

PUBLICATION

The Rotterdam Rules: New Convention May Govern Your International Shipments

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On September 23, 2009, the United Nations Commission on International Trade Law (UNCITRAL) is scheduled to present for signature a new Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Convention or Rotterdam Rules) in the city of Rotterdam, The Netherlands. Twenty countries will need to ratify the Convention for it to enter into force. Assuming economic powers such as the United States, China, Japan and the European Union ratify the Convention, the legal regime governing the carriage of goods by sea will undergo substantial changes that are likely to affect importers, exporters, shippers and carriers.

Most of the shipping world has operated for almost a century under the Hague Rules (which are the basis for the U.S. Carriage of Goods by Sea Act, or COGSA), the Hague-Visby Rules or the Hamburg Rules. However, the drafters of those legal regimes could not have anticipated the tremendous impact that the container revolution would have on shipping, the exponential growth of multimodal shipments, the increased importance of transportation intermediaries, and the implementation of new technologies such as electronic commerce. The Convention addresses many of the requirements of the modern shipping industry and provides the international community with a unique opportunity to harmonize the law governing the carriage of goods by sea.

This article will briefly highlight some of the major changes to existing law found in the Convention.

Multimodal (or Door-to-Door) Coverage

The Convention provides for door-to-door application, which represents a significant change from existing law since most current international regimes apply on a tackle-to-tackle basis (i.e., they apply upon loading, once the cargo crosses the ship's rail, and cease to have effect upon discharge). While the Convention will facilitate multimodal transportation (particularly in an era where most contracts of carriage and insurance contracts are now concluded on a door-to-door basis), the parties will nevertheless be able to “opt out” of the inland leg (by rail or truck) such that the Convention will only apply to the international sea leg of the carriage.

Volume or Service Contracts

While current legal regimes (including COGSA, Hague, Hague-Visby and Hamburg Rules) permit the parties a certain amount of freedom of contract (including the right to exempt charter parties and contracts of affreightment from these regimes), the Convention extends this freedom of contract to volume or service contracts. While there was substantial international opposition to this provision, U.S. shippers exerted considerable pressure during the negotiation process to ensure that volume or service contracts were exempted from the Convention.

Balance of Risk Between Carriers and Cargo Interests

The Convention attempts to strike a “fair balance of risk” between carriers and cargo interests. Some of the major changes from existing law in the Convention include the elimination of the much criticized “navigational

fault” (or “error in navigation”) exception that allows a carrier to escape liability for cargo damage if the loss was the result of navigational fault or an error in navigation. The Convention also imposes an obligation on shipowners to ensure that their ships are seaworthy throughout the voyage (rather than simply at the inception of the voyage as provided for under current law). Furthermore, the Convention provides for higher limitation amounts (835 Special Drawing Rights or SDRs per package or, alternatively, a weight-based limitation of three SDRs per kilogram), which represents a substantial increase over the current \$500 per package limitation provided for under COGSA. Finally, the Convention also imposes liability on carriers for delay in delivery (as long as the time for delivery has been agreed upon in the contract of carriage).

Time-for-Suit Period

The Convention substantially increases the time allowed for suit on a cargo claim, providing two years for a cargo claimant to file suit against the carrier before the action is timebarred. Under the current COGSA rules, cargo claims have to be filed within one year from the date of delivery.

Expanded Shippers' Obligations and Liabilities

The Convention emphasizes the bilateral nature of the shipping transaction and recognizes that shippers are better suited than carriers to identify certain serious risks (i.e., shipments involving hazardous cargoes). Thus, the Convention imposes more requirements on shippers, including the obligation to share information regarding the hazardous nature of a cargo, and explicitly imposes liability on a shipper that breaches these requirements.

Electronic Commerce

The Convention establishes a legal framework designed to facilitate electronic commerce. The rules established by the Convention will hopefully enable electronic commerce to become a practical reality (which should prove particularly helpful for multimodal shipments that include an international sea leg).

Maritime Performing Parties and Controlling Parties

The Convention provides the carrier's employees, agents and independent contractors with the same rights and obligations as enjoyed by the carrier as long as they are deemed “maritime performing parties.” In other words, the rights and obligations of these maritime performing parties will be governed by the Convention regardless of whether or not the transport document includes a “Himalaya Clause” (which is required under existing law for these parties to have the carrier's rights and obligations). Finally, existing legal regimes do not deal with the concept of “controlling parties” or the “right of control,” which are usually governed by domestic law. The Convention's provisions on the right of control become particularly important when the carrier does not issue a physical piece of paper that qualifies as a negotiable bill of lading (which will become commonplace as electronic commerce takes hold).

A Word of Caution

The Convention is bold and ambitious in its scope and application, and in its desire to accommodate modern shipping practices (especially those relating to multimodal transportation and electronic commerce). Nonetheless, some legal commentators have cited the Convention's length and complexity (it runs a full 96 articles packaged in 18 chapters) as a potential source of litigation and arbitration as parties struggle to agree on the precise meaning of some of its provisions. The Convention not only addresses carriage of goods by sea, but also touches upon related topics such as rights of controlling parties and transfer of rights (which, strictly speaking, are sale rather than carriage concepts), and contains detailed provisions on jurisdiction and

arbitration. While it is difficult to predict at this juncture whether the Convention or Rotterdam Rules will enter into force in the foreseeable future, importers, exporters, shippers and carriers should certainly be aware of that possibility.