

Navigating Rate Agreements: Evaluating the Security and Enforceability of Contracts with Shipping Lines

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24 July 2024



ACKNOWLEDGEMENT OF COUNTRY

Mills Oakley would like to acknowledge the Gadigal Peoples of the Eora Nation (Sydney), where our team works.

Traditional Custodians of the land on which we meet today and pay our respects to their Elders past and present. We extend that respect to Aboriginal and Torres Strait Islander peoples here today.

Context: Recent increases in Freight Rates in the Australian market



Freight rate increases in the news

COZZIE SHIPPING' KEEPS RISING – BUT FOR HOW LONG?

[Dale Crisp](#) | 8th July, 2024

Today, 1 July, MSC has begun imposing a peak season surcharge ex Australia and NZ to Canada, Mexico, and South America (East Coast, West Coast, Central America, Caribbean) of US\$1100/TEU, 1600/FEU, for dry & reefer cargo.

Also today, CMA CGM imposed, until further notice, a PSS on all cargo from Australia, New Zealand, Papua New Guinea & Timor Leste to North Europe, the Mediterranean & North Africa of US\$1000/TEU and \$1500/FEU; this expands the scope of the previously-announced PSS to include North Africa.

ANL will be implementing a rate restoration program from 15 July, at US\$300/TEU dry/reefer and US\$600/FEU dry/reefer for all shipments from North East Asia to Australia East Coast, Fremantle, Adelaide & New Zealand. This increase will apply on top of current Spot/FAK rates subject to all applicable surcharges valid on time of shipment.



Global Supply Chain News: The Four Factors Driving Ocean Container Shipping Rates Higher



Capacity is Growing, but not Enough to Make a Difference Yet, Drewry says

June 18, 2024

The rates-up round-up

Shipping costs on the rise with conflict, pirates, protectionism and profits sharing the blame



By business reporter [Daniel Ziffer](#)
Posted Mon 29 Apr 2024 at 4:52am

The new financial year has seen a number of container lines introduce various rate rises

The \$10,000 Shipping Container Looms in Latest Trade Strains

- Elevated spot rates are heading even higher into June
- With capacity stretched, firms are double-booking ship space

By [Brendan Murray](#)

May 29, 2024 at 10:40 PM GMT+10
Updated on May 30, 2024 at 1:19 AM GMT+10



Example of freight price changes

Date 1 – Price at booking 1 40” dry container from Melbourne, Australia to Long Beach, USA via Spot Booking portal (same price following minor amendment)

PRICE OVERVIEW BOOKING AMENDMENT

Booking No.: [REDACTED]

FMC_Reference [REDACTED]

Print Date: 2024-05-02 07:39 UTC

Rate_ID [REDACTED]

Price Overview

Description	Currency	Charge PerUnit	Container Type	Quantity	Sum Rate	Total_Rounded
Basic Ocean Freight	U.S. DOLLAR	Per Container	40 DRY	1	115	115
Container Protect Unlimited	U.S. DOLLAR	Per Container	40 DRY	1	15	15
Documentation Fee - Origin	AUSTRALIAN DOLLAR	Per Documentation Fee		1	55	55
Environmental Fuel Fee	U.S. DOLLAR	Per Container	40 DRY	1	475	475
Low Sulphur Surcharge	U.S. DOLLAR	Per Container	40 DRY	1	30	30
Terminal Handling Service - Destination	U.S. DOLLAR	Per Container	40 DRY	1	700	700
Terminal Handling Service - Origin	AUSTRALIAN DOLLAR	Per Container	40 DRY	1	730	730



Date 2 – Price after consignment was “rolled” the first time

PRICE OVERVIEW BOOKING AMENDMENT

Booking No.: [REDACTED]

FMC_Reference [REDACTED]

Print Date: 2024-05-13 04:16 UTC

Rate_ID [REDACTED]

Price Overview

Description	Currency	Charge PerUnit	Container Type	Quantity	Sum Rate	Total Rounded
Basic Ocean Freight	U.S. DOLLAR	Per Container	40 DRY	1	20155	20155
Container Protect Unlimited	U.S. DOLLAR	Per Container	40 DRY	1	15	15
Documentation Fee - Origin	AUSTRALIAN DOLLAR	Per Documentation Fee		1	55	55
Environmental Fuel Fee	U.S. DOLLAR	Per Container	40 DRY	1	475	475
Low Sulphur Surcharge	U.S. DOLLAR	Per Container	40 DRY	1	30	30
Spot Booking Amendment Fee	U.S. DOLLAR	Per Container	40 DRY	1	100	100
Terminal Handling Service - Destination	U.S. DOLLAR	Per Container	40 DRY	1	700	700
Terminal Handling Service - Origin	AUSTRALIAN DOLLAR	Per Container	40 DRY	1	730	730



Date 3 – Price after consignment “rolled” the second time (charged to freight forwarder under invoice)

PRICE OVERVIEW BOOKING AMENDMENT

Booking No.: [REDACTED]

FMC_Reference [REDACTED]

Print Date: 2024-05-22 00:35 UTC

Rate_ID [REDACTED]

Price Overview

Description	Currency	Charge Per Unit	Container Type	Quantity	Sum Rate	Total Rounded
Basic Ocean Freight	U.S. DOLLAR	Per Container	40 DRY	1	10270	10270
Container Protect Unlimited	U.S. DOLLAR	Per Container	40 DRY	1	15	15
Documentation Fee - Origin	AUSTRALIAN DOLLAR	Per Documentation Fee		1	55	55
Environmental Fuel Fee	U.S. DOLLAR	Per Container	40 DRY	1	475	475
Low Sulphur Surcharge	U.S. DOLLAR	Per Container	40 DRY	1	30	30
Spot Booking Amendment Fee	U.S. DOLLAR	Per Container	40 DRY	1	100	200
Terminal Handling Service - Destination	U.S. DOLLAR	Per Container	40 DRY	1	700	700
Terminal Handling Service - Origin	AUSTRALIAN DOLLAR	Per Container	40 DRY	1	730	730



Today's presentation

1. Enforcement, variation and breach of contracts
2. Commercial risks to freight forwarders when responding to proposed freight increases and other charges
3. Role of the *Australian Consumer Law* and the Australian Competition and Consumer Commission (ACCC)
4. Role of industry bodies

Introduction to contract



Elements of Contract

Offer

- Shipping Line A agrees to ship goods from Y location to Z location, either as a one-off or subject to a long term agreement, such as a Named Account Contract or **NAC**
- Subject to a particular price

Acceptance

- Freight Forwarder B agrees to the offer, usually in writing or conduct such as clicking “OK” or “Accept” button

Consideration

- In exchange for A carrying goods for B from Y to Z, B pays the **price** agreed to
- In exchange for A carrying goods for B for the agreed price, B makes the minimum number of **bookings** agreed to (under a NAC)

Other terms

- If the contract is a NAC, B may agree to ship a minimum TEU
- B may agree to use A’s services exclusively
- A and B may agree to a particular mechanism to resolve their disputes under the contract
- Limitation and exclusion clauses



Privity

- A contract is subject to “privity”, meaning it can only be enforced by and against the parties to a contract.
- On one hand, your contract might be better than contracts offered to other people or companies
- On the other, the impact of any changes to your contract are limited only to your contract and binding only in the context of the contract, i.e. negotiating a good price or terms in one circumstance will not benefit anyone else, and will not guarantee the same outcome in the future



Case Study: Offer and Acceptance

- Carrier **A** provided a quote to Freight Forwarder **B** on 18 April 2024 to ship X goods for Y price. The quote was said to be valid from 18 April 2024 to 31 May 2024 and said “All quotations are subject to re-quote if no written confirmation and filing* within 7 days”.
- A did not re-quote the quotation after 25 April 2024.
- On 10 May 2024, B accepted the quote and made a booking against it.
- On 15 May 2024, A increased the rate, relying on the term quoted above.

*Here, “filing” means making a booking against the quote

MO Terms

- A term is contained in the offer, either expressly or by implication or by force of law
- A term explains how the contract will be performed, for example:
 - When is performance due?
 - Who must perform and can they subcontract?
 - What is the price of the services?
 - How will disputes under the contract be settled?
 - Where will the contract be performed?
- Generally speaking, terms are binding *unless* they are prohibited at law, are impossible to perform or are too vague to be meaningful



Changes to pricing – term or not?

- Quotes prices available for 24hr – not a contract term but an offer that lapses after 24 hours
- Terms that cause a particular cost to apply *if* the shipper or freight forwarder does something – liquidated damages clauses. These are not a change to the freight price but a reflection of the carrier's losses (damages) when the shipper or freight forwarder commits some kind of breach
- A contract term that allows one party to change the price of services unilaterally (i.e. whenever they want) is unlikely to be allowed under law. This is likely to be an unfair contract term under the *Australian Consumer Law* (discussed later)

Varying a contract



Contract variation

- Parties can *vary* the contract when it no longer suits all of their needs, instead of terminating the contract. Variations might include:
 - Changes in price
 - Changes in the minimum number of services provided or length of the contract
 - Changes to the time taken to provide services
- Once variation occurs, this is a **binding change** to the contract.
- Variation requires consideration. This could include:
 - Paying a different price
 - Abandoning or not enforcing existing rights
- However, where B promises to pay A an increased price for the performance of an existing duty, the fact that the contract will be performed is not consideration



Variation in action

- *Which of these is a valid variation?*

Scenario A	Scenario B
<ul style="list-style-type: none">• Shipping Line A tells Freight Forwarder B that they can no longer ship 100 containers per month for \$X amount under NAC• A offers to ship 100 containers per month for \$X + 200 amount• B accepts the “variation”	<ul style="list-style-type: none">• Shipping Line A tells Freight Forwarder B that they can no longer ship 100 containers per month for \$X amount under NAC• A offers to ship 50 containers per month for \$X - 1 amount• B accepts the “variation”



Responding to a variation offer

- What are your current and ongoing business needs? Is the variation acceptable or will create difficulties in meeting future needs?
- What are the consequences of a variation? Will you be stuck with an exorbitant price for a long time? Is this a short-term arrangement?
- Can you negotiate a better variation? E.g. if the carrier wants a higher price for each container, can you guarantee a bulk discount?
- Can you (legally AND commercially) pass on the costs of the variation to your customers?
- Have you spoken to a lawyer *before* agreeing to the variation?



Case study: Variation

- Carrier **A** and Shipper **B** entered into a NAC starting on 1 April 2023 until 31 March 2024 (12 months), with the option to renew. The contract included a schedule of different rates that would apply to the NAC. Some of the rates normally charged by A showed a “0” price.
- During the renewal of the NAC, A amended some of the rates from “0” to \$X amount. B signed the renewal without noticing the new rates.
- For shipments after 1 April 2024, A begins to charge \$X on their invoices issued under the NAC. B notices and complains.
- A points to the contract and offers a 30 day delay on imposing the \$X rate. A otherwise confirms the \$X rate will apply to all shipments after 30 days

Breach of Contract



Breach of Contract

- Breach of contract occurs when one party does not perform their obligations under the contract or does not perform them to the required standard
- Usually the contract remains on foot after a breach, depending on the nature of the breach and whether the contract can still be performed
- The main remedy for a breach of contract is damages, i.e. money representing the value of performance



Breaches related to freight increases

- Shipping line A refuses to load consignment X or issue a Sea Waybill until Freight Forwarder B agrees to or pays new freight rates
- Shipping line A refuses to accept new bookings under a NAC until Freight Forwarder B agrees to or pays new freight rates
- Shipping line A blocks Freight Forwarder B's access to the booking portal



How to respond to a breach

1. Notify the carrier that they are in breach and request they comply with the contract
2. Check the terms and conditions of your booking: Does the carrier have a dispute resolution agreement or process? Can you use this mechanism?
3. Ensure that the consignment is not delayed or detained while the breach discussion is happening
4. If the breach has caused you some kind of loss, obtain evidence of the value of the loss
5. Seek legal advice
6. Consider whether you want to fight or settle the dispute, bearing in mind cost, market power and long term consequences



How not to respond to a breach

- Do not agree to anything or pay contested invoices until you have considered your options and (hopefully) sought advice (**waiver** or **consent to variation**)
- Do not wait for the problem to go away (**delay**)
- Do not go in guns blazing to the invoicing or debt recovery team (**ineffective**)
- Do not use your preferred way of resolving the dispute instead of the mechanism set down by contract (**all of the above**)



Spot Booking: Example Dispute Resolution Processes

- Maersk Spot Booking Terms – FMC Terms (shipments to USA and US territories)

<https://terms.maersk.com/terms-spot-booking#term-header-17>

7. Invoice Dispute Time Bar: in case of a dispute arising under or relating to these Spot Terms for the payment of freight and charges, such dispute shall be handled pursuant to the law and jurisdiction clause in our bill of lading. In the event that you dispute an item invoiced by us or require additional supporting documentation, you shall notify us in writing thereof within thirty (30) calendar days from the date of invoice, specifying the disputed item and requesting that we issue a credit note for the unaccepted part or whole of the invoice as applicable. In any event you shall in such circumstances be obliged to pay only the undisputed part of a disputed invoice. If we disagree with your decision regarding the disputed item, we shall inform you in writing accordingly within 30 calendar days after receipt of your statement. In the event this dispute is resolved in our favour, you shall be responsible for immediate payment of the full invoice value.

You shall be deemed to have accepted any of our invoices and waived any rights to dispute them if you fail to submit a dispute in writing within one (1) year from the date of our invoice. We shall be deemed to have been paid in full by you and waived any rights to request payment for an undercharge if not submitted to you in writing within one (1) year from the date of our initial invoice related to such undercharge. Any extension of this time bar must be granted by either us or you in writing as the case may be.

MO Maersk Invoice Dispute Clause

1. **Timeframe** for disputing invoices: within 30 days of invoice, or no less than 1 year
2. **Method** for disputing invoices: notification in writing, specifying the disputed charge AND payment of “undisputed” part of the invoice
3. **Response** requirement: carrier to respond within 30 days in writing
4. **Waiver**: if neither side disputes or enforces the invoice within 1 year, they are taken to have waived their right to do so
5. Time bar **extension**: parties can agree to extend the time to resolve disputes

Commercial Risks



Challenges and risks vis-à-vis carriers

- Size of the carrier and automation of systems – are the different heads talking to each other?
- Authority of the person handling the dispute and escalating it – can the person you are dealing with resolve the dispute?
- Location of the consignment – when is the consignment due at its discharge port and will the dispute be resolved before it arrives?
- Does the carrier want to engage with the legal issues or are they throwing their weight around?
- Protecting the consignment – has the carrier issued the telex release/sea waybill and agreed to release the consignment on arrival?
- Will disputing the invoice put pressure on your relationship with the carrier?



Managing risks vis-à-vis carriers

- **Act quickly** – Lodge your dispute as quickly as you can
- **Be heard** – Lodge the dispute in the proper form and to the proper person, then make sure the claim is escalated to someone with decision making power, or someone who will refer the dispute to the carrier's lawyers
- **Engage with the issues** – Explain (or have your lawyers explain) why the carrier is not entitled to do what they are trying to do and set out your expected response
- **Protect the consignment** – Make sure the carrier agrees to issue the relevant documents and allow the consignment to go where required while the dispute is on foot



Challenges and risks vis-à-vis customers

- If you agree to pay *something* to settle the dispute with the carrier, can or should your customer contribute?
- If the dispute with the carrier is taking a long time, what assurances can you give your customer(s)?



Managing risks vis-à-vis customers

- **Review your own contracts** – do your standard terms respond to this type of situation and say what you are allowed to do?
- **Communicate and manage expectations** – decide how you will explain the situation to your customer, especially if they need to expect higher costs in the future

Australian Consumer Law



Unfair Contract Terms Regime

- Freight forwarders, exporters and shippers can benefit from the protection of the unfair contract terms regime if they are a “**small business**” for the purposes of the UCT regime. This applies:
 - where the ‘upfront price payable’ under the agreement is no more than \$5,000,000 (excluding interest); and
 - where at least one party to the agreement:
 - is a business that employs less than 100 persons; or
 - has a turnover (at the time the contract is made) of less than \$10,000,000.



What is an Unfair Contract Term?

- The unfair contract terms regime protects consumers and small businesses from unfair terms in standard form contracts
- A term *may* be “unfair” if it:
 - allows one party (but not the other) to avoid or limit their responsibilities under the contract
 - allows one party (but not the other) to end the contract
 - penalises one party (but not the other) for breaching or ending the contract
 - **allows one party (but not the other) to change the terms of the contract.**



Consequences

- A term that is an “unfair contract term” is **not enforceable** under the contract
- The Australian Competition and Consumer Commission can investigate reports of unfair contract terms
- The UCT regime has recently been expanded to apply to a larger group of “small businesses” and the ACCC has nominated “unfair contract terms in consumer and small business contracts” as an enforcement priority for 2024-2025
- The ACCC can bring “representative actions” on behalf of an affected consumer, meaning they bear the cost and risk, and attract significant publicity
- Civil penalties are up to \$15.65 million per contravention



More information on UCT

- We have written about this topic from the perspective of how freight forwarders are bound by the unfair contract terms regime:
<https://www.millsoakley.com.au/thinking/transport-companies-and-unfair-contract-terms-in-standard-terms-and-conditions-the-new-uct-regime-and-implications/>
- The ACCC provides general information about the UCT here:
<https://www.accc.gov.au/business/selling-products-and-services/contracts#toc-unfair-contract-terms>

Role of FTA and Industry



Role of industry groups

- Can assist in gathering information and making complaints to the ACCC on behalf of individual members or a group of members about unfair contract terms
- Can gather information about conduct not covered by this presentation, including unconscionable conduct and report to the ACCC
- Can provide information about common issues being reported by members about carriers
- Can increase publicity and media awareness about the issue
- Can lobby government about the issue

Questions?



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