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COMMITTEE ON CARRIAGE OF GOODS
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Editor: Michael J. Ryan
Associate Editors: Edward C. Radzik
David L. Mazaroli

TB; Condition Positive . .

The shipowner and charterer separately granted extensions of COGSA's one-year time bar to the subrogee of an importer of steel coils. The charterer's time extensions were granted expressly "on the condition that the U.S. District Court at New Orleans have exclusive jurisdiction over this claim within the extended time." The extension agreement received from the shipowners provided that it was contingent upon "like terms and conditions as [charterer's] extension."

Plaintiff filed suit for rust damage to the steel coils within the extended time but in New York rather that New Orleans. The defendants moved for summary judgment to dismiss the complaint. Plaintiff cross-moved to add an additional party.

The court granted the defendants' motion to dismiss and denied plaintiffs' cross-motion. The court found that plaintiff had filed suit against an affiliate of the charterer and not against the charterer. Since there was no contractual privity between the charterer's affiliate and plaintiff, the complaint was dismissed as to the charterer's affiliate.

The district court also dismissed the complaint against the shipowner for failing to complete timely and proper service of process.

In addition, the court denied plaintiff leave to amend the complaint to add the charterer as a defendant because to allow such an amendment would have been futile. The court found that plaintiff had failed to fulfill the conditions of the time extension by filing suit in New York instead of New Orleans.

The court held that the failure to fulfill the conditions of the extension rendered the extension "without effect." Since the proposed amendment of the complaint would have been time-barred by the statute of limitations, the court denied plaintiff's cross-motion to add the charterer as a party.

Continental Ins. Co. a/s/o Tradearbed v. M.V. OLYMPIC MELODY, 2002 WL 398691 (S.D.N.Y. Mar.15, 2002).

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TB; Condition in Remission . . .

Plaintiff, subrogee of the owner of a shipment of steel tubes carried aboard the ***M/V YOU LIANG*** from Japan to New Orleans in December of 1996, sued the vessel *in rem* and the owner *in personam* for cargo damage under COGSA in September of 2000.

Plaintiff claimed that it had obtained numerous suit time extensions from the vessel owner's P & I Club representatives up to and including the date plaintiff filed suit. The vessel owner moved for summary judgment, claiming that the extensions of suit time granted to plaintiff were conditional upon plaintiff obtaining parallel extensions from the vessel's time charterer. The vessel owner contended that plaintiff had failed to fulfill the requirement of

obtaining parallel extensions from the charterer and, therefore, that the claim was time-barred.

The court denied defendant's motion to dismiss, finding that plaintiff had submitted sufficient evidence to raise an issue of fact as to whether defendant was estopped from claiming time bar. Specifically, plaintiff submitted proof that the vessel owner's P & I Club representative made representations to plaintiff that approval of the extensions received from charterer's agents was sufficient to satisfy the conditions imposed by vessel owners.

Tokio Marine & Fire Ins. Co., Ltd. v. M/V YOU LIANG, 2001 WL 167397 (E.D. La. Dec. 20, 2001).

Scooby Dubai . . .

Plaintiff sued vessel owners and others for losses suffered as the result of the Dubai Port Authority's auctioning of four containers of textile goods after those goods lay unclaimed at the Jebel Ali Terminal following their arrival in June of 1997.

The defendants moved to dismiss the case as time-barred under §3(6) of COGSA. The court initially denied defendants' motion since the applicability of the time bar depended upon whether the Jebel Ali Terminal was the proper port of discharge for goods shipped to Dubai. The court held an evidentiary hearing on the issue and found that Jebel Ali, located about 35 kilometers from the city of Dubai, was a suitable port of discharge and that proper delivery to the consignee had been made. Accordingly, the court ruled that the plaintiff's case was time-barred.

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The court credited the testimony of defendants' witness, who testified that the ports within Dubai (*i.e.*, Port Rashid and Jebel Ali) are like the ports within New York in that cargo may be directed to Port Elizabeth or Howland Hook or Port Newark but all three would be considered within the area that constitutes the port of New York. That witness concluded that "Jebel Ali and Port Rashid are considered Dubai."

The court rejected plaintiff's arguments that the discharge at Jebel Ali constituted an unreasonable geographic deviation and that the deviation precluded the defendants from relying upon COGSA's one-year time bar.

C.P. USA v. M/V CALIFORNIA, No. 99 Civ. 4183 (S.D.N.Y. Mar. 25, 2002) (Mukasey, J.)

Chosen Forum Casts Carrier Here, Not Away . . .

Federal Express moved in the U.S. District Court for the Southern District of New York to have an air cargo damage complaint dismissed on the ground of *forum non conveniens* or, in the alternative, for a transfer of the action to the Western District of Tennessee.

The court denied the motion, finding that defendant had failed to overcome the presumption in favor of plaintiff's chosen forum. The court cited well settled Second Circuit precedent for the standard a defendant must meet to overturn a plaintiff's choice of forum:

> To prevail on a motion to dismiss based on *forum non conveniens*, a defendant must demonstrate that an adequate alternative forum exists and that, considering the relevant private and public interest facts set forth in [*Gulf Oil Corp. v. Gilbert*] the balance of convenience tilts strongly in favor of trial in the foreign forum.

In the case at bar, defendant submitted proof of its corporate status and principal place of business outside New York and cited the fact that although it had areas of operation within New York State, none of those operations had any connection with the four shipments that were the subject of the lawsuit. Defendant also claimed that all of its documents and potential witnesses were located in Tennessee and that it would, therefore, be more convenient if

the suit were transferred to Tennessee.
Plaintiff, on the other hand, presented proof that the subrogated insurers of the cargo owners were located in New York and identified witnesses from
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the insurance company in New York who would be called to testify at the trial.
The court found that the defendant did not specifically identify any potential Tennessee witnesses and that its documents and records could easily be transferred from Tennessee to New York.
Great Northern Ins. Co. v. Federal Express Corp., No. 01 Civ. 6844 (S.D.N.Y. Mar. 11, 2002) (McKenna, J.)

Kindred Clauses Considered; Court Requires "Must" or Bust . . .

Plaintiff's cargo of furniture became damaged when a vehicle, stowed adjacent on a flat rack container, shifted and fell onto the cargo of furniture while at sea.
Plaintiff, the subrogated cargo insurer, sued the vessel, her owner, who issued the bill of lading for the furniture, an NVOCC and a slot charterer who had issued the bill of lading for the vehicle that shifted. The bills of lading contained very different forum selection clauses. The NVOCC's bill of lading provided for U.S. federal court jurisdiction, the vessel owner's bill of lading provided for the application of German law to be determined by the courts of Bremen; and the slot charterer's bill of lading provided for jurisdiction in the U.S. District Court for the Southern District of New York in accordance with U.S. law. The slot-charter agreement between the vessel owner and the slot charterer contained a London arbitration clause.
The vessel owner made two motions to dismiss: one against the underwriters of the furniture to enforce the Bremen forum selection clause and the other against the slot-charterer to enforce the London arbitration clause contained in the slot charter agreement.
The court denied both motions. Judge William Pauley found that, while recognizing that mandatory and exclusive forum selection clauses are "presumptively valid," the bill of lading at issue—specifying jurisdiction in Bremen—was neither mandatory nor exclusive. Relying upon precedent from the Second Circuit, the district court stated that: "...when a forum selection clause specifies only the jurisdiction the clause will generally not be enforced without some further language indicating the parties intent to make jurisdiction exclusive." Because the bill of lading at issue did not contain specific language of exclusivity, the court held that it was not mandatory but rather was "permissive."
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For similar reasons, the court denied the vessel owner's motion to dismiss the slot-charterer's cross-claim, finding that the language of the agreement to arbitrate in England was "permissive" and therefore, not mandatory.
Hartford Fire Ins. Co. v. DSR Senator Lines, No. 01 Civ. 94 (S.D.N.Y. July 30, 2001) (Pauley, J.)
On re-consideration, the court re-affirmed its earlier opinion, holding that the vessel owners failed to put forward any "controlling decisions" or "factual matters" which had not been considered in respect of the initial motions that might have led to a different result. *Id.* (S.D.N.Y. Jan. 2, 2002).

Yikes . . .

A shipment of grapes in three containers was transported from Hermosillo, Mexico for delivery at Felixstowe, England. The shipment went by truck to Long Beach, California and thence by rail to Elizabeth, New Jersey where it was to be loaded for ocean transportation. The containers were put on the wrong train and ultimately missed the sailing and thereby a market in England. The consignee offered to accept the shipment at a

reduced price; however, the cargo plaintiff sold the shipment on the U.S. domestic market.

The ocean carrier sued for freight outstanding and the shipper counterclaimed for breach of contract and for damages under the Carmack Amendment. The ocean carrier's freight claim was settled; however, the parties could not agree on the counterclaim. On motion, the district court granted summary judgment in favor of the ocean carrier. The shipper appealed.

The Court of Appeals for the Ninth Circuit found the district court was correct in dismissing the claim under the Carmack Amendment as the shipment was from Mexico to England. Although the shipment went through the United States, it was not between places in the United States or between the United States and a place in a foreign country. Likewise, the circuit court found COGSA did not apply of its own force, however, as the carrier's bills of lading contained a "Clause Paramount" explicitly incorporating COGSA, the court found COGSA applied as a matter of contract. It also found the Harter Act did not apply.

As to the shipper's assertion that a deviation was involved, the court noted the initial mis-routing of the containers was an accident and this error alone would not constitute an unreasonable deviation. However, the rail-
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road's behavior after discovering the error raised factual issues. Thus, summary judgment was inappropriate. The court referred to an internal e-mail of the carrier in which an employee stated the carrier had time to get the units and the railroad was repeatedly requested to take the containers from the train so that they could make the sailing from Elizabeth, New Jersey. The carrier also wrote to the shipper advising that the railroad failed to follow instructions given them.

The court of appeals found the communications would permit a reasonable finder of fact to infer that the railroad intentionally caused the damage. Therefore, a genuine issue existed as to whether the carrier, through the railroad acting as its agent, had committed an unreasonable deviation. Thus, the "liberty clauses," while generally enforceable as "transship clauses," would not be enforceable as a liability limitation to the extent that they authorized the carrier to engage in an unreasonable deviation.

The court of appeals went on to consider various evidentiary rulings upholding the district court's admission of a declaration which it found to have sufficient foundation and bills of lading as business records meeting the test of Rule 803(6). As to the company e-mail, the court found it to be an admission by a party opponent. The internal memo was copied by another employee of the carrier and forwarded to the shipper in an e-mail prefaced with the statement "Yikes, Pls note the rail screwed us up …."

The court of appeals found the district court abused its discretion when it excluded the e-mail and plaintiff suffered prejudice because the e-mail tended to show the carrier's railroad agent committed an unreasonable deviation, thus creating an issue of fact on that question. The case was reversed and remanded for further proceedings.

Sea-Land Service, Inc. v. Lozen Intl., LLC, 2002 AMC 913 (9th Cir. 2002)

Carrier Desires Dim Sum, Carmack Cancels Cart . . .

A shipment of chilled pork was transported from Ensenada, Mexico to Kobe, Japan, via Long Beach, California. The "domestic leg" was conducted by an inland motor carrier operating out of Long Beach. At some point during the carriage, the temperature of the container was mis-set, causing freezing damage to the cargo. Plaintiff sued for the resulting damage.

The carrier, who had issued a bill of lading from Ensenada, Mexico to Kobe, Japan moved to dismiss the action pursuant to a forum selection clause
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in the bill of lading calling for the application of Chinese law and jurisdiction in Shanghai.

Plaintiff argued that the damage occurred during the "domestic leg"; that the Carmack Amendment applied and the forum selection clause was invalid under Carmack.

The court considered the validity of foreign forum selection clauses under COGSA, noting they are generally enforceable. However, with respect to the Carmack Amendment, the court concluded that Carmack essentially prohibits enforcement of foreign selection clauses, providing that suit may be brought against a carrier in a forum convenient to the shipper. As such, the court then turned to whether the Carmack Amendment or COGSA should govern the issue of the carrier's liability in the case at issue.

The court concluded that the ocean carrier, as the issuer of a through bill of lading, was a "receiving carrier" within the Carmack Amendment, and could therefore be held liable for damage occurring at the hands of the domestic trucking company involved. As the goods were allegedly damaged during the domestic leg of transportation by the carrier's agent, and the intended final destination was a foreign country, the court found that Carmack applied throughout the "domestic leg." As the carrier was an issuer of the through bill of lading, it was a "receiving carrier" and, as such, could be held liable for damage occurring during the domestic leg of the international transport.

The court further rejected an argument that because there was only one bill of lading issued, the Carmack Amendment would not apply, referring to a recent 9th Circuit decision holding that Carmack would encompass the inland leg of an overseas shipment under a single "through" bill of lading to the extent that the shipment went beyond the dominion of COGSA.

The court rejected the motion, finding that the foreign forum selection was unenforceable in an action pertaining to cargo damage allegedly sustained during the domestic leg of the transportation.

Kyodo U.S.A., Inc. v. Cosco N. Am., Inc., No. 01 Civ. 00499 (C.D.Cal. July 23, 2001) (Baird, J.)

But See Column B . . .

A shipment of electronics moved from Thailand to Austin, Texas, via Long Beach, California. Plaintiff was the subrogated insurer and sought to recover for alleged water damage. The rail carrier moved for partial summary [13038]

judgment on the issue of whether its liability would be limited by the COGSA limitation in the ocean carrier's bill of lading. The ocean carrier was not a party to the motion.

The court had previously concluded that the plaintiff's assured was bound by the limitation of liability provision in the carrier's bill of lading. It then considered whether that provision was enforceable as between the plaintiff's assured and the railroad. The court found the bill of lading to be a "through" bill of lading which contemplated the use of other carriers to handle inland transportation. The court went on to consider the Himalaya Clause of the bill of lading and found the railroad to be a "sub-contractor" and entitled to the limited liability provision contained in the bill of lading.

The plaintiff underwriter argued that the liability of the rail carrier was exclusively governed by the Carmack Amendment and the Staggers Amendment, regardless of the parties' contractual attempt to extend COGSA coverage to rail carriers.

In dealing with this argument, the court noted that several courts outside the Ninth Circuit have held that a COGSA liability limit in a through ocean bill of lading may be made applicable through a Himalaya Clause to inland carriers, including railroads. It distinguished *Royal Ins. Co. v. Westwood Transpacific Cerv.*, a 1990 Decision from the Western District of

Washington, on the ground that the ocean carrier's bill expressly provided that the inland carrier's terms and conditions would govern the inland portion of the transport. In contrast, the bill of lading before the court contained no such provision and, to the contrary, contained a Himalaya Clause stating that sub-contractors, including railroads, were covered by the terms of the bill of lading.

Going further, the court characterized *Royal Insurance* as contrary to the weight of cases which have allowed rail carriers to limit their liability under COGSA based upon clearly written Himalaya clauses in through bills of lading, despite the Carmack or Staggers Amendment. It referred to other cases holding that a shipment originating in a foreign country and terminating in the United States is not covered by the Carmack Amendment, unless the domestic portion of the transportation is covered by a separate bill of lading (emphasis supplied). The court noted the domestic portion of the transportation was not governed by a separate bill of lading and thus allowed the COGSA limited liability provision to extend to the railroad.

Cigna Ins. Asia Pacific v. Expeditors Intl. of Washington, No. 00 Civ. 1054 (C.D.Cal. Dec. 21, 2001)(Matz, J.)(published in the April 2002 edition of AMC). [13039]

Carmack Kicks Again, but Time Runs out for Cargo . . .

The U.S. District Court for the Southern District of Texas, Houston Division, also considered damage to cargo shipped under a through bill of lading. A marine thruster was transported from Felixstowe, England to LaRose, Louisiana. The thruster was placed on a truck at New Orleans and moved overland to LaRose. The trucker issued its own straight bill of lading. On the highway, the thruster broke loose from its restraints when the driver applied brakes to avoid a collision. Suit was brought for the resulting damage and the trucking company moved for summary judgment, arguing that Carmack applied, and, therefore, preempted the plaintiff's state law claims, and that plaintiff was time-barred for failing to comply with the notice requirements in Carmack.

The court concluded that, as the shipment was from a place in a foreign country to a place in the United States, Carmack applied. Plaintiff argued that as the trucker only transported the thruster intrastate between points in Louisiana, Carmack should not apply. Referring to decisional law, the court found that the thruster was intended from the beginning to be delivered from England to LaRose, Louisiana and fell within the ambit of Carmack. Thus, the fact that the inland trucker issued a straight of bill of lading for its portion of the journey was not dispositive and the Carmack Amendment was applicable. The court went on to find that notice to the defendant trucker failed to satisfy the filing requirements imposed by Carmack. As the letter notifications sent to the trucker did not fit the minimum requirements of Carmack, no claim was filed within nine months after delivery and the plaintiff's action against the trucker was dismissed as not being timely.

As to the action against the ocean carrier, the court rejected plaintiff's arguments that the carrier should be liable on its bill of lading. Alternatively, Plaintiff argued that the carrier's tariff, which shifted liability to the inland carrier, should apply, and since the bill of lading was unsigned, the ocean carrier could not rely on it. The court rejected these arguments, noting that the ocean carrier's bill of lading clearly referred to terms, conditions, limitations and exceptions and that the plaintiff could not argue that it did not receive actual notice of them. Noting that plaintiff did not argue either that it lacked knowledge of the terms of the bill of lading or than no contract existed, the court concluded that plaintiff was trying to profit from the contract while avoiding its more onerous terms: "Without a valid bill of lading, no liability attaches. Thus, regardless of whether the bill of lading is valid or invalid, the

Plaintiff is precluded from recovery."
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Vesta Forsikring AS v. Mediterranean Shipping Co., S.A., 2001 AMC 2594 (S.D.Tex. 2001) (Hoyt, J.).

Trucker Tagged for Temperature Transposition . . .

Due to a miscommunication regarding refrigeration instructions for a containerized shipment of humilin—a synthetic forum of insulin—the shipment froze, thus rendering it unfit for use and a total loss.

Plaintiff, the subrogated cargo underwriter of the shipper, pursued its recovery rights against the ocean carrier, an intermediate NVOCC and the trucker who had transported the shipment from the shipper's warehouse to the ocean terminal at the port of loading.

The shipper had issued instructions to maintain a temperature of "42ºF plus or minus 5ºF." An employee of the NVOCC, however, negligently informed the ocean carrier and the trucker that the temperature should be maintained at "24ºF." Following a bench trial, the district court entered judgment jointly and severally against the NVOCC and the trucker but dismissed the complaint against the ocean carrier. The district court found that the ocean carrier was not responsible for the incorrect temperature setting.

On appeal, the trucker argued that the district court had erroneously imposed federal admiralty law against it in deciding that the trucker was jointly and severally liable. The trucker also argued that the plaintiff had failed to amend its complaint after the trucker was impleaded and was thus, precluded from recovery against the trucker.

Plaintiff cross-appealed, arguing that the district court erroneously used replacement value rather than market value as the measure of plaintiff's damages. Plaintiff also appealed from the court's dismissal of the ocean carrier.

The court of appeals rejected the trucker's arguments. The court held that the lower court's finding of joint and several liability was not grounded in admiralty. Rather, the court found that the trucker's liability and the joint and several award were based upon the Carmack Amendment:

> [the trucker's] negligence in failing to ensure that the reefer was set at the proper temperature occurred exclusively on land . . . Therefore [the trucker's] negligence was plainly outside COGSA's reach.

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The court held that the Carmack Amendment applied notwithstanding the fact that the trucker's transportation of the shipment was restricted exclusively to one state. The court reasoned that because the shipment was intended for foreign commerce the statutory requirements of the Carmack Amendment were satisfied. The court also held that the district court's joint and several award against the trucker was proper under the Carmack Amendment.

In addition, the court also rejected the trucker's challenge that the plaintiff was not entitled to a recovery because it had never amended its complaint to add the trucker as a defendant, stating:

> In any event, we hold that a formal amendment of a plaintiff's Complaint asserting causes of action against a party impleaded under Rule 14(a) is unnecessary if the third party is effectively on notice that it will be held liable on the plaintiff's claims.

The court rejected the plaintiff's cross-appeal to the extent that it attempted to hold the ocean carrier liable. However, the circuit court remanded the question of measure of damages for recalculation by the district court.

On remand, the plaintiff submitted a proposed judgment after recalculating damages consistent with the Second Circuit's opinion. The proposed judgment included an award of consequential damages in the amount of $15,220.26. The trucker argued that these consequential damages were not recoverable under the Carmack Amendment.

The district court disagreed with the trucker and held that the clean-up costs associated with handling the temperature sensitive humilin were a foreseeable consequence of the trucker's negligence. Citing *Hadley v. Baxendale,* the court stated

> . . . this Court is not persuaded that an award of special damages is improper . . . Special damages are only recoverable upon a showing that they were foreseeable and within the contemplation of the parties at the time the contract was made.

Project Hope v. M/V IBN SINA, 250 F.3rd 67, 2001 AMC 1910 (2nd Cir. 2001) and 97 Civ. 3853 (S.D.N.Y. July 17, 2001) (Order by Pauley, J.)

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FAMILIARITY BREEDS ASSENT . . .

Plaintiff sued for water damage to a shipment from Casablanca, Morocco to Los Angeles, California. The court considered a motion to dismiss based upon a forum selection clause designating Germany as the forum. Plaintiff argued variously that it had no notice of the clause, that enforcement would deprive it of its day in court, and that defendants were estopped from asserting the clause. Additionally, plaintiff contended that if the clause were enforceable, it was enforceable only against the ocean carrier.

Responding to plaintiff's arguments, the court noted that plaintiff had cited no authority to support its contention that notice was required before a bill of lading's provisions become binding: "Indeed, courts have enforced terms contained in bills of lading where parties were uninvolved in the negotiation of the terms or did not receive the terms in advance." (citations omitted).

The court also noted that plaintiff's argument was inconsistent with its account of its prior dealings with the defendants: "Here, plaintiff is not an unsophisticated party, as it acknowledges it has been named as consignee 'on at least 10 Hapag Lloyd bills of lading during the past 5 years. ***' " The court thus found plaintiff was well acquainted with the services provided prior to shipment and had access to the terms of the bill of lading.

As to plaintiff's argument that it would be deprived of its day in court under a possible time bar in Germany, the court found that potential timeliness problems in Germany did not support non-enforcement of the forum selection clause. (The court referred to decisional law enforcing forum selection clauses in similar circumstances.)

In addition, the court rejected the argument that enforcement would be unreasonable due to the cost and burden of litigating in Germany. The court noted the argument had already been rejected by the Supreme Court in *Carnival Cruise Lines, Inc. v. Shute* and by the Ninth Circuit in *Fireman's Fund Ins. Co. v. M.V. DSR Atlantic*.

The plaintiff argued the defendants were estopped to assert the clause as they did not assert it in response to a prior unlitigated dispute. The court noted neither judicial nor collateral estoppel was involved under those circumstances. The prior claim had been settled before suit was filed and plaintiff did not allege any misrepresentation on the part of defendants and failed to establish even the threshold elements of detrimental reliance or a misrepresentation which would support equitable estoppel.

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Finally, addressing plaintiff's argument that the clause was enforceable only against one defendant defined as "carrier" on the bill of lading, the court

noted the bill of lading provided its terms would apply to agents who were intended as beneficiaries of the contract (a Himalaya Clause). The court found all defendants entitled to the benefit of the clause (citing cases). As plaintiff did not meet its "heavy burden of showing that enforcement of the clause would be unreasonable and unjust or that there was fraud or overreaching involved, in light of present-day commercial realities and expanding international trade" the court held the clause was binding and enforceable.
Darna Intl., Inc. v. Hapag Lloyd (America) Inc., No. 01 Civ. 1748 (C.D.Cal. Oct. 16, 2001) (Manella, J.)

Himalaya Puts Stevedore on Par . . .

Two shipments of steel were carried from Italy to Baltimore, Maryland, where they were discharged and stored for eventual receipt by inland carriers for delivery to the consignee. The consignee plaintiff alleged the shipments were either offloaded from the vessels in damaged condition or damaged while being offloaded. The bill of lading contained a forum selection clause providing that any dispute "shall be decided in the country where the carrier has its principal place of business ***." The bill of lading also contained a Himalaya Clause.

The stevedore moved to dismiss under the forum selection clauses in the bills of lading. The court noted such clauses are *prima facie* valid and enforceable and to overcome the presumption of enforceability, the party opposing must show that enforcement would be "unreasonable under the circumstances." The court noted plaintiff did not point to any circumstance suggesting that enforcement of the clause would be unreasonable. No fraud or overreaching by the carrier was alleged nor did plaintiff contend the clauses would deprive it of its day in court or deny it a remedy. Because there was no showing that enforcement would be unreasonable, the court found the choice of forum and law clause valid and enforceable.

As to its application to the stevedore, the court considered the Himalaya Clauses in the bills of lading: "The Himalaya Clauses apply to all defenses that the carrier may raise, and the forum selection clause is as valid a defense that the carriers may raise as any other."

While the court allowed the stevedore to invoke the benefit of the forum selection clauses, it also held the stevedore was bound by the terms and con-
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ditions of the contract it invoked, *i.e.*, "it cannot take advantage of the clauses here but then object to jurisdiction in the appropriate court(s)." The court, therefore, conditioned dismissal of plaintiff's claims on the stevedore's submission to jurisdiction in the foreign forum and its waiver of any time limitation defenses otherwise applicable. Dismissal was also conditioned on acceptance of jurisdiction by the foreign court(s).
Acciai Speciali Ternj, USA, Inc. v. M/V Berane, 2002 AMC 528 (D.Md. 2002) (Smalkin, J.).

Disclaimer Clause Dismantled, but Carrier Absolved on Burden . . .

A shipment of cotton T-shirts was hijacked and stolen during transportation from Santa Barbara, Honduras to the loading port at Puerto Cortes, Honduras for on-carriage by sea to South Carolina. The bill of lading provided that COGSA would govern during the entire time the goods were in the carrier's possession and further that the carrier should not be responsible for loss caused by thieves, pirates, assailing thieves...." Further, on its face, the bill of lading provided that the carrier would have no liability for hijackings and armed robberies. The same language appeared on hundreds of bills of lading previously issued by the carrier to the shipper. The court also noted the parties had stipulated that the driver of the trucking company was not in any way involved with the hijacking and that the shipper had obtained cargo insurance and the suit essentially was for the cargo underwriter.

Plaintiff argued that the bill of lading was issued two days after the hijacking; however, the court referred to this argument as a "red herring", noting that it is not unusual to issue a bill of lading after a carrier has taken possession of cargo and courts have regularly held this does not prevent parties from being bound by the terms of the bill of lading (citing cases).

As to the exculpatory clauses considered, the court found the public enemy exception of COGSA, while possibly extending to pirates on the high seas or rebels in insurrection against their own government, did not apply to thieves, rioters or robbers (citing cases).

As to the hijacking disclaimer, if it were to be read broadly, *i.e.* to disclaim liability regardless of the carrier's negligence, it would run afoul of COGSA as a clause relieving the carrier or ship of liability for negligence. If the clause were to be considered consistent with COGSA, the court said it would recognize the disclaimer and COGSA by limiting the disclaimer to situations where there was no proof of the carrier Crowley's negligence. The

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bottom line under either analysis was that negligence was the applicable standard and the burden rested with the carrier to prove its due care.

Additionally, the court noted even if liability could be waived under COGSA, the Harter Act would still void the disclaimer for hijacking, as disclaiming liability for the period between acceptance of the goods and when they were loaded on the vessel. At the same time, the court noted the carrier could only be held liable for negligence.

While the court found the bill of lading exculpatory clauses to be inapplicable or invalid, it also found plaintiff had failed to produce any evidence of negligence. There was sufficient time for discovery to undertake a full investigation into the events of the hijacking, including depositions taken in Central America. After eight months of investigation, both parties stipulated that the truck driver was not an accomplice nor involved in the robbery.

The court found plaintiff had made no showing of evidence of carrier's negligence and, with the stipulation that the carrier's agent was not involved in the hijacking and plaintiff's opportunity to investigate other possible acts of negligence (other than the unsupported allegation in the Complaint), the court found there was no triable issue of fact as to due diligence on the part of the carrier. Thus, it found the burden of proof under the "Q" clause of COGSA had been met and defendants were not liable.

Anvil Knitwear, Inc. v. Crowley American Transp., Inc., 2001 AMC 2382 (S.D.N.Y. 2001) (Buchwald, J.)

One per Customer ….

In an action instituted in the Southern District of New York, plaintiff entered a default judgment against a vessel owner for more than $90,000. Defendant's vessel was arrested in New Orleans pursuant to the default judgment. Defendant promised to pay the full amount of the judgment, plus costs and interest to secure the release of the vessel. However, when payment of $93,394.24 was made the following day, payment included a letter "replete with reservation of rights, including the defense of lack of personal jurisdiction."

The court found the defendant vessel owner was estopped from asserting the defense of lack of personal jurisdiction because it had failed to notify the plaintiff that it had reserved any rights, or from seeking the court's assistance because it had promised to pay the full amount of the judgment in order to secure the release of the vessel.

Although the trial court found defendant vessel owner had "forfeited" or was estopped from asserting the defense of lack of personal jurisdiction, the

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court went on to consider whether its package limitation defense should be similarly treated. The court noted COGSA speaks in mandatory terms

of the package limitation—"[n]either the carrier not the ship shall in any event be or become liable … in an amount exceeding $500 per package." The court considered this to indicate a strong Congressional policy in favor of limiting recoverable damages when no value has been declared. It went on to note the policy was so strong that courts did not permit more than one $500 recovery in cases where the limitation applies, regardless of the number of potential defendants: "Thus, a plaintiff can recover $500 once for each package, from one defendant, not $500 per package from each of multiple defendants."

The court noted plaintiff had already recovered $500 from another defendant. To find a forfeiture of the limitation would simply confer a windfall on plaintiff. The court found defendant vessel owner had not forfeited its right to rely on the package limitation and in view of plaintiff's prior recovery from a co-defendant, plaintiff had no remaining claim against defendant vessel owner. The court directed that judgment be entered for defendant vessel owner and plaintiff was directed to remit the sum previously paid in satisfaction of the default judgment.

Corium Corp. v. M/V MSC Shanghai, 183 F. Supp.2d 630, 2002 AMC 557 (S.D.N.Y. 2002) (Mukasey, J.).

Resale Price Shanghaied . . .

Plaintiff sought damages for a cargo lost during shipment from Shanghai, People's Republic of China, to the New York metropolitan area. Defendant railroad conceded liability for the loss and moved for summary judgment holding that its liability was limited. The container of ladies garments was shipped from Shanghai to a port on the west coast, United States, and then transferred to the railroad for shipment to the New York metropolitan area. On opening the container a number of garments were missing which had cost plaintiff $15,164.70 to acquire. Their alleged sale value was $62,142.00.

The court considered various bases of jurisdiction. There was no question that the court had admiralty jurisdiction over the claims against the ocean carrier; however, the claims against all defendants other than the railroad had been dismissed. Thus, the court considered whether it retained subject matter jurisdiction.

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It did not have maritime jurisdiction as the loss has occurred on land and there was no evidence of any connection between the activity on land and maritime commerce, since the sea voyage had been completed.

As to admiralty contract jurisdiction, the court found the ocean bill of lading to be a mixed contract (covering both water and land) and therefore, under the general rule, no admiralty jurisdiction existed. The court found exceptions to the mixed contract general rule were inapplicable since the loss had occurred during the non-maritime leg of the journey and because a transcontinental shipment across the United States was not considered incidental to sea transport. As to diversity jurisdiction, the required amount in controversy did not exist.

The court next considered federal question jurisdiction. Plaintiff asserted that the Carmack Amendment governed the overland transportation of the goods by the railroad. The court, citing cases, also noted that the Amendment was inapplicable to through bill of lading for the entire course of an international journey. Since the bills of lading were through bills covering transportation from Shanghai to New York, the Carmack Amendment did not apply if they were the only bills of lading issued. The argument was also raised that an "edi waybill" was a separate bill of lading issued for the rail segment. The railroad contended this document was not a bill of lading. However, the court did not need to resolve this issue in order to resolve either

the jurisdictional issues or the merits of the dispute.
(In a footnote the court noted neither party had invoked COGSA; however, even if they had, COGSA would not support jurisdiction. COGSA applies only until discharge and the goods were lost after they were unloaded. If the parties had agreed that COGSA applied after discharge, it would have applied as a matter of contract, not as a statute).
The court then considered supplemental jurisdiction. As previously noted, the court possessed maritime jurisdiction over the claims against the ocean carrier. Accordingly, the court possessed supplemental jurisdiction over the plaintiff's claims against the railroad. While a district court may decline to exercise supplemental jurisdiction after dismissing all claims over which it has original jurisdiction, the court noted that both parties had requested that the court resolve the dispute and concluded that declining to exercise supplemental jurisdiction would unnecessarily prolong the litigation. Thus, the court exercised its supplemental jurisdiction.
As to the merits, the court referred to the railroad's circular, which offered two alternative liability provisions; "standard" and "Carmack" liabil-
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ity. Under the Carmack Amendment, a party would be entitled to the fair market value of lost goods unless special circumstances applied. The liability provision in the circular limited liability to "actual physical loss or damage to the cargo itself, plus any cost reasonably incurred in efforts to mitigate the loss or damage." It specifically excluded consequential damages, a category that would include lost profits. Under the through bills of lading issued, plaintiff was entitled to the actual physical loss of the garments, which was agreed to be $15,164.70.
The court noted the Himalaya Clause in the ocean carrier's bill of lading and the limitation provision that "all claims for which Carrier may be liable shall be adjusted and settled on the basis of merchant's net invoice cost, plus freight and insurance premium, if paid. In no event shall Carrier be liable for any loss of profit or any consequential loss." Thus, regardless which document governed (the Railroad Circular, the NVOCC bill of lading or the Ocean Carrier's bill of lading), the plaintiff's recovery was limited to the actual physical loss.
Jessica Howard Ltd. v. M/V Skylight, 2002 AMC 798 (S.D.N.Y. 2002) (Schwartz, J.).