

## *Carrier liability under the rotterdam rules*

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### ABSTRACT

*This paper discusses the carrier liability regime arising from multimodal transport under the new Rotterdam Rules. Although not a panacea, nevertheless the legal regime provided by the Rotterdam Rules specifies in a more specific way the liability of the sea carrier. It is believed that if the Rotterdam Rules are ratified by the states constituting the "major players" in the maritime field, the Rotterdam Rules will resolve many uncertainties in the field of maritime transport, especially multimodal.*

### 1. Introduction

The 1924 Brussels Convention aimed into compromising the interests of carrier and shipper and hence limiting the abuse of freedom of contract.<sup>1</sup> The same concept and idea was promoted via the adoption of the 1968 Visby Protocol<sup>2</sup> (i.e. the Hague-Visby Rules). Likewise, the Hamburg Rules aimed in clarifying the previous legal instruments and in strengthening the regime of protection offered by previous legal instruments, however they have been largely known and acknowledged as a replica of the Hague-Visby Rules, in the sense that they did not enforce the regime of the carriers' liability as it had been expected, and hence their success has been diminished. The Rotterdam Rules,<sup>3</sup> however, serve as a much better - than the previous - legal instrument regulating maritime transport, in that they do not

1. G. TREITEL, F.M.B. REYNOLDS, *Carver on Bill of Lading*, London, 2001, 9-062; H. KARAN, *The carrier's liability under international maritime conventions: the Hague, Hague-Visby, and Hamburg rules*, Lewiston-Queenston-Lampeter, 2004; S.M. CARBONE, *Contratto di trasportomarittimo di cose*, 2<sup>nd</sup> ed. (in cooperation with A. LA MATTINA), Milano, 2010; M. STURLEY, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoires of the Hague Rules*, Littleton-Colorado, 1990.
2. Protocol to amend the International Convention for the unification of certain rules of law relating to bills of lading (Brussels, 23 February 1968), entered into force on 23 June 1977.
3. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam, 23 September 2009).

merely constitute a replica of the above. Indeed, the drafters of the Rotterdam Rules have taken into account the reasons of the failure of the Hamburg Rules to achieve a widespread consensus, when drafting the carrier liability regime under the new Rules. Although at first glance, they might appear to have a similar (as to the carrier liability regime) approach to the regime adopted by the Hague-Visby Rules<sup>4</sup>, nevertheless the Rotterdam Rules modify the carrier liability regime in that they also consider both the technical evolution of sea transport and a full-fledged assessment of the duties which a modern carrier needs to fulfil<sup>5</sup>, as will be analyzed and demonstrated below.

## 2. The pre-existing regime as to the liability of the carrier

### 2.1. *Issues linked with the element of carrier liability - delivery of the goods*

A shortfall under the Hague Rules, is the fact that a very crucial obligation of the carrier to deliver the goods to the consignee was not mentioned. An explanation for this “omission” lies in the very nature of the Hague Rules to be treated as standard bills of lading clauses.<sup>6</sup> However, in the Hague-Visby Rules the basic obligation of the carrier to make the ship seaworthy and to care for the cargo *from “tackle to tackle”* are clearly mentioned, along with the obligation to deliver the goods, which is mentioned in Article III (6) of the Hague-Visby Rules.<sup>7</sup> However, the existing obligation to deliver under a bill of lading entailed the problem that in case that the bill was endorsed while the goods were still in transit, the carrier was not aware of the party to whom delivery had to be made, since he was not party to the cargo sale contract.<sup>8</sup> Nevertheless, he remained responsible under the contract of carriage as well as when he reached the port, but still the issue remained as to whom the goods should be delivered. To assist the carrier to resolve this dilemma, the law has recognized the well-known “presentation rule”,

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4. For instance, the «presumed fault» of the carrier (Article 17.2) is based on fundamental obligations with which the carrier must comply with and with the *onus probandi* scheme, i.e. an ameliorated version of the traditional «excepted perils» system.

5. H. KARAN, *The carrier's liability under international maritime conventions: the Hague, Hague-Visby, and Hamburg rules*, Lewiston-Queenston-Lampeter, 2004, 47.

6. F. BERLINGIERI, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, (General Assembly of AMD, Marrakesh 5-6 November 2009), p 6.  
[https://www.uncitral.org/pdf/english/workinggroups/wg\\_3/Berlingieri\\_paper\\_comparing\\_RR\\_Hamb\\_HVR.pdf](https://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf)

7. S. BAUGHEN, *Shipping Law* (5<sup>th</sup> edn, Routledge, 2012), p 142.

8. J. F. WILSON, *Carriage of Goods by Sea* (7<sup>th</sup> edn, Pearson, 2010), p 154.

## The carrier's liability regime

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presented in the leading case of *The Stettin*<sup>9</sup> and in particular in its ruling which settles the case that the carrier undertakes the obligation to deliver the cargo to the person who presents the *original* bill of lading, since a bill of lading constitutes the best evidence of the holder's title to the goods. With regards to the liability of the shipowner, the latter remains responsible to ensure that the goods are in fact delivered to the right person and the master is secure when he gives the goods to the first person who presents an original<sup>10</sup> bill of lading, given that he knows no other people claiming the goods or he does not have suspicion of other possible claim. In *Glyn Mills v East & West India Dock Co*,<sup>11</sup> the consignees designated on the bills took delivery of the cargo of sugar, when they presented at the warehouse the second unendorsed original bill. They were not supposed to take delivery of the cargo, given that the first bill of lading issued was indorsed to Glyn Mills as security for a loan. However, the House of Lords held unanimously that it was a *bona fide* delivery and that the warehouseman was not liable.<sup>12</sup> Where the Master of the vessel is requested to deliver without presentation of the original bills of lading, the shipowner is still liable, since he delivers it "*at his own peril*".<sup>13, 14</sup> The carrier will therefore in his turn be liable for the full value of the cargo to the true cargo owner<sup>15</sup> and it is unlikely that he will be entitled to rely on any exception clause in the bill of lading to escape liability. Courts in such a case will examine the exception clause and probably conclude that the carrier has no defense to the claim.<sup>16</sup> In addition, no voyage or time charterparty can instruct the shipowner to procure to delivery without production of the original bill.<sup>17</sup> In case the charterer gives such

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9. In *The Stettin* (1889) 14PD 142 it was held that "...it is clear law that where a Bill of Lading is issued in respect of the contract of carriage by sea, the Shipowner is not bound to surrender possession of the goods to any person whether named as Consignee or not, except on production of the Bill of Lading".

10. It is worth noting that a scanned, photocopied or faxed bill is not an original bill of lading.

11. *Glyn Mills v East & West India Dock Co*, (1882) 7 App Cas 591.

12. In particular, Lord Blackburn supported that "...when the Master has not notice or knowledge of anything but that there are other parts of the bill of lading, one of which it is possible may have been assigned, he is justified or excused in delivering according to his contract to the person appearing to be the assign of the bill of lading which is produced to him". Lord Selbourne LC went even further and stressed that it was "for the assignee to give notice of his title to the shipowner, if he desires to make it secure, and not for the shipowner to make any such inquiry".

13. *Sze Denning Tong Bank Ltd-v-Rambler Cycle Co. Ltd* (1959) 2 LLR.

14. *The Stettin* (1889) 14 PD 142: "...the shipowner must take the consequences of having delivered these goods to the consignee without the production of either of the two parts of which the bill of lading consisted..."

15. *The Sagona* (1984) 1 LLR at 198.

16. As held in the *Motis v D/S AF*, (2000)1 Lloyd's Rep 211, where the clause was designed to protect the carrier only for loss or damage and not from non-delivery, which had actually occurred.

17. This was stated in *The Houda* (1994) 2 Lloyd's Rep 541 where the Court of Appeal considering the issue concluded that "the owners do not fulfill their contractual obligations" if the cargo is delivered without presentation of the bill of lading.

instructions to the Master, then the shipowner will be entitled to indemnity under common law<sup>18</sup> from the charterer against any liability that may arise.<sup>19</sup>

Another issue which occurs is what happens in case of fraud. In the *Motis* case<sup>20</sup>, the bills of lading had stated that the consignees would absolve the shipowner from “liability whatsoever for any loss or damage to the goods while in its actual or constructive possession before loading or after discharge over ships rail, or if applicable on the ships ramp, however caused”. The main issue in question was whether the defendants were liable for the damage caused to the goods after discharge, and where the cause of the loss had been the use of forged bills. *Rix LJ* held that a forged bill of lading loses its integrity as “the key to the floating warehouse” and therefore the shipowner was not free to release the goods. As he pointed out, not only was the delivery to the person presenting a forged bill of lading a breach of contract contained in or evidenced by the bill, but also the delivery to someone who was not the goods owner was a conversion of them. It was irrelevant that the carrier did not intend to challenge or interfere with the property or possession of the true owner, but it was sufficient that he intended to deliver to a person who was not entitled to it.<sup>21</sup> *Stuart Smith LJ* agreed with *Rix LJ* in the Court of Appeal that a “forged bill is a nullity; it was simply a piece of paper with writing on it”.<sup>22</sup> The ruling emphasized the need for carriers to ensure, when applicable, that their agent delivers the goods against presentation of an original bill of lading which further ensures genuineness through its’ authenticity.<sup>23</sup> To address fraud in bills of lading carriers and P & I Clubs use methods such as specially issued bills of lading, i.e. bills of lading issued on specially-commissioned security paper characterized by various security features. To address the problem of delivery without production of bills of lading, a solution used is to substitute the bill of lading with a sea waybill, but the most common solution is to expect the shipowner to deliver against a letter of indemnity.<sup>24</sup> However, the shipowner cannot be obliged to accept an indemnity, even when modified by the terms of the charterparty. In *The Nordic Freedom*<sup>25</sup>, *Choo Han Teck JC* held that the charterparty clause providing for discharge of the cargo against letter of indemnity did not relieve him of his obligations under the contract of carriage. P&I Clubs expressly

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18. *The Sagona* (1984) 1 LLR at 194.

19. S. GIRVIN, *Carriage of goods By Sea*, (2<sup>nd</sup> edn, Oxford, 2011), p 144.

20. *Motis Exports Ltd v Dampskibsselskabet, AF1912, A/S* (2000)1 Lloyd’s Rep 211 (CA),217 (Mance LJ).

21. (1999)1 Lloyd’s Rep 839, 845

22. (2000) 1 Lloyd’s Rep 211 (CA), 216 (Stuart-Smith LJ)

23. S. GIRVIN, *Carriage of goods By Sea*, (2<sup>nd</sup> edn, Oxford, 2011), p 146

24. *The Houda* (1994) 2 Lloyd’s Rep 541

25. *The Nordic Freedom* (1999) SGHC 256; (1999) 3 SLR(R) 507

exclude liabilities and associated costs caused by delivery which takes place without production of a bill at the port of discharge. Nevertheless, following the decision in the case of *Farenco Shipping Co Ltd –v– Daebo Shipping Co Ltd (the 'Bremen Max')*,<sup>26</sup> Many P&I Clubs have opted to protect their members and advise them to use a standard form of a letter of indemnity for such a situation.<sup>27</sup> In addition to this, the International Group of P&I Clubs has issued In December 1998, a Circular to Members<sup>28</sup> recommending revised wordings of the standard form Letters of Indemnity for use by Members in circumstances where they are requested to deliver cargo without production of the original bill of lading. An optimal solution would be to have this issue resolved via the implementation of the use of computer based data system replacing bills of lading. As stated by *J. F. Wilson*<sup>29</sup>, up until now this proposal has never been developed beyond experimental stage. Ideally, the radical solution to this problem would provide for the development of a form of registry system where bills of lading will be deposited by the shipper immediately after being issued by the carrier. The regime to be established - if and when Rotterdam Rules come into force - provides for the equivalence between electronic and paper documentation, given that there is the express or implied consent of the carrier and the shipper.<sup>30</sup> It is therefore obvious that these provisions have the capacity to supersede the Hague-Visby Rules and give a radical solution to many problematic issues.

The basis of liability for the carrier under the Hague-Visby Rules regime being the presumed fault or neglect for loss (physical or purely financial) or damage to the goods, so long as it arises in connection with the carriage, clearly excludes coverage for liability for delay. The carrier is liable from the beginning of loading of the goods on the ship to the completion of their discharge from the ship; there are periods when the goods are in the custody of the carrier to which the Hague-Visby Rules do not apply, issue which creates uncertainty. Under the Hague-Visby Rules the carrier is exonerated from liability a) in respect of loss of or damage to the goods arising or resulting from unseaworthiness unless caused by the breach by the carrier of his due diligence obligation and, b) for loss of or damage to the goods arising from fault of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship and for loss of or damage to the goods due to fire caused by fault of the crew. Under the Hague-Visby Rules the

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26. *Farenco Shipping Co Ltd –v– Daebo Shipping Co Ltd* (LLR (2009) Vol 1 81)

27. B.KIRrane, *Letters Of Idemnity*, < <http://www.ukpandi.com/knowledge/article/letters-of-indemnity-1161/>>.

28. The circular along with the standard form is available on the website of each P & I Club for its members. <[http://www.gard.no/web/publications/content?p\\_document\\_id=4162728](http://www.gard.no/web/publications/content?p_document_id=4162728)>.

29. J. F. WILSON, *Carriage of Goods by Sea* (7<sup>th</sup> edn, Pearson, 2010), p 163

30. The Rotterdam Rules, Article 8

limitation of liability covers loss of or damage to or in connection with the goods. By virtue of Article IV (5), the limits provided are 666,67 SDR per package or unit and 2 SDR per kilogram of gross weight.<sup>31</sup> A carrier will only be able to extend the right of limitation to cases of post discharge delivery only by express clauses, following the case of *New York Star*<sup>32</sup>. As per Article III(6) and (6) *bis*, the carrier will be discharged from liability in respect of goods unless suit is brought within one year, and time runs from "delivery" and not from completion of discharge. Regarding delivery for straight bills of lading, the issue was for long unsettled. In *The Stettin*,<sup>33</sup> the court held that presentation of the original bill is required, without making distinction as between order and straight bills of lading. After *The Stettin* the decisions were not uniform. On the one hand therefore, in *Evans & Reid v Cornouaille*<sup>34</sup>, it was held *obiter*, that it was not open to the carrier to deliver without the bills of lading, even if they were made to a named consignee. Later, in *Barclays Bank v Commissioners of Customs & Excise*<sup>35</sup> and in *East West Corp v DKBS 1912 & AKTS Svendborg*<sup>36</sup>, the carrier was held to be bound by the presentation rule in delivery of goods. But, *Scrutton LJ* in *Thrige v United Shipping Co Ltd*<sup>37</sup> supported the view that the issue of delivery against presentation as decided in *The Stettin*<sup>38</sup> "may require consideration. However, in the leading case of *Jl Mac William Co Inc v Mediterranean Shipping Co SA (The Rafaela S)*,<sup>39</sup> it was ruled in the House of Lords that the production of a straight bill of lading was a necessary precondition of requiring delivery, even in cases where there is no express provision to that effect<sup>40</sup>, and it was also affirmed that such a document amounts to a bill of lading for the purposes of the Hague-Visby Rules, since the consignee could not obtain delivery without presentation of the document.<sup>41</sup> The decision in *The Rafaela S* case, managed to achieve the uniformity desirable within the context of

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31. In case of misdelivery after the discharge from the vessel, for example from a shore warehouse or from a container storage area, the carrier will most probably not be able to rely on the package limitation provisions of the Hague-Visby Rules; these Rules only apply "from tackle to tackle", see the case of *Trafigura v MSC*(2007) 2 Llod's Rep 622 C/A

32. *The New York Star*,(1980) 2 LLR 317

33. *The Stettin* (1889) 14 PD 142

34. *Evans & Reid v Cornouaille* (1921) 8 LL LR 76

35. *Barclays Bank v Commissioners of Customs & Excise* (1963) 1 Lloyd's Rep 81, 89

36. *East West Corp v DKBS 1912 & AKTS Svendborg* (2002) EWHC 83 (Comm); (2002) 2 Lloyd's Rep 182

37. *Thrige v United Shipping Co Ltd* (1924) 18 LL LR 6

38. *The Stettin* (1889) 14 PD 142

39. *The Jl Mac William Co Inc v Mediterranean Shipping Co SA (The Rafaela S)*(2005) UKHL 11; (2005) 2 AC 423

40. (2005) UKHL 11; (2005) 2 AC 423 at (20)

41. (2005) UKHL 11; (2005) 2 AC 423; (2002) EWCA Civ 694; (2003) 2 Lloyd's Rep 113

delivery in straight bills of lading.<sup>42</sup> Regarding the delivery obligation of the sea carrier under a sea waybill, there is no requirement for presentation of the waybill before delivery of the goods takes place. The carrier has the obligation to deliver to the receiver who is named in the box marked as "consignee" and the consignee has merely the obligation to identify himself<sup>43</sup>. The content of the waybill is telexed to the destination and the carrier receives the required information much faster; any problem arising from the late arrival of documentation is thus avoided.<sup>44</sup>

### 3. The need for a new regime

The Hague-Visby Rules constitute a compromise between the interests of the shipowner and those of cargo owners, however, various reasons, such as i) the emergence of new transport patterns such as the sea waybill, which demonstrated the narrow scope of the Hague-Visby Rules i.e. the fact that they applied only to contracts covered by a bill of lading or any similar document of title and only for the period from "tackle to tackle", ii) the containerization "miracle" which created the need for the use of contracts of combined /multimodal transport, iii) some exceptions contained in the Hague-Visby Rules - unduly favorable to carriers - made imperative the need for a new legislative framework and lead to the UNCITRAL convention, known as the Rotterdam Rules, which have been open for signing since September 2009.<sup>45</sup>

### 4. Liability of the carrier under the Rotterdam Rules

Before we assess the liability of the carrier under the Rotterdam Rules, it is essential to analyse the delivery obligation under the Rotterdam Rules.

The Rotterdam Rules constitute a major shift in favor of cargo interest, as compared to Hague-Visby Rules. The Rotterdam Rules tackle important issues which had been left exclusively to national law. The Rotterdam Rules are unique among cargo conventions in that they make detailed, though controversial, provision for delivery

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42. S. BAUGHEN, *Shipping Law* (5<sup>th</sup> edn, Routledge, 2012), p 24

43. In the Overseas Containers Limited (OCL) non-negotiable waybill it is mentioned that " ...delivery will be made to the consignee named or his authorised agent, on production of proof of identity at the place of delivery. Should the consignee require delivery elsewhere than at the place of delivery as shown below then written instructions must be given by the consignee to the carrier or his agent. Should delivery be required to be made to a party other than that named as consignee, authorisation must be given in writing by the shipper to the carrier or his agent".

44. J. F. WILSON, *Carriage of Goods by Sea* (7<sup>th</sup> edn, Pearson, 2010), p 160

45. S. BAUGHEN, *Shipping Law* (5<sup>th</sup> edn, Routledge, 2012), p 131

of goods through a “new and ambitious” chapter.<sup>46</sup> The basic obligations of the carrier, (Chapter 4 of the Rotterdam Rules) set out in Art. 11, are the obligations to carry the goods to the place of destination and deliver them to the consignee. Contrary to previous regimes, where these obligations were not expressly written out but were only implicitly mentioned and have been covered by applicable national legislation, in the Rotterdam Rules those obligations are explicitly mentioned and covered for. Their introduction is of great importance because by having them being written out explicitly, there can be no uncertainty as to whether a breach is a breach of the Rotterdam Rules.<sup>47</sup> Delivery is specifically mentioned as an obligation of the carrier by virtue of Article 11 which provides that “...*the carrier shall, subject to this Convention and in accordance with the terms of the carriage, carry the goods to the place of destination and deliver them to the consignee*”. This position is very different from the way the obligation of the carrier to deliver the goods is in a way “implied” in Article III (6) of the Hague-Visby Rules. Chapter 9 which is dedicated to the issue of delivery of goods, largely codifies the existing English law. Article 43 is concerned with enforcing an obligation on the part of the consignee to accept delivery of the goods on arrival at their destination. Although the Convention defines the “consignee” in Article 1.11, it does not provide further guidance as to how should the carrier ascertain this person. It has been suggested<sup>48</sup> that the proper law of the contract - supplemented by the Convention, wherever relevant - should be applied. Article 44 may be said to exist in the Hague-Visby Rules. This provision offers the carrier the opportunity to refuse delivery if the consignee does not conform to his obligation to acknowledge receipt “in the manner that is customary in the place of delivery”. In the Hague-Visby Rules the carrier is under the obligation to issue a bill of lading. Article 35 of the Rotterdam Rules provides for the issue of new transport documents and at the same time protects the carrier describing the steps for securing proper delivery. Hence, the carrier is bound to issue, at the shipper’s option, a negotiable or a non-negotiable transport document unless it is the custom, usage or practice of the trade not to use one. The Rotterdam Rules completely avoid the use of the well-known categorisation into bills of lading, sea waybills and so forth in favor of their own terminology. The Hague-Visby Rules contained no provision relating to the rights and obligations of the parties relating to delivery of goods after their arrival at destination, leaving all issues to be resolved by recourse either to the proper law

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46. A. DIAMOND QC *The Rotterdam Rules*, (2009), LMCLQ, p 445.

47. This can be of importance in cases of “misdelivery” (i.e. delivery to the wrong person) because Article 11 makes misdeldelivery a clear violation of the Rotterdam Rules.

48. A. DIAMOND QC *The Rotterdam Rules*, (2009), LMCLQ, p 445.



of the contract or the *lex fori* and thus creating great uncertainty.<sup>49</sup> The Rotterdam Rules contain provisions on the rights and obligations of the parties. Article 45 provides for delivery that has to be made to the "consignee" at the relevant time and location and leaves to the carrier the option whether or not to request the person to be identified as the consignee. In particular, Article 45 applies to a broad spectrum of non-negotiable documents and records, ranging from the most simple receipt, waybill or computer equivalent to a sophisticated electronic trading system. Article 46 treats non-negotiable documents requiring surrender. Apart from producing proper identification at the carrier's request, the consignee must also surrender the document. If one of these two requirements is not met, the carrier may refuse to deliver the goods with a view to protect the holder of the document. The carrier is discharged from his obligation to deliver if he follows the instructions given from the shipper or the documentary shipper pursuant to article 46 (b) and 46 (c). Article 47 (1) provides that the holder of the negotiable document may claim delivery only upon surrender of the document. What is important here is that the holder must "properly identify himself", which is different from what exists in common law. Letters of indemnity are not covered by the Rotterdam Rules and indeed would not fit into the definition of contracts of carriage. Nevertheless, there are provisions which may affect their use. Article 47(2), which applies to negotiable transport documents, expressly states that delivery without production may take place. According to this provision the carrier is, in some circumstances, discharged from the obligation of delivering the goods to the holder of the negotiable transport document, namely, when no verifiable holder presents itself and the carrier fails to obtain instructions from the holder of the negotiable transport document. The carrier may then deliver in accordance with instructions from the shipper or the documentary shipper, who must indemnify the carrier for loss arising from that delivery and provide security if required. The question that may arise is whether the carrier, required to issue a negotiable transport document, may issue a negotiable document that expressly states that the goods may be delivered without the surrender of the transport document, which is a type of document reference to which is made in article 47(2). It is thought that this is not the case, for such particular type of negotiable transport document constitutes an exception to the ordinary character of such document as a surrender document and, therefore, the carrier may not issue the document mentioned in article 47(2) unless required by, or

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49. F. BERLINGIERI, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules* (Paper delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009), p 60 <[https://www.uncitral.org/pdf/english/workinggroups/wg\\_3/Berlingieri\\_paper\\_comparing\\_RR\\_Hamb\\_HVR.pdf](https://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf)>

with the consent of, the shipper.<sup>50</sup> Article 48 sets out the manners in which the carrier may dispose of undelivered goods and the conditions he has to observe. The carrier, before exercising his rights under article 48 (2), has to give reasonable notice of his intended action. Potential liability of the carrier is dealt by article 48 (5). Re carrier liability, in the Rotterdam Rules, liability of the carrier is stated in Chapter 5 under the title "Liability of the carrier for loss, damage or delay". More specifically, the basis of the carrier's liability for loss, damage or delay cargo damage due to a breach of the carrier's obligations is regulated in Chapter 5, whereby the fundamental Article 17 sets out the basis for the carrier's liability and the burden of proof. What differs in substance between the previous legal regimes and the Rotterdam Rules are the clear statement of the exceptions that can be applied even if fault exists and of the regulation of the burden of proof.<sup>51</sup> In particular, in the Rotterdam Rules, Article 17(1) establishes a *prima facie* presumption for the fault of the carrier, if cargo damage occurred during its period of responsibility, whereby it is expressly stated that the carrier is liable for loss or damage to the goods, as well as for delay in delivery, if the claimant proved that the event took place during the carrier's period of responsibility. The claimant can therefore show that damage happened during the carrier's period of responsibility, simply by showing that the goods were undamaged by the delivery to the carrier. In addition, it is important to note that the imposition of liability on both the "contracting" and the "actual" carrier reduces many existing problems under the previous regime. A point to note, the period of the carrier responsibility extends from the time he receives the goods until he delivers them (well known as "port to port" carriage).<sup>52</sup> Article 17(2) states that the carrier is exempt from all or part of its liability, if he can show that the cause or one of the causes of the loss, damage or delay was not due to his fault (or the fault of any person for whom he was responsible). The "nautical fault" exception has been removed and the fire exception has been modified so as to only be applicable in the clear absence of fault by the carrier including persons for whom it is responsible. Some new exceptions have also been inserted and some of the pre-existing ones have been modified.<sup>53</sup>

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50. F. BERLINGIERI, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules* (Paper delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009), p 60 <[https://www.uncitral.org/pdf/english/workinggroups/wg\\_3/Berlingieri\\_paper\\_comparing\\_RR\\_Hamb\\_HVR.pdf](https://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf)>

51. Especially in relation to the way in which liability arising from different causes is divided between claimant and carrier.

52. The Rotterdam Rules, Article 12

53. The most important change is unquestionably the removal of the nautical fault exception, which is an important change compared to the Hague-Visby Rules and in practice puts harder demands on the carrier.

Regarding the exceptions in Article 17(3), the burden of proof goes to the claimant according to 17(4) because even if the damage was caused by an event of those contained and listed in Article 17(3), the carrier can still become liable if the claimant proves that either the carrier or a person for whom the carrier is responsible caused or contributed to one of the events listed in Article 17(3). The claimant can also prove that another event, not listed in Article 17(3), contributed to the damage and if the carrier cannot prove otherwise then it is held liable. Article 17(5) finally states one further ground for holding the carrier liable for damage notwithstanding Article 17(3): if the claimant proves that the damage was, or was probably caused by unseaworthiness or non-cargo worthiness and the carrier is unable to prove that it was not or that it exercised due diligence, then he is also held liable. Article 17(6) states that when the carrier is relieved of part of its liability, he is only liable for the part of the loss, damage or delay which is attributable to the event or circumstance for which he is liable. In short, he is only liable for the part of the damage that is attributable as being the fault of the carrier.

The effect of this is the reversal of the rule, which provided that when there were multiple causes to the damage, and fault from the carrier for at least one cause there was a presumption for it being liable for the whole loss which the carrier had to break. Article 17(6) instead places the burden of showing to what extent the carrier's fault contributed to the damage on the claimant, and hence the carrier only needs to show absence of fault. A simplified approach like in the Hamburg Rules would be more suitable since the issue of carrier liability already is enough complicated as it is, the exceptions would then be left to the court instead of clearly listed. Some exceptions would nonetheless need to be clearly stated like the ones related to salvage (Hamburg Rules) but exceptions clearly related to fault (e.g. the case of force majeure) might seem as being superfluous. Of course, there are also advantages with keeping the list structure, apart from pleasing common law countries; old jurisprudence will more clearly be conserved. Furthermore, since the Rotterdam Rules aim to only moderately change the liability regime, the conservative drafting of Article 17 is in line with the whole philosophy behind the Convention. However, it is believed that the list structure nonetheless complicates Article 17 more than what is necessary. Overall Article 17 can be characterized as unnecessarily complex, just establishing a fault based liability with a *prima facie* presumption for the carrier's fault would probably have been enough (Article 17(1) and 17(2) would in such a case suffice). The details as regards burden of proof would in such a case be left to national legislation and courts. Article 17 seems overambitious and the fact that the burden of proof has been regulated in detail when Article 17 is not putting up any standard of proof as this will surely vary between different jurisdictions. Article 18 states which

other persons the carrier is liable for, such as performing parties, employees of the carrier or of performing parties, or other persons under the carrier's control. Article 19 sets out the liability of maritime performing parties, a particular group under the Rotterdam Rules. The essence of this Article is that maritime performing parties are subject to the same liability and defenses as the ones of the carrier under certain conditions, and hence, it could be said that the Rotterdam Rules therefore provide a right of direct action against performing parties. Article 20 gives the possibility of joint and several liability of the carrier and any performing party. The aggregate liability of these two categories cannot supersede the liability limits. Liability for delay is furthermore defined in Article 21. Notice of loss is regulated in Article 23 and resembles its predecessors but with some changes. Article 23 states in essence that if notice of loss for apparent damages is not given before or at the time of delivery or for non-apparent damages not within seven working days from delivery, there is a presumption that the goods were delivered in good condition. This presumption is however breakable but the effect of this provision is to give the carrier an evidentiary advantage in a claim when the claimant needs to establish that there has been damage.<sup>54</sup> In short, under the Rotterdam Rules the carrier needs to maintain their vessel seaworthy, for all of the sea-carriage voyage, and moreover he is also liable for losses, etc. from fire or navigation errors if the crew has been negligent. There are also increased limitation amounts and extended timelines as well as an established carrier liability for delay, an extended scope of application beyond the sea component part of the voyage so as to provide for 'door-to-door' coverage, an extended carrier liability to the maritime performing parties", a shipper liability in case of failure to give instructions, and the establishment of freedom of contract in volume contracts. In particular, the scope of application of the limits of liability has been widened in the Rotterdam Rules, in the sense that while what is covered under the Hague-Visby Rules is loss of or damage to or in connection with the goods, article 59 of the Rotterdam Rules now covers generally speaking breaches of the carrier's obligations under the Rules. In particular, obligations other than those relating to the (timely) delivery of the goods in the same quantity and conditions existing at the time of receipt, include those under article 35 relating to the issuance of a transport document and those under articles 45-47 relating to the delivery of the goods. The limits have been increased in the Rotterdam Rules to 875 SDRs per package or other shipping unit and 3 SDRs per kilogram of the gross weight of the goods: an increase, as respects the Hague-Visby Rules limits, of 31.25% for the package limit and of 50% for the per kilogram limit.

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54. J. ADAMSSON: *The Rotterdam Rules: A transport convention for the future?*, University of Lund, Autumn 2011; F. BERLINGIERI: *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, p.8; T. RHIDIAN D, *An analysis of the liability regime of carriers and maritime performing parties, in A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, p.64.

Re the time for suit, Article 62 of the Rotterdam Rules considers the two years' time for suit from the standpoint of the claimant rather than from that of the defendant. Its scope is wider, since it covers any action that may be brought under the Rules. Therefore under the Rotterdam Rules it applies both to any action of the shipper or consignee against the carrier or any maritime performing party as well as to any action of the carrier or any maritime performing party against the shipper, documentary shipper controlling party or consignee. Suspension and interruption of the limitation period is expressly excluded in the Rotterdam Rules.

#### ***4.1. Critical evaluation of the changes re the position of the carrier***

Of the major changes in the liability of the carrier regime under the Rotterdam Rules is the removal of the nautical fault from the list of the «excepted perils». In addition the Rotterdam Rules provide on top of the obligation of the carrier to «properly crew... the ship...during the voyage by sea» also the carrier's «vicarious liability»<sup>55</sup>. In relation to every fault of the shipowner's employees and/or agents during the execution of the carriage. There is also an extension of the obligation to provide a seaworthy vessel for all of the duration of the sea transport (Article 14.a), and the carrier has now a specific the obligation to avoid a negative impact through his operations on the environment (Articles 15, 17.3.n, 32).<sup>56</sup> In relation to the issue of the liability of the carrier for a delay (Art. 21), the liability for delay arises if goods are not delivered at the place of destination indicated and at a specific date stated in the contract of carriage. Article 21 of the Rotterdam Rules differs from the Hague-Visby Rules, where no liability for a delay exists, as well as from the Hamburg Rules, there is liability of the carrier if goods are not consigned at the time established in the transport contract, or «within the time which it would be reasonable to expect from a diligent carrier». Because in the Rotterdam Rules the carrier's obligation does not simply consist of the duty to carry the goods to the place of destination, but also extends to his duty to deliver them to the consignee, it is possible that the carrier may be liable for delay in delivery of goods. The Rotterdam Rules being an instrument pertaining to the contract of international carriage of goods wholly or partly by sea, they contain comprehensive and detailed provisions for the delivery of the goods.

All of the above clarify the fact that the Rotterdam Rules adopt on the one hand features of the pre-existing traditional carrier liability regimes, but contain

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55. R. ASARIOTIS, *Allocation of liability and burden of proof in the Draft Instrument on Transport Law*, in *Lloyd's Mar. Comm. Law Quart.*, 2002, 388

56. M. STURLEY, *Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules*, in R. THOMAS (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules*, Oxon, 2009, 1.

important clarifications and innovations in line with the modern needs and evolution of maritime transport. Hence, also their naming - by the maritime community - as “*evolutionary and not revolutionary*”. However, this does not at all diminish their importance but on the contrary it emphasizes the evolution mirrored in them. Art. 26 of the Rotterdam Rules extends - under certain conditions - the period of liability of the maritime carrier to non-sea legs of a certain multimodal maritime transport. The drafters of the Rules *have specified* the extension, in certain cases of multimodal transport (*door-to-door*) that include a maritime route. The Rotterdam Rules have extended the definition of a «contract of carriage» relevant to its proper scope of application (Art. 1.1) and state that such a contract *shall provide for carriage by sea and may provide for carriage by other methods of transport in addition to the sea carriage and* (Art. 5 in conjunction with Art. 12, specify the period of responsibility of the carrier as encompassing the time from the receipt of the goods until the delivery of the same goods to the consignee, and state that the responsibility of the carrier is not necessarily limited to the phase when the goods are placed on the ship. In addition, (Art. 5) it is possible that the places of the receipt/delivery of the goods may eventually not coincide with the ports of loading/unloading.<sup>57</sup> Under the regime established by the Rotterdam Rules - notwithstanding the exceptions in Article 17, Paragraph 3 - the carrier is still liable for the loss, damage, or delay if the claimant proves that the fault of the carrier caused or contributed to the event or circumstance on which the carrier relies in the listed exceptions. Unlike the Hague-Visby Rules, the exceptions of the carrier’s liability are not set out as unconditional in the Rotterdam Rules. Hence the exceptions in the Rotterdam Rules may be divided into categories, such as the case of events or circumstances to which the carrier’s fault could not cause or contribute (e.g. in the case of occurrence of an Act of God (Article 17, Paragraph 3 (a)) or the case of an act or omission of the shipper (Article 17, Paragraph 3 (h)), Hence, it could be said that the Rotterdam Rules have contributed to the establishment of a new structure of the basis of liability for the carrier, including the extension of the rules on the burden of proof beyond the scope of the Bills of Lading to electronic and other forms of the contract of carriage of goods.

## 5. Conclusion

The Rotterdam Rules are not a panacea or a perfect legal regime but they have ameliorated the definition and the scope of the carrier’s liability in comparison to what the latter was under previous legal instruments. Considering their naming as

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57. M. STURLEY, *Scope of the coverage under the UNCITRAL Draft Instrument*, in *J. Int. Mar. Law*, 2004, 146.

### The carrier's liability regime

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“evolutionary but not revolutionary”, although not revolutionary, the Rotterdam Rules are highly innovative in that they constitute the first international legal instrument whereby a much more detailed regime on the liability of the sea carrier is established, offering hence a much better legal protection to all parties involved in the maritime transport. Moreover, this new regime concerning the liability of the sea carrier takes into account the development of the sea transport into a «multimodal perspective».