

ROTTERDAM RULES

A Bluffer's Guide

Apart from sitting down and ploughing through the 96 Articles, these comments are based to a large extent on papers read at the 2009 General Assembly of the Association Mondiale de Dispatcheurs by Professor Hannu Honka, Professor Berlingieri (both senior figures at CMI) and Dr Regina Asariotis (Unctad) and various commentaries in the press. Essentially this is a "bluffers" guide which I hope will help identify some of the key issues, but should not be relied upon for serious legal advice.

I have taken the Rules pretty much as face value – if you drill down into a close consideration of the wording, a number of difficult legal points arise which are currently being argued over by lawyers and will only be resolved by the Courts.

1) SCOPE

The Convention applies if the place of receipt and delivery and/or place of loading and discharge are in different States and any one of the above four is in a Contracting State.

There had been so much emphasis on the liner trades that I was uncertain as to the position regarding non-liner, i.e. bulk, shipments. Article 6 says the Convention does not apply to Charter Parties on non-liner transportation but immediately afterwards Article 7 says "notwithstanding Article 6" the convention applies in non-liner trades as between the carrier and a consignee who is not an original party to the charter party.

As I understand it, this means that if a charterer ships his own cargo the Convention does not apply, but if he sells the cargo it applies as between the carrier and the new owner of the cargo. (I am not clear what happens when subsidiaries of the same company, as often happens with oil cargo, transfer a cargo between them.) It therefore seems that the Convention will apply to the majority of non-liner shipments as well.

2) GENERAL OBLIGATIONS OF THE CARRIER

In keeping with the multi-modal concept the carrier's responsibility now lasts, not from "tackle to tackle" but from when the goods are received until when they are delivered (Art. 12).

During that period the carrier shall properly and carefully receive load, handle, stow, carry, keep care for, unload and deliver the goods. When a loss occurs before or after the sea passage RR do not prevail over any Convention that would otherwise have effect – I assume CMR is the obvious example. (Art 26)

3) **MARITIME PERFORMING PARTIES**

In addition to the carrier, a new category of person is introduced so as to cover the full in-port period:

"Maritime performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control."

They are subject (Art. 19) to the same obligations and liabilities as the carrier, unless the carrier agrees to take on wider obligations than those imposed by the Convention. Their liability is joint and several with the carrier.

This is a significant change which is outside my comfort zone, but no doubt our colleagues who deal with Ports and Terminals work will be looking closely at the implications.

4) **OBLIGATIONS AT SEA**

The specific obligations "applicable to the voyage by sea" are set out in Article 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;*
- (b) *Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and*
- (c) *Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.*

The big change is of course that these obligations now exist throughout the voyage and not just at its inception.

Article 17 sets out the basis of liability and is best taken in stages.

1. *The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.*

The initial burden of proof lies with cargo but it is an easy one to discharge – simply show that the damage or delay occurred during the carrier's period of responsibility, which of course includes the land transits. It is worth noting in passing that the Convention also refers expressly to losses by delay in a number of places, giving rather greater clarity than before on this point.

4) **OBLIGATIONS AT SEA** (Continued)

The carrier is then given two ways to get himself off the hook (entirely or partly – I will come back to that).

The first way is given in general terms.

2. *The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.*

The persons referred to in Article 18 are:

- (a) *Any performing party;*
- (b) *The master or crew of the ship;*
- (c) *Employees of the carrier or a performing party; or*
- (d) *Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.*

The second way takes the form of a list of specific events/perils:

3. *The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:*
 - (a) *Act of God;*
 - (b) *Perils, dangers, and accidents of the sea or other navigable waters;*
 - (c) *War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;*
 - (d) *Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;*
 - (e) *Strikes, lockouts, stoppages, or restraints of labour;*
 - (f) *Fire on the ship;*
 - (g) *Latent defects not discoverable by due diligence;*
 - (h) *Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;*

4) **OBLIGATIONS AT SEA** (Continued)

- (i) *Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;*
- (j) *Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;*
- (k) *Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;*
- (l) *Saving or attempting to save life at sea;*
- (m) *Reasonable measures to save or attempt to save property at sea;*
- (n) *Reasonable measures to avoid or attempt to avoid damage to the environment; or*
- (o) *Acts of the carrier in pursuance of the powers conferred by articles 15 and 16 (to do with cargo sacrifices and dangerous cargo).*

It will of course be noted that the "nautical fault" exception is now absent.

Even if the carrier can hang the event on one of these pegs in paragraph 3, he is not home and dry because the burden of proof then swings back to cargo who still have two opportunities to make their recovery.

The first is to show that the carrier's fault caused or contributed to the event on the list, or that an unlisted event which is the fault of the carrier caused or contributed to the loss.

- 4. *Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:*
 - (a) *If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or*
 - (b) *If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.*

To take one example, under the Hague Visby Rules the carrier was protected if the loss was due to fire "unless caused by the actual fault or privity of the carrier". Under RR the carrier is not protected if negligence of his servants etc in relation to the fire can be demonstrated.

4) **OBLIGATIONS AT SEA** (Continued)

The second opportunity brings back the fundamental obligations set out in Article 14:

5. *The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:*
 - (a) *The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and*
 - (b) *The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.*

Even if the loss/event is on the list in paragraph 3 a causative breach of any of the fundamental obligations set out in Article 14 will negate that defense.

It will be noted that in part of both paragraphs 4 and 5 the burden of proof reverts back to the carrier again – prompting a "ping pong" analogy from many commentators.

5) **APPORTIONMENT / DIVISION OF LOSS**

It will be noted that throughout paragraphs 1-5 of Article 17 the words "all or part of liability" and "all or part of the loss" appear frequently and then paragraph 6 states:

6. *When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.*

It is perhaps an over-simplification, but the effect of the Hague Visby Rules was generally an "all or nothing" outcome. The Hamburg Rules changed this approach:

7. *Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.*

The underlined words are missing in RR and some experts consider that this significantly eases the burden of proof on the carrier because he no longer has to prove the proportion of the loss not attributable to his fault.

5) **APPORTIONMENT / DIVISION OF LOSS** (Continued)

The issue of how losses are to be apportioned seems to be a matter of some uncertainty and requires expert legal knowledge to debate fully. As a general comment, consecutive causes may be relatively easy to identify; concurrent ones less so. The comments below (9) regarding practical/GA implications of the RR are based on an assumption that the clause can be taken at face value.

6) **RECOVERIES FROM CARGO**

Cargo's obligations are set out in Articles 27 to 34. The shipper has to ensure the goods are in a condition fit for carriage, including securing the contents of a container (Art. 27).

Under Article 29 the shipper must provide information in a timely manner to ensure the safe handling of the goods and to comply with governmental requirements.

The shipper has special obligations regarding dangerous goods set out in Article 32:

Article 32

Special rules on dangerous goods

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

- (a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and*
- (b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.*

The basis for the shipper's liability (which extends to acts of employees, agents and subcontractors – Art. 34) is set out in Article 30:

Article 30

Basis of shipper's liability to the carrier.

- 1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.*

6) **RECOVERIES FROM CARGO** (Continued)

2. *Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.*
3. *When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.*

There has been debate about the exact effect of Article 30 (2), (which says it does not apply in respect of a breach regarding provision of contractual information (31 – 1) and dangerous goods (32)), in relation to burden of proof and apportionments of losses. However I would have thought the intention would have been for claims against ship and cargo to work in the same way, and to allow apportionment of loss even in cases involving dangerous goods, but there is definitely a question mark over this point.

7) **VOLUME CONTRACTS**

In her paper given at an AAA lunchtime seminar, Fionna Gavin of Ince & Co. (who has been advising DFT on RR issues) made a number of interesting points on this topic. Some commentators had painted the concept of volume contract opt-outs as a wicked plot hatched by carriers. In fact the idea was apparently driven by USA cargo interests who were happy to sign away some of their rights in return for rock-bottom freight rates - an interesting reflection on how safe containerized shipping is seen to be and the way in which major corporations still cherish freedom of contract.

She also pointed out the definition is quite narrowly drawn in Article 1.2:

"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.

Some obligations cannot be excluded:

- *The Owners' obligation to exercise due diligence before, at the beginning of, and during the voyage to make and keep the ship seaworthy and properly crew, equip and supply the ship (Art. 14).*
- *The shipper's obligations to provide information, instructions and documents (Art. 29).*
- *The shipper's obligations regarding dangerous goods.*
- *Intentional or reckless personal acts or omissions.*

7) **VOLUME CONTRACTS** (Continued)

There are safeguards under Article 80 in that there must be:

- *Prominent statement that it derogates from the Rules.*
- *Individually negotiated sections or prominently specify the sections containing the derogations.*
- *Opportunity and notice of the opportunity, to conclude a contract complying with the Convention terms.*

And for "persons other than the shipper":

- *They must receive information that prominently states that the contract contains derogations.*
- *They must give express consent (in writing) to be bound.*
- *Consent cannot be set out in the carrier's public schedule of services or prices or the transport document.*

It is perhaps difficult to see anything in the above that warrants some of the fuss that has been made. Contracting on such terms would be a material fact that would need to be disclosed to cargo insurers, so they can consider any premium adjustment based on the net value of recoveries they would lose out on.

8) **GENERAL AVERAGE**

Article 84 deals with the topic in general terms:

"Nothing in the Convention affects the application of terms in the contract of carriage or provision of national law regarding the adjustment of general average"

Two earlier Articles deal with the specific points of dangerous goods and cargo sacrifices.

*"Article 15
Goods that may become a danger*

Notwithstanding articles 11 and 13, carrier or performing party may decline to receive or to load and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

8) **GENERAL AVERAGE** (Continued)

Article 16

Sacrifice of the goods during the voyage by sea

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure."

Article 15 and 16 are referred to in Article 17.3 (o) as one of the excepted list of events (see 4 above). The effect of the "notwithstanding" in both Articles is rather confusing, and it seems unlikely that the carrier could escape any liability for a cargo sacrifice (say jettison to lighten the ship) if the ship had first got into difficulties due to unseaworthiness (Art 14). This is definitely one for the lawyers.

9) **PRACTICAL IMPLICATIONS OF RR.**

I would emphasize again that these comments are made from an average adjuster's perspective which tends to focus on serious casualties, rather than day to day cargo claims.

While hull insurers would not be greatly affected (except in the relatively rare cases of ship sacrifice) the P&I Clubs would clearly be paying cargo's proportion of general average much more frequently, as cargo declines to pay on the grounds of a breach of the contract of affreightment.

An immediate practical implication would be that the greatly increased likelihood of cargo sustaining a defence to contribution would make it unwise to automatically incur the costs of an expensive security collection from a multi-interest cargo. However, deciding not to collect security is not a call the shipowner should make without consulting the P&I Club, whose cover is likely to be conditional on proper security having been collected and a demonstrable breach of contract having occurred.

In LOF salvage cases, cargo will still have a direct liability to provide security to salvors and pay their proportion of the award, before seeking recovery from the carrier, albeit with a much greater chance of success under the Rotterdam Rules. Counter-security may become a much bigger issue and this may result in delays. It is possible that Owners and their P&I Clubs may sometimes agree to provide security and pay 100% of the salvage in order to reduce costs and achieve a quick negotiated settlement, but the bigger the exposure the greater the temptation will be to let matters run their normal course.

That temptation can only be increased by the Rotterdam Rules repeated reference in Article 17 to "all or part" of liability for a loss and the concept of a loss being apportioned somehow if the carrier can partly disprove his fault. In a collision where it seems likely that both ships are equally to blame, the owner knows that he is no longer protected by the "nautical fault" exception, but equally he is not at fault in respect of the blame attaching to the other vessel. On that basis could he not

9) PRACTICAL IMPLICATIONS OF RR. (Continued)

recover 50% of any general average contribution due from his cargo? That would seem to be the case.

Many of the most serious casualties in recent years have involved containership fires originating in cargo. These have given rise to complex legal disputes, particularly on factual issues with the shipper alleging poor stowage (perhaps over a heated bunker tank) and the carrier pointing to the (undeclared) dangerous nature of the cargo. This situation arose in the recent High Court judgement in the “Aconagua”. The carrier (actually the charterer seeking indemnity for US\$27 million paid to the shipowner) won the day on the basis that it was a rogue cargo and the shipper could not prove that the heating of the bunker tank was causative. However if the heating of the tank had been causative the Court indicated that this would have constituted negligence in the management of the ship – an excepted peril under the Hague Rules. Under the RR the carrier will lose the protection of that excepted peril but this would surely be a case in which the point about contributing causes (rogue cargo/fault of crew) would be at issue.

Whilst under the Rotterdam Rules it is highly likely the carrier will usually have to accept some degree of fault there will remain considerable incentive to allege partial fault of others. Some difficult decisions will need to be made very quickly about whether to collect general average security in such cases.

10) SUMMARY

It would appear that there are a number of areas, such as burden of proof and apportionment of loss, where the legal experts cannot agree on the correct construction of the Rules, saying that in time the “Courts will decide”. However, this could involve a very long wait since the Rules may make exclusive jurisdiction clauses unenforceable (although I understand countries can opt out of these provisions) so that decisions will be given by a wide range of Courts that may not produce a consistent view. As Fionna Gavin pointed out in discussion after the AAA presentations, cases involving bulk cargoes are likely to be decided by Arbitrators whose rationale may never be published. Perhaps it should be the commercial stake-holders, and their insurers, who should take the lead in reaching a consensus – this has been done before when property and liability insurers got together to create SCOPIC in order to make practical sense of Article 14 of the Salvage Convention.

There have been various comments about the RR being the “death of General Average” which are of course based on the common misconception that GA principles are only relevant when money actually passes between ship and cargo interests.

There will be fewer security collections (the reduction in number will depend on the rate of ratification, which is a big unknown at present, and how the issue of apportionment of liability works out in practice) but the principles of GA will still be needed to adjust the costs arising in a casualty situation – these are not going to go

10) SUMMARY (Continued)

away. Even in the absence of contribution between ship and cargo, the principles of GA remain important in defining the borders between ordinary and extra-ordinary expenditure, and property and liability insurers.

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11 February 2010