

## COGSA v. Carmack: The Ninth Circuit Applies Carmack to Ocean Carriers\*

By Cameron W. Roberts and Andrew D. Kehagiaras

In *Regal-Beloit*, K-Line issued a through bill of lading for carriage of goods from China to the United States, by sea and by rail. The bill of lading included a Tokyo forum selection clause, under which a claimant would have to file any lawsuits against K-Line in Tokyo, Japan. Under the bill of lading's "Himalaya clause," K-Line's subcontractors could also enforce the forum selection clause. The bill of lading also extended the application of the Carriage of Goods by Sea Act ("COGSA") to cover the inland transportation. K-Line subcontracted the rail transportation to Union Pacific. The plaintiff cargo interests sued for damages after Union Pacific's train derailed in Oklahoma. The District Court granted the defendants' motion to dismiss based on the Tokyo forum selection clause. The plaintiff filed an appeal to the Ninth Circuit of the District Court's order.

The Ninth Circuit reversed the District Court's dismissal based on the application of the Carmack Amendment ("Carmack"), which provides the default rules governing the inland rail leg of a shipment between a foreign country and a point in United States. Forum selection clauses are generally unenforceable under Carmack—they are enforceable under COGSA, but the Ninth Circuit ruled that a contractual extension of COGSA in K-Line's bill of lading was invalid because another federal *statute*, i.e., Carmack, applied as a matter of law to both the ocean carrier, K-Line, and the railroad. The Ninth Circuit further ruled that while Title 49 does permit parties to opt out of Carmack, they must comply with certain legal requirements to do so. Therefore, on remand, the District Court must decide whether the contractual opt-out of Carmack used by the carriers was proper under 49 U.S.C. section 10502. If the contractual opt-out of Carmack complied with section 10502, then the Tokyo forum selection clause would be valid.

In *Regal-Beloit*, the Ninth Circuit rejected the reasoning of a recent Second Circuit case, in which that court refused to apply Carmack to a non-vessel-operating common carrier ("NVOCC"). The Ninth Circuit ruled that by providing ocean transportation and *arranging* the rail transportation by Union Pacific, under those circumstances, K-Line and its United States agent had, in fact, *provided* "rail transportation" subject to Carmack. To the Ninth Circuit, the fact that an entity had licensing by the Federal Maritime Commission ("FMC") did not preclude the application to that entity of the Carmack Amendment.

Based on *Regal-Beloit*, when an NVOCC's issues a "to door" bill of lading in the Ninth Circuit, the NVOCC must offer to the shipper a fair opportunity to declare a value under Carmack, i.e., to select between at least two different limits of liability. Failure to provide the shipper with this choice could invalidate the carrier's limitation of liability. Ocean carriers, including NVOCCs, must take affirmative steps in their transportation contracts, bills of lading, and tariffs to ensure that they properly waive the potential application of the Carmack Amendment in *both* rail and motor carriage and anticipate the possibility that a court could apply Carmack, even if a waiver was expressly provided. Doing so will require attention to detail by taking into account the requirements to waive out of Carmack's application to rail transportation, as well as the statute's application to motor transportation, which waiver is in a different section of Title 49, which *Regal-Beloit* did not address. We look forward to assisting our clients with revisions to their transportation contracts, bills of lading, and tariffs.

\*Roberts & Kehagiaras LLP in Los Angeles serves the trade, transportation, and insurance communities. Telephone: (310) 642-9800 or on the Internet at [www.tradeandcargo.com](http://www.tradeandcargo.com). This article provides information about the law designed to help readers address their own legal needs. But legal information is not the same as legal advice -- the application of law to an individual's specific circumstances. Although we go to great lengths to make sure our information is accurate and useful, we recommend you consult a lawyer if you want professional assurance that our information, and your interpretation of it, is appropriate to your particular situation.