



<u>Liabilities and tailor made insurances for the Belgian Freight Forwarder or NVOCC</u>

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Anno 2019: (a selection of) legal challenges in the Belgian sector of the freight forwarders

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# LIABILITY AND INSURANCE – IMPORTANT!

#### LIABILITY VS OWN DAMAGE INSURANCE



- Liability insurance (such as "transport operator" liability insurance)
  - = insurance cover for legal liabilities + "approved" (by underwriters) contractual liabilities (general conditions and/or contracts)

LIABILITY of the assured is a condition for payment under the policy

- Own damage insurance (such as cargo / container insurance)
  - = a property insurance (insurance cover for damage to and/or loss of cargo, containers, ...)

LIABILITY of the assured IS NOT a condition for payment under the policy



# 2 LEGAL POSITION OF THE "FREIGHT FORWARDER"

#### FREIGHT FORWARDER'S ACTIVITIES



"Involved" in the supply / logistics chain:

- Transport contracts / contracts of carriage with actual carriers
- Warehousing and related activities (loading, discharging, packing, order picking, bagging etc)
- Customs formalities
- NVOCC / issuance of House and/or FIATA Bills of Lading

#### WHAT IS A FREIGHT FORWARDER?



- = an intermediary
  - ! But can have 2 faces :
- Freight forwarder as Agent ("commissionair-expediteur"):
  - "arranges" / "organises" transports of goods.
  - merely contracts to make transportation agreements on behalf / for the account of the shipper
  - Commits to organising / arranging transports, warehousing, customs formalities etc
- Freight forwarder as Principal ("commissionair-vervoerder"):
  - contracts as ("paper") carrier of the goods;
  - Commits to a transport / carriage
  - With or without issuing a transport document (example : acting as NVOCC carrier and issuing a FIATA or House Bill of Lading)



#### Principal or Agent?

- Use of General Conditions (own or from their Professional Association)
- AVEB, BIFFA, FENEX, HAFFA, ADSp
- Try to limit their exposure as being considered as Principal
- Limit the maximum liability limit exposure
- Limit the liability per gross kg
- Limit the time bar for claims
- Limit the liability exposure in general
- However : if considered to be a Freight Frowarder as Principal :
  - Liability exposure as Carrier!

Example: NVOCC carrier issuing a FIATA or House Bill of Lading



#### Opposibility of General Terms & Conditions (GTC):

- Required:
- (a) (give) knowledge of your GTC (to) by your principal prior to concluding the contract = latest when sending out your quotation
- (b) acceptance of the GTC by the principal (for example by accepting the offer as per (a) above)
- How? What will be accepted by a Court / Tribunal?
- i. Registered letter ?
- ii. In pdf attachment to a quotation email?
- iii. Link to website?
- iv. Reverse side of invoice ?
- v. Common practice ?



#### Important remark:

 Freight forwarder as agent: becomes the contractual counterparty of the carrier he is contracting with



- An agent: commits its principal, meaning that the contractual relationship (contract of carriage) will be deemed to be concluded between the principal of the agent and the contracted carrier; the agent itself does not assume personal contractual obligations within the framework of that contract of carriage
- Freight forwarder as agent acts in its own name but for the account of its principal (not revealing its client's name)
- Agent: acts in the name and for the account of its principal (must reveal the identity/name of its client)

#### REQUIRED LIABILITY INSURANCE



Depending on the intervening capacity (freight forwarder as agent / as principal) the required main liability to be insured might differ.

To avoid gaps in the cover and in view of the regular discussions regarding the capacity of the "freight forwarder", it is recommended to always extend the cover to include both capacities.

The to be covered liability might be legal or contractual:

- Legal ( = liability out of legislation, regulations, Conventions)
- Contractual ( = liability out of general conditions or contracts "approved" by underwriters)

#### Main liabilities to be covered:

- Cargo liability ( = contractual liability)
- Professional indemnity liability ( = errors & omissions / = contractual liability)
- Customs liability (strict legal and contractual)
- Third party legal liability

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**Transport Operator Liability** 

# Covers (www.post-co.com)

#### **Transport Operator Liability**

**Terminal operator Liability** 

**Professional Indemnity** 

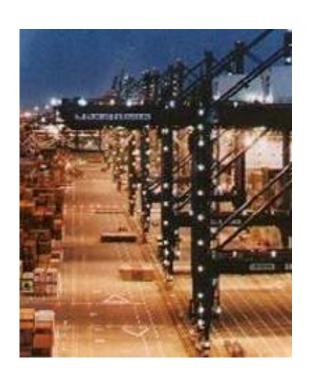
Carrying Equipment

Handling Equipment

Cargo Insurance

**Charterers Liability Insurance** 

**Others** 



## **Main Focus**

- **Transport Operator liability** 
  - Freight Forwarders (Agent/Principal)
  - NVOCCs
  - Logistics Service Providers
  - Hauliers/Barge Operators and other disciplines
- Professional Indemnity
  - Transport Intermediaries (ship agents, ship brokers, ship managers)
- Combinations with:
  - Property
  - Equipment
  - Business Interruption
  - P&I/Charterer's Liability
  - Cargo All Risks (Shipper's Interest policy)



### **Insured activities**

- Freight forwarding (as principal and as agent)
- NVOCC (House B/L or FIATA)
- Road Haulage
- Container/Trailer Freight Station (consolidation)
- Warehousing and warehouse related activities
- Local collection/delivery
- Ship agency / ship management
- Customs Liabilities
- Fiscal representation
- •



## **Insured risks**



#### **Contractual liabilities:**

- physical loss of or damage to customer's cargo, customer's property and customer's vessels \*
- financial loss/E&O

#### **Legal liabilities:**

- physical loss of or damage to third party property
- illness, bodily injury or death of any third
- financial loss incurred by third parties for which Assured is legally liable
- authorities

#### **Additional covers:**

- Property and/or handling equipment and/or carrying equipment and/or cargo insurance
- Legal assistance on uninsured risks
- Cargo insurance



# **Contractual liability**



#### Tailormade and based on:

- Any standard trading conditions developed by transport, freight forwarding, ship agency, ship broking or warehouse association
- National and/or international laws or Conventions
- Assured's approved standard trading conditions
- Approved special contracts



## Legal liabilities

- National and international public Laws
- Breach/setting aside liability limits in contracts/Conventions/Laws due to gross negligence/gross fault
- Customs Laws and Regulations/ Immigration Laws etc.

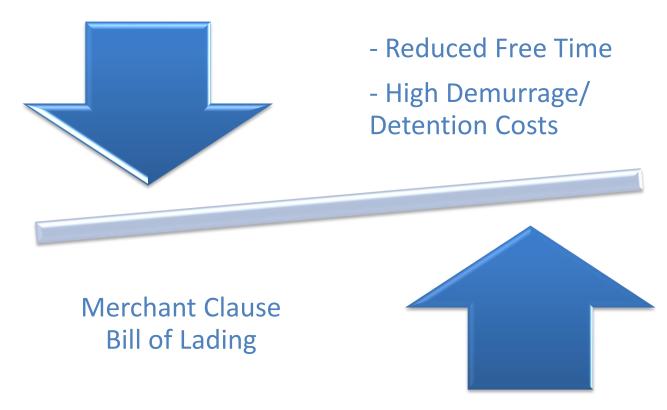


ROTTERDAM - FRANKFURT - ANTWERP - SEOUL

# Anno 2019:

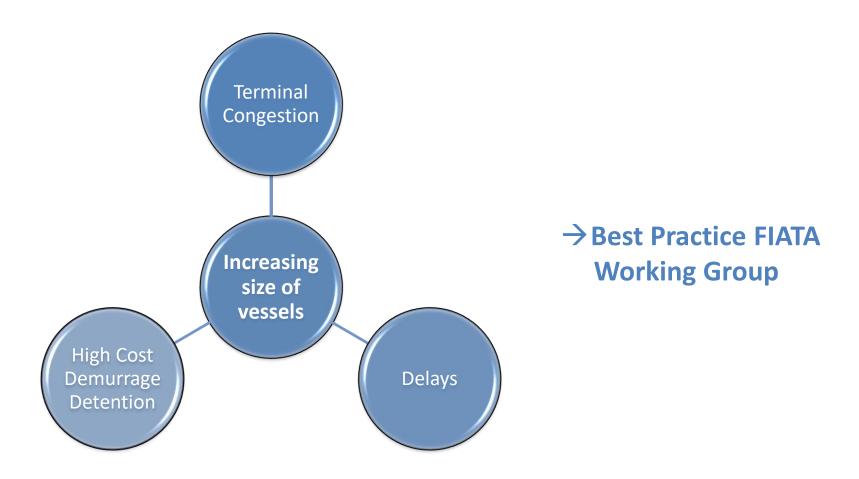
(A selection of ) Legal challenges in the Belgian sector of the freight forwarders 1. Merchant clauses in bill's of lading

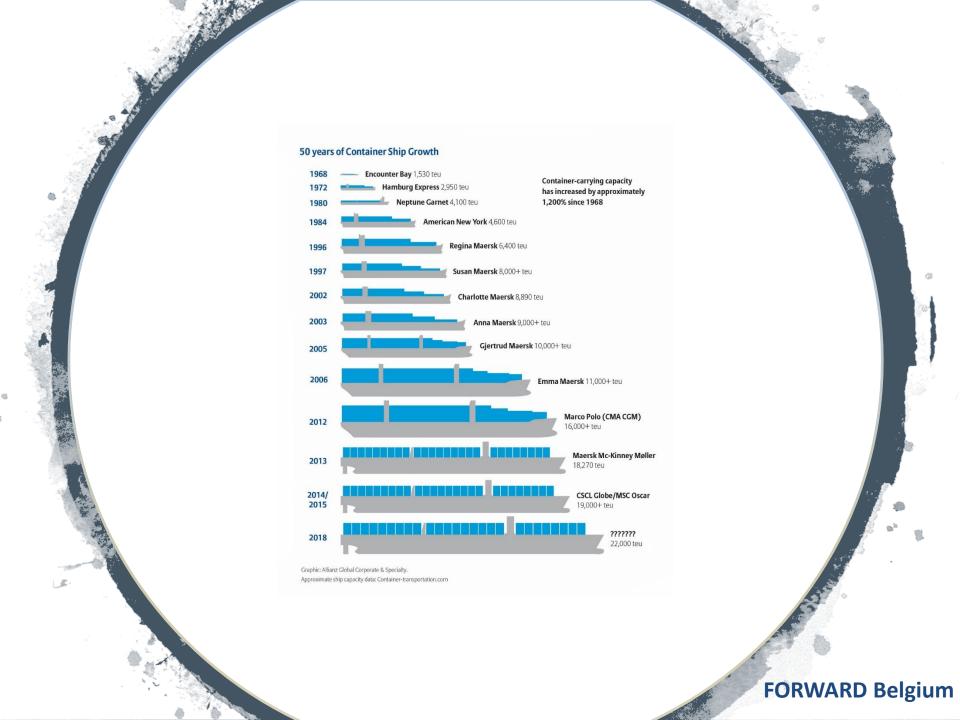
# 1.a Demurrage/detention in relation to the Merchant Clause.



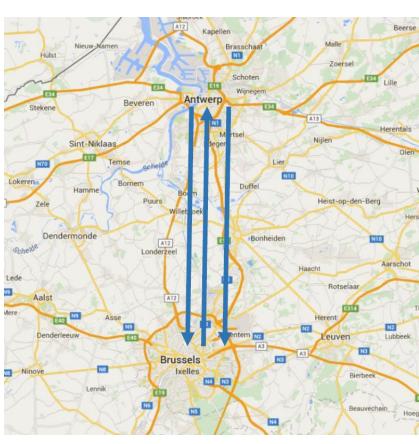
→ Best Practice for the Sector

# 1.b. Terminal Liability in relation to Megaships and Congestion









# Merchant

Merchant: includes the Shipper, Consignee, holder of this Bill of Lading, the receiver of the Goods and any Person owning, entitled to or claiming the possession of the Goods or of this Bill of Lading or anyone acting on behalf of this Person.

In other words: everybody involved in shipping contract



# Demurrage / detention

Demurrage: charged by carrier for use of shipping containers (calculated per day beginning after free time)

☐ Detention: charged by terminal beyond free time for storage of container.

(ratio: to avoid having containers used as cheap storage)



# Legal position in Belgium

□Storage / demurrage / detention: considered as damages.

Requires missive in order to claim (Court of Commerce Antwerp, 19th October 2010, A.R. A/08/2703). Application of Belgian Civil Code (art. 1146)

Possibility for courts to mitigate and lower.



# Legal position in Belgium

☐ Duration / max. demurrages?

"Illegitimate to keep the contract open for the sole purpose of claiming demurrage if it is clear that no such loss is being suffered" (High Court of Justice Queen's Bench Division (Comm. Court) 12<sup>th</sup> February 2015

Confirmation of earlier decisions in which total amount could be mitigated + in case container not returned after 1 year (presumption of loss) and max. claim max. 1 year (Court of Appeal Antwerp, 18<sup>th</sup> March 2019, 2015/AR/2304)



# Minimalisation / avoidance of risks

- ☐ Think ahead: optimisation of logistics chain (incl. time buffer and delays)
- □ Plan B: alternative ways of transport in case of congestions (added value of freight forwarder)
- □ Be informed: knowledge of general conditions (€ / day), port and terminal customs
- Negotiate: € / day unlikely, but free time

☐ Custom representation in Belgium by customs agent

Direct vs. indirect representation (Until recent: in reality, solely indirect representation)

Pressure freight forwarder's association (VEA now Forward Belgium): direct representation

☐ Custom claims Direct representation: vs. cargo beneficiary (mentioned on declaration) Indirect representation: vs. (1) cargo beneficiary (mentioned on declaration) AND (2) (!) freight forwarder ☐ Indemnification by FF against customer: all costs, custom duties, fines, ... Courts: customs agents not to be considered as bank ☐ Issues: timeframe (e.g. import 2011 vs. customs claim 2019...; bankruptcy; insurance; liability (?);

**□** Example

2010: customs declarations

2013: customs claim (additional VAT + import

duties)

2013: settlement by customs agent with customs

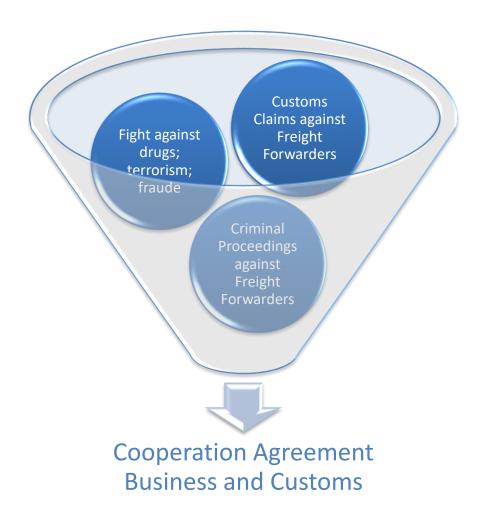
(+- 500.000 €)

2013: court procedure commenced

2015: Court in favour of customs agent: can recover

all costs and rights paid + interests (+- 600.000 €)

2019: Appeal in **favour** of customs agent



- Cooperation Agreement Forward Belgium and Customs
  - Improve cooperation
  - Improve & support compliant behavior of bonafide operators
  - Control focus on the malafide operators
  - Pro active approach
  - Enhance compliant behavior of operators
  - Mutual and legitimate trust between both parties

### Thank you for your attention!

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RISKY BUSINESS &RISKMANAGEMENT

**Katy Rijnders** 

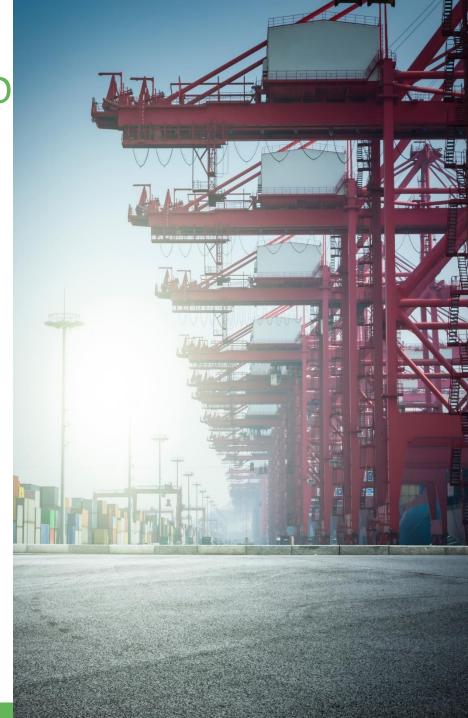
- Total loss of cargo physical cargo damage / theft (while in the custody of the freight forwarder)
- Financial loss
   if the customer does not pay
   after the performance of
   services
- Damage of cargo due to incorrect or improper packaging of the cargo, incorrect or improper handling of the cargo (while in the custody of the freight forwarder)



- Rerouting of cargo
   if the documentation
   submitted to the carrier by
   the freight forwarder was
   incorrect and cargo ended
   up in another continent
- Abandonment of cargo may happen if the consignee who was supposed to receive the cargo suddenly abandons it due to lack of funds, cancellation of the order etc.



- Non collection of documents when there is HBL involved and the freight forwarder releases cargo to the consignee while the shipper is still holding the original HBL because he has not yet been paid by the consignee
- Incorrect release of cargo if the cargo was released by the freight forwarder to the incorrect party based on the type of bill of lading issued.. For example if cargo was released to the consignee on a negotiable bill without proper endorsements on the bill of lading



#### Delays due to improper documentation

Receipt of cargo at destination was delayed due to incorrect documentation submitted by the freight forwarder to the carrier or incorrect cargo declarations were filed with customs or any other types of cargo documentation done by the freight forwarder which caused this delay

#### Consignee abandoned the cargo

because the costs for delivery of the cargo was more than the value of the goods.. If the cargo delivery costs increased due to negligence on the part of the freight forwarder, for example the freight forwarder did not notify the customer of the arrival of the cargo or they did not do the clearance of the cargo in time and cargo incurred demurrage, detention and storage..

- Risk of carrier's liability

   a freight forwarder maybe
   liable as a contractual
   carrier if:
  - They have negotiated the rates for the entire carriage of the goods with their client (say shipper or consignee)
  - They have issued their Bill of lading for the carriage

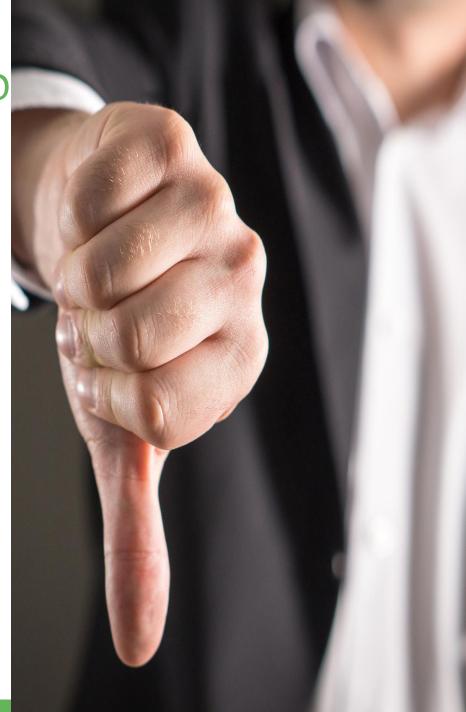


- Nevertheless you might have a claim on your hand, liable or not..
- in ALL of the above cases, there is a chance that the freight forwarder may be liable, BUT LIABILITY NEEDS TO BE PROVEN (error/negligent behavior)..



In practice the forwarder is often mentioned in the bill of lading as the shipper - without any awareness of the consequential liabilities...

○ INSURERS DO NOT LIKE THIS....



RISKMANAGEMENT Bill of Lading

- avoid as much as possible to be included in the Bill of Lading... by naming the actual shipper...
- relationships tend to change once the freight forwarder is addressed by the shipping line... and the shipper/consignee cannot /will not pay for the demurrage costs of goods that are never picked up...



- Dut while the freight forwarder takes care of all above on behalf of the client, considering the risks involved and their vulnerability, a freight forwarder must also ensure that they are properly protected and covered for the risks that they have taken on..
- a freight forwarder can be held liable for any of the above issues, especially when the customer could claim that the freight forwarder was negligent..
- The onus then falls on the freight forwarder to prove



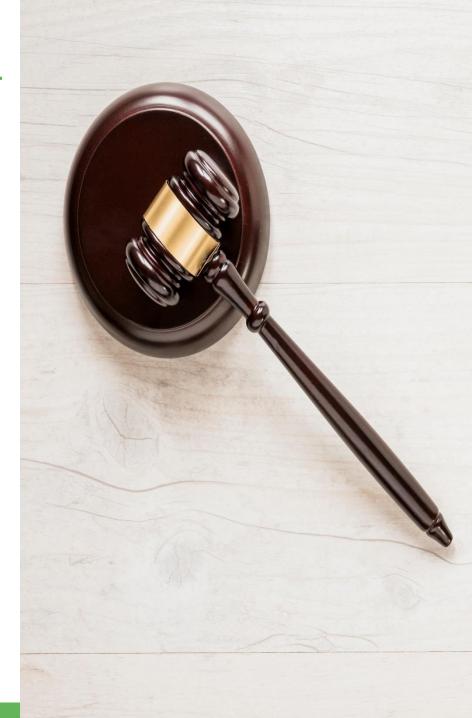
.... As a freight forwarder, you need to ensure that your cover is adequate to cater for potential claims... based on your business volume and the probability of damages...



- Therefore, all freight forwarders need to have or be sufficiently covered for:
- Marine liability cover for overseas trades
- Full liability protection to cover all forwarding operations
- Third party liabilities



- Regulatory breaches
- Errors & Omissions and Legal Liability – all freight forwarders maybe exposed to contractual liability for a loss, irrespective of who is responsible
- Survey and mitigation costs
- General Average and Salvage Charges including cargo disposal as in some General Average situations freight forwarders also could be roped in
- Legal representation & fees



 A comprehensive Liability Cover and Risk management (contractmanagement)



= contractmanagement = screening of contracts |
Back to back





= screening t & c's from shipping

- Bookings with shipping lines are "subject to the terms and conditions of the line's bill of lading", of which you are notified at a much later stage - once the shipment has been effected..
- CMA-CGM
   Shipment shall be subject to CMA CGM bill of lading terms and conditions available in any CMA CGM agencies or on CMA CGM web site: <a href="https://www.cma-cgm.com">www.cma-cgm.com</a>
- THIS BOOKING CONFIRMATION IS SUBJECT TO THE TERMS AND CONDITIONS OF OUR BILL OF LADING OBTAINABLE FROM THE CARRIER OR THE CARRIERS WEBSITE AT: <a href="https://www.hamburgsud-line.com/hsdg/de/hsdg/termsofuse.jsp">www.hamburgsud-line.com/hsdg/de/hsdg/termsofuse.jsp</a>



= screening t & c's from shipping

Hapag Lloyd
Hapag-Lloyd AG is operating under the terms and conditions of its bill of lading or sea waybill depending on which document will be issued for the shipment. Our terms and conditions will be provided to you upon request or may be viewed at any office of Hapag-lloyd AG or its agents or under www.hapag-lloyd.com

#### **Safmarine**

This contract is subject to the terms, conditions and exceptions, including the law & jurisdiction clause and limitation of liability & declared value clauses, of the current Safmarine Line Bill of Lading (available from the Carrier, its agents and at terms.safmarine.com/carriage), which are applicable with logical amendments (mutatis mutandis).



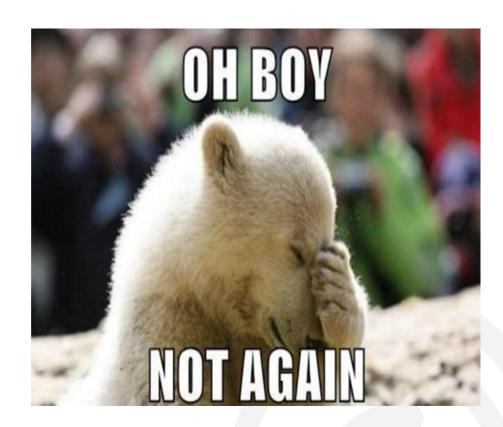
= contractmanagement = negotiate a favorable contract

#### Try to:

- Limit demurrage/detention to max amount
- Extend free limit time



- = applicability of your t & c's
- Exclude liability for demurrage and detentionreduces disputes
- Make sure that the t & c's apply....to limit your liability



- = applicability of your t & c's
- Active offering of All risk Insurance
- approved contract



### **Approved contracts**

# The agreements and





their unholy clauses

## RISKMANAGEMENT Approved contracts

#### Coverage:

- under approved trading conditions (e.g. "General Logistic Conditions", "Removal conditions" and all standard trading conditions approved or recommended by a professional union, but too the amended removal conditions for the branches)
- or approved contracts



# RISKMANAGEMENT Approved contracts

- From the above it transpires that it is
- very important to ask the approval of insurers
- for new contracts
- which have further reaching obligations
- than standard trading conditions
- (e.g. a limitation of liability that is less favorable for the ENTITY, exclusion of force majeure etc.).



### Approved contracts

- For a not-approved contract
- there will only coverage up
- to the extent that it is less favorable than agreed conditions. (till the freight forwarders t & c's)



Thank you







**FORWARD Belgium** 

