# OVERVIEW OF MARINE, INTERSTATE AND INTERMODAL CLAIMS

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# I. OVERVIEW OF LAW GOVERNING OCEAN MARINE CLAIMS

Shipments transported to or from the United States are governed by the U.S. Carriage of Goods by Sea Act ("COGSA"), 46 USC §1300, *et seq.* The statute was passed in 1936 and has been the subject of thousands of judicial decisions in the United States.

## A. Applicability

COGSA applies from tackle to tackle or, as stated in the statute, "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 USC §1311. This means that the statute begins to apply at the load port, and ceases to apply at the discharge port, as the cargo passes over the ship's rail. As will be discussed below in more detail, the coverage of the statute can be extended.

## B. Notice of Claim

Filing a formal notice of claim with the ocean carrier is not required by COGSA; however, it nevertheless remains a good practice to do so in order to create a record that the ocean carrier was given an opportunity to appoint a surveyor to inspect the goods, confirm the extent and cause of the damage and preserve any evidence which it sees fit.

The statute does require that exceptions to the good order and condition of the cargo be recorded at the time of delivery to the receiver. If damage to the goods is "not apparent," such as in the case of cargo delivered in a sealed ocean container, "the notice must be given within three days of the delivery." The failure to give such notice, however, is not fatal to the claim since the absence of exceptions on a delivery receipt, followed by a failure to give notice within three days of delivery, "shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading." A *prima facie* showing can be rebutted in court if evidence is adduced which demonstrates that, notwithstanding the clean delivery receipt, the cargo was in fact damaged.

## C. Statute Of Limitations

COGSA provides for a relatively short statute of limitations which runs from the date of delivery or the date on which goods should have been delivered:

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

Attempts to circumvent COGSA's one year statute of limitations by framing causes of action in terms of negligence, conversion and breach of contract have been uniformly rejected by the courts on the grounds that the statute preempts common law causes of action.

## D. Establishing A Prima Facie Case

The owner of cargo bears the burden of proving that cargo was damaged or lost while in the custody of the ocean carrier. A cargo plaintiff establishes a *prima facie* case against an ocean carrier by proving (1) delivery of the cargo in good order and condition to the ocean carrier; and, (2) outturn of the cargo by the carrier in a damaged condition. *Vana Trading Co., Inc. v. S.S. Mete Skou*, 556 F.2d 100, ( 2d Cir. 1976); *cert. denied*, 434 U.S. 892 (1977).

Generally, proof of delivery to the ocean carrier is established with a clean bill of lading issued by the ocean carrier. Damage at the point of delivery is generally memorialized by exceptions on trailer interchange receipts or delivery receipts. The damage is also typically quantified, and opinions articulated as to the cause, in reports issued by surveyors appointed respectively by the cargo owner's underwriter and the ocean carrier.

### E. Defenses:

COGSA enumerates seventeen defenses. The most commonly relied upon of these defenses are:

(1) Error in navigation/management: "Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;"

(2) Peril of the Sea: "Perils, dangers, and accidents of the sea or other navigable waters;"

(3) "Act of God;"

(4) Act of Shipper: "Act or omission of the shipper or owner of the goods, his agent or representative;"

(5) Inherent Vice: "Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;"

(6) Insufficient Packaging: "Insufficiency of packing;"

(7) Due Diligence: "Latent defects not discoverable by due diligence;"

(8) Q Clause: "Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier..."

### F. Package Limitation

COGSA provides that a carrier can limit its liability to $500 per package or customary freight unit:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

The courts routinely enforce COGSA's $500 limitation; nevertheless, there are ways to potentially circumvent the limitation:

1. Analysis of what constitutes the package;
2. Deviation by the carrier (geographic or, alternatively, material deviation from the contract of carriage by stowage of goods on deck which are required to be stowed below deck);
3. Failure by the carrier to give the shipper an opportunity to declare a higher valuation and to pay a commensurately higher freight rate;
4. Poorly drafted bill of lading which contains inconsistent language.

## G. Forum Selection Clauses

Foreign ocean carriers sometimes place jurisdiction clauses in their bills of lading which call for the litigation of all disputes in a foreign country, typically in a place where the carrier has its principal place of business. The U.S. Supreme Court has held that these clauses are enforceable. *Vimar Seguros y Resaeguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). There is some lower authority which indicates that the foreign jurisdiction clause can be avoided if plaintiff demonstrates that remedies under U.S. law are not available in the foreign jurisdiction, *e.g.*, enforcement of an *in rem* claim against the vessel through maritime arrest. The vast majority of the decisions dealing with jurisdiction clauses have ruled in favor of the ocean carrier.

## II. LAW GOVERNING INTERSTATE CLAIMS

### A. Carmack Amendment Superceded By I.C.C. Termination Act

A uniform procedure for the presentation of cargo claims was implemented by the **Carmack Amendment**, an amendment to the **Interstate Commerce Act** which was enacted in 1906. The Carmack Amendment established the following uniform processes:

1. Minimum nine month notice of claim period;
2. Minimum two year statute of limitations;
3. Damages: made carriers liable for actual damages;
4. Liability limitations: carriers allowed to limit liability to released values.

In the 1980s, there was a series of legislation which signaled the deregulation of the transportation industry. This culminated in the passage of the **I.C.C. Termination Act of 1995** which became effective on January 1, 1996. Virtually all regulation of trucking freight rates was ended, with the exception of those companies involved in the transportation of household goods. The practical effect of this deregulation was to abolish the formal requirement that a trucking company file tariffs which established freight rates corresponding to the trucker's liability limits.

### B. What Constitutes A Valid Notice of Claim

The requirements for the filing of a notice of claim, found in the Rules of the Interstate Commerce Commission at 49 C.F.R. §1005.2 (b),[1] are that a written notice be filed by the claimant with the carrier:

1. containing facts sufficient to identify the shipment;
2. asserting that the carrier is liable for the loss; and,

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1 Although the Interstate Commerce Commission was abolished, the Savings Provision, § 204, of the I.C.C. Termination Act of 1995, provides that the I.C.C. rules and regulations continue to be applicable until revised or revoked by the Surface Transportation Board, a court of competent jurisdiction or by operation of law.

3. making claim for payment of a specified or determinable amount of money.

Our courts have held that these requirements are enforceable. See, *Pathway Bellows, Inc. v. Blanchette, et al.(2d Cir., 1979).* It should be noted that 49 C.F.R. §1005.2 (b) provides that the notice of claim can be electronically communicated; however, this can be done <u>only</u> when agreed to by the carrier and shipper or receiver.

**C. Statute of Limitations**

The I.C.C. Termination Act of 1995 continues the two (2) year statute of limitations set forth in the Carmack Amendment. The time to file suit begins to run "from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice."

A typical response from the carrier, which would trigger the two year time in which to commence suit, is an outright declination of claim. However, the statute contemplates that a response from the carrier which only accepts responsibility for part of the loss claimed would be sufficient to start the clock on the two year limitation period. An example would be acceptance of liability by the carrier but an offer to pay less than the damages claimed because of the availability of a provision in the bill of lading which limits its liability.

The two year time in which to commence suit should accordingly be diaried from the date of any response from the carrier which declines liability for all, or any part of, the claim.

**D. Defenses:**

A carrier's liability for damage is set forth in 49 USC §14706 (a)(1) as follows:

> "A carrier providing transportation or service... shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service...are liable to the person entitled to recover under the receipt or bill of lading. <u>The liability imposed under this paragraph is for the actual loss or injury to the property</u> caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the

> United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading..." (emphasis supplied)

The language of the statute is similar to that found in the Carmack Amendment. Like the Carmack Amendment, the language seems to impose a form of strict liability on carriers. However, hundreds of cases decided under the Carmack Amendment continued to allow the assertion of five "common law" defenses which have been judicially developed. There is no suggestion in the I.C.C. Termination Act of 1995 that the common law defenses which were previously available to carriers under the Carmack Amendment have been abolished. These defenses are:

(1) Act of God: The conditions which are necessary for assertion of the defense are: (1) Damage must result from an occurrence that constitutes an Act of God; (2) Occurrence must be proximate cause of the damage or loss; (3) Loss must not be attributable to carrier's negligence. It must be emphasized that concurrent negligence on the part of the carrier, even if an "Act of God" is found to have occurred, will vitiate the defense and render the carrier liable.

(2) Inherent Vice: Inherent Vice is the natural tendency of a product to deteriorate or destroy itself through the passage of time. Examples of products which can be susceptible to this condition are (1) fruits, vegetables, cheeses and other perishables which decay with the passage of time; (2) steel products which are damaged by atmospheric rust; (3) bulk cargo which is subject to change as a result of oxidation; and, (4) bulk commodities which are subject to natural shrinkage or reduction in weight from the loss of moisture. External forces encountered during transportation, which act upon a natural condition of the cargo, do not constitute inherent vice. Examples of such conditions are (1) rust caused by exposure of cargo to water; and, (2) heat damage incurred by products which have been given protective service.

(3) Public Enemy: Public Enemy implies the existence of an actual state of war and refers to the government of a foreign nation at war with the carrier's government. Existing cases currently do not consider losses caused by robbers, hijackers or thieves to fall within the Public Enemy defense. An articulate statement of the defense by a lower court is found in *David Crystal Inc. v. Ehrlich-Newmark Trucking Co.* 314 N.Y.S.2d 559 (N.Y.City Civ. Ct., 1970):

> "Thieves, rioters and robbers, although at war with social order, are not to be classed as 'Public Enemies' in a legal sense, but are merely depredators for whose acts the carrier remains liable."

(4) Act Or Fault of the Shipper: This defense contemplates damage which arises from something the shipper has done or failed to do with respect to the shipment. The most common examples of acts which support the defense would be inadequate or improper securing of cargo within a container or trailer by the shipper; and, (2) misdescription of the container's contents on the bill of lading which results in damage. As with the Act of God defense, concurrent negligence on the part of the carrier will result in a loss of the defense.

(5) Act of Public Authority: This defense is not commonly encountered in the context of interstate claims. The defense contemplates loss or damage arising from an act of the government or public authority. Older cases have involved rare situations where there has been an embargo on cargo or a shipment has been taken from the carrier by legal process.

## E. Limitation of Liability

Case law and legislation following the Carmack Amendment resulted in an elaborate structure by which carriers could place monetary limits on their liability which correlated to freight rates they charged to shippers. The freight rates (known as "released rates") and liability limits ("released values") were submitted to the I.C.C. and, if approved, could then be offered to shippers and incorporated into the carrier's bill of lading. Thus, a shipper was offered a choice of freight rates by carriers: low rates which corresponded to low limits of liability on the part of the carrier and a considerably higher freight rate which exposed the carrier for the shipment's full value. In the latter case, the commensurate freight charge was frequently so high that a shipper elected not to select it. Nevertheless, language in a bill of lading, which limits a carrier's liability based upon released value and released rates, has been deemed to be a provision which gives the shipper a choice and is not a penalty.

Under the I.C.C. Termination Act, carriers are still free to establish released values and corresponding released rates. However, they are no longer required to obtain prior approval of these rates from the I.C.C. or the Surface Transportation Board. Significantly, the carriers are no longer required to file tariffs which set forth their freight rates or corresponding limits of liability (with the exception of shipments of household goods, a commodity which still remains regulated). In this regard, the I.C.C. Termination Act provides as follows:

> "Subject to the provisions of subparagraph (B), <u>a carrier providing transportation or service</u> subject to jurisdiction under subchapter I or III of chapter 135 <u>may...establish rates for the transportation of property</u> (other than household goods described in section 13102(10)(a)), <u>under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation</u>." §14706 (c)(1)(A)

The statute provides that the value must be "reasonable under the circumstances surrounding the transportation." In the past, the I.C.C. was the arbiter of disputes as to the reasonableness of released values and the corresponding freight rates. Now, the federal courts will be called upon to decide this issue on a case by case basis, presumably after hearing expert testimony on the issue.

More importantly, there appears to be a conflict between the provisions of the I.C.C. Termination Act and prior case law dealing with tariffs. Prior cases have held that a tariff is constructive notice only of terms which are required by law to be filed. See, *e.g.*, *Federal Commerce & Navigation Co., Ltd. v. Calumet Harbor Terminals, Inc.*, 542 F.2d 437 (7th Cir. 1976). This means that if a statute requires a carrier to put a limitation in a tariff and the carrier complies with that statute, then shippers are deemed to have constructive notice of the tariff provision and are bound by it. On the other hand, if the carrier is not required by law to state certain information in a tariff, then his doing so will not be imputed to the public.

Applying this principle to the I.C.C. Termination Act should accordingly lead to the conclusion that no limitation contained in a tariff is now binding on any shipper, because there is no longer any legal requirement on the part of truckers to file tariffs. Indeed, a strict application of this principle should require that carriers set forth released values in their bills of lading, or enter into a written agreement memorializing same with the shipper prior to the shipment.

However, there is troubling language in the statute which seems to now place the burden on the shipper to ask for the schedule of released rates and released values. §14706 (c)(1) (B) of the statute provides as follows:

> "(B) CARRIER NOTIFICATION.--If the motor carrier is not required to file its tariff with the Board, it shall provide...to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices." (emphasis supplied)

If accepted at face value, it appears that the statute is putting the burden on the shipper to ask for the carrier's schedule of released rates and released values, even though the shipper may be inexperienced and ignorant of the fact that a choice of rates is available to it. It remains to be seen how the courts will interpret this part of the statute.

## III. LOSSES ARISING UNDER INTERMODAL BILLS OF LADING

Generally, there are two types of bills of lading where intermodal transit is involved. A house/house bill of lading, also known as a CY/CY (container yard to container yard) bill of lading, contemplates a shipment loaded completely by the shipper which is then delivered to the ocean carrier at its terminal. The ocean carrier's responsibility for the shipment begins when the loaded container is received at its terminal. At the discharge port, the consignee arranges to pick up the shipment from the ocean carrier's terminal. The ocean carrier's responsibility ends when the loaded container leaves its terminal. Issues nevertheless arise because shipments arriving from the Far East are generally discharged at the west coast and transported by rail to an ocean carrier's off dock container freight station; or, a containerized shipment is held at the rail head, pending pickup by the consignee. The question arises as to whether damage which occurs to the shipment during rail transit is subject to the U.S. Carriage of Goods by Sea Act or the I.C.C. Termination Act.

Another form of bill of lading which is becoming more common in light of attempts by ocean carriers to offer seamless transportation is the door/door or store/store bill of lading. In this instance, the ocean carrier arranges to transport the shipment from the shipper's place of business to the receiver's place of business. Typically, this entails trucking in a foreign country, ocean transit to the United States' west coast, rail transit to the east coast and trucking from the ocean carrier's terminal to the receiver's warehouse. Damage at any stage can trigger a different statutory scheme, depending upon the manner in which the transit documents are drafted.

### A. Clause Paramount

As mentioned at the beginning of this paper, COGSA statutorily applies from the time of loading until the time of discharge. The statute provides, however, that its scope can be extended to all periods of time that the cargo is in the custody of the ocean carrier. The drafters were well aware that ocean carriers used independent stevedores to load and discharge cargo from ships, marshal the cargo at the terminal and make it available for delivery. The statute accordingly provided for application, via contract (*i.e.*, the bill of lading), to those times when cargo is in possession of the ocean carrier prior to being loaded aboard the ship or, at the pier after discharge, awaiting delivery to the consignee. 46 USC §1311. Language extending COGSA's coverage to periods before loading and after discharge is generally found in the Clause Paramount of the ocean carrier's bill of lading.

### B. Himalaya Clause

The Himalaya Clause of an ocean carrier's bill of lading is intended to extend COGSA defenses to contractors engaged by the ocean carrier to perform traditional maritime activities. An example of typical Himalaya Clause language which might be found in an ocean carrier's bill of lading follows:

> "All defenses under this bill of lading shall inure to the benefit of the Carrier's agents, servants and employees and of any independent contractor, including, stevedores, performing any of the Carrier's obligations under the contract of carriage or acting as bailee of the goods, whether sued in contract or in tort."

Typical defenses under the U.S. Carriage of Goods By Sea Act ("COGSA"), which have been extended to contractors under a Himalaya Clause, are the $500 package limitation and COGSA's one year statute of limitations.

While the Himalaya Clause was initially drafted in contemplation of extending COGSA defenses to the ocean carrier's terminal operators, its coverage was expanded to cover other contractors as well. Eventually, the question arose whether an interstate carrier, such as a railroad or a trucker, was entitled to claim the benefit of defenses under COGSA, when it damaged a shipment moving under a through bill of lading.

Earlier cases held that a Himalaya Clause gives a trucker the benefit of the ocean carrier's defenses. *Brown & Root, Inc. v. M/V PEISANDER.* But, there has been expression by at least one court that the type of COGSA defenses will be limited. See, *e.g.*, *Vistar, S.A. v. M/V SEA LAND EXPRESS,* where the Error in Navigation defense was denied to an overland trucker.

Historically, the Courts examined the following criteria in determining whether an interstate carrier can take advantage of COGSA defenses:

1. Was the trucker engaged by an ocean carrier?

2. Does the ocean carrier's bill of lading contain a Himalaya Clause with clear language that would cover the trucker or terminal operator? See, *Taisho Marine & Fire Insurance Co. v. Vessel GLADIOLUS* (the words "agent and sub-contractor" does not include overland trucker).

3. Was the shipment in transit under the ocean carrier's bill of lading at time of loss;

4. Was the trucker performing a traditional maritime function?

The cases were not uniform in the definition of "traditional maritime function." See, *e.g.*, *Caterpillar Overseas, S.A. v. Marine Transport Inc.* where the court held that hauling cargo over a highway is not a traditional maritime service. In contrast, *Taisho Marine & Fire Insurance Co., Ltd. v. Maersk Line, Inc.* held that moving cargo under an intermodal bill of lading is a traditional maritime function.

Another variable was which carrier's bill of lading will apply in those instances where an NVOCC (Non-Vessel Operating Common Carrier) is involved. Typically, an NVOCC issues a bill of lading to the shipper and undertakes to perform the entire transit. It, thereafter, contracts with one common carrier, and sometimes multiple common carriers, to perform the entire transit. *Kirby v. Norfolk Southern Railway*, a Supreme Court case which was decided in November, 2004, has answered the latter question and, in addition, appears to have done away with the "traditional maritime activity" requirement. In that case, an NVOCC issued a bill of lading to the cargo owner, which undertook to transport a shipment from Australia to Alabama. The NVOCC then engaged an ocean carrier, Hamburg Sud, to perform the transit. Hamburg Sud issued a through bill of lading and contracted with Norfolk Southern to perform the overland transit from Savannah, Georgia to Huntsville, Alabama. A train derailment resulted in destruction of the shipment. Since the shipment was comprised of ten machines, Norfolk Southern argued that it was entitled to the benefit of the ocean carrier's package limitation under COGSA of $500 per package ($5,000).

The Supreme Court held that the NVOCC was an agent of the shipper for a "single, limited purpose". As such, the shipper was bound by the terms and conditions of the ocean carrier's bill of lading, including its Himalaya clause which gave the railroad the benefit of the ocean carrier's defenses under COGSA. The court also appears to have implicitly abandoned the "traditional maritime activity" criterion, noting that, in light of the advancements in transportation technology which have resulted from containerization, "the shore is now an artificial place to draw a line."

## C. Maritime Jurisdiction

The *Kirby* decision has finally overruled a line of cases which has troubled maritime attorneys, i.e., whether an inland loss incurred by a shipment moving under an intermodal bill of lading is subject to admiralty jurisdiction at all. The prior rule was stated in *Transatlantic Marine Claims Agency v. Ace Shipping*, 109 F.3d, 105 (2d Cir.1997). In that case, an NVOCC issued a bill of lading providing for the transport of a shipment from New York to Pusan, via Seattle, where the shipment was to be loaded aboard a vessel for ocean carriage. The shipment was completely destroyed in a derailment. The NVOCC argued that the complaint was not subject to maritime jurisdiction because the loss took place on land. In analyzing the issue, the Court of Appeals distinguished between a "wholly" maritime contract and a "mixed" contract. While the former certainly supported subject matter jurisdiction, a "mixed" contract had to be analyzed by the Court to determine whether the non-maritime portion was merely incidental to the overall contract. In this case, the Court of Appeals claimed that it could not determine whether the parties contemplated a cross-continental transit, or whether they contemplated a transit via ocean vessel. If an overland transit was contemplated, the Court stated that the interstate leg of the transit was not maritime in nature and the complaint must accordingly be dismissed. The Court remanded the case to the trial judge for findings as to what the parties' intention was.

The tortuous analysis in *Transatlantic* should no longer be necessary as a result of the *Kirby* ruling, which succinctly held that the intermodal bills of lading involved in that case were "maritime contracts."

### C. Effect Of Forum Selection Clause

As discussed above, the *Sky Reefer* decision held that forum selection clauses in ocean bills of lading did not violate COGSA and are enforceable. A question arises as to whether entities engaged by the ocean carrier to perform some part of the transit are able to claim the benefit of a forum selection clause. U.S. courts have appeared to have answered this question affirmatively. In *Chisso America, Inc. v. M/V Hanjin Osaka*, 2003 AMC 2796 (DNJ 2003), the ocean bill of lading was issued by Senator Line; however, this carrier sub-contracted the transit to Hanjin, which had demise chartered the carrying vessel from Laysan Shipping Co., S.A. Hanjin (a Korean shipping line based in Seoul) and Laysan both moved for dismissal of a district court action commenced in New Jersey, based on the Senator Line bill of lading which called for the resolution of disputes in Bremen, Germany. Noting that the Senator Line bill of lading contained a Himalaya Clause which extended defenses to its "servants or agents, any independent contractor and his servants or agents, and all others by whom the whole or any part of the Carriage, whether directly or indirectly, is procured, performed or undertaken ..." The Court held that the slot charterer and the vessel owner were encompassed by the broad language of the Himalaya Clause and entitled to the defenses under the bill of lading, including the forum selection clause. Courts have also held that stevedores are entitled to enforce the carrier's forum selection clause. In *Indemnity Insurance Co. of North America v. Schneider Freight, U.S.A., Inc.*, 2001 AMC 2153 (C.D.C., 2001), a terminal operator based in Long Beach, California was entitled to enforce a forum selection clause calling for litigation in Seoul, Korea for a shipment which was carried from Felixstowe, England to Long Beach. The same rationale was adopted by the court in *M.C. Watkins v. M/V London Senator*, 2000 AMC 2740 (E.D. Va., Norfolk Division 2000) and allowed a Virginia stevedore to enforce a forum selection clause calling for the litigation of disputes in Seoul, Korea for a shipment which was transported from La Spezia, Italy to Norfolk, Virginia.

One court has extended this rationale in a suit against a railroad. In *CBJ, Inc. v. M/V HANJIN HONG KONG, et al.*, 2000 WL 33258660 (DNJ, 2000), the shipment moved by ship from the Far East to Seattle, and thence by rail to Secaucus, New Jersey. The ocean carrier's bill of lading contained a forum selection clause which required the litigation of disputes in Korea, and a Himalaya clause. Conrail, the railroad which performed the rail transit, moved for dismissal based on the forum selection clause. The court granted Conrail's motion stating: "(t)he Court must enforce the parties' contractual choice of forum…"

Rulings with respect to such applications by land based carriers have not been uniform however. *Kyodo U.S.A., Inc. v. COSCO,* 2001 WL 1835158 (C.D.Cal. 2001) involved a shipment which was to be transported from Mexico to Long Beach by a motor carrier, and thence by ship to Kobe, Japan. The ocean carrier's through bill of lading contained a Himalaya Clause, and a forum selection clause which specified China as the place for litigation of disputes. Claiming that the shipment was damaged during the overland transit, the plaintiff argued that the Carmack Amendment (I.C.C. Termination Act), prohibited forum selection clauses. Unlike COGSA, the I.C.C. Termination Act has a detailed scheme for the selection of jurisdictions in which to file suit. Noting that the statute codifies the shipper's right to sue the carrier in a convenient forum of its choice, the Court held that the forum selection clause violated the Carmack Amendment and was not enforceable.

In light of these holdings, it appears inevitable that there will be future decisions dealing with whether an interstate carrier hired by an ocean carrier to perform some part of its obligation under an ocean bill of lading can claim the benefit of the ocean bill of lading's forum selection clause.

## **CONCLUSION**

Intermodal transit, while providing a convenient and seamless method of transporting cargo, can give rise to a complex legal analysis when cargo loss occurs on land. It is important that the ideal statutory application, from a limitation of liability perspective, be identified early before substantive claims negotiations take place. Just as important, adverse liability limits must also be identified so that the claim can be settled economically, and before the matter finds its way into the hands of a seasoned practitioner.

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## INFORMATION AND DOCUMENTS NEEDED FOR RECOVERY

A. Shortage/Non-Delivery/Damage Claims

1. Point of Origin

   a. Waybill or bill of lading;

   b. Ocean bill of lading if an intermodal shipment;

   c. Trailer Interchange Receipt issued at ocean carrier's terminal (intermodal shipments);

   d. Container stuffing/loading tally;

   e. Packing list;

   f. Commercial invoice;

   g. Loading survey;

   h. Transportation contract between shipper and trucking company;

2. Delivery Documents

   a. Delivery receipt;

   b. Freight bills;

   c. Stripping tally;

3. Miscellaneous

   a. Retain all parts of seals removed from container;

   b. Closeup photographs of container locking bars and container door hinges;

   c. On refrigeration claims, obtain Partlow chart, Ryan recorder tape and pre-trip inspection report;

   e. Police Report (theft and accident claims);

   e. Survey report;

   f. Subrogation receipt.

4 Proof of Damages

a. Assured's commercial invoice, freight bill, U.S. Customs invoice (proof of duty paid);

b. Assured's sales contracts and proof of cancellation;

c. "Green" sheets - market reports indicating value on date of delivery (fruits, vegetables, coffee and seafood);

d. Replacement costs/contracts;

B. Trucker's Statement - Information to Obtain

1. Driver's name and address;

2. Name and address of employer on the date of loss, job title and history of employment with that company;

3. Description of property (number of cartons and/or packages), place of pickup and condition of cargo at that time (clarify if driver inspected cargo or simply picked up a sealed container); confirm date and time driver took delivery of the shipment.

4. Date, time and place of loss. Circumstances regarding same.

5. Date and time of delivery and exceptions taken on delivery receipt at time of delivery. Clarify whether driver was present while cargo was stripped from container and tallied.

C. Statement from Shipper or Entity which Loaded the Container

1. Name and address of person supervising or involved in loading container;

2. Name and address of employer, the person's title and employment history with that company;

3. Describe date and time shipment was loaded, length of time, and all documents which confirm loading of container;

4. Have witness review and identify all documents generated at the time the container was packed and made ready for transportation;

5. Date and time shipment was picked up by trucker;

6. Identify bill of lading and signature of trucking company;

D. Statement from Consignee/Receiver

1. Name and address of warehouse supervisor, dock foreman or other persons involved in receiving and unloading container;

2. Employment history, name and address and title at time of loss;

3. Date and time shipment delivered; circumstances involving same;

4. Identify all documents produced at time of delivery and unloading of container; *i.e.,* delivery receipt and stripping tallies.

5. Documents supporting damages: Commercial invoices, customs invoices and freight bills; sales contracts and cancellations; other documents supporting the damages.

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## Examples Of Transit Documents

Way bills

Ocean bill of lading

Trailer Interchange Receipts

Loading Survey

Delivery Order

Delivery Receipt

Stripping Tally

Packing List

Commercial Invoice

U.S. Customs Invoice

Freight Invoice

Survey Reports

Tape Recorded Statement - warehouse manager

Claim Statement