

# SURF & TURF

LEGAL NEWS IN TRANSPORTATION & LOGISTICS

A bimonthly newsletter published by the BPM Transportation & Logistics Practice Group

January 2010

## THE ROTTERDAM RULES: THE LONG VOYAGE OF INTERNATIONAL EFFORTS TO MODERNIZE OCEAN SHIPPING LIABILITY—PART II

(PART I PUBLISHED NOV. 2009 SURF & TURF – TO VIEW COMPLETE ARTICLE: [WWW.BPMLAW.COM/RESOURCES/NEWSLETTERS](http://WWW.BPMLAW.COM/RESOURCES/NEWSLETTERS))

By Steve Block

### *Claims and Litigation Points*

#### Defenses

The Rotterdam Rules preserve most cargo liability concepts found in earlier international treaties and COGSA. Basically, the shipper must demonstrate tender of its cargo to an ocean carrier in good order and condition, and either non-delivery or delivery in damaged or short condition. After jumping that hurdle, the burden of proof shifts to the carrier to demonstrate the loss was caused by one or more enumerated defenses. The Rotterdam Rules incorporate most of the established COGSA defenses, which essentially dictate what amounts to liability-generating fault. One adjustment is that the defenses aren't necessarily absolute, and courts could apportion liability based on degrees of fault and their contribution to the loss for specified defenses. This is something of a departure from COGSA's process, but one which may make little practical difference.

The most significant deletion from COGSA's list is the "Error in Navigation" defense, one that has never made much sense to most observers, especially shippers. It basically allows carriers to escape liability by demonstrating they were negligent, an illogical concept that has left many freight-claim litigants disenchanted with the entire system.

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Also adjusted, or perhaps clarified, is the fire defense. Under COGSA, the fire defense is somewhat unclear with regard to burdens of proof, and the U.S. circuits have gone in different directions applying it. On its face, COGSA's fire defense language is applicable only if the carrier's "privity and fault" caused it, which introduces another element someone must prove before it applies. When and who must demonstrate privity and fault, as well as when they must do so, just aren't clear. The new treaty's fire defense isn't subject to that lack of clarity; "fire on the ship" is listed as a defense like any other.

#### Deviation

Deviation terms are preserved to dissuade carriers from departing from their planned routes and service agreements, but with less vigor than certain U.S. and foreign case precedents have imposed. The current rule, though applied erratically, is that a carrier which deviates in a manner that causes loss loses its right to enforce limitation of liability provisions. Under the treaty, deviation won't destroy limitation of liability unless it was done "with the intent to cause such loss or recklessly and with the knowledge that

## THE ROTTERDAM RULES ... Continued

such loss would probably result." This leaves the door open to claims that altered routes caused delay that a carrier knew (or should have known) would cause a shipper to, say, miss a sales season in the country of destination.

Another frequent subject of deviation claims regards carriage of cargo on deck. Deviation in that manner still wouldn't necessarily be with the level of reckless intent required to destroy limitation of liability (although, for some cargoes, it very well may be). However, limited liability would be unavailable for carriers which expressly agreed to carry cargo under deck, but didn't.

### Time to Sue

The treaty provides a two-year statute of limitations for filing suit (like the Hamburg Rules, but unlike the one-year time to sue imposed by Hague-Visby and COGSA). The longer time period allows cargo interests more time to determine the nature and extent of their losses before deciding to file suit, and provides a more workable opportunity for players in certain countries to gather documentation needed for litigation. Usually a year is enough in the States, and when it's not, shippers' and carriers' adjusters usually stipulate to a deadline extension to avoid potentially unnecessary court action. The two-year period would commence on the date of delivery, or when delivery was scheduled, even if a loss isn't discovered until some time later. If two years has passed, a shipper could assert a lost/damaged freight claim as offset in response to a freight charge or other claim brought against it by the carrier.

### Damages

Recoverable damages for lost/damaged cargo are calculated based on the goods' value at the time and place of delivery. The valuation technique speaks for itself: "The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price, or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery." A provision allows shippers and

carriers to specify liquidated damages amounts in their contracts.

### Limitation of Liability

Nothing impacts cargo claims like that carrier's ace-in-the-hole, limitation of liability. Of course, the new treaty preserves this age-old feature of maritime law, but does so with some significant revisions.

The Rotterdam Rules' provisions regarding limitation of liability apply only to carriers and "maritime performing parties," which include stevedores and such, but exclude inland carriers. So what about Himalaya Clauses and other contractual extensions of maritime contract terms to railroads and truckers? How is the Kirby/ Sampo Japan debacle addressed? Put simply, it's really not. The U.S. and other countries struggling with the issues of dual ocean and inland liability regimes in a multimodal transportation world will just have to keep sorting that out themselves. One potentially problematic loophole some observers have noted is that a railroad could set itself up as a carrier simply by getting a non-vessel operating common carrier license from the U.S. Federal Maritime Commission. This might require some regulatory attention before Uncle Sam ratifies the treaty.

COGSA's per-package minimum liability of \$500, and the Hague-Visby Rules' 666.67 Special Drawing Rights (a valuation set by the International Monetary Fund based international currency fluctuations), have long been criticized as antiquated figures which don't reflect inflation over the past century. They also ignore the fact that much more valuable cargoes are now ocean shipped, taking advantage of technological developments such as containerization, faster vessels, and more reliable refrigeration.

Under the new treaty, a carrier's liability is limited to 875 SDRs (currently around \$1,500) or 3 SDRs per kilogram of weight (about \$2.20 pound), whichever is higher (a break COGSA doesn't give shippers). The weight option would be significant to break bulk shippers of heavy

## THE ROTTERDAM RULES. . . Continued

industrial equipment that might otherwise constitute a single package. Clearing up some conflicting principles from U.S. and other courts, a “package” for limitation of liability purposes the smallest unit definitively listed on a bill of lading, even if it is palletized with other packages. To escape full liability, carriers still must offer their shippers an option to declare full cargo value and pay a higher freight rate. Limited liability will not be available to a carrier if its owner (i.e., not just some deckhand) recklessly or knowingly caused the loss.

Liability for damages caused by delayed delivery are limited to two and a half times the freight charges. They are subject to the damages calculation provisos described above, and may be limited to 875 SDRs/package or 3 SDRs/kilogram if the carrier has properly limited its liability.

### Status

So where is this headed? Will we get the 20 ratified signatures needed to bring this thing to life? How many of the current 21 John Hancocks will they all be ratified? And what about Uncle Sam?

The U.S. signed the treaty at its formal ceremony earlier this year. Notably, some particularly important players - the United Kingdom, Canada, China and India, among others - haven't stepped up. Some observers question whether we will get the needed number of ratifications, or if we do, whether years will pass before it happens. The world in general, and the U.S. in particular, have gotten very used to deregulation over the past decade, and lobbying forces might not be particularly psyched to (potentially) give up newly acquired freedoms by way of an untested international treaty. The effects certain provisions of the Rotterdam Rules would have on the economic recovery are uncertain, and could be fodder for naysayers to stall or prevent ratification.

On the other hand, the uniformity and international predictability the new treaty (at least theoretically) provides have distinct advantages. Economic and legal reliability

actually might enhance economic recovery, and the risks of certain Rotterdam principles are really just theoretical. Efforts to provide contracting parties some leeway produced terms in significant areas.

We've waited a very long time for cargo liability reform. The current system of COGSA versus the world isn't a long-term option. It's time to strike a deal with our trading partners and move forward. The Rotterdam Rules are the best we can hope for by way of an immediate progress in the right direction.

Ref: *Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Transport.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html); *Norfolk Southern Railway Co. v. James N. Kirby, PTY Ltd., d/b/a Kirby Engineering, and Allianz Australia Insurance Limited*, 543 U.S. 14, 125 S.Ct. 385 (2004); *Sompo Japan Ins. Co. v. Norfolk Southern Ry. Co.*, 456 F.3d 54 (2nd Cir. 2006); and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 115 S.Ct. 2322 (1995).

## HOT RECENT CASES IN MOTOR CARRIER LAW

By Steve Block

**Nine months to file claim: the clock starts running when an originating carrier first suffers a loss.**

*Landair Transport, Inc. v. Schneider National Carriers, Inc.*, 2009 WL 3423037 (N.D. Tex. 2009)

What happens when it's an originating carrier that wants to make a freight claim against a sub that loses freight? Is it subject to the latter's nine-month deadline - stated in its standard bill of lading language - to report the claim? Yes, but the nine months begins not when the load disappears, or even when the shipper becomes aware it's missing freight, but when the first trucker is out of pocket.

## HOT RECENT CASES . . . Continued

Shipper Wal-Mart hired motor carrier Landair Transport to move a load from Mississippi to Texas. Landair realized it couldn't handle the load, and brokered it out to Schneider. The freight was stolen while in Schneider's possession. More than nine months later, Wal-Mart docked Landair some 91 grand in outstanding freight charges, offsetting the lost cargo's value. Landair made a claim to Schneider accordingly.

Schneider denied the claim, pointing to its standard bill of lading clause mandating that claims be reported nine months from the loss date. That's the Carmack-blessed minimum for interstate transit. The two truckers went to the mat in the Northern District of Texas, and filed cross motions for summary judgment.

Schneider's motion was denied. A claim doesn't accrue until a loss (including all of its elements) is sustained. Here, Landair didn't suffer a loss until Wal-Mart got around to withholding fees. Landair couldn't have asserted a viable claim any sooner. Only then did the clock start ticking. There being no dispute as to the loss, Landair's motion for summary judgment was granted.

**Carmack doesn't govern the Mexico-based leg of a through haul when no through bill of lading is issued.**

*Totran Transportation Services, Ltd. v. Fitzley, Inc. v. Transportes Ragat, SA DE CV, 2009 WL 3079246 (S.D. Tex 2009)*

Here's an interesting scenario that shows the implications of a through bill of lading, or in this instance, the absence of one. A shipper hired carrier Totran to haul a cargo of industrial gas heater equipment from Canada to San Luis Potosi, Mexico. Totran brought the freight down to Laredo, Texas, where it hired carrier Fitzley to complete the haul to destination in Mexico. Fitzley hired Mexican carrier Transportes Ragat to run the Mexican portion of the haul. It's unclear where the

transfers took place, although Fitzley alleged it occurred in Texas. In any event, Transportes Ragat issued a bill of lading that covered only transportation within Mexico. The freight was involved in an accident in Mexico, damaging it.

Totran sued Fitzley in the Southern District of Texas, and Fitzley brought in Transportes Ragat as a third-party defendant, alleging state and common law causes of action. Transportes Ragat moved to dismiss based on Carmack preemption.

The only problem with that theory was that nothing in the Mexican carrier's documented activities had any connection with the U.S. or interstate transit. Carmack doesn't control transportation wholly within a foreign country. Had a through bill of lading been issued, the result might have been different. Not totally a bad day for Transportes Ragat, though. The court did dismiss Fitzley's third-party action based on *forum non conveniens*.

**Tequila! More Mexican freight troubles, this time inbound.**

*Diageo North America, Inc. v. Con-Way Truckload, Inc., 2009 WL 3681665 (N.D. Cal. 2009)*

Importer Diageo North America engaged Mexican motor carrier Transportes Rodella to haul a cargo of tequila from Jalisco, Mexico to Laredo, Texas; and then U.S. carrier Contract Freighters, Inc. ("CFI," which is now Con-Way) to haul the load to Union City, California. The two carriers issued separate bills of lading. At destination, it was determined that some 98 grand worth of booze was missing, and the shipper sued CFI in the Northern District of California. Cross motions for summary judgment ensued based on limitation of liability and related assertions.

CFI argued that the parties had waived Carmack and that, per its tariff, no liability could attach for "Mexican losses" (and if that wasn't enforceable, that liability would be limited to 5¢ a pound). It further urged that Mexican law (with its approximately 3¢ per pound regulatory liability limitation) applied, this being a through move.

## HOT RECENT CASES . . . Continued

Diageo argued that CFI's tariff wasn't incorporated into the parties' agreement, and that even if it had been, the loss complained of took place in the U.S., and not in Mexico.

The court deferred the mess (or at least most of it) to trial, finding numerous issues of fact. Despite the dual bills of lading, the court found issues of fact regarding whether the parties had contracted for through transportation. Apparently focusing on the parties' intent, the court ignored the concept that CFI's separate bill of lading initiated a new contractual arrangement.

Similarly, the court hedged whether or not the parties had effectively waived Carmack, which typically is a contract construction issue to be determined as a matter of law. The court recognized that CFI's tariff (which disavowed Carmack) didn't accompany its bill of lading. However, incorporation by reference of tariffs has been a feature of transportation law for generations. There were some legibility issues not well explained in the opinion.

The court did rule as a matter of law on the "narrow issue" of whether CFI's limitation of liability would apply to a U.S.-based loss. If a factual determination is made that the loss did indeed occur stateside, then that limitation would not apply. That's probably little consolation to Diageo in a matter that seemingly was proper for determination as a matter of law.

### **Carmack analysis of broker's claim against trucker is subject to issues of fact.**

*Mark VII Transportation Co., Inc. v. Responsive Trucking, Inc.*, 2009 WL 2986108 (Tenn. Ct. App. 2009)

Shipper Hansbro/Milton Bradley engaged freight broker Mark VII to arrange interstate transit of a cargo of toys. Mark VII booked the haul with carrier Responsive Trucking pursuant to a master contract. Responsive loaded the cargo into shipping containers, but the carrier and broker disputed which was responsible for ensuring count. Apparently, no one did, and loads arrived

short of the counts confirmed in Responsive's bills of lading.

Hansbro/Milton Bradley made a 129 thousand dollar claim to Mark VII, which the broker paid (the opinion doesn't explain why Mark VII paid this - it wouldn't be liable unless its own negligence caused the loss - but business-relationship reasons probably had something to do with it). Mark VII sued Responsive in Tennessee state court to recoup its payout.

As the court correctly pointed out, Carmack wouldn't govern this claim because Mark VII wasn't Responsive's shipper (although Hansbro/Milton Bradley theoretically could have assigned its rights after the payout). However, the Mark VII-Responsive contract stipulated that Carmack would apply. Responsive argued that no evidence suggested the losses occurred while freight was in its custody. The trial court agreed on summary judgment, and up the parties went to the Volunteer State's Court of Appeals.

Disagreeing with the trial judge, the higher court found that Responsive's bills of lading do constitute prima facie evidence of the count at time of tender. They did not contain "shipper's load and count" disclaimers, which the court suggested might have been effective. Cited case law to the contrary was distinguishable because it involved matters in which shippers had done the loading. Regarding who had actual responsibility for loading the containers, the court found that loading sheets were incomplete and illegible, leaving questions of fact on the issue. At the core of the dispute was another factual issue: under whose watch was the cargo lost? Summary judgment was not appropriate, and trial court proceedings continue.

### **Corporate structure shields motor carrier from driver's workers comp claim.**

*Moore v. Howard Baer, Inc.*, 2009 WL 3321377 (Tenn.WorkersComp.Panel 2009)

Driver Moore was employed by corporate entity Ronald Baker, Inc. ("RBI"), which operated as a motor carrier. Its handful of drivers and equipment was leased exclusively to Tennessee-

## HOT RECENT CASES . . . Continued

based motor carrier Howard Baer, Inc. ("HBI") In fact, HBI pretty much controlled everything RBI and its employees, including Mr. Moore, did. HBI gave RBI personnel their assignments, repaired their vehicles, maintained their personnel files, and even outfitted them with clothes bearing HBI logos. Indeed, Mr. Baker was HBI's vice president and, later, president. The only thing HBI didn't do was pay RBI drivers.

Moore injured his shoulder on the job, yes, while attending to HBI tasks. He had been under the (justified) impression that RBI provided workers comp coverage through a private insurer. When that proved inaccurate and no state or private coverage applied to his injury, he sued and obtained a judgment against RBI. RBI went bankrupt, leaving Moore with a worthless judgment. He next fixed his sites on HBI, alleging it to be RBI's "alter ego."

Affirming a trial court, a remorseful Tennessee workers compensation board dismissed his claim. Tennessee law - like that of many other states - provides for liability under "borrowed servant," and "joint employer" doctrines. However, state and federal law specifies that leased operators are independent contractors not to be considered motor carrier employees for purposes at hand. The panel recognized that unscrupulous motor carriers could use this as a precedent to shield themselves from liability for employee injury claims, but the law as written is "unambiguous."

**Another injured driver is out of luck, this time on his independent contractor status.**  
*Smith v. Prime, Inc.*, 2009 WL 3190371 (La.App. 3 Cir. 2009)

Driver Smith did long hauls for carrier Prime, his work duties including unloading of cargoes. He entered into an Independent Contractor Operating Agreement and Personnel Service Agreement with the carrier. These provided numerous terms substantiating the kind of independence and lack of employer control needed to demonstrate an independent contractor relationship.

Prime assured Smith that it had coverage for workplace injuries, but didn't discuss with him whether he was actually eligible for that coverage based on his employment status. Turns out, he wasn't under a private coverage policy Prime purchased from Zurich. Smith was injured offloading freight, sued and lost before a Louisiana trial court, and took the matter up to the Pelican State's Court of Appeals.

Affirming the trial judge, the Court of Appeals ruled that Smith's status as a driver disqualified him from workers comp entitlements (whether through private or public coverage). Smith failed to present evidence that his unloading activities constituted manual labor for Prime which was outside usual owner-operator activity contemplated by the agreement. Under Louisiana law, Smith had the burden of proof on that issue, and the absence of evidence was sufficient for Prime to carry summary judgment.

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