

# Cargo claims under the Harter Act

This article highlights the importance of a USA Clause Paramount making COGSA applicable to the period prior to loading and post discharge.



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## Case study

After carriage from Dunkirk to New York, a cargo of steel coils, in good condition, is discharged by the carrier and awaits delivery at the terminal to the consignee. To avoid delay, the ship sails from Dunkirk with one crew member less than required. Through a clerical error, the coils are delivered to the wrong party. The correct party sues the carrier for the value of the goods. The bill of lading contained a clause incorporating COGSA, but the clause did not make COGSA applicable to the periods before loading and post discharge.

Is the carrier liable to the cargo owner for the loss under US law? Most likely, yes, due to the Harter Act.

## What is the Harter Act and when does it apply?

The Harter Act was enacted in 1893. Though Congress enacted COGSA over 40 years after the Harter Act, Congress did not repeal the Harter Act. Rather, the Harter Act applies when COGSA does not.

The Harter Act differs from COGSA in several respects:

- The Harter Act applies to voyages between US ports and voyages between US and foreign ports; COGSA only applies to the latter.
- The Harter Act applies from delivery at load port by the shipper to delivery to the consignee at discharge port; COGSA applies only between loading and unloading, 'tackle to tackle'.
- The Harter Act contains no package limitation; COGSA limits the carrier's liability to \$500 per package.
- The Harter Act has no statute of limitation; COGSA requires claims to be brought within one year.

Importantly, the shipper and carrier may stipulate that COGSA or any other law governs the period during which the cargo is in the custody of the carrier, including prior to loading and post discharge, so long as they do not select a foreign law or forum that would reduce the responsibility of the carrier under COGSA.

Since the voyage in the above case study is from a foreign port (Dunkirk) to a US port (New York), both the Harter Act and COGSA apply. Specifically, COGSA applies 'tackle to tackle', while the Harter Act applies from unloading until delivery to the consignee. Because the carrier did not include a USA Clause Paramount, which would make COGSA applicable to the entire time the cargo was in the custody of the carrier, and because the loss occurred between unloading and delivery, the liability of the carrier for the loss of cargo post discharge will be governed by the Harter Act. The carrier may not rely on the 'tackle to tackle' provisions of COGSA and contend its only obligation was to discharge the cargo.

#### **Exemptions from liability**

Both the Harter Act and COGSA exempt the carrier from liability if the loss or damage results from an error in the navigation or management of the ship and other perils such as perils of the sea, acts of God or public enemies, inherent vice of the cargo and insufficiency of packaging, among others. However, the way a carrier can avail itself of the exemption under the Harter Act versus COGSA could not be more different.

Under the Harter Act, a carrier has the burden to prove that it exercised due diligence to provide a seaworthy and properly manned, equipped and supplied ship before it may benefit from the exemption, regardless of whether or not a lack of due diligence caused the loss or damage. Having exercised due diligence to provide a seaworthy ship is a 'condition of the exemption' under Harter; a causal relation between the unseaworthiness and the loss or damage is not required. By contrast, under COGSA, the carrier proves a complete defence if it shows the loss or damage was due to an error in navigation or management of the ship.

Fortunately, then, this condition of exemption applies under Harter only with respect to losses caused by errors in navigation or in the management of the ship. So, here, the misdelivery of the coils is unrelated to any error in navigation or management of the ship. The fact that the ship sailed lacking a required crew member, even under Harter, is not relevant.

#### **Limitations of liability**

Under COGSA, a carrier is permitted to limit its liability to \$500 per package or customary freight unit. The Harter Act contains no limitation of liability provision, but courts have held that the COGSA \$500 per package limitation is reasonable under the Harter Act.

#### **Time bar**

In contrast with the one-year time bar limitation from the delivery under COGSA, the Harter Act does not contain a statute of limitation and therefore the doctrine of laches applies. However, as in the case of the \$500 package limitation, courts have held that the COGSA one-year limitation is reasonable under the Harter Act.

#### **Conclusion**

All other things being equal, the carrier in the case study will be liable to the cargo owner for the full value of the cargo, without the benefit of the \$500 package limitation and without the benefit of the one-year time bar. To minimise risk of liability when a cargo claim arises, carriers should incorporate a USA Clause Paramount in their bills of lading or the charterparties providing that COGSA applies to the voyage to or from a US port during the entire period the cargo is in the actual or constructive custody of the carrier, including prior to loading and after discharge.

