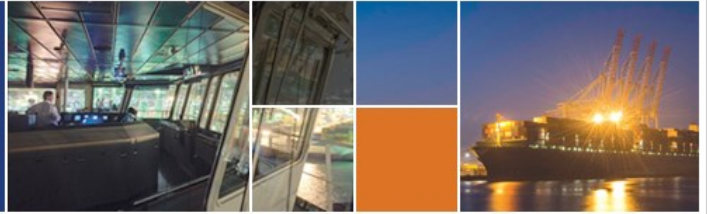




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US COGSA - Liability for Dangerous Goods

March 2008

On 3 March 2008 the United States Court of Appeals for the Second Circuit in *In re M/V DG HARMONY*¹, issued an important decision which clarifies the standard used to determine the liability of shippers and carriers transporting hazardous cargo under the Carriage of Goods by Sea Act ("COGSA").²

Under the holding of this case, shippers will not be held **strictly liable** for damage caused by hazardous goods if both the shipper and the carrier had pre-shipment knowledge of the dangerous nature of the cargo, even if the carrier lacked information about the precise characteristics of the cargo and its hazards. Instead, in such a case the shipper's liability will be determined on **negligence** principles. In particular, where the carrier alleges that the shipper failed adequately to warn the carrier about the characteristics of the particular shipment, the carrier must show:

1. that the shipper had a duty to warn because the cargo presented dangers of which the carrier could not reasonably have been expected to be aware,
2. that the shipper failed to provide the adequate warning, and
3. that this failure caused the damage complained of.

Facts and Procedural History

On 9 November 1998, the *M/V DG Harmony* caught fire off the coast of Brazil as a result of an explosion in its third hold. The fire burned for three weeks, rendering the vessel and its cargo a constructive total loss. On board the vessel were ten containers, each packed with 16,000 kilograms of calcium hypochlorite (hydrated) ("calhypo") which was manufactured and shipped by PPG Industries, Inc. ("PPG"). Calhypo is an industrial bactericide which is likely to combust when it reaches its critical ambient temperature ("CAT"), a figure which is dependent on the manner in which the calhypo is stored and is inversely proportional to the quantum of calhypo in a given sample. Calhypo is listed in the International Maritime Dangerous Goods Code ("IMDG Code"), which recommends that calhypo not be exposed to a heat source in excess of 55°C for longer than a 24-hour period. PPG provided the carrier with documentation identifying the cargo by its IMDG code, declaring the containers had been packed in accordance with the requirements of the IMDG Code, cautioning that the containers should be stored in a cool, dry, well ventilated place, away from sources of radiant heat. PPG also warned the carrier that the cargo would become unstable above a certain temperature, but it omitted specific information about what effect the packaging of the containers might have on the calhypo's CAT. PPG's containers were stowed in the vessel's third hold. Three of the containers were placed adjacent to the heated port-side bunker tank with two of these containers also sitting directly atop the bunker tank. The fire aboard the *M/V DG Harmony* was caused when PPG's calhypo exploded.

Litigation ensued in the United States District Court for the Southern District of New York. All claims were resolved except the claims of the ship-owning and cargo interests against PPG. The ship-owning and cargo interests alleged that PPG was liable for the constructive total loss of the vessel based upon theories of general negligence, negligent failure to warn, and strict liability. After a bench trial, the district court found PPG solely liable based upon the theories of strict liability and negligent failure to warn. PPG appealed to the Second Circuit.

The Second Circuit's Decision on Appeal

The Second Circuit reversed the judgment of the district court that PPG was strictly liable pursuant to COGSA Section 4(6), which provides that the shipper of flammable, explosive, or dangerous cargo "shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment." The district court's finding of strict liability was based on the Second Circuit's holding in *Senator Linie GmbH & Co. KG v. Sunway Line, Inc.*³ where a shipper was held strictly liable for damage caused by the spontaneous combustion of hazardous goods being shipped from Korea to the United States. The *DG Harmony* court emphasized that the application of the *Senator Linie* decision was limited to the situation where **neither the shipper nor the carrier** knew of the dangerous nature of the cargo. .

Here, however, both the shipper and carrier knew that calhypo was dangerous. Relying on its prior decision in *Contship Containerlines, Ltd. v. PPG Indus., Inc.*⁴ the Second Circuit held that a shipper cannot be held strictly liable for damage caused during the shipment of hazardous cargo in circumstances where the carrier was generally aware that the cargo's dangerous nature requires careful handling or stowage, as the carrier was in this case, **and** it nevertheless exposes the cargo to conditions which could trigger a known danger, as the carrier did in this case. In such a case, liability must be determined under negligence principles and not strict liability principles. .

The Second Circuit then turned to the district court's holding that PPG was liable because it failed to adequately warn of the dangers posed in shipping the calhypo. The court affirmed the district court's finding that PPG had a duty to warn and that PPG breached this duty by failing to adequately warn the carrier of the potential dangers posed by the specific manner in which PPG had packed the containers containing the calhypo, and it further affirmed the finding that the calhypo caused the explosion resulting in the constructive total loss of the vessel. The court nevertheless vacated the district court's judgment based upon its failure to address whether the carrier would have stowed the cargo differently if PPG had provided an adequate warning, and remanded the case to the district court with instructions to make findings on the issue of whether an adequate warning would have affected how the carrier stowed the calhypo.

Conclusion

Where the carrier is generally aware of the hazardous nature of cargo, even if it is not aware of the precise nature of the risk, and the carrier nevertheless exposes it to potentially dangerous conditions, it will not be able to rely on the strict liability provisions of COGSA but will be required to show that the shipper acted negligently with respect to the cargo and/or its obligation to warn the carrier of the specific nature of the cargo's risks.

With thanks to Thomas H. Belknap, Jr. LeRoy Lambert and Brian S. Tretter of Blank Rome for preparing this article.

1. *In re M/V DG HARMONY*, 2008 U.S. App. LEXIS 4483, No. 05-6116-cv (2d Cir. March 3, 2008).

2. Carriage of Goods by Sea Act, 46 U.S.C. § 30701 note.

3. *Senator Linie GmbH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145 (2d Cir. 2002).

