

CHAPTER 17

THE ROTTERDAM RULES IN THE ASIAN REGION

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I CURRENT SITUATION OF THE ROTTERDAM RULES

On December 11, 2008, during its 63rd session, the General Assembly of the United Nations adopted the "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" known informally as the Rotterdam Rules. The draft Convention had been discussed in United Nations Commission on International Trade Law (UNCITRAL) Working Group III since 2002¹; the new rules would replace the existing international conventions on the carriage of goods by sea, such as the Hague-Visby Rules² and the Hamburg Rules³.

II WHY A NEW CONVENTION?

One may wonder why we needed new rules on the carriage of goods by sea. There were two main forces that made UNCITRAL begin the project: containerization and e-commerce.

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- 1 For the drafting history of the Rotterdam Rules, see, Michal F. Sturley, Tomotaka Fujita and Gertjan van der Ziel *The Rotterdam Rules* (Sweet & Maxwell, 2010) at 13-21.
- 2 The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (The Hague Rules) as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968 (Visby Rules). It was further amended by the Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924, as amended by the Protocol of 23 February 1968.
- 3 United Nations Convention on the Carriage of Goods by Sea, 1978.

Today, the vast majority of the goods shipped worldwide are transported in containers. Unfortunately, the previous international regime for the carriage of goods by sea could not effectively handle the transportation after the "container revolution" in the late 1950s. The goods are carried by the different modes of transport without being opened throughout the whole carriage. A legal regime that covers the carriage of goods "door to door" was desperately needed. It is also recognised that some traditional rules on carriage of goods by sea, such as the regulation on deck cargo, did not fit with the goods carried in the container. The Rotterdam Rules were UNCITRAL's answer to the need.

Second, the previous conventions' treatment of bills of lading cannot catch up with the e-commerce transactions related to the carriage of goods. Even worse, the previous conventions' requirement for a paper document might constitute an obstacle for the development of electronic bills of lading. The Rotterdam Rules offer answers to these problems.

Although containerisation and e-commerce are two of the main reasons why a new regime was needed, the Rotterdam Rules provide even more benefits. These include provisions regarding right of control, the delivery of goods, and special rules for volume contracts (an exception to the mandatory regulations). These elements have not been regulated by previous conventions. The Rotterdam Rules will bring us uniform solutions to these issues and, hence, enhance predictability in an area where solutions vary substantially among different jurisdictions.

III POSSIBILITY OF ENTRY INTO FORCE

The Convention was opened for signatures at the signing ceremony in Rotterdam on September 23, 2009. To date, 25 states have signed, and 3 of them have ratified the Convention.⁴ Several countries are reported to be preparing for their domestic procedure for ratifications.

Five years after the signing ceremony, the number of ratifications to date is not very encouraging. Hasty people are already talking about the failure of the Rotterdam Rules. However, I should stress that the situation is not as pessimistic as it first looks.

4 Signatories as of March 2015 are as follows: Armenia (29 Sep. 2009), Cameroon (29 Sep. 2009), Congo (23 Sep. 2009, ratified Jan. 28, 2014), Democratic Republic of the Congo (23 Sep. 2010), Denmark (23 Sep. 2009), France (23 Sep. 2009), Gabon (23 Sep. 2009), Ghana (23 Sep. 2009), Greece (23 Sep. 2009), Guinea (23 Sep. 2009), Guinea-Bissau (24 Sep. 2013), Luxembourg (31 Aug. 2010), Madagascar (25 Sep. 2009), Mali (26 Oct. 2009), the Netherlands (23 Sep. 2009), Niger (22 Oct. 2009), Nigeria (23 Sep. 2009), Norway (23 Sep. 2009), Poland (23 Sep. 2009), Senegal (23 Sep. 2009), Spain (23 Sep. 2009, ratified 19 Jan. 2011), Sweden (20 Jul. 2011), Switzerland (23 Sep. 2009), Togo (23 Sep. 2009, ratified 17 Jul. 2012), and United States of America (23 Sep. 2009).

For example, let us consider the Hague Rules of 1924, commonly regarded as one of the most successful conventions on the carriage of goods by sea. The Hague Rules took seven years to come into force.⁵ The number of ratifications and accessions remained at 0 until 1929. These numbers increased dramatically between 1929 and 1931 when the Hague Rules entered into force. The experience with the Hague Rules reminds us of two important facts: (1) even a very successful convention takes some time before it enters into force, and (2) the number of ratifications accelerates at a certain stage, and remains very low before that stage begins.

With respect to the Rotterdam Rules, one can easily imagine that the ratification by the United States will quite likely trigger a similar acceleration. The US State Department has completed its "ratification package" for the Rotterdam Rules, and the package was sent for inter-agency review in June 2013. That review was completed in May 2014. There remains only consent and approval by Senate for the Rules' ratification. Although anything can happen in the political process, I am cautiously optimistic and believe that the United States' ratification is more or less simply a matter of time. Once the US ratifies the Rules, several European states will immediately follow and an acceleration of ratification will occur, just as it did for the Hague Rules in 1929.

IV THE ROTTERDAM RULES IN ASIA⁶

If you look at the list of 25 signatory states to the Rotterdam Rules, you will find that they are spread around the world. In particular, I wish to draw your attention to the fact that the signatories include countries that are strongly influenced by shippers' interests, such as African countries, and by carriers' interests, such as Denmark and the Netherlands. This suggests that the Rotterdam Rules are impartial; that is, they favour neither the carriers' nor the cargo interests.

At the same time you will notice that they concentrate in certain areas: Europe, Africa, and North America. Asia is an empty area. To the best of my knowledge, no Asian country is seriously thinking about ratifying the Rotterdam Rules. It is quite curious that the shipping industry in Asian countries has kept silent on the issue in the years since the Rotterdam Rules were adopted, while their European counterparts have enthusiastically expressed their position on them one way or the other.

5 The Hague Rules came into force on June 2, 1931.

6 The situation in specific Asian countries, see, Tomotaka Fujita *The Rotterdam Rules in the Asia-Pacific Region* (Shojihomu, 2014) at 227-241.

V SOME ADVICE FOR MAKING A RATIONAL DECISION

I do not wish to make any comments as to whether each Asian state should ratify the Rotterdam Rules; each government should decide the matter, taking into account the relevant interests specific to each state. I simply hope that each state makes its decision based on accurate and reliable information on the Rotterdam Rules, rather than on groundless rumours or emotional responses. For this purpose, I want to take this opportunity to give some advice to the government and industry officials considering whether to accept or to reject the Rotterdam Rules.

A Make a Correct Comparison

First and foremost, we should *not* ask whether the Rotterdam Rules are a perfect ideal instrument. This is not a relevant question. The real question is whether the Rules, as a whole, are better than other possible alternative regimes. What would these "other possible regimes" be, then? It is important to recognise that the Hague-Visby Rules, which are almost 46 years old, are not a candidate. Imagine what would happen if the Rotterdam Rules failed. The Hague-Visby regime might remain in force for some time, but sooner or later it would lose its predominant position as being obsolete. What will happen then? After the fall of the Hague-Visby regime, "regionalism" would most likely prevail in the area of the international carriage of goods. The revised Carriage of Goods by Sea Act has been pending in the US Congress and seems ready to be approved, once they think the Rotterdam Rules are a failure. In Europe, new regulations on multimodal transportation may be introduced at the EU level. We should compare the Rotterdam Rules with these alternative future regimes. It is pointless to compare them with the situation under the Hague-Visby Rules. I suppose these possible future regimes will quite likely be less benevolent to industry concerns. The shipping industries in the United States and Europe are more or less supportive of the Rotterdam Rules because they are well aware of the impact of regionalism. If the industries in Asia do not recognise such scenario and remain silent, it will be most unfortunate.

Does it make sense for the industry to keep the Hague-Visby Regime as long as it can stand? The answer is "No." We should note that time is limited. Once many states begin to seek an alternative regime, it is too late to choose the Rotterdam Rules, even if they are more favourable than the other options. We will quite likely lose the opportunity to make a meaningful decision if we keep silent for too long.

B Undue Burdens for the Carrier?

Let us turn to the typical misconceptions often held by carriers. Complaints are heard from carriers about their level of liability under the Rotterdam Rules. The biggest reason for these concerns is the increased amount of the liability limitation. The limitation amount per package under the Rotterdam Rules is 875 SDR, which is

roughly a 5% increase from the Hamburg Rules and 30% over the Hague-Visby Rules. The weight limitation is 3 SDR per kilogram of the gross weight of the goods, a 20% increase from the Hamburg Rules and 50% more than the Hague-Visby Rules. When comparing these figures, it is understandable that the carriers feel there is a substantial increase in their liability level under the Rotterdam Rules. In reality, this is not the case.

One should note that the increase of the limitation amounts under the Rotterdam Rules matter only when the amount of the goods is higher than the Hague-Visby limit. If the amount of the goods is lower than the Hague-Visby limit, the carrier's liability is no different under either rule. The fact is, more than 80% of the goods carried by sea today are reported as being below the Hague-Visby limit. In addition, the limitation amount matters only when the goods are lost or damaged. Of course, the vast majority of carriages go without such incidents. Therefore, a 30% increase in the package limitation or a 50% increase in the weight limitation affects only a very limited number of cases.

To illustrate the point more clearly, let us take a simple hypothetical calculation. Assume the value of 80% of the goods carried by sea is below the Hague-Visby limit and the probability of the goods' loss or damage is 5%. Let us further assume that the carrier's liability is increased by 50% if 20% the high-value cargo which exceeds the Hague-Visby limit is damaged. The expected increase of the liability to which the carrier is exposed is $0.2 \times 0.05 \times 0.5 = 0.005$ (0.5%). This expected increase in liability is very modest, and the premium for P&I insurance would be almost negligible.

Another source of complaint by the carriers is the deletion of the nautical fault defence. In this regard, I wish to repeat what I said before: do not compare the Rotterdam Rules with the Hague-Visby Rules. Instead, compare them with other possible alternative future regimes. I am convinced that any future regime on carriage of goods by sea will never incorporate such a defence.

C Insufficient Protection for Shippers?

Finally, let us turn to the complaints of the shippers. There are two main sources for the complaints: the numbers of provisions for shippers' liability and the exception for mandatory rules.

Chapter 7 of the Rotterdam Rules consists of a considerable number of detailed rules on the shipper's obligations and liabilities, while previous conventions have only a very limited number of provisions. Concerns have been heard from the shippers that shippers' obligations and liabilities increase substantially under the Rotterdam Rules. However, a more careful examination is necessary to decide if this

is the case⁷. First, the shipper has never been free from obligations and liabilities, even in areas where previous conventions are silent. Shippers have long been responsible for a wide range of obligations under applicable national laws, and under the terms of the contract of carriage. Although I cannot explain the details in this short speech, the shipper's liability under the Rotterdam Rules is not much different from the applicable national laws or contract terms. In addition, it should also be noted that parties cannot increase a shipper's obligations and liabilities through a contract under the Rotterdam Rules. In this sense, one can even argue that the shipper is protected in this respect than under previous conventions.

The shippers' second concern is the possibility that a carrier can derogate from the mandatory liability regime through the use of a "volume contract" under the Rotterdam Rules. Article 80 provides the detailed conditions for a carrier to enjoy such freedom, that is, contract terms that lower the carrier's liability below the provisions of the Rotterdam Rules. If you read the article carefully, you will immediately notice that it is very difficult, if not impossible, to assert the freedom of contract to the holder of the bills of lading. It is also very difficult to meet the conditions even between the carrier and the shipper. My guess is that the parties probably do not rely much on the freedom of contract under the Rotterdam Rules, which is not justified by the costs for satisfying the conditions under Article 80⁸.

VI CONCLUSION

I have explained why UNCITRAL adopted the Rotterdam Rules. I also mentioned the current situation of the Rotterdam Rules and the possibility of their entry into force. My message is that one should not underestimate the possibility. I noted the fact that the Asian states are more or less passive in their efforts to examine the new regime. The second message is that although it is up to each government to decide whether to ratify the Rotterdam Rules, the choice should be made rationally based on accurate information. In this context, I referred to the most typical misconceptions about the Rotterdam Rules and have tried to clarify the situation. I hope this short speech will be of some use to those who have an interest in the Rotterdam Rules.

7 For the details of the following discussion, see, Tomotaka Fujita "Obligations and Liabilities of the Shipper" in Meltem Deniz Güner-Özbek (ed) *The United Nations Convention On Contracts For The International Carriage Of Goods Wholly Or Partly By Sea: An Appraisal of the Rotterdam Rules* (Springer, pat, 2011) at 211-228.

8 See, Michael Sturley "Scope of Application and Freedom of Contract" in Fujita, above n 6, at 60-64.