

# Evaluation of the new Convention from the perspective of carriers

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## **I. Fundamental questions – the Convention is the last chance to achieve global uniform regulation**

I am greatly honoured to have been given this opportunity to present to your association the views on the new Convention – to be called the Rotterdam Rules – from the perspective of carriers.

Today quite a degree of legal chaos exists in the maritime transport area with many conventions and national variations thereof in force, with no multimodal convention

and with old-fashioned provisions in all the instruments and in probably most national laws. Shipowners – like all other stakeholders – need uniformity and uniformity on a global level. This is my basic starting point, and I pose two questions:

– Firstly: What is the role of the Convention in securing global rules?

– Secondly: Based on an analysis of the substantive provisions of the Convention – is the Convention good enough or is it not?

I believe we very much need international, uniform rules for maritime transports and connected transports. Unilateral state regulation or regional regulation of maritime transports and maritime multimodal transports is poison to the smooth development and performance of international trade. It is not without reason that the CMI, IMO and UNCITRAL have for many years striven to create universal solutions for maritime trade.

In shipowners' view we need to modernize the Hague, the Hague-Visby and the Hamburg Rules. We need rules on multimodal transports which comprise maritime transports, and we need a modernized regulation of the »pure« unimodal maritime transports. The Convention gives us both in one single convention. It is not so that shipowners do consider the Convention satisfactory in every respect, but taken as a whole the Convention seems quite attractive. It is in fact attractive to all parties involved – it is a win-win situation. The Convention is supported by practically all shipowners and a large number of shippers and by a majority of P&I and marine cargo insurers. Some shippers and some freight forwarders oppose the Convention. The views of the European Shippers' Council on the Convention as set forth in a public statement from March 2009 very much neglect all the advantages the Convention gives to shippers. The statement has been rebutted by the US shippers – the National Industrial Transportation League – and the position of the European Shippers' Council is not even supported by all European shippers.

Although the views may differ as to the quality of the substance of the Convention, the important point is that the Convention is probably the last chance to achieve a global regulation in the area of maritime and connected transports. If the Convention fails, we cannot just go on with the Hague, the Hague-Visby or the Hamburg Rules. To suggest this, totally neglects all the very clear political signals that the Hague, the Hague-Visby and the Hamburg Rules are not acceptable anymore, and they are certainly not adequate. To make it downright clear, the Hague, the Hague-Visby and the Hamburg Rules have no future.

To suggest that UNCITRAL should be asked to reconvene its Working Group and revise the Convention is entirely unrealistic. It would take many years, and many States would consider such a suggestion not to be acceptable.

In the late 1990s a proposal for a revision of the US COGSA was close to being introduced in the US Congress. Had the proposal been introduced and adopted, the US would have had to denounce the Hague Rules, and the US would not have been able to accede to the Hague-Visby Rules which are not considered satisfactory. This would have meant US regionalism. Fortunately, the US decided to seek an international solution instead of adopting its own national COGSA. If the Convention is not accepted, the US may very likely turn towards a national solution.

In the EU we have had clear signals from the European Commission that it believes the Convention does not meet the multimodal expectations of the EU, and therefore the European Commission may very well consider establishing a regional EU solution which may – or may not – conflict with the Convention. I shall come back to this aspect.

Let me here refer to a proposal drafted by four distinguished professors for the Commission in 2005, the ISIC (Integrated Services in the Intermodal Chain) proposal. This proposal is clearly a regional solution as it aims at traffic inside

and to and from the EU area. Such a regional solution would be a disaster to the facilitation of international trade and inflict considerable extra costs on all parties involved in international trade and would invite a large number of legal disputes, forum shopping, race to court, etc.

There is no realistic alternative to the Convention. Of course, if the Convention was a very bad product, we would have to consider other solutions. I really don't know what alternative solutions would be available. However, the Convention is not such a bad convention. Quite to the contrary, it is by and large a fine convention, and I shall now give my reasons for this conclusion.

## II. Comments on important chapters of the Convention

### 1. The scope of the Convention – the contracts covered

For shipowners of today it is important to have as much and as far reaching uniformity as possible, and it is important that the protective provisions of the Convention are given as broad application as possible. The extension of the Convention to comprise electronic documents is, of course, also a very important aspect.

Charter-parties still fall outside the Convention – and should fall outside. This is important, because they are not contracts of adhesion and, happily, attempts to cover charter-parties as well under the Convention did not get anywhere.

Volume contracts in liner transport fall under the Convention. However, by virtue in particular of Article 80, the Convention is by and large only applicable to volume contracts on a non-mandatory basis. It must be stressed that in order to deviate from the rules of the Convention, the parties to a volume contract have to fulfil very strict conditions, and this is also the case where the terms of a volume contract are to apply between the carrier and any person other than the shipper.

Some parties have criticized the provisions on volume contracts in the Convention. It has been argued that e.g. big carriers can put pressure on freight forwarders to enter into volume contracts with reduced protection whereas the forwarders remain fully liable towards their customers. This seems to me to neglect the fact that with reduced protection under the Convention, a reduced freight rate will follow. Furthermore, although Article 80 is one of the very important and innovative provisions of the Convention, I believe its practical impact is overstated. It has often been argued that Article 80 may also be applied to very small shipments, say three containers carried in two or three shipments. This is not likely to happen, and where it exceptionally happens, the protective conditions of Article 80 always have to be fulfilled.

### 2. The multimodal aspect

The most innovative aspect of the Convention and one of great practical value is the extension of the Convention to cover multimodal transports with a maritime leg – the so-called »maritime plus« approach. This is a very pragmatic and clever approach.

The multimodal transports which fall under the Con-

vention are in the relation between the shipper and the contracting carrier regulated by the general provisions of the Convention with the very important exception following from Article 26 of the Convention which provides for a network system, but only a limited network system, namely as far as the carrier's liability, limitation of liability and time for suit are concerned. Carriers have always considered network liability as more attractive than uniform liability, because network liability ensures that recourse action by the carrier against the subcarrier can be decided on the same basis as the action for the main claim between the carrier and the shipper. However, I believe it is no secret that the carriers' choice between the uniform and the network system was influenced by a fear that if the uniform system was adopted, the liability limits in the Convention would have been fixed at a higher level in order to match the compensation available under the various unimodal conventions, like the 8.33 SDR per kilo available under the CMR, not to speak of the 17 SDR per kilo limit available under the Montreal Convention. As a matter of fact the level of compensation under the Convention or under the Hamburg Rules or even the Hague-Visby Rules is often much higher than what is available under the CMR Convention or even under the Montreal Convention because of the combined per kilo/per package limitation in the maritime conventions which is unknown in the other conventions. However, the focus is very often only on a comparison of the per kilo limitation amounts of the various conventions, and the maritime per package limitation is – quite wrongly – not considered.

It is a pity in a way that the network/uniform discussion was influenced by considerations of the limitation amounts. The uniform liability system certainly has some attractions – first of all it is simple, whereas the network system as implemented in Article 26 may give cause to quite some litigation as to its correct interpretation and application.

### 3. Liability and limitation of liability of carriers

The provisions of the Convention on the carrier's obligations and liability in Chapters 4 and 5 and on limits of liability in Chapter 12 impose considerably greater burdens on the shipowner compared to the Hague and the Hague-Visby Rules and even to some extent the Hamburg Rules and greatly improve the position of shippers. Shipowners very much welcome the retention of the fault based liability system with a reversed burden of proof and retention of the so-called catalogue over instances where the carrier is presumed not to be liable. However, shippers have gained considerably *inter alia* by:

Firstly: Extension of the seaworthiness requirement to the whole voyage.

Secondly: Elimination of the navigational and management error defence.

Thirdly: The considerable increase of the limitation amounts.

Fourthly: Performing maritime carrier liability under the Convention.

Carriers got something in return for these concessions:

– Carriers first of all achieved that it was made quite clear in the Convention what has so far been very unclear, that the right to limit extends to breaches of any of the carrier's obligations under the Convention.

– Secondly, carriers achieved a much more balanced rule compared to the Hamburg Rules in case where two causes combine to cause a cargo damage, but where the carrier is only liable for one of the causes. To some it seems to be a problem that apportionment of liability under Article 17.6 takes place where it is not possible to quantify the proportions of the loss due to e.g. exempting events and loss due to a contributing negligence by the carrier. I am a simple lawyer and must say that I like such a rule of apportionment. How can one oppose a provision according to which a court may rule after having considered all the facts of the case that although there is insufficient evidence on the exact proportion of loss due to events for which the carrier is and is not responsible, the court can apportion the damage between the two parties in a way which seems best and most reasonable.

– Thirdly, carriers achieved an acceptable solution as to the question of liability for delay. Under the Convention the concept of delay is limited to cases where the carrier has agreed to deliver within a specified time. Furthermore, it is part of the difficult compromise behind the solution that national law cannot impose greater or different carrier liability for delay.

The provisions of Article 17 – apart from the apportionment element in Article 17.6 – are not very different from the Hague and the Hague-Visby Rules except the elimination of error in navigation or management of the vessel. However, Article 17 sets forth the liability system in a much more straightforward way compared to the Hague, the Hague-Visby and the Hamburg Rules. Each step in the process leading to whether or not there is liability is reasonably clearly set forth. Article 17 also avoids the very abstract liability system of the Hamburg Rules which gives little guidance to claimants and carriers when they have to decide whether or not there is liability.

Chapter 12 deals with limitation of liability of the carrier. I shall not dwell for more than a second on the size of the limitation amounts. The size is fixed arbitrarily and at a higher level than what is really needed. The present limits of the Hague-Visby and the Hamburg Rules are practically always sufficient to provide full compensation. It is, however, of great importance that the right to limit is only broken if the claimant proves that the loss etc. was attributable to a personal act or omission of the person claiming a right to limit.

### 4. Delivery of goods

The delivery provisions in Chapter 9, in particular Articles 45–48, address an issue which has marred maritime transport under negotiable bills of lading for many years. Very often the bill of lading is not in the hands of the consignee when the goods arrive and the consignee claims delivery. If the carrier delivers without the bill of lading, the consequences are today not regulated by international conventions. The consequences are under many national laws strict and unlimited liability, if the goods should have been delivered to somebody else.

Chapter 9 addresses these issues and contains detailed new rules on delivery. The structure of Chapter 9 is fine although some of the provisions are quite detailed and may be difficult to understand in the first or second reading of the text.

The new provisions are valuable. They give the carrier a right to either store the goods when they remain undeliver-

ed, or to seek delivery instructions from the shipper or other relevant persons, and they discharge the carrier of its obligations to deliver the goods under the contract when the instructions under Articles 45–47 are followed. A person who has acquired a bill of lading – before delivery to somebody else takes place – is very much to be blamed for not presenting the bill of lading and requesting delivery when the goods arrive. On the other hand, where the bill of lading is acquired – after delivery to another person has taken place – the innocent acquirer has to be protected, and this is done in Article 47.2 (d) and (e).

Where wrongful delivery has taken place, it is of course very important that a possible liability is limitable, and this is now provided for in Article 59. The question whether there is liability for wrongful delivery is for national law to decide.

I am not saying that the provisions of Articles 45–48 – and in particular Article 47 dealing with delivery when a negotiable transport document or negotiable electronic transport record is issued – are easy to apply, but I believe they constitute an important step forward towards solving the very severe problem of today with the goods arriving at the agreed place of delivery without the bill of lading holder being there.

I believe the proposed system strengthens the bill of lading compared to the situation today: Firstly, by making it clear to the carriers who want to deliver that they must exercise efforts to localize possible holders or other persons entitled to take delivery when nobody turns up and requests delivery, or the bill of lading is not there. Secondly, by making it clear to shippers and consignees that they must take care and be ready to take delivery when the goods have arrived.

## 5. Documentary issues

The Convention imposes more detailed requirements as to the content of the transport document, the so-called contract particulars. These provisions and a number of other provisions of the Convention in Chapter 8 on transport documents do not seem controversial. Of quite some interest is Article 37 on the identity of the carrier. This is a very useful article which provides that if a carrier is identified by name in the contract particulars, any other information in the transport document relating to the identity of the carrier shall have no effect to the extent it is inconsistent with that identification. This means that the typical identity of carrier clauses in bills of lading will have no effect as to the identification of who is the contracting carrier if the carrier is identified in the document. More controversial is the second paragraph of Article 37 which establishes a presumption that where the carrier is not identified in the contract particulars, the registered owner of the ship, on which the goods have been loaded according to the contract particulars, is presumed to be the carrier. This is a rule which carriers do not like, but I think I have to admit that such a rule may be quite effective in some cases and makes it difficult for the less scrupulous carrier to escape liability.

## 6. Shipper liability

Chapter 7 provides for a somewhat more detailed regulation of the obligations of shippers compared with the

Hague, the Hague-Visby and the Hamburg Rules. Most of the provisions seem rather innocuous. This is so as far as Article 31 and Article 32 of the Convention are concerned. Under these articles the shipper is strictly liable for the accuracy of the information provided by the shipper and for dangerous goods not declared as dangerous. The most interesting provision is probably Article 30 which sets forth the general rule on shipper liability for loss of or damage to the carrier caused by a breach of the shipper's obligations. Article 30.2 probably provides for shipper liability based on fault with a reversed burden of proof. This liability is a little stricter compared with the Hamburg Rules, Article 12. However, Article 30 matches quite well Article 17 on carrier liability. Some may point out that Articles 30 and 17 cannot be compared, because the shipper has not got a right to limit liability like the carrier. The question of the shipper's right to limit liability became very prominent in the discussions in the Working Group of UNCITRAL when shipper liability for delay was discussed. In the end it was decided not to have any reference to shipper liability for delay in the Convention and to leave this to national law. Thereby the need to provide a right of the shipper to limit liability was reduced. The most difficult problem with establishing a right for shippers to limit liability is how to fix the limitation amount. No solution could be found, and the result of the discussions in the Working Group was a status quo – the shipper's liability remains unlimited like in the Hague, the Hague-Visby and the Hamburg Rules. With only a slight tightening of the liability of the shipper in the Convention this was probably the only realistic result.

## 7. Right of control

Time does not allow me to comment on all the important provisions of the Convention. I shall, however, make one comment on Chapter 10 dealing with the right of control. A number of useful provisions are included here, but also one less reasonable, namely a provision giving the »controlling party« a right under certain conditions to demand delivery at another place than the agreed place on the scheduled route. Fortunately, this provision is only of a declaratory nature.

## III. European regionalism

I shall finish with a few comments on the position of European countries and of the European Commission vis-à-vis the Convention. The European Commission has clearly indicated that the Convention does not meet the multimodal expectations of the EU. This refers probably first of all to the fact that the Convention is not a comprehensive multimodal convention, because it does not cover agreements on multimodal transport which does not include a maritime leg.

Regionalism in Europe or elsewhere must be fought with determination in the area of maritime transports including multimodal transports with a maritime leg. Happily, the Convention does not allow for reservations which could make regional regulation deviating from the Convention possible. If the EU adopts a regulation or directive dealing with matters covered by the Convention in a way different from the Convention, the EU Member States could not ratify the Convention or would have to denounce it. In case it is deemed important in Europe to regulate all types of multimodal trans-

ports, this could, however, be achieved by supplementing the Convention at the European level with a convention or regulation/directive dealing with contracts on multimodal transport which are covered neither by the Convention nor by the multimodal provisions of the otherwise existing unimodal conventions, like Article 2 of the CMR. The fact that I do not oppose a European regime for such contracts on multimodal transport does not contradict what I have said about the importance of global regulation, because such contracts are very much a regional matter.

In case the European Commission aims at having a regime, say a regime similar to the CMR, applied to all types of multimodal transports in Europe, the Convention in fact to a

considerable extent allows for that possibility. Article 82 (b) of the Convention provides that nothing in the Convention affects the application of the CMR to the »piggy-back« road/sea types of transport. As far as other multimodal transports are concerned they may often fall outside the Convention, e.g. where no international maritime leg is involved or no maritime leg at all, e.g. rail/road multimodal transports. To the extent such multimodal transports are not already regulated by other transport conventions, a regime similar to the CMR could be established in Europe. It might be argued that this would further complicate the legal picture. However, to the extent the network principle is adopted as it is in Article 26 of the Convention, the complication is not believed to be significant.