



ROTTERDAM RULES

KEY PROVISIONS

1. Scope of Application (Chapter 2) / Freedom of Contract (Validity of Contractual terms) (Chapter 16)

Essentially the scope of the Convention extends to contracts of carriage used in “liner” transportation (as defined in the Convention) in which the place of receipt and delivery and the port of loading and discharge of the goods are in different states and one of the states has ratified the Convention. It does not extend to charterparties or contracts for the use of or space on a ship such as slot charters. In order to accommodate the United States, parties to “volume contracts” (defined as contracts of carriage that provide for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time) are permitted to derogate from the Convention provided notice is given in accordance with strict criteria set out in the Convention. The Convention expressly provides that its scope does not extend to contracts of carriage in non-liner transportation other than to transport documents (which term includes bills of lading). This reflects the position under the Hague/Hague-Visby Rules.

The Convention is not limited to tackle-to-tackle and port-to-port movements but extends to multimodal contracts of carriage where there is a sea leg contemplated under the contract of carriage.

Where loss or damage occurs solely during multimodal carriage other than during a sea leg, the Convention will apply unless some other existing international unimodal instrument is compulsorily applicable (e.g. CMR) to the extent that the unimodal instrument contains provisions providing for a carrier’s liability, limitation of liability and time for suit. In such case the provisions of that instrument will apply - (Article 26). This arrangement is known as a network liability system, which mirrors the current interrelation between the Hague-Visby and Hamburg Rules with other international unimodal conventions and the existing structure of Club cover. It should be noted that the UNCITRAL Commission, after lengthy and protracted debate, ultimately declined to include an express provision acknowledging/permitting the continuing use of “through transport” documents, but expressly affirmed that this decision did not in any way signal a criticism of the practice. In other words, through transport carriage and documentation ought not to be affected by the Convention and will be subject to national law.

Concealed damage, that is where it cannot be determined on what particular leg the loss or damage occurred, will be subject to the Convention limits of liability.

2. Electronic Commerce (Chapter 3)

The Convention provides that an “electronic record” of a contract of carriage or other information in electronic form has the same effect as a “transport document”, or its paper equivalent such as a bill of lading. It is intended that by including such provisions the Convention will be equally applicable to electronic trading.

3. Obligations and Liabilities of the Carrier for Loss Damage or Delay (Chapters 4 and 5)

(i) Period of Responsibility

The carrier is responsible for the goods, subject to the provisions of the Convention and in accordance with the terms of the contract of carriage, from the time that the carrier or a performing party receives the goods to the time that they are delivered.



(ii) Obligations

The current wording of the Convention is similar to that of Art III.1 and 2 and IV.1 of the Hague-Visby Rules to the extent that the carrier is obliged to properly and carefully receive, load, handle, stow, carry, keep, care for and unload the goods and to exercise due diligence in relation to the seaworthiness of the vessel, its manning, equipment and fitness for the carriage of cargo. However unlike the existing Hague/Hague-Visby Rules regime the obligation to deliver is express rather than implied and the due diligence obligation is not restricted to the period before and at the beginning of the voyage but is a continuing one throughout the voyage.

The Convention provides however that the carrier and shipper can agree that the loading, stowing and unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee i.e. FIOS terms.

(iii) Liabilities

The carrier's liability for loss, damage or delay remains fault based but is considerably more extensive than the existing liability regimes, due largely to the combination of the loss of the nautical fault exception and the extension of the obligation to exercise due diligence to make the ship seaworthy throughout the voyage. The Convention retains a list of exceptions similar to, but more extensive than, that contained in the Hague/Hague-Visby Rules. They are in the form of presumptions of absence of fault on the part of the carrier rather than exonerations from fault, and with the onus on the carrier to sustain such presumptions and prove the absence of his fault. The expanded list of exceptions includes: "hostilities", "armed conflict", more topically, "terrorism" and "piracy" and, importantly, an exception for "reasonable measures to avoid or attempt to avoid damage to the environment". The major fundamental difference is the omission in this Convention of the nautical fault exception (neglect or fault in the navigation, or management of the ship).

The Convention sets out the method of allocating the burden of proof between claimant and carrier when determining liability for loss, damage or delay. It follows to a great extent the current Hague/Hague-Visby Rules test (proof of loss or damage by the claimant; establishment by the carrier of absence of fault or proof of the operation of one of the presumptions; proof of breach of the seaworthiness obligations by the claimant; proof of exercise of due diligence by the carrier) applied by the United Kingdom and United States and a number of courts in other jurisdictions when interpreting the liability provisions of the Hague-Visby Rules. The Convention also provides that the carrier is only liable for loss, damage or delay to the extent that its breach of its obligations resulted in the loss damage or delay.

The carrier, although liable for physical loss or damage caused by delay, is not liable for pure economic loss arising out of delay, as was first proposed, unless the time for delivery is the subject of agreement between the carrier and shipper. The agreement it seems need not necessarily be express but can be implied. Where the carrier is liable for economic loss he may limit his liability to 2½ x the freight but subject to a maximum overall cap of the compensation limits for physical loss or damage (Article 60). Any liability the shipper may have for delay will not be governed by the Convention but will be left to national law.

Elimination of the nautical fault exception, coupled with the extension of the carrier's due diligence obligations to the whole of the voyage as provided for in the Convention will, it is believed, substantially alter the allocation of risk between carrier and cargo in favour of cargo and will accordingly result in an increase in the carrier's potential liability.



It should be noted with regard to carriers' liabilities generally, that these may also be increased by reason of the provision in the Convention that statements in a non-negotiable Transport Document (such as a sea waybill) will have conclusive evidential value where such a document indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee in good faith (Article 41 (a) (ii)). This is a major change from the long-standing position that statements in these documents would have prima facie evidential value and that only statements in a negotiable document would have conclusive evidential value and this only when they are transferred over to a third party acting in good faith.

4. Maritime Performing Parties (Chapter 5, Article 19)

The Convention introduces the concept of a "maritime performing party", that is a party other than the contracting carrier who performs any part of the sea leg or provides services ancillary to the sea leg. Stevedores and terminals acting normally as sub-contractors of the carrier would be "maritime performing parties" as would sea carriers performing under say an NVOCC transport document e.g. a bill of lading, now "Transport Document". Such a performing party is subject to the same liabilities and responsibilities as the carrier but essentially only whilst it has custody of the cargo. Nevertheless the carrier remains liable for the whole of the performance of the contract of carriage. Sub-contractors who perform a non-maritime leg such as road hauliers or rail operators would be excluded from the operation of the Convention. The fact that the carrier may be liable under the Convention, for the acts of a "maritime performing party" represents a potential increase in the carrier's exposure in much the same way as the "actual carrier" concept introduced in the Hamburg Rules. Carriers may need to consider strengthening where possible their contractual rights of recourse against these other parties in the future.

The Convention contains a "Himalaya" provision extending the defences and limitations available to the carrier, to maritime performing parties.

The Convention also now implicitly preserves the right of the carrier and shipper to enter into through transport arrangements in that they are not expressly excluded by the Convention.

5. Deviation (Chapter 6, Article 24)

Article 24 specifically provides that where a deviation constitutes a breach of the carrier's obligations, it shall not of itself deprive a carrier or a performing party of its right to rely on statutory and contractual defences or to limit its liability under the contract of carriage. The Hague/Hague-Visby Rules contain no such provision, which has led to a lack of consistency in the approach adopted to deviation by courts in different jurisdictions.

6. Obligations and Liabilities of the Shipper (Chapter 7)

The text provides that the shipper is obliged to deliver the goods in a condition fit for carriage and to provide the carrier with relevant information, instructions etc in order for the carrier to fulfil his obligations.

The shipper's liability to the carrier for loss or damage is generally fault based and the onus of proving loss lies with the carrier. However there are special rules for dangerous goods and documentary inaccuracies in relation to such goods. The shipper is under an obligation to inform the carrier of the dangerous nature of goods and to mark or label such goods in accordance with any applicable law or regulation. If the shipper fails to comply with his obligations he is strictly liable for all loss or damage which may result and is not entitled to limit.



7. Delivery of the Goods (Chapter 9)

Article 47 provides a mechanism under which a carrier can deliver the goods without production of the original transport document in prescribed circumstances, where the transport document expressly states that the goods may be delivered without production.

However the mechanism is hedged with caveats and does not give total protection to a carrier, in particular if a third party has acquired rights against the carrier before delivery, of which the carrier is most unlikely to be aware. Accordingly, the practice of the carrier requiring a letter of indemnity before delivering without production of the transport document is unlikely to change.

8. Limits of Liability and Time for suit (Chapters 12 and 13)

The Convention provides for a package and weight-based limitation system as is the case in the Hague/Hague-Visby Rules. The monetary limits are 875 SDR per package and 3 SDR per kilo, in excess of both the Hague/Hague-Visby and Hamburg Rules limits (see Appendix).

As with Hague-Visby the carrier loses his right to limit if the loss, damage or delay results from a personal act or omission done with intent or recklessly knowing that the loss or damage would probably result. The carrier also loses his right to limit if he carries goods on deck in breach of an express agreement to carry them under deck.

The type of claims in respect of which the Carrier may claim the right to limit has also been expanded to now include claims brought in tort and bailment and also misdelivery claims, by virtue of the reference in Article 59.1 to “liability for breaches of its obligations”. This is wider in scope than the parallel provision under the Hague/Hague-Visby Rules, which limited the right to limit to claims for loss or damage related to the goods.

Time for suit has been extended from the Hague/Hague-Visby 1 year prescription period to 2 years (Article 62.1).

9. Jurisdiction and Arbitration (Chapters 14 and 15)

Jurisdiction and arbitration provisions relating to claims are included in the Convention. Such provisions are contained in the Hamburg Rules but not in Hague-Visby.

(i) Court Jurisdiction

The text provides a claimant with a wide choice of jurisdictions connected with the carriage namely domicile of the carrier, place of receipt, delivery of the goods, or load / discharge port, in which to bring claims. The Convention also prevents a carrier from commencing pre-emptive proceedings. Although parties to a contract of carriage can agree a choice of jurisdiction in the contract of carriage, such a choice does not have primacy, even if exclusive, unless contained in a volume contract, when it must satisfy a number of specified criteria. However, most importantly a state must “opt-in” to the jurisdiction provisions for them to have effect.

Since the EU essentially gives effect to choice of jurisdiction clauses in certain categories of contracts which would generally include contracts of carriage (Council Regulation No 44/2001), it is most unlikely that the Member States will opt-in. The United States however is very likely to do so.



(ii) Arbitration

The arbitration provisions provide that the parties to a contract of carriage can agree that disputes relating to the carriage of goods under the Convention can be referred to arbitration and that the arbitration proceedings shall take place either as agreed in the arbitration agreement or at the option of the claimant in any of the jurisdictions specified under the jurisdiction provisions, again unless contained in a volume contract, when the choice of place of arbitration will have primacy.

However, it is expressly provided that nothing in the Convention will affect the enforceability of an arbitration agreement in a contract of carriage in non-linear trade, which is subject to the Convention only because it was issued pursuant to a charterparty. Clauses reflecting such an arbitration agreement should be clearly drafted.

The arbitration provisions are also subject to an “opt-in” by States in the same way as the jurisdiction provisions.

10. Entry into Force (Chapter 18)

The Convention will enter into force 12 months after ratification by 20 states.

Appendix – Comparative Limits

Convention and US COGSA Limits	SDR unless shown otherwise						
	Hague/Hague-Visby	Hamburg	CMR (Road)	COTIF/CIM (Rail)	Montreal (Air)	US COGSA	Rotterdam
Package Limit	666.67	835				\$500 or Customary freight unit	875
Weight Limit	2	2.5	8.33	17	17		3