

CMI 2012 Beijing

40th Conference of the Comité Maritime International

Rotterdam Rules Session — Panel 4

Questions and Answers

The Hague-Visby Rules are often viewed as pro-carrier while the Hamburg Rules as pro-shipper. Are the Rotterdam Rules, in your opinion, pro-carrier or pro-shipper?

Michael Sturley: I think it is vital to recognize that the Rotterdam Rules do not represent a zero-sum game. Their most important aspects benefit *both* shippers *and* carriers. Everyone would benefit from having a more modern regime that addresses the needs of the 21st century rather than correcting the problems of the 19th century. Both shippers and carriers would benefit from having a single legal regime that covers the entire period governed by the contract of carriage (whatever the contract may provide). The entire industry will become more efficient with a legal regime that facilitates the development of electronic commerce. Uniformity, certainty, and predictability are important to everyone in the industry.

If we look at the nations that have already signed the Rotterdam Rules, we see overwhelming evidence that the new regime does not favor either carriers or cargo to the detriment of the other. Denmark and Greece were the two nations that most strongly and consistently supported carriers' interests during the UNCITRAL negotiation, and they both signed the convention on the first possible day. As a group, the African countries were consistently the strongest advocates of cargo interests during the negotiation, and seven of them signed the convention in Rotterdam. (Five more African countries have since signed, and Togo has already ratified.) This unprecedented support from across the spectrum demonstrates that the Rotterdam Rules are *both* pro-carrier *and* pro-cargo.

Gertjan Van der Ziel: Allow me to add a few matters. The drafters of the Rotterdam Rules didn't think so much in terms of conflict of interests. Their goal was primarily to

modernise the law relating to maritime transport by i.a.

(i) providing practical rules for situations that under current law time and again have caused difficulties, such as the matter of identity of carrier, delivery of the goods by the carrier to the consignee, the meaning of FIO(ST) condition, the position of the FOB seller under the contract of carriage, the meaning of ‘freight prepaid’, deviation, reservation clauses in transport documents, the position of the third party holder of a negotiable transport document, etc., all this in the interest of clarity of law; and

(ii) elevating existing practices and transport document clauses into law in the interest of certainty of law. Examples are the obligations of the shipper and the liability regime for the inland part of a maritime carriage, which, to a very large extent, already apply in maritime transport, but on a contractual basis only.

It means that, compared with the existing conventions, much in the Rotterdam Rules seems new, but in comparison with existing national law and practices in the industry, there is much less new law. The Rotterdam Rules are by no means revolutionary, but are evolutionary only.

One of the information that should be included in contract particulars under article 36(2)(b) is the “address of the carrier”. Although term “address of the carrier” has not been defined under article 1, there is a definition of “domicile” (article 1(29)). Are these two terms interchangeable?

Tomotaka Fujita: We should note that the two terms are used for different purposes. Under the Rotterdam Rules, the term “domicile” is only used in connection with jurisdiction and arbitration (articles 66(a)(i), 68(a), and 75(b)(i)). The purpose of using the term “domicile” is to create an appropriate connecting factor regarding jurisdiction and arbitration. By the way, the definition in article 1(29) is heavily influenced by the EU regulation on jurisdiction. On the other hand, the carrier’s address is required in contract particulars under article 36(2)(b) in order to identify the carrier. Because the purposes of the two concepts are different, naturally their meaning is not identical and not interchangeable.

Si Yuzhuo: I agree with professor Fujita’s view that the “domicile” and “address of the carrier” are not interchangeable, but I would like to add some comments. According to articles 66, 68 and 75 of the Rotterdam Rules, the “domicile” of the carrier or maritime performing party is one of the connecting factors

regarding jurisdiction and arbitration, so the understanding of the term is important. But, the interpretation of the domicile of a legal person or a natural person differ from country to country, thus, it's necessary for the convention to have a clear definition of its intension and extension, to clarify the understanding of "domicile" under this convention.

The word "address" also appears in several articles of the convention. For example, articles 36(2)(b) (address of the carrier) , 36(3)(a) (address of the consignee) , 37(2) (...indicates its address) ,45 (b) (address of the consignee) ,67and75 (address of the parties) .I agree with professor Fujita that these addresses are used to identify a person.

However, the word "address" is more like an everyday language and there's no strict limitation on to what extent it can be used. Therefore, my understanding is: the carrier's address required in a transport document under the Rotterdam Rules, can be any place falls into article 1(29)(a) (i、 ii、 iii) or (b),or not within that article. Because "Address" should be understood in a broader sense, as long as it can be used to identify or facilitates the identification of a person ,it constitutes an address, for example, the address through which the carrier can be reached(corresponding address)is also ok. What's more, I noticed that, in Hamburg Rules, one of the contents of B/L is "principal place of business of the carrier" ,while the Rotterdam Rules adopts the same usage as CMR, i.e, "The consignment note shall include the address of the carrier." Comparing these two regulations, I can see the extension of "address" is wider than that of "principal place of business".

If a person is named as a carrier in a transport document or electronic transport record, does article 37(1) work in a way that such a person is treated as a carrier as defined in article 1(5) even though he did not conclude a contract of carriage with the shipper? If so, can he use the defenses under article 37(2)?

Tomotaka Fujita: Although it is not so explicit, I assume that this question focuses on the situation that a name of a certain person is inserted on a transport document as a carrier by those who have no relationship with the named person. For instance, A wrote the name of "B" on a transport document as a carrier but A has no relationship with B. If this is the case, such transport document is issued without authority and it cannot bind the person named as the shipper. This is not a question of article 37(1). Rather, it is the

question of who should sign the document or who can issue the valid transport document. It should be noted that the issue is a kind of agency problem that is outside the scope of the Rotterdam Rules. It is decided by the applicable national law. But I assume that people are not bound by a document which is issued by a person with whom he has no relationship.

Because the document does not bind the named person on the document, it is not necessary for him to rely on article 37(2). All he has to say is “I have never seen such a document. There is no signature of mine or of anyone to whom I gave an authority. Therefore, whatever is written on the document, it has nothing to do with me.”

If a carrier is not identified by name on the front side of a bill of lading but there is “identity of carrier” clause on the backside, can we directly pass to article 37(2) or shall we stay under article 37(1)? The difference is that in the second alternative, the presumed carrier may not rebut any presumption of being a carrier.

Alexander von Ziegler: Article 37(2) provides that if no person is identified in the contract particulars as the carrier as required *pursuant to* article 36. Article 36(2)(b) requires “the name and address of the carrier”. Even if the bill of lading indicates someone as the carrier through “identity of carrier” clause on the backside, it does not comply with article 36. Therefore, the condition of article 37(2) applies and the registered owner of the vessel is presumed to be the carrier.

If the Senate of the United States does ratify the Rotterdam Rules, is there any information available as to whether the terms of ratification will contain a transition period before the Rotterdam Rules comes into force? If so, how long? For example, if the United State Senate ratifies before the Christmas 2012, will Canadians see volume contracts being presented by container line companies in early 2013?

Michael Sturley: The Rotterdam Rules by their terms provide that they will enter into force approximately one year after the 20th ratification. Art. 94(1). If the United States were to ratify today, therefore, we would still have to wait for 17 additional ratifications and then for another year after that before the new convention would enter into force. Once the Rotterdam Rules are in force, new countries can of course continue to join the

new regime. With respect to each of those countries, the Rotterdam Rules will enter into force approximately one year after its ratification. Art. 19(2). Thus for any country there is effectively a transition period of at least one year.

What considerations have been given by various states to use the Rotterdam Rules as the legal regime to govern a state's coastal trade? For example, Canada's present law for coastal trade is one of the freedom of contract except when a bill of lading is issued, and in that case, the Hague-Visby Rules apply. Canada's question to its CMLA is whether to adopt the Rotterdam Rules as the regime to govern Canadian coastal trade. I would like to hear especially from United States and China which have large coastal trade.

Michael Sturley: The focus in the United States is on ratifying the Rotterdam Rules so that they will govern carriage within their scope of application. Thus the coastal trade would not be covered unless it is one leg of an international shipment that is subject to the new convention.

The U.S. plan is simply to preserve the status quo for all other carriage. Parties would, of course, be free to apply the Rotterdam Rules in the coastal trade if they choose to do so, but there are no plans to require that.

Si Yuzhuo: The current legal regime governing China's ocean and coastal trade is not the same one. Chapter 4 of China's Maritime Code (CMC), which mainly refers to Hague-Visby Rules, applies to international ocean trade. While the Contract Law of China governs our coastal trade, which stipulates the strict liability for the carrier. The shipments between the ports of mainland China and ports of Hong kong, Macao, Taiwan fall into the category of coastal trade but in China's legal practice, they are treated as international trade and Chapter 4 of CMC should be applied. If China shall adopt the Rotterdam Rules, the international ocean trade will have to be governed by the RR, shipment between mainland China and Hong kong, Macao and Taiwan will likewise be subject to the RR. The RR can be applied to other "pure" coastal trades only when the coastal trade is a leg of an international shipment that is subject to the new convention. Otherwise, the coastal trade will still be governed by the Contract Law of China. The only solution would be China adopts the RR and revises the CMC, so that the RR apply to both China's ocean and coastal trade.

The concept “documentary shipper” seems to impose a heavy burden on an FOB seller. Therefore, we wish to avoid the application of the rules on documentary shipper. Can “documentary shipper” be avoided by national law for contracting state?

Tomotaka Fujita: I am a little surprised to hear that the concept of “documentary shipper” puts a heavy burden on an FOB seller. The “documentary shipper” concept was introduced into the Rotterdam Rules for the benefit of FOB sellers. Under current law, it is unclear what FOB sellers who are not contractual parties can do and should do. We gave them a legal status in relation to the contract of carriage in order to clarify the situation.

But if an FOB seller does not wish to be a “documentary shipper”, all it has to do is decline to accept to be named as a shipper. Without acceptance to be named as a shipper, no one can become a documentary shipper (article 1(9)). I do not think it necessary for a state to remove all regulations on documentary shipper for the benefit of FOB sellers. However, if you ask if it is possible for a state to ratify the Rotterdam Rules without applying the provisions on documentary shipper, it is simply impossible.

Song Dihuang: I am also surprised at this. There are two legal relationships – sales contract and shipping contract. The buyer and seller can (and must) agree on shipping terms under the sales contract so that buyer or seller knows their respective obligation, without which the sales transaction would not be completed at all.

Thus, by a term of FOB, it is clear (or should have been clear) to the buyer and seller who has the obligation to book a shipping space (or an entire vessel), and if the seller also wishes to become a party to the shipping contract, it must agree with its buyer on “documentary shipper”. If the FOB seller does not wish to become a party, he does not need to agree with the buyer, and if the buyer, in breach of the contract, identifies the seller as the shipper in the bill, the seller can refuse the bill, and carrier could never automatically take seller as the shipper and/or impose any obligations on it.

But more often than not, an FOB seller wishes to protect its right (on payment for instance), and would insist on identifying itself as the shipper, so that if there is anything goes wrong with the buyer, he still has the cargo under the bill of lading (to its order).

So, this is a choice for the FOB seller in a commercial sense, and indeed, how a commercial decision is made with its buyer.

Gertjan van der Ziel: I agree with my two colleagues that it is a commercial choice for a FOB seller whether he should be stated as shipper in the transport document. I may add that, in case he made the choice to be ‘documentary shipper’, already currently under many national laws he assumes the rights and liabilities of a party to the contract of carriage. For example, under English law the doctrine of ‘privity of law’ is set aside in such case. Charles Debattista in his standard work “Bills of Lading in Export Trade” (3rd ed., Tottel), paras 1.17-1.20, discusses this matter and refers to *Pyrene Co Ltd v Scandia Navigation Co Ltd*, [1954] 2 QB 402, and *The Athanasia Comminos and Georges Chr Lemos*, [1990] 1 Lloyd’s Rep 277.

Comment to Professor Van der Ziel’s Presentation in Panel 1.

Turkey has enacted a new Commercial Code and it has been in force since July 2012. The provisions on carriage of goods by sea have been implemented directly from the Hague-Visby Rules and the gaps are filled with the Hamburg Rules. Although Turkey is still a party to Hague Rules, the Turkish translation of the Hague Visby Rules and the Draft Act on acceding to the Hague-Visby Rules are completed and on the agenda. In the near future, therefore, Turkey’s position with respect to the Rotterdam Rules seems to be “wait and see.”

Gertjan Van der Ziel: Thank you for the information. It evidences the willingness of Turkey to modernize its maritime transport law. When discussing the contents of the Rotterdam Rules in Turkey, I met similar willingness on the adoption of these Rules when it comes in Turkey to the next step of this modernization.

Comment to Professor Si’s Presentation in Panel 2.

Please interpret the meaning of “China should accede to the Rotterdam Rules in proper time.” What does “proper time” mean?

Si Yuzhuo: In view of that the attitudes in all walks of life in China on the Rules are very different at present, the Chinese Government has not formed a unified and clear attitude towards the Rotterdam Rules, particularly on the delicate issue regarding whether China should accede to the Rules and when it might happen. In this circumstance, I think the “proper time” should be that when the countries maintaining close trade exchanges with our country ratified the RR, our government should consider

acceding to the Rules. Because by then, even China does not approve the RR ,the carrier and/or cargo owner would be compelled to apply it under article 5 of the convention,. It's better to apply the rules initiatively rather than passively apply it when the RR come into force.