

The Transportation Brief®



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Supreme Court to Decide Applicability of Carmack to Import Shipments

On March 24, 2010, the U.S. Supreme Court heard oral argument in the *Regal-Beloit* case to decide whether the Carmack Amendment or the Carriage of Goods by Sea Act (COGSA) governs the inland leg of an intermodal import shipment moving under a “through” bill of lading. The Court’s decision should clarify several issues related to intermodal transportation of international shipments, including whether motor carriers can rely on COGSA’s \$500 per-package cargo liability limitation. The issue arises because Carmack typically governs rail and motor carrier liability for cargo loss, damage, and delay, but its applicability to the inland portion of an import shipment is not entirely clear. Many in the industry believed this question was settled by the Supreme Court in a 2004 decision applying COGSA to an inland leg of an intermodal shipment, but there was no alternative argument presented in that case that Carmack applied. Therefore, since 2004, decisions from lower courts have been split as to whether Carmack “trumps” COGSA, and *Regal-Beloit* is expected to clarify that confusion.

Any Motor Carrier Hauling Intermodal Container Traffic that Originates at a Port could be Affected

While *Regal-Beloit* involves damage during rail transportation, the decision will affect motor carriers that transport intermodal traffic moving in international commerce as well, since they too are subject to the Carmack Amendment. From the motor carrier’s perspective, COGSA’s rules governing the standard of liability, limitations of liability, forum selection and claim periods are generally more favorable than Carmack, and carriers might expect to benefit if COGSA is found to govern. A decision is anticipated between mid-May and late June of 2010.

Applicability to Export Shipments is not Guaranteed

Although the case has been the subject of much commentary, the Supreme Court’s decision in *Regal-Beloit* might not be a panacea. In a recent case out of the Northern District of Illinois, the court reminds us that Carmack arguably applies differently to import shipments and export shipments. The parties in *Regal-Beloit* made much of this issue in their briefing as well. The question under consideration before the Supreme Court is limited to import shipments, so questions regarding the applicability of Carmack or COGSA to export shipments moving under a through bill will likely remain.

*Craig J. Helmreich
Nathaniel G. Saylor,
Indianapolis
Christopher C. McNatt,
Los Angeles*



Briefly...

Cargo Liability Increases For Air Carriers

More than 90 countries have signed the Montreal Convention, which governs air carrier liability for international shipments between participating nations. The Montreal Convention replaces the Warsaw Convention for those nations.

Until recently, the Montreal Convention limited an air carrier's liability for cargo loss and damage to 17 special drawing rights (SDR) per kilogram, or approximately \$25.91 US/kilo (\$11.77 US/lb). SDR is the monetary unit of the reserve assets of the International Monetary Fund. The limitation on liability, however, has been reviewed by the International Civil Aviation Organization and, effective January 1, 2010, has been increased to 19 SDRs/kilo or \$28.96 US/kilo (\$13.16 US/lb).

Many air waybills currently in use do not yet reflect this increase in carrier liability for cargo loss or damage. However, air carriers, indirect air carriers, freight forwarders and shippers should all be aware of this recent change and adjust their transportation documents to reflect the revisions to the Montreal Convention.

*Craig J. Helmreich,
Indianapolis*

New Rule Anticipated to Result in Savings for NVOCCs

The Federal Maritime Commission (FMC) voted in February to initiate a rulemaking that will relieve Non-Vessel-Operating Common Carriers (NVOCCs) from the costs and burdens of publishing and adhering to tariffs that contain the

rates they charge to ship cargo. It is estimated that this new rule could save some NVOCCs as much as \$200,000 per year in administrative costs. However, it is important to note that, although tariffs will no longer be required to contain rate information, NVOCCs must continue to publish – free of charge to the public – standard rules tariffs containing contractual terms and conditions governing shipments. Also noteworthy is the fact that, the exemption is not effective until published in the Federal Register, and thus NVOCCs must continue to publish and adhere to rate tariffs in the meantime.

*Christopher C. McNatt,
Los Angeles
Jeffrey S. Jackson,
Indianapolis*

International Carriers and Intermediaries Await Rotterdam Rules

The Carriage of Goods by Sea Act (COGSA) governs loss or damage claims for international ocean carriage to or from ports of the United States. COGSA has been in effect since 1936, pre-dating the development of intermodal containerized transportation. Other countries have adopted similar rules. To address these outdated conventions, the United Nations Commission on International Trade Law developed the Rotterdam Rules. The Rotterdam Rules are an international convention that must be ratified by at least 20 countries in order to take effect. As of this writing, delegations from 21 countries had “signed” the Rules as an informal acknowledgment of assent, but no country had actually filed a formal ratification with the United Nations, a process that requires formal approval via

political processes in each country. If they are ratified by at least 20 countries and adopted in the United States, the Rules will have the force and effect of law and will replace COGSA.

The Rotterdam Rules have been criticized as unduly complex. While early press indicated they would apply to both land and ocean based “through” transportation, the final Rules do not apply to all legs of international intermodal transportation. The Rules do address many other important aspects of modern-day international shipping, including electronic commerce. Additionally, they increase the applicable limitation of liability and give shippers some relief from onerous forum selection clauses, but they also give the parties the right to enter into a “volume contract” which can provide for greater or lesser rights, obligations, and liabilities than those imposed by the Rules. Given the widespread practice of contracting, this volume contract provision has been seen as an exception with the potential to swallow the Rotterdam Rules.

At this time, the majority of commentators seem to believe the Rules will eventually achieve ratification, but whether they will be adopted by the United States remains in question. Given the wide-ranging effects of the Rotterdam Rules, both ocean transportation intermediaries and land-based transportation providers that transport intermodal shipments moving in international commerce have reason to follow their development.

*Andrew K. Light
Nathaniel G. Saylor,
Indianapolis*

The Indiana Department of Revenue's Motor Carrier Services Division has launched a new enhanced website that, among other features, offers new online services for IRP processing and oversize/overweight permitting. The website may be accessed at www.in.gov/dor/4106.htm.

Scopelitis Firm to Collaborate on Global Commerce Issues at International Transportation Symposium

This issue notes a number of developments affecting transportation providers that rely on intermodal movements and other aspects of the international delivery of goods. Most notable are the potential implications of the *Regal-Beloit* case heard recently by the U.S. Supreme Court discussed on the cover and, in *Briefly*, the yet-to-be-ratified “Rotterdam Rules”. This “International Edition” of *The Transportation Brief* focuses on these and other issues in international transportation law and represents our clients’ growing reliance on the Scopelitis firm for assistance on such issues.

The upcoming International Transportation Symposium, set for Thursday, April 22, at the Hyatt Regency Chicago, is yet another response to our clients’ needs in global commerce. In collaboration with the international business advisory organization **Grant Thornton LLP** and the international commercial law firm **Ince & Co.**, our attorneys will present issues in maritime and air transportation, cargo liability, insurance and risk management, and a number of other transportation-related topics, all from a global business perspective.

Scopelitis firm observers may note the symposium as a milestone marking a more public presence in the global arena of transportation law. But to the firm’s attorneys whose practices already embrace international transportation issues, it is another opportunity to assist clients in penetrating international markets and strengthening partnerships beyond U.S. borders.

For example, Greg Feary and Jeff Toole routinely advise U.S. motor carriers regarding transportation insurance designs and alternative risk programs. Andy Light and Jay Robinson provide guidance in business restructuring. In the symposium, they will co-present a program on recommended entity structures for intermodal/international operations. Feary also will present on insurance and indemnity aspects of transportation contracts that come into play in intermodal movements.

Dan Barney routinely advises indirect air carriers on cargo security matters, while Chris McNatt and Nathaniel Saylor advise ocean transportation intermediaries with respect to licensing and regulatory compliance, and Craig Helmreich provides guidance on intermodal transport and cargo claims. With the exception of Chris McNatt, who will be in trial, they will all present at the symposium, each with a focus on the implications of their subject areas in international commerce.

The most striking difference between the counsel each of these attorneys provides on a daily basis and their participation in the symposium is the welcome opportunity to serve as resources in collaboration with some of the world’s preeminent practitioners in global accounting, tax and international commercial law. Grant Thornton LLP is the U.S. member firm of Grant Thornton International Ltd, one of the six global accounting, tax and advisory organizations. Ince & Co. is an international commercial law firm with offices around the world and clients ranging from major international corporations to private individuals. Their websites may be found, respectively, at www.granthornton.com and www.incelaw.com.

To register for the International Transportation Symposium, go to <http://www.scopelitis.com/seminars/registration.cfm>. For more information, contact Allison Smith, Scopelitis Director of Business Development.

On the Road

Andy Light, Greg Feary, and Jay Robinson will present “Brokerage Operations in a Developing Environment” and Greg Feary will present on two additional topics, “CSA 2010 Risk Management Issues” and “Top 10 Issues Involving Owner-Operators,” at the American Trucking Associations’ Information Technology Logistics Council and National Accounting & Finance Council Combined 2010 Annual Conference and Exhibition, May 3-6, in **Amelia Island Plantation, Jacksonville, Florida**.

Fritz Damm will attend the Chicago Traffic Club’s 103rd Annual Dinner, May 2, in **Chicago**.

Steve Pletcher will attend the Messenger Courier Association of America’s Annual Meeting & Exposition, May 12-15, in **Las Vegas**.

Steve Pletcher will deliver a Legal Update at the National Association of Professional Employer Organizations’ Legal and Legislative Conference, May 17-18, in **Arlington, Virginia**.

Tom Schulte and Renea Hill will be conducting a mock trial for the Indiana Motor Truck Association’s Spring Meeting, May 27, in **Indianapolis**.

Fritz Damm will participate in the Detroit Regional Chamber of Commerce Mackinac Policy Conference, June 2-5, in **Mackinac Island, Michigan**.

Don Vogel will present “Hot Topics in Transportation Labor and Employment Law” at the National Confectioners’ Logistics Council, June 13, in **Chicago**.

Kathleen Jeffries and Fritz Damm will participate in the Conference of Freight Counsel, June 27-28, in **Kansas City**.

Don Vogel, Kathleen Jeffries and Fritz Damm will attend the Transportation Lawyers Association’s Summer Executive Committee Meeting, July 31, in **Ft. Worth, Texas**.

Greg Feary and Dan Barney will present “Owner-Operators: Regulatory Developments and a Wave of Class Actions” at the American Trucking Associations’ Forum for Motor Carrier General Counsels, July 25-28, in **Monterey, California**.



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Dispatches

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

◆ Mike Tauscher reports the postponement of the **Advanced Commercial Information (ACI) Highway eManifest requirement** that carriers submit manifest information electronically to the Canada Border Services Agency (CBSA) for shipments entering Canada. CBSA has indicated that the system will be available for testing in June 2010, when it was scheduled to begin, but the project launch will not occur until September 2010.

◆ Citizenship and Immigration Canada has the ability to deny foreign nationals admission into Canada, whether traveling for business or pleasure, if they have criminal convictions. Entry to Canada may be denied to persons who have committed any act that is considered to be an offense under Canadian laws, such as driving while under the influence of alcohol, even if the offense occurred many years ago. **Mike Tauscher cautions carriers to determine whether drivers are qualified for Canadian entry in order to ensure freight is not delayed.**

◆ Tim Wiseman reports that there appear to be **no plans by the FMCSA to further consider opening the border to Mexican carriers.** Last year, the Obama Administration suspended the pilot program implemented by the FMCSA designed to allow greater access into the U.S. by certain Mexican carriers, and, in retaliation, Mexico introduced a number of tariffs on U.S. products being sold in Mexico.

◆ Chris McNatt reports that the **Ports of New York and New Jersey have released their clean truck program.** Unlike the Port of Los Angeles program, the NY/NJ program does not contain the employee-only model which will be at issue in trial set to commence April 20 in federal court in Los Angeles.

The Transportation Brief® is intended as a report to our clients and friends on legal developments affecting the transportation industry. The published material does not constitute an exhaustive legal study and should not be regarded or relied upon as individual legal advice or opinion. Scopelitis, Garvin, Light, Hanson & Feary would be pleased to provide more specific information or individual advice on matters of interest to our readers.

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