THE END OF THE PACKAGE LIMITATION AS WE KNOW IT

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THE END OF THE PACKAGE LIMITATION AS WE KNOW IT: WHAT THE ROTTERDAM RULES WOULD MEAN FOR CARRIERS, STEVEDORES, AND TERMINAL OPERATORS

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Summary

I. Introduction

After 85 years – and 73 years in the United States, known as the U.S. Carriage of Goods by Sea Act (COGSA) – the Hague Rules are possibly on the verge of being replaced. [FN 1]. As a result of more than a decade of work, negotiations, and drafting by the Comite Maritime International (CMI) and then the United Nations Commission on International Trade Law (UNCITRAL), in December 2008 the United Nations adopted the "Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea", which will commonly be known as "the Rotterdam Rules". [FN 2].

The Convention will be signed at a formal ceremony in Rotterdam on September 23, 2009, but will not enter into force until "the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession." [FN 3]. It is expected, though, that ratification should be relatively easy to accomplish. [FN 4]. Once the new Convention enters into force, it is hoped by many, but most notably by those involved in the UNCITRAL drafting process, that the Rotterdam Rules will supplant not only the Hague Rules and COGSA, but also the Hague-Visby Amendments and the Hamburg Rules -- all of which are currently in force worldwide. [FN 5]. As a result, many people in the maritime and transportation industries world-wide are haling this Convention as a landmark step towards global uniformity for maritime commerce. [FN 6].

While the new Convention has many notable features that will benefit virtually all sectors of the maritime industry, it is commonly believed that shippers and cargo interests are the clear benefactors under the Rotterdam Rules when analyzing the provisions contained therein. On the opposite end of the spectrum, stevedores and terminal operators, now referred to as "maritime

performing parties" under the new Convention [FN 7], would arguably be the most negatively affected entities in the switch from COGSA to the Rotterdam Rules.

This paper intends to highlight some of the key areas where stevedores and terminal operators, primarily in the United States, will see a dramatic change under the new regime. This paper will also, to a lesser extent, discuss a couple of additional areas where carriers should expect to see a considerable difference.

While the general consensus seems to indicate that the Rotterdam Rules would promote uniformity, help modernize the rules that govern the international transport of cargo, and close existing loopholes that have developed over time in the interpretation of the current regimes, from the perspective of stevedores and terminal operators, particularly in the United States, the Rotterdam Rules have not been viewed so overwhelmingly positive. In fact, the Rotterdam Rules will signal the end of the package limitation as we know it, which arguably will have the potential of creating a dramatic series of unintended consequences for the industry as a whole.

II. The Main Benefits That Stevedores and Terminal Operators Currently Enjoy Under the U.S. Carriage of Goods by Sea Act (COGSA)

Under COGSA, stevedores and terminal operators who have the benefit of an adequately drafted Himalaya Clause in the bill of lading, enjoy several notable advantages. First and foremost, stevedores and terminal operators get the benefit of the carrier's package limitation provisions. [FN 8]. The package limitation provision allows stevedores and terminal operators to limit their liability to $500 per package, or, in the case of goods not shipped in packages, per customary freight unit, which in today's dollars is a very attractive limitation amount.

While everyone would have to acknowledge that the economics of 1924 (and 1936 in the United States) are no where comparable to the economics present today, this has understandably created an argument that the $500 per package limitation under COGSA is antiquated when discussing today's dollars and today's cargo valuations. However, the effect of the $500 package limitation has arguably been counter-balanced by the shipper's opportunity to declare the actual value of the cargo. [FN 9]. Most shippers today are sophisticated commercial parties working with experienced freight forwarders who are readily aware of the opportunity to declare a higher value. [FN 10].

Another benefit that stevedores and terminal operators currently enjoy under COGSA (by way of the carrier) is a one-year time bar for the shipper or cargo interest to assert a claim "…after delivery of the goods or the date when the goods should have been delivered." [FN 11]. Under the circumstances, stevedores and terminal operators believe that this is a fair and practical statute of limitations for dealing with such claims. Because of the fact that we are discussing international waterborne transportation, where vessels are carrying numerous items of cargo on each voyage, carriers, stevedores, and terminal operators are required to maintain voluminous documentation pertaining to all of these shipments.

A one-year time bar has been manageable for these entities in terms of maintaining all of that documentation as well as allowing these entities to be able to locate the relevant individuals involved with any particular shipment. Arguably, a time bar that is extended to two years (as is provided with the Rotterdam Rules) compromises a maritime company's ability to effectively manage and/or locate both its documentation and the potential fact witnesses. Of course, on the other hand, now that we are officially entering the era of electronic documentation and storage, this may prove not to be as much of an issue in the coming years.

There are also other advantages that stevedores and terminal operators currently enjoy under COGSA, such as the carrier-friendly interpretation of a "package" and the broad interpretation of "customary freight unit", among other things.

III. Previous Attempts to Overhaul The Hague Rules and/or COGSA

Over the years, various attempts have been made both internationally and domestically to overhaul the Hague Rules and/or COGSA in the United States. Up to this point, some of those attempts have only been marginally successful, while others have outright failed. The three most notable attempts to overhaul the Hague Rules and/or COGSA prior to the Rotterdam Rules are: 1) the Hague-Visby Amendments of 1968 [FN 12]; 2) the Hamburg Rules of 1978 [FN 13]; and 3) the proposal to amend COGSA in 1999. [FN 14].

A. Hague-Visby Amendments

In 1968, the Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels, more commonly referred to as the "Hague-Visby Amendments" or the "Hague-Visby Rules," were signed at a Diplomatic Conference initiated by the CMI. The Protocol came into force on June 23, 1977.

The impetus of the Hague-Visby Amendments was an attempt to update the Hague Rules, but in particular it was due to a growing number of countries who were discontent with the limitation of liability provisions contained in the Hague Rules and in COGSA. [FN 15]. The Hague-Visby Amendments increased the liability limits to an amount tied into the price of gold, known as the franc Poincare. Shortly thereafter, though, gold lost its status as an official monetary unit. In 1979, a Protocol to the Hague-Visby Amendments was adopted substituting the Special Drawing Right, or SDR, for the franc Poincare as the unit of account. [FN 16].

Following the amendment, the liability limit was expressed as 666.7 SDRs per package or 2 SDRs per kilogram, whichever is greater. [FN 17].

The other prominent change under the Visby Amendments was the enactment of a "container clause" which stated that for limitation of liability purposes, the number of packages in a container shall be the number included in the bill of lading. [FN 18]. Despite its attempts to modernize the Hague Rules and to increase the liability limits, the Hague-Visby Amendments did not get strong international support and, to date, has only been ratified by twelve countries. [FN 19].

The critics of the Hague-Visby Amendments cite the follow problems: 1) the retention of the lengthy list of exceptions to liability, particularly the negligent navigation and negligent ship management exceptions; 2) limits of liability that are still too low; 3) the amendments did not do anything to clarify the uncertainties of the definition of "package" or "customary freight unit"; 4) the amendments are limited to tackle to tackle application; and 5) the amendments are limited to negotiable bills of lading in paper format. [FN 20].

In fact, some scholars have suggested that it was actually shipper interests who prevented the ratification of the Hague-Visby Amendments under the theory that ratification of Hague-Visby would delay the enactment of another Convention that was more shipper-friendly, the eventual "Hamburg Rules". [FN 21].

B. The Hamburg Rules

In 1978, under the leadership of the United Nations Conference for Trade and Development (UNCTAD) and UNCITRAL, the United Nations Convention on the Carriage of Goods by Sea, otherwise known as the "Hamburg Rules," were promulgated with the hope that it would replace the Hague Rules and Hague-Visby Amendments.

The main components of the Hamburg Rules are: 1) further increased limits of liability to 835 SDRs per package or 2.5 SDRs per kilogram, whichever is greater; 2) fault-based liability for the carrier which is based on a rebuttable presumption of carrier liability for all matters, except fire; 3) elimination of the defenses of negligent navigation and negligent management of the ship; 4) an increased period of responsibility of the carrier; and 5) a two-year time limit for suit. [FN 22].

As the Hamburg Rules were conceived with the goal of leveling the playing field for developing countries, and incorporates many provisions favoring shippers in an attempt to reign in the superior bargaining power of the carriers and the world maritime powers, none of the major maritime nations have decided to adopt this Convention. [FN 23]. The Hamburg Rules finally came into force on November 1, 1992. [FN 24].

C. Proposed COGSA Amendments, 1999

In 1999, a domestic effort was undertaken in the United States to amend COGSA, led by the Maritime Law Association of the United States. The main amendments proposed therein included broadly interpreted Himalaya Clauses, the abolishment of the Supreme Court's Sky Reefer opinion which validated foreign forum selection clauses [FN 25], the abolishment of the "navigational fault" exception, and the adoption of Hague-Visby limits of liability. [FN 26].

The Proposed COGSA Amendments went as far as a Senate hearing, but they were eventually tabled in deference to UNCITRAL's efforts [FN 27], which have now resulted in these Rotterdam Rules.

IV. Rotterdam Rules

A. Major Changes for Stevedores and Terminal Operators

The Rotterdam Rules feature numerous changes that will greatly affect the manner in which stevedores and terminal operators conduct business. However, this paper only highlights what the author perceives to be the six major changes for these maritime performing parties under the new Convention: 1) The Package Limitation; 2) Definition of "Package"; 3) Interpretation of "Customary Freight Unit"; 4) Himalaya Clauses; 5) Time for Suit Provision; and 6) Volume Contracts.

1. The Package Limitation

The increased limitation amounts represent the most significant of all of the changes for stevedores and terminal operators when comparing COGSA to what will eventually come into force if the Rotterdam Rules are ratified in the United States.

Under COGSA, assuming that the stevedore and terminal operator are covered by an adequately drafted Himalaya Clause in the bill of lading, they currently are able to limit liability to $500 per package or in the case of goods not shipped in packages, per customary freight unit. [FN 28]. For sake of comparison, the Hague-Visby Amendments adopted an "either-or" approach whereby the liability limits are set at 666.7 SDRs per package or 2 SDRs per kilogram, with the limits being established on a case-by-case basis depending on whichever method results in the greater limit. [FN 29]. The Hamburg Rules increased those limits to 835 SDRs per package or 2.5 SDRs per kilogram, whichever is greater. [FN 30].

Under the new Rotterdam Rules regime, the liability limits are increased even further to 875 SDRs or 3 SDRs per kilogram, whichever is greater. [FN 31]. As of September 4, 2009, the SDR is currently valued at $1.562850 U.S. Dollars. [FN 32]. Therefore, if the Rotterdam Rules

were in force today, the liability limitation would equal $1,367.49 per package or $4.69 per kilogram, whichever is greater. Using these numbers, the breakeven point where one would traverse from a per package limitation to a weight-based limitation is 291.67 kilograms, or 641.67 pounds.

While a shift to the Rotterdam Rules limits may not be much of an adjustment for those countries currently governed by the Hamburg Rules, or even for those countries subject to the Hague-Visby Amendments, it is, however, a considerable adjustment from the current COGSA limitation levels. Undoubtedly, stevedores and terminal operators in the United States are questioning why the United States would agree to a liability scheme that exceeds any previous Convention and features an ever-fluctuating rate in the form of the SDR.

According to Professor Michael Sturley, who was the Senior Adviser on the United States Delegation to Working Group III, a disproportionately large number of the countries participating on UNCITRAL's Working Group III had adopted the Hamburg Rules, even though only a very small portion of the world's maritime trade was governed by that Convention. [FN 33]. Moreover, "many of these countries felt very strongly that the new convention should represent significant 'progress' over the Hamburg Rules (with 'progress' being defined as increasing the limitation amounts)." [FN 34].

2. Definition of "Package"

The new Rotterdam Rules incorporate language that is similar to the "container clause" of the Hague-Visby Amendments and the Hamburg Rules. [FN 35]. The effect of this change is that for limitation purposes, the Convention will look to the smallest package identified on the bill of lading. Where this becomes significant, at least in relation to COGSA where the term "package" was never explicitly defined and as a result was interpreted by the courts, sometimes

differently, is in the interpretation of the amount of packages shipped when shipped in containers or on pallets.

While courts in the U.S. generally look to the applicable bill of lading to determine the number of packages within a container, not all courts have done so. [FN 36]. Furthermore, U.S. law typically treats a palletized unit as a single "package" even when the individual items on the pallet have been identified on the bill of lading. [FN 37]. This will no longer be the case, which, in addition to increased liability limits, will serve to further escalate the potential liability that carriers, stevedores, and terminal operators will have to endure as a result of the expected ratification of the Rotterdam Rules.

3. Interpretation of "Customary Freight Unit"

Article 59, Paragraph 1 of the new Convention states, in part, that "the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package ***or other shipping unit***…." (emphasis added) [FN 38].

Some scholars, most notably Professor Sturley, have argued that the Convention's use of the language "or other shipping unit" as opposed to using COGSA's "customary freight unit" terminology implicitly rejects the U.S. customary freight unit. [FN 39]. While Professor Sturley, as the Senior Adviser to the U.S. delegation, is certainly entitled to a considerable amount of deference as to his opinions on this subject, the fact of the matter is that "shipping unit" is not a defined term in the Rotterdam Rules. Therefore, for the time being, it is anyone's guess whether the courts in the United States will interpret "shipping unit" as Professor Sturley suggests or whether the courts will merely fall back into utilizing the customary freight unit case law that has developed over the past several decades in the United States.

Regardless of the outcome of that interpretation, there are several bill of lading clauses which will become obsolete once the Rotterdam Rules come into force. One such clause that tangentially relates to the customary freight unit issue that will be a thing of the past under a Rotterdam Rules governed shipment is the definition of "freight unit" that has been incorporated in many bills of lading. The clause at issue typically defines a freight unit as "each physical unit, car, truck or piece of cargo not shipped in a package, *irrespective of the weight or measurement unit employed in calculating freight charges*."

This type of clause was featured in the U.S. Court of Appeals for the Fourth Circuit case of Caterpillar Overseas v. Marine Transport, Inc. where the bill of lading incorporated such a clause and the Court agreed that it operated to limit the liability for a $75,000 tractor to $500. [FN 40]. More recently, the U.S. District Court for the District of Maryland in the case of American Roll-on, Roll-off Carriers, et al. v. P&O Ports Baltimore, Inc., Civil Action No. WDQ-03-CV-3462 relied on a similar clause when limiting P&O's liability as the stevedore/terminal operator for alleged damages to 166 automobiles to a total of $83,000, or $500 per car. [FN 41].

Under the new Rotterdam Rules, it is unlikely that any vehicle or large piece of equipment will ever be subject to the per package limitation again since almost all vehicles and equipment weigh more than 642 pounds. Consequently, all such vehicles will be subject to the weight-based liability limitation of 3 SDRs per kilogram, which will result in dramatically increased limitation amounts. As will be discussed later in this paper, one avenue where such clauses may continue to see life after the Rotterdam Rules is in volume contracts, which are exempted from the application of the Rotterdam Rules. [FN 42].

4. Himalaya Clauses

Himalaya Clauses, which trace their roots to the English case of Alder v. Dickson (The Himalaya) [FN 43] and the Supreme Court case of Robert C. Herd & Co. v. Krawill Machinery Corp. [FN 44], will no longer be required for maritime performing parties, such as stevedores and terminal operators, *provided* that the shipment is governed by the new Convention. Article 4(1) of the Rotterdam Rules explicitly extends all of the carrier's defenses and limitations to every maritime performing party.

However, where Himalaya Clauses likely will continue to have tremendous importance is in volume contracts and for non-maritime performing parties, such as inland carriers. Both volume contracts and non-maritime performing parties are exempted from coverage under the Rotterdam Rules, and, therefore, do not get the benefit of any of the carrier's defenses and limitations as articulated in the new Convention.

Despite the insistence by proponents of the Rotterdam Rules that this is some major coup for stevedores and terminal operators, the reality is that the potential impact that this change will have on maritime and non-maritime performing parties is probably minimal. Over the years, Himalaya Clauses have become a standard fixture in bills of lading, and litigation as to such clauses has become less and less prevalent in recent years due to the virtually universal language used in any such clauses.

One would have to suspect, though, that Himalaya Clauses will remain a part of the terms and conditions in bills of lading governed by the new Convention merely as a safety precaution to make sure that everyone in the multimodal chain, particularly those parties beyond maritime performing parties, are adequately covered.

5. Time for Suit Provision

In what can arguably also be attributed to the disproportionate number of countries governed by the Hamburg Rules participating on Working Group III in the drafting of the Rotterdam Rules (discussed *supra*), Article 62(1) of the Rotterdam Rules features a time for suit provision of two (2) years, which is the same time limit as is contained in the previously adopted Hamburg Rules. [FN 45].

While some people are probably correct that a move from a one-year time bar under COGSA to a two-year time bar under the Rotterdam Rules will likely not increase the amount of claimants filing suit, however, the area where it likely will have a considerable effect on carriers, stevedores, and terminal operators is claims management and related logistical issues. [FN 46].

By its inherent nature, the shipping business creates a considerable amount of documentation for each and every voyage, whether it be bills of lading, mates receipts, manifests, logs, dock receipts, invoices, superintendent's reports, longshoremen gang order sheets, and so on. Even though the shipping industry is heading towards 100% electronic documentation, the process is a slow one and nowhere near complete.

Therefore, to the extent that the Rotterdam Rules will require stevedores and terminal operators to adjust their document retention policies and to physically maintain such documentation for an additional period of time may prove to be a cumbersome task, and one that may jeopardize the otherwise successful defense of claims due solely to the length of time before such suits are initiated by the cargo interests. In fact, the effect of this change may be further magnified by the switch to a "door-to-door" or "maritime-plus" regime, at least for carriers.

6. Volume Contracts

Most everyone that has commented on the Rotterdam Rules has identified the exemption of volume contracts as probably the most significant feature of the new Convention as far as ***carriers*** are concerned. However, as far as stevedores and terminal operators are concerned, the exemption of volume contracts probably represents the largest wild card for such entities.

The applicable provisions in the Rotterdam Rules regarding volume contracts provide the circumstances under which such a contract between a carrier and shipper may deviate from the rights, obligations, and liabilities of those imposed by the Convention [FN 47], and also extends that feature to any other person, including maritime performing parties like stevedores and terminal operators. [FN 48].

In the United States, which was the strongest proponent of the volume contract exemption [FN 49], this will be an extremely important provision. It is estimated that volume contracts, or "service contracts" as they are commonly called, currently account for about 90% of the liner trade to or from the United States. [FN 50].

A lot, however, will probably depend on the state of the world's economy when the Rotterdam Rules come into force and how, specifically, that economy is affecting the maritime transportation business. If the Rotterdam Rules were to come into force during a thriving economy where vessel space is at a premium, then one would expect that market forces would dictate that carriers – and by extension, stevedores and terminal operators – would have considerable leverage in negotiating favorable terms regarding liability provisions, the scope of Himalaya Clauses, and other relevant clauses that ultimately would prove beneficial for stevedores and terminal operators.

If, however, the Rotterdam Rules were to come into force in a 2009-type economy where shipowners are experiencing vessels with a considerable amount of available space, it is likely that shippers would instead have the leverage (assuming that they have cargo to ship) and could attempt to negotiate and/or dictate terms that are more favorable than what is currently provided in the Convention.

Under the latter scenario, stevedores and terminals theoretically could rely on the protections built-in to the Convention and reject any provisions that are less advantageous than what is already provided for under the Rotterdam Rules. The reality of the situation, though, may dictate that the stevedores and terminal operators accept the work under less than favorable conditions, or else run the risk of not being part of the shipment.

B. Additional Major Changes for Carriers

While this paper is primarily focused on the major changes that stevedores and terminal operators will experience under the Rotterdam Rules, it bears mentioning at least two additional features which will primarily affect carriers: 1) Period of Responsibility; and 2) Negligence in Navigation and Management of the Vessel.

1. Period of Responsibility

The new Convention adopts a door-to-door approach and has been referred to as a "maritime-plus" regime. [FN 51]. This represents a significant change from any of the other regimes that are currently in force. The Hague Rules, COGSA, and the Hague-Visby Amendments all feature tackle-to-tackle responsibility [FN 52], whereas the Hamburg Rules feature port-to-port responsibility by the carrier. [FN 53].

Several commentators on the Rotterdam Rules have noted that while this proposed change was initially controversial, it was quickly accepted as the only way to accomplish a

uniform international legal regime which could govern the entire performance of the contract. [FN 54]. Others have added that "tackle-to-tackle" and "port-to-port" regimes were obsolete in today's maritime environment, and that a single liability regime that covers the whole period of transport was "highly desired." [FN 55].

An important component of the door-to-door approach is a rebuttable presumption that provides that any damage suffered by the cargo occurred during the carrier's period of responsibility, unless it can be explicitly shown that the damage is caused by some other performing party along the multimodal distribution chain. [FN 56]. Inevitably, this will prove to be a rather significant change under the Rotterdam Rules as far as carriers and shippers are concerned.

2. Negligence in Navigation and Management of the Vessel

One of the oddities of the Hague Rules and of COGSA is that as a result of a quid pro quo arrangement struck in the infancy of those regimes whereby in exchange for carriers agreeing to provide a seaworthy vessel at the inception of any particular voyage, one of the enumerated exceptions to a carrier's liability for cargo damage was damage caused by the crew's negligence in the navigation or management of the vessel. [FN 57]. For years, reformers pointed to this exception as an unconscionable provision that could not be justified, and openly questioned how a carrier could be granted an exception to liability as to a matter that was solely within its own ability to control.

While the exception remained a feature under the Hague-Visby Amendments, it was eventually removed with the drafting of the Hamburg Rules. [FN 58]. In light of the prevalence of countries governed by the Hamburg Rules participating on Working Group III, and due to the fact that the Rotterdam Rules was largely a product of UNCITRAL, which arguably goes out of

its way to support developing countries and shippers at the expense of established maritime countries and carriers, it is no surprise that the "navigational fault" exception was not part of the Hamburg Rules and is not part of the Rotterdam Rules.

C. Unintended Possible Consequences for Maritime Commerce

Whenever you have a new Convention come into force, there likely will be unintended consequences as a result of its enactment and applicability. When considering the Rotterdam Rules and its various provisions, it is likely that the anticipated ratification of the Rotterdam Rules will create several unintended business consequences as well as a handful of unintended legal implications. Only time will tell for sure, but below are several possible unintended consequences that may result from the ultimate ratification of the Rotterdam Rules.

1. Increased Ocean Tariff Rates

The first of the possible unintended business consequences that may occur as a result of the new Rotterdam Rules is increased ocean freight rates. In fact, we may already be witnessing such an evolution in anticipation of the Convention coming into force. This year, despite a struggling economy where one would logically expect to see more competitive ocean freight rates, we instead have seen almost every major carrier increase their ocean freight rates. [FN 59]. Why?

One possible explanation is that this is being done in preparation for the ultimate ratification of the Rotterdam Rules and the increased liability limits that will result. Carriers realize that the Rotterdam Rules represent a shift from many of the carrier-friendly provisions currently contained in the Hague Rules and COGSA, to provisions that will result in increased liabilities and costs for the carriers, stevedores, and terminal operators.

Another possible explanation for increased ocean tariff rates is that carriers are trying to manipulate the market by increasing their published ocean tariff rates in an attempt to entice shippers to ultimately enter into volume contracts, where carriers would probably agree to offer reduced freight rates in exchange for more palatable liability provisions.

2. Increased Marine Insurance Premiums

Under the overly-simplified premise that insurance premiums rise or fall directly in relation to the actual (or perceived) increase or decrease in risk that the insured will face, it is evident that carriers, stevedores, and terminal operators, particularly those in the United States and governed by COGSA, will see considerable increases in their insurance premiums once the Rotterdam Rules come into force.

This is an obvious by-product of these entities moving from a regime which features a package limitation of $500 per package or customary freight unit, to a regime which features a fluctuating package limitation currently worth more than $1,367 per package or a weight-based limitation which is implicated whenever the cargo exceeds 642 pounds, not to mention the fact that the new regime allows for recovery under a couple of additional avenues that are not presently available under COGSA.

If, however, you look at insurance coverage for shipments from a global perspective, taking into account cover for carriers, stevedores, and terminal operators, on the one hand, and cover purchased by cargo interests, on the other hand, the question becomes does the overall combined cost of insurance coverage end up being a net zero change when moving from the current regime (particularly COGSA) to the Rotterdam Rules. In reality, this is a very complex question which, unfortunately, cannot adequately be addressed in the short amount of space remaining in this paper.

However, in 1981, a similar analysis was undertaken to analyze the possible effect on insurance costs when shifting from the Hague Rules to the Hamburg Rules. [FN 60]. That analysis came to the conclusion that the net effect of insurance premiums following the enactment of the Hamburg Rules would not be that significant. [FN 61]. Others have since conducted additional analysis on the subject. [FN 62]. Despite the conclusions that were reached in 1981 and in the other subsequent studies, under current market conditions it is quite possible that the cumulative effect of a change from COGSA to the Rotterdam Rules will result in a net effect of considerably greater insurance premiums for our industry going forward.

It is a given that insurance premiums will increase for carriers, stevedores, and terminal operators, but it is equally as likely that cargo interests will not receive a similar size decrease in insurance premiums to match the increase experienced by carriers and stevedores, at least not initially. In today's corporate culture more so than any other time, insurers and underwriters are forced to err on the side of being conservative, or "risk averse", when assessing risk. [FN 63].

Therefore, until those insurers and underwriters get a better sense for the true shift in insurance liabilities from shippers to carriers, insurers and underwriters will likely institute significant increases in the insurance premiums for carriers and stevedores to adequately cover that increased risk, while at the same time only incrementally (and slowly) decreasing the insurance premiums for cargo interests until there is some clarity on the actual effect of the switch to the Rotterdam Rules.

3. Increased Stevedoring Costs

With the prospect of facing increased operational costs, increased liabilities, and increased insurance costs, the maritime industry can certainly expect to see a related increase in

stevedoring costs being charged by stevedores and terminal operators. This conclusion does not require much consideration as it is virtually inevitable.

4. Continued Lack of Uniformity

There is an assumption, which is a very optimistic assumption, in much of the scholarly research these days regarding the Rotterdam Rules that this new Convention will supplant all of the current regimes that are currently in force worldwide. [FN 64]. However, as a matter of historical perspective, it is important to note that while it was the intention of each of the previous two Conventions – the Hague-Visby Amendments and the Hamburg Rules – that they would completely supplant the regimes in existence at the time, for the reasons previously stated that did not occur. [FN 65].

Therefore, everyone involved in this process would be remiss not to acknowledge that it is entirely possible that the Rotterdam Rules will be ratified by at least 20 countries, and rather than being the sole surviving regime governing maritime transportation it may merely be one of four regimes that remains in force – or worse yet, one of five regimes if the United States opts not to ratify the Rotterdam Rules and decides to retain COGSA instead.

If the Rotterdam Rules merely become one of four (or one of five) regimes in force, rather than becoming the sole regime in force, this obviously will not fulfill the hopes of many that ratification of the Rotterdam Rules will help achieve uniformity in the maritime transportation industry. In fact, if this occurs, the Rotterdam Rules coming into force would probably have the opposite effect and push the industry further in the direction of lack of uniformity.

However, despite the dilemma of whether the Rotterdam Rules will be the only regime remaining or not, the hopes of uniformity were still not a very realistic premise in light of the

relevant provisions contained in the Rotterdam Rules. As was discussed previously, volume contracts are exempted from the Rotterdam Rules, and this factor, in and of itself, will result in an extraordinary amount of divergence as to what rules and liabilities apply to what shipments. [FN 66].

Even if one were to assume that all of the countries that are currently governed by the existing Conventions decide to ratify the new Rotterdam Rules, thus supplanting all of those other Conventions, carriers and shippers will still have the ability to enter into volume contracts – contracts which would have the ability to be based of any of those previous regimes, or a combination of aspects from several of those regimes, or specifically-tailored contractual provisions that have never previously been part of any regime. The possibilities and the variations are virtually endless, thus eliminating any realistic chance of uniformity.

Therefore, if uniformity is one of the over-riding goals of the expected ratification of the Rotterdam Rules, volume contracts likely will be the major obstacle to achieving that goal.

5. Potential Inconsistencies with Ocean Shipping Reform Act

Under the Ocean Shipping Reform Act of 1998 and its related regulations, a terminal operator is currently allowed to limit its liability as a matter of implied contract by the terms contained in its published schedule. [FN 67]. For instance, the Baltimore Marine Terminal Association (BMTA) Schedule provides (and presumably others do as well) for a $500 per package limit of liability.

In the event that the Rotterdam Rules are ratified by the United States and nothing is done to address this issue in the Ocean Shipping Reform Act, a question will arise as to which liability scheme will apply if cargo is damaged on the terminal by the terminal operator. As it is currently drafted, it appears that the Rotterdam Rules do not currently provide a definitive

answer to this question. Therefore, it should be expected that this issue will need to be addressed in the coming years.

6. Increased Attorneys Fees

The unintended consequence of increased attorneys fees as a result of a change to the Rotterdam Rules goes without saying. In fact, it may not even be an "unintended" consequence. The Rotterdam Rules have been politely described as "comprehensive", which is an understatement. [FN 68]. The Rotterdam Rules feature 96 separate articles. [FN 69].

In light of the length and perceived complexity of the Rotterdam Rules, the expectation is that maritime and transportation attorneys will be required to spend considerable time reviewing the language of the new Convention in an attempt to understand the scope and the subtleties of the provisions contained therein. Moreover, after spending the last 73 years creating a body of cargo law that is generally understood by practitioners, for better or worse, once the Rotterdam Rules come into force attorneys will have to begin the process of creating a whole new body of cargo law. While there is a sizeable portion of the existing case law that might apply to the Rotterdam Rules in light of many of the provisions being based on provisions contained in the other Conventions, there will be nuances that will have to be interpreted, litigated, and developed over time.

Furthermore, maritime attorneys will also have to expend considerable time and effort drafting new terms and conditions for bills of lading for shipments intended to be governed by the Rotterdam Rules, as well as drafting specifically-tailored terms and conditions for bills of lading for shipments governed by the freely negotiated volume contracts. All of the foregoing commercial realities will certainly result in increased attorneys fees for those in the industry.

7. New Litigation Issues

There are probably a fair amount of issues featured in the Rotterdam Rules that will take on a new level of significance as far as litigation practice goes, whereas those same issues are fairly innocuous under COGSA. An issue that comes to mind as possibly having increased significance under the new Convention is the valuation of cargo damage. [FN 70].

Under COGSA, particularly in light of its liability limits, the valuation of cargo at delivery in comparison to its value at the beginning of the shipment rarely ever becomes a litigated issue. Either the carrier and stevedore are entitled to limit liability pursuant to the package limitation, in which case the matter is resolved after the entry of a motion for partial summary judgment, or the carrier and/or stevedore are not entitled to limit liability, in which case the matter is typically settled on the basis of a business decision that ends up getting negotiated.

As time goes by, it will become obvious to all of us what other provisions will take on new life under the Rotterdam Rules and become more prevalent in terms of litigation.

V. Conclusion – The End of the Package Limitation as We Know It

If the United States does decide to ratify the Rotterdam Rules, it truly will be the end of the package limitation as we know it – for better or for worse. However, as far as stevedores and terminal operators are concerned, it certainly appears that it will be for the worse.

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[FN 1]. Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, August 25, 1924, 120 L.N.T.S. 155 [hereinafter "Hague Rules"]; U.S. Carriage of Goods by Sea Act, Chapter 229, 49 Stat. 1207 (1936), reprinted in statutory note following 46 U.S.C. §30701 (2006) [hereinafter "COGSA"].

[FN 2]. G.A. Res. 63/122, U.N. Doc A/RES/63/122 (Dec. 11, 2008) [hereinafter "Rotterdam Rules"].

[FN 3]. Rotterdam Rules, Article 94(1).

[FN 4]. Of course, it should be noted that it took the United States twelve (12) years to pass COGSA, it took the Hague-Visby Amendments nine (9) years to enter into force after being signed in 1968, and it took the Hamburg Rules fourteen (14) years to enter into force after being signed in 1978.

[FN 5]. *See* Michael F. Sturley, Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States, 44 Tex. Int'l L.J. 427, 428 (2009) [hereinafter "Sturley, Impact of the Rotterdam Rules"].

[FN 6]. Sturley, Impact of the Rotterdam Rules at pp. 454-455; *See* Tomotaka Fujita, The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications, 44 Tex. Int'l L.J. 349, 373 (2009) [hereinafter "Fujita, Comprehensive Coverage"].

[FN 7]. Rotterdam Rules, Article 1(7).

[FN 8]. Previously codified at 46 U.S.C. App. §1304(5).

[FN 9]. Previously codified at 46 U.S.C. App. §1304(5).

[FN 10]. *See* Michael F. Sturley, The Future of Maritime Law in the Federal Courts, 31 J. Mar. L. & Com. 241, 244 (2000) [hereinafter "Sturley, The Future of Maritime Law"]. As Professor Sturley points out, shippers and their insurers have learned to manipulate the rules to the disadvantage of the carriers:

> No sensible shipper would declare a higher value...because the ad valorem freight charge that would be triggered by a declaration is almost invariably higher than a premium that a cargo underwriter would charge for insuring the same shipment...Thus the real impact of the doctrine...is generally to shift losses...from cargo

> underwriters (who receive premiums for insuring against the losses) to carriers (who did not).

Id. *See also* Nichimen Company v. M/V Farland, 462 F.2d 319, 335 ("Most cargo damage actions are really battles between insurers, and there is thus no need for shedding crocodile tears on behalf of the shipper or consignee.").

[FN 11]. Previously codified at 46 U.S.C. App. §1303(6).

[FN 12]. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, February 23, 1968, 1412 U.N.T.S. 128 [hereinafter "Hague-Visby Amendments"].

[FN 13]. United Nations Convention on the Carriage of Goods by Sea, March 31, 1978, 1695 U.N.T.S. 3 [hereinafter "Hamburg Rules"].

[FN 14]. Another notable Convention, which focused on stevedores and terminal operators, was the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade of 1991, commonly referred to as the "OTT Convention". While the OTT Convention did not seek to overhaul any of the existing regimes, it did attempt to create a liability regime for stevedores and terminal operators that would complement those other regimes.

[FN 15]. Thomas J. Schoenbaum, Admiralty and Maritime Law (Fourth Edition), §10-13 at pp. 637; *see* Benjamin W. Yancey, The Carriage of Goods: Hague, COGSA, Visby, and Hamburg, 57 Tul. L. Rev. 1238, 1246-1247 (1983) [hereinafter "Yancey, Carriage of Goods"].

[FN 16]. The SDR is an international reserve asset, created by the International Monetary Fund in 1969 to supplement its member countries' official reserves. Its value is based on a basket of four key international currencies, which today consists of the euro, Japanese yen, pound sterling, and one U.S. dollar. The SDR is calculated as the sum of specific amounts of the four currencies valued in U.S. dollars, on the basis of exchange rates quoted at noon each day in the London market. *See* www.imf.org/external/np/exr/facts/sdr.htm.

[FN 17]. Hague-Visby Amendments, Article 2(a)

[FN 18]. Hague-Visby Amendments, Article 2(c)

[FN 19]. The countries that ratified the Hague-Visby Amendments are as follows: Belgium, Denmark, Egypt, Finland, France, Italy, Netherlands, Norway, Poland, Sweden, Switzerland, United Kingdom. Another eighteen (18) countries have acceded to the Hague-Visby Amendments.

[FN 20]. Schoenbaum, §10-14 at pp. 641-642.

[FN 21]. *See* Allan I. Mendelsohn, Why the U.S. Did Not Ratify the Visby Amendments, 23 J. Mar. L.& Com. 29, 30 (1992) [hereinafter "Mendelsohn, Why the U.S. Did Not Ratify Visby"].

[FN 22]. Id. at pp. 643-647.

[FN 23]. Mendelsohn, Why the U.S. Did Not Ratify Visby at pp. 52-53; *see* Jose Angelo Estrella Faria, Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules, 44 Tex. Int'l L.J. 277, 299-302 (2009) [hereinafter "Faria, Uniform Law"].

[FN 24]. The countries that ratified or acceded to the Hamburg Rules as of November 1, 1992 were as follows: Barbados, Botswana, Burkina Faso, Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senagal, Sierra Leone, Tunisia, Uganda, United Republic of Tanzania, and Zambia. Those countries that have ratified or acceded to the Hamburg Rules since November 1, 1992 are as follows: Albania, Austria, Burundi, Cameroon, Czech Republic, Dominican Republic, Gambia, Georgia, Jordan, Kazakhstan, Liberia, Paraguay, Saint Vincent and the Grenadines, and Syrian Arab Republic.

[FN 25]. Vimar Seguros y. Reaseguros S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995).

[FN 26]. Schoenbaum, §10-14 at pp. 647-648.

[FN 27]. Sturley, Impact of the Rotterdam Rules at p. 428, fn. 2.

[FN 28]. Previously codified at 46 U.S.C. App. §1304(5).

[FN 29]. Hague-Visby Amendments, Article 2(a).

[FN 30]. Hamburg Rules, Article 6(1).

[FN 31]. Rotterdam Rules, Article 59(1).

[FN 32]. A valuation of Special Drawing Rights (SDR) can be found on the website for the International Monetary Fund (IMF), www.imf.org.

[FN 33]. Sturley, Impact of the Rotterdam Rules at p. 438.

[FN 34]. Id.

[FN 35]. Rotterdam Rules, Article 59(2).

[FN 36]. Rosenbruch v. American Export Isbrandtsen Lines, 543 F.2d 967 (2d Cir. 1976); Norwich Union Fire Insurance Society, Ltd. v. Lykes Bros. Steamship Co., Inc., 741 F.Supp. 1051, 1056-1058 (S.D.N.Y. 1990).

[FN 37]. Sturley, Impact of the Rotterdam Rules at pp. 440-441.

[FN 38]. Rotterdam Rules, Article 59(1).

[FN 39]. Sturley, Impact of the Rotterdam Rules at p. 442.

[FN 40]. Caterpillar Overseas v. Marine Transport, Inc., 900 F.2d 714 (4th Cir. 1990).

[FN 41]. American Roll-on, Roll-off Carriers, et al. v. P&O Ports Baltimore, Inc., Civil Action No. WDQ-03-CV-3462, Memorandum Opinion granting Defendant P&O Ports Baltimore's Motion for Partial Summary Judgment, dated January 16, 2008, at p. 10.

[FN 42]. Rotterdam Rules, Article 80.

[FN 43]. Alder v. Dickson (The Himalaya) [1955] 1 Q.B. 158 (an English personal injury case in which the court permitted a carrier to contractually exempt from liability both itself and those whom it engaged to carry out the contract).

[FN 44]. Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 308 (1959)(created opening for stevedores to limit their liability when Court stated that one of the reasons why stevedores were not covered under COGSA was that they were "not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier.").

[FN 45]. Rotterdam Rules, Article 62(1); Hamburg Rules, Article 20(1).

[FN 46]. Sturley, Impact of the Rotterdam Rules at p. 453.

[FN 47]. Rotterdam Rules, Article 80(1) and (2), which state as follows:

1) Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2) A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;
(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;
(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and
(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

[FN 48]. Rotterdam Rules, Article 80(5), which states as follows:

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and
(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

[FN 49]. Sturley, Impact of the Rotterdam Rules at p. 453.

[FN 50]. *See* Chester D. Hooper, Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or the Definition of Fora Conveniens Set Forth in the Rotterdam Rules, 44 Tex. Int'l L.J. 417, 420 (2009) [hereinafter "Hooper, Forum Selection and Arbitration"].

[FN 51]. Rotterdam Rules, Article 12(1); Fujita, Comprehensive Coverage at p. 353 (rationale for referring to the Rotterdam Rules as a "maritime-plus" regime).

[FN 52]. Hague Rules, Article 1(e); COGSA, previously codified at 46 U.S.C. App. §1311; Hague-Visby Amendments, Article 1(e).

[FN 53]. Hamburg Rules, Article 1(6).

[FN 54]. Sturley, Impact of the Rotterdam Rules at p. 434.

[FN 55]. Fujita, Comprehensive Coverage at p. 351.

[FN 56]. Rotterdam Rules, Article 17(1) and (2).

[FN 57]. Hague Rules, Article 4(2)(a). *See also*, Schoenbaum, §10-13 at p. 637.

[FN 58]. Schoenbaum, §10-14 at p. 644.

[FN 59]. Hanjin to Raise Atlantic Rates, Add Surcharge, The Journal of Commerce, July 21, 2009; OOCL Raises Rates on U.S. Outbound Cargo to Asia, The Journal of Commerce, August 6, 2009; NYK Raises Trans-Atlantic Rates, The Journal of Commerce, August 12, 2009; CMA CGM Imposes New Rate Hike, The Journal of Commerce, August 24, 2009; MSC Hikes Atlantic Rates, The Journal of Commerce, August 27, 2009; Maersk Imposes New Trans-Atlantic Rate Hikes, The Journal of Commerce, August 31, 2009.

[FN 60]. *See* Erling Selvig, The Hamburg Rules, the Hague Rules and Marine Insurance Practice, 12 Journal of Maritime Law and Commerce 299 (1981) [hereinafter "Selvig, Marine Insurance"].

[FN 61]. Selvig, Marine Insurance at pp. 316-317.

[FN 62]. *See* Michael F. Sturley, Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence, 24
J. Mar. L. & Com. 119 (1993) [hereinafter "Sturley, Conflicting Empirical Arguments]; David S. Peck, Economic Analysis of the Allocation of Liability for Cargo Damage: The Case for the Carrier, or is it?, 26 Transp. L.J. 73, 99-103 (1998) [hereinafter "Peck, Allocation of Liability"].

[FN 63]. Peck, Allocation of Liability at p.

100. [FN 64]. See footnote 5, *supra*.

[FN 65]. See footnotes 20 and 23,

supra. [FN 66]. Rotterdam Rules,

Article 80.

[FN 67]. Ocean Shipping Reform Act of 1998, Section

8(f). [FN 68]. Fujita, Comprehensive Coverage at p. 350.

[FN 69]. In comparison, the Hague Rules feature 10 articles, the Hague-Visby Amendments feature 17 articles, and the Hamburg Rules have a total of 34 articles.

[FN 70]. Rotterdam Rules, Article 22(1).