



CLM 2016 Boston Conference
July 14-15, 2016 in Boston, MA

Intermodal Transport Shipments – Who is Responsible for Cargo Losses?

Setting the Table - Liability Regimes

Cargoes moving in international commerce are subject to both international and municipal (national) law; while this presentation focuses upon US liability regimes, it is important to note those regimes serve both as a foundation for, and exist within, the paradigm of a number of international agreements. Given the near-recent development of transportation of cargoes by air, development of liability regimes has focused heavily upon ocean and over the road carriage; that said, the overarching purpose of each regime has been to allocate risk of loss and create predictable liability rules on which both Carriers and cargo interests may rely.

The U.S. Limited Liability Act of 1851 led to the Harter Act of 1893, which was heavily relied upon by the Hague Rules of 1924, which were, in turn, adopted by the International Convention for the Unification of Certain Rules Relating to Bills of Lading at the Brussels Convention of 1924 (the Hague Rules). Notably, the Hague Rules allowed ship owners to limit their liability on loss and damage to 100£ (Sterling) per package. In 1936, Congress adopted the principle terms of the Hague Rules as the Carriage of Goods by Sea Act, 46 App U.S.C. §1300 *et. seq.* (“COGSA”), but increased the limitation of liability to \$500 per package or, for freight not shipped in packages, per customary freight unit.

Since the adoption of COGSA, the Hague Rules have become the Hague-Visby Rules (by adoption of The Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 1968) and the limitations available under Hague-Visby were further modified by the Special Drawing Rights Protocol of 1979 [providing for liability to be set at “666.67 units of account [SDR] per package or unit or 2 units of account [SDR] per kilogramme of gross weight of the goods damaged, whichever is higher.”

In 1978, the UN Convention on the Carriage of Goods by Sea adopted another set of rules – the Hamburg Rules – in order to provide a more modern framework, addressing the issues of multi-modal transportation and to be less biased to ship owners. Although adopted by a number of developing countries, the Hamburg Rules have largely been ignored by the principal maritime nations.

The failure of the Hamburg Rules led to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2009). Signed by twenty-five (25)

states, the “Rotterdam Rules” establish a modern, comprehensive, and uniform regime governing the rights and obligations of Shippers, Carriers, and Consignees under contract for door-to-door transport that involves ocean carriage at some point in the process. At present, the Rotterdam Rules have been ratified by only twenty states and are not yet in force.

The Harter Act, 46 U.S.C. app. §§190-196 (2003)
[27 Stat. 445].

Adopted 1983, the Harter Act paralleled a number of English statutes and was designed to protect American shipping companies from liability involving damaged or lost cargo. The Act applies to all domestic shipping, but must be specifically mentioned in the Bill of Lading in order to apply to carriage to or from foreign ports.

The Act imposes liability upon the Carrier from receipt of goods until delivery and does not permit the Carrier to limit its liability. It does, however, provide for exoneration from liability for: (1) faults or errors in navigation or management of the ship, (2) Acts of God or Public Enemies, (3) inherent defect, quality, or vice of the Goods (including packaging), (4) seizure by government authority, (5) acts or omissions of the Shipper, and (6) loss arising while saving or attempting to save lives and property at sea.

Those exonerations are only available if the Carrier exercises due diligence in (1) making the vessel seaworthy, (2) properly manning, equipping, and supplying the vessel, and (3) properly stowing and caring for the cargoes while in the Carrier’s custody.

Carriage of Goods by Sea Act, 46 U.S.C. app. § 1300 et.seq. (“COGSA”)

COGSA applies to “all contracts for carriage of goods” – Bills of Lading or similar documents of title – issued for transport by sea to or from ports of the United States in foreign trade” 46 U.S.C. at §1301(b), 1312. As with the Harter Act, COGSA imposes a duty to (1) make the ship seaworthy, (2) properly man, equip, and supply the vessel, (3) make holds, refrigerating and cooling units and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.” 46 U.S.C. at §1303. The Carrier must then “properly and carefully load, handle, stow, carry, keep care for and discharge the goods, carried.” *Id.*

The Carrier then enjoys rights and immunities from liability for (1) Unseaworthiness (unless caused by want of due diligence), (2) acts, neglect, or default in the navigation or management of the vessel, (3) fire (unless caused by fault of the Carrier), (4) accidents of the sea, (5) Acts of God, (6) Acts of War, (7) Acts of Public Enemies, (8) Arrest or restraint of princes.. or seizure under legal process, (9) quarantine, (10), Act or omission of the Shipper or owner of the Goods, (11) strikes or lockouts or stoppage or restraint of labor, (12) riot and civil commotion, (13) saving or attempting to save life or property at sea, (14) inherent defect, quality, or vice of the goods, (15) insufficiency of packing, (16) latent defect, and (16) any other cause arising without the fault or privity of the Carrier. 46 U.S.C. at §1304 (1)-(2).

COGSA provides for limitation of liability at \$500 “per package ... or in the case of goods not shipped in packages, per customary freight unit” 46 U.S.C. at §1304(5), prohibits a

Carrier from contracting away its own negligence or limiting its liability to a level lower than that prescribed by the statute. *46 U.S.C. at §1303(8)*

Finally, COGSA also includes a statute of limitations of one year – after the delivery date or the date when the goods should have been delivered. *46 U.S.C. at §1303(6)*.

Harter and COGSA Applied

The Harter Act and COGSA function similarly, but in different stages of transportation: Harter applies from the Carrier's receipt of the Goods until delivery; COGSA applies only to "the period from the time when the Goods are loaded on to the time when they are discharged from the ship." *46 U.S.C. at §1301(e)*. The parties may, however, agree to "incorporate COGSA's provisions to the periods of the voyage ordinarily covered by the Harter Act." *Sabah Shipyard Sdn. Bhd. v. M/V HARBEL TAPPER*, 178 F.3d 400, 406 (5th Cir. 1999). In such circumstances, COGSA does not apply of its own force, but merely as a contractual term. *Colgate Palmolive Co. v. S/S DART CANADA*, 724 F.2d 313, 315 (2nd Cir. 1983).

It is important to note three critical differences between Harter and COGSA:

- (1) In Harter, the Carrier is liable for "any failure to exercise due diligence to provide a seaworthy vessel, regardless of whether or not the Carrier's negligence resulted in the loss, while COGSA requires proximate causation;
- (2) Harter has no statute of limitations; and
- (3) Harter does not provide for or authorize the Carrier to limit its liability.

The Montreal Convention

The Montreal Convention of 1999 applies to International Air Shipments. The governing laws also includes the Warsaw Convention, Hague, MP4 and Montreal Protocol 99. In order to ascertain which Regime applies, one must determine whether the parties are a contracting state to the Convention. All of the regimes govern damage to cargo only Contracting States. Of utmost importance, is the applicability of the convention to damaged cargo on the airport premises. Liability of an air carrier can be extended outside the airport if there is a transshipment under a waybill which is under the control of the air carrier.

Air carrier defenses to the Montreal Convention are clearly outlined in the text of the statutory liability regime. These include:

- (1) Inherent defect
- (2) Act of War
- (3) Act of Public Authority
- (4) Defective Packaging

The air carriers Air Waybill terms and condition govern Notice Provisions. The Statutory Regime contains these provisions which are:

- (1) Damage to Cargo – Notice must be given within 14 days from receipt

(2) Delay of Cargo – Notice must be given 21 days from when the cargo should have been delivered

Time limitations for filing suit under international air carriage is contained within the statute. It cannot be extended by agreement prior to the matter being placed in litigation. The Statute provides that suit must be brought within two (2) years from the date of arrival at the destination airport or from which the aircraft ought to have arrived or from the date the carriage stopped.

The limit of liability of air carriers is determined by the applicable liability regime. If parties to an air waybill are contracting parties to the Warsaw Convention then the air carriers' liability is limited to \$20/kilo. The Montreal Protocol modified the limitation to be valued under the "SDR" and damage is calculated at 19SDRs/kilo. This limitation became effective December 30, 2009. Since the SDR is a daily fluctuating "currency", liability limitation at the date of tender of the goods for air carriage and the date of arrival at the airport of destination.

The Pomerene Act, 49 U.S.C. §80101

The Bills of Lading Act of 1916, Pomerene remains the principal statute governing Bills of Lading issued for the purpose of interstate or foreign transport (commerce).

The Pomerene Act distinguishes between straight Bills of Lading (non-negotiable bills, consigning the goods to a specified person or entity) and Order Bills of Lading (which consign the goods to the order of any person named in the Bill." Under the Pomerene Act, a Carrier has a duty to deliver the goods to any person in possession of a duly endorsed Order Bill of Lading.

The Pomerene Act provides immunity to Carriers against claims for "misdescribed cargo when the carrier describes the cargo in the bill of lading with the phrase 'said to contain' or similar language." 49 U.S.C. at §80113.

The Carmack Amendment, 49 U.S.C. §14706

Enacted in 1906 as an amendment to the Interstate Commerce Act of 1887, Carmack establishes a uniform regime of obligation and liability for over the road (motor) and rail carriers for interstate and foreign commerce, and provides a single method for Shippers to recover directly from the common carrier in whose "care" the Goods are damaged.

"Where multiple carriers are responsible for different legs of a generally continuous shipment place in a state and a place in another state," courts will look to "the intended final destination of the shipment" in order to determine the applicability of Carmack; if the final intended destination is another state or a foreign country, even the intrastate portion of transport will be subject to the Carmack Amendment. See *Project Hope v. M/V IBN SINA*, 250 F.3d 67, 74 (2nd Cir. 2001).

Carriers are liable for the “actual loss or injury to the property,” unless rates for transportation of property under which the liability is limited are published and the shipper is offered a reasonable opportunity to select between the limited liability and full value transportation rates. See *49 U.S.C. at §14706(c)*. Carriers may also provide a rule requiring filing of claims of no less than nine (9) months and no more than two (2) years from the date of delivery. *49 U.S.C. at §14706(e)*.

A cargo owner establishes *prima facie* proof of the Carrier’s Liability by showing (1) delivery of the cargoes in good condition to the Carrier, (2) arrival in damaged condition at destination, and (3) the amount of damages.

Because Carmack does not provide for specific defenses or exoneration for carriers exercising due diligence, carriers are limited to the common law exonerations from liability: (1) freedom from negligence, (2) Act of God, (3) Inherent vice of the Goods, (4) acts or omissions of the Shipper, (5) acts of Public Enemies, and (6) acts of government authorities.

Whose Bill of Lading is It?

Ocean Carrier
Non-Vessel Operating Common Carrier
Air Common Carrier

Where was Delivery Effected (and When)?

Port / Terminal Delivery
Ocean
Air
Door

Assessing Liability – What is Paid?

Declaration / Identification of Cargoes
Defining the “Package”
Contract
Limits of Liability

Exoneration

Acts of God / Force Majeure
What Is an Act of God?
Burden of Proof