



Understanding the Carriage of Goods by Sea Act

46 U.S.C. §1300 et seq.

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Purpose

- To familiarize underwriters with the provisions of the Carriage of Goods by Sea Act and its effect on contracts of carriage as well as an insured's duties under the policy of insurance.



Overview

COGSA's overarching purpose is to allocate risk of loss and create predictable liability rules on which not only carriers but others can rely.

- Historical Perspective
- Sky Reefer/Forum Selection Clauses
- Kirby Decision – US Supreme Court
- Other Statutory schemes – Harter Act, Hague Visby and Hamburg Rules



Historical Perspective

- Legislative Intent of COGSA is expressed in §1303(8).
- The carrier is prohibited from contracting away its own negligence or limiting its liability to a level lower than what is prescribed by the statute.



Sky Reefer/Forum Selection Clauses

- In the *Sky Reefer* decision the U.S. Supreme Court upheld a Japanese arbitration clause in a bill of lading for a shipment of cargo from Morocco to Boston.
- Since *Sky Reefer*, the district and appellate courts have consistently enforced forum selection clauses.



Kirby Decision – US Supreme Court

- In *Norfolk Southern Railway Co. v. James N. Kirby*, 543 U.S. 14 (2004) a rail carrier limited its liability based on a Himalaya clause, even though no privity of contract existed between the cargo interest (Kirby) and the rail carrier.
- In *Sompo Insurance Co. of America v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006) the Second Circuit held that the Carmack Amendment applied by force of law to the rail movement and took precedence over the contractual extension of COGSA provision in the ocean carrier's bill of lading.



Kirby Decision – US Supreme Court

➤ In *Altadis USA Inc. v. Sea Star Line*, 458 F.3d 1288 (11th Cir., August 7, 2006) the Court of Appeals held:

... The Carmack Amendment does not apply to a shipment from a foreign country to the United States (including an ocean leg and over-land leg in the United States) unless the domestic over-land leg is covered by a separate bill of lading.



Relevance to Underwriters

➤ Duties of the assured under the policy

- AIMU Clause 11: Duty of Assured requires assured to take measures as may be reasonable for the purpose of averting or minimizing a loss...
- Under the law, there is an obligation for the consignee to take delivery of the cargo unless such damage renders the property practically valueless.

Practically Valueless – *what are the costs and expenses for acceptance and use?*

Consequences of an Unwarranted Abandonment – *freight, cleaning expenses, costs of discharge.*



Relevance to Underwriters *(cont'd.)*

Subrogation potential: What is needed?

- A subrogation receipt assigning the rights of the assured to the insurance company;
- A survey report describing the nature and extent of damage;
- An adjustment by the underwriter quantifying the loss.



Scope of Coverage

What is the Scope of the Statute?

§1312 Scope of Chapter; “United States” “foreign trade”

A. Geographic Scope

- 46 USC §1312.
- Requirements: Bill of lading or other document of title. A Charter Party is not subject to COGSA unless a Clause Paramount is included in the contract of carriage.



Scope of Coverage *(cont'd.)*

A. Geographic Scope *(cont'd.)*

- What is a Clause Paramount and what effect does it have?
 - “This Bill of Lading, so far as it relates to the carriage of goods by water, shall have effect, subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this Bill of Lading be repugnant to said Act to any extent, such terms shall be void to that extent, but no further.”
- Types of Voyages
 - Foreign v. Domestic
 - *Ex proprio vigore*
 - Common v. Private Carriage
 - *Ex contractu*



Scope of Coverage *(cont'd.)*

B. Duration of the Voyage

- “Tackle to tackle”
- Coastwise option
 - Difference between Harter Act and COGSA
- Duration in Time for Filing Suit
(1 Yr from Delivery)
 - §1303(6) Notice of loss or damage; limitation of actions
 - Extensions of the time for suit may be granted by consent of the parties
 - Delivery may occur prior to the actual receipt of the cargo by the consignee



Scope of Coverage *(cont'd.)*

C. Exclusions

➤ Deck Cargo and Deviation

- COGSA is interpreted to require under deck stowage absent an agreement or established custom implying consent for on deck carriage.
e.g. Yachts, bagged cargo
- Did shipper assent to on deck stowage?
- What was reasonable expectation or practice with these parties on this type of vessel?



Scope of Coverage *(cont'd.)*

D. Precautions When Filing Suit

Where and how does a cargo interest assert a claim under the contract of carriage and what is the contract of carriage that the goods were carried under?

Venue/Forum Selection Clause

Risk of Loss

F.O.B. versus C.I.F.

Incorporation



Scope of Coverage *(cont'd.)*

E. How may prompt legal action assist an underwriter?

1. Discovery: An investigation into what happened may assist with both the preservation and collection of evidence.
 - What evidence should be collected or requested?
 - Federal Rules of Civil Procedure provide for expedited discovery.
2. Surveyors skilled with evaluating the condition of a vessel, the cause of a structural or machinery failure, may serve as the underwriter's "eyes and ears."



Scope of Coverage *(cont'd.)*

E. How may prompt legal action assist an underwriter? *(cont'd.)*

3. Security may be obtained by way of a Letter of Undertaking.
 - What if the vessel is lost or does not trade in the jurisdiction?
 - Rule B(1) Attachments and Rule C Arrest
4. A realistic reserve may be set based on the early evaluation of the claim and the carrier's anticipated defenses.



Allocates Responsibility

Carrier's Responsibility §1303

➤ Seaworthiness

- The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to –
 - a) Make the ship seaworthy;
 - b) Properly man, equip, and supply the ship;
 - c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.



Allocates Responsibility *(cont'd.)*

Carrier's Responsibility §1303 *(cont'd.)*

➤ Cargo

- The carrier shall properly and carefully load, handle, stow, carry, keep care for and discharge the goods carried.



Allocates Responsibility *(cont'd.)*

§1304 Rights and Immunities of Carrier and Ship.

The primary defenses that an ocean carrier may assert under COGSA are set forth in this section and they include the following categories:

- (1) Unseaworthiness
- (2) Uncontrollable causes of loss
 - Shipboard errors
 - Natural forces
 - Human forces
 - Shipper's faults
- (3) Freedom from Negligence
- (4) Deviation
- (5) Amount of Liability;
valuation of cargo
- (6) Inflammable, explosive or
dangerous cargo



Allocates Responsibility (cont'd.)

1. UNSEAWORTHINESS

A carrier or vessel is responsible for loss or damage arising or resulting from unseaworthiness, which was caused by the failure to exercise due diligence to make the ship seaworthy.

The burden of proving the exercise of due diligence is on the carrier.



Allocates Responsibility *(cont'd.)*

➤ WHEN IS A SHIP UNSEAWORTHY?

Test: Due diligence requires the exercise of care by a reasonably prudent vessel owner.

Was the vessel reasonably fit for the cargo which it undertook to carry?

➤ Examples:

- A fault in the vessel's design or construction or equipment aboard
- An improperly trained Master or crew
- Failure to comply with regulations such as Coast Guard Regulations, Classification Society Rules, International Safety Management Code ("ISM") or other international conventions may result in statutory fault under the "Pennsylvania Rule"
- Concurrent causes and the Vallescura Rule



Allocates Responsibility *(cont'd.)*

2. Uncontrollable Causes of Loss

- Shipboard Errors
 - Error in navigation or management
 - Fire w/o fault or privity of the carrier
- Natural Forces
 - Perils, dangers and accidents of the sea
 - Act of God
- Human Forces
 - Act of war
 - Act of public enemies
 - Arrest or restraint of princes, rulers or people, or seizure under legal process
 - Quarantine restrictions
 - Strikes or lockouts
 - Riots and civil commotions
- Shipper's faults
 - Act of omission of the shipper
 - Inherent defect, quality or vice
 - Insufficiency of packing
 - Insufficiency or inadequacy of marks
 - Latent defects not discoverable by due diligence



Allocates Responsibility *(cont'd.)*

Casualties where vessel's seaworthiness and "uncontrollable causes of loss" are at issue:

- A. Container collapse on modern container ship
- B. Structural/hull failure aboard a container vessel
- C. Fire aboard a container vessel or an oil tanker



Allocates Responsibility *(cont'd.)*

A. Container collapse on modern container ship



Allocates Responsibility *(cont'd.)*

A. Container collapse on modern container ship *(cont'd.)*



Allocates Responsibility *(cont'd.)*

Container Collapse Issues

- Was the weather experienced by the vessel a peril of the sea?
 - What is a peril of the sea?
 - What is an act of God?
- Was there a fault in the vessel's design (hull form) or lashing system aboard which caused the loss?
- Was there shipper's fault in the stowage of cargo inside the containers?
- What actions should be taken by underwriters to document the loss?
 - What experts are required?



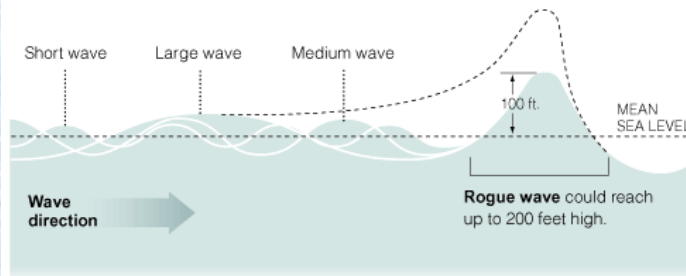
Allocates Responsibility *(cont'd.)*

Not for Surfing

Rogue waves, also known as freak or monster waves, Are large, spontaneous ocean surface waves that sink ships. Some possible explanations for them.

MERGING WAVES

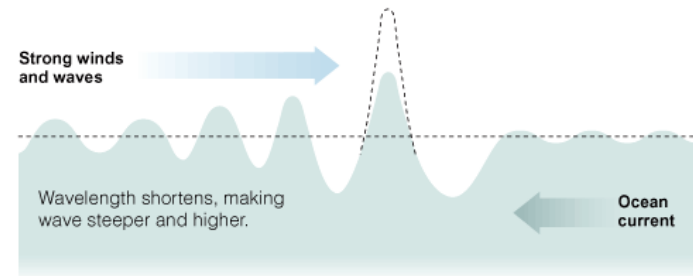
Trains of waves traveling in the same direction but at different speeds pass through one another. When they synchronize, they combine to form large waves.



Sources: Smithsonian; Dr. Wolfgang Rosenthal, Helmholtz Research Center Geesthacht

OCEAN CURRENTS

Waves and winds heading straight into powerful ocean currents may cause a surge of water to rise out of the deep.



The New York Times



Allocates Responsibility *(cont'd.)*

B. Structural/hull failure aboard a container vessel or bulker



Allocates Responsibility *(cont'd.)*

➤ Other Defenses:

- Freedom from Negligence
- Inflammable, explosive, or dangerous cargo

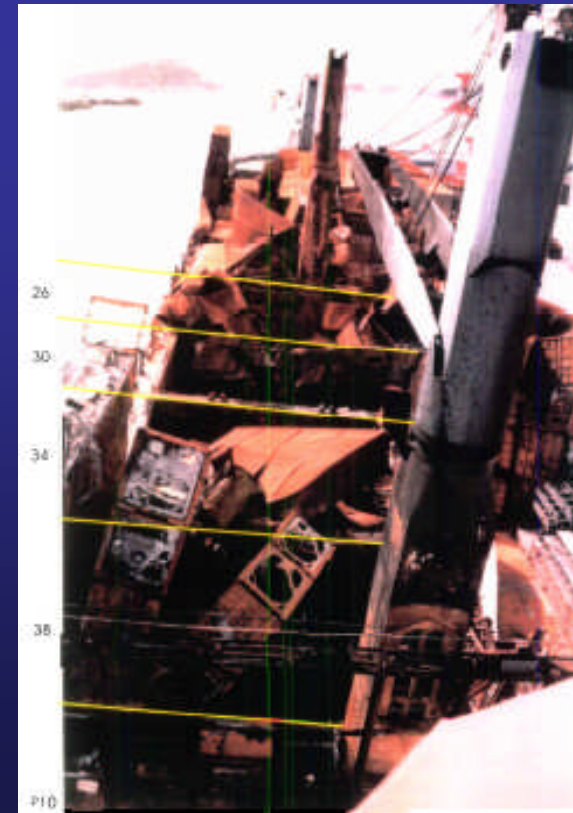
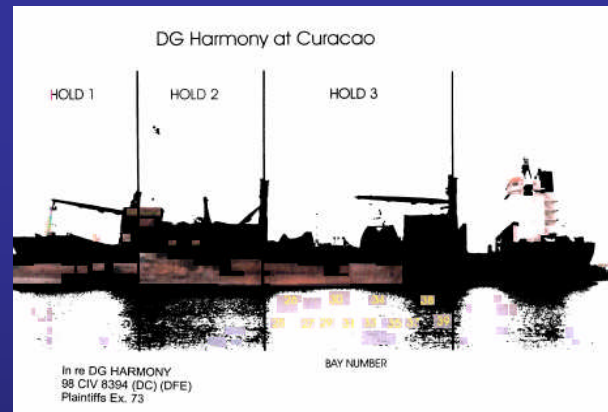
What is a shipper's responsibility and potential for liability under §1304(3) and §1304(6)?

- A shipper is liable to a carrier for damage sustained because of the shipper's negligence.
- A shipper is strictly liable for dangerous goods when carrier has neither actual or constructive preshipment knowledge of the danger.



Allocates Responsibility *(cont'd.)*

C. Fire aboard a container vessel or an oil tanker



Allocates Responsibility *(cont'd.)*

➤ Other Defenses:

- Deviation
- Amount of liability; valuation of cargo

What is meant by a package limitation?

\$500 per package

What voids the package limitation?

Geographic deviation

Stowage deviation



Burden of Proof

What is the burden of proof?

Under COGSA, there is a presumption of liability after a plaintiff establishes a prima facie case of damage. This is a modification of the common law, where the plaintiff had an onerous burden of both persuasion and producing evidence as to how the damage was caused.

Disadvantages of common law – facts and evidence surrounding the loss are within the control of the defendant carrier.



Burden of Proof *(cont'd.)*

1. Plaintiff cargo interest has burden of establishing a *prima facie* case against the carrier.
 - Cargo was delivered to the carrier in good order and condition but was discharged in a damaged condition.
 - If the condition of the cargo upon receipt by the carrier was not apparent, then additional testimony is required by the shipper.
 - A survey report at discharge showed the cargo was in a damaged condition.
2. Carrier must establish that either due diligence was exercised or damage was caused by an excepted cause under §1304(2).



Burden of Proof *(cont'd.)*

3. Burden returns to shipper to show that carrier was negligent.
4. If concurrent causes of loss are possible, then burden returns to carrier to prove what proportion of the damage was due to an excepted cause.



Burden of Proof *(cont'd.)*

In a fire case, special standards of liability and burden of proof rules are applicable because the fire statute provides:

No owner of any vessel shall be liable to answer for or to make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.



What is design or neglect?

Burden of Proof *(cont'd.)*

Fire aboard an oil tanker



Damages

What damages are compensable under COGSA?

1. Damages under COGSA are of a compensatory nature.
2. Market price at the port of destination on the day of arrival or when the vessel should have arrived.
3. COGSA sets a maximum of \$500 per package or customary freight unit.
4. A carrier may limit his liability under maritime law to the value of the vessel plus pending freight.

