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Ocean-bound cargo requires careful documentation

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Every day, ships ply our oceans laden with everything from laxatives to luxury goods. Shippers entrust their livelihoods to the whims of nature and to human negligence. When their items are lost, damaged or destroyed, they expect someone to pay the price

But that may be wishful thinking. If, when and who ultimately pays for those losses could be dictated by laws dating back more than a century. The transport of goods via ocean-bound vessels is an area rife with complexity and confusion; parties engaged in these transactions are not always up-to-speed or diligent about their rights, remedies and responsibilities. An oversight or omission in a bill of lading could have huge repercussions for a shipper, its carrier or its customers.

Who's who, what's what

Shippers are often the owners of cargo being transported, but other parties with an interest in a transaction might also be shippers. When they commit to transporting products across the seas, they engage carriers whose responsibility it is to make sure the goods get from one port - the loading point - to a different port - the unloading, or discharge, point.

Operators of vessels onto which such goods are loaded are defined by statute as "ocean common carriers," but they are also known as vessel-operating common carriers, or VOCCs. Parties other than vessel operators might also serve as carriers. These "non-vessel-operating common carriers," or NVOCCs, are carriers with respect to the shippers of goods, even though they themselves do not operate the vessels transporting those goods. They are shippers when dealing with the ocean common carriers.

The legal relationship relative to the carriage of goods by sea between shippers and carriers is specified in a bill of lading or other transportation document. A bill of lading establishes the receipt of the cargo by the carrier and the terms of the transaction, including the scope and limits of liability for lost or damaged goods. It might set forth other terms applicable to the transaction, such as who bears responsibility for losses that occur before goods are loaded onto the ship or after they have been unloaded.

Laws of transport

The original Carriage of Goods by Sea Act (COGSA) was enacted in 1936 to govern contracts of carriage of goods by sea to or from U.S. ports in foreign trade and applies to transactions covered by a bill of lading or any similar document of title. Now codified as a note to 46 U.S.C. Section 30701, COGSA states that "every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act."

Significantly, COGSA applies only from the time the goods are loaded onto a vessel until such time as they are discharged from the ship, commonly referred to as the "tackle-to-tackle" period of the voyage. COGSA does not, by its terms, extend to losses incurred when goods are

not aboard the vessel, but parties may contractually agree to extend coverage beyond the tackle-to-tackle period. If they so agree, COGSA's terms will apply to mishaps that occur before goods are loaded or after they have been unloaded.

The Harter Act, enacted in 1893, also applies to the carriage of goods to or from U.S. ports. Although COGSA supersedes the Harter Act with respect to the "tackle-to-tackle" period for international shipments, U.S. courts have recognized that, unless COGSA has been contractually extended to off-vessel periods, the Harter Act may govern the period prior to loading and after discharge of cargo from a ship.

Liability limits

COGSA limits the carrier's liability for loss or damage to goods: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States..., unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

Good news for carriers; not great for shippers. A full 40-foot container load of cargo could represent the "package" for determining liability of a carrier to a shipper. (See *Mapfre Atlas Compania de Seguros S.A. v. M/V LOA*, No. 15 Civ. 7876, 2017 WL3332234 (S.D.N.Y. Aug. 3, 2017)). Under COGSA, with few exceptions, the most a shipper can hope to receive is $500 for that "package."

This may be fine when the 40-foot container is packed with Q-Tips or rags. But what about electronics or rare white truffles? Most containers will typically be carrying goods valued in the thousands of dollars. Carriers transporting such goods will want COGSA extended to cover every moment those goods are in its possession, including before goods are loaded onto the ship and after they are removed from its vessel's holds.

Even better for carriers: COGSA has a one-year statute of limitations. Claims filed more than a year after the date when goods were delivered or should have been delivered won't hit their bottom lines. But if COGSA isn't extended by the parties, losses during pre-loading and post-discharge periods will be governed by the Harter Act. That law contains no specific limits on liability, nor does it include a statute of limitations for filing claims. A carrier could find itself liable for the full value of goods lost or damaged while sitting in a warehouse or on the dock, and claims could be asserted against it long after the loss was incurred.

Mistakes can be costly

When carriers neglect to incorporate COGSA in their bills of lading, they set themselves up for potentially large claims from shippers. Losses that occur before goods have been loaded onto a vessel or after their removal can be especially costly. Language can be included in the carrier's bill of lading to extend COGSA to such losses. Here is an example:

"Where US COGSA applies then the provisions stated in the said Act shall govern the liability of the Carrier for any loss or damage to the Goods before loading on the Vessel or after discharge therefrom, as the case may be, during Carriage to or from a container yard or container freight station in or immediately adjacent to the sea terminal at the Port of Loading and/or Discharge."

By the same token, shippers can also take steps to protect themselves. They can purchase insurance to cover the value of their cargo and specify the actual value of goods in bills of lading. They might also push back against carrier attempts to extend COGSA to pre-loading and post-discharge periods, which could limit their recovery to $500 for packages worth thousands or millions of dollars.

"Through" transportation

When downstream carriers such as trucking or rail companies are involved in transporting the goods after delivery to the destination port, the picture becomes a little murkier. In *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.* (543 U. S. 14 (2004)), goods valued at $1.5 million were damaged when a train operated by Norfolk Southern derailed. The Supreme Court ruled that inland transportation of goods subject to "through" (i.e., end-to-end transportation) bills of lading was subject to maritime laws, responding to the cargo interest's assertion that the accident involved straightforward state tort and contract claims as follows: "the situation presented here has a more genuinely salty flavor than that."

There were two bills of lading, one with the VOCC (the "Master Bill of Lading") and one with the NVOCC (the "House Bill of Lading"). The VOCC (hired by the NVOCC to effect carriage for the actual shipper, including the inland portion of the transport) had extended COGSA to all stages of transit. Both bills of lading also included a "Himalaya Clause" extending the liability limitations contained in their respective bills of lading to "any servant, agent or other person (including any independent contractor)" whose services contributed to performing the contract. The Court held that the COGSA package limitation in the Master Bill of Lading applied to the rail component of the transit and that the rail carrier was protected by that liability limitation through the Master Bill of Lading's Himalaya Clause as contracted by the NVOCC. The House Bill of Lading, in contrast, failed to incorporate the lower COGSA default liability limitation for damage done "prior to the loading on and subsequent to the discharge from the ship." This left the NVOCC exposed to greater liability to the shipper for the land leg under its House Bill of Lading.

The Court noted that Kirby, the shipper, was not precluded from suing ICC, the NVOCC, for any loss exceeding the agreed-upon liability limitation in the VOCC's bill of lading. "It seems logical that ICC– the only party that definitely knew about and was party to both of the bills of lading at issue here–should bear responsibility for any gap between the liability limitations in the bills."

The opinion concluded as follows: "We hold that Norfolk is entitled to the protection of the liability limitations in the two bills of lading. Having undertaken this analysis, we recognize that our decision does no more than provide a legal backdrop against which future bills of lading will be negotiated."

Conclusion

Bills of lading tend to be boilerplate documents that parties agree to without reading or understanding their terms. Shippers (both beneficial cargo owners and NVOCCs) assume that the fine print includes all the terms required to protect their interests. They rely upon carriers to move their goods from one port to another, assuming they will be adequately compensated for any losses.

When the worst happens - valuable items are lost or damaged - carriers and shippers often learn the steep cost of not doing their homework. They discover that the words included on bills of lading - such as identifying a 40-foot container holding hundreds of individual items as a single "package" - can have serious repercussions.

How much smoother such transactions would proceed if all parties took the time to read - and fully comprehend - bills of lading before entrusting cargo to the open seas.

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