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CARRIER'S LIABILITY UNDER THE INTERNATIONAL CONVENTIONS FOR THE CARRIAGE OF GOODS BY SEA

Summary. As is well known, there is no international convention for the carriage of goods in general. Each mode of transport counts on one or several international conventions that specifically regulate the provision of international transport by sea, rail, road or air. Thus, multimodal freight transport are characterised by a patchwork of different legal regimes that represents a huge challenge for the growth of multimodal transport industry. The paper aims to analyse the latest, but still not in force Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam rules) that should provide global solution for multimodal carrier liability. Comparison of the carrier's liability in the former conventions relating to the international carriage of goods by sea and other rules are also discussed.

ODPOWIEDZIALNOŚCI PRZEWOŹNIKA WYNIKAJĄCE Z MIĘDZYNARODOWYCH KONWENCJI DO PRZEWOZU TOWARÓW DROGĄ MORSKĄ

Streszczenie. Jak wiadomo, w ogóle nie ma międzynarodowej konwencji o przewozie towarów. Każdy sposób opiera się na jednej lub kilku konwencjach międzynarodowych, które szczególnie regulują świadczenie międzynarodowego transportu drogą morską, koleją, drogą lub powietrzem. Zatem multimodalny transport towarów charakteryzuje zlepek różnych systemów prawnych, który stanowi ogromne wyzwanie dla rozwoju branży transportu multimodalnego. Artykuł przedstawia dyskusję o Konwencji o umowie dotyczącej międzynarodowego przewozu ładunków w całości lub częściowo morzem (reguły rotterdamskie), która może być globalnym rozwiązaniem multimodalnej odpowiedzialności przewoźnika. Porównanie odpowiedzialności przewoźnika z poprzednich konwencji dotyczących międzynarodowego przewozu towarów drogą morską, a także innych przepisów jest również omawiane.

1. INTRODUCTION

It is now 55 years since famous Barbie was ´born´ and thanks to her we can easily demonstrate how the power of global supply chains, which can transform international trade. In the book The Box, economist Marc Levinson [6] explains how this famous doll had developed her very own global supply chain. Mattel's 'all-American' Barbie was anything but all-American. Thanks to containers that represented low transport costs helped make it economically sensible for a factory in China to produce

Barbie dolls with Japanese hair, Taiwanese plastics, and American colorants and ship them off for little girls all over the world. Mattel took a value chain approach and realized the possibility of wealth from outsourcing production. This eventually led to a wave of globalization and a symbol of commerce in the latter part of the 20th century. Nowadays, every product and many services are now imagined, designed, marketed and built through global supply chains that seek to access the best quality talent at the lowest cost, wherever it exists.

Since its inception in 1956, containerization for the transport of goods by sea has grown exponentially [11]. From 1990 to 2010, container trade was the fastest-growing cargo segment at an average annual rate of 8.2%. After a recession in 2009, global container trade volumes rebounded 12.9% in 2010, accounting for 140 million TEU, more than 1.3 billion tons, and almost six times its 1990 volume. While growth decelerated significantly, containerized trade volumes expanded in 2012 to reach 155 million TEUs.

Today, container transport for door-to-door moves has become the main form of transport for manufactured goods and component parts. This development was certainly not foreseen by those who drafted the rules governing contracts of carriage in the 1920s and later [1]. Moreover, the conflict between carriage liability regimes for maritime transport and the need for multimodal regimes for container trades has needed reconciliation, and failed to find it. The legal regimes governing liabilities in international trade and transport have not kept pace with the changing reality of global commerce, although they have seen many variations since the 1924 when Hague Rules were developed. In early 2008, the United Nations Commission on International Trade Law (UNCITRAL) completed its work on the latest iteration, *The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* - Rotterdam Rules. This article examines the aim of the Rotterdam Rules to reform an outdated system of liability that is currently based on several maritime conventions with different degrees of implementation. Convention is intended to be a “maritime plus” convention [8], meaning that it has a multimodal component that would extend its application beyond the sea leg. In article, we look on the Rotterdam Rules mainly from the carrier point of view. Article begins by noting the current status of the Rotterdam Rules as an alternative for earlier maritime liability regimes. The next section discussed comparison limits of the carrier under other unimodal and multimodal regimes. Conclusion of the article represents a summation of what considerations will play in a role by adaptation of these rules first by government, and then by carrier and cargo owners.

2. CURRENT STATUS ON INTERNATIONAL MARITIME CONVENTIONS AND THE ROTTERDAM RULES

At present, maritime transport is regulated by several, co-existed legal text. Hague Rules [4] (full name *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*) are first and also most recognised rules about liabilities of the carrier in maritime transport. They came into force in 1924 and due to their ratification by a large number of states, their scope of application is vast. Despite their initial widespread acceptance, they were modified by two protocols. Firstly it was so called Visby Rules in 1968 [7], and secondly again in 1979. These protocols were opened to signature not only by the parties who had ratified the treaty, but also by other states, therefore a wider acceptance of the text by the signature and ratification would produce the accession to the Rules as a whole. As a consequence, states can be found where the Hague Rules are in force in their original version, while others apply the so called Hague-Visby Rules. Another convention *United Nations Convention on the Carriage of Goods by Sea* [13], commonly known as Hamburg Rules came into force in 1992. However implementation of Hamburg rules didn´t reach the level of Hague Rules. They have been ratified by only a small number of states that, furthermore, have little weight in international shipping, mostly landlocked countries. Neither the big trading power states, nor the countries with the largest commercial fleets seems to be interested in joining in. Therefore the attempt for implementation new international rules was inevitable.

In 1996 the UNCITRAL conducted a new study on the current practise and laws in the field of international carriage of goods by sea [10]. Based on conclusion of this study, which found significant

gaps in international as well as national laws, UNCITRAL made a request to international organisations to provide information, or even possible solution regarding this deficits. Faced with these facts, the elaboration of new instrument was launched. First deliberations started in 2002 and after tough negotiations, the final version of the *UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* [12] was approved on July 3rd 2008. They were adopted by the United Nations General Assembly on 11th December 2008. The signing ceremony was held in Rotterdam on 23th September 2009. Rotterdam Rules consist of 96 articles and 18 chapters. As of May 2014, there were 25 signatories, with Spain, Togo and Congo being only countries to ratify the convention. Contracting states of international maritime conventions are listed in Table 1.

The convention will not come into force until a year after 20 countries have ratified it. Upon entry into force of the convention for a country, it should denounce the conventions governing the Hague-Visby Rules as well as the Hamburg Rules as the convention does not come into effect without such denouncements [12]. The EU would like to support Rotterdam Rules for the sustainable transport development and also for environmental-policy reasons. The development of short sea shipping encouraging a modal shift from land-based transport to shipping. However in order to promote adoption of short sea shipping, EU must adopt new legal regime that clarifies liabilities stemming from multimodal transportation options [2].

It has taken eight years to negotiate the Rotterdam Rules, given that it has been extremely difficult to reconcile carrier and cargo interests. Whereas the Hamburg Rules were result of a political compromise, The Rotterdam Rules constitute a compromise between the various interest groups, which actively participated in the drafting process. Moreover the idea has been to incorporate new topics related to technical and commercial development, modernize international rules already in existence and achieve uniformity of admiralty law in the field of maritime carriage [9]. As a result, the Rotterdam Rules address a multitude of issues, including multimodal transport, electronic commerce, transport documents, delivery of goods and international dispute resolution [5].

The Rotterdam Rules apply to contracts of carriage, which involve an international sea leg, thus such contracts may include other modes of transport in addition to the sea carriage. Actually, since the Rotterdam Rules required a sea leg, they are not a true multimodal convention. The scope of application is clarified in the Article 5th, according to this article convention can be applied if the place of receipt of the goods, the port of loading, the place of delivery, or the port of discharging is located in a contraction state. The Rotterdam Rules apply regardless of type of documents issued by the carrier or whether any document is issued at all. Moreover, they completely abolish the bill of lading and created a completely new system of transport documents, which are divided into negotiable, and non-negotiable transport documents [10]. They even may be issued as electronic transport records. As with their predecessors, according to Article 6.1 they do not apply to the charter parties. On the other hand, they do not completely excluded ´volume contracts´ from convention. Volume contracts are in Article 1.2 defined as "a contract of carriage that provide for the carriage of quantity of goods in series of shipment over a fixed period of time". Since these contracts are estimated to be the basis of 80% of transatlantic and transpacific trade, the rules have actually greater significance than the general rules. Furthermore, volume contracts allow for carriers and shippers to deviate from the terms of the convention, allowing for freedom of contract. Through volume contract provisions, a carrier and shipper can come to an alternative agreement on liability. This means that the Rotterdam Rules may not govern many contractual agreements at all. In such cases, smaller shippers may have insufficient market power and will be forced to accept unfair terms that deviate from the Rotterdam Rules. In practice, this may lead to premium pricing for transport under full liability of Rotterdam Rules, and lower freight rates for reduced liability under volume contracts. When a number of parties and contracts are involved, the claims will ultimately go back to the shipper and defeat the purpose of the volume contracts [1, 10].

Table 1

Contracting Parties to selected international conventions on maritime transport [3, 6, 10]

Title of Convention	Date of entry into force or conditions	Contracting States
International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924 (Hague Rules)	Entered into force 2 June 1931	Algeria, Angola, Antigua and Barbuda, Argentina, Belgium, Belize, Bolivia, Cameroon, Cape Verde, China, Democratic Republic of the Congo, Croatia, Côte d'Ivoire, Cuba, Cyprus, Dominica, Egypt, Ecuador, Fiji, France, Gambia, Germany, Grenada, Guinea-Bissau, Guyana, Hungary, Iran, Ireland, Israel, Jamaica, Kenya, Kiribati, Kuwait, Latvia, Lithuania, Madagascar, Malaysia, Mauritius, Monaco, Mozambique, Nauru, Nigeria, Papua New Guinea, Peru, Poland, Portugal, Saint Christopher and Nevis, Saint Lucia, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Singapore, Somalia, Slovenia, Solomon Islands, Sri Lanka, Switzerland, Syria, Tanzania, Tonga, Trinidad and Tobago, Turkey, Tuvalu, USA
International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, First Protocol, 1968 / Second Protocol, 1979 (Hague-Visby Rules)	Entered into force 23 June 1977/ 24 February 1982	Australia, Bahamas, Barbados, Belgium, China, Croatia, Denmark, Ecuador, Finland, France, Georgia, Italy, Latvia, Lithuania, Netherlands, Norway, Poland, Singapore, Sri Lanka, Sweden, Switzerland, Syria, Tonga, United Kingdom
		Belgium, Croatia, Denmark, Finland, France, Greece, Italy, Japan, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Russia, Spain, Sweden, Switzerland, United Kingdom
United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)	Entered into force 1 November 1992	Albania, Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Dominican Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kazakhstan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Saint Vincent and the Grenadines, Senegal, Sierra, Leone, Syrian Arab Republic, Tunisia, Uganda, United Republic of Tanzania, Zambia
United Nations Convention on International Multimodal Transport of Goods, 1980	Not yet in force – requires 30 Contracting Parties	Burundi, Chile, Georgia, Lebanon, Liberia, Malawi, Mexico, Morocco, Rwanda, Senegal, Zambia
United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (Rotterdam Rules)	Not yet in force – requires 20 Contracting Parties	Congo, Spain, Togo

Obligations of the carrier are regulated in the 4th chapter of the Rotterdam Rules. According to the Article 11th “the carrier shall carry the goods to the place of destination and deliver them to the consignee in accordance with the terms of the contract of carriage”. As stated by the Article 12th, the carrier or a performing party will have the responsibility of the goods in the period which starts at

receiving the goods for carriage and ends when the goods are delivered. The parties may designate and extend the responsibility period with the contract in accordance with the Rotterdam Rules and limitations expressed in the convention. Meaning, potential liabilities are significantly increased and the time frame when a carrier would be held liable for goods lengthened. In former maritime conventions carriers were liable only for goods while in transit on the sea, but now would be responsible from the point of receiving goods to the point of delivery. That point underscores a critical flaw in the Rules.

One study presented [1] that the large numbers of exemptions and exclusions in the convention deviate from the original purpose of obtaining uniformity in the legal regime and thus may be a threat to the future of this instrument.

On the other hand, carrier´s period of responsibility may be certain functions, such as loading, handling, stowing and unloading may be contractually transferred to the shipper, documentary shipper or consignee (article 13th). In the article 14th the specific obligations of the carrier connecting the voyage by sea has been designed. Carrier is responsible for making and keeping the ship seaworthy, not only at the beginning of but also during the voyage by sea. This includes the physical seaworthiness of the vessel, as well as manning, supply and equipment, and the cargo worthiness of the vessel. On the contrary to other conventions, the seaworthiness obligation is a continuous one, applying throughout the carriage [5].

With comparison to the shipper point of view, the Rotterdam Rules represent more extensive obligation and liability for them, than it has been in previous conventions relating carriage of the goods by sea. By the Article 27th they include fault-based liability relating to the preparation and delivery for carriage of the goods. Additionally, the International Federation of Freight Forwarders Associations (FIATA) also opposes the Rotterdam Rules. They criticize their complexity, an imbalance of responsibility and liability, and the increased burden placed by Article 82, which gives precedence to other conventions that deal with different transportation methods, in finding the point where damages or loss occurred [1].

3. A COMPARISON OF THE RULES

Because the existing liability regimes for the carriage of goods were not particularly satisfactory for the carriage of containerized cargo, which might use more than one mode or might have hidden unattributable damage, the international trading community established, three sets of multimodal rules.

The first, designed by the International Chamber of Commerce (ICC) and filled an important legal gap for trading interests (*ICC Rules 1975*). These were not mandatory legal arrangements but model contract terms that would establish the rules for liability allocation in cases of loss or damage in a multimodal transport shipment. As many cargo owners and developing country governments were unenthusiastic about these industry-initiated rules, they persuaded the United Nations Conference on Trade and Development (UNCTAD) to write a new convention, the Multimodal Convention. This convention also failed to gain traction with the trading community and so a third attempt was made jointly by the ICC and UNCTAD resulting in the 1992 Rules for Multimodal Transport Documents (UNCTAD/ICC Rules). While the application of the Rotterdam Rules is broader than for just multimodal transport, it is important to understand that the Rules recognize, for the first time, that liner shipping services are very different in terms of needs than tramp shipping, and the Rules do distinguish between the two in its definitions. It is also important to recognize that this convention is not a full multimodal instrument. To be applied, there must not only be a sea leg but an international sea leg [1].

All transport conventions contain a limitation of the compensation to be paid by a carrier. Visby rules established the limitation per package at 666. 67 SDR, or 2 SDR per kg. The Hamburg rules raised the limit to 835 SDR per package or 2.5 SDR per kg. The 1980 Multimodal Convention (that has not entered into forced yet) raised limit to 920 SDR per package and 2.75 per kg. The Rotterdam Rules in Article 59 adopt limit 875 SDR per package or unit and 3 SDR per kg [1]. While the weight limits are still below those found in other modes, whether these new limits of liability are seen as

better for cargo interests is, of course a different matter and will be evaluated by each cargo owner based on his or her claims history and experience. With comparison to unimodal modes, for instance Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) of 2001, establishing the liability of the carrier rate of 2 SDR per kilogram shipment or 666.67 SDR per package or any other unit load, or 1,500 SDR per container without the stored goods and further 25,000 SDR for goods stored in a container. The limit for transport of goods by air is almost nine times higher than the limit for maritime conveyances. However the goods transported by air usually have a much higher value than their counterparts that are being shipped by sea [3]. Comparable Limits of Liability under Unimodal and Multimodal Regimes can be found in Table 2.

Table 2

Comparable Limits of Liability under Unimodal and Multimodal Regimes [1, 3]

Regime	**Limit by Weight**	**Limit by Item**
Sea Carriage – *Hague Rules* (Arts. IV(5) and IX) – *Hague/Visby Rules* (Art. IV (5)) – *Hamburg Rules* (Art. 6)	n/a 2.00 SDR/kg 2.50 SDR/kg	U.S. $500/pkg (= 338 SDR/pkg) 666.67 SDR/pkg 835 SDR/pkg
ICC Rules 1975 (Rule 11(c))	30 Poincaré francs/kg (~2 SDR/kg)	n/a
Multimodal Convention 1980 (Art. 18(1), (3).) – but if no sea leg	2.75 SDR/kg 8.33 SDR/kg	920 SDR/pkg
UNCTAD/ICC Rules 1992 (Rules 6.1 and 6.3) – but if no sea leg	2.00 SDR/kg 8.33 SDR/kg	666.67 SDR/pkg
Rotterdam Rules 2009 (Art. 59)	3 SDR/kg	875 SDR/pkg
Road Carriage—CMR (Art. 23)	8.33 SDR/kg	n/a
Rail Carriage—CIM Uniform Rules (Arts. 7, 40 and 42)	17.00 SDR/kg	n/a
Air Carriage—Warsaw Convention/ Montreal convention (Art. 22(2))	17.00 SDR/kg	n/a
Inland water carriage – CMNI (Art. 20)	2 SDR/kg	666,67 SDR/pkg, 1500 + 25000 SDR/container

The choice of rules by cargo interests is dependent on the company's particular business requirements and its claims history. Cargo owners will set their priorities by using risk assessment techniques in order to determine which set of rules would work best for their particular circumstances, assuming that they have some measure of market power in dealing with the carrier. One study [1] found that companies facing localized, simple physical loss or damage without the complications of just-in-time shipments or delay in delivery would have limited interest in the decision because the differences between the rules for simple cargo damage that could be localized and attributed were not particularly significant. On the other hand, the choice of rules would most likely be of interest when cargo owners faced unattributable losses or delay. However, in these cases, the Rotterdam Rules are not applicable as the Rotterdam Rules only apply when the damage can be attributed to the marine leg [1]. When damage may be attributed to the marine leg, the issues are clearer but the limits of liability are not necessarily higher. According to Article 26 of the Rotterdam Rules, when a loss occurs during a carrier's period of responsibility, but outside of the shipping process, the convention yields to other international instruments, and the relevant unimodal convention takes effect [1, 9].

4. CONCLUSION

The beginning of containerization, the increasing complexity of modern supply chains, the development of electronic documentation and the enhanced importance of security have made carrier-shipper relations incredibly complex. While at the same time its driving governments towards a desire to harmonize the way in which global financial and trading rules are implemented. It is extremely important to the economic interests of all trading nations that complicated supply chain functions seamlessly and equitably for all involved. To achieve such a goal, there must be not only political will to sign and ratify improvements on existing carriage rules, but also widespread adoption of the contract terms without exemptions being negotiated at the firm contract negotiation level. The idea of the Rotterdam Rules is that it shall apply door-to-door mode, regardless of the mode of transport, as long as an international sea leg is involved. This broad scope of application of Rotterdam Rules carries a risk of conflicts with unimodal transport conventions, which regulates carriage by air, road carriage, carriage by rail and carriage by inland water. Moreover, as the Rotterdam Rules only apply in cases where damage is attributable to the marine sea leg, they are still not attractive from a cargo perspective even though they have been more explicit in defining delay and have raised the limits of liability. In summary, it appears that the Rotterdam Rules face similar prospects to the Hamburg Rules - for unimodal container moves port-to-port, they bring just another permutation to the table. For multimodal transport, there remains considerable confusion as to what will work best in the door-to door context and a trading environment focused on time-based competition where the consequences of cargo delay are a paramount consideration for a large portion of the moves. As is well known, the European countries represents import players on the carries as on the cargo owner sides, therefore their perspectives and decision concerning Rotterdam Rules will play huge part in international acceptance of these rules. The future of the Convention remain unclear, nevertheless, if it is finally ratified by a sufficient number of countries and achieve an acceptance, it should produce the desirable uniformity in international multimodal transport.

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