

ORIGINAL

S E R V E D
December 13, 2007
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 1883(F)

FRANK J. KUZELA

v.

A.P. MOLLER-MAERSK A/S

**MEMORANDUM AND ORDER ON
MOTION TO DISMISS FOR LACK OF JURISDICTION OR IN THE ALTERNATIVE,
TO DISMISS THE COMPLAINT BASED ON THE STATUTE OF LIMITATIONS
AND/OR LIMITING DAMAGES TO \$500 PER PACKAGE UNDER COGSA**

BACKGROUND

This proceeding is before me for consideration of the Motion to Dismiss for Lack of Jurisdiction or in the Alternative, to Dismiss the Complaint Based on the Statute of Limitations and/or Limiting Damages to \$500 per Package under COGSA filed by respondent A.P. Moller-Maersk A/S (Maersk). For the reasons discussed below, I deny the motion.

I. FACTUAL BACKGROUND.

In 2004, complainant Frank J. Kuzela (Kuzela) had a number of household goods in or around Zlin, Czech Republic. He wanted to move these goods to Palm Bay, Florida.

Kuzela contacted respondent Maersk, a vessel-operating common carrier, FMC Organization No. 020036, and entered into a contract for Maersk to transport the goods to Florida. On September 7, 2004, Maersk issued Maersk Sealand Acceptance Letter for Transport Order PRHL12276 to Kuzela. The Acceptance Letter states that the goods will be carried by several modes of transportation from Zlin, Czech Republic, to Miami Terminal, Florida. (Maersk Sealand Acceptance Letter for Transport Order PRHL12276 (ALJ App. 16.)¹

On September 25, 2004, Maersk issued Maersk Sealand Non-Negotiable Waybill No. PRHL12276 for containers AMFU8597787 and CPIU5558847. The Waybill indicates that Kuzela is the shipper of the containers and the consignee of the containers. The Waybill indicates that Zlin, Czech Republic, is the place of receipt of the containers, Rotterdam is the port of loading of the containers, M/V OLUF MAERSK is the ocean vessel on which the containers are to be carried, and Miami, Florida, is the port of discharge of the containers. (Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (ALJ App. 18).) It is noted that Rotterdam is 1211 kilometers from Zlin, Czech Republic. (Google Maps (<http://www.google.com/maps>), directions from Zlin, Czech Republic, to Rotterdam, The Netherlands (ALJ App. 20).)

On September 27, 2004, Maersk issued Maersk Sealand Export Invoice Number PR10060869 - PRHL12276. The Export Invoice concerns containers AMFU8597787 and CPIU5558847 and indicates that Frank Kuzela is the payer. The Export Invoice indicates that Maersk received the containers in Zlin, Czech Republic, and that the containers would be delivered to Miami. The Export Invoice indicates that in addition to the ocean freight charge, Maersk charged

¹ The documents on which I rely for this decision have been compiled into the accompanying ALJ Appendix.

Kuzela for inland hauling from Zlin, Czech Republic, to the port of loading. (Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 (ALJ App. 19).)

When the containers were loaded in Zlin, container AMFU8597787 did not have a hole in the roof. (Kuzela letter to de la Cruz dated October 19, 2006 (ALJ App. 8).) The containers were discharged from the M/V OLUF MAERSK in Miami, Florida, then trucked to Palm Bay, Florida, a distance of 170 miles. (Google Maps (<http://www.google.com/maps>), directions from Port of Miami, FL, to Palm Bay, FL (ALJ App. 24).) A hole was discovered in the roof of container AMFU8597787 when the container arrived in Palm Bay, Florida, on October 29, 2004. (Kuzela letter dated October 19, 2006, to de la Cruz (ALJ App. 8); Nighthawk Enterprises, Inc. Bill of Lading No. 253273 (ALJ App. 23).) Further inspection revealed that National Geographic magazines and some Czech language books shipped in container AMFU8597787 had been damaged by water. (Kuzela letter dated January 2, 2006, to Mr. Yu (ALJ App. 25).) The value of the damaged magazines and books is claimed to be \$4,147.80. (*Id.*; *Kuzela v. Maersk*, FMC No. 1883(I) (Small Claim Form for Informal Adjudication And Information Checklist (Complaint) at 1 (ALJ App. 1).)

Kuzela contacted Maersk in an attempt to obtain reimbursement for the damaged magazines and books. His attempts were unsuccessful. On June 19, 2006, Kuzela sent a letter to “Ms. Zoraya” at the Federal Maritime Commission’s Office of Consumer Affairs & Dispute Resolution Services (CADRS) seeking assistance with the matter. (Kuzela letter to “Ms. Zoraya” dated June 19, 2006 (ALJ App. 4).) On October 19, 2006, Kuzela sent a letter to Zoraya de la Cruz, an attorney in CADRS, with “the shipping documents [de la Cruz] requested for our claim against ‘Maersk Sealand.’” (Kuzela letter to de la Cruz dated October 19, 2006 (ALJ App. 8).) The Commission received Kuzela’s October 19 letter on October 25, 2006. (*Id.*)

Kuzela then prepared and submitted to the Commission an Informal Complaint against Maersk Sealand in the form prescribed by 46 C.F.R. Subpart S, Exhibit 1, of the Commission's regulations. The Commission received Kuzela's Informal Complaint on November 29, 2006, and assigned Informal Docket No. 1883(I) to the Complaint. (Complaint at 1 (ALJ App. 1); *Kuzela v. Maersk*, FMC No. 1883(F), Docket Activity Log.)² On January 12, 2007, Maersk was served with the complaint. (*Kuzela v. Maersk*, FMC No. 1883(F) (Notice of Filing and Assignment) (ALJ App. 11).)

On February 5, 2007, Maersk served Respondent's Answer & Refusal to Consent to Informal Adjudication Pursuant to Subpart S and Designation for Handling Pursuant to Subpart T (ALJ App. 13) and a Memorandum of Law in Support of Motion to Dismiss for Lack of Jurisdiction or in the Alternative, to Dismiss the Complaint Based on the Statute of Limitations and/or Limiting Damages to \$500 per Package under COGSA (Memorandum of Law).³ (*Kuzela v. Maersk*, FMC No. 1883(F), Docket Activity Log.) On April 25, 2007, the Commission converted Informal Docket No. 1883(I) from an informal docket under 46 C.F.R. Subpart S to a Formal Docket under 46 C.F.R. Subpart T, changed the docket number to 1883(F), and referred the proceeding to the Office of Administrative Law Judges. (*Kuzela v. Maersk*, FMC No. 1883(F) (Memorandum dated April 25, 2007, from Assistant Secretary to Administrative Law Judge) (ALJ App. 15).)

² The Docket Activity Log for Docket No. 1883(F) can be accessed at http://www.fmc.gov/reading/activity_logs.asp?DOCKET_ID=617.

³ While Maersk has not submitted a motion to dismiss, only a memorandum of law in support of the motion to dismiss, I consider the motion to dismiss to be properly before me.

II. RESPONDENT'S MOTION TO DISMISS.

Maersk contends that the allegations in Kuzela's complaint "stem from alleged garden variety claim damage to a shipment of household goods carried onboard the M/V OLUF MAERSK in the fall of 2004." (Memorandum of Law at 2.) Therefore, Maersk contends that the Carriage of Goods by Sea Act (COGSA), formerly codified at 46 U.S.C. app. §§ 1300-1315,⁴ controls this dispute. (*Id.*)

Maersk's motion sets forth three alternative forms of relief that it seeks: (1) this proceeding should be dismissed because the Commission lacks jurisdiction over COGSA claims; (2) this proceeding should be dismissed because Kuzela filed his complaint after the one-year COGSA statute of limitations had run; and (3) if the proceeding is not dismissed for lack of jurisdiction or on statute of limitations grounds, damages are subject to the COGSA limitation of \$500 per package.

Relying on 46 U.S.C. app. § 1312,⁵ Maersk asserts that "COGSA applies to all contracts of carriage of goods by sea to or from a port in the United States." (Memorandum of Law at 5).

The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

46 U.S.C. app. § 1301(b).

⁴ On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-170, at 2 (2005). As a result of this reenactment, COGSA is no longer codified at 46 U.S.C. app. §§ 1300-1315. Nevertheless, I will use the codification as it existed at the time the events recited herein occurred.

⁵ "This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." 46 U.S.C. app. § 1312.

Since the subject cargo was destined for Florida and the bill was the contract of carriage for the shipment, COGSA applies, and any claim that Claimant has against Maersk as carrier for the alleged damage to his cargo is subject to the provisions contained therein. The [Federal Maritime Commission] case law is clear that the Commission does not exercise jurisdiction over routine cargo claims under COGSA.

(Memorandum of Law at 5.) Maersk recites case law regarding the Commission's jurisdiction over COGSA claims, (*id.* at 5-6), and concludes that:

Claimant seeks damages pursuant to COGSA for alleged damaged that occurred during the *transportation* of the cargo by Maersk. . . . The shipment of Claimant's goods from the Czech Republic to Florida was the sole transaction between the parties and Claimant's alleged damages stem solely from the *transportation* of Claimant's goods. Accordingly, the Commission is without jurisdiction over this case, and the relief sought by Claimant can only be heard in a judicial forum.

(*Id.* at 6-7 (emphasis in original).)

Maersk then argues that even if the Commission has jurisdiction, the complaint is barred under COGSA's one-year statute of limitations. COGSA provides that "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered." 46 U.S.C. app. § 1303(6). Kuzela signed the Nighthawk bill of lading confirming delivery to Palm Bay, Florida, on October 28, 2004. Kuzela waited nearly one year to write to Maersk to claim that the books and magazines had been damaged. Kuzela did not file his complaint with the Commission until November 2006, more than two years after the goods were delivered. (*Id.* at 7-8).⁶

Maersk then argues that even if the Commission has jurisdiction over this matter and determines that the complaint was timely filed, COGSA limits damages to \$500 per package. 46 U.S.C. app. § 1304(5) ("Neither the carrier nor the ship shall in any event be or become liable for

⁶ As noted above, Kuzela first sent written correspondence to the Commission on June 19, 2006, nearly twenty months after delivery of the goods. (ALJ App. 4)

any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States.”). For the purposes of the motion, Maersk concedes that two packages were damaged; therefore, Maersk claims that if there is jurisdiction, COGSA limits Kuzela’s damages to \$1,000. (Memorandum of Law at 8 and n.3).

DISCUSSION

The Commission’s Rules of Practice and Procedure (Rules) do not explicitly provide for a motion to dismiss for lack of subject matter jurisdiction. The Rules do provide that “[i]n proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.” 46 C.F.R. § 502.12. Civil Rule 12(b)(1) permits a pleader to raise by motion lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1).

While the district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction, *see Herbert v. Nat’l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992), the court must still “accept all of the factual allegations in [the] complaint as true,” [*United States v. Gaubert*, 499 U.S. 315, 327 (1991)] (quoting [*Berkovitz v. United States*, 486 U.S. 531, 540 (1988)]) (internal quotation marks omitted).

Jerome Stevens Pharmaceuticals, Inc. v. Food & Drug Admin., 402 F.3d 1249, 1253-1254 (D.C. Cir. 2005).

I will assume for this decision that Maersk correctly states the law regarding the Commission’s jurisdiction to decide cases subject to COGSA. Nevertheless, Maersk’s motion to dismiss must be denied as Maersk has not established that Kuzela’s claim is covered by COGSA.

Maersk claims that the “shipment of Claimant’s goods from the Czech Republic to Florida was the sole transaction between the parties and Claimant’s alleged damages stem solely from the

transportation of Claimant's goods." (Memorandum of Law at 6-7 (emphasis in original).) While this is true, it does not follow that COGSA necessarily governs this case.

COGSA includes limitations not discussed by Maersk in its motion. "By its terms, COGSA governs bills of lading for the carriage of goods 'from the time when the goods are loaded on to the time when they are discharged from the ship.'" *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 29 (2004) (quoting 46 U.S.C. app. § 1301(e)). "The term 'ship' means any vessel used for the carriage goods by sea." 46 U.S.C. app. § 1301(d). Maersk has presented no evidence on which a finding that the goods were damaged during "the period from the time when the goods are loaded on to the time when they are discharged from the ship" could be based.

The facts currently in the record and recited above establish that Maersk received the containers with Kuzela's household goods in Zlin, Czech Republic. Maersk then transported the containers over land from Zlin to Rotterdam, a distance of 1211 kilometers. This portion of the "carriage of [Claimant's] goods" was prior to "the period of time when the goods [were] loaded on . . . the ship." If the goods sustained damage during this period, COGSA would not apply. The record also indicates that Maersk retained control of the goods after the goods "were discharged from the ship," as the complaint alleges that Maersk "failed to deliver said goods in proper order to the final destination, at a storage: EZ Way Storage, 888 Palm Bay Road, Palm Bay, Florida." (Complaint ¶ III (ALJ App. 1).)⁷ Likewise, if the goods sustained damage during this period, COGSA would not apply.

⁷ Maersk's motion states that Nighthawk picked up the containers in Miami "[a]cting on behalf of Claimant." (Memorandum of Law at 3.) It does not cite any evidentiary support for this claim. As noted above, since this is before me on a motion to dismiss, I must accept all the factual allegations in the complaint as true.

Maersk has not submitted evidence that would require a finding that Kuzela's household goods were damaged while on board the M/V OLUF MAERSK during a "carriage of goods" as defined by COGSA; therefore, Maersk has not established that the goods were damaged during a period in which COGSA applies to Kuzela's claim.

Maersk has not established that COGSA applies to Kuzela's claim, thereby taking it out of the Commission's subject matter jurisdiction, and has not established that either the one-year statute of limitations or the limitation on damages in COGSA applies. Therefore, Maersk's motion to dismiss must be denied.

ORDER

Upon consideration of the Memorandum of Law in Support of Motion to Dismiss for Lack of Jurisdiction or in the Alternative, to Dismiss the Complaint Based on the Statute of Limitations and/or Limiting Damages to \$500 per Package under COGSA filed by respondent A.P. Moller-Maersk A/S, the record herein, and for the reasons stated above, it is hereby

ORDERED that the Motion to Dismiss for Lack of Jurisdiction or in the Alternative, to Dismiss the Complaint Based on the Statute of Limitations and/or Limiting Damages to \$500 per Package under COGSA be **DENIED**.



Clay G. Guthridge
Administrative Law Judge