**Carriage of Goods Committee Discussions**

March 14, 2024, 2:00-3:25 p.m. Eastern via Zoom

**Attendees**

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| Mark Newcomb, ChairBrian Eisenhower, Vice ChairWilliam Robert Connor, III, Board LiaisonKatherine Christodoulatos, YLC LiaisonDennis CammaranoChristopher CareyConte CicalaChelsea CrewsWilliam FennellAlex GilesWiley GrandyTom GrassoChris HartKevin HartmannJustin HeiligChester HooperMasoud JahaniBrody Karn | Andrew KehagiarasJames KleinerLynn KriegerJan KuylenstiernaKipp LelandDavid MaloofCharlie McCarthyJessica McClellanElena MihosJohn MiklusDon O’HareRobert PhelanAnthony PruzinskyCharles SchmidtGordon SchreckKevin SmithRick SteinbergMichael Sturley (had to leave around 2:20) |

**Introduction – Mark Newcomb**

* The proposal for revision of US COGSA submitted by David Maloof will be reviewed by the Carriage of Goods Committee, which would make a recommendation that may need to be reviewed by another Committee, such as Uniformity, before potentially being submitted to the entire Association.
* Written comments from Committee members were evenly split.

**Presentation Regarding Proposed Amendments to COGSA – David Maloof**

* PowerPoint slides were made available on Committee webpage.
* Believes MLA supported Hague-Visby Rules but unsuccessful in securing Congressional support.
* COGSA is archaic; enacted in 1936.
* Table of federal court filings referencing COGSA shows significant decrease from 1990 to present.
	+ Partly because COGSA has become outdated.
* Table of US court decisions shows decrease in annual average number of federal decisions related to COGSA.
	+ Believes this is because COGSA is so outdated that issues have been litigated and judges have covered everything.
	+ Not a vibrant statute in terms of covering new issues.
* COGSA limitation of liability was not tied to inflation.
	+ Table shows increase, 1936 to 2022, in average prices of gasoline, cars, and homes, as well as salaries.
	+ No change to COGSA limit of $500 per package for cargo.
* Adoption of Hague-Visby by our principal trading partners has created massive inequity for American shipping and insuring interests
	+ Table illustrates liability limit for hypothetical damaged shipment weighing 49,870 kilograms. Generally, more than $136,000 in many countries which have a weight-based limit, but the limit would only be $500 under US COGSA.
	+ There is a lack of uniformity in that the U.S. limit is only $500 per package.
* Since 1995, ocean carriers can unilaterally choose inconvenient forums where no relevant witnesses are located.
	+ In *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), the Supreme Court held that COGSA does not nullify foreign arbitration clauses contained in maritime bills of lading.
	+ In practice, small- and medium-sized claims are often not pursued if there is a foreign forum selection clause.
* Since 2014, upstream contracting carriers and downstream sub-contractors can unilaterally be exempted from liability.
	+ *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165 (2d Cir. 2014).
	+ Covenants not to sue were in bills of lading, but generally no one attempted to enforce them.
	+ In the 1980s, anyone who was a carrier would have liability. Now, claimants can only sue the primary carrier.
	+ The primary carrier may have a foreign forum jurisdiction clause, which commonly results in claims not being pursued, while the stevedore may be in the U.S. and be the primarily responsible party and could have been sued before covenants not to sue were enforced.
	+ *Sky Reefer* combined with covenant not to sue often means there is no recovery.
* Since 2022, NVOCCs are potentially exempted from liability. *Chubb Seguros Peru S.A. v. AS Fortuna Opco B.V.*, No. 1:20-cv-3392, 2022 WL 973708 (S.D.N.Y. Mar. 31, 2022).

Current Situation: Outdated and Dysfunctional COGSA Statutory Scheme

* For example, in a mass casualty such as vessel fire, may need to sue a dozen different contracting carriers in as many jurisdictions.
* May now have to take assignments, upstream, in order to go after the actual carrier.

Need an innovative solution that takes us back to a time when the law was robust and efficient.

* U.S. shippers and insurers are being severely prejudiced to benefit foreign shipowners.
* Slow death of COGSA: chipping away at the fundamental rules, failure to increase limits of liability.

Rationale for Proposal (PowerPoint slide 15):

* Level the playing field for U.S. shippers and consignees and insurers to have the same limitations of liability as most other shippers and consignees and insurers around the world.
* Ensure that NVOCCs are liable as carriers.
* Prevent carriers and subcontractors from fully exonerating themselves from liability to the detriment of U.S. shippers and consignees and insurers, as well as to preserve the United States as a forum for COGSA claims. This restores the interpretation of COGSA which existed for decades under *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), prior to *Sky Reefer.*

Rotterdam Rules

* In David Maloof’s view, after all these years, the Rotterdam Rules are dead. Only five countries have ratified, including Spain (2011) and four landlocked African countries.
* Says that ratification effectively needs unanimous consent in the Senate, as one Senator can veto. He believes that domestic legislation would be easier to pass.

Asked that the proposal to amend COGSA not be referred to as “David Maloof’s proposal.”

**Michael Sturley’s Comments – Read by Mark Newcomb**

Professor Sturley had to leave the meeting due to a scheduling conflict. Written comments read:

If I believed that there was no chance that we could obtain ratification of the Rotterdam Rules, I might be more inclined to support David’s proposal.   Even then, however, I would prefer a more substantial revision of COGSA (along the lines of our 1996 proposal) rather than applying a few minor band-aids to a legal regime that needs far more serious revision.   I think it is very likely that we will get only one chance to modernize the regime, and I would hate to waste it on such a minor effort (unless I were persuaded that nothing more would be possible).

Because I still believe that it is possible to obtain ratification of the Rotterdam Rules and also believe that we will get only one chance to modernize the current regime, I cannot support David’s proposal.  There are far more important benefits from ratifying the Rotterdam rules than the minor improvements that David suggests.   I do not want to risk sacrificing those greater benefits for such a minor improvement in the current regime.

**Committee Discussion regarding Proposal to Amend COGSA**

Chet Hooper

* Agrees with Michael Sturley.
* Most of what David Maloof would like to see (other than adjusting COGSA package limit for inflation) is in the Rotterdam Rules. Invited David to participate in efforts to obtain support for the Rotterdam Rules.
* At this point, the MLA wants the American Association of Port Authorities (AAPA) to agree to take a neutral position, rather than opposing.
* Other countries are waiting for us. As soon as the U.S. ratifies, other countries will, too.

Alex Giles

* Although this proposal is in the interest of shippers, it is not in the interest of the entire maritime industry.
* Would argue strongly against these proposals. Believes other MLA members will as well, and that the MLA should not support.
* To the extent there are fewer cases, many of the issues were litigated in the 1980s.
* There are ways around the COGSA package limitation. Can procure insurance, but shippers do not choose to purchase insurance from carriers.
* Agrees with David that the *AS FORTUNA* case was an outlier and believes that it should be correctable through future caselaw.
* Stevedores and terminals have not supported the Rotterdam Rules from the beginning, in part because they were not consulted. If he had to guess, Alex does not believe that they will ever come around.
* Agrees with Chet Hooper that if enacted, the Rotterdam Rules would be more beneficial to the entire maritime industry, rather than just shippers and their insurers.

David Maloof

* Modernization and uniformity are primary reasons for proposal.

Chet Hooper

* In response to Alex’s comments, American Association of Port Authorities (AAPA) was invited to participated early in the process, sent their General Counsel who attended only one meeting and did not return. Decided that they were all landlord ports and that the Rules would not affect them.
* If we can get AAPA to drop opposition, the Senate will support Rotterdam Rules
* The rest of the world is waiting for the U.S. If U.S. ratifies, others will ratify quickly.

William Fennell

* Is there a sponsor at this point?
	+ David: No, but there would be no issue finding a sponsor if MLA supports it.

Andy Kehagiaras

* Agrees with the proposal’s challenge to the anachronistic aspects of COGSA and those that Rotterdam Rules seek to address.
* Full disclosure, represents a lot of NVOCCs.
* Thinks that modifying COGSA section 1a definition of Carriers to include NVOCCs is a problem, because COGSA section 3 says that Carriers have to exercise due diligence to make a vessel seaworthy. Noted that case decisions say that NVOCC cannot make a vessel seaworthy.

Don O’Hare

* Only comment on proposal: one of the things that carriers received was shared burdens of proof, which was very important to the carriers.
* If the MLA is going to attempt to fix things, should not do it piecemeal.
* Was personally involved in briefing the organizations for the ports and stevedores. Disagrees that terminals were upset that they were ignored.

Dennis Cammarano

* Seems that majority of the MLA would agree that Rotterdam Rules would be more comprehensive than present proposal.
* Commends those who were involved in the Rotterdam Rules.
* Is there a timeframe that can be provided so that the Rotterdam Rules do not forever serve as an impediment to an alternative?
* We all have client bases, and we are likely to vote consistent with their interests. Not necessarily about which attorneys would make more money.
* Does not draw any criticism from proposal being incomplete, people can make comments, and perhaps we can vote on each piece.

Mark Newcomb

* We have to look at this as an Association as a whole.
* We need to look at all interests.
* The reason that we are having this and the April session is to identify what issues we – as a Committee – wish to address during the May meeting.
* For example, perhaps there is a great deal of support in terms of revising the value of the Package Limitation.

Gordon Schreck

* Retired lawyer and MLA member for almost 50 years.
* In May 2009, the Association overwhelmingly passed a resolution supporting the Rotterdam Rules, and it went to the President.
* Thinks it would be very confusing for Congress if they were to receive a new resolution.

Anthony Pruzinsky

* So much work went into the drafting of the new Rotterdam Rules. What can be done by us as a group to move things forward?
	+ Chet: We can talk to our clients, particularly the carrier clients who hire the ports.
	+ Counsel with one of the prime ports objecting has not even looked at the Rotterdam Rules. Listening to subordinates, told it was dead, has not bothered to read.
* Suggested putting together a new group to approach ports [of Houston and Charleston] to change their minds.

Bob Connor

* Past President David Farrell and a small group have been working on this. Farrell has reported some progress, but not happening overnight.
* Does not think that an interim fix will get any traction, but could be wrong.

David Maloof

* Agrees with Dennis that maybe there should be a deadline to modernize the law.
* Alternatively, the MLA could support Hague-Visby.

Chet Hooper

* The Rotterdam Rules project started when it appeared that the Supreme Court was going to decide *Sky Reefer*.
* State Department told him that we need uniformity in the law of bills of lading and commerce before we address electronic bills of lading.
* U.S. sent question to UNCITRAL.
* Took our domestic proposal, went to CMI, changed it to an international proposal, General Assembly approved it in 2008, and signing ceremony in 2009.

John Miklus

* David Farrell has looped him in on working group’s efforts with ports.
* Met with the State Department in 2016, wrote a letter in support of the Rotterdam Rules.

David Maloof

* Ports in Texas and South Carolina opposed because they may have to pay more money.

Chet Hooper

* Does not believe that the ports understand the Rotterdam Rules
* Ports will benefit greatly from Rotterdam Rules.
	+ Can only be sued at location of their principal place of business or where they made the mistake.
	+ Automatic Himalaya clause
* Rotterdam Rules do away with the covenant not to sue. Ports have not raised that issue.
* International group of port authorities supports the Rotterdam Rules.

Gordon Schreck

* As Chet and Michael know, there was a change in the port authority management two years ago. Quasi-state agency runs all of the container ports in South Carolina. First female running a U.S. port. They have new lawyers, but they are not maritime lawyers – know nothing about COGSA, let alone Rotterdam Rules.
* The real problem is that they have been afraid to change their position because they are afraid there was a good reason that port opposed the Rotterdam Rules a long time ago.
* Thinks everyone involved has made a good case as to why the Rotterdam Rules are in their best interest.
* Represented carriers for most of his career, now retired, but carriers feel that the regime has been modernized through the court system for the past 70 years.
* MLA needs to be careful about stepping back from a strong position taken about 15 years ago. Essentially would have to eat crow to start over again.
* Until we feel like we have exhausted any opportunity, think it is a mistake to do something different.
* Thinks outside counsel for the port of Charleston has bigger fish to fry right now.

Chet Hooper

* MLA delegation visited the port of Charleston, dinner with their new outside counsel.
* Have not heard anything since.
* Believes plan was to approach Charleston first and then Houston, as the remaining holdout.
	+ Should be done in conjunction with AAPA.

Conte Cicala

* Asked about the process for a proposal from the Carriage of Goods Committee
* Brian Eisenhower restated Chair Newcomb’s explanation. Plan is to discuss proposals during the Committee’s meeting on May 1. A majority and minority report may be issued. Another Committee, such as the Uniformity Committee, may need to review. Ultimately, a proposal may be brought to the entire Association at a General Meeting.