

## MARINE CARGO CLAIMS

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## **MARINE CARGO 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 cases interpreting its various sections.

### **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. 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, such as while it is at the pier prior to being loaded aboard the ship or delivered to the consignee. 46 USC §1311 Language extending COGSA’s coverage to periods before loading and after discharging is generally found in the Clause Paramount clause of the ocean carrier’s bill of lading (see ¶ 4 of attached bill of lading).

### **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 “notice,” in the form of exceptions to the good order and condition of the cargo, be recorded at the time cargo is delivered 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.

### **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. If a claim can not be concluded or put into suit within the one year time limit, it is common to request the ocean carrier to grant an extension of time in which to commence suit. These extensions are typically granted by reputable ocean carriers.

### **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.

Whether you can completely rely upon a clean ocean bill of lading as *prima facie* proof of delivery to the carrier in good order and condition depends on the terms of the shipment and, in some cases, the nature of the loss or damage. The bill of lading should be studied to determine if the shipment moved on a CFS/CFS or pier/pier basis (which means that the ocean carrier loaded the ocean container) or on a CY/CY or house/house basis (which means that the shipper loaded the container). If the ocean carrier loads the container, cargo interests can safely rely upon the bill of lading as evidence of receipt in good order and condition. *Austracan (U.S.A.), Inc. v Neptune Orient Lines, Ltd.*, 612 F. Supp. 578 (S.D.N.Y. 1985). Even with a house/house or CY/CY shipment, if there is no doubt that damage or loss occurred while the cargo was in the custody of the ocean carrier, the introduction of a clean bill of lading into evidence will establish proof of delivery to the carrier in good order and condition. However, if cargo outturns damaged from an apparently undamaged ocean container (e.g., wet cartons from a container that is in good condition), the cargo plaintiff will have the burden of proving that the cargo was loaded into the container in good order and condition. If the dispute involves shortage from an ocean container, there is authority that the ocean carrier's statement of the cargo's weight on the bill of lading is sufficient to establish receipt of the entire shipment by the ocean carrier. *Westway Coffee Corp. v. M.V. Netuno*, 650 F.2d 30 (2d Cir. 1982).

## Defenses:

COGSA provides that “(n)either the carrier nor the ship shall be responsible for loss or damage arising or resulting from-”

- (a) “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;” (Error in Navigation or Error in Management defense);
- (b) “Fire, unless caused by the actual fault or privity of the carrier;”
- (c) “Perils, dangers, and accidents of the sea or other navigable waters;” (“Peril of the Sea defense”)
- (d) “Act of God;”
- (e) “Act of war;”
- (f) “Act of public enemies;”
- (g) “Arrest or restraint of princes, rulers, or people, or seizure under legal process;”
- (h) “Quarantine restrictions;”
- (i) “Act or omission of the shipper or owner of the goods, his agent or representative;” (“Act of Shipper” defense)
- (j) “Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, than nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier’s own acts;”
- (k) “Riots or civil commotion;”
- (l) “Saving or attempting to save life or property at sea;”

- (m) “Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;”
- (n) “Insufficiency of packing;”
- (o) “Insufficiency or inadequacy of marks;”
- (p) “Latent defects not discoverable by due diligence; and”
- (q) “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...” (the “q” clause defense).

In addition, COGSA also provides for a general “due diligence” defense, one in which a carrier can be exonerated for an unseaworthy condition aboard its vessel, provided the carrier exercises due diligence to furnish a seaworthy vessel:

“Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 131 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.”

### **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 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.

### **Foreign Jurisdiction 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. The U.S. Supreme Court recently 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.

## **INLAND MARINE CLAIMS**

### **Statutory Development**

The **Interstate Commerce Act**, which was enacted in 1887, created the Interstate Commerce Commission and instituted a system by which the freight rates of overland carriers

would be regulated throughout the hundred year period which followed its enactment. In its original form however, the Interstate Commerce Act contained no provisions governing the handling of claims. This was later accomplished by the **Carmack Amendment**, which was enacted in 1906. The Carmack Amendment and its progeny implemented the following with respect to the cargo claims process:

1. Imposed a minimum nine month notice of claim period;
2. Established a two year statute of limitations period;
3. Made carriers liable for actual damages;
4. Codified carriers' right to limit liability to released values.

The vast majority of the reported cases dealing with the interstate carriage of cargo involves or references the Carmack Amendment. In the 1980s, there was a series of legislation which signaled the deregulation of the transportation industry. In the area of trucking, this culminated with the **I.C.C. Termination Act of 1995** which became effective on January 1, 1996. The I.C.C. Termination Act abolished the Interstate Commerce Commission and replaced it with the Surface Transportation Board. 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 former requirement that a trucking company file tariffs which established freight rates corresponding to the trucker's liability limits.

#### **NOTICE OF CLAIM AND STATUTE OF LIMITATIONS**

At first blush, it appears that the **I.C.C. Termination Act** merely continues the nine month notice of claim period established in the Carmack Amendment. In this regard, the I.C.C. Termination Act provides:

“A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written



notice that the carrier has disallowed any part of the claim specified in the notice.”  
§14706(e)(1)

Case law interpreting the Carmack Amendment provided that the nine month notice of claim period began to run from the date of delivery or, if the cargo was not delivered, within nine months after a reasonable time for delivery has elapsed. The Uniform Motor Carrier Bill of Lading contains similar language.

A potential pitfall in the current statute however is the I.C.C. Termination Act's failure to specify when the nine month notice period begins to run. It is conceivable that a trucker could draft its bill of lading to provide that the time to file a notice of claim shall run from the date of the bill of lading, rather than the date of delivery. There is nothing in the statute which suggests that such language is prohibited and, presently, there is no case law which sheds light on the subject.

Until there is, the most prudent course of action that a claims person should take is to immediately file a claim with the carrier or, if enough information is not available to file, then diary the notice of claim deadline nine months from the bill of lading date.

An alternate benefit of the statute, as drafted, is that it merely prohibits the carrier from establishing a notice of claim period which is less than nine months. It does not establish a nine month "statute of limitations" in which the claim must be filed. Therefore, in the event the trucker fails to establish a nine month notice of claim period in its bill of lading, or in some other writing transmitted to the shipper, it is plausible to argue that a notice of claim, submitted after the expiration of nine months, is still timely.

Nevertheless, it would be a better practice to file a notice of claim before the expiration of nine months.

## **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),<sup>1</sup> 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,
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 only when agreed to by the carrier and shipper or receiver.

## **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

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<sup>1</sup> 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.

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.

### **LIABILITY PROVISIONS OF THE I.C.C. TERMINATION ACT:**

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. The liability imposed under this paragraph is for the actual loss or injury to the property 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 of liability on carriers. However, hundreds of cases decided under the Carmack Amendment continued to allow the assertion of four “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, (2) Inherent Vice, (3) Public Enemy and (4) Act of Shipper.

#### **Act of God**

This defense has been articulated in one case as follows:

“...an accident that is due directly and exclusively to natural causes without human intervention and which no amount of foresight or care reasonably exercised could have prevented. The accident must be one occasioned by the violence of nature, and all human agency is to be excluded from creating or entering into the cause.”

Examples of the Act of God defense are natural phenomena which the carrier is incapable of resisting, such as lightning, hurricanes, floods, earthquakes, etc. 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.

### **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.

Keep in mind that 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.

### **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.”

### **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.

### **LIMITATIONS ON RECOVERABLE DAMAGES**

The liability portion of the I.C.C. Termination Act, which is recited above and found at 49 USC §14706 (a)(1), states on the subject of damages as follows:

“The liability imposed under this paragraph is for the actual loss or injury to the property 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...”

This damages scheme appears to be the same as that which was imposed by the Carmack Amendment. Given this similarity to the damages provision of the Carmack Amendment, it is likely that Courts will continue to look to decisions interpreting the Carmack Amendment for guidance on damages issues. Under the existing case law, a shipper is entitled to recover the market value of the damaged cargo, plus incidental expenses incurred in the mitigation of its damages.

Market value has been determined by the Courts in several ways:

1. Courts have looked to the plaintiff's selling price, if the plaintiff had an existing contract to sell the goods, and awarding these damages will make the plaintiff whole, *Internatio v. M.S. Taimyr*, 602 F.2d 49 (2d Cir. 1979).

2. If cargo was to go into inventory, or the receiver fulfilled its contract obligations by taking cargo out of inventory, the Court will award replacement cost.

3. If the plaintiff had no contract to sell the goods, Courts will look to published listings of market value such as Hunts Points "green sheets" for commodities.

4. Absent all of the above, the Court will award the CIF value of the cargo, i.e., the amount paid by plaintiff to purchase the goods, the freight charges incurred and the amount paid to insure them.

There is an alternative method of prosecuting a claim for market value, which is not widely used. In *Polaroid Corporation v. Schuster's Express, Inc.* 484 F.2d 349 (1<sup>st</sup> Cir. 1973), the court awarded Polaroid the wholesale selling price of a hijacked shipment of its cargo (less the costs saved by the non-delivery) even though it did not have a contract to sell the lost shipment. In support of its case, Polaroid put evidence before the court that it had a unique product which had no competitor in the market place, that it always sold all of its inventory and the average wholesale price of its product during the month the shipment was stolen. Plaintiff accordingly proved that, because of the theft, its "full actual loss" under the Carmack amendment was its wholesale selling price. It must be emphasized that the *Polaroid* decision has not been adopted in any other case since, it appears, that the lost product was unique and there was little question that a steady market existed for it.

Miscellaneous damages which have been allowed, in addition to the above, are repair or reconditioning costs incurred to restore the cargo's market value and survey costs incurred in an attempt to mitigate damages.

## **Consequential Damages**

A Court will not impose liability for damages which were not within the contemplation of the parties at the time the contract was entered into, *Hadley v. Baxendale*. The rationale for this rule was stated quite effectively in *Contempo Metal Furn., v. East Ex. Mtr.*, 661 F.2d 761 (9th Cir. 1981):

“The purpose of this rule is to enable the carrier to protect itself from special damages by negotiating special contractual terms, declining the shipment, or taking special precautions to avoid the loss. (citations omitted) Because the carrier is taking the risk that events appreciably beyond its control may prevent it from performing the contract, the carrier is entitled to notice of any unforeseeable consequences of nonperformance so that the carrier can protect itself.

Examples of cases where the courts have disallowed consequential or special damages, absent notice to the carrier at or before the time of the contract, are:

1. Claim for consequential damages disallowed where it was based on construction delays arising from the late delivery of rip-rap to the plaintiff's site. *Illinois Cent. Gulf R. Co. v. Southern Rock, Inc.*
2. Carrier was not responsible for special damages arising out of its failure to timely deliver movie posters, absent evidence that the carrier had notice of the time sensitive nature of the shipment. *Starmakers Publishing Corp. v. Acme Fast Freight, Inc.*, 615 F. Supp. 787 (S.D.N.Y. 1985); 646 F. Supp. 780 (S.D.N.Y. 1986).
3. Destruction of the plaintiff's jig mill in a multi-vehicle accident did not subject the carrier to a loss of use claim, absent knowledge on the part of the defendant that such damages would occur due to the unavailability of the plaintiff's equipment. *Carrington v. Edinger*, 586 N.Y.S. 2d 52 (4th Dept., 1992)

## **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 with a choice and is not a penalty.

### **Liability Limits Under the I.C.C. Termination Act of 1995**

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), a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may...establish rates for the transportation of property (other than household goods described in section 13102(10)(a)), 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.” §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 principal 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 principal should require that carriers set forth released values in their bills of lading, or a 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 are available to it. It remains to be seen how the courts will interpret this part of the statute.

## **Liability Limits For Intrastate Shipments**

Keep in mind that the above analysis only applies to interstate shipments which, by virtue of the fact that they cross state lines, invoke federal law. In the event the shipment in question moves only within a particular state, then it is necessary to look to that state's law as to whether or not a trucker's released value will be enforced. The outcome can vary from state to state and be fact sensitive. See, e.g., *Calvin Klein Ltd. v. Trylon Trucking Corp.*, 892 F.2d 191 (2d Cir. 1989), in which the Court held that a released rate which was not contained in the bill of lading was nevertheless enforceable because the course of dealing between the shipper and carrier gave the shipper adequate notice of the limitation. A contrary result was reached in *GFT U.S.A. v. EXPORT FREEDOM, 1996 AMC 1882 (SDNY, 1995*, where the Court, applying New Jersey law, held that a prior course of dealing was not sufficient notice to the shipper.

## **EFFECT OF HIMALAYA CLAUSE ON TRUCKER'S LIABILITY**

The Himalaya Clause of an ocean carrier's bill of lading can affect a trucker's defenses in those cases where a shipment is moving under a through bill of lading and the trucker has been engaged by the ocean carrier in performance of its contract. A Himalaya clause potentially gives a trucker or terminal operator the benefit of the ocean carrier's defenses. *Brown & Root, Inc. v. M/V PEISANDER*.

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.”

Certain defenses, which are usually available only to an ocean carrier under the U.S. Carriage of Goods By Sea Act (“COGSA”), which have been allowed under a Himalaya Clause, are the \$500 package limitation and COGSA's one year statute of limitations. There has

been expression by at least one court that the extension 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.

In deciding whether a COGSA defense is available to a trucker, the following criteria should be examined:

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? 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.