

# CONTRACTS

**THIS ISSUE OF TRUCKERS' GUIDE TO THE LAW ATTEMPTS TO PROVIDE GUIDANCE ON THE MERITS OF, AND THE APPROPRIATE CONTENT FOR, CARTAGE CONTRACTS.**

## What is a Contract?

A contract is an agreement between two parties defining their working relationship. Contracts may be:

- detailed and contained in formal contract documents;
- an exchange of letters between parties;
- a verbal contract.

Contracts do not have to be in writing. An oral contract is enforceable in the same manner as a written contract. The advantage of a written contract is that the terms of that contract are set out in detail thus limiting any arguments to questions of interpretation only.

Written contracts are therefore highly preferable particularly when an owner driver or carrier is dependent on such a contract for his or her livelihood.

## Verbal Contracts

Although it is not recommended, sometimes a written contract cannot be drafted or the parties may for some particular reason prefer to have only a verbal contract.

While it is true that a verbal contract is just as binding on both parties as if it were written, it is more difficult to prove if there is a difference of opinion. To avoid later misunderstanding, written notes should be made of the understanding of the verbal arrangement immediately.

This procedure is not foolproof but if there is a subsequent dispute, the parties involved can at least refer to a record created at the time that the arrangements were entered into. Courts will place some weight on this written record as being evidence of what was decided at the time. The ultimate decision however will depend on whether the Judge or Arbitrator believes you or the other party. Verbal contracts have the additional disadvantage of being brief and lacking in detail and the disagreements that often arise are on points not anticipated at the time the agreement was made.

## Written Contracts

A lengthy industry tradition exists for comprehensive written contracts to govern the working relationship between owner drivers, transport companies, freight forwarding organisations and sole customers owning freight to be carried.

However, once drafted and signed, it must be recognised that the terms contained in the written contract are binding on both parties whether favourable or unfavourable. It is no use saying that what the parties actually agreed to differed from that contained in the written document.

Comprehensive contracts are often difficult for people who do not have a legal background to understand and it is desirable for parties entering into contracts to get professional advice from an experienced solicitor in this field, their local transport association or other professional advisors prior to signing the contract document.

Whilst the parties may prefer a fairly brief document for the sake of simplicity, this is not necessarily a virtue. There are certain fundamental terms that must be included and those terms may be different depending on whether the contract is a customer or a freight forwarding organisation.

## Exchange of Letters

Frequently, particularly in a contractual relationship between a carrier and a sole customer such as a retailer, importer, manufacturer or distributor, neither party wishes to enter into a fully detailed formal contract. Instead the carrier may place before the customer an offer to provide cartage services under specified conditions, with the other party indicating their acceptance of the proposal by return letter.

Again, this type of arrangement lacks detail and while not recommended, is preferable to a purely verbal contract. While the parties often feel more comfortable with such an informal arrangement it must be remembered that its lack of detail will often be the cause of a dispute, the resolution of which is made more difficult by that very deficiency.

## Parties to a Contract

The contract is only worthwhile if the company offering the contract is financially viable.

Many contracts are entered into between an owner driver and a company where the company is a shell company having a share capital of as little as \$100.00. A small capital base may indicate a lack of financial security.

A contract is worthless if the company to whom the carrier or owner driver is contracted is not worth suing for non performance.

Too often, owner drivers pay large amounts of money to purchase an owner driver contract with a company of little or no financial base.

Many owner drivers have suffered severe financial losses as a consequence of entering into relationships with freight brokers who had virtually no financial structure or investment and who subsequently went into receivership or liquidation. They leave the carrier or owner driver with substantial unpaid accounts and financial obligations, not to mention the loss of thousands of dollars paid in "goodwill".

Just because a company or organisation appears to be busy does not mean that it is financially sound. If you are entering into a contract with a company or organisation or for that matter an individual you would be wise to obtain any available information on the finances of the party.

A solicitor, accountant or credit reporting agency can often be of assistance in providing information through company searches, debt history or other accessible records.

## Status of the Parties

A primary objective of any contract entered into between owner drivers and transport organisations is to clarify the status of the parties, by specifically stating that their relationship is a contractual one as distinct from an employer/employee relationship. Such a contractual relationship removes the obligation on the transport organisations to deduct PAYE. Care

must be taken however, to ensure that the construction of the contract treats the owner driver as a self employed contractor.

The Inland Revenue Department has challenged contracts where there is no element of financial risk for the owner driver arguing that the owner driver should be treated as an employee with PAYE deductions as he or she is effectively doing no more than paying for a truck and driving it.

Owner drivers are independent contractors and consequently don't have the protections that employees have. Further, in any negotiations over rates or other aspects of the contract, the owner driver as an individual is sometimes in a weaker bargaining position. For this reason it is desirable that an appropriate mediation/arbitration provision be incorporated in the contract. See comments below.

The contract should treat the owner driver as a self-employed business person with appropriate commercial freedom to operate the business for profit and to seek normal commercial remedies in the operation of his or her business without excessive restrictions.

## Contractual Obligations

The basic purpose of the contract document is to define the obligations of both parties signing the document. In the case of the customer or transport organisation the obligation is to provide work and to pay for that work and the conditions for which the work is to be provided. In the case of the carrier or owner driver the obligation is to perform that work in a certain manner.

Owner driver contracts tend to reflect a sometimes unequal bargaining position and the contracts are often loaded against the owner driver requiring them to comply with numerous contract conditions and the transport company/customer doing no more than providing work, and then sometimes only under certain conditions.

## Some Terms of a Contract

Most contracts specify that they are to run for a certain number of years. From the carrier or owner driver's point of view, where a single dedicated vehicle is being used for the purpose of that contract, it is preferable that the term of the contract at least spans any period of hire purchase payments on that vehicle.

Some contracts provide for a right of renewal, exercisable by either the carrier owner driver or by the organisation to whom that party is contracted. A right of renewal can be granted to either party. A well written contract specifies the procedure for exercising renewal rights, requiring the party having that right to give a specified period of notice of intention to renew.

Some contracts seem to offer a specific period of years but which in fact may be terminated by either party giving, say, one month's notice in writing. This form of contract gives little security to either party and it places the owner driver or carrier at a severe disadvantage especially if he

or she is carrying a high liability in borrowed finance. Parties should think very carefully about entering into any contract that can be terminated without any reason on one (1) month's notice. They provide little security of tenure to either party. They do, however, allow the carrier to leave a transport organisation quickly and in some situations this can be an advantage.

The primary provision in a transport contract is the obligation on the carrier or owner driver to ensure that he or she makes a specified vehicle available on certain days of the week and at certain times. Such a provision is clearly necessary but there may be periods where the vehicle must be off the road for repairs and appropriate provision should be made in the document for provision of a substitute vehicle. It must also be recognised that the operator of the vehicle may have periods where a relief or replacement driver is necessary, to cover for illness, holidays or the like, or where the carrier or owner driver loses their licence. The contract should therefore recognise such situations and permit the use of a substitute driver when necessary.

Unless such provisions are made in the contract the owner driver or carrier could find themselves in a position where they are unable to perform the contract, lose their contract, but more importantly, still be required to make their hire purchase payments.

## Contract Rates

It is preferable for the contract to spell out the rates payable at the time of commencement of the contract, the basis of determination of those rates and how and when these rates are to be reviewed. It is vital that if, in the event that rate negotiations break down, provision is available in the contract to refer the dispute to arbitration or mediation.

There have even been instances where the customer or transport organisation has retained the sole right and discretion in the fixing of rates leaving an aggrieved carrier or owner driver with little or no remedy other than departure or possibly expensive litigation.

It is however appropriate for the onus to be placed on the carrier or owner driver to make application to the other party for rate adjustments as a basis for the negotiation.

## Payment

The contract should clearly specify that the company will pay the owner driver on a certain day of the month relating to the period in which the work has been carried out. The contract may specify that the transport organisation in the case of an owner driver contract be entitled to make deductions from payments due to the owner driver BUT only specific amounts determined under the terms agreed in the contract should be treated in this way.

Contracts frequently provide for a transport organisation to deduct commission payments before paying other sums due to the owner driver or carrier for the performance of work.

The basis of this commission should be carefully defined with a variation to the rate of commission only being permissible by written agreement. Owner drivers should also have the right to be given the documentation from which their payments are calculated – usually of course invoices or time records.

## Termination of Contract

Although the contract should be for a specific period there should be a provision to allow for early termination, but only in the following ways:

- at any time by mutual agreement in writing.
- by the company forthwith in the event of serious misconduct of the carrier or owner driver in the course of carrying out their work under the contract. Serious misconduct may be defined in the contract as including theft, fraud, possession of illegal drugs and driving with excess breath or blood alcohol while working under the contract.
- by either party giving notice in writing where the other party has been warned in writing to remedy any breach of the agreement and fails to remedy such a breach within 14 days of receiving such a warning. The period of notice would be agreed prior to entering into the contract and would depend on the circumstances of the parties.

## Non Competition

It is only fair that where an owner driver is working for a transport organisation that upon termination of the contract he is not able to take work from that company or its clients. Non competition or restraint of trade clauses in contracts are quite common but must be fair and reasonable. Courts will not uphold provisions in contracts which are excessively restrictive and would deny a transport operator the ability to earn a living.

A non-competition clause should only be for a specific period, say 6 to 12 months. Any more than 12 months may be excessive. Secondly, it should be restricted to customers of the organisation to whom the owner driver or carrier was contracted and it should also be restricted to the particular area in which the owner driver or carrier was working. In cases where the restriction is excessive, the Court has the power to either declare it unenforceable or to reduce its area or nature.

## Disputes

There should be an alternative dispute resolution clause in any owner driver contract requiring any dispute between the parties to be submitted to mediation or arbitration under the Arbitration Act on the initiative of either of the parties.

The benefit of arbitration is that it may be less expensive than court proceedings and the resolution is private.

The benefit of mediation is that it should be faster and less expensive and it allows the parties to reach their own settlement.

It is obviously in the interests of both parties for disputes to be resolved by negotiation but in the event of total disagreement the contract should have a framework for the resolution of the dispute. If no such provision exists, serious disputes undermining the very working relationship may be left to be resolved by costly and drawn out Court action, simply because no other alternative is provided.

## Goodwill

If goodwill is payable for the purchase of the contract whether by outright sale or assignment, it should clearly be stated in the document. Goodwill payable in the road transport industry has substantially deteriorated over the years. Some contracts specifically prohibit goodwill payments. If no goodwill is payable, the cost of entry into the contract is limited to the purchase price of the truck but any profit on sale or assignment is also limited to the residual value of the truck.

Whether a contract includes goodwill or not, a prospective purchaser must first ascertain if they can achieve a reasonable profit given the outlay and commitments and not bank on the expectation of a lump sum profit from the sale of goodwill.

The contract should therefore specify the conditions relating to goodwill so this is clearly understood by all concerned.

Some contracts state that the goodwill accruing during the term of the contract is the sole property of the company. This is a perfectly proper provision provided that the owner driver or carrier has not paid to enter into the contract.

## Assignment

The contract is basically an agreement between two parties and in the absence of a specific provision, it could be argued that there is no right to assign the contract to a third party.

Normally the right to assign will be subject to the prior consent in writing of the company, but it should also stipulate that the company or organisation's consent cannot be unreasonably withheld.

Any contract providing for the payment of goodwill should always have a right to assign as otherwise (in the absence of a compulsory purchase by the company) that goodwill may well not be recoverable.

## Access to Owner Driver Books

Some contracts include a provision whereby the contractor must allow the company access to the contractor's business records. As the carrier or owner driver is a self-employed operator, such a provision is not appropriate.

Because of the work time and logbook provisions, it is however not unreasonable for a company to require an owner driver to properly and accurately keep logbooks up to date and to allow the company access to these books.

## Insurance Covers

Many contracts specify the minimum insurance covers required of the carrier or owner driver. Given the responsibility of the carrier or owner driver, this is not an unreasonable provision.

## Signing of Contracts

The manner in which the contracts are signed is important. Where companies are involved the contract should be signed by a person of sufficient executive status within the organisation to have the authority to commit the company in signing the contract.

All pages and schedules to the contract should be initialed by both parties.

Two copies of the contract should be created, both signed by both parties as described above. One copy should be immediately released to the carrier or owner driver, the other retained by the transport organisation/company.

## Amendments to Contract

Circumstances can arise during the life of a contract where either party wishes to vary the terms of the contract. This is acceptable, but proper legal procedure should be followed. Either the original contract should be amended in writing, the amendments being initialed by both parties, or the changes to the contract should be made by way of letter as an addendum. Verbal variations to written contracts should be avoided.

## Collapse of Contractual Relationships

Circumstances can arise where, because of serious disputes or difficulties arising between the parties, a contractual relationship collapses.

Unless these issues can be remedied through mediation/arbitration, the only option left to the parties is to pursue action through the Courts for damages for breach of contract. These issues are frequently extremely complex legally, can take considerable time to get before the Courts and are costly. It is therefore desirable to avoid such actions and work within the framework of a clearly detailed contract which will operate smoothly in the interests of all concerned.

This summary is intended only as a guide. It is not a full summary of the law relating to contracts.

If you have specific questions, or need legal advice on a particular issue, please contact Cathy Fisher or Shafraz Khan at Fortune Manning Lawyers. Cathy and Shafraz have extensive experience in all areas of the law relating to the transport industry.

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