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Validity of Bills of Lading That Are Not Registered With the Chinese Ministry of the Communication

Non-Vessel Operating Common Carriers ("NVOCCs"), which are doing business in China or with China, are subject to regulations on international maritime transportation which came into effect on January 1, 2002 (the "International Maritime Regulations"). The International Maritime Regulations require foreign NVOCCs to comply with two regulatory requirements. The first is that foreign NVOCCs must deposit RMB800,000 into a Chinese bank as proof of financial responsibility. The second requirement is that the NVOCC must register its bill of lading with the Ministry of the Communication ("MOC") in China. This article summarizes a case study regarding the consequences that failing to register the Bill of Lading has on the validity of that Bill of Lading. The facts are summarized as follows:

A Chinese textile supplier (the "Chinese Supplier") and a U.S. purchaser (the "U.S. Purchaser") entered into a purchase agreement, pursuant to which the Chinese Supplier would supply the textile to the U.S. Purchaser. The term was FOB (Shanghai) and the payment term was telegraphic transfer.

The Chinese Supplier entrusted a Chinese international freight forwarder (the "Freight Forwarder") to handle the freight transportation matters. The Freight Forwarder then requested a U.S.

NVOCC to issue its bill of lading. The Bill of Lading specified that the shipper was the Chinese Supplier and the recipient was the U.S. NVOCC. When the textile goods arrived at the U.S. destination port, the goods were picked up by a third party without presenting the original Bill of Lading. As a result, the U.S. Purchaser did not pay the purchase price to the Chinese Supplier.

The Chinese Supplier then brought the Freight Forwarder to the court in China, claiming damages for the lost goods. The main argument made by the Chinese Supplier was that the bill of lading was void. The validity of the bill of lading is governed by the Contract Law of the PRC, which, in relevant clause, provides that: "a contract violating a mandatory provision mandated by other laws and regulations is void." Since the International Maritime Regulation had mandated the registration of a bill of lading with the MOC, and the U.S. NVOCC had failed to register the Bill of Lading with the MOC, the Bill of Lading signed by the Freight Forwarder on the Chinese Supplier's behalf was not valid. Therefore, the Chinese Supplier contended that the Freight Forwarder should return the goods.

The Freight Forwarder denied responsibility for the lost goods, reasoning that the Bill of Lading was effective. The issue before the court

was whether the Bill of Lading issued by the U.S. NVOCC, but not registered with MOC, is binding upon the Chinese Supplier.

The court found that though the International Maritime Regulation mandates the registration of the bill of lading, such registration requirement is not a condition precedent to the validity of the bill of lading. Instead, the bill of lading registration requirement is designed to serve as a guaranty that NVOCCs will meet their compliance obligations to the Chinese government. It does not affect the validity of the underlying Bill of Lading.

Since China is not a case law country, the judgment entered by the court does not have binding authority over the other cases in either the same Chinese jurisdiction or the other jurisdictions within China. Further, since the issue

continued on page 3

IN THIS ISSUE:

Validity of Bills of Lading That Are Not Registered With the Chinese Ministry of the Communication

Broken Brokerages? The Legislative Front.

Is Your Import Commodity a Priority With U.S. Customs?

Team Members Spotlight

Recent Events

On the Horizon

Broken Brokerages? The Legislative Front.

On June 14, 2010, Senator Olympia Snowe and Senator Amy Klobucher introduced “The Motor Carrier Protection Act of 2010” (the “Bill”) in the U.S. Senate. The Bill, if enacted, would result in a number of significant changes in the way that transportation brokers and surface freight forwarders are licensed and operate. Moreover, the Bill includes

changes that directly affect motor carriers as well.

Various industry players have voiced opinions on the Bill. For instance, the Transportation Intermediaries Association and the Owner-Operator

Independent Drivers Association have been involved in developing and promoting the Bill. In contrast, the Association of Independent Property Brokers and Agents remains critical of aspects of the legislation. Not all other industry groups have taken a stand.

In any event, changes implemented by the Bill include the following:

1. **Annual Registration Renewal.** The Bill requires that transportation brokers and surface freight forwarders must undergo an *annual* renewal process in order to maintain operating authority. This renewal requires the broker or forwarder to (a) pay an annual registration fee, (b) provide “updated information,” and (c) submit proof of compliance with applicable surety and insurance requirements. The Bill does not identify the amount of the registration fee, but directs the Secretary of the Department of Transportation to establish the fee through regulation. Likewise, the Bill does not specify the scope of the “updated information” that must be submitted during the renewal process. In any event, if a broker or

forwarder fails to renew its operating authority, its operating authority is supposed to be listed as “inactive” with the Federal Motor Carrier Safety Administration (“FMCSA”) and on the FMCSA website.

2. **Existing Operations.** The Bill contemplates that existing brokers and freight forwarders will not need

to comply with the new laws and regulations immediately.

However, these businesses will need to comply with the new laws and regulations within four (4) years of enactment. At that time, a broker or

forwarder is required to obtain a “new” license to operate, presumably with a new number assigned by the FMCSA. Losing an “old” license number will likely create some practical issues for operators.

3. **Heightened Enforcement.** The Bill establishes that the revenue generated as a result of the Bill must be used to “administer and enforce” the registration and related requirements contained in the Bill. While changes in the initial registration process should not materially increase the workload of the FMCSA, the new renewal processes will obviously sap the agency’s already thin resources. At present, FMCSA maintains that it processes most OP-1 applications in roughly four to six weeks. Perhaps more importantly, conventional wisdom is that FMCSA currently does little to police compliance with existing broker-related regulations. As a result, these allocated registration funds may provide FMCSA with more enforcement “teeth” than it has historically had. How much the additional fees will generate, and how

those funds will be allocated between administering and enforcing the new requirements, is yet to be seen.

4. **Heightened Penalties.** The Bill imposes civil penalties and creates a private cause of action arising from unauthorized brokerage activities (*i.e.*, a failure to comply with registration or financial security requirements). The federal government may impose a civil penalty in the amount of “up to \$10,000 for each violation.” The private cause of action makes an unauthorized broker liable to an injured party “for all valid claims without regard to amount.” The Bill also imposes these civil penalties and civil remedies upon the individual officers, directors and principals of any business engaging in unauthorized brokerage activities.

5. **Proliferation of Registration Numbers.** Under current law, a single entity may have multiple forms of operating authority under a single MC number. The Bill provides that if a company has more than one type of operating authority, the company will be assigned different “registration numbers” (presumably, MC numbers) for each activity for which the entity is registered. The registration number will contain an indicator as to what type of operating authority is issued (*i.e.*, motor carrier, freight forwarder or broker).

6. **Delineation of Services.** As mentioned above, a single entity may have multiple forms of operating authority. For instance, a company may be both a motor carrier and a broker. Frequently, operators can be hard pressed to identify where the motor carrier operations end and the transportation broker operations begin. The Bill provides that any company seeking compensation for its services must specify, in writing, the operating authority under which it is providing its services.

7. Brokers and Forwarders as Carriers.

The Bill starts with the proposition that neither a broker nor a freight forwarder is permitted to provide transportation as a motor carrier. However, the Bill carves out an express exception that permits a broker or a freight forwarder to act as a motor carrier if it has separately registered as a motor carrier and if it has met all of the other applicable requirements governing motor carriers. Unfortunately, this exception may have the unintended effect of promoting the practice of housing multiple operating authorities in a single entity – a practice that is widely regarded in many quarters as anything but a “best practice.” While other parts of the Bill are aimed at clarifying which “hat” a business is wearing at any given time, this part of the Bill increases the likelihood that these distinctions will be obscured.

- 8. Bolstering the Bond.** The Bill raises the amount of a broker's or freight forwarder's surety bond from \$10,000.00 to \$100,000.00. The Bill also expressly provides that a broker's or freight forwarder's surety bond is available to pay claims made against a broker or freight forwarder arising from its failure to pay freight charges. The appropriate time for making a claim is when: (a) the broker or forwarder consents to the claim,

(b) the broker or freight forwarder fails to respond to adequate notice of the validity of the claim, or (c) the claimant made a reasonable attempt to resolve the matter as set forth in (a) and (b) but the claim was not resolved for a reasonable period of time (*i.e.*, the claim has languished). Finally, the Bill sets forth in detail the procedures that the claimant and surety must follow in attending to a claim against the surety bond.

- 9. Freight Forwarder Insurance.** The Bill requires that surface freight forwarders maintain liability insurance sufficient to pay an amount, not to exceed the amount of the security, for each final judgment against the forwarder for bodily injury to, or death of, an individual, or loss of, or damage to, property (other than cargo claims) resulting from the negligent operation, maintenance, or use of motor vehicles by, or under the direction and control of, the freight forwarder, when providing transfer, collection, or delivery service. The Bill also provides that FMCSA “may” require a forwarder to post a bond or file an insurance policy that will pay an amount, not to exceed the amount of the security for loss of, or damage to, the property for which the freight forwarder is providing service.

- 10. Restriction on Interlining.** The FMCSA has maintained for some

time in its “frequently asked questions” on its website that a motor carrier may not interline a shipment to another motor carrier without having a brokerage license. The Bill now makes this interpretation explicit by providing that a motor carrier may not broker transportation services unless the motor carrier has registered as a broker under this chapter. Unfortunately, not unlike the section mentioned above, this restriction on interlining may have the unintended effect of promoting the practice of housing multiple operating authorities in a single entity.

The Bill contains many other items that will be of interest to those operating as transportation brokers, freight forwarders, or motor carriers. However, the foregoing summary provides an initial, meaningful, representative sampling of the issues contained in the Bill. At the very least, introduction of the Bill is generating an excellent industry debate over the merits of the existing regulatory and business regime. Of course, where this debate will ultimately lead is entirely uncertain at this point in time. Stay tuned.

For more information on this topic, please contact Marc Blubaugh at mblubaugh@beneschlaw.com or (614) 223-9382.

Validity of Bills of Lading That Are Not Registered With the Chinese Ministry of the Communication

continued from page 1

to be determined by the Chinese court is a narrow one, one should not interpret that there is no consequence for failure to register the bill of lading. Pursuant to the International Maritime Regulation, a foreign NVOCC is not permitted to operate in China or with Chinese businesses without registering its bill of lading. In the above case, the income received by the U.S. NVOCC could have been subject to confiscation by the

Chinese government. In addition, if the income generated by the U.S. NVOCC was in excess of RMB100,000, a fine in the amount of two to five times its income generated from this transaction could have been imposed. If the income received by the U.S. NVOCC was more than RMB100,000, a fine between RMB50,000 to RMB200,000 could have been imposed.

Based upon this case scenario, we highly recommend that a U.S. NVOCC that engages in business in China or with Chinese entities should register its bill of lading with the MOC.

For more information on this topic, please contact Yanping Wang at ywang@beneschlaw.com or in China (011-8621) 3222-0388, or Eric Zalud at ezalud@beneschlaw.com or (216) 363-4178.

Is Your Import Commodity a Priority With U.S. Customs?

U.S. Customs and Border Protection (CBP) prioritizes which segments of the trade industry to scrutinize by utilizing a risk management approach. CBP calls them Priority Trade Issues (PTIs), and they are measured based on the potential impact they may have on U.S.

commerce. The Office of International Trade (OT) within the CBP organization focuses its resources on seven designated PTIs. These are

high-risk areas that can cause significant revenue loss, damage the U.S. economy, or threaten the health and safety of Americans. The OT constantly assesses new risks to and the best enforcement of U.S. trade laws.

Over half of the merchandise for sale in U.S. markets comes in from other countries. This year CBP will process approximately \$1.8 trillion in legitimate trade. CBP is challenged with preventing terrorists and their weapons from entering the U.S., while simultaneously clearing shipments for customs entry. Entry volume at the mid-point of fiscal year 2010 is 13 million. By year end, 27 million entries are expected, an increase of five percent from fiscal year 2009. With this type of volume, it is necessary for CBP to focus its efforts on the highest risk shipments.

PTIs are the focus of CBP resources and enforcement, including the selection of audit candidates. These are the seven Priority Trade Issues:

1. **Agriculture.** The goal is to prevent the importation of contaminated, diseased or adulterated agricultural and food products. Between fiscal years 2008 and 2009, agriculture seizures increased 100 percent. Preliminary figures in fiscal year 2010 indicate that seizures will decline by 20 percent.

2. **Antidumping and Countervailing Duties (ADCVC).** When the Department of Commerce discovers imported merchandise was sold in the U.S. at an unfairly low price, CBP is responsible for collecting the AD/CV

duties to level the playing field for U.S. companies affected by unfair trade practices. A total of \$130 million in AD/CV duties were collected during the first six months of fiscal year 2010.

3. **Import Safety.** Import safety is designed to ensure that unsafe products do not enter U.S. commerce by working with other government agencies, other foreign governments and the trade community. These best practices are designed to protect U.S. consumers, and focus on safeguarding public health and safety from unsafe importations. During the first six months of fiscal year 2010, CBP conducted 1,400 import safety seizures.

4. **Intellectual Property Rights (IPR).** Counterfeit and pirated goods threaten American innovation and competitiveness. CBP protects businesses and consumers every day through an aggressive IPR enforcement program. One example of counterfeit product seized is fake fragrances. These fakes have been found to contain contaminated alcohol, antifreeze, urine and harmful bacteria. At mid-year fiscal year 2010, nearly 8,000 IPR seizures have been made.

5. **Penalties.** The goal of the PTI is to ensure that penalties are effective in deterring non-compliance. The trade penalties strategy complements other PTI strategies whose action plans provide for the use of penalties to obtain compliance. CBP assessed more than \$120 million in penalties to non-

compliant importers in 2009. During the first six months of fiscal year 2010, approximately \$30 million in penalties have been assessed.

6. **Revenue.** The goal of PTI is to ensure that CBP has effective internal controls to protect the duties and taxes it collects for the U.S. government. During the first six months of fiscal year 2010, CBP collected \$15 billion in revenue for the U.S. government. It is projected that \$31 billion will be collected by year end.

7. **Textiles.** PTI ensures that textile imports, which generate more than 40 percent of the duties collected by CBP, fully comply with applicable laws, regulations and Free Trade Agreement requirements. In 2009, textile imports generated 46 percent of total duties or \$10.2 billion in revenue.

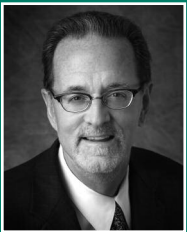
If your import commodity is on the PTI seven list, ensure that you have a solid customs compliance program. This includes pre- and post-entry audit program, periodic internal training, as well as five-years of accurate recordkeeping. CBP will approach your company using several different methods, including audit or the Focused Assessment program, CBP-28 (request for information) or Quick Response Audits. Quick Response Audits are single-issue audits that are designed to address a specific objective within a short period of time. CBP's fiscal year begins in October. You and your company need to be prepared for the eventuality of a visit or information request from U.S. Customs.

Benesch can help you create a streamlined customs compliance program, while simultaneously looking for potential duty saving programs.

For more information, please contact Mary Bianchi at mbianchi@beneschlaw.com or (239) 985-9776.

Team Members Spotlight

Get to know James M. Hill and Lianzhong Pan



James M. Hill

Currently, Jim serves as Executive Chairman of the firm, Chair of the firm's Private Equity Practice Group and an active and practicing member of its Corporate and Securities and Transportation & Logistics Practice Groups. He is also a member of the firm's Executive Committee.

Jim frequently presents and writes on topics affecting the transportation industry. Most recently, Jim moderated and spoke at the Benesch/Ahern Transportation Conference in Phoenix, AZ. He gave a timely and topical speech highlighting the recent heightened appetite for transportation industry acquisitions.

Jim focuses his active practice on publicly and privately held growth companies in addition to representing mezzanine finance providers and equity participants. He primarily handles mergers and acquisitions, public and private offerings of equity, and public and private offerings of debt.

Lianzhong Pan

Leo is Of Counsel with the firm's China and Transportation & Logistics Practice Groups. Leo is experienced in helping American companies enter the Chinese market. He counsels companies in connection with mergers and acquisitions of Chinese companies, Chinese real estate development projects and the formation of foreign-invested enterprises in China.

Additionally, Leo is experienced in dealing with bills of lading, cargo loss, warehousing, insurance subrogation, and maritime accident related litigation and arbitration cases. He has worked for COSCO Dalian, a major steamship company, as in-house counsel and has represented other major logistic companies in China.

Recent Events

Marc Blubaugh, as Secretary/Treasurer of the Transportation Lawyers Association, attended the **TLA's Executive Committee Meeting** in Fort Worth, TX, on July 31, 2010.

Richard Plewacki presented *Essential Concepts for Protecting Your Independent Contractors Status* at the **Independent Contractors Division Meeting** in Dallas, TX, on August 26 and 27, 2010.

Teresa Purtiman attended the **Ohio Trucking Association Conference** in Newark, OH, on September 12–14, 2010.

Andi Metzel and **Teresa Purtiman** attended the **FTR 2010 Conference** in Indianapolis, IN, on September 14–16, 2010.

Eric Zalud attended the **Arkansas Trucking Conference** in Fayetteville, AR, on September 15–17, 2010.

Marc Blubaugh spoke at the **2010 Freight Claims Management Webinars** on *Recent Developments in Freight Claims Law & Reality* on September 23, 2010.

Eric Zalud and **Martha Payne** attended the **Canadian Transportation Lawyers Association Annual Conference** in Vancouver, Canada, on September 23–25, 2010.

Eric Zalud attended the **Terralex Annual General Meeting** in Washington, D.C., on September 29–October 3, 2010.

Tom Washbush attended the **Message Courier Association of American's Last Mile Delivery Forum** in Hollywood, FL, on October 1, 2010, where he spoke on the *What's Your Company Really Worth? How Bankers, Investors and Buyers Evaluate Your Organization* panel.

Marc Blubaugh presented a legal update to the **International Warehouse Logistics Association** at a Regional Conference in Columbus, OH, on October 14, 2010.

Richard Plewacki attended the **Truckload Carriers Association Board of Directors Meeting** and related working committee meetings on October 16, 2010 in conjunction with the **American Trucking Association Management Conference and Exhibition**.

Marc Blubaugh, **Peter Kirsanow** and **Teresa Purtiman** attended the **American Trucking Association Management Conference and Exhibition** in Phoenix, AZ, on October 17–19, 2010.

Marc Blubaugh, **Martha Payne**, **Richard Plewacki** and **Eric Zalud** attended the **Transportation Law Institute** in Kansas City, MO, on October 22, 2010, where Eric spoke on *Ethical Considerations and Conflicts of Interest*.

On the Horizon

Ann Knuth will be attending the **NATERA 2010 Annual Conference** in Savannah, GA, on October 24–26, 2010.

Eric Zalud will be speaking at the **Trucking Industry Defense Association (TIDA) Conference** in Orlando, FL, on November 8–10, 2010 on the *Expansion of Carrier Selection Personal Injury Liability*.

Martha Payne and Eric Zalud will be attending the **TIA/NITL/IANA Conference** in Fort Lauderdale, FL, on November 13–16, 2010, where Eric will speak on *Logistics Industry Problems and Solutions*.

Marc Blubaugh, Jim Hill, Gregg Eisenberg and Eric Zalud will be attending the **Capital Roundtable** in New York City, NY, on November 16, 2010, where Jim will speak on *Executing Transportation & Logistics Deals—How to Complete Due Diligence, Get Financing and Manage Valuation & Structuring Issues*.

Marc Blubaugh and Eric Zalud will be attending the **Transportation Lawyers Association Regional Conference** in Chicago, IL, on January 21, 2011.

For further information and registration, please contact Megan Pajakowski, Client Services Manager at mpajakowski@beneschlaw.com or (216) 363-4639.

Pass this copy of *InterConnect* on to a colleague, or e-mail Ellen Mellott at emellott@beneschlaw.com to add someone to the mailing list.

Help us do our part in protecting the environment.

If you would like to receive future issues of this newsletter electronically, please e-mail Sam Daher at sdaher@beneschlaw.com.

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