

K&L GATES

# Cargo Damage Liability and the Rotterdam Rules

History and Upcoming Changes

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## 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
  - *Kawasaki v. Regal-Beloit* (2010), “Carmack Amendment” does not apply to rail leg of incoming shipment
- “[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



UNITED NATIONS

## 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 contract (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

# MAJOR THEMES

## 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

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