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Standard Form Contracts Often Fail to Protect Against Avoidable Risks

By Joseph E. Gotch Jr., Esq., and Jonathan E. Eady, Esq.

As transportation and logistics businesses expand their services and customer bases in the rapidly evolving third-party logistics environment, many firms unknowingly expose themselves to legal risks by using a single, standard form of terms and conditions for all customer arrangements.

Whether developed in house or adopted from an applicable trade group, such one-size-fits-all documents are often inadequate to cover the new services or specialized risks common to customers operating in industry segments in which the service provider has no prior experience.

A hypothetical scenario illustrates a few of the risks that may arise: A trucking company that normally operates within the United States plans to begin offering freight forwarding services and arranging the movement of its customers' goods from overseas origin points to various destinations by land, sea, or air. Given the service provider's lack of experience in freight forwarding, it decides to adopt the standard terms and conditions of service published by a national industry trade association as its sole documentation for all services performed on behalf of such customers.

Force Majeure

If a hurricane or other natural disaster prevents the goods from arriving at the U.S. port of entry or onward destinations, or significantly delays that arrival, then a customer might make a claim against the service provider for damages alleged to have resulted from the ensuing delays in the movement of the goods. To protect against such risk, parties often include "force majeure" provisions in contracts, which are intended to excuse the non-performance of the parties for the duration of an act of nature or other occurrence that is outside their control.

If the trade association form lacks a force majeure provision, the service provider's delay in performing under the contract will not be excused automatically, and the service provider must instead look for relief under any applicable monetary or other limitations of liability found in the contract.

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Foreign Corrupt Practices Act

The U.S. government may charge that a customer's employee paid a foreign customs official to expedite the release of goods being forwarded by the service provider, and that this was done to help the customer obtain its underlying transaction relating to those goods. Depending upon the circumstances, this could be deemed a violation of the United States' Foreign Corrupt Practices Act (FCPA), which generally prohibits a person from providing anything of value to a foreign official to influence an official act that assists a company in retaining or obtaining business.

Logistics businesses are especially susceptible to FCPA risk, and payments made in connection with foreign customs issues have been frequent targets of FCPA enforcement activity. While fulfilling its new and likely unfamiliar freight forwarding obligations in connection with the movement of goods through foreign customs, the service provider can easily be drawn into FCPA allegations.

To protect against FCPA risks, customized contracts should require that the customer maintains adequate internal controls to ensure compliance with the FCPA. Further, contract language should grant the service provider rights to audit those control structures and the customer's compliance documentation, and reserve the right to terminate the contract if the customer breaches those obligations. Given the broad applicability of the standardized trade association terms and conditions, which are aimed at situations where FCPA concerns may not exist, the trade association form may lack these vital provisions.

Hazardous Materials

Finally, when a freight forwarding provider expands its service offerings to customers operating in industry segments it hasn't served previously, there may be an increased likelihood that the service provider will become involved in the transportation or handling of hazardous substances, if it had not already done so. Given the complexity of regulations governing hazardous materials, and the potentially severe penalties that could result from mishandling them, logistics providers entering that arena need to adopt specialized requirements, routines or procedures.

Logistics contracts will often require the customer to notify the service provider in advance if any shipments include hazardous materials, and to comply with all applicable regulations governing such shipments. Those provisions, which may not be included in the trade association form, will be particularly important to the service provider if its insurance coverage limits the insurer's liability where hazardous materials are involved.

These are just a few examples of how one-size-fits-all terms and conditions seldom provide a proper fit to customized arrangements between a logistics provider and its customers. Rather, standard documents are intended to backstop more tailored contracts that build on those basic terms and conditions. When a service provider relying upon standardized terms and conditions expands its services or customer base into unfamiliar territory, the provider's lack of prior experience exacerbates the risk by leaving the firm unaware

of the new and different risks it may encounter.

Engaging a qualified professional at the outset can help providers to ensure that the contract the provider uses will properly address the new services offered or new customer base served, and thereby help the provider avoid unnecessary risks.

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