The Coming Sea Change in the Handling of Ocean Cargo Claims for Loss, Damage or Delay

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I. Introduction

The admiralty and maritime law in the United States has long been characterized by its dogged pursuit of uniformity; its interconnection with the maritime laws of many of the major trading countries in the world; and its adherence to tradition and hoary historical precedents (some would stay stubbornly so)—changing only in the most cautiously incremental fashion over an extended period of time. These characteristics of U.S. admiralty and maritime law have, generally, provided consistency and stability in application of the law, and have generally outweighed the negative affects of rigidity.

The characteristic features of U.S. admiralty and maritime law are on full display with regard to the law regulating the loss and damage of goods transported by vessels between countries on the oceans. The so-called "Hague Rules" have since 1924 been the internationally recognized rules governing liability with respect to loss and damage claims arising out of the international shipment of goods.[1] In the United States the Hague Rules were the basis for the Carriage of Goods by Sea Act, commonly referred to as "COGSA," enacted in 1936.[2] The COGSA adhered to the Hague Rules and was, in general, aligned with the laws relating to the carriage of goods enacted in most of the important trading countries in the world. The Hague Rules provided a source of uniformity, which resulted in a certain consistency for the international trade of goods transported by ocean.

While the Hague Rules and the COGSA were a breakthrough in the development of international law for the carriage of goods by sea, the experience with the actual application of those laws over time revealed certain deficiencies and the need for some revision. Consequently, the

1. *See* International Convention for the Unification of Certain Rules Relating to Bills of Lading Convention and Protocol of Signature thereto, between the United States of American and other Powers Respecting Bills of Lading for the Carriage of Goods by the Sea, June 23, 1925, 51 Stat. 233, T.S. No. 931.

2. Carriage of Goods by Sea Act, 46 U.S.C. § 30701 (2006).

Hague Rules were slightly modified by the so-called Visby Rules.[3] Many nations adopted these Rules, which came into force in 1977. In pursuit of further change, the United Nations in 1978 adopted the Hamburg Rules which introduced major changes into the law governing the international shipment of goods by sea.[4] The changes called for by the Hamburg Rules were controversial and not widely adopted. The exact details of all of the changes found in the Visby Amendment and the Hamburg Rules are not the subject of this paper as neither of those regimes were adopted by the United States, which has continued to rely on the COGSA since 1936.[5] Needless to say, what started as a uniform approach to the international shipment of goods by sea has changed into a non-uniform approach in several significant areas, as trading countries have each sailed their own route in deciding which rules they are going to follow. This is apparent by the division of the world into Hague states (53), Hague-Visby states (54), Hamburg states (36), and states without any known cargo liability laws (7).[6] As time passed, the lack of uniformity proved profound, cumbersome and increasingly difficult to justify, especially as trade between countries of the world increased exponentially.[7]

Since the adoption of the Hague Rules, there have been substantial changes in the types of vessels, the handling of cargo, the technology, and the procedures involved in the transportation of cargo by sea. For the tradition-based admiralty and maritime law, the changes rapidly outpaced the ability of the laws to keep up, and be applied in a realistically meaningful way. In the United States, the courts stepped in and tried to interpret and stretch the COGSA to the new world which was developing as a result of all of the rapid change. However, while the courts acted with the best of intentions, the difficulties in trying to interpret and apply a law crafted during the first decades of the twentieth century with conditions that existed at the end of the twentieth century resulted in numerous conflicts. It became painfully obvious that a new legal regime needed to be developed; one with a keen eye towards modern business practice.

The task of modernizing and harmonizing the law regarding the international transport of goods was taken up by the United Nations Com-

3. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1412 U.N.T.S. 128.

4. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), March 31, 1978, U.N. Doc. A/CN.9/306.

5. For a good discussion of these rules, see THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW (2d ed. West 1994).

6. *See* International Conventions, Informare, http://www.informare.it/dbase/convuk.htm (Last visited April 20, 2009).

7. In 1996, the Maritime Law Association of the United States proposed amendments to the COGSA, which stalled in Congress as it became apparent that the United Nations was prepared to address the issue.

mission on International Trade Law ("UNCITRAL"). In October 2003, UNCITRAL proposed a draft of a new convention, which provided for substantial changes to the Hague/Visby/COGSA regime in a number of very important respects.[8] The United States through both the Department of State and the Maritime Law Association were active participants in the UNCITRAL process.[9] On December 11, 2008, the United Nations General Assembly adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea as developed by UNCITRAL.[10] On September 23, 2009, sixteen nations signed

8. *See* U.N. Comm'n on Int'l Trade Law, Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [wholly or partly] [by sea], A/CN.9/WG.III/WP.36 (May 3-14, 2004), *available at* http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0452117.

9. *See* Origin and Member Composition of UNCITRAL, http://uncitral.org/uncitral/en/about/origin.html (last visited Apr. 20, 2009).

10. The United Nations issued the following press release regarding the Convention:

> The United Nations General Assembly adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea on 11 December 2008. The General Assembly authorized the opening for signature of the Convention at a signing ceremony to be held on 23 September 2009 in Rotterdam, the Netherlands, and recommended that the rules embodied in the Convention be known as "The Rotterdam Rules."
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> The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea aims to create a contemporary and uniform law providing for modern door-to-door container transport including an international sea leg, but not limited to port-to-port carriage of goods. There are many innovative features contained in the Convention, including provisions allowing for electronic transport records, and other features to fill the perceived gaps in existing transport regimes. Extensive negotiation by the Member States and observers of the United Nations Commission on International Trade Law (UNCITRAL) has resulted in overwhelming support for a significant increase to the limits on carrier liability for cargo loss or damage that apply in most countries. This is expected to be of substantial benefit for shippers, particularly those in developing and least-developed countries, which are consumers of transportation services. It is expected that harmonization and modernization of the legal regime in this area, which in many countries dates back to the 1920s or earlier, will lead to an overall reduction in transaction costs, increased predictability when problems are encountered, and greater commercial confidence when doing business internationally.
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> Since 2002, the Working Group on Transport Law of UNCITRAL worked in close cooperation with interested international inter-governmental and non-governmental organizations to prepare a legislative text on issues relating to the international carriage of goods. The draft Convention was prepared over thirteen sessions of the Working Group from April 2002 to January 2008, and was approved by UNCITRAL in New York on 3 July 2008, following which it was sent to the General Assembly for adoption at its current 63rd session.

See General Assembly Adopts Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, United Nations Information Service, Dec. 12, 2008, http://www.unis.unvienna.org/unis/pressrels/2008/unisl125.html ("The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. Its mandate is to remove legal obstacles to international trade by progressively modernizing and harmonizing trade law. It prepares legal texts in a number of key areas such as international commercial dispute settlement, electronic commerce, insolvency, international payments, sale of goods, transport law, procurement and infrastructure development. UNCITRAL also provides technical assistance to law reform activities, including assisting Mem-

the Convention at a ceremony in Rotterdam, the Netherlands.[11] The rules embedded in the Convention will be thereafter known as the "Rotterdam Rules." Ratification by twenty nations will place the Convention into force.[12] Given the history of the development of this new Convention; the active participation by the United States; and the wide variety of special interests and organizations involved, commentators are cautiously optimistic that the Convention will enter into force as provided in Chapter 18 of the Convention.

Writing about a Convention, which has not yet been ratified, can be an exercise in futility. However, the forces necessary to lead to ratification and adoption of the new Convention appear to be aligning in the direction of ratification. This means that all those who spend their working lives involved in transportation issues (including lawyers) need to be aware of the changes which might be coming so that they can determine what impact such changes may have for them in the future. While the Convention limits its application to the international carriage of goods wholly or partly by sea, there will be implications for all those parties that interface with such carriage. Therefore, the implications of the new Convention may be more significant than its modest title would suggest. This author suggests that knowledge of the Rotterdam Rules at this stage of its early life would seem beneficial to the readers of this journal. Therefore, with cautious optimism this author dips his writing oars into the waters, and navigates with only the splendor of the ratification star as his guide.

II. A Very Brief Overview of the COGSA

Having been in existence for over 70 years, the COGSA is both a familiar and comprehensively litigated (sometimes *ad nauseum*) statute with volumes of case law dealing with every aspect of its provisions. It is neither the purpose nor the intent of this paper to exhaustively review each and every such issue. However, it would be useful to engage in a short review of the salient provisions of the COGSA as an introduction to the Rotterdam Rules, and a more extended discussion of the salient provisions of that Convention and how they compare with equivalent provisions of the COGSA.

Generally speaking, the COGSA may be described as setting up a

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ber States to review and assess their law reform needs and to draft the legislation required to implement UNCITRAL texts. The UNCITRAL Secretariat is located in Vienna, Austria.").

11. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, art. 88(1), U.N. Doc. A/RES/63/122 (Feb. 2, 2009) [hereinafter Rotterdam Rules] ((signatories: The Congo, Nigeria, Gabon, Senegal, Ghana, Togo, Guinea, The United States of America, Denmark, France, Greece, The Netherlands, Poland, Spain, Norway and Switzerland).

12. *Id.*

liability regime very similar to the law of bailment, but different in key aspects. An ocean carrier (defined as "the owner or the charterer who enters into a contract of carriage with a shipper")[13] has responsibilities and liabilities, rights and immunities, as well as an available limitation of liability for negligence. The statute is relatively short (16 sections) as compared to the Rotterdam Rules (96 articles divided into 18 chapters). The statute applies to every bill of lading or similar document of title related to a carriage of goods by sea to or from ports of the United States in foreign trade. Thus, the COGSA does not apply to purely domestic water born carriage of goods, which is the subject of the Harter Act.[14] The COGSA only defines the terms "carrier," "contract of carriage," "goods," "ship," and "carriage of goods."[15] The COGSA makes it clear that all contracts for the carriage of goods by sea are subject to the responsibilities and liabilities, and entitled to the rights and immunities provided in the statute.[16] The responsibilities and liabilities of the carrier and ship include the responsibilities and concomitant liabilities to make the ship seaworthy: to properly man, equip, and supply the ship; to make the holds, refrigerating and cooling chambers, and other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation; to properly and carefully load, handle, stow, carry and discharge the cargo; and to issue a bill of lading, providing specific information including the number of packages or pieces, or the quantity or weight of the cargo and the apparent order and condition of the goods.[17] The bill of lading is considered *prima facie* evidence of the receipt by the carrier of the goods as described in the bill of lading.[18] Most importantly for loss and damage claims, the receiver of the cargo must note any loss or damage on the bill of lading upon delivery, or, if the loss and damage is not apparent, within three days of the delivery.[19] The date of the delivery is important because suit for a loss or damage to goods must be brought within one year after delivery of the goods, or the date when the goods should have been delivered.[20] Any clause in a bill of lading relieving the carrier or the ship from liability for loss or damage contrary to the liabilities provided for under the statute are void and of no effect.[21]

13. 46 U.S.C. § 30701 1(a).

14. *Id.* § 30701. ("Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.").

15. *Id.* § 30701 (1).

16. *Id.* § 30701 (2).

17. *Id.* § 30701 (3).

18. *Id.* § 30701 (3)(4).

19. *Id.* § 30701 (3)(6).

20. *Id.*

21. *Id.* § 30701 (3)(8).

Under the COGSA, a carrier is not liable for any loss or damage caused by the unseaworthiness of the vessel unless that unseaworthiness is the result of the owner's want of due diligence to make sure that the ship is properly manned, equipped, and supplied.[22] The carrier and the ship are also not responsible for loss or damage due to so-called "uncontrollable causes of loss" including fires; so-called perils of the sea; acts of God; acts of war; acts of public enemies; arrests or restraints of princes, rulers, or people; services under legal process; quarantine restrictions; acts or omissions of the shipper; labor-related issues, riots and civil commotions; life-saving attempts at sea; wastage in the cargo due to the nature of the cargo; insufficiency of packing; insufficiency or inadequacy of marks; latent defects not discoverable by due diligence; or any other cause arising without the actual fault or privity of the carrier.[23] With regard to the last requirement, the carrier has the burden of proof to show that neither the fault nor neglect of its agents or servants contributed to the loss or damage.[24] Unlike other common carriers, an ocean carrier has no vicarious liability for the negligence of the master, mariner, pilot, or servants in the navigation or management of the vessel.

Similarly, the shipper is not responsible for loss or damage sustained by the carrier or the ship that is without its act, fault, or neglect.[25] Most importantly, the carrier's liability shall not exceed $500 per package, or in the case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in currency, unless the nature and value of the goods have been declared before the shipment and inserted in the bill of lading.[26] The term "package" is not defined and probably has been the most litigated aspect of the statute especially since the development of containerization, and one of the reasons for the impetus to update the legal regime for the international transportation of goods by water.[27]

Finally, and of most importance to other modes of domestic transportation which have come to interface directly with the ocean mode as a result of the development of intermodalism, the COGSA does not preclude extending its terms by contract for the period of time prior to loading or after discharge.[28] Thus, the genesis of the so-called Himalaya Clause[29] and the application of the COGSA limitation to the transporta-

22. *Id.* § 30701 (4)(1).
23. *Id.* § 30701 (4)(2).
24. *Id.*
25. *Id.* § 30701 (4)(3).
26. *Id.* § 30701 (4)(5).
27. The general rule is that a "package" is the largest individual unit of packaged cargo made up, by or for the shipper, which is delivered to the carrier. *See* Omark Indus., Inc. v. Assoc. Container Transp. (Australia), Ltd., 420 F. Supp. 139, 142 (D. Or. 1976).
28. 46 U.S.C. § 30701 (7).
29. Adler v. Dickson, [1955] 1 Q.B. 158, 159 (C.A.).

tion of cargos on the domestic leg of a through shipment.[30]

The COGSA, was in its way and in its time, designed to balance the respective liabilities, responsibilities, and limitations of a carrier and a shipper. It recognized both the concept of bailment in the context of common carriage, while at the same time acknowledging the particular challenges faced by an ocean carrier transporting cargo in the often difficult and hostile environment of the seas. It was not the most comprehensively written statute, nor was it all inclusive, requiring constant review and interpretation by numerous courts from its beginning until today. Thus, while the statute did purport to honor the uniformity sought by the Hague Convention, over time that uniformity was strained and sometimes non-existent as the COGSA was applied in the real world. These problems were exacerbated by the change in the business of shipping and its technology. From that experience was born the Rotterdam Rules.

III. The Rotterdam Rules: Analysis and Comparison with the COGSA

The Rotterdam Rules reflect both the legacy of the Hague/Visby/Hamburg Rules, incorporating some of the core concepts found in those rules while also adding many other provisions such as intermodalism, electronic document communication, and other developments in the international transportation of cargo by sea. Consequently, the scope of the Rotterdam Rules is much greater than the scope of the prior conventions, which is reflected in a much lengthier set of rules—divided between 96 articles and 18 chapters The preamble to the Convention acknowledges the contribution of the previous conventions to the uniformity of the law governing the carriage of goods by sea, and reaffirms the value of a harmonized and unified set of rules governing international trade in the promotion of "universal economic cooperation among all States on a basis of equality, equity and common interests."[31] Noting that, at the present time, shippers and carriers do not have the benefit of a binding universal regime, the Convention provides for a set of rules, which—if ratified—will serve that purpose. The time honored quest for uniformity lives on![32]

The following is a chapter-by-chapter summary and analysis (not ex-

30. *See* Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004).

31. Rotterdam Rules, *supra* note 11.

32. *Id.* ("*Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally.").

haustive) of the salient provisions of the Rotterdam Rules with comparisons, as appropriate, to the COGSA.

A. Chapter 1 – General Provisions

The Rotterdam Rules ("the Rules") reflect both an adherence to some of the legal principles of its predecessors as well as radical change. The first major difference between the Rules and the COGSA can be found in this first chapter, which defines 30 terms used in the Convention—as compared to the five terms defined in the COGSA.[33] In addition to the increase in defined terms, two of the common terms, "carrier" and "contract of carriage," have been altered. In the COGSA, "carrier" is defined as following: "[t]he term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper."[34] In the Rules, "'Carrier' means a person that enters into a contract of carriage with a shipper."[35] Thusly, the Rotterdam Rules simplify the definition of a carrier. To include, as the COGSA does, an owner or charterer within the definition is redundant. By defining "carrier" as a person who "enters into a contract of carriage with a shipper," the drafters have crafted a straightforward and inclusive provision.

Under the COGSA, the term "contract of carriage" is defined as:

> [A]pplies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.[36]

This most cumbersome and somewhat convoluted definition has been replaced in the Rotterdam Rules with the following:

> "Contract of carriage" means a contract in which a carrier, against a payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by

33. COGSA defines "carrier," "contract of carriage," "goals," "ship," "carriage of goods"; the Rotterdam Rules defines those terms (except "carriage of goods") and "volume contract," "liner transportation," "non-liner transportation," "performing party," "maritime performing party," "shipper," "documentary shipper," "holder," "consignee," "right of control," "controlling party," "transport document," "negotiable transport document," "Non-negotiable transport document," "electronic communication," "electronic transport record," "negotiable electronic transport record," "non-negotiable electronic transport record," "issuance," "transfer," "contract particulars," "container," "vehicle," "freight," "domicile," and "competent court." *Compare* 46 U.S.C. § 30701 (1), *with* Rotterdam Rules, *supra* note 11, art. 1.

34. 46 U.S.C. § 30701 (1)(a).

35. Rotterdam Rules, *supra* note 11, art. 1(5).

36. 46 U.S.C. § 30701 (1)(b).

other modes of transport in addition to the sea carriage.[37]

There are two noteworthy aspects of this definition. First, in addition to a more straight forward definition of the term, the Rotterdam Rules also implicitly acknowledge the Himalaya Clause concept and intermodalism, by providing that a contract of carriage for carriage by sea may also include carriage by other modes of transportation. Second, the new definition does not mention the phrase "bill of lading" as is found in the COGSA definition. Indeed, "bill of lading" is not referenced at all in the Rotterdam Rules. The Rules substitute the concept of a "transport document" (and its variations "negotiable transport document" and "non-negotiable transport document"), as well as the concept of the "electronic transport record," in place of the bill of lading.[38] Jettisoning the bill of lading phrase—common to all modes of transportation—may be the most radical departure from the previous conventions. However, the new terminology reflects the modern day realities of ocean transportation, and is more consistent with the overall structure of the Rotterdam Rules.

Some of the other newly defined terms in the Rotterdam Rules merit further comment at this juncture. The definition of "volume contract"[39] is an acknowledgment of the use of shipping contracts pursuant to U.S. law, which are separately negotiated documents between shippers and carriers.

The definitions of "liner transportation" and "non-liner transportation"[40] draw the distinction between ships that operate on regular schedules, and those that do not.

The concept of a "performing party" is introduced into the lexicon of the Rotterdam Rules essentially to denote a designee of a carrier who performs "any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods;" but does not include any person retained or under the control of the shipper or a consignee.[41]

A "maritime performing party"[42] is a performing party who undertakes the carrier's obligation essentially at the ports of loading and discharge of a ship. An inland carrier may be a maritime performing party if it performs its services exclusively within a port area.[43]

The definition of a "documentary shipper" is an acknowledgment of

37. Rotterdam Rules, *supra* note 11, art. 1(1).
38. *Id.* art. 1(14)-(16), (18).
39. *Id.* art. 1(2).
40. *Id.* art. 1(3), (4).
41. *Id.* art. 1(6).
42. *Id.* art. 1(7).
43. *Id.*

the current usage of documents to reflect the transportation of goods.[44]

The terms "transport document," "negotiable transport document," and "non-negotiable transport document" mentioned above have been substituted for the concept of a bill of lading with clear meanings within the context of the Rotterdam Rules.[45]

The addition of the terms "electronic communication," "electronic transport record," and "negotiable electronic transport record" are a nod to the use of electronic communications in the handling and negotiation of written contracts of carriage.[46] It is clear from the definitions that the drafters of the Convention acknowledge the common usage of such wording in international trade, and the legal effect given to that terminology.

The definition of the word "container" is obviously inclusive of any conveyance, which is used to consolidate and transport goods intending to include not only those conveyances currently in use, but any which may be developed in the future.[47]

While it may seem somewhat redundant to define some of the terms contained in the definitional section of the Rotterdam Rules, a reading of the entire Convention reveals the value of doing so, as the definitions portend what the Rules hope to accomplish and avoid.

The concept of uniformity is again brought to the fore in this chapter by Article 2, which emphasizes the "international character" of the Convention, and "the need to promote uniformity in its application" for the benefit and "good faith in international trade."[48] Finally, in yet another nod to the holy doctrine of uniformity and—most importantly—for practitioners of admiralty and maritime law in the United States, Article 4 of Chapter 1 provides for the supremacy of the terms of the Rotterdam Rules over common law contract and tort claims in any judicial or arbitral proceeding, so long as the loss or damage relates to goods covered by a contract of carriage as defined under the Convention.[49] The terms of the Convention, including defenses and limits of liability, apply to the carrier, a maritime performing party, the master, crew, and any other person that performs services onboard the ship, including employees of the carrier or maritime performing party. A similar protection is provided to a shipper, documentary shipper, and their subcontractors, agents, or employees.[50] This provision is of particular importance in the U.S. federal system subject to the "Savings to Suitors" clause.

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44. *Id.* art. 1(9).
45. *See supra* text accompanying note 38.
46. Rotterdam Rules, *supra* note 11, art. 1(17)-(19).
47. *Id.* art. 1(26).
48. *Id.* art. 2.
49. *Id.* art. 4.
50. *Id.* art. 4(1).

B. Chapter 2 – Scope of Application

As seen above, the COGSA has been somewhat limited in its scope to the carriage of goods by sea to and from ports of the United States in foreign trade—with the caveat that there has been no prohibition against a carrier or shipper agreeing to extend the COGSA to the custody, care, and handling of the goods prior to loading or subsequent to discharge from the ship. The Rotterdam Rules go considerably further as they apply to not only inward and outward carriage, but also to carriage to and from inland points in contracting states, regardless of whether either port is in a contracting state.[51] The Rotterdam Rules apply universally without regard to the nationality of the carrier, performing parties, the shipper, the consignee, or other parties.[52]

While the Rotterdam Rules apply to contracts of carriage as defined, the Rotterdam Rules do not apply to certain contracts in liner transportation, and certain contracts of carriage in non-liner transportation even though such contracts could otherwise fall within the definition of contracts of carriage. Included within the exclusion for contracts in liner transportation are charter parties and other contracts for use of the ship or any of the space therein (such as slot charters).[53] The Convention does not apply to contracts of carriage in non-liner transportation (such as a voyage charter) except where there was no charter party, or other contract between the parties and a transport document or an electronic transport record is issued.[54] While excluding certain contracts, the Rotterdam Rules would still apply between the carrier and a consignee, a controlling party, or another bill of lading holder that is not an original party to the charter party, or another contract of carriage as excluded by the Rotterdam Rules.[55]

The COGSA is also not applicable to charter parties.[56] However, if a bill of lading is issued when a ship is being operated pursuant to a charter party, then the charter party shall conform to the terms of the COGSA.[57]

C. Chapter 3 – Electronic Transport Records

This chapter represents an acknowledgment of the advances made in the communication of transportation documents by electronic means,

51. *Id.* art. 5.
52. *Id.* art. 5(2).
53. *Id.* art. 6. "Liner Transportation" is defined in article 1(3) and "Non-Liner Transportation" is defined in article 1(4).
54. *Id.* art. 6(2).
55. *Id.* art. 7.
56. 46 U.S.C. § 30701 (5).
57. *Id.*

which is now commonly accepted in the maritime commercial world. This is not a subject covered under the COGSA. Chapter 3 authorizes the use of electronic records, and a method by which paper negotiable transport documents may be replaced by negotiable electronic transport records.[58] The Rules are designed to affirm the validity and integrity of the electronic transport record and the equivalence of the two records, so long as the shipper and carrier both consent.[59] The specific procedures for the use of such records are left to the parties, subject only to their reference in the "contract particulars" which shall be "readily ascertainable."[60]

D. Chapter 4 – Obligations of the Carrier

The obligations of the carrier (or performing party) found in the Rotterdam Rules generally comport with the same obligations found in the COGSA, but with more clarity and specificity. Chapter 4 begins with a general statement that the carrier has an obligation to carry the goods to the place of destination, and deliver them to the consignee in accordance with the terms of the contract of carriage and subject to the Convention.[61] This explication of the general duty of the carrier is then followed by a delineation of the period of time during which the carrier is responsible for the goods, which can be the subject of agreement between the contracting parties subject to certain limitations, but essentially begins with the receipt of the goods for carriage, and extends to when the goods are delivered.[62]

Such specificity was lacking in the COGSA. During its period of responsibility, the carrier must "properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods," which actions may be, subject to written agreement, "performed by the shipper, the documentary shipper or the consignee."[63] The COGSA also obliges the carrier to do the same.[64] Like the COGSA, the Rotterdam Rules obligate a carrier to certain conduct during the period of its responsibility. Specifically, the carrier must "properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods" (but, a shipper and carrier may contract for the shipper to perform any or all of those duties).[65] "Before, at the beginning of, and during the voyage by

58. Rotterdam Rules, *supra* note 11, art. 8-9.
59. *See id.* art. 8(a).
60. *Id.* art. 9(2).
61. *Id.* art. 11.
62. *Id.* art. 12.
63. *Id.* art. 13.
64. *Id.*
65. *Id.*

sea," a carrier must exercise due diligence to:

(a) Make and keep the ship seaworthy;
(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and
(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.[66]

The Rotterdam Rules are more explicit than the COGSA in the right of the carrier to deal with goods that may become a danger to the vessel, or to sacrifice the goods at sea when such a sacrifice is necessary to preserve human life, the vessel or the vessel's other cargo.[67]

E. Chapter 5 – Liability of the Carrier for Loss, Damage or Delay

This chapter will look somewhat familiar in part to anyone used to referencing the COGSA, or to anyone comparing the two sets of rules side by side. However, the structure of the two rules differs in important ways.

The enumeration of the liabilities of the carrier in the COGSA are found in Section 4 of that Act titled "Rights and Immunities of Carrier and Ship."[68] The first part of that section deals with "unseaworthiness," and provides that neither the carrier nor the ship will be liable for loss or damage resulting from unseaworthiness, unless caused by want of due diligence to make the vessel seaworthy, and "to secure that the ship is properly manned, equipped and supplied."[69] The carrier has the obligation of proving that it exercised due diligence once unseaworthiness has been established.[70]

Section 4(2), titled "Uncontrollable causes of Loss," states that neither the carrier nor the vessel shall be responsible for loss or damage

66. *Id.* art. 14. "The test of seaworthiness is whether the vessel is reasonably fit to carry the goods which she has undertaken to transport." The Silvia, 171 U.S. 462, 464 (1898). "As unseaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it has held out as fit to carry, or it is not seaworthy in that respect." Martin v. Steamship Southwark, 191 U.S. 1, 9 (1903). "The Amended Jason clause has been interpreted in conjunction with the Carriage of Goods by Sea Act to permit a carrier to recover in general average, even if the vessel was unseaworthy, provided the carrier exercised due diligence to make the vessel seaworthy at the commencement of the voyage." Todd Shipyards Corp. v. United States, 391 F. Supp. 588, 591 (S.D.N.Y. 1975).

67. *Compare* Rotterdam Rules, *supra* note 11, art. 15-16, *with* 46 U.S.C. § 30701 (4)(6).

68. 46 U.S.C. § 30701 (4).

69. *Id.* § 30701 (4)(1).

70. *Id.*

arising or resulting from a list of enumerated causes very similar to what is found in the Rotterdam Rules.[71] Perhaps most notable of the enumerated causes of loss are causes related to the "act, neglect or default of the master, mariner, pilot or the servants of the carrier and the navigation or in the management of the ship" (the so-called errors in navigation and management defense),[72] and the catch all clause which states:

> [a]ny other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault of privity of the carrier nor the fault or neglect of the agents or servants of the carrier, contributed to the loss or damage.[73]

Implied within both Section 3 and Section 4 of the COGSA is a shifting burden of proof.

The Rotterdam Rules provide a more explicit shifting burden of proof with regard to liability, as compared to the burden of proof developed by the courts from the COGSA.[74] The Rules declare that a carrier is liable for loss or damage if the claimant proves that said loss or damage took place during the period of the carrier's responsibility.[75] However, a carrier will not be liable if it can prove that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault, or the fault of any person identified as such in the Rules.[76] Alternatively, the carrier can be relieved of all or part of its liability if it proves that the loss, damage, or delay was the result of one of the enumerated events or circum-

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71. *Compare Id.* § 30701 (4)(1), *with* Rotterdam Rules, *supra* note 11, art. 17(3).

72. 46 U.S.C. § 30701 (4)(2)(a).

73. *Id.* § 30701 (4)(2)(q).

74. As one court has noted, "the burden of proof under COGSA shifts more frequently than the wind on a stormy sea." Banana Services, Inc. v. M/V Fleetwave, 911 F.2d 519, 521 (11th Cir. 1990). The Ninth Circuit has described COGSA's burden shifting procedures as follows:

> 1. The plaintiff cargo interests have the burden of proving a 'prima facie against the carrier by showing that the cargo was delivered in good condition to the carrier, but was discharged in a damaged condition.'
> 2. 'The burden of proof then shifts to the vessel owner to establish that the loss came under a statutory exception to COGSA.'
> 3. 'The burden then returns to the shipper to show, at a minimum, concurrent causes of loss in the fault and negligence of the carrier, unless it is the type of negligence excluded under COGSA.'
> 4. 'The carrier then has the burden of allocating the loss between (1) the loss caused by his fault and negligence and (2) the loss covered under the exceptions . . . . The burden of proof, however, alters when a carrier seeks exoneration under [§ 1304 (2) exception whereby] the carrier acquires the additional burden of showing freedom from negligence.'

Complaint of Damodar Bulk Carriers, Ltd., 903 F.2d 675, 683 (9th Cir. 1990) (citations omitted); *see also* Sunkist Growers, Inc. v. Adelaide Shipping Lanes, 603 F.2d 1327, 1341(9th Cir. 1979).

75. Rotterdam Rules, *supra* note 11, art. 17(1).

76. *Id.* art. 17(2).

stances.[77] The Rotterdam Rules then shift the burden of proof again by noting that—notwithstanding the enumerated events or circumstances which would excuse the carrier of liability—the carrier will be liable if the claimant can prove that the fault of the carrier contributed to that event or circumstance on which the carrier relies; or if the claimant proves that an event or circumstance not listed contributed to the loss, damage, or delay; and the carrier cannot prove that this event or circumstance is not attributable to its fault or the fault of other persons referenced in the Rules.[78] The carrier is also liable if the loss, damage, or delay was probably caused by or contributed to by the unseaworthiness of the ship, the improper crewing, equipping and supplying of the ship, or the fact that the holds or other parts of the ship in which the goods are carried or any container supplied by the carrier in or upon which the goods are carried were not fit and safe for reception, carriage and preservation of the goods; and the carrier is unable to prove that none of those events or circumstances caused the loss, damage, or delay; or that it exercised due diligence in accordance with Article 14 of the Rotterdam Rules.[79] If at the end of the entire analysis, the carrier is relieved of part of its liability, it is only relieved "for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article."[80] The carrier also has vicarious liability.[81]

A maritime performing party is also subject to the obligations and liabilities of the Rotterdam Rules, and is entitled to the same defenses and limits of liability as are available to the carrier if it meets certain conditions.[82] A maritime performing party is not liable for greater limits of liability agreed to by the carrier unless it agrees to accept such obligations.[83] A maritime performing party does have vicarious liability.[84]

The Rotterdam Rules provide for joint and several liability among the carrier and any maritime performing parties, but said liability is limited to the amounts provided in the Rules.[85]

Another important provision relates to the notice that is required in the event of loss, damage, or delay. The notice provision of the Rotterdam Rules is not substantially different than what currently applies under the COGSA. There is a presumption of good delivery by the carrier,

77. *Id.* art. 17(3). The Rules depart from the COGSA with provision (n) which eliminates liability when the carrier avoids or attempts to avoid environmental damage. *Id.* art. 17(3)(n).
78. *Id.* art. 17(4).
79. *Id.* art. 17(5).
80. *Id.* art. 17(6).
81. *Id.* art. 18.
82. *Id.* art. 19(1).
83. *Id.* art. 19(2).
84. *Id.* art. 19(4).
85. *Id.* art. 20.

unless notice of loss of or damage to the goods is provided to the carrier before or at the time of delivery or, if not apparent, within seven working days after delivery (three days under COGSA).[86] In the case of delay, the time period is twenty-one days (COGSA lacks this provision).[87] The failure to provide notice does not affect the right to claim compensation for loss or damage, nor does it change the allocation of the burden of proof set out in Article 17.[88] The obligations to participate in a joint survey of lost or damaged goods and provide information—a practice common to the maritime industry (also found in the COGSA)—are affirmed.[89]

Whether the shifting burden of proof provides too much complexity in the actual application of the liability rules, or whether the previous approach developed by the courts will be a sufficient template upon which to handle the issue, will be determined as cases are brought before the courts. The prosecution of a claim and the defense against a claim may not prove as cumbersome as the Rules might suggest.

"Delay" is an important concept addressed in the Rules, but not expressly covered by COGSA with few cases on the subject. Articles 17, 19, 20 and 23 of Chapter 5, refer to "loss, damage or delay," but, interestingly, the damage calculation provisions of Article 22 refer only to "loss of or damage."[90] Delay is defined in Article 21 in relation to an agreement among the parties for a time of delivery, suggesting that there can be no delay claim absent an agreed delivery time.[91] Article 60 sets out or applies damages for delay, referencing back to Article 22.[92] There is also an express limit on damages "for economic loss due to delay," which is "two and one-half times the freight" on the goods delayed.[93]

F. Chapter 6 – Additional Provisions Relating to Particular Stages of Carriage

The concept of "deviation" has long been a particularly harsh issue for carriers. Basically, the doctrine of unreasonable deviation provides that where a carrier subjects the cargo to unreasonable and unjustifiable risks not contemplated by the parties who contracted carriage, the carrier forfeits its contractual limitations of liability. This has usually been applied in cases involving geographical deviations or unauthorized on deck

86. *Id.* art. 23(1); 46 U.S.C. § 30701 (3)(6).
87. Rotterdam Rules, *supra* note 11, art. 23(4).
88. *Id.* art. 23(2).
89. *Id.* art. 23(6); 46 U.S.C. § 30701 (3)(6).
90. Rotterdam Rules, *supra* note 11, art. 22.
91. *Id.* art. 21.
92. *Id.* art. 60.
93. *Id.*

stowage.[94] The Rotterdam Rules rely on existing law to determine what constitutes a deviation, but the Rules also make clear that the deviation itself does not deprive a carrier of any defense or limitation available unless reckless, willful, and wanton conduct was involved.[95]

Another contentious issue has to do with the stowage of cargo onboard the decks of vessels, a practice now common with the advent of containerization. The Rotterdam Rules specifically spell out when cargo may be carried on deck, and specifically address the use of containers as well as the "customs, usages or practices of the trade in question."[96]

Finally, the Rotterdam Rules make clear that they do not take precedence over other international conventions, which apply to the loss of or damage to goods during the carrier's period of responsibility, but solely before their loading onto the ship or solely after the discharge from the ship.[97]

G. Chapter 7 – Obligations of the Shipper to the Carrier

The COGSA is primarily carrier-directed when it comes to allocating liability for loss, damage, or delay. The COGSA says virtually nothing about any obligation the shipper may have to the carrier, with the exception of providing accurate information about the shipment itself.[98] In a departure from that approach, the Rotterdam Rules specify clear obligations that the shipper has to the carrier and the consequences of a breach of those obligations. The Rotterdam Rules provide that the shipper is to deliver the goods in such condition that they can withstand the rigors of

94. Bunge Edible Oil Corp. v. M/Vs' Torm Rask & Fort Steele, 949 F.2d 786, 788 (5th Cir. 1992); Sedco, Inc. v. S.S. Strathewe, 800 F.2d 27, 31(2d Cir. 1986). The Seventh Circuit has held that the application of the doctrine of unreasonable deviation does not avoid the application of the package limitation. Atlantic Mut. Ins. Co. v. Poseidon Schiffahrt, 313 F.2d 872, 875 (7th Cir. 1963). However, other circuits have refused to follow the Seventh Circuit. Nemeth v. Gen. S.S. Corp., 694 F.2d 609, 612 (9th Cir. 1982); Spartus Corp. v. S.S. Yafo, 590 F.2d 1310, 1317 (5th Cir. 1979); DuPont de Nemours Int'l v. S.S. Mormacvega, 493 F.2d 97, 103 (2d Cir. 1974). Damage sustained as a result of the deviation makes the carrier an insurer of the goods without statutory exceptions and limitations. *See, e.g.*, Northwestern Nat'l Ins. Co. v. Galin, No. 85 Civ. 1832 (CSH), 1987 WL 25050, at *1 (S.D.N.Y. Nov. 13, 1987); Ataei v. M/V Barber Tonsberg, 639 F. Supp. 993, 1004 (S.D.N.Y. 1986).

95. Rotterdam Rules, *supra* note 11, art. 24. It is not entirely clear what "applicable law" refers to in this article, although it is reasonable to conclude that it is a reference to the existing case law under the COGSA. Even the word "deviation" is left undefined. A deviation is not necessarily improper and it is clear from the case law that only unreasonable deviations would constitute a breach of a carrier's obligations. Therefore, where a carrier subjects the cargo to unreasonable and unjustifiable risks not contemplated by the parties to the contract of carriage, such actions would constitute an unreasonable deviation.

96. *Id.* art. 25(1)(c).

97. *Id.* art. 26.

98. *See* 46 U.S.C. § 30701 (3)(3)(c).

the transport.[99] The shipper must cooperate with the carrier in providing information and instructions with regard to the shipment of the cargo.[100] A shipper must provide all information, instructions, and documents for the handling and transport of the cargo.[101] Dangerous goods requiring special handling shall be disclosed and appropriately marked.[102] In this regard, the Rules do not change the obligation under U.S. law, the Hague-Visby Rules, or the Hamburg Rules.

Most importantly, and absent from the COGSA, the Rotterdam Rules provide that a shipper can be liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage is caused by a breach of the shipper's obligations under the Rules.[103] This liability would include liability for the acts or omissions of anyone that the shipper has entrusted with the performance of its obligations except the carrier or a performing party acting on behalf of the carrier.[104]

One possible consequence of obligating the shipper to the carrier is a shifting of the burden of proof from the carrier to the shipper in relation to damage for goods in shipper-packed containers. Under COGSA, it is the carrier's burden to prove that goods were insufficiently packaged to withstand the normal handling during transportation in order to establish a defense to a cargo damage claim.[105] Under Article 27 of the Rotterdam Rules, a shipper has an affirmative duty to deliver the goods in a condition able to withstand normal handling.[106] With regard to a shipper-packed container, the cargo must be carefully stowed, latched, and secured such as not to cause harm to persons or property.[107] The result of such a provision might be to shift the burden of proof to the shipper to prove that cargo was sufficiently packaged when a claim is made for cargo damage. This provision may also grant a cause of action to a maritime performing party when an improperly packaged container causes injury to persons or other property.

H. Chapter 8 – Transport Documents and Electronic Transport Records

One of the most novel features of the Rotterdam Rules as compared to the COGSA is this chapter dealing with transport documents and the

99. Rotterdam Rules, *supra* note 11, art. 27(1).
100. *Id.* art. 28-30.
101. *Id.* art. 29.
102. *Id.* art. 32.
103. *Id.* art. 30.
104. *Id.* art. 34.
105. 46 U.S.C. §§ 30701 (4)(1), (4)(2)(n).
106. Rotterdam Rules, *supra* note 11, art. 27.
107. *Id.*

electronic transmission of those documents in connection with the international transportation of cargo by sea.[108] There are no similar provisions in the COGSA. Indeed, while the COGSA refers to a bill of lading as the shipping document, there is no mention of a bill of lading in the Rotterdam Rules. In its place, the Rules refer to a "transport document,"[109] "negotiable transport document,"[110] "non-negotiable transport document,"[111] "electronic transport record,"[112] "negotiable electronic transport record,"[113] and "non-negotiable electronic transport record."[114] This is a significant change in the nomenclature of ocean shipping. The Rotterdam Rules, in essence, acknowledge the use of electronic communication in the transmission of transport documents, and make electronic transport documents the equivalent of the paper form.

The Rotterdam Rules recognize three types of paper documents and two types of electronic alternatives. There is a difference drawn between a non-negotiable transport document and a negotiable transport document. For each of those documents there is an electronic equivalent.

In this chapter and throughout the convention, the Rules acknowledge the custom, practice, and usage of the trade with regard to the use of a negotiable document or record.[115] While a shipper is entitled to receive a transport document or a record of his choice, he may agree not to use one or rely on the custom practice and usage of the trade.[116] Electronic transport records are the most interesting. They are treated in the same way as their paper counterparts, but must be used with the consent of the carrier and the shipper.[117] There must be an agreement in place that provides for the procedures associated with the issuance and transfer of the record and other particulars.[118] Those procedures must be referenced in the contract of carriage and be readily available to the parties to the contract. There are no statutory procedural requirements, so this is one area where the courts may have to determine whether the procedures, which are referenced in the contract of carriage, provide a satisfactory substitute for a paper equivalent.

The transport document or the electronic transport record must contain, *inter alia*, the following information (to be provided by the shipper):

108. *Id.* art. 35-42.
109. *Id.* art. 1(14).
110. *Id.* art. 1(15).
111. *Id.* art. 1(16).
112. *Id.* art. 1(18).
113. *Id.* art. 1(19).
114. *Id.* art. 1(20).
115. *Id.* art. 35.
116. *Id.*
117. *Id.* art. 8.
118. *Id.* art. 9.

- the description of the goods;
- "[t]he leading marks necessary for the identification of the goods;"
- "[t]he number of packages or pieces, or the quantity of the goods;"
- the apparent good order and condition of the goods at the time they are received for carriage;
- "[t]he name and address of the carrier;"
- the date of reception or loading of the goods or of the issue of the document of record, a number of originals of any negotiable transport document if more than one original was issued;
- the name and address of the consignee; and
- the name of the ship as specified in the contract and the relevant transport of points (place of receipt, delivery).[119]

Transport documents must be signed by the carrier or, if the record is electronic, an electronic signature is required.[120] Documents issued in accordance with the Rules will provide *prima facie* evidence in favor of the shipper, and, where the document or record is negotiable, conclusive evidence in favor of a third party transfer action in good faith.[121] A consignee of a non-negotiable document has further protections.[122] Where a shipment is transferred "freight prepaid," a carrier will not be able to assert against a holder or consignee of the transport document a claim that the freight has not been paid.[123] The Rules also benefit the carrier as the carrier will be able to qualify contract particulars if it knows that the contract particulars are false or has reasonable grounds for suspicion.[124] This is especially valuable with regard to goods that are delivered to a carrier in a sealed container.[125] The Rules will assist in determining the evidentiary effect of the document when it comes to loss or damage claims.

The detail of the chapter relating to transport documents and electronic transport records is, as mentioned above, a new innovation with regard to the COGSA. The COGSA, insofar as bills of lading are concerned, specifies the contents of the bill.[126] The bill of lading is *prima facie* evidence of the receipt by the carrier of the goods as described in the bill of lading.[127] There is reference to a so-called "shipped" bill of lading in relation to documents of title.[128]

119. *Id.* art. 36.
120. *Id.* art. 38.
121. *Id.* art. 41(a).
122. *Id.* art. 41(c).
123. *Id.* art. 42.
124. *Id.* art. 40.
125. *Id.* art. 40(4).
126. 46 U.S.C. § 30701 (3)(3).
127. *Id.* § 30701 (3)(4).
128. *Id.* § 30701 (3)(7).

I. Chapter 9 – Delivery of the Goods

The Rotterdam Rules obligate a consignee to accept delivery of the goods at the time and location agreed in the contract of carriage; or if there is no such agreement, at a time and location where delivery could reasonably be expected with regards to the terms of the contract and the customs, usages, and practices of the trade, and the circumstances of the carriage.[129] The consignee must acknowledge receipt of the goods from the carrier, and the carrier may refuse delivery if the consignee refuses to acknowledge that receipt.[130]

The Rules then provide for different treatment if a delivery occurs when there has not been any negotiable transport document or the negotiable electronic transport record is issued;[131] when delivery is made pursuant to a non-negotiable transport document that requires surrender;[132] and delivery when a negotiable transport document or negotiable electronic transport record is issued.[133] The procedures to be followed and the rights and obligations of the carrier delivering the goods and the consignee accepting delivery vary depending on the nature of the delivery. The Rules are very specific for each type of delivery, presumably, so that the respective parties have a clear understanding of how delivery should be effectuated and what needs to be done if problems arise.

The Rules also recognize that not all goods end up "delivered" as provided in the Rules. "Goods remaining undelivered" (as that phrase is delineated by the Rules) may be subject to certain so-called self help remedies.[134] Here:

> the carrier may, at the risk of expense of the person entitled to the goods, take such action in respect to the goods as circumstances may reasonably require, including:
>
> (a) To store the goods at any suitable place;
>
> (b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect to the goods, including by moving them; and
>
> (c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.[135]

Before such actions are taken, the carrier must give reasonable notice to the person stated in the contract and, if known to the carrier, the

129. Rotterdam Rules, *supra* note 11, art. 43.
130. *Id.* art. 44.
131. *Id.* art. 45.
132. *Id.* art. 46.
133. *Id.* art. 47.
134. *Id.* art. 48.
135. *Id.* art. 48(2).

consignee, the controlling party, or the shipper.[136] The proceeds for the sale of such goods are to be delivered to the person entitled to the goods subject to costs incurred by the carrier, including costs in connection with carriage of the goods.[137]

Finally, and perhaps most importantly, the carrier will not be liable for the loss of or damage to the goods when they remain undelivered, unless the claimant can prove that such loss or damage resulted from the failure by the carrier to act reasonably under the circumstances to preserve the goods, *and* that the carrier knew or ought to have known that the loss or damage to the goods would result from taking reasonable actions.[138] As an alternative to any of those actions, the carrier may retain the goods to secure payment of any sums due.[139]

J. Chapter 10 – Rights of the Controlling Party

This chapter, unknown in content in the COGSA, specifies who is entitled to exercise the right of control over the goods during their transportation. The carrier has control during its period of responsibility as required by the Rules.[140] The Rules deal primarily with the shipper and the right of control in relation to cargos transported in accordance with non-negotiable transport documents, negotiable transport documents, or negotiable electronic transport records.[141] A carrier is bound to execute instructions issued by the person who has the right of control; with the right of the carrier to indemnity from the shipper for loss or damage related to the carrier's executing any instructions received pursuant to the Rules.[142] Conversely, the failure to comply with the instructions will subject the carrier to liability for loss of or damage to the goods, or for delay in delivery subject to the liability limitations in the Rules.[143]

K. Chapter 11 – Transfer of Rights

This chapter continues with issues related to the use of negotiable

136. *Id.* art. 48(3).
137. *Id.* art. 48(4).
138. *Id.* art. 48(5).
139. *Id.* art. 49.
140. *Id.* art 50(1). While the right of control is not provided in the COGSA, the right of control has been largely governed by the 1916 Pomerene Act, sometimes called "The United States Bill of Lading Act." 49 U.S.C. §§ 80101-80116 (1994). The Pomerene Act does not of its own terms apply to shipments from a foreign country to the United States, but, courts have applied a "General Maritime Law" based upon the Pomerene Act and Article 7 of the U.C.C. David Crystal, Inc. v. Cunard S.S. Co., 223 F. Supp. 273, 284-86 (S.D.N.Y. 1963), *aff'd*, 339 F.2d 295 (2d Cir. 1964).
141. *See* Rotterdam Rules, *supra* note 11, art. 51.
142. *Id.* art. 52.
143. *Id.*

transport documents and the right of the holder to transfer the rights incorporated in such documents to another person.[144] This largely procedural chapter defines the rights and liabilities of a holder.[145]

L. Chapter 12 – Limits of Liability

Perhaps the most litigated issue found in cases interpreting the COGSA has been the limit of liability. Under the COGSA, the liability for loss or damage in connection with the transportation of goods is $500 per package or for goods not shipped in packages, $500 per customary freight unit; unless the nature and value of the goods has been declared by the shipper before shipment and inserted in the bill of lading, and the shipper and carrier are permitted to contract for greater liability.[146] Most of the litigation involving the COGSA package limitation has had to do with determinations regarding what constitutes a "package" for the purposes of applying the limitation. The COGSA did not define "package," and, thus, it has been left to the courts to define the intent of the statute as to whether a specific cargo constituted a single package or multiple packages.[147] The cases attempting to apply the $500 limitation to the "customary freight unit," another term left undefined in the COGSA, have also struggled with determining the intent of the parties to the shipment and applying the limitation. Generally speaking, a "customary freight unit" is the actual freight unit used by the parties to calculate freight for the shipment at issue.[148]

For the carrier to be entitled to invoke the $500 per package or customary freight unit limitation, the Supreme Court has required a reciprocal benefit of a choice of freight rate tied to the release valuation of

144. *See id.* art. 57-58.

145. *Id.* art. 58.

146. 46 U.S.C. § 30701 (4)(5).

147. Cases interpreting the word "package" are too numerous to cite in total here. *See, e.g.*, Mitsui & Co. v. Am. Exp. Lines, Inc., 636 F.2d 807 (2d Cir. 1981) (bundles as packages); Trane Disc Inc. v. M/V Barber Nara, 1984 A.M.C. 1984 (D. Md. 1983); *see also* Hartford Fire Ins. Co. v. Pac. Far East Line, Inc., 491 F.2d 960 (9th Cir. 1974). *But see,* Tokio Marine & Fire Ins. Co. v. Nippon Express, U.S.A. (Ill.), Inc., 155 F. Supp. 2d 1167 (C.D. Cal. 2000) (discussing goods on pallets as packages); Allied Int'l Am. Eagle Trading Corp. v. S.S. Yang Ming, 672 F.2d 1055 (2d Cir. 1982) (discussing goods on pallets as packages); Royal Ins. Co. v. Sea-land Serv., Inc., 50 F.3d 723 (9th Cir. 1993) (yachts on cradles as packages). Generally speaking, the rule has evolved that the court will attempt to determine the intent of the parties from the bill of lading especially where the number of packages is stated in the bill of lading even for containerized or palletized cargo. *E.g.*, Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); *see also Mitsui & Co.*, 636 F.2d 807 (discussing containers as packages); Smythgreyhound v. M/V Eurygenes, 666 F.2d 746 (2d Cir. 1981) (discussing containers as packages).

148. FMC Corp. v. S.S. Marjorie Lykes, 1988 A.M.C. 960, 1987 WL 28797 (S.D.N.Y. Dec. 16, 1987), *rev'd* 851 F.2d 78 (2d Cir. 1988).

cargo.[149] Constructive notice of the package limitation results from the incorporation of the COGSA in the bill of lading.[150]

The Rotterdam Rules provide for a limit of liability of 875 Special Drawing Rights ("SDR") as defined by the International Monetary Fund, converted into the national currency of the state on the date of judgment or award or the date agreed upon by the parties.[151] The limitation is to be applied "per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher."[152] Like in the COGSA, the parties can agree to a higher amount of limitation of liability.

The Rules, like the COGSA, do not define the word "package" but attempt to alleviate the problems associated with the use of that term by reference to both the manner in which the packages are physically shipped and reference to the contract particulars. Thus, when goods are loaded in a container on a pallet or on a similar article of transport used to consolidate goods, the number of packages or shipping units actually specified in the contract of carriage will be deemed either "packages" or "shipping units."[153] If there is no such delineation in the contract of carriage, then the entire container, pallet, or vehicle will be deemed one shipping unit.[154] The Rotterdam Rules then look to the contract of carriage and the details about how the goods have been enumerated in order to determine the intent of the parties for purposes of the application of the limit of liability which, essentially, has been what courts have done with COGSA cases.

Loss of or damage due to delay are treated somewhat differently than claims for physical loss or damage. Loss of or damage to goods due to delay will be calculated by reference to the value of the goods at the place and time of delivery.[155] That value will be based on either the commodity exchange price, the market price, or by reference to the normal value of the goods of the same kind and quality at the place of delivery.[156] Further, compensation for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed.[157] The total amount payable for any loss may not

149. Union Pac. R.R. Co. v. Burke, 255 U.S. 317, 321 (1921); *see also* Pan Am. World Airways v. Cal. Stevedore & Ballast Co., 559 F.2d 1173, 1176 (9th Cir. 1977).

150. Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., 254 F.3d 987, 996 (11th Cir. 2001).

151. *See* Rotterdam Rules, *supra* note 11, art. 59(1), 59(3).

152. *Id.* art. 59(1).

153. *Id.* art. 59(2).

154. *Id.*

155. *Id.* art. 60.

156. *Id.*

157. *Id.*

exceed the amount established by applying the 875 SDR per package figure if there was a total loss of the goods concerned.[158]

Finally, the limitation of liability may be avoided if the carrier engages in an intentional breach of its obligations under the Rules, or acts "recklessly and with knowledge that such loss would probably result."[159]

M. Chapter 13 – Time for Suit

No suit for loss or damage "may be instituted after the expiration of a period of two years" from the date of delivery,[160] but "[t]he day on which the period commences is not included in the period."[161] This contrasts with the one year period provided in the COGSA.[162] In the case of short delivery or non-delivery, the period of time is calculated beginning with the last day in which the goods should have been delivered.[163] Extensions of time for suit by a carrier are permitted by a "declaration to the claimant."[164] Extensions are not provided for in the COGSA, but courts have permitted them.[165]

When a carrier or other person is sued for loss or damage to cargo, that carrier or person may institute an action for indemnity.[166] The time for instituting that suit is the latter of the time allowed by the applicable law in the jurisdiction where the proceedings are instituted or ninety days from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the underlying action, whichever is earlier.[167] This is a new time period unknown in the COGSA. In the case of an action for indemnity, the two year period of time for suit does not apply.[168]

N. Chapter 14 – Jurisdiction

This chapter was particularly important to members of the U.S. delegation who participated in the UNCITRAL negotiations for the Convention. In the wake of the *Sky Reefer* decision of the U.S. Supreme Court,[169] choice of forum clauses in ocean bills of lading, providing for judicial forums other than the United States, are routinely inserted by

158. *Id.* art. 59-60.
159. *Id.* art. 61.
160. *Id.* art. 62(1)-62(2).
161. *Id.* art. 62(2).
162. 46 U.S.C. § 30701 (3)(6).
163. Rotterdam Rules, *supra* note 11, art. 62(2).
164. *Id.* art. 63.
165. *See* Gen. Elec. Co. v. M/V Gediz, 720 F. Supp. 29, 30 (S.D.N.Y. 1989).
166. Rotterdam Rules, *supra* note 11, art. 64.
167. *Id.*
168. *See* 46 U.S.C. § 30701 (3)(5).
169. Vimar Seguros y Reasaguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995).

carriers and have been enforced by U.S. courts—effectively making it difficult for cargo interests to pursue their claims against carriers in the United States.[170]

The Rotterdam Rules provide that a plaintiff may institute suit against a carrier in a competent court within the jurisdiction of one of the following places: (1) "[t]he domicile of the carrier;" (2) "[t]he place of receipt agreed in the contract of carriage;" (3) "[t]he place of delivery agreed in the contract of carriage;" (4) "[t]he port where the goods are initially loaded on a ship or the port where the goods are finally discharged from the ship;" or (5) in a competent court designated by an agreement between the shipper and carrier.[171] The right of the shipper and carrier to agree to an exclusive court is limited to a volume contract.[172] A person who is asserting a claim against a carrier, but who is not a party to such a volume contract, is only bound by the exclusive choice of court agreement if: (1) "[t]he court is in one of the places designated in [Chapter 14];" (2) "[t]hat agreement is contained in the transport document or electronic transport record;" (3) "[t]hat person is given timely and adequate notice of the court where the action shall be brought and that jurisdiction of the court is exclusive;" and (4) "[t]he law of the court seized recognizes that the person may be bound by the exclusive choice of court agreement."[173] It is believed that the perceived adverse results of the *Sky Reefer* decision are remedied by this jurisdiction provision.[174]

Similarly, a claim may be instituted against a maritime performing party in the domicile of the maritime performing party; the court where the goods are received by the maritime performing party; "the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performed its activities with respect to the goods."[175] In the event a carrier and a maritime performing party are both joined in a single action arising out of a single occurrence, the action may only be instituted in a court designated pursuant to the Rules, unless there is an exclusive choice of court agreement that complies with

170. *See* Indem. Ins. Co. v. Schneider Freight U.S.A., Inc., 2001 A.M.C. 2153, 2001 WL 1356247 (C.D. Cal. 2001) (enforcing the choice of forum clause requiring litigation in Korea); *see also* Acciai Speciali Terni U.S.A., Inc. v. M/V Berane, 181 F. Supp. 2d 458, 463 (D. Md. 2002) (enforcing a forum selection clause in favor of litigation in Italy); Pasztory v. Croatia Line, 918 F. Supp. 961, 966 (E.D. Va. 1996) (enforcing a forum selection clause requiring suit in Croatia).

171. Rotterdam Rules, *supra* note 11, art. 66.

172. *Id.* art. 67.

173. *Id.*

174. REPORT OF MLA DELEGATES, CHESTER D. HOOPER AND VINCENT M. DEORCHIS TO UNCITRAL WORKING GROUP III—VIENNA 4 (2008), *available at* www.mlaus.org/archives/library/1889.doc.

175. Rotterdam Rules, *supra* note 11, art. 68.

the Rules.[176]

An interesting provision of this chapter is the fact that both shall be binding on contracting states only if those contracting states declare in accordance with the Convention that they will be bound by them.[177] The reason for this so-called opt in provision has to do with the law of the European Union as well as the fact that most of the nations who participated in the UNCITRAL negotiations did not want any jurisdiction or arbitration provisions in the Convention. If a contracting state does opt into the jurisdictional provisions of the Convention, then any decisions made by a court having jurisdiction under the Convention are to be recognized and enforced by another contracting state in accordance with the law of that contracting state, which would also include the right to refuse recognition and enforcement if so provided by that state's law.[178]

O. Chapter 15 – Arbitration

The COGSA does not contain any prescription or prohibition with regard to the availability of arbitration or the right of parties to conclude arbitration agreements in a contract of carriage. In apparent recognition of the use of arbitration as a means of resolving disputes relating to the loss and damage of ocean cargo, the Rotterdam Rules instead provide that arbitration may be used if the parties agree.[179] The Rules place very few restrictions on the use of arbitration agreements. The arbitration proceeding may take place at any place designated for that purpose in the arbitration agreement. If no place is designated, then the arbitration proceeding may take place in the domicile of the carrier, the place of receipt agreed in the contract of carriage, the place of delivery agreed in the contract of carriage, the port where the goods are loaded on a ship, or the port where the goods are discharged from the ship.[180]

There are also certain provisions regarding the use of arbitration agreements contained in volume contracts, and for contracts of carriage and non-liner transportation.[181] Similar to the opt out provision in Chapter 14, the provisions of this chapter only bind contracting states that declare that they will be bound by the provisions of this chapter.[182]

P. Chapter 16 – Validity of Contractual Terms

Chapter 16 essentially provides for the non-voidability of the terms

176. *Id.* art. 71.
177. *Id.* art. 74.
178. *Id.* art. 73.
179. *Id.* art. 75.
180. *Id.* art. 75(2).
181. *Id.* art. 78.
182. *Id.*

of the Convention. Any contract of carriage which excludes or limits the obligations or liabilities of the carrier or maritime performing party are void.[183] The COGSA has a similar provision.[184] The Rotterdam Rules also void any assignment of a benefit of insurance of goods in favor of the carrier or other persons referred in the Convention.[185] Again, the COGSA has a similar prohibition.[186]

In addition, any term in a contract of carriage which directly or indirectly excludes, "limits or increases the obligations under this Convention of a shipper, consignee, controlling party, holder or documentary shipper," or increases the liability of those entities for breach of any of its obligations under the Convention is void.[187]

Notwithstanding these provisions, there are special rules for so-called "volume contracts." Greater leeway is given to shippers and carriers to negotiate terms and conditions of such contracts, which "may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention."[188] The concept of "derogation" is introduced reflecting a departure from the Rules of the Convention that otherwise would apply to a contract of carriage.[189] The Rules contemplate that a derogation will be individually negotiated and prominently stated in the contract of carriage that it is not incorporated by reference from another document or included in a contract of adhesion not subject to negotiation. The Rules also include that the shipper is given an opportunity and notice to conclude a contract of carriage on terms and conditions that comply with the Convention and without any derogation.[190] If the volume contract satisfies the requirements of the Rules, then the terms of the volume contract will apply to other persons than the shipper, if those persons "[receive] information that prominently states that the volume

183. *Id.* art. 79.

184. 46 U.S.C. § 30701 (3)(8).

185. Rotterdam Rules, *supra* note 11, art. 79(1)(c).

186. 46 U.S.C. § 30701 (3)(8).

187. Rotterdam Rules, *supra* note 11, art. 79(2).

188. *Id.* art. 80. The concept of volume contracts is not unfamiliar to American shipping practitioners because service contracts as regulated by 46 U.S.C. § 40502 (2006) were authorized under the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1988. Such service contracts allowed for rates and other terms of service that might differ from a carrier's published tariffs and deal with such terms as conditions as volume, rates, service, equipment, liability and security, all of which may vary from COGSA's provisions. Under the Rules, a volume contract must cover more than one shipment, include a volume commitment and a specified duration.

189. Rotterdam Rules, *supra* note 11, art. 80(2). A derogation from the Rules' provisions do not include: the duty of the ocean carrier before and during a voyage by sea to exercise due diligence to make and keep the ship seaworthy and properly crewed, equipped, and supplied (Article 14); the shipper's obligation to provide certain information, instruction and documents (Article 29); special rules for carrying dangerous cargo (Article 32); and liability for any damage arising from a breach of Article 61.

190. *Id.*

contract derogates from this Convention and gave its express consent to be bound by such derogation; and . . . [s]uch content is not solely set forth in a carrier's public schedule of prices and services, transport documents or electronic transport record."[191] In the event of a dispute, the party that is claiming the benefit of "the derogation bears the burden of proof that the conditions for derogation have been fulfilled."[192]

Live animals and other goods, which require special treatment, come in for special treatment under the Rotterdam Rules, notwithstanding the general prohibitions with regard to the lessening or increasing of obligations or liabilities found in this chapter.[193] The Rules permit that a contract of carriage for those types of cargo may exclude or limit the obligations or the liability in both the carrier and the maritime performing party, unless the claimant can prove that the loss, damage, or delay resulted from the intent to cause such loss, damage or delay, or was done as a result of a reckless act, and with knowledge that such loss, damage, or delay did probably result.[194] However, the Rules make clear that contracts of carriage for such cargo must not be related to ordinary commercial shipments made in the ordinary course of trade.[195] This provision makes it clear that these special rules are not to be used as a smoke screen to avoid the applicability of the Convention for the normal and ordinary course of trade.

Q. Chapter 17 – Matters Not Governed by this Convention

The Rotterdam Rules clearly apply to the international transportation of cargo by sea. In what appears to be an abundance of caution, the scope of the Rules is further defined by this chapter, which delineates those matters not intended to be governed by the Convention. Those matters include: (1) international conventions governing the carriage of goods by other modes of transport (air, road, rail, and inland waterways);[196] (2) the limitation of liability of vessel owners;[197] (3) general average adjustments by national law;[198] (4) contracts of carriage for passengers and their luggage;[199] or (5) damage caused by a nuclear incident.[200]

191. *Id.* art. 80(5).
192. *Id.* art. 80(6).
193. *Id.* art. 81.
194. *Id.* art. 81(a).
195. *Id.* art. 81(b).
196. *Id.* art. 82.
197. *Id.* art. 83.
198. *Id.* art. 84.
199. *Id.* art. 85.
200. *Id.* art. 86.

R. Chapter 18 – Final Clauses

This chapter deals mostly with procedural issues having to do with the ratification of the Convention by the contracting states and the effect of such ratification. The most important provision of this chapter for purposes of this paper is Article 94 relating to the entry into force of the Convention.[201] The Convention will become effective on the first day of the month following the expiration of one year after the twentieth contracting party has ratified the Convention.[202] Each contracting state will then apply the Convention to all contracts of carriage concluded on or after the date of entry into force.

IV. Summary and Conclusions

As should be obvious to the reader of this article, the COGSA and the Rotterdam Rules share a common heritage. There are also many differences which need to be considered and understood. The new Convention establishes a level of contractual freedom in the guise of volume contracts, which can be tailored providing for greater or lesser rights or obligations. The period of responsibility for the cargo changes from a "tackle to tackle" principle to a "door to door" principle beginning at the place of receipt, and ending when the cargo is delivered to its final destination—a recognition of the use of intermodal carriers for the transportation of cargo. Carriers and shippers are provided a high level of flexibility in determining in their contracts of carriage the period of responsibility. The concept of a performing party and a maritime performing party is introduced, a feature which differs substantially from the COGSA. The application of the new Convention extends to such defined entities providing substantive liability rules for those parties as well as granting them the defenses available to the carrier.

The new Convention extends the carriers obligations to exercise due diligence not only prior to and at the beginning of the sea voyage, but during the entire voyage in addition to the customary obligations found in the COGSA. The burden of proof in the event of a claim for loss or damage is delineated in great detail. The limitation of liability has been changed and will be measured using Special Drawing Rights. The shipper's obligations are also spelled out unlike in the COGSA.

Rules regarding transport documents or electronic transport documents are also delineated, recognizing the practices of modern international shipping. The statute of limitations has been increased from one to two years and the notice provisions are changed. The Rotterdam Rules provide, for the first time, rules relating to the right of control, and trans-

201. *Id.* art. 94.
202. *Id.*

fer of rights in relation to the contracts of carriage as reflected in transport documents or their electronic equivalent. Electronic documents are authorized, and rules for usage are provided. The errors in navigation and management of the vessel clause has been deleted as has the so-called catch-all exemption of the COGSA relating to the exemption from liability for any cause without the actual fault or privity of the carrier. The Rotterdam Rules recognize and provide for the use of arbitration. One can continue, but the point is made that while the heritage is the same, the Rotterdam Rules are new and different.

It remains to be seen how well the Rotterdam Rules, if finally ratified by a sufficient number of countries, will impact the international transportation of cargo by sea. While the Rotterdam Rules in many respects constitute a radical departure from the COGSA, it would not be inconceivable for courts to look to the case law developed under the COGSA in those instances where the two regimes share similar provisions or concepts. Undoubtedly, situations will develop which, notwithstanding the extensive amount of work which went into the drafting of the Convention, were not contemplated or considered and will require creative legal analysis and judicial resolution. And, as in all things related to admiralty and maritime law, tradition will be respected and uniformity will be pursued.