

Abandoned Goods, detention and forwarder liability

May 2020



Topics

1. COVID-19 issues
2. Can detention charges be enforced
3. When is a forwarder liable
4. Customer liability
5. Enforcing rights against customers
6. Practical issues
7. Customs Issues

Is this becoming a bigger problem

In 2020 have you seen an increase in the level of abandoned goods:

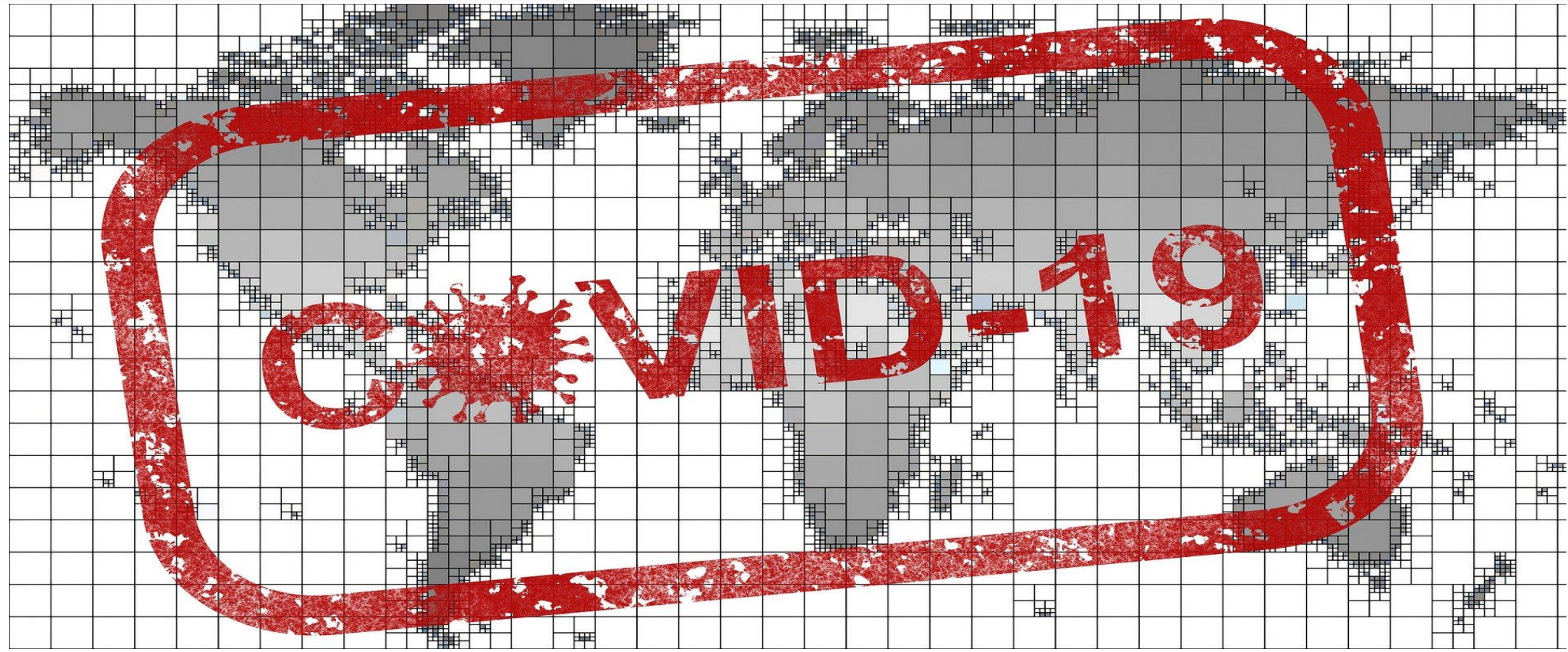
- a) Yes
- b) No

Why are goods abandoned

- Consignee financial problems
- Quality issue or damaged goods
- Customs issue – paperwork or goods seized
- Consignee cannot be identified
- Problem obtaining other necessary documentation
- Commercial disagreement such as no longer having the right to sell the goods

Poll result

This is not new law – Just greater occurrence of an age old issue

A stylized world map is centered on a white grid background. The map is rendered in shades of gray. A thick, red, hand-drawn style border frames the map. Overlaid on the map is the text 'COVID-19' in a bold, red, sans-serif font. The letter 'O' in 'COVID' is replaced by a red silhouette of a coronavirus particle.

COVID-19

Issues for customs brokers

Response from shipping lines

Detention rates and free time largely remain unchanged



Force Majeure

A legal concept that applies automatically in most civil law countries, but not in Australia, Singapore or England – check if Chinese law applies

Look to the terms of the contract – the BOL

There will be a force majeure clause but only in favour of the shipping line

Generally COVID-19 will not prevent the goods from being collected or the container returned

MSC v Cottenex - Frustration

Facts

- 2016 English Court of Appeal decision
- Concerned a scenario where the containers could not be returned due to the acts of the consignee
- The claim was against the shipper
- Containers discharged May – June 2011
- Shipper informed carrier they could not deal with the goods – Sep 2011
- Carrier offered to sell the containers to the shipper – Feb 2012
- Carrier claimed against the shipper – June 2013

MSC v Cottenex - Frustration

Findings

- Detention could not be charged indefinitely
- The delay will reach a point where the commercial purpose of the contract had become frustrated
- Found that from Feb 2012 the contract had been repudiated by the shipper – it could not perform its obligations
- The carrier had to accept repudiation as the contract had become frustrated
- Carrier entitled to detention to that point plus the value of the containers
- Detention at the daily rate is not a penalty just because it can run indefinitely



Liability for detention

Does this affect you

In the 12 months has your company had to pay container detention which it could not recovery from the customer:

1. Yes, under \$1,000 in total
2. Yes, over \$1,000 in total
3. No

Enforceability – Australian case law

Each case depends on the terms under which detention is payable

The general position is that detention charges are enforceable

- DV Kelly v China Shipping (Australia) Agency [2010]
 - » Amount claimed was extravagant and unconscionable in amount in comparison with the greatest loss that would follow from the breach – no room from argument
 - » Overturned on appeal on jurisdictional ground
- Ichiban Imports v China Shipping Australia Agency [2011]
 - » Charges for use of the container, not charges for breach
 - » Was more concerned where the rates doubled from day 26
 - » Hard to argue it's a penalty when you still have possession of the containers
- Cosco Container Lines v Unity Int'l Cargo [2012]
 - » The amount payable was not for breach of a term
 - » There was no amount immediately payable for failure to return on time
 - » The defendant agreed to hire containers at the agreed rate until their return

Poll result

To what extent is industry incurring container detention charges ...

Prove their claim

- The shipping line must prove that the contracting parties agreed to pay detention
- Identify the detention clause
- Was it brought to your attention
- Is there merely a vague reference to the “carriers tariff”
 - if so, locate the tariff on line
 - can detention charges for Australia be easily found
- Were the correct transport documents issued

Who is liable - Forwarder

The first target for collection by shipping lines will be the shipper on the BOL or a consignee that presented the BOL

If the forwarder is named on the ocean BOL – are they acting agent or principal and does it matter?

Relevant factors:

- was a house BOL issued
- is the house BOL merely a back to back BOL
- is the FF described as the “carrier” on the house BOL
- the method for charging - all in pricing vs commission
- terms of the contract
- what was the FF asked to do – carry or arrange carriage
- Door to door service – versus merely arranging carriage

If FF is merely agent

General law – agents are not liable under the contract

Australian Tallow (2001) – A FF that understood that the definition of merchant included agent of the shipper and arranged the BOL knowing this was bound by the BOL

Pay close attention to the terms under which you book freight:

1.4 It is a condition of any booking under the Spot Terms that you agree and accept that you will be deemed a “Merchant” as defined in the Terms for Carriage and as such will be responsible for all the obligations and liabilities of the shipper, whether disclosed or not. Any subsequent nomination of a shipper or other party in relation to the booking shall be subject to our discretionary acceptance. In nominating a shipper or other party in relation to the booking you warrant that you have authority to legally bind the nominated shipper or other party relating to the booking, as applicable, and, should that not be the case, you will assume full liability and shall indemnify us for any and all loss suffered or cost incurred as a consequence of the absence of such authority.

Forwarder as consignee

- If the FF is the consignee on the ocean BOL and demands or takes delivery of the goods, the obligations under the BOL will be transferred to the FF
- **Acting as Australian agent for an overseas forwarder:**
 - If the FF agrees to be consignee and collects the goods the FF will be liable
 - The FF may have a claim against the origin FF
 - Do you have an agreement with the origin FF
 - Are you entitled to an indemnity from the origin FF
 - You could easily get stuck in the middle of a fight between the buyer and seller

Liability of the cargo owner

- What is the contractual relationship
 - Where you are local agent
 - Signed T&Cs
 - Terms of BOL provided to customer
 - Famous Shipping Case
- Where FF booked as agent, the cargo owner will be liable as principal under the BOL
- Where FF issued a house BOL, the cargo owner will be liable under that house BOL
- Is there another agreement with the cargo owner under which they provide an indemnity – terms and conditions of trade

Enforcing rights against the customer

- Contractual right to payment:
 - Letter of demand
 - Statutory demand
 - Legal proceedings
- Lien over goods – general and particular
- Director's guarantee
- Other security
 - Personal property security interest
 - Charge over assets
 - Interest over land

When cash is king, you can demand more in exchange for credit terms



What can you do

Negotiating with the shipping line

In your experience, how willing are shipping lines to negotiate:

1. No willingness at all
2. Will often provide a discount
3. Every shipping line is different

Practical Tips - Customers

- Ensure that your customers accept your T&Cs and you have written proof
- The T&Cs should contain an indemnity in favour of the FF
- Some customers are high risk:
 - New customers
 - Customers with generic details
 - Customers who have exceeded credit terms
 - Customers with no contact details other than an email address
 - Freight collect – obtain confirmation from the consignee
 - Delay in responding to an arrival notice
 - High risk goods – Anything you can not easily resell

Practical issues - Customer

- Identify the client **tipping point** – When do the goods become commercially uncollectable
- Don't let your client **string you along** – if they want the goods but are not collecting them:
 - does the promise of collection make sense
 - demand security
 - draw a line in the sand and sell the goods
- Contact the shipper – will they indemnify you if you redirect the goods

Act quickly

- Determine if you are potentially liable
 - Are you merely the notify party on the ocean BOL;
 - There is no house BOL
 - You did not arrange the carriage with the shipping line
- If you are liable to the shipping line, act quickly to limit your losses
- Time will not change your legal liability, just the amount payable
- What are your rights to clear or re-export the goods
 - You have a lien, use it
 - Unpack the goods and place them in storage – what is worse, warehouse costs or container detention
- No lien – can you get a letter of abandonment
 - Don't waive your rights against the customer
- Keep a record of all communication – including telephone calls
- Client in administration – contact the administrators

Poll result – Negotiate with the shipping line

- Request an extension of free time
- Contact the carrier before the expiry of the free time
- Explain what is the factor beyond your control
 - what makes your case different
- Record the response
- Carrier letter of indemnity – be careful

Practical issues – Systems and procedures

- Have systems in place to track the return of the containers and contact consignees before the end of the free period if a container has not been returned
- How will you know when a container has been returned – bigger issue with exports
- Take every step possible to allow pre-arrival clearance:
 - asbestos / stink bug / dumping duties
- Contact the consignee where you do not have authority to release the goods due to non-payment
- Make sure the consignee knows the costs involved with abandonment and late return of containers:
 - literally send them a document that shows the actual increasing costs

Disputes between parties

- Dispute between the consignor and consignee:
 - push for an interim resolution that allows the containers to be returned
 - make the parties aware that the carrier can pursue them regardless of the reasons for the delayed return
 - Even if in the right, the consignee has an obligation to mitigate their losses – this will often include limiting demurrage/detention
- You are in dispute with the customer
 - You have a duty to mitigate losses
 - The shipping line does not care about your dispute

Insurance

- What cover do you have in place
- Does the policy cover cost of abandonment in the absence of negligence
- Specialist freight forwarder policy may provide some coverage
- More general professional indemnity policies may require negligence
- All policies will require the insured to act reasonably to reduce their losses



Customs Issues

Have you had to arrange the disposal of goods

In the past 5 years have you or your firm had to arrange the disposal of goods under customs control:

1. No
2. Yes, only once
3. Yes, 2 – 5 times
4. Yes, more than 5 times

Abandoned goods under customs control

- If under customs control, you cannot interfere with the goods without the permission of the ABF
- However, this does not mean that the ABF will incur the cost of disposal of abandoned goods
- PS2009/23 – Unentered Goods and Certain Abandoned Cargo

Section 218A – Certain Abandoned Goods

(1) If a Collector has reason to believe that goods found at a Customs place:

- (a) are not required to be, or are not able to be, entered for home consumption; and
- (b) have been abandoned by their owner;

the Collector may take steps to dispose of the goods in any manner he or she thinks appropriate

- Cannot force ABF to exercise this power
- Is it clear that the goods have been abandoned
- If unclear – 90 day waiting period

Section 218A

Usually wont apply to cargo reported goods – the owner can be identified via the shipping and commercial documents

Very limited exceptions:

- intractable
- toxic or hazardous goods
- goods that pose a risk to life or limb
- disposal furthers the operational objectives of the Department

Section 72 – failure to make an entry

- If no entry made, Customs may cause goods to be entered to a warehouse
- If the goods are perishable or hazardous material or a live animal, Customs can sell or dispose of the goods
- other goods – after six months Customs may sell or dispose of the goods

Customs does not consider it has an obligation to act in the above instances – merely that “may” act

Sections 94 and 96 – warehoused goods

Goods not worth duty may be destroyed

(1) Where a Collector is satisfied that the value of any warehoused goods is less than the amount of duty payable in respect of the goods, he or she may, if requested by the owner of the goods to do so, destroy the goods and remit the duty.

Arrears of warehouse charges

(1) Where any rent or charges in respect of warehoused goods has or have been in arrears for:

(a) except where paragraph (b) applies--6 months; or

(b) where the goods are the unclaimed baggage of a passenger or member of the crew of a ship or aircraft--30 days;

a Collector may sell the goods.

Poll result

Customs says disposal of goods is very rare



Practically

- The ABF will rarely auction goods
- The ABF is less likely to become involved in general goods abandoned as a result of a failed commercial transaction
- The ABF will not bear the cost of disposal of such goods
- The ABF will not provide guidance on the ownership of goods
- The ABF does encourage industry operators to take positive action
- The ABF may not themselves be involved in the destruction of goods – factors are the value of goods, likelihood of theft, risk to the community

What positive action is expected

S4 of Customs Act – Owner:

in respect of goods includes any person ... being or holding himself or herself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods.

- Definition of owner includes anyone in possession of the goods
- ABF suggests as owner:
 - enter the goods into a warehouse or for home consumption
 - export the goods
 - obtain permission to destroy or dispose of the goods
- Duty and GST obligation will fall on the “owner”
- Before lodging an entry undertake some due diligence as to the accuracy of the entry

ABF tips

- Give the original importer ample opportunity to enter the goods
- Resolve competing claims over the goods before taking action
- Have a lawful basis for ownership
- Seek independent advice
- Negotiate with other parties to agree on a course of action
- Keep the Department informed of decisions
- Keep good records of correspondence and actions
- Seek authorization from the department before disposing or destroying any goods under customs control

Disposing of goods

- There is no specific form
- Seek permission from the applicable ABF regional command
- ABF may request:
 - evidence of attempts to contact the owner
 - reasons why the goods cannot be entered
 - why the goods were allowed to go “time up”
- If sufficient evidence is not provided, the broker / forwarder should claim “ownership” and resolve the matter

Questions?

CONTACT

Russell Wiese

T: 03 8602 9231

E: rwiese@huntvic.com.au

An aerial photograph of a port area. In the foreground, a large container ship is docked at a pier. In the middle ground, a smaller cargo ship is visible. The background shows a cityscape and a large body of water under a cloudy sky. The image is overlaid with a semi-transparent red banner containing contact information.

hunt & hunt
lawyers