

# THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA (THE “ROTTERDAM RULES”)

## A POSITION PAPER BY THE INTERNATIONAL CHAMBER OF SHIPPING

### Introduction

The exhaustive discussions and negotiations that took place under the aegis of the United Nations Commission on International Trade Law (“UNCITRAL”) between 2001 and 2008 have culminated in the new international Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. It was approved by the UNCITRAL Commission in July 2008 and adopted by the UN General Assembly on 12 December 2008. The Convention will be open for ratification following a signing ceremony in Rotterdam in September 2009 and will be known as the “**Rotterdam Rules**” (the “Convention”).

### I. Importance of Internationally Applicable Rules for a Global Industry

About 90% of world trade is carried by the international shipping industry on some 50,000 merchant ships trading internationally, transporting every kind of cargo. Shipping is thus truly a global industry. The Rules that govern it must of necessity also be truly international in the sense that they are widely accepted across all the various jurisdictions in order to provide legal certainty and uniformity, thereby reducing conflicts of rules which would necessitate a variety of insurances at increased expense and lead to confusion, an increase in litigation and consequent legal and other costs. This is of vital importance to all stakeholders, shippers and carriers and international trade at large.

### II. Historical Context

That international shipping trade continues as efficiently as it does is testament to the wide international applicability of the central legal code encased in the Hague, Hague Visy Rules and the US COGSA which define the basic rights and obligations of the parties to a contract for the carriage of goods by sea. However, the growing efficiency of shipping with the development of faster ships, quicker port turn-arounds, the use of e-commerce and e-communication, the unimagined growth in containerised trade and the increasing practice whereby the operator undertakes the entire transport of goods from receipt from shipper’s premises to final delivery, have created liability and documentary challenges which are not met by the present unimodal maritime liability regimes in the Hague, Hague Visby and the Hamburg Rules.

Whilst some *ad hoc* solutions have been found, there is no uniformity or legal certainty and the various initiatives over the years to agree internationally accepted rules which would meet the challenges of modern trade have been unsuccessful. It will be recalled that this lacuna led to the initiative in the US in the early nineties to modernise the US

COGSA of 1936, resulting in a draft text for an amended US COGSA. This caused great concern, because it represented regionalism which would have caused chaos to international trade and the Industry. The US was ultimately dissuaded from pursuing this initiative in favour of the proposal to develop an international, and uniform, solution under the aegis of UNCITRAL and since then, the US has been fully engaged in the successful negotiation of a new Convention.

### **III. Political Context**

The number of States (representing shipping and shipper interests and all major trading nations), Industry representatives and academics that participated in the UNCITRAL discussions was almost unprecedented. The Convention was approved by a huge majority of those participating, signifying a successful and acceptable compromise which raises the very real prospect of an international solution coming into effect.

Importantly, for many States, this Convention represents the last attempt to obtain international agreement after the previous unsuccessful attempts. The US has made it clear, for example, that having deferred its own national proposals in 1993, if there is not widespread ratification of the Rotterdam Rules, it will proceed with its own regional plan. Such a step by the US will almost certainly result in a failure of the UNCITRAL Convention and the end of the prospect of an internationally accepted regime.

ICS is also aware that the EU Commission has plans to introduce its own EU-wide multi-modal solution which might also apply to matters and trades that would otherwise be governed by the UNCITRAL Convention. If such proposals are introduced and this prevents EU Member States from ratifying, it is inevitable that other key States such as the US will walk away from the Convention.

For this reason alone, it is absolutely imperative that full support is given to the international UNCITRAL Convention and that the EU Commission sees that there is a strong international political will in favour of the Convention. It is only by showing strong political support that the attempts to introduce conflicting and overlapping regional rules will be eliminated – an absolute priority for not only the international shipping industry but all interests and ultimately, for the consumer.

### **IV. Overview of the Convention**

Very broadly, the aim of the Rotterdam Rules is twofold: first to modernise the regime generally for the traditional “tackle-to-tackle” and “port-to-port” carriage of goods and secondly, to introduce innovative solutions to meet the demands of carriage of goods on “door-to-door” terms by which the carrier undertakes responsibility for not only the maritime leg but also the intermediate and final land, inland waterway or air leg, from receipt of the goods from the shipper until final delivery to the receiver. Existing regimes such as the Hague Visby Rules are restricted in their scope of application to the maritime leg. The Rotterdam Rules regulate multimodal carriage terms provided that an international maritime leg is contemplated in the contract of carriage.

The Convention is best described as a “maritime plus” instrument rather than providing a full uniform multimodal liability regime for all modes of transport. By limiting the scope in this way it was possible to apply the provisions for the maritime leg to damage which cannot be localised (“concealed damage”). Application of the maritime rules to concealed damage was found to be quite appropriate because a maritime transport always has to be part of the whole transport. Furthermore, application of the maritime rules made it unnecessary to establish a separate liability system for such concealed damage, thereby avoiding yet another set of liability rules.

For localised damage, the Convention adheres to the concept of “network” liability. Thus liability and the applicable limits of liability for loss of or damage to the goods occurring before or after the sea-leg will be determined by any unimodal international instrument compulsorily applicable to the relevant mode of transport where the loss or damage occurs, for example, the Convention on the Contract for the International Carriage of Goods by Road (CMR 1956) if the damage takes place on the road leg.

The Convention also has a very broad geographic scope of application in that it applies to international contracts of carriage with an international maritime leg where the place of receipt, loading, delivery or discharge is situated in a contracting state. In other words, like the Hamburg Rules, it will apply to both outward and inward carriage. Thus by virtue of its own provisions, the Convention will enhance uniformity and is to be contrasted with the Hague Visby Rules which apply only to an outgoing carriage.

## **V. Industry’s view of the “Rotterdam Rules”**

Shipowners will see a significant increase in the cost of cargo liability claims due to certain provisions of the Convention, namely:

- Loss of the right to the nautical fault defence;
- Extension of the obligation to exercise due diligence to make the ship seaworthy;
- Higher limits of liability;

Balanced against the increased liability for shipowners, however, the Convention contains many valuable provisions that seek to facilitate and regulate modern trade practices and shipowners welcome the following:

- As stated, the Convention modernises the liability regime for carriage of goods by sea and also, importantly, addresses the lacuna that presently exists for maritime carriage where there is also multimodal carriage and a sea leg, and regulates such carriage.
- The Convention will extend not only to outgoing maritime carriage but also to incoming maritime carriage.

- The beneficial aspects of existing non-maritime conventions which are known and well-understood and applicable to EU Member States in particular, are retained. Specifically, the new Convention adheres to the concept of “network” liability whereby liability and the applicable limits of liability for loss and damage to the goods occurring before or after the sea-leg will be determined by any unimodal Convention compulsorily applicable to the relevant mode of transport where the loss or damage occurs, e.g. CMR and COTIF.
- The Convention provides a much needed solution for the problem of how to deal with “concealed damage” during multimodal carriage by providing that where it is not known when the damage took place and on which mode of transport, the Convention will govern liability and limits of liability, etc.
- The Convention makes provisions for and regulates e-commerce. In particular, the Convention gives functional equivalence to traditional bills of lading and other transport documents such as way bills and electronic trading systems. In this way, e-commerce will no longer be impeded by shipper rights to demand paper documentation before delivery. The use of encrypted electronic systems will help to reduce fraudulent transactions while instantaneous transmission means that documentation will no longer be delayed in postal systems. This will go a long way toward overcoming the age-old problem often leading to pressure on carriers to release cargo without surrender of documentation.
- The Convention applies to all transport documents in liner trade, not only bills of lading, and provides detailed rules on all documentary aspects thereby ensuring uniformity and certainty in an area which has been dominated by divergent national rules and court decisions.
- The Convention allows parties in the liner trade greater freedom of contract where this is appropriate while at the same time giving mandatory protection where needed. For example, it permits volume contracts in liner traffic to derogate from the Convention by contractual arrangement and according to certain strict conditions to ensure that all parties are adequately protected before embarking on terms outside of the Convention.
- The Convention applies to cargo whether carried on or under deck and thereby avoids the legal difficulties which follow from the Hague and Hague Visby Rules general exclusion of deck cargoes from the scope of those conventions.
- The Convention provides for a much improved regime for deviation when compared with the Hague Visby Rules, in that where under a national law there is a deviation, the Convention will not deprive the shipowner of the right to defences and limitations;

- The Convention contains comprehensive and more systematic provisions on carrier and shipper liability and provides a balanced allocation of risk between these parties.
- Where the consignee has not obtained possession of a negotiable transport document, the Convention permits the carrier under certain circumstances, to deliver the goods without presentation of the negotiable transport document while at the same time protecting the interests of all the parties involved.
- The Convention deals with jurisdiction and arbitration, however the provisions are subject to an opt-in by States. It is most unlikely that EU Member States will opt-in whereas the US is expected to exercise the option to opt-in.

The features mentioned above are distinct improvements over existing regimes and the fact that they are encased in an international convention lead shipowners to believe that this instrument is the most effective mechanism to govern international maritime carriage of goods and that it should be supported by all States in the interests of achieving international uniformity and certainty.

## **VI. Conclusion**

There seems little doubt that, if the Rotterdam Rules are not ratified, the status quo of existing regimes will not remain because they do not meet the needs of today's trading environment, the likelihood being, in particular, that the USA would enact its own domestic legislation. That would be regionalism, and would result in lack of uniformity and conflicts between liability regimes leading to legal uncertainty and legal and administrative costs incurred in navigating the various legal jurisdictions. International trade would inevitably suffer as result.

To all those involved in international trade, uniform international solutions are of vital importance and regionalism must be avoided. The Rotterdam Rules represent the only international solution. They provide a considerable number of valuable provisions to the advantage of international trade which clearly outweigh the small number of less attractive provisions. Accordingly, the Rotterdam Rules should be supported, promoted and quickly ratified.