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October 9, 2007

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SOMPO VS. ALTADIS/COGSA VS. CARMACK

By David Y. Loh, Esq.

COZEN O'CONNOR

45 Broadway Atrium • Suite 1600 • New York, NY 10006
Phone: 212.908.1202 • Fax: 212.509.9492 • dloh@cozen.com

In *Norfolk Southern Railway Co. vs. James N. Kirby*, 543 U.S. 14 (2004), the U.S. Supreme Court attempted to provide a uniform application of federal transportation law to the intermodal transportation of cargo. On its facts, the Supreme Court held that a rail carrier, which was the subcontractor for the inland portion of an intermodal movement of goods traveling from Sydney, Australia to Huntsville, Alabama via Savannah, Georgia, was entitled to rely upon the U.S. Carriage of Goods by Sea Act, 46 U.S.C. Appx. Sec. 1300, *et seq.* ("COGSA") $500 per package limitation of liability. The COGSA limitation of liability was incorporated by reference through the Himalaya and Paramount Clauses on the reverse side of both the ocean carrier's bill of lading and freight forwarder's bill of lading. The Supreme Court envisioned that this decision would provoke shippers, ocean carriers, rail carriers and freight forwarders to revise their contracts of carriage to provide a single default scheme to govern the rights and responsibilities of the parties throughout the cargo's movement, irrespective of the mode of transportation. Most significantly, *Kirby* expanded maritime jurisdiction to include the inland portion of the transit from Australia, taking a "conceptual", rather than "spatial" approach to the jurisdictional analysis.

Unfortunately, subsequent attempts to apply the lessons of *Kirby* have resulted in a rather stark circuit split.

Just over one (1) year ago, the Second Circuit ruled that a rail carrier could not rely upon the COGSA $500 package limit in *Sompo Japan Ins. Co. of America v. Union Pacific Railroad Co.,* 456 F.3d 54 (2nd Cir. 2006). *Sompo* involved the

MARITIME TERM OF THE DAY - Slush Fund

Grease from cooked salt pork was carefully saved during the age of sailing vessels. It gradually turned into a rancid slush during a long voyage. Upon arrival in port, the slush would be sold to soap makers and the proceeds used to purchase luxuries for the crew.

shipment of thirty-two (32) tractors traveling from Tokyo, Japan to Swanee, Georgia via Los Angeles, California. The tractors were damaged as a result of a train derailment during the rail movement from California to Georgia. The question on appeal was whether the rail carrier would be entitled to rely upon the COGSA $500 per package limitation of liability since the intermodal bill of lading included the requisite Himalaya and Paramount Clauses which effectively extended the reach of COGSA throughout the entire movement. The Second Circuit could have simply followed *Kirby* and ruled that the rail carrier was entitled to the protections of COGSA, including the $500 per package limitation of liability.

Instead, the Second Circuit ruled that *Kirby* did not consider the application of the Carmack Amendment, 46 U.S.C. Sec. 14706, *et seq.* and ultimately concluded that a contractual provision extending the reach of COGSA to also include the inland portion of an intermodal movement could not trump the application of Carmack. The Second Circuit remanded to the district court for a determination of whether the rail carrier was entitled to a limitation of liability under the Carmack Amendment and the district court ultimately determined that the rail carrier was entitled to no limitation of liability because of the ambiguous nature of its transportation documentation.

The Eleventh Circuit, in *Altadis USA, Inc. f/u/b/o Fireman's Fund Ins. Co. v. Sea Star Line, LLC,* 458 F.3d 1288 (11th Cir. 2006), ruled exactly the opposite from *Sompo. Altadis* involved the intermodal transportation of a shipment of cigars from Puerto Rico to Tampa, Florida, via Jacksonville, Florida. The cigars were stolen during the inland truck movement from Jacksonville to Tampa. The question was whether the two (2) year time bar under Carmack or the one (1) year time bar under COGA applied to the inland movement. Apparently, the cargo claimant filed suit within the two (2) year time bar under Carmack, but failed to protect suit time under COGSA. Ocean carriers regularly grant extensions of suit time because it is difficult to negotiate and settle a cargo claim within the COGSA one (1) year time bar. For reasons known only to the cargo claimant, no one obtained the required extension of suit time from both the ocean carrier and its subcontractor, the inland trucker. In ruling that the one (1) year COGSA time bar applied to the trucker, the Eleventh Circuit reasoned that since there was no separate bill of lading governing the inland portion of this intermodal movement, then the contractual provisions—including the Himalaya and Paramount Clauses—on the reverse side of the intermodal bill of lading would govern. Since the Paramount Clause incorporated by reference the terms and conditions of COGSA—including the one (1) year time bar, and the Himalaya Clauses extended the defenses under the bill of lading to the ocean carrier's subcontractors—including the trucker, the trucker was able to dismiss the complaint as being time-barred. If a separate bill of lading or contract of carriage had been issued for the inland movement, the Eleventh Circuit would have found that Carmack and its two (2) year time bar would have applied.

Interestingly, *Altadis* was decided less then three (3) weeks after *Sompo* and yet *Altadis* makes no attempt to distinguish *Sompo*. Although the *Atladis* plaintiff did submit a writ of *certiorari* to the Supreme Court, we are told that the plaintiff eventually settled this matter for cents on the dollar. Therefore, we will have to wait for another decision to resolve this conflict between the Circuits.

However, it is not just the Second Circuit which differs with *Altadis*. *See Ting-Hwa Shao v. Link Cargo (Taiwan) Ltd.,* 986 F.2d 700 (4th Cir. 1993) (personal goods were transported from Taiwan to Baltimore; shipment was later diverted to Miami where it was destroyed in a fire; the Fourth Circuit ruled that Carmack Amendment and its two (2) year time bar applied even though no separate bill of lading was issued to cover the inland portion of this movement).

Other Circuits which have previously considered this issue have generally ruled in line with the *Altadis* approach. *See Neptune Orient Lines v. Burlington Northern,* 213 F.3d 1118 (9th Cir. 2000); *Swift Textiles v. Watkins Motor Lines,* 799 F.2d 697 (11th Cir. 1986) and *Capitol Converting Equipment v. LEP Transp.,* 965 F.2d 391 (7th Cir. 1992).

Since *Sompo* and *Altadis*, there has been only one (1) district court decision which has tried to resolve the conflict between these two approaches, *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.,* 2007 WL 541958 (S.D.N.Y. 2007).

Rexroth involved the transportation of a flight simulator traveling from Rotterdam, Netherlands to Englewood, Colorado, via the port of Houston, Texas. The cargo traveled without incident but was improperly released (*i.e.* without receiving permission from the shipper) by the ocean carrier's agent to the consignee. The consignee failed to pay for the cargo and later declared bankruptcy. The shipper recovered some monies through the bankruptcy court, and filed suit to recover a balance of approximately $300,000 against the ocean carrier, NVOCC and their respective agents (but not the inland carrier, in this case the railroad) on the basis that they breached the terms and conditions of the contract of carriage.

The ocean carrier's agent admitted liability, but insisted on paying only the COGSA $500 per package limitation which in this case totaled only $13,500. In ruling the COGSA $500 package limit applied, *Rexroth* distinguished *Sompo* on the basis that Carmack applied only to rail carriers and the plaintiff failed to name the rail carrier as a defendant in this lawsuit. Rexroth's analysis, unfortunately for the shipper, is patently incorrect. *Sompo's* analysis was not limited to rail carriage because Carmack applies not just to rail carriers, but to any carrier-type entity involved in the interstate carriage of goods. The fact that the shipper's counsel failed to name the rail carrier as an additional defendant gave the court an easy way out of the case, albeit on faulty grounds. In addition, *Sompo* stands for the proposition that the contractual terms on the reverse side of a bill of lading cannot otherwise trump the application of Carmack which should govern the interstate transportation of goods in the U.S. In other words, carriers do not have an unfettered right to contractually pick and choose which federal statute can apply to the intermodal transporation of cargo. Plaintiff has appealed this decision to the Second Circuit and it is hoped that the Second Circuit will uphold its prior analysis in *Sompo* and rule that the COGSA $500 per package limitation does not apply in this instance.

In conclusion, despite the U.S. Supreme Court's efforts in *Kirby* to adopt a single default rule on cargo liability for intermodal shipments, federal courts throughout the U.S. are nevertheless split on how to apply COGSA and Carmack in a consistent and methodical fashion. Until then, we recommend that our maritime clients take all necessary steps to protect their respective interests under both COGSA and Carmack. In the case of cargo interests, it is absolutely critical to act promptly to protect suit time under both COGSA and Carmack, and to submit written notices of claim to all potentially responsible parties—particularly those sub-contractors involved in the interstate transportation of cargo within the U.S.

If you have any doubt, please feel free to contact David Loh at 212.908.1202 or dloh@cozen.com, who can provide advice on how to proceed.

For more information about the Cozen O'Connor maritime practice please contact

DAVID Y. LOH
212.908.1202 • dloh@cozen.com

ROBERT W. PHELAN
212.908.1274 • rphelan@cozen.com