UK P&I CLUB

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LEGAL BRIEFING

Sharing the Club's legal expertise and experience

Cargo claims under US law

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Sharing expertise

This briefing is one of a continuing series which aims to share the legal expertise within the Club with our Members.

A significant proportion of the expertise in the Managers' offices around the world consists of lawyers who can advise Members on general P&I related legal, contractual and documentary issues.

These lawyers participate in a virtual team, writing on topical and relevant legal issues under the leadership of our Legal Director, Chao Wu.

If you have any comments or queries on this briefing, please contact the author, Susan Lee (susan.lee@thomasmiller.com or +1 201 557 7338) and she will be pleased to respond to your query.

The team also welcomes editorial suggestions from Members on P&I related legal topics and problems. Please contact Jacqueline Tan (jacqueline.tan@thomasmiller.com or +44 20 7204 2118) or Chao Wu (chao.wu@thomasmiller.com or +44 20 7204 2157)

Previous issues

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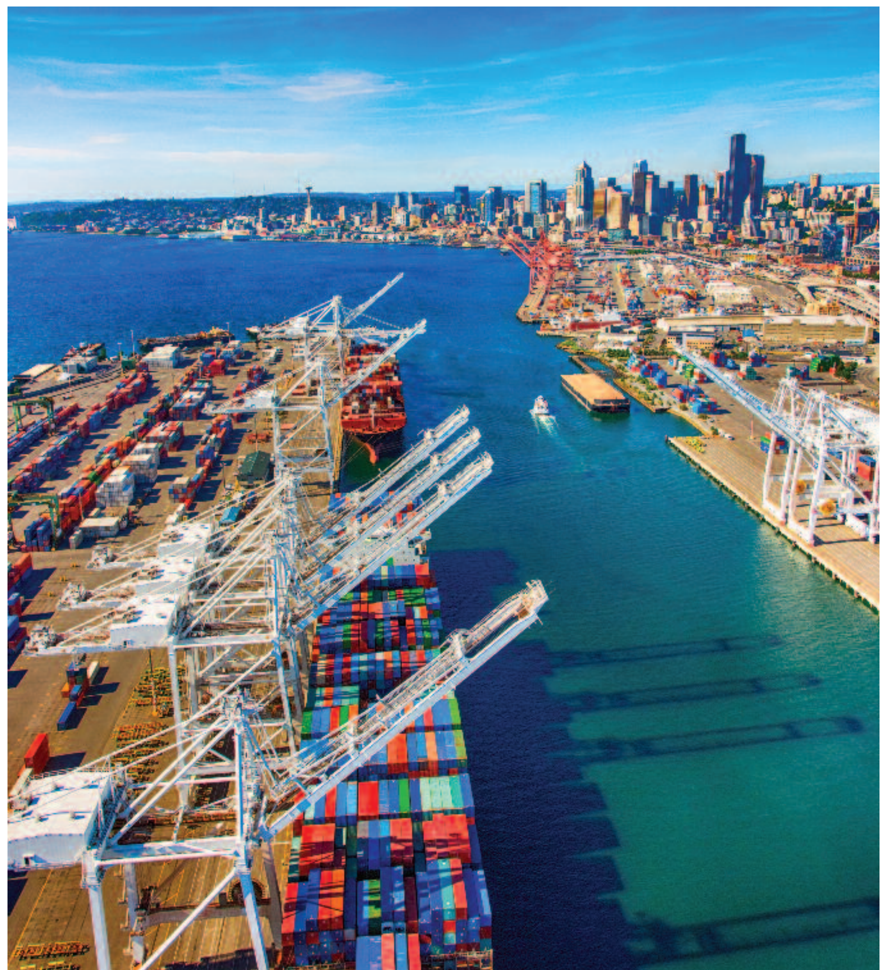
A Member's guide to cargo claims under US law

The law governing ocean carriage of cargo being shipped to and from US ports is generally the US Carriage of Goods by Sea Act (COGSA) 1936. This is simply the US enactment of the 1924 Hague Rules but with one or two important differences.

Other relevant local laws include the related but now little-used Harter Act for shipping, the rather onerous Carmack Amendment for inland transport, the Federal Bills of Lading Act and individual US state laws.



Being subject to COGSA

COGSA applies by force of US law to, 'every bill of lading or similar document of title which is evidence of a contract of carriage of goods by sea to or from ports of the United States, in foreign trade.' The Act governs the carrier's liability to cargo interests whenever a bill of lading or similar document of title is the contract of carriage.

Under COGSA, the 'carrier' is defined as including, 'the owner or the charterer who enters into a contract of carriage with a shipper.' In practice it can include all owners and charterers involved with carrying the cargo.

Like the Hague and later, the Hague-Visby Rules, COGSA applies only from the time the goods are loaded on board to the time they are discharged from the vessel. Parties often contractually agree to extend the Act's application beyond this to avoid other US transport laws applying.

This can be done by:

- Extending the defences and limitations available under COGSA to third parties engaged by the ocean carrier, such as inland carriers, stevedores, terminals and other agents, using a 'Himalaya clause' in the bill of lading. This is usually accompanied by a 'clause paramount' specifying US law and extending COGSA's application beyond loading and unloading.
- Extending COGSA's application to private carriage (e.g. where the charterparty is the contract of carriage) or a non-negotiable/straight bill of lading or waybill by including a clause paramount or similar choice-of-law provision in the applicable charterparty, bill of lading, waybill or contract of affreightment.

Carrier's limits on liability

The carrier's duties under COGSA are identical to the duties imposed under the Hague/Hague-Visby Rules. The Act also exempts the carrier from liability for loss or damage to cargo due to the same set of excepted causes.

But uniquely, COGSA limits a carrier's liability for cargo loss or damage to US$500 'per package… or in case of goods not shipped in packages, per

customary freight unit'. For the US$500 package limitation to apply, the shipper must have been given sufficient notice of the limitation and a fair opportunity to opt out of it by declaring a higher value for the cargo in exchange for paying a higher freight rate.

Not surprisingly, the question of what constitutes a COGSA package and customary freight unit has been the subject of much litigation in the USA.

A 'package' for the purposes of COGSA has been defined by one leading US court as 'a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods'.

Thus, boxes, crates, pallets, skids and sometimes shipping containers can constitute packages. Project cargo – such as a power plant, a fire engine or a yacht – may also be considered a package if it is shipped on a rack, cradle or other type of support.

US courts generally look at the 'Number of Packages/Containers' column and then the 'Description of Goods' column in a bill of lading to determine the applicable package. If the type of unit identified in the Number column qualifies as a package, this is held to be the number packages. However, if the Number column does not identify a number of units or if it only identifies a number of containers, the courts will refer to the Description column to determine what unit constitutes the COGSA package.

Failing that, the courts will look outside the bill of lading to secondary evidence such as invoices, packing lists, communications, survey reports and how the cargo was consolidated for shipment. US courts generally hold ambiguities on a bill of lading against the carrier, so careful attention should be given to the way in which units of cargo are described on each bill of lading.

For cargo not shipped in packages, such as bulk or unenclosed cargo, most US courts consider the unit by which freight was calculated – typically weight or volume – as the applicable customary freight unit. But if the bill of lading clearly states that freight is charged on a 'lump-sum' or 'per-item' basis, this may be deemed to be the applicable customary freight unit regardless of whether it was actually paid for on that basis.

Deviation and other breaches

Like the Hague/Hague-Visby Rules, COGSA allows 'reasonable' deviation but adds, 'if the deviation is for the purpose of loading or unloading cargo or passengers it shall…be regarded as unreasonable.'

If a deviation is found to be unreasonable, the carrier will be in fundamental breach of the Act. As such it will most likely lose its limitations and defences, and be held liable for the actual

damage proved by the cargo interest. Also, bills of lading clauses that allow deviation from the direct or customary route will probably be held by the US courts to give no more rights to deviate than allowed for in the Act.

The question of whether a deviation is unreasonable will turn on industry practice and custom, prior dealings between the parties, descriptions of the route on the bill of lading and what was known or should have been known to the shipper at the time the cargo was booked.

Most US courts restrict the definition of an unreasonable deviation to geographic deviations and the 'quasi-deviation' of unauthorised deck stowage of cargo. In practice, any action that would expose a cargo to a substantially greater risk of loss or damage will make the carrier liable for the full cost.

Ensuring proper delivery

Under US law, carriers are required to receive the original bills of lading before delivering the cargo when the bill of lading:

- is issued in the US, so is subject to the US Federal Bills of Lading Act, and is a negotiable bill of lading
- expressly requires the presentation of the original bill of lading prior to delivery
- contains a choice-of-law clause providing for it to be governed by US law.

However, the carrier's duty of proper delivery may be modified by industry practice, local law, regulation and custom at the destination port. In such instances, the carrier' duty can often be discharged by delivering the cargo to a government entity, which is charged by local law or custom with the exclusive duty to receive and distribute cargo to the consignee.

In the event of a mis-delivery claim and the carrier is held liable to the consignee or subsequent holder of the bill of lading, the carrier may be able to sue the shipper for any inaccurate or misleading information which led to improper release of the cargo.

Time bars for cargo and indemnity claims

As in the Hague/Hague-Visby Rules, COGSA has a one-year time bar provision from when goods are delivered, or should have been delivered, to bring claims for loss, damage or mis-delivery of cargo.

The Act's time bar does not, however, apply to a carrier's indemnity claim against third parties for recovering amounts paid to cargo interests for loss or damage. The timing for this under US law is generally governed by the legal principle of 'laches' – an unreasonable delay in asserting a claim – the time period for which starts on payment of the cargo claim by the carrier.

However, contracts with US road and

rail carriers and warehouses may contain contractual notice or time-bar provisions that are relatively short. It is important to comply with these to preserve any indemnity claim the carrier may have.

Shifting nature of burden of proof

Similar to the Hague/Hague-Visby Rules, the cargo interest under COGSA bears the initial burden of establishing a case for cargo loss or damage against a carrier, by showing that the cargo was loaded onto the vessel in good condition and delivered by the vessel in damaged condition.

The burden then shifts to the carrier to exonerate itself by proving the harm resulted from an excepted cause or that there was no negligence. However, this does not necessarily end the inquiry. For example, if the shipper can show that despite the excepted cause of an error in navigation, the damage was also partly due to the vessel's unseaworthy condition or the cargo's improper stowage, the burden shifts back to the carrier.

The carrier must in turn respond for all damage caused, apportioning the damage to the excepted cause and other causes. If it is unable to do so, then, under US law, it will be held responsible for all the damage.

The Harter Act

The 1893 US Harter Act still applies by statute to cargo shipped under a bill of lading between two or more US ports, and between a US port and a non-US port. The Act is effectively codified by COGSA but it applies from the time of receipt of the cargo by the carrier to the time of delivery to the consignee.

In practice, most carriers involved in US trade include a US clause paramount or similar provision in the bill of lading to extend COGSA beyond the loading to discharge period. As such, the Harter Act is almost always replaced by COGSA.

Carmack Amendment

US road and rail transportation is generally governed by a 1935 US law called the Carmack Amendment. It differs from COGSA in a number of important ways.

Carmack imposes almost strict liability upon carriers, 'for the actual loss or injury to the property'. A carrier is only relieved from that liability if it can prove both lack of negligence and that the damage was due to an act of God, public enemy or public authority; act or omission of the shipper; or the inherent nature of the goods. The law requires use of US courts only, and the time bar for cargo interests to submit claims to carriers is nine months followed by an additional two years to sue.

Because COGSA affords much greater protections to carriers, both inland and ocean carriers share a common interest in ensuring Carmack does not apply.

Accordingly, multi-modal through bills of lading involving a shipment to or from US ports typically contain a US clause paramount and a Himalaya clause, contractually extending the benefits of COGSA to all inland and ocean legs of the shipment, and to all inland and ocean participants acting for the ocean carrier. This is generally supported by the US courts.

US state law and foreign law options

In the event of loss or damage to ocean cargo or multi-modal through cargo in the US prior to loading or after discharge from a vessel, US state laws or even foreign laws may also apply.

Moreover, if the bill of lading is subject to COGSA either by statute or contract, but provides for disputes between the parties to be resolved in a non-US forum, there is a risk of conflicts of law. A non-US court or tribunal may not feel bound to apply US law, and apply the local law instead.

Summary

All cargo shipped in or out of the USA under a bill of lading is subject to COGSA. It is the US enactment of the Hague Rules for ocean carriage, and as such, should provide no major concerns to Members trading with the USA.

While US cargo damage litigation frequently focuses on what constitutes 'packages' or 'customary freight units' for COGSA's US$500 liability limit, provided these units are clearly set out in the bills of lading – or higher liability limits are agreed – this should not be an issue.

The US courts take a somewhat stricter view of what constitutes 'unreasonable deviation', so Members should take extra care to avoid any action which would expose a cargo to a substantially greater risk of loss or damage.

Members also need to be careful when using US bills of lading or those subject to US law to ensure proper delivery, either by receiving the original bills of lading before releasing the cargo, or by delivering the cargo to a government entity charged with the duty to receive and distribute cargo to the consignee.

With regard to inland carriage by road and rail, the governing US Carmack Amendment imposes far stricter liability on carriers than COGSA. As such, Members would be wise to ensure that multi-modal through bills of lading involving US shipments stipulate that COGSA shall apply throughout the carriage and transportation or include a Himalaya clause and a paramount clause to extend COGSA's defences and limitations to all parts of the cargo journey.

As elsewhere, Members are free to make indemnity claims against US third parties who damage the cargo, for which there is no fixed time bar.

If you have any questions on the above, please do not hesitate to contact your usual contact at the Club. ■

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