

## THE ROTTERDAM RULES

### SOME CONTROVERSIES

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It is not possible to draft a convention which contains 96 articles and updates a regime first established ninety years ago without attracting some controversy. Some provisions in the Rotterdam Rules have not appeared before in an international convention and inevitably the need for regulating these matters will be questioned. Provisions that change familiar provisions in the existing regimes will provoke questions about the need for such changes.

This morning I attempted to explain why there was a need to change the existing regimes to take account of the major changes that have taken place in the industry over the past fifty years and I highlighted some of the provisions in the Rotterdam Rules that reflect these changes. Not all of these provisions are seriously controversial, but the general criticism has been made that the Rotterdam Rules are too long and too complex. However by adopting the CMI Draft as the basis for its work, UNCITRAL Working Group III implicitly set itself the task of preparing a comprehensive instrument and the complexity of the Rotterdam Rules to a large extent reflect the complexity of the modern industry.

I shall begin by concentrating on two topics that were not the subject of detailed presentations this morning.

I mentioned **door-to-door transport** in the context of my general remarks about the “container revolution”. As I pointed out, in the container trade the carrier’s period of responsibility under the contract of carriage often extends to cover some carriage by road or rail before or after the carriage by sea. This used to be referred to as combined transport, which is not necessarily strictly door-to-door, that is, for example, from the seller’s factory to the buyer’s warehouse.

Three principal areas of controversy arose during the negotiations in Working Group III.

When the instrument being drafted by the CMI was considered at its Conference in Singapore in 2001, it was decided that it should cover the possibility that it would apply also to other forms of carriage associated with the carriage by sea. This decision was reflected in article 4.2.1 of the CMI Draft. The UNCITRAL secretariat however considered that this was going beyond its brief and article 4.2.1 was placed in square brackets in the Preliminary Draft Instrument placed before Working Group III.

The first question, therefore, was whether the Convention should apply to door-to-door contracts at all, or whether it should be a purely maritime convention. Because many contracts in the container trade are structured on a door-to-door basis, it was felt that it would be artificial to restrict the legislative treatment of such contracts to the port-to-port carriage and in any event there was no demand from the industry for a third restricted regime. No serious argument was advanced for adopting a uniform,

as opposed to a network, system, but the network system adopted is a limited system; the provisions of another convention which may prevail are those directed to carrier's liability, limitation of liability and time for suit. It was emphasised that the Convention was to be essentially maritime – maritime plus - and for the Convention to apply an international sea leg had to be included. It was suggested that this should be emphasised by referring to the ancillary or incidental nature of the land carriage, but this proved impossible to draft with any precision.

The Convention has been criticised because it does not apply when there is no international sea carriage and is therefore not fully multimodal. But this was never the intention and arguably it would have been outside Working Group III's brief to draft such a convention. Such a convention is the aspiration of many and, indeed, the United Nations Convention on International Multimodal Transport of Goods 1980 is such a convention, although it does not establish a fully uniform regime. However only eleven states have ratified it and it is not yet in force. The Rotterdam Rules do not preclude a further attempt, but experience shows that the task will be difficult.

The second area of controversy was the scope for conflict with other conventions, such as CMR, COTIF/CIM and Montreal. This problem has been dealt with in two ways. First article 26 (article 4.2.1 in the CMI Draft) refers to a hypothetical contract, so it is not necessary to look at the scope provisions of the other convention<sup>1</sup> with which there might possibly be a conflict. Second article 82 deals with specified potential areas of conflict where other conventions may govern carriage by sea.

These attempts to mitigate, if not wholly eliminate, the problem have been criticised on the grounds that uncertainty still remains and uncertainty will lead to increased litigation. However the object of such litigation is usually to obtain a more favourable limit of liability. It has been pointed out that door-to-door transport mostly involves containerised packaged goods.<sup>2</sup> Packages with a weight below about 109kg will receive more favourable treatment under the Rotterdam Rules than under the other conventions I have mentioned because article 59 provides for a limit of 875 SDR per package. Packages with a weight in excess of 109kg are exceptional. I think that lawyers may be disappointed.

The third area of controversy concerned national law. The question was whether article 26 should also provide that the relevant provisions of mandatory national law should prevail over the provisions in the Rotterdam Rules. This question had been left open by the CMI because "national law" had been placed in square brackets in article 4.2.1 in the CMI Draft. Working Group III finally decided that including national law would make for uncertainty. National laws differed from state to state, they could always be changed and they could be difficult to ascertain.

I now turn to maritime performing parties and in particular **terminal operators**. I explained this morning that the Rotterdam Rules drew a clear bright line between maritime performing parties, who perform the carrier's obligations between the arrival of the goods at the port of loading of a ship and their departure from the port of

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<sup>1</sup> Article 26 does not in fact refer to "another convention"; it refers to "another international instrument" which could include an EU Regulation or Directive.

<sup>2</sup> See Gertjan van der Ziel "Multimodal Aspects of the Rotterdam Rules" *CMI Yearbook 2009 Athens II* 301

discharge from a ship, and are covered by the Rules, and other, non-maritime, performing parties, who are not. Professor Fujita then developed this subject in his presentation. A terminal operator falls within the definition of a “maritime performing party” and is thus jointly and severally liable with the carrier under the Rules for loss or damage insofar as the occurrence causing such loss or damage meets the requirements of article 19(1)(b). Terminal operators have no liability under the Hague, Hague-Visby and Hamburg Rules (a terminal operator is not an “actual carrier”) and they have expressed some concern at being brought within the scope of a mandatory regime.<sup>3</sup> As there is usually no direct contract between a terminal operator and the shipper, or goods owner, the issue concerns claims by the shipper or goods owner against the terminal operator in tort. At present few such claims are made because the claimant usually has a more straightforward claim under the contract of carriage against the carrier. I doubt whether the Rotterdam Rules will change this. However if a claim is made against a terminal operator under the Rules, the terminal operator will be entitled to rely on the defences and limits of liability afforded by the Rules, the carrier will be jointly liable, thus giving rights to contribution, and it will remain open to the terminal operator to seek an indemnity from the relevant shipping line in respect of liabilities in excess of its liability under its terminal handling agreement. Whilst I can understand terminal operators’ natural reluctance to be drawn into a mandatory regime, I hope that on closer analysis they may appreciate that the advantages counterbalance, if not outweigh, the disadvantages.

Now I will say something about the topics that are not at present covered by any international convention. Chapter 3 on electronic transport records is, I believe, largely welcomed. The chapters in the CMI Draft on freight and rights of suit were deleted by Working Group III. Some have argued that the chapters on delivery of the goods (chapter 9), the rights of the controlling party (chapter 10) and the transfer of rights (chapter 11) should also have been excluded, or their subject matter treated in some other way. I do not believe the objective of chapter 10 to be controversial, although there has been some criticism of the detail. However the control clause in the CMI Uniform Rules for Sea Waybills is important and the Rotterdam Rules apply to non-negotiable documents. Moreover Justice Johanne Gauthier explained the importance of these provisions in the electronic context.

**Delivery of the goods** is another matter. It gave rise to much controversy in Working Group III and the final text of article 47 was not settled until the Commission session in June 2008. Chapter 9 attempts to deal with two long-standing problems which the CMI was urged by the industry to grapple with in preparing the CMI Draft. It must be said that if there was a simple solution to these problems, it would have been found long ago. The first is the failure of the receiver to come forward and claim the goods at the discharge port. The second is the non-availability of the bill of lading at the discharge port. A convention cannot deal with the underlying causes of these problems, such as a bankruptcy in the sale and purchase chain, a falling market, or long credit terms. At present the first problem is often dealt with by an application to the local court to discharge and store the goods, or to sell them, for the account of the goods owner, but this is not always practicable. The second problem is often

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<sup>3</sup> The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade 1991 is not yet in force.

dealt with by a letter of indemnity, but this solution has well known shortcomings. Article 43 of the Rotterdam Rules imposes an obligation under the Convention on the consignee to accept delivery and the Rules go on to set out provisions designed to protect the carrier if the carrier complies with them. These provisions have been described as a legal minefield. I accept that they are complex, but this is partly because three types of transport document must be provided for.

Article 47(2) offers a contractual opt-in solution to the problem of the non-availability of a negotiable transport document. It remains to be seen whether such an opt-in provision will prove acceptable to the industry and to financing institutions that rely on the transport document as security. The Rules offer formulae that commercial parties are free to take advantage of if they wish. If they do not, current practices will no doubt continue to be followed.

These provisions relating to the delivery of goods are controversial, but, unlike the provisions relating to door-to-door transport, to which I have devoted the greater part of this short presentation, I do not believe that they are fundamental to the international acceptance and success of the Rotterdam Rules.

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