CARRIERS VERSUS SHIPPERS – THE ROTTERDAM RULES: STRIKING A MORE APPROPRIATE BALANCE

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Executive Summary

In the field of international maritime carriage of goods, the still-nascent "Rotterdam Rules" (known formally as the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea) have been lauded by the United Nations Commission on International Trade Law (**"UNCITRAL"**) as a "binding and balanced universal regime", providing "a modern alternative" to the current international regime based on the familiar Hague-Visby Rules (the **"HVR"**), which have the force of law in Singapore under the Carriage of Goods by Sea Act (Cap. 33). This article explains why and how, compared with the HVR, the Rotterdam Rules seem, on paper, to strike a more appropriate balance between the oft-conflicting interests of carriers and shippers of maritime cargo.

Roadmap

The discussion starts by identifying some commercial interests of carriers and shippers – interests that would be prudent for either party to protect against the other. Following that, a brief history of the HVR will be examined to understand the shortcomings of the present legal regime governing the international maritime carriage of goods. These shortcomings provide the basis for criticisms of the HVR, with critics calling for a revamped and modernised set of rules more cognisant of the realities facing the modern logistics industry. Thereafter, by comparing and contrasting the HVR against the Rotterdam Rules, several areas of divergence between the two will be identified which demonstrate the latter appears to strike a fairer balance between the interests of carrier and shipper.

For the optimists, the Rotterdam Rules herald a bright new beginning for the law of international maritime carriage. However, like all things new and innovative, they face a wave of scepticism and resistance, not least by vested interests in the present regime based on the HVR. The article concludes with a brief mention of some of the Rotterdam Rules' weaknesses, which might ultimately hinder the widespread adoption necessary for their success.

Carriers' interests versus shippers' interests – an irreconcilable lot?

In order to understand how the Rotterdam Rules attempt to strike an appropriate balance between the interests of the carrier and the shipper, it is important to first identify and appreciate some of their respective commercial interests. For the carrier, some of his interests are necessary to:

- Limit the categories of contracts of carriage recognised by the rules of carriage to those with which he is most comfortable;
- Limit the applicability of the rules of carriage to the period where he has direct, or at least sufficient,

control and supervision over the carriage operation;
- Limit his liability in monetary terms to an acceptable ceiling when his liability is proven;
- Benefit from as wide a catalogue of defences against liability as possible;
- Be protected by a detailed list of the shipper's obligations and responsibilities.

For the shipper, however, his interests would be to:

- Expand the categories of contracts of carriage recognised by the rules of carriage to include those contracts which are already commonplace but not yet covered by existing legal regimes;
- Expand the carrier's period of responsibility under the rules of carriage to include a non-maritime leg of the voyage in intermodal logistics arrangements;
- Benefit from the widest possible protection of his cargo during the voyage;
- Limit the carrier's catalogue of defences against liability;
- Have recourse against the carrier for any damage to cargo due to the carrier's negligence.

It is evident from the above that most of the carrier's interests are diametrically opposed to those of the shipper's. But far from being hopelessly irreconcilable, the rules of international maritime carriage of goods, beginning with the Hague Rules of 1924, represent attempts at bringing the two sides closer together for a workable compromise. The 95 articles comprising the Rotterdam Rules, drafted some 84 years after the original Hague Rules, are by far the most comprehensive set of rules to date governing the rights and responsibilities of both carrier and shipper.
The Rotterdam Rules are the result of over a century of evolution balancing the rights and responsibilities between carriers and shippers. They materialised thanks to a perception amongst users of shipping services that, apart from being outmoded, the HVR was unfair to shippers' interests, being generally skewed towards carriers' interests.

How the Hague-Visby Rules fall short

In the nineteenth century, shippers and carriers had unbridled freedom to negotiate between themselves the terms governing their own contracts of affreightment. Carriers typically had the upper hand in such negotiations, abusing their far superior bargaining position to impose widespread and unreasonable liability exclusions upon the weaker shipper, who usually had to accept these terms without qualification. The original Hague Rules were enacted to address this undesirable situation: to protect shippers by imposing upon carriers some internationally agreed minimum affreightment standards and obligations.

However, the Hague Rules, and their successors the HVR, seem instead to have entrenched carriers' hold over shippers, by in fact diluting the protection once afforded to shippers by the English common law prior to 1924. One good example is regarding seaworthiness: the English common law imposed upon carriers an absolute obligation to provide a seaworthy ship at the commencement of the contractual voyage; whereas the HVR mandate a lower standard of "due diligence" for carriers to make their ship seaworthy. The HVR has also preserved within their provisions the ancient and controversial "nautical fault defence" found in

contracts of carriage predating the Hague Rules. This rule is regarded as being manifestly unfair to shippers, as it provides them with no recourse against the carrier when the latter's employees have been negligent in the navigation or management of the ship.

Shippers are therefore still inadequately protected under the HVR despite their crafters' initial, lofty aims. Attempts were made over the years to remedy and improve the situation, but had minimal impact as changes imposed barely went far enough: powerful maritime nations representing carrier interests ensured that any proposed change was minimal to protect their own positions. Worse still, a patchwork of international agreements on the maritime carriage of goods meant an equally confusing patchwork of adherents – some nations signed up to the HVR while others remained on the original Hague Rules; and a number went on to adopt the Hamburg Rules and denounce the HVR. A new regime was thus needed to address old injustices, keep currency with developments in the logistics industry and to provide long-overdue uniformity. Drafted and published by UNCITRAL, the Rotterdam Rules are a bold step in this direction.

The Rotterdam Rules: a more appropriate balance

The overriding aim of the Rotterdam Rules is to achieve a comprehensive re-balancing of shipper interests against carrier interests, given shippers' widespread misgivings toward the HVR. This section will explain how such rebalancing is achieved and explains why it results in a more appropriate balance between shipper interests and carrier interests.

Shippers' interests: Better recognition and more protection

The shortcomings of the HVR expose some deeply-entrenched injustices against shippers' interests, which still exist today. The main objectives of the Rotterdam Rules, therefore, include broadening the scope of shippers' rights and according to their interests greater recognition. To achieve this, a corresponding reduction of carriers' rights and an increased scope of carriers' duties were deemed necessary.

Wider scope of applicability and coverage

The Rotterdam Rules seek to accord greater recognition of shippers' rights and make the legal regime fairer to shippers by expanding the scope of coverage in three areas:

- Applicability;
- The carrier's period of responsibility; and
- The types of contracts covered.

The Rotterdam Rules apply more widely, and more fairly to all parties

The HVR apply only in three situations, two of which being when the bill of lading (**"BL"**) is issued in a contracting State; or if the carriage is from a port in a contracting State. No mention is made of the port of discharge and thus of the receiver's/shipper's rights to invoke the HVR. Tellingly, the emphasis on the location of BL issuance makes it far easier for carriers to invoke the HVR: since BLs are frequently issued in carriers' places of business (which are invariably in contracting States), even though that location might have nothing to do with the actual voyage referred to in the BL. The emphasis on outbound ports only has the same effect since a great majority of these ports are in maritime nations where carriers operate. As can be seen, the balance is tipped greatly in favour of carriers where applicability of the HVR is concerned.

The Rotterdam Rules strike a more equitable balance. The place of issue of the BL is rightly dispensed with as it might have no relevance to the voyage. Instead, the Rotterdam Rules are applicable once there is an international, maritime element to the voyage and if any one of the following locations is in a contracting state: the places of receipt and delivery, and the seaports of loading and discharge. This is a more sensible approach which ties the applicability of the Rotterdam Rules to the relevant locations of the particular voyage concerned. More importantly, this gives shippers an equal chance at invoking the Rotterdam Rules against carriers.

The carrier is responsible for more than just the sea voyage

Secondly, under the HVR, the carrier's period of responsibility is described facilely as being "tackle-to-tackle". In precise terms, the carrier is responsible for the shipper's cargo from the time when such cargo is loaded onto the vessel's tackle at the loading port, until it is discharged from the same vessel's tackle at the discharge port. Unless otherwise agreed, at no further points in time is the carrier liable for the shipper's cargo.

Under the Rotterdam Rules, the carrier's period of responsibility is significantly increased with the emphasis on "receipt" and "delivery" – the carrier is now responsible not just from "tackleto-tackle", but also from when he receives the cargo until he delivers it into the hands of the shipper or consignee. This period would include any inland or non-maritime leg of a voyage, particularly during the time when cargo transits from the shipper's premises to the load port and from discharge port to the consignee's premises, which could account for considerable distances in large countries.

It may seem somewhat unfair to make carriers responsible for portions of a voyage over which they have little or no supervision, such as during road, rail, or even inland waterway transit. However, in extending the period of responsibility from receipt to delivery, the Rotterdam Rules accord long-overdue recognition to "door-to-door" logistics arrangements in today's containerised age, which form the bulk of modern, multi-modal contracts of carriage – where goods are received by the carrier at the shipper's premises, and delivered at the consignee's premises – with the carrier and his agents capable of performing the whole of the voyage, over both land and water, in-between. The period of responsibility mandated by the Rotterdam

Rules, therefore, reflects a more contemporary, holistic understanding of the concept of "carriage", and is much more cognisant of the practices of the modern logistics industry. In contrast, the HVR with its "tackle-to-tackle" policy, completely ignore the containerisation revolution in international trade and shipping and still assume that shippers and consignees would turn up at the port personally to claim their cargo. It is also useful to note that with the places of receipt and delivery being relevant locales for the applicability of the Rotterdam Rules, this is consistent with the corresponding period of the carrier's responsibility being from receipt to delivery. Therefore, by expanding the carrier's scope of responsibility, the Rotterdam Rules strike a more sensible balance between the rights of the carrier and the shipper, certainly to the detriment of the former, but for the benefit of the industry as a whole.

"Contract of carriage" to include more than simply negotiable BLs

Thirdly, the HVR take an unreasonably restrictive, BL-centric approach when deciding which contracts qualify as "contracts of carriage" to be covered by them. Compounding such restriction further, only "contracts of carriage covered by a bill of lading or any similar document of title" are covered by the HVR, implying that not all BLs, but only negotiable BLs come under their purview. This is undoubtedly to the benefit of carriers who can escape the HVR for the many other categories of documents which they issue and control, but which are not covered: seawaybills and mates' receipts being just two examples. Given this, there is no practical reason to so restrict what constitutes a "contract of carriage".

The Rotterdam Rules contain a general definition of "contract of carriage", which is not tied to any specific document issued thereunder. As "a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another", with the requirement that such a "contract shall provide for carriage by sea", the Rotterdam Rules leave it open to parties to introduce other forms of documentation as contracts of carriage. This will benefit shippers since they will now be able to rely on consigned BLs and mates' receipts, for example, in addition to negotiable BLs, to come under the Rotterdam Rules and thereby make the carrier liable for cargo loss or damage. Again, the carrier's interests have been tapered in favour of the shipper's, and for good reason.

Seaworthiness and related obligations

The carrier's duty to "exercise due diligence" to make his ship seaworthy "before and at the beginning of the voyage" and the obligations relating to manning and maintaining the ship under the HVR have been upgraded under the Rotterdam Rules. While the "due diligence" standard remains with regard to seaworthiness, the carrier is now expected to maintain this standard throughout the sea voyage also. By extending these obligations past cast-off and into the voyage proper, the scope of the shipper's protection is greatly expanded. This change is reasonable considering technological advancements enabling carriers and their crew to communicate instantaneously on the high seas, allowing quick remedial action whenever seaworthiness surfaces as an issue during the voyage.

Carrier's defences reduced

Under the Rotterdam Rules, the infamous "nautical fault defence" is abolished, and carriers will no longer be absolved from liability when the negligence of their employees in the navigation or management of the ship cause loss or damage to cargo. Although the courts have tried hard to mitigate the harshness of this defence by ruling around it, the definitive abolition of this rule will come as a huge relief to all shippers. Again, this rule is a relic of the past when carriers had little control over the defaults of their employees during the voyage. With technological advancements and modern crew training methods, it is only appropriate that carriers become vicariously liable for the negligence of their crew.

Carriers' interests: Preservation and update

With the Rotterdam Rules, all is not lost for carriers, however. Any appropriate balance between shippers' and carriers' interests must adequately address carriers' concerns as well.

For starters, the text of the Rotterdam Rules has preserved the HVR obligations and defences in a similar format and wording, and hence meaning, familiar to carriers. Since the Rotterdam Rules build upon earlier conventions like the HVR, it does not compel carriers to navigate unchartered waters when it comes to interpreting their rights. Thanks to this, the considerable corpus of case law built up over the years interpreting the HVR can be used as a base from which to interpret the Rotterdam Rules.

Crucially for carriers, the Rotterdam Rules include an entire chapter comprising eight articles devoted to the shipper's obligations. This is a novel innovation over the HVR, in which shippers' obligations are contained in only three provisions "scattered in different parts of the text". The Rotterdam Rules elaborately detail shippers' obligations (some of which are strict) regarding cargo readiness and suitability for carriage, provision of accurate and timely information, and contain special obligations regarding dangerous goods.

The Rotterdam Rules contain another noticeable improvement for carriers. Through the concept of the "Maritime Performing Party", the same defences and liability limitations enjoyed by carriers are extended to third-party sub-contractors like stevedores, and rightfully so. This is something which is lacking in the current regime, as the HVR does not address the issue of stevedores' liability. At present, stevedores can only benefit from "Himalaya" clauses extending to them the carrier's limitation of liability. The Rotterdam Rules seek to protect stevedores without the need for such a clause. Naturally, as quid pro quo, Maritime Performing Parties will also be subject to the same responsibilities and liabilities as the carrier.

Finally, the Rotterdam Rules allow the carrier under certain circumstances to deliver cargo without the consignee's surrender of the original BL and yet preserve his rights. This is provided that such BL expressly states that cargo may be delivered without its surrender – a significant departure from the age-old axiom that the original BL provides the key to the floating warehouse. This signals the Rotterdam Rules' flexibility and cognisance with commercial realities: carriers are occasionally under considerable pressure to agree to consignees' and shippers' demands to deliver cargo without surrender of original BLs when commercial

exigencies clash with strict legal requirements. In situations like these, carriers must be protected against claims that might subsequently arise from competing cargo interests. The Rotterdam Rules afford such protection where a negotiable BL expressly allows for the delivery without its surrender, proving the shipper's agreement to such an arrangement.

Conclusion: the Rotterdam Rules – A long time coming, but a long way to go

The Rotterdam Rules, in addition to building on, and providing a "modern alternative" to, the HVR; is described as a "balanced universal regime" to facilitate maritime carriage and hence develop international trade. They have influential supporters like the World Shipping Council and the International Chamber of Commerce. But they also have detractors who describe the Rotterdam Rules as "a very extended grey area of uncertainty". Such criticism is not unfounded considering the potentially profound, game-changing consequences of some provisions like Article 47 (2), and novel concepts like "Maritime Performing Party" and "Volume Contracts" which are not yet well understood.

The insurance industry is particularly concerned about the Rotterdam Rules' overlap and possible conflict with existing conventions governing land transport like the CMR Convention. Similar concerns are shared by the rail industry, used to its own liability regime. For these and other sceptics, the adage "Better the devil you know than the devil you don't" rings true, and the HVR remain firmly in place despite the Rotterdam Rules' significant improvements over the former. At present, there is sadly little incentive for states-parties to adopt the Rotterdam Rules. Unless maritime and trading nations themselves take the lead and venture out of their HVR-engendered comfort zones to adopt the Rotterdam Rules, their full potential might forever remain only a potential; and in time, the rest of the world will be left contemplating what might have been.

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