



March 2009

**View of the European Shippers' Council
on the Convention on Contracts for the International Carrying of Goods Wholly or Partly
by Sea
also known as the 'Rotterdam Rules'**

Introduction

The European Shippers' Council represents the freight transport interests of some 100,000 companies, whether manufacturers, retailers or wholesalers, throughout Europe whose goods move across EU and international borders (imports and exports) by any mode of transport.

ESC has taken a strong interest in the UNCITRAL process in recent years. It is the aim to ensure that any new international convention on maritime liability would provide shippers with basic protection when involved in international trade. ESC takes issue with many of the features of the new regime, known today as the 'Rotterdam Rules', which has yet to be ratified, and fears that it could put some shippers in **a worse position than that of the pre-1924 liability environment**, before introduction of the original Hague Rules.

The European Shippers' Council contests that the new convention is flawed, puts shippers at greater risk, potentially unknowingly, and would do little to facilitate door-to-door co-modal transportation in European trades. The ESC argues that the interests of exporters and importers should be given their due weight by EU member state governments, and that this Convention should not be supported.

ESC's position in brief:

The new Rules

- conflict with other conventions
- present unequal obligations and liabilities between shippers and carriers
- present a risk that carriers' may reduce significantly their own limits of liability and obligations under so-called 'volume contracts
- make proving fault harder for the shipper
- make it increasingly difficult for shippers to successfully make a claim for damages
- make shipper obligations far more onerous
- may deter shippers from integrating short-sea shipping into their door-to-door logistics due to obligations and limits of liability being worse than under individual modal conventions

ESC has concluded that there is nothing in the final text of the convention which justifies a departure from the status quo of Hague Visby Rules for the majority of shippers who represent the preponderant trade interest of the majority of European states.

In the interests of European shippers, ESC proposes:

- a) the parallel development of a European multimodal convention aligning with other land-based conventions in order to foster greater use of co-modal logistics solutions for intra-

European door-to-door freight transport

- b) EU member states decide not to sign up to the Rotterdam Rules, and publicly indicate this view
- c) The Hague Visby and Hamburg Rules should remain the appropriate conventions applying to the international movement of containers by sea in the interim period
- d) National and mode-specific conventions should not automatically take precedent over the new Rotterdam Rules if they hinder co-modal logistics solutions: a 'one-size-fits-all' solution is not considered the most appropriate approach to setting conditions of carriage.

The full extent of ESC's concern

Below, ESC identifies six key areas of concern with the new international convention. These concerns relate to a sense that there exist unequal obligations and liabilities between the carriers and shippers, favouring more the carrier than the shipper, and the removal of many protections for the shippers, especially under volume contracts.

1. Conflict with other conventions

The Rules would apply to *contracts* of carriage (rather than shipment of goods) in which the place of receipt and place of delivery are in different states and where the ports of loading and discharge are also in different states. The contract *must* provide for **sea carriage** and may also provide for **carriage by land**.

- a. This would bring The Rules into potential conflict with **other international conventions** such as CMR and CIM which, although covering road and rail respectively, also may cover certain maritime transits.

Other conventions, such as CRM and CIM, will prevail over the Rotterdam Rules where they would apply if the Rotterdam Rules did not exist, but in practice only where the source of the damage can be localised – in reality a difficult thing identify in many cases

- b. The more favourable terms and conditions of CMR and CIM, as examples, would not extend to short sea shipping. Shippers concerned with intra-European shipments may **choose against the use of short-sea services** because of the increased obligations and liabilities of the Rotterdam Rules compared to other conventions.

2. Unequal obligations and liabilities

Carriers would be able to continue to offer purely sea carriage under the Rotterdam Rules and to **limit their period of responsibility** to exclude loading, handling, stowing and unloading if the shipper agrees.

The unwitting shipper may be tempted into accepting such terms, but it would be equivalent to not renewing one's insurance policy in order to save money

3. Volume Contracts represent significant risks for shippers

It is possible to contract out of nearly all the provisions in the Rules by means of a **volume contract**. **This represents the greatest of ESC's concerns over the introduction of the Rotterdam Rules.**

A “volume contract” is one that provides for carriage of a *specified* quantity of goods in a *series* of shipments during an agreed period of time. It could apply to quantities as low as 3 containers shipped over a year or more.

ESC fears that acceptance to increased shipper liability and reduced carrier reliability would represent a serious risk to shippers that were not completely aware of the implications. Merely signing up to a volume contract could expose the shipper to greater risk.

For example, when a volume contract is agreed, nearly all the shipper-protective provisions of the Rotterdam Rules need not apply. Examples are given below:

- a. The carrier must normally ship the goods to the place of destination and deliver them to the consignee, responsibility commencing when the carrier or his agent receives the goods for carriage (according to the contract) and ending when they are delivered. **This is NOT OBLIGATORY** under a volume contract.
- b. The carrier must normally properly and carefully receive, load, handle, stow, keep, care for, unload and deliver the goods, unless the contract provides that the shipper shall load, handle, stow or unload the goods. **This also is NOT OBLIGATORY** under a volume contract
- c. The Carrier must normally make and keep the holds and any containers supplied fit and safe for the reception, carriage and preservation of the goods. **This again is NOT OBLIGATORY** under a volume contract

A number of questions and further related issues also arise from the convention as it relates to ‘volume contracts’:

- i. Despite some apparent safeguards intended to alert the shipper to the fact that the Rotterdam Rules will no longer apply if ‘negotiated’ away, it is unclear as to what these will be in practice or how effective such safeguards may in effect prove to be
- ii. Shipping is excluded from EU law relating to unfair contracts; this puts the shipper at even greater risk of being press-ganged into accepting terms and conditions they do not want
- iii. How will the legal system deal with an apparent vacuum between the mandatory application of international law (governed by the convention) and national law if a volume contract removes the application of international and theoretically national law from a contract?
- iv. How would competition rules apply under such circumstances where it might be accused, for example, there was an abuse of a dominant position?
- v. It is generally assumed (**for why else would one reasonably be persuaded to accept such terms**) that volume contracts would offer lower rates to reflect any reduced liability by the carrier or increased rates to reflect increased liability.
- vi. There is a danger that bill of lading terms would be rewritten to be still more adverse to shippers than at present. Furthermore, “reductions” in rates may be more illusory than real: whilst a shipper could not be forced to accept a volume contract unprotected by the Rotterdam Rules, in practice it is possible that rates would be manipulated to make refusal subject to a rates penalty.

Small shippers are most vulnerable being less able to negotiate from a position of market strength. **At a time of considerable economic stress** in the world today, shippers will be under huge pressure to accept greater risk in return for promises of price reductions.

4. Proving fault becomes harder for shippers

Subject to contrary provision in a volume contract, the carrier is liable for *all or part* of the loss, damage or delay to the goods during the period of the carrier's responsibility (whether on sea or land) as proved by the claimant, unless either

- a. The carrier proves that the cause or *one of the causes* of the loss is not attributable to its fault or the fault of anyone used to perform the contract, or
- b. It proves that a similar but more extensive list of excepted perils than that under Hague Visby Rules (except negligent navigation now deleted) *caused or contributed* to the loss or damage.

The **choice of which defence** to use is given to the carrier but if it uses the list of exceptions, the shipper must **prove** that the loss was or was probably caused by or contributed to by the unseaworthiness of the ship, its holds or containers or improper crewing.

- c. How are shippers expected to prove fault?
- d. The carrier may also be liable **only** for that part of any loss attributable to its fault

5. Claiming compensation becomes harder for shippers

Subject to contrary provision in a volume contract, **compensation** payable in case of loss or damage is limited to no less than 875SDRs per package or shipping unit or 3SDRs per kilo of gross weight, whichever is higher, but in the case of containerised goods, the package limit can only be invoked if the packages are enumerated in the transport document.

Unfamiliarity with this rule or an oversight may cost the shipper dearly

It appears possible to *increase* these limits of liability by agreement without having to enter into a volume contract.

Subject to contrary provision in a volume contract, compensation in case of **delay** is limited to 2 ½ times the freight payable on the goods delayed. However, delay occurs only when goods are not delivered within the time agreed in the contract. Therefore, if no delivery time is stated, no compensation will be due for delays.

- a. It is currently believed to be uncommon for a delivery time to be specified on the contract, in particular for consignments belonging to smaller volume shippers who may employ the services of third parties to handle the freight procurement and contracting with the carriers

Even under a volume contract a carrier may not contract out of its liability for **wilful misconduct** but this concept has become harder to make out as the carrier will now be liable without limit only for a *personal* act or omission done with the intent to cause loss or through a reckless act.

- b. There will be a *presumption* of safe delivery unless **notice of loss** or damage is given by the shipper before or at the time of delivery or if the loss was not apparent within 7 working days after delivery. In the case of delay notice must be given within 21 days. There is a **two year period** to bring a legal claim against the carrier or shipper. However a time-barred claim may be used as a defence or by way of set-off.
- c. Shipper options on choice of jurisdiction, similar to those in Hamburg Rules, have been made applicable only if states opt in to the relevant provisions. An exclusive jurisdiction

clause may be valid in a volume contract. In practice carriers would no doubt continue to dictate jurisdiction in many instances.

6. Shipper obligations are far more onerous than previous conventions

- a. The shipper must deliver the goods in such **condition** that they will withstand the intended carriage including their loading, handling, stowing, lashing, securing and unloading and that they will not cause harm to persons or property. These requirements also apply to containers and vehicles packed or loaded by the shipper.
 - i. This may appear reasonable to the shippers' best ability and knowledge, and they must seek appropriate advice, but the carrier should also have some responsibility in this regard
 - ii. The Rules would apply to **deck carriage and to carriage of live animals**, but the rights which normally apply to the shipper of freight stowed under deck would not necessarily be the same for deck cargo, nor would there be any right to a statement that the goods are carried on deck.

Shippers may be unwittingly exposed to fewer rights of protection from liability than they may otherwise believe

- b. The shipper must provide the carrier with **information, instructions and documents** reasonably necessary for the proper handling and carriage of the goods and compliance with the law. (Mandatory even in a volume contract)
 - i. The shipper must provide in timely manner specified information required to complete the **transport document** and is deemed to guarantee the accuracy of the information.

ESC has developed with the liner shipping industry association (ELAA) and the European freight forwarders association a framework of **joint responsibility** and best practice which ensures accuracy, timeliness and quality in the production of transport documents; Placing all responsibility on the shipper removes the concept of shared responsibility, even though a failure to provide accurate and timely information would impact heavily on the quality of the service performance of the carrier which should be its primary focus and concern

- ii. The carrier does not need to **qualify information** in the transport documents, notably if it is not "commercially reasonable" to check the information. This again removes them from a duty which ESC believes is unreasonable; it could also affect the value of such documents in relation to letters of credit.
- c. The consignee must accept delivery at the time or within the time period agreed. There are novel provisions allowing the carrier to deliver goods under a negotiable transport document without surrender of that document if the document so allows.

This could cause problems in relation to letters of credit as could the carrier's novel rights of disposal of goods that are deemed undeliverable.

- d. The shipper is liable *without limitation* for **loss or damage sustained by the carrier** if the carrier proves that such loss or damage was caused by a breach of the shippers' obligations under the Rules.

- i. In the case of information supplied for the transport document, the shipper is liable for inaccuracies irrespective of fault and must indemnify the carrier in respect thereof.
 - ii. Similarly strict liability and indemnity applies to obligations in relation to dangerous goods. In other cases the shipper is relieved of *all or part* of its liability if the cause or one of the causes of the loss is not attributable to itself or its agents. These liabilities may be modified under a volume contract but not in relation to the transport document or dangerous goods.
- e. The shipper is also liable for the actions of those it uses to perform its obligations.
- f. Where the Rules allow certain instructions to be given concerning the goods in the course of transit, the controlling shipper must reimburse the carrier for any reasonable additional expense incurred and indemnify it ***without limitation*** against loss suffered in execution of the instructions including any compensation payable to third parties. The carrier is entitled to require security before carrying out such instructions.
- g. Application of the Rules is not made subject to the prior issuance of any **bill of lading** or other transport document; neither do the Rules require issuance of such a document when it is not custom usage or practice to do so.

Conclusions

While there have been some drafting improvements to the final Rotterdam Rules text which make it clearer in places, and while “headline” liability of the carrier is increased compared to both Hague Visby and Hamburg limits, there remain some substantial concerns with this new Convention. Largest among ESC’s concerns is with volume contracts which allow the carriers to derogate from virtually all the provisions of the Rules to the potential detriment of the shipper.

Despite determined negotiation by shipper interests, there are still inadequate safeguards built into the volume contract system. There is nothing in the final text which justifies a departure from the status quo of Hague Visby Rules for the majority of shippers who represent the preponderant trade interest of the majority of European states.

What does ESC propose?

The history of multimodal transport is littered with failed attempts at legislation. In the early 1970s, the proposed TCM Convention/Tokyo Rules failed to reach an outcome. In 1980 the UN made another attempt with the UN Convention on Multimodal Transport but nearly 30 years later it is no nearer entry into force than at the outset. The Rotterdam Rules could follow the same path.

The response of industry to the earlier failures was to seek a commercial solution in the form of the ICC Rules for a Combined Transport Document (now the UNCTAD/ICC Rules), incorporated into the FIATA Bill of Lading. Research by ESC member associations has shown that both Hague Visby and Hamburg Rules would allow updated contractual multimodal solutions working alongside these Conventions to be devised. Furthermore as a modern maritime regime, the Hamburg Rules, which seemed radical to some maritime nations during the 1970s now appear far less problematical than the Rotterdam Rules. They have been adopted by some 32 countries including Austria, the Czech Republic, Hungary and Romania while others, such as the Scandinavian countries, have included some Hamburg provisions in their national law.

On the basis of the arguments set out above, Shippers do not believe that the Rotterdam Rules deserves the support of the European Commission or of the Member States. The draft is not the only option for the future.

In the interests of European shippers, ESC proposes:

- e) the parallel development of a European multimodal convention aligning with other land-based conventions in order to foster greater use of co-modal logistics solutions for intra-European door-to-door freight transport
- f) EU member states refusing to sign up to the Rotterdam Rules until or unless adequate protection has been given to shippers and accepted by shippers' representatives
- g) The Hague Visby and Hamburg Rules should remain the appropriate conventions applying to the international movement of containers by sea in the interim period.
- h) As a precaution, in the event that the Rotterdam Rules acquire the 20 signatories needed to make it pass as an international convention, any terms put forward by a carrier should be interpreted *contra proferentem*¹ making it prudent for carriers to seek to meet any definition exactly. In those Civil Law countries which might find the concept of derogation from a mandatory regime unpalatable in principle, judges might seek to examine this line of interpretation to query whether the requirements for a volume contract were met. If not met, they might set aside the volume contract terms and apply the Rotterdam Rules.

¹ **Contra proferentem** is a rule of contractual interpretation which provides that an ambiguous term will be construed against the party that imposed its inclusion in the contract – or, more accurately, against (the interests of) the party who imposed it. Therefore, the interpretation will favor the party that did not insist on its inclusion. The rule only applies if, and to the extent that, the clause was included at the unilateral insistence of one party without having been subject to negotiation by the counter-party. Additionally, the rule only applies if the court determines the term to be ambiguous, which often forms the substance of a contractual dispute. (source: Wikipedia)