UPDATING THE RULES ON INTERNATIONAL CARRIAGE OF GOODS BY SEA: THE ROTTERDAM RULES

ABSTRACT

The philosophy of the Rotterdam Rules can be summed up in one word - practical. Practical because the Rotterdam Rules represent a rich alloy of the sentiments of various interest groups - carriers, shippers, freight forwarders, insurance companies and not least Governments who have interests in international trade and the carriage of that trade across various transport modes. The Rules bring currency to the existing international legal regimes on the trade related aspects of the international carriage of goods, seek to better allocate the risks and responsibilities of the shipper and the carrier as well as harmonize and modernize the law with a view to attaining uniformity so craved for by international commercial partners. It is expected that the improvements in the new Rules should lead to a reduction of overall transport costs, increase predictability and introduce greater commercial confidence for international business transactions.

The new international legal regime on the international carriage of goods wholly or partly by sea, builds on the strengths of the predecessor treaties and eliminates some of their weaknesses. Moreover, the Rotterdam Rules codify modern commercial practice and especially for common law jurisdictions, preserve the rich body of case law that has been built over the years as a result not only of the application of the Hague- Visby Rules, but other international instruments on the international carriage of goods.

This short paper takes a look at the attempt by the Rotterdam Rules to balance the interests of the protagonists in the international carriage of goods transaction. It examines some of the salient features of the Hague and Hague- Visby Rules as well as the Hamburg Rules, points out their perceived weaknesses from the view point of shippers and carriers and seeks to shed some light on the ways in which the Rotterdam Rules have attempted to address the concerns of the protagonists.

It is important to mention that within its mandatory character, sufficient flexibility is introduced in the Rotterdam Rules to provide a leeway for the carrier and create commercial convenience for both parties. The *travaux preparatoires* of the Rotterdam Rules is well documented and thus should serve as ready reference in the interpretation, adjudication and application of the Rules to commercial disputes that arise in the international carriage of goods wholly or partly by sea.

INTRODUCTION

For well over half a century, the Hague Rules (1924)[1] held sway. The Rules are now over eighty (80) years since they were first enunciated in Brussels. Some nations have argued and in particular maritime lawyers from many common law jurisdictions, (notably carrier interests) that the Rules are tried and tested and need to remain unchanged.

For a good number of developing countries, mostly consumers of shipping services, the rules which have held sway for so many years are unfair and work against the interest of the users of shipping services. The Hague Rules establish a mandatory legal regime in respect of carrier liability for loss of or damage to goods concluded under a contract evidenced by a bill of lading. Under the Rules, the period of responsibility of the carrier covers the from period when the goods are loaded on to the ship till they are discharged. (Tackle to tackle).

The Rules provide that the carrier is to be held liable for loss or damage to the goods resulting from his failure to exercise due diligence to make the ship seaworthy, to properly man equip and supply the ship or to make its storage areas fit and safe for the carriage of goods. The Rules also provide other responsibilities of the carrier.

[1] [Convention for the Unification of certain Rules of Law Relating to Bills of Lading]

One of the basic criticisms of The Hague – Visby Rules is the litany of exculpatory clauses commonly perceived by shipper interests to serve the interests of the carrier especially the so called Nautical Fault Exception. The Hague Rules has seen two amendments. The protocols of 1968 (Visby) and 1979 which deal mainly with the limits of liability which to most shippers amounted to no more than "band-aid" improvements and did not go far enough in addressing the perceived weaknesses of the Rules.

Some countries ratified the protocol and hence became parties to the so called Hague-Visby Rules. Others did not ratify and thus remained parties only to the Hague Rules. For some countries, the protocol was not far reaching as it did not deal comprehensively with the issues of liability, the allocation of responsibilities and risks, as well as other modes of transport and hence they did not ratify.

The United Nations, through UNCTAD began discussions in the late 1960's to revise the Rules and come out with a uniform law on international transport of goods by sea. The objective of the work of UNCTAD was to remove the ambiguities and uncertainties and to establish a balanced allocation of responsibilities and risks between suppliers and users of shipping services. Acting upon a recommendation by an UNCTAD Working Group, the United Nations Commission on International Trade Law (UNCITRAL), was mandated to come out with a revision of the Rules. This work was concluded in 1973 and the Convention commonly referred to as the Hamburg Rules was adopted in 1978 with 20 ratifications by countries most of whom were not significant players in the international trade of the world. The major maritime nations which contribute almost two-thirds of the world's total trade did not ratify the Rules. In effect, even though the convention entered into force in November 1992, it was moribund at birth as its mother laboured in vain.

The major maritime nations with significant contribution to world trade, contended that the mandatory character of the liability rules with respect to the scope of application of the rules was too wide and the deletion of the exculpatory clauses make the liability

floor too slippery as compared to the tackle to tackle regime under The Hague/Visby Rules which they were used to.

Carriers also complained about the restriction of the choice of jurisdiction and were not happy with the jettisoning of the Nautical Fault exception even though that came as a great relief to the user nations.

Some countries adopted the rules wholly while others, especially the Scandinavian countries, incorporated relevant provisions into their national law.

Thus the stage was set for the application of a multiplicity of rules for the international carriage of goods by sea. While some countries have denounced the Hague Rules and become parties to the Hamburg Rules, there are others who are party to Hague-Visby Rules and yet others who are party to only the Hague Rules (e.g. Ghana). There are some who have not denounced the Hague Rules but have ratified the Hamburg Rules. As indicated earlier, there are still some other countries who have incorporated bits and pieces of the various laws into their national law. Currently therefore, there is a hotch-potch of international rules for the carriage of goods by sea which has created a great deal of muddled confusion and uncertainty.

It is therefore widely recognized within the international community that there is an urgent need for uniformity in the international law on carriage of goods by sea.

UNCITRAL therefore took the bold attempt at unification of the international law on the carriage of goods by sea, and to modernize the entire regime of international transport law through the elaboration of rules dealing not only with the carriage of goods by sea but also the carriage of goods under a "multimodal" (maritime plus) transport regime. This is indubitably a bold attempt when viewed against the backdrop of the difficulties and failures that have attended to the various international regimes where uniformity is concerned.

Indeed the original mandate of the UNCITRAL Working Group did not include multimodal transport.

This short paper in view of its limited purview will not deal with all the issues and complexities which are introduced by the Rotterdam Rules. Suffice it however to mention that the instrument covers various areas of existing mandatory liability regimes in the field of carriage of goods by sea akin to the provisions of the Hague, Hague –Visby and Hamburg Rules. It however goes further to modernise the existing legal regime in relation to current practice by covering areas such as freight, the transfer of rights, right of control and the right to sue.

There is no doubt that the Rules would be subject to interpretation by various legal systems and in various jurisdictions and as pointed out by Lord Macmillan in Stag Line V Foscolo Mongo[2], they should not be rigidly controlled by domestic precedents of antecedent date but be based on broad principles of general acceptation. Indeed any new regime for the international carriage of goods needed to take due cognisance of this and demonstrably indicate that it is in tune with current trends and has clear advantages over the existing legal regimes. This is what the Rotterdam Rules seeks to achieve. Whether it succeeds or not is yet to be seen.

It is worth pointing out that no attempt to balance the interests of carriers and cargo can come out with provisions or a regime that is entirely satisfactory. Like all compromises, no one leaves completely satisfied but all leave in the hope that they have taken something away. Those that argue in favour of the new Convention point to the deletion of the Nautical Fault Rule, the continuing obligation of due diligence and seaworthiness, the inclusion of provisions on delay, the higher limits of liability, the extension of the time for suit, the widening of the period of responsibility, the new provisions on Jurisdiction, (even though they must be agreed upon by an opt-in process), and the door- to – door possibilities that it offers.

SOME SALIENT FEATURES

[2] [1932] AC 328

The convention opens with some general provisions that define various terms used in the convention. Of key significance in the general provisions is Article 1(1) which defines a "contract of carriage" as : "a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transportation in addition to the sea carriage."

It is important to mention that while the Hague/Visby as well as the Hamburg Rules emphasis the production of a bill of lading as a basis for the contract, the Rotterdam Rules de-emphasis the bill of lading and instead refers to transport documents or electronic transport records. The Rotterdam Rules take this approach so as to deal with the increased use of various types of bills of lading that has become commonplace in a number of sea carriage transactions involving the use of transport documents such as sea waybills, straight bills of lading[3] and negotiable and non negotiable bills of lading. It is also worth mentioning that the Hague Rules only deal with outbound cargoes. This limitation is removed by the definition of the contract of carriage provided in the Rotterdam Rules.

The definition also takes cognizance of present practice where commercial partners sometimes arrange for the carriage of their cargoes by other modes of transport in addition to the sea- leg.

SCOPE OF APPLICATION

The Hague- Visby Rules scope of application was rather limited. This was improved upon by the Hamburg Rules to ensure that the application of the Rules is not only limited to outbound cargoes and contracts evidenced by a bill of lading. The Hamburg Rules widen the scope to which the Rules are applicable and extent the tackle to tackle obligations to port-to port. The Hamburg Rules are also applicable when the bill of lading or other document evidencing the contract is issued in a contracting state. Thus

[3] See J.I. Mac William Co Inc. v Mediterranean Shipping CompanySA [2005] UK, HL 11

the Hamburg Rules widen the scope of application when compared with the Hague-Visby Rules.

The Rotterdam Rules expands further the scope of application and provides that the scope of application shall include the place of receipt, the port of loading, the place of delivery and the port of discharge. It is to be noted that the Rotterdam Rules refer to the place of receipt and delivery in accordance with this "multimodal" tenets - a "maritime plus" convention. The convention applies to contracts of a multimodal nature but with a sea-leg hence its name the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.[4]

PERIOD OF RESPONSIBILITY

The period of responsibility of the carrier under the Hague/Visby Rules is what has commonly been referred to as "tackle to tackle" i.e. from the time when the goods are loaded till the time when the goods are discharged from the ship is the reference point for the period of responsibility of the carrier. The Hamburg Rules extend the period of responsibility of the carrier to "port to port". This has how being further extended by the Rotterdam Rules to cover "door-to-door" carriage transactions upon agreement by the parties.

ELECTRONIC TRANSPORT RECORD

In line with the desire of the drafters of the Rotterdam Rules to bring the rules of international transport law into the 21st century, the Rotterdam Rules has extensive provisions on the use of electronic transport records. It however needs be stated that where electronic transport records represent an evidence of the contract, its adoption must be with the consent of the shipper. By the time the Hamburg Rules were developed around the late 1970's there had already been calls for the recognition of

[4] For an appreciation of how the Rotterdam Rules introduce the application of other international conventions governing the carriage of goods by other modes of transport, see Art. 82. And also Art. 26 dealing with carriage preceeding or subsequent to the sea carriage.

electronic documents. The Hague- Visby and the Hamburg Rules do not create opportunities for the utilization of electronic transport documents. The Rotterdam Rules fill this gap.

THE LIABILITY OF THE CARRIER

At the heart of most international transport conventions is the issue of the liability of the carrier. This is so because it represents to a very large extent the risk allocation and the balance of rights and responsibilities between the principal players – the shipper and the carrier.

The provisions on the basis of liability of the carrier are contained in article 17 of the convention. They follow the format of the Hague Visby Rules but are poles apart from the respective provisions in the Hamburg Rules[5].

The approach adopted by the Rotterdam Rules is still fault based but with a reversed burden of proof. It is worth pointing out that even though there is a reversal of the burden of proof, two significant changes in the Rules strive for mastery. The first is the deletion of the so called nautical fault exemption in the Hague- Visby Rules and the second is the continuing obligation of seaworthiness and due diligence.

Under the Hague/Visby Rules the carrier, his servants and agents are exonerated from liability where damage or loss is as a result of their negligence in the management of the ship[6]. This has now been done away with under the Rotterdam Rules.

The Hague/Visby Rules also make the carrier responsible for the seaworthiness of his vessel only "before and the beginning of the voyage[7]". Under the Rotterdam Rules the carrier's responsibility with respect to seaworthiness is now not only before and at the beginning but shall continue throughout the voyage. It is however worth mentioning that the other exculpatory clauses in the Hague- Visby Rules[8] have been maintained in

[5] Article 5
[6] See the litany of exceptions in article iv r 2
[7] See Maxine Footwear Company Ltd v Canadian Government Merchant Marine Ltd [1957] SCR 801, see also The
[8] Article iv r 2

the Rotterdam Rules with necessary modifications such as the strengthening of the fire exception and the deletion of the Nautical Fault Rule and changes in language with respect to some of the exculpatory clauses.

DELAY

The Hague-visby Rules has no provisions on delay. The Hamburg Rules provides for delay amd the carrier is liable for delay in delivery where he does not honour the time agreed upon in the contract. The Hamburg Rules go further to add that where no such agreement as to time of delivery is agreed upon by the parties then the test would be that of a diligent carrier in the particular circumstances[9]. The Rotterdam Rules also provide for liability of the carrier in instances of delay[10] when the period for delivery has been agreed upon but omits the test of a diligent carrier in particular circumstances. The Rotterdam Rules The Rotterdam Rules also allow for economic loss arising out of delay.

DEVIATION

The Hague-Visby Rules provide for deviation as a way of absolving the carrier from responsibility where the deviation was for purpose of saving life or property. The Hamburg Rules does not provide for deviation. The Rotterdam Rules leaves the issue of deviation to national law but still makes it possible for the carrier to enjoy the defenses of limitation under the Rules[11].

DECK CARGO

Deck cargo or cargo which is carried on deck is not considered as goods within the Hague/Visby Rules if the carrier stipulates that the goods are to be carried on deck. Both the Hamburg Rules and Rotterdam Rules[12] have made significant changes in this

[9] Article 5 (2)
[10] Article 21
[11] Article 24
[12] Article 25

respect. Under the Rotterdam Rules, the following circumstances are necessary for carriage on deck:

a. Where such carriage is required by law
b. They are carried in or on containers or vehicles that are fit for deck carriage and the decks are specially fitted to carry such containers or vehicles; or
c. The carriage is on deck in accordance with the contract of carriage, or customs usages or practices of the trade in question.

These provisions have undoubtedly brought currency to the rules regarding carriage on deck especially as they now provide that the containers should be fit for deck carriage[13]. The decision of the Supreme Court of the Netherlands that in accordance with Article iii r 1 of the Hague- Visby Rules, containers supplied by the carrier should be cargoworthy has now been exemplified by the provisions of the Rotterdam Rules

Where by an agreement the carrier is not supposed to carry on deck but carries on deck and damage results then he is not entitled to the benefits of limitation of liability[14]. It however has to be shown that the damage was the result of the carriage on deck.

OBLIGATIONS OF THE SHIPPER

There are relatively speaking no obligations on the shipper with respect to the Hague/Visby Rules except for the fact that he shall not ship dangerous goods. The Hamburg Rules also make provision of some obligations of the shipper. Under the Hamburg Rules the Shipper is not to ship dangerous goods unless he has informed the carrier about the dangerous nature of the goods. The Rules also require the shipper to indemnify the carrier from losses occasioned by the carriage of such goods. Additionally the shipper is expected to guarantee the accuracy of information provided to the carrier

[13] See the NDS Provider (SCN 1 February 2008, co6/082 HR)
[14] Article 25 (5) See also Royden Machinery Co Ltd v The Anders Maersk [1986] 1 Lloyds Rep.488
Also see the case of Daewoo Heavy Industries Ltd v Klipriver Shipping Limited (The Kapitan Voivoda) [2003] 2 Lloyds Rep 1.

in respect of labels and marks on the goods.[15] By far the most elaborate provisions on the obligations of the shipper are contained in the Rotterdam Rules. This serves to provide clarity with respect to obligations which the shipper is expected to undertake. A good number of these obligations represent a codification of practice. The three main areas where the shipper is expected to carry the obligation with respect to the provision of information to the carrier include: information to enable the carrier handle and carry the goods[16] ; information to enable compliance with laws, regulations and requirements of public Authorities as they apply during the carriage [17] and information for the compilation of the contract particulars.[18] The Rotterdam Rules make special provisions for the carriage of dangerous goods. [19] Where the shipper does not provide accurate information for the contract particulars or the dangerous nature of the goods, he is strictly liable to the carrier for any damage caused thereby. The shipper is also liable for the acts or omissions of his servants or agents as well as subcontractors but not to the performing party acting on behalf of the carrier to which the shipper has entrusted the performance of its obligations. Indeed the obligations of the shipper seem onerous in view of the fact that the shipper cannot limit his liability. It must however be stated that in all the predecessor conventions there is no limit of liability for the shipper. This may be due to the fact that the onerous requirements coupled with strict liability have public good implications. The detailed provisions of the obligations of the shipper in the Rotterdam Rules serve to bring clarity on the issues and requirements regarding the shipper's obligations and are not indeed detrimental to the interest of the shipper. The Rotterdam Rules also seem to have clarified the position taken by common law judges with respect to the dangerous character of goods.[20]

LIMITATION OF LIABILITY

[15] Article 17
[16] Article 29 (1) (a)
[17] Article 29 (b)
[18] Article 31
[19] Article 32
[20] See The Giannis NK [1994] 2 Lloyds Rep 171, [1998] 1 Lloyds Rep 337 HL and compare with The Darya Radhe [2009] EWHC 845

Lord Denning in his so called final word in *The Bramely Moore* had this to say: "*I agree that there is not much justice in this rule, but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in his history and its justification in convenience*[21]*".*

The Hague Visby Rules provide for a limit of liability of the carrier to the tune of 666.67 units of account while the Hamburg Rules provides for 835 units of account per package or 2 kilos of gross weight of the goods whichever is higher. The Rotterdam Rules provide for 875 units of account per package or 3 units of account per kilo of the gross weight of the goods, that are the subject of the claim or dispute, whichever is higher. Thus the Rotterdam Rules limit represent an improvement on limits when compared with the Hague Visby and Hamburg Rules.

TIME FOR SUIT

The Hague/Visby Rules provide for one year time bar while the Hamburg Rules provide for two year limit and the Rotterdam Rules adopt the two year time limit[22].

JURISDICTION AND ARBITRATION

There are no provisions in the Hague Visby Rules on Jurisdiction and Arbitration. It was the intention of the drafters that it should be left to the parties under the doctrine of freedom of contract.

The Hamburg Rules provide for jurisdiction and Arbitration and the Rotterdam Rules follow suit. It however needs to be mentioned that states that ratify the convention are expected to opt- in or opt- out of the application of the jurisdiction provisions. This is most unwelcome in the view of shippers and one can only expect that most states when they ratify, would opt in for the Jurisdiction and Arbitration provisions of the convention. It is of significance to developing economies who desire to found

[21] [1963] 2 Lloyds Law Rep. 429
[22] Article 62

jurisdiction so that their courts can build a well-spring of jurisprudence in maritime law through judicial decision making.

VOLUME CONTRACTS

In the discussions leading to the development of the Rotterdam Rules issues of permissiveness with respect to freedom of contract came to the fore after a proposal submitted by the United States of America[23].

It is to be noted that the regime of the Hague/Visby Rules and the Hamburg Rules are "one way mandatory" implying that contracts for the carriage of goods by sea should not derogate from the convention to the detriment of the shipper, however derogations increasing the carrier's liability are permissible[24]. It is not intended to deal in any detail in this overview with the issues pertaining to the inclusion of Volume Contracts in the Rotterdam Rules. Within the Working Group there was protracted debate on its inclusion. The proponents of its inclusion argued that the predecessor mandatory regimes were developed in a commercial milieu which has now undergone tremendous metamorphosis and could not be strictly adhered to in addressing the practicalities of present day commerce.

Those who argued against its inclusion pointed out that inclusion of such a provision was tantamount to a victory for freedom of contract thus returning to the pre-Hague Visby era, at a time when the regulatory mechanisms ought to be further strengthened in the interest of small shippers.

In the end Volume Contracts found its way into the Rotterdam Rules but not without very significant caveats[25]. Within the context of the Rotterdam Rules Article 80 remains arguably the most controversial provision. The definition of Volume Contracts is fraught with uncertainty as there is no minimum quantity, period of time, frequency or number of shipments. Article 80 therefore sets out special provisions (super mandatory)

[23] The proposal of the US was to the effect that Ocean Service Liner Agreement (OSLA) should be made non-mandatory – UN Doc A/CN.9/WG III/WP.34 at page 6-9
[24] Articles III r 8 of the Hague/Visby Rules and articles 23 of the Hamburg Rules
[25] Article 80

to guide the conduct of transactions with respect to Volume Contracts and defines the purview within which a Volume Contract would be binding on the shipper. The special rules do provide some respite in respect of the concerns of shippers. It is however yet to be seen how the courts would apply the so called super mandatory provisions.

ENTRY INTO FORCE

The convention is expected to enter into force one year after ratification by the 20th member state. As pointed our earlier, by April 2010, 21 states had signed the convention and it is expected that these states together with others yet to sign would take steps towards early ratification of the convention. As at October 2012 two states[26] have ratified the convention.

CONCLUSIONS

The above represents a snapshot of the salient features of the Rotterdam Rules and a brief comparison with the predecessor conventions on the carriage of goods by sea. While the Hague/Visby rules had 12 articles, the Hamburg had 34 articles, the Rotterdam, by far the most ambitious attempt to introduce modernity and uniformity, has 96 articles.

It is quite clear from the above that the Rotterdam Rules is a mixed bag. If the perception that the Hague/Visby Rules were largely drafted the shipowning interests and thus was skewed in their favour, the Hamburg Rules drafted largely by shipper interests and thus skewed in their favour is anything to go by, then the Rotterdam Rules, developed both by the CMI and UNCITRAL representing both sides of the "divide" should represent an accommodation of the interests of the major groupings. The Rules thus represent a compromise and like all compromises no one group leaves completely satisfied but all leave in the hope that they have taken something away. That is the spirit of the Rotterdam Rules which must be made to reflect in the judicial interpretation of the Rules.

[26] Spain and the Republic of Togo.

For shipper interests the deletion of the nautical fault rule, the continuing obligation of due diligence and seaworthiness, the inclusion of provisions on delay, jurisdiction and arbitration (albeit under an opt-in-opt-out) clause are indeed welcome.

In addition shippers should also find satisfaction and solace in the provisions on deck cargo, the extension of the time of suit, increased limitation amounts, the provisions on delivery,the widened scope of application and responsibility of the carrier not to mention the clarity of language in a number of provisions even if they suffer from verbosity.

For shipowners, the adoption of the format of the Hague/Visby Rules with respect to the basis of liability of the carrier, with the litany of exculpatory clauses, the reversed burden of proof on the claimant, the increased scope for limitation of liability, (breaches of its obligations) the flexibility of a network liability regime, the himalaya protection (now clearly covering maritime performing parties) are indeed welcome.

Further to the above, shipowner interests have the benefit of flexibility in volume contracts, the provision of detailed rules on all documentary aspects, as well as the detailed provisions and obligations of the shipper, strict liability of the shipper with respect to dangerous goods etc. Indeed these are some of the underlying tenets of compromise reflected in the spirit of the rules.

The fact that the convention was arrived at after extensive consultations with major stakeholders and has largely represented modernity and codification of practice is welcome.

If judicial interpretation should be made within the spirit of the rules, then the overall objective of achieving international uniformity, commercial convenience and confidence as well as predictability and a reduction in transaction cost would have been realised. The legislative bargain is concluded. It is the turn of the judiciary.