

***International
Multi-Modal Movements:
New Developments In Recovery Law***

David T. Maloof, Esq.
Maloof Browne & Eagan LLC
411 Theodore Fremd Ave., Ste. 190
Rye, NY 10580-1411
Phone: (914) 921-1200
E-mail: dmaloof@maloofandbrowne.com

NOTE: ©2016 Information herein is simplified and provided for discussion purposes only-not to be construed or utilized as legal advice. Counsel should be consulted for specific claims.

Two Actual Cases Concerning Shipments: Far East to United States

1. Ocean

Tractor cargo shipped via ocean vessel from Japan to Los Angeles, railed to Georgia, derailed en route in Texas.



2. Air

Machinery cargo flown from Korea to Miami, trucked to Orlando, damaged at an intermediate warehouse, delivered damaged.

Typical Ocean Movement Roles

<u>Entity</u>	<u>Typical Ocean Movement Roles</u>	<u>Applicable Cargo Liability Statutes</u>	<u>Typical Cargo Liability</u>
1. Freight Forwarder	Arrange Movements	None	Various by contract
2. NVOCC/Ocean Carrier	International port-to-port carrier	U.S. COGSA 46 U.S.C. 28 § 1300 et seq.	\$500 per package
3. Inland Motor or Rail Carriers	Domestic city-to-city carrier	US COGSA (by contract) or Carmack Amendment, 49 USC § 14706 (trucking) or 49 USC § 11706 (rail)	\$50 per shipment up to \$250K per shipment (typical)
4. Draymen	Within cities carrier	Vary by State	Various by contract
5. Customs Broker/Intermediaries	Various	None.	Various by contract

First Ocean Case: Import Shipment Through Bill of Lading

- Shipment Under Multi-Modal Bills of Lading Asia to Los Angeles to Georgia, Derailed in Texas*

<u>Entity</u>	<u>Liability</u>
NVOCC (Nippon Express)	COGSA-\$500 per package
Ocean Carrier (Yang Ming)	COGSA-\$500 per package
Railroad (Norfolk Southern)	Contractual-Exonerated



* *Sompo Japan Insurance Co. of America v. Norfolk Southern Railway Company*, 762 F.3D 165 (2d Cir. 2014)

Second Ocean Case: Separate Bills of Lading

- Hypothetical Shipment-Same as First Ocean Shipment, Except Separate Bills of Lading



<u>Entity</u>	<u>Liability</u>
NVOCC	COGSA \$500 per package
Ocean Carrier	COGSA \$500 per package
Railroad	(No limit unless by contract with offer of higher declared value) (typically \$25k or \$250k per railcar)

Third Ocean Case:

Multi-Modal Bill of Lading-Export Shipment

- Railed under a Through Bill of Lading to California, to be shipped to Australia.

<u>Entity</u>	<u>Liability</u>
Ocean Carrier (Maersk)	COGSA - \$500 per package**
Railroad (BNSF Railway Company)	Carmack Amendment - \$250k per shipment*



* *American Home Assurance Company v. A.P. Moller-Maersk A/S*, 609 Fed Appx. 662 (2d Cir. 2015).

** *But see, Royal & Sun Alliance PLC v. Service Transfer, Inc.*, 2012 WL 6028991 (S.D.N.Y. 2012)(COGSA not Carmack governs export claim against inland carrier under through bill of lading); *CNA Insurance Co. v. Hyundai Merchant Marine Co., Ltd.*, 747 F.3d 339 (6th Cir. 2014) (Ocean carriers moving export shipment held contractually liable under Carmack Amendment).

Fourth Ocean Case: Separate Bills of Lading- Import Shipment

- Shipment under Ocean Bill of Lading from Japan to Minnesota, trucked to railyard, railed to Canada.*



<u>Entity</u>	<u>Liability</u>
Ocean Carrier (Eastern Car Liner)	COGSA - \$500 per package
Railroad (BNSF Railway Company)	Carmack Amendment - \$25k per shipment
Third-Party Rail Supervisor (TTS)	By contract and tort (federal common law) – No limitation

* *Tokio Marine & Nichido Fire Ins. Co., Ltd. v. Transportation Technology Services, Inc.*,
Case No. 13-cv-3368 (D. Minn.)

First Multi-Modal Movement Import Air Case

- Shipment Under An Airway Bill from Korea to Miami, Trucked to Orlando, Trucked to Independent Warehouse, Trucked to Consignee.*

<u>Entity</u>	<u>Liability</u>
Contractual Air Carrier (Expeditors Korea Ltd.)	Montreal Protocol – 19 SDR's (currently roughly \$26 per kilo)
Actual Air Carrier (Korea Air)	Montreal Protocol - Same
Air Carrier's Sub-contracted Trucker Airport-to-Airport (Forward Air)	Montreal Protocol – Same**
Warehousemen (All American Crating)	By Contract

**Underwriters at Lloyd's v. Expeditors Korea, Ltd. and Forward Air, Inc., (S.D. FL. 2015)*

** *Cf. Tata AIG General Ins. Co. v. British Airways PLC Corp., 2013 WL 3092828 (M.D. Tenn. 2013)* (Inland carrier liability held to be limited by contract, not by Montreal Protocol).

Second Multi-Modal Movement Import Air Case

- Shipment Under Airway Bill from Korea to Miami, Trucked Under Separate Inland Bill of Lading from Miami to Orlando

<u>Entity</u>	<u>Liability</u>
Contractual Air Carrier	Montreal Protocol – 19 SDR's per kilo
Actual Air Carrier	Montreal Protocol – 19 SDR's per kilo
Trucker Airport-to-Airport	By Contract
Warehousemen	By Contract



Shipper Liability: SOLAS New Weight Regulations Take Effect July 1, 2016

1. Effective July 1, 2016, any shipping container leaving from any port in the world must be accompanied by a shipping document listing the verified gross mass of a container.
2. The container weight mandate from the International Maritime Organization under the Safety of Life at Sea (SOLAS) convention comes after misdeclared weights contributed to maritime casualties such as the MSC Napoli in 2007.
3. The weighing must be done in one of two approved ways, on scales calibrated and certified to the national standards.
4. Many of the finer points of the new regulation have not yet been finalized, such as enforcement, and what happens to a container that arrives at a port without the necessary documentation.

Some Details of the New SOLAS Requirements

1. Estimating weight is not permitted. The shipper (or by arrangement of the shipper, a third party) has a responsibility to weigh the packed container generally or to weigh its contents. Further, the party packing the container cannot generally use the weight somebody else has provided.
2. A carrier may rely on a shipper's signed weight verification to be accurate. For the shipper's weight verification to be compliant with the SOLAS requirement, it must be "signed", meaning a specific person representing the shipper is named and identified as having verified the accuracy of the weight.



Details of the New SOLAS Requirements (Continued)

3. The lack of a signed shipper weight verification can be remedied by weighing the packed container at the port, or other alternate verified means.
4. When a marine terminal receives a packed export container that does not have a signed shipper weight verification, they will need to have processes in place at the terminal for obtaining the weight of such containers.
5. If a packed container is weighed at the load port, that weight is to be used for vessel stow planning.
6. Vessel stow plans must use verified weights for all packed containers loaded on board.

Conclusion: The New Trends

1. The Carmack Amendment is now less likely to be involved in international multi-modal movements, even if losses occur on land, and COGSA is now more likely to be involved.
2. Ocean carrier's sub-contractors can now be exonerated.
3. Air shipments are more likely to be subject to the Montreal Convention even if losses occur on land.
4. The best way to maximize recoveries is to look to third-party (non-carrier) tort claims, wherever possible.
5. Consult counsel concerning the new SOLAS weight verification requirements well before July 1, 2016.