


Whitelaw — Twining

Motor Truck Cargo in the Canadian Marketplace

Presented by Whitelaw Twining





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Cross-Border Transportation – Carmack Amendment

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It's 6:30 a.m. on a cool fall morning in the prairies of Manitoba. A long haul truck carrying state-of-the-art extra large dell computer monitors is travelling west on a highway just on the outskirts of Winnipeg. Unfortunately, the driver underestimates a sharp turn and takes it way too quickly, causing his trailer to tip, and smashing every single monitor being carried.

The cargo in this case originated in Minneapolis, Minnesota, and was destined for Alberta and British Columbia.

Cargo owners say: "The Carmack Amendment applies to the pricey cargo and your insured cannot limit its liability! If you do not provide the cargo owners with the full value of the monitors, we will commence an action in the US."

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What is the Carmack Amendment?

+ Overview

- + 1906 amendment to the *Interstate Commerce Act*
- + Governs shipments interstate and to foreign countries
- + Uniform system of carrier liability
- + Shipper's remedy against a carrier for goods lost or damaged during shipment

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Liability Imposed by Carmack

- + Full liability on carriers for damaged cargo
 - + Strict Liability
 - + Actual loss or injury to the property
 - + Defences
 - + An act of god, act of public enemy, act of shipper, act of public authority, or the inherent nature or vice of the goods
 - + Also look at whether the claim was sufficient and made in a timely fashion
- + Not liable for:
 - + Legal fees
 - + Punitive damages

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Limitation of Liability

- + Carriers can limit liability
- + Criteria by which carrier may limit liability to shipper:
 - + Offer reasonable opportunity to shipper to choose between different levels of liability
 - + Obtains shipper's agreement to its choice of liability
 - + Issues bill of lading before moving cargo that reflects agreement
 - + Ensure agreement of limited liability printed on the bill of lading

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What are the Limitation Amounts?

- + No legislated amount or “tariffs”
- + Carrier may limit liability to reasonable value under the circumstances
 - + Do not have to offer full value
 - + “Reasonable value under the circumstances” may be as little as \$.10 per pound

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When Does It Apply?

- + Surface transit between two US states
- + Very strong arguments that:
 - + It should apply to surface transit originating in US destined for a foreign country (Canada or Mexico)
 - + It should not to apply to surface transit originating in a foreign country destined for US
- + BUT- the above is unsettled
- + Look to the US Perspective and the Canadian Perspective

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American Perspective

- + US to Canada - governed by Carmack Amendment
 - + Point of origin
 - + Where damage occurred
- + **Point of origin = stronger factor but US courts inconsistent**

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American Perspective

+ Prior to 1978 amendments:

+ Carmack applied to transportation “from any point in the United States to a point in an adjacent foreign country”

+ Post 1978 amendment:

+ Carmack applies to transportation “between the United States and an adjacent foreign country, to the extent the transportation was in the United States”

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Canadian Perspective

+ Jurisdiction?

- + Real and substantial connection
- + Where contract was formed
- + Where parties reside
- + Where incident arose

+ Law?

- + In Canada: Law of Contract or Law of Tort

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What Law Applies: (Law of the Contract) and Conflict of Law

- + System of law where transaction has
 - + Closest and most real connection
 - + Proper law of the contract

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What Law Applies: (Law of the Contract) and Conflict of Law

- + Factors that may result in a finding of Canadian jurisdiction and law despite US origin are:
 - + The shipper has a place of business in a particular province
 - + The carrier is a provincial company
 - + The contract of carriage was executed in the province
 - + The bill of lading discusses limiting liability to \$2 per pound or any other detail with specific ties to the particular province; and
 - + Anything else indicating intention of parties or location at which the contract of carriage was formed

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What Law Applies: (Tort and Conflict of Law)

- + Proper law is in the Province
 - + Where incident occurred
 - + *Lex loci delicti*

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Canadian Perspective

- + Canada to US
 - + Within Canada – law of place of origin
 - + International transactions - Canadian court will determine jurisdiction & law
 - + If you want to limit liability using Carmack, issue a separate bill of lading at the time the goods reach the US
 - + Ensure notice is given

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Summary

- + Canada to US shipment – Canadian law typically applies
 - + But, Canadian courts will look at much more than point of origin
- + US to Canada shipment – US law typically applies
 - + But, if would result in a negative finding, there may be particular ties to a Province to assist a carrier in limiting liability in Canada

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6 Tips – Cross Border Shipments

- + Carrier should ensure all steps taken to limit liability in US, particularly if US origin
 - + Offer shipper multiple rates with different levels of liability
 - + Obtain affirmative agreement selecting level of liability
 - + Include terms on bill of lading
 - + Issue bill of lading with terms before moving goods
- + Carriers may want to Issue separate bill of lading once goods enter US
- + Carriers may want to include a Canadian choice of law clause and jurisdiction clause
- + Claims examiners will need to determine whether Carmack or the law of a specific province applies to losses
- + If full liability under Carmack, claims examiners will need to consider whether there are any arguments to apply a preferable law of a specific province
- + If provincial law preferable, claims examiners will want to take pre-emptive action to ground jurisdiction in Canada

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Thank you.

For more information, please visit our website at

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