



## The West Coast Port Slow-Down Caused You to Fail to Deliver the Goods Under Your Supply or Transportation Contract. Are You Liable to the Customer?

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Although the unpleasantness at the west coast ports has been partially resolved, there continues to be an unmanageable backlog with continued delays, and the losses have become enormous. By some estimates, retailers will suffer more than \$7 billion<sup>1</sup> in losses due to delays and lost sales. Do the retailers have to absorb all those losses, or is someone else in the supply chain going to be responsible for those losses?

If you are a supplier or transportation company with obligations to deliver those goods, you should make sure that the responsibility does not fall on you.

### Significant Contractual Provisions

Well-drafted contracts should have provisions that address such problems. Below is a discussion of some of the most pertinent provisions.

**Delivery Terms.** As an initial matter, you must know the terms of your delivery obligations under your contract. Does your responsibility end as soon as the goods leave your loading dock? Or are you fully responsible for delivery at the end customer's plant or store? Or does it fall at some point in between? And where is that point in relation to the port that is so backed up that the goods will not be moved until several weeks too late? INCOTERMS<sup>2</sup> or other standard industry terms may dictate the initial delivery obligation, subject to the additional terms discussed below.

**Force Majeure Clause.** Many contracts have a "force majeure" clause which absolves the party from liability in case of events beyond the party's control. If your contract lacks such a clause, this could greatly increase your exposure. If you do have a force majeure clause, the devil may be in the details. Is it broad enough to cover events such as: labor disputes which fall short of a formal strike; or the failure of another intermediary to deliver the goods; or a shortage of other supply chain capacity due indirectly to the port's labor disputes?

**Indemnification Clause.** Contracts frequently include an indemnification clause whereby one party takes responsibility for losses of the other party in the event that specified events go wrong. If your business routinely uses contracts containing an indemnity clause, you should ask yourself an important question: Does that provision require you to indemnify your contract partner in the event that a loss is caused by his own negligent acts? Generally, the law resists putting the burden of negligent acts upon an innocent company and instead encourages people to proceed carefully, rather than recklessly, knowing that someone else will bear the risk. Thus, a company expecting indemnification for its own negligent acts must usually include express language to that effect in its contracts. Although many states follow this general rule, judicial interpretation varies. When it comes to indemnification, it's not only *what you say*, but *how you say it*, that counts.

**Demurrage and Detention.** Port delays may lead to goods being stuck in ships, trucks, train cars, and intermediate warehouse facilities where they don't belong for such long times. There could be significant delays in unloading the cargo due to the back-ups in the supply chain. Transportation

<sup>1</sup> "West Coast Ports: Retail's \$7 Billion Problem," CNBC News Report, February 9, 2015.

<sup>2</sup> International Commercial Terms, or INCOTERMS, are standardized commercial terms related to the transportation and delivery of goods, published by the International Chamber of Commerce. More information is available at <http://store.iccwbo.org/icc-guide-to-incoterms-2010>.

contracts may have demurrage and detention provisions governing costs related to such events. Now would be a good time to be an expert in any such provisions included in your contracts.

**Standard of Care.** Some contracts include a provision governing the standard of care in handling goods. The provision likely will reference “industry standards.” Companies subject to such a provision need to make sure they are following industry best practices in dealing with the current crisis. What kinds of options or alternative solutions are being used in your industry sector? If everyone else is finding a way to get the goods there, and you’re falling down, this scenario may affect your liability.

**Spoilage.** The contract should address who is responsible for the spoilage incurred when perishable goods arrive late.

## Contractual Gaps

Where the contract fails to adequately address the risks and costs associated with current crisis, gaps may be filled in by industry standards, and failing that, the courts will allocate responsibility under applicable statutes and the common law. The preemptive power of federal transportation law cannot be overstated, and should be considered in every contract negotiation and/or review.

For example, the United States Congress, through the enactment of the Carmack Amendment to the Interstate Commerce Act and the Federal Aviation Administration Authorization Act, has expressly preempted state laws relating to interstate surface transportation of freight. See 49 U.S.C. § 14706 and 49 U.S.C. § 14501(c). The Carmack Amendment governs the liability of a common carrier (motor carrier or freight forwarder) of cargo in interstate commerce under receipts and bills of lading. The statute generally preempts state and federal common law claims. It makes a carrier liable for the “actual loss or injury to” the transported property but also permits the carrier, where the required steps are taken, to limit that liability to a specific value established at the time of shipment – and that limitation can be applied to bar or at least limit damages for delay. While these federal laws are, perhaps, most typically perceived to provide various bases for liability, they also afford certain significant protections. Motor carriers, freight forwarders, and brokers are well-advised to incorporate appropriate language into their contracts that maximizes these protections, and thereby limit their respective liability exposure.

## What is the State of Your Insurance Coverage?

Does your contract require you to provide insurance? What types of coverages are required and what types do you have? Will the policy you have in place cover any of the losses to your company? Will it cover the losses incurred by your customer? You should carefully review your policy, and then consider consulting with your insurance broker. Many policies cover losses from unavoidable business interruptions, but they may exclude labor strikes and they may exclude events which do not directly affect your business (as opposed to affecting another party in the supply chain).

## The Best Defense is an Offense.

Your company should be proactive and anticipate the issues before they overtake you. Below are some suggested steps:

- Review all contracts and insurance policies to understand your rights and obligations.
- Consult with outside counsel regarding potential exposures.
- Keep a careful record of all delays, shortages, and other problems, and document the underlying causes to the extent possible.
- Understand and follow industry best practices in addressing the current situation, mitigating all parties’ damages to the extent possible.
- Reach out to counterparties early, to work out alternate arrangements where possible.
- Consider negotiating a settlement where necessary, after consultation with counsel.

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