



## US law – COGSA v. Carmack

In another maritime case about a train wreck, the US Supreme Court holds that US COGSA, not Carmack, applies to the inland rail leg under an ocean carrier's through bill of lading covering a multimodal shipment originating overseas.

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# Facts

In *Regal-Beloit*,<sup>1</sup> the vessel operating common carrier, Kawasaki Kisen Kaisha, Ltd. (K Line) issued through bills of lading to cover containerised shipments from Asia to inland destinations in the US via the Port of Long Beach. The containers were carried by K Line by vessel from Asia to Long Beach. K Line sub-contracted with Union Pacific Railroad (UP) to carry the containers by rail from Long Beach to the Midwest destinations to complete the carriage under its through bills of lading. During the rail leg, the UP train derailed in Oklahoma and this gave rise to cargo claims being filed by cargo interests against K Line and UP in a California state court. K Line and UP removed the case to the US District Court in California.

## The terms of the bill of lading

The through bills of lading provided that US COGSA applied from the time of receipt of the containers in Asia until delivery of the containers in the US. The bills of lading also contained a forum selection clause providing that any action under the bills or in connection with the carriage shall be brought in the Tokyo District Court. The bills of lading also contained a Himalaya Clause which extended the benefit of the bill of lading defences to sub-contractors of K Line that perform services contemplated by the bills, such as UP. The bills also permitted K Line to sub-contract the carriage "on any terms whatsoever".

## Motion to dismiss

K Line filed a motion to dismiss pursuant to the Tokyo forum selection clause. The District Court granted the motion to dismiss and found that US COGSA applied to the through bills of lading and that the forum clause should be enforced. UP joined in the motion and was also dismissed from the lawsuit.

## Appeal

Cargo interests appealed the dismissal to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the decision of the District Court and held that the Carmack Amendment,<sup>2</sup> not US COGSA, governed the inland leg of the through bills of lading issued by K Line, even though no separate bill of lading had been issued by K Line or UP for the domestic rail transportation, and notwithstanding the fact that the bills extended COGSA throughout the entire carriage. Since Carmack has its own forum provision, the Ninth Circuit concluded that the Tokyo forum selection clause was trumped by the Carmack's forum provision and therefore was unenforceable. In finding that Carmack applied, the Ninth Circuit found that K Line was a "rail carrier" for purposes of Carmack, because K Line provided "common carrier railroad transportation for compensation" and provided "intermodal equipment [the containers] used by or in connection with a railroad".

K Line and UP petitioned for certiorari to the US Supreme Court. The Supreme Court

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*granted certiorari and agreed to hear the case because of the conflict between the decision of the Ninth Circuit and the decisions of four other circuits.*

## COGSA v. Carmack

US COGSA and Carmack differ significantly. Under COGSA, a carrier's liability for loss or damage to cargo during transit is based upon negligence. COGSA is flexible, allowing parties to contractually limit liability, as well as select forums for disputes. Carmack is far more rigid. Carmack makes the receiving and delivering rail carriers liable for loss or damage to cargo and imposes something closer to strict liability. Carmack also restricts the ability of parties to agree to limitations on liability. It also has its own forum provision specifying the venues where actions against carriers may be brought, and thus has been interpreted to prohibit forum selection clauses.

## Supreme Court

The US Supreme Court, in a six to three decision, reversed the Ninth Circuit decision and held that Carmack does not apply to a shipment originating overseas under a through bill of lading. Since the through bill of lading issued by K Line was subject to US COGSA, not Carmack, the Tokyo forum clause was enforceable.

In support of its decision, the court first looked at the text of Carmack. In construing the statutory language, the court concluded that Carmack applies where the initial carrier is a "receiving rail carrier" that receives the cargo "for [domestic rail] transportation". Since the cargo in this case was not received by a "receiving rail carrier" for "domestic rail transportation", but instead was received at an overseas location under a through bill that covers the transportation from the overseas location to an inland destination in the US, the court found that Carmack did not apply. The court further found that since UP was not a "receiving rail carrier", but instead was a "delivering rail carrier" that did not have to issue its own Carmack bill of lading, UP too was not subject to Carmack.

The court also said that Carmack's statutory history supports the conclusion that it does not apply to a shipment originating overseas under a through bill of lading. The court found that none of Carmack's legislative versions applied to the domestic rail segment of an import shipment from overseas under a through bill of lading.

The court further held that its interpretation of Carmack attains the most consistency between Carmack and COGSA and promotes the purposes of the two statutes. Applying different statutory regimes to the same through shipment would undermine COGSA and container multimodal transportation. If Carmack applied to the inland leg of an overseas through shipment, one set of liability and venue rules (COGSA) would apply when the cargo is damaged during ocean transport and another (Carmack) would apply during the inland rail transportation. The benefit of having uniformity of law under the through bill of lading would be lost. This would make it harder to resolve cargo claims because a court would have to decide where the damage occurred to determine which law applied. This is not always easy because of the containerised nature of the shipments. According to the court, applying Carmack to overseas import through shipments would also undermine the purpose of COGSA, to facilitate efficient contracting in contracts for the carriage by

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*sea". In this case, the cargo owners had chosen the efficient contracting option of selecting K Line for the entire through transportation, rather than contracting separately for the domestic rail transportation with UP.*

## Comment

The court expressly noted in its opinion that its decision does not address the instance where goods are received in the US for export to overseas destinations. However, for export shipments originating in the US under through bills of lading, it is the author's view that since the initial carrier (the contracting ocean carrier) is not a "receiving rail carrier" receiving the cargo for "domestic rail transportation", COGSA, not Carmack, should govern the ocean carrier's liability under Regal-Beloit's reasoning and analysis. Further, the policies enunciated by the court in Regal-Beloit (e.g., uniformity of law, efficient contracting, ease to settle cargo claims) should apply equally to export shipments originating in the US. Nonetheless, it appears that at least for the time being, the question with respect to export through bill of lading shipments will remain disputed among vessel and cargo interests.

The Supreme Court's decision in Regal-Beloit is significant because it clarifies that US COGSA, not Carmack, governs the liability of an ocean carrier under a through bill of lading covering the carriage of cargo from an overseas port to a US destination even where cargo is lost or damaged during the inland rail leg of the carriage. The decision reverses the Ninth Circuit decision in Regal-Beloit<sup>3</sup> and overrules the Second Circuit's decision in Sompo Japan Insurance Co. v. Union Pacific Railway Co.<sup>4</sup> The Regal-Beloit decision follows the Supreme Court's decision in Norfolk S. Ry. Co. v Kirby, and is consistent with the principles and policies that the court articulated in Kirby.

## Footnotes

<sup>1</sup> Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433 (2010).

<sup>2</sup> The Carmack Amendment (49 U.S.C. Section 11706) is a uniform national liability system for interstate rail carriers.

<sup>3</sup> 557 F. 3d 985. <sup>4</sup> 456 F. 3d 54 (2d Cir. 2006).