

# THE ROTTERDAM RULES: CHANGES FROM COGSA

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In 1924, when the Hague Rules (The International Convention for the Unification of Certain Rules Relating to Bills of Lading, August 25, 1924) were adopted, virtually all ocean break-bulk cargo in the world's ocean trades moved as individual bags, cartons, crates, bales and barrels on sailing vessels, with bills of lading and the Hague Rules applying only for ocean transit, ship's gear to ship's gear. The use of pallets and containers, which became common in the 1960s, revolutionized cargo handling in terminals and aboard ship, with container terminals and container ships replacing traditional transit sheds on piers and break-bulk ships. Intermodal shipment of containers under ocean carriers' bills of lading from manufacturers to customers, door-to-door, became pervasive in the 1970s. The Hague Rules, with Visby Amendments adopted by most maritime nations (the United States adopted the Hague Rules with minor variations as the Carriage of Goods by Sea Act, or "COGSA", in 1936 but has not adopted the Visby amendments), did not anticipate and did not provide for the containerization and intermodal transportation under through bills of lading that have dominated carriage of dry cargo for more than 50 years, and for electronic documentation.

After 10 years of international negotiations and several drafts by UNCITRAL, the Rotterdam Rules adopted by the United Nations in 2009 are a long-overdue necessary step to bring international shipping law into the modern era. The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules") provides for modern transportation of goods wholly or partially at sea, including the prevailing use of containers carried in multi-modal transportation under through bills of lading ("transport documents") from "door-to-door," factory to distributor. The Rotterdam Rules will change the exiting law of ocean transportation by replacing the Carriage of Goods by Sea Act ("COGSA") in the United States and the Hague-Visby Rules as adopted by other nations in a number of respects, making some changes both in terms of concepts and in substance. But to the extent that the Rotterdam Rules and the Hague Rules/COGSA share much in both concepts and rules, much of COGSA case law will be applicable in interpreting the Rotterdam Rules.

## Effective date of Rotterdam Rules

The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, referred to as the "Rotterdam Rules", was adopted by the United Nations General Assembly in September 2009, and promptly were signed by the requisite 20 nations. By its provisions, it will become as a United Nations convention effective the first day of the month one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession. At this point, it appears that the United States soon will ratify the Convention. Some doubt remains whether it will be ratified by the requisite 20 nations: there is substantial opposition to ratification by freight forwarders generally, who are concerned that the Convention may increase their exposures to liability. The United Kingdom, Canada, and Australia have not indicated support. Germany is critical of its complexity. Some European nations are concerned that the Convention will conflict with laws governing inland domestic carriage. Japan, Korea, China, Singapore and Central and South America nations appear neutral. The criticism from Canadian lawyers seems to be directly primarily towards the "volume contracts" provisions that in effect will allow many shippers to opt out of coverage by the Convention. That is not an issue in the United States, as Article 80 essentially incorporates existing law, the Ocean Shipping Reform Act of 1998, that permits private shipping agreements between ocean carriers and larger shippers (and associations and consortiums of shippers) to exempt the agreements from the application of COGSA.

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Importantly, there is the possibility that the United States may enact the Rotterdam Rules as domestic law, to be effective with respect to shipments of goods by sea to and from the United States, replacing COGSA, irrespective of ratification by the 20 nations required for the effectiveness of the Rules as a United Nations convention.

### **Major provisions of the Rotterdam Rules**

The Rotterdam rules provide for substantial changes the Hague-Visby/COGSA regime in a number of respects, especially in extending its application to the multimodal custody of goods by ocean carriers and their subcontractors and other “maritime performing parties” (excluding, at their request, inland carriers) before and after goods are loaded onto ships and recognizing the pervasive use of containers, sometime provided by the ocean carrier. The Rotterdam Rules will apply to all international carriage of goods wholly or partly by sea. The Convention preserves the basic scheme of the Hague-Visby Rules/COGSA relative to liability of ocean carriers and the available defenses and limitations of damages, and extend the statutory regime to the entire period the goods are in the custody of the carrier and its “maritime performing parties” (subcontractors and agents that perform any of the carrier’s responsibilities relative to the goods under the contract of carriage at the carrier’s request or under the carrier’s supervision or control. The Rotterdam Rules does away with the term “bill of lading”, replacing it with the term “transport document”, which means a document, including an electronic document, issued pursuant to a contract of carrier by a carrier or a performing party that evidences the receipt of goods under a contract of carriage or contains a contract of carriage, or both. The Rotterdam Rules do not apply to charter parties or towage agreements. Qualified “volume contracts” can provide for greater or lesser rights, obligations and liabilities. A transport document can be negotiable if so provided by its terms.

### **MAJOR CHANGES FROM COGSA/HAGUE-VISBY RULES**

- 1. Obligations, liabilities and limitations of carriers are extended to “maritime performing parties”.** The Rotterdam Rules provisions, including carriers’ responsibilities and the limitations of liability and damages which apply to “carriers”, are extended to any “maritime performing party” who physically performs any of the carrier’s responsibility under a contract for the carriage, handling, custody or storage of the goods, at the carrier’s request or under the carrier’s supervision or control. Thus terminal operators, stevedores, carriers exclusively within a port area, and other maritime agents or subcontractors of the shipment of goods from receipt by the carrier or its agent until delivery to the consignee are be subject to the Rotterdam Rules and are entitled to the defenses and limitations of the Rules.. Inland carriers are not subject to the Convention’s provisions, and will continue to be governed by any applicable domestic or international law. Article 19.
- 2. Period of application.** The Rotterdam Rules apply to the responsibilities of carriers and maritime performing parties at all times the goods are being carried or stored under a through contract of carriage. Article 12. COGSA/Hague-Visby govern from “tackle-to-tackle” of the carrying ship (can be extended by contract), but the Rotterdam Rules apply the entire period the goods are under the control of the carrier, often “door-to-door”, manufacturer’s warehouse to consignees’ warehouse. They apply to the period from the time when the carrier or a performing party has received the goods for carriage until the time the goods are delivered to the consignee at the time and location agreed in the contract of carriage, or, failing any specific provision relating to delivery, in accordance with the customs, practices, or usages in the trade. Article 12.
- 3. Contracts to which it applies.** The Rotterdam Rules apply to all contracts of carriage of goods when the place of receipt and the place of delivery are in different nations when one of the nations of receipt, delivery, or where the contract of carriage is entered into contract to the Rotterdam Rules, or the contract of carriage provides of application of the Rotterdam Rules or the law of a nation

which is a signatory to the Rotterdam Rules. Article 5. They do not apply to charter parties (referred to as “non-liner transportation” unless a negotiable transport document or electronic transport record is issued. Article 6. They do not apply to contracts of carriage for passengers and their luggage. Article 84.

4. **Carriers’ obligations.** Article 13 requires a carrier to “properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods” Relative to voyages by sea, carriers shall exercise due diligence to (1) make and keep the ship seaworthy, (2) to properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied through the voyage, and to make and keep the holds and all other parts of the ship, and any containers supplied by the carrier, fit and safe for their reception, carriage and preservation. Article 14. COGSA/Hague-Visby only obligate the carrier to exercise due diligence to make the ship seaworthy *at the beginning of the voyage*: The Rotterdam Rules impose the obligation to exercise due diligence to make the ship and its holds and carrier-furnished containers seaworthy to the entire period the goods are in the control of the carrier.
5. **Carrier’s obligations extend to containers.** The Rotterdam Rules provide that the carrier shall exercise due diligence to make and keep the ship seaworthy, properly man and equip and supply the ship, and to keep the ship and containers supplied by the carrier in or upon which goods are to be carried fit and safe for their reception, carriage and preservation. Article 14.
6. **Defenses to liability.** Under Article 17, the carrier is not liable for cargo loss or damage if it meets its burden of proving that the loss was not the fault of the carrier or a performing party. Absent proof to the contrary, it is presumed that the carrier or a performing party was not at fault if the loss, damage, or delay was caused by: (a) an act of god, war, hostilities, armed conflict, piracy, terrorism, riots and civil commotion; (b) a peril of the seas, (c) quarantine restrictions or other interference by or impediments created by governments, including interference by or pursuant to legal process; (d) act or omission of the shipper or consignee; (e) strikes, lockouts or other labor disputes; (f) saving or attempting to save life or property at sea; (g) fire in the ship; (h) latent defects not discoverable by due diligence; (i) acts of omissions by the shipper; (j) wastage in bulk or other loss or damage arising from inherent quality, defect or vice of the goods; (k) acts of third parties for whom the carrier is not responsible (not a “performing party”); (l) insufficiency or defective condition of packing or marking; or (m) handing, loading, stowage or unloading of the goods by or on behalf of the shipper or consignee. The Rotterdam Rules add the defenses of war hostilities, piracy, terrorism, and reasonable measures to attempt to save property at sea or avoid damage to the environment. A carrier is not liable for loss, damage or delay in delivery caused by deviation to save or attempt to save life or property at sea, or by other reasonable deviation. A carrier will be responsible for all or part of a loss, damage or delay if the claimant proves the loss, damage or delay “was or was probably caused by or contributed to by” the unseaworthiness of the ship, the improper crewing, equipping and supplying of the ship, or the holds or any containers supplied by the carrier in or upon which the goods are carried “were not fit and safe for reception, carriage, and preservation of the goods”, and the carrier cannot prove that it complied with its obligation to exercise due diligence. **Importantly, the COGSA/Hague Rules defense of error in navigation or management of the vessel has been omitted.** Article 17.
7. **Measure of damages for loss or damage.** Under Article 22, compensation for loss or damage is calculated by the value of the goods at the place of time of delivery, referring to a commodity exchange price, market price, or, if none, to the normal value of the goods of the same kind and quality at the place of delivery.
8. **Damages due to delay in delivery.** If the delay in delivery causes loss not resulting from destruction of or damage to the goods, damages are limited to a multiple of 2.5 times the freight payable on the goods delayed. Article 60. Notice of delay must be given within 21 days of the date the goods should have been delivered. Article 23.

9. **Carriage of cargo on deck.** Article 25 provides that cargo may be carried on or above deck only if the cargo is carried on or on containers on decks that are specially fitted to carry such containers, or the carriage on deck is in accordance with the contract of carriage or customs, usages and practices of the trade. Thus, COGSA concepts of deviation will be preserved in essence, but, as mentioned below, the carrier is not be deprived of exemptions from liability and limitations of liability under the Rotterdam Rules, unless the parties specifically agree that the cargo shall be carried under deck.
10. **Limits of liability/number of packages or shipping units.** Article 59 provides for a per package limitation of 875 SDRs (currently about US\$1,330), and 3 SDRs per kilogram (about US \$4.55) of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods has been declared by the shipper before shipment and included in the contract of carriage particulars. Packages or shipping units enumerated in the contract particulars as packed in or on a container are deemed packages or shipping units. If not so enumerated, the goods in or on a container are deemed one shipping unit. Article 59.3.
11. **Intentional act or reckless conduct.** Article 61 provides that a carrier or performing party has no right to limit liability if the claimant proves that the loss or delay resulted from a personal act or omission of the person claiming the right to limit was done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result. A personal act or omission include some forms of management failure in a corporate carrier.
12. **Effect of deviation.** Article 24 states that “where, under national law a deviation of itself constitutes a breach of the carrier’s obligations, such breach only has effect consistently with the provisions of this instrument.” The intention of this provision is that misperformance by the carrier, whether geographical or otherwise, does not displace the exemptions from liability or limitations of liability of the carrier or performing parties.
13. **Notice of loss or damage, presumptions.** Under Article 23, the carrier is presumed to have delivered the goods according to their description, absent proof to the contrary, unless notice of loss or damage to or in connection with the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days after the delivery of the goods.
14. **Defenses and limits apply whether action is in contract or in tort.** The defenses and limits of liability apply in any action against the carrier or a performing party which the action is founded in contract or in tort. This addresses issues of priority of maritime liens and whether the Rotterdam Rules’s provisions apply to performing parties who are not in privity of contract with the party seeking recovery. Article 4.
15. **Shipper’s obligations.** Under Article 27, the shipper’s obligations include delivering the goods ready for carriage in such condition that they will withstand the intended carriage. If the goods are in a container packed by the shipper, the goods must be stowed, lashed and secured in such a way that the goods will withstand the intended carriage, and will not cause harm to persons or property.
16. **Qualifications in contracts of carriage relative to description of goods, quantities.** Article 40 provides that a carrier may qualify the description of the goods in the contracts to a limited extent. For non-containerized goods, if the carrier can show that it had no reasonable means of verifying the information furnished by the shipper, it may include an appropriate qualifying clause in the contract particulars. For goods delivered to the carrier in a closed container, the carrier may include an appropriate qualifying clause in the contract particulars with respect to the marks on the goods inside the container, the number of packages or pieces or the quantity of the goods inside the carrier, unless the carrier in fact inspects the goods inside the container or otherwise has actual knowledge of the contents. For goods received in a closed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if it did not weigh the container and the shipper and the carrier

did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars.

- 17. Time bars.** Article 62 provides a time bar on any suit of two years, commencing on the day on which the carrier has completed delivery of the goods or, if there is no delivery, on the last day on which the goods should have been delivered. An action for indemnity may be instituted after two years of the later of the time allowed by the applicable law of the jurisdiction where proceedings are instituted, or 90 days of the date the person seeking indemnity has settled the claim has been served with process in the action against itself, or, if earlier, within the time. Article 64.
- 18. Burdens of proof.** Under COGSA/Hague-Visby, proof of delivery in good order (a clean bill of lading is *prima facie* proof of delivery in good order) and received in damaged condition creates a *prima facie* case of liability of the carrier that can be rebutted by the carrier proving that damage was caused by one of the exceptions to liability. The Rotterdam Rules provide that a claimant establishes a *prima facie* case of liability of the carrier if the consignee proves (1) that it has given notice of loss or delay as required by Article 23, and (2) that the loss took place during the period of responsibility of the carrier:

**Article 17 - Basis of liability**

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.
2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.
3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay.
  - (a) Act of God;
  - (b) Perils, dangers, and accidents of the sea or other navigable waters;
  - (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
  - (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;
  - (e) Strikes, lockouts, stoppages, or restraints of labour;
  - (f) Fire on the ship;
  - (g) Latent defects not discoverable by due diligence;
  - (h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;
  - (i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;
  - (j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
  - (k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;
  - (l) Saving or attempting to save life at sea;
  - (m) Reasonable measures to save or attempt to save property at sea;
  - (n) Reasonable measures to avoid or attempt to avoid damage to the environment; or
  - (o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

**Article 41 - Evidentiary effect of the contract particulars**

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or

(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non negotiable electronic transport record:

(i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;

(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and

(iii) The contract particulars referred to in article 36, paragraph 2.

If the carrier relies on one of the exemptions from liability under Article 17(3), the burden shifts to the claimant to prove that the loss or damage was "probably caused" by unseaworthiness of the vessel. Article 17(5)(a). The burden of proof then shifts to the carrier to prove that there is no causation between unseaworthiness and the loss, damage or delay (Article 17(5)(b)), or that it met its obligation to exercise due diligence to make and keep the ship seaworthy. Article 17(5)(b).

- 19. Apportionment of fault and damage.** Under Article 17, the carrier is liable for all of the loss unless and to the extent it can prove that a specified part of the loss was caused by an event for which it was not liable. If it meets that burden, the burden of proof shifts to the party seeking to recover to prove that the loss was attributable to one or more events for which the carrier is liable.
- 20. Anti-derogation clause.** Any contractual stipulation that derogates from the provisions of the Rotterdam Rules is null and void if and to the extent it is intended or has as its effect, directly or indirectly, to exclude or limit or increase the liability for breach of any obligation of the carrier, a performing party, or the shipper, controlling party or a consignee. A carrier or a performing party may increase by contract its responsibilities and obligations. Any benefit of insurance clause in favor of the carrier is null and void. Article 79. A volume contract may validly provide for modification of rights, obligations and liabilities (but not essential provisions such as seaworthiness of the ship) only if the contract prominently states that it derogates from the Rules and meets the other requirements of Article 80.
- 21. Choice of forum.** Article 66 limits contractual choice of forum for litigation, allowing a cargo claimant a choice of permissible *fora* against the carrier from a list that includes (1) the domicile of the carrier, (2) the place of receipt of the goods as delivered in the contract of carriage, (3) the place of delivery agreed in the contract of carriage, (4) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship, or (5) a court designated in the contract of carriage. The limitations on forum do not apply to qualified volume contracts. Actions against a maritime performing party may be brought where it is domiciled or the port where it received or delivered the goods, or where it performed its activities with respect to the goods. Article 68.

**22. Arbitration.** Article 75 generally recognizes the enforceability of arbitration clauses. With an important change from COGSA precedents, it allows the places where arbitration may take place, at the option of the claimant, at:

1. Any place so designated in the arbitration agreement;
2. Any other place in the State where any of the following places is located:
  - (a) The domicile of the carrier;
  - (b) The place of receipt agreed in the contract of carriage;
  - (c) The place of delivery agreed in the contract of carriage; or
  - (d) The port where the goods are initially loaded on a ship or where the goods are finally discharged from a ship.

The Rotterdam Rules permit the contracting state to opt-out of these provisions.

**22. Provisions for volume contracts.** Article 80 proposes that volume contracts covered by the Rotterdam Rules may provide for greater or lesser duties, rights, obligations and liabilities than the Rotterdam Rules otherwise provide, but only if the volume contract (1) prominently states that it derogates from provisions of the Rotterdam Rules; and, (2) the volume contract either is individually negotiated or prominently specifies the sections of the volume contract containing the derogations. Any such volume contract must be a separate document: it may not be part of the carrier's tariff or regular transport document. Importantly, not all obligations of carriers may be disclaimed: volume contracts permit carriers and cargo to derogate from many of the provisions, but not fundamental obligations such as seaworthiness. A "volume contract" is defined as one "that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time," (the specification may be general, such as a minimum, maximum or a certain range). Article 1.2.

Even volume contracts may not disclaim the parties' fundamental obligations affecting the safety of the ship, such as the carriers' obligation to provide a seaworthy ship and the shippers' obligations relative to hazardous cargo. Service contracts for shipments to or from the United States will be subject to Federal Maritime Commission regulations, under the Shipping Act, 46 U.S.C. § 40101 *et. seq.* Provisions of the Shipping Act, which includes the Ocean Shipping Reform Act of 1998, will be controlled by inconsistent provisions of the Rotterdam Rules. Carriage of goods under service contracts that are not subject to COGSA has replaced a large portion of commerce which formerly was shipped by common carriage by sea under bills of lading. The OSRA amends the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.*, in a number of respects to deregulate ocean shipping. The OSRA allows formerly prohibited practices in private contracts such as discriminatory rates, rebates, and extending or denying special privileges, so long as the discrimination is not in retaliation against any shipper.