Is it typical for dangerous cargo cases occurred in the near sea of China be decided in foreign courts?

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I. Introduction

During the first three decades after Mainland China established its *Open Door Policy* in 1978, many Western multinationals (mostly from the U.S. and Western Europe) set up manufacturing facilities in Mainland China to take advantage of its abundant labor resources and favorable environmental regulations. These facilities were mostly organized as joint ventures with a certain percentage of Chinese ownership, and they were independently registered under PRC authority. Many of these plants were producing substances of a hazardous nature, which were then shipped back to their foreign parent companies for further processing. Since the sea carriage of these dangerous cargoes was likely to involve a foreign shipper, the injured shipowner or carrier might have the option to sue the shipper in a foreign court even if the actual accident occurred off the coast of Mainland China. In this paper, the author submits that it is not a rare exception for dangerous cargo cases occurring near China to end up in foreign courts, and it is helpful for shipping professionals who engage in China trade to be familiar with the foreign Carriage of Goods by Sea laws.

Chem One, Ltd. v. M/V Rickmers Genoa was a dangerous cargo case reported in American Maritime Cases (*2012 A.M.C. 2986*). The case represents a commonly encountered sea carriage of dangerous cargo scenario happening in the ocean near Mainland China, but ending up in foreign court.

II. Facts

In *Rickmers Genoa*, a U.S. multinational parent corporation created its manufacturing facilities in Tianjin, China during the late 1990s. It produced a substance called magnesium desulphurization reagent (SS–89), which is used in steelmaking and is designed to remove sulphur and make the steel less brittle. SS-89 consists of approximately 89% magnesium, and magnesium agents will liberate hydrogen gas when in contact with water, especially sea or salt water. Hydrogen gas is flammable and susceptible to exploding.

On January 25, 2005, the U.S. parent corporation sent it's Tianjin plant a purchase order for 600 metric tons of SS–89, C.I.F. Baltimore. The Tianjin plant then contracted with a Non–Vessel Owning Common Carrier ("NVOCC") to transport the 600 metric tons of SS–89 from the Tianjin plant to Xingang port (天津新港), where the vessel was docked. In the bill of lading issued by the NVOCC, it identified theTianjin plant as the shipper and "To Order of Shipper" as the consignee.

The NVOCC then contracted with the owner of M/V Rickmers Genoa, and used the vessel to carry the SS–89 from China to New Jersey, USA.

The Tianjin plant neither informed the carrier about the risks associated with transporting SS–89 by sea nor provided the carrier a *Material Safety Data Sheet ("MSDS")* prepared by the parent corporation, which provided that SS–89 poses "unusual fire and explosion hazards" and should be kept dry and away from water and moisture.

The vessel collided with another vessel in foggy weather in the Yellow Sea. The collision caused sea water to enter the cargo hold of M/V Genoa and caused the magnesium substances in the SS-89 to liberate hydrogen gas. Hydrogen gas caused the eventual explosion of the vessel about four hours after the collision. The shipowner sued the Tianjin plant and its U.S. parent corporation in New York Federal Court.

One of the grounds for the lawsuit was based on the on the ground of strict liability under *Carriage of Goods by Sea Act (COGSA)*.

III. Whether a U.S. Federal Court has the admiralty subject matter jurisdiction to hear a dangerous cargo carriage case where the collision occurred in the Yellow Sea?

The New York Federal Court held that the Complaint invoked U.S. admiralty subject matter jurisdiction. The alleged facts supporting the subject matter jurisdiction included: (a) the cargo loss and damage occurred aboard a vessel, (b) the vessel was serving as a common carrier of merchandise on the high seas, and (c) the injuries alleged in the Complaint occurred on navigable waters and arose from a traditional maritime activity. The court of first instance cited two cases in it's support. They are: *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674–75 (1982) and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

Accordingly, the judge held that the U.S. Federal Court has admiralty subject matter jurisdiction to hear the case.

IV. Whether the parent corporation is subject to strict liability under *Carriage of Goods by Sea Act (COGSA)*?

A) At the Court of First Instance Level whether the parent corporation is a "shipper" under *COGSA § 4(6)*?

At the court of first instance level, the judge first considered whether the parent corporation was a "shipper" under *COGSA § 4(6)*, which provides: "*Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment*."

The parent corporation argued that *COGSA § 4(6)* should not be applicable to a cargo buyer, and that it was acting solely as a cargo buyer for the entire carriage transaction. Since *COGSA* does not define "shipper," the judge adopted the principle illustrated in *Senator Linie*[1] that U.S. Courts of Appeal have tended to interpret *COGSA* according to its plain meaning.

The judge pointed out that in a plain language interpretation, the term "*COGSA* shipper" is whomever the carrier contracted with, as evidenced by their bill of lading. The plain language interpretation favors the parent corporation because it acted as a third-party buyer, and never contracted with a carrier.

During the arguments in the court of first instance, the shipowner urged the court to disregard the plain meaning of the term "shipper" and instead use the definition in the *Shipping Act of 1984* (the "Shipping Act")[2] - a definition which includes consignees.[3]

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[1] *Senator Linie GMBH & Co. KG v. Sunway Line, Inc*., 291 F.3d 145, 169 (2d Cir.2002)

[2] Currently, the *Shipping Act* was codified in United State Code (U.S.C.) §§ 40101–41309.

[3] According to the *Shipping Act § 40102(22)*, the term 'shipper' means:

> (A) a cargo owner;
> (B) the person for whose account the ocean transportation of cargo is provided;
> (C) the person to whom delivery is to be made;
> (D) a shippers' association; or
> (E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract."

In reply, the judge opined that the "Statutory Exegesis Rule" required the court to consider the statutory context when interpreting identical terms. The judge cited *Atl. Cleaners & Dyers* [4], a case which held that if "the scope of the legislative power exercised in one statute is broader than that exercised in another", then it may be judicially unwise to assign the same meaning to identical words used in different statutes.

The judge reasoned that the *Shipping Act* serves wider objectives than that of *COGSA*. The two primary goals of the *Shipping Act* are: (1) to provide antitrust immunity to ocean carriers who form Shipping Conferences and (2) to create new tools for shipper-interests to obtain better services and lower rates from carriers.[5] In addition, the *Shipping Act* is administered by the Federal Maritime Commission, which is tasked with reviewing shipping agreements so as to regulate rates and services offered to the shipper market. Other purposes of the Act also include regulating common carriage of goods and providing an efficient economic transportation system.[6] The judge believed that with this context in its legislative goals, it was necessary for the U.S. Congress to define "shipper" broadly in the *Shipping Act*.

By its very nature, the *Shipping Act* was not legislated for governing maritime parties' rights and liabilities in civil litigation. As a general rule, therefore, a plaintiff may not sue under the *Shipping Act* unless and until he has lodged a complaint with the Federal Maritime Commission and an investigation has been concluded.[7] And even then, such plaintiff may only sue for injunctive relief in accordance with a Federal Maritime Commission investigation.[8]

On the other hand, *COGSA* does affect maritime parties' rights and liabilities for purposes of civil litigation. For example, by acknowledging the fact that carriers historically have exercised dominant bargaining power, *COGSA* invalidates carriers' onerous limited-liability provisions in their bills of lading.[9]

Unlike the *Shipping Act*, *COGSA* provides no textual support for broadening the plain meaning of the term "shipper" to include non-contracting third-parties. The text of *COGSA* does not even mention buyers or consignees, let alone "*the person for whose account the ocean transportation of cargo is provided*" or "*the person to whom delivery is to be made*."[10]

The judge then pointed out that the parent corporation did not contract with the shipowner or the carrier, and it was a mere consignee. On the other hand, the Tianjin plant, through the NVOCC, contracted with the shipowner and carrier. Therefore, only the Tianjin plant would qualify as a *COGSA* shipper. For these reasons, the judge concluded that *COGSA* imposes rights and obligations on the Tianjin plant, but not on the parent corporation. Accordingly, the judge dismissed shipowner's *COGSA* claim against the parent corporation.

Because the judge concluded that the parent corporation is not a "*COGSA* shipper", the judge decided that it would not be necessary for him to investigate the mindset of the carrier, that is: Whether the carrier has consent with knowledge about the nature and character of SS–89 under *COGSA § 4(6)*?

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[4] *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)
[5] Peter A. Friedmann & John A. Devierno, The Shipping Act of 1984: The Shift from Government Regulation to Shipper "Regulation", 15 *J. Mar. L. & Com*. 311, 313–14, 320 (1984).
[6] Ibid., at 327–28.
[7] See 46 U.S.C. § 41306(a).
[8] 46 U.S.C. § 41306(c).
[9] See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* (1995), 515 U.S. 528 at 543–44.
[10] 46 U.S.C. § 40102(22).

B) At the Appellate Level

The Court of Appeals' decision includes an analysis of whether the carrier had knowledge about the nature and character of SS–89. The decision was referred to *Contship*'s finding that a carrier was precluded from invoking strict liability if the carrier: (a) knows that a cargo poses a danger and requires special handling or stowage, and (b) nevertheless exposes the cargo to the general condition that triggers the known danger.[11] The court would apply this preclusion regardless of whether the carrier was aware of the precise characteristics of the cargo.

(i) Whether the carrier has the knowledge about the nature and character of SS–89 under COGSA § 4(6)?

On appeal, the carrier reminded the court to look at the three facts that were helpful to prove the carrier didn't possess the relevant knowledge, they are: (a) the parent corporation never declared that the cargo was "dangerous" within the meaning of the *International Maritime Dangerous Goods ("IMDG") Code*. (b) the Carrier was never provided with *a Material Safety Data Sheet ("MSDS")* that identifying the SS–89 as dangerous, and (c) the parent corporation affirmatively certified that the SS–89 was not a cargo to which the *IMDG Code* applied.

The Court of Appeals, adopted the principle illustrated in *Senator Linie* and pointed out that the legal investigation to determine strict liability under *COGSA § 4(6)* turns on whether the carrier knows about the dangerous nature of its cargo, not whether or how the shipper conveys that information. In *Senator Linie*, the court decided that "*it is the carrier's knowledge of the goods' dangerous nature, not the shipper's, that conditions shipper liability*".[12] Therefore, the Court of Appeals concluded that a *COGSA* strict liability claim does not require a shipper to use any particular method, whether by *MSDS* or otherwise, to inform a carrier of the dangerous properties of its cargo.

The Court of Appeals believed the relevant facts are those that look to the knowledge of the carrier, such as: (a) the parent corporation did give the carrier a *U.S. Harmonized Tariff Schedule ("HTS") Code*, which identifies the cargo of SS–89 as a magnesium-based substance, and (b) the ship master also made testimony that he knew magnesium would emit highly flammable hydrogen when exposed to water.

When analyzing the ship master's testimony, the Court of Appeals pointed out that the master acquired the knowledge of "magnesium, plus seawater, means hydrogen," from his "*own background information*". This indicated that the knowledge was not obtained after the collision.

As a result, the Court of Appeals opined that the facts did establish that the carrier was on notice that the SS–89 cargo contained magnesium and that flammable hydrogen would be released if it came in contact with water.

(ii) Whether the carrier places SS–89 in a condition which triggers the known danger?

The carrier argued that he did not intentionally expose the SS–89 to the condition triggering the danger, i.e., water. Such exposure was the result of an accidental collision with another vessel. The court decided that the argument was without merit for the following reasons.

When the carrier agreed to carry a cargo of magnesium-based substance on a sea voyage, with the knowledge that a chemical reaction would emit flammable hydrogen if the magnesium were exposed to any

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[11] *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, 442 F.3d 74, 77 (2d Cir.2006).
[12] *Senator Linie GMBH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145, 154 (2d Cir.2002)

of the water in the vast ocean surrounding the ship; the carrier still decided to stow the SS–89 below deck in an enclosed cargo hold. The carrier also testified that "*the dangerous accumulation of hydrogen from the reaction of the water and magnesium could have been avoided entirely if it had stowed the SS–89 on deck where hydrogen could "dissipate harmlessly into the atmosphere."*

In its final conclusion, the Court of Appeals held that carrier's strict liability claims based on *COGSA § 4(6)* must fail as a matter of law because: (a) the carrier knew that the SS–89 cargo would react with water to produce flammable hydrogen, and (b) the carrier nevertheless stowed that cargo in a hold susceptible to flooding in the event of a collision from which resulting hydrogen could not escape.

Conclusion

An interesting question arises as to whether shipping professionals mainly engaged in transporting cargoes of hazardous substances from China to foreign countries need to know about foreign Carriage of Goods by Sea Law. The huge foreign direct investments in manufacturing facilities of the chemical sector in China suggest a positive answer. The lessons of *M/V Rickmers Genoa* are:

1) The injured shipowner faces difficulty to establishing the U.S. parent corporation consignee as "a *COGSA* shipper" for it did not contract with the carrier.

2) When the injured shipowner brings a strict liability claim based on *COGSA § 4(6)*, the U.S. law will focus less on evidences concerning the conduct of the shipper, and more on the knowledge and conduct of the carrier. Such as whether the ship master knows about the dangerous nature of the cargoes and whether the ship stows the cargoes in a safe location according to its nature.

3) The ship's master has to maintain a reasonably skeptic mindset even if the shipper does not declare the cargo as dangerous according to the *International Maritime Dangerous Goods ("IMDG") Code*. The inquiry should not stop even if the shipper affirmatively certifies that the cargo is not a type in which the *IMDG Code* would apply.

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