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The Intermodal Lead

Legal Developments in Freight Carriage, Logistics and Transportation Infrastructure

Charter Parties: Who's the "Carrier" for Purposes of COGSA Liability?

By Steve Block

The complexity of charter agreements often causes an array of legal and business headaches for players seeking to maximize economic and operational efficiency in their ocean transportation arrangements. It can be extremely difficult to piece together and document multi-party deals which include daisy chains of charterers and sub-charterers presenting vessels to successions of brokers, forwarders, agents and, ultimately, shippers.

But the real migraine comes when you try to sort out who's wearing what hat for purposes of cargo liability under the U.S. Carriage of Goods by Sea Act (COGSA). A case in point is importer QT Trading's (QT) recently adjudicated lawsuit against the vessel SAGA MORUS and umpteen other defendants. You'll need your pad and pen for this one.

QT booked shipment of a large load of steel pipes from China to Houston by way of a charter party it entered into with Daewoo Logistics on the M/V SAGA MORUS. Patt, Manfield and Company (Patt) served as the SAGA MORUS's operator and manager. Daewoo had chartered the vessel from Saga Forest Carriers International (Saga). Saga, in turn, had chartered the vessel from its actual owner, Attic Forest AS (Attic). The Daewoo-Saga charter party provided that charterer QT would load and stow its cargo, and that the vessel's captain would issue bills of lading "in conformance with Mate's and Tally Clerk's receipts." This is important, because those receipts might note any preexisting damage. The Daewoo-Saga charter party also authorized Daewoo "to sign such bills of lading on the Master's behalf."

Attic's Protection & Indemnity Club engaged a cargo surveyor to issue a "Preshipment Cargo Condition Report" (the Preshipment Report), which did indeed indicate damage to a number of the pipes. Nonetheless, Daewoo's agent signed clean bills of lading which named only Daewoo as a carrier of record, but didn't incorporate the Mate's receipts. Of course, the pipes arrived rusty, and QT wanted someone to pay up. But who's on the hook?

Absent contractual agreement to the contrary, only ocean carriers of record are liable for cargo damage under COGSA. QT sued everyone in the mix. Daewoo soon went belly up, eliminating the defendant

most clearly liable as a "carrier." Affirming the U.S. District Court for the Southern District of Texas, the Fifth Circuit Court of Appeals ruled that no one else had stepped into a carrier's shoes. QT bears its own losses.

Per COGSA, a "carrier" is "the owner or the charterer who enters into a contract of carriage with a shipper," and a "contract of carriage" is

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only one which is "covered by a bill of lading or any similar document of title." Per maritime case law, a contract of carriage may be established "by virtue of the charterer's authority to bind the vessel owner by signing the bill of lading 'for the master.'" Thus, the Fifth Circuit ruled, "the charterer must have authority to sign the bill of lading 'for the Master,' and the Master must have authority to sign bills of lading for the shipowner."

Neither Attic nor Patt came close to activity that might indicate carrier status under this standard, and were dismissed accordingly. Saga, on the other hand, appeared to fit the bill. Daewoo's agent had authority to sign on behalf of the master, and Saga had given the master authority to sign bills of lading. Nonetheless, the court ruled, Saga still wasn't a carrier. Although Daewoo had authority to do so, it never actually signed a bill of lading on Saga's behalf. Rather, its agent had signed "As Agent For The Carrier Daewoo Logistics Corp." Thus, Saga couldn't be said to be party to a bill of lading.

Also, contrary to its authority, Daewoo's agent didn't sign the bills of lading in conformity with the Mate's receipts (they were issued "clean on board"). The Mate's receipts, had they been incorporated, would have referenced the Preshipment Report by noting "as per P&I surveyor report" which indicated preexisting damage. Thus, Saga can't be held liable for the loss.

The Fifth Circuit joined other federal courts holding that "when a signing party exceeds its authority in signing bills of lading not in accordance with the Master's instructions, the owner cannot be held liable as a COGSA carrier." The court also dismissed QT's bailment theory on the ground a bailment in admiralty requires a bailee's exclusive possession.

So what's a shipper to do in a complex charter party arrangement like this? Unfortunately, the attention needed to obtain the economic benefits of a charter party, especially a multi-tiered one, does not end with the signing of documents. The shipper must monitor the entire process to ensure that the various players' acts and omissions don't impact who's ultimately liable for what. Shippers that don't have in-house expertise to do so should procure it through outside service providers, and consult with counsel as to what must be done to avoid unpleasant surprises. ✦

Ref: QT Trading, L.P. v. M/V SAGA MORUS, et al., 2011 WL 1792071 (5th Cir. 2011).

Two Maritime Law Queries: What Constitutes "Discharge" and "Delivery" Commencing the Time to Give Notice of Claim; and Is a Freight Forwarder an "Agent" in its Relationships With Ocean Carriers and Shippers?

By Steve Block

The U.S. District Court for the District of Maryland recently took a look at two issues that frequently come up in ocean cargo disputes. COGSA, the U.S. Carriage of Goods by Sea Act, at 46 USC §30701, requires shippers to provide ocean carriers timely notice of claim of cargo damage in order to pursue recovery. That notice must be given "at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery" of any "apparent" damage to cargo. If the damage is not apparent, "the notice must be given within three days of the delivery." Failure to give timely notice can be a complete defense to the claim.

But what constitutes delivery? And when an ocean freight forwarder books freight with a carrier, is it the agent of the shipper? Of the carrier? Both? And what difference does it make?

Christopher Aniedobe hired forwarder Cartainer Ocean Line to arrange transport of his Toyota Sequoia from Baltimore to a town in Nigeria. Cartainer booked the shipment with Hoegh Autoliners, an ocean carrier that specializes in automobile transportation. Apparently, the car was vandalized en route. Its radio, navigation system and computer were stolen, and it suffered body damage.

Hoegh's vessel arrived and was offloaded on November 19, 2008, but the car remained under the carrier's control during the succeeding two days. The customs clearing agents first accessed the car on November 21st. Aniedobe emailed Cartainer about the damage that day, and was directed to take it up with Hoegh. He did on November 24th, and tried to get the claim paid over the succeeding months. When that failed, he brought suit against the carrier and forwarder.

Both defendants moved to dismiss. First, Hoegh claimed the shipper gave it untimely notice, as over three days had elapsed from the time of offload. To decide that issue, the court looked to the plain meanings of the terms "discharge" and "delivery," as COGSA contains no definitions of them. While the cargo was "discharged" from the vessel five days before Aniedobe gave notice of claim, "delivery," or what

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Webster's Dictionary defines as "the act of transferring from one to another," was not made until November 21st, which was only three days before notice was given. Until then, Hoegh's agents had the car, and Aniedobe couldn't touch it. Because the shipper had presented a *prima facie* COGSA case (tender in good condition; delivery in damaged condition; and timely notice), the motion to dismiss was denied.

Next, Hoegh argued that its liability should be limited to the COGSA-blessed minimum of $500/package. The statutory criteria a carrier must demonstrate to enjoy this umbrella include providing the shipper with a reasonable opportunity to declare his freight's value, typically by filling in a space on the bill of lading. If no value is supplied, the carrier's liability can be limited to relative peanuts. Cartainer left that space blank.

The shipper argued such creative and legally unfounded points as (1) the damage was "far removed from maritime activities"; and (2) that the Carmack Amendment, which governs surface carrier liability should displace COGSA. Those arguments didn't hold water. While Hoegh might be liable for the loss, its liability is capped at five hundred bucks.

Foreseeing that possible outcome, Aniedobe argued that Cartainer was negligent in failing to declare the car's full value without apprising him of the consequences of its doing so. Cartainer sought dismissal on the ground it was Aniedobe's "agent" in all its activities, such that it can't be liable for Hoegh's alleged screw-up.

Whether or not ocean freight forwarders are agents of anyone has long been the subject of discussion and disagreement within industry and law. In some senses, they clearly perform tasks on behalf of their shipper customers, providing expertise and resources to service the customers' needs. But in other significant ways, forwarders are service providers themselves, marketing and receiving compensation for their own tangible and intangible products as part of arms-length transactions. They also arguably perform agent-esque tasks on behalf of carriers.

The court ruled that Cartainer was acting as a go-between, but its efforts were primarily for Aniedobe, such that it was the shipper's agent. Principal-agency law in this context precludes an entity from being the agent for two entities. In any event, the U.S. Supreme Court, in its 2004 landmark decision of *Norfolk Southern Ry. v. Kirby*, ruled that forwarders are indeed shippers' agents for the "single limited purpose" of contracting with carriers for limitation of liability." The court determined that Cartainer didn't "stray from standard practices when opting for the default limited liability," although there's no discussion of what the forwarder might have done to ensure Aniedobe was apprised of the consequences and had an opportunity to purchase cargo insurance coverage.

The times of discharge and delivery frequently are issues of fact that courts won't decide on summary judgment, but offloading freight from a vessel alone clearly doesn't start COGSA's notice-of-claim clock running. Delivery involves a consignee actually taking possession. Forwarders are empowered to waive a carrier's full liability for cargo damage. However, an intermediary's best practices include advising shippers – preferably in writing – about the considerations (freight charge savings in exchange for reduced remedies), and educating them about cargo insurance options. ✦

Ref: Aniedobe v. Hoegh Autoliners, Inc., et al., 2011 WL 829139 (D. Md. 2011).

Recent Developments in Motor Carrier Law

By Steve Block

Owner-Operator Isn't Separately Liable for Cargo Damage Under State Law Bailment Theory

Merchants Terminal Corp. v. L&O Transport, Inc., et al., 2011 WL 2650700 (D. Md. 2011)

Shipper Merchants Terminal booked transit of a load of fish from Delaware to Maryland with motor carrier L&O Transport. Owner operator Charles Elmore was under lease to L&O, and made the haul. The fish apparently didn't make it to Maryland in good condition.

Merchants brought suit in the U.S. District Court for the District of Maryland against both L&O and Elmore, the former claim properly based on Carmack, and the latter alleging bailment liability under Maryland law. Elmore brought a FRCP 12(b)(6) motion to dismiss.

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Motions under 12(b)(6) are limited to analysis of whether the complaint itself states a claim which could present a cognizable claim under the facts and law alleged. Simply making a conclusory legal statement about a legal theory's applicability – here, bailment – isn't enough. Merchants alleged Elmore was liable to it based on his accepting Merchants' cargo and not returning it in the same condition he got it. But that's not how bailment law works, at least not in Maryland, which requires a contract between bailor and bailee. Merchants' contract, as its complaint clearly stated, was with L&O. The complaint also failed to allege delivery of property to Elmore (again, the tender was to the carrier), or that a "sub bailment" was intended. The L&O-Elmore lease doesn't confer on Elmore a tort duty to Merchants. The action against Elmore was dismissed accordingly.

Must a Product Manufacturer Label Irregularly Shaped Cargo to Avoid Responsibility for a Stevedore Dropping it?

Rafanasi, et al. v. Coast Cargo Company, Inc. v. Babcock & Wilcox Power Generation, Inc., 2011 WL 2600991 (E.D. La. 2011)

Here's a fact pattern that's seen numerous variations and outcomes in litigation, with no firm rules being issued by the courts. Manufacturer/shipper arranges for shipment of unevenly weighted product without marking its weight dimensions or special handling requirements; carrier or stevedore drops it, or it overturns; buyer/consignee sues carrier or stevedore; carrier or stevedore impleads in third-party lawsuit manufacturer/shipper alleging breach of a duty to properly mark the cargo.

But does the manufacturer have any obligation to do so absent a contractual promise? Here, Babcock & Wilcox's boiler unit, top heavy and weighted more on one side, was sent via rail to the Port of New Orleans, where stevedore Coastal Cargo Company placed it on a MAFI trailer for transport to the dock for loading onto a vessel. The MAFI trailer, when pulled by a semi, overturned, causing some 284 grand in damages. The overseas buyer, Rafanasi, sued Coastal in the Eastern District of Louisiana, and Coastal brought a third-party action against Babcock & Wilcox alleging negligence in failing to mark the boiler as having unusual weight dimensions and requiring special handling.

Babcock & Wilcox moved to dismiss Coastal's claim. In response to the summary judgment motion, Coastal submitted an expert's affidavit opining that Babcock & Wilcox's failure to label and instruct caused the accident. On that basis, the court easily found a question of fact as to causation. But tort liability in negligence also requires demonstration of a duty, which is a question of law appropriately decided by the court on summary judgment.

The court found no statutory obligation on Babcock & Wilcox's part to label its freight. Precedential cases cited by both parties were distinguishable, so there was no basis in Louisiana law to find such a duty. But the court found one nonetheless based on a Babcock & Wilcox's "general duty" to "take reasonable care to avoid acts or omissions which [it] can reasonably foresee would be likely to injure" Coastal. This was enough to defeat summary judgment, although the court declined to find any "specific" duty with respect to labeling cargo and instructing stevedores as to proper handling. The court also found issues of fact as to whether that duty had been breached.

If that sounds vague, the court's opinion isn't much clearer. The court bases its conclusion on Babcock & Wilcox's obligation to deliver the boiler to Coastal, extending that obligation to include doing so "without problem." The court dodges the question of what the shipper's "general duty" entails, which is at the heart of the issue. Under this analysis, any participant in the transportation process should be concerned about undefined duties it has to others.

A Federal Court Applies Carmack in Broker's Claim Against Motor Carrier (Yes, you Read that Right)

Eagle Transportation, LLC v. Scott, et al., 2011 WL 2214812 (S.D. Miss. 2011)

Here's a typical cargo loss scenario with an inexplicable court ruling. Shipper Peco Foods hired freight broker Eagle Transportation to arrange transit of a cargo of frozen chicken from Mississippi to Michigan. Pursuant to a Motor Carrier Agreement, the broker booked the load with carrier Scotty's Trucking. It was damaged en route. Scotty's insurer, Great American, sold the load at salvage, and issued a check for the salvage amount only to Eagle. Eagle paid Peco the cargo's full value, and sued Scotty to recover the same. Eagle also sued Great American claiming the salvage sale was below market.

Eagle's action was filed in Mississippi state court and alleged common-law negligence and breach of contract. The defendants removed the action to the U.S. District Court for the Southern District of Mississippi, and Eagle moved to remand. In response, the defendants urged that Carmack governed the claim and preempted the asserted causes of action.

The court properly concluded that if Carmack applied, it would trump Eagle's state law claims. But how could it? The unanswered question – one of elephant-in-the-room proportions – was why Eagle would

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have standing to sue in the first place. What are its damages? If it were Peco's assignee, there would be no problem (Carmack would clearly govern), but that wasn't alleged or discussed in the opinion.

Instead, the court found Carmack applicable to the broker-carrier contract by virtue of a Fifth Circuit decision that held Carmack governs as against any state laws that "in any way enlarge the responsibility of the carrier for loss or at all affect the ground of recovery, or the measure of recovery." The court ruled that Eagle "is plainly trying to impose a standard of care upon [Scotty's Trucking] that is either concurrent with or in addition to that imposed by [Carmack]." But that principle, which isn't unusual, applies only in the context of the carrier's obligations to its shipper.

Summing up its ruling, the court concluded as follows:

> To be clear: the Court expresses no opinion as to whether a transportation broker's breach of contract claim against a carrier is preempted by the Carmack Amendment. The Court merely finds that Plaintiff's negligence claim as to Defendant Scott is an attempt to enlarge the common-law duties beyond those imposed by the Carmack Amendment. It is arguable that the Fifth Circuit only intended to forbid enlargement of the common-law duties owed to *shippers* [emphasis in the original], as opposed to brokers or other third parties. However the Court concludes that is not the case, given the purpose of the Carmack Amendment and the fifth Circuit's broad description of its preemptive scope.

If Eagle stands in the shoes of a shipper (by virtue of an assignment from the shipper of its rights against Scotty's Trucking), then Eagle's claims are governed exclusively by Carmack, and this analysis is unnecessary. If Eagle is a broker, it has no claim for cargo damage, as it is not the cargo's owner, and it specifically is not liable to Peco under Carmack or otherwise if its own wrongdoing didn't cause the loss.

Carmack Claim Doesn't "Relate Back" to Time When Complaint for Breach of Settlement Agreement was Filed

Daybreak Express, Inc. v .Lexington Insurance Co., et al., 2011 WL 2043029 (Tex. App. – Hous. (14 Dist.) 2011)

This case addresses an interesting procedural conundrum a shipper and its insurer found themselves in after settling a damaged freight claim with a carrier, and then litigating breach of the alleged settlement agreement. Shipper Burr Computer Environments engaged trucker Stupor & Sons to haul a cargo of electronics from New Jersey to Texas. Stupor interlined the load to Daybreak Express which, in turn, handed it off to T. Orr Trucking. The load arrived damaged.

Daybreak's adjuster valued the damage at $166,655, and Burr apparently concluded it had reached a settlement agreement with Daybreak as to this amount. Burr also made a claim against Stupor, which paid the shipper $5,000 (Stupor's insurance policy deductible). Stupor's insurer, Lexington Insurance Company, paid Burr an additional $87,500 and, within two years of the notice of claim, sued Daybreak in subrogation to enforce the settlement agreement Daybreak had reached with Burr. The suit was brought in Texas state court, and Daybreak removed it to the U.S. District Court for the Southern District of Texas saying, hey, this is about freight damaged in interstate commerce subject to the Carmack Amendment. On Lexington's motion to remand back to state court, the federal court disagreed. The subject of this complaint is enforcement of an alleged settlement agreement, which is a transaction separate and apart from the underlying loss that might otherwise be subject to federal jurisdiction.

Back in state court, Lexington added a series of common-law claims and one based on Carmack, and the trial court awarded it $85,800. The whole mess went up the hill to the Longhorn State's Court of Appeals.

There, Daybreak fared much better. First at issue was the timeliness of Lexington's subro suit. Contrary to Lexington's position, Carmack doesn't establish a two-year statute of limitations (rather, it only limits the amount of time the parties can agree to that minimum). New Jersey gives property damage claimants six years to file suit, and Texas two years. The court ruled that statute of limitations determinations are matters of procedural, and not substantive, law. Because suit was filed in Houston, Texas's time bar governs. But does that save Lexington?

The insurer's original action, filed within two years, was to enforce the settlement agreement only. It alleged Carmack and common law causes of action only after two years had passed. The court ruled that Carmack's preemptive effect rendered the settlement agreement claim improper. Lexington argued that its subsequent Carmack claim should relate back to the date of its original suit for breach of the settlement agreement (even though Carmack wasn't pleaded), as it addressed the same subject matter.

The court rejected that argument. As the federal court ruled when remanding the lawsuit, a claim based on a settlement agreement involves a separate transaction and occurrence than one for interstate

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cargo damage. No relation back, and Lexington's subro action was tossed out of court altogether.

A Steak on the Grill, or, the Thing Speaks for Itself

McLaughlin Freight Lines, Inc. v. Gentrup, 798 N.W.2d 386 (Sup. Ct. Neb. 2011)

A cow breaks loose from its holding pen, and a McLaughlin Freight Lines truck hits it, damaging the truck. It's not clear how the cow got out, and rancher Gentrup claims he's never had livestock "lick off" the chain in his otherwise state-of-the-art facility. McLaughlin sued Gentrup in Nebraska state court, and the curious mess wound its way up to the Cornhusker State's High Court.

Figuring out what happened and why is more than McLaughlin wanted to get into in seeking damages for the "steak on the grill" (old CB-speak for a trucker's collision with a cow). It therefore resorted to the common law doctrine of *res ipsa loquitor*, Latin for "the thing speaks for itself," which basically can be the basis for tort liability if circumstances demonstrate that an accident wouldn't have occurred but for someone's negligence with respect to an instrumentality over which they have exclusive control, and absent an alternative explanation. A plaintiff need not eliminate with certainty all other possible causes; rather, in keeping with civil liability's standard burden of proof, it must prove that no cause other than the defendant's negligence is more likely to have caused the mishap. Thus, r*es ipsa loquitor* is an exception to the rule that negligence may not be presumed.

Reversing the trial court's summary judgment dismissal, Nebraska's Supreme Court found that a jury could reasonably find that negligence on Gentrup's part must have allowed the cow to escape. The fact that the pen was constructed soundly only further bolstered the point, i.e., that someone must've done something wrong. The rancher pointed to a Nebraska statute that says the escape of livestock "by itself" isn't sufficient to raise an inference of negligence with respect to motor vehicles (this problem must come up frequently in Nebraska!). This, he said nixes *res ipsa loquitor's* applicability to truckers' claims. The court disagreed based on the pen's adequacy (which shows somebody must have screwed up, such that the escape wasn't the only evidence), and legislative history demonstrating that the statute was not intended to displace the doctrine. ✦

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