

Ocean Hazmat Shippers Beware: IMDG Code Compliance May Not Suffice

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It appears the courts are joining federal regulators in a trend toward holding shippers more responsible for hazardous material mishaps. Witness a horrible fire that broke out on the Brazil-bound *M/V DG Harmony* about seven years ago, resulting in the vessel's total destruction and some \$18 million in damages. The vessel owner, cargo owners, insurers and other players recently went to the mat in a New York federal court, which slapped a hazmat manufacturer/shipper with full liability. The decision was notwithstanding the shipper's compliance with the International Maritime Dangerous Goods (IMDG) Code and honest ignorance of dangers it had created.

Chemical company PPG Industries manufactured, sold and shipped a cargo of calcium hypochlorite (cal-hypo). Carrier Cho Yang slotted the freight with a vessel under charter to the Independent Carriers Alliance. Fire broke out near Brazil, the crew couldn't contain it, the ship was abandoned (thankfully, no one was hurt), and three weeks later, the vessel was scrapped.

It's no news that shippers are responsible for knowing their product, packing it properly, labeling and warning about hazmats adequately, and advising carriers and other service providers about any cargo peculiarities. The IMDG Code provides the specifics for a plethora of hazmats in an internationally accepted format regularly used by such shippers. On the face of it, PPG apparently did all it was supposed to do. So why was its feet held to the fire?

It turns out that cal-hypo is some tiger when it comes to chemical instability and explosive potential. The court's opinion goes through a scientific explanation (based on expert testimony) you almost need a chemistry degree to understand. Put simply, cal-hypo's properties are subject to "thermal runaway," meaning that the right (or wrong) combination of temperature, packaging, ventilation and other factors can cause the stuff to heat up exponentially on its own to the point a vessel and its other freight become toast. The court dismissed PPG's protest that the fire's cause was uncertain, finding the shipper's expert witness not credible (largely because he was inadequately versed in shipping issues).

The IMDG Code contains provisions for safety procedures designed to prevent that chemical snowball effect. The carrier stowed adequately packaged cal-hypo in an acceptably cool hold, and fire resulted nonetheless. But here's where some rather severe legal concepts and attitudes came into play. Federal maritime law, which essentially embraces general products liability law, holds hazmat manufacturers to the standard of experts. It didn't help PPG's cause that it was both the cargo's manufacturer and shipper. International standards and protocols notwithstanding, manufacturers will be held liable

if injured parties aren't informed "of the specific hazard and of the extent of the harm that could follow, so that his choice to brave it was an informed one."

Following certain product liability law, the court held that those who make and/or ship hazmats may be "strictly liable" for injuries. This legal standard is particularly difficult to defend against, as it imposes some daunting legal presumptions and requires defendant manufacturers to demonstrate plaintiffs knew or should have known they were playing with fire when engaged with the defendant's product.

Considering PPG's expertise and background, similar previous mishaps PPG was aware of, and the disaster's sheer enormity, the court concluded that a hazmat manufacturer/shipper of something this dangerous better shoulders risk than would a carrier that processes huge cargo volumes within limited time frames. Apparently, the cal-hypo at issue was still warm from production when it was placed in drums for shipment, increasing the likelihood it would spontaneously combust. Not something a chemical manufacturer should let happen.

The court applied the U.S. Carriage of Goods by Sea Act (COGSA) and similar precedents in support of its conclusion. COGSA holds shippers responsible for "all" unforewarned hazmat losses, including all damages that "directly and indirectly" ensue. Even though the freight was booked with Cho Yang, PPG gets to pay the tab of other parties "indirectly" harmed, such as other shippers and insurers. PPG protested it had no duty to warn a carrier that already had knowledge (per the IMDG Code) of the danger, but the court found the carrier's knowledge incomplete.

This case, especially when considered in the context of onerous demands federal regulatory agencies saddle hazmat shippers with, should give pause to those who ship and book chemical cargo. You can't be too careful in confirming that special-needs freight is in order, regardless of its source or origination. New federal regs broadening the definition of a cargo's "offeror" (see September 2005 Legal Lookout) only complicate the matter. Hazmat shippers should have in place detailed transportation safety programs that might have to exceed the IMDG Code or similar protocols. Lest they face significant potential liability.

Ref: *In re M/V DG Harmony*, 2005 WL 2649907 (SDNY 2005).