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Panama Canal Expansion Could Increase Freight Claims

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Ports up and down the East Coast of the United States are preparing for an influx of container traffic from Asia. The Panama Canal Expansion Project is nearing completion, with the locks set to open on June 26, 2016. The new locks will be able to accommodate Post-Panamax vessels with capacities of up to 14,000 20-foot-equivalent units, almost a three-fold increase over current Panamax vessel capacity.

Ronald Leibman

The increasing of the Canal's capacity will allow Asian shippers to more cheaply transport their goods to East and Gulf Coast ports. The expansion makes the Panama Canal more competitive with the Suez Canal in Egypt, shortening the one-way journey by sea from Asia to the East Coast by roughly five days and eliminating the need for a trip around Cape Horn to get to the Atlantic. It is estimated by the Boston Consulting Group that as much as 10 percent of the volume of container traffic between East Asia and the United States will shift from West Coast ports to East Coast ports by 2020.

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It is expected that the trades which will see increases in volume will be the transportation of refrigerated cargo from South America, such as fresh produce, fish and meat to East Coast ports. From the Far East the overall transportation of manufactured goods should increase. Notably, items ordinarily possessing expensive transportation costs such as tires will see lower overall costs by transiting through the Panama Canal to the East Coast instead of over land as before. Ultimately, the East Coast ports are predicted to compete for shipments with destinations as far west as Memphis and Chicago given lower transportation costs via ocean carriage.

East Coast ports have been planning for this increase in cargo volume for years and are in various stages of readiness. For example, the Bayonne Bridge, flanked by the Port of New York-New Jersey, is raising the roadbed an additional 64 feet to allow for larger vessels to pass underneath. This construction is now estimated to be completed for navigational purposes in 2017. The Ports of Jacksonville, Charleston, Savannah and Miami have invested in dredging and infrastructure improvements as well.

Although the Panama Canal Expansion Project is expected to decrease shipping costs, there are anticipated trade-offs. Transit times from East Asia to East Coast ports will remain longer than to West Coast ports. Thus, shippers must factor the additional transit time and communicate this to the consignees. If the volume of containerized cargo to the East Coast expands, this could encourage new shippers/consignees to enter the industry. These new participants may not have the experience necessary to ensure goods are packaged properly.

Further, to accommodate the higher volume, an increase in port personnel will likely be required. The presence of new personnel preparing shipments may result in higher damage claims due to poor handling of containers. The adjustment to new routines at the ports and the ports' increased capacity to handle a higher volume of cargo, is likely to increase the number of claims for lost or damaged goods. Each shipper or consignee should be aware of their position in the supply chain and the likely prospect of recovery in the event of lost or damaged cargo.

Shipping via ocean from a foreign port to the United States, or from the United States to a foreign port, is governed by the U.S. Carriage of Goods By Sea Act (COGSA). Understanding the basic terms of the COGSA is more important than ever for East Coast shippers in view of the potential for more claims resulting from the Panama Canal Expansion Project.

COGSA requires that the shipper or consignee provide notice of loss or damage to the carrier no later than three days from the date of delivery. Waiting longer to notify the carrier creates a presumption that the goods were delivered in good order and condition, and as a practical matter, makes it more difficult for the carrier to investigate the cargo claim. COGSA contains a one-year time period for suit to be brought, running from the date of delivery or, in the case of lost cargo, the date the cargo should have been delivered. COGSA permits the parties to extend this deadline by agreement, but failure to obtain the agreement of every possible party may prejudice a claim and cause it to lapse, resulting in no recovery.

Assuming a timely claim has been preserved, under COGSA, the claimant must meet a prima facie burden of showing (1) that the cargo was in "good order" upon its delivery to the carrier, (2) that it was damaged during transit and (3) the amount of the damages. A consignee of a shipment may be at the mercy of the shipper to demonstrate good order upon delivery to the carrier. Photographs taken during loading are one type of useful evidence of good order. Contemporaneous notes or logs referencing the condition of the cargo are also helpful in establishing good order. Conversely, the absence of photographs or documents will permit the carrier to hide behind claimant's burden of proof. Invoices or proofs of payment are vital for proving the amount of damage. A contemporaneous survey of the condition of the cargo is also helpful in establishing both the condition of the cargo, but also the amount of damages incurred.

Also important, though not a part of COGSA, is that a lawsuit to recover for a loss or damage claim may need to be brought in a particular jurisdiction, such as New York, California or, potentially, a foreign jurisdiction like Japan, the United Kingdom or France. The forum selection clause on the back of the ocean bill of lading can be determinative, and may also be available on the carrier's website. Finally, under COGSA and most bills of lading, a Himalaya clause will be included in the language of the bill, providing the same protections that the carrier enjoys to the carrier's agents (including stevedores and port personnel).

In general, ocean carriers are becoming more reluctant to settle cargo claims, particularly when there is what they deem to be insufficient proof supporting the claim. Maintaining a sufficient amount of cargo insurance provides a level of certainty for the shipper or consignee. Most cargo insurers offer the prospect for timely reimbursement, rather than awaiting the results of a lengthy claim with the carrier.

The expected increase in shipments to East Coast ports as a result of the Panama Canal Expansion Project may well lead to an increase in loss and damage claims. Shippers of goods would be well advised to familiarize themselves with the laws relating to loss and damage claims, and to review their documentation and insurance policies to ensure that they are adequately protected.

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