

Usinas Siderurgicas De Minas Geras, SA-Usiminas v. Scindia Navigation Company, Ltd. 118 F.3d 328 (5th Cir. 1997) (Decided July 17, 1997)

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GENERAL AVERAGE CONTRIBUTION ALLOWED UNDER EXCEPTION CONTAINED IN CARRIAGE OF GOODS BY SEA ACT

Based upon the New Jason Clause and its meeting of burden of proof, the carrier was entitled to contribution in general average under the Carriage of Goods Act for extraordinary expenses incurred by the vessel even though she had been involved in negligent operation.

Usinas Siderurgicas De Minas Geras, SA-Usiminas v. Scindia Navigation Company, Ltd.
118 F.3d 328 (5th Cir. 1997)
(Decided July 17, 1997)

Defendant-appellee, Scindia Steam Navigation Company, Ltd. ("Scindia") was the owner (carrier) of the Jalavihar, a cargo vessel. Plaintiff-appellant, Usinas Siderurgicas De Minas Geras, SA-Usiminas ("Usiminas") was the cargo owner. On March 7, 1994, the Jalavihar, while executing a routine turning maneuver with the assistance of two tugs, the Sandra Kay and the Billy Slattern, ran aground and sustained damages to its steering mechanism.

Scindia claimed that the grounding was a general average event and demanded contribution from Usiminas. When Usiminas refused, this lawsuit was commenced. The district court, as described below, found that the grounding occurred as a result of miscommunication

between the pilot of the Jalavihar and the captain of one of the tugs. Therefore, Scindia was entitled to contribution from Usiminas.

Under the principle of general average as applied herein, losses incurred for the common benefit of the participants in a maritime venture are shared ratably by all participants in the venture. In cases where the carrier is at fault, the carrier is unable to receive contribution from the cargo owner. However, if the contract between the carrier and the cargo owner contains a "New Jason Clause" the carrier may receive contribution, even if it is negligent, provided that the carrier has not violated the Carriage of Goods by Sea Act (COGSA) and has met the burden of proof required by the Act. Under COGSA, the carrier may have immunity if the damage was caused by error in navigation, but not for damage resulting from the vessel being unseaworthy.

Once the carrier proves the accident was caused by navigational error, it is entitled to general average unless the cargo owner can prove the vessel was unseaworthy and the unseaworthiness caused the accident. If unseaworthiness is proved by the cargo owner, the burden of proof shifts back to the carrier to show it exercised due diligence in preparing the vessel for its voyage. On appeal, Usiminas claimed the district court erred in three respects:

1) The district court applied the wrong burden of proof structure and should have applied the rule of *The Pennsylvania*, 9 Wall. 125, 86 U.S. 125, 22 L.Ed. 148 (1873);

2) An error in navigation which causes damage prior to the commencement of a voyage should be considered a lack of due diligence, and that the Jalavihar, in the process of turning, had not yet begun its voyage;

3) The court erred in finding that none of the unseaworthy conditions alleged by Usiminas caused the grounding.

The rule of *The Pennsylvania* states that a vessel in violation of a statute has the burden of proving that the violation both did not, and could not have, caused the damage. In prior cases this Court of Appeals has held that it will not apply the rule of *The Pennsylvania* where COGSA provides the burden of proof structure. Once Scindia demonstrated that the accident was caused by navigational error, COGSA became operative and the burden of proof shifted to Usiminas to show the vessel was unseaworthy. The carrier has a duty to provide a vessel that is seaworthy before the commencement of the voyage. Thus, if the cargo owner can show that the vessel was unseaworthy he is not bound to provide contribution. The district court, however, ruled that the voyage had begun when Jalavihar left the dock and that the vessel was not unseaworthy.

The Court of Appeals held that COGSA excepts error in navigation regardless of whether it occurs before or after commencement of a voyage. Thus, Usiminas' argument that the voyage had not yet begun was ruled immaterial and of no legal consequence. In *Isbrandtsen Co. v. Federal Ins. Co.*, 205 F.2d 679 (2d Cir. 1953), the court held that under COGSA, the error in navigation exception is unconditional.

The district court correctly held that none of the conditions of unseaworthiness alleged by Usiminas contributed to the grounding but instead provided additional evidence of navigational error. As previously concluded, navigational error is excepted by COGSA. Usiminas, therefore, failed to establish that the district court erred in any of the above respects and the Court of Appeals affirmed.

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