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Maritime Law
Carriage of Goods by Sea Act Fundamentals

By Vanessa C. DiDomenico*

The author discusses the key differences between the Carriage of Goods by Sea Act ("COGSA"), which defines the basic relationship between ocean carrier and cargo owner, and the Harter Act, which governs certain transactions that COGSA does not.

The Carriage of Goods by Sea Act ("COGSA") defines the basic relationship—duties, liabilities, rights, and immunities—between ocean carrier and cargo owner. COGSA was passed in the United States in 1936 and its enactment was the result of various concerns by Congress. In the early nineteenth century, carriers were strictly liable for cargo damage, with only few limited exceptions to liability for an act of God, public enemies, and inherent vices. By the second half of the nineteenth century, carriers began issuing bills of lading containing exculpatory clauses that sought to reduce or eliminate a carrier's liability altogether.

Therefore, a compromise occurred in 1893 when Congress enacted the Harter Act, which sought to achieve uniformity in the rules of liability applied in international shipping and to strike a balance between carriers' efforts to reduce liability and cargo owners' efforts to impose liability regardless of fault. The Harter Act allowed carriers who furnished a seaworthy vessel and exercised due care with the cargo to be exempt from most liability. Currently, the Harter Act has not been repealed and does govern certain transactions where COGSA does not. Below is a detailed exploration of the key differences between the Harter Act and COGSA.

DIFFERENCES BETWEEN THE COGSA AND THE HARTER ACT

COGSA applies by force of law to contracts for the carriage of goods by sea, to or from foreign ports and U.S. ports. The Harter Act applies to the carriage of goods to or from U.S. ports. COGSA preempts the Harter Act with respect to contracts of carriage pertaining to foreign trade. COGSA does allow for parties to incorporate its provisions for the contract of carriage for voyages between U.S. ports. In fact, it is not uncommon for parties to do so. The question may be asked why a carrier would agree or even want to expand coverage: one reason could be that COGSA provides carriers with a wide array of defenses, and where liability does exist it can be limited.

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COGSA applies from "tackle to tackle," meaning the time goods are loaded onboard the vessel until the time the goods are discharged from the vessel, while the Harter Act applies to preloading, or receipt of such cargo, to the post-discharge, or delivery of the goods. Both the Harter Act and COGSA do not apply to live animals, and COGSA does not apply to cargo carried on deck.

Other notable differences between the two acts include that COGSA provides for a $500 per package limitation, whereas the Harter Act does not and that COGSA claims must be filed within one year whereas a claim under the Harter Act does not have an enumerated time limitation.[1]

WHO IS A COGSA CARRIER AND WHAT ARE THE CARRIER'S DUTIES?

A COGSA carrier is generally the owner of the vessel, the vessel itself (in rem), or a time charterer that enters into a contract of carriage and issues a bill of lading.

A COGSA carrier has certain duties as prescribed by Section 3(1). Specifically, a carrier, before and at the start of the voyage must exercise due diligence to provide a seaworthy ship, to properly man, equip, and supply the ship; and to make the holds, refrigeration and cooling chambers, and all other areas of the vessel where goods are carried, fit and safe for their reception, preservation, and carriage. Section 3(2) of COGSA requires the carrier to "properly and carefully load, handle, stow, care for, and discharge the goods carried."

Once the carrier receives the goods, it then, and upon demand of the shipper, must issue a bill of lading. Importantly, a carrier cannot use an exculpatory clause to avoid the duties and obligations set out in Sections 3(1) and 3(2) of COGSA, which requires the carrier to exercise due care, or due diligence. Thus, the liability of the carrier is based upon fault and negligence, not mere damage or loss to the cargo.

WHAT IS MEANT BY THE CARRIER'S OBLIGATION TO MAKE A VESSEL SEAWORTHY?

Seaworthiness is a relative term and is determined by whether the vessel is reasonably fit to carry the cargo that she has undertaken to transport. Pursuant to Section 4(1) of COGSA, neither the carrier nor vessel owner shall be liable

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[1] Regarding COGSA time bars, a shipper must bring an action for cargo damage within one year after "delivery" of the goods. However, COGSA does not define "delivery." Courts have interpreted delivery to occur when the carrier places the cargo in the custody of whoever is legally entitled to receive it from the carrier. It is worth noting that if goods are lost, then the one-year period starts to run from the time which they should have been delivered.

for loss or damage arising from the unseaworthiness of the vessel unless it is caused by a lack of due diligence to make the ship seaworthy. Thus, unless the carrier is negligent in failing to discover the defective condition, or failing to remedy it once discovered, the carrier will not be liable.

The duty to exercise due care is imposed before and at the commencement of the voyage. This means that the carrier is not liable for damage to the cargo resulting from the unseaworthy condition if the defective condition rendering the vessel unseaworthy is not reasonably discoverable, or it arose after the vessel's voyage commenced.

CARRIER IMMUNITIES UNDER COGSA

Pursuant to Section 4(1), COGSA carriers have 17 enumerated immunities, or defenses.[2] These defenses are based upon a variety of circumstances. Some of the enumerated defenses can arise due to external forces, such as acts of public enemies, war, arrest or restraint of princes (or governments), and strikes. Defenses can arise due to the negligence of employees, such as errors in navigation. Defenses can also be attributed to natural forces such as acts of God and perils of the sea.

Additionally, in some cases, carrier defenses can be attributed to the acts of the shipper, such as losses resulting from inherent vices, insufficiency of packaging or marking.

BURDENS OF PROOF IN A COGSA CASE

The cargo owner bears the initial burden under COGSA to make a prima facie case by showing that the cargo was delivered to the carrier in good order and condition and was discharged in damaged condition. To avoid liability, the

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[2] "(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; (b) Fire, unless caused by the actual fault or privity of the carrier; (c) Perils, dangers, and accidents of the sea or other navigable waters; (d) Act of God; (e) Act of war; (f) Act of public enemies; (g) Arrest or restraint of princes, rulers, or people, or seizure under legal process; (h) Quarantine restrictions; (i) Act or omission of the shipper or owner of the goods, his agent or representative; (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts; (k) Riots and civil commotions; (l) Saving or attempting to save life or property at sea; (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods; (n) Insufficiency of packing; (o) Insufficiency or inadequacy of marks; (p) Latent defects not discoverable by due diligence; and (q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

carrier must then prove that the cause of the loss was due to one of the excepted causes enumerated in Section 4(1) and that it acted with due diligence to care for the cargo. If successful, the burden shifts back to the cargo interests to prove that the damage resulted from the carrier's negligence.

Where negligence is shown as at least a concurrent cause of the damage, then the burden shifts one more time to the carrier to establish what portion of the loss was attributable to its negligence and what portion was attributable to an excepted cause; if it fails to meet this burden then it will be liable for the entire loss.

PER-PACKAGE LIMITATION

Usually, pursuant to COGSA, when cargo is damaged or lost in situations that are not within the 17 enumerated defenses, the shipper is entitled to recover damages. COGSA limits carrier liability to $500 per package in these instances. In order for carriers to assert the per-package limitation, U.S. courts typically require adequate notice of the limitation and the fair opportunity given to the shipper to declare a higher excess value.

In order to fully comprehend the $500-per-package limitation, it is important to understand what constitutes a "package." If cargo is completely enclosed, it is considered a package for COGSA purposes. Difficulties arise when goods are only partially enclosed. Most courts look to the intent of the parties, as evidenced in the bill of lading. It is also important to note that a cargo interest will never receive more that its actual damages.

If the goods are not shipped in a "package," then the liability is limited to $500 per customary freight unit ("CFU"). The CFU is derived from the method that was used to calculate the freight in the contract of carriage, usually based upon weight.

UNREASONABLE DEVIATIONS

There are different consequences under COGSA depending on whether a deviation is reasonable or unreasonable. A deviation that is intended to save life or property at sea is not a breach of the contract of carriage and thus the carrier would not be liable for loss or damage resulting from the deviation. Conversely, COGSA states that a deviation for the purpose of loading or unloading cargo or passengers shall be regarded as unreasonable. COGSA does not specify the consequences of an unreasonable deviation; however, the majority of courts regard an unreasonable deviation to deprive the carrier of both the defenses under COGSA and the $500 per-package limitation if there is a causal connection between the deviation and the cargo damage or loss.

CONCLUSION

To summarize, an ocean carrier is not necessarily fully liable for whatever might occur to cargo during transit. COGSA does not impose strict liability. Liability under COGSA is predicated on fault or negligence. Carrier defenses can arise due to internal or external forces, and it is important for the carrier and the shipper to perform a cargo assessment to determine whether the cargo may be exempted from liability.