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Supreme Court Finds That COGSA, Not Carmack, Applies to Intermodal Shipments

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The United States Supreme Court held last week in a 6 to 3 decision that the Carriage of Goods at Sea Act (COGSA) applies, to the exclusion of the Carmack Amendment, to the domestic rail portion of a transoceanic shipment under a single bill of lading, where the parties have contractually extended COGSA. The Court considered a similar issue in *Norfolk Southern Railway v. James N. Kirby Pty. Ltd.*, 543 U.S. 14 (2004). In that case, the Court had held that the parties could extend COGSA inland to protect ground carriers, even when such an extension would conflict with state contract and tort law. This time, in the consolidated cases of *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp. and Union Pacific Railroad v. Regal-Beloit Corp.*, Nos. 08-1553 and 08-1554 (U.S. June 21, 2010), the Court decided that the parties' contractual extension of COGSA under a through bill of lading will control, despite prohibitions or limitations contained in another federal statute, the Carmack Amendment.

COGSA governs all shipments from "tackle to tackle" or from the point of loading goods onto a ship to the point of offloading. A through bill of lading can also extend it to the inland portion of an intermodal shipment by a clause that specifically provides for the extension of COGSA

(known as a "Himalaya Clause"). In contrast, the Carmack Amendment governs the terms of bills of lading issued by domestic rail carriers. In *Kawasaki v. Regal-Beloit*, the Court decided that when a Himalaya Clause in a through bill of lading for an international shipment extends COGSA's reach inland, it will govern the rail portion of the shipment, and the Carmack Amendment does not apply.

The factual circumstances of the dispute will be familiar to many international carriers and shippers. The shipper, Regal-Beloit Corporation, contracted with a carrier, Kawasaki Kisen Kaisha, Ltd. (generally known as "K" Line), to transport goods from China to the Midwestern United States. "K" Line issued a single through bill of lading that covered the cargo's entire journey, on both sea and land. The bill of lading provided that COGSA's terms would govern the entire journey and also included a forum selection clause that required that all claims relating to the shipment be brought in Tokyo. "K" Line completed the ocean leg of the journey without incident, but the Union Pacific train carrying the cargo derailed during the inland journey and damaged the cargo. Ignoring the forum selection clause, Regal-Beloit sued "K" Line and Union Pacific in federal district court in

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California, pursuant to the jurisdiction conferred by the Carmack Amendment. The shipper argued that the Carmack Amendment applies to the rail portion of the journey. It would therefore prevail over the forum selection clause in the bill of lading and vest jurisdiction in the federal court. “K” Line and Union Pacific argued that COGSA had been properly extended inland and that suit in California was barred by the bill of lading’s forum selection clause.

The Court agreed with “K” Line and Union Pacific. The Carmack Amendment applies only to rail carriers who “receive” cargo for domestic transportation and are required by the statute to issue an initial bill of lading. Therefore, for Carmack to apply the shipment must originate with a “receiving rail carrier,” reasoned the Court. A rail carrier like Union Pacific, which performs the inland leg of a multi-modal journey under a single bill of lading, does not “receive” cargo for purposes of the statute. Instead, it is a “delivering” carrier not subject to the Carmack Amendment. “K” Line, on the other hand, “received” the cargo overseas and issued a through bill of lading that covered the entire journey under COGSA. Therefore, the cargo was never “received” for domestic shipment in the United States and, thus, was not subject to the Carmack Amendment. COGSA, as extended by the Himalaya Clause, controlled, thereby making the Tokyo forum selection clause enforceable.

The Court’s decision is significant for reasons beyond the enforceability of forum selection clauses. There are major differences in remedies and defenses afforded by the two statutes. COGSA allows the carrier to limit its liability for damages to a shipment, while the Carmack Amendment does not. Under COGSA, a carrier can limit its liability to \$500 per “package” or “customary freight unit.” Carmack, on the other hand, does not offer a carrier the ability to limit its liability for loss or damage to a shipment. Similarly, certain defenses are available to carriers under COGSA that are not available under Carmack. The court’s decision brings further clarity to the legal issues surrounding international intermodal transportation. Together with *Kirby*, this decision clearly indicates that COGSA will be the controlling law of multi-modal shipments throughout their journey, if the parties agree to extend its reach inland.

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