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Welcome to TT Talk

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Contents

We are delighted to dedicate TT Talk Edition 132 to an article by Peter Clark (who is a Partner in the New York maritime law firm of Clark, Atcheson & Reisert) on the United States Supreme Court judgment ('opinion') in Kawasaki Kisen Kaisha Ltd v Regal Beloit Corp (21 June 2010) and the order in Sompo Japan Insurance Company of America v Norfolk Southern Railroad (28 June 2010). Peter Clark has been (and still is) involved in litigation on the conflict between US COGSA and Carmack in the District Court of the Southern District of New York and the US Court of Appeals for the Second Circuit. He shows that Regal Beloit relies heavily on Norfolk Southern Railway v Kirby (2004) and reminds us that NVOCCs and Ocean Carriers who issue bills of lading are regulated by the Federal Maritime Commission under the Shipping Act of 1984. For previous items on the conflict between US COGSA and Carmack, please see TT Talk Editions 114 (23 January 2009) and 117 (24 March 2009). Peter Clark's article is aimed at anyone involved in combined ('through') carriage of goods to (or from!) the United States.

1. US COGSA and the Shipping Act trump Carmack

INTRODUCTION

Within one week the US Supreme Court has ruled on two occasions that the Carmack Amendment ('Carmack'), which governs bills of lading issued by domestic rail carriers, does not apply to international shipments that originate overseas. In doing so the Supreme Court has clarified, with a degree of certainty, which law is applicable to a cargo loss occurring on an international import shipment that moves by ship and rail.

On 21 June 2010 the Supreme Court in Kawasaki Kisen Kaisha Ltd v Regal-Beloit Corp 561[1] ruled 6-3 that Carmack does not apply to a cargo shipment originating overseas under a through bill of lading that incorporates the US Carriage of Goods by Sea Act, ('COGSA') that includes a Himalaya clause extending certain protections to subcontractors. The majority opinion was authored by Justice Kennedy and the dissent by Justice Sotomayor.

[1] U.S.__, 2010 WL2471056 (2010) (Regal-Beloit)

Likewise, on 28 June 2010, the Supreme Court in Union Pacific Railroad Co v Sompo Japan Insurance Co [2] issued an order in the similar case [3] to the effect that its pending petition for a writ of Certiorari was granted, the judgment vacated, and the case remanded to the Second Circuit for further consideration in light of Regal-Beloit.

BACKGROUND

Before analyzing Regal-Beloit, a brief overview of COGSA, the Shipping Act of 1984 and Carmack is in order. A review of the Supreme Court's earlier Kirby decision may also prove helpful as it is referred to 31 times in Regal-Beloit. Indeed, the Supreme Court in Regal-Beloit has stated that much of what the Court said in Kirby applies to Regal-Beloit.

COGSA

Shipments by ocean common carriage to and from the United States are governed by COGSA 46 [4] (which is largely identical to the Hague Rules 1924). COGSA applies as a matter of law to all bill of lading contracts of common carriage involving trade between foreign ports and ports of the United States. The statute provides, however, that nothing contained in the Act shall prevent the ocean carrier and shipper from extending COGSA provisions by contract to the period prior to loading and after discharge from the ship. By virtue of through bill of lading terms, parties can contract for an extension of COGSA throughout the entire time that the ocean carrier (or the non-vessel operating common carrier ('NVOCC') is responsible for the goods. The carrier may extend COGSA benefits by contract to its agents and independent contractors by utilizing a Himalaya Clause in the bill. A Himalaya Clause is an exculpatory provision which extends to non-carriers the protections available to carriers.

Under COGSA, a carrier's liability for loss or damage to goods is based upon negligence principles. The main benefits of COGSA are the one year time bar provision and the USD500 limitation for packaged goods. The statute affords shippers a choice to declare a higher value for the cargo and pay a higher freight rate, or accept the USD500 of liability limit set out in the Act. To obtain the benefit of the USD500 limitation, ocean carriers must comply with the so called 'fair opportunity' requirement of giving the shipper notice of the limitation and the means of avoiding it by declaring a higher value for the cargo. Although COGSA imposes some limitations on a carrier's authority to adjust liability, it does not limit the parties' ability to adopt foreign forum selection clauses.

Shipping Act of 1984

Ocean carriers ('VOCCs') and NVOCCs, who issue bills of lading, are regulated by the Federal Maritime Commission ('FMC') under the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 ('OSRA')[5]. The FMC is responsible for the oversight of common carriage of goods by water in foreign commerce. As such, the FMC does not come within the purview of Carmack.[6]

As used in the Shipping Act, a 'common carrier' holds itself out to the general public to provide transportation by water between the United States and a foreign country for compensation, assumes responsibility from point of receipt to point of destination, and utilises for all or part of the transportation a vessel operating on the high seas or Great Lakes. Under the Shipping Act an 'ocean common carrier' means a vessel operating common carrier (VOCC). A 'non-vessel operating common carrier' (NVOCC) is a common carrier that does not operate the vessel by which the ocean transportation is provided. It is a shipper in its relationship with the VOCC. 'Through transportation' means continuous transportation between origin and destination for

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[2] 561 U.S.__, No.09-787 (June 28, 2010)

[3] Sompo Japan Ins. Co. of America v. Norfolk Southern R.R. Co., 540 F. Supp. 2d 486 (S.D.N.Y. 2008) (Sompo)

[4] U.S.C. § 30701 et seq

[5] Pub. L. No. 105-238, Title 1, 101, 112 Stat. 1902, 46 USCS § 40101 et seq.

[6] Rexroth Hydraudyne v. Ocean World Lines, Inc. 547 F. 3d 351, 357 (2d Cir. 2008)

which a through rate is assessed and is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port.

Carmack

Congress passed the Interstate Commerce Act ('ICA') in 1887 which established the Interstate Commerce Commission ('ICC') to regulate railroad rates. In 1906, the Hepburn Act amended the ICA to include liability provisions to govern rail carriers. These provisions are commonly referred to as the Carmack Amendment. The ICC's jurisdiction was expanded to include motor carriers in 1935, domestic water carriers in 1940 and freight forwarders in 1942.

Regal-Beloit concerns itself only with Carmack as it pertains to domestic rail carriage. Over the last century Carmack's railroad provisions have been altered and re-codified. The ICA was re-codified in 1978 without substantive change. The Staggers Rail Act of 1980 [7] provided that the ICC could exempt certain types of transportation from the requirements of the Act as well as permitting railroads in some instances to negotiate transportation contracts with shippers. The Matsui Amendment [8] to the Staggers Rail Act and required railroads offering limited liability rates also to offer full liability rates.

Congress abolished the ICA and re-enacted Carmack by enacting the ICC Termination Act of 1995 [9] ('ICCTA'), again without substantive change. When the ICCTA was enacted, it divided Carmack into two sections. One [10] governs rail carriers and the other [11] motor carriers and freight forwarders. The ICCTA created the Surface Transportation Board ('STB') to replace the ICC. The STB has no jurisdiction over international transportation by ocean carriers regulated by the FMC. Carmack imposes something close to strict liability on rail carriers. It also specifies the venues in which civil actions against rail carriers can be brought.

Some of the main Carmack requirements effecting rail carriage in the United States are as follows:

- A rail carrier subject to the STB shall issue a receipt or bill of lading for property received, but failure to do so does not affect the carrier's liability;
- Rail carriers and connecting carriers are liable for the actual loss or injury to property caused by the receiving rail carrier, the delivering rail carrier or another rail carrier over whose line the property is transported in the United States or from the United States to adjacent foreign country when transported under a through bill of lading;
- A delivery rail carrier is the rail carrier performing the line-haul transportation nearest the destination;
- A limitation of liability in the bill of lading in violation of Carmack is void
- A rail carrier may establish rates and limit liability to a value established by written declaration or agreement with the shipper;
- Civil actions may be brought in federal district court or state court venues, but may only be brought against the originating rail carrier in the judicial district at the point of origin;

[7] Pub. L. No. 96-448, 49 U.S.C. § 10502(e)
[8] 49 U.S.C. § 10505(e)
[9] Pub. L. No. 104-88
[10] 49 U.S.C. § 11706
[11] 49 U.S.C. § 14706

- Civil actions against a delivery rail carrier can usually be brought in the judicial district of the plaintiff's principle place of business or in the judicial district of the destination;

- Civil actions may also be brought against the carrier alleged to have caused the loss in the judicial district where the loss is alleged to have occurred;

- No time period of less than nine months may be provided for filing a claim of loss;

- No time limit for filing a civil action can be less than two years from the date the carrier notifies the claimant in writing that any part of the claim is disallowed;

- Any rail carrier offering a limited liability rate also has to offer a full liability rate;

- A party to a contract entered into under 49 U.S.C. § 10709 shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract;

- A contract authorised by 49 U.S.C. § 10709 shall not be subject to Carmack and may not be subsequently challenged before the STB or in any court on grounds that such contract violates a provision of the United States rail transportation policy.

The Kirby Case

In 2004 the US Supreme Court decided in Norfolk Southern Railway Co v Kirby Pty Ltd, 543 [12] 'Kirby'), holding that federal maritime law, rather than state law, governs disputes arising under a through bill covering a shipment from Australia to inland Huntsville, Alabama. The opinion was authored by Justice O'Connor who called it 'a maritime case about a train wreck'.

In Kirby, an Australian shipper engaged an NVOCC (described as a freight forwarder) to arrange transportation for 10 containers of machinery from Australia to Huntsville, Alabama. The NVOCC engaged a VOCC for the ocean segment and the VOCC engaged a railroad for the onward transportation to Huntsville. Both the NVOCC and VOCC issued through bills of lading: The NVOCC to the shipper, and the VOCC to the NVOCC. Both bills provided for USD500 COGSA package limitations; and both had Himalaya clauses that extended the package limitations to subsequent carriers.

The train derailed, causing more than USD1.5 million in cargo damage. Kirby sued the railroad to recover full cargo value, arguing that neither the NVOCC nor the VOCC had authority to contract with the railroad to limit his shipper's rights.

The Court found that an intermediary such as a NVOCC could bind a cargo shipper such as Kirby to liability limits set out in bills of lading between the intermediary and the ultimate carrier based upon a 'limited agency rule'. Although the intermediary was not the shipper's agent in the classical sense, it acted as an agent for the limited purpose in contracting with subsequent carriers for limitation of liability. The Court went on to note that the 'limited agency rule' for intermediaries tracks industry practices.

The Court found that a multimodal through bill of lading is a maritime contract as long as it requires substantial carriage by sea and its purpose is to effect maritime commerce. The Court emphasised the importance of uniformity of the general maritime law and the need to reinforce the liability regime Congress established in COGSA for the purpose of facilitating efficient contracting in contracts for carriage by sea. The Court recognised that through bills governed by COGSA should have the same law apply equally to all legs of the journey; otherwise the purpose

[12] U.S. 14 (2004)

of COGSA to facilitate efficient contracting for international carriage of goods by sea would be defeated.

The Court went on to hold that bill of lading provisions permissible under COGSA can be invoked by domestic rail carriers, despite contrary state law. The rail carrier could limit its liability to USD500 per container as per the terms of the VOCC's bill issued to the NVOCC. Justice O'Connor concluded the opinion with the Court's view that under the framework of Kirby 'future parties remain free to adapt their contracts to the rules set forth here, only now with the benefit of greater predictability concerning the rules for which their contracts might compensate'.

THE REGAL-BELOIT OPINION

Regal-Beloit concerned itself with through bills of lading covering containerised cargo shipped from China for inland delivery in the United States. The journey included ocean transit followed by rail carriage. The cargo owners delivered the goods to ocean carrier, K Line, in China who then issued through bills covering the entire movement. The bills required K Line to arrange delivery of the goods by any mode of transportation of its choosing.

K Line's bills contained five relevant provisions:

1. A Himalaya clause extended the bills' defences and liability limitations to K Line's subcontractors;
2. The bills permitted K Line to subcontract;
3. The bills provided that COGSA governed the entire journey;
4. The bills required disputes to be governed by Japanese law;
5. The bills' forum selection clause stated that any action must be brought in Tokyo District Court. The forum selection provision gave rise to the dispute.

K Line arranged for the entire journey and subcontracted with Union Pacific Railroad ('UPR') for the US rail segment. The cargo containers were transported from China to California without incident on K Line vessels. The containers were then loaded into a UPR train which subsequently derailed in Oklahoma, damaging the cargo.

Cargo owners filed suits in a California state court. UPR removed the cases to a US district court and then moved to dismiss based on the Tokyo forum clause. The district court granted the motion. The Ninth Circuit reversed and remanded holding that Carmack applied to the inland segment, thus trumping the parties' forum selection clause. The Ninth Circuit noted that this view was consistent with the position taken by the Second Circuit in Sompo, but inconsistent with the views of the Circuit Courts of Appeal for the Fourth, Sixth, Seventh and Eleventh Circuits on similar cases.

Prior to the Second Circuit's 2006 Sompo decision, the judicial consensus was that Carmack did not apply to international multimodal import shipments originating overseas under a through bill unless a separate domestic bill was issued by a US inland carrier. Because a significant percentage of containerised cargo imported into the United States is shipped under through bills and the Circuits were sharply divided on which law to apply to multimodal through transport, the Supreme Court agreed to hear the case to resolve the conflicts.

Issue Presented

Regal-Beloit presents an issue not addressed in Kirby. Whether a foreign forum-selection clause in a through bill issued abroad by an ocean carrier can apply to the domestic rail segment of an import shipment, despite statutory prohibitions regarding foreign forum-selection clauses under Carmack.

Special mandatory local venue provisions are set forth in Carmack. COGSA does not contain venue provisions and, therefore, the general venue statute [13] determines proper venue for COGSA cases. If Carmack applied to the foreign import shipment in Regal-Beloit, cargo shippers would have had a strong argument that the Tokyo forum clause in the bills would be pre-empted by Carmack's mandatory venue provisions.

The Main Arguments

K Line and UPR argued that much of what the Supreme Court said in Kirby applied to Regal-Beloit. K Line issued a through bill in maritime commerce under COGSA; Congress permits parties to extend COGSA's provisions to inland domestic carriers under through bills. The parties agreed in the through bill that any suit would be brought in Tokyo.

Cargo owners countered that Carmack, which has its own venue provisions and was not discussed in Kirby, requires a different result. They contended that Carmack applied to the domestic carriage and, therefore, the Tokyo forum-selection clause was void.

The Majority Opinion

The majority rejected the shippers' argument. The Court held that Carmack does not apply to a shipment originating overseas under a single through bill of lading. Therefore, the parties' agreement to litigate the dispute in Tokyo was binding. The Court relied heavily on Kirby as identifying the relevant policy concerns that should be taken into consideration in deciding the case. As in Kirby the terms of the bill of lading governed the parties' rights.

The majority premised their holding on the assumption that there could be but one receiving carrier in the sense of Carmack in a through transport shipment. As such, Carmack did not require K Line to issue Carmack bills of lading in China because K Line was not a receiving rail carrier. K Line shipped the cargo under COGSA authorised through bills.

The majority opinion specifically did not determine whether Carmack would apply to through export shipments from the United States. Likewise, because of its ruling, it never addressed the parties' ancillary arguments concerning whether the parties were permitted to contract out of Carmack under Sections 10502 and 10709.

The Dissent

Unlike the majority, the dissent reasoned that the receiving carrier under Carmack would be the first carrier to receive the cargo in the United States. The receiving carrier would, therefore, be UPR. The dissent viewed Carmack as applying to the inland leg of a multimodal shipment carried under a through bill unless the railroad had permissibly contracted around Carmack's requirements.

The dissent was of the opinion that Carmack does not govern ocean carriers because such carriers are not rail carriers providing transportation or services subject to the jurisdiction of the STB. The dissent also noted that the STB itself had concluded that ocean carriers providing intermodal transportation jointly with inland rail and motor carriers are subject to the FMC's jurisdiction rather than its own.

The dissent explained how Congress in 1980 set forth a national policy in the Staggers Rail Act allowing competition to establish reasonable rates for transportation by rail and thus minimizing the need for regulatory control of the railroad industry. Consistent with these goals Congress enacted 49 USC § 10502 and 10709 to provide two options for contracting around the requirements of the ICA.

Pursuant to 49 USC 10502(a) and (b), any trailer-on-flatcar and container-on-flatcar service provided by a rail carrier as part of a continuous intermodal freight movement are exempt from

[13] (28 U.S.C § 1391(b)

Carmack. That exemption, however, did not release a carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of Carmack. Under section 10502(e), a rail carrier providing exempt transportation must offer the shipper the option of contractual terms for liability and claims consistent with Carmack. It may enter into a contract with different terms only if the shipper does not select that option.

That requirement to offer Carmack terms is unaffected by section 10709 for at least two reasons. First, section 10502(e) specifies contractual terms that the carrier must offer before a contract of carriage is entered into, whereas section 10709 specifies the effect of such a contract after it has been executed. Nothing in section 10709 relieves a rail carrier providing exempt transportation of its obligation to make Carmack-compliant terms available to the shipper. When the STB exempts a particular type of traffic under section ~~1~~10709, the traffic is generally no longer subject to any part of the ICA.

In the dissent's view Carmack 'does not require the rail carrier to offer Carmack-compliant terms to anyone other than the party with whom the rail carrier contracts with when it receives the goods. It does not place obligations on the relationship between any overseas carrier and any overseas shipper who operate under their own bills of lading'. No fair opportunity for full Carmack terms would need to be given directly to a cargo shipper if the shipper did not contract directly with the railroad. Once the railroad offered the ocean carrier (VOCC or NVOCC) full Carmack terms, the ocean carrier could reject them. Thereafter the railroad could negotiate other terms with the ocean carrier and opt out of Carmack.

DISCUSSION

Carmack is a rather complex statute that mainly concerns itself with liability provisions that govern some rail and motor carriers in the United States. Carmack is exclusively regulated by the STB. Carmack has absolutely nothing to do with the regulation of ocean shipping. That function comes under the exclusive jurisdiction of the FMC as authorised by the Shipping Act of 1984, as amended ('Shipping Act').

In Regal-Beloit the Supreme Court acknowledged that 'ocean carriers' are regulated by the FMC, which is responsible for oversight over 'common carriage of goods by water in…foreign commerce'. The Court went on to note that 'ocean-based through bills are governed by COGSA, and ocean vessels like those operated by K Line are overseen by the FMC.'

The jurisdictional provisions of the ICA and the Shipping Act supported the dissent's view that K Line is not a rail carrier subject to the jurisdiction of the STB. Furthermore, the STB's jurisdiction over transportation by rail carriers is exclusive, while ocean carriers are subject to the exclusive jurisdiction of the FMC.

To the disappointment of some, the Supreme Court specifically did not determine whether Carmack would apply to through export shipments. The Court's inaction is not surprising. Under Article III of the U~~.~~S~~.~~ Constitution the power of the Supreme Court extends only to a 'case or controversy'. The dispute must be real as opposed to hypothetical. This constitutional requirement prevents the Court from issuing advisory opinions. The only real dispute before the Court in Regal-Beloit involved an import shipment. That specific dispute has been resolved by the Supreme Court and its holding now is the law of the land. The Court did, however, give strong indications that Carmack would not apply to export shipments by relying heavily on Kirby's policy concerns for uniformity in multimodal through transport movements governed by COGSA.

The dissent in Regal-Beloit is instructive because it gives a detailed suggestion on how parties concerned with export shipments might permissibly contract around Carmack. Under Section 10502(e) a rail carrier must offer the shipper the option for Carmack terms. This requirement is unaffected by 'opt-out' Section 10709.

In the dissent's view, only the party with whom the rail carrier contracts with when it receives the goods is entitled to the option. It does not place Carmack obligations between any overseas carriers (VOCC or NVOCC) and any shipper who operate under their own bills of lading. No option for Carmack terms would have to be given directly to a cargo shipper if the shipper did not contract directly with the rail carrier. Once the rail carrier offered the ocean carrier (VOCC or NVOCC) full Carmack terms, the ocean carrier could pro-forma reject them. The parties would then be free to 'opt-out' of Carmack and negotiate private contract terms.

This simple method could eliminate the need for the 'limited agency rule' annunciated in Kirby that was used to bind the cargo shipper to the liability limits between an intermediary and the ultimate carrier. It could also eliminate the need for indemnity agreements often written between ocean carriers and rail carriers with respect to utilizing 'opt-out' terms when dealing with the ultimate shippers.

CONCLUSION

Regal-Beloit is the first maritime through transport dispute that the Supreme Court has heard since Kirby in 2004. Unless a commercial case has national significance or addresses conflicting decisions in the federal Circuit Courts, the Supreme Court will rarely grant certiorari to hear a case. Each year the Court receives thousands of petitions for certiorari (to be more fully informed) and accepts approximately 150 for review.

The chance for a new maritime through transport case to be heard by the Supreme Court in the near future is miniscule at best. For this reason it is most important to review carefully and analyse the views expressed by the Supreme Court in Kirby and Regal-Beloit. It is also a reason to heed the parting words of Justice O'Connor in the Kirby case. 'Future parties remain free to adapt their contracts to the rules set forth here, only now with the benefit of greater predictability concerning the rules for which their contracts might compensate'.

Peter D. Clark is a partner in the New York maritime law firm of Clark, Atcheson & Reisert at www.navlaw.com. Mr. Clark also serves as a maritime arbitrator and mediator.

Please use the following web link for the full text of Kawasaki Kisen Kaisha Ltd v Regal Beloit Corp (United States Supreme Court, 21 June 2010):
http://www.supremecourt.gov/opinions/09pdf/08-1553.pdf

2. Conclusion

We hope that you will have found the above item interesting. If you would like to have further information about it, or have any comments you would like to make, please email the editor at peter.stockli@thomasmiller.com. We look forward to hearing from you.

Peter Stockli
Editor
for the TT Club

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