

The Rotterdam Rules

Shipper's Obligations and Liability

José Vicente Guzmán

Introduction

1. In general terms, the Rotterdam Rules (RR) do not make substantial changes about the existing law regarding shipper's obligations and liability. Most of the features in the subject have been kept nearly the same as they were treated in the Hague Rules (HR), the Hague – Visby Rules (HVR) and the Hamburg Rules (HbR).
2. The Hague and Hague-Visby Rules do not have a special chapter regulating the shipper's obligations and liabilities. However, several of their provisions partially deal with the subject, without any particular order or method to facilitate their application. As to the liability of the shipper, the HVR start from a general provision of responsibility set out in article 4.3, based on the act, fault or neglect of the shipper, his agents or representatives, which has been considered as a fault based liability regime, placing on the carrier the burden of proving the shipper's fault. Subsequently, section 4.6 establishes a strict liability regime of the shipper for damage to the carrier arising out of the shipment of dangerous goods without consent.
3. Even though Part III of the HbR is dedicated to the shipper's liability (Articles 12 and 13), they do not represent a significant advance on what had already been established in the HVR. They also provide for a general principle of fault based liability of the shipper (art. 12), but without clarifying whether the shipper's fault is presumed, as provided for in the

same convention for the carrier's liability. And then, article 13, sets forth a strict liability regime for the shipment of dangerous goods, similar to the system of HVR.

4. The new convention regulates the shipper's obligations and liability in Chapter VII (Articles 27 - 34), with detailed provisions, which gives more certainty to the regulation, for the benefit of the market and the parties involved.

5. Shipper's obligations can be divided into the following:
 - a. To deliver the goods ready for carriage
 - b. To provide information, instructions and documents
 - c. To provide information for the compilation of contract particulars
 - d. To inform of the dangerous nature or character of the goods

6. Shipper's liabilities can be classified as follows:
 - a. General shipper's liability rule
 - b. Special liability regime regarding the information for the compilation of contract particulars
 - c. Special liability regime for dangerous goods

Shipper's Obligations

First Obligation - To deliver the goods ready for carriage

7. According to article 27.1, the shipper is obliged to deliver the goods to the carrier in a "ready for carriage" condition, which implies to deliver the goods in such a condition that:

- a. They will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, as well as unloading; and
 - b. They will not cause harm to persons or property.
8. Article 27.3 of the RR extends this obligation of the shipper, when the goods are loaded onto a container or a vehicle, so that the shipper is then obliged to carefully stow, lash and secure the goods in or on to the container or vehicle, in such a way that they will not cause harm to persons or property.
9. This obligation of the shipper is typical in any contract of carriage of goods, and it was implicit in the HVR, as they contemplate an exemption of the carrier's liability due to bad packaging (art. 4.2.n HVR). The HbR, instead, do not have any specific obligation of the shipper to properly pack the goods to be carried; however, my view is that this is a primary obligation of every shipper in any contract of carriage, as it is provided for in some national regulations, so I think the situation is not altered by the fact that the HbR do not expressly contemplate it. Thus, in this point I do not see that the RR worsens the position of the cargo interests in comparison with the existing regimes; on the contrary, I think that article 27 clarifies the contractual relationship of carriage by adding specific regulations in cases where the goods are carried in a container or vehicle, which is very common in the current sea trade.
10. Additionally, article 27.2 of the RR, establishes that the shipper shall properly and carefully comply with any of the obligations related to loading, handling, stowing or unloading of the goods, in case he has agreed, according to article 13.2, to perform any of these activities, in which is known as the legitimization of the FIOST agreements, very common in certain trades.

Second Obligation - To provide information, instructions and documents

11. The RR then refers to the shipper's obligation to provide the carrier with information, instructions and documents relating to the goods, which are reasonably necessary:
 - a. For the proper handling and carriage of the goods, including the precautions to be taken by the carrier and a performing party;
and
 - b. For the carrier to comply with the law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.
12. However, under article 29.2 of the RR, even if the carrier does not notify the shipper about the information, instructions or documents required for the carriage, the shipper is still obliged to comply with any law requiring to provide such information, instructions or documents. Therefore, this specific obligation of the shipper does not depend, according to the RR, on any particular requirement from the carrier.
13. The new provisions of the RR do not, in fact, modify the existing law as stated in the international conventions in force, since the HR and HVR by virtue of the "act or omission of the shipper or owner of the goods" exception (art. 4.2.i) render the carrier not liable for the loss or damage to the goods caused by any breach of the shipper of his duty to provide the carrier with the information, instructions and documents necessary for the carriage, according to the applicable law. The same rule is derived from article 12 of the HbR. In this case, the burden of proving

the act or omission of the shipper remains on the carrier, as it is now specifically set forth in article 30.1 of the RR.

Third Obligation - To provide information for the compilation of contract particulars

14. The shipper is obliged to provide to the carrier with the information needed to compile the contract particulars, as stated in article 31, which read together with article 36.1, includes:

- a. A description of the goods as appropriate for the transport.
- b. The leading marks necessary for identification of the goods.
- c. The number of packages or pieces, or the quantity of goods.
- d. The weight of the goods, if furnished by the shipper.
- e. The name of the shipper.
- f. The name of the consignee, if any.
- g. The name of the person to whom the document of transport is going to be issued, if any.

15. The shipper is allowed to furnish to the carrier the above-mentioned information and he desires it to be included in the contract particulars. However, any information provided to the carrier must be accurate. The standard and nature of this obligation of the shipper is that of a guarantee, as it was provided for in the preceding conventions.

16. Indeed, the same obligation exists in article 3.5 of the HVR and in article 17.1 of the HbR. Therefore, the RR make no significant changes to the existing law and do not increase the shipper's obligations in this regard.

Fourth Obligation - To inform of the dangerous nature or character of the goods

17. Special provision is made by article 32 about the shipper's obligation to inform the carrier about the dangerous nature or character of the goods to be carried, before they are delivered to the carrier or to any performing party. Although the obligation remains, in essence, the same, as compared with the preceding conventions, there are some novelties, which are worth mentioning.
18. First, the dangerous nature or character of the goods is defined by reference to a potential danger to persons, property or the environment, which in my view makes it easier to determine the cases where certain goods shall be considered as dangerous for the purpose of the contract of carriage. The HVR only referred to the "inflammable, explosive or dangerous nature" of the goods (art. 4.6), while the HbR just mentioned the "dangerous goods" without any additional precision (art. 13). Therefore, it is submitted that the new reference to the potential damage to persons, property or the environment, as a parameter to identify a cargo as dangerous, is more precise.
19. Second, this duty of information of the shipper not only arises where the goods are actually of a dangerous nature or character, but also when they reasonably appear likely to become such a danger, which imposes on the shipper a more stringent obligation.
20. And thirdly, the RR imposes a new obligation to the shipper consisting of marking and labelling the dangerous goods in accordance to any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. This obligation, which already existed by the application of such applicable laws and regulations, would normally, under the existing conventions, render the goods "legally dangerous" as opposed to "physically dangerous". However, this obligation is now emphasized as a contractual obligation of the shipper under the RR.

21. Article 15 of the Rotterdam Rules regulates the right of the shipper to take measures when dangerous goods have been loaded onto the ship, with the same principle applicable in the light of previous conventions (Article IV.6 of the Hague Rules and article 13.2.b of the Hamburg Rules). Indeed, the carrier, in case of shipment of dangerous goods may well refuse to receive them (as it could do under the previous regimes), or having received them, to take measures if they become dangerous or *"reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment"* (same as in the previous regimes). It is important to emphasize that now, under the new Convention the carrier may also adopt the same measures if the goods are dangerous or could reasonably be expected to become dangerous to the environment. Article 15 is expressly subject to carrier's compliance with the obligations set forth in article 13, which implies that if the carrier knew the potentially dangerous nature of the goods he may only be exempted from liability for their destruction or unloading, if he proves compliance with these obligations.

Shipper's Liability

General shipper's liability rule

22. There is a general fault based liability rule for the shipper, for any breach of his obligations (i) to deliver the goods ready for carriage and (ii) to provide information, instructions and documents relating to the cargo. According to this, the shipper will indemnify the carrier for any loss or damage caused by the shipper's breach of any of these obligations.

23. In order to establish this liability, the burden of proof is on the carrier to demonstrate that there was a breach of these obligations on the part of

the shipper and that such a breach effectively caused the loss or damage he is claiming for. It is noticeable that for compromising the shipper's liability it is necessary to establish a breach of his obligations first, which means a difference as compared with the general formula of the HVR where the act, fault or neglect of the shipper entailed his liability, with – it is submitted – the possibility that an “act of the shipper”, without the existence of any actual fault on his part, could make him liable.

24. The shipper will then be relieved from liability if he can prove that the cause or one of the causes of the loss or damage is not attributable to his fault or to the fault of any person to whom he entrusted the performance of any of his obligations, including his employees, agents and subcontractors, for whom he is vicariously liable, according to article 34 of the convention.
25. As to the breach of the obligation to provide information, instructions and documents relating to the cargo, the shipper can also escape liability by proving that such information, instructions and/or documents were reasonably available to the carrier (art. 29.1).
26. According to article 30.3 there is an apportionment of liability of the shipper when he can prove that there was another cause contributing to the loss or damage, which is not attributable to him or to the persons for whose he is vicariously liable. In that case, the shipper will only be liable for that part of the loss or damage that is attributable to its fault or to the fault of such persons, being the burden of proving this apportionment on the shipper. This apportionment mechanism is not applicable to the other liabilities of the shipper that will be dealt with later.
27. The convention does not specifically contemplate any shipper's liability for delay in the delivery of the cargo or the information, instructions and

documents, so it is submitted that this might be subject to the application of national law. However, it is necessary to bear in mind that any clause of the contract of carriage aimed at imposing liability of the shipper for delay would be considered void under article 79.2 (b) of the RR, which prohibits any clause increasing the liability of the shipper as provided for in the convention.

Special liability regime for the breach of the obligation to provide information for the compilation of the contract particulars

28. Since this obligation takes the form of a guarantee from the shipper to the carrier about the accuracy of such information, the liability system for its breach is strict, because article 31.2 states that "the shipper shall indemnify the carrier" against loss or damage resulting from the inaccuracy of such information, and this breach is expressly excluded from the general fault based liability system set forth in article 30.
29. This strict liability regime for the carrier is not entirely new, since the same standard of shipper's liability might be implied - as it has been in some jurisdictions - by the fact that under article 3.5 of the HVR and under article 17 of the HbR, this obligation was also treated as a guarantee.

Special liability regime for dangerous goods

30. Shipper's liability in case of breach of his obligations in relation with dangerous goods is also strict (art. 32), following the same trend in the existing conventions. Therefore, if the carrier proves that there was a breach of shipper's obligations to inform the dangerous nature of character of the goods, or to mark and/or label them properly in accordance with the applicable laws or regulations, and that this caused a loss or damage to him, then the shipper will have to compensate such

loss or damage.

31. However, the shipper can be exonerated from this liability if he is able to prove that the carrier (or a performing party) was aware of the dangerous nature of the goods, as it had already been considered as good law under the HVR.

Other provisions

32. Article 28 imposes to both carrier and shipper a mutual obligation to provide each other with information and instructions that are required for the proper handling and carriage of the goods, at the request of any of them, and provided that the requested party is in possession of this information and the same is not reasonably available to the requesting party.
33. The two years time bar set forth in article 62 of the RR is also applicable for any action that can be brought against the shipper, which marks a distinction as compared with the HVR, which only provide for time bars benefiting the carrier.
34. It is true that the Rotterdam Rules do not establish a limitation of liability for the shipper, as it does for the carrier's responsibility. This is a feature that has raised very much criticism to the new convention. However, it is not possible to say that this is a disadvantage of the Rotterdam Rules as compared with the Hague Rules, the Hague - Visby Rules or the Hamburg Rules, because none of these conventions provide for any limitation of liability of the shipper. In fact, there is no international convention regulating the contract of carriage by any mode of transport, which contemplates limitations of liability for the shipper. So in this particular issue the Rotterdam Rules can not be accused of being

in detriment of the legal position of the cargo interests, because they simply maintain the same line of the preceding conventions.

Conclusion

35. As it was already said, the Rotterdam Rules (RR) do not make substantial changes about the existing law regarding shipper's obligations and liability. Instead, they contain a more complete and detailed set of provisions on shipper's obligations and liability, which do not worsens the shipper's contractual position under the existing regimes, but gives more certainty to the regulation, for the benefit of the market and the parties involved.