On January 19, 2011, Spain deposited its ratification of the Rotterdam Rules with the United Nations, becoming the first nation to ratify them. It is fitting that Spain is the first such country. Professor Rafael Illescas Ortiz from the Universidad Carlos III de Madrid was chairman of UNCITRAL’s Working Group III on Transport Law, which drafted the Rules. His excellent leadership continues.

The Rotterdam Rules will go into force on the first day of the month following the expiration of one year after the deposit of the 20th instrument of ratification, acceptance, approval or accession. Now that the first nation has ratified the Rules, several other nations may follow suit. Still other nations are likely waiting for the United States to ratify the Rules. Those nations may realize that the world does not need another carriage of goods treaty to which the United States is not a party.

U.S. Government Action

The United States Department of State is preparing a "Transmittal Package" for President Obama to send to the Senate. The package will include an analysis of the Rotterdam Rules, a letter from the Secretary of State summarizing the Rules and explaining why the United States should ratify them, and a letter from the President to the Senate asking for the Senate’s advice and consent.

Once the Senate gives its advice and consent by a two-thirds vote, President Obama may ratify the treaty and deposit the United States' ratification with the United Nations. We expect to see the Transmittal Package sent by the Secretary of State President within the next few months, and the President asking the Senate for its advice and consent shortly thereafter.

Industry representatives are in the meantime informing the Senate of their favor of the Rotterdam Rules. The World Shipping Council and the National Industrial Transportation League are taking the lead in this effort.

Pluses and Minuses for Carriers

The Rotterdam Rules will make some changes that are favorable to carriers and some changes that are not. The Rules will also bring about some neutral changes that modernize and simplify the law needed for today’s multimodal carriage. Rules may appear to be complicated, they are not. They should simplify and clarify the documents needed for carriage. Carriers will probably want to change their bills of lading and other shipping documents to accommodate the changes.
1. Changes Favorable to Carriers

**Shipper’s Load Weight and Count Clauses** At the present time, U.S. courts have not honored these clauses, even though the carrier has not had a reasonable opportunity to count the contents of a sealed container or accurately determine the amount of bulk cargo loaded onto the ship. The Rotterdam rules at Article 40 and 41 explain how the carrier may avoid liability for receipt of a quantity of cargo that the carrier cannot reasonably verify.

**Free In and Out Ship** A carrier and shipper may agree that the shipper will load, stow and secure the cargo. Article 13(2).

**Who May Give Instruction on Behalf of Cargo Interests to the Carrier** Chapter 10 of the Rules explains that the “Controlling Party” may give certain instructions to the carrier, and identifies the Controlling Party.

The provisions in Chapter 10 should eliminate the need for litigation if the carrier receives conflicting instructions concerning the carriage or delivery of cargo. They will also assure the carrier that it may accept instructions from the Controlling Party.

**Delivery** Chapter 9 and Article 53 of Chapter 10 define when delivery occurs and when the carrier’s responsibility ends.

These provisions clarify the present law, which is unclear. The new provisions are likely to reduce litigation by telling carriers when and how they should deliver cargo.

**Lowering the Carrier’s Liability When An Event for Which the Carrier Is Liable Combines with An Event for Which the Carrier is Not Liable to Cause Loss or Damage** Under the present law, if two such events combine to cause loss or damage, the carrier bears the insuperable burden to prove the precise damage or loss that was caused by the event for which the carrier was not liable. Chapter 5 of the Rotterdam Rules provides that the carrier and cargo interests will share an equal burden to the carrier’s percentage of fault, and thus the percentage of the loss that the carrier should pay.

**Obligations of the Shipper to the Carrier** Chapter 7 of the Rotterdam Rules specifies when the shipper will be liable to the carrier. It explains when and how warnings must be provided to the carrier and when the shipper is liable for damage caused by dangerous cargo. The description of dangerous cargo at Chapter 7, Article 32, is favorable.

**Economic Damage Caused by Delay** Article 21 provides that delay only occurs when cargo is not delivered by the agreed time. If no time is agreed, delay will not occur.

2. Changes Unfavorable to Carriers

**Loss of the Error in Navigation or Management Defense** This defense is eliminated. Carriers will thus be liable for loss or damage caused by error in navigation, such as running aground.

**Increase of the COGSA Package or Customary Freight Limitation** The present time, COGSA limits the carrier’s liability to $500 per package shipped in packages, per customary freight unit. There are, however, many judge-made exceptions to that limitation.

The Rotterdam Rules increase that limitation at Chapter 12 to 875 Special Drawing Rights (SDR) per package or three per kilo, whichever is greater. An SDR is valued at about $1.56. If cargo is carried in or on a container, pallet or similar article, the number of packages in or on that article and set forth in the contract of carriage will be the limitation rather than the container, pallet or similar article.

**Weakened Fire Defense** Cargo interests will no longer bear the burden that the carrier had privity and knowledge, before the fire, of the problem that caused the fire or prevented it from being properly extinguished.

**Continuing Duty to Exercise Due Diligence to Make the Ship Seaworthy** The present COGSA only specifies that the owner has this duty before the voyage – the Rotterdam Rules Article 14, provides that their duty...
throughout the voyage. It is anticipated that a lower burden will be imposed when the vessel is at sea away from shore-side experts to repair and maintain.

3. Other Changes

**Door-to-Door Coverage and Maritime Performing Parties** COG

COG with the force of law to the tackle-to-tackle period, i.e., from the time the tackle attaches at the port of loading until the cargo is placed on the unhooked from the ship’s tackle at the port of discharge.

The Rotterdam Rules will govern the relations between the shipper and carrier with certain exceptions during the entire door-to-door carriage described in the contract for carriage.

The Rotterdam Rules will also govern “Maritime Performing Parties” performing work in ports; stevedores and terminal operations are MPPs. MPPs will give MPPs all the defenses of the carrier without the need for a properly drafted Himalaya Clause in a bill of lading.

This coverage should remove the incentive that now encourages cargo interests to sue stevedores or terminal operators in tort to avoid the COGSA package or customary freight limitation.

The Rotterdam Rules are suited to today’s multimodal carriage and include provisions for electronic records. Again, although the Rules may at first appear complex, they should reduce litigation in the long run.

**Related Practices**

Maritime