SPRING 2011

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InterConnect

A PUBLICATION OF BENESCH FRIEDLANDER COPLAN & ARONOFF LLP'S TRANSPORTATION & LOGISTICS GROUP

Rotterdam Rules—The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, otherwise known as the "Rotterdam Rules," was adopted by the United Nations General Assembly on December 11, 2008. The stated purpose of the Rules is to bring international uniformity to the law of carriage of goods by sea, and to make the law of carriage of goods by sea appropriate and relevant to the modern age of international, containerized, intermodal transportation of goods.

The U.S. has signed the Rotterdam Rules, but the rules must be ratified by the U.S. Senate before they can be implemented. Currently, the rules are still being reviewed by the U.S. State Department before being presented in the Senate. When implemented, the Rotterdam Rules will, in the U.S., eliminate the Carriage of Goods by Sea Act (COGSA), which is codified at 46 U.S.C. § 30701. This article highlights some of the major differences between COGSA and the Rotterdam Rules.

Scope of Application. The Rotterdam Rules apply to contracts of carriage for movements between countries, if part of the carriage is by water. The rules apply to "all maritime performing parties," including terminals and harbor-area truckers. The rules do not apply to charter parties or other contracts for the use of any space on a ship. COGSA applies to port-to-port shipments by ocean carriers, but may be extended to inland carriers and subcontractors by *Himalaya* clauses.

Period of Responsibility. Under COGSA, the carrier is responsible only during "the period from the time when the goods are loaded on to the time when they are discharged from the ship," or "tackle-to-tackle." Often, carriers have contractually extended the period during which they are liable, resulting in carrier liability beyond the "tackle-to-tackle" portion of carriage. The Rotterdam Rules apply door-to-door (Article 12(1)). By law, the carrier will be responsible for the entire contractual period of carriage, which often means from the carrier's receipt of the goods at an inland location until the goods are delivered to an inland location in another country.

Limitation of Liability. The limitation of liability for cargo loss or damage under COGSA was set in 1936 at $500 per package, "or in case of goods not shipped in packages, per customary freight unit." Determining what constitutes a "package" under COGSA is confusing and can be controversial. For instance, courts have sometimes held that a large piece of machinery or even an entire shipment is one package or one customary freight unit. The limitation of liability under the Rotterdam Rules (Article 59) is 875 Special Drawing Rights (SDRs) per package or 3 SDRs per kilogram of gross weight, whichever is greater. The value of an SDR varies daily, but for example, an SDR value of $1.56 would set the limitation of liability at $1,363.37 per package or $4.65 per kilogram, whichever is greater.

Basis of Liability. Under the Rotterdam Rules, the carrier is liable for loss or damage or delay, if the claimant proves the loss, damage or delay (or the event or circumstance that caused or contributed to it) took place during carriage of the goods, unless the carrier proves the cause of the loss, damage or delay was not its fault. The carrier is also relieved of liability if it proves that the loss, damage or delay was caused or contributed to by one of several exceptions to liability, which are similar, for the most part, to the exceptions under COGSA.

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COGSA does not explicitly address delays. Under the Rotterdam Rules, delay is defined in Article 21 as a situation when goods are not delivered "within the time agreed." This implies that if the parties do not agree upon a specific delivery time, there can be no claim based on delay.

Under COGSA, a carrier was not liable for cargo loss or damage if such loss or damage was caused by an error of navigation. Under the Rotterdam Rules, there is no exception based on an error in navigation.

Under COGSA, if the carrier performed due diligence to make the vessel seaworthy prior to voyage, the carrier was considered free from negligence and exempt from liability. Under the Rotterdam Rules, the obligation to exercise due diligence in making the vessel seaworthy continues throughout the voyage.

Time for Suits. Under COGSA, the time period during which litigation can be commenced is one year from date of delivery or the date the goods should have been delivered. The Rotterdam Rules provide for a two-year time limit for commencement of proceedings.

The Rotterdam Rules contain many other items that will be of interest to both shippers and carriers. However, the foregoing summary provides an initial, meaningful, representative sampling of the changes contained in the Rotterdam Rules as they compare to the current U.S. laws under COGSA. Only time will tell when and if the U.S. Senate ratifies the new rules and they become the new law of the land.

For more information, please contact Martha Payne at mpayne@beneschlaw.com or (541) 764-2859 or Teresa Purtiman at tpurtiman@beneschlaw.com or (614) 223-9380.

Do I Need More Than One Entity?

In a competitive business environment, transportation and logistics providers can distinguish themselves by offering additional value-added services to their customers, ranging from transportation brokerage to warehousing to air freight forwarding and more. One question that inevitably arises when these new service offerings are contemplated is whether the services should be offered through whatever existing legal entity the provider is already using or whether a new legal entity should be created to house the new service offering. For example, a motor carrier may decide to begin operating as a transportation broker. That motor carrier may simply declare that it now has a brokerage "division" within its current corporation or limited liability company. Alternatively, that motor carrier may decide to create a wholly separate (but usually affiliated) corporation or limited liability company through which to operate.

"… over time, many operators have realized that housing multiple operating authorities within a single entity can create certain strategic disadvantages."

Historically, many transportation and logistics operators housed multiple operating authorities within a single entity. Doing so was simpler and seemed less expensive. Perhaps most importantly, though, doing so did not appear to create any truly significant risk for the operator. However, over time, many operators have realized that housing multiple operating authorities within a single entity can create certain strategic disadvantages. An operator who is thinking of offering a new service will want to consider many factors including, but not limited to, the following three:

- **Asset Protection.** Separating the operations into different entities may help protect the operator's assets and, ultimately, overall enterprise value. For instance, a successful warehouse operator who has built substantial value in that warehousing business may not wish to expose those assets to any liabilities that might be created by a brand-new transportation operation. While various legal theories might ultimately still permit an injured party to pursue the warehouse operator, doing so will be made more difficult through the formal separation of the business units into different legal entities.
- **Operational Confusion.** Failing to house different service offerings in different entities frequently results in an operator failing to identify with clarity which service it is providing in a given transaction. In other words, a disgruntled shipper inevitably claims that the provider represented itself as a motor carrier when in fact the operator believes that it was entering into a brokerage arrangement. Segregating different service offerings in different entities forces an operator (and its sales force) to think clearly about the services that it is offering and to document those services

accordingly. Furthermore, as a practical matter, the operator may find that it is much easier to track and evaluate the respective profit and loss for each service offering if the operator houses the service offerings in separate entities.

- **Insurance.** Certain insurance companies may be reluctant to underwrite certain types of risk, or may charge higher premiums, if an operator fails to house operating authorities in separate entities. Such insurers may conclude that failing to establish separate entities is an indication that the operator is not clearly delineating what services it is providing in any given circumstance. Such practices can create unnecessary risk. For instance, a motor carrier insurer may find itself paying for defense costs associated with a brokerage claim. Moreover, in light of the recent claims that have been successfully brought against transportation brokers for negligent selection, the cost of contingent cargo and contingent automobile insurance will likely continue to rise. Therefore, the growth of an insured's brokerage business could increase the size of premiums going forward if the service offerings remain housed in the same entity.

In short, many good reasons exist for an operator to give serious consideration to separating its various service offerings into separate legal entities (i.e., ABC Company for motor carrier services, XYZ Company for transportation brokerage services, etc.). The steps involved in implementing this structure are not necessarily complex or difficult, but can certainly provide an operator with a range of strategic advantages. It is never too late!

For more information, please contact Marc Blubaugh at mblubaugh@beneschlaw.com or (614) 223-9382.

Bankruptcy Logistics Part 1

Chapter 11, together with Chapter 7, are the most familiar formal methods for restructuring or liquidating a failing business. Informally, businesses often just shut down operations—leaving their creditors with no process to collect on their debts. If the failing business had a bank or a factor financing their operations, there is typically not much left over for any unsecured creditors. This "Part 1" of Bankruptcy Logistics addresses some of the unique issues for carriers, warehousemen and 3PLs (third party logistics providers) in the formal Chapter 7 and Chapter 11 processes—processes akin to chess and backgammon in respecting priority of position, but not dissimilar to horseshoes!

Traditional Carriers

Under the Uniform Commercial Code and State statutes, carriers in possession of freight—where the costs of shipment have not yet been paid—have rights to retain possession and enforce lien rights. The extent of those lien rights depends on the language in the contract (and bill of lading) between you and your shipper. Oftentimes in Chapter 11 cases, the shipper/debtor files a motion with the bankruptcy court to continue to pay carriers to address this "in route" lien issue. If you have expanded contractual lien rights, you will have better leverage in this process.

Warehousemen

The same goes for warehousemen, a profession that is *very* broadly defined under the Uniform Commercial Code and state statutes. So long as warehouse receipts with the requisite data are being provided to shippers, the costs associated with storage are given priority and can be enforced. Critically, section 546(i)(1) of the Bankruptcy Code provides that *"the trustee may not avoid a warehouseman's lien for storage, transportation, or other costs incidental to the storage and handling of goods."* The benefits of falling in this category cannot be understated, since this creates an immunity to preference actions and other "avoidance actions" by either the debtor or its subsequent trustee in a Chapter 11 or Chapter 7 proceeding.

Third Party Logistics Providers

Third party logistics providers (3PLs) often lack any special rights directly (with the exception of granted rights in documents of title for ocean and rail shipments). However, depending on your level of integration with the debtor's operation—and your leverage, if you have it, to no longer provide services—you may have a conversation with the debtor on being treated as a "critical vendor." While this may create an opportunity to get paid for old invoices, it is by no means a "free lunch." There are many strings associated with critical vendor status: Bad planning can make whatever amounts you get up front not worth the back-end risk. Think before you leap!

Preference Actions

All of you have probably received a "clawback letter"—a letter from a trustee in a bankruptcy case requesting the return of funds received in the 90 days prior to the filing of the bankruptcy. The next *InterConnect* will highlight how you use these special rights and leverage points to deal with these trustee preference demands. In the meantime…know your rights.

For more information, please contact David Neumann at dneumann@beneschlaw.com or (216) 363-4584.

Recent Events

Martha Payne and **Eric Zalud** attended the **Conference of Freight Counsel Meeting** in Orlando, FL, on January 9–10, 2011.

Marc Blubaugh, Clare Taft, Teresa Purtiman and **Eric Zalud** attended the **Transportation Lawyers Association Regional Meeting** in Chicago, IL, on January 21, 2011.

Marc Blubaugh moderated a panel discussion, *Out of the Frying Pan and Into the Fire: Transportation Challenges in 2011*, for the **Columbus Roundtable of the Council of Supply Chain Management Professionals** in Columbus, OH, on January 28, 2011.

Rich Plewacki presented *Upon Further Review: Winning with an IC Model* and **Eric Zalud** presented *Dealing With Brokers, Acting As a Broker and Doing it Right!* at the **National Tank Truck Carriers Winter Membership and Board of Directors Meeting** in Indian Wells, CA, on February 9–11, 2011.

Marc Blubaugh and **Eric Zalud** attended the **BB&T Capital Markets 26th Annual Transportation Services Conference** in Coral Gables, FL, on February 16–17, 2011.

Martha Payne attended the **Oregon State Bar Annual Mid-Year CLE: Update on Government, the Public Sector and Immigration Law** in Gleneden Beach, OR, on February 25, 2011.

Marc Blubaugh spoke on a panel entitled *Innovation Strategies and Solutions* at the International **Warehouse Logistics Association Annual Convention** in St. Petersburg, FL, on March 6–8, 2011. **Eric Zalud** was also in attendance.

David Neumann, Martha Payne and **Eric Zalud** attended the **2011 AirCargo Conference and Tradeshow** in San Diego, CA, on March 10–12, 2011.

Jim Hill, Rich Plewacki and **Eric Zalud** attended the **Truckload Carriers Association Annual Convention** in San Diego, CA, on March 13–16, 2011.

Eric Zalud attended the **Council of Litigation Management Annual Conference** in New Orleans, LA, on March 23–25, and participated in the Transportation Committee there.

On the Horizon

Marc Blubaugh will be presenting *Freight Loss and Damage Workshop* and **Martha Payne** will serve as a panelist for the *International Shipping – Air and Ocean Panel* at the **Transportation and Logistics Council/Transportation Loss Prevention & Security Association Annual Conference** in St. Louis, MO, on April 3–6, 2011. **Eric Zalud** will also be attending and speaking on freight brokerage issues. Additionally, Martha will be attending the meeting of the Board of Directors of the Transportation Loss Prevention & Security Association.

Martha Payne and **Eric Zalud** will be attending the **Transportation Intermediaries Association 33rd Annual Trade Show & Convention** in Orlando, FL, on April 6–9, 2011. **Eric Zalud** will be speaking on the Legal Panel on vicarious liability issues.

Teresa Purtiman will be attending the **National Private Truck Council 2011 Education Management Conference & Exhibition** in Cincinnati, OH, on April 17–19, 2011.

Marc Blubaugh will be presenting *Playing Your Aces: F4A Preemption – New Developments to Help You Use It As a Shield and a Sword* at the **Transportation Lawyers Association Annual Conference** in Las Vegas, NV, on May 10–14, 2011. **David Neumann, Martha Payne** and **Eric Zalud** will also be attending. Marc and Eric will also be attending the TLA Executive Committee Meeting, and Eric is the Co-Chair of the educational program.

Teresa Purtiman will be attending the **Messenger Courier Association of America's Conference** in Las Vegas, NV, on May 11–14, 2011.

Rich Plewacki will be attending the **American Trucking Association Leadership Meeting** in White Sulphur Springs, WV, on May 15–17, 2011.

Martha Payne will be attending the **Cargo Business News Northwest Intermodal Conference** in Portland, OR, on May 17–18, 2011.

For further information and registration, please contact Megan Pajakowski, Client Services Manager at mpajakowski@beneschlaw.com or (216) 363-4639.

Pass this copy of *InterConnect* on to a colleague, or e-mail Ellen Mellott at emellott@beneschlaw.com to add someone to the mailing list.

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