



## Does COGSA or the Carmack Amendment Apply to the Domestic Inland Portion of a Multimodal Through Bill of Lading? The Answer Remains Unclear.

In today's global economy, many goods are exported across vast distances and between foreign nations with diverse shipping laws. Goods manufactured in the midwestern United States may ultimately be intended for the markets of Singapore. In order to get these goods to market, they must often be shipped using multiple modes of transportation, typically rail and sea. Carriers generally issue bills of lading, which govern the terms of the shipping agreement. In the case of multimodal shipping agreements, shippers and carriers typically enter into a "through bill of lading" that is intended to cover the shipping terms of both the sea and land modes of transportation in a single document. Whether the Carriage of Goods by Sea Act (COGSA) or the Carmack Amendment ("Carmack") applies to all or portions of a through bill of lading is an important consideration for both shippers and carriers, since the application of either law can have a significant impact on any dispute arising from the cargo agreement, specifically with regard to liability, choice of venue, and the validity of arbitration agreements.

COGSA governs the terms of bills of lading issued by ocean carriers engaged in trade between United States ports and ports of foreign countries. Notes following 46 U.S.C. § 30701. On the other hand, Carmack governs the terms of bills of lading issued by domestic rail carriers. 49 U.S.C. § 11706. Carmack requires a receiving rail carrier to issue a bill of lading. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S.Ct. 2433, 2443 (2010). A receiving rail carrier is the initial rail carrier, which "receives" the property for domestic rail transportation at the journey's point of origin. *Id.* (citing 49 U.S.C. § 11706(a)). However, COGSA allows parties to contractually extend certain terms contained in COGSA to cover the entire period under which goods are under a carrier's responsibility, including those periods of inland transportation. *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004).

The United States Supreme Court has held that in the case of a multimodal shipping agreement wherein the shipment originates at a foreign port for delivery to an inland domestic location, the parties can contractually agree that the terms of COGSA will apply to the entirety of the transportation (i.e., both sea and land transportation). *Kawasaki*, 130 S.Ct. at 2444. This is because there is no receiving rail carrier, as defined in Carmack, and thus no carrier that must issue a Carmack-compliant bill of lading. *Id.* However, the *Kawasaki* Court expressly refused to address the instance where goods are received at an inland point in the United States for export to a foreign country. *Id.*

The Supreme Court has provided no further guidance on this issue since *Kawasaki*. Dicta in *Kawasaki* could reasonably be interpreted in such a way that would lead one to believe that a Carmack-compliant bill of lading must be issued by the initial rail carrier that accepts the goods at the inland point in the United States, since they are a “receiving rail carrier” under Carmack. However, other dicta in *Kawasaki* suggests that the Court would support application of COGSA to all multimodal shipping contracts, since “applying Carmack’s provisions to international shipping transport would also undermine the purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea.” *Id.* at 2447. The law remains unclear as to which of these interpretations should be applied to multimodal international shipping agreements wherein the goods are received at an inland point in the United States for export to a foreign country.

A recent case in the Second Circuit Court of Appeals, *American Home Assurance Co. v. A.P. Mollermaersk A/S*, No. 14-1212, March 25, 2015, suggests that the former approach is being adopted in certain jurisdictions. In *American Home Assurance*, Maersk agreed to transport goods pursuant to a single shipping agreement from Ohio and Indiana to Australia. Maersk subcontracted with BNSF Railway to transport the cargo by rail from Illinois to California, where it was then to be loaded on a Maersk vessel for ocean carriage to Australia. BNSF’s train derailed prior to reaching the port in California, damaging the cargo. The cargo insurer then sued both Maersk and BNSF to recover for damage to the cargo as a result of the derailment.

The Second Circuit affirmed the district court’s judgment holding that Carmack governed plaintiff’s claims against BNSF, but that Carmack did not govern the claims against Maersk, because ocean carriers are not subject to statutory Carmack liability and because Maersk did not contract into Carmack liability in its bill of lading: “Carmack provides the default legal regime governing the inland leg of a multimodal shipment originating in the United States and traveling on a through bill of lading.” Ultimately, the Court found that although the carrier issued a through bill of lading which did not incorporate Carmack, Carmack still applied to all aspects of inland transportation performed by Maersk’s subcontractor, BNSF.

*American Home Assurance* highlights the uncertainty facing carriers issuing through bills of lading in today’s legal landscape. It is important that through bills of lading contain the proper legal language to minimize any confusion as to the applicable legal regime to be applied. Careful consideration also must be given as to whether a through bill of lading is the best choice for a particular shipping agreement. As always, Jones Walker will continue to monitor this issue and all issues that may potentially impact our clients and will provide updates in future E\*Alerts should there be any further developments with regard to this issue.

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