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"AS A RESULT, COGSA WAS AMENDED, NOT MERELY RELOCATED"???

Crates of plywood were carried from Malaysia and Indonesia and discharged at the Port of Camden, New Jersey, and plaintiff alleged damage to the cargo. Bills of lading had been issued by the time charterer. When the vessel was again bound for Camden, under threat of arrest, the owner arranged for a letter of undertaking which provided for an appearance *in rem* by owner which would be without prejudice to all defenses available to it and the vessel.

After filing its complaint, plaintiff became aware that the vessel had been bareboat chartered (to an entity identified as Star Bulk Carrier, Co., S.A.) and therefore the owner had no liability for cargo alleged to have been damaged.

Plaintiff did not file suit against the bareboat charterer or the time charterer and thus, its "only claim in this action is against the OCEAN QUARTZ, *in rem*."

The vessel moved to dismiss the claim against it on the basis of a forum selection clause in the bills of lading issued calling for any claim, dispute, suit or action to be brought before the Seoul District Court in Korea.

Plaintiff argued it could not bring an action against the vessel in Korea as Korean law did not recognize actions against vessels *in rem*. The Court noted the same position was advanced in *Fireman's Fund Ins. Co. v. M.V. DSR Atlantic*, 131 F.3d 1336 (9th Cir. 1977), *cert. denied*, 525 U.S. 921 (1998) and was rejected by the Ninth Circuit.

The vessel argued that the Court should follow *Fireman's Fund* and its progeny "and the

dozens of cases throughout the country that have applied the Ninth Circuit's reasoning" as opposed to aligning itself with three courts that disagreed with that outcome.

The Court did not accept plaintiff's argument, stating "As a primary matter, COGSA was amended in 2006, and section 3(8) was modified." The Court noted that prior to 2006, section 3(8) of COGSA included the ship, along with the carrier; however, the current "iteration" of section 3(8) merely refers to a carrier:

> "The 2006 amendment to COGSA is significant because it eliminates 'the ship' from the obligations previously set forth in section 3(8)."

Thus, the Court found that while a carrier may not limit its liability through provisions inserted in a bill of lading (referring to 46 U.S.C.A. §§30704 and 30705), "COGSA did not make the same requirement of 'the ship.'"

The Court did not feel compelled to depart from the reasoning of the *Fireman's Fund* line of cases and read into COGSA a provision that prohibits a shipper [sic "carrier?] from choosing a forum for disputes that does not recognize *in rem* actions. Accordingly, the Court found the forum selection clause valid and enforceable. (*Liberty Woods v. MV Ocean Quartz*, 219 F. Supp. 3d 494 (2016).)

The Appellate Court, in dealing with the District Court's decision based on that Court's interpretation of COGSA, stated:

> "In granting the motion to dismiss, the District Court erred in interpreting COGSA by confusing it with the Harter Act, a precursor to COGSA. COGSA was modeled after the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules). In 2006, COGSA was relocated from 46 U.S.C. §§ 1300 *et seq.*, to a note after 46 U.S.C. § 30701. During this same period, the Harter Act was also moved from 46 U.S.C. §§ 190-196 to 46 U.S.C. §§ 30701-30707. As a result, COGSA was amended, not merely relocated. The relocated Harter Act provisions were the 'amended' COGSA provisions. Upon analyzing 46 U.S.C. §§ 30704 and 30705, the District Court held that Congress modified COGSA's language so that it no longer prohibited limiting a ship's liability. That, however, was a misinterpretation of COGSA."

Nevertheless, the Circuit Court affirmed the judgment, finding the foreign forum selection clause did not violate COGSA. It joined the Ninth Circuit in holding a forum selection clause specifying that Korean law would govern was merely a "means…of enforcing [COGSA] liability."

The Court also noted plaintiff did not file an *in personam* suit against the charterer in South Korea. Additionally, it did not obtain a Letter of Undertaking which would be applicable to an *in personam* suit. The Court considered rejection of such alternatives, not the forum selection clause, eliminated plaintiff's ability to recover.

The Court went on to state where parties contracted to bring suit abroad, the United States "must be cognizant of its status as a member of a global community and respect the competence of other jurisdictions to adjudicate claims. In light of this and in light of the fact that the forum selection clause did not lessen or eliminate ship liability for cargo damage, we decline to impose LWI's restrictive interpretation of COGSA." It affirmed the District Court's order dismissing the action.

In a concurring opinion, Circuit Judge Ambro stated:

> "an action *in rem* is only one way to impose lability on a ship. Although South Korean law does not allow *in rem* suits, [plaintiff] concedes that equivalent security for *in personam* suits is available. As it chose not to pursue this avenue for relief, I agree with my colleagues that any lessening of the ships' liability is the fault of [plaintiff], not the selection of a foreign forum." (Parenthesis supplied.)

However, Judge Ambro went on to state, if a forum selection clause would operate such that a shipper could *never* enforce the selected forum's judgment against the value of the ship that carried the shipper's damaged goods, the clause would be unenforceable, citing *M/V Sky Reefer*, 515 U.S. 528, 540 (1995).

In his view, COGSA requires a shipper have some means to assess liability for damaged goods against the value of the ship. Because plaintiff had not explained why it would be

impossible to vindicate its rights in the designated forum, he agreed to the dismissal of the *in rem* action.

LIBERTY WOODS INT'L, INC. v. THE M.V. OCEAN QUARTZ et ano.; U.S. Court of Appeals, Third Circuit, No. 16-4195; 889 F.3d 127; Decision dated May 4, 2018; Circuit Judges McKee, Ambro, and Roth.

[Editor's Note: Both the District Court decision and the Court of Appeals decision assert that COGSA was amended in the course of the codification in 2006.

The Historical and Statutory Notes (46 U.S.C.A., West Publishing 2007 ed., 46 U.S.C. §§30701-30707) state: "This chapter codifies the Act of February 13, 1893 (Ch. 105, 27 Stat. 445) (commonly known as the Harter Act). Changes are made to simplify, clarify, and modernize the language and style but the intent is that these changes should not result in changes in substance."

The Carriage of Goods by Sea Act appears as a note following section 30701. Sections 30702 through section 30707 refer to the "Source" as "Feb. 13, 1893".

The provisions of COGSA are set forth verbatim. It is not referred to as a "Source" in any of the Notes. COGSA (as a note) comprises 16 separate sections, and the "Harter Act," as recodified, comprises 7.

The parenthetical Note in Section 16 of the COGSA Note states:

> "[Note was classified to former 46 App. U.S.C.A. §§1300-1315 prior to the general revision and enactment into positive law of 46 Shipping, by Pub. L. 109-304, Oct. 6, 2006, 120 Stat. 1485, *but was not repealed, omitted, or restated by Pub. L. 109-304.*]" (Italics supplied.)

Attention is also called to the comments of the late Charles M. Davis, author of the *Maritime Law Deskbook*:

> "The Carriage of Goods by Sea Act (COGSA), formerly published at 46 U.S.C. Appx. §1301 *et seq.*, was not recofidied when the Appendix to 46 United States Code was recodified in 2006. The Appendix to Title 46 no longer exists. *COGSA was not amended or repealed*: it just is not included under its own provisions in the United States Code. COGSA now is published in the United States Code as part of the historical and revision notes to the recodification of the Harter Act, at 46 U.S.C. § 30701." (Italics supplied.) davismarine.com/articles/COGSA%20-%20The%20Statute.pdf

NO DAMAGE TO CARGO = COGSA DOES NOT APPLY

Defendant received a request from plaintiff's subrogor to arrange the transportation of 700 used tractor units from Houston, Texas to Hai Phong Port, Vietnam. Defendant chartered

the vessel to perform the carriage of 153 of those tractor units and issued a bill of lading for that carriage.

During the voyage, the vessel experienced a total engine breakdown which required it be towed to Japan. From the time of the booking, defendant knew that the cargo's delivery in Vietnam had to take place by a certain date to allow its entry into that country.

After some negotiations, the vessel was towed to Japan and then arrangements were made for transshipment of the cargo on another vessel for carriage to Vietnam. The cargo was timely delivered in Vietnam, and defendant issued an invoice for some $252,500 for the carriage of freight plus charges to discharge and load the cargo plus terminal handling and coordination charges.

Plaintiff, as subrogee of the cargo owner, filed suit for recovery of the charges which plaintiff had paid under its insurance policy. Defendant moved for summary judgment.

The parties agreed on the applicability of each bill of lading; indeed, plaintiff did not dispute that it sued defendant under the bills of lading and, in doing so, accepted their terms (citation omitted).

The Court found, upon reviewing the bills of lading, that plaintiff did not have a right to recover for the freight charges under the terms of the bills of lading.

Plaintiff's only argument was that defendant violated a duty to "exercise due diligence to…make the vessel seaworthy," referring to 46 U.S.C. §30705(a)(1), (b). [See footnote *infra*.]

It noted an NVOCC that issues a bill of lading could be considered a "carrier" within the meaning of COGSA and that plaintiff seeks to impose a duty on it to make the ships it charters seaworthy.

> "It is true that as a "carrier," NVOCCs would seemingly be held to all responsibilities and liabilities applied to "carriers" under COGSA, a law initially passed in 1936, including the duty to exercise due diligence to make a ship seaworthy. However, it is not clear to this Court that this result was

> intended or warranted. By definition, NVOCCs are non-vessel-operating intermediaries, and do not have physical control over specific vessels. NVOCCs, which do not operate vessels, are not likely to have the right or practical ability to inspect ships for seaworthiness or order repairs. It strikes this Court as unrealistic to hold NVOCCs to impossible duties."

At the same time, the Court found it need not reach such issue because COGSA did not apply to the present dispute. To make a claim under COGSA, a shipper has the burden of proving that the cargo was damaged while in the custody of the carrier and the Court agreed with the position stated by the NVOCC that COGSA was not applicable to the present dispute because the cargo in question was not damaged in any way. "COGSA applies to loss or damage to the cargo itself." (Citation omitted.) "Had cargo damage been suffered because of the engine malfunction in the instant case, COGSA would control the rights, responsibilities, and liabilities of the parties." (Citation omitted.)

Absent such cargo damage, COGSA does not govern the parties' dispute. The Court noted there was no evidence of any resulting "damage to the Cargo" and that COGSA does not require the goods to be delivered by any specific time and there are no provisions in COGSA relating to delay. "Detention or delay that is 'wholly unconnected with physical loss or damage to [cargo]' is outside the scope of COGSA." (Citation omitted.) Thus, a provision disclaiming liability for delay is not in conflict with COGSA. (Citation omitted.)

As plaintiff conceded that the cargo arrived undamaged, its COGSA claim was not applicable. Thus, applying ordinary contract principles to the express language of the bills of lading, the defendant was not liable for the additional freight charges incurred as a result of the engine failure.

Finding no genuine issue of material fact, the Court granted summary judgment.

STARR INDEMINTIY [sic] & LIABILITY CO. as subrogee of NAVISTAR, INC. v. TRANSFAIR NORTH AMERICA INTERNATIONAL FREIGHT SERVICES d/b/a TRANSFREIGHT; U.S.D.C. W.D.Wa. at Seattle; Case No. C17-697 RAJ; Decision of the Honorable Richard A. Jones; dated August 22, 2018.

[Editor's Note: The Court's reference to the definition found in 46 U.S.C. §30701 and to 46 U.S.C §30704 and 46 U.S.C. §30705(a)(1), (b) make reference to the recodified and amended Harter Act and not to COGSA. *See* Editor's Note, *supra*.**]**

ATTACHED RIDER SUFFICIENT NOTICE OF CARRIAGE ON DECK…

Seismic equipment, including a seismic vessel in sections, were booked for transportation from Houston, Texas, to Poti, in the country of Georgia. The freight forwarder negotiated with the carrier to ship plaintiff's seismic equipment, entering into a booking note which contained no terms specifying that the cargo was to be stowed under deck; however, the booking note referenced "additional terms and conditions as per attached [Bill of Lading]."

The cargo was delivered to the vessel and loaded on board. During that time, the forwarder sent instructions with respect to the Bill of Lading to the carrier. In the instructions, no specification was made that the equipment should be stowed below deck.

The carrier informed the forwarder that the cargo would be stowed on deck and that the Bill of Lading would so reflect. The forwarder asked that the provision be removed so that the cargo would be stowed below deck, and the carrier said no.

The Bill of Lading ultimately issued stated that the cargo consisted of 34 packages of seismic equipment "as per attached rider." The rider listed the 34 packages and, above the list, contained a notation in all capital letters: "CONTAINERS & FLAT RACKS STOWED ON DECK." While in transit, the vessel encountered very heavy seas and the starboard hull section of plaintiff's seismic vessel fell overboard and was lost.

Plaintiff alleged defendants were negligent and breached their obligations under COGSA and defendant carrier asserted a counterclaim seeking indemnity for the loss of plaintiff's cargo and also to recover its attorneys' fees.

As to defendant's counterclaim, the Court noted it sought indemnity for the loss of the

cargo and sought to recover attorneys' fees pursuant to provisions in the bill of lading. In response to plaintiff's motion, the carrier admitted it was seeking to enforce the indemnity clause as a release of the plaintiff's claims under COGSA. The Court found this to violate section 3(8) of COGSA as effectively relieving the carrier of liability under COGSA. The Court also considered enforcement the bill of lading provision would alter the applicable burdens of proof. As such, the Court found the indemnification clause, as asserted by defendant, to be invalid and granted plaintiff's motion for dismissal of defendant's counterclaim; however, the Court also stated dismissal of the counterclaim for affirmative relief in no way affected the defendants' ability to assert statutory defenses under COGSA.

As to the issue of whether a "clean" bill of lading was issued, the Magistrate Judge had recommended holding that the carrier issued a clean bill of lading and, thus, under-deck stowage was required. The Court did not adopt this recommendation:

> "The parties cite no legal authority, and this Court is aware of none, that requires the words 'on deck stowage' to appear on the first page of the bill of lading, rather than through a clearly-stated reference on page 1 to a separate, simple document that includes the language, or similarly clear notification that the cargo will be stowed on deck."

As a result, the Court denied judgment on this record of whether, as a matter of law, the bill of lading provided "on its face" that plaintiff's cargo would be stowed on deck.

As there was conflicting evidence presented as to whether the parties had a "definite agreement" authorizing on deck stowage of the cargo, whether on deck stowage was "reasonable and customary" at the ports in question, and whether such was a material deviation from the contract of carriage, the Court found there were genuine issues of material fact on these matters and denied defendant's motion for summary judgment.

ADVANCED SEISMIC TECHNOLOGY, INC. et al. v. M/V FORTITUDE et al.; U.S.D.C. S.D.Tx, Houston Div.; Civil Action No. H-16-3041; Decision of Senior U.S. District Judge Nancy F. Atlas; dated March 22, 2018.

COURT FINDS NOLA NOT A GOOD PLACE TO START FROM IN SUMMERTIME…

In July of 2012, the vessel "Flaminia" was crossing the Atlantic Ocean bound for Antwerp, Belgium. The vessel departed from New Orleans, Louisiana, and early on the morning of July 14th, a smoky cloud arose from one of the holds and an explosion followed shortly thereafter.

As a result of this explosion and fire, three members of the crew were killed, a great quantity of cargo containers were destroyed, along with cargo, and the vessel was seriously damaged. A number of lawsuits followed seeking compensations for, among other things, death, bodily injury, loss of cargo, damage to the vessel, and for contribution and indemnification. Many of the original claims were resolved, including those alleging wrongful death and bodily injury.

The Court divided the trial into phases. In Phase I, the Court determined what caused the explosion and resulting fire, finding auto-polymerized DVB80, a chemical contained in a container aboard the vessel, was ignited by a spark and caused the explosion and fire. The Court found the following substantially contributed to the chemical's auto-polymerization:

- The decision to ship the cargo out of New Orleans necessitating a longer voyage than would have been from a more northeastern port and exposed it to undesirable conditions;
- The chemical was left sitting on the dock at New Orleans prior to loading for some ten days in the sun, in hot weather, and next to a number of tanks of heated DPA;
- The chemical was stowed in hold no. 4, next to containers of heated DPA and next to the ship's heated fuel tanks. The lack of proper ventilation lead to hotter

than typical ambient temperatures in hold no. 4.

"For the sake of the convenience and the sanity of the reader…," the Court went on to summarize the relevant claims and defenses.

[In the trial of the matter, the Court received evidence from a total of 82 witnesses (24 live; 2 by trial declaration only with cross-examination waived; and 56 by deposition designation). It reviewed hundreds of documents as evidence. It finally issued its decision consisting of 122 pages.]

The Court found both the manufacturer of the chemical that auto-polymeritized and the NVOCC that booked transport aboard the FLAMINIA and was responsible for trucking the chemical to New Orleans, liable.

The Court found the manufacturer responsible for 55% of proven damages with the NVOCC being 45% liable. Other parties were found not to be at fault.

As stated, the decision consists of 122 pages and the reader is urged to read the opinion itself which covers the various issues in some detail.

IN RE M/V MSC FLAMINIA; U.S.D.C. S.D.N.Y.; Civil No. 12-cv-8892 (KBF); Decision of Judge Katherine B. Forrest; dated September 10, 2018.

[Editor's Note: Subsequently, Judge Katherine B. Forrest left the bench to return to private practice.]

"PLEASE RELEASE ME, LET ME GO…"

The ocean carrier brought suit against the shipper with respect to four shipments of yellow corn shipped to China. The shipments were completed and cargo made available; however, defendant failed to take delivery. The ocean carrier subsequently transported the cargo elsewhere for disposal so it could reclaim use of its containers and also incurred expenses for storage, handling, transportation, and disposal.

The parties also had other disputes involving container demurrage and detention charges,

and in March of 2016, entered into a settlement agreement and release. Payment was for $190,000.

In July of 2017, the ocean carrier instituted the suit involved.

The primary question presented by defendant shipper's motion to dismiss was whether the release (incorporated by reference in the amended complaint and thus to be considered) barred the carrier's claim for damages. The Court, applying principles of contractual interpretation, concluded that the carrier's damage claims were barred by the release. Rejecting the arguments asserted by the ocean carrier, it stated:

> "In short, because the Release is unambiguous in its scope, the Court must 'enforce the agreement as written,' 'without the assistance of parol evidence or any other extrinsic aids.' [Citation omitted] And as written, the Release plainly bars [plaintiff's] damages claims in this case."

The Court found the carrier's second claim for arbitration should also be dismissed.

MITSUI O.S.K. LINES, LTD. v. ARCHER-DANIELS-MIDLAND COMPANY; U.S.D.C., S.D.N.Y.; 17-CV-5588 (JMF); Decision of Judge Jesse M. Furman, dated August 16, 2018.

GEOGRAPHIC DEVIATION SUPERSEDES EROSION OF FUNDAMENTAL BREACH...

A shipment of Indian maze was carried from Diamond Harbour, India, to Aqaba, Jordan. The vessel arrived in August of 2011 and the Jordanian customs authorities declared the cargo would not be permitted to enter Jordan but would have to be returned to the country of origin on account of "broken percentage, foreign matters, impurities, damaged kernels…and apparent fungus."

The cargo owner appointed an arbitrator, seeking damages of approximately $8 million in respect of damage to the cargo.

About a month later, the vessel sailed to Turkey with the cargo on board without consent of the cargo owner or the Jordanian authorities. Proceedings were commenced by the vessel

owner in Turkey against the cargo owner for demurrage and the cargo was sold under judicial sale and the proceeds transferred to the vessel owner.

Although commenced in October of 2011, the arbitration remained in abeyance until March of 2015. One of the preliminary issues posed by owner was, "Should the cargo claim be struck out for want of prosecution?"

The tribunal found there had been inordinate and inexcusable delay on the part of the cargo owner in particularizing its cargo claim and struck out the claim on the basis that delay had (a) given rise to substantial risk it would not be possible to have a fair resolution of the issues; and (b) had caused serious prejudice to the vessel owner. (Delay of some three years and nine months.)

The cargo owner was given permission to appeal. The question raised by the cargo owner in its submission preliminarily was whether, in a contract evidenced by a bill of lading subject to the Hague Rules, a geographical deviation (the vessel's unauthorized voyage to Turkey) precludes a carrier from relying on the one-year time-bar statute created. The Tribunal had held that it did not.

The Court considered this point and the applicability of a prior decision (*Hain Steamship Company Ltd v. Tate & Lyle* [1936] 41 Com Cas, 350) which held that a geographical deviation of a vessel entitled the innocent party either to declare itself "no longer bound by any of the contract terms" or to otherwise elect to treat the contract as subsisting. The decision was based on the doctrine of fundamental breach, which precludes a party from relying on an exemption or limitation clause in a contract where it has breached a "fundamental" term of that contract.

The Court noted that the decision in *Hain Steamship* was inconsistent with the modern doctrine of repudiatory breach.

The Court concluded that in cases of geographical deviation, the *Hain Steamship* decision

remained the law unless and until overturned. Thus, the Court held a geographic deviation precludes a carrier from relying on the one-year time bar under Article III, Rule 6 of the Hague Rules if the other party elects to terminate the contract. It was held that the arbitration tribunal had made an error in law; however, owners were given permission to appeal to the Court of Appeal on this point.

DERA COMMERCIAL ESTATE v. DERYA INC (The "SUR"); English Commercial Court: [2018] EWHC 1673 (Comm); Decision of Carr, J., dated July 13, 2018.]

YOU ONLY GET WHAT YOU LOST…

A shipment of pharmaceuticals were lost during transportation from Pennsylvania from Tennessee. The case arose under the Carmack Amendment to the Interstate Commerce Act. After nearly seven years of litigation, including appeal, judgment was entered for plaintiff awarding it the replacement cost of the lost pharmaceuticals owned by plaintiff's customer which amounted to approximately $5.9 million. Plaintiff was the assignee of its customer's interest in the shipment.

The interstate motor carrier appealed, arguing its bills of lading limited liability to a small fraction of the shipment's value. Plaintiff cross appealed arguing that the District Court erred in awarding replacement cost of the goods rather than their higher market value.

The Court found under Carmack, the carrier's ability to limit its liability for cargo damage is restricted unless a motor carrier has agreed to some limitation in writing: the carrier "must have a written agreement [with the shipper] that is sufficiently specific to manifest that the shipper in fact agreed to a limitation of liability" (citation omitted).

The Court found the carrier had the burden to support the limitation and found the carrier did not meet it. It also rejected the argument that, as the shipper drafted the bills of lading, the carrier was excused from the requirement to give the shipper notice of two or more levels of

liability, and that the motor carrier failed to satisfy the opportunity-to-choose requirement. The shipper received no discount by including liability-limiting language in the bills of lading.

In its cross appeal, plaintiff argued that the District Court erred in limiting its damages to replacement cost.

The Carmack Amendment allows shippers to recover damages for "actual loss or injury to the property." Courts have generally held that this to be equivalent to market value at destination; however, the Court considered this statement had little bearing on any individual case because how the shipper's loss should be measured would depend on the circumstances (citation omitted). The evidence showed that the stolen shipment was successfully replaced and no sales were lost.

Distinguishing cases, the Court found there was no evidence that the shipper was a volume seller and its own customer-service records suggest that it did not lose any sales.

The Court concluded that there was no error in measuring the shipper's damages by the replacement cost. Indeed, measuring damages by market value would have awarded plaintiff a windfall.

The Court affirmed the judgment of the District Court.

EXEL, INC. v. SOUTHERN REFRIGERATED TRANSPORT, INC.; U.S. Court of Appeals, Sixth Circuit; Nos. 173904/3917; Decision of Circuit Judges Gilman, Gibbons and Thapar; dated September 25, 2018.

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