

# BEST PRACTICE GUIDE



## GUIDANCE ON CONTRACT MANAGEMENT



International Federation of  
Freight Forwarders Associations

*The global voice of freight logistics*

# FIATA INTERNATIONAL FEDERATION OF FREIGHT FORWARDERS ASSOCIATIONS

FIATA is a nongovernmental, membership-based organization representing freight forwarders in some 150 countries. FIATA is a reference source on international policies and regulations governing the freight forwarding and logistics industry. FIATA works at the international level to represent service providers who operate in trade logistics and supply chain management. Through its FIATA documents and forms, congress, training and publications, and engagement with relevant international organizations, it promotes trade facilitation and best practices among the freight forwarding community.

Founded in Vienna, Austria, on 1926, FIATA owes its name to its French acronym (*Fédération Internationale des Associations de Transitaires et Assimilés*) and is known as 'the global voice of freight logistics'. FIATA is headquartered in Geneva, Switzerland.

## DISCLAIMER

It should be borne in mind that 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.

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 readers 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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For further information about the activities of the FIATA Advisory Body on Legal Matters or to make comments about this guide, please contact the FIATA Headquarters at [legal@fiata.com](mailto:legal@fiata.com)

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# INTRODUCTION

The contracting process is crucial for freight forwarders, not just to mark the start of a new business relationship, but as a method by which to manage one's risk and avoid undue liability exposure. Much depends on having proper management controls in place from the outset to avoid common and unnecessary pitfalls.

This best practice guide provides general considerations for freight forwarders during any contracting process, delving into the overall stages of the process and providing guidance regarding what to watch out for and the essential contractual clauses to consider. The guide also addresses other more specialized contracts to provide general guidance on what to consider in such instances.

**This best practice guide was developed by FIATA's Advisory Body on Legal Matters to follow the journey of the contracting process and help freight forwarders develop a practical contract management protocol for use in their daily business. It should not be construed as legal advice in any way and freight forwarders are advised to seek their own independent legal advice and contact their own national association for guidance, in accordance with their own national context.**

# RECOGNITION OF COMMERCIAL OPPORTUNITIES AND ASSESSMENT OF RISKS

## RECEIPT AND EVALUATION OF COMMERCIAL BENEFIT

From the very moment that the initial prospect of a new business contract arises, for example, where a request for quotation or invitation for tender is made; freight forwarders should be alert and ready with strong management controls in place.

Having a firm grip on the process from the very beginning through a central point will facilitate a smoother contractual process and help avoid the unnecessary mistakes of missing deadlines or not having the contract reviewed at the correct level. In addition, understanding the request and context from the beginning will be valuable to ensuring all appropriate considerations are taken into account from the outset. This may require also developing a standard system to ensure proper record-keeping of relevant communications, so that all are aware of what has been discussed.

## CONDUCT OF DUE DILIGENCE PROCESS

Doing appropriate due diligence before entering a contract is crucial to know exactly who one is going into business with and which goods one is handling. Many risks can be mitigated substantially at the pre-contractual stage, simply by having proper due diligence procedures in place. Ultimately, it is important to take one's time. Urgent, last minute, take it or leave it transactions can be the most problematic and result in circumventing the due diligence procedure.

Fundamentally, one needs to know with whom they are contracting, whether they are a genuine, financially viable entity, and whether dealing with that entity or goods may breach international or autonomous sanctions or require permits or approvals to carry. This is a critical step in protecting one's business, so it is important not to rush. This is ever more crucial when contracting in unfamiliar jurisdictions, which may require a more comprehensive due diligence process.

The following are key considerations when conducting due diligence on a contractual party:

- > **Verify the identity of the company.** Doing so may include, *inter alia*, verifying some information online e.g. the landline number, address, domain name, company registration number, VAT numbers. When contracting in unfamiliar jurisdictions, consider conducting local investigations and meeting the company at their primary place of business. Secure details such as their full trading style(s), both in English and local language, the names of directors, banking details, and original copies of insurance documents.
- > **Conduct a credit check on the company** with a credit reference agency and consider appropriate policies or agreements required. Key questions to bear in mind include how much credit is the customer expecting and on what terms? Consider one's cash flow.
- > **Consider if the customer has material assets** or whether it is a company with no substance and no assets.
- > **Consider conducting a peer review.** It is valuable to look into whether one's peers have experience of trading with this company, for example, and whether they are known to pay on time.
- > **Consider applicable sanctions** (all relevant UN, EU, US, and national sanctions) in relation to the entities involved as consignor or consignee, as well as the goods themselves. This includes looking into the ownership structure of the customer and the country they are doing business in. One should also consider the cargo in question, and whether they are subject to sanctions or other controls requiring approvals or permits, and whether they are dual use goods. This information could be secured from relevant government agencies.
- > **Consider whether the customer has liability insurance in place**, and if possible, what are the limits.
- > **Consider safety aspects** and whether the customer can demonstrate commitment to safety/adherence to applicable regulations. Possible considerations include mis-declared goods, AEO, ISO, and cargo/industry specific designation.
- > **Consider what goods the customer is shipping, to where and when?** Low value goods, as well as goods shipped for waste or recycling, for example, can increase the risk of uncollected/abandoned goods. In addition, there may be certain risks and costs associated with different ports or jurisdictions, and such risks should be taken into consideration.

**Remember:** If it seems too good to be true, then it probably is. Freight forwarders should ensure they have consistent and well-documented processes in place to conduct due diligence and ensure it is cross-checked with trusted sources.





# NEGOTIATION OF KEY TERMS

At the negotiation stage, it is important to involve legal counsel and/or decision makers i.e. those who have the authority to agree and who understand contractual terms. The involvement of in-house legal counsel who knows the intricacies of the business can be a critical advantage to be able to balance the ideal contractual terms with practical solutions. Moreover, it can help to streamline internal discussions, given their familiarity and relative ease of communication with internal stakeholders. In case where figures are being estimated or quoted, it is important to ensure that the indexes on which the figures rely on are referred to, as well as the timeframe in which prices are expected to be held pending further negotiation.

## **Watch out for 'battle of the forms'**

It is also important at this stage to watch out for the concept of 'battle of the forms', which arises when two businesses are negotiating the terms of a contract and each party wants to contract on the basis of its own terms. This can commonly occur, for example, when two parties are exchanging pre-printed forms or documents with their own standard terms and conditions on the back. The disadvantages of doing things in this way are many. Doubts may arise as to the very existence of a contract, and in the best of cases, even when a contract is finally concluded, many doubts and controversies may likewise arise with regard to its contents and interpretation. For instance, to determine the contents of the contract, the prevailing terms and conditions will possibly be the ones put down by the last party which were not explicitly rejected by the recipient. Alternatively (under the so-called 'knock-out rule'), only the parties' terms that do not conflict in substance with each other will be kept, with the ensuing and not always expected consequences.

This sort of uncertainty should be avoided at all costs. In such similar situations, it is worth negotiating an agreement that supersedes these forms to ensure clarity – including a clause stating that such agreement comprises the complete understanding between the parties. It may also be helpful to clearly identify conflicting terms at the outset and negotiate acceptable alternatives during the negotiation stage.

Finally, it is important to ensure that conditions in the contract provide for back-to-back liability coverage in relation to other relevant agreements and transport documentation, and that there are no gaps/differences in terms of liability that you are unaware of or that have not been insured. Having the assistance of legal counsel will be valuable.

### **Ensure careful management of communications**

All communication exchanged in the context of a negotiation or preliminary traits should be managed carefully. Anything pertinent should be confirmed in writing as soon as possible, and it may also be good practice to include a clear (and possibly standard) statement that no message expresses consent to any conditions or clauses, unless explicitly stated. In communication including terms or conditions of a freight forwarder, such statement may even state that any modifications or additions to the terms/conditions will not be accepted, unless explicit consent is given thereto.

When unexpected changes or unagreed terms are spotted, it is advisable to react quickly and make an express reservation. Ultimately, freight forwarders should be wary not to accept something that does not seem right and should not be afraid to challenge it.



# DRAFTING AND REVIEW OF CONTRACT

## GENERAL CONSIDERATIONS

### Template contracts

Freight forwarders should exercise caution regarding the use of template contracts. This use is becoming particularly prevalent today, given the ease of obtaining such documents for use in one's everyday contracts for a variety of different functions. Nevertheless, it is important to read the clauses carefully to consider if there are clauses that simply do not belong in a freight contract, or that could become problematic in the case of a dispute. As a matter of good practice, no clause or term should be included in a contract unless there is a clear understanding of its purpose and intended consequences.

The freight forwarder should be careful that none of their 'template' contracts breach relevant local legislation. For example, some contracts with individuals (known as consumer contracts) cannot include certain provisions. This extends to provisions which could be deemed as 'unfair' which provisions could not only be unenforceable but attract a penalty as an offence under that 'unfair contract' legislation.

### Standard trading conditions

Standard trading conditions (STCs) are recognized industry terms and conditions which state the general contract terms and conditions between the two contracting parties. These are often developed by a freight forwarder's national association in line with local legislation and vary from country to country. Often, they find their basis in the FIATA Model Rules for Freight Forwarding Services, which are the standard trading conditions formulated by FIATA for any kind of freight forwarding services such as carriage, consolidation, handling, packing, storage, distribution of goods, as well as ancillary and advisory services in connection therewith. As these rules are voluntary, they are not applied uniformly around the world. As recognized industry terms and conditions, they provide a level of assurance that the freight forwarder is trading in accordance with uniform terms specifically approved by FIATA (in the case of the FIATA Model Rules), or the relevant national freight forwarding association where such STCs have been developed in their territory.

Several FIATA Association Members have developed their own STCs for adoption by its members and should already cover most common issues that arise, and the essential clauses listed below in accordance with local legislation and specificities.

## **Consistency between the contract and the terms of the bill of lading**

For one shipment, the freight forwarder is normally involved in various contracts or documents with different stakeholders in different jurisdictions. Consistency among these contracts or documents is vital, especially in terms of clauses on the basis and limitation of liability, as well as applicable law and jurisdiction, to enable the freight forwarder to manage their 'gap' of legal risks. The bill of lading is evidence of the contract of carriage initially agreed. Therefore, freight forwarders should be mindful to ensure consistency between the terms of the contract initially signed and the terms of the bill of lading, or other relevant transport document to ensure clarity. Such precautions should also be followed when a different transport document, other than a bill of lading e.g. a waybill is used.

Note contradictions and overriding provisions e.g. incorporation of terms or precedence clauses. For these purposes, the freight forwarder should be aware of which version of Incoterms may apply and the effect of the relevant Incoterm used in the contract of sales possibly existing between shipper and consignee, as they may help to understand the position of the freight forwarder.

## **Insurance contract**

Freight forwarders should consider insurance cover: do the services to be provided under the new contract or the goods being carried fit within the existing insurance cover framework – or does one need to make its insurer aware? This should be done in consultation with one's insurer, as well as the national association to ensure appropriate coverage for the different aspects of their business.

Clear procedures for handling claims should be laid out in the insurance contract. It is also important to have someone experienced who is dedicated to handle insurance claims. Most insurance contracts require the insurer to be notified as soon as any event arises, which could lead to a claim on the insurance. Failure to notify the insurer (or its broker) at the earlier stage may allow the insurer to deny indemnity.

## **REVIEW**

The review stage of a prospective contract is a vital occasion to ensure that the appropriate due diligence is done into the new client's identity and financial viability, and to ensure that the contract appropriately covers the obligations of both parties, and what happens if something goes wrong. This includes ensuring all essential clauses are included, that the contract does not inadvertently bind a freight forwarder to unachievable or onerous obligations, and that appropriate provision is made to manage any ensuing disputes.

Contracting in unfamiliar jurisdictions can also involve greater risks and present greater challenges in the event of a dispute, so it is important to ensure those risks are correctly assessed. Considerations can include operational and cultural differences, and local regulations and requirements. Some high-level guidance can be found, as a starting point, in the [World Bank 'Doing Business' Index](#). Crucially, the local environment can, for example, also impact on the predictability of a given entity to satisfy its legal and

financial exposures. Challenges can also be found in being able to perform simple business searches, such that one is unable to clarify whether one is trading with a financially stable, asset-driven business or what is essentially a company with no substance and no assets. Contracting in unfamiliar jurisdictions can moreover raise additional issues from a liability insurance standpoint.

Often, it is at the review stage that many unintended costs and consequences can simply be avoided by taking proper care and ensuring a standard and thorough process.

## ESSENTIAL CLAUSES

### Liability

To prevent limitless liability, it is advisable to limit contractual liability to a specific monetary value and exclude liability for indirect loss/consequential damages. Provisions concerning liquidated damages and consequential losses should also be considered. It is important to ensure that the contract does not extend the liability of the freight forwarder beyond the STCs, and it should also take into consideration the need to ensure that adequate insurance is in place to cover the liability at hand. Liability provisions can be found in STCs of one's national association, the FIATA Model Rules, and usually on the back of the relevant transport document. Again, consultation with one's insurance provider is crucial to ensure that any potential gap in insurance cover is properly mitigated.

As recent events have demonstrated, having a comprehensive force majeure clause is crucial to exclude liability for the occurrences of certain pre-specified events which are beyond the control of the contracting parties. Usually, this refers to natural and extraordinary disasters, and now increasingly reference events such as pandemics, government action, and stoppage or restraint of labour. These will often be included in the national association's STCs and may vary from jurisdiction to jurisdiction.

### Security: detentions, liens, pledges

Ensuring appropriate provision is put in place as to how to deal with the goods is important in the event that something goes wrong. This is usually covered by STCs, and is reflected in the FIATA Model Rules. Freight forwarders often have a retention right, a right of lien or other forms of security over the goods or documents in question, which may be particularly important where the customer has ceased trading or simply disappeared. This may give the freight forwarder a property interest over the goods or transport documents, without the requirement of actual possession, to which they can have recourse in order to secure payment of amounts owed to the forwarder, such as transport and storage costs. The provision of detention of goods or documents should be consistent with the payment schedule. The content of such rights and procedural requirements can vary substantially across the different jurisdictions and legal advice may be necessary, particularly when dealing with unfamiliar jurisdictions.

### **Liability for additional costs and conditions**

Care should be taken to ensure that the freight forwarder has the ability to pass on additional costs which are imposed on it by third parties in respect of the carriage of goods, as well as any delays or other conditions. This is particularly important in relation to the liability for delay in delivery, the definition of which should be clearly provided. Here, it is useful to refer back to the STCs, as this should generally provide for this eventuality.

### **Indemnity clauses**

Each party should warrant that it is free to enter into the agreement and indemnify the other party for breach of such warranty. There should be an indemnity clause for losses that are suffered by the freight forwarder on account of carriage of the goods, being those aspects that are due to the acts, omissions or negligence of the customer or other contracting party that results in a claim being made against the freight forwarder. In such instances, the latter should be indemnified for all reasonable costs and expenses that may arise out of that act, omission or negligence of the other party.

### **Governing law and jurisdiction**

Freight forwarders should ensure that they include a clause stating the applicable governing law and jurisdiction to ensure certainty in the event of a dispute. Where possible, seek to incorporate a familiar law and jurisdiction clause – this will usually be the law and the jurisdiction of the State or place in which your business is established. National association STCs often provide for the relevant law and jurisdiction, and freight forwarders are advised to check this with their national association and to incorporate the STCs as appropriate.

### **Dispute resolution provisions**

It is helpful to specify a course of action to be followed in case a dispute arises. This may involve consideration of a clause allowing for mediation and (if needed when mediation does not succeed) an arbitration clause to prevent lengthy and expensive court litigation from taking place. Reference should be made to the mediation/arbitration process to be adopted, for example, whether according to ICC or HKAC rules. This should be a meditated decision, ideally under the advice of an in-house or external counsel, as the advisability of the different dispute resolution methods may vary depending on the transaction and the circumstances.

### **Entire agreement clause**

It is important to include an entire agreement stating that the contract constitutes the entire agreement of the parties in respect of the subject matter, unless it is amended or varied in accordance with the agreement.



# SIGNATURE AND EXECUTION OF THE CONTRACT

## SIGNATURE

An easy mistake to fall into is inadvertently binding oneself into a contract without even realizing it, either due by some other means e.g. email or oral, or due to another internal person binding the company to a contract despite not necessarily having approval from the board or authorized decision maker.

The formality requirements to validate a contract may vary from jurisdiction to jurisdiction, or from contract to contract. For instance, the signature of a director might be sufficient for some contracts, while a company seal is mandatorily required in other cases. The freight forwarder should carefully verify the formality required by the governing law and jurisdiction.

It is also prudent to consider publishing and distributing clear authority levels internally and to consider developing a short list of those authorized to sign contracts on behalf of the company.





# PERFORMANCE OF THE CONTRACT

## **Record management**

Poor management regarding storage obligations and management can prove costly. Missing rates reviews, for example, can mean that a company has to pay higher-than-necessary rates, or risk being subject to penalties due to renewal dates being missed. Again, holding a central database and contact point can be helpful to ensure that this does not occur. Such system should also take note of the details of the contract and any terms that may be onerous to ensure care is exercised.

## **Accessibility of contracts**

Good practice is to ensure a central storage point to maintain a proper repository of all contracts so that they are easily accessible and can be retrieved if need be. Ensuring all relevant persons within the company know where to retrieve the contracts in the event of need is key.



# SPECIFIC CONSIDERATIONS REGARDING DIFFERENT TYPES OF CONTRACTS

## CONTRACTS WITH SUB-CONTRACTORS

It is important to pay close attention to the terms and conditions sent by sub-contractors, which may present clauses unfavourable to the freight forwarder. Special care should be taken, noting that in case of loss or damage to the cargo, clients usually seek remedy directly from freight forwarders, instead of from insurers or third-party contractors, because the forwarder is the party with whom they had direct dealings.

In addition to the essential clauses listed in the above section, below are some provisions that freight forwarders may wish to consider when contracting with sub-contractors, where appropriate and in line with national jurisdictional requirements:

- > Clarification that sub-contracting can only be done with prior written consent of the freight forwarder
- > Provision that time will be of the essence in the rendering of services under the agreement
- > Deletion of clauses that give the sub-contractor the sole discretion to exercise a lien or right of retention over goods as security for money owed
- > Deletion or limitation of clauses in which the sub-contractor purports to exclude all liability for loss or damage
- > Clarification that revision of the contract is only possible as and when the freight forwarder agrees in writing
- > Clarification regarding legal fees in the event of a dispute to ensure that they are balanced and that the freight forwarder is not overly exposed to liability

## CONTRACTS WITH CLIENTS

In terms of liability risks, when a freight forwarder acts as agent for the shipment, it is important to regulate such role clearly in the contract with the client, ensuring that the freight forwarder's liability is based on negligence. Indirect and consequential losses should be excluded from the liability and there should be a monetary value to the limitation of liability. Reputational risks or compliance risks nowadays may relate to anti-corruption, anti-competition, data protection and sanctions, which should also be considered in the contracts.

In terms of credit risks, it is crucial that before giving extended credit terms to a client, the credit rating of the client should be carefully evaluated. Set-off clauses should be deleted or restricted so that only the agreed amount could be set off. Having the right of lien or retention or other relevant security over the goods or documents can also be a powerful tool for freight forwarders. For duties and taxes, they should be paid by clients and ideally changes in third-party charges beyond control of freight forwarders should also be borne by clients.

Freight forwarders should always go through their insurer to check if they are properly covered in terms of potential liability regarding different clients or different transactions, as this may bring about different types of risks – even if they are using a tried and tested contract. For regular customers, it is valuable to consider having an overarching master agreement covering the respective obligations and understandings of both parties, as this may be useful in the event of a dispute.





# PRACTICAL CHECKLIST

- **Ensure appropriate procedures are in place for communication and record keeping.** This includes designating a central point of contact and storage, ensuring all relevant stakeholders are involved in the contract management process, and ensuring appropriate authority levels within the company for decision and signature.
- **Conduct appropriate due diligence to ensure one knows who they are contracting with** and the goods and jurisdictions they will need to deal with, noting challenges when dealing with unfamiliar jurisdictions.
- **Look out for gaps/differences in terms of liability** and ensure that any are appropriately covered by one's insurance provider or factored in as part of the commercial risk management process.
- **Be careful not to be inadvertently bound to terms.** Watch out for differing terms if exchanging pre-printed forms or documents with their own standard terms and conditions. Include relevant statements to clarify that no message expresses consent or modifications to any conditions or clauses, unless explicitly stated. Check for consistency with the terms of the contract and other relevant transport documents.
- **Get in touch with one's national association to get hold of their standard trading conditions (STCs).**
- **Ensure appropriate consultation with one's insurer and national association** to check that there is appropriate insurance coverage.
- **Consider inclusion of key clauses** such as: limitation of liability, security or retention rights, indemnity clauses, governing law and jurisdiction, dispute resolution provisions, and entire agreement clause.
- **Check formality requirements for validating a contract** in line with the governing law and jurisdiction.

# CONCLUSION

Having appropriate, centralized and well-documented contract management processes with proper due diligence controls is key for freight forwarders to prevent far-reaching risks and liability exposure in the course of their business. Having a firm grip on the process from the very beginning will facilitate the contractual process and help avoid many unnecessary mistakes, and the involvement of all necessary stakeholders is crucial to streamline the process. This includes consultation with one's insurers to ensure appropriate insurance cover, noting that a number of factors can invariably impact coverage. It also requires careful commercial and legal considerations as to essential clauses and the necessary jurisdictional requirements. Noting the highly globalized nature of the freight forwarding business, particular care should always be taken when contracting in an unfamiliar jurisdiction, and legal advice should be sought.

The commercial environment often provides many time imperatives, but ultimately, it is important to take one's time to ensure a smooth and comprehensive process. It is crucial that freight forwarders are well aware of these realities to ensure that common and unnecessary pitfalls be avoided. This best practice guide provides important considerations for freight forwarders on the contracting process for freight forwarders, which freight forwarders may find useful to take into account in developing their own contract management procedures.

It should be noted that this is not legal advice, and should not be construed as such. Through its Advisory Body on Legal Matters, FIATA is committed to provide the global freight forwarding community with important resources and tools for their daily businesses and keep them informed of the legal developments around the world. FIATA nonetheless underlines that freight forwarders should seek their own independent legal advice in accordance with the relevant jurisdictional requirements.





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