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Ocean Carriers Are Not Always Liable

By Marilyn Raia

Many cargo shippers think ocean carriers should be fully liable for whatever happens to their shipments during transit. It is not a totally irrational thought considering the ocean carrier and its subcontractor(s) have sole possession of the shipments in transit. However, under US law, an ocean carrier transporting goods is not necessarily liable for whatever might happen to them during transit. And when held liable, an ocean carrier and its subcontractor(s) may not be liable for the full value of a lost or damaged shipment.

The Harter Act Basics

In the "old days", i.e. before 1893, ocean carriers would routinely put clauses in their bills of lading exculpating themselves from liability for all cargo loss or damage. Cargo owners would often be left with no remedy when their shipments were lost or damaged.

In 1893, Congress enacted the Harter Act, which one maritime law scholar called "one of the first consumer protection acts". Under the Harter Act, ocean carriers transporting goods from or between ports of the United States and foreign ports were prohibited from putting clauses in their bills of lading that purported to relieve them from liability for cargo loss or damage resulting from a variety of causes. The disallowed causes included negligence in loading, stowing, caring for or properly delivering a shipment.

Under the Harter Act, ocean carriers were also prohibited from putting clauses in their bills of lading that purported to lessen their obligation to exercise due diligence to make the carrying vessel seaworthy and capable of undertaking the intended voyage. The Harter Act governed until a "proper delivery" of a shipment was made.

The Harter Act was a compromise between the ocean carriers who wanted no responsibility for cargo loss or damage, and the cargo owners who wanted the right to recover for cargo loss or damage. It allowed an ocean carrier to avoid liability under certain circumstances. Those circumstances included: 1) perils of the sea; 2) errors in navigation or management of the carrying vessel; 3) acts of God or the public enemy; 4) inherent vice of the shipment; 5) insufficiency of packaging; 6) legal seizure; 7) acts or omissions of the shipper; and 8) acts to save life or property at sea and any deviation arising therefrom.The circumstances under which the ocean carrier was exempted from liability under the Harter Act were essentially circumstances outside of its control.

COGSA Basics

In 1936, Congress enacted the United States Carriage of Goods by Sea Act, known as "COGSA". COGSA was based on a 1924 international convention entered into in Brussels. The convention was part of a move toward uniformity of ocean bills of lading used in international commerce. Various countries ratified the international convention as is and others, like the United States and Canada, enacted legislation based on it.

COGSA applies to contracts of carriage to or from the United States in foreign trade, i.e. international imports and exports. By its terms, it governs during the "tackle to tackle" period, which means from the time a shipment is loaded onto the carrying vessel until it is discharged from the carrying vessel. It does not apply to cargo carried on deck that is stated to be carried on deck on the bill of lading. However, containers that are carried on the deck of a containership are not considered deck cargo for the purposes of COGSA.

COGSA can be extended by contract to govern during the entire time a shipment is in the carrier's custody or control, that is, before being loaded to or after being discharged from the carrying vessel or during intermodal carriage. It can also be contractually extended to cover United States domestic shipments. And, it can be extended to govern the carriage of deck cargo.

COGSA did not supersede the Harter Act in its entirety. The Harter Act still governs bills of lading for domestic shipments unless COGSA has been contractually extended to govern them. It also governs the before and after tackle periods unless COGSA has been contractually extended to cover those periods.

There are differences between the acts but there are many similarities. Like the Harter Act, COGSA strikes a balance between the ocean carrier's interests and the cargo owner's interests. It imposes obligations on the ocean carrier before the commencement of the voyage. The ocean carrier must exercise due diligence to 1) make the vessel seaworthy; 2) properly man, equip, and supply the vessel; and 3) make the cargo carrying spaces fit and safe to receive the cargo, carry it, and keep it in good condition. To balance those obligations, COGSA allows an ocean carrier to avoid liability for certain causes of loss or damage to a shipment.

Exemptions from Liability

Both the Harter Act and COGSA provide ocean carriers with certain exemptions from liability for cargo loss or damage. COGSA's exemptions include those in the Harter Act plus several more. COGSA allows ocean carriers to avoid liability for cargo loss or damage caused by 1) fire unless caused by the ocean carrier's fault; 2) an act of war; 3) quarantine restrictions; 4) strikes, lockouts and labor restraint; 5) riots and civil commotions; 6) insufficiency or inadequacy of marks; and 7) latent defects not discoverable by due diligence. COGSA also gives ocean carriers a "catch all" exemption from liability known as the "Q clause". It allows an ocean carrier to avoid liability for any other cause without its actual fault or privity.

Limitation of Liability

The Harter Act does not provide for, nor does it prohibit, clauses in bills of lading limiting an ocean carrier's liability for cargo loss or damage. Rather, under the Harter Act, ocean carriers may limit their liability to a "reasonable amount." COGSA specifically provides for a limitation of liability of $500 per "package" or $500 per customary freight unit if the cargo is not in "packages." Unfortunately, COGSA does not define the term "package" which has resulted, and continues to result, in much litigation. Ocean carriers want the largest unit, such as the entire shipping container, to be the "package" to minimize the cargo owner's recovery. The cargo owners want the smallest unit, such as each carton inside the shipping container, to be the "package" to maximize the recovery.

Under COGSA, an ocean carrier desiring to limit its liability for cargo loss or damage must give the cargo shipper a fair opportunity to declare a value for a shipment that is greater than $500 per "package" or $500 per customary freight unit. The same principle applies as a matter of common law when the Harter Act governs. An ocean carrier may not be able to limit its liability in all cases. Limitation of liability is not permitted when an ocean carrier subjects the cargo to unreasonable risks not contemplated by the parties when entering into the bill of lading contract, also known as an unreasonable deviation.

An ocean carrier's ability to limit its liability is the result of another compromise between the ocean carrier and cargo owner interests. In exchange for limited liability, the cargo owner pays a reduced freight rate. If the cargo owner wants to recover the full value of the lost or damaged cargo, it pays a higher freight rate.

Extension of COGSA Benefits to Carrier's Subcontractors

COGSA allows ocean carriers to extend the benefits of the terms and conditions of their bill of lading, which customarily include COGSA, to various subcontractors that participate in the handling and transportation of a shipment. An ocean carrier is also permitted to put a clause in its bill of lading that prohibits the cargo owner from suing those subcontractors. The intent to extend the benefits of the bill of lading and the prohibition of suits against subcontractors must be clearly stated. If the extension of benefits is clearly stated, the cargo owner's right to recover for cargo loss or damage caused by the ocean carrier's subcontractor is subject to the same defenses and limitation of liability available to the ocean carrier.

Cargo owners would like ocean carriers to be liable in full for the loss of or damage to a shipment during transit. Ocean carriers would like to avoid liability for the loss of or damage to a shipment during transit. The 127 year-old Harter Act and the 84 year-old COGSA strike a balance between those competing interests. To promote fairness, they impose obligations on ocean carriers. But they also allow ocean carriers to avoid liability under certain circumstances beyond their control. They allow an ocean carrier and its subcontractors to limit their liability in exchange for a reduced freight rate. And when the ocean carrier exposes a shipment to risks outside of the contemplation of the parties, it is liable in full. Isn't that fair?