THE ROTTERDAM RULES: The New International Regime for Carriage of Goods by Sea

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I. Present Law

When we discuss a change in law, the natural place to start is by discussing the present law. While one could say that for cargo originating or ending up in the United States, the current law is the Carriage of Goods By Sea Act, COGSA; this would not be totally accurate. In fact, in many cases, it would be incorrect.

I will discuss the substantive features of COGSA below but there are a number of other laws in addition to COGSA that come into the mix in U.S. litigation. COGSA covers cargo being transported in common carriage by a bill of lading or other document of title which is evidence of a contract for the carriage of goods by sea to or from ports in the United States. COGSA is to be read in to every such bill of lading or other document. However, by its own terms, COGSA merely covers the cargo from tackle to tackle or from the time the cargo is loaded onto the ship until it leaves the vessel. Other contracts of carriage can extend the coverage of COGSA but such extensions do not exist in every case and therefore the analysis only begins with COGSA.

The Harter Act, which was enacted in 1893, continues to govern the carrier's duties in international and domestic shipments, prior to the time the goods are loaded on to the ship and after they are discharged from the ship until proper delivery. There are additional requirements regarding bills of lading contained in the Pomerene Act which was enacted in 1916 and applies to all bills of lading issued by a common carrier for transportation of goods from the United States in foreign trade. 49 U.S.C. § 80101. In addition, if a shipping company issues a multi modal through bill of lading and arranges for rail transportation in the United States, the Carmack Amendment to the Interstate Commerce Act may also come into play. 49 U.S.C. § 10102. The Carmack Amendment was enacted in 1906 as an amendment to the Interstate Commerce Act of 1887. COGSA excepts liability for damages caused by fires unless the fire was caused by the actual fault or privity of the carrier. In cases of fire, the Fire Statute, enacted in 1851, might be controlling. For intermodal rail or truck transport in the United States after cargo has left the discharge terminal or before arrival at the load terminal, one may also have to review State law depending upon the facts and contracts of transportation. Finally, American shippers may also be subject to the Hague Rules, Hamburg Rules or Hague-Visby if there goods are shipped overseas and litigation ensues in a foreign country.

Thus, while one could say that cargo law in the United States is governed by COGSA, this not the whole story. Nonetheless, since it is a big part of the story, one should look at it first.

II. History of COGSA

The history of COGSA and the law relating to carriage of goods can be viewed as a tug of war between the shipowner and cargo interests. This continues up to the present with many of the same issues being dealt with differently under each regime.

a. **Common Law-** In the early 19th Century, generally a carrier was absolutely liable for cargo damage unless it could prove that its negligence had not contributed to the loss and that one of the four excepted causes – Act of God, Act of Public Enemies, shipper's fault or inherent vice of the goods- was responsible for the loss. Shipping was an established international business and as the courts of different nations gave their own interpretations to these general principles, a movement grew to establish uniformity.

b. **Early attempts -** In the 1870's and 1880's, there were attempts to adopt model bills of lading or sets of rules that parties could voluntarily incorporate by reference into their bills of lading. However, these efforts did not bear fruit and this led to unilateral action on the part of some countries.

c. **Harter Act -** In the United States, the unilateral action took the form of the Harter Act. In 1892, Congressman Michael Harter of Ohio introduced a bill that strongly favored cargo interests. Little is known about Congressman Harter other than he was first elected to Congress in 1891, a year before he introduced the Harter Act and perhaps as a pre-cursor of what was to come, he committed suicide in 1896. In the original form, the bill prohibited all common carriers from avoiding liability for loss or damage due to negligence faults or failures. It also prohibited clauses limiting liability to less than full indemnity to the legal claimant.

Ohio is a big grain state and this bill was seen as protecting the American shippers from ship owners who were mostly foreigners. We may think that the use of foreign flag vessels carrying American goods in trade is a recent development. However, it was present during Congressman Harter's time also. For instance, before the Civil War, foreign flag vessels carried around a third of the American foreign commerce. As British iron hulled vessels replaced American sail ships, the per cent of American trade carried on foreign vessels rose to about 87% by 1890.

Congressman Harter's bill passed in the House but in the Senate, they struck the ban on limitation clauses, weakened the requirement to provide a seaworthy vessel and added that if a carrier exercised due diligence, it would not be liable for damage or loss resulting from faults or errors in navigation or in the management of the vessel. The Harter Act was enacted in 1893 and a number of other countries enacted similar domestic legislation over the next twenty years.

d. **Hague Rules -** Following domestic legislation in the United States, Canada, New Zealand and other countries, the British concluded that there should be uniform legislation throughout the British Empire dealing with liability arising from the carriage of goods. This made the prospect of international uniformity more appealing to British

businessmen and insurers and they led the push for uniformity and the Hague Rules. They included some features of the Harter Act requiring a carrier to exercise due diligence to make a vessel seaworthy and making the carrier liable for the negligent handling of the cargo but in return, the carrier was not liable for errors in the navigation or management of the ship. One of the most significant things to come out of the Hague Rules was the agreement that a carrier could limit its liability to 100 pounds per package or unit of freight in the absence of a declaration of higher value.

e. **The U.S. – COGSA** - There was little U.S. representation at the Hague Convention that resulted in the Hague Rules. In fact, in the intervening years, there had been efforts by mid-western congressmen to amend the Harter Act to provide greater protection for cargo interests. The United States was a big shipper of agricultural products and there were a number of proposals to place more of the risk on the ship owners than the cargo interests. The first COGSA was introduced in the U.S. in February 1923. Hearings were held in 1923 but not much progress was made as domestic shippers thought that the Hague Rules favored the ship owners too much. Over the next thirteen years various bills were introduced but it was not until 1936 that Congress passed COGSA. The U.S. COGSA mirrors the Hague Rules and in June 1937, the U.S. was able to add its ratification to the Hague Rules. A number of other maritime nations followed suit and by the end of the 1930's much of the maritime world had a uniform body of law to govern liabilities arising from the carriage of goods.

III. Need for Change

Since the Hague Rules and our COGSA were enacted there have been many changes in the trading patterns of countries, the types and amounts of cargos carried, the use of containers and the documents used by those in business to provide order to this trade. There were many reasons why a new framework was needed but three reasons stand out:

a. Lack of Uniformity - The world is divided into various camps on cargo liability laws. There are 53 Hague states, 54 Hague-Visby states, 36 Hamburg states and 7 states without any known cargo liability laws. About two-thirds of U.S. trade is with Hague or Hague Visby states but even in these states, there is inconsistency about how the law is applied. The greatest distinction may be found in the package limitation. United States COGSA limits the carrier's liability to $500.00 per package or, for cargo not packaged, $500.00 per customary freight unit. Hague Visby limits the carrier's liability to two special drawing rights of the International Monetary Fund (SDR's) per kilogram or 666.67 SDR's per package, whichever is greater. An SDR is now valued at a $1.57 and at this rate, the limit per kilo is $3.14 and per package is $1,046.67 or substantially higher than the U.S. COGSA limit. Thus, this difference has led to a certain amount of forum shopping by plaintiffs and defendants. This was aggravated in a way by the U.S. Supreme Court's decision in the Sky Reefer case that enforced the forum selection clauses in bills of lading. Thus, not only was there a lack of uniformity in the world but a perception that certain parties were able to choose the law that is most favorable to their position.

b. There has been a growth of intermodalism especially in the United States that complicated legal issues arising when cargo was lost or damaged on the inland leg of a voyage. Liability regimes applicable to truckers and railroads were not generally compatible with COGSA and this led to potential shifting of fault under laws such as the Carmack Amendment. Recent decisions have addressed the issue of whether Carmack will override a contracted extension of COGSA in inland interstate carriage. Thus, it was not just international uniformity that was needed but uniformity of law in the United States.

c. Electronic Transport Records – There were no provisions in any of the earlier treaties to deal with electronic transmission of trade documents. As the Uncitral Commission stated when first considering a proposal to review current practices and laws in this area, "the growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particularly to the use of the new technologies." [1] Ground rules were needed to define what the transport documents were and to set minimum procedures to insure that any system used in electronic trade will maintain the integrity of process, would identify the holder and could confirm delivery to the holder.

In addition to these three main reasons, there are many other reasons to rethink and redraft the old laws.

IV. Previous Efforts

Prior to the drafting of the Rotterdam Rules, there were a number of efforts to try to modernize our COGSA. In 1987, the American Bar Association called for the immediate ratification of Hague-Visby. The following year, the Department of Transportation held a one-day Maritime Cargo Liability Symposium to try to reach an equitable solution. In 1992, the Sub-committee on Merchant Marine of the House held an oversight hearing on the issue but there was no consensus.

In 1992, Chet Hooper, George Chandler and Michael Sturley of the MLA convened a study group within the MLA Carriage of Goods Committee to try to reach a consensus. This work went on for four years and by 1996, the proposal of the study group had been approved by the MLA Carriage of Goods Committee and that same year, the MLA formally approved a proposed bill to amend the Carriage of Goods by Sea Act. Although there was some interest in the Senate, various crises intervened and there was no real enthusiasm in Congress to act on the MLA's proposed bill.

V. How were the Rotterdam Rules Drafted

During the drafting of the United Nations Model Law on Electronic Commerce, there were some exchanges between MLA members and members of Uncitral. As you may know, Uncitral stands for United Nations Commission on International Trade Law. These

[1] Report of the United States Commission on International Trade Law on the work of its Twenty-ninth session, May 28th – June 14th 1196 (Document 17A/51/17) P.49.

exchanges occurred in 1996 and it was decided then that the Secretariat of Uncitral should gather information, ideas and opinions on the problems that arose in International Carriage of Goods by Sea. Uncitral met in 1998 and decided to cooperate with the Comite Maritime International (CMI) to come up with an international regime. By 1999, a working group had been established at CMI and it began to gather information and begin drafting a new treaty. The CMI is an umbrella organization of many national maritime law associations around the world. Thus, it has access to many lawyers who specialize in this area of the law in various countries around the world. The CMI also sent out a questionnaire to all its member organizations covering a large number of legal systems. In addition, a colloquium was held in New York in July, 2000 to gather ideas and experts' opinions on problems that arose in the international carriage of goods. Eventually, the CMI prepared a working document and submitted it to Uncitral.

Uncitral then set up a working group on transport law which held its first session in New York 2002. There were twenty-six states that were members of the working group including Brazil, Canada, China, France, Germany, Japan, UK and the U.S. In addition, the session was attended by observers from nineteen other states. There were also non-governmental organizations invited to attend such as the International Chamber of Shipping, International Group of P&I Clubs, International Union of Marine Insurance, International Federation of Freight Forwarders and various other groups. At this first meeting in 2002, the group elected a Chairman and a reporter and began working on a draft instrument. Eventually there were twelve sessions of the working group held over the next six years in Vienna and New York. At all of these sessions, there were representatives of governments participating, observing and also representatives of Intergovernmental Organizations and non-governmental organizations participated.

The final working group meeting was in October 2008 and a final draft was adopted by the General Assembly of the United Nations on December 11, 2008. Many groups connected with shipping around the world endorsed the Rotterdam Rules both prior to their passage by the General Assembly or following the passage. The CMI endorsed the draft convention in October 2008. The European Community Shipowners Association, U.S. based Industrial Transportation League, U.S. based World Shipping Counsel, International Chamber of Commerce, International Chamber of Shipping and various other international and American based groups endorsed the Rotterdam Rules. The U.S. Maritime Law Association sees itself as one of the groups that began the effort to bring this important law up to date and the MLA also endorsed the Rotterdam Rules in May, 2009.

VI Who is involved the process?

As I mentioned above, this process went on for more than seven years and there was full participation by most of the maritime nations of the world as well as many non-government organizations such as, Comite Maritime International (CMI), the International Chamber of Commerce (ICC), the International Union of Martine Insurance, (IUMI), the International Federation of Freight Forwarders Association (FIATA), the International Chamber of Shipping (ICS), the International Association of Ports and Harbors, the Baltic and International Maritime Counsel (BIMCO), the International Group of Protection &

Indemnity Clubs (IG), United Nations Conference on Trade and Development (UNCTAD), Intergovernmental Organization for International Carriage by Rail (OTIF), Association of American Railroads (AAR), Center for International Legal Studies, Institute of International Container Lessers (IICL), Instituto Iberoamericano De Derecho Maritimo, International Multimodal Transport Association (IMTA), Transportation Intermediaries Association (TIA), and various other groups. In addition to attending meetings of the working group, many nations put forth their own preliminary draft instruments on various points under discussion. Among the countries that put forth their written proposals were Canada, Sweden, Italy, United States, China, Denmark, Finland, Norway, United Kingdom, Netherlands, Switzerland, Japan, Australia, France, European Shippers Counsel, Nigeria and Korea. A number of these countries made multiple submissions to the working group.

The United States was deeply involved in this entire process and Mary Helen Carlson of the Department of State was the lead of the United States delegation. She is part of the State Department's Office of the Legal Advisor for private international law. For guidance and expertise, the U.S. delegation consulted with the Secretary of State's Advisory Committee on Private International Law. This is a committee of representatives from all national legal organizations that have an interest in private international law, including the ABA, the National Conference of Commissioners on Uniform State Laws, the National Association of Attorneys General, the Judicial Conference of the United States, the Maritime Law Association and many others. In the negotiations for the Rotterdam Rules, other governmental offices were consulted, including the State Department's Bureau of Economic Energy and Business Affairs and the Department of Transportation's Maritime Administration. The Office of the Legal Advisor set up a study group that included these organizations as well as every sector of industry concerned with the carriage of goods in the United States. This included the MLA, the World Shipping Council, the National Industrial Transportation League, the Transportation Intermediaries Association, Fed Ex, UPS, the American Institute of Marine Underwriters, the Association of American Rail Roads, the American Trucking Association and representatives of the Stevedore's and Terminal Operators. The members of MLA who were involved in the study group were Professor Michael Sturley of University of Texas and Chet Hooper, George Chandler and Vince De Orchis.

There were hundreds of individuals and groups involved in the drafting of the Rotterdam Rules both internationally and in the United States and while the views of every group were not reflected in the final rules, the views of the groups were certainly heard and considered.

VII How would the Rotterdam Rules Change the Existing Law

a. Scope of the Rules

The Rules cover contracts in the liner trade that would not have been covered by earlier conventions. Both COGSA and the Hague Rules are supposed to be limited only to contracts of carriage covered by a bill of lading or any similar document of title. U.S. Courts have construed this section broadly but this broad reading of "bills of lading" does not follow

throughout the world. If the place of receipt or delivery or the port of loading or discharge is in a contracting state and international transport is involved, the Rotterdam Rules' coverage would apply to all contracts of carriage except for charter parties or other contracts for use of space on a ship. The new Rules also apply to contracts in the liner trade that are not evidenced by a transport document or electronic record. Thus, even if no documentation is issued, if there is international transport and the place of receipt or delivery is in a contracting state, the Rules apply.

This may not be such a big change in Untied States courts because COGSA applied to all shipments to or from ports in the United States. Similarly, The Rotterdam Rules would apply to all shipments either to or from a contracting state. However, in the future, there could be more conflict of law cases because of the difference in traditional choice of law analysis. Under the international rule on conflicts of law, the law of the country of origin would govern transport issues. Thus, if there was a shipment from the United States to another country, the U.S. COGSA would apply under the U.S. law and the U.S. Law should apply under international law because the U.S. was the place of origin. Under the Rotterdam Rules, if the receiving country was a signatory to the Convention, the Convention would apply and there would be a conflict of laws issue. If the United States does not ratify the Rotterdam Rules, this could cause problems in that COGSA would govern litigation on the shipment in the United States but if the same litigation was brought in the place of delivery, the Rotterdam Rules would govern. Of course, if the United States enacts the Rotterdam Rules, this problem would be avoided.

The Rules extend the carrier's period of responsibility. Under the Hague Rules and COGSA, the carrier is responsible during the period from the time when the goods are loaded onboard to the time when they are discharged from the vessel. For other periods of time, the parties can make other agreements that may be subject to the national laws that might apply. Under the Rotterdam Rules, the carrier's period of responsibility starts when it receives the good for carriage and ends when the goods are delivered. Thus, this is door to door coverage and beyond the scope of COGSA. The carrier is responsible under this regime for the entire contractual period of carriage, which in a multi-modal shipment, may be from the carrier's receipt of goods at an inland location in the country of origin all the way to the delivery of goods in another inland location in the country of the destination. There is really no other way to insure uniformity. If the tackle to tackle concept survived, there would still be different national laws or contractual issues involving the inland portion of the transport. By making the Convention door to door, uniformity is enhanced. As a practical matter, many parties often agree in the contract to extend the maritime law inland but this only takes effect if the contract is enforced by a court. The Convention gives this concept the force of law.

While our Supreme Court has held that maritime law generally displaces state law in multi-modal contract cases, there are issues that arise in the United States when other Federal laws, such as the Carmack Amendment conflict with COGSA.

The future of the Harter Act would also be in question if the U.S. ratified the Rotterdam Rules. COGSA preserved the Harter Act to cover liabilities arising before loading and after discharge. However, since the Convention would cover the cargo door to door, it

would seem that the Convention would effectively repeal the Harter Act if the U.S. ratifies the Convention.

The practical effect of the door to door coverage would be to limit litigation in which a party tries to take advantage of State law or other Federal law or tries to argue about interpreting the meaning of clauses in contracts governing the inland portion of the transport. The Rotterdam Rules should simplify this and curtail some of the forum shopping that currently exists.

b. Volume (Service) Contracts

In the United States, the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998 (OSRA) permit shippers and carriers to negotiate confidential service contracts in which the parties may agree on many terms and conditions that vary from the COGSA provisions, including a lower limit for the carrier's liability. These contracts are very popular in the United States and it is estimated that they apply to about ninety percent of the liner trade to and from the United States. It was thought that parties to volume or service contracts were sophisticated parties of equal bargaining power but many States involved in the UNCITRAL negotiations feared that carriers would impose unfair volume contract provisions on small shippers. As would be expected in a Convention that involved so many different parties with varying interests, compromises were struck. Article 80 in the Rotterdam Rules provides that a volume contract may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention. These different terms are binding only if various conditions are met including, for instance, that a prominent statement be made in the contract, that the contract be individually negotiated and that the shipper is given an opportunity and notice to conclude a contract on terms and conditions that comply with the Convention without any derogation or lessening of its requirements. Furthermore, the derogation cannot be incorporated by reference from another document or included as a contract of adhesion that is not negotiated.

As part of the compromise though, certain things may not be negotiated away and certain obligations and liabilities cannot be lessened. Thus, the derogation or special contract does not apply to the Article 14 requirement that the carrier make and keep the ship seaworthy, properly crew, equip and supply the ship. The volume contract cannot lessen the shipper's obligation to provide information, instructions and documents relating to the cargo that are not otherwise reasonably available to the carrier and are necessary. Also, the volume contract exception does not apply to Article 32 which deals with special rules on dangerous goods. In addition, there can be no derogation from the rules if the loss is due to a personal act or omission of the person claiming the right to limit liability with the intent to cause such a loss or recklessly and with knowledge that the loss would probably result.

Although the Rotterdam Rules give parties to volume contracts freedom to choose the place to litigate or arbitrate their disputes, the Rules do not allow the same freedom to holders of transport documents or electronic records issued pursuant to volume contracts. A cargo claimant that is a third party holder of a transport document or electronic record will be bound by the forum selected in the contract provided that the volume contract, as well as the

carriage document, contain the same clause and that the transport document gives the claimant timely and adequate notice of the exclusive forum provision and provided that the forum is one in which the cargo interest may make their claims under the rules in the absence of an exclusive forum clause. In other words, the chosen forum has to be one of those specified in the Rules and the third party holder of a transport document must be given timely and adequate notice of the forum and that the jurisdiction of the particular forum is exclusive.

The Rotterdam Rules do not define what timely and adequate notice is. It is thought that a prominent statement on the face of the transport document or electronic record would be sufficient. This is the standard for passenger contracts on cruise ships. While it is possible that the purchaser may not learn of the choice of forum until after it has paid for the cargo, to avoid this, the purchaser should specify in a contract of sale or letter of credit that such jurisdiction clauses are not acceptable.

These provisions arguably are an improvement on the current law in the United States. At this time, in the United States, a carrier may choose any place it wishes to litigate or arbitrate by placing a clause on the reverse side of a bill of lading. The Rotterdam Rules limit the forum that may be selected and require that adequate and timely notice be given.

c. Jurisdiction and Arbitration

Jurisdiction was one of the most controversial subjects during the Convention negotiations. While the United States pushed strongly for provisions covering these matters, many nations considered that parties to contracts of carriage should have complete freedom to choose the place where any disputes would be arbitrated or litigated, even though bills of lading have often been viewed as contracts of adhesion. These nations therefore did not favor any provision that would allow claims to be made in any forum other than that stated to be exclusive in the contract. The result is that separate clauses permitting litigation and arbitration in other forums were included but each of these clauses will bind a contracting state only if the state expressly so declares. See Articles 74, 78.

If a country opts in or declares that it will be bound by the choice of forum sections of the Convention, cargo interests will have several available forums even if there is an exclusive forum clause except, of course, if the carriage was pursuant to a volume contract. By opting in, the nation has trumped the exclusive forum clause in non-volume contracts. Therefore, cargo interests in the liner trade will always have the option to bring suit or when there is an arbitration clause, commence the arbitration in the

A. Carrier's domicile,

B. The places (often inland) of receipt or final delivery in the contract of carriage,

C. The first port of loading or final port of discharge on the sea leg or

D. A place specified in the contract and

E. Also, bring suit against the maritime performing party in its domicile or the port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

Pursuant to Article 69, no judicial proceedings under the Convention may be brought against the carrier or a maritime performing party in a court not mentioned above. The Convention does not limit provisional remedies such as attachment or arrest. However, under Article 70, the court where the attachment or arrest takes place does not have jurisdiction to decide the case on the merits unless it would otherwise have jurisdiction under the Rotterdam Rules or under another Maritime Convention.

In general, exclusive forum clauses will not be binding in the liner trade. Charter parties or other contracts for the use of a ship or any space on the ship are outside the scope of the Convention and therefore outside any restrictions on the enforceability of forum selection clauses.

Thus, in the liner trade, Article 66 which provides for jurisdiction in various places, effectively overrules the Sky Reefer decision for common carriage, bills of lading containing choice of court clauses whether issued by the carrier in the liner trade or issued under a charter party and negotiated to a third party in the liner or non-liner trades. Article 75 and 76 do the same thing for arbitration clauses.

d. Right of Control

After the contract had been made, the goods loaded and the voyage started, certain events may occur that could require a modification in the transport terms, such a change in the place of delivery or a change of those entitled to issue instructions to the carrier about the disposition of the goods. In the United States, the "right of control" has been largely governed by the 1916 Pomerene Act; sometimes call the "United States Bills of Lading Act."

This Act applies to shipments between states and from a state to a place in a foreign country but does not cover shipments from a foreign country to the United States. The Pomerene Act arose as a result of the "cotton frauds" at the beginning of the Twentieth Century. It does not refer to the right of control and does not distinguish between a shipper who contracts with the carrier and the documentary shipper named in the transport document.

Article 51 of the Rotterdam Rules confirms that the shipper is the controlling party unless the shipper designates the consignee, the documentary shipper or another party as the controlling party. Article 50 limits the controlling party's unilateral rights to modifications that do not substantially affect the carrier's performance. Article 53 protects the carrier in that if the carrier follows the instructions, this is deemed a proper delivery. Article 51 permits the shipper to transfer the right of control to others and the transfer and presentation of all original transport documents is necessary to prove that the party claiming the right of control actually has that right. This is similar to the Pomerene Act.

Article 52 requires the carrier to execute the instructions of the controlling party if they are reasonable and do not interfere with the carrier's normal operations. If the carrier does comply, the controlling party must reimburse the carrier for any reasonable additional expense that is incurred. The carrier may also obtain security for any additional cost or damages the carrier reasonably expects will arise from the compliance with the instructions. The Pomerene Act does not have similar provisions, although a carrier has a lien for any freight, storage demurrage or terminal charges. The carrier and controlling party may expressly agree to change the contract of carriage. Those changes must be set forth in a negotiable document or a non-negotiable bill that requires surrender. The Pomerene Act only states that any changes to the contract of carriage must be made with the carrier's authority.

As with all of these sections, the Rotterdam Rules provide uniformity both globally and for all shipments to and from the United States, if the United States adopts it. This is certainly preferable to the Pomerene Act applying to some shipments and foreign law governing others.

e. Error in Navigation and Management Defense; Due Diligence

Article 14 provides that the carrier is obligated before, at the beginning of, and during the voyage "to exercise due diligence to make and keep the ship seaworthy," properly crew, equip and supply the ship and to make and keep the holds and other parts of the vessel in which cargo was carried and any container supplied by the carrier, fit and safe for the reception, carriage and preservation of the goods. This is a change from COGSA and the Hague Convention which require due diligence only before and at the commencement of the voyage. COGSA does require the carrier to properly care for the goods during the voyage thus establishing a negligence standard for its performance after the ship leaves the dock. The extension of the due diligence period in the Convention may seem like a more stringent standard but it is still just a duty to exercise due diligence, not an absolute duty to provide a seaworthy ship. Thus, the new Convention may establish more of a negligence standard but just uses different terminology.

Although the Convention does not contain the defense of error in navigation and management of the ship, it allows for apportionment of liability which will be seen by carriers as an improvement in the law. Under the current law, COGSA, the error in navigation defense cannot prevail over the carrier's duty to care for the cargo if the navigation or management action was merely incidental to vessel operations. If the carrier's negligence was at least a partial cause of the loss, the burden then fell upon the carrier to segregate the damages for which it was responsible from those for which it was not. In practice, this was an impossible burden and carriers generally had to bear the entire loss if there were concurrent causes that contributed to it such as an excepted cause and a violation of another duty. Article 17 of the Convention relieves the carrier of part of its liability and allows for apportionment unlike the all or nothing result that was often the case under COGSA.

f. Limits of Liability

Although it would be harder to break limitation under the Convention, the limits are higher. Article 59 Limits of Carrier's Liability to the higher of 875 Special Drawing Rights (SDRs) "per package or other shipping unit" or three SDRs per kilogram of the gross weight of the goods involved, unless the shipper declares a higher amount or the carrier and shipper agree to higher limitations. Special Drawing Rights is defined by a basket of currencies, the dollar, yen, euro and pound, given varying weights. As of September 3, the exchange rate was 1.57 dollars per SDR so the package limit under the convention would go up from the COGSA $500.00 per package to the conversion rate in effect at the time, which is now roughly $1,373 per package or other shipping unit.

g. Deviation

The Deviation doctrine predates COGSA and the Hague Rules. If there was a deviation, however it was defined at the time, the carrier would lose the benefit of certain clauses in the bill of lading, most importantly, the right to limit liability. Deviation was a judge made concept and could be applied unevenly by courts. For instance, a carrier guilty of gross negligence might still retain the benefit of the package limitation but a minor fault, involving a geographic change of route, could qualify as a deviation and thus oust the package limitation. In Article 24, the Convention sets forth that a deviation in of itself does not deprive the carrier of any of the rights under the Convention. Article 24 refers to Article 61 which states that if the claimant proves that the loss was attributable to a personal act or omission of the person claiming a right to limit, done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result, then the carrier is not entitled to the benefit of limitation under the convention. This section is the exclusive remedy for parties seeking to break limitation. Thus, it becomes much harder to break limitation under the Rotterdam Rules.

h. Time to Sue

The time to sue is two years under Article 62 and extensions are permitted by Article 63. Article 64 injects a new time limit in place of COGSA's one year for indemnity actions. Indemnity actions must be filed within the later of the time allowed by local law or ninety days after the indemnitee has settled the claim or been served with process.

i. Delay

Delay is not expressly covered by COGSA and there are not many cases on the subject. The Convention has specific provisions for delay and delay is defined in Article 21 as when the goods are not delivered "within the time agreed." Thus, if you do not have an agreed time, there can be no delay claim. Damages for delay are set out in Article 60 based on the value of the goods and there is an express limit on damages for economic loss due to delay which is two and one half times the freight on the goods delayed.

j. Shipper Liability

Under COGSA, it is the carrier's burden to prove "insufficient packaging" of the goods to withstand normal handling as a defense to a cargo damage claim. Under Article 27 of the Rotterdam Rules, a shipper has an affirmative duty to deliver the goods in such a condition that they can withstand normal handling. Where the goods are in a shipper packed container, the shipper has an affirmative obligation to carefully stow, lash and secure the contents in such a way that they will not cause harm to persons or to property. The effect of this provision may well be to shift the burden of proof to the shipper to provide sufficient packaging in a cargo damage case where packaging was at issue. This provision might also provide the carrier with a cause of action against the shipper where an improperly packaged container caused injury to persons or to other property.

In respect of the carriage of dangerous goods, the Convention will not change the parties' obligation under existing U.S. law. The shipper has the duty to inform the carrier of the dangerous nature of the goods and if it fails to do so, it will be held liable for all damages and expenses resulting from the shipment. Article 32 imposes strict liability on the shipper when the carrier is unaware of the dangerous nature of the goods.

Like COGSA, the provisions for imposing liability on the shipper under the Rotterdam Rules are fault based. The Rules however are far more detailed as to the duties of the shipper and should eliminate much of the guess work that currently exists as to whether the shipper can be held strictly liable and whether third parties such as adjacently stowed cargo interests have a right of action against the shipper.

VIII. What Next – How would the Rotterdam Rules become Law.

The Convention will be open for signature by all states at Rotterdam on September 23, 2009 and thereafter, at the U.N. headquarters in New York. Under Article 94, the Convention enters into force after the twentieth country has ratified, accepted or approved the Convention. There is no requirement that a set percentage of the world tonnage ratifies or adopts the Convention because it applies to both carriers and shippers. Due to the widespread participation and acceptance of the Convention worldwide, it is expected that it will enter into force relatively quickly.

The United States does not have a good record on ratifying conventions. It took us almost twelve years to put the Hague Rules into force by enacting COGSA. Representatives from the State Department participated fully in the negotiation of the Rotterdam Rules and as the United States delegation supported the text of the Convention, it is assumed that the State Department and Executive Branch will press to have it enter into law. In order for this to happen, the President must transmit to the Convention to the Senate for its advice and consent. The Senate must then vote on the Convention which is often very time consuming and perhaps influenced by strong feelings of a relatively few Senators. The State Department is optimistic that the Senate will ratify and approve the Convention because of the wide spread support of industry. However, no one can say how long this will take.