

UNDERSTANDING THE UIIA AND HOW IT CONTRIBUTES TO THE DEVELOPMENT AND EXPANSION OF THE INTERMODAL MARKET



Marc S. Blubaugh

Two recent events illustrate the challenges facing providers of transportation and logistics services when problems arise at a port that interfere with the usual, efficient flow of goods. First, labor disruptions lasting for several months at the Ports of Los Angeles and Long Beach in late 2014 and early 2015 generated enormous challenges for motor carriers and others trying to pick up or drop off containers. Second, the bankruptcy filing of Hanjin Shipping Co., Ltd. (“Hanjin”) had a domino effect that temporarily paralyzed port operations and has had a variety of residual consequences that continue to unfold. This article focuses primarily on the effect that these events had upon equipment providers and motor carriers who are participants to the Uniform Intermodal Interchange and Facilities Access Agreement (“UIIA”).

What Is The UIIA?

The UIIA is a uniform industry agreement that governs the interchange of intermodal equipment (*i.e.*, intermodal containers, chassis, trailers, etc.) among ocean carriers, rail carriers, and motor carriers. A copy

of the current version of the UIIA is attached as Exhibit 1 and can be downloaded by the public without charge at <http://www.uiia.org/assets/documents/newuiia-Home.pdf>. The purpose of the UIIA is to promote intermodal productivity and operating efficiencies through the uniform industry processes and procedures. The UIIA is used by all major railroads in the United States as well as by almost all of the world’s ocean carriers who berth in the United States. Therefore, motor carriers who wish to do business with ocean carriers or rail carriers typically become “participants” to the UIIA.

Who Participates in and Who Maintains the UIIA?

In 1973, a task force of representatives of the Association of American Railroads, the Equipment Interchange Association (a former affiliate of the American Trucking Associations), and the Steamship Operators Intermodal Committee formed a joint task force under the auspices of the Office of Facilitation in the U.S. Department of Transportation and the Maritime Administration in the Department of Commerce to draft a uniform agreement for the interchange of trailers, containers, and related equipment used in intermodal surface transportation. The UIIA was the fruit of those efforts. Up until that point, ocean carriers and rail carriers largely used

their own interchange agreements.

Since 1991, the UIIA has been administered by the Intermodal Association of North America (“IANA”). IANA was formed in 1991 by virtue of a combination of three different trade associations. The Intermodal Marketing Association represented intermodal marketing companies who were establishing business relationships with railroads and motor carriers at the time. The National Railroad Intermodal Association provided a forum for railroads and their suppliers to meet. Finally, the Intermodal Transportation Association offered an organization where all three modes could come together to address common industry operating issues.

In the more than forty (40) years since the UIIA was developed, the UIIA has undergone many changes, and modifications to the UIIA are made on a periodic basis. Some of these modifications result from participants’ experience under the UIIA. Others result from industry changes themselves. For instance, deregulation caused a variety of changes that needed to be addressed under the UIIA. Likewise, operational changes—such as the fact that the railroads and steamship lines no longer own much of the intermodal equipment in question but, rather, have sold much of that equipment to equipment leasing companies—have driven other changes. The most recent modifications to the

* Benesch, Friedlander, Coplan & Aronoff LLP, Columbus, Ohio

UIIA were effective as recently as September 19, 2016.

Ocean carriers, rail carriers, and motor carriers can each be “participants” to the UIIA. Notably, equipment lessors who lease containers and chassis to ocean carriers are not presently eligible to be participants to the UIIA. Likewise, marine terminal operators (unlike rail terminal operators) are not presently eligible to be participants to the UIIA. Motor carriers and equipment providers (i.e., ocean carriers and rail carriers) who wish to become participants to the UIIA must complete an application.

What Are Some of the Key Terms and Conditions of the UIIA?

Premises Access

As the name suggests, the UIIA expressly authorizes motor carriers to enter upon terminal facilities for the sole purpose of completing an interchange of intermodal equipment. Equipment providers may exclude a UIIA participant, however, for good cause shown. An equipment provider who wishes to exclude a participating UIIA motor carrier must issue a written statement to the motor carrier by registered mail explaining the reasons for its suspension of access rights. The notice must issue at least three (3) days prior to the suspension.

Of course, since marine terminal operators are not signatories to the UIIA, the UIIA does not generally govern motor carriers’ access to marine terminals (as contrasted with rail terminals). For instance, the UIIA would not limit a marine terminal operator’s ability to prohibit a motor carrier from accessing its port facility because of anticipated disruption caused by picketing aimed at that motor carrier. In other words, a marine terminal operator cannot breach an agreement to which it is not a party.

Equipment Use

Absent a separate contract between the equipment provider and a motor carrier, a motor carrier who takes possession of equipment must use that equipment only for the authorized purpose, must not authorize use of the equipment by others, and must promptly return the equipment after the interchange purpose is complete. Equipment must generally be returned to the physical location where it was received unless the equipment provider directs the motor carrier to return the equipment to a satellite location identified in a separate agreement between the parties or identified in IANA’s Equipment Return Location Directory (“ERLD”). By reviewing the list of possible satellite locations in the ERLD, a motor carrier will know the geographic range and distance of various possible return locations and may, therefore, charge its customer an amount sufficient to take the return trip into account.

Equipment Loss or Destruction

If equipment is lost, stolen, or completely destroyed the motor carrier must pay the equipment provider the actual cash value of the equipment or the depreciated replacement value as agreed by the parties in the provider’s Addendum. In exchange for payment, the equipment provider must assign to the motor carrier its rights against any responsible third-party. The motor carrier must notify the equipment provider within thirty (30) days of the equipment being lost, stolen, or completely destroyed. If the equipment provider itself concludes that that equipment is lost, stolen, or destroyed, the equipment provider must notify the motor carrier within eighteen (18) months of the date of interchange. Otherwise, the equipment provider forfeits its right to pursue the motor carrier.

Equipment Damage

If equipment is damaged (but not completely destroyed), the motor

carrier is obligated to pay the reasonable and customary costs to repair the damage that occurred while the equipment was in the motor carrier’s possession. The equipment provider is obligated to detail the repairs performed and provide the repair bill or other details regarding the party who performed the repair. A motor carrier is required only to pay the lesser of the reasonable and customary cost to repair and the casualty loss value of the equipment. If an equipment provider uses a manned in-gate, any invoice for repairs must issue no later than 165 days from the date of the interchange where the damage was documented. If an equipment provider uses an automated in-gate, any invoice for repairs must issue no later than 120 days from the date of the interchange where the damage was documented. Other timeframes run from the date that repairs are actually performed. In any event, various exceptions exist to the foregoing timelines when the equipment has been involved in an accident that might give rise to litigation.

Motor carriers are also obligated to return the equipment free of all dunnage, bracing, contaminants, and debris. The floor of the container must be swept clean when returned.

Tire damage is called out separately under the UIIA. Repair of certain tire damage arising during the motor carrier’s possession of the equipment is the sole responsibility of the motor carrier while other types of damage is the sole responsibility of the equipment provider.

Fines and Citations

Motor carriers are responsible for paying any fines or citations arising out of its own acts or omissions in the operation of the equipment during the interchange period. The motor carrier is obligated to provide to the equipment provider a corrected copy of any equipment-related citations. The motor carrier remains responsible for the equipment even if it interchanges the equipment to another party.

Indemnity

Motor carriers agree to defend, hold harmless, and indemnify equipment providers with respect to claims for claims and suits for bodily injury, death, and property damage. Courts that have considered the matter have concluded that this indemnification does not extend to cargo claims as cargo claims are outside the scope of the UIIA.¹ Nevertheless, the scope of the indemnity provision is expansive and extends even to claims arising from the equipment provider's own negligence. Only limited exceptions apply. For instance, the indemnity provision carves out certain damages arising on the equipment provider's premises caused by the equipment provider or its agents, employees, vendors, or invitees. Similarly, the indemnity provision carves out certain damages resulting from particular defects in the equipment. Finally, one party receiving notice of a claim must promptly notify the other party.

Notably, many states that have adopted anti-indemnity legislation (aimed at voiding a motor carrier's contractual obligation to indemnify a shipper for the shipper's own negligence) include an express exception indicating that the indemnity provisions of the UIIA are enforceable. For instance, Ohio's anti-indemnity statute, Ohio Rev. Code 2305.52, provides an express exception for the UIIA:

This section does not apply to the uniform interchange and facilities access agreement, administered by the intermodal association of North America or other agreements providing for the interchange, use, or possession of intermodal chassis or other intermodal equipment.

However, not all jurisdictions have adopted a similar exception. For example, in *CMA-CGM (America), Inc. v. Empire Truck Lines, Inc.*² the Court of Appeals of Texas held that the UIIA's indemnity provision

contravened the Texas Transportation Code's anti-indemnity statute.

Insurance

Motor carriers are required to have a commercial automobile liability policy containing a combined single limit of \$1,000,000 or greater. The policy must be primary and must name the equipment provider as an additional insured. The motor carrier must also have a commercial general liability policy with a combined single limit of \$1,000,000 or greater per occurrence. No portion of the policy may be self-insured.

Per Diem

The UIIA defines "Per Diem" as a "charge to be paid when Intermodal Equipment is not returned by the end of the allowable free time to its origin or to another location, as specified by the Provider, or at the discretion of Provider, is Interchanged to another Motor Carrier." In other words, "Per Diem" is the equivalent of a detention charge for failing to return containers or chassis as required by the party who provided the containers or chassis in the first place. Equipment providers identify in their respective addenda the number of free days awarded to a motor carrier and the accompanying daily charge for failure to return equipment after the free days have expired.

Alternative Dispute Resolution

Since 2008, the UIIA has contained an alternative dispute resolution procedure ("DRP") aimed at addressing disputes that arise with respect to Per Diem invoices as well as maintenance and repair invoices. These disputes can be submitted to a three-member arbitration panel consisting of volunteer members of the IIEC. These members must have at least five (5) years of operating experience involving gate interchanges, yard procedures, loading and unloading, the operation of container yards, and the like. The panel consists of one IIEC

member from each mode. However, the matter is initially submitted to representatives of the two modes involved in the disputed invoices. The third arbitrator only becomes involved in the event that the other two arbitrators cannot resolve the dispute.

Most arbitrations are based exclusively based upon the written submissions of the parties. However, the IIEC has the discretion to convene conference calls with the parties in dispute. The proceedings and submissions of the DRP are confidential, but the decisions themselves are public (with the names of the participants redacted). Decisions can be reviewed at http://www.uiia.org/about/drpd_decisions.php.

Once a DRP has been initiated with respect to a claim, no suspension, cancellation, termination, or any type of interruption of the motor carrier's interchange privileges may occur on the basis of that dispute. However, an equipment provider can still suspend, cancel, or terminate a motor carrier's interchange privileges for reasons not related to the disputed claim.

Over 752 cases have been submitted under the DRP since its inclusion in the UIIA. Of the cases submitted, only 501 cases were appropriate for submission under the DRP. 319 of those cases resulted in an issued decision. (The balance of the cases settled pending arbitration and others remain pending at present.) In these cases, the motor carrier prevailed 41% of the time, the equipment provider prevailed 42% of the time, and 17% involved a split decision of some sort. The DRP itself is described in detail in Exhibit D to the UIIA.

Miscellaneous

The UIIA contains a number of other customary provisions, such as an integration clause, a notice provision, a counterpart provision, a forum selection clause, a section governing assignment, and the like. One such provision is a provision awarding

attorneys' fees to a prevailing party in litigation.³

Has the Enforceability of the UIIA Been Challenged?

Some courts have questioned the enforceability of the DRP under the UIIA. For instance, in April 2011, Elite Logistics Corp., a motor carrier, filed suit in California state court against Wan Hai, a steamship line, for unlawful business practices under California law. Unimax Express, Inc. filed a similar suit against Hyundai Merchant Marine Co., Ltd. on the same basis. The thrust of the motor carriers' claim was that the steamship lines imposed per diem charges on them (and other motor carriers), dating back to 2008, for weekends and holidays in violation of California Business & Professions Code § 22928. They also claimed that doing so violated Section G.11 the UIIA ("Compliance with the Law").

In response to the lawsuit, the steamship lines asked the trial court to compel arbitration as required under the UIIA. The trial court agreed and compelled arbitration. The parties then proceeded to arbitrate under the UIIA. The arbitrators unanimously concluded that the motor carriers did not advise the steamship lines about any disputed items within thirty (30) days of the receipt of the invoice as required by the UIIA. Therefore, the motor carriers lost their right to challenge the per diem charges.

The steamship lines then filed a motion with the trial court for confirmation of the arbitrator's award. The motor carriers opposed confirmation and argued that the arbitrators had exceeded their powers. The trial court agreed with the steamship lines and the arbitrators, confirmed the award, and entered judgment in favor of the steamship lines.

The motor carriers then appealed to the California Court of Appeal. The Court of Appeal reversed the trial court's decision. In essence, the Court of Appeal concluded that the

thirty (30) day time limitation in the UIIA for disputing invoices was procedurally and substantively unconscionable. The Court of Appeal also criticized other aspects of the UIIA's arbitration process. The steamship lines asked for the Court of Appeal to reconsider the matter. However, the Court of Appeal denied that request. The steamship lines then asked the California Supreme Court to entertain a discretionary appeal. However, the California Supreme Court denied that request. The steamship lines sought further review by the United States Supreme Court. However, on March 23, 2016, the U.S. Supreme Court denied review.

While the decision in Elite Logistics Corporation v. Wan Hai Lines, Ltd.⁴ appears to undermine the enforceability of the DRP under the UIIA, two points should be noted:

- The Court of Appeal's decision is an "unreported" decision. As the legend on the first page of the decision states: "California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by Rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115" (emphasis added). In other words, no other court is technically permitted to cite to this decision as precedent except in very limited circumstances (i.e., where the same two parties are litigating the very same issue).
- The Court of Appeal's decision itself expressly states that the decision is to have narrow applicability: "To the contrary, we have said that our conclusion that the UIIA arbitration procedure is unconscionable is

limited to this case. We have not considered, nor have we decided, that the UIIA arbitration provision cannot lawfully be applied to any dispute—we hold only that it cannot be applied to this dispute" (emphasis in original).

The Court also misconstrued several provisions of the UIIA in rendering its decision. Accordingly, notwithstanding the Elite Logistics opinion, participants to the UIIA should have confidence regarding the continuing vitality of the UIIA.

What Law Governs the UIIA?

Section G.7 of the UIIA contains a Maryland choice of law provision since IANA is headquartered in Maryland:

The laws of the state of Maryland, the location at the principal place of business of the Intermodal Association of North America shall govern the validity, construction, enforcement and interpretation of this Agreement without regard to conflicts of law principles.

Case law is split regarding the extent to which Maryland law applies in a given dispute under the UIIA. For instance, in CMA-CGM (Americas), Inc., supra, the Court found that Texas, rather than Maryland, had a more significant relationship to the UIIA and that Texas, rather than Maryland, had a materially greater interest in determining the enforceability of an indemnification provision under the UIIA.⁵ However, other courts have enforced the Maryland choice of law provision.⁶

What Consequences Did The West Coast Port Slowdown Have for UIIA Participants?

One consequence of the labor disruptions on the West Coast in late 2014 and early 2015 was that motor carriers were unable to return

containers and chassis to the designated return locations at the ports in timely fashion. Notwithstanding that inability to return equipment to the ports in a timely fashion, ocean carriers imposed Per Diem charges on motor carriers for failing to return the equipment before expiration of the “free days” awarded under the UIIA and the ocean carrier’s addendum. These Per Diem disputes, in turn, lead to the commencement of DRP cases.

A total of 137 cases were submitted to IANA involving Per Diem disputes relating in some fashion to congestion on the West Coast. 17 of the 137 cases were rejected outright as either being untimely (9 were outside the established 30 day timeframe for a motor carrier to dispute Per Diem charges initially, and 8 were outside the 15 day timeframe for motor carriers to submit claims to the DRP). 37 of the 137 claims were resolved by the parties prior to a decision issuing from the arbitrators. This resulted in 83 decisions on the merits. 43 of those decisions were rendered in favor of the equipment provider for the original invoiced amounts, 26 were rendered in favor of the equipment provider for a modified amount, and 14 were rendered in favor of the motor carrier.

The primary legal issue involved in the DRP cases involving West Coast congestion was whether or not the congestion amounted to a “force majeure” under Section G.12 of the UIIA, excusing the motor carrier from its usual obligation to pay Per Diem. Section G.12 of the UIIA provides:

Force Majeure: In the event the Motor Carrier is unable to Interchange Equipment to Provider within the free time as specified in Provider’s Addendum, or Provider’s applicable Tariff, as a result of Acts of God, war, insurrections, strikes, fire, flood or any like causes beyond the Motor Carrier’s control, the Motor Carrier shall be exempted from the per diem charges

to the extent of, and for the duration of, the condition that prevented the redelivery of the Equipment.

During the DRP proceedings, motor carriers generally tried to introduce industry articles, news reports, and driver turn time data captured by the Harbor Trucking Association that provided evidence of the impact that the port congestion had on their business operations.

However, motor carriers were infrequently able to provide evidence that they had in fact tried to return equipment on a certain date and time and had been turned away. Moreover, equipment providers maintained that they kept regular business hours, accepted many containers and chassis, and maintained no control over the marine terminal operators. Consequently, as the results of the decisions above indicate, most motor carriers were unable to prevail.

What Consequences Does the Hanjin Bankruptcy Have for UIIA Participants?

Hanjin itself is a participant to the UIIA. A true and accurate copy of Hanjin’s Addendum to the UIIA is attached hereto as Exhibit 2 and Hanjin’s executed Participating Party Agreement is attached hereto as Exhibit 3.

The Hanjin Chapter 15 bankruptcy created a concern similar to what faced motor carriers during the West Coast congestion of 2014-2015. Pursuant to Section E.1.b of the UIIA, Hanjin had an obligation to accept the return of equipment. However, vast numbers of containers and chassis were not being accepted for return, and Hanjin did not notify motor carriers of any alternative return locations. Similarly, many motor carriers maintained that, pursuant to Section G.12, Hanjin created a force majeure exempting motor carriers from having any obligation to pay Per Diem since the ability to return the containers

and chassis to Hanjin was beyond the control of the motor carrier.

As a result, many motor carriers expressed concerns that Hanjin or its Foreign Representative would attempt to collect Per Diem charges from motor carriers for their failure to return equipment even though neither Hanjin nor marine terminal operators were accepting return of such equipment. Consequently, on the same day that Hanjin filed its Chapter 15 petition, IANA issued preliminary guidance to motor carriers.

Motor carriers were advised to create a factual record of any unsuccessful attempt to return or pick-up Hanjin equipment so that motor carriers would have evidence available in any future Per Diem dispute. Specifically, motor carriers were reminded to:

- Retain copies of any and all notices, bulletins, or other advisories identifying changes to a facility’s policy as it relates to Hanjin equipment.
- Maintain copies of any and all documentation (i.e., e-mail communications with facilities, turn-away tickets, rejection slips, etc.) that demonstrate a motor carrier’s unsuccessful attempts to return or pick-up specific Hanjin equipment.
- Create a log of any verbal communications that a motor carrier’s driver or dispatch office may have with a facility regarding the inability to return or pick-up Hanjin equipment. The log should include 1) the date and time of attempted return or pick-up; 2) the name and contact information of the person with whom the driver or dispatcher spoke at the facility; and 3) the response of the facility when the motor carrier attempted

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to return or pick-up Hanjin equipment.

Furthermore, as Hanjin's bankruptcy continued to unfold in the United States, IANA sought an order from the Court to establish that Hanjin could not charge Per Diem when equipment could not be returned due to Hanjin's bankruptcy.

IANA informed the Court that great uncertainty exists in the intermodal market as to whether Hanjin or the Foreign Representative will attempt to collect Per Diem from motor carriers and others with respect to the thousands of units of intermodal equipment that cannot be returned or picked up but that, otherwise, would be accruing massive Per Diem each and every day. The uncertainty regarding this issue was contributing to inconsistent and inefficient business planning, particularly with respect to empty containers (and unused chassis). IANA noted that preventing Hanjin from collecting Per Diem for this equipment would bring clarity to the marketplace and permit parties to begin making sound

business decisions.

In addition, IANA itself had a strong and compelling interest in avoiding having to administer future arbitrations regarding Hanjin-related Per Diem under the DRP contained in the UIIA. The IIEC members devote significant time, on a voluntary basis without compensation, to review, evaluate, and rule on Per Diem disputes brought under the DRP. The IIEC members also volunteer of their time to attend numerous in-person and telephonic IIEC meetings, review and evaluate addenda to the UIIA, discuss and approve modifications to the UIIA where appropriate, and otherwise ensure that the UIIA is meeting its intended purpose of promoting intermodal productivity and operating efficiencies. The IIEC members have significant operational and leadership responsibilities at their respective businesses as well.

In short, Hanjin's financial distress threatened to create a wave of new Per Diem disputes that will be subject to the DRP. As indicated above, the West Coast port congestion created

well over 100 DRP disputes alone. Fortunately, in response to IANA's filing, Hanjin agreed that it would not charge detention on containers or chassis that could not be returned. The Court embodied this principle in an order on October 4, 2016. A copy of that order is attached as Exhibit 4. Consequently, the Court has now held that no detention charges or chassis use charges may be assessed by Hanjin on containers or chassis under the UIIA.

Conclusion

Fortunately, the UIIA has played a key role in the development and expansion of the intermodal market and permits parties to respond to events like the Hanjin bankruptcy or labor controversies on the West Coast with some degree of certainty despite meltdowns at the ports. Consequently, understanding the UIIA is essential for any attorney who is representing ocean carriers, rail carriers, motor carriers, or third-party logistics providers involved in the intermodal market.

Endnotes

- ¹ See, e.g., *MSC Mediterranean Shipping Company, S.A. v. Wall Street Systems, Inc.*, 2013 WL 8227571 (N.D. Ga. 2013) (holding that the indemnification obligation contained in the UIIA was not intended to apply to cargo claims).
- ² 416 S.W.3d 495 (Tex. 2013)
- ³ See, e.g., *Evergreen Shipping Agency Corp. v. Djuric Trucking, Inc.*, 996 N.E.2d 337 (Ind. 2013) (affirming an award of attorneys' fees to a motor carrier who successfully defended an action brought by an ocean carrier to recover Per Diem). 2015 WL 3522606 (Cal. 2015)
- ⁴ See also *Unimax Express, Inc. v. Cosco North America, Inc.*, 2011 WL 5909881 (C.D. Cal. 2011) ("Nor can the court find any reasonable basis to apply Maryland law where the only conceivable connection to Maryland is a contract of adhesion drafted by a third party.").
- ⁵ See, e.g., *Yan Ming Marine Transport Corporation v. Intermodal Cartage Co., Inc.*, 685 F.Supp.2d 771 (Tex. 2010) (finding that the UIIA was governed by Maryland law, rather than Tennessee law, because, among other things, the UIIA has a material connection to Maryland as the state where IANA administers the UIIA).