



ROTTERDAM RULES

REVIEW

Introduction

The development of the new Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, (the “Convention”), governing the carriage of goods by sea is now completed. It is now called the Rotterdam Rules. The Convention is intended not only to replace the Hague/Hague-Visby and Hamburg Rules but also the US Carriage of Goods by Sea Act 1936, and other domestic and regional legislation relating to the carriage of goods by sea. Its text, which is sponsored by the United Nations Commission on International Trade Law (“UNCITRAL”), was finalised by UNCITRAL Working Group III at its 21st session held in Vienna between 14 and 15 January 2008. It was considered by the UNCITRAL Commission between 16 June and 3 July 2008 in New York and approved by it with a mandate for it to be sent to the UN General Assembly for adoption. Approval by the 6th Committee of the 63rd Session of the UN General Assembly (the UN Legal Committee) took place in October 2008 and a draft resolution was forwarded to the UN General Assembly in November 2008 urging adoption. The UN General Assembly adopted the Convention on 11 December 2008. A ceremony for the opening for signature of the Convention was held on 23 September 2009 in Rotterdam.

A more detailed summary of the key provisions of the new Convention can be found in our publication **ROTTERDAM RULES KEY PROVISIONS** which is available on our website together with the full text of the Convention.

Overview

The Convention is designed to legislate not only for international maritime carriage of goods but also for international multimodal carriage of goods, where a maritime leg is provided for in the contract of carriage. It is best described as a “maritime plus” instrument, which explains much of the new terminology in the Convention as well as changes to some of the traditional terminology and familiar terms, so that for example, “bills of lading” and “sea waybills” now fall within the general term “Transport Document” in this Convention.

If ratified, the Convention will significantly increase the liability of shipowners and maritime carriers in respect of the carriage of cargo. In particular the long established exception of error in the navigation or management of a vessel (the nautical fault exception) will be lost in its entirety. The obligation to exercise due diligence in relation to the seaworthiness of a vessel has been extended to the duration of the voyage rather than restricted to before and at the commencement of the voyage as under the Hague/Hague-Visby Rules and the limits of liability per package or unit of weight have been significantly increased beyond Hague-Visby, US COGSA and Hamburg Rules limits – see Appendix attached. The liability of shipowners and other maritime carriers for the negligence of so-called maritime performing parties such as sub-contracted sea carriers, stevedores and terminals will be governed by the Convention.

Although it is not at present possible to quantify the financial impact of these increased liabilities, there can be no doubt that shipowners and their P&I insurers will see a substantial increase in the cost of cargo claims if the Rotterdam Rules are widely adopted.



The increase in liability for sea carriers will not be welcome for shipowners and operators, but the Convention contains a number of new and positive features. Its scope will extend to door-to-door carriage as well as tackle-to-tackle/port-to-port carriage and many of the beneficial aspects of existing conventions and regimes are retained. Specifically, it retains the existing concept of network liability, whereby liability and the applicable limits of liability for loss of and damage to the goods occurring before or after the sea-leg will be determined by any unimodal international instrument compulsorily applicable to the relevant mode of transport where the loss or damage occurs (as, for example, in the Convention on the Contract for the International Carriage of Goods by Road (CMR)). This concept was preferred to the alternative, which was originally supported by a number of states, of having a regime of uniform liability under which the same scope and the same limits of liability for loss and damage would apply irrespective of whether the loss or damage occurred on the sea or a land leg. There was concern that, under this latter approach, it was likely that the limit of liability adopted would be the highest of the relevant unimodal Conventions (e.g. the Convention Concerning International Carriage by Rail (COTIF-CIM) – 17 SDR per kilo). There was also concern as to whether a single liability regime could effectively be applied to modes of transport involving fundamentally different risks.

The Convention has retained the concept of fault-based liability found in the Hague/Hague-Visby Rules, although standards and burdens of proof overall are more onerous for the carrier. The new Convention looks forward by making provisions for electronic commerce. It also allows parties greater freedom of contract in the liner trade.

In the same way as in existing conventions it will apply to transport documents, such as bills of lading and sea waybills, issued both in liner and in non-liner trades. In line with the Hague/Hague-Visby Rules it will not, however, apply to charterparties whether used in liner or non-liner transportation. 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 accordingly be subject to individual states’ national legislation.

The new Convention deals with jurisdiction and arbitration, and the relevant provisions are essentially based on the overly restrictive approach of the Hamburg Rules. Under the Convention cargo owners are effectively able to choose from a number of jurisdictions the court where they can sue the carrier and exclusive jurisdiction agreements contained in contracts of carriage largely do not have primacy. However the provisions are subject to an “opt-in” by States and it is most unlikely, for instance, that European Union States will “opt in”. It is however very likely that the United States of America will. The ability of cargo owners to choose from a number of jurisdictions is likely to lead to greater uncertainty for carriers and insurers and increased legal costs, as the courts of countries unfamiliar with such issues are asked to decide test cases arising under the Convention.

The new Convention is an ambitious project which seeks to codify almost all aspects of maritime carriage. There seems little doubt that, if it is not ratified, the status quo of existing regimes will not remain, the likelihood being that the EU and US would enact their own domestic legislation. Indeed the European Commission, encouraged by the European Shippers Council, has made no secret of its desire to develop a multi-modal transport regime applicable either to multi-modal carriage between Member States or possibly international multi-modal carriage where the commencement of or destination of the carriage is in a Member State. While advising the International Group of P&I Clubs (IG), the International Chamber of Shipping (ICS) and the European Community Shipowners’ Associations (ECSA) that it remains open minded in its approach to the question of the desirability of a European multi-modal convention and will consult fully before reaching any decision, the European Commission has publicly attacked the Rotterdam Rules and stated that they do not conform with European multi-modal expectations. It would seem therefore more likely than not that the Commission will take steps to draft its own multimodal solution.



Such proliferation of national or regional regimes would inevitably lead to a lack of uniformity and conflicts between liability regimes across the world. The cost of such a circumstance is impossible to quantify but it would have to be taken into account when considering the full impact of the new Convention's increased liability exposure for shipowners and carriers. It is also reasonable to conclude that the European Commission's hostility towards the Rotterdam Rules is a strong indication that any steps it may take to implement a multi-modal regime will seek even greater liability on maritime carriers than that contained in the Rotterdam Rules.

ICS and other shipowner organisations such as ECSA, BIMCO and the World Shipping Council (WSC) are of the view that on balance the Convention is broadly acceptable from a carrier's perspective. In light of this, and their concerns at the likely proliferation of regional and domestic legislation if the Convention is not widely implemented by major trading nations, they have adopted a policy of actively encouraging administrations to ratify the Convention through their members, and in the case of ICS their national shipping association members.

Outlook

Whether and when the draft Convention will come into force will, as usual, depend on the ratification process and in particular, which states ratify in the early stages. The United States delegation has participated very actively in the drafting process and it appears that a significant body of US carriers and shippers support the latest draft (notably the WSC and the National Industrial Transportation (NIT) League representing US shippers). Early ratification or incorporation into domestic law by the US may cause a significant number of other states to follow suit. The number of ratifications required in order for the Convention to come into force has been set at 20. If the Convention is to have any real impact it will need to be adopted by a large number of states. In this regard it is worth noting that approximately 90 states have ratified the Hague/Hague-Visby Rules but only 34 the Hamburg Rules (the latest ratification being in 2008) and in the latter case no major trading nations.

Industry's Contribution

The Clubs have worked in close co-operation with the ICS and BIMCO to put forward the industry position at the meetings of the UNCITRAL Working Group III. The overall strategy has been to seek to emphasise the importance of allowing carriers and cargo owners reasonable freedom to contract into or out of the new Convention and to underline the need to have a liability regime which provides a realistic allocation of risk between ship and cargo both in today's terms and in the future. Greater success has been achieved in limiting the mandatory application of the Convention than in resisting the imposition of greater liability on the carrier. It should be noted that although carrier interests argued strenuously for its retention, the loss of the nautical fault exception was perhaps almost inevitable since the great majority of states (supported by cargo interests) have long considered it outmoded in light of modern navigational and communication aids. Apart from this, however, the catalogue of exceptions has remained virtually unchanged and indeed, it has been expanded to now also include "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". It is nonetheless true however that Governments continue to view the bargaining position of the average carrier as stronger than that of the average cargo owner and it has proved difficult to persuade them not to modify existing liability regimes accordingly.

The standard for P&I Cover

Club cover for liability in respect of cargo is based on the relevant contract of carriage being subject to terms no less favourable than the Hague/Hague-Visby Rules. The Club's Cargo Rule (Rule 2, Section 16 proviso (a)) provides as follows:



“.....there is no cover in respect of liabilities which would not have been payable by the Member if the contract of carriage had incorporated the Hague Rules, the Hague-Visby Rules, or similar rights, immunities and limitations in favour of the Carrier. There is no cover in respect of liabilities arising under the Hamburg Rules unless the Hamburg Rules are compulsorily applicable to the contract of carriage by operation of law.”

Club cargo cover is based on the liability regime set out in the Hague/Hague-Visby Rules, principally because it is recognised that this has for a long time been the accepted standard according to which the majority of carriers by sea and cargo owners contract commercially, when contractual terms are not imposed by law. Further, the Hague/ Hague-Visby Rules have been ratified or, (as in the case, for example, of the United States Carriage of Goods by Sea Act 1936) adopted, as the basis for domestic legislation by a substantial number of states and, in particular, by major trading states.

It is worth remembering in this respect that when the Hamburg Rules came into force, following ratification by 20 states, the Clubs did not substitute them for the Hague/Hague-Visby regime as the standard for cargo cover, partly because those states ratifying the Hamburg Rules have not to date included major trading nations and partly because there was no commercial appetite within the shipping industry for doing so.

The Rotterdam Rules have been open for signature since 23 September 2009 and will enter into force 12 months after ratification by 20 states. The issue which will arise is to what extent P&I cover should be available for liabilities incurred by Members pursuant to the Rotterdam Rules.

The provisions of the new Convention would normally become compulsorily applicable by law in the relevant state where that state either ratifies the Convention and the Convention has entered into force or enacts its provisions by other means into its domestic law (e.g. US COGSA). Under the terms of the current Club Rules, the Club would indemnify a Member in respect of cargo liabilities arising compulsorily by law under the new Convention, even if those liabilities would not have arisen if the contract of carriage had been subject to Hague/Hague-Visby Rules or similar rights and immunities in favour of the carrier. This is currently the position in respect of liabilities arising under the Hamburg Rules.

The position would be different if the Member were to voluntarily incorporate the provisions of the Rotterdam Rules into a contract of carriage. Applying the same principle as applies to the voluntary incorporation of the Hamburg Rules into contracts of carriage, the Club would not expect to cover liabilities arising under the Rotterdam Rules in excess of those which would be covered pursuant to the Hague/Hague-Visby Rules nor where the contract of carriage is on terms less favourable to the carrier than those in the Hague/Hague-Visby Rules

At this stage it is not clear which states, and particularly which major maritime trading nations, will ratify the new Convention, or otherwise incorporate it wholly or in part into their domestic law. Equally, it remains to be seen to what extent carriers will want to adopt the Rotterdam Rules as the standard for their carriage terms, and there may be differing opinions from those engaged in liner shipping as opposed to other sectors. Whether and, if so, when the Group Clubs will consider it appropriate to replace the Hague/Hague-Visby Rules with the Rotterdam Rules as the standard for P&I cover, in terms of their voluntary incorporation into contracts of carriage, is likely to depend mainly on how ratification and incorporation of the new Convention into domestic law progresses and, of course, on the views of the Clubs' membership as a whole. It will be important for the Clubs to keep the matter under regular review.

In the meantime, as is the case today, a Member wishing to be covered for liabilities which he has voluntarily accepted and agreed beyond the normal standard of the Hague/Hague-Visby Rules, may ask his Club to arrange cover for the additional liabilities on special terms by agreement.



Appendix – Comparative Limits

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