

BEST PRACTICE GUIDE



ON ABANDONED GOODS



International Federation of
Freight Forwarders Associations

The global voice of freight logistics

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DISCLAIMER

This document is NOT to be construed as providing any legal advice. FIATA recommends that readers seek independent legal advice if they have any questions on dealing with their specific circumstances.

It should be noted that this best practice guide provides general considerations that are of relevance on a global, risk-management basis, and does not include technical advice. It is recommended that the reader adjust and implement the recommended measures in accordance with the applicable laws and regulations in their jurisdiction, its corporate structure, business model and risk control requirements in the country or geographic areas where it is operating.

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INTRODUCTION

The issue of abandoned goods has been brought increasingly to the forefront in today's challenging economic climate. In such situations, the freight forwarder often becomes a central party against which to seek recourse for fees and associated costs.

Many of the issues commonly encountered in such scenarios can be substantially mitigated from the outset, at the booking and contract drafting stage. Freight forwarders should pay particular attention to conducting appropriate due diligence, drafting contracts with precision, and ensuring proper management controls throughout the process.

This best practice guide, produced by FIATA's Advisory Body on Legal Matters (ABLM), with inputs from FIATA's Customs Affairs Institute (CAI), provides practical information on how to reduce the risk of being left with abandoned goods, and what considerations should be had where a freight forwarder is in a situation of abandoned goods.





CAUTION
16
IGH

CAUTION
16
IGH

CAUTION
6
IGH

ALL GROSS 12500 LBS.
1490 LBS.
11010 NET
TANK 11010 LBS.



WHAT ARE ABANDONED GOODS?

Abandoned or uncollected goods are those which the consignee has manifested no intention to take delivery of after a reasonable period (typically in line with the agreed 'free' period), including situations where the consignee cannot be found or where the consignee has refused collection. However, the conditions that need to be fulfilled, including the period by which goods can be considered as abandoned, varies across different jurisdictions.

VARYING NATIONAL PRACTICES

In several jurisdictions, goods that are unclaimed after 90 days of entry may be considered abandoned. This includes the European Union under Article 149 of the Union Customs Code (UCC)¹, Australia under Section 218A of the Customs Code², and Argentina.

Nevertheless, this period can vary. For example, in Lebanon, if the goods have not been claimed after six months, the shipping agent has the right of disposal. In China, such period spans 60 days. In addition, the time period may depend on whether the goods are pre-clearance or post-clearance from a customs standpoint. In Canada, for example, if the goods are pre-clearance, they are held for 40 days, following which they are moved to a customs-controlled warehouse for a further 30 days.

Care should be taken to understand the specific rules applicable in the relevant jurisdictions and the circumstances of the case.

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- 1 Temporary Storage, Taxation and Customs Union. European Commission, 2020. (https://ec.europa.eu/taxation_customs/business/customs-procedures/general-overview/temporary-storage_en, accessed 13 November 2020).
 - 2 Instructions and Guidelines, Unentered Goods and Certain Abandoned Goods. Australian Government, Department of Immigration and Border Protection, 2009. (<https://www.abf.gov.au/help-and-support-subsite/files/instructions-guidelines-unentered-certain-abandoned-goods.pdf>, accessed 13 November 2020).

HOW TO REDUCE THE RISK OF BEING LEFT WITH ABANDONED GOODS?

CONDUCT APPROPRIATE DUE DILIGENCE

1. Identify the counterparty

Many risks can be mitigated substantially at the pre-contractual stage, simply by having proper due diligence procedures in place. Fundamentally, one needs to know with whom they are contracting, and whether they are a genuine, financially viable entity. Freight forwarders should therefore ensure they have consistent and well-documented processes in place. This applies also to the forwarder's foreign correspondent at origin or destination where the forwarder does not have a presence in both jurisdictions.

It is important to ensure that information is cross-checked with that of trusted sources. Wherever possible, one should obtain original documents, conduct pre-contract negotiations over company landline phone numbers, and verify email addresses appropriately.

2. Identify the cargo

The type of cargo in question will invariably invoke different considerations from the outset. Where cargo is prone to spoilage, such as fresh produce, freight forwarders will have a higher duty to deal with the cargo as soon as possible, and this should be rapidly identified as part of one's management and control process.

Certain types of cargo may be more prone to be abandoned than others. Often, these are those that are relatively low value, high volume, and used as opposed to newly manufactured, such as waste and scrap shipments, used computer equipment, used tyres, and personal effects. In addition, one should beware of counterfeit, non-compliant and prohibited goods, noting that these will often be more difficult to identify.

3. Identify the trade route

Unconventional trade routes may be a key indicator of illicit trade and may signal a red flag for further checks to be conducted. In addition, attention should be paid to certain socio-political circumstances such as sanctions and embargoes, which may indicate a higher risk jurisdiction.

CONTRACTUAL CONSIDERATIONS – IS THE FREIGHT FORWARDER ACTING AS PRINCIPAL OR AGENT?

Where the freight forwarder acting as NVOCC issues their own house bill of lading, invariably they will be named as the shipper on the ocean bill of lading, establishing a direct contractual connection as a principal to the contract for carriage. In the event that the cargo is abandoned, the freight forwarder/NVOCC will have a contractual liability towards the shipping line for any associated costs. Such costs can rapidly outstrip the value of the cargo itself, and therefore cannot be mitigated simply by advance payments or securities. Particular attention should therefore be taken in relation to the formulation of the contract itself, including the apportionment of responsibility for costs.

Where the cargo has been shipped under an ocean bill of lading only and no house bill of lading has been issued, it is more likely that the named shipper is the actual shipper of the cargo and the freight forwarder has acted as agent only. The freight forwarder might either be named as the notify party or not at all on the face of the bill. In such circumstances, the shipping line will have a direct contractual relationship with the actual shipper and consignee under their bill of lading and the carrier should look to them for recovery of charges. Bringing a claim against the actual shipper, however, might not be an attractive proposition, noting for example that the shipper might be domiciled in an unfavourable jurisdiction or might not have sufficient assets to cover the cost of the claim.

The shipping line will generally have rights under their bill of lading terms to hold cargoes subject to lien and ultimately auction the goods, offsetting their incurred costs. There is no obligation on them to do so, and they might elect not to take such action if the cargo is low value or recovery is otherwise problematic.

In these circumstances, carriers may try to recover from freight forwarders based on their tariff or on the 'Merchant Clause' now commonly appearing on carrier bills of lading and which purports to place full liability on forwarding agents and notify parties. It is the view of ABLM that carriers should not be able to impose liability on forwarders acting as agent only, and forwarders facing such carrier claims for charges should seek legal advice promptly.

Of course, this depends on the jurisdiction. In some jurisdictions, the binding effect of any contractual obligation requires consent by the obligor. Consequently, the terms of the so-called 'merchant' clauses are not enough by themselves to create obligations for the persons named therein, and freight forwarders should pay close attention to whether such clauses are legally enforceable.

In certain jurisdictions, specific rules have been enacted depending on the mode of transport. In some instances, this may even include legislation specifically deeming freight forwarders to be the contractual carrier or to have concluded contracts on their own behalf and for their own account, regardless of the actual terms of the contract. This may be the case even despite the terms of the contract, deviating from the principles of freedom of contract, agency, and interpretation of contracts, and has been justified by the need to protect shippers in relation to certain modes of transport.³

THROUGHOUT THE PROCESS: ENSURE EFFECTIVE MANAGEMENT CONTROLS

Speed is key when dealing with abandoned goods, so proactive management control and good record keeping will help to quickly identify risks and ensure that one can act quickly to minimize possible costs.

In general, it is worth maintaining records to help one identify common patterns and risks. Such data may include risky hotspots and trade routes, unreliable customers, and types of cargo most likely to be abandoned. Technology may assist in collating such data. This will help to identify bookings that present heightened risk and ensure that decisions can be taken accordingly.

Early contact should be established with local agents and correspondents at the port of discharge, who will be able to provide guidance as to how to minimize risk. In addition, arrival dates and associated free periods should be closely monitored, together with the status of key milestones in the transportation process such as the surrender of bills of lading.

Nevertheless, it is noted that it is often difficult to obtain up-to-date information from the shipping line, which is not obliged to provide such specific information. Digital means may in future assist with this, as discussed in the last chapter.

3 For example, in Spain, Art. 5 ACCGLand states that all professional transportation intermediaries are deemed to have concluded contracts for the carriage of goods by land on their own behalf and for their own account, regardless of the actual terms of the contract. This provision is a clear exception to the principles of freedom of contract, on agency and on interpretation of contracts, and it has been justified by the need to protect shippers in road/rail transportation markets. Conversely, with regard to maritime carriage, the Spanish MaritimeNA expressly states that freight forwarders will be deemed the (contractual) carrier when they conclude the contract acting as such, even if promising to perform the contract.



HOW TO MANAGE A SITUATION OF ABANDONED GOODS?

SPEED IS KEY

Taking quick action can drastically mitigate cost exposure. Situations concerning abandoned goods can often see the associated costs swiftly exceeding the commercial value of the goods themselves, increasing the likelihood that the shipment remains uncollected. In addition, the situation as between the carrier and freight forwarder will often be a complicated one, and the freight forwarder has an interest in acting quickly to avoid being hit first by demurrage and detention charges and other associated costs.

The shipper and the consignee need to be contacted immediately, put on notice about the situation, and given a short deadline to collect the goods and settle any costs that have already accrued. Meanwhile, the freight forwarder should remain on full alert until the situation has been resolved. Formal notification should be sent immediately after the expiry of the 'free time' and any provided deadline, explaining the parties' rights and obligations under the contract of carriage and/or other incorporated trading conditions, specifically warning that any further delay or failure to take delivery will result in legal proceedings.

Meanwhile, detention and demurrage costs should be mitigated as far as reasonably practicable as the freight forwarder will often become bound to make such payments in the event that such charges are not paid by the consignee or shipper. In some jurisdictions, this may even be expressly stated in the law. Consultation with local agents will shed more light on how to go about this most effectively. Alternative storage solutions, for example, will often prove far less costly.

In the instance that the cargo is abandoned, a final notice should be issued, explicitly stating that the necessary measures will be taken, including sale or disposal, and that all associated costs incurred will be on the customer's account. It is advisable to secure letters of abandonment from both the shipper and the consignee, including a clear undertaking that they are jointly and severally responsible for all accrued costs. A Letter of Abandonment of Cargo will also generally need to be sent to the authorities, requesting the authorities to allocate a date for disposal or auction of the cargo.

It is crucial that freight forwarders pay particular attention to the national procedures and legislation around dealing with cargo, as this varies on a country-by-country basis. For example, in China, sale of cargo requires court process in order to ensure appropriate price control. In Canada, legislation sets out requirements for enforcement of liens arising from the storage of goods, however there are no formal requirements by law for the sale of goods subject to a maritime of carrier lien.

JURISDICTIONAL CONSIDERATIONS

There currently exists no commonly accepted practice covering all jurisdictions. This adds a further layer of complexity to the effective handling of this type of case for the freight forwarder/NVOCC. It may not be possible for example for the freight forwarder/NVOCC or shipping line to hold a lien over the goods. In the United States, there exists a process called General Order, which could assist in facilitating/forcing the sale of the goods.

In addition, it is important to note the difference in relation to local jurisdiction versus the jurisdiction named on the contract of carriage, and the circumstances in which they would apply. Often, this will depend on the procedural and substantive elements at dispute. For example, the jurisdictional clause in relation to disputes relating to the contract may be applicable, whilst not impacting on the procedure for selling the goods. Nevertheless, one should be mindful that every day spent arguing about what jurisdiction applies becomes ever more costly.

Jurisdictional variances mean it is ever more important to maintain close dialogue with your local agent. Recognizing that there may be local jurisdictional challenges in handling such cases, a prudent approach would be to obtain an early legal opinion before proceeding.

ROLE OF CUSTOMS AUTHORITIES

As previously observed in relation to the time period by which goods are considered to be 'abandoned', customs procedures play an important role in the process. Often, much turns on whether the goods are pre- or post-clearance, and will impact on what duties and taxes are due. For example, in China, customs grants the consignee three months in which to collect cargo, following which customs has the right to deal with the cargo.

The Revised Kyoto Convention (RKC) provides for the issue of abandoned goods in Standard 3.44 regarding the repayment or remission of duties and taxes. In particular, it states that in the situation of abandoned goods, the person should not be liable to pay the duties and taxes on the goods (remission) or, if a payment has been made, the person should be entitled to repayment:

When goods have not yet been released for home use or when they have been placed under another Customs procedure, and provided that no offence has been detected, the person concerned shall not be required to pay the duties and taxes or shall be entitled to repayment thereof :

- when, at his request, such goods are abandoned to the Revenue or destroyed or rendered commercially valueless under Customs control, as the Customs may decide. Any costs involved shall be borne by the person concerned;

HOW TO MANAGE A SITUATION OF ABANDONED GOODS?

According to the RKC Guidelines, for the goods to be abandoned to the revenue or to be rendered commercially valueless under customs control as provided for in this Standard, the main condition is that person concerned requests this action. Since such abandonment or rendering the goods commercially valueless will only be done at the request of the person concerned, the declarant is normally required to bear any costs to customs that this may involve. The above applies in the instance that no offence should have been discovered, and therefore does not apply to stolen goods, for example.

Moreover, in instances where the customs authorities sell goods which have not been declared within the relevant period or could not be released, the RKC's Transitional Standard 3.45 states that customs has the right to recover the duties and taxes, storage costs, and other charges or expenses from the proceeds of the sale. Any sums owed to creditors may be deducted from the sale proceeds if this is allowed by national legislation. After recovery of the amounts due to customs, the remaining proceeds of the sale are to be held at the disposal of the entitled person for a period that is specified in national legislation. Customs may require a claim to be filed by the persons concerned or creditors prior to releasing the proceeds. It should be noted that this provision does not apply to the sale of goods by customs that have been voluntarily abandoned to the revenue. In that case all the proceeds would remain with the government.



SECURITY INTERESTS AND RETENTION RIGHTS

Different remedies are available in different countries regarding the ability to deal with the goods in question, thus highlighting the need to ensure precise and appropriate contract drafting to mitigate any possible disputes or confusion. In the event that goods are abandoned, or unclaimed, the carrier may have certain rights and duties, which may include a retention right and lien on the goods, with a right to request the sale of the goods to get paid with the proceeds. The ability and scope to dispose, sell or otherwise hold the goods as security depends on the specific jurisdiction, as well as the applicable contractual provisions. In addition, the freight forwarder remains responsible for the goods it is holding and should therefore take care to seek local advice and ensure it is adequately protected with all risks insurance cover in case of accidental loss or damage.

The specific mode of transport use may impact on how the freight forwarder can deal with the goods, and whether there is the right of lien or retention. In addition, specific procedures may also exist in relation to certain modes, including whether court process and use of specific tribunals or other institutions.

International conventions may also have a bearing. For contracts falling within its scope of application, the CMR Convention regulates the right to, in certain circumstances, store the goods at the disposal of the consignee and to sell them, in accordance to local practices or regulations (art. 16). Likewise, in international rail carriage under the COTIF-CIM, if the consignee refuses to receive the goods, the carrier may unload the goods for the account thereof, and in these and other cases where delivery cannot be made (and reasonable instructions are not received from the consignor or the person entitled to give them), it can have the goods sold in accordance to local custom or prescriptions. The proceeds are to be applied to the payment of the charges due to the carrier (Art. 16).

Regarding sea transport, it should be noted that the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea of 2008, not yet entered into force, contains a provision (Art. 48) that addresses the situation where the goods remain undelivered. In such cases, the carrier, after giving proper notice to the notify party (if any), may take any appropriate and reasonable measures to dispose of the goods, including to have them sold in accordance to local practices, laws or regulations of the place where the goods are located. These provisions follow the same rationale as the domestic and international ones previously referred, and in terms of the remedies or rights available to the carrier are partly dependent on national rules (like the CMR and the COTIF-CIM).

In general, contractual terms are often particularly important in determining the scope and existence of such rights, demonstrating the importance of ensuring proper contract drafting. It is also important to consider standard trading terms and conditions, which will often provide for certain remedies.

Nevertheless, attention should be paid to specific rules that may override contractual provisions. For example, the current Maritime Law of China provides that the carrier only has a lien on the cargo that is (a) related to the specific claim and (b) belongs to the defendant who should be responsible for payment of the charges in dispute. This overrides standard terms and conditions providing for liens that may be

unrelated to the carriage in question, as under Chinese law the scope of the lien can only be decided by the law. It should be noted that this legal provision is currently under review.

In common law jurisdictions such as the United Kingdom, Canada, Australia and South Africa, a forwarder can contract for the lien to go beyond the particular charges in a particular cargo, and the CIFFA standard trading conditions reserve a general right of lien in all cargoes and documents for any sums owed by the customer. The general right of lien is also observed in the standard trading conditions of other national associations, including BIFA (Art. 8(A)), IIFA (Art. 10(A)), and the NCBFAA (Art. 14(A)). In other instances, the scope of the lien may cover the goods named in the bill of lading rather than being a general right in respect of the customer as the standard trading terms and conditions governing the FIATA Multimodal Transport Bill of Lading state in Art. 14:

“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 same, and may enforce such lien in any reasonable manner which he may think fit.”

Contrast this language with the general right of lien on all cargoes for all sums set out at Art. 18 of the CIFFA STCs (emphasis added):

*“**All goods** (and documents relating to goods) shall be subject to a **particular and general lien** and right of detention **for monies owing either in respect of such goods, or for any particular or general balance or other monies owed**, whether then due or not, by the Customer, sender, consignee or owner of the goods to the Company.”*

One should pay close attention to any specific notice requirements. In general, it is wise to give notice regarding the exercise of a lien exercise as it is far preferable to be paid than to have to get into the process of the exercise and potential sale of the goods to recover all or part of the sums due. Contractual liens often have notice and other requirements relating to the exercise of rights. Carefully check all terms of the contractual lien to make sure you comply with the terms of and do not invalidate the lien or affect the quality of it.

If insolvency or administration proceedings are currently underway in relation to the consignee, different procedures may be required to ensure that the lien is exercised correctly as the goods cannot be sold under lien without the authorization of the administrators or a court of law. For example, in the UK, if it can be proven that the lien was in place prior to insolvency procedures commence the Administrators will either have to provide security or reach a settlement agreement to secure the cargo's release.





QUICK CHECKLIST OF PRACTICAL TIPS

Pre-contract:

- Identify the counterparty
- Identify the nature of the cargo
- Identify the trade route
- Consider necessary management controls in accordance with the above

Contract drafting stage:

- Include provision for apportionment of costs and responsibilities in the event of abandoned goods
- Pay attention to whether you are contracting as a principal or agent under the contract

Throughout the transportation process:

- Put in place appropriate management controls to ensure careful monitoring of the cargo
- Establish early contact with local agents and correspondents at the port of discharge

In a potential or actual situation of abandoned goods:

- Contact shipper and consignee immediately, providing a short deadline to collect the goods and settle costs accrued
- After expiry of the free time and deadline provided, send a formal notification specifically warning that any further delay or failure to take delivery will result in legal proceedings
- Consider alternative storage options to mitigate demurrage and detention costs
- Send a formal notice and if possible, obtain a Letter of Abandonment
- Consider legal remedies available, including liens and retention rights. Obtain legal advice!



LOOKING TO THE FUTURE: THE ROLE OF DIGITALIZATION

Use of a digital means of contracting may aid the process of dealing with abandoned goods, particularly if a system is used to multilaterally communicate with all parties involved. This would facilitate getting consent from the consignee in relation to certain wordings to protect freight forwarders, including payment commitment and indemnity. This would however require widespread use of digital contracting means.

In addition, digitalization may provide an important tool to aid in the communication of information about a shipment, including its whereabouts, arrival times, and delays. Smart containers, for example, could be a useful aid in this regard. In particular, establishing an efficient and effective channel of communication between the shipping line, freight forwarder, and other parties, would help to ensure that freight forwarders can act with greater speed in the instance of abandoned cargo, thus substantially decreasing the costs at stake.

SUMMARY

Situations of abandoned goods continue to be a key issue for freight forwarders, and all the more so in today's fraught economic climate. It is therefore imperative that freight forwarders take important steps from the outset to reduce their risk exposure in this regard, through the establishment of strong standard due diligence and cargo management procedures.

FIATA, through its institutes and bodies, and in cooperation with other international actors, continues to be committed to shaping policy and practice to aid freight forwarders and supply chain professionals to tackle such situations. FIATA encourages the cooperation of all actors within the supply chain to proactively act in good faith in dealing with such situations, and to collaborate on industry-level initiatives to find solutions for the benefit of the whole supply chain, such as through the adoption of digital means.



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