

Kyodo Won't be Shanghai'ed: A Foreign Forum Selection Clause Isn't Enforceable Under Carmack

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Shipper Kyodo gave clear instructions to Chinese ocean carrier Cosco that its cargo of pork had to be kept at 32 degrees at all times from Ensenada, Mexico to Long Beach, California (by truck) and then on to Kobe, Japan (by ship). During the land-based leg of the haul, reefer temperature settings plunged to 18 degrees, ruining the cargo. Kyodo sued Cosco, which had issued a through bill of lading, in the U.S. District Court for the Central District of California, notwithstanding the bill of lading's foreign forum selection clause mandating that lawsuits be brought in Shanghai. Cosco asked the court to dismiss Kyodo's action based on jurisdiction.

Such jurisdictional clauses are enforceable under the U.S. Carriage of Goods Act (COGSA). Just ask the shipper in the 1995 *Sky Reefer* case, wherein the U.S. Supreme Court booted a cargo claim to Japan based on a clause similar to the one in the *Koyodo* matter. *Sky Reefer* basically lets carriers force shippers to bring cargo claims in places of the carriers' choosing, so long as those places embrace COGSA-esque principles (which most of the world does). Having to travel half way around the globe to sue a carrier often makes cargo litigation impractical for all but the largest losses or the most determined plaintiff shippers.

But, the *Kyodo* court found, COGSA doesn't control here. Because a trucker Cosco engaged allegedly screwed up, the Carmack Amendment to the Interstate Commerce Act kicks in with its provisions allowing shippers to select a U.S. forum. Courts have held differently in similar circumstances, and proposed amendments to COGSA would statutorily extend the ocean cargo liability regime's dominion to losses on the highway.

But this court concluded that COGSA addresses only salty cargo damage. It noted that an express intention of Carmack is "to relieve shippers of the burden of searching out a particular negligent carrier" in circumstances where more than one is involved. This is particularly significant in the age of intermodal transportation, and was the precise issue in *Kyodo*.

Some legal precedents have held ocean carriers liable under Carmack, even though they never moved the cargo on a road. No separate motor carrier bill of lading was required in those cases to sever the jurisdictional analysis. The *Kyodo* court actually concludes that Carmack "prohibits" forum selection clauses in ruling that the lawsuit stays stateside.

Carmack's applicability to such matters could have far-reaching results. COGSA is a huge statute with detailed provisions addressing specified carrier defenses, per package liability limitation, route deviation, bill of lading issues, and a host of other topics. Carmack consists of a few pithy paragraphs which hold carriers fully liable for

lost/damaged cargo subject to their ability to limit that liability (to a reasonable amount), plus a few statements regarding intermediaries. It leaves most specifics for courts to decide, and our berobed friends have obliged with an extensive body of surface transportation case law. That's good in the sense that judges interpret and apply the law on a case-by-case basis taking into account individual circumstances. But it's bad because there's inconsistent judicial precedence on some pretty key issues, namely, what hoops a carrier must jump to limit its cargo liability.

While COGSA governs international ocean transit, Carmack applies to domestic water carriage. Controlling are the points of origin and destination of the subject cargo, not how far a truck or boat goes in the process. But in international transportation arrangements, COGSA and its laundry list of carrier defenses often are extended to cover domestic service providers – such as stevedores, warehousemen and, yes, truckers – by way of a bill of lading provision called the Himalaya Clause. In those instances, players other than steamship lines can limit their liability to 500 bucks a package just like the carrier.

If *Kyodo* becomes the judicial norm, ocean carriers will have a harder time dodging shipper claims based on jurisdiction clauses in their bills of lading. However, they can still force shippers to sue abroad by including such clauses in service contracts, making them applicable to claims based on trucker negligence. For the most part, jurisdiction is a part of the bargaining process, unless the players ignore it and let the courts and statutes decide.

***Ref: Kyodo U.S.A. v. Cosco N. Am.*, pending in the U.S. District Court for the Central District of California, CV 01-00499 LGB (Manx)**