WHAT HAS BECOME OF THE ROTTERDAM RULES?*

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** Fannie Coplin Regents Chair in Law, University of Texas at Austin; B.A., J.D., Yale; M.A. (Jurisprudence) Oxford. In the course of this paper, I discuss the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (popularly known as the "Rotterdam Rules"). *See infra* note 2 and accompanying text. In the interest of appropriate disclosure, I note that I served as the Senior Adviser on the United States Delegation to Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL), which negotiated the Rotterdam Rules; as a member of the UNCITRAL Secretariat's Expert Group on Transport Law; and as the Rapporteur for the International Sub-Committee on Issues of Transport Law of the Comité Maritime International (CMI) and for the CMI's associated Working Group, which prepared the initial draft for UNCITRAL's consideration. But I write here solely in my academic capacity and the views I express are my own. They do not necessarily represent the views of, and they have not been endorsed or approved by, any of the groups or organizations (or any of the individual members) with which (and with whom) I have served. I delivered an earlier version of this paper at the 23rd Annual Admiralty Symposium of the Louisiana State Bar Association in New Orleans on September 16, 2016.

I. Introduction

During the summer of 2008, the U.N. Commission on International Trade Law (UNCITRAL) completed the negotiation of a new multilateral convention to govern international ocean transport.[1] After review by the Legal Committee, the General Assembly on December 11, 2008, formally adopted the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (popularly known as the "Rotterdam Rules").[2] The Convention has been open for signature since September 23, 2009, and the United States was one of the sixteen countries to sign the Convention on the first day in Rotterdam. Twenty-five countries have now signed the Convention. Three of those (including Spain) have already ratified it.

Unfortunately, the United States has not yet made any publicly visible progress toward ratifying the Rotterdam Rules. The U.S. commercial interests that worked for years to negotiate the Convention have long been pushing for ratification, primarily to bring the U.S. legal regime into the twenty-first century,[3] and all of the U.S. commercial interests that would be most directly affected by the Rotterdam Rules are in favor of U.S. ratification. It is thus

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[1] *See* Report of the United Nations Commission on International Trade Law, 41st Session, U.N. GAOR, 63d Sess., Supp. No. 17, Annex I, U.N. Doc. A/63/17 (2008).

[2] The original final text of the Convention is annexed to General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 (11 December 2008). Minor amendments were adopted in January 2013 to correct two editorial mistakes. *See* Correction to the Original Text of the Convention, U.N. Doc. C.N.105.2013.TREATIES-XI-D-8 (Depositary Notification) (Jan. 25, 2013). For a more detailed discussion of the issue, *see* Michael F. Sturley, *Amending the Rotterdam Rules; Technical Corrections to the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 18 J. INT'L MAR. L. 423 (2012).

[3] *See generally*, *e.g.*, Michael F. Sturley, *Beyond Liability Disputes: The Larger Impact of the Rotterdam Rules on the Efficiency of the Shipping Industry*, in Η ΛΕΙΤΟΥΡΓΙΑ ΤΗΣ ΝΑΥΤΙΛΙΑΚΗΣ ΕΠΙΧΕΙΡΗΣΗΣ ΣΕ ΠΕΡΙΟΔΟΥΣ ΟΙΚΟΝΟΜΙΚΗΣ ΑΣΤΑΘΕΙΑΣ: 8° ΔΙΕΘΝΕΣ ΣΥΝΕΔΡΙΟ ΝΑΥΤΙΚΟΥ ΔΙΚΑΙΟΥ [SHIPPING IN PERIODS OF ECONOMIC DISTRESS: EIGHTH INTERNATIONAL CONFERENCE OF MARITIME LAW] 123 (Piraeus: Piraeus Bar Association, 2015).

surprising that we have not seen more visible progress toward that goal.

Some of the explanation can no doubt be attributed to the usual factors that make ratification of any treaty difficult in the best of times. The Senate is notorious for its inertia, for example, particularly on issues that do not generate much public attention. But the single biggest explanation for the current lack of progress is the opposition of the American Association of Port Authorities (AAPA) and some public port authorities — opposition that surfaced while the State Department was preparing the ratification package. This article reviews and evaluates that opposition.

II. The Rotterdam Rules

To understand and evaluate the current status of the ratification debate, it is helpful to have some background information on the Rotterdam Rules to provide context. I will accordingly discuss the process by which the Convention was negotiated and explain a few of the relevant substantive provisions.

A. The Negotiation of the Rotterdam Rules

One of the most important goals of the Rotterdam Rules was to meet the needs of industry, particularly by updating and modernizing the governing legal regime. In the United States, liability for the loss or damage of goods carried by sea is governed primarily by the Carriage of Goods by Sea Act (COGSA),[4] which is the U.S. enactment of a 1924 international convention popularly

[4] Ch. 229, 49 Stat. 1207 (1936), *reprinted in note following* 46 U.S.C. § 30701. A quarter-century ago, COGSA was codified at 46 U.S.C. app. §§ 1300-15. A decade ago, when Congress recodified most of title 46 of the United States Code and enacted the new version as positive law, *see generally* Michael F. Sturley, *Reflections on the Recodification of Title 46*, 2 BENEDICT'S MARITIME BULLETIN 209 (2004), it did not include COGSA in the recodification. *See* Pub. L. No. 109-304, 120 Stat. 1485 (Oct. 6, 2006). COGSA accordingly remains in force as an uncodified statute.

known as the Hague Rules.[5] Most of the world's major maritime nations have adopted the amendments to the Hague Rules in the Visby Protocol,[6] which produced the Hague-Visby Rules, and a small portion of international maritime trade is subject to a U.N. convention popularly known as the Hamburg Rules,[7] but even those regimes are now out-of-date. And none of the current regimes fully addresses the needs of modern commerce.

From the beginning, UNCITRAL made a point of reaching out to commercial interests to develop a new regime that would meet commercial needs. When the Commission first considered the Transport Law project it directed the Secretariat to consult with non-governmental organizations (NGOs) that act on behalf of various segments of the industry, including the Comité Maritime International (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS), and the International Association of Ports and Harbours (IAPH).[8] Thereafter, representatives from interested NGOs attended every meeting of the CMI's International Sub-Committee, and commercial observers

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[5] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 (Hague Rules), *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-1 (7th rev. ed. 2016).

[6] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), Feb. 23, 1968, 1412 U.N.T.S. 128 (the Visby Protocol), *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-2 (7th rev. ed. 2016). In many countries, the Hague Rules have been further amended by the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197), *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-2A (7th rev. ed. 2016).

[7] United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3, *reprinted in* 6 BENEDICT ON ADMIRALTY doc. 1-3 (7th rev. ed. 2016).

[8] *See Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Ninth Session*, U.N. GAOR, 51st Sess., Supp. No. 17, ¶ 215, U.N. Doc. A/51/17 (1996), *reprinted in* 1996 CMI YEARBOOK 355.

were active participants at every session of the UNCITRAL Working Group.

Although the CMI was the most active NGO, all of the listed organizations participated in the process. The International Association of Ports and Harbours (IAPH) was involved from the very beginning, having been represented at the UNCITRAL Commission meeting at which the project was launched.[9] Indeed, the IAPH participant was the late Patrick J. Falvey, who was then the Chairman of the IAPH Legal Counselors, having recently completed his forty-year career at the Port Authority of New York and New Jersey (including almost twenty years as its general counsel). The IAPH continued to participate throughout the process,[10] including at the Commission session at which the Rotterdam Rules were finalized.[11]

When the UNCITRAL negotiations began, the State Department put together a broad delegation to represent U.S. interests. A lawyer from the Office of the Legal Advisor headed the delegation, which also included two additional government representatives — one from the Department of Transportation's Maritime Administration (MARAD) and one from the Office of Transportation Policy in the State Department's Bureau of Energy, Economic and Business Affairs' Transportation Affairs division. I was included as the delegation's "senior advisor," having expertise on the issues but no regular clients whose interests might color my

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[9] *See List of Participants*, United Nations Commission on International Trade Law, Twenty-ninth Session 18, U.N. Doc. A/CN.9/XXIX/INF.1 (1996) (identifying Patrick J. Falvey as the IAPH participant).

[10] *See, e.g.*, *List of Participants*, United Nations Commission on International Trade Law, Thirty-third Session 22, U.N. Doc. A/CN.9/XXXIII/INF.1/Rev.1 (2000) (identifying "Patrick J. Falvey, Former Chairman, IAPH Legal Counselors," and "Hugh H. Welsh, Chairman, IAPH Legal Counselors," as the IAPH participants). Mr. Welsh also represented the Port Authority of New York and New Jersey. *See, e.g.*, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 32 (1994).

[11] *See List of Participants*, United Nations Commission on International Trade Law, Forty-first Session 29, U.N. Doc. A/CN.9/XLI/INF.1 (2008) (identifying Frans van Zoelen, "Chairman, Legal Committee," as the IAPH participant).

recommendations. A number of industry representatives wished to be included as "advisors" to represent the interests of their industries, and they were all welcomed into the delegation. Carrier, cargo, and transportation intermediary advisors were particularly active in the process, but no one was denied access. Representatives of the Association of American Railroads (AAR) would have been included in the U.S. delegation, but the AAR obtained observer status from UNCITRAL so that its representatives had an independent seat at the negotiations and could speak on its own behalf (without going through the U.S. delegation).[12] Finally, the Maritime Law Association (MLA) had one or more advisors at every meeting, representing the interests of the maritime industry as a whole. Although the federal government did not fund these industry advisors, they had tremendous influence in the positions that the delegation took during the negotiations. Indeed, with the exception of a very few issues on which the government had independent concerns — *i.e.*, safety and security issues — the U.S. position on any subject was a compromise agreed upon by the affected industries during U.S. delegation meetings.

Before each UNCITRAL Working Group session, the U.S. delegation met in Washington with an even broader group of industry representatives so that every affected group would have the opportunity to express its views. For example, representatives of the stevedores and terminal operators, the trucking industry, and cargo underwriters did not attend UNCITRAL Working Group sessions but they generally attended the U.S. delegation meetings in Washington to ensure that their interests were considered. To enable all interested parties to have the opportunity to participate in those meetings, an official notice was published in the *Federal Register* before each meeting and the head of the U.S. delegation sent an e-mail message (with the *Federal Register* notice attached) to anyone who was thought to have even an indirect interest in the subject.

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[12] AAR representatives nevertheless attended virtually every U.S. delegation meeting.

A few weeks before the meeting held on April 20, 2004, for example, the head of the U.S. delegation sent the following e-mail message to forty-seven separate recipients, including the Executive Vice President and General Counsel of the American Association of Port Authorities (AAPA):

> Subject: State Department Meeting on New UNCITRAL Transport Convention: Tuesday, April 20, 2004
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> Attached to this email is a notice that has been submitted to the Federal Register for publication. It announces a public meeting on the new UNCITRAL Transport Convention. All of you have indicated an interest in receiving information about this project. You are all cordially invited to attend. It would be appreciated if you could let me know by email if you intend to attend, so that we can make sure that there are enough seats.
>
> While anyone is welcome to raise any relevant topic, it would help us to make the best use of our time if you would let me know in advance if there is a particular topic that you would like to have included in the agenda.[13]

The attached notice, which was subsequently published in the *Federal Register* on April 9, gave more specific details about the upcoming meeting:

> There will be a public meeting of a Study Group of the Secretary of State's Advisory Committee on Private International Law on

[13] For an additional perspective on this e-mail message, *see* Chester D. Hooper, *Activities in the United States to Ratify the Rotterdam Rules*, 2015 DIR. MAR. 750.

Tuesday, April 20, 2004, to consider the draft instrument on the International Transport Law, under negotiation at the United Nations Commission on International Trade Law (UNCITRAL). The meeting will be held from 1:30 p.m. to 5 p.m. in the offices of Holland & Knight, Suite 100, 2099 Pennsylvania Avenue, N.W., Washington, D.C.

The purpose of the Study Group meeting is to assist the Departments of State and Transportation in determining the U.S. views for the next meeting of the UNCITRAL Working Group on this draft instrument, to be held in New York from May 3 to 14, 2004.

The current draft text of the instrument and related documents of Working Group III (Transport Law) are available on the UNCITRAL website, *http://www.uncitral.org*. The Study Group meeting is open to the public up to the capacity of the meeting room. Persons who wish to have their views considered are encouraged to submit written comments in advance of the meeting. Comments should refer to Docket number MARAD-2001-11135. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room PL-401, Department of Transportation, 400 7th Street, S.W., Washington, DC 20490-0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., Monday through Friday, except

> federal holidays. An electronic version of this document, along with all documents entered into this docket, is available on the World Wide Web at *http//dms.dot.gov*. For further information, you may contact Mary Helen Carlson at 202-776-8420, or by e-mail at *carlsonmh@state.gov*.[14]

Of course not everyone attended these meetings. Representatives of shippers, carriers, stevedores and terminal operators, transportation intermediaries, and cargo underwriters, for example, recognized that the proposed convention could affect their interests, and therefore attended the meetings. But others concluded that the proposed convention either would not have a significant impact on them or that their interests were already adequately represented by other organizations. The AAPA, for example, stopped coming to the meetings.[15] Its executives apparently believed (correctly, in my opinion) that (1) the proposed convention would not have a significant impact on its members' operations, and (2) to the extent that the convention would affect its members' operations, the stevedores and terminal operators (who were already well represented at the meetings) had the same interests as the ports, and could effectively advocate those views.

B. Particular Aspects of the Rotterdam Rules

The primary purpose of the Rotterdam Rules is to bring the law governing the carriage of goods by sea into the twenty-first

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[14] 69 Fed. Reg. 18998 (Apr. 9, 2004).

[15] In contrast, the railroads sent representatives to all of the Washington meetings, to every UNCITRAL Working Group session, and to U.S. delegation meetings during the negotiating sessions, even though any effect on the railroads of the proposed convention was not readily apparent. The trucking industry attended some meetings but it was less active, recognizing that its interests — to the extent that the new convention would affect them — were the same as the railroads' interests, and the railroads were already effectively advocating their views.

All of this activity vividly demonstrates that the negotiating process was completely transparent, and even those who would not be directly affected by the final product were welcome to participate fully if they wished to be involved.

century.[16] When the new Convention enters into force, it will provide benefits for the entire industry, including (for example) the facilitation of electronic commerce. It is unnecessary to explain in detail here what the Convention will do, for other sources are readily available.[17] But it would be helpful when considering the opposition to the Rotterdam Rules to have a few specific aspects in mind.

1. Door-to-Door Coverage

Perhaps the most significant innovation of the Rotterdam Rules is the extension of geographic coverage. Like COGSA,[18] the Hague and Hague-Visby Rules are both limited to tackle-to-tackle coverage.[19] The Hamburg Rules extend coverage somewhat, but still apply only on a port-to-port basis.[20] Modern contracts of carriage, however, frequently cover carriage from an inland place of origin to an inland destination. In order to provide a single legal regime to govern that contract, the Rotterdam Rules extend coverage to the entire contractual period on which the parties have agreed, whether it be port-to-port, door-to-door, or some variation thereof.[21] As the Supreme Court has observed in this context, "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning."[22]

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[16] *See, e.g.*, Michael F. Sturley, *Reflections on Fifty Years of Revolutionary and Glacial Change in the Shipping Industry*, 50 EUROPEAN TRANSPORT LAW 357 (2015).

[17] *See generally, e.g.*, MICHAEL F. STURLEY, TOMOTAKA FUJITA & GERTJAN VAN DER ZIEL, THE ROTTERDAM RULES: THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA (London: Sweet & Maxwell 2010).

[18] *See* COGSA § 1(e)

[19] *See* Hague-Visby Rules art. 1(e).

[20] *See* Hamburg Rules art. 4(1); *see also* art. 1(6).

[21] *See generally, e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 4.001-.008.

[22] *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 29, 2004 AMC 2705, 2715 (2004).

2. Performing Parties

Closely related to the Rotterdam Rules' expansion to door-to-door coverage is the explicit recognition of the role played by performing parties.[23] In modern multimodal carriage, carriers routinely sub-contract at least a portion of their obligations. If the carrier that contracts with the shipper is an ocean carrier, for example, it will routinely sub-contract with an inland carrier to move the goods from the place of receipt to the port of loading, or from the port of discharge to the ultimate place of delivery. If the carrier that contracts with the shipper is a "non-vessel operating common carrier" (NVOCC), it will routinely sub-contract with other companies (including inland and ocean carriers) to perform every aspect of the carriage. In the Rotterdam Rules, those sub-contractors are labelled "performing parties,"[24] and if they do their work at sea or in the port area they are "maritime performing parties."[25]

The Rotterdam Rules impose primary responsibility for cargo loss or damage on the carrier that contracts with the shipper, but when a cargo claimant is able to show that a particular maritime performing party was in fact responsible for the loss of or damage to the cargo, article 19(1) gives the claimant a direct claim against that maritime performing party under the terms of the convention.[26]

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[23] *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 4.025-.030.

[24] Article 1(6)(a) defines a "performing party" as "a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.." *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 5.144-.155. The word "keeping" was added by the 2013 amendment to the convention. *See supra* note 2.

[25] Article 1(7) defines a "maritime performing party" as "a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship." *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 5.156-.159.

[26] Article 19(1) provides:

That provision was not revolutionary. Cargo claimants have long sued negligent sub-contractors that damaged their cargo.[27] Article 19(1)'s innovation is to bring the action within the scope of the Convention, rather than leaving claimants with different remedies against different parties for the same loss or damage depending on whether the carrier or the responsible sub-contractor is being held liable.

3. Automatic "Himalaya" Protection

When an entity qualifies as a "maritime performing party" under article 1(7), with the result that it might become liable under article 19(1) for damage that it causes to cargo that it is handling on behalf of a carrier, article 4(1) guarantees that it will be entitled as a matter of law to the benefit of all of the carrier's defenses and limitations of liability, regardless of whether it is sued under the Convention or under some other legal theory (such as tort or

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> A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:
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> (a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and
>
> (b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship and either (ii) while it had custody of the goods or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

See generally, e.g., STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 5.163-.195. The 2013 amendment to the convention, *see supra* note 2, corrected a drafting error in paragraph 19(1)(b).

[27] *See, e.g.*, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004); *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 1959 AMC 879 (1959).

bailment).[28] Current U.S. law generally gives a carrier's servants, agents, and sub-contractors the benefit of the carrier's defenses and limitations of liability only by contract — and only if the carrier included an adequate "Himalaya clause" in its bill of lading. Although Himalaya clauses are often effective to protect entities that qualify as maritime performing parties under the Rotterdam Rules,[29] some bills of lading omit the Himalaya clause entirely[30] and some Himalaya clauses are held to be inadequate.

In *Jagenberg, Inc. v. Georgia Ports Authority*,[31] for example, a port authority, acting as the agent for an ocean carrier, damaged a single "package" of the plaintiff 's cargo while moving it in the port area.[32] The plaintiff, alleging that the port authority and the ocean carrier had breached their obligations as bailees of the cargo, claimed $750,000 in damages for the package and both defendants moved for partial summary judgment to limit their liability to COGSA § 4(5)'s $500.[33] The port authority's rights

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[28] Article 4(1) provides:

> Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:
>
> (a) The carrier or a maritime performing party;
>
> (b) The master, crew or any other person that performs services on board the ship; or
>
> (c) Employees of the carrier or a maritime performing party.

[29] *See, e.g.*, Michael F. Sturley, *Third Party Rights and the Himalaya Clause*, 2A BENEDICT ON ADMIRALTY § 169 (7th rev. ed. 2016).

[30] *See, e.g., Fortis Corp. Ins., SA v. Viken Ship Management AS*, 597 F.3d 784, 792, 2010 AMC 609 (6th Cir. 2010) (O'Connor, J., sitting by designation).

[31] 882 F. Supp. 1065, 1995 AMC 2333 (S.D. Ga. 1995).

[32] 882 F. Supp. at 1068-69.

[33] 882 F. Supp. at 1069.

depended on the carrier's Himalaya clause, which the court held to be inadequate to protect the port authority.[34] The court therefore granted only the carrier's motion for partial summary judgment[35] and the case proceeded on the basis that the port authority faced full liability for the damage. Under the Rotterdam Rules, the port would automatically have benefitted from the same rights as the carrier.

III. The Sole Opposition to U.S. Ratification

It is surprising that port interests would oppose U.S. ratification of the Rotterdam Rules since — as was apparent over a dozen years ago when the proposed convention was being negotiated — the proposed convention would have very little impact on the ports.[36] The final text confirms this. Many ports — including two of the most vocal opponents of the Convention — would not be liable under the Rotterdam Rules without their consent because they are entitled to sovereign immunity.[37] Many other ports — including the largest ports in the container trade (the trade that will be most significantly affected by the Rotterdam Rules) — would not be liable under article 19 because they are simply landlords that lease space to the stevedores, terminal operators, and other private parties that conduct the actual operations in the port.[38] Those port authorities would not qualify as "maritime performing parties" under article 1(7) because none of them "performs or undertakes to perform any of the carrier's obligations" under the contract of carriage. That work is left to a landlord port's tenants.

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[34] 882 F. Supp. at 1074-76.

[35] 882 F. Supp. at 1076-79.

[36] *See supra* text at note 15.

[37] *See, e.g., Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 751 (2002) (finding South Carolina State Ports Authority entitled to sovereign immunity); *Kamani v. Port of Houston Authority*, 702 F.2d 612 (5th Cir. 1983) (finding Port of Houston Authority entitled to sovereign immunity).

[38] MARAD reports, for example, that the Port Authority of New York & New Jersey, the Port of Long Beach, and the Port of Los Angeles are all landlord ports.

It is even more surprising that port interests would oppose U.S. ratification of the Rotterdam Rules when so many provisions of the Convention would provide greater protection to ports than does current U.S. law. Perhaps the most obvious example is article 4(1), which would guarantee a port (when it qualifies as a "maritime performing party" under article 1(7)) the benefit of all of the carrier's defenses and limitations of liability, regardless of whether it is sued under the Convention or under some other legal theory (such as tort or bailment). Because ports now have only the uncertain contractual protection of Himalaya clauses,[39] the automatic protection of article 4(1) is indeed a valuable benefit.

The ports' objections to U.S. ratification of the Rotterdam Rules remain surprising even when the stated reasons for those objections are considered. Although the ports have generally been vague in explaining why they oppose U.S. ratification of the Rotterdam Rules, one port authority gave the Maritime Administration a detailed memorandum (which I will call here the "Ports' Memorandum") with a list of various objections. In the rest of this section, I will examine those objections in detail. None provides a plausible reason to oppose U.S. ratification. They instead reveal a lack of understanding of the Convention, the process by which it was negotiated, and current U.S. law.

A. The Ports' Opportunity to Participate in the Negotiations

The first objection mentioned in the Ports' Memorandum is the supposed "fail[ure] to include the United States port community in the seven year drafting process." As explained above, the American Association of Port Authorities was notified of the negotiations, was given an opportunity to participate in the process, attended at least one meeting, and chose not to participate further.[40] Every meeting of the U.S. delegation was publicized in advance in the *Federal Register* and any interested party — including any port

[39] *See supra* notes 29-35 and accompanying text.

[40] *See supra* notes 8-15 and accompanying text.

authority — was invited to attend the meetings or to submit comments.[41] Moreover, experienced representatives of the United States port community participated in the negotiations as representatives of the International Association of Ports and Harbours (IAPH).[42]

To the extent that the ports failed to participate in the drafting process, they themselves made the decision to abstain from the negotiations. Of course they were not obligated to participate, and they certainly retain their right to criticize the result of the negotiations in which they chose not to participate. If they had legitimate concerns, it would still be appropriate to address them. But it is simply inaccurate for them to assert that they were in any way excluded from the process.

B. Prior International Treaties

In a somewhat cryptic objection, the ports complain that they "*have never been the subject of international treaties*." It seems odd that ports, whose business (at least to the extent relevant here) is based on international trade, would be espousing isolationist views. The Ports' Memorandum offers no reason for objecting to the source of the legal regime (as opposed to its substantive content). It certainly makes no effort to challenge the advantages of international uniformity,[43] which is a well-recognized benefit of having an international treaty that establishes the same legal standards in different countries for multinational transactions.

In any event, the ports' assertion is substantially incorrect. Although it is true that ports *as ports* have never been the subject of an international treaty governing the carriage of goods by sea, that truth will not change under the new Convention. Ports *as ports* are not subject to the Rotterdam Rules; nothing in the Rotterdam Rules

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[41] *See, e.g.*, 69 Fed. Reg. 18998 (Apr. 9, 2004).

[42] *See supra* notes 9-10 and accompanying text.

[43] *See generally, e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM. 553 (1995).

regulates ports as such. The Rotterdam Rules would apply to a port only to the extent that it is a "maritime performing party," and a port would not qualify as a performing party unless it "performs or undertakes to perform" some "of the carrier's obligations under the contract of carriage."[44] To the extent that a port is currently performing any of the carrier's obligations, it is already liable to be sued for any loss or damage that it causes to the cargo in its care. And if a port is sued, it will quickly assert the benefits of the carrier's COGSA defenses under a Himalaya clause.[45] Although COGSA appears in the *Statutes at Large* as an Act of Congress, it is well recognized that this particular statute is simply the U.S. enactment of an international treaty known as the Hague Rules.[46] To be sure, Congress modified the treaty language in a handful of places,[47] but each of those modifications was intended to give effect to the international understanding, not to change it.[48] Moreover, a carrier's rights are sometimes defined by another international convention, such as the Hague-Visby Rules,[49] and when that happens a port's derivative rights under a Himalaya clause would also be defined by the international treaty. International treaties have long been a part of the landscape for the international carriage of goods by sea, and to the extent that ports are part of that process

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[44] Article 1(6)(a). *See supra* note 24 (quoting article 1(6)(a)).

[45] *See supra* notes 31-35 and accompanying text.

[46] *See, e.g.*, *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301-02, 1959 AMC 879 (1959).

[47] *See generally, e.g.*, Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 53-54 (1991).

[48] The most obvious change was in COGSA § 4(5), which enacts article 4(5) of the Hague Rules. Whereas the Hague Rules provide for a package limitation of £100 sterling, COGSA § 4(5) sets the limitation amount at $500. But the Hague Rules explicitly authorized that "amendment." *See* Hague Rules art. 9(2) ("Those contracting states in which the pound sterling is not a monetary unit reserve to themselves the right of translating sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.").

[49] *See, e.g.*, Michael F. Sturley, *Bill of Lading Provisions Calling for the Application of Legal Regimes Other Than the Carriage of Goods by Sea Act*, 2A BENEDICT ON ADMIRALTY § 46 (7th rev. ed. 2016).

— as opposed to being mere landlords[50] — they are (by their own choice) very much subject to those treaties.

C. The Ports' Control Over the Conditions and Limits of Their Liability

Turning to specific objections to the substance of the Rotterdam Rules, the Ports' Memorandum argues "that under the Rotterdam Rules, U.S. ports have absolutely no control over the conditions and limits of their own liability." The asserted basis for that argument is that article 80 permits carriers to enter into "volume contracts" with customers[51] "and thereby establish the applicable liability conditions and amounts per customer." The Ports' Memorandum recognizes "that the ports . . . will get the benefit of any lower liability negotiated by a carrier, and not suffer if there is a higher liability assumed by the carrier in the volume contract."[52] In other words, the carriers' limited freedom of contract under article 80 can only help the ports. Whatever the carrier does, a port's maximum liability will be established by the Convention's terms. The only uncertainty will be whether it might benefit from the carrier's having made a better bargain (without informing it).[53] The objection, in other words, is that a port might get a windfall without having known in advance that this good fortune was possible.

Even if it were a bad thing to obtain a windfall, the ports' objection reveals a major misunderstanding of current U.S. law.[54]

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[50] *See supra* note 38 and accompanying text.

[51] *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 13.049-.059.

[52] *Cf*. *infra* text at note 71.

[53] *See*, *e.g.*, Michael F. Sturley, *The Rotterdam Rules and Maritime Performing Parties in the United States*, 79 J. TRANSP. L., LOGISTICS & POLICY 13, 25-28 (2012) [hereinafter *Maritime Performing Parties*].

[54] This objection also reveals a minor misunderstanding of the Rotterdam Rules. Under article 80, carriers can conclude "volume contracts" with shippers but only if they comply with strict requirements that protect shippers from carriers' overreaching. *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note

To the extent any basis exists for the objection, the problem is much more serious today. Performing parties such as ports are currently subject to suit in tort (or bailment) for any damage they cause to the cargo but they generally receive the benefit of the carrier's defenses and limitations under a Himalaya clause in the bill of lading. If the Himalaya clause is missing (which sometimes happens[55]) or inadequate (which also happens[56]), the performing party's potential liability is unlimited. In other words, a performing party's protection is entirely in the hands of the carrier that drafts the bill of lading. Although the Ports' Memorandum may be correct in claiming that "it is impossible for ports to know what the terms are for the thousands of confidential volume contracts in effect between each carrier and each of its customers," the Memorandum ignores the fact that it is even more impractical for ports to know the terms of the Himalaya clauses in every bill of lading that each carrier issues to each of its customers. The significant difference is in the consequences. Not knowing the terms of the Himalaya clauses means that a port will not know whether it is subject to no liability,[57] unlimited liability,[58] or some limited liability between those two extremes.[59] Not knowing the terms of a volume contract, on the other hand, means that the port will not know whether its liability is capped at the level of the Rotterdam Rules or whether it may have even less potential liability.

Moreover, the ports' objection reveals an even more fundamental misunderstanding of current U.S. law and practice. In the real world, a carrier's or a performing party's liability is rarely

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17, ¶¶ 13.039-.068. Informed observers do not expect many volume contracts to address liability terms.

[55] *See supra* note 30 and accompanying text.

[56] *See supra* notes 31-35 and accompanying text.

[57] *Cf., e.g., Federal Insurance Co. v. Union Pacific Railroad Co.*, 651 F.3d 1175, 2012 AMC 1303 (9th Cir. 2011).

[58] *See, e.g., Jagenberg, Inc. v. Georgia Ports Authority*, 882 F. Supp. 1065, 1995 AMC 2333 (S.D. Ga. 1995)..

[59] *See, e.g., Colgate Palmolive Co. v. M/V Atl. Conveyor*, 1997 AMC 1478 (S.D.N.Y. 1996).

affected by the statutory liability limits. Even under COGSA's 80-year-old $500/package limit, a large majority of maritime shipments today are worth less than the specified limitation amount.[60] The more important limitation is the actual value of the goods.[61] The Rotterdam Rules continue that principle.[62] Neither the carrier nor its maritime performing parties have any effective control over the value of the goods that are shipped, and shippers very rarely declare the actual value of the goods.[63] In most cases, therefore, the effective limit on a maritime performing party's potential liability is entirely in the shipper's hands, and neither ports nor carriers have either knowledge or control over the limits of their own liability.

D. Ports as Attractive Targets for Suits

The Ports' Memorandum's next objection reveals another fundamental misunderstanding of the Rotterdam Rules and current U.S. law. The Memorandum predicts that "[p]orts will become the most attractive target for suits involving cargo damage when the cause or place of damage is in doubt."[64] The gravamen of the

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[60] *See*, *e.g.*, Michael F. Sturley, *Unit Limitation under the Rotterdam Rules and Prior Transport Law Conventions: The Tail That Wags the Dog*, in CURRENT ISSUES IN HONG KONG AND INTERNATIONAL MARITIME LAW 93, 103 & n.78 (Hong Kong Centre for Maritime and Transportation Law, City University of Hong Kong 2015).

[61] *See* COGSA § 4(5) (2d paragraph) ("In no event shall the carrier be liable for more than the amount of damage actually sustained.").

[62] *See* Article 22(1).

[63] *See*, *e.g.*, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 19, 2004 AMC 2705 (2004) (noting that it "is common in the industry" for shippers not to declare the true value of their shipments) (citing Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. MAR. L. & COM. 241, 244 (2000) (explaining why shippers do not declare the true value of their shipments)).

[64] This objection also reveals a basic misunderstanding of the Rotterdam Rules. A cargo claimant cannot recover from anyone other than the carrier "when the cause or place of damage is in doubt." The Convention imposes liability on a maritime performing party only if the damage occurred when it was responsible for the goods. Article 19(1)(b)(ii)-(iii); *see supra* note 26 (quoting article 19(1)). And article 4 protects maritime performing parties from liability otherwise than as imposed by article 19.

objection is that volume contracts "usually" include forum selection clauses that may prevent a cargo claimant from suing the carrier where the damage occurred, whereas ports may be sued where they operate. "Thus the port becomes the first target for lawsuits where there may be joint liability."

It is true that volume contracts could include forum selection or arbitration clauses that require suits against a carrier to be brought overseas,[65] and those clauses would be enforceable under specified conditions,[66] but requiring suit overseas is very much the exception to the general rule. For the most part, article 66 makes it easier for a cargo claimant to seek redress against the carrier in the most convenient forum — thus making it more likely that the carrier, instead of a port, will be sued (or at least that the port will not be sued alone).[67]

Current law is much more likely to trigger the problem of which the port complains. Under *Sky Reefer*,[68] foreign carriers today can almost always avoid litigation in the United States if they simply include the appropriate clause in their bills of lading (without any of the protections that article 80 of the Rotterdam Rules creates for volume contracts). Thus the Rotterdam Rules would represent a significant improvement for ports that worry about the risk of "becom[ing] the most attractive target" for cargo-damage suits. The Ports' Memorandum has the analysis exactly backwards.

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[65] Because volume contracts are a creation of the Rotterdam Rules, no one yet knows whether they will "usually" include forum selection clauses. To the extent that volume contracts resemble the "service contracts" now common in U.S. trades, it is perhaps more likely that forum selection clauses in volume contracts will specify U.S. forums.

[66] *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 12.044-.057, 12.081-.088.

[67] *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 12.022-.041, 12.077-.079.

[68] *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995). *See generally*, *e.g.*, Michael F. Sturley, *Forum Selection Clauses*, 8 BENEDICT ON ADMIRALTY § 16.09[A] (7th rev. ed. 2015).

E. The Convention's Alleged Failure to Provide Adequate Guidance

1. Apportionment of Lability

A recurring theme in the Ports' Memorandum is that "[c]ontradictions and confusions abound" in the Rotterdam Rules. The first concrete example of that complaint is that "the Rotterdam Rules provide no guidance as to how liability is to be apportioned" when the carrier and a port are sued in a single suit. It is true that the Rotterdam Rules do not specify how to apportion liability. Because the Rotterdam Rules do not attempt to regulate every aspect of the carrier-shipper relationship, they fail to resolve many issues. Of course it would have been absurd if the Rotterdam Rules had attempted such an ambitious task. Moreover, for eighty years COGSA has similarly failed to address how liability is to be apportioned when a carrier and a performing party are co-defendants. Fortunately, well-established principles of maritime law resolve that issue today and will continue to apply under the Rotterdam Rules.[69]

Unfortunately, the Ports' Memorandum ignores those well-established principles of maritime law. In a subsequent section, it asserts that "[m]any jurisdictions permit a tortfeasor a credit when a co-tortfeasor settles with the plaintiff." It then complains, "if a shipper settles with an at-fault operating port for a modest sum due to limitations under either the Rotterdam formula or a volume contract, an at-fault landlord port would be required to pay a disproportionate part of the loss." This analysis errs on many levels. To begin with, the initial assumption is wrong. Under state law in some states, a non-settling tortfeasor receives a dollar-for-dollar credit, but in *McDermott, Inc. v. AmClyde*,[70] the Supreme Court adopted the proportionate share approach in maritime law for apportionment of liability. The feared problem does not arise in maritime law. Second, the Rotterdam Rules protect maritime

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[69] *See, e.g.*, *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994).

[70] 511 U.S. 202 (1994).

performing parties from being sued for more than the amount of the carrier's liability "under either the Rotterdam formula or a volume contract."[71] And finally, to the extent any basis exists for the problem described in the Ports' Memorandum, the problem is far worse under existing law (under which maritime performing parties do not have the benefit of automatic Himalaya protection, for example) than it would be under the Rotterdam Rules.

2. Sovereign Immunity

The Ports' Memorandum's second concrete example of "unclear draftsmanship" is the Convention's failure to specify whether it would abrogate the sovereign immunity that "[s]ome US ports presently enjoy . . . under the Eleventh Amendment of the U.S. Constitution." The Memorandum complains that the "question has not been judicially resolved at this time." Of course no court could have ruled on a port's entitlement to sovereign immunity under the Rotterdam Rules because the Convention is not yet in force. But courts have ruled on various ports' claims to sovereign immunity in cargo-damage cases under current law, and nothing in the Rotterdam Rules would change those results. I have addressed this issue in detail in an earlier article,[72] and there is no need to repeat my analysis here. The bottom line is that some ports are entitled to sovereign immunity and some ports are not. The result is controlled by legal principles independent of COGSA that will not change under the Rotterdam Rules. Indeed, it is difficult to imagine a plausible legal theory under which a treaty could deny constitutionally protected rights.

3. Breaking the Liability Limits

Perhaps the most significant criticism along these lines is that the Rotterdam Rules do not provide adequate guidance on when it is possible to break the liability limits under article 61. The Ports' Memorandum worries that "there may in fact be no limit to the amount of loss for which a (carrier or) port may be liable." Once

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[71] *See supra* notes 28-35 and accompanying text; text at note 52.

[72] *See generally* Sturley, *Maritime Performing Parties*, *supra* note 53, at 28-35.

again, the ports' objection betrays a misunderstanding of the Rotterdam Rules' relationship to current law. The Hague Rules created the package limitation codified at COGSA § 4(5) to protect carriers from unlimited liability but did not provide any explicit mechanism for breaking that limitation, even in cases of deliberate misconduct. Courts therefore developed judicial doctrines for breaking limitation. The U.S. courts have been particularly inventive in this regard, and thus it is easier to break limitation under COGSA than under any international regime. Judicial inventions such as the "fair opportunity"[73] and "deviation"[74] doctrines often permit limitation to be broken in circumstances that have little if anything to do with carrier misconduct. The Hague-Visby Rules addressed the problem by adding a provision (article 4(5)(e)) to permit limitation to be broken only in cases of intentional or reckless carrier misconduct, thus protecting carriers (and other parties, such as ports, who receive the same benefits under a Himalaya clause) more effectively than COGSA or the Hague Rules. The Hamburg Rules strengthened that provision very slightly in article 8. In the Rotterdam Rules, article 61 starts with the language of article 8 of the Hamburg Rules and makes it somewhat more difficult for limitation to be broken. Once again, the risk that the ports fear is much greater under current law; the Rotterdam Rules would give ports much better protection than they currently have today.

IV. Conclusion

It is disappointing that the United States has not yet ratified the Rotterdam Rules. It is more disappointing that the principal reason for our failure to ratify is apparently due to misunderstandings on the part of an industry that will be affected only tangentially by the Convention when it eventually enters into force. Even if the ports' negative analysis of the Rotterdam Rules had been accurate (rather than based on misunderstandings throughout), it would still be so incomplete that it would be of little value. The

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[73] *See, e.g.*, Michael F. Sturley, *The Fair Opportunity Requirement*, 2A BENEDICT ON ADMIRALTY § 166[c] (7th rev. ed. 2016).

[74] *See, e.g.*, Michael F. Sturley, *Deviation*, 2A BENEDICT ON ADMIRALTY ch. 12 (7th rev. ed. 2016).

ports have focused entirely on liability aspects of the regime, which are relevant in those rare cases — fewer than one percent of all shipments — in which something goes terribly wrong and cargo is lost or damaged. Most of the time, everything turns out well and cargo reaches its intended destination in good condition. Although the Rotterdam Rules address liability issues, the Convention covers much more, and the Ports' Memorandum ignores all of the non-liability provisions.

Perhaps most significantly, the new Convention facilitates electronic commerce (as part of the general updating effort to provide a 21st century regime for ocean carriage), which will produce significant cost savings for everyone in the industry. That is a major reason why carriers (represented in the United States by the World Shipping Council) overwhelmingly support the Rotterdam Rules despite the imposition of somewhat higher liability on carriers. Those savings on every shipment would far outweigh any increase in liability when things go wrong (less than one percent of the time). Similarly, shippers (represented in the United States by the National Industrial Transportation League) overwhelmingly support the Rotterdam Rules, primarily for the non-liability benefits.

It is ironic that the Ports' Memorandum in its concluding paragraphs recognizes that the ports' "economic well-being" depends "on the success of their operators," but does so in a manner suggesting that potential increased burdens on operators provide a basis for opposing the Rotterdam Rules. Although the economic well-being of ports is indeed ultimately tied to the economic well-being of the other participants in the enterprise, the Ports' Memorandum has once again drawn precisely the wrong conclusion from that insight. All of the interests that would be most directly affected by the Rotterdam Rules — including the operators who use the ports' facilities on a daily basis — recognize that the new Convention would be good for the industry as a whole. And the benefits of the Rotterdam Rules for those who use the ports would be good for the ports, too.