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Limitations of Liability Under the Carriage of Goods by Sea Act

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An important aspect of international commerce is the topic of limitations of liability under federal law and bills of lading. The main statute governing bills of lading in the United States is the Carriage of Goods by Sea Act (COGSA), enacted as 46 U.S.C.A. 1301 et al. and now cited as 46 U.S.C. § 30701 note § 4(5). COGSA governs cargo shipped between the United States and foreign ports and has been incorporated into bills of lading for transportation between the continental United States and other U.S. territories, including Puerto Rico and the U.S. Virgin Islands, typically through a clause paramount listed on the back of the bill of lading. Although certain overlapping statutes exist, including the Shipping Act of 1984, the Harter Act, and the Bill of Lading Act, these do not deal with limitations of liability to the same extent. Notably, a number of international laws also address limitations of liability in ocean shipments, including the Hamburg Rules and the Hague Convention.

One of the most litigated COGSA statutes limits liability to $500.00 per package on cargo claims. This seemingly straightforward requirement has led to varied contentious litigation. Everything from a shipping container to a box of clothing has been litigated on this issue. When adopted in 1936, it was believed that this statute was in the shipper's favor, but this has not necessarily been the case over the last eighty-one years.

46 U.S.C.A. § 1304(5), the relevant COGSA section, states the following:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.[1]

A carrier seeking to assert the package limitation must provide an opportunity for the shipper to declare a higher value.[2] It is best if this is clearly designated on the bill of lading. Very few shippers, however, will take advantage of this opportunity to declare a higher value, although it is usually a cheaper option than declaring a higher value with the ocean carrier. Marine cargo

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insurance can often be purchased through the ocean freight forwarder or a non-vessel operating common carrier, entities that are often used by shippers to book cargo with ocean carriers. The non-vessel operating common carrier typically acts as a consolidator for the cargo and is a carrier licensed by the Federal Maritime Commission that does not operate the actual ship; thus, it may include a $500.00 per package limitation on its bills of lading.

Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co. demonstrates the importance of insurance. In this case, the court held that a stage was a package and that Tropical Shipping Construction Company Ltd., the ocean carrier, was only liable for $500.00.[3] The shipper in the matter had two forms of insurance, such that it could claim more than $500.00 from the insurance carriers. Although the package limitation was used to limit the value of the stage to $500.00, the insurance from the two different insurance carriers, one a property insurer and the other a cargo insurer, contributed considerably more to the loss.

46 U.S.C.A. § 1304(5) also states:

> By agreement between the carrier, master, or agent of the carrier, and the shipper, another maximum amount than that mentioned in this paragraph may be fixed: Provided, that such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.[4]

If the package limitation does not apply, then the invoice value is often used to compute damages. Replacement value has also been used in some instances when the item can be quickly replaced with no damages due to a loss of market. Fair market value is another means that has been used to compute damages.[5]

A good reference as to what does and does not constitute a package is contained in 2A-XVI, Benedict on Admiralty § 170, which gives a list of different items such as containers, pallets, vehicles, etc., that have been considered to be a package under the COGSA. There are numerous cases on what constitutes a package and/or a customary freight unit. The author was involved in a case where two school buses were considered to be packages, *Expeditors Int'l of Wash., Inc. v. Crowley Am. Transp., Inc.*[6] This case, although dealing with a domestic shipment of buses from Ohio to Puerto Rico, was one in which the COGSA was incorporated through a clause paramount in the bill of lading, applying the COGSA to this domestic shipment. The court ruled that the plaintiff could recover a maximum of $1,000.00 or $500.00 per customary freight unit (bus) for the alleged misdelivery of the buses. When shipping vehicles of any kind, it is a good practice to ensure the vehicle is insured or declared at a higher value. Declaring a higher value could be more expensive than purchasing insurance.

Another case worth noting is *American Home Assurance Co. v. Crowley Ambassador*, where the bill of lading indicated that the container held "22,355 pieces" of clothing, and the garments were prepackaged in sets wrapped in plastic.[7] There was no indication of how many sets there were in the container. The court held

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that it had "no other viable option" than to treat the container as the "package."[8] This was seen as an issue as to whether or not the packages can stand on their own as one fully packaged item that could be shipped on its own. Notably, *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.* found that a master carton of clothing was held to be a package.[9]

There are cases holding that a container is not a package, such as *Tokio Marine & Fire Ins. Co. v. Nippon Express U.S.A. (Illinois), Inc.*, where the bill of lading indicated that one container held 33 skids consisting of 177 pieces, with the number 1 in the column for packages and the number 33 for the skids. The skids were held to be a package.[10] It was affirmed at 45 F. App'x 710 (9th Cir. 2002). In this case, the skids were certainly a method used to prepare the cargo for shipment.

Pallets are sometimes considered to be packages. In *Groupe Chegaray v. De Chalus v. P&O Containers*, 2,270 shoebox-sized corrugated cardboard cartons of perfumes and cosmetics were placed into 42 larger units and were bound together with plastic wrap as pallets with an additional 2 cartons remaining inside an 8-ton, 40-foot container.[11] The description on the bill of lading described the contents of the container as "42 packages [said to contain] 2268 cartons + 2 ctns" of cosmetics.[12] The court held that each of the forty-two palletized units and each of the two remaining cartons constituted a COGSA "package," as pallets are another form of preparation for shipment and the individual cartons could not have been shipped and placed individually into a container.[13]

The bill of lading will typically have a section to fill in the number of packages. This can come into play in these cases; however, courts will look beyond this column on the bill of lading.

It should be noted that the carrier cannot arbitrarily decide to apply the limitation, if the carrier knows what is actually being shipped and/or was constructively notified of the value of the shipment.[14] In other words, the shipper cannot be denied an opportunity to declare a higher value and then have a limitation imposed upon it.

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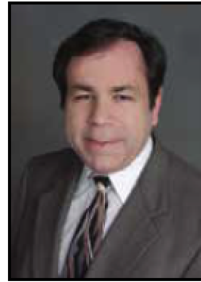
The $500.00 per package limitation can be raised as an affirmative defense. The burden is on the carrier to prove the applicability of an affirmative defense. This issue should be resolved early in a case whenever possible. If a claim is going to be limited to $500.00, the parties will want to know that before they go through considerable discovery and possible trial preparation.

Another important limitation is the statute of limitations. It is only one year from the date of delivery or when delivery should have been made by the carrier.[15] This is quite short when compared to Florida's four-year statute for negligence and five-year statute for breach of contract on written contracts. A number of cases deal with delivery, so the attorney needs to be careful in interpreting what constitutes delivery. Extensions of time can often be obtained from the ocean carrier, but you must be sure to get the extension from the proper party and it should be in writing. In fact, there could be several parties involved that are able to claim this limitation through a Himalaya clause from whom the shipper might also need to get an extension of time. If there is a non-vessel operating common carrier, that entity can also assert the $500.00 per package limitation. It can be tricky in some instances to determine who is the correct carrier.

The package limitation might not apply if there is an unreasonable deviation.[16] This typically could be delivery to the wrong port. A deviation, however, does not extend the time for filing a lawsuit under the COGSA.

The package limitation, along with the rest of the COGSA, can be extended to inland shipments on intermodal bills of lading. This is typically where the carrier picks up the cargo from the point of origin to the point of destination. *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*[17] and *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* are two cases dealing with extending the COGA to inland shipments.[18]

Shippers and their attorneys should educate themselves on the package limitation for international shipments and, in some cases, for domestic shipments. When handling a claim, it is necessary to ask for the entire bill of lading, both the front and the back, as they typically cross reference each another. The package limitation is a reason for a shipper to purchase cargo insurance to protect the full value of the items being shipped.



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Endnotes

1 46 U.S.C.A. § 1304(5).

2 *Aetna Ins. Co. v. M/V Lash Italia*, 858 F.2d 190 (4th Cir. Md. 27 Sept. 1988; *Jean-Baptiste v. New York Terminal 1, Inc.*, 2014 U.S. Dist. LEXIS 14746, 2014 WL 495160); and 2A-XVI. Benedict on Admiralty § 166.

3 *Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987 (11th Cir. 2001).

4 46 U.S.C.A. § 1304(5).

5 8-V Benedict on Admiralty § 5.15 (2017)(discussing all three methods of computing damages).

6 *Expeditors Int'l of Wash., Inc. v. Crowley Am. Transp., Inc.*, 117 F. Supp. 2d 663 (D. Ohio 2000).

7 *American Home Assurance Co. v. Crowley Ambassador* 2003 AMC 510, 512 (S.D.N.Y. 2003).

8 2003 AMC at 516.

9 *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.*, 240 F.3d 956 (11th Cir. 2001).

10 *Tokio Marine & Fire Ins. Co. v. Nippon Express U.S.A. (Illinois), Inc.*, 155 F. Supp. 2d 1167, 2001 AMC 1239 (C.D. Cal. 2000).

11 *Groupe Chegaray v. De Chalus v. P&O Containers*, 251 F.3d 1359, 1367-70 (11th Cir. 2001).

12 251 F.3d at 1365.

13 251 F.3d at 1368.

14 *See Belize Trading v. Sun Ins. Co.*, 993 F.2d 790, 1993 U.S. App. LEXIS 14774, 7 Fla. L. Weekly Fed. C 475.

15 46 U.S.C.A. 1303(6).

16 *Unimac Co. v. C.F. Ocean Serv.*, 43 F.3d 1434 (11th Circuit 1995) and Benedict on Admiralty Volume 8 § 5.05.

17 *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004).

18 *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89 (2010).