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Ocean cargo claims and forum selection clauses

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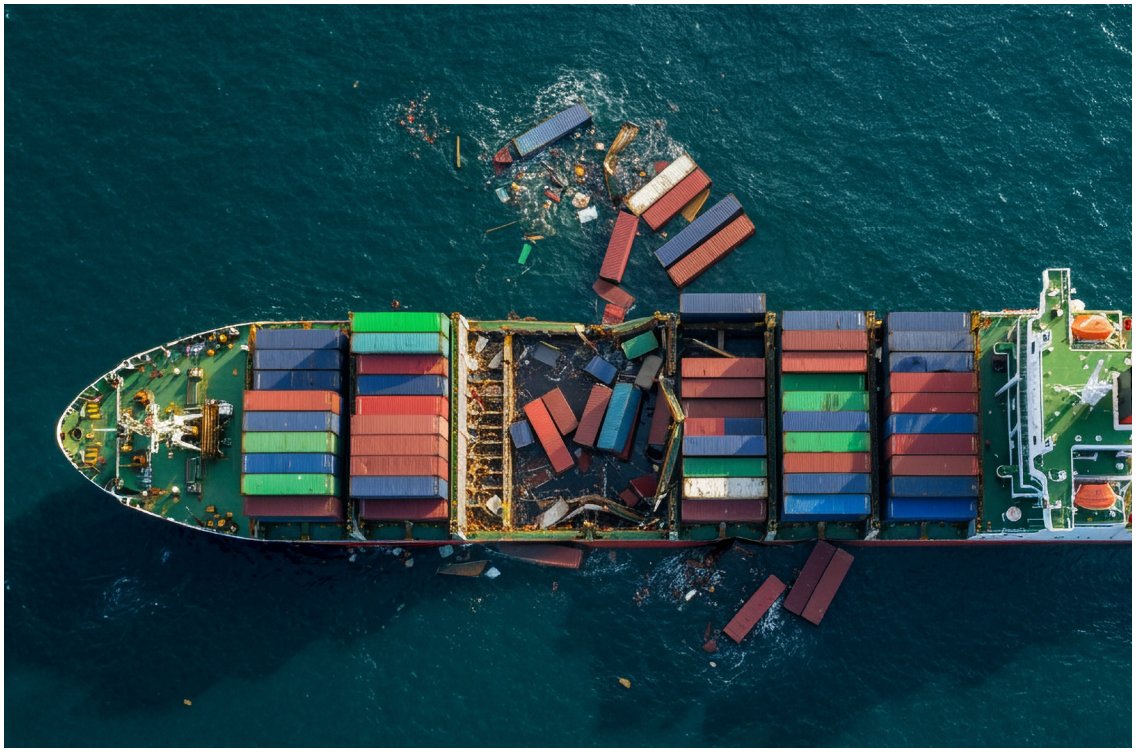

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Imagine that your client has imported goods from overseas or has shipped products to an overseas destination, but those products are somehow tossed, turned and upended during the ocean voyage, or perhaps they were damaged or pilfered before loading onboard the vessel. When unloaded at the destination port, they are damaged or short to the tune of several thousand dollars. Now imagine that your client failed to insure that merchandise.

Who pays the price when ocean-borne cargo is damaged in transit and there is no insurance?

Types of carriers

Operators of vessels onto which goods are loaded are referred to, by law, as "ocean common carriers" or "vessel-operating common carriers" (VOCCs). Other parties - "non-vessel-operating common carriers," or NVOCCs - can also serve as carriers. NVOCCs will be considered carriers with respect to the shippers of goods, but they themselves do not operate the vessels transporting goods. When dealing with ocean common carriers, they are considered shippers.

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

Laws of transport

The original Carriage of Goods by Sea Act (COGSA), enacted in 1936, governed contracts of carriage of goods by sea to or from U.S. ports in foreign trade. It applied to transactions covered by a bill of lading or any similar document of title. Now codified at 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, therefore, extend to losses incurred when the goods are not aboard a vessel. The parties may, however, contractually agree to extend coverage beyond the tackle-to-tackle period. If they agree to such an extension, COGSA's terms will also apply to mishaps that occur before the goods are loaded or after they have been unloaded.

The Harter Act was enacted in 1893 to cover the carriage of goods t o or from U.S. ports. COGSA supersedes the Harter Act when addressing the "tackle-to-tackle" period for international shipments. U.S. courts, however, have recognized that unless COGSA has been contractually extended to off-vessel periods, the Harter Act might actually govern the period prior to loading and after discharge of cargo from a ship.

The 1906 Carmack Amendment ("Carmack") may impose something akin to strict liability on carriers - including railroads and trucking companies - for loss or damage of goods in interstate commerce. Courts have not always been inclined to find carriers liable under Carmack when international shipments are involved. The picture becomes even less certain when carriers such as trucking or rail companies are involved in transporting goods before or after deliv-

ery to a port under through bills of lading. (See *Norfolk S. Ry. Co. v. Sun Chem. Corp.*, 318 Ga.App. 893, 735 S.E.2d 19 (2012), in which a Georgia Court of Appeals considered an export of ink from Kentucky to Brazil via a port in Savannah, Georgia, under a through bill issued by the ocean carrier (subcontracting the rail carrier, Norfolk Southern)).

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."

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 WL 3332234 (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."

Because COGSA has a one-year statute of limitations, claims filed more than a year after the date when goods were or should have been delivered are time-barred from enforcement. The time bar under COGSA, at 46 U.S.C. Section 30701, states that the carrier and the ship are discharged from all liability for loss or damage unless a suit is brought within one year after the date when the goods were or should have been delivered. This provision is applicable to all contracts for the carriage of goods by sea to or from ports of the United States in foreign trade.

Forum selection

That being said, where can your client file a claim? First, take careful note of the notice provisions in the bill of lading. Most bills of lading also contain a forum selection clause requiring that any cargo claims be instituted and heard in a particular country, state or court as the forum. You may be surprised to learn, if you look at the terms, conditions and exceptions stated in the bill of lading, that your client's claim must probably be filed in a specific foreign country outside of your client's location. Is your client bound by this? Well, it depends.

The choice of forum selection clause in an ocean bill of lading, as well as the ocean carrier's assertion and insistence on that forum, are generally considered prima facie valid under federal case law. In admiralty cases, federal courts will enforce these clauses unless the objecting party can convince the court that imposition of the forum selection clause in the bill of lading would be unreasonable or unjust. This principle is primarily derived from the landmark case of *The M/S Bremen v. Zapata Off-Shore Co.* ((1972), 407 U.S. 1, 19, 92 S.Ct. 1907, 32 L.Ed.2d 513) (*The Bremen*), which established a federal standard for these types of clauses.

Enforceability is, however, subject to certain exceptions, such as fraud, overreaching, or contravention of public policy. Additionally, COGSA does not automatically invalidate foreign forum selection clauses (See *Vinmar Seguros Y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528 (1995)). The case of *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991), also supports the enforceability of forum-selection clauses (See also *Davis Media Group, Inc. v. Best Western Intern.*, 302 F.Supp. 2d 464 (D. Md. 2004)).

The Second Circuit has adopted a four-factor analysis to determine whether a forum selection clause is enforceable. (See *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383 (2d Cir. 2007)). The first three factors are: (1) whether the clause was reasonably communicated to the party resisting enforcement; (2) whether the clause is "mandatory or permissive;" and (3) whether the claims and parties are subject to the forum selection clause. "If the forum clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable." For the first three factors, the burden of proof is on the party seeking to enforce the clause. (*Tropp v. Corp. of Lloyd's*, 385 Fed.Appx. 36, 37 (2d Cir. 2010)). The burden shifts on the final factor, which requires the party resisting enforcement to rebut the presumption of enforceability. (*Phillips*, supra, 949 F.3d at 383.)

The Ninth Circuit's approach to forum selection clauses is heavily influenced by existing federal law, particularly the principles established in *The Bremen*, that such clauses are prima facie valid and should be enforced unless deemed unreasonable or unjust due to factors like fraud or overreaching. This standard has been consistently applied in the Ninth Circuit. In *Fireman's Fund Ins. Co. v. M.V. DSR Atl.* (131 F.3d 1336, 1339 (9th Cir. 1997)), the court upheld a foreign forum selection clause in a bill of lading, emphasizing that such clauses do not violate public policy or lessen liability under COGSA. Such clauses in bills of lading are thus broadly enforceable in the Ninth Circuit unless public policy, fraud, or reasonableness undermine their enforceability.

Conclusion

Goods are shipped internationally every day, but few people think about the challenges faced by parties who rely on ocean-bound carriers to transport and deliver those goods. Only when things go wrong may shippers discover that they have little legal recourse. They might be unable to recover the value of any merchandise lost or damaged, and they could find themselves pursuing legal action in a foreign jurisdiction.

Attorneys representing shippers should carefully review bills of lading and other important documents early in the process and should advise their clients on the risks they could be facing when agreeing to international transactions. When parties are educated and prepared at the outset, they will have a better chance of successfully navigating these problems.

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