CARGO CLAIMS IN MULTI-MODAL SHIPPING

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Fall 2009 CLE

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By Ryan Gilsenan[1]

Theft is alive and well. One such caper, of interest for its sheer audacity, occurred on the U.S. East Coast in the autumn of 2007. Although fairly local to this writer's market, the ensuing litigation raised a host of claims, defenses, contracts and law that may be illustrative for ocean and motor carriers engaged in intermodal shipping. Certain names and details are changed to protect confidentiality.

I. A Common Casualty

This story starts in Belgium. In October 2007, the ocean carrier issued a through bill of lading to high-end liquor distiller (the "Distiller" or "Shipper") at the Port of Antwerp for shipment of a container of 2,500 cases, identified as "Total Packages," of premium label spirits aboard a container ship bound for Philadelphia. The bill of lading listed the Distiller's warehouse in Knoxville, Tennessee as the final inland destination.

The reverse terms on the bill of lading limited the carrier's liability under the Carriage of Goods by Sea Act ("COGSA") to $500 per package.[2] The vessel and cargo arrived at Philadelphia in good order, where the Distiller had documented to U.S. Customs that the cargo was worth $200,000. The ocean carrier subcontracted the inland leg to a motor carrier. The motor carrier retrieved the container from the port and parked it over the weekend at its local depot several miles away. The depot, apparently unmanned on weekends, was fenced all around except in back, where the yard was bound by a stack of empty shipping containers. The cargo

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[2] 46 U.S.C.A. § 30701 nt.

was last seen on a Friday. Thieves entered the depot sometime over the weekend through a field in back. They hot-wired a large forklift and used it to create a hole in the back boundary by removing several empty containers. It was presumably others among them who broke the seals off of several containers until they identified the one stuffed with 2,500 cases of spirits. Then they stole a tractor that happened to have a valid "overweight permit" in the cab, hooked it to the container chassis that was itself overweight and required a permit for that condition, and pulled it off the premises, over an empty field, through a tree line, and onto an interstate highway. The container was later found stripped alongside a secondary road several hundred miles away. The thieves and cargo were long gone.

The Distiller's insurance underwriters paid the claim and tendered same to the ocean carrier, which in turn tendered the claim to the motor carrier. The motor carrier filed an action for declaratory judgment in federal court, seeking to limit its liability to $500 for the entire container.

II. Identify the Contracts

To assess such a case, the shippers, ocean carriers and motor carriers alike are wise to first identify and examine the governing contracts. These could include a service agreement between shipper and carrier, bills of lading between shipper and carrier, a drayage agreement between carriers, bills of lading between carriers, and the Uniform Intermodal Interchange and Facilities Access Agreement between carriers.

A. Service Agreements

Seeking assurances for their property, high-volume shippers such as our Distiller will often persuade ocean carriers to assent to certain undesirable terms and conditions in consideration of awarding them a steady stream of business. The typical vehicle used for this

purpose is a Service Agreement. Service Agreements may govern the responsibilities of the shipper and the ocean carrier on certain defined routes, such as Europe to Asia or to North America. The Service Agreement may incorporate COGSA indemnity limits, but often the carrier consents to unlimited liability. Such a provision might appear as follows:

> **INSURANCE, INDEMNITY:**
>
> **Carrier shall indemnify and hold harmless any Authorized Shipper** …and related companies from and **against any and all liability, damage, loss, cost or expense (including reasonable attorney's fees and costs) arising from any (i) breach by Carrier of any of its…warranties, obligations, or covenants contained in this Contract**, or (ii) negligence or intentional misconduct of Carrier or any of its affiliates, employees, agents, contractors, subcontractors, or other representatives….(emphasis added).
>
> **CARGO CLAIMS**
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> Carrier shall assume liability for the cargo from the time it is received by Carrier or its agent or designee at the point of receipt specified in the Carrier's bill of lading. Carrier's liability will continue until delivery to final destination specified in the bill of lading, whether or not the cargo was in the actual custody, possession or control of the Carrier at the time the loss or damage occurred, unless otherwise specified by written agreement.
>
> Notwithstanding the definition of the term "Package" in the Carrier's bill of lading, if the number of items packed in the container (as that term is defined in the Carrier's bill of lading) is indicated on the front of the bill of lading and those items may reasonably be considered "packages" as that term is defined under applicable law, then **the Container shall not be considered the Package** (as that term is used in the Carrier's bill of lading). (emphasis added).

As between the carrier and the shipper, this Service Agreement is thought to prime any conflicting language in the carrier's bill of lading that purports to limit the carrier's liability to the shipper.

B. The Bill of Lading

Notwithstanding a Service Agreement, which may or may not be in place, the ocean carrier's bill of lading usually stipulates that the shipment is governed by COGSA, the identical

Hague-Visby Rules, or another regime of the carrier's choosing. As discussed in Sect. III, *infra*, by incorporating COGSA, the carrier limits its liability and establishes certain defenses.

C. The Drayage Agreement

Just as certain ocean carriers occasionally accede to the demands of high-volume shippers expressed in Service Agreements, certain motor carriers may compete for the business of ocean carriers by waiving their own liability limits in a Drayage Agreement with the ocean carrier. Drayage Agreements are not required to form a contract of carriage. However, when they are in place, they often require the motor carrier to bear a burden of unlimited liability, similar to terms expressed in the aforementioned ocean carrier's Service Agreement.

D. The UIIA

The Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA") is a creature of the intermodal container shipping industry. The UIIA has been drafted and maintained by the Intermodal Association of North America, based in Maryland, to permit participating motor carriers to share the use of container chassis among fleets owned and maintained by steamship lines at the nation's seaports. The UIIA's purpose is to facilitate the rapid taking, use, and return, or "interchange," of container chassis by motor carriers. The UIIA details the liability for maintenance and use of the chassis. With respect to indemnity, the UIIA provides:

> **4. Indemnity**. Motor Carrier agrees to defend, hold harmless, and fully indemnify the indemnitees against any and all claims, suits, loss, damage or liability, **for…property damage** (including reasonable attorney fees and costs incurred in the enforcement of this agreement) **arising out of or related to the Motor Carrier's: use or maintenance of the Equipment** during an Interchange Period, the performance of this agreement, and/or presence on Facility Operator's premises. (emphasis added).

"Equipment" is defined as "Equipment commonly used in the road transport of intermodal freight including trailers, chassis, containers and associated devices." (UIIA at ¶ B.4.). The time in which the motor carrier possesses a chassis is defined as the "interchange period." The ocean carrier is defined as the "indemnitee."

Notably, the UIIA Web site states that, "[m]any UIIA Equipment Providers require that Motor Carriers maintain a motor truck **cargo insurance** with varying limits depending on the Equipment Provider." (emphasis added).[3] However, that requirement is absent from many versions of the UIIA under which carriers are operating today, which are silent with respect to "cargo." For example, a standard UIIA clause provides:

> **6. Insurance**: To the extent permitted by law, Motor Carrier shall provide the following insurance coverages in fulfillment of its legal liability and obligations contained in this Agreement:
>
> **a.** A commercial automobile insurance policy with a combined single limit of $1,000,000 or greater, insuring all Equipment involved in Interchange including vehicles of its agents or contractors; said insurance policy shall name the Equipment Provider as additional insured.
>
> **b.** A commercial general liability policy with a combined single limit of $1,000,000 per occurrence or greater.
>
> **c.** Motor Carrier shall have in effect, and attached to its commercial automobile liability policy, a Truckers Uniform Intermodal Interchange Endorsement (UIIE-1), which includes the coverages specified in Section F.4. Motor Carrier shall use endorsement form UIIE-1 (or other corresponding forms which do not differ from UIIE-1) in the most current form available to the insurance carrier. Evidence of the endorsement of the policy and the coverage required by this provision shall be provided to IANA by the insurance company.
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> **d.** IANA shall receive a minimum of thirty (30) days advance Notice of any cancellation of such coverages.[4]

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[3] *See:* http://www.uiia.org/documents/crinst.pdf. Last visited August 25, 2009.

[4] In the event of disputes, the UIIA is governed by Maryland law: "**G.7. Governing Law:** The laws of the State of Maryland…shall govern the validity, construction, enforcement and interpretation of this Agreement without regard to conflicts of law principles."

Therefore, at first glance, it would appear that the motor carrier may be responsible for cargo loss as included among "property damage" arising from its use of the ocean carrier's "Equipment." It should be noted, however, that the UIIA defines "Equipment" narrowly and is silent with respect to cargo. As such, the motor carrier may be expected to argue that the "property" for which it is liable does not include cargo.

E. The Motor Carrier's Tariff

Lastly, in the event the motor carrier's liability is not defined by the ocean carrier's bill of lading, a drayage agreement, its own bill of lading, or the UIIA, its default liability limits should be published in its tariff. The purpose of a tariff is to publicly identify the motor carrier and set forth its services and limits of liability.

III. Applicable Statutes

The intermodal shipment may be governed by COGSA, the Harter Act, the Carmack Amendment, general maritime law, or state law.

A. COGSA

The Carriage of Goods by Sea Act establishes a negligence-based liability regime, *Sompo Japan Ins. Co. of America v. Union Pacific R. Co.*, 456 F.3d 54, 57 (2nd Cir. 2006), and limits the carrier's liability to $500 per package, so long as a shipper had "fair opportunity" to declare higher value.[5] Under COGSA, a carrier may avoid liability on a number of grounds, including "due diligence" with respect to damage caused by unseaworthiness.[6] "With respect to damage caused by something other than unseaworthiness, the carrier can avoid liability by

[5] 46 U.S.C.A. § 30701 nt. at subsection 4(5).

[6] *Id.* at subsection 3.

proving among other things that he was without actual fault and privity and that his agents or servants were without fault or neglect." *Id.*

COGSA applies of its own force to international shipments to or from U.S. ports.[7] COGSA does not apply beyond "tackle to tackle," that period which terminates upon the cargo's discharge from the vessel.[8] However, the parties are free to issue a bill of lading that extends COGSA beyond tackle to tackle, to the final, inland destination through a contractual provision known as a "Clause Paramount." In addition, the carrier is free to extend the COGSA protections inland to its servants, agents, and subcontractors, such as terminal operators, stevedores, motor and rail carriers, by use of a "Himalaya Clause" in the bill of lading.[9] The Himalaya Clause cloaks the carrier's servants with the same protection that the carrier itself enjoys.[10]

B. The Harter Act

While COGSA controls shipments between U.S. ports and abroad, the Harter Act is its domestic counterpart, governing contracts of carriage for shipments between U.S. ports, and on inland routes.[11] The Harter Act imposes a duty of "proper loading, stowage, custody, care [and] proper delivery," between discharge from the vessel and "delivery." Like COGSA, the Harter Act invalidates clauses in a bill of lading in which a carrier would disclaim liability for its own negligence, and absolves carriers from liability if they have exercised due diligence in making

[7] *Id.* at subsection 13.

[8] *Id.*

[9] *See generally:* Thos. J. Schoenbaum, Admiralty and Maritime Law, § 8-8 (3rd ed. 2000)("Schoenbaum").

[10] *Id.*

[11] 46 U.S.C.A. § 30701, *et seq.*

the vessel seaworthy.[12] However, the Harter Act does not control shipments moving inland on "a through bill of lading." *Mannesman Demag Corp. v. M/V CONCERT EXPRESS*, 225 F.3d 587, 593-4 (5th Cir. 2000); *Van Heusen Corp. v. Mitsui O.S.K. Lines, Ltd. et al*, 2003 AMC 2471, 2002 WL 32348263 (M.D.Pa. 2002)(unreported Table case). In those cases, "delivery" is said to have occurred once the cargo is discharged from the ship and ready for inland carriage. *Id.* As discussed further, *infra*, the controlling law might then be the Carmack Amendment, federal maritime law, or federal or state common law.

C. The Carmack Amendment

The Carmack Amendment to the Interstate Commerce Act exists to protect shippers from the problem of identifying the carrier responsible for a loss among many carriers in a complicated chain of transactions.[13]

> "The purpose of the Carmack Amendment was to relieve shippers…of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods. Under the statute, the receiving carrier…is responsible for the shipment over the entire route. The receiving carrier then has a right to 'recover from the carrier over whose line or route the loss or injury occurred' upon the proper submission of proper proof." *Canon USA, Inc. v. Nippon Liner System, Ltd.*, 1992 WL 82509, *6-8 (N.D.Ill. 1992)(quoting 49 U.S.C.A. 11707(b)).

Although Congress passed the Carmack Amendment pursuant to the Commerce Clause of the U.S. Constitution, Carmack may apply to the inland leg of goods moving to or from overseas, even without crossing state lines. The Carmack Amendment applies to any shipment "between a place in the United States and a place in a foreign country….."[14] Applying as it does to a shipment between the United States and "a foreign country," the Carmack Amendment does not

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[12] As observed by Professor Schoenbaum, "[d]istinctions in coverage between COGSA and the Harter Act produce few practical problems since the two acts reflect the same policies and standards of liability." Schoenbaum at § 8-15.

[13] 49 U.S.C.A. §14706 *et seq*.

[14] 49 U.S.C. § 13501(1)(E). The same jurisdiction applies to rail carriers. *See:* 49 U.S.C. § 10501(a)(2)(F).

distinguish between adjacent and distant foreign countries. Neither does it distinguish between imports and exports.[15] To the extent Carmack applies to a multi-modal shipment, state laws such as UCC § 7-309 will be without effect.[16]

1. Carmack May Prime the COGSA Package Limitation

The Carmack Amendment is vital because it arguably primes the COGSA package limitation, even if the ocean carrier extended COGSA ashore by use of the Clause Paramount and Himalaya Clause. In this context, most courts have held that the Carmack Amendment, as a federal statute, preempts both state and federal common law. *See Shao v. Link Cargo (Taiwan) Ltd*., 986 F.2d 700, 706 (4th Cir. 1993), *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913), *Ward v. Allied Van Lines, Inc.*, 231 F.3d 135, 139 (4th Cir. 2000). Many courts also view the extension of COGSA by a Himalaya Clause as merely contractual and thus preempted by federal statutes. *See Sompo*, 456 F.3d at 73 (holding "the contractual provision extending COGSA's terms inland must yield to Carmack"); *See also Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 557 (2d Cir. 2000); *Colgate Palmolive Co. v. S/S Dart Canada*, 724 F.2d 313, 315 (2d Cir. 1983); *Commonwealth Petrochems., Inc. v. S/S Puerto Rico*, 607 F.2d 322, 325 (4th Cir. 1979). Significantly, COGSA itself declares that it does not supersede the Harter Act or any other applicable law prior to loading and after discharge.[17]

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[15] For a learned discussion on the pre-1978 Carmack Amendment, which distinguished between imports and exports, and adjacent and non-adjacent foreign countries, *See:* Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1, 33-35 (2009)(contrasting older and modern cases, with analysis).

[16] It must be noted, however, that there has been little guidance on the issues since the two re-codifications of Carmack. "Most courts of appeals have either applied the Carmack Amendment to a shipment involving a non-adjacent country without considering the issue or have declined to apply the Carmack Amendment by applying the *Swift Textiles* 'separate bill of lading' requirement without considering that the shipment at issue involved a non-adjacent foreign country." *Id*. at 34 (citing cases).

[17] 46 U.S.C.A. § 30701 nt. at subsection 12.

If COGSA must yield to the Carmack Amendment, the $500 package limitation should not apply unless the parties have agreed to it. To that end, the carrier must demonstrate the shipper's "fair opportunity" to choose between different rates and levels of liability. "Only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained." *New York, N. H. & H. R. Co. v. Nothnagle*, 346 U.S 128, 135 (1953). While *Nothnagle* is the seminal case "fair opportunity" case, it provides little guidance. *Id.* More recently, the Seventh Circuit Court of Appeals articulated a 3-part test in *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407 (7th Cir. 1987). The carrier must prove that it:

1. Obtained the shipper's agreement as to its choice of liability;

2. Gave the shipper a reasonable opportunity to choose between two or more levels of liability; and that it

3. Issued a receipt or bill of lading prior to moving the shipment.

The carrier generally satisfies the first prong by proving a written agreement of limited liability, which contracts courts will interpret according to ordinary principles. The third prong is satisfied by issuing a bill of lading. Proof of the second prong, however, can be more subjective, and summary judgment is rare.[18]

2. Liability Limitations under Carmack

Absent having negotiated for a lower rate with the shipper, the carrier under Carmack is subject to unlimited liability. The Carmack Amendment provides that a carrier who transports property from one state to another or to an adjacent foreign country is liable for all loss, damage, and injury it causes to the cargo, unless the carrier has contracted with the shipper to limit

[18] While courts appear to have struggled to define "reasonable opportunity," two which have examined the issue are *KLLM, Inc. v. Watson Parma, Inc*. Slip Copy, 2009 WL 1702075 (S.D.Miss. 2009) and *Hoskins v. Beken Van Lines*, 343 F.3d 769, 779 (5th Cir. 2003).

liability under section (c)(1). *See, e.g., Allied Tube & Conduit Corp. v. S. P. Transp. Co.*, 211 F.3d 367 (7th Cir. 2000); *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936).

"Whereas COGSA establishes a negligence-like liability regime, Carmack imposes something close to strict liability upon originating and delivering carriers." *Sompo*, 456 F.3d at 59 (internal citations omitted). "Once the shipper establishes a prima facie case of Carmack liability by showing delivery in good condition, arrival in damaged condition, and the amount of damages, the carrier is liable for the actual loss or injury to the property it transports, unless there is an available defense." *Id.* (citing 49 U.S.C. § 14706(a)(1)). With respect to defenses, the Supreme Court has held that Carmack preserved those that had been available to the carrier under the common law. Briefly, a carrier is relieved of liability under Carmack if it can prove (1) that it was free from negligence, and (2) that the damage to the cargo was caused by one of five excusable factors: (a) an act of God, (b) a public enemy, (c) an act of the shipper himself, (d) public authority, or (e) the inherent vice or nature of the goods. *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137 (1964).

3. Does Carmack Apply? The Circuits Are Split.

Unfortunately, as critical as application of the Carmack Amendment is to the assessment of one's case, the federal circuits are presently split as to whether Carmack applies to goods moving inland on a through bill of lading. The issue turns on whether the inland carrier issued a separate, inland bill of lading. The Second and Ninth Circuits would apply the Carmack Amendment regardless of whether a separate, inland bill of lading was issued. *See: Sompo*, 456 F.3d at 61; *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., et al*, 2009 AMC 305 (9th Cir. 2009); *Berlanga v. Terrier Transp., Inc.*, 269 F.Supp.2d 821, 829-30 (N.D.Tex.2003); and

Canon USA, Inc. v. Nippon Liner Sys., Ltd., No. 90-C-7350, 1992 WL 82509, at *6-8 (N.D.Ill.1992). The Fourth, Seventh, and Eleventh Circuits, however, reject the Carmack Amendment without a separate, inland bill of lading. *See: Shao v. Link Cargo (Taiwan) Ltd*., 986 F.2d 700 (4th Cir. 1993)(declining to apply Carmack without a separate, inland, bill of lading); *Capitol Converting Equipment, Inc. v. LEP Transp., Inc*., 965 F.2d 391, 394-95 (7th Cir.1992); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 698-700 (11th Cir.1986); *Altadis USA, Inc. ex rel. Fireman's Fund Ins. Co. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006) *cert. dismissed* 127 S. Ct. 1209 (2007).[19]

The Supreme Court was set to resolve the split in *Altadis*, but the parties reportedly settled the case prior to oral arguments and the Court dismissed the writ of certiorari. *Altadis*, 127 S. Ct. 1209. Until the Court decides the matter, parties must identify the state of the law in their forum, and if Carmack applies, determine whether liability has been limited. If Carmack does not apply, the parties should examine their rights and liabilities under the state law, UCC § 7-309.

D. General Maritime Law and Federal and State Common Law.

Ever since the Supreme Court decided "a maritime case about a train wreck," multimodal shipments in which ocean shipping amounts to a "substantial" part of the contract of carriage are subject to the admiralty jurisdiction of the federal courts. *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd,* 543 U.S. 14, 27-28, 2004 AMC 2705 (2004). Unless otherwise addressed by a statute such as Carmack, multimodal shipments subject to admiralty jurisdiction will be governed by the

[19] For a scathing criticism of this line of cases that comprise the majority view, tracing the holding to a typographical error in the Eleventh Circuit's *Swift Textiles* opinion, 799 F.2d 697, 701 (11th Cir. 1986), *See:* Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo,* 40 J. MAR. L. & COM. 1, 26 (2009).

general maritime law of the United States.[20] Where there the case implicates "local interests," the courts sitting in admiralty are free to supplement the general maritime law with state law, to the extent that the state law creates no conflict. *Id.* In cases untouched by an applicable federal statute, and outside admiralty jurisdiction, i.e. where ocean shipping is less than a "substantial" part of the contract of carriage, the shipment will be governed entirely by federal common law and state law, according to the Rules of Decision Act.[21]

IV. Claims and Defenses

In a claim such as our Distiller might bring, it is fairly clear from the unlimited indemnity provision of the underlying Service Agreement that the ocean carrier must pay the shipper's claim. In cases without a Service Agreement, the ocean carrier would raise the protections incorporated in its bill of lading and attempt to defend the actions of its subcontractor against the shipper's claims. To do so, the ocean carrier would raise the defenses and limitations of liability available under COGSA, the Harter Act, or the Carmack Amendment, as applicable.[22]

A. The Shipper's Claims Against the Ocean Carrier

The ocean carrier could likely have the choice of filing suit in either state or federal court. Under the Supreme Court's *Kirby* decision, the federal courts' admiralty jurisdiction exits "so long as a bill of lading requires *substantial* carriage of goods by sea, its purpose is to effectuate maritime commerce – and thus it is a maritime contract."[23] Thus in most multi-modal shipments involving ocean carriage, the shipper is free to avail itself of the admiralty jurisdiction of the

[20] *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd*, 543 U.S. 14, 2004 AMC 2705 (2004); Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1, 41 (2009).

[21] 28 U.S.C. § 1652 (applying state substantive law as rule of decision in federal courts, except where required by federal statute or treaty); *See also: Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

[22] *See, supra,* Section III.

[23] 543 U.S. 14, 2004 AMC 2705 (2004).

federal courts.[24] Depending on the citizenship of the parties and the amount in controversy, the shipper may also proceed in federal court under the court's diversity jurisdiction.[25] Or, if suing under a federal statute such as COGSA, the Harter Act, or the Carmack Amendment, under the courts' federal question jurisdiction.[26] Of course, the shipper could also choose to litigate in state court under the Savings to Suitors clause, or if jurisdiction of the federal courts was otherwise unavailable.

The shipper should start with the Service Agreement. If the Service Agreement is in place, it trumps the bill of lading package limitation because it alone supplies the controlling limits of liability. In that case, the Service Agreement should overcome whatever liability limitation and statutory regime the ocean carrier has incorporated into the bill of lading. Where there is a Service Agreement, the ocean carrier's bill of lading operates as a "mere receipt" to the shipper and does not supplant the underlying Agreement. This rule arose in early cases involving bills of lading issued pursuant to charter parties, the issue being whether the contract was the original charter party between shipper and vessel owner, or the form bill of lading issued by the ship's master. The Second Circuit Court of Appeals might have been the first to state that the bill of lading is a mere "receipt."

> 'The usual practice is for the master, or agent of the shipowner, to give bills of lading for the cargo, although it may be shipped under a charter party. When the charterer himself ships the goods these bills of lading operate as receipts for them, and also as documents of title which he can negotiate, and thereby constructively transfer possession of the goods. *But they do not, as between the shipowner and the charterer, operate as new contracts, or as modifying the contract in the charter party*.' *The Fri*, 154 F. 333 (2d Cir. 1907) (quoting Thomas Gilbert Carver, *Carriage by Sea* 151-52) (emphasis added).

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[24] *Id.*

[25] 28 U.S.C. § 1332.

[26] 28 U.S.C. § 1331.

More recent decisions continue to cite *The Fri*. The Second Circuit reaffirmed that "[a] bill of lading may serve three functions: as a receipt, as a document of title, and as a contract for the carriage of goods; however, it does not perform this third function for the shipper and the carrier when there is a charter party containing the terms of the carriage contract."[27] The Southern District of New York described the "mere receipt" rule as "well settled" in a 2003 decision.[28]

While our Distiller example does not involve a charter party, the "mere receipt" rule expressed in *The Fri* continues to apply. "[W]hen it is clear that by agreement between the parties the contract of carriage is not contained in the bill of lading but in a *prior agreement*, the bill of lading is but a receipt and, if negotiable, an indicia of title." 2A *Benedict on Admiralty* § 34, at 4-14 (2007) (emphasis added). Thus, "the service contract, rather than the sea waybills, represent[s] the contract." *Delphi-Delco Electronics v. M/V NEDLLOYD EUROPA*, 324 F. Supp. 2d 403, 425 (S.D.N.Y. 2004).[29]

An attempt to rely on the bill of lading would make little practical sense. The parties would not trouble themselves to execute a service agreement, only to have its terms superseded by a form document issued by the ocean carrier. The Second Circuit Court of Appeals rejected that result in *Hellenic Lines, Ltd. v. Embassy of Pakistan*, 467 F.2d 1150 (2d Cir. 1972), declaring that "[t]o hold that language in the bill of lading prevails over inconsistent language in

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[27] *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972).

[28] *Continental Insurance Co. v. M/V "OCEAN JADE,"* 269 F. Supp. 2d 348, 351 (S.D.N.Y. 2003); s*ee also Cargill Ferrous International v. SEA PHOENIX MV*, 325 F.3d 695, 702 (5th Cir. 2003); *Vanol USA, Inc. v. M/T CORONADO*, 663 F. Supp. 79, 81 (S.D.N.Y. 1987).

[29] Those cases which enforce bill of lading terms are distinguishable. *TMC Co., LTD v. M/V MOSEL BRIDGE*, 2002 AMC 2355 (S.D.N.Y. 2002) featured a service contract which was expressly subject to the terms of the carrier's bill of lading. Most service agreements contain no such provisions. *Regal-Beloit Co. v. Kawasaki Kisen Kaisha, Ltd.*, 462 F. Supp. 2d 1098, 1105 (C.D. Cal. 2006) and *Calchem Corp. v. Activsea USA, LCC*, 2007 AMC 1950, 1955 n.13 (E.D.N.Y. 2007) both involved service contracts which related to shipping volumes and rates rather than liability for cargo damage. 462 F. Supp. 2d at 1105; 2007 AMC at 1955 n. 13. The Distiller example, by contrast, contains an entire section devoted to liability for cargo damage.

the freight contract would permit [the shipping line] to change unilaterally the terms of an already existing contract." *Id.* at 1154.

In the absence of a service agreement, the ocean carrier's bill of lading supplies the terms of the contract of carriage. The shipper would thus bring claims against the ocean carrier pursuant to COGSA or similar regime incorporated in the bill of lading, and subject to those package limitations. The ocean carrier's issuance of a clean bill of lading establishes the shipper's *prima facie* evidence that the goods were received in good order.[30] Under COGSA, the ocean carrier may not disclaim its own negligence or the negligence of its subcontractors.[31] However, the shipper must be aware that the statute of limitations under COGSA is one year.[32]

In the Distiller example, the shipper should examine whether the package limitation applies to losses incurred ashore. Under the "tackle to tackle" rule, COGSA applies only while the goods are aboard ship. If the loss occurred inland, as with the Distiller example, the shipper must examine the Clause Paramount, extending COGSA inland, and the Himalaya Clause, conferring the package limitation on the ocean carrier's subcontractors. In the event the shipper pursued the motor carrier directly, it must examine the separate, inland bill of lading, if issued, application of the Carmack Amendment, and, absent a separate bill of lading, at the motor carrier's tariff.

B. The Ocean Carrier's Claims Against the Inland Carrier.

In multi-modal shipping cases, the ocean carrier has the same forum options available to it as the shipper, *supra*. The doors to the federal and state courts should be equally open to it. Regardless of forum, the elements of the claims should be more or less the same, whether

[30] 46 U.S.C.A. § 30701 nt. at subsection 3.

[31] *Id.*

[32] *Id.*

sounding in contract or tort. Depending on the federal circuit, however, the unlimited liability provisions of the Carmack Amendment, *supra,* may apply. In addition to the controlling statutes, the ocean carrier should examine its contract claims under the drayage agreement, the motor carrier's bill of lading, and the UIIA, to the extent the documents exist. Other claims, including breach of bailment, negligence, and common law indemnity, arise from the common law.

1. Contract Claims

The ocean carrier's contract claims would arise under the drayage agreement, the motor carrier's bill of lading, and the UIIA, if available. With a drayage agreement, the grounds for the ocean carrier's claims of contractual indemnity and breach of contract would seem fairly well laid. The motor carrier's liability under the drayage agreement is typically as straightforward as the ocean carrier's obligations to the shipper under the Service Agreement. If there is a drayage agreement and liability is unlimited, the ocean carrier should prevail so long as the claim does not arise from the ocean carrier's own negligence. If the document exists, the ocean carrier should start there.

Under the UIIA, contractual indemnity and breach of contract may also provide grounds for the ocean carrier to recover. The question is whether the indemnity for "property" arising from use of the ocean carrier's "Equipment" covers the loss of cargo. The two published opinions found on point reached opposite conclusions. *See: Philips-Van Heusen Corp. v. Mitsui O.S.K. Lines, Ltd. et al,* 2003 AMC 2471, 2002 WL 32348263 (M.D.Pa. 2002)(unreported Table case)(holding trucker liable for cargo); *Altadis USA, Inc. v. Sea Star Line, LLC,* Case No. 3:04-cv-331-J-25HTS (M.D.Fla. 2008)(holding trucker not liable for cargo). The UIIA provides that "Motor Carrier agrees to defend, hold harmless, and fully indemnify [ocean carrier] against any and all claims…or liability, **for…property damage** (including reasonable attorney fees and

costs incurred in the enforcement of this agreement) **arising out of or related to** the Motor Carrier's: use or maintenance of the Equipment during an Interchange Period…." (emphasis added).

Under the "plain meaning" rule of contract interpretation, there is a strong argument that "property" should include cargo. Furthermore, as a matter of grammar, it seems that *but for* the motor carrier's use of the ocean carrier's "Equipment," the theft in the Distiller example could not have occurred. The cargo was on the motor carrier's property only because it had used the ocean carrier's "Equipment" to bring it there. Because the loss was impossible without the motor carrier's use of the "Equipment" to take custody of the cargo, the loss could be said to "aris[e] out of" and "relate[] to" to the motor carrier's use of the "Equipment."[33] Nevertheless, the motor carrier may be expected to argue that if the UIIA drafters intended to create liability for cargo damage, they could have defined that term in the document.

Case law on the question is surprisingly sparse. The *Philips-Van Heusen* Court addressed a case exactly on point to the Distiller example, where cargo was stolen from an inland trucker, and the consignee sued the ocean carrier and the motor carrier. *Philips-Van Heusen Corp.*, 2003 AMC 2471. In addressing the motor carrier's liability for cargo under the UIIA, the *Philips-Van Heusen* Court did not even address the term "Equipment" when quoting from the indemnity provision. *Id.* The court simply ordered the trucker to indemnify the ocean carrier for the loss of the cargo. The court held:

> Pursuant to the terms of that agreement, the "Motor Carrier agrees to defend, hold harmless, and fully indemnify ... Equipment Owner ... as [its] interests appear against any and all loss, damage or liability ... suffered by ... Provider ... arising out of Motor Carrier's negligent or intentional acts or omissions during an Interchange Period and/or presence on Facility Operator's premises." *Id.*

[33] UIIA.

Due to this interpretation, "the court has previously found that [motor carrier's] failure to install additional safety measures constituted negligence. Therefore, the UIIA requires [motor carrier] to indemnify the Ocean Liner Defendants for the amount it will have to pay [shipper] for the loss of the cargo." *Id.*

However, the U.S. District Court for the Middle District of Florida reached the opposite conclusion when interpreting the same UIIA language. *Altadis,* Case No. 3:04-cv-331-J-25HTS (M.D.Fla. 2008). "The unambiguous and clear language of the definition makes it clear that "Equipment" does not encompass cargo." *Id.* at *10. The Court did not discuss the meaning of "property," or the grammatical structure of the indemnity provision to ask what it means for a cargo loss to "aris[e] out of" or "relate[] to" the use of the "Equipment." Because the court did not discuss the question, it is unclear whether counsel raised it.

There is a third case, with slightly different facts. In *Mitsui OSK Lines, Ltd. v. MAK Transport, Inc.*, the Southern District of Texas decided a case in which the UIIA contained a provision that required the motor carrier to obtain liability insurance "for cargo." 2006 WL 2987711 (S.D.Tex 2006)(Unpublished Table case). As a result of that provision, the court required the motor carrier to indemnify the ocean carrier for the loss. It is therefore important to examine the UIIA in question to see whether it contains the provision requiring cargo insurance.

Failing existence of a drayage agreement or the UIIA, the ocean carrier should assess the remedies and applicability of the Carmack Amendment. The ocean carrier might bring contract claims under the motor carrier's inland bill of lading, if issued. As evidenced by the Carmack cases discussed earlier, motor carriers do not necessarily issue their own bills of lading. Absent a bill of lading from the motor carrier, the ocean carrier would rely on common law claims for recovery.

2. Common Law Claims

Putting aside the contracts, given facts such as the Distiller example, the ocean carrier's strongest common law claim against its subcontractor might be breach of bailment. The ocean carrier typically makes complete delivery of the cargo in good condition to the motor carrier, who, by accepting, creates a bailment. The motor carrier possesses the cargo in its exclusive care, custody and control, and has a duty to deliver in the same condition as received. The theft is a breach of the bailment. As a result, the ocean carrier should be entitled to recover its damages.

One court deciding a bailment claim held that Maryland law "could apply" to the cause of action because the transaction arose under the UIIA, which selects the application of Maryland law. *Mitsui OSK Lines, Ltd. v. MAK Transport, Inc.*, 2006 WL 2987711 (S.D.Tex. 2006). The *Mitsui* Court held, however, that there was no difference between Maryland law and maritime law with respect to the issue of bailments, and proceeded to apply maritime law. Therefore, the elements might best be examined under the general maritime law cases.

"Bailment is the delivery of goods or personal property to the bailee in trust, under an express or implied contract, which requires the bailee to perform the trust and either to redeliver the goods or to otherwise dispose of the goods in conformity with the purpose of the trust. *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349, 1354-55 (5th Cir.1995)(citing *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc*., 702 F.2d 585, 588 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983); *C. Itoh & Co. v. M/V HANS LEONHARDT*, 719 F.Supp. 514, 516 n. 2 (D.D.La.1989)). "Under general admiralty law, bailment does not arise unless delivery to the bailee is complete and he has exclusive possession of the bailed property, even as against the property owner." *Id.* (citing *T.N.T. Marine Service*, 702 F.2d at 588)).

"Under maritime law, when a bailee receives the bailed property in good condition but it is then damaged or lost while in the bailee's possession, a presumption arises that the bailee was negligent." *Mitsui*, at *2 (Citing *Leather's Best, Inc. v. S.S. Mormaclynx et al*., 451 F.2d 800, 812 (2d Cir.1971)). "The burden of production then shifts to the bailee to show either how the loss occurred and that it was not attributable to his negligence, or that he exercised such care that, regardless how the loss occurred, it could not have been caused by any negligence on his part." *Id.* Summarizing these elements, the ocean carrier would plead that it made complete delivery of the cargo in good condition to the motor carrier, which, by accepting, created a bailment. The motor carrier possessed the cargo in its exclusive care, custody and control. The burden then shifts to the motor carrier to prove the theft occurred without negligence on its part.

Common law indemnity and negligence require the same standard. The plaintiff must prove duty, breach of duty, and proximate cause. In the Distiller example, the motor carrier had a duty to deliver the cargo to Knoxville, and breached that duty when the theft occurred. The motor carrier's failure to fence, patrol, or monitor its depot over the weekend would seem to amount to proximate cause. "Indemnity rests upon the principle that the true wrongdoer should bear the ultimate burden of payment." *Ingersoll Mill. Mach. Co. v. M/V Bodena*, 829 F.2d 293, 305 (2nd Cir. 1987). "Where courts find that common law rules apply to an indemnity claim, they require plaintiff to establish negligence – a duty, a breach of duty, and that the injury was proximately caused by the breach." *Tokio Marine & Fire Ins. Group v. J.J. Phoenix Exp., Ltd.*, 156 F.Supp.2d 889, 898 (N.D.Ill. 2001). "Under this standard, if there is no evidence that the defendant's acts or omission caused the theft of cargo, proximate causation is missing and a claim for negligence fails." *Id.* If the motor carrier can show due diligence, the ocean carrier's claim might prove unavailing.

V. Conclusion

Where an intermodal claim arises, shippers and carriers alike should examine the contracts. These may include a service agreement between shipper and ocean carrier, the ocean carrier's bill of lading, a drayage agreement between ocean carrier and motor carrier, the motor carrier's bill of lading, if issued, the UIIA, and the motor carrier's tariff. The parties must also assess their claims and defenses under the controlling statutes, if any, including COGSA, the Harter Act, and the Carmack Amendment. The application of Carmack has broadened considerably since 1976, with language changed that seems to embrace imports as well as exports, and shipments between the U.S. and any foreign country, adjacent or not. A host of common law claims arise, as well, including breach of bailment, breach of contract, equitable and contractual indemnity, and negligence. As for the forum, the parties should have access to state courts where the loss occurred, as well as to the federal courts, under admiralty, diversity, or federal question jurisdiction, as applicable.