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## Forum Selection Clauses in Intermodal Shipment Under a Through Bill Of Lading: Should COGSA or Carmack Apply to the Inland Shipment

### Breaking Developments In London Market Law 3/6/09

In February 2009, the Ninth Circuit Court of Appeals issued a decision examining “*which federal statute governs a maritime case involving a train wreck.*” In *Regal-Beloit Corp., et al. v. Kawasaki Kisen Kaisha, Ltd., et al.*, -- F.3d -- 2009 WL 251949 (C.A. 9 (Cal.) (2009)) the Court refused to enforce a Tokyo forum selection clause contained in a through bill of lading issued by Kawasaki Kisen Kaisha, Ltd. (“K-line”). The through bill of lading contained a Himalaya Clause extending the ambit of the Carriage of Goods by Sea (“COGSA”), 46 U.S.C. 30701 (Note) to the inland portion of the shipment. The Ninth Circuit held, however, that despite the Himalaya Clause in the bill of lading issued by K-line, the inland shipment was controlled by the Carmack Amendment, 49 U.S.C. § 10502(e).

Plaintiff Regal-Beloit Corp. (“Regal”) contracted with K-line for the shipment of cargo from China aboard a K-line vessel to the Port of Long Beach and then for inland carriage to Midwest destinations by the Union Pacific Railroad Company (“UPRR”). K-line’s agent, K-line America (“KAM”) arranged the shipment directly with Regal for the rail and sea carriage. A single through bill of lading was issued by K-line. The UPRR derailed in Oklahoma damaging Regal’s cargo.

Regal filed suit against UPRR in California state court. K-line and KAM removed Regal’s suit to federal court and filed a motion to dismiss based upon the Tokyo forum selection clause in the through bill of lading. The federal district court concluded that the Tokyo forum selection clause was enforceable under COGSA and dismissed plaintiff’s suit. The Ninth Circuit Court of Appeals reversed, holding that although the Tokyo forum selection clause would have been enforceable under COGSA, the Carmack Amendment applied to the inland portion of the

shipment. The Court recognized that the Carmack Amendment allows enforcement of forum selection clauses in a bill of lading only in limited circumstances. The Court held that because K-line failed to comply with the statutory procedures for contracting out of Carmack's venue restrictions consistent with 49 U.S.C. § 10502 that the Tokyo forum selection clause in the bill of lading was ineffective.

### ***Conflicting Provisions of the Carmack Amendment and COGSA***

The Ninth Circuit examined the conflicting federal statutes potentially governing the inland leg of the shipment of Regal's cargo. COGSA, 46 U.S.C. § 30701 (Note §§ 1(e)) applies *ex proprio vigore*, and governs the carriage of goods from a foreign port to an American port during the *tackle-to-tackle* phase extending from the point of loading to discharge. Beyond the *tackle-to-tackle* phase, 46 U.S.C. § 30701 (Notes §§ 7, 13) provide that a carrier and shipper may contractually extend the effect of COGSA by incorporating a Himalaya Clause in the bill of lading to cover inland transportation or transportation between two American ports. Moreover, the Supreme Court of the United States allows enforcement of forum selection clauses under COGSA. *Vimar Seguros y Reaseguros v. M/V SKY REEFER*, 515 U.S. 528, 115 S. Ct. 2322 (1995).

Although forum selection clauses are generally prohibited under the Carmack Amendment, the Staggers Rail Act establishes two mechanisms under which rail and motor carriers have the ability to contractually waive Carmack's requirements under certain conditions. Contractual waiver of the venue provisions under COGSA requires strict compliance with either 49 U.S.C. § 11706(d) (2) (A) or 49 U.S.C. § 10502.

### ***The Carmack Amendment – and not COGSA – Applied to the Inland Leg of the Shipment***

Relying upon *United States v. Mississippi Valley Barge Line Co.*, 285 F.2d 381, 391-94 (8<sup>th</sup> Cir. 1960) in its first stage of analysis, the Ninth Circuit held that the Carmack Amendment applies to a water carrier that is the contracting carrier under a common transportation arrangement of a through bill of lading. Given that K-line and its agent KAM held themselves out to the public and contracted with Regal for the continuous transportation under a through bill of lading, the Ninth Circuit found that K-line and its agent KAM engaged in railroad transportation. Accordingly, because K-line actually transported the cargo on its ocean liner and had "*sustained contact with the shipped goods*," the Court concluded that K-line and KAM were

subject to the Carmack Amendment for the rail segment of the carriage. Given that a conflict exists between the permissibility of forum selection clauses in bills of lading in the Carmack Amendment and COGSA under the Himalaya Clause for the rail segment, the Court held that the Carmack Amendment was controlling in this case.

***K-line Failed to Comply With 49 U.S.C. § 10508 and the Tokyo Forum***

***Selection Clause Was Unenforceable***

The Court examined the statutory scheme of 49 U.S.C. § 11706(d) (2) (A) of the Carmack Amendment which strictly limits the venues in which a party can assert a claim. Pursuant to 49 U.S.C. § 10502(f), the Carmack Amendment provides that a carrier such as K-line is required to effect remedies under the Carmack Amendment as a pre-condition to contractually agreeing with a shipper to opt out of the Carmack Amendment. Following the analysis of *Neptune Orient Lines Ltd. v. Burlington Northern & Santa Fe Railroad Co.*, 213 F.3d 1118 (9<sup>th</sup> Cir. 2000), the Ninth Circuit held that a Himalaya Clause extending the effect of COGSA would not contractually control the inland aspect of the shipment unless the parties had opted out of the Carmack Amendment protections in compliance with the requirements of 49 U.S.C. § 10502. The Court concluded that K-line and KAM failed to strictly comply with the requirements of § 10502 and, therefore, plaintiff did not contractually waive the protection of the Carmack Amendment. Accordingly, the Court found that the Tokyo forum selection clause in K-line's bill of lading was not enforceable under the Carmack Amendment.

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