A publication of Benesch Friedlander Coplan & Aronoff LLP's Transportation & Logistics Group

Spring 2014

InterConnect

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Only one law firm per practice area in the U.S. is receiving this recognition, making this award a particularly significant achievement. This honor would not have been possible without the support of our clients, who both enable and challenge us every day, and the fine attorneys of our Transportation & Logistics Practice Group.

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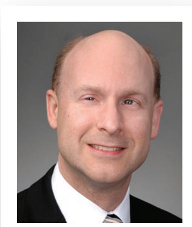
Counsel for the Road Ahead®

Measure Twice and Cut Once: The Need for Precision When Incorporating a Tariff Containing a Limitation of Liability


Marc S. Blubaugh

On January 21, 2014, the United States Supreme Court denied certiorari in the case of *CSX Transportation, Inc. v. ABB Inc.*, thereby letting stand a troubling precedent from the United States Court of Appeals for the Fourth Circuit. In *ABB*, a divided panel of the Fourth Circuit had refused to enforce a plain and unambiguous limitation of liability for freight loss and damage claims on the basis that the tariff containing that limitation of liability was incorporated *generally*, rather than *specifically*, in the bill of lading governing the shipment.

The case involved a shipper, ABB, who regularly shipped electrical equipment via a rail carrier, CSX. ABB utilized a form shipping contract that contained a clause that expressly incorporated the governing "classification or tariff" published by CSX. The form contract further acknowledged that the shipper agreed to all such classifications and tariffs and was familiar with the terms and conditions set forth in those classifications and tariffs. CSX's "Price List 4605" stated that "[c]arriers' maximum liability for lading loss or damage will not exceed $25,000 per shipment" and invited shippers to contact a CSX sales representative if they desired full liability coverage.

At one point in the parties' relationship, ABB tendered to CSX an electrical transformer worth $1.3 million to be transported from St. Louis, Missouri, to Pittsburgh, Pennsylvania. The parties utilized the shipping contract mentioned above. Unfortunately, the transformer was found at destination to be damaged from unknown causes. ABB ultimately sued CSX to recover approximately $550,000 in damages.

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Measure Twice and Cut Once: The Need for Precision When Incorporating a Tariff Containing a Limitation of Liability

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The district court held that CSX's liability was limited to $25,000 pursuant to the limitation of liability contained in its "Price List 4605" and incorporated into the parties' contract. ABB appealed. The Fourth Circuit reversed and found that although the parties' contract incorporated the limitation of liability contained in CSX's "Price List 4605," the Carmack Amendment required that any limitation of liability be incorporated with "specificity" such that no doubt can exist that the shipper was actually aware of the limitation of liability. This decision conflicted with contrary court decisions in other jurisdictions, such as *Werner Enterprises, Inc. v. Westwind Maritime International, Inc.*, 554 F.3d 1319 (11th Cir. 2009).

As the *ABB* decision is now good law in the Fourth Circuit, any motor carrier that moves goods within the Fourth Circuit's jurisdiction now faces the prospect of litigating the enforceability of its liability limits if those limits were included in a tariff or price list incorporated into the bill of lading. For instance, one nearly universal feature of many bills of lading, including a Uniform Straight Bill of Lading, is an acknowledgment on the face of the bill of lading incorporating a carrier's tariff by general reference. Similarly, certain carriers use "pro stickers" that are affixed to bills of lading and contain general language that alerts the shipper to the fact that the carrier has a tariff in place. Furthermore, many carriers alert their customers to various terms and conditions posted on their websites in a variety of other ways—by referencing the website on a rate confirmation or other shipping documents or by communicating the existence of the website to its customers in emails, correspondence or the like. The *ABB* decision subjects these customary methods of incorporating a limitation of liability to attack.

The practical turmoil created by the *ABB* decision is particularly acute in light of the fact that such a tremendous volume of truck traffic occurs throughout the states constituting the Fourth Circuit. For instance, as of 2011, a total of 7,138,000 trucks were registered in Maryland (1,683,000), North Carolina (2,743,000), South Carolina (1,726,000), Virginia (2,954,000) and West Virginia (732,000). Of course, this figure does not include the millions of trucks domiciled in other jurisdictions that regularly cross into these states as well. The states constituting the Fourth Circuit serve as a vital conduit for truck transportation throughout the northeast and the south and serve as the origin or destination of a significant volume of truck transportation between the east and west coasts, including over 1,209,822 containers imported and exported from the Port of Virginia alone in 2012.

In short, in light of the U.S. Supreme Court's denial of certiorari in the *ABB* case, carriers are well advised to review current business practices to ensure that limitations of liability are being incorporated as specifically as possible into every customer transaction. Shippers and carriers will both benefit from using precision in their contracting practices.

For more information, please contact **MARC S. BLUBAUGH** at mblubaugh@beneschlaw.com or 614.223.9382

China Loosens Foreign Ownership Restrictions in Shipping Industry

Richard Grams

On January 27, 2014, China's Ministry of Transport announced the *Trial Implementing Measures for Increasing the Proportion of Foreign Investment in International Shipping and International Ship Management in the Free Trade Zone* (the Decree), which became effective immediately.

Foreign investors have been permitted to establish Sino-foreign shipping businesses in China since 2001 by establishing joint ventures with Chinese partners. However, these were subject to a 49% foreign ownership cap. Under the Decree, these businesses (i.e., serving international ports from China) can now be incorporated in the Shanghai Free Trade Zone (FTZ) without any restriction on foreign ownership.

Furthermore, the Decree permits the chairman and general manager of such businesses to be appointed by either party instead of by the Chinese partner as previously required.

The Decree also allows foreign investors to establish both wholly foreign-owned and joint venture international ship management businesses in the FTZ. Outside of the FTZ, such businesses must still be in the form of joint ventures.

Such incremental changes as these can hardly be regarded as bold reform, but do reflect the Chinese government's eagerness to attract more foreign capital and know-how into its hidebound shipping industry.

For more information, please contact **RICHARD GRAMS** at rgrams@beneschlaw.com or 86.21.3222.0388.

Investment Banking Engagement Letters—Please Take Them Seriously

James M. Hill

As companies in the transportation and logistics industry continue to see transactional activity, many are considering hiring an investment banker either for growth capital needs or for a control transaction where the owners would seek a change in control with a buyer. One of the phenomena that has occurred over the past 10 years is that many companies, even those with EBITDA as low as $4 million, are seeking out a professional advisor in the form of an investment banker in order to carry out an orderly process and create an auction atmosphere, which, arguably, can maximize the enterprise value of the seller or the seeker of growth capital.

This article assumes that the seller or the owner seeking growth capital has carefully analyzed the appropriate investment banker for the transaction. Some of the important variables to evaluate are the investment banker's experience in the transportation industry and reputation as a quality investment banker. It's also important to understand who "the team" would be from the investment banking institution as well as understanding that smaller enterprise-value transactions may not be of interest to larger investment banking firms that have a minimum dollar amount they need to achieve if the sale or growth capital transaction is successful. Many of the larger firms require a minimum investment banking fee of $500,000, or more in some cases. Therefore, the owners of the company should check out the investment firm's previous clients who both succeeded and failed in an auction process in order to be comfortable that (1) the firm has the right "sizing" and (2) they will be interacting with senior investment bankers who are experienced in the entire process.

If you have an accomplished "deal professional" in your camp—be it a seasoned M&A lawyer in transportation (always a key to a successful transaction) or a similarly seasoned financial advisor—this due diligence can be carried out effectively and efficiently. Again, most owners only sell or seek growth capital once, whereas deal professionals are involved in hundreds of sales over their careers and have both knowledge and comfort in this area. However, many owners do not engage a deal professional until they have already selected an investment banker and executed an engagement letter (without consulting people who have often negotiated these letters). Those of us in the business have all experienced a seller or a seeker of growth capital who has already executed the engagement letter, with little or no negotiation, and—trust me—this is not where an owner wants to be.

Instead, owners should be aware of the following key points in an engagement letter and seek expert advice to get the letter positioned appropriately for their situation.

1. **Scope of the Engagement.** These provisions specify what the investment banker will do for the owners; that is, basically help them coordinate the process, help them write the "teaser" that goes out to potential interested parties, work with their attorney on the NDAs (nondisclosure agreements) sent to parties expressing an interest after reading the teaser, and working with their owners and the attorneys and accountants to prepare the Confidential Information Memorandum (CIM). The investment banker will not create independent research on the company, although may help by providing a competitive and industry description, but rather rightfully relies on the company for the information. A key to the scope of the engagement wording is to ensure that the engagement does not go beyond what you, the owner, are hiring the investment banker to do; i.e., not expanding for debt financings, joint ventures, IPOs and other transactional matters. The owners need to be clear that the letter only articulates exactly why they are hiring the investment banker and that it is the only engagement.

2. **Team and Termination.** It is important to articulate in the engagement letter who will be on the team, as you do not want to work with only junior investment bankers after being "sold" by a senior investment banker. No investment bank can promise that a particular person will always be involved—as he or she might leave the firm—but you can get a "best efforts" type of arrangement.

   As to termination, most engagement letters should allow either party to terminate on 30-days' prior written notice—some investment banks will ask for at least six months before this termination can occur, and that may be reasonable under the circumstances. As noted below, mere termination does not eliminate other responsibilities the owner has to the terminated investment banking firm.

3. **Fees and Reimbursement.** Most investment banks require an up-front fee to show good faith on the part of the owners. This will vary depending on the size of the investment bank, but a fee of, in most instances, $25,000 to $50,000 that is credited against the success fee is not unusual. As to the fee on the enterprise value of the transaction (what is known in most investment banking agreements as "Consideration"), the fee will typically be a certain percent up to a certain enterprise value (a higher percent if a smaller transaction), with that enterprise value to be agreed upon between owner and bankers as likely to be achieved. Thereafter, the fees are structured in increments above the initial enterprise value to encourage the banker to seek a higher valuation. Again, this is done in increments of dollars and can be stair-stepped with two or three different increments. As for a minority growth capital investment, the fee will start higher, as the total dollars being sought will be less than in a control situation. Reimbursement of costs incurred by the investment banker is usually in the $25,000 to $50,000 range, with any overage needing prior approval by the owners.

4. **Consideration.** This is a key element in any engagement letter in that the total consideration is how the banker gets his or her fee. Consideration will include all payments to the owners and will also include: all assumption of debt (but excluding ordinary payables) by the buyer; excluded assets that the owners get to keep after the closing of the transaction; if a stock exchange, the value of the stock (be it public or private); any over-market terms on employment agreements or noncompetition agreements; and all "rollover" equity interests where the

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Investment Banking Engagement Letters—Please Take Them Seriously

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owners determine to maintain an ownership position in the buyer. In short, all amounts that the owners receive, or where they are relieved of debt obligations, are included. Points worthy of negotiation are: seller notes that are not contingent (oftentimes being valued based on a present value discount); seller notes or earnouts that are contingent (with the banker to get its percentage of that payment if and only when received by the owners); escrow amounts (sometimes not considered contingent but sometimes one can negotiate to pay the banker when the escrow is released in whole or in part); and any other contingent "Consideration" deemed worthy of discussion.

5. **Termination and Tail.** As noted above, termination of the investment banker upon thirty-days' notice, if not a minimum term as might be negotiated, requires: that the owners are still responsible for indemnifying the investment bank, discussed below; that the non-refundable fee remains non-refundable; that the Confidentiality Agreement executed up front by the investment bank remains in effect (and should remain in effect for two years after either completing a deal or having a termination); that all reimbursements be paid as noted above; AND the key element is that the investment banking institution, whether or not going through a full process, will have what is known as a "tail period." During this period, if any party introduced by the investment bank, or brought to the investment bank by the owners (who have the responsibility to disclose those parties to the investment bank), enters into a transaction with the owners—and much negotiation goes on as to whether it is a Letter of Intent, a closed transaction or something in between during that tail period—then the investment bank is owed its entire fee.

   First, the time of the tail. Oftentimes 12–24 months will be suggested by the investment banker. This varies with each investment bank, but one should try to get the "tail" down to 12 months after the official termination. Second, the parties introduced. This is usually based on anyone that the investment banker or the owners suggest might be the buyer or the growth capital provider. Now, it is not unusual for the investment bank to simply suggest that after the termination it shall prepare such a list of those parties that would qualify for the 12-month period. It is more desirable to have a list as an exhibit to the engagement letter, where both the owners and the investment bankers have agreed that these parties were discussed and, whether or not they were sent "teasers" (a brief, anonymous description of the company usually involving one or two pages), if they were discussed and even rejected by the owners, they should still go on the list.

   Owners who are unschooled and do not have experienced deal professionals helping them may simply agree that anyone who enters into a transaction with the company—with no agreed-upon list—within 12 months (if that is the tail period) will allow the investment banker to get his or her fee. The "tail" discussion as to length and the parties on the list, if a list, is a sensitive issue to the investment banker, as he or she does not want to have excluded from that list parties who in fact might be buyers and were talked to by the owners but not put on the list. This is a key element of a termination, and the discussion requires significant experience to iron out the details. It is important to be fair to both the owners and the investment banker.

6. **Other Banker Duties and Competitors.** The investment banking firm is obligated to communicate with the owners as to all parties with whom it has discussed the potential transaction. In addition, oftentimes the owners will negotiate a provision that will not allow the investment bank to represent a competitor in a transaction while it is representing the company. This is a carefully negotiated provision, as the investment bank does not want to be precluded from helping a competitor as long as it does not directly affect the owners' transaction. These are parts of the engagement letter where a seasoned deal professional can be of great help.

7. **Indemnification.** Of all of the provisions in the engagement letter, this is the provision that is the most "sacred" to investment banking firms and little negotiation can occur. Basically, the company is required to indemnify the investment bank for any and all claims arising out of the transaction, or the process if the transaction does not occur. Unless it can be shown that the investment bank was completely creating the liability due to its "wanton misconduct or gross negligence" as determined by a final non-appealable court decision (highly unlikely, of course), then the indemnification stands.

   The other part of this indemnification that annoys owners is that in all cases, even if the investment bank is found to be fully creating the liability, its total indemnification cap is the amount it received pursuant to the transaction. Now, many owners read these provisions—usually as an exhibit to the main body of the agreement—and are not happy with the concept. However, if one understands that in the great preponderance of private transactions, or public transactions, the issues on liability arise out of the company's disclosures or conduct or representations (and remember, the investment banker makes clear in the engagement letter that he or she is relying solely on the company's information to create the teaser and the CIM and to conduct the management presentations), then one can understand why the engagement letter is positioned as it is for indemnification. To be sure, you can achieve a few concessions with good, experienced deal counsel, but most of these provisions will remain in place

As you can see from the discussion above, an engagement letter has many variables, many complications, and requires a careful review and negotiation by the owners and the deal professionals. Ultimately, with experienced negotiation, all will be worked out and the owners and the investment banker will be on the same page and, most importantly, will be focused on making the transaction a success.

For more information, please contact **JAMES M. HILL** at jhill@beneschlaw.com or 216.363.4444.

RECENT EVENTS

Private Equity Investing in Transportation, Distribution & Logistics Companies
Capital Roundtable Conference
Marc S. Blubaugh, James M. Hill, **Peter K. Shelton** and **Eric L. Zalud** attended.
December 5, 2013 | New York, NY

Transportation Lawyers Association Chicago Regional Seminar
Martha J. Payne was a part of the Ethics Panel and **Marc S. Blubaugh**, **J. Allen Jones, III**, **Thomas B. Kern**, **Stephanie S. Penninger**, **Richard A. Plewacki, Teresa E. Purtiman** and **Eric L. Zalud** attended.
January 17, 2014 | Chicago, IL

BG Strategic Advisors Supply Chain 2014
Marc S. Blubaugh, J. Allen Jones, III and **Eric L. Zalud** attended.
January 22–24, 2014 | Palm Beach, FL

Council of Supply Chain Management Professionals Columbus Roundtable
Marc S. Blubaugh moderated the annual Transportation and Logistics Panel.
January 24, 2014 | Columbus, OH

Conference of Freight Counsel
Martha J. Payne and **Eric L. Zalud** attended.
January 25–27, 2014 | San Francisco, CA

TIDA's Advanced Seminar
Eric L. Zalud presented "Video-Based Driver Safety Programs and EOBRs: Are They Really Making a Difference in Risk Prevention, Quality Control and Litigation Management? Understanding How these Technologies Work, What Information is Being Transmitted and How that Information is Being Used in Litigation."
January 27–28, 2014 | Dallas, TX

International Warehousing Logistics Association Insurance Company Board of Directors Meeting
Marc S. Blubaugh presented *Transportation Brokerage: Navigating New Risks and Opportunities in a MAP-21 World.*
January 31, 2014 | Grand Cayman

BB&T Capital Markets 29th Annual Transportation Services Conference
Marc S. Blubaugh and **Eric L. Zalud** attended.
February 12–13, 2014 | Coral Gables, FL

National Tank Truck Carriers Association, Winter Membership & Board Meeting
J. Allen Jones, III attended.
February 12–14, 2014 | LaQuinta, California

Transportation Logistics Council's 40th Annual Conference
Marc S. Blubaugh spoke on *Mitigating the Loss—Dealing with Damaged, Refused, and Undeliverable Freight.* **Martha J. Payne** spoke on *Outsourcing—Avoiding Traps and Pitfalls*. **Eric L. Zalud** moderated a panel on insurance issues in the transportation industry and spoke on *Limiting Risk in the Cargo Arena via Insurance*.
March 17–19, 2014 | Nashville, TN

Specialized Carriers & Rigging Association, Specialized Transportation Symposium
J. Allen Jones, III attended.
March 19–21, 2014 | Houston, Texas

Truckload Carriers Association—76th Annual Convention
Peter N. Kirsanow and **Richad A. Plewacki** presented on *Hiring Without Hitting an EEOC Land Mine.* **J. Allen Jones, III** and **Teresa E. Purtiman** attended.
March 23–26, 2014 | Grapevine, TX

International Warehousing Logistics Association's Annual Convention
Marc S. Blubaugh presented on *Where the Rubber Meets the Road, What Your Warehousing Company Needs to Know About Transportation in 2014.* **David M. Krueger** also attended.
March 24, 2014 | Phoenix, AZ

AirCargo 2014 Closing the Deal Conference
Martha J. Payne and **Eric L. Zalud** attended.
March 30–April 2, 2014 | Orlando, FL

American Conference Institute—4th National Forum on Defending and Managing Trucking Litigation
Marc S. Blubaugh spoke on *Moving Ahead for Progress in the 21st Century (MAP-21): What New Requirements Mean for Motor Carriers, Forwarders, and Brokers.*
March 31, 2014 | Chicago, IL

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If you would like to receive future issues of the newsletter electronically, please email **SAM DAHER** at sdaher@beneschlaw.com.

INTERCONNECT

ON THE HORIZON

2014 TIA Great Ideas Conference & Exposition
Eric L. Zalud will be a part of a a legal panel presenting an overview of legal issues relating to transportation intermediaries. **Martha J. Payne** and **Stephanie S. Penninger** will also be attending.
April 9–12, 2014 | Tucson, AZ

Specialized Carriers & Rigging Association Annual Conference
Eric L. Zalud and **J. Allen Jones, III** will be attending.
April 22–27, 2014 | Boca Raton, FL

Maritime Law Association of the United States 2014 Spring Meeting
Stephanie S. Penninger will be attending.
April 29–May 2, 2014 | New York, NY

Transportation Lawyers Association's Annual Conference
Marc S. Blubaugh will be inaugurated as TLA President. **Eric L. Zalud** will be presenting *I Buy When Other People Are Selling! Are YOU Ready for the Pending Increase in Mergers, Acquisitions and Finance Activity in the Transportation Space?* **J. Allen Jones, III** and **Richard A. Plewacki** will be attending.
April 30–May 3, 2014 | St. Petersburg, FL

Transportation Lawyer Association's Executive Committee Meeting
Marc S. Blubaugh and **Eric L. Zalud** will be attending.
April 30, 2014 | St. Petersburg, FL

Arkansas Trucking Association's Annual Business Conference & Vendor Showcase
Eric L. Zalud will be presenting on *Negotiating Shippers Contracts: The Essentials Carriers Should Include; Phrases to Avoid/Look For; Indemnification Clause.*
May 21–23, 2014 | Branson, MO

Terralex 2014 Global Meeting
Eric L. Zalud will be attending.
June 4, 2014 | Indianapolis, IN

International Warehousing Logistics Association's Legal Symposium
Marc S. Blubaugh will be speaking on Transportation Law.
June 18, 2014 | Chicago, IL

DRI Trucking Law Seminar
Eric L. Zalud will be attending.
June 19–20, 2014 | Las Vegas, NV

Conference of Freight Counsel Summer 2014 Meeting
Eric L. Zalud will be attending.
June 21–23, 2014 | Avon, CO

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

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