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## Timing Challenges in Transportation M&A – Considering Deal Structure

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Timing Challenges in Transportation M&A – Considering Deal Structure

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On The Horizon



Michael J. Mozes

As any mergers and acquisitions (M&A) practitioner knows, one of the keys to a successful transaction is ensuring that all of the moving pieces come together smoothly at the appointed time for closing. Regulatory issues especially can impact considerably the time and expense associated with consummating a deal. Given their regulatory nature and the number of third parties generally involved in the deals, this is undoubtedly true when it comes to the acquisition and disposition of companies in the transportation and logistics fields. As a result, M&A professionals should ensure

that they seek the counsel of attorneys experienced with the rules and regulations of the Federal Motor Carrier Safety Administration (FMCSA) and any other relevant federal or state agency. Since the nuances of the regulatory regime can greatly affect deal structure, regulatory attorneys should be consulted at the commencement of the transaction to avoid unexpected delays as the deal nears completion.

In traditional M&A, the choice of stock versus asset deal might be based upon taxes or the retention of liabilities. Although the traditional factors are no less important in transportation and logistics M&A, the required approvals and filings (including those with the FMCSA and other agencies) also play heavily into the calculus.

In a recent deal, a large, diversified transportation company with multiple subsidiaries was looking to divest a portion of its refrigerated trucking and brokering business. The entire business was held in a wholly owned subsidiary (Sub) of the parent company (Parent). In order to divest the business, Parent could have sold the stock of Sub to the buyer. However,

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## The Benefits of Clear Drafting in Transportation Agreements



Stephanie S. Penninger



John N. Rapp

Navigating transportation contracts can be a daunting task. “Aging language from the Cretaceous period,”<sup>1</sup> many cite to the now-defunct ICC or other outdated laws or regulatory schemes. Several reference “filed” tariffs that are no longer required, are hundreds of pages long, or are impossible to find. They often use language so ambiguous or antiquated that it is impossible to know the drafter’s true intention. Some are completely indecipherable. The Gordian knot is figuring out which of the competing terms and conditions—many of which are hidden within the shipping document abyss of rate confirmations, credit agreements, lading documents, rules publications, amendments, rate schedules or exhibits—controls. Some recent industry cases reveal the benefit of clear and precise contract drafting and some pitfalls to avoid.

### Getting Out of the Fog

Basic contract provisions often get lost in the contractual chaos that all too often unfolds in this industry. The importance of clearly stating who is to pay for what is highlighted in *In re Couture Hotel Corporation*,<sup>2</sup> where Primary Freight, the delivery agent for several shipments of furniture to Couture, the purchaser, paid \$54,425 in demurrage and other charges to the steamship line that transported the goods. Primary Freight, in turn, invoiced those charges to Couture, which refused to pay them. Unfortunately for Primary Freight, Couture never “signed a written contract where it agreed to pay the [demurrage].”<sup>3</sup> Primary Freight conveyed the demurrage costs to Couture in a series of emails. However, Couture orally told Primary Freight that it would not pay the charges and emailed Primary Freight that

additional charges were unacceptable per the original agreement. The court could not find a clear understanding of who was responsible for demurrage, either in the form of a formal contract or email correspondence (which can be the basis for a contract). Therefore, Primary Freight was left holding the bag with regard to paying the demurrage fees.

Likewise, clearly identifying how disputes are resolved would have made Pittsburgh Logistics’ life easier in *Pittsburgh Logistics Systems, Inc. v. B. Keppel Trucking, LLC*.<sup>4</sup> There, Pittsburgh Logistics complained that an arbitration award obtained by B. Keppel Trucking was invalid because the parties never executed a contract containing an arbitration provision. The court thought otherwise. While Pittsburgh Logistics’ online carrier terms and conditions did not contain an arbitration provision, its Motor Carrier Service Contract (MCSC) did. Despite that the MCSC was not executed, the parties acted as though they intended to be bound by it, not the online terms. Therefore, its arbitration provision was enforceable.

### Dazed and Confused

Just because a contract term is clear to one party does not mean it is clear to others. Deciphering what “RVNX \$2.40” meant was the hurdle in *Exel, Inc., F/U B/O Sandoz, Inc. v. Southern Refrigerated Transport, Inc.*<sup>5</sup> There, the Master Transportation Service Agreement (MTSA) between SRT, the carrier, and Exel, the broker, measured loss by the replacement value of the commodity, but did not contain a limitation of liability provision. The bill of lading, on the other hand, stated “RVNX \$2.40.” After the cargo was stolen, SRT attempted to limit its liability to \$2.40 per pound, arguing that RVNX means “Released Value Not to Exceed.” Excel disagreed, arguing that RVNX was a freight classification that was programmed in its computer. In the end, the court sent the case back to the lower court to decide whether SRT had provided the shipper with the opportunity to choose between two or more levels of liability, what “RVNX \$2.40” meant, and if SRT could limit its liability.

Similarly, the court in *Hisense USA Corp. v. Central Transport, LLC*<sup>6</sup> had to decipher what the parties intended when they stated “NMFC 100, CTII Rules Tariff, 49 USC 14706 and 49 CFR 370.” There, Hisense engaged Central Transport to carry damaged computer tablets back from its Wal-Mart distribution center destination. When a pallet went missing, the question became whether Central Transport had adequately limited its liability.

Unfortunately for Central Transport, the answer was no. Wal-Mart had prepared the bill of lading, which stated “[a]ll shipments are hereby released to the value at which the lowest freight charges apply.” However, at pick-up, Central Transport’s driver slapped a sticker on the bill of lading stating “[s]ubject to NMFC 100, CTII Rules Tariff, 49 USC 14706 and 49 CFR 370.” Wal-Mart then signed the bill of lading, sticker and all. While Central Transport’s online tariff was found by the court to be adequately incorporated into the contract, merely referencing the tariff, without describing any limitation of liability in the bill of lading, did not demonstrate Wal-Mart’s awareness of or assent to limiting Central Transport’s liability.

### Lost in Translation

Persistent inclusion of outdated and confusing terms cost M/V PAC ALTAIR and the other carrier defendants in *Atwood Oceanics, Inc. v. M/V PAC ALTAIR, et al.*<sup>7</sup> There, the carrier-prepared bill of lading contained the phrase “shipped on deck at shipper[']s risk & expense.” The carrier’s intention in including that phrase was to inform the shipper that the cargo would be on the deck and subject to the elements as it was crossing the ocean. Thus, when a rogue wave swept away a chunk of the cargo, the shipper should not have been surprised—it took the risk. Unfortunate for the carriers was that this phrase actually eliminated the \$500 per package liability limitation afforded carriers by the Carriage of Goods by Sea Act (COGSA), thus subjecting the carriers to full liability. COGSA excludes goods shipped “on deck” from its definition of goods. “As such COGSA does not apply—by its terms—to cargo carried on the

deck of a vessel when the bill of lading states that cargo will be carried on deck.” Accordingly, the ironic effect of the carriers’ inclusion of this ancient phrase was to expose them, not the shipper, to the full risk.

### The Contractual Quagmire

How many times have you read “the terms and conditions contained in X are hereby fully incorporated in Y?” Determining whether X applies to a particular transaction is a recurring problem in the industry. Indeed, it was the root of the problems in *In re Couture Hotel, Pittsburgh Logistics, Exel and Hisense*, discussed above.

It also caused problems in *Complete Distribution Services, Inc. v. All States Transport, LLC*,<sup>8</sup> where the broker, CDS, argued that the carrier, AST, was subject to the 2012 version of CDS’s contract, as opposed to the 2010 version that AST had signed. CDS’s argument was that its 2012 load confirmations alerted AST to the change and that AST had received and signed nineteen (19) such confirmations. According to CDS, the new load confirmations “looked different” from prior versions and contained new language. The court found, however, that the rate confirmations were not sufficiently specific in incorporating the 2012 contract, meaning the decision on which contract governed was one for the jury to decide. If you are looking for certainty in your dealings, leaving the applicable contract to the whim of a jury is certainly not what you had in mind.

### Bring It On Home!

The transportation industry is dynamic and fast-paced. It is naïve to think that business is going to slow down so that clearer contracts can be negotiated. That being said, the following are a handful of simple takeaways that you can implement that ought to make contracts more readable, understandable and, most importantly, enforceable.

1. **Specify the Basics.** Who is responsible for paying what? Who are parties? This will save a lot of legal fees down the road.

2. **Understand the Impact of All Clauses.**

The carriers in *M/V PAC ALTAIR* undoubtedly included the phrase “shipped on deck at shipper[']s risk & expense” without even thinking about it. Do you understand what every provision in your contract means? If the answer is no, then you may inadvertently be hurting your end goals.

3. **Revise Your Form Agreements.** Has it been a few years since you took a look at your form agreements? If so, it may be time to update them. What are the provisions that your contractors always balk at? Are they realistic to expect? What types of claims keep coming up? Have you accounted for changes in the law and technology? Most importantly, use it as an opportunity to bring your contracts into the 21st century. Be clear about expectations and risk allocation. Eliminate unnecessary words.

4. **Keep the Rules of Contract Interpretation in Mind.** The court will do everything in its power to give meaning to every word in the contract. Do your contracts use the phrases “including” and “including, but not limited to” interchangeably? Those two phrases undoubtedly are both intended to mean the same thing—that the following is a non-exhaustive list of examples of the thing just described. But if you use both expressions, they must have different meanings, meaning the court may not construe your contract the way you hoped it would.<sup>9</sup>

5. **Be Able to Prove the Other Party Has Notice of Terms.** This is essential to increasing the likelihood that online and other terms and conditions (especially limitations of liability provisions for freight loss or damage) that are incorporated by reference in contracts, email quotations, signature lines and TMS-generated rate quotes, and any changes to those terms, will be enforceable.

6. **Be Aware of What Makes Pro Stickers Stick.** Pro stickers are more likely to “stick” and allow carriers to limit their liability when they: (1) reference the carrier’s governing tariff, and, if applicable, its website, indicating

where the tariff can be viewed; (2) describe the limitation of liability, with specificity; and (3) after affixation of the pro sticker, the shipper, with knowledge and full disclosure, signs the bill of lading to which the pro sticker had been affixed.<sup>10</sup>

<sup>1</sup> *Tempel Steel Corp. v. Landstar Inway, Inc.*, 211 F.3d 1029, 1030 (7th Cir. 2000) (Easterbrook, J.).

<sup>2</sup> 554 B.R. 369, 373-74 (N.D. Tex. 2016). At some point, Couture filed bankruptcy. When Primary Freight made its claim for the unpaid demurrage, the trustee objected to it. Accordingly, this dispute was actually litigated in bankruptcy court.

<sup>3</sup> There was a bill of lading with terms and conditions, but it was prepared by third-party Ever-Logistics who had an agency agreement with Primary Freight. Due to a trial technicality, though, it was excluded as evidence.

<sup>4</sup> No. 1943 WDA 2015, 2017 WL 65468 (Sup. Ct. Penn. Jan. 6, 2017).

<sup>5</sup> 807 F.3d 140 (6th Cir. 2015).

<sup>6</sup> No. 14 C 7485, 2015 WL 4692460 (N.D. Ill. Aug. 6, 2015).

<sup>7</sup> No. 15-00456, 2016 A.M.C. 1993, 2016 WL 3248440 (S.D. Ala. June 13, 2016).

<sup>8</sup> No. 3:13-cv-00800-SI, 2015 WL 5764421 (D. Or. Sept. 30, 2015).

<sup>9</sup> The Seventh Circuit in *Shelby County State Bank v. Van Diest Supply Co.*, 303 F.3d 832, 837 (7th Cir. 2002), took the phrase “including” one step further, wondering “if all goods of any kind are to be included, why mention only a few? A court required to give ‘reasonable and effective meaning to all terms,’ must shy away from finding that a significant phrase (like the lengthy description of chemicals and fertilizers we have here) is nothing but surplusage.” (internal citations omitted).

<sup>10</sup> See, e.g., *Aim Controls, LLC v. USF Reddaway, Inc.*, NO. H-08-cv-1662, 2008 U.S. Dist. LEXIS 93034 (S.D. Tex. Nov. 17, 2008).

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## IN MEMORIAM



JAMES M. HILL  
8/30/53 – 12/13/16

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### *Remembering our friend and colleague*

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We are deeply saddened to note the passing of our longtime partner, colleague and friend, James M. Hill.

Jim was a partner at Benesch for nearly 30 years, having joined the firm in 1987. He served as Benesch's Managing Partner from 1999 to 2007 and was instrumental in growing the firm.

Above all, Jim was a consummate deal maker with exceptional business acumen. He focused his practice on publicly and privately held growth companies in addition to representing equity funds, mezzanine funds and family offices. Jim built a nationally-recognized private equity practice. He especially enjoyed working with family-owned business, having grown up in a family-owned building materials manufacturing business. He was very active and valued as a strategic advisor to companies as they evolved, and sat on a number of boards of directors.

Jim was always eager to do deals and build relationships to help clients. He truly was a leader in client service and an excellent lawyer who kept in touch with all legal industry trends.

Jim perennially earned recognition from The Best Lawyers in America® and was selected by Chambers USA as a 2015 Leader in his Field (Corporate Law and Mergers & Acquisitions).

Jim most recently served as Vice Chairman of Benesch, Chair of its Private Equity Group, an Executive Committee Member, and an active and practicing member of its Corporate & Securities Practice Group. Jim frequently spoke at national conferences.

All of us in the Benesch family mourn Jim's passing and extend our deepest sympathies to his wife, Freda, and their children and grandchild. Jim left big shoes to fill, and we will work hard to honor his many contributions to the firm by building on his strong platform of growth and continuing his legacy of excellence.

# Choosing Between Bonded Warehouses and Foreign Trade Zones



Jonathan Todd



Justin P. Clark

Many practical benefits are available to international supply chains from bonded warehouses and foreign trade zones (FTZs). Despite the similarities between these tools for optimizing global manufacturing and distribution, and managing duties, the differences are tremendous. Professionals tasked with the global flow of products have a clear choice when analyzing whether to purchase or launch bonded warehouse and FTZ services.

## Common Advantages and Limitations

Bonded warehouses and FTZs are buildings or secured areas in which imported dutiable merchandise may be stored, manipulated or undergo manufacturing operations without the payment of duties for a period of time. The greatest legal distinction between bonded warehouses and FTZs is that products held in bonded warehouses are legally within the customs territory of the United States, while products held in FTZs are outside the customs territory despite their physical presence. The availability of favorable treatment in the application of United States duties is similar for each.

A key advantage of utilizing a bonded warehouse or FTZ is that merchandise can be manipulated therein. Product manipulation, including sorting and repackaging, is permitted in bonded warehouses without necessitating importation into the United States. However, bonded warehouses offer limited options for manufacturing operations. FTZs permit product manipulation as well as manufacturing and other substantial changes without importation. The degree of manipulation or manufacturing is the single greatest factor in choosing between the two.

Another significant operational factor is the ease of withdrawal or removal of products. As a general rule, shipments entered into a bonded warehouse must be withdrawn from the warehouse in their entirety. U.S. Customs and Border Protection (CBP) historically grants the practice of partial withdrawals only upon the showing of a history of compliance, strong inventory practices, and tremendous burdens in withdrawing entire shipments. In contrast, removal of products from FTZs does not generally require parity with the product entered because FTZs are legally outside the customs territory of the United States.

## “Ground Rules” for Bonded Warehouses and FTZs

CBP oversees the establishment and operation of bonded warehouses. A shipper or its customs broker may enter its products into a bonded warehouse under an importer's bond. Product may be held in a bonded warehouse for a period up to five (5) years. Product manipulation is permitted in warehouses designated as a certain class upon application for a permit and approval by the Port Director. Permits may be granted on a blanket basis covering all warehouse entries for one (1) year, at the discretion of the Port Director, provided that the type of manipulation is identical for each of the covered entries. The shipper can then file an application to withdraw manipulated shipments from the bonded warehouse. Blanket permits to withdraw are granted only in limited circumstances.

The United States Foreign Trade Zones Board, which consists of the Secretary of Commerce and Secretary of Treasury or their designees, oversees the establishment and operation of FTZs in cooperation with CBP. A shipper or its customs broker may enter its products into an FTZ pursuant to Customs Form 214. Blanket permits for entry may be granted in limited to circumstances involving single transportation entries or for entries within a single business day. Product manipulation is permitted in any FTZ upon application for a permit, which may be granted for periods of up to one (1) year. Permits for removal from an FTZ may be granted on a weekly basis.

The transportation services required to move products from ports of entry in the United States, to the bonded warehouse or FTZ, and then to export, is the same under either scenario. A carrier will process an Immediate Transportation Entry for the initial leg and a Transportation and Exportation Entry for the final leg. The carrier will then haul the products under an in-bond manifest and bear liability to the United States under its custodial bond for any failure to deliver. These activities will be provided in compliance with the requirements of 19 CFR Part 18, of which carriers may be familiar if they have experience providing in-bond transportation within the United States.

## Opening New Bonded Warehouses and FTZs

Bonded warehouses are available from third parties, or new bonded warehouses may be established through an application and approval process that spans approximately six (6) months. Establishing a new bonded warehouse begins with filing a written application with the nearest Port Director. The application requires detailed information regarding the facility, including blueprints, the type of merchandise and its anticipated customs value, the existence of fire insurance coverage, financial statements, background information on company officers and relevant employees, and descriptions of inventory controls. The Port Director may grant or deny applications at his or her sole discretion following a physical survey of the facility for security compliance and a background investigation of the applicant and other parties involved. Upon approval, the applicant must post a bond on Customs Form 301 based on the estimated annual customs value of products held at the facility. Once a bonded warehouse is established, its proprietor is responsible for complying with all legal requirements, including supervision of the warehouse, safekeeping of the merchandise, inventory and recordkeeping.

FTZs are available for use from public and private third-party entities, or new FTZs, including “sub-zones” within existing FTZs, may be established through an application and approval process that spans between

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### Choosing Between Bonded Warehouses and Foreign Trade Zones

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approximately five (5) and twelve (12) months. While private for-profit organizations are eligible to apply to establish FTZs, approval requires a special act of the state legislature specifically naming the organization and evidence that the entity was chartered for the purpose of establishing an FTZ. These stringent requirements are due to the role of FTZs as public utilities offered for economic development and advancement of United States trade policy.

Establishing an FTZ requires filing a written application with the Foreign Trade Zone Board. The application requires substantial and detailed information, including evidence of state enabling legislation, descriptions of the proposed site, analysis of the economic justification for the FTZ (including impact studies and an economic profile of the local community), and an explanation for how the FTZ will advance the trade-related goals and objectives of the United States. The nearest FTZ grantee receives notice of the application and an opportunity to object by demonstrating that public interest would not be served by approval. Details of the application

are also published in the Federal Register for public comment and the possibility of a public hearing. If the application is approved by the Board, then the grantee must apply to the local Port Director to gain additional approval for activation of the FTZ. This final approval process may involve a background investigation and will be granted or denied with finality at the sole discretion of the Port Director.

Once an FTZ is established, the grantee must conduct its operations as if it were a public utility. All rates and charges must be published, uniform, fair and reasonable. If any member of the public believes that it did not receive fair treatment from the FTZ, then he or she may submit a complaint to the Executive Secretary of the Board for review and investigation. Additionally, grantees are subject to annual reporting as well as stringent security, storage and handling requirements.

#### **A Clear Choice based on Domestic Activities**

Choosing between bonded warehouses and FTZs depends foremost on the specific

operational activities sought without the imposition of duties. Bonded warehouses are available for repositioning, consolidation and deconsolidation, and light manipulation, although they are not appropriate for most manufacturing activities. FTZs are available to satisfy manufacturing needs in addition to the many benefits offered by bonded warehouses, and offer ease of withdrawal, although they are subject to greater regulation. The regulatory burden for launching new bonded warehouse or FTZ operations is significantly, and sometimes prohibitively, greater for FTZs. As with all decisions for supply chain engineering, the advantages of favorable duties and on-shore operations balance against the cost of time, expense and effective compliance.

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### Timing Challenges in Transportation M&A – Considering Deal Structure

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after considering the tax consequences of purchasing the stock, the buyer decided to purchase the assets of Sub instead. Unfortunately, an asset sale was going to raise potential regulatory issues because among the assets that the buyer wanted to purchase was Sub's operating authority under the FMCSA.

This type of transfer requires increased scrutiny and approval by the FMCSA that would not normally be present in a mere change of control. This was not ideal, as buyers and sellers always try to reduce the uncertainties inherent in and time associated with third-party approvals, regulatory or otherwise. As a result, the parties were forced to devise a configuration that would preserve the asset sale structure while allowing the transfer of the operating authority with minimal approval by the FMCSA.

After consultation with regulatory counsel, and in order to avoid the time and expense required in connection with the transfer of an operating authority, the parties employed a two-step process with a signing and deferred closing. A reorganization effected in the interim period between signing and closing allowed the Sub to continue to operate until closing under its current authorities, while also permitting a transfer of the operating authorities with the other assets. At closing, the asset sale occurred as planned, with the interim reorganization preserving the name and operating authorities that the buyer was intent on purchasing, without the need for additional consents from the FMCSA.

In order to successfully implement this reorganization, the parties had to organize

new entities, make regulatory filings, and execute additional agreements. Altogether the reorganization process took several weeks. As a result, it is imperative that, at the outset of a deal, each party clearly indicate both their preferred deal structure and their ultimate goals in preserving any regulatory status. As with a tax expert, the M&A practitioner should ensure regulatory counsel is involved as soon as possible in order to craft the most appropriate strategy to reach the parties' objectives and to eliminate any wasted time and expense that could otherwise impede a successful deal.

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## Hanjin: Some Lessons Learned



Marc S. Blubaugh



Kevin M. Capuzzi

Labor Day weekend is generally anticipated as offering some final, end-of-summer respite. For the transportation community, however, this past Labor Day weekend (September 3–5, 2016) was anything but restful. Just before the start of the holiday weekend, Hanjin, Korea's largest containership company, commenced rehabilitation proceedings in South Korea. That proceeding essentially halted Hanjin's vessels bound for the U.S., thereby stranding millions of dollars of goods at sea, until Hanjin's bankruptcy was recognized by a U.S. court in a Chapter 15 bankruptcy proceeding. Thus, instead of enjoying a peaceful holiday weekend, cargo owners and transportation companies alike were scrambling to find a way to offload their goods without violating the automatic bankruptcy stay.

The days following the bankruptcy filing were fast-paced and eventful. At the first hearing on the day after Labor Day itself, lawyers packed a Newark, New Jersey, courtroom trying to develop a creative way to get their clients' goods offloaded before the window on the all-important Christmas season passed. Ultimately, and notwithstanding the competing interests of many parties (such as cargo owners, terminal operators, equipment providers, and third-party logistics operators), the parties were able to develop a protocol, which the Court approved, to allow Hanjin's vessels to berth and the goods to be offloaded and delivered. While that protocol was a start, it was far from smooth sailing, and parties returned to that Newark courtroom many times in the weeks and months that followed. Last month, the Court granted final recognition of the Korean proceeding in the U.S., thus essentially concluding the proceedings in the U.S., although various issues continue to smolder.

Rather than recount the occurrences at each hearing, which have been widely reported, this article provides a look back at a few of the lessons learned from both a bankruptcy and transportation perspective. While certainly not exclusive, these tips demonstrate the importance of careful planning and on-the-ground legal representation in the event of a bankruptcy of another international transportation conglomerate.

Bankruptcy considerations:

- **Get There.** It is imperative to have boots on the ground in the bankruptcy forum. In the case of Hanjin, at virtually every hearing, something was discussed or decided that was not originally anticipated to go forward. Having counsel in the courtroom is imperative in these fast-paced cases.
- **Get Foreign Bankruptcy Representation.** In the case of international bankruptcies, having counsel in foreign forums is just as important as having local counsel in the United States. The particular rules and procedures of the foreign court are, for lack of a better word, often "foreign" to U.S. practitioners. In addition, there is value added in avoiding the delay caused by waiting for legal developments to filter through to the U.S.
- **Get Organized.** In foreign bankruptcies, claims are submitted to the foreign court. That process, especially in Hanjin, is much more cumbersome than the typical U.S. proof of claim process. Among other things, the claim documents had to be translated into Korean and submitted with untraditional supporting documents, thereby taking significant time and expense to complete.
- **Get Involved.** It is critical that you talk with others in your industry, as there is power in numbers. The protocol developed in the Hanjin case is a vivid illustration of parties coming together to establish a procedure that was in all of their best commercial interests.

Transportation considerations:

- **Get Critical.** It is increasingly important to scrutinize the solvency of the carrier who is carrying your goods or with whom you contracted to carry another's goods. Both public and private means of obtaining information about a carrier's solvency are available. Of course, at the first sign of payment delay or operational instability, you should take action.
- **Get Diversified.** Conventional wisdom holds that Hanjin will not be the last international containership bankruptcy. It is therefore important that you diversify your ocean carrier providers so that, in the event of bankruptcy, your goods are not stuck with one party.
- **Get Contractual Safeguards.** Insist on contractual language that protects you in the case of bankruptcy. For example, many shipping contracts contain "minimum quantity commitments" (MQCs). It would be wise to demand that such MQCs are excused if the shipper ceases operations or terminates its shipping contracts. Similarly, in light of alliances and slot sharing agreements, shippers and ocean transportation intermediaries should require ocean carriers to transport a certain percentage of loads on the carrier's own vessels.
- **Get Involved.** Join a trade group that will advocate on your behalf in a bankruptcy proceeding. For example, Benesch represented the Intermodal Association of North America in order to obtain a court order preventing Hanjin from assessing *per diem* while it was unable or unwilling to accept the return of empty containers.

We hope that these lessons will allow the transportation community to enjoy the next Labor Day (and all other holidays) should another international transportation conglomerate file bankruptcy at an inopportune time.

For more information, please contact **MARC S. BLUBAUGH** at [mblubaugh@beneschlaw.com](mailto:mblubaugh@beneschlaw.com) or (614) 223-9382, or **KEVIN M. CAPUZZI** at [kcapuzzi@beneschlaw.com](mailto:kcapuzzi@beneschlaw.com) or (302) 442-7063.

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## U.S. Transportation Secretary Appoints Todd to FMCSA Advisory Committee



Jonathan Todd

Benesch is pleased to announce that **JONATHAN TODD**, an attorney in the firm's Transportation & Logistics Practice Group, was recently appointed by the U.S. Department of Transportation Secretary Anthony Foxx to serve as an industry representative on a Federal Motor Carrier Safety Administration (FMCSA) Advisory Committee. The Committee, known as the Household Goods Consumer Protection Working Group, is required by the Fixing America's Surface Transportation (FAST) Act. It is tasked with recommending improvements to communications advising professional movers and consumers regarding the federal regulation of interstate moving as well as reducing and simplifying required documentation and paperwork. The Committee's recommendations will take the form of a report submitted to the FMCSA Administrator and to Congress.

Jonathan focuses his practice exclusively on representing clients in domestic and international transportation, logistics and supply chain management matters. Prior to joining Benesch, he was Senior Corporate Counsel with a global transportation and logistics services provider. Jonathan may be reached at (216) 363-4658 or [jtodd@beneschlaw.com](mailto:jtodd@beneschlaw.com).

## Michael Mozes Joins the Firm's Transportation & Logistics Practice Group



Michael J. Mozes

We are pleased to announce that **MICHAEL J. MOZES** has joined Benesch's Transportation & Logistics Practice Group. In addition, Michael has been a member of Benesch's Corporate & Securities and Private Equity Practice Groups since he joined the firm in September 2015. Michael counsels private equity and venture capital funds in connection with their investments in portfolio companies; advises investment managers in relation to fund formation and federal and state regulatory compliance; and assists pension plans, endowments and high-net-worth clients with investments in all types of alternative investment vehicles. In addition, Michael assists companies in all stages of growth in a variety of transactional matters, including entity structure, formation, corporate governance, financing transactions, and mergers and acquisitions.

Michael's most recent Transportation & Logistics experience includes representing a large Southeastern transportation company in connection with the sale of its refrigerated trucking and brokering division, and advising a private equity fund that focuses on industrial and logistics businesses in connection with the acquisition of an East Coast-based specialized hauler of volume less-than truckload, truckload and temperature-controlled freight with service to a diversified customer base of pharmaceutical, medical, specialty chemical, food ingredient and automotive shippers. Welcome to the team, Michael!

# RECENT EVENTS

## **Truckload Carriers Association 22nd Annual Independent Contract Division Annual Meeting**

J. Allen Jones and Matthew J. Selby attended.  
September 8, 2016 | Chicago, IL

## **Arkansas Trucking Seminar**

Eric L. Zalud and J. Allen Jones attended.  
September 13, 2016 | Fayetteville, AR

## **The FTR Transportation Conference**

Stephanie V. McGowan attended.  
September 13–15, 2016 | Indianapolis, IN

## **Airfreight Forwarders Association Webinar**

Stephanie S. Penninger presented *Let's Give 'Em Something to "Taco" 'Bout*.  
September 15, 2016 | Webinar

## **Ohio Trucking Association Annual Conference**

Steven M. Moss presented *What Employers Need to Know About the New Overtime Regulation*. Matthew J. Selby attended.  
September 18–20, 2016 | Columbus, OH

## **Intermodal Association of North America EXPO**

Marc S. Blubaugh presented *Intermodal Legislative & Regulatory Report: What's the Impact on Your Business?* Martha J. Payne and Stephanie S. Penninger attended.  
September 19, 2016 | Houston, TX

## **Truckload Carriers Association (TCA) Wreaths Across America Charitable Gala**

Richard A. Plewacki attended.  
September 20, 2016 | Washington, DC

## **Truckload Carriers Association (TCA) Policy Committee and Board of Directors Meeting**

Richard A. Plewacki attended.  
September 21, 2016 | Washington, DC

## **The Global TerraLex Conference**

Eric L. Zalud attended.  
September 21–24, 2016 | New York City, NY

## **Indiana Motor Truck Association (IMTA) Future Leaders Council Annual Conference**

Stephanie S. Penninger and Brittany L. Shaw presented *How the FDA Got "Jalapeño" Business With the Publication of the Final Sanitary Food Transportation Regulations*.  
September 22–23, 2016 | Bloomington, IN

## **Canadian Transportation Lawyers Association Annual Conference**

Marc S. Blubaugh presented *Regulatory Investigations Affecting The Transportation and Logistics Industry*. Martha J. Payne attended.  
September 23, 2016 | Toronto, ON

## **APICS 2016 Supply Chain Conference**

Jonathan R. Todd attended.  
September 25–27, 2016 | Washington, DC

## **30th Annual Conference on Transportation Innovation and Cost Savings**

Eric L. Zalud attended.  
September 26 | Ontario, CA

## **American Trucking Associations (ATA) Management Conference & Exhibit**

Marc S. Blubaugh, Richard A. Plewacki, Stephanie Penninger and Matthew J. Selby attended.  
October 1–4, 2016 | Las Vegas, NV

## **International Warehousing Logistics Association "Essentials" Course**

Marc S. Blubaugh presented *Fundamentals of Transportation Law: What You Need to Know About Transportation*.  
October 6, 2016 | Phoenix, AZ

## **ELEVATE 2016 Air Freight Conference**

Jonathan R. Todd and David M. Krueger attended.  
October 10, 2016 | Miami, FL

## **Trucking Industry Defense Association (TIDA) Annual Seminar**

Eric L. Zalud attended.  
October 12–14, 2016 | Baltimore, MD

## **LTNA National Conference**

Jonathan R. Todd and Martha J. Payne attended.  
October 19–21, 2016 | Las Vegas, NV

## **Joint 50th Anniversary Meetings of the Tulane Admiralty Law Institute & Maritime Law Association of the U.S.**

Stephanie S. Penninger attended.  
October 26–28, 2016 | New Orleans, LA

## **International Warehouse Logistics Association's (IWLA) Legal Symposium**

Marc S. Blubaugh presented *Life in the Fast Lane: Managing Transportation Liability in 2016*.  
November 3, 2016 | Chicago, IL

## **The 49th Transportation Law Institute (TLI)**

Stephanie S. Penninger moderated "One if By Land, Two if By Sea: The Latest on MAP 21, Safely Transporting Food, Ocean Carriage and Hello Cuba!" Marc S. Blubaugh presented *There's a Meltdown at the Port . . . Now What?* Eric L. Zalud, Richard A. Plewacki, Martha J. Payne and J. Allen Jones attended.  
November 4, 2016 | Houston, TX

## **Accelerate Conference & Expo Sponsored by Women in Trucking**

Martha J. Payne moderated the panel "Legal Issues: Transportation, Employment, and Beyond." Kelly E. Mulrane attended.  
November 7–9, 2016 | Frisco, TX

## **Private Equity Investing in Transportation & Logistics Companies Capital Roundtable**

Ira Kaplan moderated "Due Diligence on Transportation M&A Deals." Marc S. Blubaugh, Richard A. Plewacki, Peter K. Shelton and Eric L. Zalud attended.  
November 17, 2016 | New York City, NY

## **Columbus Importers and Brokers Association (CIBA)**

Marc S. Blubaugh presented *The Hanjin Bankruptcy and Lessons Learned*.  
November 30, 2016 | Columbus, OH

## **Transportation Logistics Association (TLA) Webinar**

Marc S. Blubaugh presented *The Hanjin Bankruptcy: Lessons Learned and Guidance for the Future*.  
December 6, 2016 | Webinar

## **Conference of Freight Counsel Meeting**

Martha J. Payne and Stephanie S. Penninger attended.  
January 8–9, 2017 | Dana Point California

## **Stafford Publications Webinar**

Jonathan Todd presented *Supply Chain Risk Assessment and Compliance: Mitigating Risk with Effective Due Diligence and Supplier Oversight*.  
January 10, 2017 | Webinar

# Transportation & Logistics Group

**For more information about the Transportation & Logistics Group, please contact any of the following:**

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# ON THE HORIZON

## Columbus Roundtable of the Council of Supply Chain Management Professionals Annual Transportation Panel

**Marc S. Blubaugh** moderated "Transportation & Logistics in 2017: If You Don't Know Where You're Going, You Might Not Get There!"  
January 12, 2017 | Columbus, OH

## Transportation Intermediaries Association (TIA) Webinar

**Stephanie S. Penninger** presented *Perish the Thought: The Challenge of Transporting Food – Part 2*.  
January 17, 2017 | WEBINAR

## Transportation Lawyers Association (TLA) Chicago Regional Seminar

**Marc S. Blubaugh, Kevin M. Capuzzi, Stephanie S. Penninger, Jonathan Todd, Brittany L. Shaw, J. Allen Jones, Christopher J. Lalak and Eric L. Zalud** attended.  
January 19–20, 2017 | Chicago, IL

## SMC 3 Jump Start

**Martha J. Payne** is attending.  
January 23–25, 2017 | Atlanta, Georgia

## Intermodal Association of North America (IANA) Board Meeting

**Marc S. Blubaugh** is attending as Outside General Counsel.  
January 25, 2017 | Atlanta, GA

## BG 2017 Strategic Advisors Supply Chain Conference

**Eric L. Zalud** is presenting *Top 10 Regulatory and Technological Pitfalls in Buying a Transportation Business*. **Peter K. Shelton** and **Michael J. Mozes** are attending.  
January 25–27, 2017 | Palm Beach, FL

## Trip Captive Insurance Board of Directors Meeting

**Matthew J. Selby** is attending.  
January 31, 2017–February 1, 2017 | San Antonio, TX

## American Conference Institute 6th Annual Forum on Admiralty and Maritime Claims and Litigation

**Stephanie S. Penninger** is presenting *Sharing Economy and Boats: What Has Been the Insurance Industry and Regulator's Response So Far and Is a Standard of Care Developing for This Industry?*  
January 31, 2017 | Miami, FL

## Cargo Logistics Canada

**Martha J. Payne** is attending.  
February 8–9, 2017 | Vancouver, B.C.

## Stifel 2017 Transportation & Logistics Conference

**Marc S. Blubaugh** and **Eric L. Zalud** are attending.  
February 14–15, 2017 | Key Biscayne, FL

## SC&RA 2017 Specialized Transportation Symposium

**J. Allen Jones** is a panelist on "The Mitigation of Litigation."  
February 14–17 | Orlando, FL

## NTTC's Winter Membership Meeting

**Richard A. Plewacki** is attending.  
February 15–17, 2017 | Rancho Mirage, CA

## BB&T Capital Markets Transportation & Logistics Conference

**Marc S. Blubaugh** and **Eric L. Zalud** are attending.  
February 15–16, 2017 | Coral Gables, Florida

## Transportation Law and Finance Symposium at the Traffic Club of Leigh Valley

**Stephanie S. Penninger** is presenting *Hot Transportation Topics for 2017 and What's on the Regulatory Horizon*.  
February 21, 2017 | Easton, PA

## Intermodal Interchange Executive Committee Meeting

**Marc S. Blubaugh** is attending as Outside General Counsel.  
February 23, 2017 | Calverton, MD

## American Moving and Storage Association Annual Education Conference & Expo

**Richard A. Plewacki** and **Jonathan Todd** are attending.  
February 26, 2017–March 1, 2017

## International Warehouse Logistics Association's Annual Conference

**Marc S. Blubaugh** and **Christopher J. Lalak** are presenting *The Sanitary Transportation Rule Under the Food Safety Modernization Act*.  
March 19–21, 2017 | Palm Springs, CA

## Transportation & Logistics Council's 43rd Annual Conference "Education for Transportation Professionals"

**Martha J. Payne** is presenting *Insurance and Risk Management—How to Avoid Surprises*. **Eric L. Zalud** is presenting *Out Sourcing – 3rd Party or Partner?*  
March 20, 2017 | Henderson, NV

## Truckload Carriers Association 79th Annual Convention

**Richard A. Plewacki** and **Stephanie S. Penninger** are presenting *The Trail of Breadcrumbs – How to Manage Compliance with the FSMA' New Requirements*.  
March 26–29, 2017 | Nashville, TN

## National Customs Brokers and Forwarders Association of America (NCBFAA) Annual Conference

**Jonathan Todd** is attending.  
April 2–6, 2017 | New Orleans, LA

## Transportation Intermediaries Association (TIA) - 2017 Capital Ideas Conference & Exhibition

**Martha J. Payne, Stephanie S. Penninger and Eric L. Zalud** are attending. **Martha J. Payne** is presenting *Did You Hear the One about the Attorney?* **Eric L. Zalud** is presenting a panel titled "Kicking the Tires: Assessing and Choosing on an Asset Based or Non-Asset Based Business Mode." **Stephanie S. Penninger** is participating in a panel discussion called "The Intricacies of Multi Modal Transportation."  
April 5–7, 2017 | Las Vegas, NV

## National Shippers Strategic Transportation Council Annual Conference

**Marc S. Blubaugh** is presenting *Pennywise or Pound Foolish? Best Practices in Transportation Contracting*.  
April 10, 2017 | Orlando, FL

## Transportation Lawyers Association (TLA) Executive Committee Meeting

**Marc S. Blubaugh** and **Eric L. Zalud** are attending.  
April 26, 2017 | Santa Fe, NM

## Transportation Lawyers Association (TLA) Annual Conference

**Marc S. Blubaugh** is presenting *Well . . . Isn't that Special? What You Need to Know About Representing Specialized Carriers*. **Martha J. Payne, Richard A. Plewacki, Stephanie S. Penninger and Eric L. Zalud** are attending.  
April 26–29, 2017 | Santa Fe, NM

## ABA TIPS Section Conference

**Stephanie S. Penninger** is presenting *Anatomy of an Emergency Response – In-House Counsel, Government, and Insurance in the Golden Hour*.  
April 28, 2017 | Chicago, IL

## Customized Logistics & Delivery Association's (CLDA) Annual Conference

**Richard A. Plewacki** and **Matthew J. Selby** are attending.  
May 3–5, 2017 | Orlando, FL

## American Trucking Associations Leadership Meeting

**Richard A. Plewacki** and **Matthew J. Selby** are attending.  
May 7–10, 2017 | San Antonio, TX

## Ohio Trucking Association Webinar

**Marc S. Blubaugh** is presenting *Freight Broker Contracts and Insurance Considerations*.  
May 18, 2017

## Juvenile Products Credit Group

**Marc S. Blubaugh** is presenting *Eliminating That Millstone Around Your Neck: A Practical Primer on Shortage Claims*.  
May 24, 2017 | Chicago, IL

## Air Cargo Conference

**Martha J. Payne, David M. Krueger and Jonathan Todd** are attending.  
June 4–7, 2017 | Orlando, FL

## Ohio Trucking Association's Safety Council

**Marc S. Blubaugh, Kelly E. Mulrane and Matthew J. Selby** are presenting *The Best Defense is A Good Offense: Proactive Responses to Catastrophic Accidents*.  
June 8, 2017 | Columbus, OH

For further information and registration, please contact **MEGAN PAJAKOWSKI**, Client Services Manager, at [mpajakowski@beneschlaw.com](mailto:mpajakowski@beneschlaw.com) or (216) 363-4639.