condition of vehicles, the character and qualifications of drivers/personnel and its performance during the carriage of cargo.
10. Include in the contract of carriage express provisions that protect you as a shipper, broker or 3PL provider from liability—or at the very least limit your exposure to liability—if a carrier is negligent.

Diligence pays off

Smart businesses have begun to take these steps in efforts to seriously address risk management.

“There are a lot of good things coming out in supply chain and risk mitigation,” confirms Dalia Raheja, president and CEO of management consulting firm Mpower Group.

However, Raheja adds that there is lots of room for improvement, particularly across the broader supply chain. “While by and large shippers do a good job of managing risk in a single process or within a single contract, we don’t find a lot of managing of risk across the entire supply chain.”

The risks shippers face when contracting out supply chain activities are undeniable. Loud warning shots have been fired. Are you prepared for the clear and present dangers facing you? Can you effectively address them?

When you recognize the risks, you can develop and implement a strategy to minimize, control and even avoid them. That strategy should factor in to every business decision you make. Don’t delay. The time for change is here. Your due diligence will be richly rewarded.

MM&D

Marvin Huberman, LLM (www.marvinhuberman.com), is a Toronto lawyer, mediator and arbitrator, and is certified by the Law Society of Upper Canada as a specialist in civil litigation.