June 2010 www.ssd.com

COGSA Trumps Carmack– Recent Supreme Court Decision Highlights Tension Between the US and Rotterdam Rules

On June 21, 2010 the United States Supreme Court ruled that the Carmack Amendment[1] does not apply to a cargo shipment originating overseas under a through bill of lading where the bill of lading complies with the Carriage of Goods by Sea Act (COGSA)[2] and includes a Himalaya Clause extending certain defenses and limitation of liability to subcontractors.[3] The Court focused on the question of whether the terms of a through bill of lading issued abroad by an ocean carrier apply to the domestic portion of the imported goods journey by a domestic rail carrier, despite prohibitions or limitations in another federal statute (in this case the Carmack Amendment) governing the domestic rail carriage of goods.

Regal-Beloit Corporation (Regal), a manufacturer, contracted with the shipping company Kawasaki Kisen Kaisha, Ltd. and its US agent (collectively "K" Line) to ship Regal's cargo from China to cities throughout the United States.[4] "K" Line and Regal entered into intermodal bills of lading covering the shipment from China to its ultimate destination inland in the United States.[5] In the bills of lading, "K" Line designated COGSA to govern its responsibilities to Regal.[6] The bills of lading also contained a clause designating the law of Japan as the controlling law of the contract requiring that "any action thereunder or in connection with Carriage of Goods shall be brought before the Tokyo District Courts in Japan."[7] "K" Line used its vessel to carry the goods from

Founded in 1890, Squire, Sanders & Dempsey L.L.P. has lawyers in 32 offices and 15 countries around the world. With one of the strongest integrated global platforms and our longstanding one-firm philosophy, Squire Sanders provides seamless legal counsel worldwide.

Contacts:

Douglas R. Burnett
+1.212.872.9820

Michael P. Hartman
+1.212.872.9894

Alan Heblack
+1.212.872.9849

John J. Reilly
+1.212.872.9865

Squire Sanders emphasizes quality, efficiency and alignment with client goals as core standards. Our Partnering for Worldwide Value SM initiative is focused on continuously improving our service delivery to maximize the value of our services to clients. Squire Sanders wholeheartedly endorses the Association of Corporate Counsel's Value Challenge® and encourages and manages development and implementation of processes and tools to continually improve staffing and pricing models, training and resource optimization, knowledge management

China to Long Beach, California, and then subcontracted with Union Pacific Railroad (UPR) to ship the goods from California to various inland destinations.[8] While traveling by rail through Oklahoma, UPR's train derailed and the goods allegedly were damaged.[9]

Regal initially filed suit in California state court, and the case was removed to federal court.[10] The district court dismissed the case holding that COGSA controlled and the parties were bound under the governing law clause to proceed to Tokyo for resolution of the matter.[11] On appeal, the Ninth Circuit reversed and held that the Carmack Amendment governed the limitation of liability and that the governing law provision controlled only if the parties had explicitly contracted out of the Carmack Amendment, which they had not. "K" Line and UPR petitioned, and the Supreme Court granted the writ of *certiorari*.[12]

On appeal to the Supreme Court, "K" Line and UPR argued that the Carmack Amendment did not apply to import shipments from a foreign country to inland points in the United States, based on its language, and that the Carmack Amendment was designed to cover operations of rail carriers and domestic rail transportation only. "K" Line and UPR relied upon *Norfolk Southern Railway Co. v. Kirby,*[13]which held that a cargo shipment involving carriage of goods by sea from a foreign country under bills of lading was maritime in nature, thus implicating the default rules of COGSA rather than the Carmack Amendment. Therefore, the governing law clause was proper and the parties should proceed to Tokyo courts to litigate the matter.

Respondent Regal argued that "K" Line performed transportation services commonly performed by rail carriers, thus it was subject to jurisdiction under the Carmack Amendment. Therefore, the carrier's ability to limit liability by contract should be constrained and the parties' choice of venue limited to federal and state courts, not foreign courts.

The Supreme Court held that the Carmack Amendment did not apply to a shipment originating overseas under a single through bill of lading, and thus the parties' agreement to litigate these cases in Tokyo was binding. The Court found that applying Carmack to the inland segment of an international carriage originating overseas under a through bill would undermine the purposes of both statutes, especially the Carmack Amendment, which is premised on the view that a shipment has a single bill of lading and that any damages are therefore, the responsibility of both receiving and delivering carriers.

Of significant importance, the decision highlighted the tension between US law and the Rotterdam Rules. The dissent strenuously objected that this result would upset the recently signed United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules)[14] which retain the current system in which the inland leg may be governed by a different legal regime than the ocean leg, and would upset domestic law disregarding industry practice as evidenced by carefully calibrated international negotiations on the Rotterdam Rules. However, the majority was unconvinced and noted that nothing in the Rotterdam Rules required every country to mandate a different regime to govern the inland rail leg of an international through shipment and that Congress, by enacting COGSA, had opted for allowing shipments governed by a single through bill. Furthermore, the majority noted that while the United States signed the treaty on 23 September 2009 in Rotterdam, the US Senate has not ratified the treaty, nor has the President signed it into law for the Rotterdam Rules to assume the force of law.

While the decision resolves a split in the circuits surrounding the application of the Carmack Amendment, commentators have noted significant industry concerns that the decision will create inconsistent liability regimes that differ. However, since the Carmack Amendment does not apply, shippers will not have to negotiate separate liability agreements with the ocean carrier and the inland railroad or motor carrier. Though this result may be consistent with the Rotterdam Rules' single standard of liability, it appears to cut against the spirit of the Rules, which permit the inland leg of an international shipment to be governed by a different legal regime from the ocean leg. Arguably, the Court's decision could be viewed as a snub to the Rotterdam Rules.

Squire Sanders has a team of experienced maritime lawyers and non-lawyer claims experts to assist clients with their multimodal shipping concerns. Drawing upon this collective experience, we are well prepared to assist clients in even the most challenging situations. In addition, our global footprint allows us to assist our maritime clients with cross-border disputes by offering seamless representation from country to country. If you would like to learn more about our maritime practice, please contact your principal Squire Sanders lawyer or one of the lawyers listed in this Alert.

---

[1] 49 U.S.C. § 11706 (2010).

[2] 46 U.S.C. § 30701 (2010).

[3] *Kawasaki Kisen Kaisha Ltd v. Regal-Beloit Corp.,* Slip Op. No. 08-1553 (June 21, 2010).

[4] See *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.,* 557 F. 3d 985, 987 (9th Cir. 2009).
[5] *Id.* at 988.
[6] *Id.* at 987.
[7] *Id.* at 989.
[8] *Id.*
[9] *Id.* at 990.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] 543 U.S. 14 (2004)
[14] G. A. Res. 63/122, art. 26, U. N. Doc. A/RES/63/122 (Dec. 11, 2008).