

HUB INTERNATIONAL

# LEGAL CONTRACT REVIEW PLAYBOOK

*For Transportation Companies*



**What you don't know about transportation liability could end up costing you a lot of money — and transportation liability isn't as straightforward as it used to be.**

Now, individual custom contracts are negotiated between each shipper and carrier, and each agreement likely contains many complexities and onerous terms and conditions that aren't easy to understand — but can significantly impact your business.

This guide provides you with information regarding a few key legal concepts that you should evaluate carefully during the contract review process and real life business applications of them.

As a specialist in insurance and risk management for the transportation industry, HUB International can help you reduce your risks and plan confidently for the future.



# I. Indemnification

Transportation contracts often contain a provision that shifts the risk of future claims and damages from one party to the other. Identifying the indemnity provisions in your contracts can be challenging—they often appear in more than one place. How an indemnification provision is worded is also important. Sometimes they are worded so broadly that in some states you could potentially be obligated to pay for claims that were not your fault. Some general liability insurance policies provide coverage for contractual indemnification. If you sign a contract that contains an indemnification provision, make sure to check whether you have such coverage.

**Common Indemnification Provision** — *A agrees to indemnify and save harmless B... against all liability, obligations, claims, loss and expense caused or created by A...arising out of work hereunder....”*

**Business Application Example 1** — A shipper improperly loads a truck causing a rollover as the driver exits a highway. A third party in a nearby car is injured. If both the carrier and the shipper are sued by the injured third party for their injuries, the shipper may tender the defense of the case to the carrier and ask that the carrier indemnify them under a broad contractual indemnification provision. This may expose the carrier to paying the shipper’s legal expenses and the shipper’s liability obligations even though the shipper’s actions may have caused the accident.

**Business Application Example 2** — The bill of lading limits the carrier’s cargo liability to \$100,000. However, the contract between the shipper and the carrier includes a broad indemnification provision that does NOT exclude cargo damage from its scope. The shipper incurs a \$500,000 cargo damage claim and makes an end run around the limitation of cargo liability by relying instead on the broad contractual indemnification provision to recover its \$500,000 in cargo loss.

## II. Force Majeure

COVID-19 raised many people's awareness of force majeure provisions in contracts. A force majeure provision excuses a party from performing if an event beyond its control prevents it from performing. It is important to know whether your contract has a force majeure provision and, if so, what it says. Without one, excusing non-performance under the contract will likely be more difficult. Because in trucking it is possible for performance to be interrupted by external factors, you should know whether your contract has a force majeure provision and what it includes.

**Common Force Majeure Provision** — Neither party shall be liable under this agreement for its failure or delay in performing its obligations hereunder if such delay or failure is caused by events beyond the party's reasonable control, including but not limited to hurricanes, tornadoes, war, riot, insurrection, epidemics or quarantine restrictions.

**Business Application Example** — COVID-19 causes a trucking company to temporarily cease operations. Because of it, the carrier is delayed in performing transportation services for the shipper. The carrier's failure to perform would likely be excused.

## III. Special and Consequential Damages, Including Delay

Special, incidental, and consequential damages are unpredictable, costly and may not be covered by insurance. They are the kind of damages that could arise from a breach of contract or, in the case of cargo claims, from the damage to the cargo itself e.g., where a shipment is time sensitive and is delivered late. Because it is common for transportation contracts to impose consequential damages, it is important to understand whether your contract includes such a provision and whether you have insurance to cover the potential liability.

**Common Special and Consequential Damage Provision** — Carrier shall be liable for all special, consequential, indirect and consequential damages incurred by Shipper under this agreement, including but not limited to those arising out of loss, damage or delay to cargo.

**Business Application Example** — Carrier is delivering to a manufacturing plant and the delivery is late, causing the manufacturing plant to shut down. The shipper imposes plant shut down expenses on the carrier due to the late delivery.

## IV. The Right of Setoff

Setoff is a contract provision that may impact your ability to collect revenue. Setoff provisions allow the party paying the invoice to reduce the amount they pay you (to setoff) based on the amount of their pending or disputed claims. Parties often ask for setoff due to concerns about a denial of claims, failure to settle them or failure of insurance coverage for claims.

**Common Right to Setoff Provision** — Money owed to carrier may be withheld at shipper's discretion to satisfy shipper's pending claims or debts owed to shipper by carrier.

**Business Application Example** — Shipper has a pending cargo claim for \$100,000 and owes carrier \$100,000 for services performed. Shipper tells carrier it will withhold payment of the \$100,000 until carrier pays shipper's pending cargo claim in full. Carrier may face the dilemma of having to pay a claim for which it may have defenses, for which shipper may have failed to mitigate its loss, or for which carrier's insurance coverage may be denied in order to avoid an interruption of carrier's cashflow.

## V. Choice of Law/Choice of Forum

Many transportation contracts contain both a choice of which law will apply to disputes between the parties as well as a choice of where the parties must bring a suit regarding disputes. It is important to be aware of whether the contract obligates you to litigate in a specific state which may be inconvenient for you or to be bound by a specific state's laws which may be unfamiliar or hostile to your interests.

**Common Choice of Law/Choice of Forum Provision** — California law governs all adversarial proceedings arising out of this contract or the carrier's performance of carriage and related services under this contract. All actions, claims or lawsuits between carrier and shipper shall be brought exclusively in the State of California.

**Business Application Example** — Carrier is an Indiana company that signed a contract obligating it to litigate in California and to be bound by California law. In California, statistics showed that 97.1 percent of 34 cases resulted in a plaintiff's verdict, making the venue unfavorable to the carrier. In addition, the carrier is forced to litigate under California law with which it may be unfamiliar, and which tends to favor expansive liability for defendants.

## VI. Cargo Loss & Damage-Salvage

Shippers may dictate by contract how salvage value is determined and the process that must be followed when salvaging cargo. Shippers have a duty to mitigate which may be waived by contract. Knowing if and what the contract provides for regarding salvage is important so that you can determine whether it is reasonable and be prepared in the event an incident occurs.

**Common Cargo Loss & Damage-Salvage Provision** — Neither shipper nor its consignees shall have a duty to mitigate damages. It shall be within shipper's sole discretion as to whether to salvage any or part of a shipment and to determine in its sole discretion the value of any such salvage.

**Business Application Example** — Carrier is hauling a load of canned applesauce. Carrier has an accident which causes the load to shift, denting many of the cans. Shipper rejects the entire load and requires it to be dumped with no salvage value.

## VII. Insurance

Transportation contracts often contain multiple insurance provisions. You should always check to make sure that you have the required coverages. Some provisions your business needs to watch for include:

### AUTO INSURANCE

Carriers must carry the minimum insurance required under federal law. Because of liability concerns, a shipper might require carriers to have auto liability insurance in amounts in excess of the minimum required under federal law—typically at least \$1 million dollars or more of coverage.

### CARGO INSURANCE EXCLUSIONS

Make sure your policy does not contain exclusions that the contract prohibits i.e., for theft or employee dishonesty.

**Common Cargo Insurance Exclusion Provision** — Carrier's cargo insurance shall not exclude coverage for infidelity, fraud, dishonesty or criminal acts of carrier's employees or agents.

**Business Application Example** — Carrier signs a contract prohibiting its cargo policy from excluding criminal acts of its employees. However, carrier fails to check its policy which does in fact exclude employee theft from coverage. Carrier's employee steals a trailer valued at \$100,000. Although carrier has \$100,000 of cargo coverage, its claim is denied because employee theft is excluded from its policy. Carrier may have to pay the claim out of pocket.

## ADDITIONAL INSURED

Sometimes there is confusion in contracts between a Certificate Holder which provides evidence of insurance coverage and Additional Insured status which gives that party potential rights to your insurance policies as an insured. Making a party an additional insured may provide coverage that is potentially excluded by state anti-indemnification statutes and may allow that party to share in your coverage, making them an additional insured should always be carefully reviewed.

**Common Additional Insured Provision** — Shipper shall be included as an additional insured with respect to all insurance required under this agreement.

**Business Application Example** — Shipper is unable to get indemnity against its own negligence due to a state anti-indemnification provision. It asks instead to be named as an Additional Insured under the carriers general and auto liability policies. Although it may have caused the accident, shipper may have coverage under carrier's insurance policy for any damages it must pay.

## COMMERCIAL GENERAL LIABILITY

A commercial general liability (CGL) policy provides coverage for property damage or bodily injury not arising out of the use of a commercial motor vehicle but from incidents tangential to the services being provided, such as a driver using a shipper's forklift to load a trailer. Importantly, and as stated above, the CGL policy might also cover contract liabilities, for example indemnity obligations.

## INSURANCE (PRIMARY)

It is important to be aware of provisions in contracts that require your insurance policies to be primary in relation to the other party's policies instead of being excess or contributing insurance. That means losses would first be covered by your policies even if other policies insure against those losses. You should always confirm that your insurance policies permit this before agreeing to the same.

**Common Primary Insurance Provision** — All insurance required of carrier under this agreement shall be primary to and not excess or contributing with any insurance maintained by shipper.

**Business Application Example** — There's a rollover accident, and both shipper and carrier have applicable insurance coverage. Carrier's policy may have to respond first which means that carrier will be likely be responsible for paying the deductible.

## INSURANCE (UMBRELLA/EXCESS)

In today's litigious environment, umbrella and excess insurance is a hot topic. Umbrella/excess insurance covers claims that exceed the limits of the underlying policy. A contract might require a specified amount of excess or umbrella insurance. If the contract does not require it, you should carefully consider the need to purchase excess coverage in light of your business and the litigation environment in which it operates.

**Common Umbrella/Excess Provision** — Carrier shall have commercial umbrella/excess insurance with minimum limits of \$2 million dollars per occurrence and in the aggregate coverage amounts in excess of underlying policy limits. The policy must provide coverage at least as broad as the underlying policies.

**Business Application Example** — Carrier has \$1 million of auto liability insurance but fails to purchase excess insurance coverage. Carrier's driver has an accident, and the jury returns a verdict of \$3 million dollars against the carrier. Carrier will be responsible for paying the uncovered \$2 million out of its own pocket. Carriers should be aware that the average verdict size for a lawsuit above \$1 million involving a truck crash has increased nearly 1,000% from 2010 to 2018, rising from \$2.3 million to \$22.3 million and that the median settlement of the top 50 U.S. verdicts nearly doubled over the last several years (\$28 million in 2014 to \$54 million in 2018).

## VIII. Integration Clauses

Transportation agreements often include a clause that states that the contract itself contains all the items to which the parties agree and that no other documents will apply, including the Bill of Lading or the carrier's Tariff. It is important to identify when the contract excludes or incorporates such ancillary documents as they may contain needed rights and remedies.

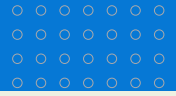
**Common Integration Clause Provision** — This agreement contains all terms between the shipper and the carrier and no provision of any carrier tariff or rules circular applies. The agreement may be modified only by a fully executed written addendum.

**Business Application Example** — The shipper and carrier have a dispute about an issue that is not covered by the written contract. The carrier's rules circular covers the issue in detail in a way that is favorable to the carrier. However, because the contract excluded the carrier's rules circular, that remedy may not be available to the carrier.

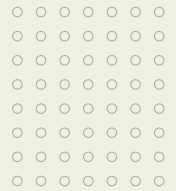
## IX. Cap on Cargo Liability

Identifying whether there is a cap on the amount of cargo liability in the contract is important in order for carriers to protect themselves against large uninsured cargo claims. Carriers often choose to include such a cap in the same or lower amount than the amount of cargo insurance they have in place. A reference to the amount of cargo insurance required in the contract is not the same thing as a cap on a carrier's liability for cargo loss/damage.

**Common Cargo Liability Provision** — Carrier must maintain Cargo Insurance in the amount of \$100,000.



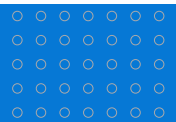
**Business Application Example** — Carrier did not limit its cargo liability to \$100,000 any place in the agreement. Carrier transported a load of pharmaceuticals which was stolen. The load had a value of \$6 million dollars. The carrier may be liable for the full value of the load due to its failure to limit its liability for cargo loss and damage in the agreement.



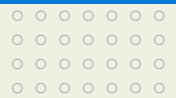
## X. Liens / Waiver

If a carrier deals directly with a shipper, the Bill of Lading Act and a similar UCC provision (and some state laws) give the carrier a lien on the shipper's goods for freight charges. However, shippers may ask by contract for carriers to waive their lien rights. Waiving lien rights may deprive carriers of a tool to collect past due freight charges.

**Common Liens/Waiver Provision** — Carrier releases its right to any lien or claim of lien right on any cargo or other property of shipper.



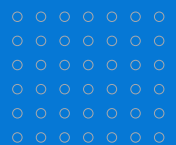
**Business Application Example** — Shipper fails to pay carrier's charges. Carrier has limited recourse to collect its charges i.e., pursuing the shipper under the contract.



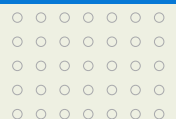
## XI. Payment Terms

When to Submit Invoices: A contract might require that the invoicing party submit its invoice within a stated period. This suggests that if an invoice is submitted late, carrier is not entitled to be paid. Some contracts say as much. The invoicing party often resists deadlines on submitting invoices. If that doesn't work, they often make sure the deadline is long enough to give them plenty of time.

**Common Payment Term/When to Submit Provision** — Any charge or invoice submitted by carrier more than 90 days from the date of service will not be accepted by shipper, and shipper shall not be responsible for payment of such charges.



**Business Application Example** — Due to an internal accounting error, carrier submits its invoice to the shipper 91 days after a move was performed. Shipper rejects carrier's invoice as untimely.



# Need Help Negotiating Your Contracts Quickly, Safely and Affordably?

HUB Drive Online provides contract review services tailored to the transportation industry.

Registered users of HUB Drive Online may access HUB Drive Contract Review, which combines artificial technology and human expertise to flag risks in your transportation agreements — including Shipper-Carrier, Broker-Carrier and Broker-Shipper contracts.

You'll be able to respond quickly to business opportunities through this accelerated contract review process while reducing your contractual liability risk.

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