Summary

When vessels encounter violent storms at sea, it is commonly thought that the Carrier is exonerated from liability for damage to the cargo on board. Each of the cargo recovery conventions incorporates some defense for an “Act of God” or “Peril of the Sea.” However, along with these defenses, the United States Carriage of Goods by Sea Act (COGSA), 46 U.S.C. app. § 1300 et seq., for example, imposes on the Carrier a non-delegable duty to provide the necessary care that carrying the cargo requires. This is a continuing duty of care that the Carrier must satisfy or risk being held liable for the damage caused to cargo during a hurricane or other natural disaster.

The Defenses of Natural Force Majeure

The “Act of God” defense is one of two defenses of natural force majeure frequently raised by Carriers to avoid liability for damage done to cargo by hurricanes and other violent storms. This defense and its counterpart, the “Perils of the Sea” defense, are codified in COGSA as exceptions to liability. See 46 U.S.C. app. §1300(2)(c)(d). However, the fact that an “Act of God” such as a hurricane has occurred does not automatically absolve the Carrier from liability. These defenses will insulate a Carrier from liability only where 1) the conditions are determined to rise to the level of an “Act of God” or “Peril of the Sea,” 2) the damage or loss to the cargo was unforeseeable and 3) there was no contributing human negligence on the part of the Carrier. See Friedman & Slater, Inc. v. M.V. Tateho, 222 F. Supp. 964 (S.D.N.Y. 1963). Stated another way, the Carrier has a continuing duty to care for the cargo and must be able to establish a lack of fault in order to be relieved of liability. Skandia Insurance Co. Ltd. v. Star Shipping AS, 173 F. Supp. 2d 1223, 1242 (S.D. Ala. 2001); See, Compania de Navegacion Porto Fororo, S.A. v. S.S. American Oriole, 474 F. Supp. 22 (E.D. La. 1976), affd, 585 F.2d 1326 (5th Cir. 1978).

The “Perils of the Sea” defense has been defined as “those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence." See, The GIULIA, 218 F. 744, 746 (2d Cir. 1914). The “Act of God” defense is commonly thought to be broader in scope than the “Peril of the Sea” and is defined as “... when it happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled and uninfluenced by the power of man, and without human intervention, and is of such a character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence ...". See BLACK’S LAW DICTIONARY, 33 (6th ed. 1990). In general, the “Act of God” defense includes those occurrences that are “so extraordinary that that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.” Skandia, 173 F. Supp. at 1239; citing Warrior & Gulf Navigation Co. v. United States, 864 F.2d 1550, 1553 (11th Cir. 1989). Practically speaking, courts have not found the scope of these powerful defenses to be amenable to a general standard. See, Thyssen, Inc. v. S/S EUROUNITY, 21 F.3d 535, 539, 2001 AMC 1527 (2d Cir. 1994). Therefore, determining whether given conditions constitute an “Act of God” or “Peril of the Sea” is “wholly dependent on the facts of each case.” Id.

The unforeseeability of the “Act of God” to the Carrier is absolutely essential to absolve the Carrier of liability for damage to the cargo due to the storm. It is well settled that where “a defendant has sufficient warning and reasonable means to take proper action to guard against, prevent, or mitigate the dangers posed by the hurricane [or other Act of God] but fails to do so, then the defendant is responsible for the loss.” See, Skandia, 173 F. Supp. at 1241. What must always be remembered, however, is that the Carrier’s duty to safeguard cargo as much as reasonably possible remains in effect until delivery to a hit and customary wharf. Id. at 1237; citing Caterpillar Overseas S.A. v. S.S. Expeditor, 319 F.2d 720, 723 (2d Cir. 1963). Where the prevailing weather and other condition, including the conditions of the cargo itself, allows, this includes a duty to deliver the cargo in a safe location where it may not be damaged further or stolen, and to provide it with the level of care it reasonably requires in the interim. Id.; citing The Italia, 167 F. 113 (2d Cir. 1911); see also Standard Brands, Inc. v. Nippon Yusen Kaisha, 42 F. Supp. 45 (D. Mass. 1941).

The last element that must be proven to successfully defend against liability in the wake of an “Act of God” is that the damage to the cargo must be due exclusively to natural causes. This has been interpreted as meaning that the Carrier must not have been able to prevent the damage through the exercise of reasonable care. Thus, a Carrier will not be relieved from liability unless it can be shown that the damage did not arise through want of proper foresight and prudence, not only with respect to an unforeseeable Act of God, but also in how the Carrier responded to the Act of God. In short, the Carrier who exonerates itself from liability will have successfully carried out the not insignificant burden of proving that there was no human negligence involved, before, during, or after the event giving rise to the defense.

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