THE IMPACT OF THE ROTTERDAM RULES ON MULTIMODAL TRANSPORT IN THE U.S.

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INTRODUCTION

The number of multimodal shipments in and out of the United States moving under a single “through” bill of lading now has reached record levels. In 1965, world port container throughput was zero. By 2010, there were 500 million moves worldwide, and the number is expected to increase at a rate of about 10% per year. In the U.S., about 80% of containers handled by the ports are moving under multimodal “through bills of lading.” Many of these shipments involve substantial inland carriage by rail and motor carrier.

There is currently no single international convention or treaty in place that governs the rights and liabilities of parties involved in multimodal shipments. The laws and treaties that may apply to shipments to and from the U.S., for example U.S. COGSA (the U.S. enactment of the Hague Rules), the Harter Act, and the Carmack Amendment, came about before the advent of containerization and multimodalism and are inadequate to deal with modern-day problems. As a result, over the last three decades or so, the parties to multimodal transport contracts in the U.S. have been subject to a wide variety of conflicting laws, including the

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2 Id.
3 Id.
4 In 1980, under the auspices of the United Nations Conference on Trade and Development (UNCTAD), the international community adopted the Convention on International Multimodal Transport of Goods (Multimodal Convention). United Nations Convention on International Multimodal Transport of Goods, May 24, 1980, U.N. Doc. TD/MT/CONF/17 (1980), reprinted in 6 BENEDICT ON ADMIRALTY, Doc. 1-4 [hereunder Multimodal Convention]. Because many of the Multimodal Convention’s provisions, especially those concerning liability and liability limits, were viewed as being closely related to the Hamburg Rules, the major carrier and underwriter groups have opposed the Multimodal Convention while many shipper groups support it. Consequently, the Multimodal Convention has not yet entered into force and has been basically ignored.

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application of state law or the Carmack Amendment, in particular where damage occurs inland while the goods are in the custody of inland rail and motor carriers\textsuperscript{10}. This has led to uncertainty, higher risks, and higher costs.

In 1997, the international community, working initially through the Comite Maritime International and later through the U.N. Commission on International Trade Law (UNCITRAL), and recognizing the need for uniformity that could be obtained only through a comprehensive “door-to-door” multimodal convention, began negotiating a draft international instrument. Eleven years of work culminated in the “Convention on Contracts For The International Carriage of Goods Wholly or Partly by Sea”\textsuperscript{11} (the “Rotterdam Rules” or the “Convention”), which were adopted by UNCITRAL in December 2008 and presented at a signing ceremony in Rotterdam on September 23, 2009. The Convention’s entry into force is still pending.

In the meantime, the parties have continued to rely on the courts for guidance in filling the gaps caused by the lack of international agreement. Most notably, the U.S. Supreme Court’s ruling in \textit{Kirby}\textsuperscript{12} expanded admiralty jurisdiction inland and made it clear that a multimodal shipment moving under a “through” bill of lading was governed by federal maritime law, not state law. In doing so, however, the court adopted a broad all-inclusive interpretation of Himalaya clauses, and created a rather curious “limited agency rule” by stating that NVOCC’s, when contracting with ocean carriers, are “agents only in their ability to contract for liability limitations with carriers downstream.”\textsuperscript{13} More recently, the U.S. Supreme Court in \textit{Regal-Benoit},\textsuperscript{14} relying on the uniformity principles set forth in \textit{Kirby}, held that the Carmack Amendment did not apply to an inbound shipment moving under a “through” bill of lading, even where the goods are damaged while in the custody of an inland rail carrier. These and similar decisions offer only a piecemeal approach and have not solved all of the problems caused by the lack of international agreement. In some instances, in fact, these decisions have created new problems that never before existed.

The Rotterdam Rules consist of 94 articles, organized into 18 chapters. (See Appendix 1 attached to this paper showing a list of articles by chapter and article headings). The Convention deals with routine subjects such as carrier obligations and liability (Chapters 4 and 5), shipper obligations and liability (Chapter 7), and limits of liability (Chapter 12), but also includes innovative provisions dealing with subjects not previously addressed in U.S. COGSA and the Hague Rules (including Electronic Transport Records – Chapter 3; Jurisdiction – Chapter 14; Arbitration – Chapter 15; and containerized goods – Chapter 8, Art. 40). At first glance, the Convention may seem unnecessarily complex. This is understandable considering the complex nature of multimodal transportation. Upon careful review, however, the Convention’s provisions actually make sense. In many ways, the Convention clarifies existing international law and will

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\textsuperscript{10} \textit{Id. at 1478-1486.}\\
\textsuperscript{12} \textit{Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.}, 125 S. Ct. 385, 2004 AMC 2705 (2004).\\
\textsuperscript{13} \textit{Id. at 399.}\\
bring U.S. law more in line with existing liability regimes concerning the international carriage of goods. In other ways, the Convention provides the “modernization” of current legal regimes that is desperately needed. This article will examine the potential impact the Rotterdam Rules may have on existing liability regimes in the U.S. First, several areas where the Convention makes substantial and innovative changes to existing law will be examined. Second, some potential problem areas that remain will be discussed.

**Scope, Application and Period of Responsibility**

The Rotterdam Rules will replace the Hague Rules, the Hague-Visby Amendments, the 1979 Protocol to the Hague-Visby Rules, and the Hamburg Rules. However, the Rotterdam Rules are not a full multimodal convention as by its own title it applies only to shipments “wholly or partly by sea”. Accordingly, the Convention does not cover multimodal shipments that do not include an ocean leg. Perhaps the most innovative change contained in the Convention is its “door-to-door” coverage. The carrier’s period of responsibility runs from the time the carrier or its contractors receive the goods until the time they are delivered. This varies from the Hague Rules and U.S. COGSA (applying only during the “tackle-to-tackle” period when the goods are on board the vessel), and the Hamburg Rules (“port-to-port”).

The Convention applies to all types of contracts of carriage (not just bills of lading) involving international carriage to or from a contracting state. This avoids the confusion created by some U.S. court decisions holding that a “way bill” or “sea bill” does not constitute a contract of carriage. There are exceptions. Similar to the Hague Rules and U.S. COGSA, the Convention does not apply to charter parties, whether in liner trade or non-liner trade. The Convention even goes further than the Hague Rules by excluding “volume contracts”, as long as certain conditions are met. If the parties’ attempt to derogate from the Convention does not

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18 Convention, Art. 12.
19 Convention, Art. 5.
20 This is accomplished by the Convention’s use of the novel term “transport document” defined as “a document issued under a contract of carriage by the carrier that: (a) evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and (b) evidences or contains a contract of carriage.” Convention, Art. 1(14).
21 Convention, Art. 6.
23 These conditions are set forth in Article 80 (2) and (5). “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;
satisfy the specific criteria set forth in Article 80, both with respect to parties and non-parties, the Convention will apply by default.

The Convention does not govern transportation currently covered by applicable international conventions on air, road, rail, and inland waterway carriage. As the Carmack Amendment is not an international convention, this exclusion would not apply to inland transportation in the U.S. currently covered by Carmack. The Convention also does not affect the application of any international convention or national law regulating the “global” limitation of liability of vessel owners (i.e., U.S. Limitation Act of 1851 and the 1976 Limitation Convention).

Exclusion of Inland Carriers and the “Limited Network” Approach

At outset of the negotiation of the Convention, industry groups representing rail and motor carriers in the U.S. and Europe made it very clear to their respective country’s delegates that they did not want their rights and liabilities to be governed by the Convention. Apparently, inland carriers in Europe were content to continue operating subject to the CIM-COTIF and CMR, international regional conventions in Europe covering the carriage of goods by rail and road, respectively, and inland carriers in the U.S. were content to continue operating subject to the Carmack Amendment, a U.S. national law.

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24 Convention, Art. 82.
25 Convention, Art. 83.
26 For an excellent discussion of the position taken by inland carriers, see Michael F. Sturley, Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo, 40 J. Mar. L. & Com. 1, 2 (2009).
27 The Uniform Rules Concerning the Contract for International Carriage of Goods by Rail [hereinafter CIM], reprinted in 7 SAUL SORKIN, GOODS IN TRANSIT app. R. (2004), originally adopted in 1890, has been revised on several occasions, most recently in 1980, with the Convention Concerning International Carriage by Rail [hereinafter COTIF], reprinted in SORKIN, supra, app. R-1. Most European countries, as well as some countries in North Africa and the Middle East have become parties to the convention. See Stephen G. Wood, Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues, 46 Am. J. Comp. L. 403, 413 n.73 (Supp. 1998); Zamora, supra note 4, at 420-23 & n.152. After the 1980 revision, the convention often goes by the acronym CIM-COTIF. Rolf Herber, Terminal Operations and Multimodalism: The European Legal Experience with Multimodalism, 64. Tul. L. Rev. 611, 612 (1989).
As the coverage period is “door-to-door”, this required the establishment of a “network” liability system. Generally, there are three possibilities for creating a liability regime for multimodal carriage. The first option, a “uniform” liability regime, applies the same liability rules to all carriers regardless of the location of the loss or damage. The second, a “pure network” regime, applies the liability rules that would otherwise govern the carrier on that leg of the transportation. The third option, and the one adopted in the Convention, is a “limited network” regime in which different liability regimes can cover different carriers for liabilities arising out of the same incident, depending on where the loss or damage occurs. The Convention’s “limited network” approach is set forth in Article 26:

Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contact with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier’s liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.29

The Rotterdam Rules also adopt novel terms pertaining to carriers and their contractors to clarify who may or may not be directly liable under the Convention, and to ensure that inland carriers are carved out. A “Performing Party” (“PP”) is defined as “a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage…”30 with respect to broadly enumerated duties. This would obviously include inland carriers. A “Maritime Performing Party” (“MPP”), on the other hand, is defined as a PP that performs any of the carrier’s obligations “during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship.”31 This would not include the inland carrier. Under the Convention’s liability provisions (Articles 17 – 22), the Convention provides for direct liability of the “carrier” and the “MPP”, but there are no

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29 Convention, Art. 26 (emphasis added).
30 Convention, Art. 1(6).
31 Convention, Art. 1(7) (emphasis added).
provisions establishing direct liability of the PP (i.e. inland carrier). For added clarification, the definition of the MPP contains the following exclusion: “An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.”

**Liability Scheme**

The Convention’s liability scheme follows the same type of fault-based regime as contained in the Hague Rules and U.S. COGSA, rather than the more “strict liability”-based regime of the CMR, COTIF, and the Carmack Amendment, and presents nothing dramatically new. Chapter 4 (Articles 11 – 16) sets forth the obligations of the carrier during the entire period of receipt until delivery, and Chapter 5 (Articles 17 – 22) sets forth the basis for liability of the carrier. Basically, the Convention provides the carrier with a list of enumerated defenses similar to those found in the Hague Rules and U.S. COGSA, and follows the same “ping pong” approach to burdens of proof. What is new is the application of comparative fault principles in the event of loss, damage or delay caused in part by carrier’s fault and in part by an event for which the carrier is not liable, including shipper’s fault.

With respect to the carrier’s contractors, the Convention establishes direct liability for the carrier for the fault of any PP, including inland carriers. In addition, the MPP is subject to the same obligations and liabilities of the carrier under the Convention and is entitled to the carrier’s defenses and limits of liability, if the loss, damage or delay occurred during the port-to-port period, while in the custody of the MPP, or “at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.”

Commentators have referred to the MPP liability provision as the “auto-Himalaya Clause.” This means that the carrier’s contractors and agents acting in the port area, such as stevedores, terminal operators, and warehousemen, will automatically receive the defenses and limits of liability of the carrier without the need to resort to the carrier’s bill of lading Himalaya Clause (extending COGSA protection to persons other than the carrier) and Clause Paramount (extending COGSA beyond the “tackle-to-tackle” period).

Again, inland carriers (in the U.S. and elsewhere) are not subject to direct liability under the Convention. There are no liability provisions pertaining to PPs. Accordingly, in the event suit is brought against an U.S. inland carrier arising out of loss or damage occurring during rail or road transport, the inland carrier will still need to invoke the ocean carrier’s Himalaya Clause

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32 Convention, Art. 1(7) (emphasis added).
33 Notably, the “error in navigation or management” defense is not included in the enumerated exceptions and therefore has been abolished, creating a continuous obligation to properly crew, supply and equip the vessel throughout the voyage.
34 This in effect rejects the approach followed by U.S. courts under the *Vallescura* rule which holds the carrier liable for the entire loss if it cannot sustain the difficult burden of showing what damage resulted from carrier fault, and what damage resulted from a cause for which the carrier is not liable.
35 Convention, Art. 18.
36 Convention, Art. 19.
and Clause Paramount in order to benefit from the bill of lading’s defenses and limits of liability. In this respect, it should be noted that due to the exclusion of inland carriers from direct liability under the Convention, the Rotterdam Rules would not have dealt with the situation in Kirby (inland carrier seeking benefits of the ocean carrier’s limitations of liability for damages arising out of a train wreck). Of course, if the inland carrier does not consider these provisions to be beneficial, it may choose instead to rely on its own transportation contract, circulars and/or tariffs.

Finally, the Convention includes detailed and clear provisions regarding “delivery” under the contract of carriage (Chapter 9 – Articles 43 – 49). The term “delivery” was not defined in the Hague Rules, or in U.S. COGSA, which led to substantial litigation as to when the carrier’s duties and obligations ended.

**Liability Limits**

The Convention provides for higher liability limits than those contained in previous liability regimes\(^{38}\), but makes it more difficult for the claimant to break limitation. Under Article 59, liability is limited to 875 SDR “per package or other shipping unit”, or 3 SDR per kilo, whichever is higher.\(^{39}\) This is currently the equivalent of about $1,368 per package, or $4.70 per kilo. Although the Convention does not define the term “package”, it does follow the Hague-Visby Rules and Hamburg Rules by specifying that the *smallest* package or unit enumerated in the contract of carriage, whether carried in a container or on pallets, is considered the “package.”\(^{40}\) This avoids the substantial amount of litigation in the U.S. over what constitutes a “COGSA package”. In addition, Article 60 provides for a separate limit of liability in the event of economic damage arising out of delay, i.e., 2 1/2 times the amount of freight.\(^{41}\) Under the Convention, limitation can be broken only upon proof by the claimant that the loss “was attributable to a *personal* act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.”\(^{42}\)

The Convention departs dramatically from U.S. COGSA and case law interpreting U.S. COGSA in several respects. First, there is no mention of “per customary freight” unit with

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38 The Hague Rules limit liability to 100 pounds sterling (gold) per package or unit, with no reference to weight. COGSA limits liability to $500 per package or customary freight unit, again with no reference to weight. Hague-Visby increased the liability limitation to 10,000 francs per package or unit, or thirty francs per kilo, whichever is higher. The Hague Rules were further amended by the 1979 SDR Protocol, which converted the limitation amount to the SDR standard and increased the limit to 667.67 SDR per package or unit, or 2 SDR per kilo, whichever is higher. The Hamburg Rules limit liability to 835 SDR per package or 2.5 SDR per kilo, whichever is higher, unless the loss is caused by the carrier’s act “done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.” The U.S. is not a party to Hague-Visby, the 1979 SDR Protocol, or the Hamburg Rules.

39 Convention, Art. 59.

40 Convention, Art. 59 (emphasis added).

41 Convention, Art. 60.

42 Convention, Art. 61 (emphasis added).
respect to goods not shipped in packages. Second, the right to limit is not conditioned upon a showing of “fair opportunity” for the shipper to declare a higher value. Accordingly, the “fair opportunity doctrine” adopted by most U.S. courts has been rejected. Finally, under Article 24, a “deviation” of any kind, including a geographical deviation, is no longer a basis to deny the right to limit.

Jurisdiction

Unlike U.S. COGSA and the Hague Rules, the Convention contains Jurisdiction provisions (Chapter 14, Articles 66 – 74) which present the parties with several alternative forums to resolve disputes. This, in effect, overrules the U.S. Supreme Court’s ruling in *Sky Reefer* which held that mandatory and exclusive form selection clauses and/or arbitration clauses contained in bills of lading were enforceable.

Article 66 provides, in part:

*Actions against the carrier*

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier.

(a) In a competent court within the jurisdiction of which is situated one of the following places:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

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43 The international community has criticized this COGSA provision, as well as U.S. case law interpreting a freight unit to mean the basis upon which ocean freight is paid, and the Convention rejects the U.S. approach.

44 Convention, Art. 66.
A separate article deals with suits against a MPP.\textsuperscript{45}

In either case, suit may be brought only in a “competent court”. This is defined in the Convention as:

“... a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.”\textsuperscript{46}

It should be noted that the jurisdictional provisions apply only to suits against the carrier or MPP. They do not apply to suits against the shipper. In addition, a ratifying country must expressly “opt in” to the jurisdictional provisions to make them binding on that contracting state.\textsuperscript{47}

Chapter 15 (Articles 75 – 78) contains similar provisions relating to arbitration.

\textit{Electronic Transport Documents}

Chapter 3 (Articles 8 – 10) deals specifically with electronic bills of lading and other “transport documents”. According to a recent U.N. Report, about 7\% of the cost of international trade is wasted on paper-based administration processes.\textsuperscript{48} Chapter 3, as well as other provisions throughout the Convention, specifically Chapter 8 dealing with “Transport Documents” and the acceptance and recognition of electronic signatures, modernizes international transport laws in a fundamental way. The Convention, however, stops short of achieving full uniformity among the U.S., Europe, and the Far East (primarily Hong Kong and China), and it will be left up to the courts of each contracting state to evaluate the transactions based on their national laws affecting electronic commerce.

\textit{POTENTIAL PROBLEM AREAS}

\textit{The NVOCC Problem}

A shipper of goods will typically book the multimodal shipment with a non-vessel owning common carrier (“NVOCC”), who then makes arrangements for the shipment with an ocean carrier. The NVOCC, as “carrier”, issues its own bill of lading to the actual shipper. In turn, the ocean carrier, as “carrier”, issues its own bill of lading to the NVOCC, as “shipper”. Pre-\textit{Kirby}, most U.S. courts treated the NVOCC as the shipper’s agent when negotiating with the ocean carrier, thus binding the original shipper to the ocean carrier’s bill of lading. In its ruling in \textit{Kirby}, however, the U.S. Supreme Court established a “limited agency rule” by stating that the NVOCC acts only as the \textit{limited} agent of the shipper with respect to negotiating liability limits.

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\textsuperscript{45} Convention, Art. 68.
\textsuperscript{46} Convention, Art. 1(30) (emphasis added).
\textsuperscript{47} Convention, Art. 74.
downstream. The question immediately became whether the original shipper is bound by any terms in the carrier’s bill of lading other than the liability limits, including for instance the forum selection clause, time bar, choice of law, and other similar provisions. At the time Kirby was decided, the U.S. Supreme Court remanded another pending case, Hyundai Liberty, back to the Ninth Circuit to be decided in light of Kirby.⁴⁹ The Hyundai Liberty dealt with an ocean carrier’s attempt to enforce its Korean forum selection clause (contained in the ocean carrier’s bill of lading contracted with the NVOCC) as against the actual shipper. Despite Kirby, the Ninth Circuit dismissed the shipper’s suit, not because it found the shipper to be privy to the ocean carrier’s bill of lading, but because the shipper had brought suit on the ocean carrier’s bill of lading, thereby agreeing to its terms.⁵⁰

In recent years, shipper’s counsel have cleverly sought to avoid an ocean carrier’s bill of lading (including an otherwise enforceable forum selection clause) by bringing suit only against the NVOCC, leaving it up to the NVOCC to implead the ocean carrier into the action. As an example, in Federal Insurance Company v. M/V CMA CGM MARLIN,⁵¹ an ocean carrier issued a bill of lading to a NVOCC containing a Marseilles forum selection clause. In turn, the NVOCC issued its own bill of lading to the shipper containing a California forum selection clause. Cargo interests brought suit in New York only against the NVOCC. The NVOCC then impleaded the ocean carrier under FRCP 14(c), requiring the ocean carrier to respond directly to cargo’s complaint. Both the NVOCC and the ocean carrier then moved to dismiss on the basis of their respective forum clauses. The court dismissed the suit against the NVOCC on the basis of the California forum clause and dismissed the NVOCC’s third-party complaint against the ocean carrier on the basis of the Marseilles forum clause. The court, however, denied the ocean carrier’s motion to dismiss the plaintiff’s complaint on the ground that the actual shipper was not a party to the ocean carrier’s bill of lading and therefore was not bound by the Marseilles forum selection clause, relying in part on Kirby.

The NVOCC problem is even more pronounced where claims by carriers for damage caused by unsafe or dangerous cargo may run downstream toward the actual shipper. In such cases, a vessel owner will typically sue the NVOCC alleging shipper fault and breach of the shipper’s warranties contained in the ocean carrier’s bill of lading. The NVOCC will then implead the actual shipper under its own bill of lading. In the event the actual shipper can’t be brought into the litigation (or can’t be found), the NVOCC will be stuck in the case facing enormous liabilities. Often times, the NVOCC has insurance for cargo damage or loss, but not for vessel damage or other liabilities. In other situations, where the shipper can be found, the ocean carrier may sue the shipper directly. This was the case in In Re M/V Rickmers Genoa Litigation,⁵² involving an explosion and fire aboard a vessel allegedly caused by a dangerous cargo of magnesium-based desulphurization reagent. Innocent cargo brought suit against the

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⁴⁹ Shortly after Kirby, the United States Supreme Court granted a petition for a writ of certiorari on a similar case involving a bill of lading’s forum selection clause, vacated judgment, and remanded the case to the Ninth Circuit for further consideration in light of Kirby. See Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty, 294 F.3d 1171, 2002 AMC 1598 (9th Cir. 2002), vacated and remanded sub nom. Green Fire & Marine Ins. Co. v. M/V Hyundai Liberty, 125 S. Ct. 494 (2004).

⁵⁰ Kukje Hwajae Insurance Co., Ltd. v. M/V Hyundai Liberty, 408 F.3d 1250, 2005 AMC 1550 (9th Cir. 2005).


ocean carrier and NVOCC. The ocean carrier then impleaded the actual shipper for alleged breach of the shipper’s warranties contained in both the ocean bill of lading and the NVOCC bill of lading, and the shipper moved to dismiss. With respect to the claim under the NVOCC bill of lading, the Court granted the shipper’s motion on the ground that the ocean carrier was not a party to the NVOCC’s bill of lading. With respect to the claim under the ocean carrier bill of lading, the court granted the motion on the ground that the shipper was not party to the ocean carrier’s bill of lading, and therefore was not bound by its warranty provisions, again relying on the “limited agency rule” in Kirby. All of these cases leave open the question as to what law applies between the ocean carrier and the actual shipper.

The Rotterdam Rules seem to bypass the NVOCC intermediary problem. The Convention defines a “carrier” as “a person that enters into a contract of carriage with a shipper.” There is no mention of the NVOCC, or any other intermediary, and its provisions seem to contemplate one contract of carriage, not two. So, it appears that the NVOCC will continue to be deemed the “carrier” under its own bill of lading, and the ocean carrier will continue to be deemed the “carrier” only with respect to the NVOCC, not the actual shipper. It is possible that the ocean carrier may be considered a MPP under the NVOCC’s bill of lading, in which case it may be subject to direct liability to the actual shipper under Article 19. However, this liability is limited to the port-to-port period or during the time the ocean carrier has custody, or performs the carriage. It may not apply to the period of inland carriage. As the inland carrier contracts with the ocean carrier, this uncertainty will affect the inland carrier’s liability to the actual shipper as well.

With respect to claims against the shipper, the NVOCC will most likely be subject to all of the Convention provisions dealing with shipper obligations and shipper liability (Chapter 7 – Articles 27 – 34) vis-à-vis the ocean carrier with whom it contracted. But the actual shipper may not. This may be crucial to a vessel owner or inland carrier seeking to recover equipment damage or loss caused by shipper fault. Again, the Convention does not seem to deal with this.

Does the Convention Affect Regal-Beloit?

Another issue that may arise is whether the Rotterdam Rules will have any impact on the holding in Regal-Beloit, i.e., that the Carmack Amendment does not apply to an inbound shipment in the U.S. moving under a multimodal “through” bill of lading. Cargo claimants may make the weak argument that the Convention’s network liability provision (Art. 26, supra at p. 5), referring to “another international instrument”, should require the application of Carmack to inland carriage. After all, the term “international instrument” is not defined, and the term “international convention” is used elsewhere in the Convention. The Carmack Amendment, however, is a national law, albeit one that affects international commerce. It would be difficult to imagine how a court could construe “international instrument” to include the Carmack Amendment, but this remains to be seen.

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53 Id. at 391-393.
54 Convention, Art. 1(5).
55 Convention, Art. 1(8).
CONCLUSION

The Rotterdam Rules will certainly have a major impact on ocean carriers and intermediaries and will require a careful and thorough re-wording of their bill of lading contracts. The Convention, however, will probably not have a significant impact on U.S. inland carriers in the way they conduct business or handle claims. Without the application of the Carmack Amendment to inbound shipments (Regal Beloit), inland carriers will still need to rely on an ocean carrier’s Himalaya Clause and Clause Paramount to benefit from the ocean carrier’s bill of lading, if it is in their favor to do so. These bills of lading will likely incorporate the terms of the Convention and extend them to inland carriers. With higher Convention limits, a two year suit time, and jurisdictional provisions, however, the inland carriers may choose not to seek protection under the ocean carrier’s bill of lading and may instead rely on their own transportation contracts, circulars and tariffs (perhaps containing lower liability limits and a more favorable forum selection clause). As there is no contractual privity between cargo and the inland carrier, such claims will likely be governed by federal bailment law under Kirby. In any event, as the ocean carrier’s bill of lading will be subject to the Convention, inland carriers should be fully aware of all aspects of the Rotterdam Rules in the event they choose to defend under the carrier’s bill of lading.

On September 23, 2009, the Convention was presented at a signing ceremony in Rotterdam. Currently, 24 nations have signed the treaty (including the U.S.) and one nation has ratified (Spain).\(^{56}\) For an update on the status of the signatures and ratifications, visit UNCITRAL website at www.uncitral.org. According to its terms, the Convention comes into force one year after the 20th ratification.\(^{57}\) It is fair to say that the international community is waiting for the U.S. to act. If the U.S. ratifies, it is likely that a sufficient number of ratifications will rapidly follow which will bring the Convention into force.

In the U.S., the Department of State (“DOS”) has not yet sent its “transmittal package” to the Senate seeking advice and consent on ratification. Once this is done, the Senate will vote. Upon receipt of two-third Senate vote, the consent is sent to the President for ratification.\(^{58}\) Last summer, industry members, including the National Industrial Transportation League (“NITL”), the World Shipping Counsel (“WSC”), the National Retail Federation, the Transportation Institute, UPS, and the Maritime Law Association of the United States (“MLA”), strongly urged the Department of State to send the “transmitted package” to the Senate. On January 13, 2012, MLA representatives and members of the U.S. delegation attended a meeting with the DOS to discuss the status. According to the MLA, the DOS stated that they “continue to discuss various issues with stakeholders and hoped to resolve the matter soon and proceed with the transmittal

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56 Most Asian countries, including China, have not yet signed, nor have several major trading nations, including Canada, the U.K. and Germany.
57 Convention, Art. 94.
58 For an excellent discussion of the U.S. position on ratification and the consensus among industry groups needed to obtain Senate approval, see Mary Helen Carlson, *U.S. Participation in Private International Law Negotiations: Why the UNCITRAL Convention on Contracts For the International Carriage of Goods Wholly or Partly by Sea is Important to the United States*, 44 Tex. Int’l L.J. 269 (2009).
Considering that the Hague Rules took almost 12 years to be ratified, it is no surprise that the process is taking some time. The Rotterdam Rules are not perfect, but they are a welcome first step in what may become an incremental international effort toward achieving uniformity. After coming into force, it is certain that the Rotterdam Rules will be the subject of substantial litigation in the U.S. and elsewhere, primarily to work out the meaning of certain terms and concepts in the Convention that are not defined. After that, the industry should have at least the beginning of a uniform and predictable liability regime.

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THE ROTTERDAM RULES
UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA

Chapter 1
General provisions

Article 1 – Definitions
Article 2 – Interpretation of this Convention
Article 3 – Form requirements
Article 4 – Applicability of defences and limits of liability

Chapter 2
Scope of application

Article 5 – General scope of application
Article 6 – Specific exclusions
Article 7 – Application to certain parties

Chapter 3
Electronic transport records

Article 8 – Use and effect of electronic transport records
Article 9 – Procedures for use and negotiable electronic transport records
Article 10 – Replacement of negotiable transport document or negotiable electronic transport record

Chapter 4
Obligations of the carrier

Article 11 – Carriage and delivery of the goods
Article 12 – Period of responsibility of the carrier
Article 13 – Specific obligations
Article 14 – Specific obligations applicable to the voyage by sea
Article 15 – Goods that may become a danger
Article 16 – Sacrifice of the goods during the voyage by sea

Chapter 5
Liability of the carrier for loss, damage or delay

Article 17 – Basis of liability
Article 18 – Liability of the carrier for other persons
Article 19 – Liability of maritime performing parties
Article 20 – Joint and several liability
Article 21 – Delay
Article 22 – Calculation of compensation
Article 23 – Notice in case of loss, damage or delay
Chapter 6
Additional provisions relating to particular stages of carriage

Article 24 – Deviation
Article 25 – Deck cargo on ships
Article 26 – Carriage preceding or subsequent to sea carriage

Chapter 7
Obligations of the shipper to the carrier

Article 27 – Delivery for carriage
Article 28 – Cooperation of the shipper and the carrier in providing information and instructions
Article 29 – Shipper’s obligation to provide information, instructions and documents
Article 30 – Basis of shipper’s liability to the carrier
Article 31 – Information for compilation of contract particulars
Article 32 – Special rules on dangerous goods
Article 33 – Assumption of shipper’s rights and obligations by the documentary shipper
Article 34 – Liability of the shipper for other persons

Chapter 8
Transport documents and electronic transport records

Article 35 – Issuance of the transport document or the electronic transport record
Article 36 – Contract particulars
Article 37 – Identity of the carrier
Article 38 – Signature
Article 39 – Deficiencies in the contract particulars
Article 40 – Qualifying the information relating to the goods in the contract particulars
Article 41 – Evidentiary effect of the contract particulars
Article 42 – “Freight prepaid”

Chapter 9
Delivery of the goods

Article 43 – Obligation to accept delivery
Article 44 – Obligation to acknowledge receipt
Article 45 – Delivery when no negotiable transport document or negotiable electronic transport record is issued
Article 46 – Delivery when a non-negotiable transport document that requires surrender is issued
Article 47 – Delivery when a negotiable transport document or negotiable electronic transport record is issued
Article 48 – Goods remaining undelivered
Chapter 10
Rights of the controlling party

Article 49 – Retention of goods

Chapter 10
Rights of the controlling party

Article 50 – Exercise and extent of right of control
Article 51 – Identity of the controlling party and transfer of the right of control
Article 52 – Carrier’s execution of instructions
Article 53 – Deemed delivery
Article 54 – Variations to the contract of carriage
Article 55 – Providing additional information, instructions or documents to carrier
Article 56 – Variation by agreement

Chapter 11
Transfer of rights

Article 57 – When a negotiable transport document or negotiable electronic transport record is issued
Article 58 – Liability of holder

Chapter 12
Limits of liability

Article 59 – Limits of liability
Article 60 – Limits of liability for loss caused by delay
Article 61 – Loss of the benefit of limitation of liability
Article 62 – Period of time for suit
Article 63 – Extension of time for suit
Article 64 – Action for indemnity
Article 65 – Actions against the person identified as the carrier

Chapter 14
Jurisdiction

Article 66 – Actions against the carrier
Article 67 – Choice of court agreements
Article 68 – Actions against the maritime performing party
Article 69 – No additional bases of jurisdiction
Article 70 – Arrest and provisional or protective measures
Article 71 – Consolidation and removal of actions
Article 72 – Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance
Article 73 – Recognition and enforcement
Article 74 – Application of chapter 14

Chapter 15
Arbitration

Article 75 – Arbitration agreements
Article 76 – Arbitration agreement in non-liner transportation
<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 77</td>
<td>Agreement to arbitrate after a dispute has arisen</td>
</tr>
<tr>
<td>Article 78</td>
<td>Application of chapter 15</td>
</tr>
</tbody>
</table>

**Chapter 16**  
**Validity of contractual terms**

<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 79</td>
<td>General provisions</td>
</tr>
<tr>
<td>Article 80</td>
<td>Special rules for volume contracts</td>
</tr>
<tr>
<td>Article 81</td>
<td>Special rules for live animals and certain other goods</td>
</tr>
</tbody>
</table>

**Chapter 17**  
**Matters not governed by this Convention**

<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 82</td>
<td>International conventions governing the carriage of goods by other modes of transport</td>
</tr>
<tr>
<td>Article 83</td>
<td>Global limitation of liability</td>
</tr>
<tr>
<td>Article 84</td>
<td>General average</td>
</tr>
<tr>
<td>Article 85</td>
<td>Passengers and luggage</td>
</tr>
<tr>
<td>Article 86</td>
<td>Damage caused by nuclear incident</td>
</tr>
</tbody>
</table>

**Chapter 18**  
**Final clauses**

<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 87</td>
<td>Depositary</td>
</tr>
<tr>
<td>Article 88</td>
<td>Signature, ratification, acceptance, approval or accession</td>
</tr>
<tr>
<td>Article 89</td>
<td>Denunciation of other conventions</td>
</tr>
<tr>
<td>Article 90</td>
<td>Reservations</td>
</tr>
<tr>
<td>Article 91</td>
<td>Procedure and effect of declarations</td>
</tr>
<tr>
<td>Article 92</td>
<td>Effect in domestic territorial units</td>
</tr>
<tr>
<td>Article 93</td>
<td>Participation by regional economic integration organizations</td>
</tr>
<tr>
<td>Article 94</td>
<td>Entry into force</td>
</tr>
<tr>
<td>Article 95</td>
<td>Revision and amendment</td>
</tr>
<tr>
<td>Article 96</td>
<td>Denunciation of this Convention</td>
</tr>
</tbody>
</table>