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COGSA Trumps Carmack Amendment - Forum Selection Clause Upheld

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On June 21, 2010, the United States Supreme Court issued its opinion in the case of *Kawasaki Kisen Kaisha Ltd. v. Regal Beloit Corp*., 2010 WL 2471056, 78 USLW 4651 (U.S. June 21, 2010). The case, which arose out of damage to cargo during a train derailment in Oklahoma, addressed the question of whether cargo shipped under a through bill of lading from China to the interior of the United States by a combination of sea and rail carriage was governed by the Carriage of Goods by Sea Act (COGSA) or by the Carmack Amendment. If COGSA governed the entire course of the shipment over both sea and land, the terms of the ocean carrier's bill of lading would apply, including its forum selection clause requiring suit to be brought in Tokyo. If the Carmack Amendment applied, its terms would mandate venue within the United States.

The District Court held that the shipment was covered by COGSA and dismissed the case on grounds of the forum-selection clause requiring suit in Tokyo. The Ninth Circuit reversed, finding that the Carmack Amendment applied to the inland portion of an international shipment under a through bill of lading and, thus, trumped the parties' forum-selection clause. In reversing, the Ninth Circuit noted that its holding was consistent with the position taken by the Court of Appeals for the Second Circuit, but was inconsistent with the views of the Courts of Appeals for the Fourth, Sixth, Seventh and Eleventh Circuits. The Supreme Court granted certiorari "to address whether Carmack applies to the inland segment of an overseas import shipment under a through bill of lading."

The Supreme Court reversed the Ninth Circuit and held that the Carmack Amendment does not apply to a shipment originating overseas under a through bill of lading. The Court reasoned that, while COGSA by its terms applies to shipments from United States ports to ports of foreign countries and vice versa, it nevertheless allows parties the option of extending its terms by contract to cover the entire period during which the goods will be under a carrier's responsibility, including periods of inland transport. COGSA also allows the parties to agree to a particular forum for resolution of disputes. In contrast, the Carmack Amendment governs the terms of bills of lading issued by domestic rail carriers, and requires a rail carrier that "receives [property] for transportation" within the United States to issue a bill of lading. Under the Carmack Amendment, a "receiving" rail carrier is the initial carrier, which "receives" the property for domestic rail transportation ***at the journey's point of origin***. Noting that the Carmack Amendment only applies to the transportation of property for which the Amendment requires a receiving carrier to issue a bill of lading, the Court explained that the rail carrier at issue did not receive the cargo at its point of origin (China), but rather in California. Therefore, the rail carrier was not required to issue a bill of lading under Carmack, and its venue provisions did not apply:

Carmack does not apply if the property is received at an overseas location under a through bill that covers the transport into an inland location in the United States. In such a case, there is no receiving rail carrier that "receives" the property "for [domestic rail] transportation" … and thus no carrier that must issue a Carmack-compliant bill of lading.

2010 WL 2471056, at *10. The Court further reasoned that Carmack did not require the carrier to issue bills of lading if it was not a "receiving rail carrier." Instead, the carrier obtained the cargo in China for overseas transport across an ocean and then to inland destinations in the United States. The carrier received the cargo for shipment under COGSA-authorized through bills of lading, and chose to use rail transport to complete one

segment of the journey under what the Court deemed to be an "essentially maritime" contract. The carrier was not within Carmack's reach and, thus, was not required to issue Carmack bills of lading. *Id*.

Justice Sotomayor, writing in dissent and joined by Justices Stevens and Ginsburg, argued that the majority read the Carmack Amendment's terms and history much too narrowly, and further argued that the majority holding was at odds with the recently signed "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea," also known as the "Rotterdam Rules," which retained the current system in which the inland leg of a multi-modal shipment may be governed by a different legal regime than the ocean leg. (See our previous article on the Rotterdam Rules here.)

While some parties engaged in the multi-modal shipment business may join with the dissent in disagreeing with the *Regal Beloit* majority decision, it arguably brings some simplicity and uniformity to such transactions, by allowing international multi-modal shipments to be governed by a single through bill of lading and a single legal regime, which accordingly enhances predictability and the ability to manage and insure risks inherent in multi-modal transportation.

In light of this recent decision, rail carriers acting as subcontractors for ocean carriers in multi-modal cargo movement should, if at all possible, review the ocean carrier's through bill of lading in order to make an informed decision about whether they are willing to be bound by the terms of that document, including clauses mandating venue in foreign forums. Rail carriers and parties employing intermodal shipping should also be aware of COGSA's per-package liability limitations ($500 per package or customary freight unit, subject to higher limits if declared for insurance purposes), and the ocean carrier's right under COGSA to extend those limitations to subcontractors.

If you have questions about these or any other transportation issue, please contact your Baker Donelson attorney or one of our attorneys from the Firm's Admiralty, Oil & Gas and Transportation Groups.