

Questions and Answers

on

The Rotterdam Rules

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by

The CMI International Working Group on the Rotterdam Rules

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Preface

On December 11, 2008, during its 63rd session, the UN General Assembly adopted the “United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules).” The Convention became open for signature at the signing ceremony in Rotterdam on September 23, 2009.

Comité Maritime International, which has been involved in the process of drafting the Rotterdam Rules from the early stages, endorsed the Rotterdam Rules (then “the Draft Convention”) at its 39th Conference in Athens. Taking into account the practical and historical importance of the new regime for the international carriage of goods, the Executive Council decided that the CMI would continue to monitor the adoption and implementation of Rotterdam Rules, and established an international working group on the Rotterdam Rules for this purpose.

The Rotterdam Rules consist of 96 articles that were drafted carefully and deliberately. Because of their highly technical nature and their comprehensive coverage of the relevant issues, those who first read these rules might need some help to properly understand as to how the Rules work and what they achieve.

The International Working Group on the Rotterdam Rules thought it would benefit all involved if it were to make a “Questions and Answers” list that coincides with the Signing Ceremony and clarifies commonly asked questions and corrects occasional misunderstandings that arise. It should be noted that the intent of these “Q&As” are not to evaluate the Rotterdam Rules’ pros and cons, nor to persuade governments to ratify them. The sole purpose is to offer guidance for an easy and correct understanding of the Rules.

We hope that the “Q&As” will help the readers of Rotterdam Rules.

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Questions and Answers on the Rotterdam Rules

A. Scope of Application, Persons Covered by the Convention, and the Multimodal Aspect

<Scope of Application>

1. Do the Rotterdam Rules apply to individual shipments under booking contracts of slot charterers, space charterers in liner or non-liner transportation? Do the Rotterdam Rules apply to individual shipments under long term contracts with NVOs?

The application of the Rules should be determined when specific contract terms are filled in to the general conditions.

If individual shipments under booking contracts or long term contracts are performed in a non-liner transportation, the Rotterdam Rules do not apply either to the terms of the booking contracts or the long term contracts or to the terms of individual shipments (article 6(2)) unless they do not qualify as “on demand carriage” (article 6(2)(b)).

If individual shipments are performed in a liner service and if they are not charterparties or other contracts for the use of a ship or of any space thereon, the Rotterdam Rules apply to the terms of individual shipments and the terms contained in the booking contracts, or long term contracts to the extent that they are applicable to the individual shipments.

2. What is the intention of the proviso of article 6(2)? Does article 7 not also make the Rotterdam Rules apply when a transport document or an electronic transport record is issued?

The chapeau of article 6(2) excludes contracts of carriage in non-liner transportation. However, there is a case where the exclusion of non-liner transportation also excludes a type of contract that has been covered by the Hague and the Hague-Visby Rules. This type of contract is sometimes called “on demand” carriage, to which the proviso of Article 6(2) refers as follows: “When (a) there is no charterparty or other contract

between the parties for the use of a ship or of any space thereon; and (b) a transport document or an electronic transport record is issued”.

An example can illustrate this exception. Assume the following arrangements: Several shippers bring their cars for carriage to the port of loading. When the number of cars reaches a certain level, the ship departs for its destination. While the route is fixed, the schedule is not. Bills of lading are issued for this carriage. This contract is covered by the Hague or the Hague-Visby Rules because bills of lading are issued under the contract and it is not a charterparty. The proviso of Article 6(2) reintroduces this type of contract for non-liner transportation into the Rules’ scope of application.

It should be noted that the Rotterdam Rules apply only as between the carrier and the consignee, controlling party or holder that is not an original party under article 7. In contrast, if a contract of carriage falls under the category of article 6(2), the Rules also apply between the carrier and the shippers. The additional precision of Article 6(2) is needed to maintain the status quo under the Hague, the Hague-Visby or the Hamburg Rules (i.e., the regulation applies even as between original parties) and article 7 alone is not sufficient to do this.

3. Is it correct that the Rotterdam Rules apply in a situation where a transport document is endorsed to a third party, pursuant to article 7, but they would not apply under Article 6, as between the carrier and the shipper?

Yes. The same applies under the Hague and the Hague-Visby Rules or the Hamburg Rules.

<Door to Door Application>

4. Is it possible to agree on traditional “tackle-to-tackle” or “port-to-port” contract of carriage under the Rotterdam Rules?

Although it is often mentioned that the Rotterdam Rules adopt the “door-to-door” principle, it should be noted that the carrier’s period of responsibility depends on the terms of the contract and that nothing in the Convention prohibits the parties from entering into a traditional “tackle-to-tackle” or “port-to-port” contract of carriage.

Article 12(3) explicitly allows the parties to agree on the time and location of the receipt and delivery of the goods. The only restriction is the proviso in Article 12(3) that the time of receipt of the goods cannot be after the beginning of their initial loading, and the time of delivery of the goods cannot be before the completion of their final unloading. Therefore, it is perfectly possible for the parties, for instance, to enter into a traditional “port-to-port” contract of carriage in which the shipper delivers the goods to the container yard of the port of loading, and the carrier unloads them at the container yard of the port of discharge, with the carrier only responsible for the carriage between the two container yards.

5. How do the Rotterdam Rules apply to total door-to-door transport? Do the Rules regulate the liability of the carrier who may not necessarily be responsible for a certain part of the transport?

The Rotterdam Rules apply to “door to door transport” only if the parties agree that the carrier assumes the responsibility for the whole part of the transport, including land legs. Nothing in the Rotterdam Rules prevent parties from entering into a pure maritime contract (“port to port” or even “tackle to tackle”) and the only restriction is article 12(3). See, also *Question 4*.

6. How are the possible conflicts with other conventions solved under the Rotterdam Rules?

Article 26, introducing the “limited network rule”, mostly removes the possible conflict with other Conventions, such as CMR or COTIF-CIM. Article 82 provides the safeguard for a contracting state to other conventions to the extent that such conventions apply to the sea carriage.

7. Article 26 provides that it applies “when loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship”. It appears that the phrase “an event or circumstance causing” should apply not only to delay but also loss of or damage to goods. The current text of article 26 seems incorrect.

The wording “*loss of or damage to goods, or an event or circumstance causing a delay in their delivery*” is chosen intentionally and is not a drafting error. It is the intention of Article 26 that limited network principle applies only if that the loss or damage itself rather than its cause occurs during the relevant period. The word “an event or circumstance causing” is inserted in connection with delay for technical reason. We cannot say “the delay occurs during” the certain part of the whole carriage because “delay” can be judged only at the final destination (*See*, the definition of delay in art. 21). We should ask whether *the cause of delay* occurred during the relevant period. This is why the phrase “an event or circumstance causing” applies only to delay and not to loss of or damage to the goods.

8. Why do the Rotterdam Rules not adopt a uniform system instead of a limited network system?

Although the “network system” and the “uniform system” look entirely incompatible, each system is usually modified so that the difference is not as large as it appears. For example, any network system should be supplemented by a rule that governs the carrier’s liability when it is impossible to determine where the damage occurred (UNCTAD/ICC Rules article 6.1-6.3 apply the limitation amount of Hague-Visby Rules when the damage is not localized, as far as the contract in question contains a sea-leg.). The “uniform system” is often modified to allow the application of the mandatory liability rule that governs the corresponding transport mode, as far as the place where damage occurs is identified (*See*, article 19 of UN Multimodal Convention).

The difference would be whether to adopt a unique limitation amount, totally independent of each legal regime that is applicable to each transport mode. In this regard, the Rotterdam Rules do not offer a “unique” limitation amount but apply a limitation amount applicable to sea carriage unless a different limitation applies pursuant to article 26 or article 82. This is the natural consequence of the fact that the UNCITRAL Project has always been understood as a modernization of the legal regime

of the carriage of goods by sea (or a “maritime plus” approach), rather than of the pure multimodal transport.

9. Why did the Rotterdam Rules not adopt a full network system rather than a limited network system?

A full network system, which applies every term of other conventions when the loss, damage, or delay is “localized” in a particular stage of carriage to which such conventions are applicable, was thought to be too modest an approach to achieve sufficient uniformity. One consistent and coherent regime should govern each stage of multimodal transport to as great an extent as possible.

10. Why do the Rotterdam Rules not include mandatory national law in their network system?

If the most important function in introducing a “limited network system” is to avoid conflict of conventions, there is no need to include mandatory national law in article 26. Further, the inclusion of mandatory national law would greatly reduce transparency, predictability and overall uniformity.

11. Article 82 refers to other international conventions “that regulate the liability of the carrier for loss of or damage to the goods.” Why does article 82 regulate only the loss of and damage to goods and not delay in delivery?

Article 82 regulates the case of delay in delivery. The phrase “that regulate the liability of the carrier for loss of or damage to the goods” is used to describe the character of other convention which article 82 applies. It does not mean only the provisions with respect to the liability of the carrier for loss of or damage to the goods can be applied pursuant to article 82. For instance, the Montreal Convention qualifies this requirement because it “regulates the liability of the carrier for loss of or damage to the goods”. If other requirements in Article 82(a) are satisfied, the court can apply the provisions of the Montreal Convention including those relating to carrier’s liability for delay.

<Performing Parties>

12. Do freight forwarders fall within the definition of "maritime performing party" so that they are subject to the Rotterdam Rules?

Freight forwarders play various roles in connection with the contract of carriage. The Rotterdam Rules apply to some of these and not to others. The application of the Rotterdam Rules is decided depending on how they are involved in a specific contract of carriage.

If, for instance, a freight forwarder undertakes to carry the goods to its customer, it is a carrier under the Rotterdam Rules. If a freight forwarder enters into a contract with a sub-carrier in its own name, it is a shipper under the Rotterdam Rules. If a freight forwarder enters into a contract with a carrier on behalf of a customer (as an agent), it is not the carrier or the shipper under the Rotterdam Rules and is not liable as such. It is also not a "maritime performing party" unless it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship, and, in respect of freight forwarders acting as inland carriers, only if the services performed are done exclusively within the port area.

When a freight forwarder provides services as a stevedore, for instance, one should be careful which relationship one focuses on. As regards the contractual relationship between the freight forwarders (acting as stevedores) and the carrier, the contractual relationship is not affected by the Rotterdam Rules because they do not apply to the contract between the carrier and the maritime performing party, unless that contract satisfies the definition of "contract of carriage" (article 1(1)) (this is apparently not the case here). As regards the forwarder's relationship with the shipper or consignee, the Rotterdam Rules make the carrier and the maritime performing party jointly liable towards the shipper and consignee. The fact that the freight forwarder, acting as a maritime performing party, is subject to the Rotterdam Rules would probably constitute an advantage rather than a disadvantage, because it guarantees that the freight forwarders enjoy defences including the short time-bar and the right of limitation of its liability. At present, irrespective of the contractual terms, in cases where it may be sued in tort, it would be liable without limitation.

13. Is it possible for the parties to give the persons who are not covered by article 4(1) the same defense and exoneration as the carrier via “Himalaya” clause? Does it constitute a “term in a contract of carriage” that “directly or indirectly excludes or limits the obligations of the carrier” which is void pursuant to article 79(1)?

Nothing in the Rotterdam Rules prevent the parties of the contract of carriage from agreeing on a “Himalaya clause” for the benefit of non-maritime performing parties or other persons who are not covered by article 4(1). The Rotterdam Rules leave the issue of liability of such persons including the validity of the “Himalaya clause” to national law and the issue is outside the scope of article 79.

B. Carrier’s Obligations, Period of Responsibility and Liabilities

<Period of responsibility>

1. Is it possible for the carrier to limit their period of responsibility by contract?

First, the carrier cannot unilaterally limit the period of responsibility. This should be agreed in the contract of carriage. Second, there is a restriction for contractual agreement to avoid its misuse. A provision in a contract of carriage is void to the extent that it provides that (a) the time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage or (b) the time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage. (article 12(3))

2. Article 12(3)(a) states that the time of receipt of the goods cannot be defined to be after "their initial loading under the contract of carriage". What is "initial loading under the contract of carriage"? Can it mean "alongside the vessel", i.e. tackle to tackle, as in the current Hague-Visby Rules, because Article 12(3)(a) uses the term "initial loading", not "initial receipt"?

“Initial loading under the contract of carriage” means loading on the first means of transportation, which could be a ship, a truck, a train, or even an aircraft. If the only means of transport used in the contract of carriage in question is a ship, article 12(3), in substance, means that the parties cannot agree on a contract of carriage with a period of responsibility that is shorter than “tackle to tackle”.

If the parties enter into a contract for “door to door transportation,” which includes road carriage from the shipper’s factory, it is impossible to agree on a period of responsibility that begins after the loading onto the truck, which is "the initial loading of the goods under the contract of carriage".

3. Will the carrier be able to limit its specific obligations under the contract of carriage under FIO clause? Is it correct that the carrier's responsibility for loading, handling, stowing and unloading of the goods would be eliminated by terms of Article 13(2) if the shipper assumed "legal responsibility for load, handle, stow, and unload"?

Yes, but ***only if*** the carrier and the shipper agree on the FIO clause and ***only to the extent*** that the shipper assumes the obligation of performing the loading, handling, stowage and unloading of the goods. Such an arrangement would be beneficial for the shipper, for example, in cases where such goods require special treatment, or where the shipper has specialized equipment necessary to handle the goods. Unfortunately, the jurisprudence on the FIO clause has varied among jurisdictions and there is uncertainty for its validity. Article 13(2), providing for the legal underpinning for FIO clauses, is intended to assist the parties when they desire to use them. On the other hand, article 13(2), enumerating the task of which the shipper can assume responsibility, restricts the extent to which the FIO clause are effective and thereby prevents its misuse of the FIO clause.

4. May the parties stipulate in the transport document that the legal responsibility for loading, handling, stowing and unloading of the goods is placed upon the shipper, but that the carrier, as agent of the shipper, would perform those tasks?

The parties may agree that the carrier, as agent of the shipper, would perform loading, handling, stowing, or unloading under FIO clauses. However, in such a case, the carrier cannot rely on the exoneration under article 17(3)(i).

Article 17(3)(i) explicitly provides:

“The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

.....

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, *unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee.*” (Emphasis added).

<Carrier’s Obligation>

5. Article 11 provides that “the carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee”. In addition to terms set out in the Convention, is the carrier free to include other terms in the contract of carriage that are outside the Convention? If so, what type of terms would possibly be included?

The carrier and the shipper are free to incorporate any terms that are not restricted by the Rotterdam Rules. The payment of freight, time of delivery, laytime and demurrage, or options to change port of destination are examples of such terms. The parties can also insert a liberty clause such as “Caspiana” or “war clause” which would permit the carrier to discharge the goods at a different place than original destination under certain exceptional circumstances. These clauses can be interpreted as providing an alternative destination which can be chosen under certain circumstances and should not be automatically invalidated as derogation from the carrier’s obligation under article 11.

6. Article 14 appears to replicate Article III(1) of the Hague-Visby Rules.

(1) How does Article 14 relate to Article 17?

(2) What is the consequence if due diligence is not exercised?

(3) Who has the burden of proof of due diligence?

(4) Should the carrier prove that it had exercised due diligence before being able to rely on the relief of liability provisions Articles 17(2) and (3)?

(5) Who has the burden of proof of unseaworthiness, etc.?

(1) When the carrier relies for exoneration on an event or circumstance under article 17(3), the claimant can defeat it by proving that the loss or damage was “probably caused” by unseaworthiness, pursuant to article 17(5)(a), although the carrier may still prove that there is no causation between unseaworthiness and the loss, damage or delay, or that it exercised due diligence (article 17(5)(b)). One should note that, under the

Rotterdam Rules, the due diligence obligation to make and keep the ship seaworthy only plays a role in connection with the case in which the carrier relies on the exoneration under article 17(3).

(2) The failure to exercise due diligence is a breach of the obligations of the carrier. If such breach caused or contributed to the loss of or damage to the goods or the delay in delivery, the carrier loses its defence pursuant to article 17(3).

(3) The carrier bears the burden of proof of due diligence. See (1), above.

(4) No. See (1), above. The exercise of due diligence matters only if the claimant proves the loss or damage was “probably caused” by unseaworthiness, pursuant to article 17(5)(a). The Rotterdam Rules explicitly rejected the idea of the “overriding obligation” of the carrier, which is adopted in some jurisdictions.

(5) Article 17(5) provides that the claimant must prove that the loss, damage or delay was or was probably caused by or contributed to by the unseaworthiness etc. Therefore, claimant should prove the unseaworthiness etc. Please note that this burden of proof matters only if the carrier can successfully prove that the events or circumstances listed in article 17(3) caused or contributed to the loss, damage or delay. See, also (4).

<Basis of Liability>

7. Is article 17(2) intended to mirror Article IV(2)(q) of the Hague-Visby Rules?

Yes. Therefore the “(q) clause” is deleted from the list of exonerations in Article 17(3).

8. The basis of the carrier’s liability under the Rotterdam Rules resembles that under the Hague-Visby Rules, but there seem to be some differences. The list of perils is more extensive than under Hague-Visby. The carrier can excuse itself if it is proven that the cause or one of the causes of the loss was not due to its fault. Do these elements imply that it is more difficult for shippers to make the carrier responsible?

It is correct that there are some important differences between the Rotterdam Rules and the Hague-Visby Rules. However, the differences imply that the Rotterdam Rules strengthen the carrier’s liability.

The list of perils is *less* extensive under the Rotterdam Rules. The major differences with the list under the Hague and the Hague-Visby Rules are the following: Error in navigation and in management is no longer a valid defence under article 17(3). While the “fire defence” still exists, the carrier cannot rely on the defence if the person referred to in article 18 (any performing party, employees etc.) caused the fire. (article 17(4)(a)). This is the same rule as in the Hamburg Rules rather than the Hague-Visby Rules. On the other hand, the items added to the list such as (i), (n), or (o) are of a clarification nature and should not be regarded as a substantive expansion of the list. If it can be proven that one of the causes of the loss was not due to its fault, the carrier is relieved of its liability *only for the part of the loss, damage or delay that is not attributable to the event or circumstances for which the carrier is liable* (article 17(6)).

9. Why does the claimant bear the burden of proof of unseaworthiness, etc. under Rotterdam Rules?

See, *Question 6(5)*.

10. Is the list of perils in art 17 a step backwards from the Hamburg Rules?

The Hamburg Rules repealed the list of exoneration and some delegations preferred that approach during the discussions in the UNCITRAL Working Group. However, most delegations did not think that significant differences existed in substance regarding whether to retain or to delete the list. If the listed events or circumstances caused or contributed to the loss, damage or delay, the court, even without the list, would usually infer that they are not attributable to the fault of the carrier. As well, the proof under article 17(3) does not offer absolute exoneration. The shipper still can hold the carrier responsible under article 17(4) and (5). While the retention of the list does not substantially change the substance, many delegations wished to preserve the existing case law that has developed under the Hague and Hague-Visby Rules.

11. When there were concurring causes that contributed to the loss, damage or delay, should the carrier who wishes to be partly relieved of its liability prove the extent to which it is liable?

As far as the carrier can prove that a part of the loss, damage or delay is not attributable to the events or circumstances for which it is liable, the court should relieve the carrier of that part of its liability. This is true, even if the exact extent of the loss, damage or delay that is not attributable to the events or circumstances is not specified. Courts, which are accustomed to making these sorts of determinations, should exercise their discretion in this type of case, in an appropriate manner.

12. Is liability for pure economic loss due to delay covered by the Rotterdam Rules?

Yes, but it is subject to the special limitation applicable to economic loss, under article 60 (2.5 times of the freight payable on the goods delayed).

13. Deck cargo

(1) What are "special risks involved" in deck carriage in article 25(2)?

(2) The carrier is required to state in the contract particulars that the goods may be carried on deck. Do particulars of deck carriage need to be stated in bold type on the face of the bill of lading, or would generic fine print on the reverse of the transport document be sufficient?

(1) "Special risks" include, but are not limited to, such risks as wetting and washing overboard.

(2) The validity of the fine print on the reverse of the transport document is an issue left to the court. This is not a problem unique to this article.

<Limitation of liability>

14. The carrier is entitled to limit its liability "for breaches of its obligations under this Convention" rather than the liability for loss of, damage to or delay in delivery of the goods. What is the intention of this wording, which seemingly expands the scope of claims subject to limitation?

The wording "liability for loss of, damage to or delay in delivery of the goods" was thought inadequate for the purpose of article 59(1). The misdelivery of the goods is the typical case that the UNCITRAL Working Group had in mind during the deliberation of the Convention. Let us assume that the carrier delivers goods without observing the proper procedure provided under the Rotterdam Rules. The carrier would be liable to

the person entitled to the delivery. In some jurisdictions, the court might find that this is one of the cases of “loss of goods” under article 17 because the goods were “lost” from the viewpoint of the person entitled to the delivery, even though they were, physically, not lost. However, in other jurisdictions, the court might see differently and conclude that this is not a case of “loss of the goods” and the liability is not based on article 17. In this case, it is not clear if limitation of liability applies, if article 59(1) provides that the limitation applies to “liability for loss of, damage to or delay in delivery of the goods”. The current text, providing “liability for breaches of its obligations under this Convention”, clarifies that the limitation applies to the case of misdelivery.

15. Is the limitation of liability more onerous to for the shippers under Rotterdam Rules? For instance, the shippers may forget to enumerate the number of packages in the container and thus be unable to claim under the per package limitation. Article 61 requires that the loss must result from a personal act or omission in order to result in the carrier’s loss of the benefit of liability limitation.

No. The two elements referred to are not a novelty in the Rotterdam Rules at all. The limit per package can only be invoked if the packages are enumerated in the transport document under article 4(5)(c) of the Hague-Visby Rules and article 6(2)(a) of the Hamburg Rules. Nothing is changed by the Rotterdam Rules. In any event, the declaration of the content of a container is always made, due to customs requirements, and it is hardly persuasive for a shipper to complain against this traditional rule by asserting that it could have enjoyed a better limitation amount if it had not forgotten to declare.

Only the personal behaviour of the carrier causes the loss of the right to limit under the Hague-Visby Rules, wherein reference is made to the act or omission of the carrier and reference to the carrier does not include the master or the carrier’s servants, as it appears clearly from article 4(2)(a). The same applies to the Hamburg Rules in article 8(1). The Rotterdam Rules simply explicitly codify the existing rule. Speaking more generally, the requirement of “personal” action of the person liable to break the limitation is a common feature of most maritime conventions today.

16. Given the fact that the Rotterdam Rules have multimodal application, the Rules’ limitation amount fall to be compared with that of CMR or COTI-CMI. However, the

***weight limitation under the Rotterdam Rules is far lower than CMR or COTIF-CIM.
How can this gap be justified?***

This comparison is inaccurate or even misleading. The limitation amount based on weight is 8.33 SDR per kilogram under CMR (Article 23(3)) and 17 SDR per kilogram under CIM-COTIF (Art. 40(2)). These amounts are certainly higher than the weight limitation under the Rotterdam Rules (3 SDR per kilogram). However, the Rotterdam Rules also adopt a separate limitation amount per package (875 SDRs). In practice, the limitation amount per package is often higher. Let us assume a package of a laptop computer, the gross weight of which is 1.0 kg. Under the CMR, the limitation would be 8.33 SDRs, while under the Rotterdam Rules it is 875 SDRs.

Because the calculation mechanism is totally different under maritime transport and land transport conventions, we cannot easily conclude that the limitation amount under CMR or COTIF-CIF is more advantageous than that of the Rotterdam Rules. .

<Time-bar etc.>

18. Are the notice periods of the loss of or damage to the goods and the two year period to bring a claim too short?

The period of notice of loss under article 23 is extended to seven days as compared with the three day period under the Hague and the Hague Visby Rules. The period after which an action is time-barred under the Rotterdam Rules is twice as long as that under the Hague and the Hague-Visby Rules.

C. Shipper's Obligations and Liabilities

1. Are the shipper's obligations more onerous than in previous conventions?

The Rotterdam Rules includes more detailed provisions on the shipper's liability. However, the increased number of the provisions, in itself, does not imply more obligations or liabilities. First, it should be noted that the shipper has never been free from obligations and liabilities, even in such areas where previous conventions are silent. The shipper has been responsible under applicable national law. In addition, the

contract of carriage has often imposed specific obligations on the shipper. Therefore, one should examine whether the shipper's obligations and liabilities under the Rotterdam Rules are expanded compared with those under applicable national law or under ordinary contractual terms. Although a comprehensive comparison is not possible, several basic elements are outlined here.

Save as mentioned in the next paragraph, the shipper's liability is fault-based under the Rotterdam Rules, as well as under the Hague, the Hague-Visby and the Hamburg Rules (Article IV (3) of the Hague and the Hague-Visby Rules and Article 12 of the Hamburg Rules). The carrier must prove the shipper's breach of obligation under the Rotterdam Rules in order to make the shipper liable. While the Rotterdam Rules explicitly provide for the specific obligations of the shipper, the effect would be subtle. Such a breach could cause the shipper's liability under applicable national law or under the contract of carriage in many cases. On the other hand, since the "breach of obligation" imposed under the provisions of Chapter 7 is the prerequisite of a shipper's liability (article 30(1)), the explicit references to specific obligations may be understood as a safeguard for the shipper.

The shipper bears strict liabilities under the Rotterdam Rules in two situations: damage caused by dangerous goods and by inaccurate information provided by the shipper for the compilation of transport documents. These rules do not increase, at least substantially, the shipper's liability compared with previous conventions. Liability in respect of dangerous goods has already been strict under the Hamburg Rules and, in some jurisdictions, under the Hague and the Hague-Visby Rules. The shipper has been deemed to guarantee the accuracy of information that it provided to the carrier for the transport with regard to the goods under the Hague, the Hague-Visby and the Hamburg Rules.

Finally, it should be noted that parties cannot increase the shipper's obligations and liabilities through a contract (article 79(2)). The shipper is more protected in this respect than under previous conventions. The Rotterdam Rules also provide for certainty for the shipper in that they prohibit Contracting States from imposing more liability through their national legislation than the Rules impose.

Taking all of these elements into account, it is doubtful whether the shipper's obligations and liabilities are substantially increased under the Rotterdam Rules compared with existing conventions.

2. Is it an imbalance that there is no limitation for shippers' liability to the carrier?

Shippers are not currently entitled to a limitation on their liability under the Hague Rules, the Hague-Visby Rules or the Hamburg Rules. During the sessions of the UNCITRAL Working Group, the issue of the limitation of liability of the shipper was raised in connection with the suggested regulation of its liability for delay. The representatives who stressed shipper's interest were in fact concerned that such liability might be of an unpredictable level, for example, in the case of the sailing of the carrying ship being delayed for many days resulting in the shipper responsible for the delay being liable for the delay caused to every other shipper, and suggested that in respect of liability for delay, a limit would be appropriate. Efforts were made to identify an appropriate basis for such a limit, but they proved fruitless, and it was decided that shippers should not be liable for delay pursuant to the Convention. Such liability, therefore, is governed by the applicable law.

3. The second sentence of Article 34 appears to relieve the shipper of liability for acts or omissions of the carrier or a performing party to which the shipper has entrusted the performance of its obligations. What is the meaning of article?

It might be easier to understand the meaning if we restate the proposition from the reverse side: the carrier could not claim damages for its own acts or omissions, even if its activity had been performed following a request of the shipper. The former part of article 34 mirrors in respect of the shipper the provision of article 18 and the latter part of article 34 mirrors article 17(3)(h).

D. Transport Documents, Right of Control and Delivery of the Goods

1. With respect to Article 40(2), do you foresee that the transport document would contain a "standard form of disclaimer" that the carrier does not assume responsibility for accuracy of information furnished by the shipper?

Because the Rotterdam Rules do not control the wording of qualifying clauses for contract particulars, the carrier might continue to use traditional standard forms of disclaimer such as “said to contain”, “contents unknown”, or “accuracy not guaranteed” etc. The Rotterdam Rules regulate that such disclaimers are valid only to the extent that article 40 allows. This unifies the diversity of law among jurisdictions regarding the effect of disclaimer, which is not completely regulated under the Hague and the Hague-Visby Rules.

2. Does article 47(2) allow the delivery of goods without surrender of the transport document?

Yes, but only if that option is opted into by way of an *express* statement in the negotiable transport document or the negotiable electronic transport record that the goods may be delivered without their surrender.

E. Jurisdiction and Arbitration

1. Are Articles 66(a) and (b) an alternative with the choice to the plaintiff? In other words, can the plaintiff always insist on the provisions of Article 66(a)? What is the relationship between Article 66 and Article 67? Is Article 66(a) always paramount to the clauses in Article 67?

As to the first two questions, the answer is in the affirmative. The language of article 66 clearly gives the choice to the plaintiff.

As to the third and fourth questions, Article 67 is clearly an exception to the general rule set out in article 66. As the general rule under the Rotterdam Rules, an exclusive choice of court agreement is not allowed, but if inserted in a volume contract, it is valid to the extent of the requirements under article 67.

2. Is it possible that the exclusive jurisdiction clause in a volume contract binds the parties as well as the holder?

Yes, but only if and to the extent that it meets the requirement under article 67 (especially article 67 (2)(c), that a non-party to the volume contract must be given

timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive).

3. (1) Is it correct that by articles 74 and 78, the jurisdiction and arbitration clause terms apply only if the contracting State positively declares in accordance with Article 91 that they will be bound by them, otherwise, articles 68-73 and 75-77 would not apply?

(2) What would occur in the situation where State X did not specifically make a declaration to apply Chapter 14 of the Convention and State Y did? Assuming there was a shipment from State Y to State X and an action commenced in State Y. What would be the result, particularly if an anti-suit injunction was commenced in the State X?

(1) When a Contracting State does not make a declaration that it will be bound by the provisions in Chapter 14 and 15 the issue of jurisdiction is governed by its national law.

(2) State X is not bound by the Rotterdam Rules as far as the issue of jurisdiction is concerned. State Y, which made the declaration to apply Chapter 14, can treat the judgement or other court actions (including anti-suit injunction) in State X just as those in non-Contracting State. Therefore, State Y simply applies its general rule regarding the recognition and enforcement of foreign judgement or other court actions and the Rotterdam Rules have no role to play in this context.

F. Volume Contracts and Freedom of Contract

1. What are the safeguards for the shipper under article 80?

Article 80 contains the following stringent mechanism for the protection of cargo interest from any potential abuse of freedom of contract, through the “volume contract” provisions.

Article 80(2) provides a series of conditions that must be met before the parties can derogate from the terms of the contract that are imposed by the Rotterdam Rules.

First, there should be a “prominent statement” regarding the fact that the contract contains the derogation (Article 80(2)(a)). A statement should be “prominent” rather

than simply “expressed”. It should be written in such a form that attracts the reader’s attention, such as bold font or large capitalized letters.

Second, the volume contract should be either (i) individually negotiated or (ii) prominently specify which provisions of the contract contain the derogations (Article 80(2)(b)). Although subparagraph (b) allows for the possibility that the contract is not individually negotiated, subparagraph (d), which prohibits incorporation by reference or contracts of adhesion, would make it very difficult for the parties to introduce derogations without individual negotiation.

Finally, the shipper should be given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with the Convention, without any derogation. The shipper always has an opportunity to enter into a contract with Convention terms at such a price as is published on the tariff.

Article 80(4) provides for “super-mandatory provisions”, which are core provisions of the Rotterdam Rules that cannot be derogated from even in volume contracts. These include obligations under Article 14 (a) and (b) (carrier’s duty to make and keep the ship seaworthy), Article 29 (shipper’s duty to provide information, instructions and documents), and Article 32 (shipper’s liability regarding dangerous goods) and liabilities arising from any breach of those provisions. It is also prohibited to exonerate or limit a carrier’s liability arising from its intentional or reckless act or omission that causes the loss of or damage to the goods or a delay in delivery.

Even when the terms of the volume contract validly derogate from the Convention, further conditions are required for the carrier to invoke it against any person other than the shipper. The conditions are that (i) the person receives information that prominently states that the volume contract derogates from this Convention and gives his/her express consent to be bound by such derogations and (ii) such consent is not solely set forth in a carrier’s public schedule of prices and services, transport documents or electronic transport records.

2. What is the definition of “volume contract”? Would a certain number of containers be considered to be "a specified quantity of goods in a series of shipments"? What is the minimum range of shipments in a contractual time frame? Is the definition of “volume contract” too loose?

Article 1(2) defines “volume contract” as “a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range”. Critics of the volume contract exception have argued that this definition is too loose. It is true that even a very small number of shipments, as they claim, can meet the definition.

The question is if there would have been a sensible way to limit the concept. It might be suggested to introduce a qualitative restriction, such as “significant number of shipments” but this would raise the question of what is significant. Is a quantitative restriction, such as “more than 100 shipments a year” or “more than 100,000 tons of cargo”, more sensible? In fact, there was a proposal in 21st session of UNCITRAL Working Group along the lines of “the specified quantity of goods referred to should be 600,000 tons and the minimum series of shipments required should be 5”. (See, Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), A/CN.9/544, para.251) This approach would cause another problem, although it is quite predictable. A specific figure would be too formalistic and a figure that makes sense in certain trade might not be sensible for other trades. Further, parties would not know with certainty until the specified number of shipments or volume was reached whether the earlier contracts qualified as volume contracts, creating uncertain commercial conditions.

After lengthy efforts, many delegations to the UNCITRAL Working Group reached the conclusion that there was no commercially reasonable way to limit the definition of volume contracts. Rather, they agreed that it would make more sense to enhance the protective requirements for any derogation in Article 80, so as to protect the parties

from any abuse of the freedom of contract provisions, even in the case of small shipments.

G. Others

1. Is it true that the Rotterdam Rules do away with all of the existing case law and practice that has developed under the Hague, Hague-Visby and Hamburg Rules?

It is wrong to see that “the Rotterdam Rules do away with all of the existing case law and practice”. The situation is more delicate.

In some cases, the Rotterdam Rules intentionally changed the case law in certain jurisdictions. For instance, the purpose of article 24 is to change the case law regarding the consequence of unreasonable deviation in a certain jurisdiction, which was thought problematic.

At the same time, the Rotterdam Rules pay much attention to the preservation of valuable precedents. The list of exonerations under article 17(3) is a clear example. The wording is intentionally aligned with that of the Hague and the Hague-Visby Rules.

