

Transportation Of Hazardous Materials Exporters' Liability

Incidents involving chemicals and hazardous substances in transit may bring significant liabilities for cargo owners, manufacturers, shippers and purchasers. In many instances these liabilities are not fully understood.

Cargo owners, even if they rely on services of professional carriers, are not immune from the legal risks inherent in the transportation of hazardous substances. Manufacturers and/or shippers, if at fault for an accident, can face claims asserted by transportation carriers, insurers, crew and third-party cargo interests. If an accident causes environmental damage, shippers may also have responsibility for cleanup costs and remedial actions. The value of the destroyed cargo, as well as uncapped and unfunded legal liabilities, results in extremely high stakes for shippers and cargo owners.

Manufacturers of hazardous substances face significant risks related to the transportation of their products. Based on three fictitious scenarios involving a US chemical manufacturer exporting its goods to a Polish buyer, we discuss the exporter's potential exposure to liability under various US federal and state laws, as well as European Union and international laws, and introduce methods of mitigating exposures.

Case Study – By Rail

A US chemical manufacturer sells three containers of chemicals and hazardous materials to a Polish buyer. The first container is sent by train to the Port of New York for delivery to an ocean carrier. A series of explosions causes the train to derail en route. The contents spill in a sensitive environmental area and pollute navigable waters of the US. It is determined that improper packaging, leading to chemical leaks and the resulting explosions, caused the accident.

In this example, the manufacturer uses services of a professional railway carrier to transport its products. As a general rule, case law tends to impose liability on the carrier rather than shipper.

Yet, as the cause of the accident is related to the improper packaging, the manufacturer's liability may be established based on his negligence in cargo packaging.¹ Additionally, the shipper may find itself in violation of the Hazardous Materials Transportation Act (HMTA),² or regulations promulgated thereunder, which set forth detailed requirements regarding the handling, packaging and conveyance of hazardous materials before and during transportation.

With respect to the environmental liability for cleanup costs, US federal laws and state equivalents lean towards strict liability of enumerated categories of entities, which can be held liable for cleanup costs even where they have not acted intentionally or negligently. This is the case with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),³ which sets forth a *strict liability regime* for the cleanup of hazardous waste, both on land and navigable waters. While the railway carrier undoubtedly falls into one of the categories of potentially responsible parties under CERCLA,⁴ either as the owner and operator of a facility or person who accepted waste for transportation, the scope of the cargo owner's liability as an arranger for disposal under CERCLA for years remained disputed.⁵ However, in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (U.S. 2009), the Supreme Court emphasized that "arranging" requires an element of intent, and thus, an entity that sells useful product that is disposed of unbeknownst to the seller cannot be held liable under CERCLA as an arranger.

The fact is, the manufacturer's exposure to cleanup cost liability exists even though the manufacturer is not strictly liable under CERCLA. The carrier may use the third-party liability exception to exonerate itself from strict liability under CERCLA, in which case environmental agencies may seek to recover cleanup costs from the shipper based on his negligence.⁶ Moreover, even if the carrier bares the costs of cleanup, it may seek to recover such costs partially or fully from the shipper, as the liability of potentially responsible persons under CERCLA does not bar a cause of action that such person has or would have, by reason of subrogation or otherwise, against any person.⁷

Similarly to CERCLA, the Federal Clean Water Act (CWA)⁸ sets forth a liability regime for discharges of oil and hazardous substances into or upon the navigable waters of the US and imposes strict liability not on a shipper, but on an owner or operator of a vessel or facility⁹ from which oil or a hazardous substance is discharged in violation of the act. In the case that such discharge was caused solely by an act or omission of a third party, the carrier, although not released from its obligation to pay the US government the actual costs of the cleanup, is entitled by subrogation to recover such costs from such third party.¹⁰

Furthermore, the liabilities of the owner/operator under CWA do not affect any right such owner/operator or the US government might have against any third party whose acts may in any way have caused or contributed to the discharge.¹¹

Case Study – At High Seas

The US manufacturer has the two remaining containers successfully delivered to the ocean carrier. While at sea, one of the containers catches fire, causing widespread damage to both the vessel and the cargo owned by third parties. The subsequent investigation proved that the container caught fire due to content mislabeling that caused improper stowage.

An entity shipping its goods under a charter party agreement often assumes liabilities broadly similar to those of a ship owner, together with additional liabilities towards the vessel owner, including damage inflicted on the ship. Liabilities of a shipper using an ocean carrier's common carriage services are narrower, yet not insignificant. In general, shipper's liability in maritime transport is fault-based. Pursuant to Carriage of Goods by Sea Act (COGSA)¹², which governs ocean shipments to and from the US, the shipper shall not be held responsible for any loss or damage incurred by the carrier or the vessel resulting from any cause without the act, fault or neglect on the part of the shipper, his agents or servants.¹³

This general negligence standard is modified with respect to inflammable, explosive or dangerous goods.¹⁴ In the case of unforeseeably dangerous goods, where neither the carrier nor the shipper had actual or constructive knowledge before the time of shipment of the inherently dangerous nature of shipped goods, COGSA imposes strict liability on a shipper for damages and expenses arising out of the shipment of those goods, i.e., liability without regard to any level of fault on his part.¹⁵ However, the strict liability shall not apply in the case where the carrier is aware, or should be aware, of the generally dangerous nature of the cargo, even where the full extent of such risks is unknown.¹⁶ In such cases, the shipper's liability shall be determined according to a negligence standard, the so-called negligent failure to warn. To prevail on a claim of negligent failure to warn, the carrier must show (i) that the shipper failed to warn the carrier about dangers inherent in the cargo of which the carrier could not reasonably have been expected to be aware and (ii) that the warning, if given, would have impacted stowage.¹⁷

Furthermore, the shipper is deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper must indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars.¹⁸

In our example, the accident caused by content mislabeling resulted in improper stowage. Hence, the manufacturer could be facing claims based either on his general negligence, negligent failure to warn or breach of obligations concerning accuracy of cargo marks. Primarily, such claims might be asserted by the vessel owner for the damage inflicted on the vessel. Secondly, the shipper may have liability towards any third-party cargo interests for damage sustained to their goods resulting from fire.

Thirdly, if the accident resulted in any personal injuries or deaths, the shipper may be facing claims by the crew members and their families. Moreover, the shipper may retain responsibility for the salvage charges, demurrage claims and consequential losses of the parties involved. Lastly, all parties at risk must be aware and understand that rules and regulations are fluid and such fluidity creates increased liabilities.

Case Study – Overseas

The fire did not cause damage to the last of the three containers while at sea. After offloading in Hamburg, a truck transports the container to its final destination in Warsaw. At the territory of Poland, the truck has an accident in an environmentally sensitive area. Chemicals from the container contaminate a nearby river. Facts established that due to improper packaging and filling of barrels, the truck tipped and resulted in unstable stowage.

International transport of goods by definition may trigger the necessity of application of foreign laws, as well as jurisdictional and conflicts of laws issues. Although transportation and maritime laws are, to a large extent, unified on the international level, differences among local laws exist and sometimes might be significant. This case study involves multimodal transport from the US, via the territory of Germany to its final destination in Poland. Both Poland and Germany are member states of the EU, which adds a level of complexity to the analysis of applicable laws and shipper's liability hereunder. Absent choice of law and depending on the laws of the jurisdiction where the dispute would be commenced,¹⁹ claims against the shipper in this scenario would most likely be governed by Polish law, as the law of the country where both damage and event giving rise to the damage occurred.

The Act on Prevention and Remedy of Damage to the Environment (Environmental Damage Act),²⁰ which implemented directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage (the Environmental Liability Directive), governs environmental liabilities of the parties involved.^{21,22} Both the Environmental Liability Directive and the Environmental Damage Act are based on a "polluter pays" principle. The Environmental Damage Act imposes on a polluter²³ strict liability for undertaking preventive and remedial measures in the case of direct threat of damage to the environment or actual damage to the environment. In the event that more than one polluter is responsible for a direct threat or actual damage to the environment, their liability is joint and several. The polluter bears all the costs of the preventive and remedial measures. The polluter may exempt itself from such liability if it proves that damage to the environment (or a direct threat of such damage) was caused by a specified third party and occurred despite application by that party of appropriate safety measures.

This administrative liability for cleanup costs does not prejudice private parties' right of compensation as a consequence of environmental damage. In Poland such liability could be based on Environmental Protection Act²⁴ or general civil law tort liability. Additionally, the shipper may be liable for violation of the Act on Transportation of Hazardous Substances²⁵ that extensively refers to European Agreement concerning the International Carriage of Dangerous Goods by Road.²⁶

Managing Supply Chain Risk

All parties (and counterparties) in a contract of sale of hazardous materials, including manufacturers, sellers, shippers, logistics providers (arrangers) and buyers are exposed to risk throughout the supply chain. These parties should be cognizant of the magnitude/complexity (of potential losses) as well as risk management tools available.

Manufacturers, sellers, exporters or shippers, can mitigate their risk of loss by utilizing risk management tools, such as: (1) vetting third-party logistics providers, including charterers, and engaging them only after successful completion of due diligence;²⁷ (2) recognizing and quantifying exposures that exist and how best to transfer (and potentially cap) those risks using insurance; (3) procuring favorable shipping terms (Incoterms®); and (4) using familiar, prescreened and approved counterparties. Incoterms® rules are an internationally recognized standard used in international and domestic contracts for the sale of goods. Incoterms® help traders avoid costly misunderstandings by clarifying the tasks, costs and risks involved in the delivery of goods from sellers to buyers. UNCITRAL²⁸ recognizes Incoterms® rules as the global standard for the interpretation of the most common terms in foreign trade.

Potential Gaps in Coverage

Insurance coverage provided in a charterer's liability or marine liability policy may not adequately protect the seller or other potentially impacted parties against environmental risk. Assuming pollution coverage is afforded in the policy, several hurdles must be cleared: (1) the seepage, pollution or contamination must be caused by a direct physical loss; (2) the seepage, pollution or contamination must have commenced on a fixed specific date; (3) the event must be discovered by the assured within a definite number of hours; (4) the seepage, pollution or contamination must be reported to underwriters within a fixed period of time; and (5) the event was not caused by intentional misconduct.

Furthermore, charterers should be aware that additional limitations/exclusions exist in liability insurance policies that hinder indemnification and liability protections, for example:

- It may be prudent to seek additional shelter from risk by taking the benefit of the vessel owners' cover by including appropriate language in the charter party agreement. However, charterers should not solely rely upon such language because: (1) the policy would not automatically extend to include such contracts if the insurer is not a party to the charter agreement, and (2) even if the charterer is added to the vessel owner's policy, the charterer may only be covered for those liabilities incurred by the vessel owner and charterer may not be covered for the charterer's own fault.²⁹
- Liability for environmental losses including natural resource damages or biodiversity damages are apportioned using the principles of joint and several liability. This coverage extension is selectively available in the marine insurance marketplace and coverage may apply solely for actions to avoid or minimize pollution.
- Charterer's liability coverage follows the conveyance and is limited in time and scope. The coverage is typically limited to losses that take place: (1) while laden on an insured vessel, (2) in the process of being loaded on to or discharged from an insured vessel, or (3) in the process of being transported or lightered to or from an insured ship provided (a) the transshipment or lightering is performed as a regular custom of the port or trade and (b) an appropriate written receipt has been obtained from those interested in the transshipment.³⁰

The liability of the vessel owner ceases upon discharge in the regular custom of the port. Liability then flows to the next method of conveyance, such as rail.

Potential gaps in insurance coverage exist when goods or products are transported via rail. For example, transporters may seek recovery or damages against the cargo owner should such goods be mislabeled or improperly declared or the railroad may not be deemed liable for losses or may not assume liability/culpability for incurred losses, such as gradual pollution losses or faulty workmanship on the impacted rail car. Potential claimants include: (1) rail transporter seeking indemnification from the potentially responsible party(ies), (2) third-party private citizens alleging bodily injury, property damage or claims for remediation expense, (3) governmental entities or quasi-governmental entities imposing damages, such as fines/penalties, and (4) third party diminution in value of impaired property.

Balancing Risk with Reward – Bulk Transport of Toxic Inhalation Chemicals Risk

Further complicating the analysis of potential liabilities facing cargo owners is the rail industry's practice of transporting Toxic Inhalation Chemicals and the rail industry's occasional resistance to providing adequate contractual protections to its lessees.

According to a discussion paper prepared by Belfer Center for Science and International Affairs, "Toxic inhalation hazard (TIH) chemicals such as chlorine gas and anhydrous ammonia are among the most dangerous of hazardous materials. Rail transportation of TIH creates risk that is not adequately reflected in the costs, creating a TIH safety and security externality."

Once the hazardous goods or materials are discharged from rail to motor truck, chemical shippers or exporters should be aware of the regulatory obligations imposed upon the motor truck operator, especially during loading/unloading and transport.

For example, in the US, its territories and possessions, motor truck operators are required under federal statute to maintain financial responsibility while they transport hazardous goods. The US Department of Transportation, Federal Motor Safety Act Administration website clearly defines the type and amount of financial responsibility (which includes public liability insurance) operators bear. Form MCS-90, Financial Responsibility for Motor Carriers states, states: "Financial responsibility means having insurance policies or surety bonds sufficient to satisfy the minimum public liability requirements. Public liability means liability for bodily injury, property damage, and environmental restoration. Environmental restoration means restitution for the loss, damage, or destruction of natural resources arising out of an accidental discharge of toxic or other environmentally harmful materials or liquids." For profit and private carriers transporting hazardous chemicals must maintain a US\$1 million limit of liability, at a minimum, subject to a US\$5 million maximum limit. These funds are dedicated and ensure the impacted governmental entity can seek reimbursement (in whole or in part) should the release of hazardous cargo require remediation. These funds are not meant to guarantee that tort liability is adequately funded. Cargo owners should be aware the protection offered by transporters on an MCS 90 form represents the minimum amounts of coverage required by operators in order to be in compliance with federal laws and it does not absolve transporters of tort liability.

Conclusions

While the risks faced by carriers are generally well known, potential liability relating to hazardous cargo is often overlooked by owners. The authors offer the following guidance for those involved in the sale, shipment or arrangement of hazardous chemicals:

- Liability for environmental losses including natural resource damages or biodiversity damages are apportioned using the principles of joint and several liability. This coverage extension is selectively available in the marine insurance marketplace and coverage may apply solely for actions to avoid or minimize pollution.
- These liabilities are often complex and need to be fully understood.
- Exposure to risk can be mitigated through sound risk management techniques, including due diligence review prior to selecting haulers and carriers.
- Understand what insurance coverage is available and negotiate proper terms specific to your needs.
- A carefully designed environmental insurance program can act as a hedge against: a) potential gaps in available insurance coverage, b) contractually assumed liabilities and c) unknowingly assumed risks (rogue trading activities).

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Notes

- 1 In *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 916 F2d 1174 (7th Cir. 1990), the court held that a shipper of a hazardous chemical by rail is not strictly liable for the consequences of a spill or other accident to the shipment en route, however, a shipper may be held liable if plaintiff can prove that the shipper acted negligently. The court did not find shipping of acrylonitrile by rail as an ultrahazardous activity that would justify shipper's strict liability under common law, but such possibility has not been explicitly excluded for other hazardous substances posing more serious risk to human life and environment.
- 2 The Hazardous Materials Transportation Act (HMTA) of 1994, 49 U.S.C. §§ 5101-5127.
- 3 The Comprehensive Environmental Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §9601 et seq.
- 4 Categories of potentially responsible parties under CERCLA include: (1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. CERCLA § 107(a), 42 U.S.C. § 9607(a). The term "Facility" under CERCLA includes, among other things, rolling stock and motor vehicles. CERCLA § 101(9), 42 U.S.C. § 9601(22).
- 5 One of the categories upon which CERCLA imposes strict liability are "arrangers" of the disposal of hazardous substances. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). As the disposal under CERCLA is defined broadly and includes spilling (CERCLA § 101(29), 42 U.S.C. § 9601(29); § 1004 of the Solid Waste Disposal Act, 42, U.S.C. § 6903) the question arose whether shipper of hazardous substances who arranged for its transportation in the course of its ordinary business can be held liable as an arranger of its disposal in the case the hazardous substance had been accidentally spilled on route. Initial judicial approach was to read the statute broadly and include shippers as potentially responsible parties (*United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989)). This approach has changed largely under the influence of In *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 916 F2d 1174 (7th Cir. 1990), in which the court held that a shipper of a hazardous chemical by rail is not strictly liable for the consequences of a spill or other accident to the shipment en route, however, a shipper may be held liable if plaintiff can prove that the shipper acted negligently.
- 6 Although *Indiana Harbor* decision was not itself based on the interpretation of CERCLA, it set forth a standard that courts started to follow while interpreting scope of arranger liability under CERCLA. In *Amcast Industries v. Detrex Corp.*, 2 F.3d 246 (7th Cir. 1993) the court emphasized that "to arrange" means to plan and one cannot plan for something to happen accidentally; in *Freeman v. Glaxo Welcome Inc.*, 189 F.3d 160 (2d Cir. 1999) distinguished between sale of a useful product and sale of waste.
- 7 The third party liability exception is not available when the third party's act or omission causing environmental damage occurs in connection with a contractual relationship existing directly or indirectly with the potentially responsible party, but an exception is made to situations where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail. CERCLA § 107(b), 42 U.S.C. § 9607(b).
- 8 CERCLA § 107(e)(2), 42 U.S.C. § 9607(e)(2).
- 9 Onshore facilities under CWA include, among other things, motor vehicles and rolling stock. CWA § 311(a)(10), 33 U.S.C. § 1321(a)(10).
- 10 CWA § 311(g), 33 U.S.C. § 1321(g).
- 11 CWA § 311(h), 33 U.S.C. § 1321(h).
- 12 The Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 30701.
- 13 COGSA § 1304(3).
- 14 COGSA § 1304(6).
- 15 *Senator Linie GmbH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145 (2d Cir. 2002).
- 16 *In re M/V DG Harmony*, 518 F.3d 106 (2d Cir. 2008).
- 17 *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, 442 F.3d 74 (2d Cir. 2008).
- 18 COGSA § 1303(5).
- 19 In the case of disputes before both German and Polish courts conflicts of law issues would be resolved pursuant to Regulation (EC) No. 864/2007 of the European Parliament and of the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal L 199 , 31/07/2007 p. 0040 – 0049.
- 20 The Act on Prevention and Remediying of Damage to the Environment dated April 13, 2007 (Journal of Laws 2011, no. 228, item 1368, as amended).
- 21 Directive 2004/35/CE of the European parliament and of the Council of April 21, 2004 on environmental liability with regard to the prevention and remedying of environmental damage, Official Journal L 143, 30/04/2004 p. 0056-0075.

- 22 EU environmental law is mostly enacted in the form of directives rather than regulations. The most important difference between regulations and directives is that the former are self-executing and automatically become part of national legal systems of the member states, while the latter require implementation to national legal system of each member state. Directives usually require member states to achieve a particular result without dictating detailed means of achieving that result. Thus, in areas of law to which EU directives apply, laws of individual member states, although similar as to its goal, may differ in terms of detailed solutions.
- 23 To simplify, the Environmental Damage Act imposes liability on an entity using the natural environment, which is defined by a reference to the types of business activities posing risk of damage to the environment. The activities posing a risk of damage to the environment include, among others, (i) the manufacturing, using, storing, modifying, disposing, releasing and transporting of hazardous substances and materials and (ii) the transportation of hazardous materials. Thus, potentially both the shipper and the carrier can be classified as entities using the natural environment and be subject to liability pursuant to the Environmental Damage Act.
- 24 Environmental Protection Act dated April 27, 2001 (Journal of Laws of 2008, no. 25, item 150, as amended).
- 25 Act on Transportation of Hazardous Substances dated August 19, 2011 (Journal of Laws of 2011, no. 227, item 1367, as amended).
- 26 European Agreement concerning the International Carriage of Dangerous Goods by Road dated September 1957 (Journal of Laws of 2011, No. 110, item 641, as amended).
- 27 Principle characteristics of a charter are: a) vessel owner provides/maintains seaworthy vessel and employs captain and crew enabling vessel to safely sail between ports as ordered by charterers, b) charterer's responsibility for loading, stowage and discharge of cargo and voyage instructions, c) charterer's responsibility to provide vessel bunkers.
- 28 United Nations Commission on International Trade Law.
- 29 West of England Insurance Services (Luxembourg) SA, *Underwriting Guidelines*.
- 30 Charterer's Liability Insurance Conditions 2002, LSW 1122 p. 22.