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DEMURRAGE IS SACROSANCT BUT SO IS THE CARRIER'S DUTY TO MITIGATE DAMAGES

In a January 2021 ruling in the District of Oregon, $78,705 was awarded to carrier on a demurrage claim arising out of a $6,360.61 dispute.

This matter concerned a dispute between a carrier, COSCO Shipping Lines Co., Ltd. ("COSCO"), and its customer, Shelter Forest International Acquisition, Inc. ("SFI"). Specifically, a container of plywood rolled over despite alleged loading in accordance with SFI's customary practices and in accordance with industry standards. The parties disagreed as to the cause of the accident, with SFI pointing to CSL's negligent driving and CSL to SFI's failure to properly load the container. The cargo was transloaded into a different container, delivered to Portland, Oregon on May 23, 2018, and made available to SFI for pickup upon payment for container damage and transloading charges, totaling $6,360.61. SFI refused to pay the charges so COSCO held the cargo in its container yard, beginning to charge demurrage on June 2, 2018, ten days after the cargo was made available for pickup, pursuant to the terms of the bill of lading and COSOC's tariff of general applicability.

On March 15, 2019, SFI finally paid the $6,369.61 "under protest," and sought to take possession of the cargo "without concurrent payment of demurrage." COSCO refused to release the shipment until January 8, 2020, when the parties reached an agreement for SFI to take possession without paying demurrage while both parties reserved all rights and defenses. Litigation ensued.

On COSCO's motion for summary judgment, SFI argued that the carrier has the burden of proving that damage to the container and the related costs were caused by the shipper's improper loading of the container before the carrier can be entitled to demurrage. SFI also asserted a failure to mitigate damage via the carrier's decision to retain the containerized cargo to protect its $6,360 claim compared to, for example, the common practice of conducting a salvage sale to cover the container damage and related costs.

The court rejected SFI's causation argument, stating that case law supports a general rule that "absence of fault in the shipper or consignee is not sufficient to excuse it from liability for demurrage." Instead, demurrage is incurred where there is an excess of lay days over those stipulated, regardless of what brought about the delay (with some exceptions that did not apply). For this reason, the court ruled that COSCO was entitled to collect demurrage from SFI beginning June 2, 2018, after the ten-day grace period lapsed.

However, the court did agree that COSCO failed to mitigate its damages, in light of the failure to make the cargo available from March 15, 2019, when SFI made the $6,360.61 payment, until the release agreement was reached on January 8, 2020. The court declined to award demurrage for that period. Notwithstanding this award reduction, SFI remained on the hook for the substantial demurrage cost of $78,705 arising out of the disputed $6,360.61.

***Shelter Forest Int'l Acquisition, Inc. v. COSCO Shipping (USA) Inc*., No. 3:19-Civ-01259-JR, 2021 WL 54202; (D. Or. Jan. 6, 2021)(decision of Magistrate Jolie A. Russo)**

LIMITATION APPLIES COME HELL OR HIGH WATER AND MIGHT DOES NOT MAKE WRITE

This two-prong federal decision comes from the Eastern District of Michigan. Star Wars light sabers in boxes were air imported from China via FedEx. Two were delivered with damage. The consignee's theories of recovery included negligence, breach of contract, interference with business and contractual relations and assault and battery (as concerns the second shipment).

The first shipment was delivered with boxes "dented, smashed and torn completely open." Plaintiff proffered that one of the boxes appeared to have been "run-over" and displayed tire tracks.

On FedEx's motion for partial summary judgment based on the Montreal Convention's cargo limitation of liability provision (Art. 22(3)), the court confirmed the Montreal Convention provides the sole remedy for cargo damage and thus, preempts state law causes of action.

The consignee argued liability was not limited because the nature of the damage to the box (tire tracks) was indicia of the carrier's reckless or intentional misconduct. In doing so, Plaintiff relied on Article 22(5) of the Convention which suspends the Convention's rules involving damages from intentional and reckless conduct.

The court agreed the facts would support a claim of carrier recklessness, but nevertheless agreed FedEx's potential liability was limited as a matter of law. The court determined the Convention's Article 22 (5) exception of limited liability based on carrier recklessness or intentional misconduct only applies to passenger delay or baggage, and not to cargo loss or damage.

During the delivery of the second shipment relations with the FedEx delivery team deteriorated. When the boxes were tendered for delivery, one appeared physically damaged. The consignee requested the driver re-scan and mark the box as damaged. The driver refused and purportedly battered and assaulted the consignee in seeking to “rip the box” from the consignee’s possession. After the exchange, the consignee immediately contacted the police and filed a criminal complaint against the driver. FedEx’s security team investigated and suspended the consignee’s shipping account pending withdrawal of the criminal complaint.

Nevertheless, the court said, “absent evidence of fraud, failure to comply with the Convention’s written notice requirements bars recovery.” The court granted FedEx’s motion to dismiss because the consignee did not file a written notice of claim for cargo damage within the time provided by Article 31 of the Montreal Convention (14 days of delivery) or FedEx’s 21-day contractual notice period.

The court’s ruling seems to reject the notion that the notice of claim requirement can be functionally met by an air carrier’s purported assault on a customer, knowledge of a pending criminal complaint, investigation of an altercation and suspension of a consignee’s shipping account following the delivering driver’s refusal to make an exception notation in the carrier’s own records.

***Tron IT Consulting, Inc. etc. v. FedEx Trade Networks*, No. 19-10658 (E.D. Mich. Nov. 30, 2020)(Judge Denise Page Hood)**

APPELLATE COURT AFFIRMS COGSA’S PRE-EMPTIVE EFFECT, ENFORCES NO-SUIT CLAUSE AND UPHOLDS “WITHOUT PREJUDICE” RESERVATION AGAINST CLAIM OF ESTOPPEL

The Court of Appeals for the Second Circuit considered a claimant’s appeal of dismissal on summary judgment of its action for physical damage of containerized marble carried under an international through bill of lading calling for ocean carriage from China to Los Angeles and continuing rail carriage to New York. Mediterranean Shipping Line (“MSC”) was the ocean carrier and issuer of the through bill of lading. BNSF Railway Company was the rail carrier.

The court dismissed the complaint against BNSF on the basis of the bill of lading's covenant not to sue provision which shields subcontractors of MSC from direct proceedings by a cargo claimant. Following Second Circuit precedent, the court held enforceable exoneration clauses which unambiguously relieve subcontractors of liability and relegate a claimant to suits against the issuer of the through bill of lading, MSC in this case.

The court next considered the claimant's contention that when COGSA applies as a contract term, as compared to force of law, i.e., tackle to tackle. Borrowing from the Supreme Court's decision in *Kawasaki Kisen Kasisha v. Regal-Beloit*, the court found that federal maritime law, to the exclusion of contrary state laws, governs the inland portion of a journey under a through bill of lading. The court stated the principles of uniformity underpinning COGSA's enactment would be defeated if not extended to inland carriage where, as here, the ocean carrier permissibly extended COGSA's application.

Therefore, the court rejected the claimant's argument that state law survives when COGSA applies as a matter of contract, especially as concerns liability limitations.

Finally, the court rejected the claimant's argument that MSC was estopped to assert the COGSA one year time bar. The court framed the issue "whether plaintiff has been justifiably misled by defendant's actions," so that "defendant's actions have lulled plaintiff into a false sense of security and so induced him not to institute suit in the requisite time period." (Citation omitted).

In this case, the court found the claimant was not reasonably induced to believe MSC would pay the claim, notwithstanding the carrier's reminder that a formal claim statement was required, especially where carrier's communications included the expression "without prejudice and without admission of liability."

***Herod's Stone Design v. Mediterranean Shipping Co.,* No. 20-637 (2nd Cir. Feb. 16,**

2021)[summary order]

TOUGH CALL - LIABILITY FOR STOLEN CELLPHONES LIMITED TO FRACTION OF VALUE

This district court case arose from the theft of a $1,300,000 shipment of cellphones during interstate motor carriage. The shipper and the motor carrier ("Landstar") entered into a Transportation Services Agreement ("Agreement"), which expressly applied the Carmack Amendment, 49 U.S.C. § 14706 with a $100,000 limit of liability. The Agreement was amended to allow the shipper to request a "higher limitation on liability" up to $250,000 on a case-by-case basis (hereinafter "the Amendment").

The shipper sent an email requesting the maximum $250,000 coverage for several shipments, including the one that was subsequently stolen (hereinafter "the Shipment").Subsequently, the shipper issued a Rate Confirmation for the Shipment with no mention of the requested limitation amount.

Under its dual operating authority, Landstar "brokered" the Shipment to another motor carrier. The Shipment was stolen when the driver for the custodial motor carrier violated the shipper-Landstar Agreement (in a supplement) that prohibited stoppage in transit.

The shipper filed suit against Landstar seeking the full value of the Shipment. Landstar moved for summary judgment contending that the shipper's damages were limited to $100,000.Contending Landstar's "brokering" of the load meant it was not limited to the Carmack Amendment's remedy, the shipper pursued state law causes of action.

The district court rejected the shipper's arguments and found Landstar should be considered a "carrier" under the Carmack Amendment. Citing the Code of Federal Regulations, the court explained that the quintessential inquiry was whether Landstar had accepted legal responsibility to transport the Shipment. Here, it (1) assumed responsibility for the Shipment and

(2) the Agreement identified Landstar as the carrier and imposed Carmack obligations by Agreement. Moreover, the shipper believed Landstar was responsible for transporting the Shipment and first learned the third-party was involved after the shipment had been stolen.

Finding Landstar a carrier under Carmack, the district court addressed compliance with the requirements to limit liability: (1) obtain the shipper's agreement as to its choice of liability; (2) give the shipper a reasonable opportunity to choose between the two or more levels of liability; and (3) issue a receipt or bill of lading prior to moving the shipment -- known as the *Hughes* factors. *See Nipponkoa Ins. Co. v. Atlas Van Lines, Inc.*, 687 F.3d 780, 782 (7th Cir. 2012); *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1415 (7th Cir. 1987).

The shipper argued the terms of the Agreement and Amendment did not satisfy the *Hughes* test, entitling it to recover the full value of the Shipment.

The district court concluded the two documents provided the shipper with an opportunity to choose between liability limits of $100,000 to $250,000. Because both documents provided a procedure for increasing maximum liability to $250,000, the court found that the shipper had both reasonable notice of the liability limitation and the opportunity to obtain information necessary to making a deliberate and well-informed choice. This satisfied the first prong of the *Hughes* test.

As to the second prong's requirement of obtaining the shipper's agreement to the choice of liability, despite the shipper's email desire for $250,000 coverage, the court said the shipper failed to request the higher limit as delineated in the Amendment. Because the shipper failed to request the increased coverage "in writing via a rate confirmation," the default limitation of liability could apply.

Finally, in seeking to defeat the third prong, i.e., that Landstar issue a receipt or bill of lading prior to moving the Shipment, the shipper contended the second motor carrier via its driver, not Landstar, issued the bill of lading which nowhere indicated Landstar.

The district court rejected the shipper's arguments, finding the *Hughes* test focuses on notice and agreement to liability limitations. Here, both parties signed the pre-pickup Rate Confirmation that provided details of the Shipment. By virtue of the Agreement and Amendment, the shipper had notice of the liability limitation before the bill of lading was issued. As for the shipper's contention that the motor carrier had not signed the bill of lading, the district court concluded that the driver acted on the Landstar's behalf when he signed the bill of lading.

Accordingly, finding that the motor carrier had satisfied all three prongs of the *Hughes* test, the district court ultimately held Landstar was entitled to limit its liability to $100,000.[1]

***CorTrans Logistics, LLC v. Landstar Ligon, Inc.*, No. 1:17-02033-JPH-DLP, 2020 WL 5702186 (S.D. Ind. Sept. 23, 2020)(Judge James P. Hanlon)**

[NB: This court determined the offer of alterative rates need not be between unlimited and limited liability but rather between two levels of limited liability.]

SLICED AND DICED - NEGLIGENCE CLAIM AGAINST RAIL SERVICES COMPANY AND ITS AFFILIATE ARE SEVERED FROM BREACH OF CONTRACT CLAIM AGAINST THE RAIL CARRIER

A CSXT train carrying auto parts collided with an unattended rail car on an Ohio siding. Underwriters brought a subrogation action against the rail carrier (CSXT) and the rail service

[1] The shipper also argued that the "material deviation" doctrine should apply to set aside the liability limitation. The district court rejected this argument, stating that no statute or binding authority recognized the material deviation doctrine or required its application.

entities suspected of mis-directing the train onto the wrong siding track (Savage Services Corp. "SSC" and Savage Industrial Rail Services "SIRS") (collectively, "Savage"). CSXT was sued under the Carmack Amendment and breach of contract, and Savage under negligence.

Suit was filed in the Middle District of Florida, the domicile of CSXT and the contractually selected forum as to that defendant. SSC and SIRS, non-Florida entities, each brought a motion dismiss or sever and transfer the claims against them to Ohio where the loss occurred based primarily on lack of the court's personal jurisdiction over SIRS and on convenience of the parties as to SSC.

Plaintiff sought to defeat to the motion by pointing to shortcomings in the SIRS declaration supporting the motion, asserting the Savage defendants were alter egos of each other because of a strong corporate affiliation involving shared ownership, offices, and web services, and by trying to bootstrap CSXT's forum activities to the contract between SSC and Plaintiff's insured which implicated the services of CSXT.

The court found that Plaintiff's evidence was insufficient to make a *prima facie* showing of jurisdiction against SIRS based on that firm's purported contacts with Florida.

Then, the court considered SSC's request for a transfer to the place of loss, i.e., Southern District of Ohio, for the convenience of the parties and witnesses and in the interest of justice (28 U.S.C. §1404(a)). The court's analysis of the merits of transfer included the following considerations 1) convenience of witnesses, 2) location of relevant documents, 3) convenience of the parties, 4) locus of operative facts, 5) availability of process to compel the attendance of unwilling witnesses, 6) relative means of the parties, 7) familiarity with the governing law, 8) weight accorded a plaintiff's choice of forum, and 9) trial efficiency and the interests of justice, based on the totality of the circumstances.

Based on its analysis, the court found the factors preponderated in favor of transfer.

Finally, the court determined the best course of action was not dismissal but rather severance of claims involving Savage and their transfer to Ohio (the place of loss), with claims against CSXT remaining in Florida.

***Sompo Japan Nipponkoa Ins. v. CSX Transp. Inc.*, No. 3:19-Civ-01154-J-348BD (M.D. Fla. Dec. 3, 2020)(Judge Marcia Morales Howard)**

GROUNDED - PLAINTIFF PLEADS AROUND THE MONTREAL CONVENTION TO REQUIRE REMAND

In a California state court, plaintiff, a consignee under house air waybills sued an air freight forwarder for shortage of several consignments of face masks slated to move from China to Sacramento via SFO. Causes of action included state law breach of agreement and negligence.

On December 3, 2020, the defendant forwarder removed the case based on the Montreal Convention. Plaintiff moved to remand the case to state court.

In granting the motion to remand, the district court found that, as the master of its complaint, the Plaintiff "may avoid federal jurisdiction by exclusive reliance on state law" and "removal …cannot be based on a federal 'defense, including the defense of complete pre-emption."

The court noted that "complete preemption serves as a narrow exception to the well-pleaded complaint rule."

This court surveyed the legal landscape and found that whether or not the Montreal Convention completely preempts state law claims has not been answered by the Supreme Court or the Ninth Circuit and that lower courts are split on the issue. The court concluded that "the Montreal Convention does not completely preempt state law claims" for purposes of converting Plaintiff's state law causes of action to a federal claim supporting removal.

Nevertheless, the court acknowledged that as an affirmative defense, the Montreal Convention most likely does provide the exclusive remedy available to plaintiff under its state law causes of action.

Parenthetically, the court noted its belief that the Montreal Convention applies to a freight forwarder when acting as a contracting carrier and that, unlike the Warsaw Convention, Article 18 of the Montreal Convention extends its coverage during land carriage whenever the cargo is in the possession, custody, or charge of the carrier (quoting the Convention's Explanatory Note, Ch. III, Art. 18(3).

***Sun Coast Merchandise Corp. v. Hecny Transportation, Inc.*, 2:20-Civ-11007-CAS (C.D. CA Feb. 22, 2021)(Judge Christina A. Synder)**

CARGO CLAIMANT IS DOUBLE-DOWNED – BARRED FROM RECOVERY BY HIMALYA CLAUSE NO-SUIT RESTRICTION AND HELD LIABLE FOR DOWNSTREAM RAILROAD'S ATTORNEYS' FEES

This dispute arose out of a shipment of electrical transformers moving from Germany to Ghent, Kentucky, via Baltimore, Maryland. Blue Anchor Line, a non-vessel operating common carrier, issued a through bill of lading. CSX was engaged to rail the transformers during the land leg in the U.S.

Siemens filed suit against CSX because one transformer was purportedly damaged during rail carriage. CSX moved for summary judgment.

The district court granted summary judgment for CSX because it qualified as a subcontractor under the Blue Anchor bill. Hence, CSX could invoke its liability-shielding provision in the "the terms of the carriage." Siemens Energy appealed.

After determining the Blue Anchor bill of lading was a through bill of lading, two provisos took center stage at the appellate court.

First, the bill of lading included a Himalaya clause which extended bill of lading provisions and benefits to downstream subcontractors, including CSX.

Second, the Himalaya clause included a "covenant not to sue" wherein the Merchant (Siemens) agreed that "no claim or allegation shall be made against any Sub-Contractor whatsoever, whether directly or indirectly, in connection with the Goods or the Carriage of the Goods."

The Court of Appeals for the Sixth Circuit affirmed the district court's summary judgment finding CSX was insulated from suit by Siemens. The court found that Blue Anchor and Siemens were within their right to extend liability-limiting provisions to downstream carriers like CSX, opting to take on the risks of transport (and perhaps insurance) for themselves. *See Fortis Corp. Ins., SA v. Viken Ship Mgmt. AS*, 597 F.3d 784, 792 (6th Cir. 2010); *CNA Ins. Co. v. Hyundai Merch. Marine Co*., 747 F.3d 339, 361 (6th Cir. 2014). And that, "[i]n the context of a Himalaya Clause …it makes no difference that the downstream carrier was not in privity of contract with either of the Siemens entities" (citing *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 34 (2004)). The court extended to prohibitions of suit *Kirby*'s principle of extending limitation of liability provisions.

As a victorious party, CSX then filed a motion in the district court for an award of costs and attorney's fees. Therein, taking center stage was the bill of lading's indemnity provision which provided, *inter alia*, that if any claim or allegation should nevertheless be made against a subcontractor [CSX], that Siemens indemnify the Carrier against all consequences thereof.
Hitching the bill of lading's Indemnity provision to the Himalaya clause, the district court held in a decision dated March 17, 2021 that CSX was entitled to be indemnified for its own fees and costs in defending itself against Siemen's lawsuit.

***Progressive Rail Inc. v. CSX Transportation, Inc.,* 981 F.3d 529 (6th Cir. 2020)**

[Editor's Note: - The ECF docket indicates that after CSX filed a motion seeking attorneys' fees in the amount of $681,533.05]

UNDERWRITERS' INTEREST EXCISED - PROSECUTION OF CARGO CLAIM, AS LIMITED BY THE CARMACK AMENDMENT, SURVIVES BANKRUPTCY BUT NOT THAT PORTION OF THE CLAIM PAID BY CARGO UNDERWRITERS

On November 17, 2020, District Judge Rodolfo A. Ruiz II of the Southern District of Florida issued a ruling that limited claims by plaintiff IAG Engine Center Corp. ("IAG") and certain subrogating underwriters against defendant Cagney Global Logistics, Inc. ("Cagney") arising out of damage that occurred to a jet aircraft engine during interstate commerce on July 20, 2015. Later that year, IAG entered into a $1,990,000.00 settlement agreement with its insurers (the subrogating underwriters) under which IAG assigned its right to bring claims regarding the incident to the extent of the settlement. Thereafter, IAG filed a lawsuit against Cagney asserting claims for 1) strict liability under the Carmack Amendment, 2) strict liability based on Cagney's engagement in an inherently dangerous activity, and 3) negligence through Cagney's employees and agents.

In October 2017, Cagney filed a notice of bankruptcy and automatic stay, informing the Court that it had filed a bankruptcy petition. The Court entered an order staying all proceedings in the matter. In February 2018, IAG filed a proof of claim in the Cagney bankruptcy matter in the amount of $4,359,343.91 for the damages to the engine. On March 1, 2019, the Court granted a motion by IAG to partially lift the bankruptcy stay to allow IAG to pursue its claim against Cagney so as to collect against insurance proceeds only. IAG did not, however, notify the bankruptcy court of the assignment of rights, and the underwriters did not submit a proof of claim in Cagney's bankruptcy.

Cagney filed a motion to dismiss on the grounds that a) the plaintiffs' state law claims were preempted by the Carmack Amendment, and b) IAG did not have standing to bring the action because it subrogated and assigned its claims to the underwriters and the underwriters were not permitted to pursue a subrogation claim by the order partially lifting the bankruptcy stay.

Judge Ruiz concluded that: 1) the Carmack Amendment preempted IAG's second and third claims; and 2) IAG had no standing to bring the portion of its claim that was assigned and subrogated (the first $1,990,000), but it may pursue damages beyond $1,990,000. Underwriters were precluded from pursuing the subrogation claim because it was not expressly permitted under the order partially lifting the bankruptcy stay.

With regard to the Carmack Amendment portion of the decision, the Court rejected IAG's argument that it was acting as a "broker" rather than a "carrier," as IAG invoked the Carmack Amendment in its pleadings, undermining its own argument. Additionally, the Court cited IAG's language in the pleadings that Cagney "was acting as an interstate motor carrier" and that its driver "proceeded under the bridge at a high rate of speed" as evidence that the state law claims arise from Cagney's failures in transportation and delivery of the goods, which means they are subject to the Carmack Amendment.

With respect to the standing issue in light of the bankruptcy stay, the Court stated that an order modifying a bankruptcy stay must be strictly construed. For that reason, the failure of the bankruptcy order to mention the underwriters' subrogation claim, and the fact that the bankruptcy court was unaware of the assignment to the underwriters, weighed against standing for the underwriters. With regard to IAG, however, the Court determined IAG's claims were consistent with the order partially lifting the stay and the assignment -- to the extent of IAG pursuing a claim on its own behalf for damages beyond the value of the $1,990,000 settlement.

***IAG Engine Center Corp. v. Cagney Global Logistics Inc.*, No. 17-Civ-23271-RAR, 2020 WL 6736293 (S.D. Fla. Nov. 17, 2020)(Judge Rodolfo A. Ruiz II)**

OTHER DECISIONS OF INTEREST

The District of Connecticut found a claimant's alternative pleading allegations of motor carrier or broker liability sufficient against a motion to dismiss. The court also rejected the contention that ICCTA or FAAA shielded a broker from potential negligence liability**.**

***Covenant Imaging, LLC v. Viking Rigging & Logistics, Inc*., No. 3:20-Civ-00593, 2021 WL 973385 (D. Conn. Mar. 16, 2021)(Judge Kari A. Dooley)**

The Southern District of New York upheld a $500 per package bill of lading limit for a Brazil to UAE ocean movement, rejecting for lack of proof the plaintiff's contention that a higher UAE law limitation was compulsorily applicable.

***Indemnity Insurance Co. of North America a/s/o Baker Hughes Co. v. Expeditors International of Washington, Inc. v. CMA CGM, S.A.*, 2021 WL 1372654 (S.D.N.Y. April 12, 2021) (Judge Alvin K. Hellerstein)**

The Southern District of Illinois held that neither ICCTA nor FAAA pre-empt a state law bodily injury claim against a transportation broker for alleged negligent hiring of the motor carrier.

***Morrison v. JSK Transport, Ltd.*, 2021 WL 857343 (S.D. Ill. Mar. 8, 2021)(Judge J. Phil Gilbert)**

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