Contract Key Concepts

High Priority

Arbitration: Resolving Dispute by Arbitration

Arbitration is an alternative to litigating disputes in courts of law and is a process considered either binding or nonbinding. When binding, the decision is final, is enforceable in court, and may only be appealed on narrow grounds. When nonbinding, the arbitrator's award is advisory—it is final only if accepted by the parties. Arbitration is less costly and faster when resolving disputes, but that's not always the case. If your transactions are complex, any disputes are likely to be equally complex; and arbitration might be inadequate. Before agreeing to arbitration, you should consider the advantages and disadvantages that might impact the cost, speed, and outcome of the dispute. Here is the American Arbitration Association's model clause:

Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

Limitation of Liability: Cap on Liability

Because the value of the deal might not justify the potential liability, a broker might want to cap overall liability under the contract to a specific sum, often one based on the value of the contract. The shipper might want to carve out from the cap damages caused by intentional acts such as fraud and theft. Any such cap on overall liability might be in addition to a cap on cargo liability.

SAMPLE: The Broker's aggregate liability for claims arising out of this contract or services performed by Broker or the Carrier [except for liability arising out of cargo loss, damage, or delay] will not exceed the amount of [enter amount].

Shipping: Period for Reporting Concealed Damage

Concealed damages are those in which damage to the freight was not noted on the bill of lading or delivery receipt. That often happens when trailers are dropped at a shipper's or consignee's premises. Under the Carmack Amendment, a carrier's liability for the freight ends when it is no longer in the carrier's possession, usually upon delivery of the freight to the shipper or the shipper's consignee; therefore, carriers will refer to the delivery receipt and the absence of any noted damage to the freight on the delivery receipt as evidence that the freight was delivered undamaged. However, shippers will argue that the trailer was sealed and that they could not tell if damage occurred until the seal was broken, and the freight inspected. Many carriers try to address this problem by giving shippers a limited amount of time to report concealed damages, by including shipper load-and-count provisions in any transportation or equipment contracts, or by saying when the carrier's responsibility for the cargo begins and ends. Shippers might require that brokers include a time limit for reporting concealed damages in broker-carrier contracts. Brokers should not accept the responsibility for reporting concealed damages within a specific timeline themselves and should pass down to carriers in broker-carrier agreements any shipper requirements to which the broker agreed in the broker-shipper contract. SAMPLE SHIPPER MIGHT USE: The parties acknowledge that the Broker is not a Carrier and that the Broker will not be liable for cargo loss, damage, or delay. The Broker shall arrange that in its contracts with servicing

Carriers the Carrier acknowledges that for a Shipper's claim for concealed damages to be valid, the Shipper must file it with the Carrier no later than ___ days after delivery.

Shipping: Seals, Who Bears Risk of Broken

If a seal is broken, concerns over contamination might cause the shipper to claim that the cargo has been lost or damaged or to reject the entire shipment, particularly if the shipment contains products intended for animal or human consumption. Cargo claims for broken seals are typically treated as if they're covered under the Carmack Amendment because the shipper may be claiming that a broken seal standing alone constitutes damage to the load. Shippers might want brokers to address broken seals in broker-carrier agreements, to reduce the likelihood of contentious cargo claims. Alternatively, if a broker has accepted cargo liability, the shipper might address the issue of liability for broken seals in the broker-shipper agreement. If the issue isn't addressed by contract, rejecting a load because of a broken seal in the absence of other evidence of damage might pose complex issues of proof and mitigation. SAMPLE SHIPPER MIGHT USE: In the Broker's contracts with Carriers, each Carrier must acknowledge that, unless the Shipper accepts otherwise in writing, a broken seal is by itself evidence of loss and damage to the Shipper's cargo and that the Carrier will be liable to the Shipper for the full value of the load minus salvage as determined by the Shipper.

Shipping: Whether the Carmack Amendment Applies

The Carmack Amendment (49 USC § 14706) is a federal statute that governs interstate cargo claims. Under the Carmack Amendment a broker isn't liable for lost or damaged cargo and isn't required to accept by contract that it's liable. It's not advisable, but to get a shipper's business, a broker could choose to accept liability in a broker-shipper agreement. If it does so, the broker should incorporate the application of the Carmack Amendment to cargo liability into its broker/shipper contract. Alternatively, either at the shipper's request or under the broker-carrier agreement, the broker might want to provide that carriers are subject to Carmack liability. The Carmack Amendment makes a carrier liable for actual loss or damage to property (subject to the carrier's right to limit its liability), if a carrier receives a shipment in good condition and delivers it damaged. In that case, the presumption is that the carrier caused the damage, absent a set of enumerated exceptions to liability; and the shipper isn't required to prove that the carrier was negligent. Generally, consequential, special, and punitive damages and attorney fees are not recoverable under the Carmack Amendment. The Carmack Amendment preempts state law and provides a basis for federal jurisdiction. It's best that shippers and carriers do not waive application of the Carmack Amendment, as it offers a well-developed body of case law relating to liability for cargo loss and damage. SAMPLE: The Broker shall require in its contracts with Carriers that the Carrier will be liable for actual loss and damage to cargo in accordance with 49 USC § 14706.

Audits and Inspections of Books and Records

A contract might give one party the right to inspect the records of the other party, either to check accounting or because the auditing party has more general concerns regarding how the audited party handled some aspect of their operations. If a shipper wants the right to inspect a broker's records, at a minimum it should state the scope of the audit, whether the audit right continues after termination and, if so, for how long, and whether the auditing party must give advance notice or whether the parties must agree on a date for the audit. 49 CFR 371.3 provides that all parties to a brokered transaction have the right to review the records required by the regulation to be kept by the broker for three years. Such records include: 1) the amount of compensation received by the broker for brokerage and non-brokerage

services and the name of the payer and, 2) the amount of any freight charges collected by the broker and the date of payment to the carrier. Brokers sometimes ask shippers to waive their rights under Section 371 to preserve the confidentiality of the broker's records. Alternatively, brokers might ask the shipper to treat any information disclosed as confidential.

SAMPLE: During the term of this contract and for [one year] after, on reasonable prior written notice the Shipper or its authorized representative may inspect and copy at the Shipper's cost during normal business hours Broker records related to the Broker's performance under this contract. The Broker shall maintain all records relating to its performance under this contract for at least [one year] after termination of this contract or as required by law, whichever is longer. All information disclosed during an audit shall be treated as and remain confidential by the parties. To the extent allowable by law, Shipper waives its right to obtain copies of Broker's records as provided in 49 CFR 371. To the extent that Shipper does obtain access to such records, it agrees that such records contain Broker's confidential information and Shipper agrees not to use any such information for its own benefit or to disclose it to third parties. This Section shall survive termination of this contract.

Indemnification: Obligation to Indemnify

Indemnification provisions say that a party will be responsible for specified liabilities incurred by the other party, but the purpose of indemnification is to address issues not covered by default remedies available to the parties by law. If you're not worried about gaining access to deeper pockets (typically a parent company); if you don't need to address the consequences of disclosed liabilities; or if your being subject to nonparty claims isn't a major concern (either because they're a remote possibility or because any claims would likely be for modest amounts), then indemnification would probably be more trouble than it's worth. Remedies otherwise available in the contract would likely address your needs, so including indemnification provisions in your contract would add words—potentially a lot of them—for little benefit. See Kenneth A. Adams, A Manual of Style for Contract Drafting (4th ed. 2017) (MSCD) ¶¶ 13.399–.416. Indemnification provisions that use the phrase indemnify and hold harmless are asking for trouble—uncertainty over what those terms cover has resulted in much litigation. Instead, use just indemnify and be specific about what is covered. The same applies to adding the word defend. See MSCD ¶¶ 13.419–.431. Indemnification is primarily intended to protect a party against claims brought by nonparties. For Ken Adams's indemnification language, go to https://www.adamsdrafting.com/my-indemnification-language/. Indemnification provisions could say that the indemnifying party is responsible for all losses arising from such claims, or they could say that the indemnifying party is responsible only if those losses are the result of the indemnifying party's negligence. Which option is appropriate is a matter of how the parties wish to allocate risk. Additionally, indemnification obligations can be made subject to a range of carveouts. For example, a carrier might ask to carve out cargo loss and damage, as cargo loss and damage liability should be capped elsewhere in the agreement. SAMPLE: Broker and Shipper shall each indemnify the other against all claims for loss, liability, or damage brought by a nonparty to the extent that such loss of life or personal injury or property loss or damage (excluding cargo) is proximately caused by the negligence of the other in connection with this contract.

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Insurance: Additional Insured, References To

The shipper might ask both the broker and the carrier to name it as an "additional insured" under insurance policies, so it's covered for claims against it arising out of services performed. As an additional insured, a shipper would: (1) benefit from coverage under the policies; (2) be able to file a claim against the policies; (3) be subject to the policy limits along with the policy holder; and (4) possibly obtain coverage that is broader than that permitted for indemnification. As such, anyone giving a shipper status as an additional insured should: (1) check with their insurance broker or insurance carrier; (2) not offer broader coverage than what is contained in existing insurance policies; and (3) limit the coverage to services performed for the shipper under the contract. SAMPLE SHIPPER MIGHT USE: The Broker shall direct its insurance provider to name the Shipper as an additional insured under the Broker's general liability policy, and the Broker shall require in its contract with each Carrier that the Carrier also direct its insurance provider to name the Shipper as an additional insured under the Carrier's auto and general liability policies.

Insurance: Auto, References To

Because a broker arranges for transportation, it doesn't own or operate vehicles. However, a shipper concerned about liability might require a broker in its contracts with carriers to ensure that the carrier has auto liability insurance in amounts in excess of the minimum required under federal law. (See 49 CFR §387.) Shippers typically ask for at least $1 million dollars or more of coverage. Brokers should: (1) know the carrier minimum financial responsibility amounts set forth in the federal regulations; and, (2) incorporate any shipper insurance coverage requirements into the broker/carrier agreement; and (3) incorporate auto liability insurance requirements into the broker's standard broker/carrier agreement. SAMPLE SHIPPER MIGHT USE: Broker shall require in its contract with carriers that the Carrier must

maintain automobile liability insurance with a combined single limit of not less than $1 million or more per occurrence.

Insurance: Cargo, Prohibited Exclusions

Because a shipper wants cargo insurance to be of an amount and type sufficient to cover the value of its loads, it might require that neither the broker's contract with carriers nor the carrier's cargo insurance policy exclude coverage arising out of specified types of losses. For example, prohibited exclusions may include those arising from temperature control, damage due to theft or employee dishonesty, clean-up costs or pollution related expenses, special or consequential damages, delay, infestation and so on.

SAMPLE SHIPPER MIGHT USE: The Broker shall require in its contracts with Carriers that the Carrier's cargo policy not exclude coverage for infidelity, fraud, dishonesty, criminal acts of the Carrier or its Personnel, temperature control, damage due to theft or employee dishonesty, clean-up costs or pollution related expenses, special or consequential damages, delay, infestation or any other items that might nontrivially limit coverage with regard to Shipper's cargo.

ALTERNATIVE SAMPLE: The Broker will be liable to the Shipper for any losses arising out of Broker's use of any Carrier not properly licensed, authorized, and insured as required by law or this contract.

Insurance: Cargo, References To

Many shippers require the broker and/or carriers to maintain cargo insurance (or contingent cargo insurance) in a minimum amount, typically $100,000 or more depending on the value of the shipper's loads. Independently of a shipper's demand, many brokers include such a provision as part of their standard broker/carrier agreement. Shippers might also ask the broker to confirm that the amount of cargo insurance and the exclusions in either the broker's or the carrier's cargo policy match the requirements the shipper requests. If necessary, the broker should check that its policy matches the shipper's requirements and that the broker passes along any shipper requirements in its broker/carrier agreement.

SAMPLE SHIPPER MIGHT USE: The Broker shall require in any contract with a Carrier that the Carrier maintain cargo insurance to cover damage to or loss of cargo in the amount of $100,000 per trailer or conveyance. In addition, Broker shall maintain contingent cargo insurance coverage in the amount of $100,000 during the term of this contract.

Insurance: General or Public Liability, References To

A commercial general liability (CGL) policy provides coverage for property damage or bodily injury not arising out of the use of a commercial motor vehicle but from incidents tangential to the services being provided, such as a driver using a shipper's forklift to load a trailer. The CGL policy might also cover contract liabilities, for example indemnity obligations. Shippers often request coverage both from the broker and carriers for $1 million per occurrence and $2 million in the aggregate.

SAMPLE SHIPPER MIGHT USE: The Broker shall maintain and shall require in any contract with a Carrier that the Carrier maintain commercial general liability insurance for not less than _____ per occurrence and _____ in the aggregate. ALTERNATIVE SAMPLE: The Broker will be liable for any losses to the Shipper arising from failure of a Carrier to be licensed, authorized, or insured to perform the services.

Insurance: Loss Payee

A shipper might ask the broker to confirm that the broker or each of the carriers with which broker arranges transportation on behalf of the shipper names the shipper as a loss payee under their cargo insurance policy. A loss payee is entitled to receive the insurance proceeds from covered property. Typically, cargo insurance policies pay proceeds for damaged cargo to the owner of the cargo, so generally naming the shipper as a loss payee is unnecessary. However, brokers that agree to do so should address this issue in their contracts with carriers or revise their policy appropriately, as applicable.

SAMPLE SHIPPER MIGHT USE: The Broker shall require in its contract with Carriers that each Carrier name the Shipper as loss payee under that Carrier's cargo insurance policy, and Broker shall have Shipper named as a loss payee under any Broker cargo insurance policy relative to this agreement.

ALTERNATIVE SAMPLE: The Broker will be liable for any losses to the Shipper arising from failure of a Carrier to be licensed, authorized, or insured to perform the services.

Insurance: Primary

The broker/shipper contract might require that both the broker's insurance policies and carriers' insurance policies be primary in relation to the shipper's policies, instead of being excess or contributing insurance. That means losses would first be covered by the broker's and carriers' policies, even if other policies (including those of the shipper) insure against those losses. The broker should check with its insurance broker or provider that its insurance policies permit this. If the shipper requires the broker to include an equivalent provision in its contracts with carriers, the broker should ensure that is the case in those contracts. The broker should consider whether to say in broker/carrier agreements that the carrier's insurance policies are primary to the broker's insurance policies, too. SAMPLE SHIPPER MIGHT USE: The Broker's insurance policies are primary in relation to the Shipper's insurance policies, instead of being excess or contributing. The Broker shall require in its contract with Carriers that each Carrier maintain policies of insurance that are primary in relation to the Shipper's policies, instead of being excess or contributing.

Insurance: Responsibility for Deductibles

A deductible is an out-of-pocket amount an insured is required to pay under a policy before the insurance company is required to pay proceeds under the policy. A shipper might require the broker and the carriers with which it contracts to be responsible for deductibles. If the broker agrees to cover the shipper's deductibles, the broker might be responsible for paying deductibles under any policy of the broker for which the shipper is an additional insured. If the shipper requires the broker to include an equivalent provision in its contracts with carriers, the broker should ensure that is the case in those contracts. The broker might also want to include an equivalent provision benefitting the broker in its standard broker/carrier agreement. SAMPLE SHIPPER MIGHT USE: The Broker shall pay all deductibles and premiums under insurance policies required by this contract. The Broker shall require in its agreement with Carriers that each Carrier is required to pay all deductibles and premiums under [say what policies].

Insurance: Umbrella or Excess

Excess insurance covers claims that exceed the limits of the underlying policy. Umbrella insurance is a form of excess insurance that covers claims exceeding the limits of the underlying policy and also covers kinds of losses beyond those covered by the underlying policy. A shipper might require both the broker

and carriers with which the broker contracts to have a specified amount of excess or umbrella insurance. If a broker agrees to maintain such coverage, it should check that it's in place. If the shipper requires the broker to include an equivalent provision in its contracts with carriers, the broker should ensure that is the case in those contracts. SAMPLE SHIPPER MIGHT USE: The Broker shall maintain and shall require in any contract with a Carrier that the Carrier maintain, commercial excess liability coverage with minimum limits of $5 million per occurrence and with coverage at least as broad as the underlying policies required by this contract or as required in the Broker's contracts with Carriers (whichever is more), including automobile liability, general liability, cargo, and workers' compensation.

Workers' Compensation, References To

Workers' compensation insurance is mandated by state law and provides wage and medical benefits to injured workers. Employer liability insurance covers employers for work related injuries to employees. A shipper might require both the broker and any carriers with which it contracts to say that each has workers' compensation insurance and employer liability insurance in place. A broker might want carriers to say the same in the broker's standard broker/carrier agreement. SAMPLE SHIPPER MIGHT USE: The Broker shall maintain at its expense and shall require in any contract with a Carrier that the Carrier maintain, at its expense, workers' compensation insurance as required by law and employer liability insurance in an amount of not less than _____.

Jurisdiction: Establishing Jurisdiction

The primary function of jurisdiction provisions (also known as forum-selection provisions) is to specify one or more courts to hear a dispute between the parties. In choosing a court to hear a dispute, a party might consider one or more of several factors. How convenient would appearing in a particular court be for the parties, counsel, and witnesses, and how familiar is the local law to those parties? In the US, you should also consider whether to specify federal courts, state courts, or both. It might make sense to select the courts of the jurisdiction the laws of which are the governing law of the contract, as those courts would likely be most familiar with applying that law. Establishing-jurisdiction provisions are generally enforceable. The analysis that courts apply varies depending on whether federal courts or state courts are involved. One basis for voiding an establishing-jurisdiction provision is that enforcing it would violate an important public policy. New York and Delaware have enacted legislation to make it simpler for contract parties to select their courts to hear any disputes.

SAMPLE: Each party hereto expressly consents to the personal jurisdiction of and venue in the courts located in ____County in the State of____.

ALTERNATIVE SAMPLE THAT INCLUDES BOTH GOVERNING LAW AND JURISDICTION: This Agreement will be construed, to the extent not preempted by applicable federal law, under the laws of the State of_____, without giving effect to any choice or conflict of law rules. All actions, claims or lawsuits between Broker and Shipper shall be brought exclusively in the State of _____.

Liens: Waiver

If a carrier deals directly with a shipper, the Bill of Lading Act and a similar UCC provision (and some state laws) give the carrier a lien on the shipper's goods for freight charges. However, if the carrier uses an intermediary such as a broker, it might not be entitled to any such lien. Nevertheless, it would be prudent for a shipper to require that a broker include in its contract with carriers a waiver by the carrier of any lien on the shipper's goods.

SAMPLE SHIPPER MIGHT USE: The Broker shall require in its contract with carriers that the Carrier waives its right to any lien on any cargo or other property of the Shipper, the Shipper's consignees, or the Shipper's consignors with respect to any shipments transported on behalf of the Shipper.

Payment Terms: Right to Set Off Amounts Owed

Setoff refers to the general right of a debtor to reduce the amount of a debt by any sum the creditor owes the debtor. Shippers often give themselves the right to set off against amounts the shipper owes the broker or any amounts the shipper believes are owed by the broker to the shipper arising out of various types of claims, including claims the shipper may have against the carrier. Many shipper-drafted contracts allow the shipper to set off the amount of pending or disputed claims against money owed to the broker. Brokers should be wary of setoff provisions which may affect cashflow. Because brokers are not liable for cargo loss and damage under the Carmack Amendment (49 USC §14706), brokers may want to resist such setoff rights regarding amounts the shipper owes to the broker. The broker may want to include setoff rights in contracts with carriers, regardless of whether the Shipper insists on it.

SAMPLE: Neither party may offset any amounts due (or to become due) to the other Party against any other amount due (or to become due) to it by the other Party.

Payment Terms: When to Pay Invoices

If a contract provides for invoicing, it's advisable to say when invoices must be paid. Usually, that's expressed in terms of payment within a certain number of days from the date of the invoice; but if invoices are issued monthly, it could be expressed in terms of payment by a stated day of the month, or by the end of the month. Don't use the word "net," as in "Payment terms are net 30 from the date of the invoice." It's jargon—say instead "Acme shall pay each invoice no later than 30 days from the date of the invoice." That requires more words, but it's clearer. Saying payment is due on receipt of an invoice is unclear; because generally you don't pay invoices instantaneously, due on receipt leaves open the question of how long you have to pay. It invites the recipient to dawdle. Brokers tend to be careful that unreasonable restrictions are not imposed on invoices being paid and incorporate any applicable shipper requirements into their contracts with carriers.

SAMPLE: The Shipper shall pay the Broker's invoice no later than 30 days from the date of the Broker's invoice.

Payment Terms: When to Submit Invoices

A contract might require that the broker submit an invoice to the shipper within a stated period. That suggests that if a broker submits an invoice late, it won't be entitled to be paid. Some contracts say as much. Brokers often resist deadlines on submitting invoices. If that doesn't work, they often make sure the deadline is long enough to give them plenty of time. If a broker-shipper contract states a deadline for submitting invoices, then the broker's contracts with carriers should impose the same requirement on carriers. Otherwise, a broker might find that if a carrier submits to the broker an invoice past the deadline stated in the broker-shipper contract, the broker has to pay the carrier although it can't get paid by the shipper.

SAMPLE SHIPPER MIGHT USE: The Broker shall submit to the Shipper all invoices for transportation services under this agreement no later than 180 days after those transportation services have been performed. The Shipper will not be required to pay any invoice that the Broker submits late.

Shipping: Broker Authority

Under 49 USC § 13901, a broker is required to specify, in writing, the authority under which it is arranging for transportation or services—in other words, that it is acting as a broker. In addition, many shippers require brokers to state that they have the operating authority required by law to sell, provide, or arrange for transportation by a motor carrier for compensation. (See 49 USC § 13102(2)). Including that language in the broker-shipper contract helps avoid confusion as to whether the broker is acting as a broker (rather than a carrier).

SAMPLE: The Broker states that it holds valid and currently effective licenses and permits required by federal, state, local, and foreign authorities, as applicable, to arrange as a property broker for Carriers to transport freight.

Shipping: Broker Invoices Customers

A transportation contract might require that the broker, not the carrier, invoice the shipper. A broker might prefer this arrangement to prevent direct contact between the shipper and the carriers it retains. A shipper might prefer it because it would have to deal with only one-party regarding invoicing. A shipper might also want the broker-shipper contract to say that if the shipper pays the broker for transportation charges invoiced by the broker and the broker doesn't pay a carrier its share of that payment, the shipper won't be liable to the carrier. To address that issue, a shipper might ask the broker to have carriers waive recourse against the shipper if the shipper has paid the broker. If the broker agrees to this, it should make sure that the broker-carrier contract includes it. A shipper might ask the broker to indemnify the shipper for any liability the shipper incurs as a result of the broker failing to pay carrier their share of any transportation charges, but indemnification would be unnecessary, as the shipper would have a claim under the broker-shipper contract if that contract provided that the broker was obligated to pay the carrier its share. A shipper might also, or instead, ask the broker to take out insurance to cover any such shipper liability.

SAMPLE: Only the Broker may bill the Shipper for transportation services provided under this contract. The Broker shall promptly pay all Carriers their share of all amounts the Shipper pays the Broker for those services. The Broker shall require in its contract with Carriers that except if the Shipper fails to pay any of the Broker's invoices for those charges, the Carrier waive its right to seek that the Shipper or the Customer pay any such charges.

Shipping: Broker Responsible for Paying Carrier

If a transportation contract requires the broker, not the carrier, to invoice the shipper for transportation charges, it would be appropriate for it to require the broker to pay each carrier its share of transportation charges. It follows that it would also be appropriate for each broker-carrier contract to require the carriers to invoice the broker for its share of those charges. A transportation agreement may provide that the carrier will invoice the broker for the carrier's transportation and related charges and that the carrier will not have the right to invoice the shipper. A shipper might also want the broker-shipper contract to say that if the shipper pays the broker for transportation charges invoiced by the broker and the broker doesn't pay a carrier its share of that payment, the shipper won't be liable to the carrier. To address that, a shipper might ask the broker to have carriers waive recourse against the shipper if the shipper has paid the broker. If the broker agrees to this, it should make sure that the broker-carrier contract includes it.

SAMPLE: The Broker shall require in its contracts with Carriers that each such Carrier authorizes Broker to invoice Broker's customers for services provided by the Carrier and that Carrier waives its right to collect such charges from the Shipper or Customer unless Shipper fails to pay Broker's invoice. The Broker shall promptly pay all Carriers their share of all amounts the Shipper pays the Broker for those services. The Broker shall require in its contract with Carriers that except if the Shipper fails to pay any of the Broker's invoices for those charges, the Carrier waive its right to seek that the Shipper or the Customer pay any such charges.

Shipping: Cap on Liability for Cargo Loss or Damage

The Carmack Amendment (49 USC §14706) imposes strict liability on carriers for actual loss or damage to property while it's in the carrier's possession, subject to several well-recognized exceptions. Carmack allows carriers to limit their liability if the shipper says in a written or electronic declaration that it accepts the limit or if the shipper and the carrier agree to the limit in writing, but only if the limit is reasonable under the circumstances. A property broker is not liable under the Carmack Amendment for loss or damage to the cargo, but some shippers ask brokers to assume this liability by contract. Although it adds to the broker's risk, some brokers do accept this liability based on the perceived financial benefit of contracting with the shipper. Because the Carmack Amendment provides a well-established body of case law, brokers should ensure that they incorporate Carmack liability in their broker/carrier contracts. Brokers should also include a negotiated limit on liability in transportation agreements, including in their agreement with the shipper if the broker has agreed to be liable for cargo loss or damage, because otherwise cargo liability may exceed the limits of applicable cargo insurance. The limit on cargo liability should mirror any amount the shipper requests in the broker/shipper contract, be the same or lower than the amount of cargo insurance the broker or a carrier has in place and cover the maximum value of loads the shipper will tender.

SAMPLE: The parties acknowledge the Broker is not acting as a Carrier and that the Broker will not be liable for cargo loss, damage, or delay. The Broker shall require in its contracts with Carriers that the Carrier will be liable under the Carmack Amendment for cargo loss and damage up to $100,000 per trailer or conveyance.

Shipping: Delay-Related Expenses

Brokers arrange for transportation, and they never physically take possession of freight. As such, a broker should avoid suggesting that they're acting as a carrier rather than a broker. It follows that brokers should resist guaranteeing that freight will be delivered on time or accepting responsibility for damaged or delayed freight. Under the Carmack Amendment, 49 USC § 14706, a carrier might be liable for unreasonable delay in delivering goods. Carriers may want to eliminate or cap liability for delay under transportation contracts, as it can be substantial. Carriers may try to limit their liability for delay liability by setting limits in their tariffs or rules circulars and making them part of a contract. Carriers might also limit liability for delay by invoking force majeure provisions, to the extent appropriate. A shipper might ask the broker to make carriers liable for the consequences of delay. That might include providing alternative transportation for the shipment or reducing freight charges. If a broker agrees to such provisions, then the broker should include any such shipper requirement in their contract with carriers. If a broker commits to delivering on time, that should be matched by a carrier commitment in the broker-carrier contracts. Additionally, the broker might want to cap or otherwise limit its liability for delay.

SAMPLE: The Broker shall require in its contracts with Carriers that in the event of a delay, the Carrier shall at its expense immediately notify the Broker of that delay and promptly take steps to reload freight in replacement equipment or take other necessary steps to minimize delay, all at the Carrier's expense.

Shipping: Liability for Loss or Damage to Cargo

Under the Carmack Amendment (49 USC §14706), a property broker isn't liable for loss or damage to cargo because the broker is never in physical possession of the cargo; nevertheless, some shippers ask brokers to assume this liability by contract. Although generally it's not recommended, some brokers do accept this liability because they see a financial benefit to contracting with the shipper. Whether or not they accept that liability, brokers should require carriers with which they contract to specifically accept Carmack Amendment liability in their agreements with the carriers because the carriers may try to disclaim such liability in their rules, tariffs or on their bills of lading. Additionally, brokers should incorporate this requirement into contracts with shippers if the broker agrees to assume responsibility for cargo loss or damage. Unless waived by written agreement, the Carmack Amendment should govern a carrier's liability for cargo claims. If a load is delivered damaged and unless an exception applies, the presumption under the Carmack Amendment is that the carrier caused the damage, without the shipper having to prove negligence. Loss or damage can be based on wholesale value, retail value, invoice value of the goods, or some other measurement. Carriers (and brokers if they assume liability for cargo) can be expected to negotiate how value is expressed in contracts as it can determine the amount of cargo liability. Consequential, special, and punitive damages and attorney fees are generally not recoverable under the Carmack Amendment, although shippers often impose that liability in broker-shipper contracts. The Carmack Amendment preempts state law and provides a basis for federal jurisdiction. It's best that shippers and carriers not waive application of the Carmack Amendment, as it offers a well-developed body of case law relating to liability for cargo loss and damage. In summary, brokers should say in their broker-carrier agreement that the Carmack Amendment applies. They should also include any valuation or other cargo liability provisions requested by the shipper.

SAMPLE SHIPPER MIGHT USE: The Broker shall require in its contracts with Carriers that the Carrier will be liable for actual loss and damage to cargo in accordance with 49 USC § 14706.

Shipping: Overcharge or Undercharge

Carriers seeking to collect undercharges and brokers/shippers seeking to contest overcharges should follow the procedures for handling overcharge and undercharge claims stated in 49 CFR §378. Such claims must be filed within 180 days of receiving the bill and related suits must commence no later than 18 months after the claim arose. If a shipper or broker intends to pursue an overcharge or undercharge claim, it must do so in writing and provide sufficient information along with its claim to allow the carrier to conduct an investigation to pay or decline the claim within the time limits stated in the regulations.

SAMPLE SHIPPER MIGHT USE: Broker shall specify in its contracts with Carriers that the time limit for filing overcharge and undercharge claims shall be 180 days as set forth in 49 CFR §378, that each such Carrier must process all overcharge claims in accordance with 49 CFR § 378, and that any lawsuit relating to overcharge or undercharge claims must be filed no later than 18 months after the claim arose.

Shipping: Period for Filing a Cargo Claim

A property broker is not liable under the Carmack Amendment for loss or damage to the cargo. However, some shippers ask brokers to assume this liability by contract. Although not advisable, some brokers do

accept this liability based on the perceived benefit of contracting with the Shipper. In either case, a broker should ensure that the carriers with which it contracts accept Carmack liability; and should also incorporate this requirement into the broker's contracts with shippers if the broker has agreed to assume responsibility for cargo loss or damage. Under the Carmack Amendment (49 USC §14706(e)), a claimant has at least nine months from the date of delivery to file a written claim for a stated amount, identifying the claimed damage or loss to the shipment. The carrier must not provide, by rule, contract, or otherwise, for a period of less than nine months for filing a claim against it and a period of less than two years for bringing a civil lawsuit against it. The broker-carrier agreement must incorporate this if the broker has agreed to do so in the broker-shipper agreement. If the broker has agreed to facilitate cargo claims or to be responsible for cargo loss or damage, the broker-shipper agreement should also clearly incorporate a time limit for filing claims.

SAMPLE SHIPPER MIGHT USE: The Broker shall require in its agreement with Carriers that claims for loss or damage to cargo be filed with the Carrier in writing no later than nine months after the date the shipment was delivered and that a civil suit be commenced no later than two years after the Carrier notifies the claimant that the Carrier is disallowing the claim or any part of it.

Shipping: Period for Handling Claims

In order to set the parties expectations regarding cargo claims handling, a shipper might ask a broker to include the claims handling procedures stated in 49 CFR §370 in the broker's contracts with carriers. Additionally, a broker might want to include them in its standard broker-carrier agreement and might also want to include them in its broker-shipper agreement if the broker accepts liability for cargo claims. 49 CFR § 370.5 says, among other things, that a carrier must acknowledge a properly filed claim in writing or electronically no later than 30 days after it received the claim, unless the carrier paid or declined the claim in writing or electronically no later than 30 days after receiving it. In its acknowledgement, the carrier must tell the claimant what, if any, additional evidence or information it requires to process the claim. The carrier must also create a separate file and assign a claim number upon receipt of a claim. 49 CFR § 370.7 governs investigation of claims. Among other things, it requires that a claim be promptly and thoroughly investigated, and that the claimant supply supporting documents and verify its loss. 49 CFR § 370.9 says that carriers must pay, decline, or make a firm compromise settlement offer in writing or electronically no later than 120 days after receiving a claim. If it's not able to do so, a carrier must then and at the end of each succeeding 60-day period say in writing what the status of the claim is and the reason for the delay in disposing of the claim and keep a copy of that writing in its claim file.

SAMPLE SHIPPER MIGHT USE: The Broker shall require in its contract with Carriers that the provisions of 49 CFR Part 370 apply, including that Carrier acknowledge that it received a properly filed claim in accordance with 49 CFR § 370.5 and shall pay, decline, or make a firm compromise settlement offer in writing or electronically to the claimant in accordance with 49 CFR § 370.9.

Shipping: Reasonable Dispatch

"Reasonable dispatch" is a concept used in bill of lading and in transportation contracts. It means that carriers aren't required to meet deadlines that might conflict with normal constraints, such as having to observe speed limits and hours-of-service regulations. Shippers often reject a "reasonable dispatch" standard and ask brokers to impose requirements on carriers to timely deliver loads by using terms such as "without delay," "timely," and "promptly." Shippers might use such standards to assert liability for

delay and for consequential damages against carriers or brokers if the broker has agreed to accept any such liability. Because brokers only arrange for transportation, don't handle or move freight, and want to avoid any suggestion that they are acting as a carrier rather than a broker, brokers tend to resist guaranteeing timely delivery of the freight and instead rely on imposing that obligation on the carrier in the broker-carrier agreement. Brokers should include in broker-carrier agreements any standard to which they have agreed in their contract with the shipper particularly if they have agreed to be liable for cargo claims.

SAMPLE SHIPPER MIGHT USE: The Broker shall require in its contracts with Carriers that the Carrier transport all shipments safely and without delay.

Term: Duration

A contract for ongoing services usually says how long the contract remains in effect. If the term renews automatically unless either party opts out, that commits the parties to an additional term without the opportunity to renegotiate terms, including critical terms such as rates.

SAMPLE: This agreement will continue in effect for one year from the date of this agreement.

Termination

You could say that a party may terminate a contract "for convenience." That phrase originated in government contracts but has come into more general use, perhaps because it doesn't sound threatening. But "convenience" is an odd word that doesn't capture the variety of reasons for which a party might want to terminate. And a counterparty could conceivably argue that you may terminate for convenience only if the contract imposes some sort of burden. A clearer and simpler alternative is "for any reason." The associated implication that you may terminate whenever you want is sufficiently strong that you can do without "at any time." But for some kinds of contracts that provide for termination "for cause" (notably employment agreements), it's commonplace to refer to termination "without cause." Don't rely on "at its sole discretion" to express this meaning. It doesn't address causation clearly, and it could be argued that it's subject to the implied duty of good faith. You could simply say that a party may terminate by giving notice, but it would be prudent to refer to causation as well as timing. If the other party may terminate for any reason (however that's expressed) and you're unable to negotiate it out of the contract, you could try to negotiate a notice period (if there is none) or a longer notice period. Or the terminating party might be required to pay for terminating for any reason or might be required to surrender something of value. For more information, See A Manual of Style for Contract Drafting (4th ed. 2017) ¶¶ 13.795–.806 (regarding "termination for convenience"); ¶¶ 224–.257 (regarding "at its sole discretion").

SAMPLE: Either party may terminate this agreement for any reason by giving the other at least 30 days' prior notice.

Medium Priority

Notices: Contact Information

Include in a notices provision any contact information required to give notice consistent with that notices provision. A party could designate a named individual as a recipient. That would perhaps make it more likely that the appropriate person receives notices. But people come and go, and you can't assume that a party will remember to notify counterparties to all relevant contracts that the designated individual has

changed. That might make it more likely that the appropriate person doesn't receive notices. Anecdotal evidence suggests that often happens:
https://twitter.com/AdamsDrafting/status/1402001885461106688

SAMPLE: All communications or notices shall be delivered to_[ADDRESS] Attention:

Shipping: Assigning Claims

A property broker is not liable under the Carmack Amendment (49 USC §14706) for loss or damage to cargo, but under some transportation contracts the broker assumes this liability. Consider whether the deal justifies the broker accepting cargo liability that it would not otherwise have and would want to avoid. If the broker does assume liability for cargo loss or damage, it should aim to have the shipper commit to assigning all cargo claims to the broker and to allowing the broker to attempt to collect any damages directly from the carrier.

SAMPLE: If the Broker pays the Shipper for a claim for cargo loss or damage, the Shipper shall assign its rights and interest in the claim to Broker.

Shipping: Claims for Loss or Damage Covered by 49 CFR Part 370

49 CFR Part 370 governs the handling of claims for loss or damage to cargo. It applies to both carriers and freight forwarders unless the parties agree by contract to waive the regulations. Because the federal regulations contain cargo claims handling procedures and timelines, shippers might ask that they be incorporated into contracts with brokers or carriers. Brokers might want to include them as part of their standard broker-carrier contract or the contracts with shippers, particularly if a broker accepted liability for cargo claims in its contract with shipper. Part 370 says, among other things, that a claim must be in writing and contain the information specified, that a claim must be acknowledged in writing no later than 30 days after it was received, and that the claim must be promptly investigated and resolved in writing not later than 120 days after the claim was received (or if that's not possible, a written update of the reason for the delay in resolving the claim, and the status of the claim investigation, which must be provided at that time and every 60 days thereafter).

SAMPLE SHIPPER MIGHT USE: Broker shall require in its contracts with Carriers that all claims for loss of or damage to cargo are filed and resolved in accordance with 49 CFR 370 et. seq.

Shipping: Delivery Receipts

Delivery receipts are used to evidence receipt and delivery of goods. They're used in various contexts in transportation contracts. For example, presentation of a delivery receipt might be a condition to payment of an invoice, or it might mark when liability for freight begins or ends. Additionally, a delivery receipt might be required to evidence damage to goods.

Shipping: Designating the Broker as Carrier Does Not Affect Status

Property brokers don't issue bills of lading and should be cautious about having their name added to a bill of lading as carrier. Doing so might make it seem the broker has accepted a carrier's liability for, among other things, cargo loss and damage. If a broker is willing to have its name on a bill of lading only as a convenience to the shipper, the broker should have the contract say that the broker isn't liable as a carrier.

SAMPLE: If the Broker is named as a carrier on a bill of lading, it is for the Shipper's convenience only and will neither affect the Broker's status as a property broker nor relieve the obligations of the motor carrier providing transportation services on behalf of the Shipper.

Shipping: The Broker Is Not a Carrier

Under 49 USC § 13901, a broker is required to say in the agreement, the authority under which it is arranging transportation or services—in other words, that it's acting as a broker. Also, many shippers require brokers to make such a statement in the broker-shipper agreement that they have the operating authority required by law to sell, provide, or arrange for transportation by motor carrier for compensation. (See 49 USC § 13102(2). SAMPLE: The Broker states that it holds valid and currently effective licenses and permits required by law to arrange as a property broker for carriers to transport freight. The broker will not be deemed to be acting as a motor carrier. The Broker does not intend to act as a motor carrier and does not intend to provide the transportation itself.

Shipping: What a Claim Must Include

49 CFR § 370.3 says that to bring a claim for lost or damaged cargo, a shipper must submit a written or electronic communication filed with a proper carrier within the specified time limit that:

(a) contains facts sufficient to identify the shipment,

(b) asserts liability for alleged loss, damage, injury, or delay, and

(c) makes a claim for payment of a specified or determinable amount of money.

The regulation makes it clear that submitting the following doesn't constitute filing a claim: bad order reports, appraisal reports of damage, notations of shortage or damage on freight bills, delivery receipts or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise. Unless these provisions are waived by contract, a carrier or broker may reject a shipper's cargo claim that fails to meet these requirements. To avoid confusion over what's required for a valid claim for lost or damaged cargo, a shipper might require that a broker include the requirements of 49 CFR § 370.3 in broker-carrier contracts. A broker might want to do so of its own volition if it has agreed to be liable for cargo claims.

SAMPLE: The parties intend that the Broker will not be acting as a motor carrier under this Contract and does not intend to provide transportation services itself. The Broker will not be liable for cargo loss, damage, or delay. At Shipper's request Broker shall provide in its contract with Carriers that the Shipper may file with the Carrier claims for loss or damage to cargo in accordance with 49 CFR § 370.3.

Taxes: Each Party Pays Their Own

Transportation agreements often include a provision indicating that each party is responsible for paying its taxes. Shippers often require brokers to accept liability for all employment related taxes for workers. It is not uncommon for shippers to ask for a specific indemnification from the broker regarding such taxes. SAMPLE: Each party shall be responsible for all taxes or assessments applicable to its employees or business.

Termination for Insolvency

A termination for insolvency provision is common in all types of commercial contracts. They allow for one or more parties to terminate or modify the operation of the contract upon the occurrence of an

insolvency event. These are rarely negotiated and often unenforceable. Variants include provisions that trigger a termination right on the occurrence of any of the following:

Filing a voluntary bankruptcy

Having an involuntary bankruptcy filed against a party

Becoming insolvent

Admitting in writing that the party is insolvent

Making a general assignment for the benefit of creditors (a liquidation alternative recognized under the laws of many states)

Tripping a financial condition covenant

For more information see this post by Bob Eisenbach - https://bankruptcy.cooley.com/2007/09/articles/business-bankruptcy-issues/are-termination-on-bankruptcy-contract-clauses-enforceable Or this post by Ken Adams - https://www.americanbar.org/publications/blt/2014/06/07_adams.html SAMPLE: Either Party may terminate this Agreement without notice if the other Party becomes insolvent, makes or has made an assignment for the benefit of creditors, is the subject of proceedings in voluntary or involuntary bankruptcy instituted on behalf of or against such Party (except for involuntary bankruptcies which are dismissed within sixty (60) days), or has a receiver or trustee appointed for substantially all of its property.

Termination: Inaccurate Statements of Fact

It's standard for contracts to say that making an inaccurate statement of fact in a contract is grounds for termination. (The word representation is often used to refer to a statement of fact, and the word breach is often used instead of referring to inaccuracy.) One issue is that in a contract involving an ongoing commitment, parties are unlikely to want to give the other party the freedom to terminate for minor inaccuracies. In that context, it's conventional to include a materiality standard, and courts are likely to require the terminating party to show that the inaccuracy was a major one. SAMPLE: In the event of a material breach of any representation in this section 5, the Company may terminate this agreement and the Executive's employment with the Company without any liability to the Executive.

Assigning Rights and Obligations

Generally speaking, parties are free to transfer their rights and obligations under a contract to another, unless the contract prohibits it. Reasons for prohibiting transfer include your being reluctant to assume risk relating to the identity, qualifications, or financial stability of any transferee. SAMPLE: Neither party may assign any of its rights or delegate any of its obligations under this contract without the prior written consent of the other party. Any assignment or delegation in breach of this section __ will be void.

Compliance with Law

It's commonplace for a contract to have the broker state that the carriers it uses currently comply with the laws of those municipalities, states, and federal jurisdictions in which such carriers operate, including regulations of the US DOT and the FMCSA. A contract might also, or instead, ask the broker to impose on

the carrier an obligation to comply with those laws. Such provisions might also ask the broker to impose on the carrier penalties for noncompliance.

SAMPLE SHIPPER MIGHT USE: Broker will only use Carriers that comply with federal, state and local laws and regulations applicable to their services, including those of the United States Department of Transportation and the Federal Motor Carrier Safety Administration.

Confidential Information: Obligation Not to Disclose

Because shippers and brokers might share business information (for example, rates and shipping volumes) that they would like kept confidential, it's commonplace for contracts to include a provision requiring each party not to disclose or use confidential information of the other party other than as contemplated in the contract. If any such information is particularly valuable, more detailed confidentiality provisions might be appropriate.

SAMPLE: Neither party shall disclose or use other than as contemplated in this contract any confidential information it learns about the other while performing services under this contract.

Confidential Information: Use Only for Stated Purpose

Because shippers and brokers might share business information (for example, rates and shipping volumes) that they would like kept confidential, it's commonplace for contracts to include a provision requiring each party not to disclose or use confidential information of the other party other than as contemplated in the contract. If any such information is particularly valuable, more detailed confidentiality provisions might be appropriate. SAMPLE: Neither party shall disclose or use other than as contemplated in this contract any confidential information it learns about the other while performing services under this contract.

Confidentiality of Agreement or Terms

It's commonplace for a contract to say that the existence of the contract or its terms, or both, must be kept confidential. That information would nevertheless have to be disclosed as required by law, so it's appropriate to make that explicit by adding to this kind of provision an exception for disclosure required by law. It's also standard to include an exception for disclosure to those who need that information for business purposes, for example accountants and lawyers.

SAMPLE: During the term of this contract [and for three years thereafter], each party shall not disclose to any other person the existence of this contract and its terms, except to the extent disclosure is required by law.

Curing Breach

A transportation contract might give one or both parties opportunities to "cure" their breach of any obligations or of specified obligations. That might not make sense. For one thing, some breaches can't be cured, just as you can't unbreak an egg. Allowing for a breach to be cured amounts to permitting temporary breach. That might be unnecessarily generous, given that the purpose of a contract is to have the parties commit to performing. Consider providing for cure only in limited contexts, for example late payment: if Acme fails to make a payment, Widgetco might not be risking much by giving Acme a few days to get its act together and make the payment. SAMPLE: Either party may terminate this contract if the other party breaches this contract and fails to cure that breach no later than 30 days after the nonbreaching party notifies the breaching party of that breach.

Entire Agreement

Transportation contracts usually say that the contract (including any ancillary documents that are made part of the contract) constitutes the entire understanding of the parties. A broker might want to consider incorporating ancillary documents (including its own service terms), to the extent they don't conflict with the terms of the written agreement.

SAMPLE: This contract constitutes the entire understanding between the parties regarding the subject matter of this contract. The Broker's service terms, the tariff and rules circulars of any carriers with which Broker contracts, and the bill of lading are part of this Contract, except to the extent any one or more of them conflicts with the rest of the agreement, in which case the terms of the rest of the Contract will prevail.

Equal Employment Opportunity Compliance

If a contract says that a party will practice equal opportunity and nondiscrimination in its business activities, that might simply mean that it will comply with the law, which it would have to do anyway, or it might indicate a willingness to go further than what the law requires.

SAMPLE: Shipper will practice the principles of equal employment opportunity and non-discrimination in all its business activities.

Force Majeure: Causation

An essential element of the concept of excusing performance as it's generally understood is that the circumstances preventing performance must not have been under the control of the party seeking to be excused. That can be expressed various ways in a contract. Ken Adams refers to events or circumstances "that were not caused by" the party seeking to be excused. For Ken's force majeure language, see https://www.adamsdrafting.com/revisiting-my-force-majeure-language/. The question of causation can be complicated by whether the party seeking to be excused contributed to the whatever caused nonperformance. In his force majeure language, Ken Adams makes it a condition to excused performance that the party seeking to be excused have taken precautionary steps.

Force Majeure: Definition

A force majeure provision excuses a party from performing if an event beyond its control prevents it from performing. This sifter looks for the reference to occurrence of an event that prevents a party from performing—a force majeure provision wouldn't make sense without it. You can expect that the part that says that performance will be excused will accompany the reference to occurrence of an event that prevents a party from performing. In the absence of a force majeure clause, in common law jurisdictions like the United States and United Kingdom (as opposed to civil law jurisdictions like France or Germany) parties are forced to rely on the narrow common law contract doctrines of "impracticability" and "frustration of purpose" to excuse nonperformance. Whether it makes sense to include a force majeure provision in a contract depends on the likelihood of performance being interrupted by external factors. There is often confusion in transportation contracts between the concept of "Act of God" as it relates to Carmack liability for cargo and as it relates to being excused from performing because of a Force Majeure Event. The latter is broader than the former—you should consider including a general force majeure provision.

SAMPLE: Failure or delay by either Broker or Shipper to perform under this contract will be excused to the extent caused by a Force Majeure Event.

Force Majeure: Failure to Perform

A force majeure provision excuses a party from performing if an event beyond its control prevents it from performing. This sifter looks for the reference to occurrence of an event that prevents a party from performing—a force majeure provision wouldn't make sense without it. You can expect that the part that says that performance will be excused will accompany the reference to occurrence of an event that prevents a party from performing. In the absence of a force majeure clause, in common law jurisdictions like the United States and United Kingdom (as opposed to civil law jurisdictions like France or Germany) parties are forced to rely on the narrow common law contract doctrines of "impracticability" and "frustration of purpose" to excuse nonperformance. Whether it makes sense to include a force majeure provision in a contract depends on the likelihood of performance being interrupted by external factors. For Ken Adams's force majeure provision, go to https://www.adamsdrafting.com/revisiting-my-force-majeure-language/.

Force Majeure: List of Examples

The most distinctive feature of force majeure provisions is the list of events or circumstances that constitute examples of what might constitute a force majeure event. This "parade of horribles" is counterproductive; consider simply referring to any event or circumstance, offering no examples. The parade of horribles creates three problems. First, drafters use it to try to encompass all bad things that might happen. That's not remotely feasible, but it routinely results in long lists. Second, if the parade of horribles is a finite list, don't be surprised if a court limits you to what's in the list. That encourages drafters to make their lists even longer. And third, the elements of the parade of horribles are usually offered as examples, for example by introducing the list with including. But that creates an ejusdem generis problem. (Ejusdem generis is the principle of interpretation that holds that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.) A court might say that, for example, you included only terrestrial events in your list, so the force majeure provision doesn't cover solar flares. That it gives drafters yet another reason to make their parade of horribles ever longer. So the parade of horribles both constrains your options and clogs up the works. Consider simply referring in a force majeure provision to any event or circumstance, offering no examples that might encourage a court to arbitrarily limit the provision. Leave it to the parties or the courts to figure out what would be reasonable in the circumstances. That's what they'd have to do anyway.

RECOMMENDED: For purposes of this agreement, "Force Majeure Event" means, with respect to a party, any event or circumstance, whether or not foreseeable, that was not caused by that party [(other than a strike or other labor unrest that affects only that party, an increase in prices or other change in general economic conditions, a Change in Law, or an event or circumstance that results in that party's not having sufficient funds to comply with an obligation to pay money)] and any consequences of that event or circumstance. For more on this, see Ken Adams's blog post at https://www.adamsdrafting.com/force-majeure-in-the-time-of-coronavirus/. For Ken's force majeure language, see https://www.adamsdrafting.com/revisiting-my-force-majeure-language/.

Governing Law

A governing-law provision aims to ensure that the law of the specified jurisdiction governs any dispute between the parties. But for a governing-law provision to be enforceable, the designated jurisdiction must have a reasonable connection to the transaction. In deciding which jurisdiction to specify as the

governing law for a particular contract, in theory one should consider whether a jurisdiction under consideration has a well-developed body of law and whether in adopting laws it has taken positions that might be relevant to the contracting parties or the kind of transaction involved. But anecdotal evidence suggests that out of habit, many drafters opt for the home jurisdiction of the party they represent or for what appears to be a safe and sophisticated jurisdiction. (In the United States, that usually means New York or Delaware.) Unless high stakes are involved, for most transactions it's unlikely to be worth anyone's time to explore in detail the substantive and procedural implications of whatever hypothetical litigation might result from a proposed transaction. Governing-law provisions might use one or more of a range of verbs, including governed, construed, interpreted, and enforced. Use just governed—most courts have recognized that these alternatives are essentially equivalent. Federal law governs aspects of interstate commerce, but it's not necessary to mention that in a governing-law provision, as it's not within the control of the parties. A governing-law provision might govern just claims under the contract, but it's simpler to have it govern all claims, including tort claims and statutory claims. Unless you know what you're doing, it might be unclear what was intended, leading to a fight over, say, the implications arising out of or relating to. Instead, be specific in the manner of the example below.

SAMPLE: Governing Law. [Jurisdiction] law governs all adversarial proceedings arising out of this contract or the Carrier's performance of carriage and related services under this contract.

ALTERNATIVE SAMPLE SHIPPER MIGHT USE THAT INCLUDES BOTH GOVERNING LAW AND JURISDICTION: This Contract will be construed, to the extent not preempted by applicable federal law, under the laws of the State of_____, without giving effect to any choice or conflict of law rules. All actions, claims or lawsuits between Broker and Shipper shall be brought exclusively in the State of _____; provided, however, (a) actions for recovery of cargo loss and damage claims may be commenced (at the option of Shipper or claimant) in such other jurisdiction and venue as may be authorized under 49 U.S.C. § 14706, and (b) actions brought by third parties requiring Broker or Carrier's indemnification under this Contract may be adjudicated in the courts where the third-party claim is filed. Broker consents to the jurisdiction and venue of any court adjudicating the dispute in accordance with the foregoing sentence.

Hazardous Materials, References To

The Hazardous Materials Transportation Act (49 USC § 5101) and DOT regulations govern transportation of hazardous materials by both shippers and carriers. If a carrier is to transport hazardous materials under the broker's contract with a shipper, the broker should require shippers to properly identify and placard hazmat loads; and the broker should make sure that carriers designate personnel responsible for hazmat compliance, have properly licensed hazmat drivers, and carry at least the amount of hazmat insurance required by law.

SAMPLE: The Shipper shall identify in advance of tender any load that contains Hazardous Materials as defined by the Hazardous Materials Transportation Act and will be responsible for placarding any Hazardous Materials as required by law. The Broker shall require in its contracts with Carriers that the Carrier comply with federal law governing transportation of Hazardous Materials.

Independent Contractor

For tax and liability purposes, a company might want to make sure that a service provider who is an individual isn't considered an employee. It's standard for contracts to address that issue but be aware that you cannot establish that a service provider is an independent contractor just by saying so in a

contract—that status is determined by how the relationship develops after the contract has been signed. Instead, say that the parties intend that the service provider will be an independent contractor. That reflects reality. The "acting as independent contractor" provision is often used by mistake in contracts between companies. Including it doesn't make sense unless one of the parties is an individual and the provision relates to the individual not being an employee of the other party.

See Ken Adams's blog post at https://www.adamsdrafting.com/beware-overuse-of-the-acting-as-independent-contractor-provision/.

Insurance: Insurance Company Rating

Because the stability of a broker's insurance company is important to addressing the shipper's liability concerns, many transportation agreements require the broker and/or carriers to maintain the required insurance with an insurance company that has a strong financial rating (usually an AM Best rating of A– or better) or one that meets the shipper's subjective requirements of reliability and solvency. Brokers should consider the financial rating of an insurer before purchasing coverage. Brokers should also consider including a provision in their broker/carrier agreement (whether the shipper requests it or not) requiring the carrier to obtain required insurance with an insurance company that meets specified standards.

SAMPLE SHIPPER MIGHT USE: Broker shall maintain and shall require in any contract with a Carrier that the Carrier maintain all insurance required with solvent and reliable insurance companies with an AM Best rating of A– or better.

Insurance: Notice of Cancellation Required

A shipper might require a broker to give 30 days' notice before cancelling, changing, or not renewing required insurance coverages. Because the insurance carrier might not be required to notify the shipper, a broker may accept this requirement only if it is willing to notify the shipper itself. The broker might also want to impose such a requirement on the carrier in its standard broker/carrier agreement.

SAMPLE SHIPPER MIGHT USE: The Broker shall notify the Shipper at least 30 days before any cancellation, change or nonrenewal of any insurance required of it under this contract or required by law.

Insurance: Proof of Insurance

Shippers often require certificates of insurance. Issued by insurance companies, they serve as evidence of a broker's insurance coverage. A certificate of insurance includes a summary of insurance coverage types, liability limits, and the effective date of the policy.

SAMPLE SHIPPER MIGHT USE: The Broker shall provide the Shipper with a certificate of insurance evidencing that the insurance coverage required under this contract is in force.

Jurisdiction: Consent to Jurisdiction

A sentence that specifies courts to handle a dispute is routinely accompanied by language in which the parties consent to jurisdiction. Or a contract might address jurisdiction using only a consent-to-jurisdiction provision.

SAMPLE: Each party hereby submits to the jurisdiction of those courts for purposes of any such proceeding. But using both establishing-jurisdiction and consent-to-jurisdiction provisions in a single

contract is redundant. See Adams on Contract Drafting (24 Aug. 2019): https://www.adamsdrafting.com/stop-using-consent-to-jurisdiction-provisions/

And of the two ways to address this issue, establishing-jurisdiction provisions is the better choice: saying that A may do something is simpler than saying that B consents to A doing whatever it is. So it makes sense to delete consent-to-jurisdiction provisions and add an establishing-jurisdiction provision if a contract doesn't otherwise contain one. But because the drawbacks of consent-to-jurisdiction provisions are redundancy and indirection rather than any obvious confusion, it might be best to save those changes for your drafts as opposed to the other side's drafts.

Jurisdiction: Exclusive

An establishing-jurisdiction provision can be exclusive or nonexclusive. If an establishing-jurisdiction provision is exclusive, the specified courts are the only option. If it's nonexclusive, it serves to establish the specified courts as one option; a party could ultimately opt for other courts, assuming that courts are willing to enforce that choice. Nonexclusive provisions give you flexibility, but they give the other side that flexibility too.

SAMPLE: As the exclusive means of bringing adversarial proceedings to resolve any dispute arising out of this agreement or disclosure or use of Confidential Information, a party may bring such a proceeding in the United States District Court for the Southern District of New York or in any state court of New York.

Limitation of Liability: Consequential Damages

The Carmack Amendment generally doesn't allow for recovery of consequential damages unless agreed to by contract or unless the carrier had notice of special circumstances giving rise to such damages. A shipper that thinks it might be subject to consequential damages should either notify the broker or provide by contract for recovery of such damages. A standard feature of commercial contracts is a provision excluding various kinds of damages—consequential, incidental, and so on—but the focus is often on excluding consequential damages, because they are unpredictable, costly and may not be covered by insurance.

SAMPLE: In no event will [Party] be liable for loss of profits or for any consequential, special, indirect, incidental, punitive, or exemplary damages or expenses. But excluding certain types of damages is unhelpful for three reasons: First, in addition to being vague, the terms of art used in language excluding consequential damages are poorly understood and are conducive to dispute. Second, it can be arbitrary to exclude certain types of damages as recoverable under the contract but not others. And third, some provisions pile on the exclusions in a way that makes no sense, as when you exclude both "direct" and "indirect" damages, which suggests that all damages are excluded. If the concern is the possibility (however mistaken) of remote damages, you could address it more simply as follows:

RECOMMENDED: Neither party will be liable for breach-of-contract damages that the breaching party could not reasonably have foreseen at the time of breach. Another alternative is to put an absolute cap on damages as opposed to engaging in the arbitrary and uncertain exercise of excluding certain types of damages. If you also, or instead, want to exclude certain types of damages, to avoid confusion consider being specific about what you're excluding. Don't use legal terms of art; instead, refer to whatever types of damages are of concern.

SAMPLE: Broker will include in its contracts with Carriers that the Carrier will be liable for loss of profits and for any consequential, special, indirect, incidental, punitive, or exemplary damages or expenses, whether related to cargo loss, damage, or delay or otherwise. In no event will Broker be liable to Shipper for loss of profits or for any consequential, special, indirect, incidental, punitive, or exemplary damages or expenses, whether related to cargo loss, damage, or delay or otherwise.

Notices: How to Deliver Notices

Notices provisions can address in two ways the means used to deliver notices. One way is to say what means of delivery are required for a notice to be valid, or conversely what means of delivery will not be valid. Another is to specify, in the case of each means of giving notice, when a notice is deemed to have been received. Whatever the context for addressing the means of delivery, you have to specify what those means are. In that regard, traditional contract drafting offers plenty of suboptimal options. Some are unclear and potentially ambiguous, for example personal delivery and deliver by hand.

See Kenneth A. Adams, Thoughts on Delivery "By Hand" (https://www.adamsdrafting.com/thoughts-on-delivery-by-hand), Adams on Contract Drafting (7 Feb. 2021).

Others are unhelpfully vague (for example references to "reputable" delivery services) or leave too much to chance (for example using regular mail). And yet others rely on old-fashioned technology, notably sending notices by fax. The three means of delivery we recommend are stated in the recommended provision below. Our selection is novel, but it's clear and predictable. For more about delivering notices by email, see Kenneth A. Adams, Giving Notice by Email Only? I'd Rather Not (https://www.adamsdrafting.com/giving-notice-by-email-only), Adams on Contract Drafting (6 Apr. 2020).

RECOMMENDED:

(a) A notice or other communication under this agreement will be effective when received by the party to which it is addressed. It will be deemed to have been received as follows:

(1) If it is delivered by a delivery organization that allows users to track deliveries, upon receipt as stated in the tracking system;
(2) If a tangible copy is delivered by another means, when the intended recipient or a representative of the intended recipient signs for it;
(3) if it is delivered by email, when the intended recipient acknowledges by notice in accordance with this section __ (but without need for further acknowledgement) having received that message, with a read receipt or an automatic reply not constituting acknowledgment of a message for purposes of this section 1; and (4)
(4) if the intended recipient rejects or otherwise refuses to accept it, or if it cannot be delivered because of a change in address for which no notice was given, then upon that rejection, refusal, or inability to deliver.

(b) A notice or other communication that is oral or that is delivered other than as contemplated in section 1(a) will not be valid under this agreement.

Notices: When Notices Are Deemed Received

Including a notices provision in a contract allows the parties to avoid the uncertainties involved in, say, knowing when someone is deemed to have delivered notice by regular mail. But achieving certainty

requires not only describing the means of delivery but saying when delivery by each method is deemed effective. (For recommended language regarding when delivery is deemed effective for purposes of selected methods of delivery, see the advice for our "Notices: How to Deliver Notices" sifter.) RECOMMENDED: A notice or other communication under this agreement will be effective when received by the party to which it is addressed. It will be deemed to have been received as follows:

Party Name

You should insert the complete legal name of your company, including entity designation (whether LLC, Inc., or something else). The legal name is the business entity name on file with the state in which the company filed its organizational documents. If you do business under a different name, then use the DBA as it appears on the company's tax return. Along with the company's name or DBA, you should include the state where the company was organized and the kind of entity it is.

SAMPLE: ABC Company, Inc, a New Jersey corporation.

Payment Terms: Late Payments

Brokers may charge late fees if permitted under the contract. Brokers should consider specifying the implications of paying late, including interest, fees, and termination of the contract. Late fees tend to be between 1 and 1.5%; in many jurisdictions they're capped by law. SAMPLE: If the Shipper is late in making any payments under this contract, the unpaid amount will bear interest at 1.5% per month or the maximum rate allowed by law.

Remedies: Exclusive

Exclusive-remedy provisions limit the remedy available to a party to a specified remedy. Among the options are indemnification (often with a cap or basket), liquidated damages, or the right to terminate. In commercial contracts, the exclusive remedy might be in the form of replacement, refund, or credit. The challenge is to determine how the proposed exclusive remedy relates to the possible damages. Courts have held that if a contract specifies a remedy—for example, liquidated damages—but the contract doesn't say that the specified remedy is exclusive, then the specified remedy isn't exclusive. And an exclusive remedy could apply to just a specific kind of damages, with other nondamages remedies otherwise being available.

Requirement to Notify

In many transportation contracts, the broker is required to notify the shipper of certain events, such as when a delay or an accident has occurred. A broker shouldn't agree to such a notice requirement unless it's sure it would be able to meet it.

SAMPLE SHIPPER MIGHT USE: Broker shall use its best efforts to provide reasonable notice to Shipper in the event_____.

Shipping: Accessorial Charges

Accessorial charges are fees used to compensate the carrier for costs outside of the linehaul rates, such as detention, lumper services, stop-offs, and other miscellaneous services. Brokers should take accessorial charges into account when considering the carrier's quoted line-haul rates (which generally exclude accessorial charges) and when quoting transportation rates to the shipper. Failing to consider accessorial costs can lead to disputes. If possible, the broker and each carrier should agree on accessorial charges in writing and in advance, and that document should be attached to the contract

between the broker and the shipper. If that's not possible, the broker might want to try to negotiate the right in the contract with the shipper to pass through to the shipper accessorial charges from carriers. SAMPLE: The Shipper shall reimburse the Broker for all Carrier administrative fees and accessorial charges.

Shipping: Bill of Lading Issuance and Contents

Brokers do not typically issue bills of lading. They should be cautious of doing so and should resist having their name added to the bill of lading as the carrier, as that could result in the broker accepting a carrier's liability, including liability for cargo loss or damage. Shippers often prepare the bill of lading. A shipper might ask the broker to enter into a written contract with carriers that clarifies who issues bills of lading and which bill of lading will be used. (See Uniform Straight Bill of Lading 49 CFR §1035 Appendices A and B.) SAMPLE: The Broker shall require in its contracts with Carriers that each incident of transportation be evidenced by a written receipt in the form of the Uniform Straight Bill of Lading. The Broker must not be named as the Carrier under any bill of lading. If it is so named, that will not affect the Broker's status as a property broker.

Shipping: Carrier Safety Rating

After a safety compliance review, a carrier will be rated "satisfactory," "conditional," or "unsatisfactory." (See 49 CFR § 385.) Carriers rated" unsatisfactory" are generally prohibited from operating commercial motor vehicles. (See 49 CFR § 385.13.) Shippers often require in the broker's contracts with carriers that the carrier is obligated to maintain a safety rating of "satisfactory." It would be prudent for brokers to include such an obligation in the broker-carrier contracts, whether or not the shipper requires it. SAMPLE SHIPPER MIGHT USE: The Broker shall contract only with Carriers that maintain a safety rating of "satisfactory." The Broker shall require in its contract with Carriers that the Carrier notify the Broker if its safety rating changes from "satisfactory," and the Broker shall not tender any Shipper freight to Carriers that experience such a change in safety rating.

Shipping: Driver Standards

Many regulations govern the qualifications the drivers of commercial motor vehicles must have and the performance standards that apply to such drivers. (See for example 49 CFR § 382 and § 391.) When contracting with a broker, shippers expect that the broker will require that carriers commit to using only drivers who meet the legal standards.

SAMPLE SHIPPER MIGHT USE: Broker shall require in its contracts with Carriers that the Carrier's drivers meet all legal requirements and performance standards.

Shipping: Equipment Condition

Many shippers have specific requirements regarding the condition of the equipment used to perform services for them and might ask brokers to ensure that carriers meet those requirements. That would best be accomplished by the broker incorporating those requirements into the broker-carrier contracts.

SAMPLE SHIPPER MIGHT USE: The Broker shall require in its contracts with Carriers that each Carrier at its expense furnish all equipment required for its services and that all such equipment be maintained in good condition, be safe for handling products intended for human or animal consumption, be secure, leak-proof, free from contamination, infestation, and odor, and not have been previously used to transport trash or hazardous materials.

Shipping: Equipment, Expenses Relating To

Shippers often require that the carrier pay for maintaining and repairing all equipment used in performing services for the shipper. Shippers might ask brokers to ensure that carriers meet the shipper's requirements regarding who pays for maintaining and repairing equipment. If a broker agrees, it should pass those requirements down to carriers. Because such a provision might make the carrier responsible for fixing damage caused by a shipper, a carrier might resist being held responsible for such damage.

SAMPLE SHIPPER MIGHT USE: Broker shall require in its contracts with Carriers that each Carrier provide, maintain, and repair at its expense all equipment required by it in performing services for the Shipper as contemplated in this contract.

Shipping: Food and Other Products for Human or Animal Consumption

Many regulations govern transportation of food or food-related products. (See the Food Safety Modernization Act (21 USC § 2201), the Food, Drug and Cosmetic Act (21 USC § 341), the Sanitary Food Transportation Act (49 USC § 5701), and the USFDA Final Rule on the Transportation of Human and Animal Food (21 CFR § 1.900). If using a broker to arrange transportation for loads consisting of food or food-related products, shippers should be aware of both their and the carrier's respective obligations under those regulations, including notice, maintaining required documentation, training personnel in handling the products, and controlling the temperature at which products are kept, among others. If the shipper is shipping food or food related products, the carriers transporting these shipments should be appropriately licensed, hold the appropriate local, state and federal authorities, and be insured. SAMPLE SHIPPER MIGHT USE: Any Carrier retained by the Broker to transport the Shipper's freight must be licensed, authorized, and insured to transport food and food-related products.

Shipping: Fuel Surcharge

To reflect the cost of fuel, most carriers incorporate a fuel surcharge into their rates, often basing them on the Department of Energy's weekly fuel-cost index. The provision imposing fuel surcharges usually appears in an appendix to the broker-carrier agreement, shippers might also want it attached as an appendix to the broker-shipper agreement. SAMPLE: Fuel surcharges are as stated in appendix A.

Shipping: Interlining

Before 2012, carriers often hired other carriers to handle all or part of their shipping. This practice was known as "convenience interlining" or "double-brokering." The Moving Ahead for Progress in the 21st Century Act (MAP-21), enacted in 2012, prohibited this practice unless the carrier is authorized to act as a broker or freight forwarder and informs the shipper that in certain situations it may act as such. Brokers should clearly state in the broker-shipper contract that the broker is acting as a broker. The broker-carrier agreement should prohibit the shipper's loads from being transported in equipment other than that owned or leased by the carrier. SAMPLE: Under no circumstances shall Broker be deemed to be acting as a motor carrier under this Agreement. Broker shall not itself perform the actual physical transportation of Shipper's shipments as a motor carrier. Broker shall provide in its contracts with Carriers, that such Carrier shall not cause, use or permit any other person or entity, including Carriers or Brokers, to interline, co-broker, subcontract or provide substituted services of any kind, that such Carriers will transport all shipments under their own operating authority and that, in no event, shall Shipper or Broker have any liability to any third party retained or used by Carrier.

Shipping: Responsibility for Securing Cargo

Under 49 CFR § 392.9, a driver of a commercial motor vehicle (CMV) may not operate a CMV unless the driver determines that the cargo is properly distributed and adequately secured. But this doesn't apply if the CMV has been sealed and the driver has been ordered not to open or inspect the cargo or if the CMV has been loaded in a manner that makes it impractical to inspect the cargo. Because of this, shippers might ask brokers to state in broker-carrier contracts the parties' respective obligations with regard to securing freight.

SAMPLE SHIPPER MIGHT USE: Broker shall require in its contracts with Carriers that the Carrier's driver will be responsible for how the cargo is loaded and secured, unless the cargo has been loaded in such a way as to make it impractical for the driver to inspect it or if the Shipper has sealed the trailer and ordered the driver not to open or inspect the cargo.

ALTERNATIVE SAMPLE: Broker represents that the servicing Carriers with which transportation is arranged are licensed and authorized and have the requisite insurance coverages to perform the services.

Shipping: Salvage, References To

Transportation contracts between a broker and a carrier might address how the salvage value of cargo is calculated and how salvage proceeds are applied to claims or invoices. 49 CFR § 370.11 states a carrier's obligations regarding salvage in the absence of a written contract to the contrary. Carriers may sell nondelivered, rejected, or refused goods after notice, unless advised to the contrary, subject to the detailed requirements in the regulations. To protect its interest, shippers often prefer to have a broker include a shipper's own salvage provisions in broker-carrier contracts. If a shipper addresses salvage in a broker-shipper contract, the broker should include those provisions in broker-carrier contracts.

SAMPLE SHIPPER MIGHT USE: The Broker shall arrange for its contracts with Carriers to say that it's at the Shipper's discretion, subject to a reasonableness standard, whether to repair, repackage, salvage, or scrap damaged freight and that the Carrier must not salvage any freight without the Shipper's prior written consent.

Shipping: Shipper Load and Count

If the shipper will be tendering sealed trailers to a carrier selected by the broker, the broker should be aware that the Bill of Lading Act (49 USC § 80113) says that if certain conditions are met, carriers issuing bills of lading aren't liable for non-receipt and misdescription of the cargo or for improper loading. One way to meet the requirements of the statute is if a shipper loads the goods and the driver notes on the bill of lading "shipper's weight, load and count or words of the same meaning." This practice is known as "shipper load and count" (SLC) and is used by carrier drivers to protect a carrier from liability for shortage claims or for claims of improper loading. Brokers might want to make shippers aware that if an SLC notation is made on the bill of lading, a trailer arriving at destination with an intact seal creates the presumption that the carrier is not liable to the shipper for loss or damage to that load.

SAMPLE SHIPPER MIGHT USE: In the Broker's contracts with Carriers, each Carrier must acknowledge that if a shipper loads and seals a trailer tendered to the Carrier without a representative of the Carrier inspecting and counting the cargo during loading and the Carrier notes that fact on the bill of lading with the Shipper's prior written consent, Carrier will not be liable for non-receipt and misdescription or for improper loading if the trailer is delivered with the seal intact.

Shipping: Tariff or Rules Circular

Unlike a carrier that has a tariff or rules circular with the carrier's general terms for conducting its business, a broker might not have its own terms of service. If it does not, it might want to consider creating a set of terms to govern matters that might not be addressed in the broker-shipper contract. In creating service terms, a broker should be careful to position itself as arranging transportation, as opposed to accepting the responsibilities of a carrier or exerting unreasonable control over carriers. To the extent that a broker is subject to either the carrier's tariff or rules circular or the shipper's terms, the broker's contracts with those entities should say as much. SAMPLE: This agreement, the Carrier's tariff or rules circular, the bill of lading, and the Broker's terms of service constitute the entire understanding between the parties regarding the subject matter of this agreement. In the event any inconsistencies of the terms contained in the collective documents arise, the terms in this agreement shall control.

Shipping: The Broker Arranges Transportation of Cargo

Under 49 USC § 13102(2), a broker is a principal or agent that sells, offers to sell, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for transportation by motor carrier for compensation. In other words, brokers arrange for transportation and don't provide transportation or take possession of freight. Because broker liability differs from that of a carrier, brokers should consider saying in broker-shipper contracts that the broker is acting as a broker and not as a carrier. SAMPLE: The Broker intends to arrange for transportation by motor carrier of the Shipper's goods for compensation under the terms of this agreement. The Broker does not intend to act as a motor carrier and does not intend to provide the transportation itself.

Shipping: Waiver in Accordance with 49 USC 14101(b)(1)

While carriers and brokers may expressly waive in writing any or all rights, duties and obligations under 49 USC § 14101(b)(1) except for the statutory provisions and related regulations that govern registration, insurance, or safety fitness, such waiver is generally not applicable to agreements between shippers and brokers. A broad waiver among other things, may waive key statutory and regulatory provisions such as the Carmack Amendment, claims handling regulations and various statutes of limitations. For that reason, brokers should be careful to carve out these important provisions (including the Carmack Amendment) from the scope of any waiver. In practice, carriers typically object to wholesale waivers and often choose to specifically set forth in the contract a position on important provisions that are being waived or alternatively limit the waiver to only those provisions that expressly conflict with the terms of the contract. A typical example of a waiver provision can be found in the sample language.

SAMPLE: Pursuant to 49 USC § 14101(b(1), the parties expressly waive any and all provisions of US Code Title 49, Subtitle IV, Part B, and of the regulations thereunder, to the extent that such provisions conflict with the terms of this agreement.

Shipping: When the Carrier Is Responsible for Cargo

Ordinarily a broker isn't liable for lost or damaged cargo. Instead, the Carmack Amendment imposes strict liability on a carrier for cargo that is lost or damaged while in the carrier's possession, subject to recognized exceptions. Because who is liable can depend on when possession begins and ends, a shipper might ask the broker to establish that in broker-carrier contracts. Or the broker may want to do so of its own volition, in the interest of avoiding confusion. Generally, it's to the shipper's advantage for the carrier to be deemed to be in possession of the cargo sooner rather than later (and for the carrier to be in possession as long as possible). SAMPLE SHIPPER MIGHT USE: The Broker shall require in its

contracts with Carriers that the Carrier's possession of cargo will begin when the bill of lading has been signed and will end when the lading has been fully unloaded and delivered as evidenced by a signed delivery receipt or as noted on the bill of lading.

Shipping: Where Rates Are Stated

A broker's rates might include both the broker's rates and the rates of the carriers it retains. Brokers typically incorporate their rates into the broker-shipper contract. Shippers may want the broker-shipper contract to say the following: (1) the rate the broker quotes the shipper is all inclusive; (2) the shipper isn't liable for additional carrier charges; (3) the broker must pay all carriers retained by the broker; and 4) carriers waive recourse against the shipper for nonpayment if the shipper has paid the broker. If the broker-shipper contract contains any of these provisions, the broker should consider incorporating them into broker-carrier contracts.

SAMPLE SHIPPER MIGHT USE: The Shipper shall pay the Broker according to the rates and charges in appendix A as full compensation for services it provides under this agreement. To be valid, appendix A must be signed by an authorized representative of each party. Broker agrees that it shall promptly remit full payment to Carriers providing transportation services and shall maintain records of all such payments.

Shipping: Whether the Broker Acts as Carrier

Pursuant to 49 USC § 13901, a Broker is required to specify, in the agreement, the authority under which it is arranging for transportation or services, i.e., it is acting as a Broker. In addition, many Shippers might require brokers to represent that they have the requisite operating authority to sell, provide, or arrange for transportation by motor carrier for compensation pursuant to applicable laws and regulations. (See 49 USC § 13102(2)). In addition to the above, such language may help to eliminate any confusion as to whether the broker is acting as a broker (rather than a carrier) under the agreement.

SAMPLE: Broker represents that it holds valid and currently effective licenses and permits required by federal, state, local and foreign authorities as applicable, to arrange as a property broker for third party Carriers to provide transportation of freight. Under no circumstances shall Broker be deemed to be acting as a motor carrier. Broker shall not itself perform the actual physical transportation of Shipper's shipments as a motor carrier.

Termination for Any Reason, for Convenience, or Without Cause

There are different ways to say that a party may terminate a contract for any reason. You could say that a party may terminate "for convenience." That phrase originated in government contracts but has come into more general use, perhaps because it doesn't sound threatening. But "convenience" is an odd word that doesn't capture the variety of reasons for which a party might want to terminate. And a counterparty could conceivably argue that you may terminate for convenience only if the contract imposes some sort of burden. A clearer and simpler alternative is "for any reason." The associated implication that you may terminate whenever you want is sufficiently strong that you can do without "at any time." But for some kinds of contracts that provide for termination "for cause" (notably employment agreements), it's commonplace to refer to termination "without cause." Don't rely on "at its sole discretion" to express this meaning. It doesn't address causation clearly, and it could be argued that it's subject to the implied duty of good faith. You could simply say that a party may terminate by giving notice, but it would be prudent to refer to causation as well as timing. If the other party may terminate

for any reason (however that's expressed) and you're unable to negotiate it out of the contract, you could try to negotiate a notice period (if there is none) or a longer notice period. For more information, See A Manual of Style for Contract Drafting (4th ed. 2017) ¶¶ 13.795–.806 (regarding ""termination or convenience""); ¶¶ 224–.257 (regarding ""at its sole discretion""). SAMPLE: Acme may terminate this agreement for any reason by giving the Vendor at least 30 days' prior notice.

Termination: Breach of Obligation

It's standard for contracts to say that breach of an obligation under the contract is grounds for termination. One issue is that in a contract involving an ongoing commitment, parties are unlikely to want to give the other party the freedom to terminate for minor breaches. In that context, it's conventional to include a materiality standard, and courts are likely to require the terminating party to show that the breach was a major one. Another issue is whether a breaching party has the opportunity to cure its breach. That's covered by the Sifter Curing Breach. SAMPLE: Either party may terminate this agreement and without notice if the other party has materially breached any provision of this agreement.

Third-Party Beneficiaries: None or Intended

A transportation contract might say that no one other than a party to the contract is an intended beneficiary under that contract. It's worth including such a provision if there's a risk of affiliated companies of the shipper or the shipper's consignees claiming benefits under the contract. SAMPLE: Except as stated in this agreement, no one other than a party is granted (1) any discretion under this agreement, (2) any right to satisfy a condition under this agreement, or (3) any remedy under this agreement.

Low Priority

Amendment: Unilateral

A contract for transportation services might specify that one of the parties may amend the contract without the other party's consent. That can be problematic. To reduce the risk of any such amendment being held unenforceable, it should be a condition to amendment that the party amending the contract provide advance notice to the other party. If the parties continue to operate under the contract, that would likely be deemed to constitute acceptance of the amendment. SAMPLE: Acme may amend this agreement by giving you at least 30 days' prior written notice. If you use the Service after an amendment has taken effect, you will be deemed to have accepted that amendment.

Insurance: Environmental or Pollution

Shippers might ask a broker to confirm that carriers have insurance coverage for environmental or pollution costs. Carriers that transport hazardous substances must meet minimum requirements for insurance under federal law (see 49 CFR §387.9). Even incidents involving nonhazardous substances might result in claims for environmental cleanup costs. If such insurance is required by law or under a contract, brokers should make sure that carriers they use have appropriate coverage and that their coverage meets the shipper's or the broker's specifications. SAMPLE SHIPPER MIGHT USE: The Broker shall require in any contract with a Carrier that the Carrier maintain environmental or pollution liability coverage in types and amounts sufficient to cover any work performed on behalf of the Shipper, but not less than $5 million per incident.

Insurance: No Representation That Coverage Is Adequate

Because the amount of insurance required in a contract might not be sufficient to adequately cover the broker's liability, a shipper might want the broker to acknowledge that the minimum insurance amounts required don't limit the broker's liability to that amount. The shipper might also ask the broker to require carriers to acknowledge as much in the broker's contracts with carriers. SAMPLE SHIPPER MIGHT USE: The Broker acknowledges that the types and amounts of insurance provided for in this contract might not be adequate to protect the parties' interests and that the insurance limit amounts do not limit the Broker's liability under this contract. Broker shall require in its contract with Carriers that each Carrier acknowledges that the types and amounts of insurance provided for in that contract might not be adequate to protect the parties' interests and that the insurance limit amounts do not limit that Carrier's liability.

Insurance: Physical Damage

Physical damage insurance covers damage to equipment, namely tractors and trailers. To address concerns about liability and equipment capacity, shippers might want brokers to commit to requiring that carriers state that their equipment is covered by physical damage insurance. A broker that makes this commitment should make sure that each carrier makes that statement in its agreement with the broker. SAMPLE SHIPPER MIGHT USE: Broker shall require in any contract with a Carrier that the Carrier maintain physical damage insurance covering all tractors and trailers leased to or operated, maintained, or used by Carrier in an amount sufficient to cover the replacement cost of that equipment used in the service of the Shipper.

Insurance: Waiver of Subrogation

Subrogation allows an insurer who pays an insured for losses caused by another to sue that other person for the insured's loss. For example, if a carrier suffers a loss, the carrier's insurance company might pay for the loss and then seek reimbursement from another—perhaps a shipper—that might be entirely or partly responsible. To avoid this, the shipper might require both the broker and any carriers with which the broker contracts to add to all relevant broker and carrier policies a waiver of subrogation, which is an endorsement that prohibits an insurance carrier from recovering from another person what they paid on a claim. A broker might also want to ask carriers to waive subrogation in favor of the broker. SAMPLE SHIPPER MIGHT USE: The Broker shall include a waiver of subrogation in all insurance policies required under this contract. The Broker shall require in its contracts with Carriers that all insurance that a Carrier is required to carry under that contract must include a waiver of subrogation in favor of the Shipper.

Payment Terms: Price Adjustment, References To

A shipper might want to fix the broker's rates for a stated period or prohibit rate increases. In that case, brokers should consider including the right to terminate if the parties don't agree on rates and should include a similar provision in broker's contracts with carriers. SAMPLE: If the Broker proposes a rate adjustment during the initial term or thereafter and the Shipper does not respond to that proposal in the 30 days after the date of the proposal, the Shipper will be deemed to have accepted the proposed rate adjustment. If the Shipper rejects that proposed rate adjustment, the Broker may terminate this contract effective ten days after notifying the Shipper.

Retention Period for Records

A shipper might ask a broker to preserve records during the term of the contract and for a period afterward (which might exceed the federal regulatory requirements), and the broker might want to

include such a provision in its standard broker-carrier contract. 49 CFR § 379 regulates preservation of records by carriers, brokers, and household goods freight forwarders and says what categories of records must be retained, what procedures must be followed, and how long the records must be retained. With that said, parties can agree to additional requirements and longer preservation times. Such provisions are often accompanied by a provision giving the shipper the right to inspect the broker's records. Preserving records is important and necessary for brokers because these records are often used to show that a broker has complied not only with the records preservation requirements but also with the economic and safety regulations promulgated by the Federal Motor Carrier Safety Administration. SAMPLE SHIPPER MIGHT USE: The Broker shall retain in accordance with 49 CFR § 379 all records relating to services performed under this agreement.

Shipping: Carrier Authority

Under 49 USC § 13901, a carrier is required to specify, in writing, the authority under which it is providing transportation or service—in other words, that it's acting as a motor carrier. A shipper might require in the broker's contracts with carriers that the carrier states it has the operating authority required to operate lawfully as a motor carrier in interstate commerce. Even if a shipper doesn't require such a statement of fact, it would be prudent for the broker to make sure its broker-carrier contract includes it. SAMPLE SHIPPER MIGHT USE: The Broker shall require in its contracts with Carriers that the Carrier states that it holds valid and currently effective licenses and permits required by all relevant federal, state, and local authorities to provide interstate motor carrier transportation services.

Shipping: Exceptions to Carrier Liability for Cargo Loss and Damage

Under the Carmack Amendment (49 USC §14706) a property broker isn't liable for loss or damage to the cargo, and generally a broker wouldn't accept that liability. Assuming the broker hasn't waived Carmack liability for a carrier, if the shipper can prove that the carrier received the cargo in good condition and delivered it damaged, the carrier is liable for the loss or damage to the cargo unless one of the recognized exceptions to carrier liability applies. The five recognized exceptions are (1) an act or default of the shipper, (2) an act of god, (3) the public enemy, (4) the public authority, or (5) the inherent vice of the goods. Even if one of the five recognized exceptions to carrier liability does not apply, a shipper should be mindful of its obligation to mitigate the loss. Shippers sometimes ask brokers to have carriers waive the shipper's duty to mitigate its losses in the broker's contract with carriers. Whether the shipper asks for inclusion or not, brokers should incorporate into their broker-carrier contracts language that imposes Carmack liability onto the carriers and include language addressing the recognized exceptions to such liability. SAMPLE SHIPPER MIGHT USE: Broker shall require in its contracts with Carriers that the Carrier is liable for cargo loss and damage under the Carmack Amendment, subject to the Carmack Amendment exceptions, namely an act or default of the shipper, an act of god, the public enemy, the public authority, and the inherent vice of the goods.

Shipping: Insurance Exclusions Do Not Affect Carrier Liability

A carrier's insurance policy might contain exclusions, often relating to cargo, that eliminate or narrow the coverage provided. Because carriers, not brokers, are typically liable for cargo loss and damage, a shipper might want to know what is and isn't covered by the carrier's insurance. Shippers might ask brokers to say in broker-carrier contracts that even if a carrier's insurance policy has exclusions, the carrier will still be liable for loss or damage to cargo. Even if a shipper doesn't require that, a broker might nevertheless want to include it in its broker-carrier contracts to protect the shipper's interests—or its own, if it has

agreed to assume liability for cargo claims. Common cargo-related exclusions relate to failure to maintain temperature controls, damage not caused by an accident, damage due to theft or employee dishonesty, clean-up or pollution-related expenses, special or consequential damages, delay, and infestation by pests. If a loss isn't covered by the carrier's insurance, it might be more difficult for the shipper to collect on the claim. SAMPLE SHIPPER MIGHT USE: The Broker shall require in its contracts with Carriers that the Carrier's cargo insurance policy not exclude coverage for fraud, infidelity, or dishonesty or criminal acts of the Carrier or its employees or agents and that any exclusions in the Carrier's cargo insurance policy not limit the Carrier's liability.

Shipping: Intermodal Transportation

Intermodal transportation involves two or more means of transportation—for example, rail and truck. Intermodal transportation might involve complex issues relating to containers and chassis, including cargo loss and damage, maintenance and repair, breaking of seals, and liability for theft.

SAMPLE: This agreement will not apply to intermodal transportation (incorporating transportation by air, ocean, or rail) unless the parties supplement this agreement to incorporate terms governing intermodal transportation.

Shipping: Seals, Breaking Of

Seals might be intentionally or unintentionally broken in transit for a variety of reasons. For example, a seal might be broken by a regulatory agency or by a carrier to check how the cargo has been loaded and secured. A shipper might specify in the broker-shipper contract in what circumstances a seal may be broken and might require the broker to include that in broker-carrier contracts. For example, a shipper might require that the carrier note in freight documentation that the seal was broken or might require that the carrier ask in advance for permission to break a seal. Even if the shipper doesn't ask that the broker do so, brokers might want to include such provisions in their standard broker-carrier agreement.

SAMPLE SHIPPER MIGHT USE: The Broker shall state in its contracts with Carriers that (1) a Carrier may break a seal (A) to comply with the law, (B) if required by a governmental agency or court order, or (C) if necessary to inspect, secure, reposition, or protect the cargo and (2) the Carrier must record any such incident, immediately notify the Broker of it, and note any new seal number on the bill of lading.

Shipping: Seals, Noting Seal Number

Shippers may ask the broker to require each carrier retained by it to note the seal number on the Bill of Lading for purposes of verifying the integrity of the seal. If so, you should include this provision in your broker/carrier agreement. SAMPLE SHIPPER MIGHT USE: Broker shall require in its contracts with Carriers that each Carrier secure every trailer with a seal and to note the seal number on the Bill of Lading.

Shipping: Seals, Using on Trailers and Containers

Many shippers, particularly those that have products intended for animal or human consumption, may want the broker to require the carriers retained by it to apply a seal to each load. Shippers may even have detailed seal policies that they want the broker to incorporate into contracts with carriers that dictate the type of seal that must be used, among other things. Such seal policies are often attached as an exhibit to the contract between the broker and the carrier. Because broken seals are a thorny cargo claims issue that may result in disagreements between the shipper and carrier, brokers should ensure that they incorporate any such shipper requirements into contracts with carriers. SAMPLE SHIPPER

MIGHT USE: Broker shall require in its contracts with Carriers that the Carrier secure every trailer with a seal and note the seal number on the bill of lading.

Termination: Change of Control

In high-value transactions that provide for an ongoing commitment, a party might want the right to terminate the contract if there occurs a change of control of the other party, as that could significantly change the nature of the relationship. SAMPLE: If after a Change of Control of a party the other party notifies that party that it wishes to terminate this agreement in accordance with this section 8.3, this agreement will terminate at midnight at the end of the 30th day after the day that party receives that notice.

Termination: Lead-In

A contract might list grounds for termination preceded by an introductory phrase. This Sifter looks for that introductory phrase as a way of flagging the list. SAMPLE: Either party may by written notice to the other terminate this agreement if any of the following events occur: