

## The United States Ratifies the Rotterdam Rules: Changes in Cargo Liability

### Breaking Developments In London Market Law 9/24/2009

On September 23, 2009, the shipping industry embraced a new international regime the Rotterdam Rules (*United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*) to regulate marine cargo liabilities in the global economy. As a new international regime on contracts of carriage by sea, fifteen signatory nations including the United States, Denmark, the Netherlands, Switzerland, Spain, Poland, Guinea, Senegal, Greece, Norway, Ghana, Nigeria, Togo, Benin and the Democratic Republic of Congo ratified the Rotterdam Rules. France and China are not yet signatories, but are public supporters of the Rotterdam Rules. The maritime nations of New Zealand, the United Kingdom, Singapore, Bulgaria, Slovenia, Japan, Finland and Croatia have not yet signed the Convention.

The Convention will not be fully implemented until one year after it has been ratified by 20 signatory nations. The Rotterdam Rules will replace the current international regimes of The Hague Rules, Hague-Visby Rules and Hamburg Rules in the respective countries that are signatories to those conventions.

The United States ratification of the Rotterdam Rules will usher in many sweeping changes to the Carriage of Goods by Sea Act ("COGSA"), Section 46 U.S.C. 1300 *et seq.* recodified at 46 U.S.C. Section 30701 (Note) which governs cargo liabilities for international shipments to and from the United States. The Hague Rules were codified into United States statutes in 1936.

Points of special interest in the Rotterdam Rules are as follows:

#### **1. Scope of the Rotterdam Rules**

The Rotterdam Rules in Article 5 and 6 cover all contracts of carriage (either under a negotiable transport document or non-negotiable transport document) except for charter parties or other contracts for use of space on a ship. The Rotterdam Rules extend a broader reach than the COGSA's coverage based on issuance of negotiable bills of lading or other similar documents of title.

*Volume contracts* are within the scope of the Rotterdam Rules (Articles 67, 68 and 80), which do not have a counterpart in COGSA. However, parties can contract privately to derogate from the

Rules' substantive provisions in certain respects.

The geographic scope of the Rules (Article 12) is that the carrier's period of responsibility commences from the receipt of the goods for carriage and ends when the goods are delivered. The inclusion of door-to-door coverage is beyond the COGSA's tackle-to-tackle coverage.

## **2. The Right of Control**

The substantive provisions in Chapter 10 on the right of control exceed the scope of COGSA. Under the Rotterdam Rules, the shipper or holders of both a negotiable or non-negotiable transport document can be the controlling parties who can then instruct the carrier for disposal of the goods. The instructions, however, cannot substantially affect the carrier's performance and in case of losses or damages to the other cargo, the controlling party shall reimburse the carrier pursuant to Articles 50 and 51. In addition, the carrier has the right to request security from the controlling party under Article 52.

## **3. Basis of Liabilities**

Under COGSA, in cases of concurrent causes of a loss, after the shipper proves the damage is also caused by negligence or fault of the vessel, the carrier bears the burden to prove the proportion of the cargo damage that was caused by an excepted cause and its negligence. If the carrier is unable to meet this burden of proof, the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both. See, *e.g.*, *The VALLESCURA*, 293 U.S. 296 (1934).

Under the Rotterdam Rules (Article 17), despite the list of exemptions/defenses, if the claimant proves the carrier is at fault or is negligent, the carrier is still liable. The carrier is not protected by the list of defenses if certain circumstances are met. The carrier, however, is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which the carrier is liable. The carrier liability system under the Rotterdam Rules focuses on carrier's fault or negligence, which is a departure from the multi-causation system under the COGSA.

## **4. Error in Navigation**

Under COGSA, an error of navigation is an excepted cause. Therefore, when the damage to the cargo is solely caused by error in navigation and the cargo owner fails to prove that the damage was the result of the carrier's fault or negligence, the carrier is exempted from liability. See, *e.g.*, *Director General v. S.S. MARU*, 459 F.2d 1370 (2nd Cir 1972).

The Rotterdam Rules do not provide an exemption of "*error in navigation*" for liability for carriers. A carrier will be not exempted for the damage or loss caused by the error in navigation.

## **5. Loss or Damage to Fire**

Under COGSA a carrier may be liable for fire damage where the "*design or neglect*" of the carrier prevented extinguishment of the fire once it began. Once a carrier proves that the cargo

loss or damage was caused by fire, the burden of proof shifts back to the shipper to prove that the fire was caused by the design or neglect of the carrier. Under COGSA, the burden is on the shipper to identify by preponderance of evidence the cause of the fire, and also to establish that cause was due to "*actual fault or privity*" of the carrier. "*Neglect of the owner*" means his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates, the findings below take the case out of the only exception provided by statute. *See, e.g., Westinghouse Elec. Corp. v. WVLeslie Lykes*, 734 F.2d 199 (5th Cir. 1984).

The Rotterdam Rules do not incorporate a condition for carriers to be immune from liability. Therefore, this defense under Rotterdam Rules is easier to be applied and will not cause a problem on construction of "*the actual fault or privity of the carrier.*" It should be noted, however, that under Rotterdam Rules, notwithstanding of the fire exemption, if the claimant could prove that carrier is at fault or negligent, the carrier may still be liable for all or part of the loss or damage.

## **6. Seaworthiness**

Under COGSA, if the carrier has performed due diligence to make the vessel seaworthiness prior the voyage, the carrier is free from negligence or fault. In result, the carrier is exempted from liability under COGSA. *See, e.g., Fireman's Fund v. M/V VIGNSNES*, 794 F.2d 1552 (11 th Cir. 1986).

Under Rotterdam Rules (Article 14), the carrier is bound to exercise due diligence to make the vessel seaworthy not only at the beginning of the voyage but also during the voyage by sea.

## **7. Delay**

Delay is not expressly covered by COGSA. In contrast, the Rotterdam Rules have specific provisions for delay. Delay is defined in Article 21 as when the goods are not delivered "*within the time agreed.*" Therefore, absent an agreed delivery time, there would be no delay claim.

## **8. Maritime Performing Party and Himalaya Clause**

Under the Rotterdam Rules (Article 7), *maritime performing parties* are expressly entitled to the defenses and limitation of liability. The *maritime performing party* is defined as a *performing party* to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship, and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area. Therefore, railroad and other inland carriers will not be protected under the Rotterdam Rules if they do not provide services exclusively within a port area. Many subcontractor carriers will then be protected under the Himalaya Clause.

COGSA does not expressly protect the *maritime performing party*, and liability is interpreted by the terms of the bills of lading and the existence of a Himalaya Clause.

## **9. Package Limitations**

Under COGSA, in determining what constitutes a "package." a court must consider the following factors: (1) parties' contractual agreement in bill of lading; (2) COGSA package is a result of some amount of preparation for purpose of transportation, which also facilitates handling; (3) container can be considered COGSA package only in light of clear agreement to that effect; and (4) when goods are placed in containers without being described as separately packaged, they are classified as "goods not shipped in packages" for COGSA purposes, absent agreement otherwise. *See e.g., Groupe Chegaruy v. De Chalus v. P&O Container*, 251 F3d 1359 (11th Cir. 2001).

The result under Rotterdam Rules is dissimilar from COGSA. The packages under the Rotterdam Rules (Article 59) are possibly smaller units than those under COGSA. Therefore, the compensation amounts for limitation of liability could be higher. In addition, the limitation is 875 units of account per package under Article 59, which is higher than 500 bucks per package under COGSA. The unit of account is the Special Drawing Right as defined by the International Monetary Fund.

## **10. Opt-out or In of Jurisdiction and Arbitration Provisions**

Jurisdiction and arbitration were among the most controversial subjects during the drafting process of the Rotterdam Rules. The Rules in Chapter 14 and 15 provide for forum selection clauses and the binding effect of arbitration clauses or agreements. The chapters of the Rules permits the contracting state to opt-out of these provisions if so declared.

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