From the Benesch

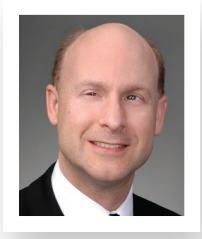
TRANSPORTATION ARCHIVES

A prior article from Benesch Friedlander Coplan & Aronoff LLP's Transportation & Logistics Group

Over the past couple decades, the lawyers in Benesch's Transportation & Logistics Practice Group have spoken at countless industry conferences and authored hundreds of substantive articles dealing with a host of business and legal issues important to both the providers of, and the commercial users of, transportation and logistics services. With this new publication, which will be issued every other month, we look back on some of these seminal articles that remain critically relevant to the industry to this day. In advance of each issue, we carefully comb through the archives of our prior published work in the transportation and logistics arena and select a relevant article that we trust will be of continuing interest to our readers. Please let us know how we are doing!

"We're From The Government and We're Here to Help": When The Act of a Government Constitutes a Valid Defense to a Freight Claim

This article is reprinted from the April 2005, PRACTITIONERS' PERSPECTIVE column published in the CCH FEDERAL CARRIERS REPORTER.



Marc S. Blubaugh

Will Rogers once quipped that "I don't make jokes; I just watch the Government and report the facts." While most Americans can probably identify with that observation to one extent or another, the government unquestionably plays a very serious role in controlling the transportation of goods both domestically and internationally—whether by facilitating or liming that movement. Indeed, in today's global marketplace, the governments of other countries have equally powerful control over the transportation of goods coming to or from the United States. A sovereign government's extraordinary control over the transportation of goods means that a government's conduct can, at times, cause actual loss or damage to goods or, as is more often the case, delay in the delivery of goods. Consequently, under some circumstances, a carrier can successfully assert that the interfering act of a government is valid defense to a freight claim.

This brand of defense is formally codified in a number of statutes and treaties and is also recognized by common law. For instance, the Carriage of Goods by Sea Act ("COGSA") contains a number of relevant provisions. 46 U.S.C. § 1304(2)(g) recognizes that neither an ocean carrier nor a ship shall be liable for loss or damage arising from "arrest or restraint of princes, rulers, or people, or seizure under legal process." COGSA also recognizes that an "act of war" as a defense 46 U.S.C. § 1304(2)(e). Courts have also uniformly held that an "act of a public authority" is a valid defense to a freight claim under the Carmack Amendment. *See, e.g., Case Western Reserve University v. Yellow Freight System, Inc.* (Cuyahoga Co. 1993), 85 Ohio App. 3d 6. Similarly, Article 18 of Montreal Protocol No. 4 to the Warsaw Convention expressly identifies acts of war or acts of "public authority carried out in connection with the entry, exit, or transit of the cargo" as defenses to freight claims involving international air shipments.

As a result, shippers, intermediaries, and carriers will each benefit from understanding more clearly what types of government acts can give rise to a valid defense in a freight claim. This article surveys some of the boundaries of such a defense.

A. Customs Seizure / Inspections

A carrier may be able to escape liability for a cargo claim if a foreign government has seized the cargo in the course of a customs inspection or otherwise exercised dominion over the cargo for customs purposes. For instance, in *M&Z Trading Corp. v. Hecny Group*, 2002 WL 1492018 (9th Cir. 2002), a shipper retained a 3PL and a carrier to transport two containers of ginseng ethyl alcohol composition to Russia. The Latvian government seized the cargo as contraband while it was en route. The carrier relied upon the "restraint of princes" defense found in COGSA. The court explained:

> A carrier can establish immunity under the "Restraint of Princes" defense if it shows that seizure by a foreign sovereign was the proximate cause of the loss to the cargo. A shipper may rebut this burden by proving that the carrier's negligence led to the loss.

The court found that the carrier readily proved that the Latvian government seized the goods. The shipper asserted that the carrier could not prevail because one of the carrier's obligations was to move the goods successfully through Latvia. However, the shipper merely introduced some evidence that the Latvian government's seizure was a result of either counterfeit title or mislabeled cargo. The court held that this evidence was insufficient to rebut the carrier's prima facie defense. Therefore, under the right circumstances, a carrier can preclude summary judgment in favor of a shipper when goods have been seized by a government in connection with a customs inspection. *See Dorland v. M/V MSC Daniela*, 1997 WL 626399 (S.D. N.Y. 1997) (shipper not entitled to summary judgment when carrier's failure to deliver goods "may have been" the result of the Kenyan government's refusal to clear the cargo).

Similarly, in *Benjamin v. M.V. "Balder Eems"*, 639 F Supp. 1497 (S.D. N.Y. 1986), an ocean carrier was retained to move household goods from Santo Domingo to Puerto Rico. Before the carrier took possession of the goods at the port, the Dominican Customs Service, the Dominican National Police, and the Port Authority opened the container in order to search it for drugs. This process delayed the transportation of the container. No drugs were found. However, during the course of the inspection, certain goods were damaged and others were apparently stolen. The court quickly found that the actions of the Dominican officials in connection with the inspection was sufficient for the carrier to establish the "restrain of princes" defense:

> The Court finds that it may fairly be inferred from the agreed set of facts that defendants had neither access to nor means to exercise control over the container in question while it was under the "detention" of the Dominican authorities.

Id. at *9. The court expressly found that the defense was applicable whether or not the acts committed by the Dominican authorities were *ultra vires* or illegal under the laws of the Dominican Republic:

> Plaintiff has cited no authority for that position, and the Court has been directed to no authority or legislative history pertaining to the restrain of princes exception to COGSA which mandates judicial inquiry by American courts into the legality or propriety of acts by agents of a foreign sovereign which are committed within that sovereign's territory.

Id. In other words, the *de facto* exercise of power by a sovereign government is sufficient to establish a *prima facie* "restrain of princes" defense.

In *The Hellig Olav* (2nd Cir. 1922), 282 F. 534, an ocean carrier was transporting beef and pork from New York to Copenhagen. En route, a British war cruiser stopped the ship and required the ship to detour for an inspection. The inspection determined that a portion of the goods constituted contraband. The government advised the ship that it could continue its voyage if it either unloaded the contraband at that point or, in the alternative, if it promised not to deliver the contraband to the consignee but, rather, would return it to Britain. The carrier agreed in order to avoid inconvenience to the passengers. At destination, the carrier refused to unload and deliver the contraband goods, notwithstanding the demand of the consignee. When sued, the carrier relied upon the "restrain of princes" defense. The consignee asserted that no actual restrain or seizure had taken place since the carrier had voluntarily agreed not to deliver the goods. However, the court disagreed:

> Under these circumstances, the guaranty was given, and the ship was permitted to proceed. This seems to us a good seizure of goods. The British authorities took constructive possession of them…. and the [carrier], by its guaranty, became thereby the agent of the British Admiralty… The failure to make delivery at Copenhagen was due to the seizure of the goods… and their subsequent return…. was under the compulsion of the British government.

Id. at 540. Once again, the *de facto* threat of the exercise of power on the part of a government is often sufficient to give rise to a valid defense on the part of a carrier.

Of course, the mere fact that a customs official interferes with the transportation of goods does not automatically immunize a carrier from liability. As indicated above, the carrier must be free from negligence on its own part. For instance, in *Altrix International, Inc. v. Seaboard Marine Ltd., Inc.* (S.D. Fla. 1996), 1996 WL 870729 a carrier was transporting deep sea lobster tails from Panama to Miami. The United States Customs Services put a "hold" on the container in question for two days pending an inspection. When the product was eventually delivered to Miami, the lobster tails were blackened, clumped together, and crystallized ice had formed on the bags. The carrier raised the "restraint of princes" defense and claimed that the customs inspection must have damaged the goods. However, the court found "very little evidence" that suggested that the inspection caused the damage. Among other things, the court noted that the carrier had not even monitored the temperature of the container. Consequently, the court was unwilling to draw inferences "from so scanty a circumstantial foundation." *Id.* at * 10. Likewise, the mere fact that a port may be managed by a government agent does not necessarily mean that the agent's acts are governmental in nature. *See, e.g., International Harvester Co. v. TFL Jefferson*, 695 F. SUPP. 735 (S.D. N.Y. 1988) (carrier could not avail itself of "restraint of princes" defense because port government entities that detained cargo were acting in commercial, rather than sovereign, capacity in making certain guarantees).

In short, a non-negligent carrier may be able to defend a freight claim successfully if a government—whether foreign or domestic—has exercised or seriously threatened control over the cargo for customs purposes.

B. War

Military hostilities can obviously impact a carrier's ability to transport goods from origin to destination. In *Vacuum Oil Co. v. Luckenbach S.S. Co.*, 275 F. 998 (E.D. Va. 1921), a carrier was transporting refined petroleum and similar products from New York to Australia and New Zealand during the course of World War I in 1917. During the course of the carriage, the United States government commandeered the

ship. The original contract between the parties provided that the carrier would not be liable for losses caused by "restraint of princes, rulers, or people." Likewise, the bill of lading provided that the carrier would not be liable for losses caused by "restraints of government." The court found these provisions to be fully enforceable:

> … where the carrying out of the contract was frustrated and prevented by causes beyond the control of the shipowner, or by war, such shipowner was excused from carrying out the contract, and exempted from liability arising as a consequence thereof.

Id. at 1000. Not surprisingly, this result is consistent with the vast majority of holdings throughout the country.

For instance, a similar result followed in *Lekas & Drivas, Inc. v. Goulandris* (2nd Cir. 1962), 306 F. 2d 426. A shipper had loaded various goods—including certain cheese—abroad a vessel docked in Greece in October 1940 in preparation for a voyage to the United States. However, on October 26, 1940, Italy attacked Greece and requisitioned the vessel for a short period of time. The vessel was ultimately released and permitted to proceed to the United States, but only via a circuitous route. The vessel was unable to communicate with its owners. Drydock facilities were unavailable in England due to the needs of the British Navy. As a result, when the ship stopped in England for a repair, much of the cheese was removed and stored on floating lighters under tarps. The repairs, which typically took three days, took thirty-five days. At that time, the cheese had started to leak through the barrels and, expectedly, began to stink. When the cheese arrived in the United States, it was described as "melted with a terrible stench, and worthless." The court ultimately found that the carrier was able to take advantage of the "restrain of princes" defense under COGSA because the Italian government had prevented the timely departure and the Greek government had required the vessel to take a circuitous route. *See also The Texas Company v. Hogarth Shipping Company, Ltd.* (1921), 256 U.S. 619 (ocean carrier not liable for loss to goods because carrier was pressed into war service, which was "a supervening act of state which operated directly on the ship and the parties could not avoid"); *Vacuum Oil Co. v. Luckenbach, S.S. Co.* (E.D. Va. 1921), 275 F. 998 (steamship that was commandeered by the United States government was relieved of liability for failure to deliver cargo).

Of course, the mere fact that a war is being prosecuted does not automatically shield carriers from liability for losses occurring during the war. For instance, in *Pennsylvania R. Co. v. Greco* (Fla. 1946), 25 So. 2d 809, a railroad defended a cargo claim involving rotten tomatoes on the basis that the war effort required it to delay the delivery of the produce. The court rejected the claim that an act of war proximately caused the loss:

> No doubt there were movements of troops and war materials which took precedence over all other traffic. Those occurrences necessarily were secretive to the general public and could not have been known by the shipper. The fallacy of the pleas here is in the failure to aver that this loss occurred by reason of and at a time when the movements of high priority items made it necessary to delay this shipment.

Id. at 341. Likewise, in *Sedco, Inc. v. S.S. Strathewe* (2nd Cir. 1986), 800 F. 2d 27, a carrier was transporting certain oil drilling equipment from Dubai to Houston, Texas. The British government requisitioned the ship for use in the Falkland Island War. The carrier ultimately transshipped the cargo aboard another ship. However, when the second ship reached its destination, certain cargo was missing. The court rejected the carrier's defense that the wartime requisition excused its performance because it concluded that the carrier had failed to unload the goods carefully and properly at the point of transshipment. *Id.* at 33.

In short, even during wartime, a carrier must take measures to ensure that it does not contribute to any loss occasioned by military hostilities.

C. Embargo

Government embargoes—which often follow as a result of war—can also give rise to a valid defense to a freight claim under appropriate circumstances. For instance, the United States Supreme Court dealt with this issue in *The Malcolm Baxter, Jr.* (1928), 277 U.S. 323. In that case, a ship developed leaks while transporting cargo from New Orleans to Bordeaux during the course of World War I. The ship was forced to take refuge in Havana, Cuba. Before the repairs were completed, the United States imposed an embargo on all ships traveling beyond the war zone. The court explained that:

> For the delay caused by the embargo alone petitioners may not recover… It was the embargo and not the unseaworthiness of the vessel which delayed the voyage after the Baxter was repaired and ready for sea on January 14, 1918.

Id. at 333. The court concluded that the carriers could not be charged with any knowledge or expectation that the delay caused by the unseaworthiness of the vessel would bring the vessel within the scope of a government embargo.

Like embargoes, government blockades can provide an even stronger defense. In the *Spartan; Crossley v. Fabbri* (S.D. N.Y. 1885), 25 F. 44, a war between Chili and Peru resulted in a series of blockades along the ports of Peru. The court analyzed the difference between an embargo and a blockade, noting that a blockade would relieve performance of the transportation contract by both sides:

> The effect of such a blockade under our law is therefore to relieve each party from the obligation to deliver the cargo or to receive it at the specific place designated in the charter, without any liability for damages either to the other… [A] contract which cannot be performed without running a blockade, and thus violating the law of nations, cannot be binding.

Id. at 51. In short, an embargo or blockade can, like war itself, provide a carrier with a valid defense to a freight claim.

D. Quarantine

Certain government bodies have the power to quarantine shipments. Such quarantines can plainly impact the timely delivery of goods. For instance, in *Sunpride (Cape) (Ply) Ltd. V. Mediterranean Shipping Co., S. A.* (S.D. N.Y. 2003), 2003 WL 22682268, a shipper retained an ocean carrier to transport certain citrus from South Africa to New York pursuant to a "cold treatment protocol" imposed by the U.S. Department of Agriculture. When the goods arrived in the United States, the temperature recorders indicated that the citrus had not maintained a sufficiently low temperature. As a result, the shipper was required to return the goods to South Africa, have them destroyed, or ship them elsewhere. The shipper decided to have them transported to Canada (since Canada did not impose a similar quarantine) but then sued the carrier for the difference in market value between a sale of the citrus in the United States and the price that it obtained in Canada. The carrier defended the case on the basis that, among other things, COGSA relieves carriers of liability arising from government quarantine restrictions: 46 U.S.C. § 1304(2)(h). The court agreed. In granting partial summary judgment in favor of the carrier, the court explained:

> The immediate cause of the alleged loss was the threatened application of quarantine restrictions as a result of the failure of the cold treatment protocol and the subsequent sale of the citrus in Canada. With regarding to container CRLU 9137295 on the M/V Stefania (which is governed by COGSA, see fn. 2), supra), I find that defendant has shown that the loss was occasioned by quarantine and that defendant may invoke the quarantine exception set forth at § 1304(2)(h).

Id. at *7. However, as is the case with the similar defenses described above, the application of the defense merely shifted the burden to the shipper to demonstrate that the carrier's negligence in carrying out the cold treatment protocol created a concurrent cause of the loss.

Similarly, in *Cheek Neal Coffee Co. v. Osako Shosen Kaisa* (E.D. La. 1929), 36 F.2d 256, an ocean carrier was delivering a load of coffee from Brazil to Texas. However, several members of the crew were determined to have contracted bubonic plague. Although the ship proceeded to New Orleans, the U.S. Public Health Service placed the vessel under fumigation and it was denied the privilege of docking in the harbor until all of the cargo had been discharged and fumigated on lighters. An insufficient number of covered lighters were available. Consequently, some coffee was placed on open lighters. Rain followed and damaged the coffee. The court found that the carrier was not liable, noting that the carrier "clearly establish[ed] the fact that the damage falls within the exceptions against quarantine." *Id.* at 257. While this shifted the burden back to the plaintiff to show the carrier's negligence, the plaintiff was unable to do so. Among other things, the United States government conceded that it had exclusive control over the manner in which the fumigation was performed (*i.e.*, how the tarpaulins were to be placed on the lighters, the procedure of the fumigation, etc.). The court held:

> I am persuaded that the United States Public Health Service was in complete control of the situation, and that their representatives dictated the method of procedure and the manner in which the ship and lighters should be fumigated. I am also satisfied that there was no negligence or inattention to duty on the part of the carrier.

Id. at 258. Therefore, once again, a carrier who has conducted itself reasonably is not liable for loss caused by the government's interference with a delivery.

E. Judicial Process

Goods in transit are sometimes subject to government execution on a judgment. The U.S. Supreme Court addressed this issue in *American Express company v. Mullins* (1909), 212 U.S. 311. In that case, a shipper retained a carrier to transport twenty packages of whisky from Kentucky to Kansas. When the carrier entered Kansas, a county sheriff seized the goods pursuant to a warrant containing a seizure clause. The whisky was ultimately destroyed after the shipper did not appear for a hearing. The shipper then sued the carrier for failing to deliver the whisky to destination. The carrier defended on the basis that an act of a public authority precluded it from performing the remaining leg of the transportation. The Court agreed that the carrier was excused from performance:

> While it is the duty of a carrier to safely carry and promptly deliver to the consignee the goods entrusted to its care, yet that duty does not call upon it to forcibly resist the judicial proceedings in the courts of the State into or through which it is carrying them.

Id. at 313. The court noted the critical fact that the carrier promptly notified the shipper about the seizure and had received an assurance from the shipper that the shipper would contest the legality of the seizure. The efficacy of this defense in the context of seizure by judicial process has been reaffirmed in a variety of cases. *See, e.g., Pecos Valley Trading Co. v. Atchinson, Topeka & Santa Fe Railway company*, 24 N.M 480 (1918) (noting that "practically all of the authorities" agree that seizure by legal process is a "complete defense" to a freight claim when the shipper was given prompt notice of the seizure and had an opportunity to be heard); *Stiles v. Davis & Barton* (1861), 66 U.S. 101 (a carrier is not justified in delivering goods while a proceeding in attachment is pending since the consignee's remedy is against the officer who wrongfully seized them or the plaintiff in the attachment suit).

Of course, a judicial seizure—like any act of government—does not immunize a carrier from liability for its own negligence. For instance, in *The Ohio and Mississippi Railway Co. v. Yohe*, 51 Ind. 181 (1985), a trucking company was moving certain wheat from Illinois to Indiana. The carrier received notice that the wheat was subject to a writ of replevin and could be the subject of execution. However, the carrier never notified the consignee of this fact. The wheat was ultimately seized in transit by a sheriff pursuant to the writ of replevin. The court, while noting that a carrier would not normally be liable for failing to deliver goods under such circumstances, concluded that the advance

"We're From The Government and We're Here to Help": When The Act of a Government Constitutes a Valid Defense to a Freight Claim

notice of execution imposed a duty on the carrier to notify the consignee:

> It is very questionable whether this shows proper diligence on the part of the carrier… Clearly, we think the carrier cannot make use of the fact that the property has been seized by legal process to shield himself from liability for his own negligence, or to justify any improper confederation with the party or officer seizing the goods.

Id. at 187. In other words, a government seizure pursuant to judicial process can generally provide a carrier with a defense to a freight claim unless that carrier has been less than diligent in advising its shipper about the execution.

F. Martial Law

The exercise of martial law by a state or federal government, while infrequent, can obviously have a dramatic impact on a business's supply chain. For instance, the case of *Chicago & Eastern Illinois Railroad Company v. Collins Produce Company* (1919), 249 U.S. 186 involved a shipment of live poultry from Illinois to New Jersey by railroad. The train happened to pass through Dayton, Ohio, just as the area was experiencing unprecedented flooding. Indeed, the flooding was so severe that the State of Ohio declared martial law in the entire Dayton region. The state military took possession of the car containing the shipment of poultry and distributed its contents to persons rendered destitute by the flood. The shipper ultimately used the railroad for the associated loss, asserting that the railroad had invited the military confiscation by falsely advising the authorities that the chickens were dying from lack of food and attention. The railroad disputed this charge and claimed that it had no control over the government seizure.

The trial court agreed that seizure by a public authority could be a legitimate defense and instructed the jury accordingly:

> That it was the duty of the carrier to transport the property to destination, if it could do so; that it could not overcome the flood or the action of the military authorities and that if the latter acted of their own volition the shipper could not recover…

(emphasis added). However, the jury ultimately entered a verdict in favor of the shipper, presumably concluding that the railroad had in fact invited the confiscation. The U.S. Supreme Court affirmed the trial court's jury instruction as well as the verdict.

Conclusion

In summary, companies involved in international trade and domestic transportation—whether shippers, carriers, or third-party logistics providers—necessarily find themselves at loggerheads with government bodies from time to time. These parties must understand that government interference with transportation can excuse nonperformance on the part of a carrier in many instances. However, generally speaking, the carrier itself must be free of negligence in order to claim successfully that the government conduct was the proximate cause of the damage, loss, or delay. Therefore, all parties having influence over the supply chain must develop business plans that take the foregoing principles in account, particularly in light of the fact that instances of government interference are likely to increase in light of the enormous security challenges presented by a post September 11, 2001 world.

MARC S. BLUBAUGH, a partner in the firm's Litigation Practice Group, also Co-Chairs the firm's Transportation & Logistics Practice Group. Mr. Blubaugh has litigated a wide variety of transportation and logistics-related cases in state and federal courts throughout the United States as well as before administrative bodies. Among other things, he represents international and domestic carriers of all modes, freight forwarders, transportation brokers, warehousemen, other third-party logistics providers, and commercial shippers in a wide variety of surface, air, and ocean disputes including, but not limited to, high-dollar cargo claims, freight charge and pricing controversies, breaches of transportation, logistics, and warehousing agreements, prosecution of subrogation claims, insurance coverage disputes, trade-secrets and unfair competition litigation, and class action defense. He also defends carriers, third-party logistics providers, and shippers in catastrophic injury actions arising out of the transportation of goods. In addition to litigating matters, Mr. Blubaugh also regularly consults with clients regarding contracting practices and operating procedures, helps clients navigate the changing regulatory landscape, and provides strategic and business advice to help clients not only minimize liability but, just as importantly, to grow their businesses. He is currently President of the Transportation Lawyers Association.

For more information, please contact **Marc S. Blubaugh** at mblubaugh@beneschlaw.com or (614) 223-9382.