



Protect your cargo: What to do when a carrier defaults



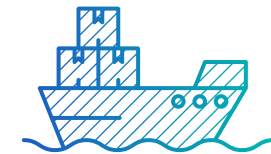
The COVID-19 pandemic has impacted trade and shipping, and remains a severe threat to many business activities.

From home isolation and forced business shutdowns to border closures and travel restrictions, the pandemic's impacts are wide-ranging. Global trade and supply chains have been affected significantly, but so far individual carriers have fared reasonably well.

"We haven't seen significant problems from a sea-freight perspective yet," says Daniel Morrison, Marine Protect's National Cargo Product Manager.

And although some trade types – such as food staples and medical equipment – may maintain demand with limited interruption, the overall trend is clear:

we can expect large-scale reductions in trade and cargo movements, which will ultimately affect the transport sector's financial viability.



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Our view is that shippers will benefit from shorter-term contracts and either by diversifying their carriers' selection pool or by concentrating more on financially healthier or government-supported carriers.

– **Godfried Smit**, Secretary General of the European Shippers' Council

THE RISK OF DEFAULT

Should a shipping company fail, its vessel(s) will likely cease to trade at the next port of call or be directed to an interim port and all further service suspended.

Cargo owners will be advised to remove their cargo from the ship and arrange any on-forwarding of the goods to the final destination at their own cost.

Owners often prepay their freight costs, but service providers such as freight forwarders, shipping agents or customs agents do not. Unscrupulous operators may try to take advantage of a ship's situation, for example by holding a cargo due to be loaded onto or released from a defaulting ship.

Legally, such action has no standing.

Debt-recovery actions should address the ship and its owners; they have nothing to do with the ship's cargo or cargo owners.

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A vessel doesn't have the right to say “the cargo owners owe us money, so you can't have your stuff”.

— **Daniel Morrison**, National Cargo Product Manager at Marine Protect

Service providers may characterise such actions as liens¹. However, this characterisation is incorrect and unenforceable (unless there is a separate debt between the service provider and the cargo owner).

Similarly, a service provider may request a bond payment or guarantee before releasing a cargo which, again, would be a claim with no legal standing.

Cargo owners faced with such claims should promptly engage the services of a specialist trade and transport solicitor for a suitable remedy.

¹ A privileged claim on a property or the right of a creditor to retain a debtor's property until the debt is paid.

THE INSTITUTE CLAUSES

Cargo policies, for the most part, cover loss or damage to goods. If your cargo is stranded, your insurance might not be applicable, as Nick Rowley, NTI's Technical Specialist - Marine, explains:

“These goods aren't damaged. They've just been offloaded somewhere they shouldn't be.”



Most local cargo policies are based on the more recent versions of the Institute Clauses (such as the *Institute Cargo Clauses* dated 01.01.09). These versions include a more flexible Insolvency Exclusion Clause:

In no case shall this insurance cover loss, damage or expense caused by insolvency or financial default of the owners, managers, charterers or operators of the vessel/aircraft where, at the time of loading of the subject-matter insured on board the vessel/aircraft, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage.

This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the insured goods in good faith under a binding contract.



The clause also specifies:

1. A privity requirement, i.e. that cover will be excluded if the insured knows, or ought to know, that the carrier is at risk of default.
2. That the above exclusion will not apply to an assigned party under a binding contract.

Where the insured can show full compliance with both of the clause's provisions, subsequent loss, damage or expense (including reasonable forwarding costs) may be recoverable.

Further, the final paragraph provides relief where you are the seller of goods and assign the insurance cover to the consignee under a binding contract. In such cases, the exclusions clause does not apply.

CHOOSE YOUR CARRIER WITH CARE

One precaution every cargo owner should take is to choose their business partners carefully. Primarily this means freight forwarders and logistics providers, not shipping companies.

“Freight forwarders are in the industry,” Daniel says. “They know who is performing well, who’s having problems and where any issues might lie.”

For example, there might be two carrier options for your cargo. A well-connected agent or forwarder will help you choose which to use. The cheaper carrier might be less financially secure, in which case you’ll have to decide how much risk you want to take on.

In short, after you’ve insured your cargo, forging a close and trusted relationship with your providers is perhaps the single most useful precaution you can take.

“**Work closely with your logistics provider, your freight forwarder, to understand the process and their concerns as part of the industry. If they have concerns about a particular carrier, you can mitigate the risk.**

– **Daniel Morrison**, National Cargo Product Manager at Marine Protect

These relationships are even more critical during the current period of global disruption and economic strain caused by COVID-19.

And if there is a problem, even with uninsured or trade exposures, you should identify it immediately so the risks arising can be managed.

TERMINATION OR CHANGE OF VOYAGE

Most Institute Cargo Clauses provide some form of continuity of cover in these circumstances. For the sake of example, here are some clauses from the *Institute Cargo Clauses (A) 2009*:



Transit (Clause 8.3)

- Provides the maintenance of cover during delays (beyond the control of the Assured), any deviation, forced discharge, reshipment or transshipment for shipments already departed and where this action is undertaken by the carrier (ship or airline) under a liberty granted to them in the contract of carriage.
- Usual transit and termination of cover provisions remain where the forced change is not part of the liberty granted to the carrier.
- Where the Carrier terminates the shipping contract at an intermediate port or place, in circumstances beyond the control of the Assured, Clause 9 (Termination of the Contract of Carriage) comes into force.

Termination of the Contract of Carriage (Clause 9)

- It is important to note that insurers require notice to continue cover in these circumstances (termination of the shipping contract [beyond Assured control] at a port/ place other than the intended destination).

Change of Voyage (Clause 10)

- Similar to Clause 9 above, notice must be given to insurers to allow a review of the new exposure contemplated by a different voyage.

Note: NTI has officially accepted 'notice' as having been given (under Clauses 9 and 10) for all shipments directly impacted by COVID-19 where the Change of Voyage is activated. However, this does not include carrier insolvency or defaults that cannot be directly linked to COVID-19.

INSOLVENCY OR FINANCIAL DEFAULT OF CARRIER EXPENSES

Coverage under Institute Clauses focuses on loss of, or damage to, the goods in question.

It does not usually extend to consequential losses such as additional shipping costs in the absence of an initial claim for loss or damage.

Notwithstanding the limitations of the Institute Clauses coverage, and to assist our customers, Marine Protect offers an additional benefit of up to 10% of the sum insured.

This cover is to defray reasonable additional freight and/or temporary storage expenses to complete a delivery.



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We want to help. If you know you’ve got cargo on a ship that’s gone into administration or default, let us know as soon as possible.

– **Nick Rowley**, Technical Specialist
Marine at NTI

Even if your cover doesn’t respond to insolvency or default, NTI can often lend assistance.

“We can try to get your goods on another ship,” Nick says. “It’s quite likely we will have more than one client involved, so we may be able to pool resources and assist.”

This possibility applies to land, sea or air carriers. It is a common feature across our Combined Cargo and Inland Cargo products (excluding the Perils Cover option).

INSOLVENCY OR FINANCIAL DEFAULT OF CARRIER EXPENSES CLAUSE

If any insured transit is interrupted or terminated due to the insolvency or financial default of the carrier (land, sea or air), whether or not loss or damage has been occasioned to the goods, NTI will pay reasonable freight and/or temporary storage expenses to forward the goods to:

- their intended destination
- an alternate destination
- the place from which they were dispatched

up to a maximum value of 10% of the sum insured. Daniel says that “the standard exclusion in pretty much every policy is insolvency or financial default”.

“If customers have specific concerns, we can always work with them and their broker to **find a suitable solution.**”

– **Daniel Morrison**, National Cargo Product Manager at Marine Protect

But even that amount can be eaten up quickly if cargo needs to be moved quickly, or if it has special handling or storage requirements. These requirements might include temperature control or strict delivery dates.

“We offer up to 10% of the sum insured,” says Daniel, “which may or may not be enough. Situations can change quickly ... customers should always work with their brokers in the first instance to see what can be done.”

WHAT TO DO - ACTIONS, RESPONSES AND RECOMMENDATIONS

Daniel and Nick agree that if you have an insured cargo in transit, it pays to remain alert to current events and developments through press, industry and government information sources.

Stay in regular contact with your freight forwarders, brokers, booking agents and logistics providers, as they may provide alerts regarding potential problems.

Where an insolvency or financial default impacts your cargo, take prompt and appropriate steps to safeguard it, and take physical control where possible. Your legal and trade advisors may be able to assist you in this regard.

“Early communication and working with your providers to understand the risks before they even happen is the key,” Daniel says. “And then if something does go wrong, get in touch as soon as you know and we’ll start working with you to resolve the situation.”

Note:

The above information has a general application to many Cargo Insurance contracts and Insured Party circumstances. We strongly recommend that specific inquiry and review is undertaken to ensure that a complete picture of Insured Party circumstances and requirements is identified.