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## International Transportation Law

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## I. United States Aviation Regulatory Developments

### A. DOT CONSUMER PROTECTION RULES

Consumer protection and aviation safety issues dominated the U.S. regulatory scene during 2010. On December 30, 2009, the U.S. Department of Transportation (“DOT”) published a final rule that requires, among other things, that U.S. carriers adopt contingency plans for lengthy tarmac delays that include an assurance that a carrier will not permit an aircraft to remain on the tarmac for more than three hours in the case of domestic flights and for more than a set number of hours, as determined by a carrier, for international flights, without providing passengers an opportunity to deplane. Exceptions to the rule are permitted for safety, security, or air traffic control-related reasons.<sup>1</sup> The rule, known as the “tarmac delay” rule, or phase one of DOT’s consumer protection effort, became effective on April 29, 2010.<sup>2</sup> Less than two months later, DOT began phase two by issuing a wide-ranging notice of proposed rulemaking that would not only extend the

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1. See Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983 (Dec. 30, 2009).

2. See *id.* However, the DOT subsequently extended the effective date for the requirement that airlines update flight delay data on their websites for two months (see Posting of Flight Delay Data on Web Sites, 75 Fed. Reg. 42,599 (July 22, 2010)) and denied requests of five airlines for a temporary exemption from the new rule at New York area airports due to construction on the main runway at John F. Kennedy International Airport. See Press Release, Dept. of Transp., DOT Denies Requests for Waiver of Tarmac Delay Rule (Apr. 22, 2010).

tarmac delay rule to foreign airlines and to more airports but would also establish new and/or expanded requirements on a broad range of other issues, including denied boarding compensation, full-fare advertising, and peanut allergies.<sup>3</sup> The phase two rule, generally opposed by U.S. and foreign airlines alike, remains pending.

#### B. FAA FLIGHT AND DUTY TIME RULEMAKING

More recently, on September 14, 2010, the Federal Aviation Administration (“FAA”) published a new proposed rule, “Flight Crewmember Duty and Rest Requirements” (the “NPRM”), that would impose one level of safety on all U.S. commercial flight operations, in contrast to the current rules, which recognize differences between types of operations, whether a flight carries passengers or cargo.<sup>4</sup> This FAA rulemaking grew out of a February 2009 fatal crash of a regional aircraft in Buffalo, New York, which ended the longest period in U.S. aviation history without a passenger fatality<sup>5</sup> and subjected the industry to unprecedented media scrutiny and congressional hearings on pilot experience, training, fatigue, rest, training, and related issues. Pointing to a congressionally-imposed deadline for implementing a new rule,<sup>6</sup> the FAA denied requests from numerous stakeholders to extend the November 15, 2010 due date for an extension of time to comment on this complex and highly controversial proposal.<sup>7</sup> In its comments, the Air Transport Association (“ATA”) supported the goals and certain core elements of the proposal, including science-based flight duty periods, reasonable cumulative flight duty period limits, and realistic minimum rest requirements, but it objected to the “one-size-fits all” approach eliminating current regulatory distinctions between different types of operations, and it criticized various aspects of the proposal as unnecessary, overly restrictive, or lacking in scientific and operational support.<sup>8</sup> Characterizing the NPRM as “overloaded with duplicative rules that subject the U.S. industry, passengers, and shippers to unjustified economic burdens and adverse service consequences”<sup>9</sup> and “not based on science,”<sup>10</sup> the ATA urged the FAA to withdraw and revise the NPRM. In contrast, the Airline Pilot Association (“ALPA”) supported the FAA’s determination that “one level of safety with regard to fatigue should apply equally to all Part 121 certificate holders”<sup>11</sup> and praised “the FAA’s and industry’s desire to move forward with a regulation that is scientifically supported to

3. Enhancing Airline Passenger Protections II, 75 Fed. Reg. 32,318 (June 8, 2010).

4. Flightcrew Member Duty and Rest Requirements, 75 Fed. Reg. 55,852 (Sept. 14, 2010).

5. *Id.* at 55,874.

6. The Airline Safety and Federal Aviation Administration Extension Act of 2010 (Public Law 111-216) imposed an August 2011 deadline on FAA to issue its new flight/duty/rest regulations, and FAA issued a notice of proposed rulemaking on Sept. 14, 2010. Flightcrew Member Duty and Rest Requirements, 75 Fed. Reg. at 55,854.

7. FAA Response to Comment Period Extension Requests for Flightcrew Member Duty and Rest Requirements, 75 Fed. Reg. 63,424, 63,425 (Oct. 15, 2010) (denying stakeholders’ extension requests on the grounds that the “[Aviation Rulemaking Committee] provided a forum for the aviation industry to give extensive input” and “to help ensure that we meet [Congress’s deadline that the FAA issue a final rule on pilot fatigue by Aug. 1, 2011]”).

8. Comments of the Air Transp. Ass’n, Notice of Proposed Rulemaking for Flightcrew Member Duty and Rest Requirements, Docket No. FAA-2009-1093, i (Nov. 15, 2010), available at <http://www.airlines.org/PublicPolicy/Judicial/Documents/ATAFDTfinalcomments.pdf>.

9. *Id.* at 5.

10. *Id.*

11. *Id.* at 1.

the maximum extent possible.”<sup>12</sup> But, ALPA’s support for the NPRM was tempered somewhat by what it perceived to be “significant scientific gaps that still exist” in the fatigue studies and models relative to late-night operations, time zone changes, and age.<sup>13</sup> The National Air Carrier Association (“NACA”) assailed the NPRM for “fail[ing] to consider the unique nature of the operations of non-scheduled carriers,” including carriers that are small businesses.<sup>14</sup> While supporting the FAA’s objective of combating crew fatigue, the Regional Airline Association (“RAA”) raised concerns that “cover nearly the full range of the proposed regulation and its conceptual underpinnings.”<sup>15</sup> Although the RAA presented alternative processes and language, it also questioned whether the breadth of its concerns could be resolved within the framework of the existing NPRM.<sup>16</sup> The NACA and the ATA both emphasized the inadequacy of the FAA’s cost/benefit analysis, asserting that the FAA had significantly underestimated the costs and overestimated the benefits of the proposed rule.<sup>17</sup> The FAA is currently reviewing stakeholder comments, which took several weeks to upload to the public docket in light of the volume received.

### C. IMMUNIZED ALLIANCES

Following closely on the heels of the announcement that the United States and Japan had agreed to the terms of an Open Skies aviation agreement<sup>18</sup> liberalizing the air transportation market between the two countries, Continental Airlines, United Airlines, and ANA (Star collectively) and American Airlines and Japan Airlines (Oneworld collectively), each sought grants of antitrust immunity (“ATI”) from the DOT that would allow the carriers to engage in joint pricing, sales and marketing, and revenue sharing on transpacific routes.<sup>19</sup> Over relatively minimal opposition compared to other recent significant antitrust immunity proceedings,<sup>20</sup> the DOT finalized its tentative approval<sup>21</sup> and granted each of the Star and Oneworld applications for U.S.-Japan ATI on October 6, 2010.<sup>22</sup>

2010 also saw DOT finally grant ATI to another alliance between Oneworld carriers—American Airlines and British Airways, along with Iberia, Finnair and Royal Jordanian (AA/BA Oneworld collectively),<sup>23</sup> after American Airlines and British Airways had failed

12. *Id.* at 2.

13. *Id.*

14. *Id.* at 1.

15. *Id.* at 4.

16. *See id.*

17. *Id.* at 25.

18. *See* Memorandum of Understanding between the United States and Japan (Oct. 25, 2010), *available at* <http://www.state.gov/documents/organization/150284.pdf>.

19. *See* DOT Order 2010-3-10, U.S.-Japan Alliance Case, Docket No. DOT-OST-2010-0059, 1-2 (consolidating applications of the Star Carriers and the Oneworld Carriers into a single proceeding).

20. *See, e.g.*, Joint Application of Continental Airlines, et al., Docket No. DOT-OST-2008-0234 (adding Continental to the 9-way immunized group of Star Alliance carriers); Joint Application of Alitalia-Linee Aeree Italiane-S.P.A., et al., Docket DOT-2004-19214-0086, (bringing Northwest Airlines into the SkyTeam Alliance following KLM’s merger with Air France).

21. *See* DOT Order 2010-10-4, U.S.-Japan Alliance Case, Docket No. DOT-OST-2010-0059 (Oct. 6, 2010), 2010 DOT Av. LEXIS 441.

22. *See* DOT Order 2010-11-10, U.S.-Japan Alliance Case, Docket No. DOT-OST-2010-0059 (Nov. 10, 2010), 2010 DOT Av. LEXIS 483.

23. *See* DOT Order 2010-7-8, Joint Application of American Airlines, et al., Docket No. DOT-OST-2008-0252 (July 20, 2010), 2010 DOT Av. LEXIS 327.

on two previous occasions.<sup>24</sup> DOT determined that the AA/BA oneworld alliance “would enhance competition by creating a viable third immunized alliance that is comparable to and competitive with the product and service offerings of [its] competitors, Star Alliance and SkyTeam, which have already received grants of antitrust immunity and are proceeding with their own alliance plans and integrated joint ventures.”<sup>25</sup> As the central condition to its grant of ATI, however, the DOT required the applicants to:

make available four slot pairs at London’s Heathrow International Airport to duly authorized airlines that are not affiliates of the applicants or members of Oneworld, for a period of up to ten years . . . at times that are usable for transatlantic services, for the purpose of introducing new services between the U.S. and London.<sup>26</sup>

#### D. CONTINENTAL AND UNITED MERGE TO CREATE THE WORLD’S LARGEST AIRLINE

On May 3, 2010, Continental Airlines and United Airlines announced their proposed merger of equals, aimed at creating the world’s largest airline.<sup>27</sup> Following the Department of Justice’s announcement that it had concluded its review of the proposed merger and that its antitrust concerns had been resolved by the transfer of take-off and landing slots at New York-Newark Liberty International Airport from Continental Airlines to Southwest Airlines on August 27, 2010,<sup>28</sup> DOT granted an exemption allowing Continental Airlines, Continental Micronesia, Air Micronesia and United Airlines to operate under the common ownership of United Continental Holdings, Inc., pending action on the carriers’ application for the *de facto* transfer of international routes.<sup>29</sup> While the carriers must remain separate entities and be operated as separate brands until the route transfer application is granted, this exemption order effectively cleared the way for the merger transaction, which closed on October 1, 2010.<sup>30</sup>

24. See Joint Applications of American Airlines, and British Airways, Docket Nos. DOT-OST-2001-10387 and DOT-OST-1997-2058.

25. DOT Order 2010-7-8, at 3 (citing Order 2010-2-8, at 2 (Feb. 13, 2010), 2010 DOT Av. LEXIS 153).

26. *Id.* at 57-58. Delta Airlines subsequently applied to operate Boston-London and Miami-London service using three of the available slot pairs. See Application of Delta Airlines, Docket DOT-OST-2008-0252 (Aug. 26, 2010).

27. See Press Release, United Cont’l Holdings, Inc., United and Continental Announce Merger of Equals to Create World-Class Global Airline (May 3, 2010), available at <http://ir.unitedcontinentalholdings.com/phoenix.zhtml?c=83680&p=irol-newsArticle&ID=1477955&highlight=>.

28. See Press Release, U.S. Dept. of Justice, United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice’s Antitrust Concerns (Aug. 27, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/262002.pdf](http://www.justice.gov/atr/public/press_releases/2010/262002.pdf).

29. See DOT Order 2010-8-15, Application of Continental Airlines, et al., Docket No. DOT-OST-2010-165 (Aug. 30, 2010), 2010 DOT Av. LEXIS 384.

30. See Press Release, United Cont’l Holdings, Inc., United and Continental Close Merger (Oct. 1, 2010), available at <http://ir.unitedcontinentalholdings.com/phoenix.zhtml?c=83680&p=irol-newsArticle&ID=1478014&highlight=>.

## II. European Aviation Law

### A. AVIATION SECURITY: NEW FRAMEWORK, BODY SCANNERS, AND COSTS

On April 29, 2010, the European Union's revamped aviation security framework<sup>31</sup> became fully applicable. Regulation 2008/300/EC, of which some provisions have been in effect since April 29, 2008, intends to streamline the security procedures and measures, drawing lessons from the experience gathered since 2002, when the E.U. adopted its first comprehensive aviation security legislation. Regulation 2008/300/EC, together with its implementing and supplementing legislation<sup>32</sup> now looks to eliminate the duplication of security controls within controlled areas of airports, to establish common standards for training and identification of persons engaged in aviation security, and introduce common criteria for the recognition of entities involved in the process of air cargo so as to avoid the need for re-screening the cargo when shipments are passed on within a secure chain. Regulation 2008/300/EC also allows for the application of the so-called "one-stop security" concept between the European Union and specific non-E.U. countries that have equivalent levels of aviation security. One-stop security is, for example, applied between the E.U. and Switzerland.

The attempted terrorist attack on a Northwest Airlines flight from Amsterdam to Detroit on December 25, 2009 stirred the debate<sup>33</sup> on the feasibility and/or necessity of a widespread use of so-called 'body scanners,' i.e., scanners that allow for the creation of (full) body images so that a reviewer of these images can assess the absence of prohibited metallic or non-metallic items. Opponents of body scanners pointed to the breach of their fundamental rights and to health concerns related to the use of x-rays. The European Commission was asked to study the concerns and to report to the European Parliament and the Council. On June 15, 2010, the European Commission delivered its report in which it found that security scanners can enhance the quality of security controls at E.U. airports.<sup>34</sup> But the manner in which these scanners are currently deployed and operated—each Member State sets its own conditions—can be improved. The Commission is in favor of imposing common European technical and operational requirements so as to ensure that health standards and European fundamental rights are respected. This report has not yet led to any change in legislation.

During 2010, the debate on the costs of airport security continued over whether security should be paid for by taxpayers generally or by the users of air transport services. The debate follows a proposal for legislation by the European Commission that would establish a common framework regulating essential aspects of security charges.<sup>35</sup> This legislation would codify the application of the principles of non-discrimination, consultation,

31. Commission Regulation 300/2008, Common Rules in the Field of Civil Aviation Security and Repealing Regulation 2320/2002, 2008 O.J. (L 97), 72 (EC).

32. See generally EUROPEAN COMM'N MOBILITY & TRANSP., [http://ec.europa.eu/transport/air/security/legislation\\_en.htm](http://ec.europa.eu/transport/air/security/legislation_en.htm) (last visited Jan. 30, 2011).

33. See, e.g., Press Release, European Comm'n, Transport: Vice-President Siim Kallas Addresses the European Parliament on the Use of Body Scanning Technology in Airport Security (Feb. 2010; IP/10/150).

34. *Communication from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU Airports*, COM (2010) 311 Final (June 15, 2010).

35. *Proposal for a Directive of the European Parliament and of the Council on Aviation Security Charges*, COM (2009) 217 Final (May 11, 2009).

transparency, and cost-relatedness to security charges. In its response to the Commission's legislative proposal, the European Parliament proved determined to add provisions to the legislation—implying that where Member States decide to impose security measures that are more stringent than those required by basic E.U. requirements, the costs thereof must be borne by the Member State and may not be passed on to the airlines or passengers.<sup>36</sup> The individual Member States, on the other hand, are opposed to any legislation that would require public financing of aviation security measures. The debate is far from over, and became even more complex when, in early November 2010, authorities uncovered a terrorist plot to carry explosives on cargo aircraft.<sup>37</sup>

#### B. VOLCANIC ASH CLOUD: IMPACT AND RESPONSE

On April 15, 2010, Eurocontrol<sup>38</sup> issued a press release stating that: “[b]ased on the guidelines of the International Civil Aviation Organization normal air traffic control services cannot be provided to flights in airspaces affected by volcanic ash. Therefore, several air navigation service providers have issued notifications to airlines requiring the temporary suspension of air traffic.”<sup>39</sup> The eruption of the Eyjafjallajökull volcano caused the closure of sections of the European airspace between April 15 and April 21, 2010, cancelling more than 100,000 flights.<sup>40</sup> It impacted passengers and airlines greatly and made clear that current structures and regulations make a coordinated and harmonized response to events of this magnitude and nature difficult. In the aftermath of the crisis, the Council agreed to various measures which should improve the E.U.'s response capability.<sup>41</sup> These measures comprise the development of a European methodology and coherent approach to risk assessment and risk management, including the establishment at E.U. level of safety limits for the presence of volcanic ash in the air. The Council also called for an accelerated development of Functional Airspace Blocks—airspace designed for air traffic management purposes according to operational functionality instead of the current practice of basing it on national borders.<sup>42</sup>

36. See Press Releases, European Parliament, (1) Airport Charges: Security is Member States' Responsibility, say MEPs (Mar. 1, 2010) and (2) Airport security: Member States should bear costs of extra measures (May 5, 2010).

37. See Memorandum from the European Comm'n on Air Cargo Sec. (Nov. 5, 2010).

38. Eurocontrol is an intergovernmental organization, with thirty-nine member states and to which the European Union has acceded. Eurocontrol's mission is to harmonize and integrate air navigation services in Europe. *About Us*, EUROCONTROL, [http://www.eurocontrol.int/corporate/public/standard\\_page/lp\\_about\\_us.html](http://www.eurocontrol.int/corporate/public/standard_page/lp_about_us.html) (last visited Jan. 30, 2011).

39. Special Report on Volcanic Ash Cloud, EUROCONTROL, [http://www.eurocontrol.int/corporate/public/subsite\\_homepage/report-ash-cloud.html](http://www.eurocontrol.int/corporate/public/subsite_homepage/report-ash-cloud.html) (last visited Jan. 30, 2011).

40. See *Information Note to the Commission*, at 2, SEC (2010) 533 Final (Apr. 27, 2010).

41. Press Release, Council of the European Union, EU Response to the Consequences of the Volcanic Ash Cloud for Air Transport (May 4, 2010).

42. *SES I and II consolidated legislation: The 4 Regulations Creating the Single European Sky*, EUROPEAN COMM'N, [http://ec.europa.eu/transport/air/single\\_european\\_sky/single\\_european\\_sky\\_en.htm](http://ec.europa.eu/transport/air/single_european_sky/single_european_sky_en.htm) (last visited Mar. 22, 2011).

Faced with passenger concern, the European Commission repeatedly made clear<sup>43</sup> that it considered the passenger rights legislation<sup>44</sup> fully applicable during the volcanic ash crisis. Stranded passengers were entitled to care (*e.g.*, snacks, drinks, etc.), communication (*e.g.*, telephone, fax, etc.) and accommodation (hotel, if needed). Passengers were also able to ask for a re-routing or a reimbursement of their tickets. Air carriers were, however, not obliged to pay monetary compensation (up to €600 per passenger), as the volcanic crisis indeed amounted to an extraordinary circumstance<sup>45</sup> that could not have been avoided even if all reasonable measures had been taken.

The volcanic ash crisis was an enormous financial blow to the aviation industry. Very quickly, a parallel was drawn with the economic impact of September 11, 2001, on which occasion the European Commission clarified the application of the state aid rules.<sup>46</sup> On April 27, 2010, Commissioner Kallas stated that aid measures could take different forms (both state aid and other aid) and pointed to article 107.2.b of the Treaty on the Functioning of the European Union (“TFEU”),<sup>47</sup> which specifically allows aid to make good the damage caused by natural disasters or exceptional occurrences.<sup>48</sup> But the status of the Member States’ budgets makes it unlikely that airlines will effectively receive assistance.

### C. E.U.-U.S. OPEN SKIES: SECOND STAGE

On June 24, 2010, the E.U. Transport Ministers signed the second stage of the open skies agreement between the E.U. and the United States.<sup>49</sup> The first stage of the agreement was adopted by the E.U. in 2007 and came into effect on March 30, 2008.<sup>50</sup> Article 21 provided that the E.U. and U.S. negotiators would meet again in May 2008 to “further the common goal of continuing to open access to markets,” resulting in: (i) a protocol to amend the air transport agreement between the United States and the E.U.; (ii) a memorandum of consultations accompanying the second stage agreement; and (iii) a joint statement on environmental cooperation.<sup>51</sup> One of the issues that has dominated the E.U.-U.S. aviation relationship is airline ownership and control: current U.S. legislation allows foreign ownership only up to twenty-five percent of voting rights, whereas the E.U. allows forty-nine percent. As a practical matter, such legislation prevents true transatlantic aviation mergers from occurring and causes air carriers from both sides of the Atlantic to join forces in the form of alliances.<sup>52</sup> The second stage E.U.-U.S. open skies agreement now includes a provision stating that upon the necessary legislative change in the United

43. See, *e.g.*, Memorandum from the European Comm’n on Volcanic Ash Cloud Crisis (Apr. 27, 2010).

44. Commission Regulation 261/2004, Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights and Repealing Regulation (EEC) No. 295/91, 2004 O.J. (L 46), 1 (EC).

45. *Id.* art. 5(3).

46. See, *e.g.*, Memorandum from European Comm’n on Volcanic Ash Crisis (Apr. 20, 2010).

47. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, Sep. 5, 2008, O.J. (C 115) 47.

48. See *Information Note to the Commission*, at 8, SEC (2010) 533 final (Apr. 27, 2010).

49. Press Release, European Comm’n, Siim Kallas Welcomes the Signature of the Second Stage EU-US “Open Skies” Agreement (June 24, 2010).

50. Air Transport Agreement art. 26, May 25, 2007, O.J. (L 134) 4.

51. *Memorandum of Consultations*, 2010 O.J. (L 223) 3-19.

52. R. Bruce Keiner, Jr., Lorraine B. Halloway & Gerald F. Murphy, Crowell & Moring LLP, Airline Alliances, Antitrust Immunity and Mergers in the United States, Address at the Annual Meeting of the Amer-

States, the E.U. will equally and reciprocally allow majority ownership of E.U. airlines by U.S. nationals.<sup>53</sup>

Several other equally important elements of the second stage agreement are not, however, dependent on legislative changes and will enter into effect immediately. These elements include (i) mutual recognition of certain regulatory decisions; (ii) an extension of the role of the monitoring body established by the open skies agreement, the Joint Committee; (iii) access by E.U. airlines to U.S. government-financed traffic, notably the Fly America program; (iv) closer cooperation on aviation security and on environmental matters; and (v) increased transparency of the cooperation between the respective competition authorities concerning the transatlantic airline alliances.

### III. The Rotterdam Rules and Uniform Intermodal Cargo Law: While the World Debates, the U.S. Supreme Court Acts

Maritime observers waited throughout 2010 for U.S. Senate action ratifying the Rotterdam Rules ("Rotterdam"), formally known as the United Nations ("UN") Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.<sup>54</sup> As described by the International Transportation Committee in last year's article, Rotterdam is intended to foster more uniform liability for the ocean and inland portions of global cargo movements, while facilitating e-commerce.<sup>55</sup> Without waiting for action on Rotterdam, however, another branch of the U.S. government acted in 2010 to facilitate uniform intermodal liability for such cargo. In some respects, the U.S. Supreme Court's decision in the "*K-Line*" case, formally known as *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*,<sup>56</sup> did at least as much for this cause as Rotterdam could.

#### A. ROTTERDAM

The U.S. treaty ratification process begins in the State Department, where the Legal Adviser prepares a transmittal package with input from other executive departments, including the DOT and the Department Justice in this case. This package is then reviewed by the Secretary of State and the President before its submission to the Senate. As of October 2010, the Rotterdam transmittal package was still being drafted,<sup>57</sup> and an informed estimate is that the package will not be delivered to the Senate before March 2011.<sup>58</sup>

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ican Bar Association (Sept. 2009) (transcript available at <http://www.crowell.com/documents/airline-alliances-antitrust-immunity-and-mergers-in-the-us.pdf>), at 1.

53. Protocol to Amend the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on 25 and 30 Apr. 2007 art. 6, Aug. 25, 2010, O.J. (L 223) 7-8.

54. *Contracts for the International Carriage of Goods Wholly or Partly by Sea*, UNCITRAL, U.N. Doc. E.09.V9 (2009), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/2008rotterdam\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html).

55. See Mark J. Andrews et al., *International Transportation Law*, 44 INT'L LAW. 379, 395-97 (2010).

56. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2438-49 (2010).

57. Interview with Andrews, Co-Author, Office of the Legal Adviser (Oct. 5, 2010).

58. Interview with Andrews, Co-Author, Office of the Legal Adviser (Oct. 4, 2010).

Given the status of U.S. ratification, it is not surprising that the rest of the world is mulling the merits of Rotterdam at a deliberate pace. On one hand, the number of signatory countries has increased to twenty-three from sixteen at the September 2009 signing ceremony.<sup>59</sup> The signatories account for perhaps twenty-five percent of global trade,<sup>60</sup> and include major seafaring countries as well as minor players. The European Parliament has recommended that member states ratify Rotterdam.<sup>61</sup> The convention is supported by non-governmental organizations ranging from the World Shipping Council (carriers in U.S. trades) to the National Industrial Transportation League (U.S. shippers) to the International Chamber of Commerce<sup>62</sup> to the American Bar Association.<sup>63</sup> On February 3, 2010, commercial representatives from fifteen Arab League states signed the Alexandria Declaration 2010, recommending that Arab League states jointly sign Rotterdam.<sup>64</sup>

On the other hand, there remain plenty of skeptics of Rotterdam outside the United States. For example, the Colloquium held from October 24-27, 2010 by the Comité Maritime International (“CMI”) in Buenos Aires, Argentina,<sup>65</sup> devoted a full day to panels on “Rotterdam Rules—An Alternative for Maritime Carriage for South America?” CMI is closely following Rotterdam, having drafted the initial text from 1999 to 2002 when it was delivered to the United Nations Commission on International Trade Law (“UNCITRAL”), where after six more years of negotiation, Rotterdam was approved by the UN General Assembly in 2008.<sup>66</sup>

At the CMI Colloquium, the panels included many prominent lawyers who were involved in the early CMI work and subsequent UNCITRAL negotiation. The many national maritime law associations present at Buenos Aires, with particularly strong representation from Latin American countries, vigorously debated the merits of Rotterdam.

Much of this debate concerned the “Declaration of Montevideo” (“Montevideo”), signed on October 22, 2010 and supported by fifty-eight individuals from eleven countries, plus three Uruguayan business associations.<sup>67</sup> Montevideo was also signed by eight maritime lawyers who have written widely against Rotterdam, under an endorsement “applaud[ing] the excellent work done [to create] Montevideo and wholly support[ing] the

59. See *Status 2008-United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the “Rotterdam Rules”*, UNCITRAL, U.N. Doc. E.09.V9 (Dec. 11, 2008), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/rotterdam\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html) (last visited Dec. 1, 2010).

60. Adeline Teoh, *UN Shipping Convention Ready for Australia*, DYNAMIC EXPORT, Nov. 16, 2009, <http://www.dynamicexport.com.au/news/un-shipping-convention-ready-for-australia00799/>.

61. *Shipowner Associations Welcome EP Support for Rotterdam Rules*, TRANSPORTWEEKLY, May 17, 2010, <http://www.transportweekly.com/pages/en/news/articles/72043>.

62. Vijay Kurup, *Let's Join Rotterdam Convoy*, ECON. TIMES, June 3, 2010, <http://economictimes.indiatimes.com/opinion/policy/lets-join-rotterdam-rules-convoy/articleshow/6005658.cms>.

63. R.G. Edmonson, *Bar Association Endorses Rotterdam Rules*, J. OF COM., Feb. 9, 2010, <http://www.joc.com/maritime/bar-association-endorses-rotterdam-rules>.

64. Press Release, Arab Acad. for Sci., Tech. & Mar. Transport, Alexandria Declaration 2010 (Feb. 3, 2010), available at <http://www.uncitral.org/pdf/english/news/ArabPressReleaseRR.pdf>.

65. Co-author Schmitt attended the Rotterdam deliberations at the CMI Colloquium, and co-signed the Montevideo Declaration which criticized Rotterdam as discussed *infra*.

66. ROBIN BURNETT & VIVIENNE BATH, *LAW OF INTERNATIONAL BUSINESS IN AUSTRALASIA* 151 (2009).

67. DECLARATION OF MONTEVIDEO (2010), <http://www.rotterdamrules.com/DECLARATION%20OF%20MONTEVIDEO-%20FRINAL.pdf>.

views stated therein that Rotterdam should not be brought into force.”<sup>68</sup> An English translation of Montevideo was circulated at the CMI Colloquium,<sup>69</sup> along with the following three critiques of Montevideo:

1. “Montevideo Declaration-The Facts” by Manuel Alba (Spain), and eight others including Francesco Berlingieri (Italy), Professor Michael Sturley (U.S.), and Alexander Von Ziegler (Switzerland);<sup>70</sup>
2. “The Rotterdam Rules, a Latin-American Response to the ‘Declaration of Montevideo’”, signed by Jose Vincente Guzman plus 14 others from Columbia, Chile, Spain, Uruguay and Venezuela;<sup>71</sup> and
3. “Limitation of Liability in the Rotterdam Rules, a Latin American Perspective” by Alberto Cappagli (President of the Argentine Maritime Law Association).<sup>72</sup>

The main concerns about Rotterdam identified by CMI panelists included the jurisdiction/arbitration provisions, the limits of liability, the burden on claimants to prove the cause of loss, and the overall complexity of the instrument. Opponents of Rotterdam were concerned about potential uncertainty introduced by freedom of contract for “volume contracts” under Rotterdam. While even Rotterdam supporters such as Professor Sturley acknowledged imperfections of Rotterdam in some of these areas, they emphasized that it incorporated significant compromises between vessel and cargo interests and that the years of effort behind these compromises were unlikely to be replicated in the near future if Rotterdam failed.

Some parts of Rotterdam are non-controversial. For example, the e-commerce provisions are generally regarded as a long overdue modernization of carriage of goods law. If Rotterdam were to stall for lack of general acceptance, many proponents hope that these necessary improvements can be adopted in some other international document without further controversy.

## B. K-LINE

Meanwhile, back in the United States, the Supreme Court in *K-Line* had to address the conflicting liability rules of U.S. statutes on ocean and inland transportation by reference to the law as it is, not as it would be after Rotterdam. The Court held, in a 6-3 decision, that the ocean rules prevail, at least on containerized import shipments moving on single “through bills of lading” and delivered to inland U.S. destinations via rail.<sup>73</sup>

68. *Id.*

69. A link to the English language translation of the Declaration of Montevideo—as prepared by the solicitors at Pysdens (Eng.) and Dr. Julio Vidal Amodeo (Uru.), with signatories shown—may be viewed at [http://www.ahbl.ca/files/publications/Declaration\\_of\\_Montevideo.pdf](http://www.ahbl.ca/files/publications/Declaration_of_Montevideo.pdf).

70. Manuel Alba et al., *Montevideo Declaration: The Facts*, <http://www.cmi2010buenosaires.com.ar/Facts%20-%20Montevideo%20Declaration%20-%20final%20-%20English.pdf> (last visited Feb. 1, 2011).

71. José Vincent Guzmán et al., *The Rotterdam Rules—A Latin-American Response to the Declaration of Montevideo* (2010), <http://comitemaritime.org/Uploads/Rotterdam%20Rules/The%20Rotterdam%20Rules%20-%20A%20Latin-American%20Response%20to%20the%20Declaration%20of%20Montevideo.pdf>.

72. Alberto C. Cappagli, *Limitation of Liability in the Rotterdam Rules—A Latin American Perspective* (2010), <http://comitemaritime.org/Uploads/Rotterdam%20Rules/Limitation%20of%20Liability%20-%20Alberto%20Cappagli.pdf>.

73. See *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2444 (2010) [hereinafter *K-Line*].

For generations before *K-Line*, the respective liabilities of ocean and inland carriers for cargo loss and damage differed sharply under U.S. law. With the advent of containerized cargo moving by sea and land on a through bill of lading, the differences between U.S. maritime rules (The Carriage of Goods by Sea Act or “COGSA”)<sup>74</sup> and U.S. inland rules (collectively known for historical reasons as the Carmack Amendment)<sup>75</sup> increasingly roiled international commerce. Carmack generally was considered a more “cargo friendly” regime than COGSA because (among other things) liability levels tended to be higher<sup>76</sup> and the time period for bringing suit was longer.<sup>77</sup>

In 2004, the U.S. Supreme Court’s *Kirby* decision held that whenever intermodal cargo movements under a through bill included a substantial segment of sea transportation, they were subject to federal maritime law rather than state law.<sup>78</sup> But both COGSA and Carmack constitute federal law, and *Kirby* did not decide which took precedence on inland segments. After *Kirby*, federal appeals courts split on this question. Notably, the appeals courts for the Second and Ninth Circuits held that Carmack prevailed, while several other circuits gave primacy to COGSA.<sup>79</sup> As noted, the Supreme Court now has agreed with those other circuits.

The *K-Line* decision does not directly address which body of law applies to containerized export movements on through bills, but at least two of the Court’s rationales for choosing COGSA (uniformity concerns plus the historical limitations of Carmack’s international reach)<sup>80</sup> would seem to apply as well to exports. *K-Line* likewise does not directly consider import shipments being delivered by truck. The governing statute, however, gives motor carriers much more latitude to contract out of Carmack (thus eliminating the choice-of-law issue) than railroads have.<sup>81</sup>

Notably, the Rotterdam Rules would not overrule the *K-Line* result. Rotterdam, like COGSA, permits ocean cargo rules to be extended inland by contract,<sup>82</sup> and *K-Line* simply holds that U.S. law permits such contracts.

74. See generally Carriage of Goods by Sea Act, 46 U.S.C. § 30701 (2011) [hereinafter COGSA].

75. See generally 49 U.S.C. § 11706 (2011); 49 U.S.C. § 14706 (2011).

76. See David Fisk, COGSA v. Carmack—United States Supreme Court to Address Carmack’s Application to Intermodal Shipments, SUBROGATION AND RECOVERY L. BLOG (Mar. 5, 2010), <http://www.subrogationrecoverylawblog.com/2010/03/articles/transportation/cogsa-vs-carmack-united-states-supreme-court-to-address-carmacks-application-to-intermodal-shipments/>.

77. Compare 49 U.S.C. § 11706(e) (2010) (setting a two year time limit), with 46 U.S.C. § 30701(3)(6) (2006) (setting a one year limit).

78. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 27 (2004).

79. Compare Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., 557 F.3d 985, 992 (9th Cir. 2009) (rejecting argument that Carmack cannot apply to ocean carriers), and Sampo Japan Ins. Co. of Am. v. Union Pac. R. Co., 456 F.3d 54, 76 (2d Cir. 2006) (holding that Carmack governs), with, e.g., Altadis USA, Inc. ex rel. Fireman’s Fund Ins. Co. v. Sea Star Line, LLC, 458 F.3d 1288, 1294 (11th Cir. 2006) (concluding that in the absence of a separate bill of lading, Carmack does not apply).

80. See *K-Line*, 130 S. Ct. at 2446-47.

81. Compare 49 U.S.C. § 10502(e) (2011) (limiting a railroad’s ability to contract out of Carmack) with 49 U.S.C. § 14706 (2011) (containing no similar provision for motor carriers).

82. While Rotterdam does not directly address long-haul inland transportation, Professor Sturley has demonstrated that inland extensions of Rotterdam by contract are permissible by implication from its text. See Michael F. Sturley, *Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States*, 44 TEX. INT’L L.J. 427, 448-50 (2009). As to extending the ocean regime inland by contract under current law, see COGSA, 46 U.S.C. § 13701(1)(3) (2011).

#### IV. Developments in European Union Maritime Law

##### A. LEGISLATION

On September 13, 2010, the Commission adopted rules in support of E.U. Directive 2009/16/EC on Port State Control, establishing the criteria for measuring company and flag state performance, and creating a new online register to “name and shame” shipping companies that perform poorly in port state controls inspections, while giving visibility to those companies that perform well.<sup>83</sup> Under Directive 2009/16/EC, which went into force on January 1, 2011, the E.U. hopes to establish a harmonized system of port state control and a coordinated system of port state safety inspections.<sup>84</sup> A new THETIS database “will track all safety inspections” across the E.U. and “provide a risk analysis that will determine the frequency and priorities for inspections” carried out in the Member States.<sup>85</sup> The Commission has created a Register of Company Performance and a Register of Flag Performance. The former will be publicly available online and provides the methodology to rank shipping companies by their inspection results. The Register of Company Performance will also list shipping firms whose ships’ safety performance has been low or very low for three months or more. This measure is expected to trigger increased frequency of inspections for ships of those firms. The Register of Flag Performance sets out similar criteria for assessing the performance of Flag State responsibilities but does not appear to be intended for public view.

The Commission has also acted to expand the scope of the E.U.’s maritime activities and outreach. On October 28, 2010, the Commission proposed an expanded mandate for the European Maritime Safety Agency (EMSA).<sup>86</sup> EMSA’s proposed new tasks include: (i) expanding the role of the EMSA-contracted Stand-By Oil Spill Response Vessels where pollution is caused by offshore installations; (ii) extending EMSA’s technical assistance to all European Neighborhood Policy countries to promote E.U. maritime safety policy in regional seas; and (iii) emphasizing EMSA as the basis for developing a Common Information Sharing Environment for the E.U. maritime dimension.<sup>87</sup>

##### B. ENFORCEMENT ACTIONS

The Commission launched a smaller number of actions against member states in the area of maritime safety this year. On September 30, 2010, it issued a Reasoned Opinion to Italy to amend national legislation enacted in 2009 allowing ports fees for intra-E.U. shipping to be charged at a higher rate than that for shipping between Italian ports.<sup>88</sup>

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83. Press Release, European Union, Maritime Safety: New EU Rules to “Name and Shame” Shipping Companies with Poor Safety Records (Sept. 13, 2010), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1115&format=HTML&aged=0&language=EN>.

84. *Id.*

85. *Id.*

86. Press Release, European Union, Maritime Safety: Commission Proposes Updated Mandate of the European Maritime Safety Agency (Oct. 28, 2010), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1446&format=HTML&aged=0&language=en>.

87. *Id.*

88. Press Release, European Union, Maritime Transport: Commission Requests Italy to Ensure that Port Dues are not Discriminatory (Sept. 30, 2010), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1260&type=HTML>.

Regulation 4055/86 requires that no discrimination can exist between national and intra-E.U. shipping, and that higher charges on external shipping coming from or going to a non-E.U. state must be justified by compelling reasons of public interest. In practice, Italy has not charged higher port fees for intra-E.U. shipping, but it has done so for external trade. If Italy does not come into compliance by December 2010, thereafter the Commission may bring an infringement action against it.

The Commission has supported efforts to improve port facilities. It approved Greek state aid proposals to develop a new pier in the Port of Piraeus, although not to support the purchase of loading and unloading equipment.<sup>89</sup> Support for the development of Ventspils Port in Latvia has also been approved.<sup>90</sup> Under its MarcoPolo II program to improve inter-modal transport in the E.U., the Commission awarded sixty-six million Euros to twenty-two projects which are expected to shift 16.8 billion tons/kilometers of freight away from European roads.<sup>91</sup>

The grants include €4 million and authorization for thirty million in state aid for a Franco-Spanish proposal under the “Motorways of the Sea” (“MoS”) initiative to link the French port of Nantes-Saint Nazaire with the Spanish port of Gijon.<sup>92</sup> Four MoS corridors have been designated for establishment by 2010, although progress has been slow: (i) a Motorway of the Baltic Sea, linking the Baltic Sea Member States with Central and Western Europe; (ii) a Motorway of the Sea of Western Europe from Portugal and Spain via the Atlantic Arc to the North Sea and the Irish Sea; (iii) a Motorway of the Sea of South-East Europe connecting the Adriatic to the Ionian Sea and the Eastern Mediterranean; and (iv) a Motorway of the Sea of South-West Europe, connecting Spain, France, Italy, and Malta, with links to South-East Europe and the Black Sea.<sup>93</sup>

### C. DEVELOPMENTS IN PIRACY

Incidents of piracy have increased in 2010, along with the effectiveness of multinational naval forces and merchant crews in combating it. As a result, the number of attacks on merchant ships has increased dramatically since 2008, but the success rate of pirate hijackings has also declined from sixty-three percent in 2007 to less than twenty percent in 2010.<sup>94</sup> The consequence is that the number of successful hijackings has remained about constant. In the first quarter of 2010, forty pirate groups had been disrupted by multina-

89. Press Release, European Union, Commission Endorses the Public Financing of Part of the Development Project for the Port of Piraeus in Greece (Dec. 18, 2009), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1973&format=HTML&aged=0&language=EN>.

90. Press Release, European Union, Commission Raised No Objection to the Public Financing for New Infrastructures in Ventspils Port But Raises Doubts on a Concession Price (Dec. 15, 2009), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1925&format=HTML&aged=0&language=EN>.

91. Press Release, European Union, Commission Authorises State Aid to a Franco-Spanish Motorways of the Sea Project and Includes It Among the Twenty-Two Selected Projects for Marco Polo Financing (Jan. 27, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/55&format=HTML&aged=0&language=EN>.

92. *Id.*

93. European Commission, Motorways of the Sea, [http://ec.europa.eu/transport/maritime/motorways\\_sea/motorways\\_sea\\_en.htm](http://ec.europa.eu/transport/maritime/motorways_sea/motorways_sea_en.htm) (last visited Jan. 22, 2011).

94. Bill Varner, *Somali Pirates Deterred by Cargo Ship Defense Efforts, UN Says*, BLOOMBERG, July 28, 2010, <http://www.businessweek.com/news/2010-07-28/somali-pirates-deterred-by-cargo-ship-defense-efforts-un-says.html>.

tional forces, up from fourteen groups in the first quarter of 2009. Nonetheless, in May 2010, Somali pirates held twenty-three ships and more than 400 prisoners hostage. The periods of captivity and scale of ransom payments have both increased, from sixty-eight average days of captivity and an average ransom payment of \$2.3 million (with highest being \$6 million) in 2009, to 104 average days of captivity and \$4.5 million average ransom (with the highest being \$7.5 million).

Both Kenya and the Seychelles are taking custody of suspected pirates for trial. As of October 15, 2010, the E.U. Naval Force ("E.U. NAVEUR") had arrested ninety-two suspected pirates since operations began in 2008. Of these, seventy-nine were transferred to Kenya for trial, eleven to the Seychelles and two to Spain.<sup>95</sup>

Legal developments have focused on issues relating to the definition and implications of piracy, and on the question of ransom. In *United States v. Said*, Judge Raymond Jackson of the Eastern District of Virginia rejected a charge of piracy against the six Somalis who had been arrested after firing weapons at the USS Ashland.<sup>96</sup> The government argued the definition of piracy under the law of nations was wider than armed robbery at sea and included any unauthorized just armed assault or use of violence on the high seas. Although upholding the other charges against the men, Judge Jackson held that piracy is rooted in its traditional meaning as armed robbery on the high seas and was not applicable to their situation.

The English High Court recently addressed a commercial consequence of piracy in *Cosco Bulk Carrier v. Team-Up Owning*,<sup>97</sup> holding that on the basis of the charter party involved (with no special provisions), a pirated vessel was not considered "off-hire" during the period of its captivity. Being off-hire would have shifted a greater liability to the ship owner. As an intentional act, the Court held that piracy could not be equated to delays related to normal accidents. Further, no evidence had shown that the ship or men were defective in their performance in a way that would make the owner liable for losses incurred in the period of captivity.

The legality of ransom was a major theme of 2010. In *Masefield AG v. Amlin Corporate Member Ltd*, the High Court, Queens Bench Division, ruled that ransom payments to pirates do not violate public policy under English law.<sup>98</sup> The position was restated by the House of Lords in its report on Somali piracy.<sup>99</sup> By contrast, on April 12, 2010, the White House issued Executive Order 13536 ("Order"), declaring a U.S. national emergency with respect to the situation in Somalia and off its coast.<sup>100</sup> Piracy was included as a threat to peace and security, but ransom payments were not prohibited *per se*. Rather, the Order places restrictions on named persons deemed to be contributing to Somali instability. Eleven persons and one entity were named, two persons with links to both the Al

95. EU NAVFOR, EU NAVFOR Supports a Legal Training Course for Regional Countries in Djibouti, <http://www.eunavfor.eu/2010/10/eu-navfor-supports-a-legal-training-course-for-regional-countries-in-djibouti/> (last visited Jan. 22, 2011).

96. See *U.S. v. Said*, No. 2:10CR57, 2010 WL 3893761, at \*11 (E.D.Va. Aug. 17, 2010).

97. See generally *Cosco Bulk Carrier Co. v. Team-Up Owning Co.* [2010], 2010 WL 2131662 EWHC (Comm) 1340 (Eng.).

98. See generally *Masefield AG v. Corp. Member Ltd.*, [2010], 2010 WL 517040 EWHC (Comm) 280 (Eng.).

99. EUROPEAN UNION COMMITTEE, COMBATING SOMALI PIRACY: THE EU'S NAVAL OPERATION ATALANTA, 2009-10, H.L. 103, 18.

100. Exec. Order No. 13536, 75 Fed. Reg. 19,869 (Apr. 12, 2010).

Shabaab insurgency and pirate groups. The Order also prohibits any U.S. person or persons within the United States from making any contribution for the benefit of such named persons.

The Order raised significant interest in the maritime shipping and insurance community, as it seemed to place in question the ability of U.S. ship owners, insurers, or re-insurers to make or insure ransom payments. The Order also appeared to establish a standard for due diligence but was not well defined.

Subsequent meetings with the Office of Foreign Assets Control ("OFAC") and the Department of Treasury ("Treasury") officials have clarified a number of key points. The scope of the Order includes all U.S. persons, including U.S. corporations, both at home and abroad. It does not include foreign corporations for the sole reason that they have assets or offices in the United States. The provisions are likely to include actions of U.S. insurers or re-insurers where cover of ransom payments by ship owners to named persons are involved. U.S. banks would also be included where they were facilitating such a payment or consequent insurance claim. OFAC has urged firms to consult with Treasury or OFAC officials before any ransom payments are made. Informal assurances have been made that the Order is not likely to be amended on receipt of information concerning a ransom demand before the fact, and that ransom payments would not be prohibited where life was at stake. In May 2010, OFAC issued the Somalia Sanctions Regulations, implementing the Order.<sup>101</sup>

Questions remaining regarding the legal position of law firms and attorneys who negotiate or facilitate a ransom payment and the impact on payments in general by U.S. cargo interests where a ransom is paid and insured by foreign entities, but where contributions in general will be sought from the U.S. cargo interest in a foreign (likely English) court.

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101. See Department of Treasury, Recent OFAC Actions, <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20100505.aspx> (last visited Jan. 22, 2011).

