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Expert Analysis

On the Move: Changes for Trucking Freight and Ocean Shipping

Effective Oct. 1, 2013, new statutes will take effect governing the moving of trucking freight throughout the United States. That is the date that the "Moving Ahead for Progress in the 21st Century Act (MAP-21)," P.L. 112-141, goes into effect. Signed by President Barack Obama on July 6, 2012, MAP-21 not only allocates more than $100 billion for transportation programs, it also directs the Federal Motor Carrier Safety Administration (FMCSA) to implement far reaching structural changes covering the manner in which trucking freight moves around the country. These structural changes are designed to have trucking freight move more safely, while also making the highways generally safer for all of us. On the ocean side, a new treaty is expected to be presented to the U.S. Senate to modernize ocean cargo carriage law—which has not been updated since 1936

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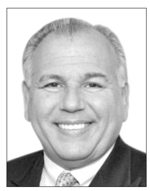

By
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Movement Requirements

MAP-21's fundamental restructuring of the trucking industry is the result of years of widespread complaints about trucking companies with deficient safety ratings who, when shut down by federal regulators, close up shop, only to "reincarnate" under a new name, as well as truck drivers who exceed the permitted driving hours on the road by creating falsified log books, and thus risk falling asleep. Indeed, a New York Times exposé in December 2006[1] described truckers who kept dual sets of hourly log books; the truckers referred to the books they submitted to federal authorities as "comic books," because it was said to be "an open secret in the industry" that they were often works of fiction.

To combat these and other industry problems, MAP-21 will mandate the following new major freight movement safety improvements, among others:

- A national driver registry, composed of all drivers possessing commercial driver's licenses, and recording not only their driving history, but also their blood and alcohol results.[2]
- A unified registration system in which all motor carriers, brokers and freight forwarders must register and obtain authority for each function they will carry out.[3]
- Disclosure by each transportation provider of their specific legal role in the carriage (i.e., as a broker, carrier or forwarder) to their customers.[4]
- Disclosure of family ownership between transportation companies and a ban on "reincarnated" carriers.[5]
- The installation of both electronic on-board recorders (EOBRs) and "electronic logging devices" to electronically monitor both motor truck accidents and hours of service engaged in. The EOBRs are required to be in place within two years and the electronic logging devices must be in place by 2014.[6]
- Minimum driving training stan-

dards, to be implemented within one year.[7]

- An increase in the bond a freight broker must file to obtain operating authority, from $10,000 to $75,000.[8]
- A minimum of one officer at each transportation company with at least three years of trucking experience.[9]

Why New Law Was Necessary

MAP-21 is expected to be beneficial to shippers of goods domestically in multiple ways. First, the improvements in monitoring truck drivers' hours of service can be expected to decrease the frequency of motor truck accidents, in which cargo is frequently damaged. The closer tracking of truck driver safety records should have a similar effect. The significant bump in the surety bond for freight brokers may force out smaller industry players, but it responds to the increasingly common problem of trucking middlemen simply closing up shop in the face of a high claim, leaving innocent shippers to fend for themselves. The $75,000 bond figure also places land-based transportation intermediaries on par with most of their ocean intermediary colleagues, and thus makes intermodal responsibility more uniform.

The new law also responds to criticism of the practice known in the industry as "interlining" whereby motor carriers simply rebook freight—in some cases going through multiple iterations—with other downstream carriers who actually do the hauling. This has resulted in situations in which shippers do not know who is actually carrying their freight nor who they can look to for the payment of damages. This confusion has resulted in a long progeny of legal cases wherein even sophisticated federal judges have struggled to determine which entity in a particular cargo movement was acting as a broker, and which was acting as a motor carrier, forcing them to set up elaborate legal formulas to decide the issue.[10] Under MAP-21, for the first time, transportation providers will have to be transparent and specific as to which legal role—trucker, broker or forwarder—they are playing with respect to each cargo movement.[11]

Compensation for Damage in Ocean Transit

Country	Liability Limitation	Buyer's Standard Recovery In That Country
Hague-Visby Countries*	667 SDRs per package, 2 SDRs per kg.**	$2,712,480
Chile	835 SDRs per package, 2.5 SDRs per kg.	$3,399,672
Rotterdam Rules (proposed law)	875 SDRs per package or 3 SDRs per kilogram	$4,068,770
United States (current law)	$500 per package/ customary freight unit	$500

* Including Australia, Belgium, Canada, China, Denmark, France, Germany, Greece, Italy, Japan, Mexico, Netherlands, New Zealand, Norway, Russia, Sweden and the United Kingdom.
** 2 SDRs were valued at $2.99 as of May 30, 2013.

U.S. Ocean Freight Law

While those motor truck laws are being updated, U.S. laws concerning the movement of ocean freight are uniformly considered to be decades behind the rest of the world, with the last real modernization attempt having been undertaken in 1936.

The relevant U.S. statute, the Carriage of Goods by Sea Act (COGSA), is thus at this point a law that only Rip Van Winkle could love.[12] Passed in the 1930s, it has never been amended or modernized to cure its most outdated provisions—most notably its $500 per package limitation of liability for cargo damage[13]—or even to account for the intervening advent of the movement of freight intermodally via containerization. But a new international treaty, known as the "Rotterdam Rules" (formally, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or herein after the "Convention"[14]) is expected to soon be presented by the President to the Senate for ratification.

Earlier this month the Maritime Law Association of the United States reported that the Rotterdam Rules and their ratification package had finally, after several years in apparent limbo, left the State Department for inter-agency review by the Maritime Administration, the Federal Maritime Commission, and the Justice Department. It is anticipated that the review will be complete shortly and the rules will then go up the chain at the State Department to the Secretary of State and finally, to the President. The president is then expected to send the Rotterdam Rules to the Senate for its advice and consent.

The Rotterdam Rules are a treaty (similar to COGSA, which was also based upon a treaty) comprising international rules that revises the legal and political framework for maritime carriage of goods.[15] The convention establishes a more modern, comprehensive, and uniform legal regime governing the rights and obligations of shippers, carriers and consignees under contracts for door-to-door shipments involving international sea transport. Among the many changes (too detailed to cover in full here),[16] it incorporates a liability limitation of 875 SDRs[17] per package or 3 SDRs per kilogram, even higher than the Hague-Visby limitation followed by most of the largest trading nations.[18] Some of the major changes the convention would make law include:

- An extension in the period of time that carriers are responsible for goods. The new law would cover the time between the point when the goods are received to the point when the goods are delivered.[19] (Note: This applies only if there is a sea leg involved in the transport. Thus, the Rotterdam Rules are not completely multimodal since inland carriage except by a multimodal carrier is outside of the scope of application.)
- Comparative fault with shippers for cargo damage.[20]
- The elimination of the "nautical fault defence," which had prevented carriers and crewmen from being held liable for negligent ship management and navigation.[21]
- The extension of time in which lawsuits can be filed, from one year to two years following the day the goods were delivered or should have been delivered.[22]

MAP-21 is expected to be beneficial to shippers of goods domestically in multiple ways.

- The ability of countries to "opt" into a jurisdiction in their nation if they so choose, when it is the place of receipt of the goods, port of delivery, place of delivery or domicile of the carrier.[23]
- The ability of parties engaged in certain "volume" contracts to opt out of some liability rules set in the convention.[24]

The final draft of the Rotterdam Rules, which were assembled by the United Nations Commission on International Trade Law, was adopted by the United Nations on Dec. 11, 2008. A signing ceremony commenced in Rotterdam, The Netherlands (the convention's informal namesake), on Sept. 23, 2009. In addition to the United States, signers included France, Greece, Denmark, Switzerland and the Netherlands; in all, signatures were obtained from countries which are said to make up 25 percent of world trade by volume.

The Rotterdam Rules will enter into effect one year after 20 countries ratify the treaty. As of Aug. 9, 2011, there are 24 signatories to the treaty, but, to date, only two countries, Spain and Togo, have actually ratified the convention.[25] The conventional wisdom is that unless the United States ratifies the treaty, it will never be accepted by the rest of the world.

Why Modernization Is Needed

Virtually no one disagrees that COGSA's $500 per package limitation is now completely out of step with the international community. Today, while the rest of the major trading nations of the world have increased their package limitations to add a weight component and updated their compensation schemes to account for containerization, the United States has been unable to effect any change whatsoever to its own law, causing COGSA's compensatory scheme to, each decade, fall further and further behind those of other nations.

While COGSA's $500 per package figure may have been deemed adequate compensation in 1936, today, with inflation added to the mix, it constitutes more or less a license for carriers to be negligent (or even grossly negligent) without any accountability.

With respect to the effect of inflation on the $500 limitation figure, a rudimentary Internet survey of prices for staple items is useful here, as Congress was certainly cognizant of the relative value of $500 in 1936. A typical new car cost $665 in 1936 (today $26,700); a loaf of bread 8 cents (today $2.20); a gallon of gas 10 cents (today $3.54); a new home $3,925 (today $295,000). On the other hand, the COGSA limit was $500 in 1936 and remains the same today.[26]

The end result of these developments is that the United States affords its shippers and cargo buyers one of the lowest minimum statutory limitations of liability for freight damage on Earth.[27] Consider the accompanying chart of the compensation to be paid by a shipping line, should one of the largest objects moved by ocean, a stator generator weighing two millions pounds (907,184 kilograms), be damaged in ocean transit due to their negligence (or, again, even gross negligence).

Thus, despite the fact that Congress clearly intended COGSA, when it was originally enacted, to be both a mechanism to encourage international uniformity, as well as a means to align U.S. shipping compensation with the rest of the world, we now rank close to dead last in our level of standard liability limitation, and any concept of international uniformity is risible. The ratification of the Rotterdam Rules by the Senate will firmly change that. Indeed, as demonstrated by the foregoing chart's example regarding damage to a massive stator generator, if the Rotterdam Rules are ratified by the U.S. Senate, the recoverable statutory minimum limitation of liability for that loss, rather than $500, would be $4 million, far higher than even the current limitation under the Hague-Visby Rules.

Conclusion

The implementation of MAP-21 in the United States beginning this year will be a significant step forward toward modernizing the United States' domestic trucking system and laws; likewise, the Rotterdam Rules, if ratified by the Senate in the near future, as is now expected, will be a significant and much-needed step forward in the field of international ocean freight law.

1. http://www.nytimes.com/2006/12/03/washington/03trucks.html?pagewanted=print.
2. §32402.
3. §§13901-13909; §32915-32917.
4. §13901(c).
5. §32103.
6. §31137.
7. §32304.
8. §32918.
9. §32916.
10. See, e.g., *Nipponkoa Insurance Co. v. C.H. Robinson Worldwide and CNR Carrier*, 2011 WL 671747 at **3-5 (S.D.N.Y. 2011).
11. MAP-21 is not, however, a panacea clarifying all of the murky legal issues involved in resolving trucking freight claims, such as the geographic breadth of the Carmack Amendment, 49 U.S.C. §14706, where confusion still reigns. See generally, Michael F. Sturley, "*Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*: More Questions than Answers?" 77 J. Transp. L., Logistics & Policy 267 (2010).
12. Reprinted in Note following 46 U.S.C. §30701.
13. While in theory ocean shippers can increase their limit of liability contractually, in practice this is not commonly done and the U.S. State Department itself has conceded that this is due, at least in part, to a systematic "inequality of bargaining power" which exists (and has always existed) based upon the fundamental structure of the liner shipping industry between shippers and carriers. Mary Helen Carlson, "U.S. Participation in the International Unification of Private Law: The Marking of the UNCITRAL Draft Carriage of Goods by Sea Convention," 31 Tul. Mar. L. J. 615, 625 (Summer 2007) (In the liner trade "a certain inequality of bargaining power between the shipper and the carrier is assumed to exist.") As of 2007, 25 liner service companies controlled 80 percent of the world container trade; in contrast, in 2006 the U.S. had roughly 239,000 export shippers. Moreover, as noted above, The Rotterdam Rules do have within them a mechanism for lower liability limitations to be contractually agreed upon, utilizing what are known as "volume contrasts," but with certain procedural protections in place.
14. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, United Nations Commission on International Trade Law, Vienna, 2009. http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/09-85608_Ebook.pdf.
15. See David T. Maloof and Jacqueline M. James, "U.N.'s New Compensation Treaty: Should United States Ratify It?" New York Law Journal, Jan. 7, 2009, Volume 241-No. 4.
16. For a more detailed discussion of the convention, see "The Rotterdam Rules In A Nutshell," Brittania News Conventions, available at http://www.britanniapandi.com/download.cfm?docid=D22DD3E1-C8E9-4407-95421AB234C6F5FB and the bibliography therein. COGSA and the Rotterdam Rules are compared by Charles M. Davis at http://davismarine.com/articles/ Rotterdam%20Rules%20vs%20COGSA%20Comparision%20Table.pdf.
17. The Special Drawing Right (SDR) is a fluctuating amount dependent upon the value of five world currencies: U.S. dollars, German Deutsche marks, British pounds, French francs and Japanese yen.
18. In most major countries that trade with the United States shippers' pleas for modernization were answered by foreign governments with the passage of the so-called Hague-Visby Rules (1968 Protocol to Amend the Bills of Lading Convention, Brussels), and a subsequent protocol in 1979. The cumulative effect of these amendments with regard to the liability limitation was to replace the former £100 limit with 666.67 Special Drawing Rights (SDR), and a per-kilogram limitation of 2 SDRs, whichever is higher, as well as to add a "container clause" expressly defining the number of packages for limitation of liability purposes.
19. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, United Nations Commission on International Trade Law, Vienna, 2009. http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/09-85608_Ebook.pdf, Art. 5, Art. 12.
20. Art. 30(3).
21. Art. 17(3) [defence not listed].
22. Art. 62(1).
23. Arts. 66-72, 74, 91.
24. Art. 80.
25. http://en.wikipedia.org/wiki/Rotterdam_Rules.
26. http://www.thepeoplehistory.com/1936.html; www.census.gov/construction/nrs/pdf/newressales.pdf?;

http://abcnews.go.com/topics/business/energy/gas-prices.htm;

http://www.numbeo.com/cost-of-living/country_result.jsp?country=United+States.

27. Package and Kilo Limitations of 148 Countries (Updated Weekly), available at, http://www.mcgill.ca/maritimelaw/glossaries/package-kilo/.