



*Transportation Lawyers
Association*

56th Transportation Law Institute

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Negotiating and Drafting the International Transportation Agreement

*What's the Same;
What's Different;
and What to Avoid*





International Transportation Agreements:

More than just negotiating rates and describing the services

- Different jurisdictions = different laws, rules and practices
- Various agencies regulate international trade
- Various trade and transport programs may apply
- Additional complexity in several areas:
 - choice of law
 - dispute resolution
 - limitation of liability
 - changing circumstances, fluctuating currencies
 - formal requirements for execution of contracts



Issues by mode

AIR - U.S. Agencies and Programs



- Federal Aviation Administration
 - Indirect Air Transportation of Property
14 CFR Part 296
 - Foreign Air Freight Forwarders and Foreign Cooperative Shippers Associations
14 CFR Part 297
- Transportation Security Administration
 - Indirect Air Carrier Standard Security Program
49 CFR Part 1548
 - Certified Cargo Screening Program
49 CFR Part 1549
 - Known Shipper Management System
49 CFR Parts 1544, 1546 and 1548



Issues by mode

AIR - Canadian Agencies and Programs



- **No federal licensing requirement for forwarders**
- Canada Border Services Agency
 - Air Freight Forwarder Registration
Transportation of Goods Regulations (SOR/86-1064)
 - Policy Respecting the Importation & Transportation of Goods
Memorandum D3-1-1
 - Air Pre-arrival and Reporting Requirements
Memorandum D3-2-1
- Transport Canada
 - Air Cargo Security Program
Canadian Aviation Security Regulations, 2012 (SOR/2011-318)



Issues by mode

AIR - Canadian Agencies and Programs



- Agencia Federal de Aviación Civil
 - General Dispositions for Aviation in Mexico
 - Civil Aviation Law
 - National and International Air Transportation
 - Regulations for Civil Aviation Law
 - Granting of Concessions and Permits for Air Services
 - Regulations for Civil Aviation Law
 - Specification of Tariffs
 - Regulations for Civil Aviation Law



Issues by mode

MOTOR - U.S. Agencies and Programs

- Federal Motor Carrier Safety Administration
 - 49 CFR Parts 300-399
 - Operating authorities
 - Recordkeeping requirements
 - Safety fitness
 - Inspection and maintenance requirements, etc.
- Carrier contracts with shippers
 - 49 U.S.C. §14101(b)
- International Programs Page
 - Hours of Service
 - Electronic logging devices
 - Drug and alcohol testing





Issues by mode

MOTOR - Canadian Agencies and Programs

- Load brokerage industry is largely unregulated
- No federal agency with oversight over carriers

- Authority delegated to provinces & territories
 - 13 separate motor carrier safety regimes
 - No operating authority requirements (trucking)
 - Safety fitness certificates (“SFCs”) are mandatory
 - Each province and territory monitors its own carriers
 - Each province and territory issues safety ratings
 - Carriers with multiple subfleets
 - Check for multiple SFCs
 - Check safety ratings in each province & territory
 - Not all Canadian jurisdictions provide online access





Issues by mode

MOTOR – Mexican Agencies and Programs

- Brokerage is a largely unregulated activity in Mexico - Governed by Commercial Code

- Federal Directorate of Federal Motor-Transport
 - Law on Roads, Bridges and Federal Motor-Transport
 - Carrier Services reserved for Mexican Nationals ONLY
 - Exceptions for Companies with Foreign Investment ONLY for International Transport
- OFFICIAL MEXICAN NORMS – NOM / Decrees
 - NOM-012-SCT – Max. weight and dimensions of vehicles
 - NOM-035-SCT – Security Tests for Trailers and Semi-trailers
 - AGREEMENT updating the Bill of Lading in Federal Motor-Transport and auxiliar services. – COMPLEMENT BILL OF LADING IS THE NEW BILL OF LADING





Issues by mode

OCEAN - U.S. Agencies and Programs



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- Federal Maritime Commission
 - Ocean Transport Intermediary Programs
 - Non-Vessel Operating Common Carrier
 - Ocean Freight Forwarder
- Shipping Act
 - 46 U.S.C. 40101 et seq.
- Ocean Shipping Reform Act of 2022
 - Public Law 117-146



Issues by mode



- Federal Maritime Commission
 - Law on Navigation and Maritime Commerce
 - Ships shall be inscribed in the Public Maritime Registry
 - Shipping Companies (Carriers) – Reserved for Mexican Nationals ONLY.
 - Ocean Freight Forwarder – Authority issued by Ministry of the Navy
- OFFICIAL MEXICAN NORMS – NOM
 - Nom-021 – Regulations for Transport of Petrochemical products
 - Nom-025 – Regulations for Transport of Hydrocarbons



Hazmat / Dangerous Goods

AGENCIES

- U.S. Department of Transportation
- Pipeline and Hazardous Materials Safety Administrator
- Transport Canada

ADOPTION OF INTERNATIONAL STANDARDS

49 C.F.R. Part 171 Subpart C authorizes the offering for transportation and the transportation in commerce of hazardous material in accordance with:

- ICAO's Technical Instructions for the Safe Transport of Dangerous Goods by Air
- International Maritime Dangerous Goods (IMDG) Code
- IAEA Safety Standards – Regulations for the Safe Transport of Radioactive Material

See also: Transportation of Dangerous Goods Regulations (Canada)



Carrier Liability and Bills of Lading

International Ocean	• Carriage of Goods by Sea Act • Marine Liability Act (Canada)	46 U.S.C. §30701 note SC 2001, c.6, Part 5
Rail	• Carmack Amendment • Rwy Traffic Liability Regs (Canada)	49 U.S.C. §11706 SOR/91-488
Surface Freight Forwarders	• Carmack Amendment	49 U.S.C. §14706
Motor Carrier	• Carmack Amendment • Conditions of Carriage Regs. (Canada)	49 U.S.C. §14706 SOR/2005-404
Contractual Waivers	• Carmack Amendment	49 U.S.C. §14101(b)
Common Carrier Exports	• Federal Bills of Lading Act	49 U.S.C. §§80101-80116
International Air	• Montreal Convention	ICAO Doc. No. 9740



Carrier Liability and Bills of Lading

Himalaya clauses in international bills of lading may extend COGSA provisions to subcontract carriers otherwise subject to Carmack liability. Contracts involving international transport where an intermediary contracts with a carrier may limit the cargo owner's recovery against the carrier pursuant to the limitation of liability provision to which the intermediary and carrier agreed.

Norfolk Southern R. Co. v. James N. Kirby Ltd., 543 U.S. 14 (2004)

Import contracts on single through ocean bills of lading into the United States will be governed by COGSA rather than Carmack.

Kawasaki Kisen Saisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89 (2010)



Carrier Liability and Bills of Lading

Sample Himalaya Clause

“It is hereby agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to this contract in or evidenced by this Bill of Lading.”



Bills of Lading – Mexico

- New Reform – Complement Bill of Lading (C-BOL)
 - Applies to all modes of transportation
 - “*Complemento Carta Porte*” is an electronic document attached to electronic invoices for transportation services
 - Reform published January 2022 mandatory fiscal implementation – Full enforceability over the road starting on Jan 2024
 - Contains aprox. 150 fields to include detailed information of Cargo, Carrier, Shipper, etc.
 - Important and even criminal consequence in case of non-compliance



Compliance with Laws

- All countries have rules and regulations that apply to businesses and transactions conducting business within their borders, or subject to the country's jurisdiction, including domestic and international transactions.
- Not every country recognizes the laws or policies of other countries.
- Drafters of international transportation agreements must negotiate contract language that addresses conflicting policies while ensuring compliance with the law.
- All parties are responsible for adhering to applicable rules and regulations:
(i) *transport service provider*; (ii) *shipper*; (iii) *agents*; and (iii) *subcontractors*.



Compliance with Laws

Export Controls

- International contracts for logistics services also need to address the various regulatory roles that carriers and forwarding agents may have in the exportation process.
- Export licensing and control laws limit or prohibit the export of goods that are controlled due to:
 - advanced, sensitive or weapons-grade technology;
 - other strategic characteristics.
- May apply either in whole or be limited as to certain countries or entities.



Compliance with Laws

Import Controls

- International transport and logistics contracts must address:
 - respective roles and legal obligations of the carrier and the shipper or importer when transporting goods into a country;
 - various regulatory roles that carriers and customs brokers have in the importation process; relationship between carrier, customer and broker;
 - specialized laws that may apply to the product that is being imported.
- Customs agencies are the primary point of contact for international transport providers bringing goods into a country; but frequently also administer laws for other partner government agencies. *E.g.:*
 - (i) *wines and spirits*; (ii) *food and drugs*; (iii) *motor vehicle safety standards*.



Compliance with Laws

Antiboycott

- Various countries have antiboycott provisions that discourage or prohibit their own nationals from participating in foreign boycotts or embargoes that are not sanctioned, or that offend their foreign policy objectives.
- In U.S., enforced by BIS/Office of Antiboycott Compliance: 15 C.F.R. Part 760
- *E.g.:*
 - Arab League's boycott of Israel; India-Pakistan; Ethiopia-Eritrea; China-Taiwan; Bahrain-Bangladesh; & (until April 2023) Oman-Qatar-Saudi Arabia.
 - Under *Foreign Extraterritorial Measures Act*, R.S.C., 1985, c. F-29 (Canada) it is illegal for Canadian businesses and their directors, officers and managers to comply with U.S. laws preventing trade and commerce with Cuba.



Compliance with Laws

Sanctions & Finances

- Many countries have anti-bribery, anti-money laundering and sanctions laws that prohibit doing business with sanctioned persons or entities, or prohibit business practices that may be legal elsewhere. *E.g.:*
 - Economic sanctions administered by the U.S. Department of Treasury Office of Foreign Assets Control (“OFAC”)
 - U.S. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, *et seq.*
 - *Corruption of Foreign Public Officials Act*, S.C. 1998, c.34 (Canada).
- All parties to international transportation contracts and their agents are subject to these laws, and must meet all applicable legal standards.



Compliance with Laws *Anti-Slavery/Forced Labor*

- Take note of the proliferation of complex legislation designed to weed out the use of forced and child labor at any point in the supply chain.
- Failure to comply may result on hefty financial penalties, criminal prosecution, confiscation of goods, and reputational damage.
- *E.g.:*
 - *Modern Slavery Act 2015 (U.K.)*
 - *Global Magnitsky Human Rights Accountability Act*, (Pub. L. 114–328, Title XII, Subtitle F), as amended by Public Law 117–110, Section 6.
 - *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, S.C. 2023, c.9



Other Laws and Contract Terms

- International transportation and logistics contracts are often part of a larger transaction between a buyer, seller, and perhaps other third parties.
- Several other laws may apply to the transaction and may be used to interpret the contract or provide terms or obligations. *E.g.:*
 - The Convention on the International Sales of Goods (CISG)
 - International Chamber of Commerce private rules, including:
 - INCOTERMS® 2020
 - UCP 600 Uniform Rules and Practices for Documentary Credits
 - Hague Conference on Private International Law Conventions and Publications



Data Privacy

- International transportation and logistics contracts must balance similar but sometimes conflicting data privacy and confidentiality provisions
- Many countries and subnational jurisdictions have mandatory data privacy and confidentiality laws which can sometimes conflict. *E.g.:*
 - EU General Directive on Data Privacy and EU GDPR Standard Contract Terms
 - U.S. Shipping Act 46 U.S. Code § 41103, prohibiting unauthorized disclosures of shipping information by carriers, marine terminal operators, and ocean freight forwarders without permission
- Key data privacy issue in drafting contracts is how and when data can be transmitted and used by subcontractors providing services.



Battle of the Corporate Standards

- Many companies with global operations require their contract counterparties to abide by prescribed codes of conduct and business policies.
- This presents two key issues:
 - How to contractually reconcile conflicting corporate policies, when each contract party has a mandatory contract provision?
 - How to contractually reconcile mandatory corporate policies that conflict with local law?



International Transportation Agreements: Choice of Law; Choice of Forum; Dispute Resolution



*The most important
clauses in any
international contract?*



International Transportation Agreements: Choice of Law; Choice of Forum; Dispute Resolution

- Drafters of international transport and logistics contracts must consider:
 - What law for which issues?
 - Will a court enforce a choice of law/choice of forum clause?
 - The role and rules of arbitration, if applicable, including discovery
 - The possible liability of third parties:
 - *Will they be bound by a choice of law/choice of forum clause?*
 - Enforcement of judgments across international borders:
 - *Legal considerations*
 - *Practical issues and challenges*



The U.S. Rules Choice of Forum

- Choice of forum clauses are prima facie valid and generally enforced
 - *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995)
 - *Atlantic Marine Const Co v. U.S. Dist. Ct. of the W. Dist. of Texas*, 134 S.Ct. 568 (2013)
- The fact that the forum selection clause is contained in a form contract or an international contract does not prevent the contract from being enforced
 - *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)
 - *Scherk v. Alberto-Culver Company*, 417 U.S. 506 (1974)
 - *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985)



The U.S. Rules

Choice of Law

- Choice of law clauses are generally enforced in the same manner as choice of forum clauses. Note that a court may imply a choice of law clause in a choice of forum-clause.
 - *M/S The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)
- BUT: Choice of law and forum clauses may not be enforceable if there is a risk that mandatory U.S. law or public policy would not be applied by a foreign tribunal.



The U.S. Rules Arbitration

- Contract clauses requiring international arbitration will also be enforced.
- But: Private contracts to adjudicate disputes outside of the United States are not entitled to the benefit of 28 U.S.C. § 1782(a), which authorizes a U.S. district court to order the production of evidence “*for use in a proceeding in a foreign or international tribunal.*”
 - *Scherk v. Alberto-Culver Company*, 417 U.S. 506 (1974)
 - *Federal Arbitration Act* (“FAA”) 9 U.S.C. § 1
 - *ZF Auto US, Inc. v. Luxshare, Ltd.*, 142 S.Ct. 2078, 213 L.Ed 2d 163, ____ U.S. ____ (2022)



Dispute Resolution Clauses: Recognition and Enforcement of Judgments

- When drafting international transportation agreements, pay close attention to contract clauses regarding the recognition and enforcement of judgments.
- Take into account all relevant international conventions and treaties.

E.g.:

- The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”)
- The 1975 Inter-American Convention on International Commercial Arbitration (“Panama Convention”)



The U.S. Rules

Recognition and Enforcement of Judgments

State laws:

- Uniform Foreign Money Judgments Recognition Act
- Restatement (Third) of Foreign Relations Law

Federal laws and treaties:

- The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”)(9 U.S.C. §§ 201-210)
- The 1975 Inter-American Convention on International Commercial Arbitration (“Panama Convention”)(9 U.S.C. §§ 301-307)



Rookie Mistakes





Rookie Mistakes

- Don't assume that all countries, states, provinces and territories have the same legal framework as your home jurisdiction.
- Don't ignore subnational governments (*e.g.*: states, provinces and territories) that may have jurisdiction over your matter.
- Important differences between civil code and common law rules. *E.g.*:
 - Quebec warehouse operators may have an *obligation of means* or an *obligation of results*, depending on whether the contract provides by *onerous* or *gratuitous* title.
 - Even if the contract is silent on force majeure, civil code jurisdictions grant parties a legal right to assert extinguishment or suspension of obligations if the requisite test has been met.



Rookie Mistakes

- Don't assume that market conditions, tax laws and overall legal framework will remain stable in foreign jurisdictions where contract is to be performed.
- Don't forget to account to fluctuations in currency exchange!
- Don't forget to account for highly exceptional, unexpected changes in circumstances that fundamentally alter the equilibrium, or render performance unduly burdensome, but not quite a *force majeure*. E.g.:
 - Service provider's costs increase in an unforeseeable and substantial way.
 - Unexpected zoning law amendments prevent performance of contractual obligations.
 - Inflation over 100% per day. E.g.: Germany (1923); Zimbabwe (2008); Yugoslavia (1994).



Sample Hardship Clause

Unidroit Principles

Article 6.2.1 (*Contract to be observed*)

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

Article 6.2.2 (*Definition of hardship*)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.

Article 6.2.3 (*Effects of hardship*)

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
 - (a) terminate the contract at a date and on terms to be fixed, or
 - (b) adapt the contract with a view to restoring its equilibrium.



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