

FOREIGN ARBITRATION CLAUSES INVALID UNDER CARMACK

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If you have ever made a Carmack claim or filed a lawsuit pursuant to Carmack in the United States, only to have the defendant carrier assert that your claim must be dismissed because a clause in the contract with the shipper requires disputes to be handled through an overseas arbitration, the 9th Circuit just provided a response. See *Smallwood v. Allied Van Lines, Inc.* (9th Cir. 2011) Case No. 09-56714.

Carmack Amendment Recap

The Carmack Amendment, currently codified at 49 U.S.C. § 14706, is the exclusive cause of action for interstate-shipment contract claims with motor carriers alleging loss or damage to property. The purpose of Carmack has always been to relieve owners of goods the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods. It provides strict liability upon the common carrier without proof of negligence. In addition, and relevant to the 9th Circuit's recent decision in *Smallwood*, Carmack provides the owner/shipper the right to sue the carrier in a convenient forum of the shipper's choice. At issue in *Smallwood* is the carrier's attempt to circumvent the shipper's forum choice right with an arbitration provision in the shipping contract.

Case Facts

In *Smallwood*, the plaintiff is a U.S. citizen who resided in San Diego until September 2007, when he accepted a job in the United Arab Emirates (UAE). Smallwood contracted with a UAE company to ship most of his belongings to the UAE and store the remainder in California. The UAE carrier retained additional U.S. carriers to assist with shipment. When the carriers mistakenly shipped the goods that were to be stored in California to the UAE, including a box of firearms, Smallwood was arrested and imprisoned in UAE. Smallwood filed suit in the United States against all of the carriers for various causes of action based upon their improper shipment of his firearms to UAE instead of storing

them in California per the contract. The UAE carrier moved to compel arbitration pursuant to a clause in its contract with Smallwood that any disputes will be referred to arbitration in UAE.

Ruling - Carmack Rejects Compelled Arbitration Provisions

The 9th Circuit recognized that the United States has a strong policy that favors the enforcement of commercial arbitration agreements in international contracts. This policy is codified in both the Federal Arbitration Act as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, the 9th Circuit ruled that the Carmack Amendment prohibits carriers of goods from forcing an owner/shipper to agree to arbitrate his claims as a condition to contracting. The Carmack Amendment's rejection of international arbitration clauses in contracts for the shipment of goods is based on the intent of the Carmack Amendment to provide the owner/shipper of goods the choice of where to file suit for a Carmack cause of action. The owner/shipper can choose either a United States District Court wherein the defendant carrier operates, or in the judicial district in which the damage allegedly occurred.

Impact

If your case involves a claim under the Carmack Amendment, then the defendant carrier cannot force you to litigate your case through an arbitration in another country. This ruling will assist you in your Carmack cases in a number of ways. First, often trying a case in another country, even via arbitration, can prove more costly than litigating a case in the United States. Particularly if discovery must be conducted overseas as opposed to the United States. Second, the *Smallwood* ruling ensures your case involves the application of the favorable Carmack Amendment in a U.S. Court, including the carrier's strict liability without proof of negligence. Conversely, if these foreign arbitration provisions were valid, it is unclear what choice of law would govern the foreign arbitration.