

**Special Symposium Edition:
Third Party Surface Transportation –
Common Issues and Recent Trends**

**Legal, Practical, and Economic Aspects of Third
Party Motor Carrier Services: An Overview**

James C. Hardman*

TABLE OF CONTENTS

I. Introduction.....	238
II. Brokers	239
III. Freight Forwarders	240
IV. Shipper Agents	241
V. Logistics Company	241
VI. Supply Chain Management.....	242
VII. Identifying Roles.....	242
VIII. Freight Charges	243

* James C. Hardman has specialized in transportation law over his forty-six year legal career. He has argued before the United States Supreme Court and courts and administrative agencies across the country. He has written three books and numerous business and law review articles on business and law subjects and has been named to Marquis' "Who's Who in America." He has also been active in professional and industry organizations, receiving Life Time Achievement Awards from the Transportation Lawyers Association, the Truckload Carriers Association, and the Minnesota Trucking Association. He received both an MBA and a JD from Northwestern University and is currently engaged in private law practice in Little Canada, Minnesota.

IX. Cargo Loss and Damage Claims	245
X. Insurance	247
XI. Contracts	249
XII. Antitrust Concerns	250
XIII. Public Liability Concerns	251
XIV. Avoiding Problems	252
XV. Dealing With Problems	254
XVI. Alternative Dispute Resolution	255
XVII. Conclusions	260

I. INTRODUCTION

Economic deregulation of the motor carrier industry in 1980¹ had many effects on the nature of the service performed, the number of carriers and equipment capacity flowing into the marketplace, and also in the growth and importance of third-party providers.² Most new motor carriers were single-operator entities or those with limited fleets.³ Because new grants of Certificates of Public Convenience and Necessity or Permits allowed the carriage of general commodities, with limited exceptions, to points in the United States,⁴ carrier management in the new companies, as well as those who were attempting to expand their operations, frequently did not have the time, money, or ability to develop sales staffs to capture the type and volume of freight movements to produce profitable operations.⁵ Where trip leasing⁶ and interlining/interchange⁷ played a significant role in many carrier operations prior to deregulation, these alternative sources of business became less common as carriers

1. Motor Carrier Act of 1980, Pub. L. No. 96-296, §§ 1-3, 94 Stat. 793 (1980).

2. See Paul S. Dempsey, *The Empirical Results of Deregulations: A Decade Later, and the Band Played On*, 17 *TRANSP. L.J.* 31, 34-43 (1998); See NICHOLAS A. GLASKOWSKY, *EFFECTS OF DEREGULATION ON MOTOR CARRIERS 1-3* (Wilbur S. Smith ed., Eno Found. for Transp. 1986) (1986).

3. See Charles E. Nadeau, *Carriers: Federal Regulation of Motor Transportation Brokers*, 36 *MICH. L. REV.* 963, 963 (1938).

4. See 49 U.S.C. § 13902 (2007) (Authority issued to common carriers was by a Certificate of Public Convenience and Necessity and contract carriers were issued a document referred to as a Permit. The distinction between common and contract carriers has been eliminated and all regulated motor carriers are registered merely as a motor carrier); see also 49 U.S.C. § 14101(b) (2007) (stating that motor carriers can provide transportation under contract by choice).

5. See generally Glaskowsky, *supra* note 2.

6. See 49 C.F.R. § 376.22 (2007) (This practice allows a regulated motor carrier to lease its equipment to another regulated motor carrier with driver services for a single trip which had to be in the general direction of an authorized point or territory the lessor-carrier was authorized to serve. Currently, there is no directional requirement and successive trips can occur between the carriers).

7. See 49 C.F.R. § 376.31 (2007).

could provide the service they either previously trip-leased or interlined directly through themselves when authority became available.

Freight brokers fulfilled a role that many carriers needed and desired, for instance, to find freight from shippers throughout the United States and have it available when and where the carriers needed it. They substituted for carriers' sales and marketing personnel. There were also advantages in dealing with brokers as opposed to trip leasing, as brokers eliminated the need for equipment inspections, leases, and identifying the equipment required under trip leasing regulations and case law.

Shippers, rather than dealing with the multiple carriers now in the marketplace, could outsource the costly functions of locating the carriers, investigating them, contracting with them, and otherwise dealing with them by merely working with a broker or minimal number of brokers. Similar advantages existed in terms of using freight forwarders. By assembling less-than-truckload (LTL) freight from multiple shippers, the shippers' freight could be moved by the bulging truckload carrier population at lower costs than shipping on an LTL basis where fewer carriers competed and service was frequently higher priced because of union wages and work rules. Other entities called "logistics companies" ultimately came into existence with the rise of intermodal services,⁸ "just-in-time" service,⁹ the demise of tariffs,¹⁰ and technology advances. In the current environment, these third-party intermediaries have established themselves as valuable contributors to movement of freight and, while growth may not be as rapid as in the past twenty years, there is no reason to believe that they will not be a continuing force in transportation.¹¹

II. BROKERS

A federally regulated freight "broker" is defined as "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent, sells, offers for sale, negotiates for, or holds itself out

8. See, e.g., Improvement of TOFC/COFC Regulation, Ex Parte No. 230 (Sub-No. 5), 364 I.C.C. 731 (1981) ("Trailer-on-flat-car" and "container-on-flat-car" transportation was deregulated in the 1980s and early 1990s, which created the opportunity for expansion); see also *Am. Trucking Ass'n v. ICC*, 656 F.2d 1115, 1122 (5th Cir. 1981); see also Richard W. Palmer & Frank P. DeGiulio, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 TUL. L. REV. 281, 300 (1989).

9. See Wikipedia.org, Just in Time (Business), http://en.wikipedia.org/wiki/Just_In_Time_%28business%29 (last visited Mar. 17, 2007) ("Just-in-time" service is a practice designed to eliminate or decrease warehousing and have materials and supplies move directly from the delivery truck into the production or processing line of the receiver).

10. 49 U.S.C. § 13702 (2007) (At the current time, tariffs are only required for the movement of household good and in non-contiguous domestic trade, with some exceptions).

11. 3 I.C.C.2d 689, 690 (1987) (Before deregulation of motor carriers in 1980, there were less than 100 licensed brokers and by 1987 there were over 5000 licensed brokers).

by solicitation, advertisement, or otherwise as selling, providing, or assigning for, transportation by motor carrier for compensation.”¹² A broker normally does not have a direct role in assembling LTL quantities of goods into truckloads or in the carriage of the freight.¹³ A broker is thought of as an independent party who acts as a middleperson between carriers and the shipping public.¹⁴ Registration is required with the Federal Motor Carrier Safety Administration¹⁵ and the broker is required to provide security to the public¹⁶ and appoint registered agents for service of process in the state or states in which it contracts.¹⁷ Regulations also govern certain aspects of brokers’ operations including advertising, record keeping, and accounting.¹⁸

III. FREIGHT FORWARDERS

A federally registered¹⁹ surface freight forwarder arranges for transportation, and (1) plays a role in the assembly, consolidation, break bulk and distribution of freight,²⁰ (2) assumes responsibility and liability for transportation from the place of receipt to the place of destination, and (3) uses regulated interstate carriers for any part of the transportation.²¹ There are differing opinions as to whether all criteria must be met to satisfy the statutory requirement,²² or whether the mere proffer of the services meets the statutory provision.²³

Like brokers, freight forwarders must also register with the Federal

12. See 49 U.S.C. § 13102(2) (2007) (defining “broker”); see also 49 C.F.R. § 371.2(d) (2007) (defining “non-brokerage service”).

13. *Transp. Revenue Mgmt., Inc. v. First NH Inv. Servs. Corp.*, 886 F. Supp. 884, 886 (D. C. 1995).

14. *Reiter v. Cooper*, 507 U.S. 258, 261 (1993) (A broker is generally thought to be an independent contractor, but sometimes may be considered a shipper’s agent); see also *Gelfand v. Action Travel Ctr., Inc.* 563 N.E.2d 317, 319 (Ohio Ct. App. 1988).

15. See 49 U.S.C. § 13904 (2007).

16. See 49 C.F.R. § 387.307(a) (2007).

17. 49 U.S.C. § 13303 (2007).

18. See 49 C.F.R. §§ 371.1-.13 (2007).

19. See Jeffrey S. Wood, *Intermodal Transportation and the Freight Forwarder*, 76 *YALE L.J.* 1360, 1367-73 (1967) (Freight forwarders also exist in terms of air freight or ocean freight movements and may exist in terms of surface freight).

20. See *Chemsource, Inc. v. Hub Group, Inc.*, 106 F.3d 1358, 1361 (7th Cir. 1997) (The term “assemble and consolidate” was interpreted to mean “the assembly or consolidation of less than carload quantities into carload shipments”).

21. 49 U.S.C. § 13102(8) (2007).

22. See *Chemsource Inc.*, 106 F.3d at 1361 (holding that all statutory criteria must be met); see also *Indep. Mach., Inc. v. Kuehne & Nagle, Inc.*, 867 F. Supp. 752, 758-59 (N.D. Ill. 1994) (holding that all statutory criteria must be met).

23. See *Phoenix Assurance Co. v. K-Mart Corp.*, 977 F. Supp. 319, 325 (D. N.J. 1997) (holding that “to qualify as a ‘freight forwarder’ one need not perform all of the functions authorized under the statute, as long as the party ‘proffers all of the services’”).

Motor Carrier Safety Administration (FMCSA)²⁴ and are subject to security provisions.²⁵ The freight forwarder is generally considered a “shipper” to the carrier and the “carrier” to the shipper.²⁶ While the freight forwarder would generally be thought of as an independent contractor,²⁷ particularly if it services multiple shippers,²⁸ depending upon the particular freight services provided,²⁹ it could be considered an agent of the shipper.³⁰

IV. SHIPPER AGENTS

Shipper Agents arrange transportation on behalf of a shipper, and generally do not have to register with the FMCSA.³¹ An agent has a continuing relationship with the shipper and, under contract, functions as part of the shipper’s organization, performs duties under the direction of the shipper in a status similar to an employee, and cannot exercise discretion in awarding traffic to a motor carrier, broker or freight forwarder.³² In this respect, the shipper emulates the definition of bona fide agents of motor carrier. The non-discretionary allocation of traffic between competing carriers assists in determining whether an agency relationship exists.

V. LOGISTICS COMPANY

The word “logistics” is not the subject of any particular statutory or common law definition. It may involve some or all of the services of a carrier, a broker, a freight forwarder, an agent, a warehouseman, a custom broker, or others providing some function related to the movement of freight. Except where the logistics company provides a regulated service such as carrier, broker or freight forwarder, no registration is required.³³

24. See 49 U.S.C. § 13903 (2007).

25. See 49 U.S.C. § 13906(c)-(f) (2007).

26. See 14 AM. JUR. 2D *Carriers* § 651 (2007) (“a freight forwarder . . . assumes responsibility for the shipment from receipt to the place of destination”).

27. *Koninklijke Nedlloyd BV v. Uniroyal, Inc.*, 433 F. Supp. 121, 128 (S.D. N.Y. 1997).

28. See *Consol. Freightways Corp. of Delaware v. Admiral Corp.*, 442 F.2d 56, 63 (7th Cir. 1971).

29. See *Constructores Tecnicos, S. de R.L. v. Sea-Land Serv., Inc.*, 945 F.2d 841, 846 (5th Cir. 1991).

30. See *Zenith Elecs. Corp. v. Panalpina, Inc.*, 68 F.3d 197, 199, 201-02 (7th Cir. 1995) (holding that a forwarder can be deemed an agent of the shipper).

31. See Mark J. Andrews, *The Old “ICC Broker Regs” Alive and Well, or at Least Alive*, THE LOGISTICS JOURNAL, Jan. 2003, at 5.

32. See 49 C.F.R. § 371.2(b) (2007); see also Prop. Broker Practices, 132 M.C.C. 233 (Sept. 29, 1980).

33. See generally Andrews, *supra* note 31.

VI. SUPPLY CHAIN MANAGEMENT

Frequently referred to as 4PL, supply chain outsourcing is an outgrowth of the logistics industry and involves an integrator who directs a client and selects teaming partners.³⁴ The 4PL assembles and manages the resources, capabilities, and technologies of its own organization with those of complementary service providers to deliver a comprehensive supply chain status.³⁵ As one observer noted, supply chain management (SCM) “is truly a closed loop pipeline that starts with customer needs and raw materials and ends with customer satisfaction and a sustained environment. SCM is a pipeline that moves all its outcomes in two directions – not only product-flow but also information-flow and financial-flow.”³⁶ Like the logistics company, a 4PL is not regulated except to the extent it performs a regulated service such as motor carriage, brokering, freight forwarding or other functions such as warehousing.³⁷

VII. IDENTIFYING ROLES

The cross fertilization among the various disciplines involved in moving freight from “here” to “there” has created numerous legal issues, starting with the role the participants in the movement play and how this affects such issues as the collection of freight charges, responsibility for loss or damage of freight, public liability, and antitrust considerations. Due to diverse legal consequences flowing from the provider’s status as carrier or transportation intermediary, it is important to clarify and determine such status at the outset. A starting point in deciding the issue should begin with the agreement between the parties. When the shipper and the other party agree to a movement, it should be clear whether the individual or entity to which the freight movement is tendered is acting as a carrier or third-party intermediary and what status the intermediary is taking. The decision should be predicated on the exact functions the parties will perform.

Courts will look beyond the “titles” assigned by the parties to what tasks are actually held out³⁸ or performed.³⁹ This is true even if the par-

34. See Helen Richardson, *What are you Willing to Give Up?* 46 LOGISTICS TODAY 27, 27 (Mar. 1, 2005).

35. See *id.*

36. Edward J. Marien, *SCM & Logistics: What’s the Difference?* (Feb. 2003), available at http://www.inboundlogistics.com/articles/features/0203_feature02.shtml (last visited Mar. 17, 2007) (scroll to “Here’s what some Inbound Logistics readers had to say”) (Quote from Dan Kraska, responding to cited survey by Inbound Logistics).

37. See generally Richardson, *supra* note 34.

38. See *United States v. California*, 297 U.S. 175, 181 (1936); *ENSCO, Inc. v. Weicker Transfer & Storage Co.*, 689 F.2d 921, 925 (10th Cir. 1982).

39. *Phoenix Assurance Co. v. K-Mart Corp.*, 977 F. Supp. 319, 324 (D. N.J. 1997) (holding that the defendant’s conduct, not its title, determined its status as a freight forwarder).

ticular party does not have the requisite registration to perform the service.⁴⁰ The failure to identify the roles of the parties can lead to unintended consequences that will be discussed subsequently.

VIII. FREIGHT CHARGES

The subject of freight charges involves application of various statutory and regulatory provisions,⁴¹ and case law concerning disputes over freight charges is usually complex and fact specific. In a typical situation, a broker has failed to pay the carrier although the shipper had made payment to the intermediary and the carrier seeks payment directly from the shipper. Recovery may depend upon whether the broker was acting as an agent for the shipper or as an independent contractor.

In *Consolidated Freightways Corp. v. Admiral Corp.*, the carrier sued a consignee for charges when the broker failed to pay its freight charges.⁴² The court found that the broker had not acted as the consignee's agent as the consignee had no control over the broker's business and the broker's remuneration was based on individual shipments.⁴³ The fact that the broker had other customers, selected the carriers, and prepared the bills of lading was also considered in the decision.⁴⁴ The motor carrier conveyed its intention to seek freight charges from the broker and did so until the broker defaulted.⁴⁵ The motor carrier then sought redress against the shipper for such freight charges, and the legal principle of equitable estoppel was applied.⁴⁶ The shipper was found to have acted in good faith on the actions of the carrier in paying the freight charges to the broker and thus, under the principle of equitable estoppel, was not required to pay a second time.⁴⁷ Equitable estoppel has been applied in various broker cases,⁴⁸ but there are several decisions to the contrary.⁴⁹

40. *Id.* at 326.

41. See 49 U.S.C. § 13710 (1996) (primary jurisdiction of the dispute). See also 49 U.S.C. § 13710(a)(3)(B) (1996) (billing and collections practices); 49 U.S.C. § 14705 (2007) (limitation periods); 49 C.F.R. § 378 (2007) (overcharge, unidentified payments, duplicate payments and overcollection); and 49 U.S.C. § 80101 (2007) (bill of lading terms).

42. *Consol. Freightways Corp. of Delaware v. Admiral Corp.*, 442 F.2d 56, 58 (7th Cir. 1971).

43. *Id.* at 63.

44. *Id.*

45. See *id.* at 58.

46. *Id.* at 58, 62-63.

47. *Id.*

48. *ANR Freight Sys., Inc. v. Weldbend Corp.*, No. 90 C 1948, 1993 WL 88086, at *3 (S.D. Ill. Mar. 22, 1993); see also *S. Refrigerated Transp. Co. v. R.L.N. Traffic Unltd.*, No. 83 C 2741, 1985 WL 941, at *3 (N.D. Ill. Apr. 23, 1985); *Farrell Lines Inc. v. Titan Indus. Corp.*, 306 F. Supp. 1348, 1351 (S.D.N.Y. 1969), *aff'd*, 419 F.2d 835 (2d Cir. 1969); *Olson Distrib. Sys., Inc. v. Glasurit Am., Inc.*, 850 F.2d 295, 297 (6th Cir. 1988); *Inman Freight Sys., Inc. v. Olin Corp.*, 807 F.2d 117, 121 (8th Cir. 1986).

It should be noted that the referenced cases all involved a dependence upon the broker having the status of an independent contractor relationship with the shipper.

If a broker is found to be an agent of a disclosed shipper-principal, the shipper will be bound by the commitments of its agent and will be liable for the payment of freight charges to the carrier even if it already paid the broker.⁵⁰ In the case of freight forwarders, the shipper deals only with forwarder. The forwarder then issues its bill of lading to the shipper and the carrier issues its bill of lading to the freight forwarder. There is no privity of contract between the shipper and the carrier, and it would be more difficult to collect freight charges than in the brokerage situation unless an agency situation existed. Freight forwarders have been found to be both agents of the shipper⁵¹ and independent contractors,⁵² depending on the facts of the particular freight movement scenario.⁵³

In *National Shipping Co. of Saudi Arabia v. Omni Lines*, the court held a shipper liable to the carrier even though the shipper had already paid a freight forwarder.⁵⁴ After noting that intermediaries have few assets and that carriers have a contractual right to expect payment from the shipper under a bill of lading, the court found:

Carriers must expect payment will come to the shipper, although it may pass through the [intermediary's] hands. While the carrier may extend credit to the [intermediary], there is no economically rational motive for the carrier to release the shipper. The more parties that are liable, the greater the assurance for the carrier that he will be paid.⁵⁵

Henry Seaton, in a recent article in the *Commercial Carrier Journal*, discussed some of the steps that a carrier may take to make sure the broker or freight forwarder is considered an agent of its shipper/customers and that freight charges will be paid:

1. Provide in the contract that the broker must comply with federal regulations requiring segregation of funds.

49. *Ranger Transp., Inc. v. Wal-Mart Stores*, 903 F.2d 1185, 1187 (8th Cir. 1990); *see also Missouri Pac. R.R. Co. v. Ctr. Plains Indus., Inc.*, 720 F.2d 818, 819 (5th Cir. 1983); *Nat'l Shipping Co. of Saudi Arabia v. Omni Lines, Inc.*, 106 F.3d 1544, 1546 (11th Cir. 1997).

50. *See Farrell Lines Inc.*, 306 F. Supp. at 1351; *cf. Metro Shippers, Inc. v. Life Savers, Inc.*, 509 F. Supp. 606, 614 (D. N.J. 1980) (establishes that the duty of loyalty and obligation to account for funds paid goes from the agent to the principal).

51. *Zenith Elecs. Corp. v. Panalpina, Inc.*, 68 F.3d 197, 199, 202-03 (7th Cir. 1995).

52. *Koninklijke Nedlloyd BV v. Uniroyal, Inc.*, 433 F. Supp. 121, 128 (S.D. N.Y. 1997).

53. *Constructores Tecnicos, S. de R.L. v. Sea-Land Serv., Inc.*, 945 F.2d 841, 846 (5th Cir. 1991); *Consol. Freightways Corp. of Delaware v. Admiral Corp.*, 442 F.2d 56, 63 (7th Cir. 1971).

54. *Nat'l Shipping Co. of Saudi Arabia*, 106 F.3d at 1546-47.

55. *Id.* at 1547 (citing *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483, 490 (5th Cir. 1983)).

2. Contract to make the broker the guarantor of payments in case the shipper does not pay.
3. Have the carrier's name appear on the bill of lading as the carrier of record instead of the broker's name.
4. Do not accept "non-recourse" shipments.
5. Prepare a rules circular indicating recourse under the bill of lading and reference the circular in all contracts.
6. Send all invoices to the party liable for freight charges in care of the intermediary.
7. Request an accounting of the broker if timely payments are not being made and, if a timely response is not received, put the shipper on notice that you are preserving recourse to the shipper.⁵⁶

Another protection for carriers involves the constructive trust theory. This theory holds that the monies an intermediary receives from a shipper to pay freight charges are really the funds of the shipper and belong to the carrier that provided the service.⁵⁷ As a result, the carrier receives rights of a secured creditor in a shipper's bankruptcy proceeding.⁵⁸ This theory has also been used to the brokers' advantage in *New Prime Inc. v. Professional Logistics Management Co., Inc.*, where the court held that the broker was not obligated to pay the carrier unless it received funds from the shipper.⁵⁹

IX. CARGO LOSS AND DAMAGE CLAIMS

A frequently litigated issue between shippers and carriers involves liability for cargo loss and damage. The benchmark for this area of the law in terms of motor carrier interstate shipments is the Carmack Amendment to the Interstate Commerce Act.⁶⁰ The Carmack Amendment's operative provision reads: "A carrier . . . [is] liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by . . . the . . . carrier."⁶¹

56. Henry Seaton, *Don't Bank on Brokers: Protect Your Right to Seek Payment From Shippers*, 159 COM. CARRIER J. 21 (2002).

57. *Parker Motor Freight, Inc. v. Fifth Third Bank*, 116 F.3d 1137, 1139 (6th Cir. 1997); see also *Transp. Revenue Mgmt. v. Freight Peddlers, Inc.*, No. C.A.2:99-2585-23, 2000 WL 3339885 (D. S.C. 2000) (While Parker did not decide whether the "trust fund" theory extended to broker and logistics company, one commentator indicates "applying the Court's reasoning, an argument can be made that trust fund remedy is equally applicable to third-party brokers and logistics companies as well").

58. See *Parker*, 116 F.3d at 1139.

59. See generally *New Prime, Inc. v. Prof'l Logistics Mgmt. Co.*, 28 S.W.3d 898 (Mo. Ct. App. 2000).

60. 49 U.S.C. § 14706(a) (2007); 49 U.S.C. § 11706 (2007) (similar provisions apply to rail carriers); 49 U.S.C. § 15906 (2007) (similar provisions apply to pipeline carriers).

61. 49 U.S.C. § 14706(a)(1) (2007).

A broker is not considered a carrier for purposes of the Carmack Amendment,⁶² and thus any liability for freight charges must arise, if at all, under contract or common law. Perhaps the most prevalent way that a broker might assume freight loss liability is by contract. Shippers may exert pressure on the broker to be liable, or the broker may volunteer to undertake liability as a marketing tool. The contract should spell out the liability clearly, and both parties to the contract should understand such liability. A mere statement that XYZ broker will be liable for loss or damage to cargo is not the same as undertaking Carmack liability. Carmack liability involves special features developed by a long history of judicial interpretations as further discussed below.

Under Carmack, a plaintiff-shipper needs not prove negligence. Rather, a prima facie case of a carrier's liability is established by a preponderance of the evidence showing that the goods (1) were transported to the carrier in fine condition, (2) arrived damaged or were lost, and (3) resulted in a specific amount of damages.⁶³ Once the prima facie case is established, the burden shifts to the carrier to show that it was free of negligence and that damage or loss was caused⁶⁴ by the several specific causes that relieve the carrier of liability.⁶⁵

Another issue arising under Carmack includes consequential damages - losses or damages not arising from immediate actions of a party, but in unforeseeable consequence to such actions. Such damages involve attorneys' fees, missed appointments, goodwill business reputation, loss of use, loss of profits, penalties, and other similar items. Ordinarily, consequential damages are not available under the Carmack Amendment.⁶⁶

Several other issues arise in regards to broker liability under the Carmack Amendment. For instance, if a broker merely assumes liability for cargo damages or loss, does it accept the above liability? Will the broker be subject to the state law of choice or to laws of multiple states, which may have varying provisions regarding the burden of proof, standards for establishing negligence, defenses (if any), and damages? What rights does a broker have against a carrier if the broker assumes liability? Does Carmack apply when the broker is *not* the shipper? Will the right be one

62. See *Servicemaster Co. v. FTR Transp. Inc.*, 868 F. Supp. 90, 96 (E.D. Pa. 1994); *Prof'l Commc'ns, Inc. v. Contract Freighters, Inc.*, 171 F. Supp. 2d 546, 550 (D. Md. 2001); *Indep. Mach., Inc. v. Kuehne & Nagle, Inc.*, 867 F. Supp. 752, 761 (N.D. Ill. 1994); *Adelman v. Hub City Los Angeles Terminal, Inc.*, 856 F. Supp. 1544, 1547-48 (N.D. Ala. 1994).

63. *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964); *Fuente Cigar, Ltd. v. Rdway Express, Inc.*, 961 F.2d 1558, 1560 (11th Cir. 1992); *Indep. Mach.*, 867 F. Supp. at 758.

64. See *Missouri Pac. R.R. Co.*, 377 U.S. at 137 (the causes are: an act of God, the public enemy, the act of shipper, public authority, or the inherent vice or nature of the goods).

65. *Indep. Mach. Inc.*, 867 F. Supp. at 758.

66. *Contempo Metal Furniture Co. of California v. East Texas Motor Freight Lines, Inc.*, 661 F.2d 761, 765 (9th Cir. 1981).

of subrogation, subject to state law? Will the shipper cooperate in prosecuting the broker's attempt to recoup against the carrier, and if so, to what extent?

Apart from contractual liability, a broker might be liable to a shipper for loss of or damage to freight on a negligence theory, which is a tort cause of action.⁶⁷ However, under a negligence theory, the shipper would have the burden of proving negligence rather than the broker having to prove freedom from negligence or an excepted cause under Carmack. Since a broker is not directly involved in the actual movement, it may be difficult to find a broker liable for freight loss or damage on the basis of negligence, particularly if the broker does not appear as the "carrier" on the bill of lading.

At best, such liability of a broker might only arise under a negligent entrustment theory.⁶⁸ However, this theory involves "due care" in selecting a carrier, as subsequent breaches after the carrier is selected are generally not attributed to the broker.⁶⁹ In order to hold the broker directly responsible for a shipper's loss, the plaintiff must prove the broker's negligence.

A court might also hold a broker liable for loss of, or damage to, freight if the court determines on the facts that the broker was acting as the carrier or freight forwarder, rather than merely coordinating business between such entities.

X. INSURANCE

While brokers might not be responsible under Carmack for cargo loss or damage, many brokers will still assume responsibility (via contract) for losses on movements that the broker coordinates.⁷⁰ A broker often assumes responsibility to subsequently exert business pressure on the motor carrier to accept a claim and settle, even if such a settlement requires the broker to offset the revenues due the carrier to cover the claim.⁷¹ This type of business pressure on carriers may hurt or even terminate a business relationship, but most motor carriers probably acquiesce to the pressure eventually. Submission, however, may cause

67. *Profl Commc'ns, Inc.*, 171 F. Supp. 2d at 551.

68. *See Adelman v. Hub City Los Angeles Terminal, Inc.*, 856 F. Supp. 1544, 1548 (N.D. Ala. 1994).

69. *Chubb Group of Ins. Cos. v. H.A. Transp. Sys., Inc.*, 243 F.Supp.2d 1064, 1071 (C.D. Cal. 2002).

70. *See generally Maggard Truck Line, Inc. v. Deaton, Inc.*, 573 F. Supp. 1388 (N.D. Ga. 1983), *aff'd in part*, 783 F.2d 203 (11th Cir. 1986); *see also Franklin Stainless Corp. v. Marlo Transp. Corp.*, 748 F.2d 865, 868 (4th Cir. 1984).

71. *See Henry Seaton, Don't Accept Freight Charge Setoffs: The Practice is Potentially Lethal for Carriers*, 160 COM. CARRIER J. 16 (2003).

problems with the carrier's cargo insurer, particularly when there is a significant difference between the carrier's actual legal liability and the amount of the damages which the shipper asserts. Indeed, the broker, anxious to maintain the shipper's business, is often arguably only concerned with the shipper's demands.

Brokers often purchase their own cargo insurance. Commonly referred to as contingent cargo liability insurance, these insurance policies are legal liability policies that allow the broker's insurer to adjust and defend against cargo liability claims.⁷² Certain types of broker's insurance also pay for a motor carrier's failure to assume responsibility or satisfy claims for cargo liability.⁷³ William Augello, a renowned transportation attorney, notes that contingent insurers occasionally disavow liability on the grounds that the broker had no insurable interest.⁷⁴ To avoid this result, Mr. Augello suggests that the shipper and broker enter into a contract whereby the broker assumes liability for the transit losses that would generally create such an interest.⁷⁵ While this solution may resolve the problem Mr. Augello addresses, the broader issue is whether encouraging shippers to look to the broker for settlement of cargo claims will erode the shipper's historically strong claim status against carriers.

Why would anyone, except possibly shippers that demand as much coverage as possible, want a freight broker to assume the liabilities of a motor carrier? One reason may be that a competent broker will investigate and know the carriers with whom he is doing business and have a contract with such carriers that spell out cargo liability terms for loads they are handling for a mutual customer.

By law, motor carriers are liable for the care and custody of freight entrusted to them and should therefore be considered the first line of recovery. Freight forwarders liable under Carmack, however, are required to have cargo insurance including a Freight Forwarder Endorsement Form.⁷⁶ Thus, to the extent the loss or damage was caused by a motor carrier with whom the freight forwarder contracted, the freight forwarder would have a right of indemnity and/or contribution against the carrier.⁷⁷

Cargo insurance, primary or contingent, must be evaluated by bro-

72. *See id.*

73. *See id.*

74. William J. Augello, *A Breakthrough for Truck Brokers*, LOGISTICS MANAGEMENT DISTRIBUTION REPORT, Vol. 38, Issue 10 (Cahners Publ'g Co. Oct. 31, 1999, at 35)

75. *Id.*

76. 49 C.F.R. § 387.403(a) (2007).

77. *See* U.S.C. § 14706(a) (2006); *see, e.g.*, *Season-All Indus. Inc., v. Merch. Shippers*, 417 F. Supp. 998, 1004 (W.D. Pa. 1976).

kers and freight forwarders based on a logical evaluation of the risks involved and the insurance product itself - a task which may be eased by consultation with insurance counsel or consultants and insurance brokers or agents.

XI. CONTRACTS

The transportation contract, which is a defining element of the shipper-carrier relationship, should play a similarly central role in third-party operations. While contracts between shippers, carriers, and third parties will not necessarily override the transportation activities and their related legal consequences, it is important to have a sound, well-drafted contract that can serve as a road map for conducting day-to-day operations and providing opportunities for mutual economic success.

The volume and diversity of contracts used in the world of logistics makes contract negotiations and review a time-consuming and costly task and frequently leads one or both parties to execute contracts without fully understanding the ramifications. This lack of knowledge often leads to discord, litigation, and even economic devastation. The key to contract drafting is to create a document that eliminates costly and duplicative negotiations, hidden liabilities, and other problems resulting from poor drafting or a lack of understanding the legal consequences that such contracts may bring with them.

To remedy contract-drafting problems, the American Trucking Association (ATA), with the assistance of the Truckload Carriers Association and The National Industrial Traffic League (NITL), has drafted a model truckload shipper-carrier contract. Similarly, the Transportation Intermediaries Association (TIA) and the NITL have done the same with respect to a model broker-shipper contract.⁷⁸ The ATA-NITL contract has generally received good reviews and implementation of the standard form appears to be under way in the industry.⁷⁹ The TIA-NITL broker-shipper contract, however, has been criticized by the motor carrier segment of the industry and might not be used to the degree that its drafters had contemplated.⁸⁰ As a result of this criticism, the ATA issued its own draft model broker-shipper contracts that have yet to received broad acceptance.⁸¹

78. Nat'l Indus. Transp. League, Shipper Broker Transp. Agreement (2004), *available at* http://www.tianet.org/docs/interactiveTIANITLShipper_3PLContract.pdf (last visited Mar. 19, 2007).

79. *Id.*

80. American Trucking Ass'n, Motor Carriers Concerned About Model Broker/Shipper Contract, *available at* <http://www.truckline.com/NR/exeres/DF485755-6176-4802-BE16-698F613F2434.htm>.

81. American Trucking Ass'n, ATA Unveils Model Motor Carrier/Broker Agreements

The core difficulty posed by broker-shipper contracts is that these contracts should satisfy the demands of a three-way relationship – not merely the interests of brokers and shippers to the exclusion of carriers. Thus, in third-party operations it is essential that the interests of all three parties be considered in each contract in order to give each party an opportunity to negotiate for satisfactory provisions even though only two parties sign each contract.

XII. ANTITRUST CONCERNS

Parties to third-party motor carrier contracts frequently overlook antitrust issues arising from certain forms of cooperation. Third-party operations generally raise significant antitrust issues, particularly with respect to logistics operations involving the opportunity and need for substantial contacts, cooperation, and information exchange between parties that would otherwise be competitors. Specifically, antitrust concerns arise when logistics companies:

1. request confidential price or cost related information which may flow between competing carriers, or
2. are subsidiaries or affiliates of motor carriers and frequently enter into actual or potential cooperative agreements with competitors of their parent or affiliated companies, or
3. as asset-based companies will operate their own motor carrier businesses as subsidiaries and enter into cooperative arrangements with actual or potential competitors, or
4. partner with other logistics companies for particular business or customers, or
5. may simultaneously be serving two or more shippers that are competitors.

These “suspect” activities may lead to civil or even criminal liability when there is potential for:

1. price fixing through the logistics company as it negotiates and prepares logistics contracts, or
2. market allocations, or
3. unlawful group boycott against carriers who want to seek traffic directly from shippers or change terms of logistics company contracts, or
4. the unlawful exchange of information.⁸²

Given the penalties that antitrust violators face, logistics companies

(Aug. 15, 2006), available at <http://www.truckline.com/NR/exeres/7F828CD6-2E33-46A0-9886-4F524E80E653.htm>.

82. *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969) (exchange of price information among competitors constitutes a per se violation of the law); see also *Sugar Inst., Inc., v. United States*, 297 U.S. 553 (1936) (agreement among competitors to a uniform discount schedule, detention charges and similar items would also constitute a per se violation); see also *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970).

and shippers must take steps to avoid engaging in conduct that could lead to antitrust problems. For instance, the relationship between the logistics company and the shipper should reflect a general contractor structure where the logistics company is the shipper's exclusive or principal contractor and deals with each motor carrier individually so that each motor carrier has an incentive to act in its own economic self-interest. Specifically, the logistics company must take care not to provide its affiliated trucking companies (if any) with access to confidential information that may be supplied by non-affiliates. In such circumstances, a proverbial "Chinese Wall" should be constructed to ensure that this information remains confidential. Similar measures should be implemented for confidential cost-related information when the logistics company is providing services to a particular industry or group of industries. Parties involved in suspect activity should seek advice from antitrust specialists or attend relevant seminars to understand antitrust compliance and reduce the danger of antitrust prosecution.

XIII. PUBLIC LIABILITY CONCERNS

Third-party intermediaries are often exposed to public liability claims. There is authority for holding brokers and freight forwarders liable for conduct by carriers upon proof of:

1. a joint venture between the broker and carrier,⁸³
2. the existence of an agency relationship between the broker and the trucking company or its driver,⁸⁴ and
3. the broker's failure to determine whether the truck was properly licensed or insured.⁸⁵

While third-party intermediaries are not often held liable in public liability situations, the threat of such liability is real.⁸⁶ For instance, in a trial court ruling in Illinois, the court ruled that the broker-defendant was both a partner and a joint venturer with its contracting motor carrier whose driver caused a catastrophic accident; the court held the broker

83. See *Perkinson v. Manion*, 516 N.E.2d 977, 981 (Ill. App. Ct. 1987); *Johnson v. Pac. Intermountain Express Co.*, 662 S.W.2d 237, 241-42, 246 (Mo. 1983) (freight broker who engaged services of an independent trucker without operating authority held liable for negligent driving of operator of tractor-trailer under joint venture theory).

84. See *King v. Young*, 107 So.2d 751, 752 (Fla. Dist. Ct. App. 1958); see also *Tartaglione v. Shaw's Express, Inc.*, 790 F. Supp. 438, 440-41 (S.D.N.Y. 1992); *Gross v. Eustis Fruit Co.*, 160 So.2d 55, 56-57 (Fla. Dist. Ct. App. 1964) (A case involving a contention that a shipper's sales agent who used the services of a truck broker to arrange for a load was the truck driver's principal).

85. *Graham v. Malone Freight Lines, Inc.*, 948 F. Supp. 1124, 1134-37 (D. Mass. 1996).

86. See William D. Brejcha, et al., *Illinois Court Rulings Chill the For-Hire Broker Industry*, THE TRANSP. BRIEF, Vol. 9, No.3 (Autumn 2002), available at http://www.scopelitis.com/ps_attachment/attachment13.pdf (last visited Mar. 22, 2007).

jointly and severally liable together with the motor carrier for the deaths of the accident victims.⁸⁷

Tort liability of brokers might also arise under a theory of negligent aiding. For instance, a broker may be held liable for negligently aiding a carrier in violating federal law when it forces the carrier to violate safety regulations such as those which set maximum hours of service.⁸⁸ Under such federal safety regulations, a carrier, employee, or “other person,” which arguably includes brokers, who knowingly or willingly violates the regulations is subject to criminal and civil liability.⁸⁹

Considering the proliferation of litigation, it is not unreasonable to believe brokers and other third-party intermediaries will continually be dragged into the quagmire of tort litigation. Therefore, third-party intermediaries must (a) diligently research and select motor carriers, (b) maintain their independence from the actual transportation movement of the freight, and (c) avoid or report illegal or unsafe operations.

XIV. AVOIDING PROBLEMS

Many problems that arise in third-party movements can be avoided using common sense business approaches. For instance, participants might diligently research the issues involved in transportation deals to find out as much as possible about the trustworthiness and financial condition of contracting parties. With respect to motor carriers, the third-party intermediary should secure a copy of the carrier’s authority and confirm that the authority is still valid. Confirmation is also necessary to ensure that the motor carrier has filed listing agents for service of process consistent with the authority and that the carrier has adequate insurance coverage on file in accordance with the FMCSA regulations.⁹⁰ The third-party intermediary should also secure a certificate of insurance from the carrier’s insurer and, if possible, be named as a certificate holder on the policy itself. These precautions present merely a starting point for satisfying the requirements of due diligence. Additional issues that third-party intermediaries should investigate include:

1. the financial condition of the motor carrier and its financial ability to provide continuing service,⁹¹

87. *Id.*

88. *See* 49 C.F.R. § 395.1 (2007).

89. *See* 49 C.F.R. § 390.13 (2007).

90. Federal Motor Carrier Safety Administration [hereinafter, FMCSA], Requirements for Registration, § 367.3, available at http://www.fmcsa.dot.gov/rules-regulations/administration/fmcst/fmcstrruletext.asp?rule_toc=737§ion=367.3§ion_toc=1078 (last visited Mar. 22, 2007).

91. *See generally id.*

2. the motor carrier's safety rating and its operating record with respect to safety,⁹² and
3. the motor carrier's reputation within the industry.

This broad exploratory approach is not only necessary to ensure that the motor carrier is capable of providing the transportation requested but is also helpful to avoid liability that may arise from potential negligent entrustment claims.

Similarly, motor carriers and shippers should perform due diligence in order to ensure that their relationships with third-party intermediaries are conducted in a proper manner. Specifically, when a motor carrier or shipper engages in business deals with a broker or freight forwarder (or logistics company that provides broker or freight forwarder services), the carrier or shipper ideally should:

1. secure a copy of the third-party's operating license to confirm the validity of the third-party's operations,⁹³
2. confirm that the third-party intermediary has the requisite insurance and security trust instrument in place and secure a Certificate of Insurance or a copy of the security trust instrument,⁹⁴
3. acquire copies of the financials of the third-party particularly if a continuing relationship is anticipated,
4. secure credit reports to determine the third-party's history of financial obligations, and
5. investigate the reputation of third-parties with respect to making freight payments.

The first tool for conducting this type of due diligence investigation involves the use of products such as the Gold Book. CompuNet Credit Service, Inc. regularly publishes the Gold Book guide, which lists more than 1,000 credit-worthy brokers who meet the criteria for inclusion in the book.⁹⁵ The criteria include having full broker authority and bonding, being in business for at least three years, having five credit references on file with CompuNet, and having a history of paying all freight bills

92. FMCSA, Determination of a Safety Rating, § 385.9, available at <http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.asp?section=385.9> (last visited Mar. 22, 2007).

93. See generally FMCSA, General Applicability, § 390.3, available at <http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.asp?section=390.3> (last visited Mar. 22, 2007).

94. FMCSA, Financial Responsibility Required, § 387.31, available at http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.asp?rule_toc=756§ion=387.31§ion_toc=1677 (last visited Mar. 22, 2007); see also FMCSA, Property Broker Surety Bond or Other Security, § 387.307, available at <http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.asp?section=387.307> (last visited Mar. 22, 2007).

95. See First Advantage Transp. Servs., First Advantage's Gold Book, <https://www.compucredit.com/CompuNetWebSite/GoldBook.aspx> (last visited Mar. 22, 2007).

within 30 days.⁹⁶ Credit reports will indicate whether a broker is merely slow to pay, while the Bulletin, published by CompuNet on a monthly basis, provides details about non-paying brokers.⁹⁷

The second tool for conducting such due diligence investigation involves the use of services offered by members of the TIA.⁹⁸ TIA registers particularly reliable brokers who have been licensed and bonded and who embrace strict ethical standards.⁹⁹ TIA also maintains an effective alternative dispute resolution (ADR) program to resolve disputes that might arise between members and carriers.¹⁰⁰

Thorough investigation and due diligence research demands a significant time commitment by each party. The resulting high costs should prompt parties to limit the number of contracting brokers, freight forwarders, or motor carrier participants, and to establish long-lasting business relationships that might improve each party's commitment towards improving service.

XV. DEALING WITH PROBLEMS

Freight charges present perhaps the most prevalent problems in third-party relations. Luckily, a well-drafted contract should minimize such problems. Most importantly, however, all parties must pay particular attention to following and enforcing the terms of the contract. If payments of freight charges by a broker or freight forwarder are not made promptly, an immediate investigation and a determination should be made as to whether further or longer credit can be granted or extended, or whether enforcement steps should be taken.

Certain problems may warrant the use of security arrangements. Parties should also consider initiating actions against a broker's security bond or trust to remedy an issue,¹⁰¹ and generally may want to put the shipper on notice to prevent estoppel claims. Of course, parties might also want to determine whether the shipper can be held liable for freight charges especially under "conduit" or "trust" theories. If the relationship is contemplated as a continuing one and the volume of freight will be significant, brokers contractually should be obligated to render a bond or establish a trust fund specifically to cover the contractual movements in

96. *Id.*

97. *Id.*

98. Transp. Intermediaries Ass'n, P3 Platinum Performance Program, available at <http://www.p3program.com> (last visited Mar. 22, 2007).

99. *Id.*

100. *Id.*

101. See *Milan Express Co. v. Western Surety Co.*, 792 F. Supp 571, 574-75 (M.D. Tenn. 1992) (Direct action is allowable against a bonding company or bank trustee); see also *Transportation Revenue Mgmt. Inc.*, 886 F. Supp at 892.

an amount comparable to the carrier's monetary exposure for freight charges.

XVI. ALTERNATIVE DISPUTE RESOLUTION

Although a well-drafted contract and a good faith implementation of the contract may help to avoid disputes between the parties, there may still be situations where the parties disagree. In these cases, parties may want to consider including final and binding arbitration arrangements in their contracts. As a general rule, it makes sense to avoid the quagmire of litigation. Litigation is costly, time consuming, and diverts attention away from business and creative pursuits. Litigation also entails stress and worry that may lead to an unnecessary waste of energy. Sensible business people should be able to reach a resolution that serves their interests far better than any judgment of a court.

Business disputes such as those in third-party situations frequently arise between parties who intend to maintain continuing relations despite the disputes. These disputes can quickly lead to litigation that might not serve the best interests of both parties. For instance, despite best intentions to the contrary, the parties may become emotionally involved in disputes and seek vindication by "fighting to the end" without regard to rational business needs. Of course, successful lawsuits serve to vindicate a party's judgment and arguably improve the party's stature as a "winner" who fights hard to prove he or she was "right." As a corporate defendant, drawn-out litigation may also help to avoid recognizing costs on current financial statements associated with the claim until a later fiscal period.

Arguably, zealous trial lawyers who love the challenge of lawsuits may tend to pave the way towards such adversarial proceedings simply in order to participate in the contest. For these attorneys, "mere" alternative dispute resolution has as much appeal as the chance for Tiger Woods to play the caddy during the Masters Tournament. Seasoned lawyers frequently also fear recommending a settlement particularly when there is a chance that co-defendants or other plaintiffs may continue litigation to acquire awards that are more favorable to the client. In such situations there is also a financial disincentive to settle early and forego litigation particularly because prolonged litigation results in lengthy discovery, motions, trial preparations, and possible appeals that are profitable for the attorney. In other words, the choice between settling and litigating disputes implicates the lifeline of a law firm.

Arguably, however, too many disputes in recent times have ended in litigation instead of proper settlement. Such litigation is not desirable because it decides legal issues when business people would otherwise

have reconciled their own interests. Negotiation and settlement with or without an attorney is the most obvious way to settle a dispute, and the key to success is preparation and presentation. There must be a thorough investigation of the facts, meaningful research, an honest evaluation of the case, and client preparation. If negotiations are not successful, sage clients and attorneys will consider alternative means of dispute resolution. Legislators and courts have recognized the value of ADR. Federal law, such as the Federal Arbitration Act,¹⁰² and the Uniform Arbitration Act of Minnesota,¹⁰³ provides for arbitration in private litigation and is increasingly being used in transportation matters.

ADR is and should be an important priority in any program of dispute analysis. ADR involves an approach to dispute resolution in which parties agree to resolve their disputes through means other than formal litigation.¹⁰⁴ Numerous ADR forums exist although the two more popular approaches involve mediation and arbitration.¹⁰⁵

In mediation, an independent person with some expertise of the process and the disputed matter actively works with the parties to come up with a mutually agreeable solution.¹⁰⁶ This “reality tester” helps generate settlement options and persuades the parties to test the strengths and weaknesses of their positions.¹⁰⁷ Arbitration involves a binding or non-binding decision handed down by a third-party arbitrator or panel of arbitrators generally after the exchange of key documents and the parties’ presentation of their respective case.¹⁰⁸ While arbitration is similar to typical judicial adversarial resolution, arbitration is private, usually involves relaxed rules of evidence and procedure, and tends to be more attuned to business realities than a judicial court that may have little, if any, business experience or knowledge in the area involving the dispute.¹⁰⁹ In the context of third-party contract disputes, mediation and arbitration offer a number of benefits including the following:

1. *Confidentiality.* Mediation and arbitration allow for a high degree of confidentiality of sensitive business information including information concerning business practices, business philosophy, and the style of doing business.¹¹⁰ Federal and state laws ordinarily protect confidential com-

102. See generally 9 U.S.C. §§ 1-16 (2007).

103. MINN. STAT. ANN. §§ 572.08-30 (West 2006); see also MINN. STAT. ANN. §§ 572.31-40 (West 2006).

104. 44 AM. JUR. *Trials* § 507, sec. I.1 (2007).

105. See 4 AM. JUR. 2D *Alternative Dispute Resolution* § 2 (2007).

106. 44 AM. JUR. *Trials* § 507, sec. I.1 (2007).

107. *Id.*

108. *Id.*

109. *Id.*

110. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 16 (2007).

munications that result from mediation proceedings.¹¹¹ In court-referred mediation, the only information that may be communicated to the court is whether the parties settled.¹¹² The breach of confidentiality in mediation situations can also meet with severe sanctions.¹¹³ In arbitration, the parties and arbitrators may agree to close proceedings to third parties in order to provide for full confidentiality except to the extent that disclosure is necessary to enforce an award in court.¹¹⁴

2. *Costs.* Mediation and arbitration generally require less legal time and associated costs than judicial litigation. Discovery and motion practice - the greatest expenses in litigation - can frequently be eliminated or reduced using ADR. Moreover, the fact that all possible evidence has not been accumulated or discovered is not a legitimate reason to avoid ADR processes especially because almost all cases settle before trial on the proverbial "courthouse steps." Why incur the expense of motions and trial preparation if these expenses can be avoided using ADR? The outcome of litigation is never certain and the uncertainty of a party's position may promote an alternative settlement. The reduced costs of ADR allow business people to pursue more profitable ventures.
3. *Expertise.* Knowledgeable mediators and arbitrators are often more adept at coming to terms with complicated facts than non-expert lay juries or judges might be. Specialized knowledge by mediators and arbitrators is particularly important where a defined body of law already exists or the dispute turns entirely on tricky and convoluted facts. Private organizations such as the American Arbitration Association have set qualifications for arbitrators and mediators with expertise in particular fields on their specialized panels. These professionals are ordinarily familiar with controlling statutes, administrative rules, and important industry practices that might help to achieve agreeable settlements.
4. *Fairness.* In mediation, the forum is non-adversarial and the process and results are within full control of the parties. Each party has the opportunity to have a say, and the process focuses on the concerns and needs of the parties rather than just on the legal issues. While arbitration is adversarial dispute resolution, it is typically consensual and the parties can establish their own boundaries as to the procedures and limits of the process. This flexibility, coupled with the parties' ability to select the arbitrator, leads to the realization that arbitration is a fair mode of dispute resolution.
5. *Prompt Disposition.* Routine disputes can be disposed of efficiently and rapidly. Mediation is arguably a successful process that can achieve its results more rapidly than litigation, which may linger in court for years.¹¹⁵ In many instances mediation and arbitration can be completed in one day or within a minimal number of days. Written resolution is concurrent with the end of a successful mediation, and arbitration awards

111. *Id.*

112. *Id.*

113. *Id.*

114. 92 AM. JUR. *Proof of Facts* 3D § 1 (2007).

115. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 2 (2007).

are usually made in thirty days or less after the record is closed.¹¹⁶ The ability to resolve a business dispute in the *current* business climate cannot be overstated. A desired settlement or arbitration award might possibly be based on today's cost of goods, employment needs, the availability and demands of customers, suppliers, subcontractors, and construction or rental costs. A final judgment in a judicial proceeding, which often includes many years of appeals proceedings, begs the question "who really won?" particularly considering the lower value of the claim at the later date, the disruption of current operations, and changes in business conditions.

6. *Convenience.* Mediation and arbitration can be scheduled as promptly as agreed to by the parties. Parties are not subject to the whims of a full court calendar and the frequent cancellations and delays.
7. *Forum selection.* Unlike judicial proceedings where the defendant is generally bound to the forum selected by the plaintiff, arbitration and mediation allow parties to select locations before disputes arise that are convenient for both parties.

While mediation and arbitration offer these and many other advantages, parties contemplating ADR provisions in business contracts should be aware of significant disadvantages such as the following:

1. *Failure.* Clearly, mediation and arbitration may fail to produce agreeable results. As a result of subsequent litigation, the expenses and investment of time in a case may increase. Ultimately, alternative dispute mechanisms that fail may take longer to produce acceptable results than if the parties had initiated judicial proceedings from the beginning.
2. *Unwillingness to settle.* Adversarial emotions can increase if the participants simply cannot work together and there are emotional or even violent displays in the session. The lack of formality and power of a court may make parties less amiable to concessions and some parties will simply not settle unless a third-party makes the decision for them.
3. *Lack of good faith.* The party with greater bargaining power may lack the initiative to mediate in good faith especially when it feels that it can force the weaker party to give in to one-sided demands.
4. *Lack of necessary information.* Parties in arbitration proceedings are not always assured that they will be able to secure critical information needed during the hearing. The exchange of information, documents, and attendance of witnesses is dependent upon the arbitration rules or agreement.
5. *Unpredictable procedures and results.* Some parties feel that a lack of application of the rules of evidence may hinder a predictable and fair hearing. Moreover, parties may conclude that an award not constrained by precedent may be unfair or contrary to the law. Unless the parties request a reasoned decision, most arbitration awards have no explanation. The parties will not know why a decision was made or how the result was reached and thus no basis exists for precedent.
6. *Lack of non-judicial review.* The limited possibility to appeal arbitration

116. *Id.*

awards may concern parties who still feel aggrieved even after the arbitration process has ended.

Many third-party transportation disputes are particularly susceptible to successful ADR processes. In most instances, a continuing relationship exists between carriers, shippers, brokers, and freight forwarders. The desire to maintain such relationships and to avoid future problems prompts parties to focus on resolving problems amicably. The disputes generally do not involve clear questions of law but are more factual in nature covering issues such as cargo loss and damage claims that make up a large percentage of all motor carrier litigation. Thus, there is clearly room for mediation and arbitration.

In the realm of transportation, ADR is particularly valuable. Most litigation involves relatively small claims ranging from a few thousand dollars to the low to mid hundred thousands of dollars. Litigation of such claims is extremely costly in relation to the sums involved - the cost-effectiveness of ADR procedures offers a welcome alternative. The confidentiality that ADR proceedings afford is particularly helpful for shipping and logistics companies that want to prevent their transportation rates and fees from becoming public. Fairness is another benefit that ADR provides in transportation disputes. Participants generally feel better when they are able to participate in how disputes are handled and when their concerns and ideas are being considered.

Unlike in many courtroom proceedings, arbitration and mediation sessions also offer parties more opportunities to clarify complex laws and situations by allowing for an informal setting along with extra time for explanation and education. This is particularly important where contracts, statutes, or administrative regulations are not clear or otherwise not easy to understand.

In terms of forum selection, ADR provides transportation parties the possibility to select sites for dispute resolution that are sensible considering the circumstances. For example, in the case of a loss or damage claim, the best location to resolve the dispute may be the point of the loading of goods, the point of delivery, or another point rather than the headquarters location of the carrier or shipper. The selection of relevant forums in ADR provisions also prevents parties from using venue matters as weapons to force settlement through causing inconvenience.

Finally, transportation parties in ADR proceedings benefit particularly from the ability to rely on predetermined dispute resolution procedures. The parties do not need to be concerned with laws that would otherwise apply in proper judicial proceedings. This is particularly helpful when issues arise in foreign locations where the parties would other-

wise be subject to unknown and potentially disadvantageous foreign procedures and rules.

Considering the lack of oversight in third-party service contracts and the need to reduce dispute costs, transportation businesses are well-served by Abraham Lincoln's advice: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the normal winner is often a real loser . . . in fees, expenses and waste of time."¹¹⁷

XVII. CONCLUSIONS

The use of third-party intermediaries is well accepted in the industry particularly because these intermediaries play important and efficient roles in streamlining the movement of freight. However, the rapid growth and large number of intermediaries, coupled with the absence of any significant legislative and administrative oversight, has caused significant concern within the transportation industry. Motor carriers in particular lament that they must often bear the economic impact of this lack of oversight and regulation that frequently results in damaged business relationships with brokers who mismanage their business or engage in corrupt or unscrupulous activities. Luckily, the rise of programs such as the "Gold Book," along with efforts by the TIA to standardize relevant contracts as well as industry-wide attempts to provide relevant education with regard to pertinent legal principles and sound management techniques, should help to eliminate problems experienced in the past and facilitate mutually rewarding services in the future.

117. Dayton Aerospace, *Alternative Dispute Resolution (ADR): A Different Approach to Solving Problems*, available at <http://www.daytonaero.com/documents/Alternate%20Dispute%20Resolution.pdf> (last visited Mar. 22, 2007).