

Thank you for joining us, the Webinar will begin shortly
While you are waiting please check out the Upcoming Webinars on
www.wipp.org



Supply Chain and Related Transportation Agreement Issues

An Overview

March 1, 2016

Holland & Knight



WE DECIDE 2016

Women Entrepreneurs United For Results

WE Decide 2016 is uniting women entrepreneurs across the country to raise their voices and engage in the 2016 presidential election.

Learn more today by visiting: <http://WEDecide2016.org>

Follow *WE Decide 2016* on your social media channels:

Facebook: <https://www.facebook.com/WEDecide2016/>

Twitter: @WEDecide2016

Before we begin...just a few notes:

- » During the presentation lines will be muted so only presenters can be heard
- » While you are listening please also put your phone on mute
- » Do NOT put your phone on hold – please hang up and call back
- » If having trouble viewing the presentation – please close out and log in using a different browser
- » If your slides are not moving please refresh or log out & then log back in
- » If you have any questions during the presentation, please feel free to enter them into the discussion box on the bottom left of your screen

Supply Chain and Related Transportation Agreement Issues

An Overview

March 1, 2016



Eric Lee

Washington, D.C.

Eric.Lee@HKLaw.com

(202) 955 3000

<https://www.hklaw.com/Eric-Lee/>

I am a shipping, logistics, and supply chain services attorney, and I provide commercial and corporate advice to multinational providers and institutional shippers with integrated logistics.

Outline of Material

- » Perspective
- » Your Role
- » Core Transportation Sectors
- » Key Issues
- » Regulatory Regimes
- » Forms of Agreements
- » Gating Requirements/Integrated and Cross-referenced Agreements
- » Drafting and Negotiating
- » Resources
- » Conclusion and Questions

Perspective

- » Major Origins: 1990 – Present
- » Major Destinations: 1990 – Present
- » Transshipping Hubs
- » Key Global Destination Ports/Intermodal Ports
- » Technology Advances – Physical, Electronic, Procedural, & Legal
- » Logistics Centers and Last Mile (or more and Warehousing)
- » Key Retail Locations
- » Trends
- » Customers/Providers

Perspective: Your Role

- » Consider your role –
 - Buyer
 - Seller
 - Provider
 - Integrated manufacturing
 - End-to-end provider
 - Integrated Retailer
 - Etc.
- » Perspective –
 - Origins and Destinations
 - Consolidation and Deconsolidation
 - Door (Origin/Destination) Moves; Transshipment
 - What else?

Primary Transportation Sectors

- » Modes and Methods –
 - Ocean
 - Inland/Brown Water
 - Rail
 - Motor
 - Air
 - Intermodal - CY
 - Warehousing
 - Freight Forwarding
- » Perspective –
 - Your role
 - Your needs

Key Issues

- » Your role, your needs, and your deliverables – How do we document it?
- » What do you consider?
 - Rates
 - Contracted Services
 - Liability for cargo loss or damage
 - Timing management
 - Insurance
 - Taxes
 - Fuel costs management
 - Bills of Lading
 - Tariffs
 - What else?

Regulatory Regimes

- » Competition
- » Customs
- » Safety
- » Cargo Liability
- » Tax
- » Immigration
- » Employment
- » Environmental
- » Others

Regulatory Regimes: Competition

- » U.S. Department of Justice
- » U.S. Federal Maritime Commission
- » U.S. International Trade Administration
- » E.U. Directorate General Competition
- » E.U. Member States
- » P.R.C. Anti-Monopoly Law
- » Competition Commission of Singapore (Ministry of Trade and Industry)
- » Others

Regulatory Regimes: Customs

- » U.S. Customs and Border Protection
- » E.U. Customs Union
 - E.U. Member States
- » Central American Customs Union
- » Bangladesh Customs (and other manufacturing centers)
- » NAFTA / CAFTA-DR / TPP
 - <https://ustr.gov/trade-agreements>
- » Perspective –
 - Your role? Your needs? Your authority?
 - Buying or Selling
 - Terms of Sale
 - Cargo Declaration
 - Provider (Who is responsible for doing what? Do I have the authority to act?)

Regulatory Regimes: Safety

- » U.S. Coast Guard
- » U.S. FMCSA
- » U.S., E.U., etc. – OSHA
- » U.S., E.U., and other state requirements
- » E.U. Commissioner of Transportation
 - EASA, EMSA, ERA, and other policy and regulatory bodies
- » International Maritime Organization
- » International Labor Organization
- » Others
- » Perspective –
 - Do I have employees co-located with a customer or provider?
 - Am I moving dangerous goods?
 - What other safety (or environmental) concerns should I consider?

Regulatory Regimes: Cargo Liability

- » U.S. Carriage of Goods by Sea Act
- » U.S. 49 USC Subtitle IV (Rail Carriers, Motor Carriers, Freight Forwarders, and Water Carriers)
- » COTIF Convention (Rail)
- » Hague, Hague-Visby, and Rotterdam Rules (Ocean)
- » CMR Convention (Road)
- » Warsaw and Montreal (Air)
- » Others and Contract requirements
- » Perspective –
 - Your role? Your needs? Your deliverables?
 - What are my core concerns?
 - Insurance options?

Regulatory Regimes: Tax

- » Federal, State, and Local regimes
- » National and Supranational regimes
- » Treaties
- » Payment and collecting freight (or payment for other services) are transactions that may trigger tax consequences
- » Tax considerations as a top down analysis for operationally and commercially aligned supply chain services
- » Perspective –
 - Your role? Your corporate structure? Your transactional structure?
 - Does my plan reflect my reality?
 - Do my agreements reflect my plan?

Regulatory Regimes: Immigration and Employment

- » Are your services – whether as a customer or a provider – triggering employment liabilities?
- » Are you an independent contractor? Are you using independent contractors?
- » Non-domestic employees? Contractors? (e.g., embedded Provider from Country A working in Country B for Customer; Customer-expert from Country C working in Provider's facility located in Country D; etc.)
- » Remember – Safety regimes, cargo liability, authority to act, etc.
- » Perspective –
 - Different states, different requirements
 - Different countries, different requirements
 - Different occupations, (maybe) different requirements
 - What am I asking someone to do? What is someone asking me to do?

Regulatory Regime: Environmental

- » U.S. Environmental Protective Agency
 - State and Local Authorities
- » U.S. – Other agencies
- » E.U. and Member State Requirements
- » Other regimes
- » Transshipment Liabilities
- » Perspective –
 - Am I moving dangerous goods?
 - Am I producing dangerous goods?
 - Am I buying or selling dangerous goods?
 - Do I need a permit?
 - Trailing liabilities?

Forms of Agreement

- » Bills of Lading
- » Tariffs
- » Ocean Service and Rate Agreements
- » Other Transactional Documents
- » Buy/Sale Agreements
- » Related Agreements
- » Master Transportation and Supply Chain Agreements

Forms of Agreement: Bills of Lading

- » Three Functions
 - Evidence of the terms of the Contract of Carriage
 - Evidence of Title
 - Evidence of Receipt of the Goods
- » Variations (conceptual and functional)
 - Straight
 - To Order
 - Bearer
- » Waybills (sea, air, etc.)
 - Similar function, BUT
 - Non-negotiable
 - Not document of title
 - Generally not used when a LOC is involved
- » Perspective –
 - Externally Financed Supply Chain
 - Credit Agreement between Customer and Provider
 - Have you been paid? Have you paid your provider?

Forms of Agreements: Tariff

- » Bills of Lading Terms and Conditions generally incorporate one or more tariffs
- » Waybills generally incorporate one or more tariffs
- » Other documents often incorporate one or more tariffs
- » Provides rules and rates – more comprehensive than any particular contract
- » Tariffs can be several hundreds of pages long
- » Baseline document for most modes of transportation
- » Bills of lading (and waybills) interact with tariff
- » Generally, a contract cannot cover all the contingencies that a tariff will address; this is particularly true for multimodal, international carriage.
- » Perspective –
 - What am I asking a provider to do? What is the customer asking me to do?
 - Can I address my core concerns in a contract?

Forms of Agreements: Ocean Service and Rate Agreements

- » VOCC Service Contracts
 - Filed with the FMC
 - Maybe others?
 - <http://www.fmc.gov/questions/#C15>
- » NVOCC Service Arrangement
 - Filed with the FMC
 - Maybe others?
 - <http://www.fmc.gov/questions/#C17>
- » Negotiated Rate Arrangement
 - NVOCCs Only
 - http://www.fmc.gov/news/negotiated_rate_arrangement_exemption.aspx
- » Perspective –
 - VOCC = Vessel Operating Common Carrier
 - NVOCC = Non-vessel Operating Common Carrier
 - Who is providing what to whom?

Forms of Agreements: Other Transactional Documents

- » Freight Forwarders Cargo Receipt
- » Warehousing Receipt
- » Letters of Credit
- » Other requirements or documents issued as part of a buy/sale/transportation agreement
- » Perspective –
 - What does my supply chain require?
 - How do I trace my goods? How do I confirm my services?
 - How will I get paid? How will I pay?

Forms of Agreement: Buy/Sale Agreements

- » How and why are the goods moving?
- » Who owns what and when do they own it? When does title to the goods pass to the new owner?
- » When do I have to pay what to whom? Is this a financed transaction? Letters of credit? Other credit agreements?
- » Who is responsible for loss of the goods during each stage? Are the goods insured? Insured by whom and who benefits?
- » Who is responsible for pick-up at origin? Delivery at the door?
- » Can I use a standard agreement? Can I use standard terms (e.g., INCO)?
- » Perspective –
 - What is your role? What do you need from your provider? As a provider, what services must I perform?
 - What form of document should I consider? Bill of lading versus waybill?

Forms of Agreement: Buy/Sale Agreements

- » INCO Terms –
 - http://www.export.gov/faq/eg_main_023922.asp
- » The term, Incoterms®, is an abbreviation for International Commercial Terms. They are a set of rules which define the responsibilities of sellers and buyers for the delivery of goods under sales contracts for domestic and international trade. They are published by the International Chamber of Commerce (ICC) and are widely used in international commercial transactions. The first Incoterms® were issued in 1936. The most recent version of Incoterms®, Incoterms® 2010, were launched in September 2010 and became effective January 1, 2011.
- » INCO Terms Quick Reference Guide (Export.gov): <http://1.usa.gov/1XVfOAG>

Forms of Agreement: Buy/Sale Agreements

» RULES FOR ANY MODE OF TRANSPORT:

- » ExWorks (EXW): the seller fulfills his obligations by having the goods available for the buyer to pick up at his premises or another named place (i.e. factory, warehouse, etc.). Buyer bears all risk and costs starting when he picks up the products at the seller's location until the products are delivered to his location. Seller has no obligation to load the goods or clear them for export.
- » Free Carrier (FCA): the seller delivers the goods export cleared to the carrier stipulated by the buyer or another party authorized to pick up goods at the seller's premises or another named place. Buyer assumes all risks and costs associated with delivery of goods to final destination including transportation after delivery to carrier and any customs fees to import the product into a foreign country.
- » Carriage Paid To (CPT): seller clears the goods for export and delivers them to the carrier or another person stipulated by the seller at a named place of shipment. Seller is responsible for the transportation costs associated with delivering goods to the named place of destination but is not responsible for procuring insurance.
- » Carriage and Insurance Paid To (CIP): seller clears the goods for export and delivers them to the carrier or another person stipulated by the seller at a named place of shipment. Seller is responsible for the transportation costs associated with delivering goods and procuring minimum insurance coverage to the named place of destination.
- » Delivered at Terminal (DAT): seller clears the goods for export and bears all risks and costs associated with delivering the goods and unloading them at the terminal at the named port or place of destination. Buyer is responsible for all costs and risks from this point forward, including clearing the goods for import at the named country of destination.
- » Delivered at Place (DAP): seller clears the goods for export and bears all risks and costs associated with delivering the goods to the named place of destination not unloaded. Buyer is responsible for all costs and risks associated with unloading the goods and clearing customs to import the goods into the named country of destination.
- » Delivered Duty Paid (DDP): seller bears all risks and costs associated with delivering the goods to the named place of destination ready for unloading and cleared for import.
- » http://www.export.gov/faq/eg_main_043740.asp

Forms of Agreement: Buy/Sale Agreements

» RULES FOR SEA AND INLAND WATERWAY TRANSPORT:

- » Free Alongside Ship (FAS): seller clears the goods for export and delivers them when they are placed alongside the vessel at the named port of shipment. Buyer assumes all risks/costs for goods from this point forward.
- » Free on Board (FOB): seller clears the goods for export and delivers them when they are onboard the vessel at the named port of shipment. Buyer assumes all risks/cost for goods from this moment forward.
- » Cost and Freight (CFR): seller clears the goods for export and delivers them when they are onboard the vessel at the port of shipment. Seller bears the cost of freight to the named port of destination. Buyer assumes all risks for goods from the time goods have been delivered on board the vessel at the port of shipment.
- » Cost, Insurance, and Freight (CIF): seller clears the goods for export and delivers them when they are onboard the vessel at the port of shipment. Seller bears the cost of freight and insurance to the named port of destination. Seller's insurance requirement is only for minimum cover. Buyer is responsible for all costs associated with unloading the goods at the named port of destination and clearing goods for import. Risk passes from seller to buyer once the goods are onboard the vessel at the port of shipment.

http://www.export.gov/faq/eg_main_043740.asp

Forms of Agreement: Related Agreements

- » NITL and ATA developed a model agreements
- » Motor Carrier Agreement
 - Instructions: <http://bit.ly/1oJh0ee>
 - Form Agreement: <http://bit.ly/1WSa9ui>
- » Motor Carrier/Broker Agreement
 - Instructions: <http://bit.ly/1SctLtl>
 - Short Form: <http://bit.ly/1nbGn7i>
 - Long Form: <http://bit.ly/1Uu9ZKR>

Forms of Agreements: Master Transportation and Supply Chain Agreements

- » Segmented but Comprehensive
 - e.g., CY origin to destination warehouse-CY (retail), etc.
- » Comprehensive End-to-End
 - e.g., Manufacturing to warehouse through destination warehouse with final partial assembly and retail door delivery
- » Virtually anything you can think of as a service that manifests as an agreement between parties
- » Perspective –
 - What is your role? What do I actually need from a provider? As a provider, what am I being asked to provide to my customer?
 - Have I contemplated who is responsible for what at each stage?
 - Have I contemplated all of my concerns in the written agreement?
 - Am I requesting something abnormal?

Incorporated Agreements and Gating Requirements

- » Sustainability
- » Corporate Compliance
 - U.S. Foreign Corrupt Practices
 - U.K. Bribery Act of 2010
- » OECD Standards
- » Credit Agreements
- » Party-specific corporate requirements (e.g., particular corporate compliance questionnaire)
- » Perspective –
 - Have I reviewed these agreements or requirements?
 - Have I made sure the counter-party is aware of these requirements?
 - Am I asking more than the law requires?

Drafting and Negotiating: Overview

- » What am I asking a provider to do? On the other hand, what am I being asked to do for the customer?
- » Where will the services be performed?
- » Where does the transaction clear? (e.g., warehouse location, booking country, destination, etc.)
- » Credit Terms
- » Timing Requirements
- » Goods Transaction Requirements and Responsibilities
- » Relationships versus Dictatorships
- » Insurance
- » Other considerations

Drafting and Negotiating: Pre-Engagement

- » Overview of your supply chain or supply chain services
- » Segment by Segment
- » Commercial and Operational requirements
- » Finance, Tax, and Accounting requirements
- » Other internal requirements
- » What services do I need? What services will I provide?
- » Outline the engagement risks by segment (e.g., cargo liability, freight payment, etc.)
- » Is there a standard agreement for the applicable segment?
- » Draft / Redline Internally

Drafting and Negotiating: Engagement

- » What are you looking for with the other party? A relationship? A transaction?
- » Who is the other party?
 - Are they financially solvent?
 - Do they have assets?
- » Are my requirements or boundaries clear?
- » Are performance demands and requirements clear?
- » What role does insurance play in this engagement?
- » Who is my primary contact with the other party?
- » Does our contract reflect our agreement?

Beginning to tie the classes together...

- » Think about your other courses and programs
- » Think about the various agreements and stages mentioned here
- » Think about your own supply chain needs or services and your experiences
- » Consider...
 - A shirt is made in Bangladesh that is sold by Seller (S);
 - Buyer (B) orders X units via two FEUs from S;
 - S is located in Paris; B is located in Montreal;
 - B needs the shirts delivered by S on hangars to a warehouse facility in New Jersey;
 - B will have LogisticsCo (L) provide branding to the shirts;
 - L will deliver branded shirts to stores in and around the NY-NJ region;
 - How might this look on paper?

Resources

- » OECD: <http://www.oecd.org/>
- » International Chamber of Commerce INCO Terms:
<http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/>
- » U.S. ITA (Trade Topics): <http://www.trade.gov/trade-topics.asp>
- » U.S. ITA (Tariff Tool): http://www.trade.gov/mas/ian/tradeagreements/fta/tg_ian_003225.asp
- » U.S. ITC (Harmonized Tariff): <https://www.usitc.gov/tata/hts/index.htm>
- » U.S. Trade Representative (Trade Agreements):
<https://ustr.gov/trade-agreements/free-trade-agreements>

Resources

- » U.S. FMC (Licensed and Bonded OTIs): <http://www2.fmc.gov/oti/>
- » U.S. FMC (Carrier Tariffs): <https://www2.fmc.gov/FMC1Users/scripts/ExtReportsTOC.asp>
- » U.S. STB (FAQs): <http://www.stb.dot.gov/STB/faqs.html>
- » www.Export.gov
- » U.S. FMCSA: <https://www.fmcsa.dot.gov/>
- » USDOT: www.dot.gov
- » E.U. Laws and Regulations: http://europa.eu/eu-law/index_en.htm
- » P.R.C. General Administration of Customs: <http://english.customs.gov.cn/>
- » Canada BSA: <http://www.cbsa-asfc.gc.ca/menu-eng.html>

Conclusion and Questions

» What are your questions?

Thank You for Participating!

Following this call you will receive links to the podcast of this session, or you can find the links on www.wipp.org under Export NOW

For questions, please contact Ivana Pivovarnik at lpivovarnik@wipp.org