

## Article: Rotterdam Rules - 10 Points of Interest

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**Background:** At the moment there is a bit of a problem. There is no universally accepted regime covering the carriage of goods around the world. Some countries use the Hague Rules, some the Hague Visby Rules, a few the Hamburg Rules and the United States has its own Carriage of Goods by Sea Act. Some have not adopted any rules, so a bit of a mess.

The most recent set of rules, the Hamburg Rules, was seen as too one sided and has not been widely adopted. Most of world trade is regulated by conventions at least 40 years old. Computers and e-commerce were then a thing of science fiction, so it is time that the regulations caught up with the business they are seeking to regulate. The United Nations Commission on International Trade Law (UNCITRAL) has spent 10 years trying to draft a set of rules that will achieve the ideal of a single regime accepted by all States around the world and this is open for signature in Rotterdam this month.

If 20 States ratify the Convention then the Rules will come into force 1 year after ratification by the 20th State.

### The 10 Points

#### 1. How much of any claim will you recover?

If goods are lost or damaged then compensation will be calculated by reference to the value of the goods at the place and time of delivery. The Rules use the Hague Visby formula for the Carrier's limit of liability but with increased limits of 875 SDRs per package or 3 SDRs per kilo (as compared to the Hague Visby formula of 666.67 SDRs per package or 2 SDRs per kilo) on the gross weight of the goods which are the subject of the claim or dispute, whichever is the higher, except where a higher value for the goods has been declared by the Shipper and this is included in the contract particulars (Article 59).

In containers the number of packages or pallets stowed in the container and listed in the Transport Document or Record (see point 3 below) will be taken as the "package" for the purpose of calculating the limit.

**Comment:** A familiar formula, now updated.

#### 2. How long have you got to claim?

The limitation period has been extended from 1 year to 2 years after the goods are delivered or should have been delivered (Article 62). Time can be

extended by agreement between the parties so time extensions can therefore extend the time for issuing the proceedings beyond the 2 year period (Article 63). A Carrier who wishes to pursue an indemnity claim has a bit longer – at least 90 days from the day on which the person seeking the indemnity either settles the claim against him or he has been served with proceedings in the claim itself.

**Comment:** Again, a familiar formula but now more time to achieve an amicable settlement.

#### 3. What contracts are covered by the Rules?

The Rules seek to regulate more than for example, the Hague Visby Rules, in that they will apply to:-

- a. Bills of Lading (traditional paper documents) now called a "Negotiable Transport Document"
- b. Non Negotiable Way Bills (traditional paper documents) now called a "Non Negotiable Transport Document"
- c. Negotiable Electronic Transport Records
- d. Non Negotiable Electronic Transport Records

All the above being contracts of carriage in which the place of receipt / port of loading and the place

of delivery / port of discharge are in different States and if any one of the following are located in a contracting State:

- i. The place of receipt
- ii. The port of loading
- iii. The port of discharge
- iv. The place of delivery

The Rules do not apply to Charter Parties or Slot Charters.

If an Electronic Transport Document has been issued, the Carrier and the holder may agree to exchange it for a paper document and vice versa. The rights of the parties to Electronic Records are set out in Chapter 10 of the Convention. We will look at those rights in detail in a later Paper.

**Comment:** As well as attempting to embrace e-commerce Non Negotiable Way Bills and the electronic equivalent are brought into the regulations. The procedures for the exercise and control of electronic documents are, as stated above, set out in Chapter 10 and we will consider those in detail at a later date.

#### 4. What is the Carrier's Responsibility?

Now here is another major difference. Whereas the Hague Visby Rules only applied ship's rail to ship's rail the Rules apply from the place where the Carrier receives the goods and end when the goods are delivered at the place designated for delivery (Article 12).

However, where the loss or damage to the goods or an event causing delay in their delivery occurs during the Carrier's responsibility, but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over provisions of another International Convention which would have applied to the Carrier's activities if the Shipper had made a separate and direct contract with the Carrier in respect of the particular stage of carriage where the loss or damage to the good or delivery occurred.

**Comment:** The Rules now cover all transport covered by the contract whatever the means of transport – they have come ashore! The Rules will not however cover, for example, the road carriage if another International Convention would have applied if a separate contract had been made in relation to that leg of the journey.

#### 5. Who is liable under the contract?

The Carrier is liable. "Carrier" is defined as the person who enters the contract with the Shipper (Article 1 [5]). The Carrier is liable for breaches caused by any Performing Party, the Master and crew of the ship or employees of the Carrier or a Performing Party.

A "Performing Party" is defined in Article 1 (6)

a. It means a party other than the Carrier who undertakes to perform any of the Carrier's obligations under the contract of carriage.

Where a Transport Document is issued which has (an inland) place of receipt and delivery then the road haulier who collects and carries those goods to the port of loading and the road haulier who delivers from the port of discharge to the final destination will be a Performing Party.

In addition to the Carrier, the Rules make a "Maritime Performing Party" potentially liable. A Maritime Performing Party is a person other than the Carrier who undertakes to perform any of the Carrier's obligations between arrival of the goods at the port of loading and discharge at the port of discharge. He is liable subject to the defences and limits of liability:

- i. For any damage occurring between the port of loading and discharge or whilst the goods are in his custody
- ii. While he had custody of the goods
- iii. Any other time to the extent that the Maritime Performing Party was participating in the performance of any activities contemplated in the contract
- iv. The Carrier and Maritime Performing Party are jointly and severally liable but only up to the limits of liability within the Convention. It is not possible to recover the monetary limit from the Carrier and then a second time from the Maritime Performing Party

**Comment:** The Carrier now has an overall liability from the beginning of the contract to the end whether he carries himself or he subcontracts to others e.g. road hauliers. There is an alternative remedy against the Maritime Performing Party even though he was not a contracting party.

#### 6. Identity of the Carrier

Here the Rules go where the Hague Visby Rules did not go. The Carrier is defined as the party identified

in the contract. If no person is identified then the registered owner of the vessel named in the contract is presumed to be the Carrier unless the ship owner proves that the ship is Bareboat Chartered and provides the name and address of the Bareboat Charterer.

**Comment:** This is much over due. It is plainly right that a receiver should be able to easily establish the party to whom he has to look for redress and the “trap” of the vessel being on bareboat charter now vanishes.

## 7. Obligations of the Carrier

The Carrier is responsible for goods from receipt to delivery (Article 11). The Carrier shall properly and carefully receive, load, handle, stow, carry, keep, care for, unload, and deliver the goods.

In addition there are specific obligations applicable to the voyage (Article 14). The Carrier is bound before, at the beginning of and during the voyage to exercise due diligence to:

- a. Make and keep the vessel seaworthy
- b. Properly crew, equip and supply the vessel throughout the voyage
- c. Make the holds and any containers supplied by the Carrier fit and safe for the reception, carriage and preservation of the goods

**Comment:** This is most important; the Carrier’s obligations now continue throughout the voyage, they are not “snap shot” obligations that merely arise before or at the beginning of the voyage as in the Hague Visby Rules. It is no longer open to the Carrier to argue that a defect causing loss was not present before or at the commencement of the voyage.

## 8. What is the basis of liability?

The Carrier is liable for loss or damage if the claimant proves the event or circumstances took place during the Carrier’s period of responsibility. The Carrier is relieved of liability if he proves that the cause of the loss or one of the causes is not attributable to his fault or to the fault of any Performing Party, Master or crew, or employees of the Performing Party.

The Carrier is also relieved of liability if as an alternative to proving the absence of fault he proves one or more of a number of specific exemptions set out in Article 17(3). These specific exemptions

are similar to those in the Hague Visby Rules e.g. Act of God, latent defect etc. These exemptions do not apply and the Carrier is liable for all or part of the loss, damage or delay if the Claimant proves the fault of the Carrier or person in Article 18 (i.e. Carrier, Master, Performing Party, Maritime Performing Party) caused or contributed to the event or circumstances on which the Carriers relies. The Rules also make it clear that the obligations in article 14 are overriding obligations.

**Comment:** The really important change is that an error in navigation or negligence in the management of the vessel no longer affords the Carrier a defence, but establishes liability. In particular this means that many GA cases Cargo Interests will be able to recover salvage remuneration paid, for example, where there is a stranding of a vessel due to negligent navigation. Further, when negligence has been established, Cargo interests will be able to resist claims to contribute GA on the basis of an actionable breach of contract.

## 9. Volume Contracts

“Volume Contracts” are contracts of carriage that provide for the carriage of a specified quantity of goods in a series of shipments during an agreed time. Article 79 provides that any term in a contract is void insofar as it excludes the liability of the Carrier or Performing Party under the Convention. However, an exception to this rule relates to Volume Contracts, again this is a new feature in the rules. Here the Convention recognises that in such contracts the parties probably have equal bargaining powers allowing them to provide for greater or lesser obligations. There are however, stipulations and restrictions:

- a. The Volume Contract must contain a prominent statement that it derogates from the Convention
- b. It is individually negotiated or prominently specifies the sections of the Volume Contracts which derogate from the Convention
- c. The Shipper is given the opportunity and notice of the opportunity to conclude a contract on conditions that comply with the Convention
- d. The derogation is not an incorporation by reference from another document

Anybody other than the Shipper will be bound by the terms of the Volume Contract so long as they have given their express consent to be bound and this is not to be implied from some term in the transport document or electronic document.

**Comment:** This is an interesting development. The rules now recognise that Shippers of a volume of goods have an equal bargaining power with the Carriers. It will be of considerable interest to the insurer whether their major assured has agreed terms more or probably less favourable than the Rules as it will impact directly on the level of recoveries. This means that freedom of contract is given to the Shippers and Carriers, but that a receiver or other party can only have terms of the Convention excluded if he expressly agrees.

## 10. Jurisdiction

Except for a Volume Contract in an action against the Carrier, the plaintiff can start proceedings against the Carrier in a competent Court (Article 66[a]):

- i. In the domicile of the Carrier
- ii. In the place of receipt of the goods of the contract of carriage
- iii. The place of delivery
- iv. The place where the goods were loaded or finally discharged from the vessel

A jurisdiction agreement is only valid if, in addition to the parties agreeing, it is contained in a Volume Contract that clearly states the names and addresses of the parties and is either individually negotiated or contains a prominent statement that there is an exclusive Court agreement and specifies the sections of the Volume Contracts containing that agreement.

A person that is not a party to the Volume Contract is only bound by the exclusive Court agreement if the Court is one of the places designated in Article 66 (a) and the agreement is contained in the transport document and the person is given timely and adequate notice of the Court where the action shall be brought and that the jurisdiction is exclusive.

So whilst the original parties to the volume contract can agree to an exclusive jurisdiction clause

**Tony Thomas**

**Email:** [tony.thomas@thomasmarinelaw.com](mailto:tony.thomas@thomasmarinelaw.com)  
**Mobile:** + 44 (0) 7831 866839

For more articles please visit [www.thomasmarinelaw.com/articles](http://www.thomasmarinelaw.com/articles)

other parties will not be bound by this unless they expressly agree and the jurisdiction is one of the 4 places mentioned in Article 66(a).

After a dispute has arisen the parties to the dispute may agree to resolve their dispute in any competent Court. So if a defendant appears without contending jurisdiction then that Court will have jurisdiction (Article 72). As an alternative to proceedings Article 75 recognises that the parties may agree that any dispute should be referred to Arbitration. The person asserting a claim against the Carrier has a similar choice of jurisdiction to that set out above in relation to proceedings. So the Arbitration can take place either in the place designated for that purpose in the Arbitration Agreement or in a State where any of the following places is located.

- i. The domicile of the Carrier
- ii. The place of receipt agreed in the Contract of Carriage
- iii. The place of delivery agreed in the Contract of Carriage
- iv. The port where the goods are initially loaded
- v. The port where the goods are finally discharged from the ship

**Comment:** Except for Volume Contracts the Carrier can no longer impose an exclusive jurisdiction clause on the goods owner but jurisdiction will instead be decided on a case by case basis with up to four alternatives open to the plaintiffs.

**Tony Thomas** - 25/08/2009

**Linley Taylor**

**Email:** [linley.taylor@thomasmarinelaw.com](mailto:linley.taylor@thomasmarinelaw.com)  
**Mobile:** + 64 (0) 21 277 7227