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The Intermodal Lead

Legal Developments in Freight Carriage, Logistics and Transportation Infrastructure

The Impact of a Complex Charter Party Arrangement on Cargo Liability

By Steve Block

The U.S. District Court for the Southern District of New York recently issued an opinion that shows us how the complexity of ocean shipping arrangements can complicate the determination not only of who's liable for lost/damaged freight, but what liability regime actually governs a claim. The transaction at issue – take out your pen and pad – involved the M/V AKILI; owned by Akela Navigation Co. and managed by Almi Marine Management; which was time chartered to Seyang Shipping; which sub-chartered her to SM China Co.; which, in turn, voyage chartered the vessel to shipper MAN Ferrostaal. Ferrostaal is in the steel import business, and required ocean transit to the U.S. of a cargo of thin-walled steel pipes manufactured in China.

Survey reports demonstrated that the freight was in good order and condition when loaded and stowed on the vessel. However, Ferrostaal's surveyor expressed concern about the stowage plan, which provided for heavier cargo to be situated on top of the thin-walled pipes in a hold not best suited for pipes. SM China had retained authority over loading and stowage issues, although it charged Ferrostaal for the privilege, and its rep dismissed the surveyor's concerns. The freight arrived with compression damage to the tune of some 313 grand.

Ferrostaal filed suit against the AKILI, Akela and Almi (Seyang was dismissed out because of a process serving problem). Vessel arrest was avoided by Akela's posting a letter of undertaking with the court.

First question: what law governs the claim?

The U.S. Carriage of Goods by Sea Act (COGSA) imposes a duty on carriers to properly load cargo. However, COGSA applies only to common, and not private, carriage (unless contractually adopted by the parties, which frequently is the case). The concept of "private carriage" encompasses charter parties that govern an entire voyage. The defendants, urging that COGSA didn't apply, pointed out that, hey, the AKILI was indeed under a full-voyage time charter to Seyang at all times material.

The court didn't buy it. Neither Ferrostaal nor any of the participating defendants were signatories to the Akela-Seyang charter party. In other words, none of the parties were parties to the charter party (sorry). SM China held itself out as a common carrier to Ferrostaal, and only voyage chartered a portion (22%) of the vessel to its shipper. And because COGSA governs, the vessel is liable in rem.

<continued on page 2>

In This Issue

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The Impact of a Complex Charter Party Arrangement on Cargo Liability

<continued from page 1>

Second question: could SM China be liable for this variety of cargo damage under the voyage charter party?

It argued it couldn't be, as its contract with Ferrostaal provided that the shipper had to pay for loading and stowage. Put differently, loading and stowage, which caused the loss, weren't part of the charter agreement; rather, they were a separately contracted service. But an agreement that the shipper has to pay for a service doesn't nix COGSA's provisions holding the carrier responsible for providing that service improperly. Also, it wasn't the loading and stowage of Ferrostaal's pipes that caused the damage; the culprit was heavier cargo placed on top of it. That was SM China's doing alone.

Third question: what about Akela and Almi?

They fared better. Neither authorized SM China to issue a bill of lading on its behalf; neither was under a statutory duty to provide safe transit of freight; and neither was in contractual privity with Ferrostaal. Also, the shipper had no basis in law or fact to assume the vessel owner and manager were parties to the shipping contract. True, an action for bailment can coexist with one under COGSA, but a maritime bailment is created only when a vessel owner has exclusive possession of a shipper's freight. Here, it could not be said that Akela was in sole possession of Ferrostaal's cargo.

Thus, SM China, as the voyage charterer, and the AKILI, as a vessel statutorily liable in rem, are on the hook. To proceed under COGSA, a shipper must only demonstrate a prima facie case by submitting evidence that it tendered its cargo in good order and condition, and received it in damaged or short condition upon outturn. Once that prima facie case is established, the burden of proof is shifted to the defendant (an anomaly in law) to prove it can avail itself of one or more of COGSA's specific defenses to cargo liability. Here, the remaining defendants offered no proof of any such defense at all. Under those circumstances, summary judgment in Ferrostaal's favor was indicated.

This factual scenario shows how multi-party shipping arrangements can produce unexpected and unintended results regarding liability. To ensure adequate marine insurance is obtained, and to avoid potential disruptions in business relationships, shipping industry participants should consider the implications of complex charter party arrangements with counsel at the outset. ✦

Ref: MAN Ferrostaal, Inc. v. M/V AKILI, et al., 2011 WL 207968 (SDNY 2011); and COGSA, 46 USC §§1300-1315

But What About My Attorneys' Fees?

By Steve Block

Any lawyer will tell you that clients unseasoned in the litigation process almost always ask whether they can get their attorneys' fees awarded at the conclusion of a lawsuit. That inquiry certainly is reasonable. This article is intended to put you in the know upfront about this topic. As always, however, because factors specific to a dispute might alter the outcome, it's best to consult with an attorney about your rights before making any decisions.

In most states, including in the federal system, the answer in the U.S. is usually "no," unless

(1) your action springs from a statute that allows for attorney-fee awards;
(2) the lawsuit derives from a written contract between the parties that contains a "fee clause"; or
(3) the adverse party makes a claim, or asserts a defense, that is so baseless, i.e., "frivolous," that the judge gets ticked off enough to award fees.

This is called "the American Rule," which stands in contrast to "the English Rule," which goes the other way, and forces the loser in court battles to pay the winner's litigation costs.

A couple of states have modified or altogether rejected the American standard and apply the English Rule. Advocates of both Rules claim their approaches disincentivize litigation and promote early settlement more than the other. Interestingly, studies show that settlement rates in pending litigation on both sides of the ocean are comparable.

The federal law of admiralty embraces the American Rule, and generally does not provide for attorney-fee awards except in cases of bad faith or abuse, or when the parties contractually agree that the

<continued on page 3>

But What About My Attorneys' Fees?

<continued from page 2>

winner of any dispute will collect its fees from the loser. If one of the parties writes up the contract (which can be a service contract, bill of lading or any other manifestation of the parties' agreement) so as to provide that only it (and not the other party) gets attorneys' fees, courts generally will apply the provision reciprocally to both parties. You have to be careful though. If a bill of lading contains a fee clause that specifies the carrier will recover its litigation costs in the event of a freight charge dispute, courts will apply that clause reciprocally only to freight charge issues and not, say, to a damaged cargo claim.

So what happens if a shipping contract does contain an attorney-fee provision and you win? Do you automatically recover every nickel you paid your lawyer? No. You might, but first you have to go through a battle to determine whether your litigation costs, which include attorneys' fees and disbursements, were "reasonable."

Just ask carrier APL, which recently prevailed in a lengthy and difficult process to recover some 735 grand in litigation costs from shippers of defective hairspray and mousse which leaked throughout the holds of APL's vessel. Those compressed products constitute hazmats, about which APL's bill of lading required forewarning to the carrier under risk that the shipper pay any cleanup costs associated with the cargo. Apparently, the shipper neglected to advise APL about its potentially messy product, costing the carrier a pretty penny. The bill of lading also contained a Singaporean choice-of-law clause.

The U.S. District Court for the Northern District of California awarded APL its cleanup costs, but denied its attorney-fee application, ruling that the U.S. Carriage of Goods by Sea Act, which does not allow for attorney-fee awards, controlled the issue. The Ninth Circuit Court of Appeals reversed, and found that, per the bill of lading clause, the law of Singapore governs. That country's law does allow fee awards to the extent similar to that of most states, which apply the "lodestar" method.

The lodestar method can be complex in practice. Boiled down to its essence, it allows courts to award fees based on reasonable billable hours expended, for legal tasks reasonably necessary toward a reasonable goal, at reasonable rates. Sound reasonable? On remand, the court found that rates APL's counsel charged it were reasonable. However, some of the $824 grand in fees APL paid included time the court concluded was "duplicative," i.e., two or more attorneys billing for the same task. Also, the court determined that one task was billed out excessively, and time spent pursuing a claim against one of the defendant entities was nixed altogether because that defendant prevailed in a dispositive motion. Other than that, the costs and fees charged were fine under the court's analysis.

So how does a court adjust recoverable fees based on a imprecise "reasonableness" standard to determine an appropriate award. Imprecisely. Here, the court just reduced APL's overall costs and fees by a flat 15% down to about $735 thousand, and called it a day. That's the best we can reasonably do.

The risk of paying fees, either your own or someone else's, should always be considered before litigation. Litigation costs, time, distraction and potentially damaged reputation may be bigger stakes than a claim or defense. ✦

Ref: APL Co. PTE, Ltd. v. UK Aerosols, Ltd., et al.,
2011 WL 337361 (N.D. Cal. 2011)

Recent Developments in Motor Carrier Law

By Steve Block

The Fair Labor Standards Act's motor carrier exemption applies even to drivers who might run interstate hauls that might include exempt cargoes.

Thompson, et al. v. K.R. Denth Trucking, Inc.,
2011 WL 649680 (S.D. Ind. 2011)

K.R. Denth (KRD) is a motor carrier operating throughout much of the country that provides disposal services to its shipper customers. Its drivers are company employees. KRD hauls mostly non-recyclable materials, but does offer equipment and transportation services for recyclable materials. While it operates mostly intrastate within the various states of its operation, KRD does offer intrastate transportation to those customers who need it. Put this all together, and a KRD driver would only on a very rare occasion, if ever, be dispatched to haul a recyclable load in interstate transit.

<continued on page 4>

Recent Developments in Motor Carrier Law

<continued from page 3>

The Fair Labor Standards Act (FLSA, a federal statute at 29 USC §201 et seq) requires employers to pay their employees overtime wages for work performed in excess of 40 hours per week. However, FLSA contains a series of exemptions pertaining to various industries and classes of workers, one of which is motor carriers. To enjoy this exemption, a motor carrier must demonstrate that

(1) it is subject to the "power of the Secretary of Transportation";
(2) its employees are "engaged in activities directly affecting the operational safety of motor vehicles"; and
(3) it is engaged in interstate commerce.

A series of current and former KRD drivers brought suit in the U.S. District Court for the Southern District of Indiana against KRD seeking certification and notification of a collective action to recover unpaid overtime wages. This proceeding is very similar to a FRCP 23 motion for certification of a class, the primary exception being that members of a collective action "opt in," whereas class action members "opt out." The court took the opportunity within the certification proceeding to determine whether a viable group could pursue a valid claim. It concluded there was no valid claim, and denied the certification.

The standard to determine whether the plaintiff drivers operated in interstate commerce, and whether the feds governed KRD's activities by way of the Motor Carrier Act, is potential activity within the employment. Even though the drivers operated interstate only rarely, and some not at all, they always could be called upon to do so. Similarly, while precedents suggest that non-recyclable cargoes are not subject to the Motor Carrier Act, and few drivers ever hauled recyclables, they all could be called upon for either variety at any time. Thus, the court concluded, FLSA's motor carrier exemption applies to the drivers, and the named plaintiffs could not represent a viable group of claimants.

If an insurer knows its policyholder is a motor carrier, then it has issued motor carrier insurance – at least in the Peach State.

Sapp, et al. v. Canal Insurance Co., 2011 WL 680853 (Ga. 2011)

Here's a Georgia Supreme Court case that shows at least one state's heavy inclination, like that of the feds, to hold the feet of a motor carrier's insurer to the fire of coverage when it comes to a policy's restrictions.

Insurer Canal issued a garden variety, commercial automobile coverage policy to dump truck operator EDB Trucking. As a dump truck enterprise, EDB qualified as a motor carrier under Georgia's Motor Carrier Act. However, EDB never applied for or obtained state-required motor carrier licensing, and Canal never filed with Georgia transportation authorities an endorsement confirming financial responsibility that is required of licensed motor carriers (analogous to FMCSA's MCS-90). Canal's policy contained an exclusion for coverage of accidents outside a 50-mile radius of EDB's place of business. An EDB truck collided with a car driven by Ms. Sapp, yes, more than 50 miles away from EDB's yard. She brought a direct action suit against Canal in Georgia state court as would be allowed under state motor carrier regulation statutes. On Canal's motion for summary judgment, the trial court dismissed her action based on the policy's exclusion. The Court of Appeals affirmed, but Georgia's High Court reversed.

Just because EDB failed to comply with Georgia statutes applicable to motor carriers, i.e., by failing to obtain a permit, didn't mean it wasn't one. Canal knew what activities EDB would be up to by the insurance application EDB's broker filled out after the insured instructed it to obtain "all necessary coverage." Canal didn't issue a standard motor carrier policy, but it stepped into the shoes of a motor carrier insurer subject to state statutes that prohibit any coverage restrictions (such as the 50-mile radius). Consistent with FMCSA regs and the feds' enforcement of them, of paramount importance in the Peach State is ensuring the public enjoys an essential "bond" available whenever a trucker is involved in an accident. Any other result would invite truckers and their insurers to disobey state insurance requirements to avoid exposure.

Who's a shipper for Carmack purposes? First, look at the bill of lading.

OneBeacon Insurance Co. v. Haas Industries, Inc., 2011 WL 802048 (9th Cir. 2011)

In our May 2008 article, we reported on this matter when it was before the Northern District of California, addressing just who has standing in a Carmack claim to sue truckers for damaged freight. Here was a wonderful opportunity for a federal court to provide us guidelines on a frequently pivotal point. Professional Products, Inc. (PPI) had purchased a load of computer wafers from Omneon Video Graphics (Omneon). The purchase was FOB, but because Omneon had

<continued on page 5>

<continued from page 4>

a shipping contract in place with motor carrier Haas Industries (Haas), it agreed with PPI to arrange interstate transit to New York. Omneon did so, using a standard PPI bill of lading per its general practice with the carrier. Of course, the freight arrived damaged.

Haas refused PPI's claim, stating its shipper of record was Omneon. At PPI's direction, Omneon repeated the claim filing, but apparently agreed with Haas that, per the bill of lading's terms, Haas's liability was limited to eighty eight bucks. Omneon accepted that sum from the carrier. PPI then collected the cargo's full (105 grand) value from its insurer, OneBeacon, which sued Haas in subrogation.

Could PPI have pursued a Carmack claim from Haas? If not, its insurer couldn't either. As we reported a couple years ago:

The court did an excellent job of expressing its conundrum. "On the one hand," lamented Magistrate Judge Zimmerman, "judicial economy suggests the owner of the goods should be able to sue the carrier directly under the Carmack Amendment. The alternative would be for the owner to sue the consignor or shipper who would then have to sue the carrier."

But on the other hand, "allowing someone not a party to the bill of lading to sue the carrier after it has reached an accord and satisfaction with the shipper would seem to discourage carriers from settling claims."

Because the district court found that Haas had effectively limited its liability, it didn't much answer that question. On appeal, however, the Ninth Circuit came a little closer. Haas's bill of lading defines "shipper" as a "the party from whom the shipment is received, the party who has requested the shipment be transported by Haas Industries, and [sic] party having an interest in the shipment, and any party who acts as an agent for any of the above." The court found PPI and its insurer fall within the last clause of that definition, and thus, could recover from PPI under Carmack. In other words, the shipping contract here answered the question. Unfortunately, that still doesn't tell us much about what would happen if the bill of lading doesn't define "shipper," which is all too often the case. As the Ninth Circuit pointed out, courts go every which way in this issue.

The result doesn't change the outcome, however. The appeals court agreed Haas had effectively limited its liability to peanuts. The various "shipper" entities never requested a copy of the carrier's "tariff," or rate schedule, defeating OneBeacon's argument that it failed to maintain one. You gotta ask!

Carmack preemption doesn't extend to state good faith settlement statutes.

Mason and Dixon Intermodal, Inc. v. Lapmaster International, LLC, et al. v. W.E.S.T. Forwarding Service, 2011 WL 135084 (9th Cir. 2011)

This interesting scenario prompted the Ninth Circuit Court of Appeals to find Carmack preemption inapplicable to a state statute that limits a motor carrier's rights in a damaged freight claim. Freight broker ITG placed two cargoes consisting of oversized precision flat lapping and polishing machines with motor carrier Mason and Dixon Intermodal (MDII) for transport after international water carriage. Allegedly because of bad instructions from ITG, MDII didn't use appropriate equipment, causing the two loads to be unexpectedly high. They both crashed into the same overpass causing some 820 grand in damage.

MDII brought suit against the cargo's owner and insurer seeking declaratory relief regarding limitation of liability. The shipper impleaded ITG in a third-party action. MDII filed its own claims against ITG, and ITG settled out with the shipper.

Under California tort law, similar to that of many other states, a joint tortfeasor may settle out with the claimant and gain immunity from contribution by its fellow wrongdoer. ITG claimed MDII was barred from pursuing its claims against ITG on those grounds. Affirming the Northern District of California, the Ninth Circuit agreed.

National uniformity principles are not offended by a motor carrier losing its right to seek contribution from a third party. It can still defend based on the same defenses, and limit its ultimate liability. It can assess its risks, and rely on a consistent body of federal law to determine its exposures. True, as MDII argued, it was not a joint tortfeasor with ITG, even if it were responsible for the loss, as "torts" may not be asserted against a motor carrier. In other words, MDII couldn't be held liable as a joint tortfeasor with anyone. However, both courts found that you don't have to be accused of a "tort" to fall within the statute; liability under a statute does the trick. ITG's settlement, based on its own limitation of liability, was in "good faith" (i.e., not designed as a collaborative effort with the shipper to stick it to MDII), so was effective to get ITG out of the case altogether.

Recent Developments in Motor Carrier Law

A danger of daisy chains: a broker claiming a broker isn't a broker.

Unified Global Logistics, Inc. v. Nabers Solutions, LLC, 2011 WL 193413 (Cal.App. 4 Dist. 2011)

Okay, take out your pencil and drawing pad. You'll need them to map this one out. Shipper LG Electronics engaged freight broker FNS (USA), Inc. to arrange transit of a cargo of LCD TVs from California to Virginia. FNS hired broker Uniform Global Logistics (UGL); UGL hired Nabers Solutions; and Nabers retained motor carrier CAC American Cargo to make the haul. The freight was stolen en route, apparently off a truck not covered by CAC's liability insurance. UGL paid off LG Electronics, and stuck out its opened palm in Nabers's direction. Nabers denied liability, asserting that it was a broker liable only for its own negligence, of which none was suggested. UGL and Nabers went to the mat in California state court, where Nabers won dismissal on summary judgment. Next stop, the Golden State's Court of Appeals.

UGL urged that Nabers was a motor carrier, or at least a question of fact – for jury determination only – remained as to whether it had led UGL to believe it was. The appeals court just didn't buy it. Nabers had sent UGL documentation, including in previous transactions, that showed it held brokerage licensing only. UGL required its "subs," so to speak, to demonstrate insurance coverage, and Nabers presented a continent cargo liability policy, a line designed for brokers only.

Apparently, a Nabers sales rep may have suggested to UGL that Nabers could move the load "on its own trucks," which would support a determination that Nabers had represented itself to be a trucker. But again, UGL knew Nabers' circumstances weren't those of a licensed motor carrier, and it never considered the issue until there was a cargo loss.

Nothing requires a broker to engage a motor carrier that has adequate insurance for a particular load (although to be FMCSA-licensed for interstate transit, a competent trucker must carry minimum levels of insurance or otherwise demonstrate financial responsibility). However, an agreement between a shipper and broker or, as here, between two intermediaries, by which a broker agrees to engage only truckers with adequate coverage, is enforceable. UGL argued Nabers breached that agreement by allowing the freight to move on an uninsured truck. But Nabers confirmed CAC held an adequate policy, and had no reason to suspect the carrier might put it on an uninsured truck.

Also, Carmack, which would exclusively govern Nabers's liability if it were a trucker, requires a showing that the subject cargo was delivered to carrier in good order and condition. There was no evidence the cargo was delivered to Naber – period.

Thus, the Court of appeals affirmed the dismissal. The longer the daisy chain of intermediaries, the more players involved, and the transactions and contracts undertaken – the bigger chance of misunderstanding and dispute. ✦

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