One if by Land! (Yes); Two if by Sea? (No) – Carmack Amendment Jurisdiction Ends at the Shoreline!

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In our interconnected, post-pandemic world, thousands of shipments, every day, despite supply chain bottlenecks, move from origin to destination via several different modes of transport within each shipment schematic. These shipments span oceans, and continents, and also span statutory liability regimes. The shipments involve a cavalcade of lading documents, email exchanges amongst shippers, carriers and freight intermediaries, delivery receipts, rate confirmations and a potpourri of other shipping and lading documents that end up making the evidentiary record, and forming a basis for a foundational statutory liability analysis.

In these cases, it is critical to determine, at the very outset, which liability regime applies. When a shipment is traversing its route via different modes of transport, the threshold determination of whether, for instance, the Carmack Amendment applies to the shipment, federal common law applies, or the Carriage of Goods by Sea Act (COGSA) applies, can make a seismic difference in any liability analysis. *That* determination can impact critical components of the defense of a cargo claim, including statute of limitations issues, liability limitation aspects, and mitigation of damage issues. There has been ample Supreme Court jurisprudence in recent years on the dichotomies involved in this type of statutory analysis. However, a recent federal district court case crystalized many of these always evolving principles, and arrived at a very firm and concrete conclusion, which is helpful to the jurisprudence. The court reached this conclusion after analyzing a rather convoluted, yet typical, fact pattern in these cases.

In *EMCO Corporation, et al. v. Miller Transfer and Rigging Co.*,[1] the shipper EMCO brought a cargo claim lawsuit involving the international carriage of a Hyperturn 110-SM2W-700 industrial machine, and its corresponding spare parts (the "Cargo"). The Shipment was to be transported from Ohio, to Austria, with stops in Baltimore, and Bremerhaven, Germany. EMCO alleged that it had retained Miller to pick up the Cargo from a facility in Cuyahoga Falls, Ohio, to provide "seaworthy packaging" for the cargo, and then to transport the cargo to the Port of Baltimore. After that, the Cargo would be shipped, via EMCO's nominated steamship line, to the Port of Bremerhaven, in Germany. From there, the Shipment was to be transported by EMCO's nominated inland motor carrier, to EMCO's facility in Hallein, Austria, which was the Cargo's final destination. In the Lawsuit, EMCO claimed that upon its arrival in Hallein, the Cargo was extensively damaged by rust and corrosion.

EMCO consequently brought suit against Miller, alleging a sole cause of action for freight loss and damage under the Carmack Amendment, 49 U.S.C. §14706(d). In its complaint, EMCO alleged that Miller had failed "to adequately package the cargo, which resulted in the cargo being delivered in a damaged condition."[2]

Background of Negotiation for the Shipments

Like all international shipments, there was a smorgasbord of email exchanges underlying the negotiations between the shipper and the carrier here. On August 31, 2017, Melissa Riordan of EMCO requested from Hank Willard of Miller, a quotation for the "packaging and shipment of a machine."[3] Ms. Riordan also told Mr. Willard that the machine would be "heading to Bremerhaven to be offloaded and trucked to our company's Austrian HQ in Hallein."[4] In a subsequent email, Ms. Riordan elaborated that:

> The machine would need to be moved to your [Miller's] facility for sea worthy packaging, and upon completion of that would be ready to schedule moving from your facility via sea transport to Hallein, Austria.
>
> If you have a trucker that could assist with moving to the best determined port, probably Baltimore, that would be great too.[5]

There were several supplemental conversations and email exchanges between the parties. Then, on September 26, 2017, Andrea Spalding of Miller emailed to EMCO's Riordan, "a final formal quote," which encompassed:

- transport of the machine and spare parts from Cuyahoga Falls, Ohio to Dover, Ohio ($1585.00 for the machine and

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$1456.00 for the parts);

- crating in Dover, Ohio which 'includes crate, VCI, unloading, reloading and securing the machine in crate' ($6582.00 for the large crate [the machine] and $1768.00 for the small crate [parts]); and
- transport of both crates from Dover, Ohio to Baltimore, Maryland ($3700.00 for the large crate and $3482.00 for the small crate).[6]

Expert testimony in the case explained that "VCI" is an acronym for "vapor corrosion inhibitor," which affords protection against corrosion.[7]

The quote also stated that it was "governed by the rules and regulations in Carrier's Tariff MTRR 100 Series and the terms and conditions of the 'Uniform Straight Bill of Lading.'" The quote also clearly stated a liability limitation, directly from the subject Tariff:

> Cargo liability on this shipment/s is released to a value of two dollars and fifty cents ($2.50) per pound, per piece, unless carrier is notified prior to pick-up that a value is to be declared. If a value is declared, the amount must be stated on the Bill of Lading. All declared values subject to excess value charges as provided for in carrier's rules and regulations Tariff MTRR 100 Series. If no value is declared on the Bill of Lading, carrier's cargo liability is subject to a maximum released value not to exceed lesser of two dollars and fifty cents ($2.50) per pound, or two hundred and fifty thousand dollars ($250,000). Used machinery is insured for upset damage only.[8]

The Court, in analyzing the Formal Final Quote, tellingly observed that "it is also notable …that the formal quote above ended with delivery of the cargo by Miller in Baltimore, Maryland."[9]

There was no dispute that Riordan of EMCO initially requested, *inter alia*, a quote on seaworthy packaging. Miller, however, claimed that, although its first quote *did* include an option to encase the crate in a foil bag with a vacuum seal, for an additional $1046.00, Riordan of EMCO ultimately rejected that option. EMCO contended that Miller's characterization of the foil wrap as an option misled Riordan, contending that:

> Willard never passed that recommendation [to vacuum seal the cargo in a foil bag] onto EMCO. Instead, in its quote, Miller presented that as a mere "option." Miller admitted that any such recommendation should have been passed on to EMCO. Had such a recommendation been passed on to EMCO, EMCO would have abided by it.[10]

However, the Court noted that it was undisputed that on September 27, 2017, replying to the Final Formal Quote, Riordan responded in an email stating "Please consider the quote accepted."[11] The court elaborated that the formal quote that EMCO accepted did *not* contain the $1046.00 price identified as an option for packaging the shipment with a VCI.

The Transport: Cuyahoga Falls to Dover

On October 16, 2017, Miller transported the cargo from M&E Storage in Cuyahoga Falls, Ohio to the Clarion Warehouse Company in Dover, Ohio. There was no damage to the cargo when it arrived at Clarion. Clarion, a separate corporate entity, then packaged and crated the cargo.

The Transport: Ohio to Baltimore

On November 14, 2017, Miller picked up the now packaged and crated cargo from Dover, Ohio, loaded it on trucks, and transported it to the consignee, Ceres Marine Terminal at the Port of Baltimore. Miller delivered the cargo to Ceres on November 15, 2017. That delivery was evidenced by a dock receipt from Ceres stating that there were "no visible marks" on the packaging. There was also no evidence in the record that the cargo was damaged when it arrived at Baltimore. Similarly, there was no evidence in the record that the crates containing the cargo were opened in Baltimore to inspect for damage. *Miller had no further involvement with the cargo after its delivery in Baltimore.*

The Transport: By Sea from Baltimore to Bremerhaven

Then came the maritime portion of the sojourn. On November 28, 2017, after setting at the port in Baltimore, outdoors for two weeks (the Court noted that it is the customary practice in the industry to store such containers outdoors, unless indoor storage is purchased, which did not occur), the Cargo was loaded aboard the steamship Drive Green Highway. The Cargo then arrived at the Port of Bremerhaven, Germany on December 15, 2017.

The Transport: Across Europe from Bremerhaven to Austria

On December 20, 2017, EMCO's nominated inland motor carrier, Interfracht, delivered the Cargo to EMCO's facility in Hallein, Austria. EMCO claimed that the corrosion on the cargo was discovered almost immediately after its delivery in Hallein. However, there was a motion to strike pending before the trial court that EMCO's evidence of the timing of the discovery of this corrosion, was unsupported by admissible evidence. As the court specifically noted: "EMCO *claims* that the corrosion on the Cargo was discovered almost immediately…"[12]

Miller contended, however, that if the Cargo was rusted, it was because it sat outside in the Austrian winter weather from December 20, 2017 through January 24, 2018, when Mr. Alexander Rabb of EMCO testified that he first opened the crates and examined the Cargo. Mr. Rabb testified that the machine was "all rusty." That fact was later confirmed on January 31, 2018 by EMCO's insurance inspector in an email in which he recommended that EMCO cover the cargo with a tarp, to protect it against the weather.[13] Finally, on February 22, 2018, representatives from EMCO's insurer inspected the cargo one more time and, arguably for the first time, took photographs.

No Inspection and Salvage

EMCO salvaged the cargo on October 18, 2018, as the Court noted, "a year before this lawsuit was filed."[14] EMCO sold the cargo in an "as is" condition to an entity in Germany. Neither EMCO nor its insurer ever invited anyone from Miller to participate in EMCO's inspection of the Cargo, to independently inspect it for damage, nor to assist in salvaging the Cargo to mitigate damages.

Summary Judgment: COGSA or Carmack?

Both parties moved for summary judgment, Miller to dismiss all claims based upon either the COGSA statutory regime, or the Carmack Amendment statutory regime. EMCO moved for summary judgment affirmatively on its Carmack Amendment claims. Bringing into play *Norfolk Southern Railway v. Kirby*[15] and its progeny, Miller first contended that the Carmack Amended did not apply, because of the overseas component of the shipment, i.e., crossing the ocean. Instead, Miller contended that the entire shipment was covered by a through a bill of lading and that consequently, the Shipment was governed by COGSA (and COGSA's one year statute of limitations and $500 per package limitation). If that argument prevailed, the COGSA claim would have been barred by COGSA's statute of limitations.

Alternatively, Miller contended that, even if the Carmack Amendment *did* apply, EMCO was unable to establish a *prima facie* case under the Carmack Amendment. EMCO contended that the Carmack Amendment *did* apply, because there was no through bill of lading. EMCO contended that it *could* establish a *prima facie* Carmack claim, and, as the Court sanguinely noted, it would establish this claim by "relying on the purported damage to the Cargo discovered when it arrived *in Austria*."[16] EMCO based this assertion upon the claim that Miller had agreed to provide seaworthy packaging – by subcontracting another corporate entity – Clarion Warehouse – to do so, and that consequently Miller was liable under Carmack. The Court first noted, in discussing the background of the Carmack Amendment, that the Amendment makes carriers liable for the full actual loss, damage or injury caused by them to property that they transport in interstate commerce. *See, Missouri Pacific R. Co. v. Elmore & Stahl*, 377 U.S. 134 (1964). The Court then referenced ICCTA's broad definition of "transportation:"

> "Transportation" is defined broadly to include both "(A) a motor vehicle... related to the movement of... property...; and (B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of... property."[17]

On this point, the Court cited to *Georgia F. & A. Ry. Co. v. Blish Milling Co.*[18] ("the words of the statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation which, as defined in the Federal act, includes [packaging]").

Thus, the Court in its decision, was considering this broad, statutorily reinforced, definition of "transportation" in determining just where, from a geographic standpoint, the boundaries of Carmack Amendment liability are. The Court then summarized the very familiar and time-tested proof schematic of the Carmack Amendment:

> The Supreme Court has established a burden-shifting framework for Carmack Amendment claims. "[T]he shipper establishes his *prima facie* case when he shows delivery [to the initial, *i.e.*, the receiving, carrier] in good condition, arrival in damaged condition and the amount of damages. Thereupon the burden of proof is upon the carrier to show that ... the damage to the goods was due to one of the accepted causes relieving the carrier of liability[,]" that is "the damage was caused by (a) the act of God; (b) the public enemy; (c) the act of a shipper himself; (d) public authorities; (e) or the inherent vice or nature of the goods."[19]

The Court concluded that if the defendant carrier meets this burden – it wins. If it does not, then the shipper prevails, based upon its establishing the – very low threshold – *prima facie* case.[20]

Carmack Ends at the Shoreline

The Court then summarized very clearly, the geographic lines of demarcation of Carmack jurisprudence:

> While the Carmack Amendment applies to cargo shipped within the United States, it does not apply to international shipments. "Shipments from the United States to ports to ports of foreign countries and vice versa" are governed by COGSA.[21]

The Court then noted that in recent years, several courts have considered which law is applicable when shipments contain both domestic and international segments. In the *Kawasaki* case, the U.S. Supreme Court considered cases involving through bills of lading covering cargo for the entire course of the shipment *beginning in a foreign, overseas county*, and continuing to a final inland destination in the United States. In that case, the Court found that the Carmack Amendment did not apply to the inland segments of a shipment originating overseas and moving on a single through bill of lading, but that the through bill of lading governed the parties' rights.[22] The Court specifically did not address situations in which goods were received at a point in the United States for export overseas, to a foreign country. However, the instant Court, relying upon *Hyundai Merchant Marine Co.*, concluded that, at least in the Sixth Circuit:

> The rule of *Kawasaki* appears to be that Carmack does not apply to the overseas shipment of goods – import or export – shipped under a single through bill of lading.[23]

Applying Carmack to the Shipment Schematic

The Court then applied these principles to the shipment schematic at issue, and

concluded that there were separate bills of lading in the record to cover each leg of the overall trip. Summarizing Miller's contentions on this point, the Court noted that:

> Miller relies solely upon the Roco Ocean Bill of Lading under whose terms the cargo was shipped from Baltimore to Europe … both [EMCO employees] testified that this bill of lading was intended to cover the entire shipment of the cargo from [origin in the U.S.], to EMCO, in Hallein, Austria.[24]

Again, referencing *Kawasaki*, the Court noted when a trip comprises two separate journeys, each covered by its own separate bill of lading, the overland portion would fall under Carmack, even though the overseas portion would not. As the Court explained:

> The ocean bill of lading relied upon by Miller to attempt to avoid Carmack Amendment application is not a through bill. There is nothing in that bill of lading that even hints at the original pick-up point(s) for the Cargo. … Therefore, this case is governed by the Carmack Amendment.[25]

Having determined that Carmack applied, the Court next sought to actually *apply* the Carmack Amendment, to the shipment schematic at hand. The Court reiterated the typical Carmack proof requirements of delivery in good condition, arrival in damaged condition, and the amount of the damages. However, the Court then posited the critical question of the case:

> But arrival *where* in damaged condition – in Baltimore or in Austria? EMCO says Austria, despite its insistence on applying the Carmack Amendment – a statute establishing "carrier liability for loss or damage to goods transported in *interstate* commerce."[26]

The Court pointed out that EMCO, for its contentions, relied upon a portion of the Carmack Amendment typically applied *amongst* motor and rail carriers, involved in a single shipment, for indemnity purposes, and distinguished it away:

> EMCO relies upon *Reider's* statement that "[t]he purpose of the Carmack Amendment was to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods." But, even in *Reider*, that "purpose" of the Amendment is stated in a solely *interstate* shipping context. Here, EMCO, as the shipper, chose to structure the journey in two separate parts. Miller was involved only in the first segment, which ended in Baltimore. Therefore, the "arrival in damaged condition" referred to in the case law necessarily means, in this case, arrival in Baltimore in damaged condition. From Miller's perspective, Baltimore was the final destination, since that is where Miller delivered the cargo to a third party hired by EMCO.[27]

Thus, the Court summarized very clearly the lines of delineation, from both a geographic and multimodal standpoint, of the Carmack Amendment.

No Seaworthy Packaging Exception

EMCO, however, argued that "the seeds of the cargo's damage (alleged improper packing) were sown while the cargo was in Miller's custody,"[28] and that that was sufficient to establish that the cargo was damaged "in transit" for purposes of the Carmack Amendment. In response to this contention, the Court rather dryly noted that: "EMCO cites no authority for this proposition – neither any evidence in the record of "improper packing" nor any case law that stands for EMCO's "seeds of damage" argument."[29]

EMCO claimed that due to the alleged failure of the requested "seaworthy packaging" the cargo was damaged when it arrived in Austria. The Court noted rather succinctly, though, that: "But Carmack liability ends upon the carrier's delivery to the consignee … [a]nd [that] 'delivery' is a question of federal law."[30] The Court explained that since "delivery" must mean delivery as required by the contract of carriage, *i.e.*, the bill of lading and its commensurate tariffs, the intention of the parties defines the scope of delivery. As the Court explained:

> A "straight bill of lading," such as here, "simply requires delivery of the goods to the consignee." In this case, the consignee for each of the two cargo crates in the transport from Ohio to Baltimore, Maryland is listed as "Ceres Marine Terminal Dundalk." Therefore, under federal law "delivery" from Miller's perspective occurred in Baltimore, Maryland. Under Carmack, Miller cannot be held responsible for damage allegedly occurring after the cargo left the Port of Baltimore, which segment was performed under a separate bill of lading and did *not* incorporate Miller.[31]

Finally, the Court concluded that EMCO could not have it both ways, i.e., if EMCO was (correctly) arguing that the Carmack Amendment applied, even though there was no through bill of lading, then EMCO needed to establish Miller's liability by proving damages at the time of delivery in Baltimore, or at the very least before the cargo was loaded on the ocean going vessel. Consequently, the Court concluded that EMCO had failed to establish the elements of a *prima facie* case under Carmack.

Conclusion

This case, and its holding, touch upon several aspects of international multimodal, transoceanic shipments. The case stands for the proposition that there should be a careful and circumspect parsing of the respective lading documents for any such shipments, to first understand and assess whether there was a through bill of lading. It also stands for the very conclusive principle of law that the extent of Carmack jurisprudence – and commensurate Carmack liability – ends at the water's edge. It also finds that liability cannot somehow remain innate and inert as the cargo is transported further along in its journey, across the ocean and other continents, but that there is a very clear line of geographic demarcation.

This case also provides a helpful blueprint as to how international cargo claim

cases, with similarly complex fact patterns, should be analyzed. There really are several fundamental threshold practice pointers in an initial assessment of a cargo claim in such a case:

1. Lay out the documents (front and back!), either physically or on dual screens, and carefully examine the lading and shipment schematic, and how the lading documents interact;
2. Ensure that you have the universe of background emails from the client and counterparty as they may form part of the contractual relationship, or at least provide context;
3. Carefully assess the lading documents as to whether the bill of lading is a unitary or through bill of lading;
4. Do not forget to review the applicable tariff if it is incorporated in the uniform straight bill of lading, or other lading/shipping documents, for any appropriate liability limitations;
5. Carefully evaluate the liability regime, depending upon the mode of transport, that would be applied, since it can make a huge difference as to jurisdiction, liability limitations, and statute of limitations.

This comprehensive, thoughtful, broad-minded analysis will help form the blueprint for successfully defending (or prosecuting) a high value, multimodal, international shipment.

Endnotes

1 2022 WL 889208 (N.D. Ohio Mar. 24, 2022).
2 *Id.* at *2.
3 *Id.*
4 Id.
5 *Id.*
6 *Id.* at *3 (bracketing in original).
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.* (internal citations omitted; bracketing in original).
11 *Id.*
12 *Id.* (emphasis in original).
13 The Court noted that Miller's Motion to Strike the allegedly inadmissible evidence as to EMCO's version of when the cargo crate was opened was not relevant to its summary judgment determination, in light of its finding on Carmack Amendment applicability.
14 *Id.* at *4.
15 543 U.S. 14 (2004) ("a maritime case about a train wreck").
16 *Id.* at *5 (emphasis in original).
17 *Id.* at *6 (quoting 49 U.S.C. §13102(23)).
18 241 U.S. 190, 196 (1916).
19 *EMCO*, 2022 WL 889208, at *6 (citing *Missouri Pac. R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137-38 (1964)).
20 *Id.* (citing *CNA Ins. Co. v. Hyundai Merch. Marine Co. Ltd.*, 747 F.3d 339, 353 (6th Cir. 2014)).
21 Id. (citing *Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89 (2010)).
22 *Id.* at *7 (citing *Kawasaki*, 561 U.S. at 100).
23 *Id.*
24 *Id.*
25 *Id.* at *8 (emphasis in original).
26 *Id.* (emphasis in original) (citing *Exel, Inc. v. S. Refrigerated Transp., Inc.*, 905 F.2d 455, 462 (6th Cir. 2018)).
27 *Id.* (quoting *Reider v. Thompson*, 339 U.S. 113, 119 (1950)) (emphasis in original, internal citations omitted).
28 *Id.* at *9.
29 *Id.*
30 *Id.* (citing *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 213 (1931)).
31 *Id.* (emphasis in original) (quoting *Intech, Inc. v. Consol. Freightways, Inc.*, 836 F.2d 672, 674 (1st Cir. 1987)).