

## **FORWARDERLAW E-NEWS NOVEMBER 1, 2004**

Allianz v. Blue Anchor Line – NVOCC liable for only \$500.

Do you wonder why bill of lading terms cover everything in the book? And cover many lines of fine print? And are sometimes supplemented by lengthy conditions in a carrier's tariff incorporated by reference into the bill of lading?

The Allianz case shows why: the claimant recovered less than .05% of its claim, just because of a well-drafted clause in a bill of lading.

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Another feature of this important case.

The FIATA Bill of Lading extends the benefit of its exemptions and limitations to third parties by virtue of a Himalaya Clause. [In the Kirby Case, this clause failed to protect the railroad](#) that was engaged in the transport of the machinery from port of discharge to final destination. The Court decided that as the railway had not been engaged by the NVOCC, but by the ocean carrier, the railway did not fall within the critical words of the clause:

an "independent contractor whose services had been used in order to perform the contract."

In the Allianz case, Blue Anchor Line directly employed Distribution Express, the third party trucker. Distribution Express succeeded in having the claim dismissed against it on the basis of a clause that read:

"[t]he Merchant undertakes that no claim shall be made against any Participating Carrier, against any servant, agent or subcontractor of the Carrier ... which imposes or attempts to impose upon any of them any liability whatsoever in connection with the Goods...."

What remains is not clear is whether a sub-sub-contractor could rely upon this clause. Or whether the same reasoning in the Kirby case will limit the general language of this clause.

P.S. The US Supreme Court has now heard argument in the Kirby case, and has reserved judgement. Forwarderlaw understands that the judges questioned whether state law or US Federal Law (meaning US Maritime Law) applied. Although of little concern to forwarders, this sort of issue is of greater interest to a final court of appeal than the correct interpretation of the language used in bills of lading clauses.

Package Limitations and the Unending Quest for Certainty

US law seems reasonably clear. To quote from a recent US decision, a Court will apply certain principles when deciding what is the package for purposes of limitation. To quote from the decision in one of the cases:

(1) when a bill of lading discloses the number of COGSA packages in a container, the liability limitation of section 4(5) applies to those packages; but

(2) when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation of section 4(5) applies to the containers themselves.

(3) a container can be considered a COGSA package only in light of a clear agreement to that effect; and

(4) when goods are placed in containers without being described as separately packaged, they are classified as "goods not shipped in packages" for COGSA purposes, absent an agreement otherwise.

(5) Finally, when a bill of lading is ambiguous regarding what constitutes the COGSA package, then, in light of the widely accepted understanding that the original purpose of [the package limitation] was to protect shippers against carriers, the ambiguity is resolved against the carrier.

Despite these clear rules, the package limitation question still comes up in the courts. In the first case reported by *Forwarderlaw* the court said:

“It is remarkable that after so many decades and dollars spent litigating the package liability limitation clause . . . . . the shipping industry has not yet settled upon a sound strategy for protecting both parties' interests.”

[Read the complete summary](#) and you will understand why the Court was frustrated with having to decide this issue once again.

The following commentaries on the package limitation involved two claims that were joined in a single case, and decided by the same court. One went partially [in favour of the shipper](#), in rejecting the carrier's argument that the container was the package. The second one went [against the shipper](#), and decided that the container was the package. Perhaps after reading the commentaries, readers have an insight into the facts that made a difference?

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As the General Editor will be otherwise occupied, the next edition of Forwarderlaw will be in mid-December.

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