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# CURRENT ISSUES: AIR, LAND, AND SEA TRANSPORTATION

## I. Introduction (By Selena Ho – Moderator)

This paper corresponds to the panel which will be presenting this topic at the CLM 2015 Transportation Committee Annual Conference. It will provide an overview of current issues facing shippers and transportation intermediaries, including ocean carriers, motor carriers, freight forwarders, and brokers in their handling and transportation of cargo in the United States. This panel will highlight the current status and challenges faced by participants in the transportation of cargo and will offer both insight and practical approaches to the handling of loss and damage claims which occur during that transportation, with an emphasis on the "hot" issues of particular interest.

## II. Air Transportation (By Richard Furman)

### A. Description of Air Cargo Industry

Cargo is transported by air both within the U.S. and between the U.S. and foreign destinations. This obvious fact is noted so as to allow us to point out that, as discussed below, there is a distinction in the law and regulations that govern the respective rights and duties of cargo shippers, the companies that act on their behalf to facilitate air carriage, and the actual carriers that transport the shipper's goods.

Aside from the shippers and receivers of air cargo, there are a number of possible intermediaries in an air-shipping transaction.

#### 1. International Air Cargo Transport

In international air shipping, the intermediaries are generally either a freight forwarder or an indirect air carrier (IAC), sometimes referred to as an airfreight forwarder.

Both forwarders and indirect carriers often provide many of the same services, in addition to booking of an air shipment with an airline. Such services may include arranging for domestic and foreign pickup and delivery of cargo prior and subsequent to air carriage, compliance with export formalities and security regulations, packing of goods in ULDs or on pallets, and a variety of documentation

services that may be required by the nature of the cargo being shipped or by the destination country for import purposes.

There is, however, an important difference between the two.

The distinction between a forwarder and an IAC arises from the fact that a freight forwarder is a true intermediary, whose role can be generally described as a travel agent for cargo. An IAC is considered an airline due to the fact that it issues an air waybill in its own name just as an airline would, but often has no contact with the cargo and does not operate the aircraft that will transport the cargo to its destination.

**a. International Freight Forwarders**

When a freight forwarder handles a shipment for an exporter, aside from providing the related services outlined above, it books the shipment and then prepares and issues an air waybill (AWB) in the carrier's name. The names and addresses of the shipper and consignee are on the AWB, and the forwarder is only identified as a forwarder. In that capacity, the forwarder is acting only as an agent for whichever party engaged it to arrange the shipping formalities. As a consequence, the forwarder is not a party to the AWB and not bound by the terms and conditions on the front and back of the AWB.

An AWB is a contract, known as a contract of carriage. Courts will enforce and interpret the terms and conditions of the AWB like any other contract, consistent with the international conventions on international air carriage almost universally adopted throughout the world, and the interpretation of the conventions by the courts of the country that adopted the convention, or other domestic authority responsible for the administration of the conventions. As many disputes in air cargo transport result from claims for loss or damage to cargo focus on the possible liability of the carrier and the limitation of that liability, the identity of who is, or is not, a party to the AWB contract is a very important threshold fact determination.

When a forwarder issues an airline AWB, the parties to the AWB's contract terms are the shipper, consignee and the airline, not the forwarder.

Since, generally speaking, a forwarder is not bound by the AWB terms, its liability, if any, in the event of a loss or damage claim is governed by customary terms and conditions that most forwarders publish and maintain. Such terms are subject to interpretation and enforcement under conventional rules of law followed in the particular state where a case may be filed. The consequence of this is discussed in more detail below.

**b. International Indirect Air Carrier**

As noted an IAC issues an AWB in its own name. In doing so, the IAC assumes full responsibility for the cargo covered by its AWB, as if it had actual physical care, custody and control for the cargo, just like an actual airline.

IATA publishes and maintains a form of AWB that just about every airline and IAC use, which contains recommended standard terms and conditions. The AWB issued by the IAC sets forth the actual names and address of shipper and consignee of the shipment. As a consequence, the parties to an IAC's air waybill contract of carriage are the shipper, the consignee and the IAC, not the actual airline.

When a forwarder handles an air cargo shipment, it is a two-step process. The shipper or consignee engages the forwarder to expedite the movement of the cargo, and the forwarder engages an airline to transport the goods.

However, when an IAC handles a shipment, it can be either a two-step or three-step process. The shipper or consignee will, most often, engage the IAC, and the IAC will then engage the airline. Less often, the shipper may first refer the shipment to a forwarder, the forwarder will then engage the IAC, and the IAC then books the actual carriage with the airline.

The IAC books a shipment covered by its AWB with an airline, the IAC is the shipper on the airline's AWB. The consignee is most often a receiving agent in the country of destination, which is also an IAC, with whom the IAC works.

Therefore, in an IAC-handled air freight shipment, the airline AWB contract of carriage is between the IAC and the airline. The actual shipper and consignee are not parties to the air carrier's air waybill and have the right to hold the IAC directly liable for the performance of the air carriage. Any loss or damage that might result while the shipment is in the constructive care, custody and control of the IAC, as evidenced by the AWB, is the liability of the IAC.

In the event a claim does arise in the foregoing circumstances, the IAC, as the shipper on the carrier's AWB, must look to the carrier for satisfaction of the claim according to the terms of the airline's AWB. However, this is not a shifting of liability. The IAC is still primarily and directly responsible to the shipper. All the IAC can hope for is a measure of indemnity for whatever sum it may be responsible for to

satisfy the claim; the indemnity may not be the same or even the full amount of the shipper's claim.

## 2. Domestic Air Cargo Transport

Similar to international shipping, the players in domestic air cargo are air carriers, freight forwarders and IACs. These entities provide services and function in relation to the cargo interests they serve in most ways very similar as their international shipping counterparts; in fact, many international forwarders and IAC's provide domestic services as well.

There are distinctions, however, that need to be understood.

To begin with, a good percentage of entities that engage in domestic air forwarding are companies that also act as forwarders for interstate surface transport of goods. Further, for all practical purposes, when arranging for domestic air transport of goods, most forwarders are also acting as an IAC, since it is the more common, although not exclusive, practice for domestic forwarders to issue an air waybill in their own name just as an IAC would.

When arranging for surface shipments by motor truck or rail, the forwarder is acting under authority it must obtain from the U.S. Department of Transportation, Federal Motor Carrier Safety Administration. In doing so, the forwarder is subject, for interstate moves, to the provisions of Interstate Commerce Act (the "Act") and, more particularly, the Carmack Amendment to the Interstate Commerce Act ("Carmack") and is considered a carrier under Carmack.

However, to the extent a domestic forwarder engages in arranging air cargo shipping, it is removed from the jurisdiction of the Act and Carmack. As a consequence, its rights and duties for loss or damage to goods are governed by state law principals.

## 3. Governing Law

### a. International Air Cargo Transport

International air cargo transport is governed by a succession of conventions or treaties adopted by the U.S. as governing law. Knowing which treaty or convention may address a claim is an important threshold issue when adjusting or defending it.

International IACs are subject to the following conventions:

(a) Warsaw Convention as Amended.
(b) Montreal Convention.

### b. Standards of Liability Under the Conventions

The salient terms of both conventions provide the same time frames within which claims must be made, and if not timely made, the claims are barred;; both provide for exceptions to liability on the part of the carrier if it can prove the existence of the specified circumstances listed in the conventions; both provide a limitation of liability (not to be confused with insurance) for the purpose of increasing a potential recovery; and both provide a limitation of suit time within which suit must be filed or the action will be barred.

To the extent shipments are transported under the Warsaw Convention, as amended, and the Montreal Convention, the limitations of liability that both the conventions provide are unbreakable. Therefore, loss or damage claims, unless a declared value for carriage increasing the limitation has been made by the shipper, will be adjusted on the basis of the convention's limitations of liability.

To the extent that a claim falls outside the scope of one of the conventions, the printed terms of the back of the standard air waybill are, generally speaking, enforceable in the U.S. as a matter of simple contract.

### c. Domestic Air Cargo Transport

Simply put, domestic air cargo claims, whether for intrastate or interstate moves, are subject to conventional civil common law rules and principals. However, as a practical matter, all such shipping is done under air waybill contract-of-carriage terms that provide for very modest limitations of liability, which, as a consequence, courts generally accept and enforce. As a result, the limitations are essentially unbreakable, with the possible exception of circumstances where an issue as to whether the IAC that issued an air waybill was truly acting as an air carrier, or the shipper was given proper notice of the limitation.

## B. Issues Affecting Air Cargo Risks and Claims

### 1. Which Convention, Treaty or Rule of Law Governs a Claim?

This situation has been a cause for some difficulty in determining which standard of law will govern claims. Issues, such as scope of liability, limitation of that liability and a number of other variables can materially affect the outcome of adjustment or litigation of a claim.

### 2. Proliferation of Service Agreements and Their Impact on Liability Regimes and Claims Defense and or Settlement.

This is an issue that transcends both international and domestic air shipping.

Often drafted by shippers, service agreements are intended to define the scope and performance of services. However, the agreements can often override the service companies' terms and conditions and the statutes or conventions under which their customarily operate.

#### 3. Is It A Domestic Surface Air Shipment?

Despite the fact that IAC's engage in providing domestic air transport by issuing air waybills, very little shipping subject to a domestic air bill is carried on an aircraft. There are a number of reasons, the most compelling is economic. The consequence of this fiction is that an issue exists as to what legal regime governs the rights and duties of the IAC and shipper in the event of a loss or damage to a shipment.

#### 4. The Threat of Lithium Batteries; Other Hazardous and Dangerous Goods.

Under certain conditions the lithium batteries that power most consumer and commercial electronics, can spontaneously burst in to flame or explode, at the least causing damage to aircraft and at worst causing an airplane crash.

Shipments of lithium batteries, both domestically and internationally are governed by the International Civil Aviation Organization (ICAO) and IATA are technical and complex.[1] Shipments within the United States are additionally regulated by the U.S. Department of Transportation under the Hazardous Materials Regulations.[2] Other countries have specific regulations as well.

## III. Land Transportation (By Dennis Minichello)

### A. Aftermath of the *Kirby-Regal Beloit* Decision of the U. S. Supreme Court

#### 1. The Carmack Amendment – Carriage of Goods by Sea Act Conflict

The interstate transportation of cargo in the United States has, for decades, been governed by different statutory schemes with significant differences. Interstate rail and motor carriers engaged in the transportation of cargo over land have been covered by the Carmack Amendment to the Interstate Commerce Act. The transportation of ocean cargo to and from the United States has been governed by the Carriage of Goods by Sea Act ("COGSA"), which governs cargo transported between the United States and foreign ports, and applies from when the goods are loaded on the ship until the time when they are discharged from the ship. The application of the Carmack Amendment and COGSA worked reasonably well before intermodalism came to dominate the handling of cargo, as cargo generally moved under separate bills of lading when handled by land or ocean carriers. However, as intermodalism came to dominate the handling of cargo such that containers or trailers would be handled by

both ocean and land carriers in a seamless movement from origin to destination, very often subject to a single bill of lading, the question then arose as to which of the two statutes should apply in the event of loss or damage. The answer to that question resulted in different outcomes as to such important issues as time bars, damages, choice of law, etc.

The issue as to whether the Carmack Amendment or COGSA would apply to determine liability for loss or damage to cargo is more than an academic question because of the real differences between the two statutes. Liability under the Carmack Amendment is not limited, and carriers are liable for actual loss or injury. Cases asserting Carmack Amendment liability must be brought in certain venues. A notice of claim must be brought within nine months and legal action within two years after the denial of a claim. In contrast, ocean carriers under COGSA are liable for cargo that is lost or damaged unless one of the enumerated defenses precludes recovery. Liability for cargo loss or damage is limited to $500 per package or customary freight unit. COGSA may be extended to cover the liability of inland carriers pursuant to a Himalaya clause. These differences resulted in confusion when cargo originally carried pursuant to an ocean bill of lading with a Himalaya clause was subsequently lost or damaged during the inland transportation of the cargo from the port to a final destination. The issue was further complicated because the inland carriers, whether rail or motor carrier, would often issue their own bills of lading, which would incorporate or certainly be subject to the Carmack Amendment.[3]

**2. *Kirby-Regal Beloit* Resolution of the Conflict for Import Shipments**

The U. S. Supreme Court finally tackled the issue of the application of COGSA in *Norfolk Southern Railway Co. v. Kirby*. In *Kirby*, the shipper hired a non-vessel operating common carrier (NVOCC) to arrange for the transportation of machinery from Australia to Huntsville, Alabama. The NVOCC issued a bill of lading to the shipper which named Sidney, Australia, as the loading port; Savannah, Georgia, as the discharge port; and Huntsville, Alabama, as the cargo's final destination. The NVOCC's bill of lading had a $500/package limitation for the sea segment of the voyage. The NVOCC then hired an ocean carrier to transport the goods, which also issued its own bill of lading that accepted the package limitation for both the land and sea segments of the voyage. Both bills of lading had Himalaya clauses. The ocean carrier then hired the railroad to transport the cargo by land from Savannah to Hunstville. During that last land segment, the train derailed, causing a loss.

The cargo insurer filed suit, and the railroad sought to limit its liability with the lower liability limitation. The U. S. Supreme Court ruled that COGSA governed the determination of the issue because the bills of lading called for "substantial carriage of goods by sea" and because the bills of lading were "essentially maritime," and, thus, the application of state law was inappropriate. The railroad was, therefore, able to limit its liability to the limitations in the ocean bills of lading.

*Kirby* failed to address (because the issue was not raised by the parties) which of COGSA's or Carmack's provisions would control in the event of a loss occurring during an inland rail segment of an intermodal shipment under a through bill of lading. Circuit courts split on the issue.

### 3. The Remaining Issue – Export Shipments

In *Regal-Beloit*, the Supreme Court determined that for cargo lost or damaged on the inland rail portion of an inbound multimodal shipment under a through bill of lading, COGSA applies, and not Carmack. The Court, however, declined to address the reversal of that scenario—that is, where cargo is lost or damaged on the inland rail portion of an export multimodal shipment.

After *Regal-Beloit*, there have been "mixed results" in the lower courts regarding the reverse, "export," scenario. Most district courts have held that COGSA applies, but there has been at least one instance of Carmack analysis governing. In *American Home Insurance Co. v. Panalpina, Inc*., the Southern District of New York concluded that "Carmack applies when the first rail carrier in the chain of transportation receives the cargo at the shipment's point of origin." In that case, the rail carrier, BNSF, received the cargo in Illinois, and therefore had to issue a Carmack incorporated bill of lading. Therefore, Carmack governed the inland rail segment.

In the same Southern District of New York as *American Home Insurance Co., Hartford Fire Insurance Co. v. Expeditors International of Washington, Inc*., reached a different result on the reverse *Regal-Beloit*, holding COGSA applied. In that case, Expeditors issued a bill of lading with New York as the loading port, with delivery to France. The bill of lading had a choice-of-law provision stating that COGSA would govern. The court granted Intransit Container, Inc.'s, the subrogee's, motion for summary judgment, holding that COGSA applied. The court reasoned that the bill of lading choice-of-law clause called for COGSA. Additionally, the court held that contracts which subtantially involve carriage of goods by sea are maritime contracts, and that the substantial portion of the journey, from New York to France, was by sea; therefore, Carmack should not apply.

## B. Moving Ahead for Progress in the 21st Century Act, a/k/a "Map-21"

1. What is Map-21?

Moving ahead for progress in the 21st Century Act, commonly referred to as "MAP-21," is the most recent legislation enacted by the federal government concerning the regulation of surface transportation in the United States. MAP-21 legislates with regard to many transportation issues, but this presentation will focus on the significant legal and operational impacts for surface

transportation intermediaries; that is, property brokers and domestic freight forwarders.

MAP-21, in part, affects property brokers and domestic freight forwarders involved in the business of surface transportation. A broker is a person or entity that, for compensation, arranges or offers to arrange for the transportation of property by motor carrier. A broker does not, nor should it, transport the property itself, and does not assume responsibility for the property while it is being transported by another entity. MAP-21 left in place the previous statutory definition of "broker," which expressly excludes motor carriers and their agents and employees (49 U.S.C. 13102(2)), but the new law separately prohibits motor carriers from brokering transportation services unless they are registered as a broker (49 U.S.C. 13902(a)(6)).

In contrast to a property broker, a freight forwarder is a person or entity that holds itself out to the general public as providing transportation of property for compensation, and in the ordinary course of its business:

> Assembles and consolidates, or provides for assembling or consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;
>
> Assumes responsibility for the transportation from the place of receipt to the place of destination; and
>
> Uses for any part of the transportation a rail, motor, or water carrier subject to the jurisdiction of the Federal Motor Carrier Safety Administration ("FMCSA") or the Surface Transportation Board ("STB").

The distinction between a property broker and a freight forwarder is important with regard to the allocation of liability in the event of occurrences involving personal injury or cargo loss or damage. Generally, a broker is not liable for injuries or damage and, specifically, is not a carrier for purposes of liability under the Carmack Amendment. Freight forwarders, on the other hand, are carriers for purposes of the Carmack Amendment and face significant exposure in the event of an occurrence resulting in personal injury, death, or cargo loss or damage.

**2. Changes Created by MAP-21**

Problems and complaints with regard to the activities of brokers and motor carriers acting as brokers had arisen prior to MAP-21 and were some of the impetus for its passage. The primary problem had to do with motor carriers who were essentially acting as brokers by contracting with shippers for the carriage of cargo, but then subcontracting the entire transportation to another carrier, which created confusion for shippers and their insurers with regard to responsibilities in the event of cargo loss or damage. There was also a belief

that the surety bond amount ($10,000) was insufficient for current cargo values. Finally, there was also concern that there was no specific requirement regarding the experience or qualifications of a person who held himself or itself out as a freight forwarder or property broker.

Under MAP-21, freight forwarders and brokers that are involved in interstate commerce and subject to FMCSA jurisdiction are required to register with the FMCSA. Freight forwarders who perform both freight-forwarding services and motor-carrier services beyond the scope of their freight-forwarding operations must register both as freight forwarders and as motor carriers. Moreover, motor carriers that broker loads, even occasionally, must register as both motor carriers and brokers. These provisions clarify some of the gaps in the previous law.

While motor carriers must obtain a broker's authority if they are acting as a broker, MAP-21 does not preclude freight interlining by motor carriers. Freight interlining is the transfer of property between two or more carriers for movement to its final destination. For example, if the point of origin for a shipment is Chicago, Illinois, and the final destination is Dallas, Texas, Motor Carrier A may transport the shipment from Chicago and then interline with Motor Carrier B in St. Louis, and Motor Carrier B will then complete the transportation of the shipment from St. Louis to Dallas. While a motor carrier must have the appropriate license under the FMCSA as a motor carrier, a broker's license for that purpose is not required. A motor carrier that is performing part of a single continuous transportation movement as an interline operation can perform that service under either (1) its own operating authority or (2) the authority of the originating motor carrier.

The other significant change wrought by MAP-21 is the minimum level of financial security that a broker or freight forwarder must maintain on file with the FMCSA. That security has increased such that all FMCSA-regulated brokers and freight forwarders must obtain and file with the FMCSA a surety bond or trust-fund agreement in the amount of $75,000, which is a substantial increase over the previous limit of $10,000. All brokers and freight forwarders must file new BMC-84 or BMC-85 forms reflecting the new minimum financial security. Only one bond is required for motor carriers who have both operating authorities.

Below is a more complete summary of MAP-21 provisions regarding brokered freight.

### 3. Impact of Map-21 on Shippers and Carriers

It is too early to determine if MAP-21 will have a significant impact on the transportation insurance industry and, in particular, recovery for cargo loss or damage over the long haul. Certainly, there will be some positive impact in at least three aspects of surface transportation. Firstly, there will be a higher

qualification bar for those seeking authority to operate as a broker or freight forwarder. The additional scrutiny will hopefully eliminate anyone attempting to enter the business who does not have some level of knowledge and expertise. Secondly, the Act requires a clarity in the roles to be played by the broker, freight forwarder, and motor carrier, which, hopefully, will eliminate uncertainty as to responsibility for the successful transportation of cargo. Entities in a transportation arrangement will have to clearly identify the role they play, and motor carriers are prohibited from acting as brokers unbeknownst to shippers, unless they have received broker's authority from the FMCSA and have so disclosed that role to their shipper-customers. Thirdly, the increased surety bonding requirements should eliminate less financially stable entities from providing broker and freight-forwarder services and will provide a more substantial backstop in the event of cargo loss and damage.

In the event of an occurrence resulting in cargo loss or damage, insurers, both for cargo legal liability and first-party coverage, should find themselves in a better position to determine the roles of the participating entities and identify the culpable motor carrier and proceed accordingly. Cargo claims must still be filed with the appropriate motor carrier, and brokers do not have to process such claims under MAP-21. Insurance coverage issues with regard to covered and noncovered activities should also be more easily resolved. There are substantial law penalties for motor carriers, brokers, and freight forwarders who do not comply with the new requirements, and those penalties may also subject a noncompliant entity with greater liability exposure.

MAP-21 is now the law of the land. As the surface transportation industry adjusts to the new statute and regulations, time and experience will determine how consequential MAP-21 will be.

## C. The FDA's Proposed Regulations on Sanitary Food Transport

### 1. Proposed Regulations

The Food and Drug Administration ("FDA") has proposed to establish requirements for shippers, carriers by motor vehicle and rail vehicle, and receivers engaged in the transportation of food to use sanitary transportation practices to ensure the safety of the food they transport. In February 2014, the FDA published proposed regulations for the transportation of food (Appendix 4). The proposed regulations would be incorporated into 21 C.F.R. Section 1.900 series. The proposed regulations are pursuant to the implementation of the Sanitary Food Transportation Act ("SFT") of 2005 and the Food Safety Modernization Act ("FSMA") of 2011. There was a public comment period that closed on July 30, 2014. The FDA received 126 comments.

*The proposed regulations are not yet official regulations.* After the commencement of litigation from the Center for Food Safety and Center for Environmental Health, a resolution was reached regarding the deadline for when

the proposed regulations would be enacted. Pursuant to a court order from the Ninth Circuit, the FDA must issue the final regulations by March 31, 2016.

The proposed rule would affect motor and rail carriers, as well as shippers and receivers, of food for humans and animals. The proposed rule would establish criteria and definitions that would apply in determining whether food was adulterated because it has been transported or offered for transport by those involved in the transportation. The rule would cover any movement of food in commerce by motor vehicle or rail vehicle, and would establish requirements for the sanitary transportation practices applicable to shippers, carriers by motor or rail vehicle, and receivers engaged in the food transportation operations. Specifically, the rule would establish requirements for vehicles in transportation equipment, transportation operations, training, records, and waivers. The rule would encourage the use of best practices concerning cleaning, inspection, maintenance, loading and unloading of and operation of vehicles, and transportation equipment for the handling of food products.

### 2. Conflict with the Carmack Amendment

The FDA estimates that the proposed rule will affect 83,609 firms, with the first-year estimated cost of $1,784 per firm, and a total annual cost of $360,000 per firm. The proposed rule would exempt those operations with less than $500,000 in total annual sales, the transportation of shelf-stable food that is completely enclosed by a container; live food animals; raw agricultural commodities when transported by farms; food that is transshipped through the U. S. to another country; and food that is imported for future export that is neither consumed nor distributed in the U. S. Significant recordkeeping will be required.

Needless to say, there is concern among those who would be forced to comply with the proposed regulations, which would include anyone in the food-distribution process. There is the possibility that the proposed regulations could switch the burden of proof in a cargo-claim dispute from the shipper to a carrier, because the carrier is obligated to show that it complied with the shipper's requirements in the event of a loss or damage to a shipment. The proposed regulations may make it difficult, if not impossible, for a carrier to escape liability to a shipper-consignee for food products which are deemed to have been exposed to unsanitary conditions, or even food products that, while not specifically contaminated, have not been handled in accordance with the proposed regulations.

## IV. Sea Transportation (By W. Brett Mason)

### A. Overview – Historical Perspective

The U.S. Fifth Circuit Court of Appeals did an excellent job of outlining the history of COGSA in the case *Associated Metals and Minerals Corp. v. Alexander's Unity MV*,

41 F.3d 1007 (5th Cir. 1/9/1995), as follows: COGSA was enacted in 1936 as part of an international effort to allocate the risks of loss or damage to cargo transported internationally.

COGSA vests ship owners with certain defenses in cargo cases. For example, like the Harter Act, COGSA absolves carriers and shipowners for liability for cargo damaged by an unseaworthy vessel, if the owner or carrier exercised due diligence in making the ship seaworthy, 46 U.S.C.App. Sec. 1304(1), 8, and for losses caused by an act of God, fire, act of a public enemy, or other specified causes 46 U.S.C.App. 1304(2). COGSA also grants shippers freedom from cargo damage caused "without the act, fault, or neglect of the shipper his agents, or his servants." 46 U.S.C.App. Sec. 1304(3). Also, similar to the Harter Act, COGSA regulates shippers' ability to further limit their liability by providing that:

> any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability ... shall be null and void and of no effect.

46 U.S.C.App. Sec. 1303(8). This limiting clause is the codification of the United States' common law rule preventing contractual clauses absolving shipowners for their negligence; it in no way abrogates a negligence action for the damage to cargo. (internal citations omitted).

**B. Forum Selection Clauses**

In the case *Vimar Seguros y Reaseguro, S.A. v. M/V SKY REEFER*, 515 U.S. 528 (6/19/1995), the U.S. Supreme Court was asked to interpret the Carriage of Goods by Sea Act (COGSA), 46 U.S.C.App. § 1300, *et seq*., as it relates to a contract containing a clause requiring arbitration in a foreign country. The question presented was whether a foreign arbitration clause in a bill of lading is invalid under COGSA because it lessens liability in the sense that COGSA prohibits. The Court held that COGSA does not forbid selection of a foreign forum.

Thus, a choice-of-forum clause is presumptively valid. *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). It will, however, be "held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id*. The critical inquiry to determining whether a clause violates public policy is whether "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n. 19, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *see Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 36 (5th Cir.1997) (per curiam); *see also Haynsworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir.1997) (recognizing the holding in Mitsui as binding precedent that rejected a distinction between foreign arbitration clauses and forum selection clauses). "The party

resisting enforcement on these grounds bears a 'heavy burden of proof.'" *Haynsworth*, 121 F.3d at 963 (quoting *Bremen*, 407 U.S. at 17, 92 S.Ct. 1907); *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233 (5th Cir. 5/28/09).

**D. COGSA Burdens of Proof**

The burdens of proof associated with COGSA are set forth in *Nitram, Inc. v. Cretan Life*, 599 F.2d 1359 (5th Cir. 1979), which instructs, "[t]o enforce their respective rights under [COGSA], litigants must engage in the ping-pong game of burden-shifting mandated" by sections 1303 and 1304 of the Act. 599 F.2d 1359, 1373 (5th Cir.1979). To present a *prima facie* case under COGSA for the loss of cargo, a charterer must initially prove that the carrier failed to deliver all of the goods initially loaded. *See Tenneco Resins, Inc. v. Davy International*., AG, 881 F.2d 211, 213 (5th Cir.1989); *Horn v. Cia de Navegacion Fruco, S.A.*, 404 F.2d 422, 435 (5th Cir.1968). The charterer's proffer of the bill of lading creates the rebuttable presumption that all of the cargo listed in the document was, in fact, loaded upon the carrier's vessel in the condition therein described. *Blasser Bros. v. Northern Pan-American Line*, 628 F.2d 376, 381 (5th Cir.1980).

Once the charterer presents its *prima facie* case, the burden shifts to the carrier to prove either that it exercised due diligence in preventing the loss of the cargo or to prove that the loss was caused by at least one of the exceptions set out in section 1304(2) of COGSA. *Tenneco Resins, Inc.*, 881 F.2d at 213. If the carrier successfully rebuts the charterer's *prima facie* case, the burden returns to the charterer to prove that the carrier's negligence was at least a concurring cause of the loss. *Id*. If the charterer meets this challenge, the carrier must finally satisfy the heavy burden of proving the percentage of loss due to its negligence and the percentage of loss due to the charterer's negligence. *Id*. If the carrier fails to prove the proportionate fault of each of the parties, the carrier becomes liable for the entire loss. *Id*.

**E. Per-Package Limitation**

By its terms, COGSA governs bills of lading for the carriage of goods "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U. S. C. App. § 1301(e). For that period, COGSA's "package limitation" operates as a default rule. § 1304(5). But COGSA also gives the option of extending its rule by contract. See § 1307 ("Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea"). *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (11/9/04).

[1] 2015-2016 Edition of the ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air and the 56th Edition of the IATA Dangerous Goods Regulations.
[2] 49 C.F.R. §§ 100-185.
[3] *Smith v. United Parcel Serv*., 296 F.3d 1244, 1246 (11th Cir. 2002) ("The Carmack Amendment creates a uniform rule for carrier liability when goods are shipped in interstate commerce."); *Hansen v. Wheaton Van Lines, Inc.*, 486

F. Supp. 2d 1339, 1343-44 (S.D. Fla. 2006) (Carmack Amendment preempts all state, common and statutory law regarding the liability of an interstate common carrier for claims arising out of shipments within its purview). However, the Carmack Amendment does not apply to shipments from a foreign country to a final destination in the U.S. unless the domestic leg of the transportation is governed by a separate bill of lading. *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.* 799 F.2d. 697 (11th Cir. 1986); *Sodikart USA v. Geodis Wilson USA, Inc.*, No. 13-22626 (S.D. Fla. 9/3/14), at p. 7.