Cargo Damage Liability and the Rotterdam Rules

History and Upcoming Changes
LAW OF COMMON CARRIAGE

- Carrier “absolutely responsible for safety of the goods while they remain in his hands as carrier.”
  - Except, apparently for “acts of God and enemies of the King.”

- Act of God
  - Natural event consequences of which could not have been prevented through reasonable precaution

- Enemies of the King (or Queen…)
  - Did not include robbers; included pirates as *hostis humani generis*
OTHER EXCEPTIONS

- Jettison to save ship
  - Vessel only liable for general average contribution
- Inherent Vice
  - Perishable goods e.g. fruit
  - Existing pests e.g. weevils in grain
  - Leakage from casks
UNSEAWORTHINESS

- Carrier owed a warranty of seaworthiness
  - Included the ship itself as well as manning of vessel
- Defenses unavailable if owner breached warranty of seaworthiness
BILL OF LADING DISCLAIMERS

- English law—freedom of contract, although exculpatory clauses were strictly construed
- American law--less willing to enforce exculpatory clauses
HARTER ACT, 1893

- Applies to “carrier engaged in the carriage of goods to or from any port in the United States.”
- Carrier may not insert provision “avoiding its liability for loss or damage arising from negligence or fault in loading, stowage, custody, care or proper delivery.”
- Carrier may not avoid duty of “due diligence” to make vessel seaworthy and properly man vessel
HARTER ACT DEFENSES

- Diligent carrier not liable for “error in the navigation or management of the vessel”—key concession to shipping lines

- Other defenses:
  - Dangers of the sea;
  - Acts of God or public enemies;
  - Inherent vice of goods;
  - Insufficiency of packaging;
  - Salvage of life or property
CARRIAGE OF GOODS BY SEA ACT, 1936

- U.S. enactment of Hague Rules
- Influenced by Harter Act
- Same rule against negligence disclaimers
- Same exception for errors in navigation
- Applied “tackle to tackle” (otherwise Harter Act)
COGSA PACKAGE LIMITATION

- $500 damages limitation, per package or other customary freight unit
- About $8,400 in today’s dollars
COGSA DEADLINES

- 3 day deadline for notice of damage or loss
- One year statute of limitations
“HIMALAYA” CLAUSE

- COGSA’s defenses apply only to the carrier itself
- But bill of lading clause can extend COGSA’s protections to subcontractors who perform part of carriage
- Important to
  - Stevedores
  - Ports and terminals
  - Truckers and rail carriers
- Much litigation over who is covered by Himalaya clause
FAIR OPPORTUNITY DOCTRINE

- Shipper entitled to
  - Notice of package limitation
  - Opportunity to declare value of goods and pay additional freight

- Confusion over what constitutes adequate notice and opportunity
  - Boilerplate terms in bill of lading
  - More elaborate provisions for additional freight based on value

- Standard forms e.g. COMGEN generally deficient
DECK STOWAGE

- Outside COGSA if agreed by shipper
- Traditionally, on deck stowage without shipper’s agreement was “deviation”
- Clean bill of lading implied on deck stowage
- MORMACVEGA; on deck stowage of containers on ship designed for that purpose is not unreasonable deviation
  - But litigation over flat rack stowage and other specific cases
ARBITRATION AND FORUM SELECTION

- Lower courts had held that COGSA invalidated forum selection and/or arbitration clauses
- But U.S. Supreme Court upheld them in M/V SKY REEFER (1995)
ISSUES WITH COGSA

- Tackle to tackle application
- Problems with extension to multimodal and “door to door.”
  - Conflicts between COGSA and other laws for truck and rail transportation
  - *Norfolk Southern v. Kirby* (2004), maritime law applies to contract of carriage predominately by sea
- “[A] law drafted over 85 years ago still regulates an industry that has changed remarkably in the meantime.”
  Prof. Michael F. Sturley
UPDATES TO COGSA/HAGUE RULES

- Hague-Visby Rules; limitation increased to great of:
  - 666.67 SDRs per package ($1,011)
  - 2 SDRs per kilogram
- U.S. did not adopt Hague-Visby despite recommendations
United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea
ROTTERDAM RULES

- Signed September 23, 2009 in Rotterdam
- Currently 24 signatories, including U.S.
- Only Spain and Togo have ratified
- U.S. ratification status?
SOME MAJOR THEMES

- Container revolution
- Door to door moves
- Volume contracts
- E-commerce
- Some basic reforms and tweaks
REFORMS AND TWEAKS
CARRIER’S DEFENSES

- Most of the traditional list preserved
- Navigational fault defense abolished
PACKAGE LIMITATION

- Higher of:
  - 875 SDR (about $1326) per package
  - 3 SDR (about $4.55) per kilogram
- Breakeven = about 292 kg package
PACKAGE LIMITATION EXAMPLE

- E.g. 36 pallets totaling 19,944 kgs, invoice value $246,005
  - COGSA limit: $18,000 (36 x $500)
    - But limitation in 1936 dollars would have paid entire loss…
  - Rotterdam Rules Limit:
    - $47,736 based on package limit
    - $90,745 based on kg limit

- Will shift losses from cargo insurers to P&I insurers
STATUTE OF LIMITATIONS

- Lengthened to 2 years
- Provision for mistake/confusion as to carrier’s identity
  - Extra 90 days from when owner or bareboat charterer identifies actual carrier
HIMALAYA CLAUSE

- “Maritime performing parties” automatically protected by Rotterdam Rules
  - Handlers of goods at sea or within ports
- Other “performing parties (motor and rail) are not protected
  - Covered by other law or conventions
  - But Himalaya Clause may still extend carrier’s defenses
FORUM SELECTION CLAUSES; VOLUME CONTRACT (ARTICLE 67)

- Enforceable between parties to volume contract
- Non-parties to volume contact (e.g. holder of negotiable transport document)
  - Limited places (mainly domicile)
  - Clause must be in transport document
  - Non-party receives “timely and adequate notice” of court where action must be brought
- Jurisdictional articles must be separately ratified
AVAILABLE FORUMS; STANDARD B/L

- Carrier’s domicile
- Places of receipt or delivery
- Ports of loading or discharge
- Contractual forum selection clause
CONTAINER DEFINED

“Any type of container, transportable tank or flat, swapbody, or similar unit used to consolidate goods, and any equipment ancillary to such unit load.”
CONTAINER-RELATED PROVISIONS

- Carrier obligations:
  - Carrier-supplied containers must be fit
  - Carrier liable if its containers are unfit;
  - Containers may be carried on deck if vessel is so fitted and below-deck stowage has not been promised

- Shipper Obligations
  - Shipper must carefully stow, lash and secure container contents if shipper loads

- Carrier may *qualify* description of containerized goods
“DOOR TO DOOR” COVERAGE

- “Contract of Carriage” “shall provide for carriage by sea” but “may provide for carriage by other means of transport.”

- Rules apply if
  - Receipt and delivery are in different countries;
  - Loading and discharge ports and in different countries; and
  - Any one of the above is in a signatory country
VOLUME CONTRACTS

- Volume contract may alter rights and liabilities under Rotterdam Rules
- Referred to as a “derogation”
- Otherwise, Article 79 prohibits derogations
REQUIREMENTS FOR VOLUME CONTRACT “DEROGATION”

- “Prominent statement” of derogation from Rotterdam Rules
- Volume contract
  - is individually negotiated or
  - Prominently specifies derogating sections
- Shipper given notice and opportunity to make “normal” contract
- Derogation may not be
  - Incorporated from another document or
  - In an “adhesion” contract
E-COMMERCE
“NEGOTIABLE ELECTRONIC TRANSPORT RECORD”

- Allowed subject to procedures for
  - Issuance and transfer (formerly delivery and endorsement)
  - Assurance of integrity
  - Demonstration of “holder” status (formerly physical possession of B/L)
  - Confirmation of delivery (formally surrender of B/L)
- Procedures not defined
  - Must be “referred to in contract particulars” and
  - Readily ascertainable
NEGOTIABLE INSTRUMENTS PROVISIONS

- No negotiability rules in COGSA
- Rotterdam Rules
  - Defines negotiable (electronic) transport document
  - Defines “issuance” and “transfer”
  - Entitles shipper to negotiable document
  - Permits transfer of rights in negotiable transport document
  - Defines liability of non-shipper holder