

# **Rotterdam Rules or Hybrid: The Likelihood for Harmonization**

**By**

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**“The UNCITRAL Convention on Contracts for the International  
Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules)  
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## **1. Introduction**

I have been assigned to present on the title: “Rotterdam Rules or Hybrid: The Likelihood for Harmonization”. The Rotterdam Rules were expected by many to be a ‘hybrid’ between the Hague and the Hague-Visby Rules on one hand and the Hamburg Rules on the other. However, the Rules that eventually come out are much more than that. Although they appear to maintain certain ideas of the Hague and the Hague-Visby regimes and have some hints of the Hamburg Rules, in many respects the Rotterdam Rules have remarkably departed from the old regimes and initiated a number of new ideas of their own. The chief among them would be the idea of what we call the “Maritime-Plus” and the volume contract exception.

In any case, my presentation will mainly focus on the issue of whether the Rotterdam Rules could achieve its primary purpose of ‘harmonization’ of the fragmented regimes of the carriage of goods by sea. Talking about a Convention, which has not yet been ratified by any State, can be an exercise in futility. However, in light of whatever scant evidence I could gather on the basis of the arguments for and against the Rules and the views expressed by States and stakeholders, I will try my best to seek an answer to the question of whether the achievement of the purpose of harmonization is likely or not.

## **2. Key provisions of the Rotterdam Rules**

The Rotterdam Rules were adopted by the UN GA on 11 December 2008 and opened for signature on 23 September 2009 in Rotterdam, the Netherlands. The rules aim at achieving harmonisation of the law governing the carriage of goods by sea. More specifically, they aim to promote legal certainty and improve the efficiency of international carriage of goods.

Running to 96 Articles, the Rotterdam Rules are much more extensive than their predecessors. (Hague Rules – only 10 articles, Hague-visby – 17 articles and Hamburg – 34 articles). Now I would like to very briefly touch upon some of the key provisions of the Rotterdam Rules. I won’t go in-depth into them because they were already been discussed at length by previous presenters.

### **Definitions: ‘Transport document’**

A number of terms are defined in Article 1 (definitions). But the definitions do not mention the phrase “bill of lading”, which is invariably found in all the carriage of goods by sea conventions. In fact, ‘bill of lading’ is not referenced at all in the Rotterdam Rules. In place of the bill of lading, the Rules substitute the concept of a ‘transport document’ (and its variations: negotiation transport document and non-negotiable transport document) as well as the concept of the ‘electronic transport record’. Jettisoning the bill of lading phrase, which is common to all modes of transportation and regarded as the life-blood of international trade,

may be the most radical departure from the previous conventions. However, the new terminology reflects the modern day realities of ocean transportation, and is more consistent with the overall structure of the Rotterdam Rules.

### **Contract of carriage: ‘maritime plus’**

Contract of carriage: “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 transport in addition to the sea carriage” (Art. 1(1).

Since a sea leg is required for the Rotterdam Rules to apply, this has been described as 'maritime plus' rather than being a truly multimodal instrument.

### **Period of application, ‘door to door’**

The Rotterdam Rules apply ‘door to door’ (Article 12) – “the period from the time when the carrier or a performing party has received the goods for carriage until the time the goods are delivered to the consignee.”

### **Extension of carrier's obligations, liabilities, defences and limitations to ‘maritime performing parties’**

This is a new concept under the Rotterdam Rules.

A ‘maritime performing party’ is a performing party to the extent that it performs any of the carrier’s obligations during the period between the arrival of goods at the port of loading of a ship and their departure from the port of discharge of a ship (Art. 1(7).

The term may include port side parties like terminal operators and stevedores.

A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and are entitled to the carrier’s defences and limits of liability as provided for in this Conventions (Art. 19).

### **Volume contracts**

“Volume contract” means 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 (Art. 1(2).

The concept of “volume contract” was included at the instigation of the US where they are known as “service contracts”.

There is freedom to derogate from the Rotterdam Rules in respect of ‘volume contracts’ (Article 80).

### **Extension of the ‘seaworthiness’ obligation of the carrier**

The Rotterdam Rules extend the obligation of the carrier to exercise due diligence to make the ship seaworthy for the entire, not just at the beginning, of the voyage.

Art. 14

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

- (a) make and keep the ship seaworthy...

## **Obligations of the shipper**

The obligations and liability of the shipper are regulated in much greater detail in the Rotterdam Rules than under previous regimes. Article 27, for example, states that "... the shipper shall deliver the goods in such condition that they will withstand the intended carriage, ...and that they will not cause harm to persons or property."

## **Limits of liability**

The limits of liability (Article 59) have been extended from those included in pre-existing Conventions.

The carrier's liability is limited to 875 SDR units per package or 3 SDR units per kilogram of gross weight, whichever is higher.

The liability for economic loss due to delay is limited to two and one half times the freight payable on the goods delivered but must be no greater than the limits stated.

## **Time limit for claims**

Article 62 increases the time limit for any claim to two years, commencing on the day on which the carrier has completed delivery of the goods or, if there is no delivery, on the last day on which the goods should have been delivered.

## **3. Arguments in support of the Rules**

Those who support the Rotterdam Rules argue that the Rules establish a balanced rights and liability regime for carriers and shippers and there are much improvements for the both sides compared to other COGSA regimes.

The following are some of the improvements arising from the Rotterdam Rules in favour of shippers:

- The elimination the carriers' nautical fault exception;
- The increased limits on the carrier's liability for loss of or damage to the goods;
- The extension of the due diligence obligation of the carrier for 'seaworthiness' to apply during the entire voyage by sea, not just at the beginning of the voyage;
- The extension of the notice period for loss of or damage to goods from 3 days to 7 days;
- The extension of the limitation period for actions from one to two years.

Carriers, in turn, could refer to the following points as improvements under the new regime:

- Clear articulation of the obligations of the shipper;
- Clear rules for delivery;
- Clear articulation of the basis of liability of the carrier;
- An improved regime for deviation;
- Permitting the carrier, under certain circumstances, to deliver the goods without presentation of the negotiable transport document, while still protecting the interests of all parties involved;

- Dealing with the problem of how to deal with concealed damage in a multimodal carriage; or

The advocates of the Rotterdam Rules believe that there are enormous advantages for all parties to the contract of carriage, and other stakeholders, in establishing legal and commercial certainty in respect of the following:

- The possibility of a clear, harmonized global regime for maritime transport;
- The establishment of electronic commerce for modern, efficient shipping practices;
- The ability to ship door-to-door under a single contract of carriage;
- Specific features taking into account modern containerized shipping;
- Comprehensive and more systematic provisions on carrier and shipper liability and a balanced allocation of risk between these parties;
- Right of control, to assist shippers and financing institutions, and to pave the way for electronic commerce; and
- Clarification of numerous legal gaps that exist under the current conventions.

For one commentator, “the potential gains for all participants are great, but failure to seize this unique opportunity will mean a continuation of the cumbersome and costly *status quo* – or worse – for many years to come.

#### **4. Arguments in opposition of the Rules**

Despite the fact that the text of the Rotterdam Rules has been finalised, the trading community continues to have concerns about the application of the Rules. Debate continues about the inclusion of the following aspects:

##### **Maritime Plus: Possible conflict with existing conventions**

By virtue of the definition of “contract of carriage” under Art 1(1), the Rules will not only apply to the international carriage of goods by sea of a door to door movement of goods, but also to transportation by other modes preceding or following the maritime segment. This has raised concerns that the Rules could conflict with other uni-modal Conventions and raises doubts regarding which Convention would be applicable in the event of a dispute.

UNCITRAL has sought to alleviate this concern by providing that, “Nothing in this Convention affects the application of any ... international conventions [governing carriage of goods by air, by road, by rail, by inland waterway]... that regulate the liability of the carrier for loss of or damage to the goods”.

UNCITRAL believe that this will ensure the Rotterdam Rules will dovetail with existing Conventions and provide cover where no other competing international Convention applies.

It should be noted, however, that whilst the operation of Conventions may be protected, from the outset these Rules might fail to create a uniform body of law for the regulation of multimodal transport and could add to the complexity of the existing multimodal transport regimes.

## **Volume contract exemption: the greatest concern**

Included at the instigation of the United States, the volume contract exemption has probably engendered the greatest concern among various industry sectors. Its inclusion has meant that the U.S. practice of allowing freedom of contract for the category of 'service contracts' continues to have a legal footing.

The impact of this provision could be significant. It is estimated that currently 90% of containerised cargo in the world moves under 'service contracts'. It would mean that the vast majority of the world's cargo could be shipped in a completely unregulated fashion for the first time since the early 20th century.

For those who oppose the Rotterdam Rules, the volume contract exemption from the Rules is the single most unacceptable part of these rules. They argue that if one seeks to bring back uniformity to carriage of goods by sea law why allow any such exemption? They believe that "opting-outs" are one of the egregious defects of the Rotterdam Rules and "volume contracts" are perhaps the opting-out with the broadest effect.

## **Delivery without the surrender of the negotiable transport document**

Even if delivery of the goods without the surrender of the negotiable transport document requires an express statement in the document according to art. 47(2), it may mislead the role of the negotiable transport document (bill of lading). One of the most important functions of the bill of lading is to enable the parties to transfer title to the goods in transit by the mere transfer of the bill of lading or its electronic equivalent. In turn, the ultimate consignee must have a guarantee that he, and nobody else, will actually receive the goods.

Those who oppose the Rotterdam Rules argue that delivery without the surrender of the negotiable transport document under art. 47(2) will create confusion in sales contracts. They also argue that art. 47(2) is unacceptable and that it constitutes an erosion of the value of the bill of lading as the most important document used in international trade.

## **5. The likelihood for harmonization**

When one considers the success of a convention to achieve the purpose of harmonization, two important factors matter:

- (1) **The contents of the Convention itself:**
- (2) **The will of the States that are members of the international community.**

- (1) **The contents of the Convention itself:** whether the contents of the itself reflect unification or harmonization of the existing regimes, which is acceptable to the overwhelming majority of states and Stake holders:

To elaborate more on this point, we need to look back at the drafting history of the Rotterdam Rules. Although the Hamburg Rules entered into force in 1992 and 34 States are parties to it, the major commercial and maritime powers have not adopted it. Despite having entered into force, this convention is one of UNCITRAL's disappointments because it has not been able to replace the Hague-Visby Rules as the dominant convention for the international carriage of goods by sea.

On the other hand, the Hague-Visby Rules, despite their widespread applicability, do not satisfactorily meet the world's needs for a modern, uniform law on the subject. Although they represent the most popular liability regime, important parts of international trade are simply not covered. The United States, whose international trade represents nearly a quarter of the world's total, continues to adhere to its COGSA 1936, an enactment based on the original Hague Rules. China, with roughly a quarter of the world's population and an emerging economic giant of the contemporary world, operates under a Maritime Code that combines selected elements from the Hamburg and Hague-Visby Rules with unique Chinese provisions. Even a number of Hague-Visby countries have adopted non-uniform variations of the international convention, some of them adopting the Hague-Visby and Hamburg hybrid regimes, thus further undermining international uniformity.

In view of this confused international situation, which is practically unsatisfactory, UNCITRAL has reentered the field in an attempt to find an acceptable solution. The Hague and Hague-Visby Rules were largely the product of the *Comite Maritime International* (CMI), an influential non-governmental organization. The Hamburg Rules, on the other hand, were a product of the UNCITRAL, a United Nations institution. Many observers viewed the CMI and UNCITRAL as rivals, at least on this issue. But UNCITRAL's return to the field was in active partnership with the CMI. For more than five years, the two organizations appeared to be fully cooperative allies seeking to develop a new international convention that will be widely acceptable to the world community.

Based on the Draft Instrument of the CMI, the UNCITRAL commenced its project on convention on carriage of goods wholly or partly by sea. The primary aim was to replace the existing fragmented COGSA regimes with a single regime, adopted by a concerted effort. What is entirely different from the drafting of the previous COGSA regimes, is that the Rotterdam Rules were the result of a joint effort of the CMI, which drafted the Hague and the Hague-Visby Rules and an NGO thought to be dominated by ship owners interest, and the UNCITRAL, which drafted the Hamburg Rules and arguably thought to be in favour of shippers interest. Apart from that, various stake holders and interested organizations were invited and allowed to express their views during the negotiating sessions.

The resulting convention, therefore, could generally be regarded as a unified law, although there may be arguments to the contrary.

Despite all these efforts, it is to be admitted that the Rotterdam Rules are not perfect. This situation is to be expected of a convention of this kind, which needs to accommodate the demands of various stake holders. Besides, all of us are aware that there are indeed serious criticisms against the Rules by some Stake holders. If we look at them objectively, we can find that some criticisms like the one against "volume contract" are difficult to ignore. This volume contract exemption was included due to much pressure by the United States America and it is hoped that the same country will use its pressure again to gain support of the Rotterdam Rules.

## **(2) The will of the States that are members of the international community**

Sixteen States signed the Rotterdam Rules on the day for signing ceremony (23 September 2009) and five more States signed the Convention within a month of its opening for

signature. For those who were in support of the Rules, it was taken as a very good Start. But for those who were against the Rules, it was a cool reception and they even said that the coming out party for the Rotterdam Rules could already be their farewell. Luxembourg signed the Convention on 31 August 2010, making the total number of signatories to twenty two.

Of the 22 signatories to date, only the United States of America and eight European countries (excluding the landlocked state of Luxembourg) of course are to be reckoned with when we talk about maritime transport. But the remaining twelve are all African countries. No State from Asian-Pacific or Latin America has signed the Rotterdam Rules.

The general view of the other states that did not sign the Convention was that they wanted to take more time to thoroughly study it before deciding to sign or not to sign. Prior to attending the signing Ceremony, Canada's Ministry of Transport announced that it would not be signing on to the Convention. The UK, Australia, Germany and Finland are among nations taking the same position. Japan indicated that they may also not sign.

The position of China has been to indicate support but a final position is still far from certain. India's view is that since the Rotterdam Rules make vital changes to the old Hague regime and also introduce a number of new things, a thorough study would be required before making a decision to sign or not to sign. The Australian view is that looking from the current Australian version of the Hague-Visby Rules, shippers will be substantially worse off under the Rotterdam Rules.<sup>1</sup> There has been considerable international debate about the acceptability of the new Convention and Australia and New Zealand have not supported it to date.

It is unlikely that many other states will make their decision until it is established if and to what extent the Rotterdam Rules obtain global acceptance, particularly from maritime trade nations.

In any case, at the time of the signing ceremony, many were fairly optimistic about the future of the Rules. However, one can see the losing of momentum with time and the year 2010 witnesses the signing of the Rotterdam Rules by only one more State (a small landlocked State of Luxembourg on 31 August 2010).

It is important to recall that ratification, not signature, is what counts: the Convention will come into force one year after 20 nations have deposited their instruments of ratification. Although there are 22 signatories, it is not very sure that all these countries will ratify it. The ratification process itself takes a lot of time and these countries also have to cope with dissent from their own stakeholders. Even if the Rotterdam Rules are finally ratified by a sufficient number of countries and thus come into force, it remains to be seen how well these Rules can attract the acceptance of the overwhelming majority of States and achieve the aim of harmonization.

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<sup>1</sup> Alexandra Parker, The Rotterdam Rules: A Step Backwards for Australian Shippers?, Logistics Association of Australia Ltd.



Even though the convention itself is so good, the aim of harmonization will never be achieved if the majority of the States are not willing to support it due to political reasons. In this respect, what is crucial is the position of the US that spearheaded the drafting of the Rotterdam Rules. The speedy ratification by the US would definitely be a moral boom for the other States to follow.

## **6. Conclusion**

Again we have to admit that the Rotterdam Rules are not perfect. There may well be considerable difficulties to get a broad international consensus on the innovations contained in the new Convention. However it is vital for the maritime industry to achieve uniformity and it is crucial to convince take holders that it is a win-win situation for them to adopt the Rules.

Failure to adopt the Rules will most probably mean that the industry will come up with or adopt "regional regimes in different parts of the world." This would be the very opposite of what the international shipping industry should be seeking to achieve.

The Rotterdam Rules are an important step towards bringing much-needed uniformity to this area of the law. Only time will tell, however, whether the Rotterdam Rules will join the ranks of the world's most important international treaties or go the way of the Hamburg Rules into relative obscurity.