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CARGO NEWSLETTER NO. 37, FALL 2000

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STRING STRANGLES APPELLATE JURISDICTION …

Plaintiffs, alleging cargo damage, brought an *in rem* action against a vessel, its owner and an NVOCC. Defendants (the vessel and its owner) moved to dismiss based on a forum selection clause in the bills of lading. The bills of lading, save one, were issued by a non-party to the action. With respect to its *in rem*cause of action, plaintiff accepted a Club letter of undertaking.

The court considered a motion to dismiss pursuant to Rule 12(d). In opposing the motion to dismiss, plaintiffs asserted that the bill of lading did not specifically include the vessel and that German law (the forum stated in the clause) did not recognize actions *in rem* against vessels nor did it allow maritime liens for cargo loss, damage and/or general average contribution. The court, however, found the forum selection clause to be "broad" enough to cover *in rem* claims.

The court also considered the validity of the clause under COGSA, noting its *prima facie* validity and the plaintiffs' burden of establishing that enforcement would lessen the carrier's obligations under COGSA. Although plaintiffs contended that enforcement of the clause would deprive them of their substantive rights because German law did not recognize *in rem*actions, the court stated it was not persuaded that litigation in Germany would lessen defendants' liability or deny plaintiffs' statutory remedy provided by COGSA as Germany would apply the Hague-Visby Rules. While the court recognized that an *in rem*action is a substantive right guaranteed by federal law, it referred to "present-day commercial realities and expanding international trade" as support for enforcement of the clause, absent a strong showing that it should be set aside. (Citing *Bremen v. Zapata*, 407 U.S. at 15).

The court went on to distinguish a case in the same District Court (*M/V KASIF KALKAVAN*, 989 F.Supp. 498, S.D.N.Y. 1998) where the unavailability of *in rem* proceedings prompted a district court to deny enforcement of a similar clause. Emphasizing the Club letter of undertaking, the court stated that plaintiffs had entered into a private security agreement in which they gave up the right to arrest the vessel. The court further noted that *KASIF KALKAVAN* did not involve accepting a letter of undertaking and, finding "no reason to believe that the chosen forum, namely the courts of Hamburg, will not give effect to the

private security agreement adopted by the parties," the court found the clause enforceable and dismissed.

On reargument, the court modified its decision granting plaintiffs the right to have the case reopened "for purposes of determining any claim they may have that the Hamburg, Germany Judgment is unenforceable under the criteria set out in" the *M/V SKY REEFER*. Plaintiffs appealed.

In a Summary Order not published and not to be cited as precedential authority, the Second Circuit found itself "without appellate jurisdiction," referring to the District Court's May 12, 1999 Order with respect to reopening the matter, stating that no "rights and liabilities of the parties" had yet been determined and also noting that the claim against the other defendant was still pending.

Reed & Barton Corp. v. M/V TOKIO EXPRESS, 1999 AMC 1088 (S.D.N.Y. 1999), *appeal dismissed,* No. 99-7697 (2d Cir., April 26, 2000) (unpublished summary order not to be cited as precedent)

MOVING ALONG IN THE LAND OF *STARE DECISIS* …

The Eighth Circuit had a rule that unpublished opinions were not precedents and parties generally should not cite them. (*Newsletter Editor's Note*: Other federal circuits and districts have similar rules, *i.e.*, that decisions may be in the form of summary orders, not to be published or cited as precedential authority, etc.; *see above*.)

In a taxpayer's suit, the taxpayer's argument had previously been rejected by the Circuit Court in an unpublished opinion. She argued that the court was not bound by that ruling, referring to the court's own local rule. However, the court refused to apply the rule, finding it unconstitutional and reaching back to Blackstone's Commentaries. In finding that precedent binds, whether published or not, the court stated it was not adopting a rigid doctrine of adherence, noting that cases could be overruled. At the same time a convincingly clear explanation of the reasons for doing so would be required: "In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds."

Anastasoff v. United States, No. 99-3917 (8th Cir., Aug. 22, 2000)

CHARTERERS GET A RHUMB LINE …

A chartered vessel was ordered to take the Great Circle route, as recommended by a routing service, on a voyage from Vancouver to Japan. The Master declined to accept and took the rhumb line route. As a result, the voyage took longer and charterers deducted from hire. The matter was brought to arbitration with charterers focusing on a charter party provision requiring the captain to prosecute voyages with "the utmost dispatch" and to be under the "orders and directions of the charterers as regards employment and agency." (Clause 8) The charter also incorporated the Hague Rules.

The majority of arbitrators decided in favor of charterers, considering a "sketchy" statement from the Master where he explained he had taken the southern route because the vessel had suffered unspecified weather damage on the northern route some months earlier. The majority further decided that "navigation" in the context of a defense under the Hague

Rules could not be considered an "error in navigation" as it constituted part of the planning of the voyage.

In a subsequent appeal to the High Court, the court disagreed, stating that voyage planning was a "central part of the proper navigation of a ship." Thus, it held there was no breach of clause 8. The court went on to state the owners would still succeed as they would be permitted to rely on the Hague Rules' exception of "error in navigation."

On appeal to the Court of Appeal, the court held the Master was obliged to proceed with utmost dispatch without deviation and operate the ship in accordance with charterers' orders. Nevertheless, neither obligation displaced the right and responsibility of the Master in matters of navigation. The court went on to find the arbitrators were wrong as a matter of law in holding that owners' exemption under the Hague Rules based upon the error in navigation defense did not, by virtue of the wording of the Article, depend upon questions of reasonableness. The court agreed that navigation includes decisions taken during voyage planning and that the Master's decision to take the southerly route was a decision made for the safety of the vessel and thus was a decision as to navigation.

Whistler Intl. Limited v. Kawasaki Kisen Kaisha Ltd. (THE HILL HARMONY), 2 Lloyd's Report 209 (1999)

WHEN DOES THE CLOCK START RUNNING? …

Plaintiff brought an action for cargo damage. The parties apparently were the NVOCC and the actual carrier. The actual carrier moved to dismiss the complaint and cross-claim of the NVOCC based on a time bar. The plaintiff filed a Notice of Discontinuance of its claim against the actual carrier and the court went on to consider the motion to dismiss the cross-claim.

In considering the motion papers, the court noted that the parties had submitted a number of matters outside the pleadings, but declined to convert the motion into one for summary judgment. Based upon the pleadings alone, the court noted the time bar defense was asserted on the basis of the complaint's allegation that the container had arrived in Tokyo on or about September 7, 1998. Initially, the court questioned whether COGSA would apply to the timeliness of the cross-claim seeking indemnity. Even if COGSA applied, the court noted that the actual carrier's assumption that the date of delivery was the date when the goods should have been delivered, *i.e.* the date of arrival, was "too facile." Noting the date when goods should have been delivered should be determined from the bill of lading, the court pointed out the pleadings did not have the bill of lading attached. Accordingly, it was impossible to determine from the pleadings when the goods should have been delivered.

The court went on to note that even if the goods had arrived on September 7, 1998, the cross-claim did not allege that the missing goods were not in fact delivered subsequently (which appeared to be the case). As the actual carrier had not shown that the goods were actually delivered more than one year before the cross-claim, the court could not conclude that the cross-claim was untimely. The motion was denied.

Mitsui Marine Fire & Ins. Co. Ltd. v. Direct Containerline, Inc., No. 99-9461 (S.D.N.Y., March 6, 2000) (Kaplan, J)

TROUSERS TOSSED; POLO PROVES PROPRIETARY INTEREST….

While en route from the Dominican Republic to Florida, a cargo container loaded with 4,643 pairs of men's pants was lost overboard from a vessel in rough seas. Cargo underwriters paid $197,907.80 and pursued subrogation rights against the vessel owners in a three-count complaint, asserting claims for breach of contract, bailment and negligence.

The vessel owners moved for summary judgment on the contract claim on the ground that plaintiffs did not have standing to sue because they were not named in the bills of lading. The District Court granted the motion as to the contract claim and further ruled that the bailment and negligence claims were barred because they were pre-empted by COGSA.

On appeal the Eleventh Circuit upheld the District Court to the extent that it agreed that COGSA provided the cargo interests with an exclusive remedy. The appellate court recognized that while the statute was silent as to its pre-emptive scope, the fact that COGSA governed "during the time after cargo is loaded and before it is removed from the ship," supported the implication that COGSA superceded other laws when it applied. The Circuit Court also recognized that while COGSA claims are hybrids born of elements from both contract and tort, this does not change the fact that the resulting claim is a "unitary statutory remedy, rather than an array of common law claims."

On the issue of plaintiffs' standing to sue, the Eleventh Circuit reversed the District Court. The appellate court held that even though plaintiff was not named in the bill of lading, the terms and conditions on the back of the bill evidenced a clear intent to include the plaintiff — as the "owner of the goods" — as a beneficiary. The court also accepted plaintiff's theory that well established principals of maritime law grant an owner of lost or damaged goods standing to sue based upon its proprietary interest in the goods even if the owner is not explicitly named in the bill of lading. The court found that the record, though "regrettably sparse," contained sufficient evidence of plaintiffs' ownership of the goods.

Polo Ralph Lauren L.P. v. Tropical Shipping & Const. Co., Ltd., No. 97-01720 (11th Cir., June 21, 2000)

SPLIT SHIPMENT SURVIVES TIME BAR …

While en route from Dar Es Salaam to Baltimore, an ocean carrier noticed that a containerized shipment of red palm oil had begun leaking and removed the container from the vessel at Felixstowe to identify the cause of the leakage. Approximately one-half of the cargo was transferred into an empty container. The original container was shipped to Baltimore and delivered to the consignee in June of 1998. The second container was misplaced and then forwarded to Baltimore aboard a second vessel which arrived some four months later, on October 3, 1998.

The ocean carrier moved for summary judgment against a suit filed on October 28, 1999 on the ground of time bar under §3(6) of COGSA. The ocean carrier argued that the case was time barred in June 1999, one year after the first container was delivered or, alternatively, on October 3, 1999, the anniversary of the second container's discharge. The consignee argued that delivery was not effective until November 5, 1998, the date it became aware of the arrival of the second shipment. Secondarily, the consignee argued that the ocean carrier was estopped from asserting the statute of limitations defense on the ground that it was misled by the ocean carrier into believing that the time bar defense would not be used or

that time would be extended.

The court, by United States District Judge Denise Cote, denied the ocean carrier's motion for summary judgment. Judge Cote noted that there was "no clear precedent governing the unusual fact situation at hand" where delivery under a single bill of lading was made on two separate dates, and concluded that the statute ran from the date of the delivery of the second container.

The court went on to find a factual dispute existed as to when the second container was "delivered" for purposes of § 3(6) and held that "[e]ffective delivery requires not only the discharge of the goods from the vessel, but also notice of the discharge and a reasonable opportunity for the inspection or removal of the goods." (Citing various judicial and secondary sources as precedent).

While [the ocean carrier] offers evidence of discharge, it does not offer evidence of notice. Thus, there exists an issue whether [the ocean carrier] provided, for the second container, the requisite notice and the opportunity to inspect to [the consignee] before October 28, and consequently, as to whether [the] claim is time barred.

As to the issue of estoppel, the court also found an issue of fact existed as to whether representations by the ocean carrier may have "lulled the plaintiff into a false sense of security and so induced him not to institute suit in the requisite time period." The court found that a declaration submitted by a representative of the consignee stating that she had relied upon the ocean carrier's assertions that the claim would be settled was sufficient to raise an issue of fact as to whether the consignee was misled into delaying suit.

Universal Ruma Co. v. Mediterranean Shipping Co., S.A., No. 99-10880 (July 17, 2000) (Cote, J.)

COURT BAGS CARRIER ON HUNG JACKETS …

The ocean carrier received three forty-foot containers loaded with men's jackets for shipment from the Dominican Republic to Florida. When delivered to the plaintiff, most of the jackets were destroyed or unusable.

In the ensuing litigation, the issue presented was whether the ocean carrier was entitled to limit its liability to $1,500 by reason of COGSA's $500 per package limitation. The ocean carrier argued that each of the three forty-foot containers was a "package" for limitation purposes because the bills of lading each specified the quantity as "1" in the column designated for the information pertaining to quantity. Also, boilerplate language on the reverse side of the bill of lading provided that the carrier's liability was limited to $500 per container when the container was stuffed by the shipper and the shipper did not declare an excess value.

The court relied upon the Eleventh Circuit precedent set forth in*Hayes-Leger Associates, Inc. v. M/V ORIENTAL KNIGHT*, 765 F2d 1076 (11th Cir. 1985) as the test for determining whether the container or some other cargo unit was the relevant COGSA package. The test, which the *Hayes-Leger* court derived from the Second Circuit's decision in *Binladen BSB Landscaping v. M/V NEDLLOYD ROTTERDAM*, 759 F2d 1006 (2d Cir. 1985), adopted four basic principals for applying the COGSA package limitation to container cases:

1. the bill of lading is the "touchstone" of such analysis;

2. the meaning of "package" defines a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods;

3. since the container is functionally part of the vessel, the container cannot be a "package" unless the parties clearly agree to that effect and at least so long as the container's contents and the number of packages or units are disclosed; and

4. absent an agreement, goods placed in a container and described as not separately packaged will be considered goods not shipped in packages.

In the case at hand, the court applied these principals and found that each of the men's jackets and not the container was the COGSA package. The facts were uncontested that each unit of men's jacket was placed on a hanger and sealed in a polyethylene bag. Each unit was then placed in a specifically-designed garment-on-hanger container furnished by the ocean carrier. The court cited Judge Sofar's decision in *Marcraft Clothes, Inc. v. M/V KUROVE MARU*, 575 F.Supp. 239 (S.D.N.Y. 1983) as analogous. In*Marcraft*, each of 4,400 individually packaged men's suits wrapped in a plastic bag after having been placed on a hanger constituted a COGSA "package" rather than the entire container.

Macclenny Products, Inc. v. Tropical Shipping and Constr. Co., Ltd., No. 98-9137 (Cir. Ct., 15th Jud. Cir., Palm Beach County, Florida, Aug. 11, 2000)

VIRGINIA STEVEDORE HAS TASTE FOR KIM CHEE;
COURT PUTS IT ON THE MENU …

Underwriters subrogated to the consignee's claim for damage due to alleged negligence in the handling of a printing press sued the vessel *in rem*, the vessel's owner and the discharging stevedore for damages in the amount of $425,000. The printing press had moved aboard the vessel from LaSpezia, Italy to Norfolk, Virginia, on a flat-rack container. Subsequent to discharge at Norfolk, the stevedore transported the flat rack on a chassis to a shed on the pier. While maneuvering the chassis and flat rack into a slot in the shed, the flat-rack container overturned causing damage to the printing press.

The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. §636(c)(1) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia. The Magistrate Judge heard the following motions: (1) the vessel owner's motion to dismiss the *in rem* claim against the vessel and the *in personam* claim against it based upon a Seoul, Korea forum selection clause in the bill of lading; (2) the stevedore's motion for summary judgment, claiming the benefit of the ocean carrier's forum selection clause by way of the Himalaya Clause; and (3) the plaintiff underwriter's motion for partial summary judgment as to the issue of defendants' liability.

The court granted the motions of the vessel owner and the stevedore and ruled that it was without jurisdiction to rule on the plaintiff's motion for summary judgment. The court dismissed the*in rem* claim against the vessel because the vessel had not been served or arrested within 120 days of the filing of the complaint and there was no prospect of the vessel coming into the court's jurisdiction prior to the scheduled trial date. The complaint against the vessel owner was dismissed on the basis of the exclusive forum selection clause

in the bill of lading. The court relied upon the *SKY REEFER* case and its progeny and found that "the substantive law of Korea [would] not reduce the carrier's obligations to the cargo owner below what COGSA guarantees."

The court also dismissed the complaint against the Norfolk-based stevedore on the ground that the stevedore was protected by the bill of lading's Himalaya Clause notwithstanding that the term "stevedore" was not specifically mentioned as an intended beneficiary of the clause:

This Himalaya Clause expressly extends [the carrier's] benefits to any agents, servants or independent contractors performing any part of the carriage. Therefore, [the stevedore] was covered by the Himalaya Clause as long as it was performing part of the carriage.

The court presumed that the damage to the printing press occurred when the stevedore attempted to move the cargo into the stowage shed at the pier and held that this took place prior to either actual or constructive delivery to the consignee and within the carrier's obligations under the Harter Act.

The court found that because the stevedore was not opposed to enforcement of the forum selection clause and because the clause was binding on the plaintiff, the clause constituted a "benefit" to which the stevedore was entitled as a third-party beneficiary. The court ruled that the proper forum for the dispute was Seoul, Korea and that it, therefore, lacked subject matter jurisdiction to rule on the plaintiff's cross-motion for partial summary judgment on the issue of liability.

M.C, Watkins v. M/V LONDON SENATOR, No. 2:00-207 (E.D. Va., Sept. 6, 2000)

COURT HOLDS FOR NEW YORK CUT, NIXES GUMBO …

Plaintiff sued an ocean carrier who then impleaded the stevedore/terminal operator. The bill of lading included a provision allowing the plaintiff to sue in the U.S. District Court for the Southern District of New York. The ocean carrier and terminal operator moved to transfer the dispute to Louisiana.

The court considered the choice of forum provision in the bill of lading and, after noting the defendants did not argue that it was unenforceable, found it to be enforceable. In considering the relevant factors, the court upheld the plaintiff's choice of forum, noting that the plaintiff was a New York corporation, witnesses from Connecticut would be called (even though the incident involved Louisiana) and most of the evidence would be in the form of documents. Stating that it was experienced with maritime law, the court stated the interests of justice and efficiency required the case remain in New York. In a footnote, the court noted the amount in controversy was $60,000 and stated it would be patently unjust and inefficient to require the hiring of new counsel, extending discovery to educate new counsel and force plaintiff to bear the cost of litigating the case in a foreign state.

The court also found unpersuasive defendants' arguments that other cases were pending in Louisiana where the same defense strategy would be used and that the Louisiana courts are more familiar with Hurricane George than were New York courts. The motion to transfer was denied.

Louis Dreyfus Corp. v. M/V MSC Lima, No 99-933 (S.D.N.Y., Oct. 4, 2000) (McKenna, J.)

NOTIFY PARTY UNINVITED TO PARTY

Plaintiffs settled their cargo damage claim with both defendants. Each had issued its own bill of lading. The court then considered a motion by the ocean carrier to dismiss the co-defendant's cross-claim on the basis of a forum selection clause in the ocean carrier's bill of lading.

The court noted the ocean carrrier's bill of lading included the co-defendant as a notify party; however, it found the co-defendant was not to be a party to that bill of lading. While forum selection clauses are generally enforceable against parties to the bill of lading, the clause will not typically cover non-parties unless the parties are so closely related to the dispute that it becomes "foreseeable" that the party will be bound. The court found the relationship between the co-defendant and the plaintiffs did not warrant an expanded application of the forum selection clause. The court also noted that the ocean carrier's bill of lading was not a through bill of lading which would govern transportation throughout and rejected the argument raised for the first time in reply papers that the co-defendant's settlement was that of a volunteer.

Maritime Ins. Co. v. Midwest Intermodel Serv., Inc., No 99-9465 (S.D.N.Y., June 30, 2000) (Stein, J.)

PARTICIPATION REACHES POINT OF ELASTICITY …

The U.S. District Court in Puerto Rico considered a motion to dismiss on the basis of a forum selection clause in connection with a suit for damage to rebars. Plaintiffs had arrested the vessel and accepted a letter of undertaking as security. Defendants in turn argued that plaintiffs had harmed them by tortious and negligent interference with the discharge of the cargo and requested the court to order plaintiffs to provide counter security.

As to the motion to dismiss, the court noted that it was "well-decided" that foreign forum selection clauses are *prima facie*valid and should be enforced unless enforcement is shown to be unreasonable under the circumstances. The court considered whether the motion should be brought pursuant to Rule 12(b)(3) or 12(b)(6), where the defense should be raised in the first responsive pleading. On the other hand, if the motion should be brought under 12(b)(1) for lack of subject matter jurisdiction, it could be brought at any time. The defense had not been raised in the answer.

The court found that the defense should have been raised in the answer. The court noted that defendant had participated in discovery but that fact alone would not support dismissal. Rather, defendant would be deemed to have waived the defense if actions were taken inconsistent with it, caused delay, or if other parties would be prejudiced.

Noting that the defendants waited over a year and a half before filing a motion to dismiss for improper venue, the court felt "if nothing less, this delay has made an easy decision difficult. If not for the long delay, the court would uphold the forum selection clause ...." However, the court went on to note the activities conducted by defendants in addition to the passage of time. The defendants had filed a counterclaim, had requested that plaintiffs provide counter security, and had participated in discovery. "These are not actions consistent with its right to a different forum. As a result, (defendants) seek to prejudice this

Court as well as Plaintiffs. With enough weight a steel bar will bend. Through its actions, (defendants) have bent the bar in this case and waived (their) right to choice of forum."

Mateco Inc. v. M/V Elli, No. 98-1525 (D. P.R., July 10, 2000) (Perez-Gimenez, J.)

SHIPPER SHANGHAIED ON SURVEYOR'S SHALLOW STATS …

Plaintiff, an oil trading firm, sued defendant tanker owners for breach of a contract of carriage, alleging that leakage in the vessel's steam coils increased the sediment and water (S&W) content in a cargo of fuel oil beyond what was allowed in the delivery contract with its customer. Plaintiff claimed damages totaling $374,953 as the result of the alleged breach. Plaintiff then sold approximately 76,000 metric tons of 1% sulfur fuel to another trader who had a delivery contract with a petroleum company based in Taiwan. The delivery contract with the petroleum company had specified a maximum S&W rate of 0.5%.

The cargo was loaded at the Port of Los Angeles and was comprised of several different parcels of oil products from four different sources. Under the delivery contract for the cargo, it was permissible for the cargo to be a blend of different oil products so long as the delivered cargo was a homogenous mixture conforming to the petroleum company buyer's specifications.

While en route from Los Angeles to Taiwan, plaintiff issued instructions to blend the various oil products which consisted of: a low sulfur waxy crude from Singapore; Peruvian fuel oil; light cycle oil; residual fuel oil; and cutter stock. Defendants carried out the blending instructions immediately prior to the vessel's arrival at Kaoshiung.

Plaintiff contended that the vessel's extraordinary consumption of fresh water was conclusive proof that the steam heating coils in the vessel's cargo tanks were leaking and that this condition accounted for the increased S&W in the cargo at discharge. Defendant contended that any leaking coils were "blocked off" prior to loading and that the vessel's large consumption of fresh water was attributable to boiler tube leaks not associated with the cargo tanks.

The court dismissed plaintiff's complaint in its entirety, finding that plaintiff had failed to meet its burden of proof under COGSA of demonstrating that the oil products were in good order and condition at loading. The court also found that plaintiff failed to substantiate any damages properly payable by the vessel owners.

Specifically, the district court found plaintiff's surveyor's test results for S&W content of the oil cargo at loading to be "unreliable." The court observed that the tests performed by the plaintiff's surveyors "represent only mathematical estimates of the S&W percentage of the cargo in total" and discounted the results because "the reliability of theoretical testing is largely dependent on the representativeness of the samples used."

Based upon expert testimony at trial, the court noted that the low sulfur waxy residual (LSWR) contained elements "which were likely to mask the water content of the full cargo" and that the cutter stock similarly was likely to contain "reclaimed waste lube oil from automobiles and trucks which has inherent sediment content including dirt, iron filings, rust ... " which, like the wax in the LSWR, masked the true water and sediment content of the oil.

The court credited testimony of the vessel's master and crew that the steam heating coils were inspected regularly for leaks and ruled out the heating coils as a source of the increased water content in the cargo. The court also found it significant that "no free water was reported in any cargo tank" either during the voyage or upon discharge of the cargo. The facts that no free water was observed in the cargo and that the heating coils were capable of heating the cargo sufficiently to effect a complete discharge of the oil, bolstered the court's conclusion that the heating coils were not the source of the S&W variance. Moreover, the court found that the receiver's claim of high S&W content to be 'inherently suspect" and inconsistent with the receiver's conduct of its willingness to combine the allegedly defective oil with the presumably non-defective oil already in its shore tanks.

Westport Petroleum Inc. v. M/V OSHIMA SPIRIT, 111 F. Supp 2d 427 (S.D.N.Y., Sept. 5, 2000)

FREIGHT FORWARDER MAKES RESERVATIONS;
SHIPPER PICKS UP TAB …

During an ocean voyage, a transformer which had been negligently lashed to its flatrack broke loose and crushed a laser machine. The subrogated underwriter of the laser machine sued the ocean carrier, the shipper and the freight forwarder. The ocean carrier filed a third party action against the shipper for indemnification and clean-up costs. The shipper filed a fourth party action against its forwarder.

After trial, the court awarded a package limitation for the laser machine against the ocean carrier and damages to the ocean carrier from the shipper for clean-up costs, and also held the shipper liable for the broken laser on the basis that the shipper was directly liable to the carrier for the spilled cargo and directly liable for the broken laser.

The District Court went on to find the forwarder liable to the shipper in indemnity for both the spilled cargo and the broken laser on the basis that the forwarder contracted that it would give "door to door…close care and supervision" to the cargo. On this basis, the court found any negligence of the stevedore in lashing the transformer was imputed to the freight forwarder.

On appeal by the freight forwarder, the court noted the distinctions between a freight forwarder and a carrier. It noted that NVOCCs issue bills of lading. If anything happens to the goods during the voyage, NVOCCs will be liable to their shippers because of the bills of lading they issue. Freight forwarders, on the other hand, simply facilitate the movement of cargo to ocean vessels. They generally make arrangements for the movement of cargo at the request of clients and are vitally different from carriers such as vessels, truckers, stevedores or warehouses, which are directly involved in transporting the cargo. Unlike a carrier, a freight forwarder does *not* issue bills of lading and is, thus, not liable to a shipper for anything that occurs to the goods being shipped.

By analogy, the freight forwarder is hired to act as a "travel agent" for the transformer. It set things up and makes reservations but does not engage in any hands-on heavy lifting. Accordingly, the court found that the forwarder's statement that the shipment would receive close care and supervision was "mere puffing" and did not transform the forwarder into a carrier. Having reasonably selected a recognized, capable stevedore, the freight forwarder was not liable for the negligent actions of that stevedore. The indemnification claim against

the freight forwarder was reversed and remanded.

Prima U.S. Inc. v. United Arab Shipping Co., No. 99-9025 (2d Cir., Aug. 24, 2000)