**CARRIAGE OF GOODS BY SEA ASSIGNMENT**



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In this assignment the Rotterdam Rules will be evaluated to the extent which they progress the international carriage of goods at sea and the degree to which they address the traditional functions of a bill of lading, in relation to the Hague, Hague Visby and Hamburg Rules historical predecessors. These will be compared and contrasted to the extent to which the proposed Rotterdam Rules, actually continue or regress this “evolutionary progress”. This determines the overall efficaciousness of this proposed modernised and international attempt to unify carriage of goods at sea in one convention.

To a considerable degree the Rotterdam Rules(Chapter 2 Scope of Application: Articles 5 -7) advance the evolutionary progress of the international carriage of goods by sea, indicating a more harmonised attempt to coordinate a set of legislation that unifies and simplifies the global transportation of cargo (Ibrahim 2010), by codifying previous efforts. This creates international mercantile law uniformity, to regulate international contracts and documentary requirements for cargo (Britannia 2010), eliminating enforcement; transaction and communication costs for the shipper and carrier; facilitating the flow of global commerce (Neels 2011). In addition, the Rotterdam Rules enhance international business activity; by establishing a universally acceptable, commercial contract between carrier and cargo owner (or representative) for transporting cargo from the port or point of receipt loading to that of delivery/ discharge compatible with other international conventions. These resolve the documentary risks and costs incurred within current international transportation transactions arising from mistakes, omissions; translation and legal ambiguities along with those arising from cultural, language and etiquette differences.

The Rotterdam Rules represent advancement in modernising the international carriage of goods by sea for the challenges of the twenty first century, compared to preceding examples such as the Hamburg Rules focussing merely on physical transport documents; It does so by regulating electronic commerce (Rimaboschi 2009) through Chapter 3 Article 8 and Chapter 8. These require providing electronic transport records (by the carrier from the shipper) for both negotiable and non-negotiable (Article 35), provided that they possess the same use, effect, ownership, control and transfer rights (Article 57) as manual record equivalents; as formalized under negotiable electronic transport records usage procedure (Article 9) and replacement (Article 10). The traditional function of a bill of lading as a document of title or possession and transfer for the carriage of goods by sea, is thus accentuated. It aims to be more modernised and flexible in providing for electronic functional equivalence; provided that it incorporates the Hamburg Rules established criteria of an adequate and accurate description of the goods including leading marks; quantity and weight (Rotterdam Rules Article 36 Contract particulars). The Rotterdam Rules therefore reflect an improvement for carriers and shippers in reducing physical document and process requirements, to reduce potential risk and serve as evidence, more arduous to destroy than susceptible paper, and with a reduced possibility of losing it (the carrier no longer needs it physically) (Zuidwijk 2011). Functional equivalence also reduces trade, opportunity and regulatory compliance costs and facilitates with the same permanence; authenticity; validity and accessibility as manual versions facilitating the international contract of carriage more efficiently (Sturley 2009).

In contrast to the Hague and the Hague Visby Rules; the Rotterdam Rules (UN 2008) represents significant progress in regulating the international carriage of goods, in being more specific than the Hamburg (Ludeke 1995), Hague and Hague Visby Rules by expressly protecting each contracting party –the carrier and the shipper, including providing sufficient information implicitly detailing the conditions necessary for its fulfilment. (Rotterdam Rules Articles 28 -31). Chapter 4 carrier obligations extend merely beyond the traditional responsibility of carriage and delivery of the goods to the place of destination/ consignee (Article 11). Under Article 12 the period of responsibility extends with Article 26, to Carriage preceding or subsequent to sea carriage. This has the distinct advantage of not limiting legal carrier responsibility for the goods after acceptance, but prior to the actual loading of cargo onboard and after offloading until the point of delivery to the consignee; which was excluded under the Hamburg, Hague (Article 1e: “***covers the time from when goods are loaded to the time when discharged”)*** and Hague Visby Rules (Berlingieri 2009). Under Article 13, the Rotterdam Rules comply with the Hamburg Rules, that the carrier, agents and servants are specifically responsible for preserving the goods in sufficient condition throughout the carriage: ***“properly and carefully receive, load, handle, stow,*** ***carry, keep, care for, unload and deliver the goods.”***  The Rotterdam Rules also defend the shipper’s rights by ensuring the carrier is legally liable under Article 14 for exercising “due diligence” so that the vessel is seaworthy enough with adequate crew, equipment and maintenance to make the passage, with the goods remaining in reasonable and sufficient condition throughout the voyage and is protected for navigational flaws and fire (following Hamburg Rule Article 5), as factors within the potential control of the carrier (Davis 2010).

The Rotterdam Rules evoke even greater provisions to protect the carrier, whom may unload, destroy or prevent goods of a potential danger (Article 15) while Articles 16 and 17 follows the Hamburg Rule predecessor in establishing potential limitations of liability that enable carriers to be protected by a force majeure clause against liability for circumstances/ events beyond their control. In addition; they extend protection through specific shipper obligations (Chapter 7) including delivering cargo for carriage (Article 27) in sufficient condition as to be able to withstand the voyage, –especially if the shipper is responsible for securing and stowing the cargo (Khalid 2010). Article 24 also permits the carrier to make reasonable deviations when necessary and justifiable. Both parties potentially benefit with the inclusion of Article 28: cooperation of the shipper (Articles 29 and 31) and the carrier in providing information and instructions timeously. Hence they benefit from the information of the other in handling; stowing, securing and transporting cargo consignments, as it enables parties to honour their contractual obligations satisfying the traditional functions of a bill of lading as evidence of a contract of carriage of goods; a receipt of cargo and a document of title or ownership (Dlamini 2013). Article 43 extends this to the consignee, who has to acknowledge and accept delivery along with the receipt of cargo to aid the carrier (Article 44). In systemizing each party’s contractual obligations. This expedites the international carriage of goods by sea through establishing greater stability; certainty and predictability to minimise potential risk (Britannia 2010).

The Rotterdam Rules evolve the international carriage of goods by sea; as under Articles 50 and 51, the shipper as the controlling party more efficaciously fulfils the traditional role of the bill of lading as a sea transport document of title and possession. It preserves the rights of ownership transferability to another consignee, to receive goods at a scheduled place of delivery and to modify instructions not contravening the contract of carriage. In addition, the Rotterdam Rules progress the international contract governing the carriage of goods by sea; by embodying the concept of a fundamental breach. Each contracting party can hold the other responsible, for any potential loss or damage incurred –for which they are responsible. with recourse to arbitration (omitted from the Hague and Hague Visby Rules while general average is also excluded). This is affirmed through including Article 30 for the shipper to the carrier, Article 18 for the carrier and Article 19 for other maritime performing parties.

Article 18 protects the shipper further, as the carrier is now responsible for the act or omission of any performing party - for any employee including the master or crew of the vessel, agent or subcontractor who fails to honour the contract of carriage. In contrast, the Hague Visby Rules excluded liability for subcontractors (Berlingieri 2009) and the Hamburg Rules based it upon the master. Liability is extended from the Hamburg Rules to cover “place to place” over “port to port’ responsibility. It also provides for joint and several liabilities when both the carrier and maritime performing parties are involved (Article 20). Limits of liability (which is constrained to protect the carrier from circumstances/risks beyond its control) have increased to protect the shipper from 2325 euros per kilogram under the Hague Visby Rules and 775.58 per package maximum to 3448 per kilogram and 1017.44 per package under the Rotterdam Rules. These advance the international carriage of goods; in providing for a notice to the shipper by the carrier for cargo loss, delay or damage (Article 23). Compensation is based on market value of goods at place and time of delivery (Article 22) .The overarching objective of the Rotterdam Rules in being applicable to most sea transport documents used is for both parties to facilitate contractual performance and be granted the opportunity/ potential to do so while protecting each other’s rights (Hatley 2013).

To a point; the Rotterdam Rules follow the Hamburg Rules in also clarifying potential responsibilities and liabilities of each contracting parties (the carrier and the shipper) by stating that it is legally binding upon both inbound and outbound cargo consignments (Jha 2012) extending to ports; stevedoring; terminal and cargo operators; improving these over the preceding Hague Visby Rules which merely applied to inbound cargo; to reduce potential risk and uncertainty in liability for loss, damage or delay (Article 21) of the carrier (Chapter 5). Articles 11 and 12 now have the specific obligation (Khalid 2010) of the carrier actually being responsible for delivering cargo whereas nothing previously compelled that party to actually do so. The Rotterdam Rules have evolved in comparison to the Hamburg Rules (Johanson 2010). Articles 17 and 61 establish the basis of carrier liability if the carrier –either through act or omission; failed to ensure the safe passage of cargo during the period of carrier responsibility since the crew are now liable if negligent in the case of fire and for a nautical fault; protecting the shipper for events within the potential control of the carrier–for which they have to give notice (Article 23) –as under the Hague Visby Rules; they could claim that any damage affecting a cargo’s clean bill of lading –could have been from the force majeure clause Article 17. Its limitation of liability may penalise the shipper but incentivises the carrier to minimise freight and insurance rates rises (Jha 2012).

The Rotterdam Rules merely represent a continuation of the Hamburg Rules but improve upon the Hague Visby Rules via Article 25 (Deck Cargo on Ships), where the carrier is not liable for damage based on any special risk, (for which the shipper is liable to warn the carrier under Article 32) in stowing deck cargo –unless the carrier places cargo on deck, contrary to the shipper’s specifications in the bill of lading. However it represents an improvement over the Hague Visby Rules, (which apply to bills of lading only) in extending this to containerised cargo and being applicable to the majority of transport documents used (Dlamini 2013) and “tackle to tackle” but also “port to port” and “door to door” responsibility (Neels 2011) . It resolves the question of liability for delay in addition to loss/ damage (including concealed), (Articles 17/21) through limiting liable quantities paid. Article 17 now provides for environmental protection and exempts terrorism as a fault of the carrier. The Rotterdam Rules provide enhanced flexibility and the capacity to exclude/ reserve certain legislative provisions (Articles 90/ 91), by determining liability is applicable for contracting states or where the bill of lading is issued at the port of loading, and reducing exceptions (Jha 2012). The carrier under Article 52 is entitled to compensation from the shipper for dangerous cargo/ unforeseen risks. The Rotterdam Rule have the distinctive merit over the Hamburg Rules for the international carriage of goods by sea, in specifically reducing potential liability, (any unspecified date for the carriage of goods is based upon the shipboard date) and enhancing potential enforceability. Under Article 38; an electronic signature is just as legally binding as a physical one), in a dispute via electronic and manual document provision of each contracting party’s contact details –the consignee, consignor and the carrier; the shipment date; delivery details plus information on the port of loading/unloading.

Finally, the Rotterdam Rules has certain advantages over the Hamburg Rules for the global transportation of goods by a maritime carrier modernising through provisions for multimodal transportation (to aid potential economies of scale and other cost reductions). It is commercially practical and simple to enforce (Ibrahim 2011) through established freedom of contract (including the specific inclusion and definition of, **“Volume contract” 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,”** (United Nations December 2008). In addition; this volume contract is voluntary –to deviate from the Convention if specifically noted in the contract with sufficient warning (Article 80) to affected parties to enable compliance; in contrast to being ignored under the Hamburg Rules. Freedom of contract and to vary provisions however; cannot legally be exempted for the specific obligations ensuring the shipper’s and carrier’s protections and liabilities or for ensuring the contract of carriage via the safe passage of cargo (Rimaboschi 2009). This includes limiting liability, as that would encourage neglect and augment risk to cargo.

In addition if insufficient, the Rotterdam Rules also continues the existing Hamburg Rules regime with flexibility of either party possessing 2 years to (rather than Hague Rules of 1 year) to file a suit (Article 62) at their choice of court (Article 67) which has jurisdiction (Article 66). The required location of the carrier’s domicile, the place of good’s receipt; the place of delivery or point of loading/discharged; is far more detailed in comparison to the Hamburg or Hague Rules, (Wanigasekera 2007) for the other party’s breach of contract –while the other party retains the right to self-defence (Article 63). The question of precedence in relation to other conflicts is resolved. The Rotterdam Rules supersedes over any ratified the day after and is preceded legally by those conventions signed prior to the ratification date. If this dispute resolution mechanism fails; parties also have the chance for arbitration (Chapter 15, Article 75).

However; this is only to a certain extent as the Rotterdam Rules do not advance the evolutionary progress of the international carriage of goods by sea, for although it considers multimodal transportation; its prime failure is to avoid integrating multi-modal opportunities and subsequently to benefit from trade flexibility and facilitation (Parker 2010). With the maritime plus option provided; the contractual obligations and protections such as “contracts” and “damaged goods,” specified only apply to maritime performing parties as carriers; or to voyages of cargo entailing a sea leg (Chapter 2 Article 5: Scope of Application) (Johanson 2011) but ignore those stages concerning road, rail and air –as domestic law or other conventions apply to inland carriers, thus complicating legal enforcement and applicability. This complicates potential risk and liability not just for carriers but for ports, logistics and cargo terminal operators seeking to insure and protect against cargo risk. The Rotterdam Rules accentuate uncertainty for circumstances with the potential to conflict with the legal provisions of other conventions including Article 83 on the global limitation of liability, (Lannan 2009); enhancing potential legal, interpretation and regulatory compliance costs.

The Rotterdam Rules also do not advance the evolutionary progress of the international carriage of goods by sea, for it fails to distinguish between myriad transport documents under Article 1 (United Nations 2008), e.g. waybills; bills of lading, throughbills, combined transport bills and a shipper’s consigned bill of lading. All of these have differing obligations governing the international carriage of goods by sea, to complicate international cargo transfers further. In addition, it fails to regulate charterparties (Britannia 2010), under Article 6.1 (including slot and space charters), exclusion of which is a fundamental weakness. Any international convention governing the documents and requirements of contracts of carriage should incorporate these as a pivotal aspect of the maritime passage of goods. It further regresses when compared to predecessors as Chapter 1 Article I: (United Nations 2008) demonstrates with “documentary shipper” defined as one “accepted to be named” not one “named” from a liability perspective; increased risk occurs if that person denies acceptance. Further risk occurs for the international carriage of goods from a maritime performing party defined as anyone –even an agent to collect cargo. Further weaknesses in the advocated Rotterdam Rules include distinguishing between non detailed performing parties and maritime performing parties (Article 1 (6)). They cannot guarantee other multimodal carriers will honour the internationally defined contract of carriage of goods in only specifying the contractual obligations of maritime, not other carriers.

To a further extent; the Rotterdam Rules are flawed as a convention governing the international carriage of goods in emphasizing contractual responsibilities with the substitution of transport document holder/ controlling party. The deleted Hamburg Rules provided cargo broker/cargo holder, but ignoring the functions of a bill of lading and other documents historically associated with the passage of cargo including a receipt for cargo and affirming evidence of the contract of carriage. It fails to specify documents required or to clarify the capacity of the master to refuse to endorse the contract of carriage/ bill of lading (Dlamini 2013). This is demonstrated by the omission of maritime terminology i.e. provisions for clean and claused bills of lading to protect the carrier. It fails to refer to terms such as cargo transit agent or bill of lading itself,- which is replaced from the Hamburg Rules by the more generalised but imprecise transport or electronic transport document, (defined as the contract of carriage rather than the Hamburg and Hague Rule defined traditional role; serving as evidence itself of the contract of carriage). There is no specific role for financing - (ignores bill of exchange role). The acknowledgement of the mate’s responsibility in the receipt of cargo is deleted, thereby reducing the general applicability of the Rotterdam Rules to govern specific maritime cargos (Lannan 2009).

In contrast to more modest previous attempts requiring fewer documents and processes; the Rotterdam Rules complicate the international carriage of goods as the Montevideo Declaration among others demonstrates (Alcantara 2010). While protecting the rights of one contracting party (shipper or carrier), through raising limits of liability and increasing numerous specific contractual obligations; it increases the potential regulatory compliance costs for the other; thereby undermining international trade; sustainability and competitiveness (Lannan 2009). In contrast to the Hague Visby Rules; carriers and shippers will require higher insurance costs for increased limits on potential liability but lower than other international conventions (Article 59) (raised to 3SDR’s per kilogram/ 875 SDR’s per package) while delay is limited to 2.5 times cargo market value, while shippers are constricted in the low amount of potential recovery damage they can claim if costs exceed this limit, (even for carrier negligence/ maleficent intention) (Khalid 2010). Article 21 favours the carrier at the expense of the shipper. Both parties must agree on a pre-determined rate in order to be legally valid. Article 23 (4) grants only a limited time of three weeks to claim compensation for loss or delay. As most international courts do not limit potential liability/ delay and grant greater time periods; the Rotterdam Rules become less legally enforceable; therefore retracting the advancement of international maritime cargo transport (Lannan 2009). The Rotterdam Rules are flawed compared to the Hamburg Rules as the carrier experiences no limits to liability or delay claimable from the shipper (determined by vaguer national law). The onus of legal proof to affirm a contractual breach is also on the shipper, even when the carrier has greater access to information during the contract of carriage whereas previous both parties could consider filing a suit for a potential contract breach.

Another Rotterdam Rules risk occurs when the carrier is legally obliged to ensure every place is seaworthy and in exercising due diligence (Article 14/ 15)–however this is based on reasonableness –not hosting a multitude of port serving facilities; plus the onus to evaluate goods as being in good condition. By extending network liability coverage from point of acceptance (pre-carriage) and to include negligence of subcontractors; terminals; agents, servants and other “maritime performance parties,” the carrier is liable for factors they do not influence or control (Wilhelmson 2010). The Rotterdam Rules further advantage the carrier, (despite recognising the impracticality for the seller in physically examining every single cargo item) whilst penalising the shipper under Article 40; as the carrier can reduce potential liability (Davis 2010) by qualifying the cargo through “said to contain…” on the bill of lading. In providing freedom of contract; the Rotterdam Rules discriminate in favour of larger shippers or carriers with greater bargaining power at the expense of smaller (Chua 2010) enhancing costs of maritime cargo, contracting trade.

The efficaciousness of the Rotterdam Rules in providing for volume contracts under Article 80 (Hatley 2013) is reduced by its restricting qualifying criteria preventing potential users from benefitting or opting out. (Johanson). It allows carriers the option of reducing potential responsibilities and liability limits; therefore undermining the attempt and purpose at establishing an international convention regulating the carriage of goods by sea; further discouraging the shipper from short sea shipping. This extends to freedom for parties to avoid applying the Rotterdam Rules –non legally binding in choosing the place of jurisdiction (Chapter 14) and Arbitration (Chapter 15). As the Montevideo Declaration notes (Vega 2013); the Rotterdam Rules represents a legally regressive step compared to historic predecessors, the Hamburg, Hague and Hague Visby Rules in enforcing the international carriage of goods by sea through irrelevant contractual not maritime terminology: volume contract; maritime or non-maritime performing party etc (Alcantara 2010) but reduces the applicability of those countries dependent on precedent case laws for legal enforcement.

In conclusion, to a certain extent the Rotterdam Rules advance the evolutionary process of the international carriage of goods by sea, compared to the Hamburg, Hague and Hague Visby Rules as they provide greater protection to each contracting party by specifying the specific obligations and potential liabilities for the shipper, carrier and other performing contractual parties. They enhance the purposes of a bill of lading through the provision of electronic records with functional evidence of contract of carriage and document of title/ possession/ ownership and transfer. It extends and modernises coverage to include containerised goods and multimodal transport –or carriage beyond the sea voyage segment to facilitate greater trade volumes, more efficiently and cost effectively. They include the specific obligation of delivery; controlling party rights and freedom of contract (including volume), while ensuring that the shipper is just as responsible for the international carriage of goods by sea.

To some extent however; the Rotterdam Rules represent a continuation of existing international carriage of goods by sea conventions (with only slight improvements) in terms of providing for the risks of deck cargo and live animals with the flexibility and freedom of jurisdiction and arbitration, with the same notice and time of suit requirements. The absence of these Rules; would though complicate international trade and magnify uncertainty/risk, requiring proliferating yet diverse domestic legislation related to the transportation of cargo. It provides the merit of substituting myriad contracts for one regulated and established between the carrier and the consignor –especially for multimodal transportation. However; this is only to a point, as the Rotterdam Rules represent a regression rather than progression of the international carriage of goods with the potential to conflict with other conventions; enhancing complexity; lacking maritime terminology and with flawed definitions i.e. exempting charterparties and allowing derivations for volume contracts. While protecting the rights of one contracting party (shipper or carrier), through raising limits of liability and specific obligations; it increases potential regulatory compliance costs for the other. Overall however, they represent a credible globally coordinated attempt, modernised electronically with provisions considering volume contracts and multi-modal transport opportunities… Hence, they do indicate an advancement in the international carriage of goods by sea…

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