

NEW U.S. SUPREME COURT DECISION AND IT'S IMPACT UPON FREIGHT FORWARDERS AND NVOCC'S

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NORFOLK V. KIRBY 125 S. Ct. 385 (2004)

The U.S. Supreme Court recently decided a case involving a freight forwarder which had issued a bill of lading much like a Non-Vessel Operating Common Carrier (NVOCC). This decision is important because it extends the limited liability under the Carriage of Goods by Sea Act (COGSA) to an inland carrier.

BACKGROUND

An Australian manufacturer, James N. Kirby, Pty Ltd. sold ten containers of machinery to General Motors. The manufacturer contracted with an Australian freight forwarder to handle the transportation from Australia to Huntsville, Ala. The freight forwarder issued a bill of lading that designated Savannah, GA as the discharge port and Huntsville, Ala. as the ultimate destination. The bill of lading set the freight forwarder's liability limitation lower than the cargo's true value, using the default liability rule in the COGSA (\$500 per package) for the sea leg and a higher amount for the land leg. The bill also contained what is known as a "Himalaya Clause," which extended liability limitations to down stream parties, including "any servant, agent, or other person (including any independent contractor)." The freight forwarder hired a shipping company to physically transport the containers. The shipping company issued its own bill of lading to the freight forwarder which contained COGSA's liability rule and extended it in a Himalaya Clause to "all agents...(including inland) carriers...and all independent contractors." The shipping company hired Norfolk Southern Railway (Norfolk) to transport the machinery from Savannah to Huntsville. The train derailed, causing an alleged \$1.5 million in damages. Kirby sued Norfolk in a Georgia Federal District Court for negligence and breach of contract. The railway argued that its liability, if any, was limited by the Himalaya clause in the shipping company's bill of lading. If that limitation clause applied, Norfolk argued that it would be liable only for \$5,000 in damage, i.e., \$500 for each of the ten containers.

DECISION

The Supreme Court held that Norfolk was entitled to the protection of the liability limitations in both bill of lading. As to the bill issued by the freight forwarder, the Court found that the Himalaya clause indicated an intent to extend the liability limitation broadly and corresponded to the fact that various modes of transportation would be involved in performing the contract. The Court concluded that since Huntsville is some 366 miles inland from the discharge port, the parties must have anticipated using a land carrier's services. Accordingly, a railroad was an intended beneficiary of the bill and Norfolk's liability was limited by the bill's terms. As to the bill issued by the shipping company, the Court explained that when an intermediary contracted with a carrier to transport goods, the cargo owner's recovery against the

carrier is limited by the liability limitation to which the intermediary and carrier agreed. Thus, here, Kirby's recovery against Norfolk was limited by the liability limitation to which the shipping company and the freight forwarder agreed, i.e. \$500 per package.

COMMENTS

A. Avoid The Himalaya Clause

This decision suggests the importance of an inclusive Himalaya clause to extend the limited liability under COGSA to an inland carrier. Specifically, the clause must indicate an intent to extend the liability limitation to "*any* servant, agent or other person (including *any* independent contractor)" whose services contribute to performing the contract. Additionally, the clause must anticipate that various modes of transportation would be involved in performing the contract. Drafting an inclusive Himalaya clause will ensure that inland carriers will be benefited from the limited liability under COGSA.

Accordingly, if the cargo owner and/or the freight forwarder want to avoid the situation in which the carriers' liability is limited under COGSA, it may choose not to include the Himalaya clause in their bill of lading. The freight forwarder should also make sure that the other bill of lading down the stream do not contain Himalaya clauses. Otherwise, the limited liability under COGSA would be extended to the parties down stream.

B. The Freight Forwarder - an Agent or an Independent Carrier/Principal?

Before this Court decision was published, the main concern of the Transportation Intermediaries Association (TIA) was that the bounding of a cargo owner to the contracts that the freight forwarder makes with carriers to provide transportation would make the freight forwarder an *agent* of the cargo owner even if the parties explicitly wanted to avoid agency relationship and define the freight forwarder as a "principal" or "carrier." Many cargo owners want to avoid agency relationship because if the freight forwarder defined as an agent to the cargo owner, the freight forwarder may not be liable for damage to the cargo done by the carriers. Indeed, at the present case, Kirby (the cargo owner) and the freight forwarder specifically used the standard FIATA Multimodal Transport Bill of Lading (FBL). The FBL was designated by FIATA as a standard document of transport to be used by freight forwarders when they are acting as "principal" or "carrier" (*See*, Brief of Transportation Intermediaries Association as Amicus Curiae supporting of The Decision below) and thus explicitly not acting as "agent."

However, although the Court bound the cargo owner to the contract that the freight forwarder made with a carrier, it explicitly stated that it was "undeniable that the traditional indicia of agency, a fiduciary relationship and effective control by the principal, did not exist between Kirby and ICC [the freight forwarder]." Thus, the decision whether the freight forwarder will act as either a carrier/principal or an agent is still up to the specific agreement between the cargo owner and the freight forwarder and the Norfolk decision does not mean that the freight forwarder is automatically empowered to be the cargo owner's agent in every sense.

Accordingly, if the cargo owner and the freight forwarder want to avoid agency relationship, they may continue to use the FBL.

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