



# THE ROTTERDAM RULES: A STEP BACKWARDS FOR AUSTRALIAN SHIPPERS?

Alexandra Parker, runner up for the 2007 Logistics Development Award sponsored by CHEP Asia-Pacific, provides an insight into the impact on Australian Shippers of the draft convention - Rotterdam Rules.

### **The Rotterdam Rules: A step backwards for Australian shippers?**

The UNCITRAL 'Draft convention on contracts for the international carriage of goods wholly or partly by sea', (otherwise known as the Rotterdam Rules), was submitted to the International Legal Committee of the United Nations General Assembly on October 20<sup>th</sup> 2008.

If this draft convention is approved by the UN, in a signing ceremony scheduled for September 2009, the Rotterdam Rules become effective one year after signature by the 20th UN member state effectively altering the law that currently governs Australia's export trade. Unfortunately it seems that in many regards, this change will mean a step backwards for Australian consignors.

### **The Balance of the Document**

The main issue that must be examined regarding the draft convention is the way that it affects the balance of rights, obligations and liabilities between the parties. The intention of these new rules was to be more favourable to cargo-owning interests than that of its Hague predecessors; however difficulty in construction and consensus at the Working Groups<sup>1</sup> led to compromises that may have instead further reduced the safeguards awarded to shippers and

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<sup>1</sup> United Nations Working Group III (Transport Law)

consignee alike. While large shippers with comparable bargaining power may be able to negotiate more favourable terms for those Articles that leave room for freedom of contract, small and medium sized shippers will be left disadvantaged, forced to accept the standard terms of the more powerful carriers.

### ***i) Onus and Order of Proof***

The Rotterdam Rules significantly change the order and onus of proof for making a cargo claim against a carrier.

Under current Australian law cargo owner can raise a prima facie case against a shipowner by proving that cargo, which had been shipped in good order and condition, arrived damaged. The shipowner could then meet that prima facie case by relying on an exception in Art IV r 2. The cargo owner could then try to remove the exception by proving that the vessel was unseaworthy at the commencement of a voyage which intern caused the loss.

The Australian Government noted in its comments, this has changed the current status of the burden of proof. Now once the claimant establishes a loss, the existing rules place the burden of proof as to the cause of loss on the carrier effectively. They stated:

*'This is based on the carrier being in a better position than the shipper to know what happened while the goods were in the carrier's custody. If there were more than one cause of loss or damage, then under those regimes the carrier had the onus of proving to what extent a proportion of the loss was due to a particular cause. The current text changes this and puts part of the onus of proof on the shipper...*

They argued that shipper's would have trouble accessing the information necessary for proving unseaworthiness, improper crewing, equipping or supplying, or that the holds were not fit for the purpose of carrying goods. It is

probable that this change to the general rule on allocation of liability will affect a considerable number of cargo claims.

### ***ii) Limits of Liability***

Of the main deficiencies of the current law was said to be the level of the limits of carriers liability. Under Article 4 (5) of Hague-Visby Rules, a carriers liability is capped at any “amount exceeding 666.67 units of account<sup>2</sup> per package or 2 units of account per kilogramme of gross weight of the goods lost or damaged, or whichever is higher.”

In what seems, at first glance, to be one of the improvements made by the new draft convention, Article 59 – Limits of Liability, increase the limit on liability to “875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods”. However, this Article now applies to all actions against the carrier not just those referring to damage or loss of the goods. It also applies to the whole carriage of goods that is covered by the bill of lading, not just sea-carriage as was the case under the Hague-Visby Rules. Notably the new figures stated in the draft convention is considerably lower than existing limits provided for in current multimodal conventions that would have covered the road or rail part of the journey. It seems that depending on where the damage occurs this change will create both winners and losers out of consignors with potential cargo claims.

It seems that despite a notional increase in the carrier’s limit of liability, the increased obligations of the shipper and the introduction of uncapped liability will make the new convention, in most cases, detrimental to the shipper.

### ***iii) Period and Level of Responsibility***

The un-edited version of the Hague Visby Rules define the period of carriers responsibility as from when the “goods are loaded on to the time they are discharged from the ship” also known as the tackle to tackle period. By

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<sup>2</sup> Special Drawing Rights of the International Monetary Fund

contrast, the Australian version of the Hague-Visby Rules extend this responsibility to the “period during which a carrier is in charge of the goods” which is then further defined as follows. A carrier “begins to be in charge of the goods at the time the goods are delivered to the carrier (or an agent or servant of the carrier) within the limits of a port or wharf; and the carrier ceases to be in charge of the goods at the time the goods are delivered to, or placed at the disposal of, the consignee within the limits of the port or wharf that is the intended destination of the goods.”

The related article in the new convention, Draft Article 19, could be read to only encompass tackle to tackle coverage, thereby reducing the period of carrier responsibility that Australian shippers currently enjoy under Australian law, so that the convention would not apply whilst the goods were on the wharf or in the possession of the stevedores.

Conversely, Article 15 of the new draft convention significantly broadens the current law under Art II r I of the Amended Hague Rules. Art III r I of the Hague Visby Rules provides that a carrier is bound to exercise due diligence to make a ship seaworthy only at the beginning of the voyage. Under draft Article 15 the carrier’s obligation of due diligence has been expanded to include a continuing obligation, a change supported by Australia<sup>3</sup>. Draft Art 15 provides:

*‘The carrier is bound before, at the beginning of, **and during the voyage** by sea to exercise due diligence to –*

*(a) Make **and keep** the ship seaworthy;*

*(b) Properly crew, equip and supply the ship **and keep** the ship so crewed, equipped and supplied throughout the voyage; and*

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<sup>3</sup> Australian Attorney Generals Department “Australian comments on the UNICTRAL Draft Convention on contracts for the International Carriage of Goods Wholly or Party by Sea” (March 2008) 22(1) *Australian and New Zealand Maritime Law Journal* Paragraph 7

*(c) Make **and keep** the holds and all other parts of the ship in which the goods are carried, including any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.'*

#### **iv) Freedom of Contract**

The changed balance of the new convention now leaves more issues to freedom of contract, a situation that the current law had tried to move away from. Although some large shippers or break bulk cargo owners may have the bargaining power to negotiate favourable terms, the majority of small and medium sized shippers will be disadvantaged having to accept the terms of the carriers, probably at an increased risk or cost to themselves. This greater risk of shipping goods, transforms into higher insurance, therefore greater costs of good.

Some examples of where the draft convention leaves element up to freedom of contract include:

- Draft Article 13 – Specific obligations
- Draft Article 22 (3) Calculation of Compensation for Delay

#### **Avoiding the Convention**

Finally, unlike the current coverage of Australia's version of the Hague-Visby Rules, the draft convention leaves more room for people to contract out of the convention. Under the amended Article 10 ss 2-5 of the Hague Visby Rules, it is stated that the Rules apply to all carriage of goods as well as contracts for carriage of goods from any port in Australia for outbound bills of lading, and also to inbound bills of lading if they are not already covered by either the Hague, Hague-Visby or Hamburg Rules.

The draft convention only provides for application to the 'contract' for carriage<sup>4</sup> not actual carriage, allowing parties to draft documents in order to avoid the convention. Alternatively, as argued by Australia, due to the lack of definition given to the term 'volume contract', it appears that many of today trade agreements could fall within this category and thereby also avoid the convention and leading to a lack of uniformity and certainty returning the industry to freedom of contract, affecting small and medium shippers lacking comparable bargaining power.

### **Conclusion**

Generally it appears that vis-a-vis the current Australian version of the Hague-Visby Rules, shippers will be substantially worse off under the Rotterdam Rules, as they are now burdened with the onus of proof in cargo claims, both as to when damage and loss occurred and whether the vessel was seaworthy. As mentioned, these are tasks that are almost impossible with consideration to the shipper's access to information.

Despite an increase in the carrier's limit of liability, the extended period of that liability actually reduces the limits previously afforded under various multi-modal instruments. On top of this, the increased obligations of the shipper and the introduction of uncapped liability for carrier's losses will make the new convention, in most cases, a detrimental modification for the shipper.

A few welcome changes include the extension of the requirement of due diligence to make a vessel seaworthy, to an ongoing one and the removal of the nautical fault exception. Nonetheless on the balance of the evidence, it appears that this alleged step forward for the international law on sea carriage will be a step backward for Australian consignors.

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<sup>4</sup> See draft Article 5 – Scope of Application

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