MARITIME LAW ASSOCIATION OF THE UNITED STATES
COMMITTEE ON CARRIAGE OF GOODS BY SEA

Proposed Resolutions Concerning Chapters 14 and 15 of the Rotterdam Rules

Minority Report

March 31, 2009

The 1995 decision of the Supreme Court in *SKY REEFER* enforced foreign arbitration clauses in cargo damage cases arising under bills of lading. Since then many cases for damage to cargoes offloaded in U.S. ports have been dismissed and sent abroad to be resolved under exclusive foreign choice of court and foreign arbitration clauses.

At the time many members of the MLA regarded *SKY REEFER* as a mistake. But they recognized that it would be difficult to obtain Federal legislation to overrule the decision, since there would be certain opposition by ocean carrier interests as well as P&I underwriters, and Congress then, as now, is disinclined to take the time to consider changes in private maritime law unless they are unanimously supported by all parts of the shipping industry.

SKY REEFER came down just as the Carriage of Goods Committee was finishing up its controversial proposal to reform COGSA. The Committee decided, in an effort to compromise and thereby gain additional support for reform of COGSA, to include in the draft legislation a provision to overrule *SKY REEFER*, which was overwhelmingly approved by the Association at the May 3, 1996 meeting.[1] MLA Doc. Nos. 723, 724.

The Rotterdam Rules consist of 16 non-optional chapters and 2 optional chapters. As under Hague Rules, although charter parties are exempt, a cargo damage claim under a charter party bill of lading in the hands of a third party is governed by the Rules.

Volume (service) contracts are treated under the non-optional chapters somewhat like charter parties, in that such contracts may derogate from the Rules. Articles 80(5) and 80(6) permit volume contract derogation to bind a third party who claims for cargo damage under a volume contract bill of lading, but only if the third party gives "express consent" to the derogation, not just constructively under the terms of the carrier's published tariff or under boilerplate in the bill of lading, and the carrier bears the burden of proof that such express consent was given . 2009 A.M.C. 58.

An exception is found in optional Chapters 14 and 15 which deal with choice of court and arbitration clauses. Both chapters start off by invalidating the exclusivity of

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[1] Proposed Clause 3(8)(b) of the new COGSA statute read in pertinent part: "Any ... agreement made before a claim has arisen that specifies a foreign forum for litigation or arbitration of a dispute governed by this Act shall be null and void and of no effect if ... the port of loading or the port of discharge is or was intended to be in the United States ...."

choice of court and arbitration clauses for cargo damage claims under all bills of lading. But Articles 67(2)(d), 75(4)(d), and 76(2) allow national laws to derogate from this principle (for both choice of court and arbitration clauses) in a volume contract bill of lading, or (for arbitration clauses) in a charter party bill of lading, without the need for third party consent. 2009 A.M.C. 51, 54, 55. Thus, as applied to existing U.S. law, these three articles in optional Chapters 14 and 15 would perpetuate *SKY REEFER* for nearly all bills of lading under service contracts and charter parties in the U.S. trades.

Supporters of unconditional opting in describe Chapters 14 and 15 as representing a "compromise." But unlike the 1996 MLA proposal, which made anti-*SKY REEFER* provisions part of a true compromise, that successfully attracted more support for reform of COGSA, Chapters 14 and 15 are not a compromise. To begin with they are "optional." By definition, acceptance or rejection of their terms have nothing to do with whether other countries ratify the 16 non-optional chapters of the Rotterdam Rules. More significantly, Chapters 14 and 15 leave open for disposition under national laws the *SKY REEFER* issues in connection with volume contract bills of lading and charter party bills of lading. American legislation dealing with those purely local issues can have no influence whatever on ratification of the Rotterdam Rules by other countries.

Supporters of unconditional opting into Chapters 14 and 15 also argue that the U.S. got as much as it could out of the UNCITRAL negotiations, and the MLA should be satisfied with less than it sought in the 1996 proposal, because *SKY REEFER* would be overruled for cargo damage claims arising under all other bills of lading. But the argument is illusory. Some 90% of all containerized cargoes in the U.S. trades, which are not owned by the shipper under a service contract, are delivered under service contract bills of lading; and 100% of bulk cargoes in the U.S. trades, which are not owned by a charterer, are delivered under charter party bills of lading.

No other country is known to be even contemplating banishment abroad of claims for damage to cargoes carried under volume (service) contracts and delivered in its ports. On the contrary a number of countries – Canada, Australia, New Zealand, and South Africa -- already have laws in place preventing carriers from evading such local adjudication.

Even in the E.U., where London arbitration clauses are sometimes enforced in cargo damage cases, it is unlikely that many claims would actually be sent outside the country where the cargoes were delivered. Article 70(b) authorizes State parties to the Arrest Convention (e.g. all of the E.U. maritime countries) to derogate from Chapters 14 and 15, and empower their courts to hear cargo damage cases on the merits wherever the carrying ship or a sister ship is arrested. 2009 A.M.C. 52. There is no similar authorization, for a non-party to the Arrest Convention – e.g. the U.S., to derogate from the Rules and allow its courts to continue to hear cargo damage claims on the merits under similar local laws like F.R.C.P. Rules B and C.

Finally, many countries like Spain finesse the *SKY REEFER* issues altogether by making the local ships' agents liable for damage to cargoes offloaded in their ports.

Manifestly, if the MLA were to give unconditional support to opting into Chapters 14 and 15, -- i.e. without at least blunting the application of *SKY REEFER* -- we would **without any reason at all** be abandoning one of the fundamental goals of our original compromise proposal to reform COGSA. In this regard, it should be noted that nearly a

third of the Carriage of Goods Committee voted flatly against opting into Chapters 14 and 15.

Therefore, at the MLA meeting on May 1, I will move to amend the resolutions concerning Chapters 14 and 15 to provide as follows:

RESOLVED that The Maritime Law Association of the United States urges the United States of America to opt into Chapter 14 (Jurisdiction) of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which will probably be known as the "Rotterdam Rules", **provided that a third party claiming cargo loss or damage under a volume contract bill of lading will not be subject to an exclusive choice of foreign court clause contained therein, without the third party's express consent to be bound by such derogation from the Rules, under the same terms and conditions described in Articles 80(5)(b) and 80(6) of the Convention.***

RESOLVED that The Maritime Law Association of the United States urges the United States of America to opt into Chapter 15 (Arbitration) of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which will probably be known as the "Rotterdam Rules", **provided that a third party claiming cargo loss or damage under a volume contract bill of lading or a charter party bill of lading will not be subject to an exclusive foreign arbitration clause contained therein, without the third party's express consent to be bound by such derogation from the Rules, under the same terms and conditions described in Articles 80(5)(b) and 80(6) of the Convention.***

I hope that many members of the MLA will join me in supporting these amendments to restore, as much as we can, the compromise that was part of the original MLA proposal to reform COGSA.

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* There is slight difference in wording between the two amendments because the derogation authorized in Chapter 14, for choice of court clauses, applies only to volume contract bills of lading and not to charter party bills of lading; while the derogation in Chapter 15, for arbitration clauses, applies to both volume contract bills of lading and charter party bills of lading.