

Evaluation of the new Convention from the perspective of insurers

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Introduction

It is a great pleasure for me to present the Rotterdam Rules here in Hamburg where about 30 years ago the Hamburg Rules were adopted. The Hamburg Rules and the Rotterdam Rules have similar goals – to change the Hague-Visby system and to bring it up to date, to harmonise and modernise the liability system in the transport of goods by sea, promote legal certainty, minimise the causes for disputes and to generally promote trade and economic development.

My task today is to judge the Rotterdam Rules from the perspective of insurers. First I will try to assess the situation when the Rules are in force from the point of view of a marine insurer – that means an insurer of the goods in transit. Then I will try to do the same from the perspective of the insurer of the (road) carrier's and freight forwarder's or NVOCC's liability. By doing so, I can not talk in the name of a P & I Club that insures the liability of a shipping company being a carrier under these Rules.

Marine insurance

A marine insurer normally insures the goods from the beginning of the transport until the delivery. In the majority

of states in the world this insurance is not compulsory. Every shipper that bears the risk to the goods in transit is free to decide whether to insure the goods or not.

What can influence a shipper's decision to conclude an insurance contract if he previously did not have one or what would prevent him of taking out an insurance now if he had it earlier?

It is possible that a shipper judge the carrier's liability to be more ample and more favourable to him, so that he can get sufficient compensation from the carrier for any of his claims. In comparison to the Hague-Visby Rules now in force, the liability of a carrier under the Rotterdam Rules indeed is favourable for shippers. It exists from the receipt of the goods for carriage to the delivery (from door to door, and not from tackle to tackle or port to port). The carrier has a continuous obligation to keep the ship seaworthy during the whole sea voyage and to properly deliver the goods at destination. The defences available to the carrier have been significantly weakened by the removal of the nautical fault defence, making him liable for damage caused by an error in navigation. The carrier's limitation of liability of 875 SDR per package and 3 SDR per kilogram is higher than before. Is it really so important to have an insurance cover for the shipment?

The answer is a clear yes. Despite these conveniences for the shippers, when the Rotterdam regime applies the

arguments in favour of marine insurance remain valid. The Rules contain an almost identical list of events and circumstances like the Hague/Visby Rules that relieve a carrier from his liability – Act of God, perils of the sea, war, hostilities, piracy, terrorism, quarantine restrictions, strikes, fire on the ship, insufficiency or defective condition of packing, reasonable measures to save life or property at sea etc. (Art. 17[3]). The compensation that a shipper should obtain from the carrier is therefore not always certain.

Moreover, it is usually easier and quicker for a shipper to obtain a compensation for damage from his own insurer according to the terms of his insurance policy than to make a claim against the carrier. A marine insurer should pay the claim and take a recourse action against the person who caused the damage.

Especially at the beginning of the implementation of the Rotterdam Rules, the insurer may also offer an additional service to his client by drawing his attention to the liabilities imposed to him being a shipper according to these Rules.

Volume contracts

Contrary to the compulsory application of the liability provisions in the existing international conventions governing a carrier's liability for goods in transit, the Rotterdam Rules allow parties to contract out of much of the obligatory liability regime contained in the Rules (Article 80).

At present, it is not unusual that shippers ask for special conditions of transport reflecting their individual business requirements. In such cases shippers and carriers conclude special service contracts regulating in detail the service to be offered and its price. In Switzerland such contracts mostly refer to the transport, storage, packing or repacking, customs clearance, and on-time delivery of the goods. Concerning liability, they may derogate from the non-compulsory provisions of the Swiss Law on Obligations but not from the mandatory liability provisions of any international convention. For insurers it is normally not a problem to insure either the goods or the carrier's liability under such a contract.

Service contracts for example, are also formally recognized under the shipping law of the United States and have been used widely by both large and small shippers for many years. Such service contracts at present regulate the services and rates offered by the carrier, but have to comply with international liability regimes. It is estimated that about 90% of containerized cargo in the world moves under service contracts.

German legislation makes a step further as it provides for a derogation of the liability regime allowing freight forwarders to modify their liability provisions by contract (Art. 466 of the Commercial Code). If the sender is a consumer, that means a natural person not acting within his or her occupational activity, the liability and the time-bar provisions may not be modified by agreement to his or her disadvantage. In other cases, the liability and the time-bar provisions may be modified only by an agreement reached after detailed negotiations, whether for one or several similar contracts between the same parties. In other words, the commercial parties enjoy unrestricted freedom in negotiating a (volume) contract. The compensation payable by the forwarder for loss of or damage to the goods may also be limited by standard form contractual conditions to an amount other than 8,33 special drawing

rights for each kilogram of gross weight as provided by the law, if the agreed amount lies between two and forty SDR/kg and is given a prominent appearance by a special printing technique or is less favourable to the user (issuer) of the standard form contractual condition than the 8,33 SDR/kg provided by the law.

Whether a particular service contract will be more favourable to the shipper or to the carrier – in other words, is the liability of the carrier going to be stipulated as higher or lower in comparison to the actual regime – will depend on the economic strength of each party and on the actual situation on the freight market.

In fact, according to many international transport conventions now in force, shippers are free to declare a higher value for their goods in exchange for increased freight. If they do so, they obtain a higher amount of compensation when, and only when, the carrier is liable for damage. In practice, not very many shippers were profiting of this opportunity.

Having in mind the obvious economic needs, the Rotterdam Rules allow parties to conclude volume contracts. Volume contract (Art. 1[2]) means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

A volume contract is supposed to be a bilateral, individually negotiated agreement that reflects the shipper's business needs and provides for a customized rate, service and liability. It may provide for greater or lesser rights, obligations and liabilities than those imposed by the Rules (Art. 80[1]). Consequently, much of the obligatory liability regime contained in the Rules may be contracted out.

At the same time, the Rules protect smaller or inexperienced shippers by forbidding the conclusion of a volume contract simply by adhesion (Art. 80[2]). Also, there are some provisions of the Rules that the parties to a volume contract may not derogate from (Art. 80[4]), like the duty of the ocean carrier before and during a voyage by sea to exercise due diligence to make and keep the ship seaworthy and properly crewed, equipped and supplied (Art. 14[a] and [b]), the shipper's obligation to provide certain information, instructions and documents (Art. 29), special rules for carrying dangerous cargo (Art. 32) and loss of right to limit liability for loss or damage caused with intent or recklessly (Art. 61). Therefore, the Rules allow parties in the liner trade greater freedom of contract where this is appropriate while at the same time giving mandatory protection where needed.

It is not expected that carriers will always seek to take advantage of smaller volume shippers by forcing them to accept liability and other terms to the shipper's detriment. Such a risk exists, but is not exaggerated.

A shipper may wish to consult his marine insurer and get help in drafting certain provisions of the volume contract.

Even if he does not need such help, he is obliged to inform his marine insurer about the terms and conditions of a volume contract that he intends to conclude as they have an impact on the insurer's recourse possibilities against the carrier (Art. 15 of the Swiss ABVT 2006). Based on this information the marine insurer should be able to assess his risk properly and to ask for an adequate premium.

To sum up, the changes brought by the Rotterdam Rules should not advise any shipper against purchasing marine insurance. Marine insurers generally recommend to trans-

port users to insure their shipments. There is no reason to change this attitude once these Rules are in force.

Insurer's recourse action

A damage for which a marine insurer paid the compensation can be either localised or non-localised. A localised damage is a damage for which it is undisputed and proven where it actually happened. A current example is a machine that became a total loss because a fork lift driver dropped it while stuffing a container in a container yard. A damage that very often remains non-localised for example is the loss of a number of cartons carried in a container.

After having paid a claim, a marine insurer will have to identify the person against whom recourse can be introduced. This person is usually the contracting carrier, i.e. the person that concluded the contract of carriage with the shipper, even if it is evident that a subcontractor or an actual carrier actually caused the damage. The contractual carrier then either pays the claim to the marine insurer and makes a new recourse against the person liable for the damage or a 'shortcut' is made in a way that the contractual carrier cedes his rights to the marine insurer and enables him to claim directly from the person who caused the damage.

A marine insurer will also have to identify the legal regime that governs the liability of the person liable. When the transport is unimodal, this should not be a difficult task. With international multimodal or door-to-door transports it may not always be easy to identify which body of law applies, is a carrier liable as carrier or did he organise a part of the transport as agent only, etc.

Once the Rotterdam Rules are in force, the marine insurer will have to find out:

- Was it a sea transport to which the Rotterdam Rules or some of the old liability regimes apply?
- Was it a multimodal transport with a sea leg (carriage of goods partly by sea), so that the Rotterdam Rules apply?
- Was it a carriage of goods wholly or partly by sea, but a separate volume contract applies?
- Was it an international multimodal carriage of goods not involving a sea leg?

In each of these cases the process of recourse and a compensation to be obtained are different.

There are two situations where the Rotterdam Rules are specific and that deserve to be mentioned separately.

The first is the joint and several liability of the carrier and one or more maritime performing parties (Art. 20). A maritime performing party is defined as a party that performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship (Art. 1[7]). Such a party can be a stevedoring company or a cargo terminal operator at a sea port. If damage is localised, i.e. if a marine insurer can prove that a maritime performing party caused it, he can proceed directly against this party. This party is subject to the same obligations and liabilities imposed on the carrier and is entitled to the carrier's defences and limits of liability (Art. 19). The possibility to proceed directly against the party that caused the damage is a clear advantage to the insurers by making recourses less complicated and costly. The compensation to be obtained, e.g.

from a cargo terminal operator in a maritime port, will be the same as the compensation to be obtained from the carrier. By applying the Rules to these operators their liability will be unified globally. This is an important improvement for all the claimants as at present the liability of the terminal operators covers a whole range – from an almost total exoneration of liability through very low amounts of limitation up to a full liability in some countries. This unification will not be welcome to the operators whose liability is going to rise as their liability premiums may rise as well, but to have more uniformity concerning the liability of marine terminal operators is a positive development.

The second is the situation where damage occurs within the carrier's period of responsibility but solely before or after the sea leg. In these cases the Rotterdam Rules will not prevail over another compulsorily applicable Convention (Art. 26 and 82). Instead, the CMR or the CIM convention shall apply. Such a network system of liability will enable European shippers and their marine insurers as well, to obtain higher liability limits when damage is localised to a non-sea leg. As there is no joint and several liability of the carrier and the (non-maritime) performing party, recourse can be introduced only against the carrier as defined by the Rules (Art. 5). That makes it possible for a shipping company to be liable, e.g. according to the rules that govern the international carriage of goods by road.

Although the Rotterdam Rules expressly do not prevail over other mandatory instruments applicable to on-land damages, a conflict of the conventions can emerge in situations where both the CMR Convention and the Rotterdam Rules claim their application. A current example are garments, produced in North African countries, put into a container or a swap body and loaded onto a road vehicle in the factory, brought to a port from where the loaded vehicle is carried by sea to a French port, from where it continues by road to the destination in Germany. That is a CMR transport 'with a sea leg' to which the CMR Convention compulsorily applies (Art. 2 CMR). But this is also an international carriage of goods partly by sea to which the Rotterdam Rules compulsorily apply (Art. 5).

If a damage in such a transport obviously occurred before or after the sea leg (e.g. in a road accident), the liability of the road carrier, who is liable for the entire transport, will be governed by the provisions of the CMR Convention.

If on the other hand the damage was caused by an event that could only occur in the course and by reason of the transport by sea (e.g. sinking of the ship) or in other words, when the damage was localised to the sea leg, the road carrier will be liable according to the maritime convention in force. That means that the provisions of a maritime convention concerning the liability of the carrier (exonerations, limits, etc) will apply to the road carrier.

But if the damage to the containerised cargo in the above mentioned example is not localised, both the CMR Convention and the Rotterdam Rules should apply compulsorily. This conflict does not only represent a positive conflict of the liability provisions of the two conventions. As the Rotterdam Rules govern much larger issues than just the contract of carriage – like the electronic documents, liabilities of the shipper, transfer of rights, delivery of the goods, jurisdiction and arbitration etc. – the shipper of the garments, who actually is a German importer and consignee of the shipments, will be confronted with an entirely new environment. His marine

insurer will probably allege that the CMR is the convention to be applied because the proceeds of the recourse that he can so obtain will be higher.

To have questions like this cleared by a court will certainly increase the legal cost during an initial period of the implementation of the Rules. This is what happens with the introduction of any major piece of legislation, but it is a price that should be paid.

Considering the transport claims generally, the majority of transport damages are not caused with intent or recklessly which would make the carrier liable for their full amount. Therefore, if the value of the goods is higher than the limitation of the carrier's liability, the marine insurer will be able to recover only a portion of the amount that he paid. Although the limitation according to the Rotterdam Rules is somewhat higher than in other sea transport conventions, this difference will not radically change the marine insurer's recoveries.

In any case, it would not be appropriate to expect the amounts of recourse recoveries to rise in such a way so as to make the marine premiums fall.

Liability insurance

When concluding a contract of liability insurance, the insurer has to be informed in detail about the activities of the insured – is he acting as an agent or a carrier, is he a freight forwarder or an NVOCC, which kind of transport does he offer, which type of transport document does he issue and what do the back clauses of his document provide for, does he run warehouses or container yards and where, in which type of logistics is he involved, etc. Knowing that in detail, the insurer will grant an adequate insurance cover to an appropriate premium. The Rotterdam Rules will basically not change this situation.

It is not unusual that a shipper contact a freight forwarder, being his usual partner for transportation issues, and engage him with the transport of the goods. It is the duty of the freight forwarder to appoint a carrier and to conclude a contract of carriage with him, in his own name but to the account of the customer. For the carrier, the freight forwarder is the 'shipper' who is also entered in the Bill of Lading.

When this practice continues under the Rotterdam Rules, the freight forwarder will become a documentary shipper. Documentary shipper means a person, other than the shipper, that accepts to be named as »shipper« in the transport document or electronic transport record (Art. 1[9]). In this case, the freight forwarder is subject to the obligations and liabilities imposed on the shipper and is entitled to the shipper's rights and defences (Art. 33[1]).

When a shipper fails to inform the carrier of the dangerous nature or character of the goods or when he does not mark or label dangerous goods properly, he is liable to the carrier for the entire loss or damage resulting from such failure. A freight forwarder, entered as documentary shipper in a transport document, shall also bear this unlimited liability and will probably be the first one from whom a carrier shall seek indemnification. A further recourse of the documentary shipper against the 'real' shipper may in some cases (e.g. due to bankruptcy) be impossible. The unlimited liability will remain with the freight forwarder. His liability insurer should be aware of this possibility when concluding the contract as this may not only increase the liability premium but also prevent

the insurer from offering an insurance contract to the freight forwarder.

Conclusion

Ten years of work have been invested by hundreds of specialist who drafted the Rotterdam Rules. The Rules are not only a maritime, but a 'maritime plus' convention. The 'plus' can be understood in two ways, as the Rules govern the carrier's liability before and after the sea leg, but also because they cover many aspects connected to the transport that previous sea transport conventions did not regulate.

What remains unregulated at the global level is the multimodal or door-to-door transport without a sea leg. That would not be so grave and serious if the scope of application of the Rules would extend only to the bill of lading or to the contract of carriage like the existing maritime conventions. But the regulation of 'maritime plus' transport regulates in detail many other important aspects of transport like the electronic documents, duties and liabilities of the shipper, delivery of the goods, settlement of disputes etc. Therefore, a sometimes totally new and innovative system applies only to some kind of multimodal transport. And to the rest of it, that means to the multimodal transport without a sea leg, the old non-innovative system applies. It is a pity that all this carefully studied and balanced regulation of many questions ancillary to the transport does not apply to all multimodal transports.

It will be difficult to explain this dichotomy both to the transport providers and to the transport users and in a world that is getting more and more connected and global it is certainly not welcome. In practice, operators may use the Rotterdam Rules and the Unctad/ICC Rules for the rest of multimodal transport.

And so, we are where we are and we should not desire the impossible. We should just keep our fingers crossed that the Rules enter into force as they are and that they render our daily business somewhat easier and dealing with transport claims shorter and cheaper. Instead of having several liability regimes that may apply to international transport of goods by sea – like now the Hague, the Hague/Visby and the Hamburg Rules, all of which are inadequate – it would be a clear advantage for all parties involved to have only one regulating body of law. Although the Rules are very complex with 96 Articles in 18 Chapters, once in force, they will considerably contribute to the harmonisation and modernisation of transport liability systems in the interest of all parties involved.

If the Rotterdam Rules don't get adopted at the international level in a reasonable period of time, the status quo of the existing regimes will not remain as it does not meet the contemporary needs any more. Instead, the US will probably reassess the work on the new Carriage of Goods by Sea Act (COGSA) that was left dormant while work on the Rules was proceeding. In Europe, a European multimodal convention is deemed prone to protect the interest of European shippers. Adopting several regional legal regimes to govern a global activity like a door-to-door transport would mean falling back for several decades. This would result in lack of uniformity and conflicts between these regimes, leading to legal uncertainty. Legal costs arising out of this situation will certainly outnumber the legal costs entrained by the introduction of the Rotterdam Rules as a new set of legislation. The insurers would have to bear a considerable portion of these costs.