Case 68
SUMMARY OF THE ROTTERDAM RULES

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Purpose of the Rules

On December 11, 2008, the United Nations General Assembly adopted the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the Rotterdam Rules (hereinafter, the “Rotterdam Rules” or the “Rules”). A signing ceremony is scheduled for September 23, 2009 in Rotterdam, The Netherlands.

The purpose of the Rotterdam Rules is to bring international uniformity to the law of carriage of goods by sea, and to make the law of carriage of goods by sea appropriate and relevant to the modern age of international, containerized, intermodal transportation of goods.

Replacement of COGSA

If the Rotterdam Rules are implemented by the United States, they would eliminate the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 (“COGSA”). Although contracting carriers for door-to-door transportation would be governed by the Rules, inland carriers would not be governed by them, so that domestic laws that control such transportation would not be effected. The Rotterdam Rules would not apply to carriers engaged in domestic or inland shipping by water unless made to do so by statute.

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1 Some of the information contained herein is based on materials available on the website of the Maritime Law Association of the United States.
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Highlights of the Rules

Some of the highlights of the Rules are as follows:

1. They apply to door-to-door transportation when so-contracted, instead of the tackle-to-tackle coverage of COGSA.

2. They provide limitations of liability for contracting carriers and maritime performing parties, but not for inland carriers performing part of through carriage.

3. Liability is based on fault, with a list of exceptions similar to COGSA.

4. They contain provisions for burdens of proof, which largely follow current, United States law, but expressly allow apportionment of liability based on excepted and non-excepted causes of damage or loss.

5. They contain provisions whereby parties to volume or service contracts may avoid some of the Rules by following strict procedures.

6. They contain provisions controlling jurisdiction and arbitration, which the United States may choose to make applicable or not. The places of jurisdiction and arbitration are spelled out, and mandatory jurisdiction and arbitration contractual requirements have some restrictions.

7. There are requirements for transportation documents, e.g., bills of lading, and for control of a shipment en route to the destination.
8. They have rules for calculating damage, and base a carrier’s limitation of liability on packages or units of weight, whichever is greater, eliminating the $500 per package COGSA limitation. There are provisions to determine the number of packages or units in containers, including small packages carried in larger packages.

9. The limitations of liability apply to contracting carriers and maritime performing parties, but not to inland carriers.

10. Limitations of liability may be lost for intentional or reckless acts.

11. Delay is defined as failure to deliver the goods by an agreed time; and, liability for loss or damage that is not physical is limited to 2.5 times the freight charge.

12. The statute of limitations is two (2) years, rather than COGSA’s one (1) year statute of limitations; and, there are separate provisions for time to bring indemnity actions.

13. They cover the liability of shippers; and, there are provisions for dangerous goods.

14. They contain rules covering the use of electronic communications, such as electronic bills of lading.

15. If freight charges are stated as pre-paid on a bill of lading, a carrier may not look to the consignee for payment of the freight charges, unless the consignee is also the shipper.
**Coverage of the Rules**

The Rules would cover the entire door-to-door, multimodal contract for carriage, rather than only the tackle-to-tackle scope of COGSA. While the Rules would not directly cover railroads and trucks in the United States, they would cover the liability of a contracting carrier who sub-contracts to carry goods by rail or road in the United States.

The Rules would govern the contracting carrier throughout a multimodal carriage in the United States, but they would not govern direct actions brought against a railroad or trucking company, if the railroad or trucking company is not a contracting carrier. This effectively means that a railroad or trucker would have to issue a bill of lading that included sea carriage to be governed by the Rules.

The Rules also do not apply to carriage governed by certain other international conventions that govern the carriage of goods by air, rail, road and inland waterways. For example, in Europe, road and rail transport is governed by two regional, international conventions, the CIM-COTIF and the CMR.

In the United States, the Carmack Amendment would be superseded by the Rules for a carrier that issues a contract of carriage that includes ocean transport. Carmack might still apply to a railroad or trucker that did not issue a bill of lading.

The Rules define the carrier as a person who enters into a contract of carriage with a shipper, but does not require the carrier to actually perform the carriage.

**Performing Parties**

The Rotterdam Rules break down performing carriers into maritime and non-maritime performing carriers. The Rules would govern maritime performing parties, but not non-maritime performing parties. For the purposes of the Rules, a performing party
is someone other than the carrier, who agrees to take on any of the carrier’s responsibilities regarding transport of goods. A maritime performing party includes ocean carriers and other entities who work within the terminal or port areas.

The definition of maritime performing parties includes rail operators who operate within port boundaries. Therefore, they are liable under the terms of the Rules for any damage that occurs while the goods are in their custody. Conversely, all maritime performing parties automatically enjoy the same limitations of liability as the carrier, *i.e.*, the benefits of a Himalaya Clause.

**Control of Cargo under the Rules**

The Rotterdam Rules would not only cover limitations of liability. In addition, they would specify the party with the right to control the cargo, such as stoppage of goods in transit and reconsignment of the goods.

The Rules could impact the Pomerene Bills of Lading Act, 49 U.S.C. § 80101-80116, sometimes called “The United States Bill of Lading Act”, although, by its own terms, the Pomerene Act does not apply to shipments from a foreign country to the United States. For inbound shipments, courts have applied general maritime law based upon the Pomerene Act and Article 7 of the Uniform Commercial Code.

Under the Rotterdam Rules, the shipper is basically the controlling party, unless the shipper designates the consignee or someone else as the controlling party. Of course, when a negotiable bill of lading is issued, the holder of all original bills of lading is the controlling party, and may transfer the right of control by transferring the negotiable document to another party.
Under the Rules, the goods are deemed delivered at the place of destination. Only the controlling party may make changes to the contract of carriage, and those changes must be set forth in a negotiable document, or a non-negotiable bill of lading that requires surrender.

**Jurisdiction and Arbitration**

Some of the more controversial provisions of the Rotterdam Rules are the jurisdiction and arbitration provisions, which control and restrict foreign choice of forum and arbitration clauses in bills of lading. These provisions in the Rules effectively overrule existing United States Supreme Court rulings upholding such provisions,\(^3\) so long as the bills of lading are not subject to volume or service contracts containing contrary provisions. However, the jurisdiction and arbitration provisions in the Rules are only binding on a signatory, such as the United States, if the signatory indicates its intention to be so-bound by those provisions at the time of ratification or thereafter.

**Service Contracts**

Likewise, the controversial, volume contract provision allows for shippers and carriers to opt-out of certain provisions of the Rotterdam Rules in service contracts. Third parties, *e.g.*, consignees, would not be bound by such an opt-out provision in a service contract unless they expressly consent to be so bound. In the absence of such consent, the terms of the Rotterdam Rules would apply between carriers and consignees in the event of a loss, damage or delay of cargo.

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Implementation of the Rules

The Rotterdam Rules provide that they will become effective one year after twenty (20) countries ratify them. Once the United States ratifies the Rotterdam Rules, the country will have to pass implementing legislation.

A question remains regarding the proper procedure to implement the Rotterdam Rules in the United States, *i.e.*, whether the treaty should first be forwarded by the Secretary of State to the President for signature and referral to the Senate for ratification; or, whether the Rules should first be enacted as domestic legislation by Congress.