

A NEW FORUM SELECTION REGIME

Under **Sky Reefer**, forum selection clauses have been held to be enforceable no matter how inconvenient the foreign jurisdiction may be. However, under the Convention even if a bill of lading contains a forum selection clause, a cargo interest will be able to file suit in any of the following jurisdictions:

- (a) the place of origin;
- (b) the first port of loading;
- (c) the carrier's principal place of business;
- (d) the last port of discharge; or
- (e) the place of destination.

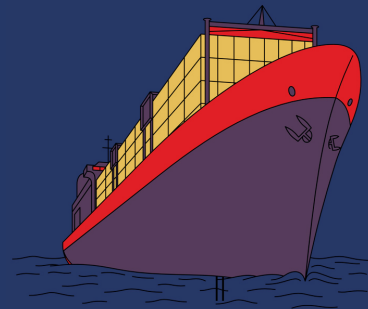
If a contract for carriage includes an arbitration clause then cargo interests must arbitrate but could demand arbitration in any of the jurisdictions where they could bring suit. Moreover, as with many other aspects of the Convention, parties to a "volume contract" can out-opt of this regime and agree to their own choice of forum clause.

ELECTRONIC DOCUMENTATION

The new rules permit the use of electronic bills of lading, referred to as electronic transport records, and create a regime that ensures that electronic transport records are treated the same as paper bills of lading.

FREIGHT PREPAID

If the contract particulars state "freight prepaid" a carrier may not assert that the freight was not paid as against the holder of the contract document or the consignee unless it is also the shipper.



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Executive Summary

THE ROTTERDAM RULES



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BACKGROUND

Over a decade in the making, the UN Convention on “Contracts for the International Carriage of Goods Wholly or Partly by Sea.” was formally adopted by the General Assembly of the United Nations on December 11, 2008.

The Convention, which was the product of the United Nations Commission for International Trade Law (UNCITRAL), is designed to supplant the existing 1924 Hague Rules, 1968 Visby Amendments, and 1978 Hamburg Rules, with a broad new regime to harmonize and modernize the rules governing contracts for international carriage of goods.

WHEN THE RULES GO INTO EFFECT

On September 23, 2009, there will be a signing ceremony in Rotterdam, the Netherlands, with a further ceremony at the UN headquarters in New York. To become international law, the Convention will only need 20 countries to ratify it, but it will be the responsibility of each Contracting State to ensure that the provisions contained in it apply under their domestic law. If ratified the Convention will become known as the Rotterdam Rules.

The US is notoriously slow to adopt new trade treaties, waiting over a decade to enact COGSA to implement the Hague Rules, and failing to ratify the Visby Amendments or do more than sign the Hamburg Rules.

The Convention is considered to be a self-executing international agreement, and thus, unlike the Hague Rules, to be enacted it need only be forwarded by the Secretary of State to the President for referral to the Senate for advice and consent prior to presidential ratification in accordance with Section 2 of Article Two of the Constitution.

The President could choose to adopt the Convention in its entirety, or only partially adopt the Convention excluding objectionable provisions, or even decline to adopt the Convention entirely, retaining COGSA’s current structure

but adopting the increased limits of liability called for under the Convention. Regardless of the result, how the US deals with the new Convention will be closely watched by all.

PARTIES GOVERNED BY THE RULES

The Convention is truly broad in scope, providing so-called door-to-door or “maritime plus” coverage. Thus, it applies to any parties participating in the carriage from port to port and within the port including: stevedores, terminal operators, ship managers, watching services, etc. The Convention will apply to in-land carriers such as truckers and railroads only to the extent that they are operating within a sea terminal.

The Convention applies to all contracts of carriage if the place of receipt, delivery, loading, or discharge is in a Contracting State. However, charter parties or other contracts of carriage providing for space aboard a ship are specifically excluded.

NEW BURDENS FOR CARRIERS

Elimination of the error in navigation or management defense and limitation of the fire defense to fires onboard the vessel.

Expansion of the duty of a carrier to exercise due diligence to the entire voyage, rather than just up until commencement of the voyage.

Carriers can no longer limit liability on the face of egregious facts showing reckless or willful acts or omissions.

Expansion of the statute of limitations to two years from the date cargo is delivered or should have been delivered

Increases of the package limitation to 875 Special Drawing Right (SDR’s) per package or 3 SDR’s per kilo, whichever is greater (approximately \$1,363 per package or \$4.67 per kilo).

NEW BENEFITS FOR CARRIERS

Carriers are empowered to enter into so-called “volume contracts” which are defined as “a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time” and would permit carriers and shippers to opt-out of the regulatory regime provided for under the Convention so long as the volume contracts give appropriate notice that they derogate from the Convention. However, carriers cannot opt-out of their obligation to exercise due diligence or the willful misconduct exception to the limitation of liability.

So long as the bills of lading are properly claused (*i.e.* shipper’s load and count or variants thereof), carriers will no longer be bound by the quantity descriptions provided by shippers for inclusion in the bills of lading. Thus, shippers will not be able to simply rely on the conclusive effect of a bill of lading to establish their *prima facie* case.

Where losses have multiple causes, carriers will no longer bear full liability. Instead both cargo interests and carriers will share the burden of showing the amount for which each cause contributed to the loss.

The shipper has an affirmative duty to deliver goods in such a condition that they can withstand normal handling.

CONTROLLING PARTY

The shipper is the controlling party by default, but the shipper can designate the consignee, the documentary shipper, or any other person as the controlling party, giving them the right to: (1) give instructions to the shipper that do not constitute a variation of the contract of carriage., (2) obtain delivery of the goods at the port of call or with respect to inland transit, any place en route, or (3) replace the consignee with any other person.

COGSA

THE ROTTERDAM RULES

**Package
Limitation**

\$500 per package – with package as listed on bill of lading or pallet

875 SDRs per package (approx. \$1,363) or 3 SDRs per kilo (approx. \$4.67 per kilo), whichever is greater – with package as the smallest unit of packing on the bill of lading

Deviation

Geographic or on-deck deviation prevents limitation of liability

Limitation only broken on evidence of willful or reckless acts

**Error in
Navigation or
Management**

Valid defense

No defense

**Cargo damage w/
multiple causes**

Carrier liable for full loss

Damages apportioned based on the amount of fault attributed to each cause

Scope of Rules

No protection to agents of carrier without a Himalaya Clause

Protection extended to stevedores, ship managers, terminal operators, warehousemen, and in-land truckers and railroads (when operating within a sea terminal)

**Statute of
Limitations**

1 year

2 years from delivery or when delivery should have been made

**Forum Selection
Clauses**

Forum selection clauses are enforceable

Cargo interest can bring arbitrate or litigate in: (1) place of origin; (2) first port of loading; (3) carrier's principal place of business; (4) last port of discharge; (5) place of destination; or (6) locale in forum selection clause

Opting-Out

Carrier cannot opt-out of COGSA

Carrier permitted to enter into "Volume Contracts" to opt-out of any part of Rotterdam Rules, but cannot opt-out of due diligence obligations and cannot limit liability where conduct was willful or reckless

**Shipper's Load
and Count**

Conclusive presumption that the shipper's count of cargo on the bill of lading is accurate

No presumption where carrier did not inspect cargo and bill of lading is properly clausued

Fire Defense

Carrier has full defense for loss due to fire

Limited to fires onboard the vessel