Seminar: The Rotterdam Rules

A good or bad deal for your international shipments?

Openings remarks form the chair

Prof Dr Eric Van Hooydonk,
Professor of Law, University of Antwerp
Rotterdam Rules
- YES or NO?

Highlights the key provisions and compares the proposed Rotterdam convention with the existing Hague/Hague/Visby Rules

Craig Neame,
Partner, Holman Fenwick & Willan
ROTTERDAM RULES
Convention On Contracts For The International Carriage Of Goods Wholly Or Partly By Sea

Craig Neame, Partner
22 June 2009

Agenda

1. Current Position
2. Overview of new convention
3. Where the convention applies
4. Interaction with other conventions
5. Liability Provisions
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1. Current position - overview

- Multiple ocean regimes
  - Hague
  - Hague-Visby
  - Hamburg
  - Nordic Maritime Code
  - National laws
  - Specially negotiated contracts

- Generally carrier friendly
  - Ocean carriers
  - Freight forwarders

- Insurance
  - Marine “all risks” cargo insurance
  - P&I Clubs
  - Freight liability insurers
  - SOL cover and forwarder extended cover
### 1. Current position – application

- Hague-Visby only compulsory if bill issued
- Hague-Visby generally governs port to port only
- After ship’s rail: freedom of contract or national legislation
- Network liability regime in most bills of lading
- Difficult to bring direct claims against terminals
- Difficult to bring direct claims against alliance partners or feeders

### 1. Current position – liability

- Due diligence before and on commencement only
- Error of navigation defence
- 2SDRs/kilo or 666.67/package
- 1 year time bar for direct claims
- Can negotiate up **but** not down
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2. Overview of new convention

- UNCITRAL
- 18 Chapters & 96 Articles
- Very ambitious in scope
- Arguably more cargo friendly
- But probably not very user friendly
- Can negotiate up or down
3. Where the convention applies

Article 5(1) - General scope of application

“...applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

(a) The place of receipt;
(b) The port of loading;
(c) The place of delivery; or
(d) The port of discharge.”
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4. Interaction with other conventions

Article 27 – Carriage preceding or subsequent to sea carriage

"When loss of or damage to goods, or ... a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading ... or solely after their discharge ... the provisions of this Convention do not prevail over those provisions of another international instrument that..."

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier’s liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument."
Agenda

1. Current Position
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3. Where the convention applies
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5. Liability Provisions

- General position
  - Balance of risk generally shifted to carriers
  - Single liability regime covering all modes
  - Seaworthiness throughout for ship, crew, holds and containers
  - Negligent navigation abolished
  - Time bar extended to 2 years
  - Limits increased to 3SDRs/kilo or 875/package

- Volume contracts
  - Almost complete freedom of contract
  - Seaworthiness for ship and crew only
  - Can increase or decrease limits
  - Can add or remove defences
Final thoughts

- Likely to increase or decrease cost of trade?
- Attractive to big shippers and big carriers/forwarders?
- Will the courts come to the aid of small shippers/forwarders?
- Effect on the insurance market?
- Likely to increase or decrease disputes?
- What are the alternatives?
Highlights some of the key problem areas

Mark Booker,
legal advisor to ESC

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**Agenda**

- Introduction
- What shippers expected from a new regime
- Uniformity
- Ease of use
- Freedom of Contract
- Shipper obligations
- Carrier obligations
- Volume contracts
- Conclusions
Panel Debate


The Clecat Secretariat for the European Shippers’ Council
June 22nd 2009
Antwerp - Belgium
WHOSE INTEREST

- CLECAT represents European freight forwarders, logistics service providers and Customs agents
  - Neutral towards all transport modes, but main users of maritime services
- Therefore one of the parties most affected by entry into force of RR’s
- CLECAT Members, through FIATA devoted time and energy in monitoring the process all along
- The message coming from European Members is clear and unmistakable:

  shadows prevail over light = not good enough

WHY NO INTEREST

- No benefit over Hague, Hague-Visby or Hamburg rules
- Extremely complex legal instrument with no trade-offs
- Uncertainty, both in legal and judicial terms
- Can become additional liability regime side by side with others ➔ more confusion
- Local or regional interpretations may nullifying harmonisation or simplification
WHO BENEFITS & WHO DOESN’T

- Benefits for maritime carriers
  - limitations to liability only for carriers
    - the right to limit liability not only for loss of or damage to cargo, but also no liability for delay, unless agreed
  - Shippers or freight forwarders, on the contrary, are liable without limitations for mistakes
- Freedom of contract is fine, but... are volume contracts perhaps a step too far?
  - Ship-owners can contract out (volume contract), but forwarders unlikely to do so = no back-to-back protection
    - Insurers being unable to accept the contract, leaving both freight forwarders and their customers without protection.

S.W.O.T. OF THE RULES

- Hitting problems prow on
  - The RR are too complex (much longer than others + full of exceptions) to be practical
  - Insurance and protection will become more expensive
  - Cargo terminals have more sophisticated rules that may be incompatible, what about state-owned terminals?
  - Imperfect network system = uncertainty in prevailing rules
  - Conflicting conventions and/or private contracts will increase number, cost and time of litigations

- Negotiable or non-negotiable
  - Carriers have released negotiable bills for centuries, but who can tell if the bill is negotiable now
  - Not mandatory to issue a negotiable bill, but if a customer wants it, it must fulfil the promise
  - RR accept that a document is called “negotiable” when in fact it is not!
    - So long, letters of credit...
CONCLUSIONS

- Member States and EU institutions are urged NOT to ratify this convention
- The world shipping community and trade in general deserve a better instrument based on the following principles:
  - as simple and universal as possible
  - with few, carefully weighed exceptions
  - serving all parties in contract without interfering with third parties
  - bearing realistic limitations of liabilities for all parties concerned

Thank you – www.clecat.org

Rotterdam Rules
Antwerp 22/06/2009
Rotterdam Rules
A Good or bad deal for shippers ?

1 foreword and 3 questions :

What is the level of shippers’ knowledge on the Rotterdam Rules (and more generally on the rules governing the international maritime transport).

1 / Will the Rules permit a rebalancing of the juridical relationship between carrier and shippers and will it help clarifying the maritime law (at least for shippers) ?

2 / Will the Rules secure Carrier / shippers relationships - Are there any real innovations in this perspective – is the contractual freedom the solution to all our problems?

3/ Will the Rules promote the development of short sea shipping and the motorways of the sea in Europe? More globally is this convention good for the European industrial world?

What is the level of shippers’ knowledge on the Rotterdam Rules (and on the rules governing the international maritime transport).

• shippers’ level of awareness on the “Rotterdam Rules” is close to zero, as is close to zero their awareness of the key concepts of this Convention.
• Since the mid 90ies the transport in general is more and more seen as an element of cost, and thus entrusted to purchasing specialists rather than Maritime experts with exhaustive knowledge.
• This ignorance and the lack of interest for the transport legal environment has also been observed at a broader level during the work of the UNCITRAL W.G..
  – European shippers were absent until the late 2005 and missed the first years of work.
  – the African shippers’ councils came out progressively in the discussion by having the status of official delegations,
  – only one American shippers’ association embedded into the official U.S. delegation, and deprived of their freedom of speech as such, has attended the works since the beginning.
  – No Asian or South American shippers have appeared, and very few shippers organisation have taken a positions vis-à-vis their government or national administration on this issue.
• In contrast the maritime world was strongly represented either as advisers in the national delegations or in numerous NGO (WSC, BIMCO, CMI, ICS and the P&I clubs etc.).
This chronic ignorance of the legal environment of the international maritime transport accounts for a large part with shippers positions.
Will the Rules permit a rebalancing of the juridical relationship between carrier and shippers and will it help clarifying the maritime

- Article 12 § 3 – Period of responsibility of the carrier can easily lead to the definition of a minimum period of the carrier liability “under tackle / under tackle”
- Article 13 on “Specific obligations”. Originally it was drafted to deal with the FIO terms. Its too vague drafting may easily negatively impacts what should be one of the carrier’s most substantial obligation to “properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods”.
- the Article 17 which deals with the principle of the carrier liability. This article actually ingrains the “excepted cases” that we thought condemned once for all to modernize the maritime law. It is complex, outdated and incidentally very detrimental to shippers:
- The Article 80 that institutes the freedom of contract is confusing. First It is mainly based on elements of common law: But it also contains some elements of American domestic legislation:

Will the Rules secure Carrier / shippers relationships - Are there any real innovations in this perspective – is the contractual freedom the solution to all our problems?

- the “error of navigation” is now dropped
- The Right of Control” has also been presented as a major innovation that should favours the shippers but it is of limited interest as it does not bring noticeable changes to what is presently done in practice.
- The increases of the carrier’s limits of liability are positive
- the “indemnity for delay” is welcome but it’s implementation may be proved difficult
- there is one thing shippers can’t consider as a positive innovation: “the contractual freedom” introduced by the Article 80
**Is the contractual freedom the solution to all our problems?**

- **the key to the contractual freedom “the volume contract”:**
  - 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. The specification of the quantity may include a minimum, a maximum or a certain range ».

- **The possibility to contract out of nearly all the provisions in the Rules by means of a volume contract represents the greatest of shipper’s concerns over the introduction of the Rotterdam Rules.**

- **The possibility to increase shipper liability and reduce carrier liability would represent a serious risk to shippers that were not completely aware of the implications.**

- **A volume contract entitles the carrier to escape nearly all the shipper-protective provisions usually contained in a maritime convention.**

- **Illusory safeguards**: to be binding the contract must:
  - contain a “prominent statement” that it derogates from the Rules
  - be “individually negotiated” or “prominently displays” the sections containing derogations

- **the position made to consignee is not secured**

- **The Fof C may lead to a disruption of the international trade by weakening the system of letters of credit.**

**Will the ROTTERDAM rules clarify the Multimodal carriage with a sea leg, and promote the development of SSS and the M of the S.**

- **the Article 26 “Carriage preceding or subsequent to sea carriage”:** the international conventions will override the Rotterdam Rules:
  - how a Chinese judge will understand the word “International” when having to deal with CMR

- **The references to national law applying to land carriage have been dropped, extending the range of situations where the Rules will apply by default.**

- **danger of an assimilation of the (road or rail) vehicle to a sea container (shipment on deck, shipper’s liability, limit of indemnity).**

- **CMR and CIM etc. should see their field of application preserved but only partially yet with a risk of interpretation.**

  Article 82 (d) precises that)” Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea”. This restriction should lead to discriminate against both general cargo and multimodal loading units shipments by river barges.

  Article 83 might also lead to a discrimination against certain multimodal transport units such as ”swap bodies”, “binnen – container”, or 45 ”wide pallet” as these modules are not in the scope of the CMR Convention (cf. Article 4). as they are unknown in the Convention on Road Traffic of 1949 amended in 1968.
CONCLUSIONS

The few shippers aware of the Rotterdam Rules and most of their representative associations in Europe therefore consider that the convention proposed to the ratification has missed an historic opportunity.

The Rules could have set the necessary provisions to balance shippers and carriers rights and obligations, actually they have not, thus preserving the historical advantages granted to the maritime industry.

The rules could also have modernized the maritime legislation in fully and clearly incorporating in the convention the consequences of 50 years of containerisation and the development of multimodal door to door transport by establishing a simple rule : Carriers are responsible for what they sell ! They have not either!

Instead of that, the Rules may constitute a serious peril for a vast majority of inexperienced shippers that could put them in a worth position than before 1924. The unlimited freedom of contract puts in danger a large number of shippers and sacrifices the positions of the consignees.

CONCLUSIONS

Finally the Rotterdam rules could have been the tool to promote the development of multimodal short sea shipping that Europe drastically needs to develop. They have not ! On the contrary the Rotterdam rules are only a mainly maritime instrument that does not meet the shippers expectations and their wishes to develop multimodal transport using a sea leg.

This failure makes more than necessary to work to the adoption of a (regional) European regulation to facilitate the emergence of intra-European short sea shipping.

Better having a supplementary regional legal system that works and helps to achieve this objective rather than implementing a may be someday harmonised global instrument that will be counterproductive.

**Shippers’ final conclusion is that the Rotterdam rules will not help the industry and do not deserve to be ratified.**
Coffee Break
Is Rotterdam a good deal for the international trade?

A view on the Rotterdam Rules from Maersk Line’s perspective

Kaare Kristofferson, Maersk
A View on the Rotterdam Rules From a Sea Carrier’s Perspective

Kaare Christoffersen
Maersk Line

I. Introduction
  > Current regimes

II. The Rotterdam Rules – Form and Forum
  > International Harmonisation
  > UNCITRAL

III. The Rotterdam Rules – Scope
  > Multimodal
  > Network Liability

IV. New Definitions and Concepts

V. The Contents of the Convention

VI. Conclusion
Thank you

Panel Debate
Efficient and sustainable freight transport as a goal of the European transport policy

European Commission, Unit TREN.B.3

Common European transport policy

Remove the obstacles at the borders between MS so as to facilitate the free movement of persons and goods

THE PRIME OBJECTIVES TO THAT END ARE TO:

✓ complete the internal market for transport,
✓ ensure sustainable development,
✓ manage funding programmes and spatial planning,
✓ improve safety and
✓ develop international cooperation.

Directorate-General for Energy and Transport
Keep Europe moving
Mid-term review of 2001 White Paper:

✓ Sustainable mobility
✓ Protection of the environment, energy resources and citizens
✓ Innovation
✓ International connectivity
✓ Co-modality:
  □ Complementary and efficient use of modes in an optimal European transport system
  □ Looking at each mode individually and their integration in logistics chains

Directorate-General for Energy and Transport

The 2007 EU Freight Transport Agenda: “Boosting the efficiency, integration and sustainability of freight transport in Europe”

✓ Freight Logistics Action Plan
✓ Communication on a freight-oriented rail network
✓ Communication on a European Ports Policy
✓ Commission Staff Working Paper « Towards a European maritime space without barriers » Action plan aimed at creating a maritime transport area without borders in Europe (21 January 2009)
✓ Commission Staff Working Paper on Motorways of the Sea

Directorate-General for Energy and Transport
Why a European Action plan?

- To increase Europe’s competitiveness and prosperity
- Face the growth in international and intra-Community trade
- Cross-border environmental and social impacts
- Optimisation potential of freight flows over medium and long distances
- Avoid market fragmentation
- Reduce Europe’s reliance on imported fossil fuels

Logistics Action Plan - encouraging multimodal transport as a drive for a competitive and sustainable freight transport system in Europe

- E-Freight and Intelligent Transport Systems
- Sustainable Quality and Efficiency
- Simplification of Transport Chains
- “Green” Freight Transport Corridors
- Urban Freight Logistics
- Vehicle Dimensions and Loading Standards
Main problems to be solved with the simplification actions

- There is an increased performance of multimodal door-to-door transportation
- There is no uniformity, legal certainty and predictability for the multimodal transport chains
  - international conventions
  - national legislations
  - (sub-)regional agreements
  - Contractual arrangements/industry solutions
- Transaction costs are increasing and the development of intermodalism is hampered
- The EC aims to facilitate the development of European trade and transport, and efficient supply chain management, by providing a:
  - cost effective,
  - simplified,
  - transparent,
  - predictable legal framework.

Transport documents

Important for establishment of liability claims regime, proves and suits
- Different documents
- Different contents
- Different functions
→ cost, time and confusion related

One document for the whole transport → could be a motive
For choosing multimodal way of transportation

Electronic international trade → electronic substitutes of paper documents → rules and procedures for their legal and court recognition
**Single transport document and liability for door-to-door transport**

- “In consultation with interested parties, the Commission will examine the details and added value of establishing a single transport document for all carriage of goods, irrespective of mode. The Commission will then consider making an appropriate legislative proposal.

- Assess the need for introduction within the EU of a standard (fall back) liability clause.

- Assess the need for a legal instrument to allow full coverage of the existing international, mode-based liability regimes over the entire multimodal logistics chain.”

**The UNCITRAL Draft**

- EC was an observer. MS were the negotiators.

- EC did not want to hamper the international efforts for uniformity of the maritime regulatory framework and took on the “wait and see approach”.

- But then the Convention evolved into a “sea+” one following the network approach and applying maritime liability by default.

- EU internal traffic is primarily performed by road, rail, SSS and inland waterways.

- EC tried to unify MS around a “disconnection clause” from the multimodal application of the Convention.

- The finally adopted by the General Assembly on 12 of December 2008 UNCITRAL Proposal was not conforming to the European Multimodal expectations.

- Therefore the Commission decided to pursue its work on a European multimodal instrument.
Initiatives towards harmonisation of transport documents and liability for multimodal transport

- 1980 UN Multimodal Proposal
- 2001- December 2008 UNCITRAL Proposal
- 1997 Commission Communication intermodality & intermodal freight carriage
- 1999 University Southampton
- 2001 IM Technologies Ltd the economic impact of carrier liability on intermodal freight transport
- 2005 Integrated Services in the Intermodal Chain (ISIC) Proposal
- 2007 Commission Communication freight transport logistics Action Plan

None of these initiatives had a successful outcome

Legal Study on multimodal transport documents and carrier liability

- Part I – Legal analysis of the existing situation
- Part II – Consultation

I. Outline of the existing situation
1) an identified need for multimodal transport
2) transport documents for multimodal transport
3) liability for loss, damage and delay
4) electronic transport documents
5) initiatives towards harmonisation of transport documents and liability for multimodal transport
6) initiatives towards electronic transport documents

II. Consultation of the MS and key industry stakeholders
1) written consultation based on a Questionnaire
2) interviews
Policy options analysed:

- **A** – status quo/no action
- **B** – opt-in network system
- **C** – modified network system
- **D** – opt-out uniform system
- **E** – pure uniform system

The sequence of steps to be taken according to the Consultants

- Documentation and liability issues are unavoidably entangled
- EC will firstly need to deal with the issue of liability and defer the issue of a single document to a later stage
- The dematerialisation and switch towards an electronic format should be dealt with simultaneously with the transport document issue
- The involvement of, and approval by the EU MS is vital if the EC is to take any further action.
- An involvement of the industry is even more essential
- Open discussion with the Secretariats of the international conventions should be maintained.
- A Working Group on Multimodal Liability to ensure further progress and dialogue
Workable Proposal for action at EU level from a Legal Perspective

EU 27 MS Convention providing for mandatory uniform rules except for the liability limits, where parties could contractually opt-out

- **Basis of liability**: fault-based regime
- **Liability limits**: Contractual freedom to expressly “assign” the multimodal contract for liability limits: rules of the assigned mode apply;
- **Default system** in the absence of an express contractual assignment:
  - in the absence of an express assignment, the rules of the “longest mode” apply;
  - in cases of disagreements as to which is the “longest mode”: 17 SDR/kg.

What next?

- The Commission will assign a preparatory IMPACT ASSESSMENT STUDY to assess the economic, environmental and social impacts of several policy options for action
  
  If the conclusions of the assessment are friendly enough to a European initiative….

- Then the EC will propose text introducing a single European document and liability regime for multimodal transport.
Thank you for your attention

http://ec.europa.eu/transport/logistics/index_en.htm
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- The Article 80 that institutes the freedom of contract is confusing. First it is mainly based on elements of common law; But it also contains some elements of American domestic legislation; The §3 says “A carrier’s public schedule of prices and services(…) is not a volume contract pursuant paragraph 1 of this article(…).”
- But there is also one element of French law; the “contract of adhesion”

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Shippers’ final conclusion is that the Rotterdam rules will not help the industry and do not deserve to be ratified.
Question and answer session
Chairman’s closing remarks

Prof Dr Eric Van Hooydonk,
Professor of Law, University of Antwerp

We would like to thank you for your attention and invite you for a reception in the lobby.