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Cargo Liability - Global Comparative Analysis of Legal Regimes

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International laws for cargo liability impact the way enterprises procure transportation and logistics services, the contracts under which those services are purchased, the process for claims adjudication, and the liability for loss, damage, or the delay of goods. Consider for example the international conventions that apply recovery in a SDR/kg metric: ocean service yields 2 SDR per kg; road service yields 8.33 SDR per kg; rail service yields 17 SDR per kg; and air service yields 22 SDR per kg. These standards vary greatly across mode, and each are different from domestic United States liability regimes, which also vary across mode. Variance also exists in the form of claims notice periods, limitations on the time in which one may file a lawsuit, the requirements for proving a claim, and the exclusions available to service providers in denying claims.

Supply chain professionals across the world around navigate these extremes and their impact on the procurement or delivery of services. This article compares those key differences in legal liability regimes.

Surface Transportation Liability

The principal surface transportation modalities are road and rail transport. For surface-based transportation providers, liability and its limitations are determined by the location where loss occurred as well as the specific mode.

CMR Convention - The CMR Convention is an international treaty that governs the transportation of goods by road across international borders. Under the CMR Convention, motor carriers are generally liable for the loss, damage, or delay of goods occurring during transport if the loss, damage, or delay was due to their fault or negligence. The CMR Convention stipulates that a motor carrier is not liable if it can prove that the loss, damage, or delay resulted from specific exempted circumstances such as inherent defects in the goods, acts of war, or natural disasters. In addition to addressing the scope of liability, the CMR Convention also establishes specific limits of liability for motor carriers in the event of loss, damage, or delay of goods during transit. The motor carrier's liability is limited to 8.33 Special Drawing Rights (SDR) per kilogram of gross weight of the lost or damaged goods. A number of countries have adopted the CMR Convention, including many European Union member states as well as other countries such as Switzerland, Turkey, and Russia.

COTIF Convention - Liability for international rail carriers is governed by COTIF. Rail carriers are liable for loss or damage to the goods between the time of acceptance and delivery, as well as for loss and damage resulting from time during which the transit period was exceeded.A rail carrier may be relieved of liability if the loss, damage, or delay resulted from a fault or order of the person

entitled to relief, by the inherent vice of the goods, or by circumstances that the rail carrier could not avoid and the consequences of which it was unable to prevent. The rail carrier is also relieved of liability when the loss or damage arises from the special risks inherent in specified circumstances. In addition, COTIF also applies limitations of liability based on the goods carried or circumstances of the loss, including completion of administrative formalities.While COTIF is not globally adopted, its rules have been adopted by the European Union member states and other countries.

Carmack Amendment - The United States applies Carmack to motor carrier liability and also rail carrier liability, which is found under statute at 49 U.S.C. § 14706 (and for rail carriers at § 11706). Under Carmack, motor carriers in interstate commerce are generally liable for the full value of the goods lost or damaged unless they can prove that the loss or damage results from specific exceptions, such as an act of God, public enemy, authority of law, or inherent vice in the goods. These exceptions are asserted as defenses to a claim. They are similar to those available to motor carriers under the CMR Convention. Another similarity is that loss caused by the shipper's own negligence or improper handling is excepted. A motor carrier's liability for loss or damage under Carmack is uncapped although parties will often agree to limitations in exchange for favorable service rates (for example, $100,000 USD per truckload of cargo).

Air Transportation Liability

As with surface transportation, the liability of air carriers can depend on the location of the transportation. The Montreal Convention (Montreal) is the leading force in determining liability for air carriers in international travel. Although the United States has adopted Montreal for international transportation, the convention does not apply to domestic air traffic, which is instead subject to common law.

Montreal Convention - Montreal is a multilateral treaty that governs the international liability for air carriers. Montreal is a two-tier liability system allowing shippers to recover with a near strict-liability regime for claims up to an SDR threshold and a negligence standard for claims over that threshold. Air carriers are subject to Montreal's liability standards between the place of departure and destination as well as while the air carrier is being embarked or disembarked. Although Montreal applies a near strict liability, air carriers can seek exemptions if they can prove damage was caused by events outside the control of the air carrier and could not have been avoided even with the air carrier's exercise of due care. Montreal sets a limitation that the air carriers' liability for cargo loss or damage shall not exceed 22 SDR; however, the parties are free to contract to set a recovery amount that exceeds 22 SDR. Montreal also sets out a claims period for damaged goods that is 14 days from the date of receipt and a claims period for delay goods of 21 days from the date of delivery.

U.S. Common Law - United States common law governs cargo liability for domestic flights. Air carriers are liable for cargo loss when the loss occurs due to the air carrier's failure to exercise reasonable care in handling the cargo. As with Montreal, the air carrier's liability applies unless the loss resulted from factors beyond its control, such as inherent defects in the cargo or natural disasters. Most air carriers in the United States seek to limit their liability for domestic flights through an air waybill, which is typically $0.50 USD per pound, unless the shipper demands a higher amount. Unlike Montreal, however, U.S. federal common law and judicial precedents provide additional guidance on interpreting liability terms and resolving disputes related to cargo damage. It is

common for parties to elect for Montreal to govern domestic U.S. air cargo for convenience and consistency with international movements.

Ocean Transport Liability

Like surface and air-based transportation, several factors can determine the liability scheme that applies to a particular ocean-based movement, but the Hague/Hague-Visby Rules (Rules) and the Carriage of Goods by Sea Act (COGSA) are the two prevailing regimes that govern liability for cargo loss, damage, or shortage that may occur in international trade and United States trade.

Hague-Visby - The Rules are an international convention applicable to contracts of carriage that are covered by a BOL or similar document of title related to the carriage of goods by sea where: (1) the BOL is issued in a contracting nation state; or (2) the carriage is from a port in a contracting nation state; or (3) the contract contained in or evidenced by the BOL provides that the Rules or the legislation of any contracting nation state governs the contract. Unless one of Rules' 17 enumerated defenses apply, the carrier is liable for loss or damage to cargo in an amount not to exceed 666.67 SDR per package or unit or 2 SDR per kilogram of gross weight of the goods that were lost or damaged, whichever is the higher. Under the Rules, shippers must assert a claim or bring suit with respect to the goods carried within one year of delivery or the date when they should have been delivered.

Carriage of Goods by Sea Act - COGSA applies to contracts or carriage between shippers and ocean carriers for the international carriage of goods by sea (except for live animals), to or from foreign ports and United States ports. A carrier's liability under COGSA is from "tackle to tackle" and predicated on: (1) a failure to exercise due diligence to make the vessel in all respects seaworthy and to properly man, equip, and supply the vessel; (2) fault; or (3) negligence. Unless one of COGSA's eight enumerated defenses apply, the ocean carrier is liable for loss or damage to cargo in an amount not to exceed $500 USD per package or per customary freight unit if the goods are not shipped in packages. COGSA preempts the application of other liability regimes for contracts of carriage in the United States foreign trade, but the Harter Act or Carmack will apply to contiguous and non-contiguous domestic trade, including coastwise shipping, inland water shipping, and movements in interstate or intrastate commerce. Shippers have a one-year statute of limitations from the delivery or the expected delivery of the goods for a shipper to file a lawsuit for cargo loss, damage, or shortage under COGSA.

Warehouseman Liability

Unlike transportation, there is no international convention that governs the accepted liability of a warehouseman. This places warehousing services almost entirely in a commercial realm as opposed to a heavily regulated environment. The regime for liability pertaining to lost, stolen, damaged, or destroyed goods in storage requires consultation not only with the jurisdiction where the goods are stored but also industry custom in that jurisdiction.

Fault-Based Liability - Absent contrary terms accepted by a depositor, a warehouseman's liability is singularly focused on fault. In common law jurisdictions, including the vast majority of the United States, fault is determined under the theory of negligence. That is, a depositor must establish a warehouseman's duty of care relating to the goods, breach of that duty of care, causation, and damages. In the United States, this proposition is also codified in each state's Commercial Code.

Simply, a warehouseman is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances. Conversely, a warehouseman is not liable for damages that could not have been avoided by the exercise of that care. The establishment of a liability regime based on fault negates the common misconception among depositors that a warehouseman is an insurer of the goods in its possession. Practically, this means that warehousemen are customarily not responsible for loss, damage, or destruction of goods caused by Acts of God or other events typically described as "force majeure" absent showing a fault.

Negotiated Limitations of Liability - The limitation of that liability is not set by convention but rather by industry practice and commercial negotiation. However, certain organizations publish standard warehousing terms in their jurisdictions that help establish market expectations; notably, those include the Dutch Warehousing Conditions in Europe and the Standard Contract Terms and Conditions for Merchandise Warehouses issued by the International Warehouse Logistics Association in the United States. Practically, the limitation of liability will depend materially on the value of the goods in storage, the strength and sophistication of the respective parties, and the availability of either the depositor's or the warehouseman's applicable insurance policies to cover the loss or damage.

Comparative Differences and Procurement or Sale Terms

The practical effect of these variances is meaningful in terms of risk to cargo owners and exposure for service providers. The cost of service, necessity of first-party insurance cover, and standard operating procedures for filing of claims are each influenced by these legal regimes. Consider that these establish the industry standards of minimum liability, although each allows parties to contract for higher standards. This means that high-value cargoes may receive higher levels of liability but at higher service rates. The bargained exchange between higher liability and reasonable rates of service may mean that first-party insurance is actually more cost-effective than paying for a carrier's liability. Insurance cover will also respond differently in the event of a claim, since the standards applied will be under the policy terms rather than exclusions available under law applicable to the carrier's service. Even in the earliest event of a claim, the fact that a Montreal claim may need to be filed within 14 days while a Carmack claim must be filed within 9 months challenges the standard operating procedures around receiving shipments, inspection of count and condition, and delivering notice to the responsible service provider.

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