

Ship we don't talk about — contracts edition

Some forethought can help ocean shippers avoid margin-losing rates

Friday, April 19, 2024



Shippers should sign an updated FMC contract or a contract that is tailor-made for their business needs. (Photo: Jim Allen/FreightWaves)

By [Alison Cusack](#)

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I wrote a tweet last year that said: "I want to start an underground fight club, but the twist is I teach you how to fight the ocean carriers with cool contracts. I think I'll call it 'ship we don't talk about.'"

And Craig Fuller said, say less (but write more).

First rule of underground fight club is that we only admit beneficial cargo owners (BCOs, or people who are listed on the steamship line/master bill of lading).

Second rule of underground fight club: hands to yourself unless you're signing a contract that gets you a better deal on your rights when it comes to ocean shipping.

What contracts am I already signing?

Great question for my U.S.-based audience. You're currently signed up to at least three-ish contracts.

1. **a.) Ocean carrier's bill of lading terms and conditions**

The old-school paper bill of lading with the reverse side terms and conditions in teeny tiny print that you could barely read? Those terms and conditions are applicable on every shipment across the world.

These terms and conditions set out (among other things) how the carrier can charge you more at a moment's notice, reroute your cargo and even leave your cargo at a transshipment port because it's more convenient.

The long form is usually located on the carrier's website and can run 10-15 pages. It's worth a read, or at the very least booking some time with a lawyer who can map out how and when you'd care.

2. **b.) FMC filed-rate contract**

For U.S. shipments, the shipping line files the rate with the Federal Maritime Commission (FMC), and it has two parts: the rates and the cut-down version of the carrier's bill-of-lading terms and conditions.

There is also a clause that spells out how the ocean carrier's bill-of-lading terms and conditions interact with the FMC filed contract (which one overrides the other and when).

3. **c.) International conventions (multiple jurisdictions edition)**

The U.S. Carriage of Goods by Sea Act (US COGSA), Hague-Visby Rules and Hague Rules are all types of international conventions that set out limitation of liability (among other things).

Which international convention applies to which shipment depends on:

— Port pairs.

— The bill-of-lading terms and conditions.

— Exporting or importing country.

For example, if exporting from Australia, then Australian law says, "It's ours!" But US COGSA says American law (i.e. US COGSA) applies to any shipments going to/from/through the USA.

(You may hear about Hamburg Rules or Rotterdam Rules, but the first isn't popular and the second isn't yet an option).

What contracts should I be signing?

You should sign either an updated FMC contract or a contract that is tailor-made for your business needs.

1. **a.) FMC contract (powerlifting version)**

The shipping lines already have to file the FMC contract, which (usually in Excel form) has the rates AND a cut-down version of the carrier's bill-of-lading terms.

The contract is already in place. It's up to you to leverage that process to add in the extras your business wants and needs.

2. **b.) Tailor-made contract**

I know, it sounds expensive. Let's get this hurdle out of the way. It can be but there are lawyers who know what they're doing and do it for a fixed price. (Hi, it's me, the shipping lawyer.)

What's the point?

If I mention general rate increase (GRI), peak season surcharge (PSS) or transit disruption surcharge (TDS), you immediately know you're paying more. But why? You have rates locked in.

But are they contractually robust? Are they the tornado-proof type of rates that can withstand the winds of change, or are they flimsy, margin-losing rates.

What if you locked in a rate ... and that was it? The shipping line announces a PSS and you go, "Don't care. My rates are contractually locked in. I can cheerfully ignore any surcharges the shipping line may wish to announce. My rates are exempt."

What level of forecasting certainty would that provide? What smug satisfaction would rejecting an incorrect invoice provide?

The point is locking in certainty.

Are the contracts a floor or a ceiling?

The obligations to the shipper are a floor and a ceiling.

The floor is the obligations they owe in the way they perform the contract; the ceiling is the limitation of liability they can claim in the event of a cargo loss.

Tell me more:

Shipping lines have a base level of obligations they have to fulfill, both to the BCO and to their Protection and Indemnity (P&I) Club (mutual insurance).

The shipping lines must trade on their bill of lading to keep their P&I Club happy, but they can commercially agree to anything that they're willing to pay themselves.

The shipping lines owe the BCOs the minimum set out in their terms and conditions, which include the international conventions.

Aside from the conventions letting carriers limit their liability, they also set out the minimum obligations carriers owe in carrying out the contract of carriage (e.g., *the carrier shall **properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.***

Ultimately, if you exclude the limitation of liability on claims, most obligations are a floor, which means the commercial scope for contract clauses is limitless.

What should I ask for?

What do you want?

Operational issues (container availability, space availability).

Documentation issues (turnaround on booking, issuing bills etc.).

Rates (Lock in "all-in all-in" rates, exclude any and all surcharges — even ones not even thought of yet – EU emissions trading system anyone?).

Claim handling (60-day turnaround on processing claims).

All that amazing customer service you want? Put it in the contract.

White-glove treatment? Contract.

Best rates in town? Contract.

Will I get it?

Leverage your ask.

If you have sufficient yearly freight tonnage, you then have a minimum quantity commitment (MCQ) that you can shop around and leverage when asking for these contracts.

About the author

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But if you never ask, you'll always be left holding the bag labeled "Surcharge."

Alison Cusack is a maritime lawyer who assists shippers and freight forwarders with tailor-made contracts for their ocean carriage, specifically with D&D, free time, cargo claims and any other foreseeable disruption to a customer's ocean supply chain during the maritime adventure.