

# 2013 AAPA Port Administration and Legal Issues Seminar



## Update on the Rotterdam Rules

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11 April 2013



# Update on the Rotterdam Rules

- What is it?
  - The Rotterdam Rules is a new draft multilateral Convention to update the liability rules for international ocean carriage.
  - The United States has signed the Convention.
  - However, it has not yet been sent to the Senate for its advice and consent to ratification.
  - It covers both liner and, in certain circumstances, non-liner (bulk) cargoes.

# Update on the Rotterdam Rules

## ■ Current Law

- The United States currently is party to the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Brussels, 25 August 1924), commonly known as the “Hague Rules.”
- The Hague Rules were implemented by the United States with the passage of the Carriage of Goods by Sea Act (“COGSA”) (1936).
- This regime provides for limited liability of the ocean carrier for damage or delay of cargo moving under bills of lading (non-bulk) in the foreign (line) trades of the United States.

- Current Law (*cont.*)
  - Hague/COGSA does not provide for the liability of ports or other subcontractors of the ocean carrier.
  - However, bills of lading typically extend the benefit of these international liability rules to subcontractors of the carrier under a so-called “Himalaya Clause.”
  - The enforceability of these rules has been upheld by U.S. Courts.

## ■ Current Law (*cont.*)

- Accordingly, the liability of ports to shippers for damage to cargo moving in the U.S. foreign trade is governed either by the COGSA-based limited liability rules of the bills of lading, or by the liability provisions of the ports' own schedules (tariffs).
- A port also may be liable directly to a carrier under its schedules in an indemnification action to recover damages the carrier may have paid to a shipper.

- Current Law (*cont.*)
  - State ports entitled to assert sovereign immunity are subject to suit only under state law in state courts, consistent with the terms of their tariffs and state law.
  - Ports are free to set their own liability rules for bulk cargoes.

## ■ History of the Rotterdam Rules

- There have been several attempts to update the international liability regime applicable to maritime bills of lading, beginning with the so-called Visby amendments to the Hague Rules, the 1978 Hamburg Rules and, lastly, the 1980 Multimodal Convention.
- The United States did not ratify any of these new treaties.
- The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam, 11 December 2008), now known as the “Rotterdam Rules,” is the latest attempt to update this regime.

- History of the Rotterdam Rules (*cont.*)
  - The Rotterdam Rules represent a significant departure in policy in that it is the first instrument to single out ports as subcontractors of the ocean carrier, subject them to the obligations of the Convention and create a separate cause of action against ports.
  - Ports are not typically in privity of contract with shippers and cargo owners, and the justification for this change in longstanding policy is not clear.
  - The port authorities were not consulted on this change in policy during the seven years of negotiations that led to the Convention.



- History of the Rotterdam Rules (*cont.*)
  - The Rotterdam Rules also represent a potential departure in policy with respect to bulk cargoes.
  - The Rules appear to establish obligations for the benefit of consignees and other holders, even though the charterparty is itself excluded from the Convention.

- Liability Rules for Ports Under the Rotterdam Rules
  - Ports are considered “maritime performing parties” under the Rotterdam Rules.
  - As long as the port is located in a country that is a party to the Rotterdam Rules, ports are made independently subject to the obligations and liabilities imposed on the ocean carrier under the treaty, and are entitled to its defenses (whether or not they actually make sense for a port).
  - In effect, the treaty overrides the rights of ports to set their own liability rules in their tariffs (schedules).
  - The limits of liability established by the proposed Convention apply to the liability of a port.

- Liability Rules for Ports Under the Rotterdam Rules *(cont.)*
  - A maritime performing party is liable under the proposed Convention for the acts or omissions of any person to which it has entrusted the performance of its functions, such as stevedores.
  - It is not at all clear whether this includes the carriers themselves while operating at the port.
  - The port and carrier share joint and several liability for loss, damage or delay of cargo up to the proposed Convention's limits.

- Liability Rules for Ports Under the Rotterdam Rules  
*(cont.)*
  - The proposed Convention establishes federal court jurisdiction within the domicile of a maritime performing party or location of the port performing the services in question.
  - As noted, the Rotterdam Rules depart dramatically from the approach of other treaties in making ports independently subject to its obligations, for both liner and non-liner cargoes.
  - Other subcontractors of the ocean carrier, such as inland carriers (unless performing services exclusively within a port area), are not made independently subject to its obligations.

- Recent Developments and Current Status of the Proposed Treaty
  - The State Department is reviewing the Rotterdam Rules and preparing the documentation that will be necessary to transmit the Convention to the Senate for its advice and consent to ratification.
  - In an effort to address some of the perceived flaws and ambiguities in the draft instrument, the ocean carriers, major shippers and public port authorities worked together through their trade associations to draft language to be used by the Department of State to address those issues.

- Recent Developments and Current Status of the Proposed Treaty (cont.)
  - In September 2012, the AAPA, NITL and WSC submitted a joint paper to the State Department.
  - That paper included language to be added to the resolution of advice and consent to ratification that would confirm the benefits of current law for subcontractors of the carrier, affirm that nothing in the treaty would abrogate or impair the sovereign immunity of any state port authority, and make other technical clarifications to the treaty.

- Recent Developments and Current Status of the Proposed Treaty (cont.)
  - To date, the State Department has been reluctant to commit to include the language proposed in the joint paper.
  - In addition, the State Department has not been willing to address the broader concerns of the port community through implementing legislation.
  - Recently the member ports of the AAPA voted to oppose the treaty.

# Thank you!

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