

CAN THE TERMS OF A THROUGH BILL OF LADING ISSUED BY AN OCEAN CARRIER APPLY TO THE DOMESTIC PART OF A U.S. JOURNEY BY A RAIL CARRIER

For those of you involved in international shipping, a recent U.S. Supreme Court case helps clarify the applicable laws, when damage occurs on U.S. soil.

The U.S. Supreme Court in a lengthy opinion dealt with the issue in Kawasaki Kisen Kaisha Ltd. et al. v. Regal-Beloit Corp., et al./UP Railroad, 2010 U.S. Lexis 4982 (March 24, 2010).

Cargo owners delivered goods in China to Kawasaki and its agent, “K” Line America (“K” Line), and “K” Line issued four through bills of lading to the cargo owners which covered the entire course of shipment to interior USA. The bills of lading required “K” Line to arrange delivery of the goods from China to their final destinations in the United States by any mode of transportation selected by “K” Line. The bills of lading recorded that the carrier had received goods from the party that wished to ship them, stated the terms of carriage, and served as evidence of the contract for carriage. A “through bill of lading” covers any ocean and inland portions of the transport in a single document. “K” Line’s through bills of lading contained five relevant provisions: (1) each bill contained a “Himalaya” clause which extend the bill’s defenses and limitations on liability to parties that signed subcontracts to perform services contemplated by the bills, i.e. the railroad; (2) the bills permitted “K” Line to subcontract on any terms whatsoever for completion of the journey; (3) the bills provided that COGSA (Carriage of Goods by Sea Act) terms were to govern the entire journey; (4) the bills required that any dispute would be governed by Japanese law; and (5) the bills stated that any legal action relating to the carriage must be brought in the Tokyo, Japan District Court. The real substance of this case dealt with the enforceability of the Forum selection provision in the last clause. Simply stated, the defendants did not want to go to Tokyo to litigate the claim.

The cargo owners initially filed four separate lawsuits in Superior Court of California naming “K” Line and Union Pacific as defendants. The UP removed the suit to the U.S. District Court and both UP and “K” Line then moved to dismiss the case based on the parties’ Tokyo Forum Selection Clause. The U.S. District Court granted the motion ruling that the Forum Selection Clause was reasonable under the circumstances.

The case was then appealed to the 9th U.S. Circuit Court of Appeals and reversed. That Court concluded that the Carmack Amendment applied to the inland portion of the international shipment, and thus trumped the Forum Selection Clause, meaning that the legal fight could occur on U.S. soil.

The 9th Circuit noted that its position had been adopted by the U.S. Court of Appeals in the 2nd Circuit, citing Sompo Japan Insurance Company v. Union Pacific Rail Company, 456 F.3d 54 (2006), but was inconsistent with the U.S. Court of Appeals' decisions in the 4th, 6th, 7th, and 11th Circuits (citations omitted). The U.S. Supreme Court granted certiorari to address whether Carmack applied to the inland segment of an overseas import shipment under a through bill of lading.

Since the defendants in this case did not want to go to Japan to litigate the claims, they argued that the Carmack Amendment controlled the selection of the Forum. The Supreme Court explained that the Carriage of Goods by Sea Act (COGSA) did not limit the parties' ability to adopt a foreign Forum Selection Clause, and that the statute allowed the Parties the option of extending COGSA's terms by contract to cover the entire period in which the goods would be under a carrier's responsibility, including the inland portion of the transportation. Upon reviewing the Carmack Amendment, the U.S. Supreme Court stated that the Surface Transportation Board (STB) had "exclusive" jurisdiction to regulate transportation by rail carriers between places in the United States, as well as places in the United States and a place in a foreign country. Thus, in cases where it applied, Carmack imposed on the receiving rail carriers and the delivering rail carrier's, liability for damage caused during the rail transportation under a bill of lading regardless of which carrier caused the damage. Citing 49 USC § 11706(a). As analyzed by the Court for purposes of this case, it can be assumed that if Carmack's terms applied to the bills of lading, the cargo owners would have a substantial argument that the Tokyo foreign Forum Selection Clause in the bills of lading was preempted by the Carmack's venue provisions. The Court citing Norfolk Southern Rail v. Kirby, 543 US 14, 29 (2004), held that through bills of lading governed under Federal Maritime Law in spite of any state laws to the contrary and that so long as the bill of lading required substantial carriage of goods by sea, its purpose was to effectuate maritime commerce. The Kirby court, in its conclusion, noted that COGSA allows parties to extend its terms to an inland portion of a journey under a through bill of lading.

The Regal-Beloit Court analyzed Carmack and stated that a complaint based on Carmack required two conditions to be satisfied: (1) the rail carrier must provide transportation or service subject to jurisdiction of the STB; and (2) the carrier must "receive" the property for transportation under the statute. Carmack requires a "receiving" rail carrier (not the delivering carrier or a connecting carrier) to issue a bill of lading. Thus, it is critical to determine whether the shipment's point of origin includes a "receiving" rail carrier that must issue a bill of lading. The Court further reasoned that Carmack required the receiving carrier to issue a bill of lading even if it erroneously failed to issue such a bill. The controlling question was not whether the rail carrier in fact issued a Carmack bill of lading, but rather whether it was required to under Carmack's language. The Court reasoned that it followed that

Carmack did not apply if the entity receiving an overseas shipment under a through bill of lading covered the transportation to an inland location in the United States because there is no “receiving rail carrier” as required by Carmack. Thus, the initial carrier received the property at the shipment’s point of origin for overseas multimodal import, and not the domestic rail transporter. The Court concluded that “K” Line received the goods in China under a through bill of lading for shipment to the United States, and was thus not a “receiving rail carrier” under Carmack, and was not required to issue bills of lading under that statute. The UP was also not a “receiving carrier” because it too was not required to issue a bill of lading. The U.S. Supreme Court concluded, 6 to 3, that because the journey included no receiving rail carrier that had to issue a bill of lading under Carmack, Carmack did not apply and thus the agreement to litigate in Tokyo was binding. Interestingly, the opinion provided no reason for the Tokyo Forum Selection Clause.

In upholding COGSA, the opinion leaves intact what should be a well known trap for parties involved in international shipping. Under COGSA, an ocean carrier’s liability for cargo loss and damage may be limited, unless the parties agree otherwise, to a default limit of \$500 per “package”. The term “package” is not defined in the Act and thus a package may constitute one container with hundreds if not thousands of packages inside the container. In that instance, if there is no other agreement, the \$500 limitation is applied to the entire container. The same default provision applies to cargo damage that occurs in a rail accident inside the U.S. Smart shipping parties therefore insist on defining “package” to reflect the values agreed upon by the parties, and which also allows for more precise distribution of risks and procurement of insurance to cover those risks. Where an ocean bill of lading by its terms is in effect from port to port, and a separate bill of lading covers a shipment from a U.S. port, inland by rail or truck, Carmack will apply to the inland portion of the transportation. The majority opinion was written by Kennedy and joined by Roberts, Scalia, Thomas, Breyer and Alito. The dissenting opinion (three Justices, Sotomayor, Stevens and Ginsberg) took the position that Carmack applies to all U.S. inland transportation regardless of the place of origination of the shipment.

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