



## Left with abandoned goods: What's next?

The difficult commercial realities of COVID-19 has increasingly led to a situation of abandoned cargo, as companies in precarious situations look to cut their losses and walk away from the goods. This leaves freight forwarders in a tricky situation, faced with the predicament of increased charges for storage of the cargo and how to dispose of the goods. How should freight forwarders deal with such a situation, and how can they mitigate their losses and ensure a fair apportionment of costs?

This is not a new issue for freight forwarders and the overarching advice is to take precautions prior to contracting. The uncertainties of COVID-19 make it ever more crucial that proper processes are put in place. What to do when left with abandoned goods is very much context-specific and varies depending on jurisdiction, however it is important to act with speed to mitigate the ensuing loss by early determination as to whether the goods are under customs control or have been appropriately customs-cleared for free circulation or home consumption. The following considerations may be helpful for freight forwarders in determining how to proceed:

### 1. Speed is key – how can a freight forwarder minimise losses from the outset?

It is vital to act quickly as storage costs can quickly mount up and even exceed the value of the cargo itself. Action should be taken even before expiry of the free period, when it becomes apparent that the consignee has manifested no intention to take delivery. Close monitoring and communication with the shipper/consignee is therefore key, and notice should be sent to all interested parties with a clear deadline.

Depending on the requirements of the particular jurisdiction, other cheaper storage solutions should be considered. Where possible, this may include unstuffing the cargo to be moved to a bonded warehouse and returning the containers to the ocean carrier in order to stop demurrage charges<sup>1</sup>. Local rules and the customs status of the cargo will often have a bearing in this instance. For example in the USA, most goods that have not been cleared within 15 days after arrival at the port will become eligible to be sent to a US Customs 'General Order' warehouse as unclaimed cargo, to be held at the risk of the consignee<sup>2</sup> for 6 months, following which it will be considered abandoned<sup>3</sup>.

It is advisable to consult local correspondents who should be able to provide more information on the best course of action in the particular jurisdiction in the immediate term. Where possible, obtaining a Letter of Abandonment from the consignee or shipper may also help to speed up the process. However,

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<sup>1</sup> P. Jones, *FIATA Legal Handbook on Forwarding*, 4<sup>th</sup> edition, International Federation of Freight Forwarders Associations (FIATA), 2008, p. 58

<sup>2</sup> 19 CFR § 123.10

<sup>3</sup> 19 CFR § 127.11

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it is important to make clear when signing any Letter of Abandonment that the consignee or shipper cannot abandon the cargo without recourse against them and that they will be liable to pay all outstanding costs, in order to prevent a situation in which the freight forwarder forgoes any chance of recovery as against the cargo owner.

At all times, it is important to retain a record of all correspondence and ensure a proper paper trail in the event of any legal dispute.

## 2. Is the freight forwarder acting as 'Agent' or 'Principal' under the Master Bill of Lading (MBL)?

A key question for the purposes of liability under the Merchant Clause in conditions of carriage is identification of the named shipper, and therefore the contractual party for the purposes of the MBL. Unless the forwarder has placed his customer in a direct contractual relationship with the shipping line, they will likely be the Principal and cannot be considered an Agent. This is context-specific and may vary according to jurisdiction<sup>4</sup>. In general, however, the status of freight forwarders as Principal has become particularly prevalent today given the expansion of forwarding services to include comprehensive logistical operations.

As Principal, the freight forwarder will be directly liable to the shipping line. This includes liability for the costs of storing the abandoned cargo, including quay rent and demurrage and detention charges, as well as destruction and other associated costs. Such risks may be assuaged to some extent where a destination delivery agent is used in accordance with the Bill of Lading. The potential liability freight forwarders face will make any actions taken to mitigate storage costs ever more vital. In addition, freight forwarders should communicate with their liability insurer at an early stage to see if it can be invoked to cover any associated costs.

Caution should be taken against the presumption that there is no liability on the part of the freight forwarder where the freight forwarder has booked the shipment 'as Agent' under the MBL, with the actual shipper being the shipper and contractual party in the MBL. Whilst it will be the shipper, not the freight forwarder, who will be in direct contractual agreement with the shipping line, the freight forwarder might be liable through the Merchant Clause.

## 3. Does the freight forwarder have a lien over the goods?

Freight forwarders often have a right of lien over the goods in question, which may be particularly important where the customer has ceased trading or simply disappeared. This gives the freight forwarder a property interest over the goods, without the requirement of actual possession, to which they can have

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<sup>4</sup> P. Jones, p.30

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recourse in order to secure payment of amounts owed to the forwarder, such as transport and storage costs. For example, the FIATA Multimodal Bill of Lading states:

*“The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering the same, and may enforce such lien in any reasonable manner which he may think fit.”<sup>5</sup>*

Such wording is mirrored in the FIATA Model Rules<sup>6</sup> and is present in many other national associations’ standard terms and conditions<sup>7</sup>. Where such clause is present, the contractual right of lien will often allow the freight forwarder to recover both the amounts owing for goods subject to the lien, as well as any previously outstanding amounts and associated costs of sale. In addition, it will generally allow for greater discretion in terms of methods of sale as opposed, such as negotiations with interested parties<sup>8</sup>. Where such clause is not present, the right of lien is also covered under many national laws to varying degrees. It is important to consult the exact wording of such clause or legislative provision to determine exactly what charges such right can be asserted against, and any notice requirements.

In all cases, an important consideration is whether the freight forwarder’s lien takes precedence as against third party interests, such as that of an unpaid seller or a trustee in bankruptcy, and what that means from a claims perspective. If the lien takes precedence over the rights of the unpaid seller, the seller may be liable for the forwarder’s claim. If the question of priorities arises as against a trustee in bankruptcy representing creditors’ security interests, the question may then turn on whether such rights are secured or not. For example, a bank’s security would likely be secured and therefore may have priority over the lien.<sup>9</sup> Nevertheless, this may raise difficult questions depending on the nature of the freight forwarder’s contractual relationships and the jurisdiction in question, and it is recommended that legal advice is sought prior to asserting a right of lien. In all cases it is important to remember to ensure that the container is returned to the shipping line to prevent liability on the part of the freight forwarder for additional costs.

## Conclusion

Being left with abandoned cargo is frustrating, and too often consignees are simply walking away from goods to cut their losses in today’s COVID-19 crisis. Speed is key, and freight forwarders are advised to consult with local agents and their liability insurer in all cases to ensure appropriate steps are being taken. The need for swift action also becomes ever more essential amid the COVID-19 crisis, in order to facilitate the fluidity of the supply chain and minimise port congestions exacerbated by abandoned cargo. In this

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<sup>5</sup> Standard Conditions (1992) governing the FIATA Multimodal Transport Bill of Lading, Art. 14

<sup>6</sup> FIATA Model Rules for Freight Forwarding Services, Art. 15

<sup>7</sup> See e.g. BIFA Standard Trading Conditions (2017 edition), Art. 8(A) and CBFCFA Standard Terms and Trading Conditions, Art. 7(j)

<sup>8</sup> P. Jones, p. 200

<sup>9</sup> P. Jones, pp. 198-199

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context, FIATA encourages the cooperation of the shipping lines to work together with freight forwarders in order to mitigate mounting costs and free up much needed containers. As advocated in FIATA's Best Practice Guide on Demurrage and Detention in Container Shipping, "*...it is the responsibility of the shipping lines to proactively act in good faith in finding solutions, for example by proposing unloading of containers – if possible.*"<sup>10</sup> Recognising the exceptional circumstances of the COVID-19 crisis and the unprecedented difficulties it brings, FIATA further underlines the need for shipping companies and terminals to exercise restraint in their demurrage and detention charges and practices, as stated in its press release of 1 April 2020.<sup>11</sup>

Now is also the time for freight forwarders to be particularly vigilant when contracting. In particular, this means to ensure that they know their customer, to understand who is the Principal and Agent under the MBL and what this entails, and to ensure that the appropriate contractual clauses, such as associations' standard terms and conditions, have been appropriately incorporated.

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<sup>10</sup> FIATA, '[Demurrage and Detention in Container Shipping](#)', FIATA, September 2018, p.4

<sup>11</sup> FIATA, '[FIATA invites shipping lines to adapt their practice on Demurrage and Detention Charges during the COVID-19 Crisis](#)', FIATA, 1 April 2020