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Welcome to TT Talk

No. 114 in the series

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1. NVOCCs under US law: US COGSA trumps Carmack in the Second Circuit

a) The issue: conflict between US COGSA and Carmack on the US land portion

TT Talk Edition 111 (item 3) examined whether CMR (Convention on the contract for the international carriage of goods by road) applies to the international road portion of a multimodal transport contract. The present item examines a similar question: what are the liabilities of carriers and transport intermediaries under the US inland carriage portion of an international multimodal transport contract?

Under US law, COGSA 1936 (which is largely identical to the Hague Rules1924) governs bills of lading for the carriage of goods 'from the time when the goods are loaded on to the time when they are discharged from the ship'. But COGSA gives parties the option to extend its application to the periods before loading on and after discharge from the ship. Bill of lading conditions routinely use this option, not least because of the favourable liability limit of US$ 500 per package.

Not so well known outside America is a law known as the Carmack Amendment. 'Carmack' goes back to 1906 when it was added to the Interstate Commerce Act. It applies to inter-US state carriages. Its purpose was to improve the position of small shippers against powerful railways. A 'Carmack carrier' faces in principle strict liability without any financial limits, but has the chance to limit his liability by offering the shipper a 'reasonable opportunity' to choose from at least two different levels of liability. This test is not satisfied by simply offering 'full liability' cover against payment of an additional premium.

b) Norfolk Southern Railway v James Kirby (US Supreme Court)

In Norfolk Southern Railway v James Kirby (2004), the parties contracted for the carriage of 10 containers of machinery first by sea from Sydney (Australia) to Savannah (Georgia) and then by rail onward to Huntsville (Georgia). The train derailed, allegedly causing damages of US$1.5 million. The US Supreme Court held that the performing railway could limit its liability to cargo interests by relying on the 'Himalaya' clauses in both the Transport Operator's and the shipping

line's multimodal ('through') bills of lading. The shipping line's bill extended US COGSA 1936 beyond the sea carriage portion and the COGSA limit of US$ 500 per package therefore applied to the damage during the rail portion.

As TT Talk Edition 57 noted, Kirby was a welcome clarification of US law on multimodal contracts of carriage. The US Supreme Court (Justice O'Connor) called it 'a maritime case about a train wreck'. The court held that the bills of lading were essentially maritime contracts because their primary objective was to accomplish the transportation of goods by sea from Australia to the United States and that the final rail portion of the carriage did not alter this.

Cargo claimants started their action before a Georgia Court, which did not consider Carmack because it looked only at carriage within the state of Georgia. But the Supreme Court held that applying state law would undermine the uniformity of maritime law and efficiency of maritime contracts and therefore removed the case from the state system.

A number of US Circuit Courts have followed Kirby. For instance in Altadis v Sea Star Line (2006) carriage of cigars under a multimodal bill of lading was first by sea from Puerto Rico to Jacksonville (Florida) and then onwards by lorry to Tampa (Florida). The Court of Appeals for the Eleventh Circuit (consisting of Alabama, Florida and Georgia) held that the one-year limitation period in COGSA and in the multimodal bill of lading applied to the theft of the goods during the US road carriage. Referring to Kirby, the Eleventh Circuit stated that the purpose of US COGSA 'to facilitate efficient contracting in contracts for carriage by sea' would be undermined if the Carmack Amendment applied to the road portion. Citing other Circuit Court judgments, the court held that Carmack did not apply unless the domestic segment of the carriage was covered by a separate domestic carriage document.

c) Sompo Japan v Union Pacific Railway (Second Circuit)

In Sompo Japan v Union Pacific Railway (2006) the shipping line issued to cargo interests multimodal bills of lading for the carriage first by sea from Tokyo to Los Angeles and then onwards by rail to Georgia. The goods were damaged in a train derailment in Texas. Cargo interests sued the railway. The Second Circuit (consisting of Connecticut, New York and Vermont) found that Kirby resolved only the conflict between US COGSA and state (Georgia) law). It then itself resolved the conflict between US COGSA and the Carmack Amendment in favour of Carmack. The court held that COGSA was incorporated into the carriage contract by agreement between the parties and lacked the status and force of a US federal law. The railway was liable to cargo interests subject to Carmack. Sompo has been appealed to the US Supreme Court).

d) Conflicting judgments in the District Court of the Southern District of New York (SDNY)

Sompo was unwelcome news for rail carriers, but as it concerned the liability of the performing railway, not an NVOCC or shipping line, many NVOCCs and shipping lines hoped they could still rely on the COGSA extension to land carriage. But bad news for NVOCCs came in Swiss National Insurance v Blue Anchor Line (SDNY, June 2008). Blue Anchor (NVOCC) issued a multimodal bill of lading and damage occurred during the US road portion. Judge Sand held that the principles of Sompo applied to both the rail and road ('motor') sections of Carmack and found Blue Anchor liable under Carmack for the full value of the claim.

In Royal & Sun Alliance v Ocean World Lines (SDNY, August 2008) cargo interests instructed Ocean World Lines (OWL) (NVOCC) who in turn instructed Yang Ming (ocean carrier). Both OWL and Yang Ming issued multimodal carriage documents. During the final US road portion the truck carrying the cargo crashed into a highway overpass. Judge Hellerstein cited Kirby extensively and emphasised that it 'gave precedence to the commercial context in which international and

multimodal transportation is arranged'. In stark contrast to Judge Sand, who had found that Kirby and Sompo were 'not contradictory' and who considered himself bound by Sompo, Judge Hellerstein held the facts of Kirby and Sompo were indistinguishable. The fact that Carmack was not mentioned in Kirby did not mean that 'the nine Justices in Kirby simply forgot [it]'. Judge Hellerstein held that commercial interests strongly favoured the rule in Kirby as against the one in Sompo, with the result that Carmack did not apply to OWL or to Yang Ming and that both could rely on the bill of lading limitation of US$500 per package.

e) Rexroth Hydraudyne v Ocean World Lines (Second Circuit)

The first of several conflicting SDNY judgements to reach the Court of Appeal for the Second Circuit was Rexroth Hydraudyne v Ocean World Lines (OWL) on 6 November 2008 (Peter Clark of Clark, Atcheson & Reisert acted for the carriers). Flight simulator equipment was shipped from Rotterdam to Houston and then carried by rail to Denver, from where it should have been trucked to Englewood (Colorado). Rexroth concluded a carriage contract with OWL (NVOCC) who in turn contracted with COSCO Shanghai. Both OWL and COSCO issued multimodal Bills of lading which extended COGSA beyond the sea portion and the benefits of its provisions to subcontractors. Against OWL's instructions, COSCO Shanghai released the cargo to the consignee, who failed to pay and later filed for liquidation. Rexroth sued OWL, COSCO Shanghai and COSCO North America.

Judge Wesley, who had delivered the Second Circuit's earlier judgement in Sompo, said the two cases 'differed markedly', because in Sompo no NVOCC was involved and cargo interests sued the performing rail carrier, while claimants in Rexroth sued the NVOCC, ocean carrier and ocean carrier's agent, but not the railroad.

He repeated the finding in Sompo that Carmack takes precedence over contractual provisions which extend COGSA to inland carriage. But he clarified that Sompo did not address whether Carmack applied to 'an intermediary shipping company that agrees to make shipping arrangements for the shipper from receipt to delivery (OWL), an ocean carrier that provides ocean passage (COSCO Shanghai) or the carrier's agent that arranges rail carriage for the inland leg (COSCO North America)'. This approach allowed the Second Circuit to maintain its reasoning in Sompo.

Judge Wesley analysed the Carmack concept of 'Rail carriers' (who are subject to the jurisdiction of the US Surface Transportation Board, STB) and emphasised that this did not include all types of carriers. The Federal Maritime Commission (FMC) regulates Ocean shipping between the US and foreign countries. Both OWL and COSCO Shanghai - as NVOCCs (Non-Vessel Owning Common Carriers) and VOCCs (Vessel Owning Common Carriers), respectively - were within the definition of 'Common carrier' under the Shipping Act of 1984, because they (i) held themselves out to the general public to provide transportation by water between the USA and a foreign country, (ii) assumed liability from the point of receipt to the point of destination and (iii) utilised for all or part of the transportation a vessel operating on the high seas. Thus, although the unauthorised delivery occurred between two portions of US land carriage, both OWL and COSCO were regulated by the FMC, not the STB and Carmack.

Old cases on Carmack, such as Ward in 1917, found the initial (rail) carrier who received the goods responsible for the entire carriage until delivery to the consignee. But in Rexroth the Second Circuit rejected any use of Ward as justification for extending Carmack to NVOCCs, ocean carriers and intermediaries, because this would ignore both 'the complexities introduced by COGSA and a commercial world grown smaller' and the fact that the international transportation industry had moved 'into the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water and land'. The Second Circuit, making only a brief reference to Kirby in a footnote, therefore held that OWL, COSCO Shanghai and COSCO

North America were not 'Carriers' for the purposes of Carmack and were entitled to rely on the COGSA limit of US$500 per package, even for the US rail carriage.

f) Conclusion

In 2004 the transport industry believed the Supreme Court judgement in Kirby had resolved the liabilities of carriers for multimodal transport with a US land portion. The Second Circuit caused uncertainties in Sompo, but has now partially settled those in Rexroth, which is welcome news for certain carriers as indicated below. The reasoning in Rexroth should apply regardless of whether the US land carriage was by rail or road or whether the goods were lost or damaged, or misdelivered.

OWL escaped liability under Carmack because it fell under the Shipping Act's definition of 'common carrier', which describes an NVOCC as 'a common carrier who does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier'. This is distinguished, for example in Kirby, from a 'freight forwarder' which arranges for, coordinates and facilitates cargo transport, but does not itself transport cargo. Parties who are 'contracting carriers' under other legal systems would not necessarily be classed as NVOCCs under US law.

In Rexroth COSCO, as VOCC, contracted directly with the rail carrier. It is not entirely clear, although probable, that the result would have been the same if OWL, as NVOCC, had contracted with the rail carrier - OWL would still have been an NVOCC under the Shipping Act, and therefore subject to FMC and COGSA, not STB and Carmack.

However, as the Second Circuit mentioned in a footnote, Rexroth does not bar land carriers from protecting themselves from the liability gap between COGSA and Carmack by concluding indemnification agreements. US railways habitually impose onerous indemnity clauses, for instance in a framework contract known as an 'Exempt Rail Transportation Agreement' (ERTA) under which the railroad, pursuant to statute, contracts out of Carmack liability in relation to the ocean carrier (Mitsui Sumitomo v Evergreen, SDNY 22 September 2008). Thus, regardless of Rexroth, NVOCCs and ocean carriers may still wish to consider whether it is possible to include in their multimodal bills of lading a clause which combines with the Himalaya clause to protect their subcontracted land carriers, who are not common carriers for the purposes of the Shipping Act, from Carmack liability.

2. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information about any of them, or have any comments you would like to make, please email the editor at tt.talk@ttclub.com. We look forward to hearing from you.

Peter Stockli
Editor for the TT Club

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