

# SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

A bimonthly newsletter published by the BPM Transportation & Logistics Practice Group

November 2009

## THE ROTTERDAM RULES: THE LONG VOYAGE OF INTERNATIONAL EFFORTS TO MODERNIZE OCEAN SHIPPING LIABILITY—PART I (PART II COMING JANUARY 2010)

By Steve Block

Modernization of ocean shipping liability has been the subject of so much analysis, conjecture, lobbying, posturing and contention over the past 20 years that it's almost difficult to present developments as news - however much the work of numerous organizations and individual players seem to be making progress. You can find Legal Lookout articles from the mid-1990s heralding a new era of shipping liability law by way of soon-to-be ratified reform to the U.S. Carriage of Goods by Sea Act (COGSA). A year or so later, you'll see sheepish retractions of those announcements based on post-deregulation torpedoing of proposed Congressional bills (it's amazing what a one-page protest letter from a dozen steamship lines can do!).

The Maritime Law Association of the United States and National Industrial Transportation League have dedicated hard-working committees since the George Bush Senior years to study, propose and promote reform legislation and, later, a new international treaty. All we currently have to show for that work are various versions of proposed bills and engaging commentary about why they would or wouldn't work.

But that's not to say we aren't making progress! COGSA, the U.S. legislation based largely on international liability regimes Uncle Sam refused to accept, is antiquated and the subject of too much discontent and dispute to carry us into the new millennium, especially with our country's current economic challenges. Enacted in 1936 with some subsequent amendments, COGSA has just lost pace with the times. It doesn't recognize modern

### INSIDE THIS ISSUE

The Rotterdam Rules: The long voyage of international efforts to modernize ocean shipping liability—Part I by Steve Block	1
Hot Recent Cases in Motor Carrier Law by Steve Block	3
Contact Information	6

shipping practices, volumes and technologies. 500 bucks a package - the minimum to which COGSA allows ocean carriers to limit their liability for lost/damaged cargo, was quite a lofty sum in 1936. It's now peanuts in most circumstances.

Similarly, the Hague-Visby Rules (the largest international cargo liability regime, and COGSA's genesis, but a treaty the U.S. refused to sign) and Hamburg Rules (a newer treaty designed largely for developing countries, again rejected by Uncle Sam) are largely obsolete. But, along with COGSA, they provide a good deal of valuable background and experience - from both legal and industry perspectives - for creation of a modernized regime suitable for the world's largest trading partners.

The movement toward an international uniform liability system was long in the making, and brought U.S. domestic reform endeavors to a halt. Years were spent by maritime organizations (some more law-oriented than others) of various countries, as well as the Comité Maritime International, analyzing the issues and boiling them down to proposed solutions. This was followed by a seven-year effort by the United Nations Commission on International Trade Law (UNCITRAL). Finally, on September 23, 2009, a formal ceremony was held in Rotterdam wherein a finalized treaty was presented for signing. It will take 20 ratified signatures of the world's major

## THE ROTTERDAM RULES ... Continued

trading parties to bring the "Convention on for the International Carriage of Goods Wholly or Partly by Sea," informally, "the Rotterdam Rules" (and here, "the new treaty") into action.

So what would happen if the U.S. charts a new course, and joins the rest of the world in adopting this international, uniform cargo liability program? As is the case with most liability legislation, much is left to speculation and ultimate determination by piecemeal litigation. How this all will work in practice cannot be predicted with much certainty. But we can certainly scrutinize what the Rotterdam Rules *seek* to accomplish based on input from numerous sources and the wisdom of delegates and committee members. This paper takes a look at some of the proposed new regime's most salient features, and suggests what they might mean for U.S. industry and law if we ratify and implement them.

### *Applicability*

The Rotterdam Rules surface at just the time the U.S. finds itself embroiled with conflict occasioned by the U.S. Supreme Court's 2004 decision in *Norfolk Southern Railway Co. v. Kirby, et al*, the Second Circuit Court of Appeals' ruling in *Sompo Japan Ins. Co. v. Norfolk Southern Ry. Co.*, and those cases' progeny (see May-August 2008 Legal Lookout articles for a thorough analysis). At issue there was whether COGSA and the limitation of liability terms of a through ocean bill of lading could effectively be extended to inland carriers and other non-maritime participants in a through move. Many observers believe the Second Circuit, in *Sompo Japan*, improperly disregarded the High Court's proclamation, in *Kirby*, that multimodal hauls will be fully subject to the predominant maritime contract's terms and governing law (absent available provisions to the contrary). Subsequent cases have gone all over the place, leaving motor carriers and railroads anywhere from confused to clueless as to what law and liability limitations control them in the event of loss.

Early rumblings suggested that UNCITRAL's forthcoming regime might encompass land-based elements of through ocean hauls, thereby clearing

up the disarray. That's not the way it worked out, unfortunately. Rail and motor

carrier interests decided they wanted nothing to do with the formation of liability guidelines designed by and for their salty cousins, and declined to submit themselves to the new terms. We'll just have to wait for the Supreme Court to straighten out the mess by a subsequent decision.

Nonetheless, the Rotterdam Rules do contain provisions for their applicability door-to-door for contracted multimodal moves. This is in contrast to COGSA's "tackle-to-tackle" applicability that may be extended by contract to include other service providers. Thus, inland carriers could stay out of the new treaty's shadow if they want to.

Notably, the Rotterdam Rules are designed not to apply to charter parties. Some rules can be opted out of for "volume contracts," which is the treaty's more-defined term for service contracts. This might give some comfort to those who like the newly deregulated, market-driven shipping world occasioned by the Ocean Shipping Reform Act of 1998.

### *Shipping documentation*

Documentation of shipping relationships has transformed since the era of deregulation's onset, with service contracts playing a more pivotal role, at least from the standpoint of economics.

Preliminarily, a bill of lading under the new treaty would represent the contract of carriage, as opposed to just being evidence of a contract of carriage as provided under current law. There are requirements for documented control over a shipment to destination.

The Rotterdam Rules provide for three types of paper: negotiable transport documents, non-negotiable transport documents and straight bills of lading. Required particulars are stated for each variety; provisions are made for electronic documentation; and the evidentiary effect of stated terms is explained (i.e., certain transport documents will be *prima facie* proof of

## THE ROTTERDAM RULES. . . Continued

a cargo's condition and count at time of tender under certain circumstances, while others could leave open questions). This is one place where the new treaty becomes messy and complex; so much so that many observers have decried its documentation aspects as prohibitively complicated. You shouldn't have to be a highly specialized attorney or 20-year industry veteran just to understand how shipping contacts work. Advantages and disadvantages of the various documentation forms aren't spelled out and may hinge on legal and business circumstances that negotiating and drafting individuals don't understand.

### *Jurisdiction and Arbitration*

One source of discontent the American shipping community has experienced over the past fifteen years is U.S. courts' recognition and enforcement of foreign jurisdiction selection and arbitration clauses in bills of lading issued by steamship lines flagged in other countries. Since the U.S. Supreme Court's decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, American shippers have been forced to pursue cargo claims against most steamship lines in foreign countries. This can complicate - or even render financially infeasible - recovery actions by the world's largest consumers of transportation services. Needless to say, U.S. shippers and, most certainly, their work-deprived attorneys have long sought to legislatively reverse *Sky Reefer* in any liability regime overhaul. Foreign steamship lines, on the other hand, are quite happy to dissuade litigation or arbitration against them by forcing it to take place in, say, Seoul.

The Rotterdam Rules address foreign jurisdiction selection, but not with the certainty some of us would like to see. Suit is allowed in any one of four specified venues (including places of tender and delivery), which would seem to expunge *Sky Reefer's* "the carrier decides" holding. However, volume contracts can still mandate foreign jurisdiction. Depending on who controls the market, this can be significant, given that the vast majority of freight moves by contract. Also, these jurisdiction provisions are optional,

and signatory nations are free to develop their own statutes and regulations which might dictate where dispute resolution must take place. One wonders how much progress this point of the new treaty makes regarding forum selection.

TO BE CONTINUED . . .

Ref: *Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Transport.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html); *Norfolk Southern Railway Co. v. James N. Kirby, PTY Ltd., d/b/a Kirby Engineering, and Allianz Australia Insurance Limited*, 543 U.S. 14, 125 S.Ct. 385 (2004); *Sompo Japan Ins. Co. v. Norfolk Southern Ry. Co.*, 456 F.3d 54 (2nd Cir. 2006); and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 115 S.Ct. 2322 (1995).

## PART 2 - Claims & Litigation Points and Status of the Rotterdam Rules Coming in the January 2010 Surf & Turf Newsletter

### HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

The Garden State applies substantial compliance test to requirement of written notice of claim.

*Foam Fair Industries, Inc. v. J.K. Hackl Transportation Services, Inc., et al*, 2009 WL 2778446 (D.N.J. 2009)

Shipper Foam Fair purchased some industrial equipment from California-based Advanced Materials, which hired a rigging outfit to facilitate transport of the equipment to New Jersey. It hired motor carrier J.K. Hackl to make the haul. The freight arrived damaged.

## HOT RECENT CASES . . . Continued

Foam Fair immediately commenced discussions with Hackl's driver. Hackl turned the claim over to its insurer, which also had discussions with the shipper. The insurer asked Foam Fair to write up a description of the damaged property and an estimate for repairs. It did so, but that was the only writing the shipper ever issued. The nine-month period Carmack blesses for shippers to give written notice of claim expired, and Hackl moved to dismiss Foam Fair's subsequent lawsuit (initiated when the carrier and insurer decided not to pay) on that basis.

Following the Ninth Circuit's lead, and noting that Third Circuit precedents have never required strict compliance with written notice of claim provisions, the District of New Jersey ruled that the writing Foam Fair issued to the carrier's insurer regarding the extent of its damages, when viewed contextually, satisfied its obligation to put the carrier on timely notice of claim. True, that document didn't expressly state that the shipper intended to hold Hackl liable for its loss, and didn't state a specific demanded sum. However, the history of circumstances and verbal discussions forced the court to conclude Hackl must have known what Foam Fair was after. Equitable estoppel arguments, i.e., that the carrier and insurer improperly led the shipper on to expect a forthcoming settlement, were also persuasive.

### Former motor carrier (now broker) isn't liable for lost cargo it never had.

*Air Express International USA, Inc. v. FFE Transportation Services, Inc., et al*, 2009 WL 2407957 (C.D. Cal. 2009)

Here's a nice, short precedent you can tuck away for future reference regarding trucking intermediary liability. Basically, under state and federal (Carmack) law, an entity that never touched a load cannot be liable in indemnity for lost freight.

American Spirit, LLC *used* to operate as a motor carrier, but stopped. Apparently, it continued to operate as an intermediary - probably a broker - and was included in a daisy chain of players

engaged to haul a cargo of frozen shrimp from Illinois to California. The seafood never arrived, prompting a lawsuit that involved three transportation companies, including American Spirit.

On summary judgment, no evidence suggested that American Spirit ever touched the stuff. Carmack is designed to allow shippers to recover the value of lost/damaged cargo from the one carrier or forwarder it contracted with, and force the latter to seek indemnity from any connecting carrier(s) who actually were in possession of the freight when it was lost or damaged. California state law provides equitable indemnity causes of action to the same effect (although query why any such state law wouldn't be preempted).

However, to seek indemnity from a connecting carrier, a forwarder or carrier that bears primary liability to a shipper has to show the putative indemnitor actually had possession of the freight. Here, there was no such showing against American Spirit, so all claims against it were dismissed.

However,

**Merely engaging another carrier to make a haul doesn't defeat Carmack's applicability.**  
*AIOI Insurance Co. v. Timely Integrated, Inc.*, 2009 WL 2474072 (SDNY 2009)

Shipper Yazaki North America engaged motor carrier - that's right *motor carrier* - Timely Integrated to haul a load of automobile parts from Arizona to Illinois. It actually entered into a "motor carrier" agreement with Timely, and received a bill of lading from Timely naming itself as the carrier of record.

Unbeknownst to Yazaki, Timely "brokered" the load to another carrier, Lucky 7, whose truck, notwithstanding its cute namesake, flipped over en route. The cargo was damaged, Yazaki collected insurance proceeds, and the subrogated insurer sued Timely to recoup its payout.

Timely tried to evade liability, as well as Carmack's very purpose, by arguing that, hey, we weren't a motor carrier here. We didn't carry Yazaki's stuff. All we did was agree to provide "

## HOT RECENT CASES . . . Continued

transportation services," which we did. That was true indeed as a matter of operational practice, but not as a matter of law. The Southern District of New York saw right through it.

The court correctly found that both Timely and Lucky 7 are carriers. Actually, "arranging for transportation by other entities" falls within Carmack's definition of a motor carrier when an entity holds itself out and conducts itself as a trucker. Any other conclusion would defeat the very purpose of Carmack. Presumably, Timely could seek indemnity from Lucky 7 if the latter truly is at fault.

**But back to frozen shrimp ...**

**Carmack doesn't apply, but a court reaches same result.**

*Fireman's Fund Insurance Co. v. ATS Logistics Services, Inc.*, 2009 WL 2369912 (S.D. Tex 2009)

It's a little off kilter at points, but this case informatively reaches the same results in a non-Carmack cargo claim as it would have had the usual statutory liability regime applied.

Shipper Expack hired transportation service provider ATS to arrange an interstate shipment of a cargo of frozen shrimp, which is Carmack exempt. Through some mix up between motor carrier Famco, the consignee and a storage unit, the cargo's quality was diminished. Expack collected on a Fireman's Fund insurance policy, and the insurer sued ATS in subrogation in the Southern District of Texas. Both moved for summary judgment.

Fireman's Fund threw the proverbial kitchen sink at ATS and lost on every turn. No, a bailment was not created, as ATS never had the freight in its possession. No, ATS isn't a freight forwarder, as no evidence suggested it was. No, ATS wasn't negligent, as no evidence suggested Famco was an incapable or otherwise improper carrier, so ATS didn't breach any duty to Expack. And no, ATS didn't breach any contract with Expack, as the bill

destination, which in fact happened (actually, here's where the court may have gotten misdirected, as it concluded that the consignee issued the bill of lading, which wouldn't be legally recognized). ATS, on the other hand, succeeded in showing that it couldn't be liable because, hey, it wasn't a carrier. End of story.

**Here we go again: more state & common law ...**

**A broker is potentially liable on state/common law counts for picking uninsured carrier.**

*Huntington Operating Corp. v. Sybonney Express, Inc., et al*, 2009 WL 2423860 (S.D. Tex 2009)

Shipper Huntington engaged transportation broker Custom to arrange transit of a load of perfume from Florida to Texas. Custom engaged motor carrier Sybonney Express, and apparently did everything it should have to ensure Sybonney was an appropriate carrier. It checked FMCSA's website and the carrier's insurance broker to ensure all needed insurance coverage was in place.

Huntington's cargo of smell-um was stolen while on Sybonney's watch. When Huntington sought to recover the cargo's value, it learned that Sybonney had failed to list the cargo with its insurer, thereby nixing coverage. The shipper sued both Custom and Sybonney in the Southern District of Texas.

Custom moved to dismiss Huntington's claims on summary judgment. Carmack doesn't govern broker liability, so the court reviewed the litany of state and common law theories the shipper had levied against custom. Again, the court delivered an interesting state-law analysis of interstate trucking liability. Here we go again:

Yes, Custom could potentially be liable to Huntington under Texas's consumer protection statute, its argument that it wasn't a sufficient causative factor in the shipper's loss falling on deaf judicial ears. Custom's actions (or omissions) very well could be deemed a substantial factor in the loss, as it selected the carrier.

## HOT RECENT CASES . . . Continued

Yes, Custom could be liable in negligence to Huntington, as issues of fact remain as to whether it should have checked to determine that Sybonney had listed the cargo with its insurer.

Yes, Custom could be liable based on negligent misrepresentation theories. It may not have intentionally deceive Huntington, but that's not what negligent misrepresentation analyzes.

Yes, Custom could be held liable for breach of contract, again because fault isn't at issue in that theory.

But no, Custom could not be held liable based on common law fraud, negligent entrustment or breach of fiduciary duty. No evidence suggested the culpability needed for fraud; nothing suggested Sybonney's driver caused the loss; and brokers are not fiduciaries of their shipper customers.

**Carmack isn't available to defeat COGSA when no truck or train is involved.**

*Meritz Fire & Marine Ins. Co. v. Hapag-Lloyd (America), Inc. et al*, 2009 WL 2916799 (C.D. Cal. 2009)

If the *Kirby* case was a "maritime case about a train wreck," this one's a maritime case about Carmack not applying. It's not really a trucking case, but might be useful to those interested in avoiding COGSA. It also shows how confused the scene has gotten since *Sompo Japan* muddied the waters *Kirby* was intended to clean up.

Here, shipper Koho International engaged non-vessel operating common carrier World Class Logistics to transport a load of cheese from Seattle to South Korea. World Class booked the load with steamship line Hapag Lloyd, which issued sea waybills that provided for specified temperature maintenance. They also contained forum selection clauses mandating that any cargo litigation take place in Germany, and extending COGSA to govern claims resulting from land-based services.

The cheese arrived in South Korea frozen, resulting in a loss to Koho of some 183 grand. When Koho's subrogated insurer sued in the Central District of California, the carrier moved to dismiss based on the forum selection clause.

Trying to keep the matter stateside, the plaintiff argued that Carmack won't allow venue restrictions. And, per *Sompo Japan*, Carmack applies by a federal statute which cannot be supplanted by contract. The parties hadn't specifically opted out of Carmack, and COGSA only applies "tackle-to-tackle" while freight is on vessels. Right?

Wrong, said the court. Unlike the recent series of cases addressing Carmack versus COGSA applicability, this transport had absolutely no surface component. Carmack cannot apply under any circumstances. The plaintiff chose to sue under the Hapag-Lloyd bills of lading, so the forum selection clauses apply. They're going to Germany.

---

### CONTACT INFORMATION

For comments or additional information on the articles in this issue please contact Steve Block either by phone at (206) 292-9988 or by email.

Steve Block  
sblock@bpmlaw.com  
Dana Henderson  
dhenderson@bpmlaw.com



Stacia Hofmann  
shofmann@bpmlaw.com  
Lori Worthington  
lworthington@bpmlaw.com

For additional articles or background information on each attorney

please see the Betts Transportation & Logistics' Web page at

<http://www.bpmlaw.com/PracticeAreas/TransportationandLogistics/tabid/1591/Default.aspx>.