

# Shippers' Case Law

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## NVOCCs are liable for misrepresented goods

G.E. International (USA) Inc., an agent for Philip Morris Inc., hired Oceanbridge Shipping International Inc., a non-vessel-operating common carrier, to transport 10 containers from Long Beach to Tokyo. Oceanbridge contracted with American, another NVOCC, to ship the containers between those ports. American issued a bill of lading identifying Oceanbridge as the “exporter/shipper” and Okamoto Freighters as the consignee in Japan. The “particulars furnished by the shipper” listed the cargo as 10 containers holding “9,600 cases cigarettes.”

American, in turn, contracted with Laufer, a third NVOCC, to ship the containers to Tokyo. Laufer then issued a bill of lading designating American as “the exporter” and describing the cargo as “cigarettes and cigars,” which Laufer duly booked with Yang Ming. A bill of lading from Yang Ming said the shipper “shall indemnify the (ocean) carrier against all loss, damage, expenses, liability, penalties and fines” arising or resulting from a misdescription of cargo. Also, Yang Ming’s bill of lading expressly incorporated by reference the terms of that ocean carrier’s tariff. One service contemplated by Yang Ming’s tariff was the storage of the shipper’s cargo at the point of destination in return for a predetermined fee called demurrage.

Shipped from Long Beach on June 23, 1997, the containers arrived in Tokyo on July 5. Okamoto, the consignee, quickly discovered that all 10 containers held used tires, not cigarettes and cigars. Okamoto notified Yang Ming that it was rejecting the entire shipment, and abandoned the containers in the carrier’s Tokyo container yard. Yang Ming notified Laufer and proposed that the NVO arrange the return of the containers to Long Beach. The carrier also told Laufer that “free time” had expired on the containers on July 15, and that demurrage charges were being incurred pursuant to Yang Ming’s tariff.

Anticipating that Laufer would abandon the cargo, Yang Ming began hunting for potential buyers for the tires. The carrier found the tires had no commercial value in Japan, and that it would cost \$25,000 to dispose of them in that country. Yang Ming eventually located an individual in Hong Kong who agreed to dispose of the tires if Yang Ming absorbed all costs of shipping the cargo from Japan to Hong Kong. That was the way the matter ended on the docks. A subsequent flurry of litigation in a U.S. federal court led to multiple rulings, the last of which granted summary judgment for Yang Ming against the NVOCCs Laufer and Oceanbridge in 1999. When Laufer appealed, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court’s verdict in part and reversed in part.

In that portion of its ruling with the broadest interest, the appellate panel said “we have traditionally defined liberally the word ‘indemnify.’ Yang Ming can recover all loss, damages, etc., as a result of Laufer’s misdescription of goods, irrespective of whether such damages represent payments made by Yang Ming to third parties.”

Yet in regard to demurrage, the appeals court said that because “Laufer had no ownership rights in the cargo subsequent to its abandonment of the containers and thus cannot be said to have benefited from such storage, Yang Ming cannot therefore argue convincingly that the demurrage provision in the tariff could include storage,” after the containers had been abandoned.

The appellate panel said essentially that NVOCCs, regardless of their own lack of knowledge of the contents of containers, cannot use made-up titles to sidestep their liability to indemnify the issuer of a bill of lading for the misdescription of cargo.

In this case, although American — the middleman NVOCC — had

been designated by Laufer as an “exporter,” the appeals court determined that “American has failed to produce any evidence indicating that an exporter is not a type of shipper, or at least that the two terms are not used interchangeably in the shipping industry.”

[*Yang Ming Marine Transport Corp. v. Oceanbridge Shipping International Inc.*; U.S. Court of Appeals for the Ninth Circuit; No. 00-55358. Appeal of rulings by U.S. District Judge Dickran M. Tevrizian, Central District of California. Date of appellate decision: Aug. 7, 2001.]

## Having a U.S. broker qualifies as ‘commercial conduct’

In August 1995, U.S. Titan Inc., and Zhen Hua, a state-owned corporation in China, began to negotiate the time charter of a ship known as the *Bin He*, owned by Zhen Hua. Both parties communicated through two shipbrokers in Connecticut: Seabrokers (representing Titan), and Seagos (representing Zhen Hua).

As negotiations progressed, Zhen Hua offered to charter the *Bin He* to Titan for one year at \$15,250 a day, with an option for an additional year at \$15,750 a day. After back-and-forth parleying, Seabrokers faxed Seagos a fixture “recap” confirming the “Owners and Charterers’ agreement,” based on the “Shelltime 4 Time Charter,” a standard time charter containing an arbitration clause that provided for arbitration in London at the election of either party.

Issues arose swiftly about what steps Zhen Hua “intends to take to bring the vessel up to an acceptable trading standard,” as Titan said in court papers. When further delays occurred, Titan asserted that “since we firmly believe we entered into a binding fixture with owners and therefore have a valid claim, we agree to seek an expedited resolution of this claim.” After subsequent exchanges, in which (according to the appeals court’s decision) “the parties dickered over arbitrators, never clarifying exactly what they were arbitrating or which agreement bound them to arbitrate,” Titan filed suit in federal court in New York in February 1996, to compel Zhen Hua to deal with Titan’s claim for breach of the charter party.

In August 1998, U.S. District Judge William C. Conner ruled that the parties had formed a binding charter party, and granted Titan’s motion to compel arbitration. “In London,” Conner said in a subsequent opinion (October 1998), “the arbitrators may determine whether the actions of either party, subsequent to the formation of the charter party, have vitiated the agreement.” Zhen Hua appealed the district court’s decision.

Before the U.S. Court of Appeals for the Second Circuit, Zhen Hua argued that its contacts with the United States were not substantial, continuous or systematic, or purposeful in the sense required to satisfy due process concerns. Furthermore, any actions taken by Seagos could not be imputed to Zhen Hua, because Seagos served as a broker rather than an agent. The appellate panel disagreed. “Zhen Hua purposely availed itself of the U.S. forum by negotiating and forming a contract with an American corporation (Titan) located in New York. To facilitate negotiations, Zhen Hua used a broker in Connecticut ... having engaged in this commercial conduct, Zhen Hua should have foreseen being ‘haled into an American court’ if a dispute were to arise out of negotiations.” The appeals court affirmed the lower court’s ruling, and ordered Titan and Zhen Hua “to proceed to arbitration in London.”

[*U.S. Titan Inc. v. Guangzhou Zhen Hua Shipping Co. Ltd.*; U.S. Court of Appeals, Second Circuit, No. 98-9477; Date of ruling: Feb. 15, 2001]