

**The Quarantine Defense in the Age of Covid-19**

The U.S. Carriage of Goods by Sea Act (“COGSA”) absolves a carrier of liability for cargo loss or damage in circumstances, among others, when the loss or damage occurs as a result of a quarantine restriction. Specifically, COGSA provides in relevant part: “(2) *Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(h) Quarantine restrictions.*”<sup>i</sup> With the Covid-19 pandemic enveloping the world and affecting virtually all (if not all) trading nations, one can expect situations developing where ships trading to the U.S. could be subject to some type of quarantine in an effort to control the spread of the virus. This note will look at how U.S. courts have analyzed whether a carrier may be liable for cargo loss or damage in situations where the quarantine defense has been raised.

The few court decisions that have addressed the quarantine defense have generally used a burden-shifting analysis in order to determine a carrier’s potential liability. That is, once the carrier properly invokes the quarantine defense, the burden of proof then shifts to the cargo interests to show concurrent negligence of the carrier for the cargo loss or damage.<sup>ii</sup>

An instructive pre-COGSA decision is *Cheek Neal Coffee Co. v. Osaka Shosen Kaisha*.<sup>iii</sup> This case involved shipment of coffee from Santos, Brazil to New Orleans, Louisiana. Upon arrival in the U.S., a form of bubonic plague was discovered on board the vessel from a crew member who had previously taken ill and had been isolated by the Master. The passengers and crew were taken off of the vessel by the U.S. Public Health Services (“PHS”) and detained by

the medical authorities under observation. The PHS took control over of the vessel and required a complete fumigation of the vessel and discharge of the coffee cargo into lighters, which the PHS arranged and paid. Insufficient covers for the lighters were available in New Orleans at that time and inevitably, it rained causing damage to the cargo.

In addressing responsibility for the cargo damage, the court found:

*Having concluded that the goods were shipped in good order and condition, and it being conceded that they were delivered in damaged condition, it is incumbent on the [carrier] to show, since that is his defense, that the injury was occasioned by one of the perils from which he is exempted by the bills of lading. This the [carrier] has done by clearly establishing the fact that the damage falls within the exceptions against quarantine, consequently the burden is upon the shipper to prove the carrier's negligence as the affirmative lies upon it.<sup>iv</sup>*

On the following evidence, the court found that the carrier was not liable for the wetting damage to the cargo based on the quarantine defense. The vessel was fumigated at Kobe, Japan before departing on the voyage. At each port, rat guards were put out and the gangway smeared with tar to prevent rats from coming aboard. When the crew member came down with symptoms of illness, the Master immediately contacted the PHS authorities in New Orleans. The arrangement for fumigation and discharge of the cargo into lighters was done under the complete control of the PHS. Tarpaulins used in the fumigation of the cargo on the lighters were arranged for and the securing of them on the lighters was orchestrated by the PHS. There was no evidence of any wetting in the lighters before the cargo was transferred to them. In these circumstances, the court found no negligence and inattention to duty on the part of the carrier.

A more recent example of the burden-shifting analysis used by courts when dealing with the quarantine defense is *Sunpride (Cape) (Pty) Ltd. v. Mediterranean Shipping Co., S.A.*<sup>v</sup> The alleged loss in this case was the “*threatened application of quarantine restrictions as a result of the failure of the [USDA] cold treatment protocol and subsequent sale of the citrus in Canada.*”<sup>vi</sup>

In addressing the quarantine defense raised by the carrier, the court reviewed in detail the historical application of the defense and concluded:

*I think that the rationale of the Second Circuit's cases defining the more limited showing a carrier must make to invoke the fire exception also applies to all COGSA 1304(2)(a-p) exceptions [including the quarantine restrictions exception], there being no principled difference between them, and mandates the burden-shifting interpretation in all such cases.<sup>vii</sup>*

In reviewing the evidence submitted on motion for summary judgment, the court found that there were issues of fact, including whether the carrier had an obligation to carry out the cold treatment protocol and whether the carrier's conduct created a concurrent cause of the loss, which precluded summary judgment.

Another issue the court analyzed was the applicability of the quarantine defense to cargo that had been discharged from the vessel. It found that for claims relating to cargo that had been discharged from the vessel the quarantine defense was not applicable, while cargo that had not been discharged was subject to the defense. The court's reasoning stemmed from the fact that for cargo that had been discharged from the vessel, the quarantine defense applied only as a matter of contract (by extension of COGSA to the post-discharge period). And under the Harter Act, which applied to the period of time that the cargo had been discharged but was still in the custody of the carrier, the quarantine defense was not enforceable under § 190 of the Act, which provided that a carrier cannot be relieved of its liability for cargo loss or damage where it has been negligent or at fault in the handling and care of the cargo.<sup>viii</sup>

The take away for the quarantine defense under COGSA is:

- Once cargo interests present a *prima facie* case of good order/bad order, the carrier can then invoke the quarantine defense by setting forth the relevant government action;
- The carrier does not have the burden to initially show freedom from negligence or fault in order to invoke the quarantine defense;

- The court will apply a burden-shifting analysis in order to determine whether the carrier is not liable for the cargo loss or damage under the quarantine defense; and
- The quarantine defense under COGSA will not be applicable during the post-discharge period while the cargo is under the custody and control of the carrier.

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<sup>i</sup> 46 U.S.C. § 30701.

<sup>ii</sup> In this burden-shifting scheme, the carrier does not have to show its freedom from fault in the first instance.

<sup>iii</sup> 36 F.2d 256 (E.D. La. 1929), *aff'd*, 39 F.2d 1021 (5th Cir. 1930).

<sup>iv</sup> *Id.* at 257. See also, *Hearty v. Ragunda*, 114 F. Supp. 869, 871 (S.D.N.Y. 1953) (“Under [COGSA] neither the carrier nor the ship is responsible for loss or damage arising from or resulting from ‘quarantine restrictions.’ However, this provision does not serve as exoneration where the quarantine was occasioned by, and the result of, a breach of contractual obligation.”)

<sup>v</sup> 2003 WL 22682268 (S.D.N.Y. November 10, 2003). Our firm represented the carrier in this case.

<sup>vi</sup> *Id.* at \*25.

<sup>vii</sup> *Id.* at \*24.

<sup>viii</sup> *Id.* at \*27.