

## ***Cargo damage caused by fire***

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Where goods carried under a bill of lading are damaged by fire, the carrier may try to raise one of two very similar defenses: the COGSA fire defense (46 app. U.S.C. §1304(2)(b), the U.S. enactment of Art. 4, r. 2(b) of the Hague Rules) and the Fire Statute (46 app. U.S.C. §182).

The fire statute provides as follows:

**‘182. Loss by fire**

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.’

The COGSA fire defense provides as follows:

‘Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –

...

(b) Fire, unless caused by the actual fault or privity of the carrier.’

The key question in relation to both of these defenses is whether the onus and order of proof are the same as they are for the other COGSA defenses in §1304 (the equivalent of Art. 4 of the Hague Rules). If the order and onus of proof are the same as for the other defenses, the carrier must show that it exercised due diligence to prevent the

fire from starting or from spreading once started. If the order and onus of proof are different, the cargo-owner must show that the carrier failed to take care to prevent the fire from starting or spreading.

The Second, Fifth and Eleventh Circuits hold that the order and onus of proof are different in relation to the fire defense, and that it is for the cargo-owner to prove fault on the part of the carrier once the carrier has shown that the loss or damage was caused by fire. In re Ta Chi Nav. Corp., S.A., 677 F. 2d 225, 1982 A.M.C. 1710 (2<sup>nd</sup> Cir., 1982); Westinghouse Elec. Corp. v. M/V LESLIE LYKES, 734 F. 2d 199, 1985 A.M.C. 247 (5th Cir., 1984), *cert. denied* 469 U.S. 1077 (1984); Banana Services Inc. v. M/V TASMAN STAR, 68 F. 3d 418, 1994 A.M.C. 1617 (11<sup>th</sup> Cir., 1995). The cargo-owner can only succeed in its claim if it is able to show fault on the part of *the carrier itself*. It is not sufficient to show fault on the part of the carrier's employees or agents. *Id.*

The Ninth Circuit disagrees, holding that the order and onus of proof are the same for the fire defenses as for the other COGSA defenses, requiring the carrier to show that it did exercise due diligence. Nissan Fire & Marine Insurance Co. Ltd v. M/V HYUNDAI EXPLORER, 93 F. 3d 641, 1996 A.M.C. 2409 (9<sup>th</sup> Cir., 1996). However, the Ninth Circuit agrees with the other Circuits that the carrier only loses the benefit of the defense if *it itself* was at fault. *Id.* Thus, the COGSA fire defense is different from the other COGSA defenses in at least one respect, even under the Ninth Circuit view. The carrier's duty of due diligence in relation to the seaworthiness of the vessel is non-delegable in relation to non-fire defenses, but not in relation to the fire defense. To put it another way, the Ninth Circuit holds the carrier responsible for damage arising from unseaworthiness caused by a want of due diligence on the part of employees or agents *except* in the case of fire.

For further information about the fire defense, see:

- Sandra A. Larkin, Comment, *The Allocation of the Burden of Proof under the Fire Statute and the Fire Exemption Clause of the Carriage of Goods by Sea Act*, 20 Tul. Mar. L.J. 403 (1996)

- Terry Marquez, Note, *The Ninth Circuit Fails to Mend the Inter-Circuit Split Regarding the Burden of Proof in Fire Statute Cases: Nissan Fire & Marine Insurance Co. v. M/V Hyundai Explorer*, 21 Tul. Mar. L.J. 629 (1997)