CURRENT UNITED STATES LEGAL ISSUES AFFECTING CONNECTING CARRIAGE

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By Christopher W. Nicoll[1]

I. INTRODUCTION

It is now a well known fact that the current and anticipated trend in containerized carriage is toward the building of larger and faster ships. Since 1997, post-Panamax orders have accounted for nearly 60% of world shipbuilding.[2] There are now more than 50 post-Panamax container ships in operation worldwide; more are on order. These ships have a carrying capacity of up to 6,600 TEUs. Some forecast container ships with carrying capacity of 12,000 – 15,000 TEUs.

Containerization itself revolutionized ocean carriage.[3] The advent of larger container ships, competition, and pressure on freight rates world-wide has led carriers and shippers to search for ways to render fast, efficient, economic and customized service. Economy, as well as the need to provide accessible service, has led to the use of smaller vessels to pick up containerized cargo at various coastal points and convey the containers to a larger vessel for the trans-ocean voyage. Other factors may also influence the need to use locally owned "feeder vessels." For

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[2] Jan Hoffmann, *Concentration in Liner Shipping: Its Causes and Impacts for Ports and Shipping Services in Developing Regions* (reprinted in www.cepal.org/English/research/dcitf/lcg2027/contents.htm.

[3] See Richard W. Palmer & Frank P. Degiulio, Admiralty Law Institute Symposium: Terminal Operations and Multimodalism: Terminal Operations and Multimodal Carriage: History and Prognosis, 64 Tul. L. Rev. 281, 286-300 (1989) (discussing the rapid growth and increasing potential of containerization).

example, by means of so-called "Cabotage Laws,"[4] many maritime nations restrict access to their coastal trade by foreign flagged ships. Thus, large foreign-owned carriers sometimes turn to smaller, locally owned ships to pick up containers and convey them to a central port for consolidation with other containers on a larger vessel. The smaller vessels provide what has come to be known as a "feeder service."

Increasingly ocean carriers are emerging as the logistics experts able to provide for conveyance of containerized cargo from point of origin to ultimate destination. In doing so, carriers often utilize several other carriers and transportation modes, transshipping the goods one or more times during carriage, frequently in more than one jurisdiction. Occasionally some or all of the carriage is performed at the behest of the ocean carrier by subcontractors who themselves have independent contractual arrangements with the ocean carrier that define and delimit their rights and liabilities.

In the United States, courts are beginning to resolve disputes involving this increasingly complicated web of inter-related contractual obligations for cargo that moves through multiple jurisdictions using a variety of transportation modes. The trend in the United States is to enforce lawful contract terms, so long as doing so does not offend public policy and the terms are not unreasonable. In Vimar Seguros Y

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[4] Cabotage Laws pertain solely to trade along the coast and parts thereof. BLACK'S LAW DICTIONARY 202 (6th ed. 1990).

Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S. 528, 536-37 (1995), the United States Supreme Court reaffirmed this trend while abandoning 40 years of precedent and ordering the enforcement of forum selection clauses in ocean bills of lading. The technical justifications for the Court's decision could be discussed at considerable length. Fortunately, such is not the purpose of this paper. The philosophical underpinning of Sky Reefer, 515 U.S. 528, is, however, a cornerstone for predicting the reaction of U. S. courts to contract terms affecting connecting carriage:

> If the United States is to be able to gain the benefits of international accords [such as the Hague Rules] and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting domestic legislation in such manner as to violate international agreements.

Id. at 539.

It is, therefore, against this backdrop that we address the topic of connecting carriage and U. S. law.

II. LEGAL BACKGROUND

A. Application of COGSA

The U. S. Carriage of Goods by Sea Act ("COGSA") applies ex proprio vigore (i.e., "automatically") to all cargo shipments between foreign ports and United States ports. 46 U.S.C. §§ 1300, 1301 & 1312. Shippers and carriers may also subject carriages of goods between domestic ports to the provisions of COGSA by expressly incorporating COGSA into the bill of lading for a given carriage. 46 U.S.C. § 1312.

However, in cases involving connecting carriage and transshipment, questions can arise concerning whether COGSA governs a claim for damage. The answer to this question will often be determined by the language of the bill of lading, or the ports of origin and destination as set forth on the bill of lading.[5] In the absence of a "Clause Paramount" extending COGSA contractually, COGSA does not apply to damage occurring in the United States during a scheduled or unscheduled stop, with or without transshipment, where the bill of lading provides that carriage is between two foreign ports. In Re Damodar Bulk Carriers, Ltd., 903 F.2d 675, 680 (9th Cir. 1990); Joe Boxer Corp. v. Fritz Transp. Int'l, 33 F. Supp. 2d 851, 855 (C.D. Cal. 1998).

In Damodar, a cargo was carried on a ship and the bill of lading designated the carriage to be from Chile to China. 903 F.2d at 676-78. The ship was to make a scheduled stop in Hawaii. Id. While en route to Hawaii, a fire broke out damaging the cargo. Id. On arrival, the damaged cargo was discharged in Hawaii. Id. The Ninth Circuit Court of Appeals held that COGSA did not apply to the claims for cargo damage because there was no Clause Paramount, and the bill of lading did not specify a U.S. port as the loading port or the ultimate port of destination. Damodar, 903 F.2d at 680.

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[5] Careful bill of lading drafting can remedy many ocean carrier conflicts and can be instrumental in resolving jurisdictional conflicts with inland carriers as well. See Palmer & Degiulio, supra note 3, at 357.

In Joe Boxer, a cargo of cotton loaded in China was short when it arrived at the destination port in Guatemala. 33 F. Supp. 2d at 833. The cargo had been transshipped to a new vessel as planned upon arrival in Long Beach, California. Id. at 853-55. The bill of lading specified the carriage was from China to Guatemala via Long Beach. Id. The district judge held that, in the absence of a Clause Paramount, COGSA applies only where "cargo engaged in foreign trade has a point of origination or ultimate destination . . . in the United States." Id. at 855.

COGSA covers the carriage from the place where the cargo is first loaded to its final port of destination. SPM Corp. v. M/V MING MOON, 965 F.2d 1297, 1300 (3d Cir. 1992), aff'd, 22 F.3d 523 (3d Cir. 1994); Joe Boxer, 33 F. Supp. 2d at 855. In SPM Corp., the cargo was damaged while temporarily off the ship for restowage. 965 F.2d at 1299-1300. The bill of lading provided for carriage from a foreign port to a U.S. port. Id. Despite the temporary discharge and restowage at the interim U.S. port, the Third Circuit Court of Appeals ruled that COGSA applied of its own force to the damage claims inasmuch as the carriage provided for in the bill of lading was from a foreign port to a U. S. port, the cargo's ultimate destination. SPM Corp., 965 F.2d at 1301.

Taken together, these cases stand for the proposition that application of COGSA will be determined by reference to the bill of lading. Transshipments and brief periods where the cargo is off of the carrying vessels should not affect the determination of the law applicable to carriage

of the cargo. It nonetheless is good practice to incorporate a COGSA Clause Paramount into bills of lading involving carriage to or from the United States in order to assure that the benefits and protections of COGSA are extended to all periods when the goods are in the carrier's custody and control.[6]

B. Conflicts Between Carriers over Limitation of Liability Under COGSA

One of the main benefits of COGSA is the carrier's right to limit liability for damage to $500 per package.[7] In connecting carriage at least one bill of lading will be issued, often denominated a "through bill."[8] Sometimes, each individual carrier will issue its own bill of lading. It is not unusual for carriers to negotiate in advance the terms that will govern the connecting carrier's liability while the cargo is in its care custody and

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[6] COGSA provides that the term "'carriage of goods' covers 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. App. § 1301(e). Typically, except in the case of transshipment from one ocean carrier to another, or temporary offloading for restowage, as discussed supra, once the cargo leaves the tackle of the vessel at the discharge port, COGSA ceases to apply in the absence of a Clause Paramount extending its application by contract. See Gamma-10 Plastics, Inc. v. American President Lines, Ltd., 32 F.3d 1244, 1249 (8th Cir. 1994), cert. denied, 513 U.S. 1198 (1995); Pan Am Wold Airways v. Cal. Stevedore & Ballast, 559 F.2d 1173, 1175 n.5 (9th Cir. 1977). Where COGSA is extended by a Clause Paramount, but after discharge from the vessel at the final port of destination, provisions of COGSA incorporated by reference will give way to conflicting specific provisions of the governing bill of lading. See Phoenix Assur. Co. v. M/V EAGLE TIDE, ___ F. Supp. 2d ___, 1999 U. S. Dist. LEXIS 7421 * 26 – 27 (96 Civ. 8404, March 24, 1999) (citing cases). Thus, even though COGSA may be extended contractually beyond its compulsory application, in some instances, specific provisions of the controlling bill of lading may take precedence over conflicting provisions of COGSA. See also Stephen G. Wood, Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues, 46 Am. J. Comp. L. 403, 408 (1998) (discussing the recent development of provisions incorporating COGSA into contracts when not applicable ex proprio vigore).

[7] There are benefits to carriers other than those dealt with herein, including the so-called "negligent navigation" defense, defenses based upon insufficiency of packing, and force majeur, among others. See Wood, Supra note 6, at 407 (for a further discussion of COGSA defenses). These attributes of COGSA are not dealt with in this paper as it is usually not in the context of substantive defenses to liability that issues arise between shippers, carriers, and sub-contracting ocean carriers.

[8] Drafting a through bill of lading is the only means of assessing liability to the original carrier for damage occurring on subsequent carriers. See Sorkin, Limited Liability in Multimodal Transport and the Effect of Deregulation, 13 Mar. Law. 285, 287 (1989). A through bill of lading may incorporate three different forms of carriage including purely ocean carriage with one carrier, ocean transport with several carriers, or the use of several different modes of transportation. See Wood, supra note 6, at 417.

control. Such agreements are often referred to as "connecting carrier agreements."[9] If the bills of lading and the connecting carrier agreement all provide for limitation of liability to the same amount and provide sufficient notice and opportunity to the shipper to opt out of the limitation, then presumably there should be no dispute between the various carriers over liability amounts in the event of damage. Difficulties have arisen, though, where one carrier's right to limit liability is greater or less than the limitation rights of another potentially liable carrier.

By way of background, COGSA limits a carrier's liability to $500 per package. 46 U.S.C. § 1304(5). If a carrier provides a shipper with notice and fair opportunity to opt for a higher liability by paying a correspondingly higher freight rate, then simple incorporation of COGSA suffices to invoke its $500 per package limitation. See, e.g., Mori Seiki USA, Inc. v. M.V. Alligator Triumph, 990 F.2d 444, 448-49 (9th Cir. 1993). The safest approach, however, is to specify in bills of lading for U.S. bound or U.S. originated shipments that the per package liability limit will be $500 (or some greater amount if desired).

In order for a carrier to take advantage of the $500 per package limit of COGSA, the carrier is obliged to give the shipper a fair opportunity to opt out of the package limit by paying a higher freight rate. Yang Mach. Tool Co. v. Sea-Land Serv., Inc., 58 F.3d 1350, 1355 (9th Cir. 1995); Travelers

[9] Carriage contracts often require primary carriers to assume total liability while reserving indemnity rights against sub-contracted carriers. See Palmer & Degiulio, supra note 3, at 352-53. The United Nations Convention on International Multimodal Transport has fully supported the implementation of such agreements. Id.

Indem. Co. v. Vessel SAM HOUSTON, 26 F.3d 895, 899 (9th Cir. 1994).[10] A carrier satisfies its obligation by demonstrating that it gave the shipper a choice of liabilities and rates. Travelers, 26 F.3d at 898; Mori Seiki, 990 F.2d at 449.

The carrier bears the initial burden of producing prima facie evidence that it provided notice to the shipper of the shipper's opportunity to opt out of the package limit by declaring the value of the goods and paying a corresponding higher freight rate. Royal Ins. Co. v. Sea-Land Service, Inc., 50 F.3d 723, 726 (9th Cir. 1995). The carrier meets its burden by including language to the "same effect" as COGSA § 4(5). 46 U.S.C. § 1304(5); Travelers, 26 F.3d at 898; Mori Seiki, 990 F.2d at 449.

Once the carrier meets its initial burden, the burden shifts to the shipper to prove that it was denied such an opportunity. Travelers, 26 F.3d at 899. Courts consider the sophistication of the shipper, the parties' course of dealing and the shipper's familiarity with the carrier's procedures relevant in determining whether a shipper was denied a fair opportunity to opt out of the package limit. Yang Machine Tool, 58 F.3d at 1354-55; Travelers, 26 F.3d at 899. Further, "actual possession of the bill of lading with the $500 liability limit is not required before a party with an economic

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[10] This paper cites primarily cases from the Western United States (the Ninth Circuit U. S. Court of Appeals). There are three reasons for this: (1) a significant amount of ocean carriage is conducted between Asian and U.S. West Coast ports; (2) the 9th Circuit's rules concerning notice and fair opportunity are considered the most stringent; and (3) the author practices in the 9th Circuit and has greatest familiarity with its approach. See also Jonathan Rodriguez-Atkatz, Admiralty Law Institute Symposium: Terminal Operations and Multimodalism: Apportionment of Risk in Vessel and Marine Terminal Contracts, 64 Tul. L. Rev. 497, 510 (1989) (discussing the 9th circuit's influence upon the fair opportunity requirement).

interest in the shipped goods can be held to the limitation." Royal Ins., 50 F.3d at 726 (citations omitted).

COGSA does not require the carrier to issue a bill of lading showing the number of packages inside a container unless the shipper "demands" that the bill of lading contain such information. 46 U.S.C. § 1303(3)(b); see G.F. Co. v. Pan-Ocean Shipping Co., Ltd., 23 F.3d 1498, 1507 (9th Cir. 1994); Tokio Marine and Fire Ins. Co., Ltd. v. Retla Steamship Co., 426 F.2d 1372, 1378 (9th Cir. 1970); Pacific Trading, Inc. v. M/V HANJIN YOSU, 7 F.3d 1427 (9th Cir. 1993).[11]

If the bill of lading does not specify the number of packages within the container, but rather lists the container as the package, then the container itself will be considered the package for purposes of COGSA. See, e.g., Binladen BSB Landscaping v. M/V NEDLLOYD ROTTERDAM, 795 F.2d 1006, 1015-16 (2d Cir. 1985).[12]

The parties to a bill of lading may extend the contractual benefits and defenses of a bill of lading to a third party who discharges an aspect of the carrier's obligation to the shipper. See, e.g., Mori Seiki USA, Inc. v. M.V. ALLIGATOR TRIUMPH, 990 F.2d 444, 450 (9th Cir. 1993). Parties

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[11] In HANJIN YOSU, 7 F.3d 1427, the court dismissed the carrier's argument that its definition of a container as a "package" for damage limitation purposes where the carrier had enumerated the number of packages held within each container. HANJIN YOSU, 7 F.3d at 1433. The court concluded that the carrier had actual knowledge concerning the smaller packages and must be liable for such knowledge. Id. However, the court admitted that had the carrier given no mention to the number of packages within each container, instead listing each container as the package, the carrier would have only faced COGSA's $500 package liability for each individual container. Id.

[12] In a recent unpublished opinion a panel of the Ninth Circuit has joined the growing number of jurisdictions to adopt the Binladen rule making the container the package under certain circumstances. Bordeaux Wine Locators, Inc. v. Matson Navigation Co., 1999 U.S. App. LEXIS 12030 (Nos. 97-35581, 35587, and 35643, June 8, 1999). This case is discussed in greater detail infra. See also Rodriguez-Atkatz, supra note 10 at 511 (discussing the application of the term "package" among the various U.S. circuit courts).

not specified in the bill of lading must be readily identifiable as intended beneficiaries to the relevant language in the bill of lading. See Mori Seiki, 990 F.2d at 450; Taisho Marine Fire Ins. Co. v. Vessel GLADIOLUS, 762 F.2d 1364, 1366 (9th Cir. 1985). [13]

In Bordeaux Wine Locators, Inc. v. Matson Navigation Co., 1999 U.S. App. LEXIS 12030 at *1, a case successfully tried and argued on appeal by the author, the limitation rights of the connecting carrier and the original carrier were different. As a consequence, a significant dispute developed between the original carrier, Hapag, and the connecting carrier, Matson. The plaintiff, Bordeaux, entered into a contract of carriage with Hapag to transport a container of fine French wine from France to Seattle, Washington. Although Hapag subcontracted virtually all of the carriage to other carriers, Hapag issued its own bill of lading ("B/L"). The Hapag B/L provided that the container held 1,115 cases of wine. It gave notice of a right to limit liability to £100 per package, and an opportunity to opt out by paying a higher freight rate. Although it incorporated the Hague Rules (i.e., COGSA), it did not expressly extend COGSA to all periods in which the goods were in the possession of the carrier. There was a Himalaya Clause which entitled Hapag to "sub-contract the Carriage on any terms whatsoever." Id. This

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[13] Interestingly, in at least one post-Sky Reefer, 515 U.S. 528, decision a court has extended to a carrier's subcontractors, via a bill of lading's "Himalaya Clause" the right to enforce the forum selection clause in the bill of lading. Street, Sound Around Electronics, Inc. v. M/V ROYAL CONTAINER, 30 F. Supp.2d 661, 663 (S.D.N.Y. 1999); see also Palmer & Degiulio, supra note 3, at 350 (discussion of Himalaya clauses generally). A connecting carrier's ability to enforce a forum selection clause in the original carrier's bill of lading could be of great value in U.S. cargo litigation.

clause also prohibited Bordeaux from pursuing claims against Hapag's subcontractors, i.e., Matson.

In June 1994, Hapag entered into a Connecting Carrier Agreement with Matson. The agreement contained an indemnity obligation and incorporated the terms and conditions of Matson's standard bills of lading. Matson's bills of lading incorporated and extended COGSA to all periods during which the cargo was in its possession, custody or control. It also provided for a liability limit of $500 per package, giving notice and an opportunity to opt out.

The Connecting Carrier Agreement provided in part:

> 9. Each carrier will indemnify and hold the other carrier harmless from all expenses and liabilities the other carrier may incur which in any way may arise from or be connected with any loss, damage, delay or misdelivery of goods while in the possession or custody of the indemnitor carrier under this agreement, **except such loss, damage, delay or misdelivery which is directly attributable to the neglect or willful misconduct of the other carrier, its agents, servants or employees.** (Emphasis added).

Pursuant to the Connecting Carrier Agreement, Matson issued Hapag a bill of lading for the container.

The Matson B/L provided in part:

> Transportation of the cargo described above is subject to the terms and conditions set forth on this bill of lading, as well as to the terms and conditions of the Connecting Carrier Agreement between Publishing Carrier and Matson Navigation Company ("Connecting Carrier"). . . .
>
> . . . .

> This transportation agreement is issued in connection with the Connecting Carrier Agreement entered into between Publishing Carrier and Matson Navigation Company, Inc. ("Connecting Carrier"). The terms and conditions of that Connecting Carrier Agreement are by this reference incorporated herein. Where this transportation agreement involves transportation to or from United States ports, the receipt, custody, carriage and delivery of the cargo is subject to the provisions of the United States Carriage of Goods by Sea Act.
>
> Liability of Connecting Carrier and its agents, independent contractors including stevedores, terminal operators, towers and tugs, for loss of or damage to cargo carried pursuant to this transportation agreement is limited to an amount not to exceed U.S. $500 per package or customary freight unit, unless Publishing Carrier declares the value of the cargo on the face hereof prior to shipment and elects to pay the regular rate (plus 22%) of the declared value of the cargo.

On the face of the Matson B/L the container was identified as "the package." The contents of the container were not identified on the bill of lading. Matson did not know the contents of the container, and no demand had been made by Hapag for issuance of a bill of lading itemizing the number of packages within.

For reasons unimportant to this paper, the container was set to 0 degrees Fahrenheit after it was drayed from Hapag's to Matson's container yard. Subsequently the wine froze and suffered a total loss. The court at trial assessed 70% of the blame to Matson and 30% to Hapag.

Bordeaux sued Matson in Seattle, hoping to avoid a German forum clause in the Hapag B/L. Matson moved for summary judgment based upon the "covenant not to sue" contained in Hapag's B/L. The court

denied the motion. Bordeaux joined Hapag as a defendant. Hapag and Matson sued each other for indemnity under the Connecting Carrier Agreement.

At trial the court concluded that Hapag's B/L governed Matson's liability to Bordeaux, but that under the B/L Matson could limit its liability to $500 per 1,115 cases or market value, whichever was less. This significantly reduced Matson's liability from the claimed amount of $650,000 plus interest to $220,000 plus interest. Bordeaux and Hapag appealed; Matson cross-appealed.

On appeal the Ninth Circuit Court of Appeals held that the trial court should have enforced the covenant not to sue and dismissed Bordeaux's claim against Matson, and also ruled that Matson's liability to the shipper, Bordeaux, should have been determined on the basis of Matson's B/L, not the Hapag through B/L. A copy of the opinion is attached.

What follows is a discussion of some of the legal issues that arose in the context of the dispute between carriers and shipper.

1. Covenants Not to Sue Are Generally Enforceable.

The covenant not to sue contained in the Hapag B/L is not unlike similar provisions in other commonly used forms. It is set forth below:

> **4. Sub-Contracting and Indemnity.**
>
> (1) The Carrier [Hapag] shall be entitled to sub-contract the Carriage on any terms whatsoever.

> (2) The Merchant [Bordeaux] undertakes that **no claim or allegation shall be made against any Person whomsoever by whom the Carriage is performed or undertaken (including all Sub-contractors of the Carrier) [Matson], other than the Carrier [Hapag],** which imposes or attempts to impose upon any such Person or any vessel owned by any such Person, any liability whatsoever in connection with the Goods or the Carriage of the Goods, whether or not arising out of negligence on the part of such Person and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof. **Without prejudice to the foregoing, every such Person [Matson] shall have the benefit of every right, defence, limitation and liberty of whatsoever nature herein contained or otherwise available to the Carrier as if such provisions were expressly for his benefit. . . .** (emphasis added).

Covenants not to sue have been upheld to protect a third party from suit. See, e.g., Morris v. Rancourt, 565 F. Supp. 64, 66 (E.D. Mo. 1983) (prospective covenant not to sue third parties contained in release enforceable). This is particularly the case where the provision does not discharge all potential defendants**.** See 4 CORBIN ON CONTRACTS, § 932 at 746 (1951). Prospective covenants not to sue have been enforced in the admiralty context where liability has been shifted to another party who agrees to cover the risk. See, e.g., Allied Chem. Corp. v. Gulf Atlantic Towing Corp., 244 F. Supp. 2, 7 (E.D. Va. 1964) (mutual covenants between barge owner and shipper enforced). In Allied Chem., 244 F. Supp. at 8, the court upheld the parties' agreement to shift liability to a third party, the insurer. The policy reasons behind enforcing covenants not to sue logically should apply with even greater force when one of the parties entering into the covenant has taken it upon itself to retain the burden of

defending claims for loss or damage in the place of the third party in whose favor the covenant has been granted. See Gatley v. United Parcel Service Inc., 662 F. Supp. 200, 201-03 (D. Me. 1987) (upholding express agreement by employer to assume liability for claims by its employees against third parties).

The Supreme Court has repeatedly enforced commercial contract terms relating to the disposition of claims under such contracts. See THE BREMEN v. Zapata Off-Shore Co., 407 U.S. 1, 9-10 (1972) (use of forum-selection clause approved); Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S. 528, 536-37 (1995) (use of arbitration clause approved); Carnival Cruise Lines v. Shute, 499 U.S. 585, 593-95 (1991) (use of forum-selection clause approved). Clauses that promote efficient handling of claims will be enforced if reasonable and not violative of public policy. See, e.g., THE BREMEN, 407 U.S. at 10.

Prior to Bordeaux, no U. S. court had addressed the enforcement of a covenant not to sue in a B/L. United Kingdom courts have enforced such a covenant, however.[14] In Nippon Yusen Kaisha v. Int'l Import and Export Co. Ltd. (the "ELBE MARU"), 1 Lloyd's Rep. 206 (Q.B. 1977), an ocean carrier, NYK, issued its customer a bill of lading containing a covenant not to sue identical to the one in Hapag's B/L:

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[14]United States courts sitting in admiralty look to United Kingdom courts in the absence of controlling authority. See, e.g., SKY REEFER, 515 U.S. at 536-37. Like the United States, the United Kingdom follows the Hague Rules. See, e.g., J.C.B. Sales Ltd. v. Seijin, 921 F.Supp. 1168 (S.D.N.Y. 1996), aff'd sub. nom., J.C.B. Sales Ltd. v. Wallenius Lines, 124 F.3d 132 (2d Cir. 1997)(discussing history of United Kingdom's adoption of Hague Rules).

> The merchant undertakes that no claim or allegation shall be made against any servant, agent or sub-contractor of the Carrier which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the Goods, and if any such claim or allegation should nevertheless be made, to indemnify the carrier against all consequences thereof.

Id. at 207. NYK delivered two containers to an inland carrier. Id. The containers were stolen from the inland carrier. Id. The customer brought its claim solely against the inland carrier, and not NYK. Id. at 209. Although the inland carrier had likely been negligent, because the customer's suit violated the covenant not to sue third parties, the court prohibited the customer from proceeding against the inland carrier. Id. at 209-11.

The Ninth Circuit agreed that the Hapag B/L clearly required the shipper to pursue claims only against Hapag and that Matson, the connecting carrier, was an intended beneficiary of the shipper's promise not to sue subcontractors for cargo damage.[15] Consequently, the shipper was permitted to sue only the original carrier (Hapag), and Hapag's remedies against Matson were those for which the parties bargained in the Connecting Carrier Agreement and the Matson B/L.

2. Application of the Connecting Carrier's Bill of Lading to the Connecting Carrier's liability to the Shipper and the Original Carrier

[15] Implicit in the Ninth Circuit's decision is the conclusion that a covenant not to sue such as that contained in the Hapag B/L does not impermissibly immunize the subcontracting connecting carrier from liability for its negligence. See, Grace Line, Inc. v. Todd Shipyards Corp., 500 F.2d 361, 373 (9th Cir. 1974)(provisions in B/L that impermissibly immunized a subcontractor from liability for its negligence were void under public policy).

Under COGSA, "[a] vessel owner can not be liable for cargo damage absent a contract of carriage with the claimant." Otto Wolff Handelsgesellschaft mbH v. Sheridan Transp. Co., 800 F. Supp. 1359, 1361 (E.D. Va. 1992). A carrier's inclusion of COGSA's $500 package limitation in the bill of lading entitles the carrier to the $500 limitation without regard for who brings a claim for damage to the goods. See Stolt Tank Containers, Inc. v. Evergreen Marine Corp., 962 F.2d 276, 279 (2d Cir. 1992); Carman Tool & Abrasives, Inc. v. Evergreen Lines, 871 F.2d 897, 900-01 (9th Cir. 1989).

In Carman Tool, milling machines arrived at the purchaser's factory from Taiwan in a damaged condition. 871 F.2d at 898. Pursuant to a working agreement between the parties, the purchaser authorized the manufacturer to arrange for shipment with the carrier. Id. The purchaser was not a party to the bill of lading. Id. The purchaser sued the ocean carrier. Id. The carrier moved for summary judgment, asserting that the bill of lading limited its liability to $500 per package. Id. The purchaser argued that its liability could not be limited by the carrier's bill of lading because the purchaser had not seen the bill of lading and had not had fair opportunity to opt out of the limitation. Id. The court rejected the purchaser's argument, concluding that such a rule would impose too heavy a burden on carriers:

> It would be next to impossible for a carrier to give actual notice of the liability limitation to everyone a court might later hold has a foreseeable economic interest in the goods. It could

> also substantially delay shipment, as the carrier attempts to identify and notify parties many thousands of miles away.

Id. at 901. Consequently, this Court limited the carrier's liability to the purchaser to $500 per package.

The Second Circuit followed the approach taken by the Ninth Circuit in Carman Tool. Stolt, 962 F.2d at 279. Stolt entrusted five tank containers to Monsanto. Id. at 277. Monsanto shipped the containers to another party through a carrier, Evergreen Lines. Id. at 277-78. Evergreen issued bills of lading to Monsanto containing a $500-per-package liability limitation provision. Id. at 278. The contents of the containers suffered damage. Id. Stolt brought suit against Evergreen. Id. Evergreen asserted that its liability was limited to $500 per container. Id. Stolt argued that, because it was not a party to the bill of lading issued by Evergreen, the limitation provisions did not apply to Stolt. Id. The Second Circuit concluded such a result would undermine COGSA's purpose:

> If we were to accept Stolt's argument, a carrier, to avoid expanded liability, would have to contract to limit liability not only with the party with whom it actually dealt, but also with all others who might possess an interest in the shipped goods. This would impose "far too heavy a burden on the carriers" and might even "delay shipment, as the carrier attempts to identify and notify parties." [citing Carman Tool.] Such a result would undermine COGSA's purpose.

Id. at 279. Thus, the Second Circuit held that the carrier's bill of lading entitled the carrier to limit its liability to $500 per container against a party who was not a party to the bill of lading. See also, Orion Ins. Co. v. M/V Humacao, 851 F. Supp. 575, 576 (S.D.N.Y. 1994).

When the original carrier arranges for on-carriage of the cargo it may be acting as agent for the shipper and, in effect, bind the shipper to the terms of the connecting carrier's bill of lading, even if it differs from that issued by the original carrier. See Stolt, 962 F.2d at 279; Carman Tool, 871 F.2d at 900-901.

The result may differ, however, if the original through bill of lading is negotiable. [16] See Madow Co. v. S.S. LIBERTY EXPORTER, 569 F.2d 1183 (2d Cir. 1978). In such a case, the connecting carrier may not be able to rely on the terms of the bill of lading it issued, if that bill of lading adversely and materially alters the terms of carriage from the original negotiable bill.

Madow involved shipment of two pieces of cargo from abroad to the United States. Id. at 1184. The original carrier issued a bill of lading to the order of the consignee for the shipment. The carrier defaulted on its loan. Id. A bank foreclosed and sold the vessel while the vessel and its cargo were still abroad. Id. A new carrier purchased the vessel. Id. As a condition of the sale, the new owner agreed to ship the cargo in chartered space aboard another vessel. Id. The new carrier transshipped the cargo from the first vessel to the second. Madow, 569 F.2d at 1184. The new carrier agreed to carry the cargo under the original through bill of lading, but issued a "memo bill of lading." Id. The memo bill purported to

[16]Negotiability of the original bills of lading in Madow was a factor in the court's decision. Madow 569 F.2d at 1186. The Hapag B/L stated that the goods were consigned to Bordeaux, and not "to the order of" Bordeaux. (SER 204.) Thus, the Hapag B/L was not negotiable. 49 U.S.C. § 80103 (1997).

disclaim liability for the condition of the cargo. Id. The original carrier and its consignee were not aware of the transshipment or the memo bill. Id.

The goods arrived damaged. The shipper sued the new carrier. Id. Relying on the disclaimer in its memo bill, the new carrier argued that only the original carrier could be liable to the consignee under the original bill of lading. Madow, 569 F.2d at 1185.

The Second Circuit disagreed. Id. The court held that the new carrier's memo bill did not apply to the consignee because the consignee did not anticipate transshipment and did not know of the attempt by the new carrier to alter the terms of the original bill. Id. at 1187.[17]

Where the connecting carrier has knowledge (1) that the first-issued through bill of lading provided for carriage on materially different terms, and (2) that the first-issued bill of lading was negotiable, the connecting carrier's bill of lading may not be enforced against the shipper/consignee. The IDEFJORD v. Den Norske Amerikalinje A/S, 114 F.2d 262, 264-65 (2d Cir. 1940). Where a freight forwarder had knowledge of the inconsistent

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[17] Madow was distinguishable from Bordeaux in several respects. First, unlike Bordeaux, the consignee in Madow had no knowledge that transshipment would occur. Id. at 1184, 1187. Second, the original bill of lading issued by the first carrier in Madow provided that "any transshipping of the goods would be subject to the terms of the bills of lading." 569 F.2d at 1187. The Hapag B/L, on the other hand, expressly provided that "[Hapag] shall be entitled to sub-contract the carriage on any terms whatsoever." Third, in Madow, the second carrier agreed to carry the goods under the original bills of lading, but attempted unilaterally to alter the terms of the original bills by issuing the memo bill. 569 F.2d at 1184. Matson, however, was not provided a copy of the Hapag B/L and was not aware of its terms. Instead, Matson issued its own bill of lading pursuant to its Connecting Carrier Agreement with Hapag. Fourth, the second carrier in Madow collected freights from the shipper for its carriage under the original bill of lading, yet purported not to be bound by its liability provisions. 569 F.2d at 1184-85. In this case, Matson collected no freights from Bordeaux, charging only Hapag. Fifth, the bill of lading issued to the consignee by the original carrier in Madow did not contain any restrictions on the consignee's ability to pursue claims against subcontractors. The new carrier attempted to circumscribe its liability for the condition of the cargo by issuing its memo bill. 569 F.2d at 1184-5. The Hapag B/L, however, contained a clause that required Bordeaux to look solely to Hapag for resolution of cargo damage claims and not pursue such claims against subcontractors. Thus, Bordeaux, or any holder in due course of the Hapag B/L, unlike the shipper in Madow, had notice of the limitations on its ability to pursue claims against subcontractors under the Hapag B/L.

terms (between the through bill and the connecting carrier's bill) and had no specific instructions from the shipper to arrange for on-carriage under terms different from those in the through bill of lading, the freight forwarder was not permitted to limit its liability to the lower amount. The CAYO MAMBI, 62 F.2d 791, 791-92 (2d Cir. 1933). Importantly, however, the liability of the connecting carrier to the cargo owner was limited to the amount provided for in the connecting carrier's own bill of lading. Id.

Consequently it is possible that a connecting carrier's liability for cargo loss or damage can be materially different than the liability of the original carrier issuing a through bill of lading. Great care, therefore, should be used to assure that the terms of carriage are consistent at all intervals to the greatest possible extent.

C. Indemnity

Often carriers will provide for indemnity between themselves in their connecting carrier agreements. Typically, the carrier in possession at the time of damage to the cargo is obliged to indemnify the other carrier(s). The various forms such agreements take can impact their enforceability and, consequently have an impact upon whether a case goes to trial or is capable of early resolution by the responsible party.

1. Contractual Indemnity is Proper Only When the Terms of the Contract Require It.

In cases involving multiple tortfeasors at common law, a party's entitlement to indemnity from another may turn on which party was primarily responsible for the harm. Weyerhaeuser S.S. Co. v. Nacirema

Operating Co., 355 U.S. 563, 569 (1958). When a contract is the basis of a demand for indemnity, however, the trial court's apportionment of fault is irrelevant to its determination of whether an award of indemnity is proper. Id. "Long-established general principles of interpreting indemnity agreements require than indemnification for an indemnitee's own negligence be fully and unequivocally expressed." See, e.g., Randall v. Chevron U.S.A. Inc., 13 F.3d 888, 905 (5th Cir. 1994), cert. denied, 513 U.S. 994 (1994). The Ninth Circuit has not addressed contractual indemnity in the maritime context. However, its approach to contractual indemnity in other contexts is consistent with that of the Fifth Circuit. See Howey v. U.S., 481 F.2d 1187, 1192 (9th Cir. 1973) (concluding that under federal common law, indemnitee not permitted to recover for own negligence); Western Constructors, Inc. v. Southern Pacific Co., 381 F.2d 573, 575 (9th Cir. 1967) (holding that under Arizona law in diversity action, indemnitee permitted to recover for own negligence on basis of contractual provision).

In Randall, the district court found the two defendants negligent; consequently, each was liable for a portion of the plaintiff's damages. 13 F.3d at 891. The district court found Chevron 25%, and the other defendant 75% liable. Id. at 893. Chevron sought contractual indemnity from its codefendant. Id. The district court concluded that the contract entitled Chevron to indemnity for damages attributable to Chevron's negligence. Id. at 893, 906. The Fifth Circuit reversed, however,

concluding that Chevron's contract did not entitle "indemnification . . . for those damages attributable to Chevron's own negligence.[18] Id. at 906.

Thus, when drafting an indemnity that will be subject to U. S. general maritime law, care should be taken to assure that the provision specifies that one party will indemnify the other even against the damage that results from the other's negligence in whole or in part, if that is the desired result. Otherwise, if the party seeking indemnity is found guilty of negligence there is a significant risk that a court properly applying maritime law will not permit indemnity.

III. CONCLUSION

The modern containerization of international ocean shipping has revolutionized the transportation industry. Ocean carriers will likely continue to struggle to bring simplicity and predictability to otherwise complex issues of liability that can arise in the transshipment context. Simple reliance on COGSA, or its incorporation into bills of lading through Clauses Paramount, will not fully address liability among ocean carriers in a connecting carriage context. Properly drafted contractual indemnity provisions between carriers, and consideration of the course of dealing between the parties are both worthy of focus. At a minimum, through bills of lading for U.S. originated or bound shipments should contain a Clause Paramount so that there will be no doubt as to the intent of the parties

[18]The contract provided for indemnity as follows: "Owner . . . agrees to indemnify and hold harmless Chevron all claims . . . to person or property, and howsoever arising in any way directly or indirectly connected with . . . operation of the vessel." Id. at 904.

concerning the law applicable should damage occur in the course of transshipment or while in the custody of the connecting carrier.

In connecting carriage and use of feeder services, care should be taken to be certain that bills of lading are issued on common terms or rationalized through other written agreements to the extent permitted by governing law. Otherwise, there is a danger that one party's potential exposure to a common plaintiff could exceed other potentially liable parties, leading to further disputes among the carriers over allocation or apportionment of the liability.

The presence of "covenant not to sue" language in frequently employed "Himalaya Clauses," presents a threat to shippers and cargo insurers should they bring suit solely against a party that did not issue the bill of lading. Such a lawsuit is likely subject to challenge and could result in dismissal. The proper party (i.e., the carrier who issued the bill of lading) would have to be sued prior to expiration of the one year COGSA statute of limitations. If the statute has already run it is likely that there would be no further recourse.

The dynamic growth of global trade has changed the legal landscape. Carriers should respond to such change by carefully drafting effective through bills of lading, keeping in mind the interaction between those bills of lading and agreements with service providers, particularly other ocean carriers providing a feeder service.. Carriers and other feeder service providers need not risk exposure to multiple and inconsistent liability

standards and limits. By the same token, shippers and their insurers need to be alert to the contractual relationships between carriers and connecting carriers, and the impact those dynamics could have on litigation and handling of their damage claims.

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