Arbitration of Maritime Disputes under the Rotterdam Rules

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I was asked the other day whether I would recommend that the United States not only ratify the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea—known as the "Rotterdam Rules"—but also adopt optional chapters 14 and 15 on the jurisdiction of courts and arbitration.[fn]As of June 2012 twenty-four countries have signed the 2008 Convention but only Spain has ratified. Twenty ratifications or adherences are required to bring the Convention into force.[/fn]

Arbitration of maritime disputes does not come to my mind automatically when I think of international commercial arbitration. In the United States this kind of arbitration is a specialist practice, where arbitrators are often "commercial [people]," disputes often involve practices known only to persons familiar with the smells of oily ports and ocean air, and law is a special enclave of federal law more familiar to arbitrators than most judges today. These arbitrators signal their expertise and distinguish themselves from other arbitrators by forming associations (e.g., the Maritime Arbitration Association of the United States and the Society of Maritime Arbitrators, Inc.), some of which have their own arbitration rules, rules of ethics, and even may administer arbitrations. (For a list of associations of maritime arbitrations elsewhere in the world, see here.)

Yet a moment's reflection reminded me not only of the ancient roots of maritime arbitration (dating, it is said, to the Phoenicians) but that U.S. arbitration law has long recognized arbitration of maritime disputes. The very first definition, for example, in section 1 of the 1925 Federal Arbitration Act defines "maritime transactions"—a definition describing matters few lawyers trained in the United States today would know much about ("charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction"). Moreover, several important recent U.S. Supreme Court cases–*Vimar Seguros y Reaseguros SA v. Sky Reefer* (1995) and *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.* (2010) come to mind—address arbitration of maritime disputes involving the carriage of goods.

The *Sky Reefer* case turns out to be particularly pertinent when reviewing the optional chapters of the Rotterdam Rules. Support within the United States for opting into these chapters is inspired by the desire to overturn that decision. In the *Sky Reefer* case, the court held that the U.S. transferee of a bill of lading issued by a charterer to a foreign shipper was bound by the arbitration clause in the bill designating Japan as the seat of arbitration. The practical result of the opinion is that disputes involving claims made by the holder of a bill of lading and arising from damaged goods offloaded in the United States end up in unbargained for arbitral proceedings in a foreign country subject to foreign arbitration rules. The foreign tribunal should apply the U.S. Carriage of Goods by Sea Act

(COGSA) and an award should not lessen the liability of a carrier under that Act but there is a natural fear that the tribunal will not apply COGSA or will misinterpret its provisions—and that it will be difficult for a U.S. court to effectively overturn the award.

Several commentators have pointed out that the facts in *Sky Reefer* were somewhat unusual. The U.S. claimant who was stayed from litigating in the United States not only was transferee of a bill of lading providing for arbitration (in Japan) but had also negotiated a sub-charter party providing for arbitration (in London).

The usual practice today is to litigate claims when goods are carried in the liner trade (i.e., carriage on a regular, published schedule between designated ports) but to arbitrate claims when goods are carried in the non-liner trade. This roughly follows the difference in the relative bargaining power of carriers and shippers. Charter parties in the non-liner trade are typically negotiated between parties with more or less equal bargaining power, while it has been assumed that carriers have greater bargaining power in the liner trade. The primary thrust of the Rotterdam Rules—and the COGSA which the Rotterdam Rules would replace—is to provide protection for holders of bills of lading. The Rules explicitly exclude charter parties but cover bills issued by the charterer or ship owner to third parties.

It turns out that you must understand these customary business practices when evaluating chapters 14 and 15 of the Rotterdam Rules. Chapter 14 on court jurisdiction permits the claimant to bring its claim against a carrier before a competent court in several specified locations no matter what the bill of lading says. Chapter 15 on arbitration is included to protect these claimants if carriers in the liner trade should suddenly change present practice in order to avoid chapter 14 and begin including arbitration clauses in bills of lading they issue. Claimants must arbitrate but they may choose the place of arbitration from several specified locations, just as they could if litigating. Given this limited objective, chapter 15 despite its title (“Arbitration”) does not include elaborate rules on how to arbitrate maritime disputes.

The Rotterdam Rules, in other words, distinguishes between parties who need the protection of its rules and those who are able to bargain on an equal footing with carriers. The Rules expand on earlier attempts to make this distinction by expanding the latter group to include “volume” contracts (much like “service contracts” in United States legislation) subject to some but not all of the Rules. In the case of arbitration, the place of arbitration designated in a volume contract binds parties to the contract if specified notices are given and may bind third parties if the term is reproduced in the transport document and if permitted by applicable law. Only actual practice will demonstrate whether the specific protections for these third parties are adequate. I have less concern about these protections than I do about whether the definition of “volume” contracts includes only those persons who do not need full protection of the Rotterdam Rules—an issue that goes to whether to ratify the Rules.

Should the United States adopt chapters 14 and 15 if she becomes a party to the Rotterdam Rules? In principle, I would answer “Yes.”