



FACULTY OF LAW
Lund University

Elson Thana

**Shippers' obligations and liabilities under
United Nations Convention on Contract for the
International Carriage of Goods wholly or Partly by Sea
(The Rotterdam Rules)**

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Supervised by
Abhinayan Basu Bal

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Abbreviations

CMI – Comité Maritime International

GHSLC - Globally Harmonized System of Classification and Labelling of Chemicals

Hague Rules - The International Convention for the Unification of Certain Rules Relating to Bills of Lading,

Hague-Visby Rules - The Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924

Hamburg Rules - United Nations Convention on the Carriage of Goods by Sea, 31 March 1978.

IMDG Code - International Maritime Dangerous Goods Code

MARPOL 73/78 - International Convention for the Prevention of Pollution from Ships

Rotterdam Rules - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

SOLAS, 1974 - International Convention for the Safety of Life at Sea, 1974

UNCITRAL – United Nations Commission on International Trade Law

1 Introduction

On 11 December 2008, the United Nations General Assembly adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea¹ with the primary aim to modernize and harmonize the law relating to carriage of goods by sea. The new Convention which is also referred to as the Rotterdam Rules will enter into force 12 months after the deposition of the 20th instrument of ratification, acceptance, approval or accession². The Rules has so far received twenty-one signatures³.

The Rotterdam Rules intends to replace the carriage regimes of different states which are primarily governed by one of the three international conventions, namely the Hague Rules⁴, Hague-Visby Rules⁵, Hamburg Rules⁶, and the different national “hybrid” regimes such as in China and in the Nordic countries⁷. Each state that ratifies, accepts, approves or accedes to the new Rules will, at the same

¹ The final text of the Convention (hereinafter Rotterdam Rules) is annexed to General Assembly Resolution 63/122, UN Doc A/RES/63/122. It was also annexed to the “Report of the United Nations Commission on International Trade Law on the work of its forty-first session”, UN Doc A/63/17 (2008), Annex I. In this thesis, the subject instrument is interchangeably referred to as the “Rotterdam Rules” or “draft convention” or “draft instrument”, as appropriate contextually.

² See Rotterdam Rules, art. 94.

³ The twenty-one States are as follows: Armenia, Cameroon, Republic of Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Madagascar, Mali, the Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States of America. See Status of the Rotterdam Rules at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html

⁴ The International Convention for the Unification of Certain Rules Relating to Bills of Lading, 25 August 1924, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155, hereinafter referred to as the “Hague Rules”.

⁵ The Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924, 23 February 1968, 1421 U.N.T.S. 121, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944) (entered into force 23 June 1977), hereinafter referred to as the “Hague-Visby Rules”.

⁶ United Nations Convention on the Carriage of Goods by Sea, 31 March 1978, 17 I.L.M. 608, hereinafter referred to as the “Hamburg Rules”. (entered into force on 1 November 1992)

⁷ China has a national maritime code that incorporates elements of both the Hague-Visby and Hamburg Rules along with domestic elements that are unique to Chinese law. The Nordic countries have incorporated significant elements of the Hamburg rules into their domestic versions of the Hague-Visby Rules.

time, denounce the international convention on carriage of goods they are party to by notifying the Belgium Government or the United Nations to that effect⁸.

The Rotterdam Rules consist of 96 articles, with the aim to establish uniform rules on international carriage of goods by sea. The Rules take into account the reality that the carriage of goods by sea is frequently preceded or followed by land carriage and apply not only to contracts for international carriage by sea but also to contracts for international multimodal transport involving at least one international sea leg⁹. The Rules also regulate issues related to volume contracts¹⁰, electronic transport records¹¹, the rights of the controlling party¹², the transfer of rights incorporated in transport documents or electronic records¹³ and the liability of some categories of third parties that assist the carrier in the performance of the contract of carriage (maritime performing parties)¹⁴. One of many significant features of Rotterdam Rules is the relative importance given to the position of the shipper as a party to the carriage contract. This thesis takes a closer look at the position of the shipper under the new Rules.

From a historical perspective, the pre-existing carriage of goods by sea regimes are primarily concerned with the obligation and liabilities of the carrier. The primary reason for the creation of the Hague Rules was in reaction to the excesses of absolute freedom of contract and was precisely meant to impose a minimum set of obligation and liabilities to the carrier. However, as a party of the carriage contract, the shipper also has obligations and liabilities.

⁸ Rotterdam Rules, Article 89

⁹ Rotterdam Rules arts 1.1 and 5.1 but subject to arts 6, 26 and 82

¹⁰ Rotterdam Rules, Article 1.2 and Article 80

¹¹ Rotterdam Rules arts 1.11-1.22 and chapter 3

¹² Rotterdam Rules chapter 10

¹³ Rotterdam Rules chapter 10

¹⁴ Rotterdam Rules art 19

Over the different conventions, these obligation and liabilities of the shipper have become more visible. While the Hague and Hague-Visby Rules contain only a few provisions on the obligation and liabilities of the shipper, the Hamburg Rules contain a separate Part consisting of two articles dealing with obligations and liabilities of shippers. Chapter 2 of this thesis provides an overview of the shippers' obligation and liabilities under these pre-existing regimes.

The Rotterdam Rules includes an entire chapter, i.e., Chapter 7, running from articles 27 to 34, entirely devoted to the "obligation of the shipper to the carrier". The legal position of the shipper is thereafter entrenched by virtue of article 79.2 (b) which renders void any attempt to vary the legal position relating to the duties and liabilities under the Rules¹⁵. The liability of the shipper under the Rotterdam Rules is fault-based and the carrier has the burden of proof to make the shipper liable. However, there are two situations where the shipper bears strict liability, namely, when the shipper provides inaccurate information in compilation of the transport document¹⁶ and when loss or damage occurs due to dangerous goods¹⁷. Chapter 3 of this thesis provides an analytical overview of the shippers' obligation and liabilities under the Rules.

Considering the importance of article 32 of the Rotterdam Rules which deals with dangerous goods, Chapter 4 of the thesis first dwell upon the technical aspects of dangerous goods, its classification and the system to deal with them. This discussion is then followed by a detailed analysis of the obligations and liabilities of the shipper for shipping dangerous goods. The lack of a clear definition of dangerous goods in pre-existing regimes gave rise to a huge debate

¹⁵ Thomas R. "*The Position of the shipper under the Rotterdam Rules*" Conference Proceedings, Rotterdam Rules Appraised, held at Erasmus University, Rotterdam on 24-25 September 2009, at p.1.

¹⁶ Rotterdam Rules Article 31.2

¹⁷ Rotterdam Rules Article 32

which can be noticed in the two leading English cases on the subject matter, namely, *The Giannis NK*¹⁸ and *The Darya Radhe*¹⁹.

The issue of dangerous cargoes in the context of the Hague Rules was explored in *The Giannis NK* in which a cargo of groundnuts infested with beetles was held to constitute dangerous goods. In the recent case of *The Darya Radhe*, a cargo of soyabean meal pellets infested with live rats was held not to constitute dangerous goods. The analysis in Chapter 4 of this thesis briefly dwells on the facts of the two cases and the legal principles which can be gleaned from them. Then the similarities and distinctions between the two cases are drawn out followed by a discussion on the possible ambit of dangerous goods under the Rotterdam Rules.

Although the newly adopted Rotterdam Rules has been at the centre stage of academic discussions in the past few years, the literature review shows that not much has been written on the subject. The purpose of this thesis is to present and analyse in a systematic manner the various provisions of the new Rules and thereby enhance understanding of shippers' obligations and liabilities.

The sources perused include major text books and publications in the law of carriage of goods by sea and the associated case law jurisprudence; relevant text books and articles on the Rotterdam Rules and the commentaries and proceedings of conferences published in the Annual Yearbooks of the Comité Maritime International, other published articles and material available on-line. Much of the legal analysis has been based on detailed reviews of decided cases primarily in English common law jurisdictions. The

¹⁸ *Effort Shipping Ltd. v. Linden Management S.A. (The Giannis NK)*, [1998] 1 Lloyd's Rep 337; [1998] A.C. 605.

¹⁹ *Bunge SA v. ADM Do Brasil Ltda and Others (The Darya Radhe)* [2009] EWHC 845 (Comm)

methodology used for this thesis is primarily based on the traditional legal approach. Nevertheless, in Chapters 2 and 3 a comparative approach is taken while explaining and comparing the shippers' obligations and liabilities under the three pre-existing international conventions.

2 Obligations of the shipper in Hague, Hague-Visby and Hamburg Rules

2.1 Obligation of the shipper under the Hague and Hague-Visby Rules

Under Hague and Hague-Visby Rules, there is no definition of shipper. The Rules does not provide much on the position of shipper's obligations and liabilities. In Article I(a) of Hague/Hague-Visby Rules, the definition of the carrier "*includes the owner or the charterer who enters into the contract with the shipper*". This indirectly means that the shipper is the party who enters in a contract of carriage with the carrier. In these Rules, one cannot find a clear expression for the obligation and liability of the shipper, but only a small number of provisions that may be extracted from the Rules.

In Article III (3), it is stipulated that "after receiving goods into his charge, the carrier, the master or the agent of the carrier, shall *on demand of the shipper, issue to the shipper a bill of lading.*" Thus, in this article, it is indicated that the shipper has the right to demand a bill of lading. In the bill of lading, the shipper demands the leading marks necessary for the identification of goods as the same are furnished in writing by the shipper before loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods in uncovered, or in the case of covering in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage²⁰. The number of package, pieces, quantity or weight is furnished in writing by the shipper²¹ and in the apparent order and conditions of the goods²².

²⁰ Hague and Hague Visby Rules Article III 3(a)

²¹ Hague and Hague Visby Rules Article III 3(b)

²² Hague and Hague Visby Rules Article III 3(c)

Article III (5) of the Rules is another provision here the shipper shall be deemed to guarantee the accuracy of information furnished by him in the bill of lading relating to the marks, number, quantity and weight of the goods and the shipper has the obligation to indemnify the carrier against loss, damages and expenses arising or resulting from inaccuracies in such particulars.

In article IV (2)(i) of Hague and Hague Visby Rules, it is provided that the carrier is not responsible for the damage or the loss arising or resulting from acts or omission of the shipper. That means that the shipper has the duty not to do any act or omission that will cause loss or damage of the goods. The shipper has the duty to sufficiently pack the goods²³. Packages must be properly designed, constructed and stowed for protecting the goods. The packaging should be able to withstand a variety of handling and environmental conditions, including those encountered during the storage and distribution processes. Improperly designed packages are more susceptible to collapse under rough handling and high humidity conditions. The packages must be able to tolerate exposure to high relative-humidity levels during transportation and storage. Under The Hague and Hague Visby Rules, the shipper is obligated to mark sufficiently and adequately goods.²⁴

Article IV (3) of the Hague and Hague Visby Rules stipulates that –

The shipper shall not be responsible for loss or damage of goods sustained by the carrier of the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.²⁵

The shipper has the duty of care in relation to the carrier and ship. One of the most important duties of the shipper under the Hague-

²³ Hague and Hague Visby Rules Article IV 2(n)

²⁴ Hague and Hague Visby Rules Article IV 2 (o)

²⁵ Hague and Hague Visby Rules Article IV 3

Visby Rules is the duty not to ship dangerous goods. Therefore, if the shipper ships inflammable, explosive or dangerous goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.²⁶ In addition, the shipper has the duty to make a statement of the resulting liabilities if the duty is breached.

In some jurisdictions, it is recognised that the shipper, as a matter of contract, can assume some of the performance duties set out in Article III (2), like handling, loading and discharging in a properly and carefully way. All the other exclusions in Article IV(2), where the carrier is not responsible, except those mentioned above and the right to limit liability in Article IV(5), are not applicable to the shipper. The one-year time limit stipulated in Article III (6) is also not applicable to the shipper²⁷.

2.2 Obligation of the shipper under the Hamburg Rules

Under the Hamburg rules, the shipper enjoys a little greater prominence. Differently from the Hague Rules and Hague–Visby Rules, the Hamburg Rules, Article 1(3), defines the term shipper:

“Shipper” means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been conclude with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.

The above article shows the importance and the specification of the role of the shipper. In addition, under Part III of the Hamburg Rules, articles 12 and 13, regarding the “Liability of the Shipper”, the shipper

²⁶ Hague and Hague Visby Rules Article IV(6)

²⁷ See Rhidian Thomas, “The Position of Shippers under the Rotterdam Rules”, Conference Proceedings, Rotterdam Rules Appraised, held at Erasmus University, Rotterdam on 24-25 September 2009, at p.1.

is not liable for loss sustained by the carrier or the actual carrier or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part²⁸. This article provides the general rule of duty of care owed to the carrier, actual carrier and ship.

Under the Article 13, “Special Rules on Dangerous Goods”, the shipper has the duty to inform the carrier about the dangerous character of goods by marking or labelling them in an appropriate manner²⁹ and, if necessary, inform about precaution measures to be taken in case of an incident³⁰. Under the Article 14(1), the shipper has the right to demand a bill of lading from the carrier when he/she receives goods. The shipper has also the right to ask for a guarantee of the accuracy of the information provided in the bill of lading concerning the general nature, marking, number, weight and quantity of goods. On the other hand, the shipper is obligated to indemnify the carrier for any liability arising from the inaccuracy of the information.

Article 6 of the Hamburg Rules stipulates that the carrier enjoy the right to limit the liability. Articles 8 deals with the loss of right to limit liability and Article 10 deals with the liability of the carrier and actually carrier. The two years limit provided in Article 20 applies to claims initiated by both carriers and shippers. The Hamburg Rules is a presumed fault regime that contains no exclusion of liability. The jurisdiction³¹ and arbitration³² provisions apply mutually to the shippers and carriers.

²⁸ Hamburg Rules Part III Article 12

²⁹ Hamburg Rules, Part III Article 13(1)

³⁰ Hamburg Rules, Part III Article 13(2).

³¹ Hamburg Rules, Part V Article 21

³² Hamburg Rules, Part V Article 22

3 Obligations and liabilities of the shipper under the Rotterdam Rules

Traditionally, the obligation of the shipper has been to deliver goods ready for carriage, and to pay freight. The current carriage of goods by sea regimes focus almost entirely on the carrier's obligations to the shipper and very little liability is imposed on the shipper. Compared to other existing regimes, in the Rotterdam Rules, the position of the shipper advances significantly in relation to the position of the carrier. The latter rules define two categories of shippers. In the first category, a shipper means a person that enters into a contract of carriage with a carrier.³³ Whereas, in the second category, a "documentary shipper" means a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record³⁴. Articles 27 to 34 under Chapter 7 of the Rotterdam Rules provide a set of duties and liabilities for the shipper.

3.1 Obligations of the shipper

In Rotterdam Rules, the main obligation of the shipper is to facilitate for the carrier in proper handling and carriage of the goods. This depends upon delivery of the goods ready for carriage and the obligation to provide information to the carrier. The obligation to deliver the goods ready for carriage can be found in article 27. Article 27.1 provides the obligation of the shipper to deliver the goods ready for carriage able to withstand the intended carriage. Parties can agree under FIOS clauses that the shipper may perform loading, handling stowing and unloading of the goods. In this case, even he is acting on behalf of the carrier, the shipper has the duty to perform functions assumed under Article 13.2 for properly and carefully to

³³ Rotterdam Rules Article 1(8)

³⁴ Rotterdam Rules Article 1(9)

load, handle, stow and unload the goods. Under Article 27, the shipper has also the obligation to pack cargo in or on container or vehicle safely, such as not to cause harm to persons and property.

In order to facilitate the carrier in proper handling of the goods the shipper may need to provide information and instructions. These information and instructions should be given in relation with the goods and the proposed carriage³⁵ for the compilation of the contractual particulars and issuance of transport documents or records³⁶ and as a guarantee of the accuracy of information compiled in the transport document and a promise to indemnify the carrier for loss resulting from the inaccuracy of this information³⁷.

3.1.1 The obligation to deliver the goods ready for carriage

This section briefly discusses the duties of the shipper presented above. Under article 27 of the Rules, one of the most important obligations of the shipper is to deliver the goods for carriage in such conditions that they will be able to withstand the intended carriage and related activities without being damaged and without causing damage to the ship and/or other cargo or injury to the crew. The related activities include loading, unloading, handling, stowing, lashing and securing of goods. An illustrative case is *Transoceanica Societa Italiana di Navigazion v H S Shipton & Sons*³⁸ where goods were loaded in such condition that they were liable to cause harm to persons or property. In this case the judge pointed out that if the rule on dangerous goods was extended to matters not involving physical danger, ‘a wide vista of responsibility is opened up against the shipper of the goods.’

³⁵ Rotterdam Rules, Art. 29.

³⁶ Rotterdam Rules, Art. 31.

³⁷ Rotterdam Rules, Art 31.2

³⁸ [1923] 1 KB 31

Article 27.1 provides that the shipper shall deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage. Thus, the shipper has the duty to deliver the goods ready unless it is not modified by the contract. It seems that the shippers' duty is to deliver goods ready for the carriage and in safe condition is an obligation that cannot be modified by the contract. In this article is stated that "in any event" the shipper is obliged to deliver the goods in such condition that they will withstand the intended carriage. This statement is supported in the third paragraph of the article, which concerns the stowage of goods inside the container or trailer and the safety aspect, but does not contain an "unless otherwise agreed" clause. This means that agreements between the shipper and the carrier are only valid if they concern aspects of the readiness for carriage other than safe transportation of goods.³⁹

The work of UNCITRAL's Working Group III concerned the question whether the shippers' duty to deliver the goods ready for carriage should be mandatory or the parties should be allowed to agree otherwise. During the session, many discussions led to unclear answers. However, the position of many experts was that more should be done in proper preparation of goods for the intended carriage in order to prevent accidents and enhance public safety. Therefore, this matter should not be left to the parties to decide.⁴⁰

Article 27.1 enumerates the duty of the shipper to deliver the goods ready for carriage, but it does not give any obligation for him to prepare the goods by himself. The shipper has the choice to use subcontractors to perform this task. In the event that the carrier offers this service and the shipper decides to use the carrier as subcontractor to prepare the goods ready for carriage, it is submitted

³⁹ See UNCITRAL, "Report of the Working Group on Transport Law on the work of its ninth session", UN Doc A/CN.9/510, (15-26 April 2002, New York), para 146

⁴⁰ *Ibid.*

that it would be unfair to construe article 27.1 so as to suggest that the contract between the shipper and the carrier is not allowed.

Assuming that the shipper is allowed to subcontract the carrier to prepare the goods ready for delivery a few questions may arise. First, who will be liable for damage to goods, properties, and injuries to people if the subcontractor, which in this case is the carrier, improperly prepares the goods for carriage? For the owners of other goods lost or damaged onboard the ship, the answer and solution are clear: under Article 27.1, they have the right to sue the shipper for not performing the obligation. On the other hand, the shipper has the right of recovery from his subcontractors. An important question in this regards is “what about damage to the ship?” Article 27.1 provides the mandatory obligation for the shipper that “in any event” the shipper shall deliver the goods properly prepared for carriage. Can the carrier argue that it was the shippers fault for non-delivery of the goods in proper condition even when he prepared the goods himself? The answer might be that the carrier has a double role in this supposition, the first as the carrier and the second as the subcontractor of the shipper for preparing the goods. Article 27.1 can provide to the carrier the opportunity to sue the shipper for not delivering the goods ready for carriage but in the other way, the carrier can be sued by the shipper for not fulfilling the obligation of the subcontract to prepare the goods ready for carriage on behalf of the shipper.⁴¹

Under Article 27.2, when between the carrier and the shipper is an agreement pursuant to article 13. 2, that the loading, handling, stowing or unloading of goods shall be performing by the shipper, documentary shipper or the consignee, the shipper shall

⁴¹ P. Bonassies and C. Scapel, *Droit Maritime* Paris, L.G.D.J., 2006, no 1040, p.665

perform this agreement carefully and properly. If in the agreement is noted that the actions should be taken from the consignee, the shipper is still liable to perform this obligation.⁴² The difference between the English Law and this article is that in the English Law the shipper has to perform all obligations described in the article “within a reasonable time”.⁴³

Article 27.3 states that the shipper loading a container or a vehicle must perform his obligation in such way that goods will not cause harm to persons or properties. Even though the Hague/Hague-Visby Rules did not spell out this duty of the shipper, it has generally been accepted that a proper performance of the shippers’ part of the contract of carriage includes taking necessary measures to prevent the goods from causing damage to the ship or other cargo⁴⁴.

3.1.2 The cooperation between the shipper and the carrier to provide information

During the discussions in UNCITRAL’s Working Group III, it was decided that both the carrier and the shipper have to respond to the requests from each other to provide information, instruction for the proper handling and carriage of the goods.⁴⁵ In article 28 of Rotterdam Rules, the carrier and the shipper shall respond to requests from each other to provide information and instructions for the proper handling and carriage of the goods. This article is a mutual one, where the shipper and the carrier have the right to request information and instruction, and in the same time has the duty to provide information and instruction if he possesses such kind of information. The obligation is not available if the information and the instructions are already available to the requesting party.

⁴² Herbert, R. “*Seehandelsrecht*” Berlin Walter de Gruyter, 1998, p.279

⁴³ Baughen, S. “*Obligation of the shipper to the carrier*” 2008, 14 JIML, p.559

⁴⁴ Stevens, F. *Vervoer onder Cognossement*, Gent, Larcier, 2001, no 242-245, p.135-137

⁴⁵ WG III 13th Session, Doc. A/CN.9/552, § 125.

3.1.3 The obligation to provide information, instruction and documents

The duty to provide information has been stipulated in the Hague/Hague-Visby Rules, Article III 3(a and b), which explicitly states that the shipper must furnish in writing the carrier with information that are necessary for identification of goods, the number of packages, pieces, the quantity or weight. Under the Article III, 5, the shipper is deemed to have guaranteed the accuracy of the information provided by him. He/she is liable to the carrier for all loss or damage or expenses resulting from the inaccuracies in such information.

The Hamburg Rules contains similar provisions regarding information provided by the shipper. In article 15(1)(a), it is stipulated that the shipper must furnish to the carrier the general nature of the goods, the leading marks necessary for identification of the goods, the number of packages or pieces, the weight or quantities of the goods and, an express statement as to the dangerous character of the goods. Also article 17(1) states that “the shipper is deemed to have guaranteed the accuracy of the information he provides and is liable to the carrier for loss resulting from inaccuracies.”

The Rotterdam Rules contain all provisions described above concerning the duty to provide information, which are classified in three categories, namely information required for the purpose of a) proper handling and carriage; b) compliance with regulations; and c) issue the bill of lading. These categories are described in some detail below.

3.1.3.1 Information required to properly handle and carry the goods

Article 29 of the Rotterdam Rules which concerns shipper's obligation to provide information, instructions and documentations, provides that the shipper shall provide to the carrier in a timely manner with the information, instruction and documentations for the properly handling of the goods⁴⁶. During the sessions, the Working Group III considered the obligation as a very important issue. However, in connection with this provision it may be questioned that if the shipper under article 29.1(a) is obliged to provide the carrier with the information, instruction and documentation, then, why should be a need for a request under Article 28 from the carrier? This may lead to the need for a request from the shipper to the carrier to provide information about the vessel, transportation, machineries etc. In addition, the carriers may have often little time to perform physical inspection and secure all goods carried onboard⁴⁷. In the opinion of the author, the keyword is to provide information "in timely manner". Obtaining the necessary information, instructions and documentations in due time from the shipper gives the carrier the possibility to prepare in time the right technical support for handling and carrying of goods in a properly manner.

Articles 28 and 29 make a distinction between the terms "information" and "instruction". The first meaning providing information in a relation between the shipper and the carrier when the shipper "provides information" is the carrier to decide the specific course of action based on that information. If the shipper provides instruction, the carrier has to follow these instructions. Although in theory, it looks that there is a big difference between these words in

⁴⁶ Article 29, 1(a), Rotterdam Rules

⁴⁷ See UNCITRAL, "Report of Working Group III (Transport Law) on the work of its sixteenth session", UN Doc A/CN.9/591, (Vienna, 28 November-9 December 2005), para 129, hereinafter Sixteenth Session Report.

practice is not the same. The shipper cannot give totally save instructions because he does not know the characteristics of a vessel and transporting technical mechanisms. If the carrier acts in accordance with the shipper's instructions that lead to damage or loss to goods, then the shipper will be liable for damages or losses. In addition, even when the shipper provides instructions, the carrier still should exercise due diligence. He may choose not to follow the shipper's instructions if he/she judges that application of these instructions may cause damage to the vessel or other cargoes. Article 13.1 of Rotterdam Rules provides that the carrier have the responsibility to properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods during the period of its responsibility. The shipper's obligation to provide information to the carrier is a super-mandatory obligation, which means that even in volume contracts the parties are not allowed to contract out this obligation⁴⁸.

3.1.3.2 Information required to comply with laws and regulations

During the deliberations at the Working Group III sessions, the obligation of the shipper to provide with information, instruction and documents to the carrier, in compliance with the rules, regulations and other requirements of authorities in connection with the intended carriage, including filings, applications and licences relating to the goods came under serious criticism. It was questioned as to how the shipper could know what kind of information, instruction and documents the carrier needs, in particular in case of multimodal transport. Some delegations at the Working Group pointed out that the carrier should provide in a timely manner to the shipper all necessary information, instructions and documents. The Working Group added a provision in the Article 29.1(b), which obliges the shipper to provide the carrier with information, instructions and

⁴⁸ Rotterdam Rules, Article 80.4 "Special Rules for Volume Contracts"

documentations to comply with the regulations provided that the carrier notifies the shipper in a timely manner of the information, instruction and documents.⁴⁹

The Working Group III decided that, in cases when the shipper fails to comply with obligations stipulated in Article 29.1(a) and (b), the shipper protection will not be considered a strict liability, but rather a fault-based liability. Therefore, the Article 29.2 contains an amendment providing that nothing in this article will affect any special obligation to provide certain information, instructions and documents related to goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

3.1.3.3 Information required to issue the Transport Document

Under the Hague Rules, the shipper has the duty to provide the information to be inserted in bill of lading by the carrier. On the other hand, the carrier has to provide the shipper accurate information. The Preliminary Draft Instrument contained a similar obligation⁵⁰ with a corresponding strict liability if the information provided is not accurate and complete⁵¹ pointing out that the parties should be able to rely on the information provided by the other party without having to check it first.

The Working Group decided that the obligation to provide information required compiling of the contract particulars and to issue the transport documents be taken out of the shipper's obligation to provide information, instruction and documents and put into a

⁴⁹ Draft A/CN.9/WG.III/WP.81

⁵⁰ See Article 7.3(c), "Preliminary draft instrument on the carriage of goods by sea", UN Doc A/CN.9/WG.III/WP.21, Annex (2002), hereinafter Preliminary Draft Instrument.

⁵¹ Preliminary Draft Instrument, Article 7.5

separate Article⁵². The reason for doing so was that the shipper's liability in respect of his obligation to provide information required for the proper handling and carrying of the goods and information required to comply with laws and regulations is a fault based liability, while his liability in respect of his obligation to provide information to issue the bill of lading is a strict liability⁵³. Article 31.1 of the Rotterdam Rules provides that "*the shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract and particular.*" Whereas, the Article 31.2 stipulates that the shipper only guarantees the accuracy of the information not sent in time. Failure to provide the information needed in time is a fault based liability and not a strict liability.

A number of questions concerning the breadth of the Article 29 arose. The drafters of the Rules suggested that the carrier should only be excused from liability for delay of, loss of, or damage to the goods that was caused by the material misstatement of the shipper. The lack of causality in the proposed draft article was not an innovation and reference was made to the corresponding provision in article IV.5.h of the Hague-Visby Rules. The prevailing view was that draft article 29 contained a well-known provision that dealt with an important matter, which should be included in the text in square brackets in order to reflect the reservations expressed with respect to causation.⁵⁴

Article 32 related to knowing and material misstatement by the shipper regarding the nature or value of the goods was inspired by the article 4 (5) (h) of the Hague-Visby Rules. This provision was seen to be problematic because no causation was required between

⁵² Rotterdam Rules, Article 31.1

⁵³ Doc. A/CN.9/621, §240 and §247

⁵⁴ See UNCITRAL, "Report of Working Group III (Transport Law) on the work of its thirteenth session", (New York, 3-14 May 2004) UN Doc. A/CN.9/552, para 150.

the shipper's misstatement and the loss, damage or delay. Further, the obligation in this draft provision was already sufficiently covered by draft article 17 on the carrier's liability. A contrary view was expressed that draft paragraph 17 (3) related to cases of acts of omissions, but not material misstatements, and that draft article 32 was helpful in that regard⁵⁵.

3.2 Liabilities of the Shipper

In the Rotterdam Rules, Chapter 7, articles 30 and 33-34 give an overview of the liability regime of the shipper. Article 30 gives the basic liability of the shipper. The first paragraph is dealing with shipper's liability for breach his obligation under the Rules and burden of proof on the carrier. A breach of obligation that gives rise to a liability regards to the carrier and the burden of proof that is a very important element in corresponding liability of the carrier. Second paragraph of Article 30 provide for the shipper to be relieved from the liability to the extent that the cause or one of the causes of the loss or damage is not attributable to the shipper's fault or any person for whom he is vicariously responsible. The preceding rule does not apply to the duty to provide accurate information for the compilation of the transport document, or to the duty not to ship dangerous cargo. Where shipper is in part at fault, he is liable only for the loss attributable to his own fault or the fault of a person for whom he is vicarious responsible. The forthcoming section provides an overview of the liabilities of the shipper as defined in the Rotterdam Rules.

3.2.1 Fault-based liability

The Hague and Hague-Visby Rules, Article IV (3), provides:

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from

⁵⁵ Sixteenth Session Report, *supra* note 47, para 155

any cause without the act, fault or neglect of the shipper, his agents or his servant.

The Hamburg Rules, Article 12, is almost identical to the Article IV (3)⁵⁶, Hague and Hague-Visby Rules, which states:

The shipper is not liable for loss sustained by the carrier or actual carrier, or for damages sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or his agents.

In both Hague and Hague-Visby Rules and Hamburg Rules the burden of proof is on the carrier side. He has to prove the shipper's fault or neglect that cause the loss or damage of the goods. The Article 7.6 of the Preliminary Draft Instrument provides:

The shipper is liable to the carrier for any loss, damage, or injury caused by the goods and for a breach of its obligations under article 7.1, unless the shipper proves that such loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which a diligent shipper was unable to prevent.

The article above shows how the burden of proof is revised from the carriers' to the shippers' side. This provision gave rise to a lot of debate in Working Group III for two reasons. The first reason was that whether the shipper's liability should be strict liability or fault-based and second in which side should be the burden of proof. The majority view is that the shipper's liability for damage caused by the goods (and for non-fulfilment of its obligations under article 7.1) should be based on fault with reversed burden of proof.

⁵⁶ Hamburg Rules, Part III "Liabilities of the shipper" Article 12, "General Rule"

As the majority of delegations were against the provision found in Article 7.6 of the Preliminary Draft Instrument, the Working Group decided to consider that presumed fault amounted to a reversal of the burden of proof onto the shipper that had no parallel in existing maritime transport regimes. Generally, the carrier had the burden of proving that the loss or damage was caused by a breach of obligation or negligence of the shipper, such as a failure to provide the necessary information. Once the carrier had proved the cause of the loss or damage, it was open to the shipper to prove that the loss or damage did not arise as a result of his fault. This general regime reflects the fact that the carrier was usually in a better position to establish what had occurred during the carriage, as he/she was in possession of goods. There was a general support for the view that the traditional approach to fault-based liability as set out in article 12 of the Hamburg Rules and article 4 (3) of the Hague-Visby Rules should be preserved as the general regime, with strict liability only in certain situations⁵⁷.

In response to the issues and views described above, present article 30 was inserted into the Rotterdam Rules. The article deals only with the liability of the shipper to the carrier under the framework of the contract of carriage of the goods, but not with the third party liabilities against the shipper. Such a right might not exist under applicable national law.

Article 30.1 of Rotterdam Rules provides that “shipper is liable for loss and damage sustained by the carrier”. This includes the damage to the ship itself⁵⁸ and the compensation that the carrier has to pay to injured crew members or third parties⁵⁹. If the carrier wants to make the shipper liable for the loss or damage of the goods,

⁵⁷ Sixteenth Session Report, *supra* note 47, para 138

⁵⁸ Sixteenth Session Report, *supra* note 47, para 142

⁵⁹ *Ibid.*, para 141

he has to prove that what he suffered was due to the breach of the shipper's obligation under this convention. If the carrier succeeds in proving that loss or damage was due to the breach of the shipper's obligation, then the burden of proof goes to the shipper to prove that the cause or one of the causes of the loss is not attributable to his fault.⁶⁰

3.2.2 Strict liability

As mentioned above, the shipper's liability is a fault-based regime. Is there any exception where shipper's liability is a strict liability? The answer is given in the Article 30.2, which stipulates: "Except in respect of the loss or damage caused by a breach by the shipper of its obligation pursuant to articles 31 paragraph 2 and Article 32 the shipper can relieve its liability to any other person." What we understand from this article is that, it gives two exceptions where the shipper's liability is not a fault-base liability. The first exception is in Article 31, Rotterdam Rules, where the shipper's obligation is to provide accurate information required for the compilation of the contract particulars and the issuance of the transport documents. This obligation is a strict liability because of the importance that Working Group III gives to the relation between the shipper and the carrier and the reliance that they should have. In practice, the carrier has no time to inspect all goods one by one and sometimes he does not see them at all, so he has to rely on the information provided by the shipper.

The second exclusion is pursuant to Article 32 regarding the special rules of dangerous goods where the shipper cannot prove that the loss or the damages are not attributable to his fault. The obligation related to dangerous goods does not only concern the aspects of contract between the shipper and the carrier, but also public policy and safety.

⁶⁰ Rotterdam Rules, Article 30.2

3.2.3 Liability for the delay

Article 17.1 of the Rotterdam Rules provides that “carrier is responsible for loss or damage of the goods as well for delay in delivery”, which means that the carrier is responsible for delay as well. A question can arise: Is the shipper also liable for the delay? A provision was added in draft article, which was extensively discussed in the Working Group III⁶¹. Some delegations supported the view that “delay” was particularly problematic as a basis for the shipper’s liability as it could expose the shipper to enormous and potentially uninsurable liability. For example, a shipper who failed to provide a necessary customs document could cause the delay of the ship. Then, the shipper will be liable not only for the loss payable to the carrier, but also for the losses of all other shippers with containers onboard the ship.

Consequently, the delegations suggested that the shipper’s liability for “delay” should be deleted from the draft text. It was also observed that if “delay” was retained in the text, a reasonable limitation should be placed on the liability of the shipper.⁶² Another group of experts expressed a contrary view regarding deletion of “delay”. They stated that the liability of the shipper and the carrier for delay was an important aspect of the draft convention. It was observed that deleting “delay” called into question the rationale for creating strict liability for submitting incorrect information, since inaccurate information was the most common cause for delay.⁶³

There was some support for the view that, while problematic, the term “delay” should not too easily be discarded as a basis of liability. Some expert suggested that it could be considered as a

⁶¹ Sixteenth Session Report, *supra* note 47, paras 143, 233-237. See UNCITRAL, “Report of Working Group III (Transport Law) on the work of its seventeenth session”, UN Doc. A/CN.9/594, (New York, 3-13 April 2006), paras 199-207.

⁶² Sixteenth Session Report, *supra* note 47, para 143.

⁶³ *Ibid.*, para 144.

separate basis of liability whether it was caused by the shipper or the carrier. The loss due to delay could not only be enormous, but that it could have multiple causes.⁶⁴

The Working Group was reminded that the basis of liability of the carrier in the draft convention also included “delay”, and it was suggested that if delay was removed as a basis for the shipper’s liability, a corresponding change should be made to the carrier’s liability. This was not simply a matter of balancing the overall rights and obligations of the shipper and the carrier in the draft convention, but that it would not be fair to hold the carrier liable for a delay for which it might not be responsible, and for which it could not claim compensation from the shipper who was responsible. There was a support for that view⁶⁵.

After strong debates in the Working Group III, in 19th session, it was decided that references to delay contained in paragraph 1 of the draft article will be deleted with the possible inclusion of a text clarifying that the applicable law relating to shipper’s delay was not intended to be affected. The word “delay” was deleted from the article, and it does not mention that the shipper is “not liable” for the delay. In some jurisdictions, the concept of loss or damage includes also the loss or damage caused by delay from the shipper. Therefore, the shipper may be liable even for the delay of the goods.

⁶⁴ *Ibid.*, para 145

⁶⁵ *Ibid.*, para 146

4 Dangerous goods

The carriage of dangerous goods by sea carries with it substantial risks of damage both to the vessel and to other cargoes. If the shipowner is made aware of the dangerous characteristics of the goods prior to loading, precautions can be taken to reduce those risks. This is the rationale behind the principal obligation that is imposed on the shipper in article 32 of the Rotterdam Rules to indemnify the carrier in respect of loss or damage it sustains because of the shipper's failure to notify it of any dangerous characteristics of the goods tendered for loading.

4.1 General overview of dangerous goods

Definition of dangerous goods

The maritime transport of dangerous goods is strictly regulated at international, regional and national levels. The International Convention for the Safety of Life at Sea (SOLAS, 1974) and the International Convention for the Prevention of Pollution from Ships (MARPOL, 1973/78) are the most important conventions dealing with dangerous goods, shipping safety and prevention of pollution from ships. The SOLAS 74, regulation 1, and the MARPOL 73/78, regulation 1, as amended, which are incorporated into the IMDG (International Maritime Dangerous Goods) Code, define dangerous goods for the purpose of the respective Conventions as follows:

- *Dangerous goods* classified under regulation 2 which are carried in packaged form or in solid bulk, in all ships to which the present regulations apply and in cargo ships less than 500 tons gross tonnage.

Regulation 2 (Classification) of SOLAS 74 describes 9 classes of dangerous goods, which are further defined and described in greater detail in the IMDG Code (2002).

4.1.1 Dangerous goods classification

In accordance with the principles set out in the United Nations Recommendations, the IMDG Code divides dangerous goods into 9 classes according to their hazardous properties. Some classes are further subdivided in sub-classes and divisions. Detailed definitions and descriptions of dangerous goods are provided in each respective class. For example, class 5.2 (Organic Peroxides) is divided into five types and further sub-divided into solid or liquid with special entries for temperature-controlled organic peroxides. Organic peroxide does not have an individual UN number but a special UN type number (e.g. Organic Peroxide Type B, Liquid, and UN 3101). The main dangerous goods classes, sub-classes and divisions are provided in Appendix I of this thesis.

With regard to the form and state in which they are carried by water, dangerous goods are divided into two main categories; packaged dangerous cargoes or goods and bulk dangerous cargoes, which are further subdivided into liquid bulk dangerous cargoes, including liquefied gases and solid bulk dangerous cargoes. This is presented in the figure below.

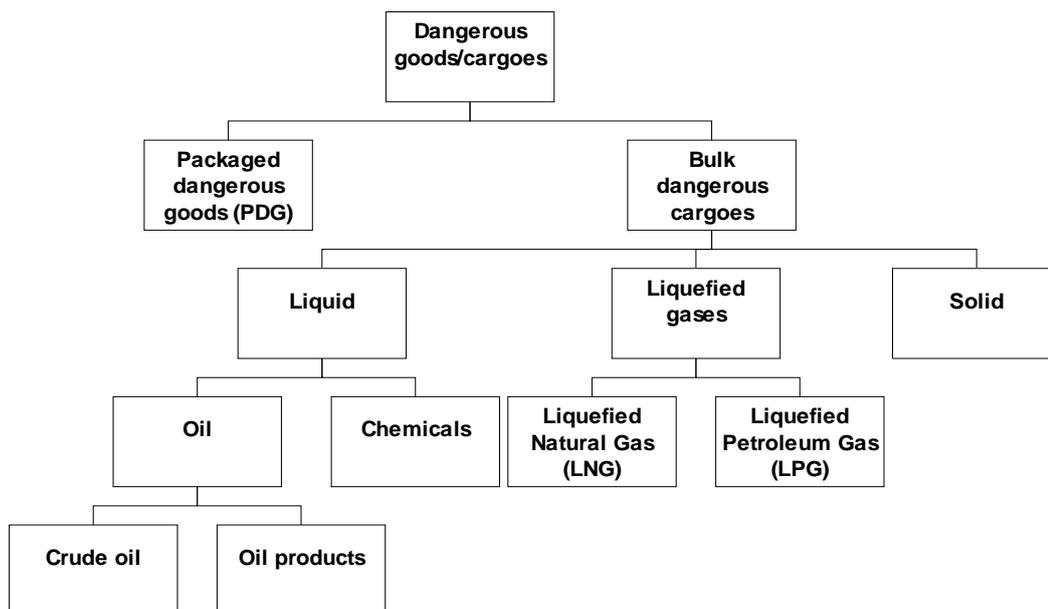


Figure 1: Classification of dangerous goods by the form in which they are carried

4.1.2 Globally Harmonized System (GHS)

The Globally Harmonized System of Classification and Labelling of Chemicals (GHS), which is a new system introduced in recent years⁶⁶, concerns classification of dangerous goods by types of hazards they pose⁶⁷. The GHS proposes harmonized hazard communication elements such as labels and safety data. In order to improve the protection of human safety and health and the environment, the purpose of the GHS is to ensure that information on hazards of chemicals is available. The GHS is also intended to facilitate trade and transport of chemicals. It provides a basis for harmonization of regulations on chemicals at various levels – national, regional and worldwide.

4.1.3 Dangerous Goods List (DGL)

According to their hazardous properties, dangerous goods are assigned UN numbers and proper shipping names. The proper

⁶⁶ GHS was first published in 2003

⁶⁷ UNECE 2006

shipping name describes the goods in the Code. Dangerous goods that are transported by water are listed in the IMDG Code's (2002) Dangerous Goods List (DGL)⁶⁸. DGL entries are of four groups: single entries, generic entries, specific Not Otherwise Specified (N.O.S) entries and general N.O.S. entries. The DGL is divided into 18 columns containing the information for each entry, such as: UN number, proper shipping name, class or division, subsidiary risk, packing group, special provisions, limited quantities, packing and tank instructions and provisions, Emergency Procedures (EmS) in case of accident, stowage and segregation, properties and observations.

4.2 Shippers obligation in respect of Dangerous Goods under the Rotterdam Rules

The CMI Draft Instrument in article 7.6 did not provide any rule or definition about the dangerous goods. It provided no distinction between ordinary goods and dangerous or polluting goods. Whether certain goods are dangerous depends on the circumstances. If harmless goods may become dangerous under certain circumstances and dangerous goods (in the sense of poisonous or explosive) may be harmless when they are properly packed, handled and carried in an appropriate vessel. The notion 'dangerous' is relative. The majority feel that the essence of a shippers' liability regime should be that the risk of any damage attributable to the nature of the cargo should be on the shipper and any damage caused by improper handling or carriage should fall under the rules for the carrier's liability. Another matter is how to deal with goods that may become a danger to human life, property or the environment during the voyage.⁶⁹

⁶⁸ DGL, part 3, Chapter 3.2

⁶⁹ Preliminary Draft Instrument, Article 7.6

All the above questions were in the centre of the discussions in Working Group III sessions. A need for the definition of dangerous goods was strongly felt. Under the Hague Rules,⁷⁰ dangerous goods are considered as “Goods of an inflammable, explosive or dangerous nature to the shipment...” That means that Hague Rules relates the dangerousness of the goods in physical danger. The Hamburg Rules⁷¹ refers to “dangerous goods” without giving any further explanation of the limits of dangerous goods, but in Article 13.4 the Rules provides that “...dangerous goods become an actual danger to life or property...” It means that the concept includes not only the physical danger but also it goes further to the danger to persons. The lack of a clear definition about dangerous goods in Hague and Hamburg Rules allows the court to give a broad definition of “dangerous goods” including the goods that pose no physical threat to the ship or other cargo, contraband cargo etc.⁷²

Article 32 of Rotterdam Rules defines dangerous goods as “..goods by their nature or character are or reasonable appear likely to become a danger to persons, property or the environment...”. It is clearly visible that Rotterdam Rules in the article 32 include even the environmental danger. There is a distinction between the meanings “are” and “reasonably appear likely to become”. When goods are not dangerous in the beginning but they become dangerous during the carriage the shipper is not liable for the loss or damage.⁷³

4.2.1 Shippers’ obligation in relation with the carriage of dangerous goods

The obligation of the shipper regarding dangerous goods are given clearly in Article 32 of Rotterdam Rules. The first duty is “...to inform the carrier for the dangerous nature of the goods in a timely

⁷⁰ Preliminary Draft Instrument, Article 4.6

⁷¹ Preliminary Draft Instrument, Article 13

⁷² Stevens, F, “*Duties of the shipper and Dangerous Cargo*” article, P.13

⁷³ Thomas, R “*The position of shipper in Rotterdam Rules*” article , page 6

manner....”⁷⁴ and the second duty is “The shipper shall mark and label dangerous goods in accordance with the law....”. This raises a series of questions. What is the intention by marking and labelling of the dangerous goods? If the shipper marks and labels the goods, in the same time he complies with the other duty to inform the carrier about the nature of dangerousness of the goods. So why is any need for the first paragraph? In the opinion of the author, the keyword is “the time”. The information, unless the carrier has knowledge about the nature of the goods, should be given before delivery of the goods to the carrier or performing party while the marking and labelling is during and after the delivery.

Article 32(b) is providing that the shipper should mark and label the goods in accordance with any law.... of any stage of the intended carriage of the goods....” But, is there a huge responsibility for the shipper to provide the carrier with all laws and regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods when he in majority of the cases does not know the means of transports and the course of carriage? The answer lies in article 28 of Rotterdam Rules where the shipper and the carrier should cooperate between them in providing information and instruction. If the shipper requests information in relation with the carriage of the goods, the carrier shall provide the necessary information and documents.

Packing of the goods was suggested in the session of Working Group to be included in this provision, which would have made the shipper strictly liable for the property packing of dangerous goods⁷⁵. Thought, the Article 27.1 of Rotterdam Rules, provides the readiness of the delivered goods provided by the shipper, the suggestion was not accepted.

⁷⁴ Article 32(a) of Rotterdam Rules

⁷⁵ WG III, 16th Session, Doc. A/CN.9/591, § 162

4.2.2 Shippers' liabilities in relation with the carriage of dangerous goods

Article 32 of Rotterdam rules provides two main obligations of the shipper to the carrier in relation with the delivery of dangerous goods. The first duty is to inform the carrier for the dangerous nature of the goods, and the duty to mark and label the goods in accordance with the law. If the shipper fails to comply with these duties, he is liable for loss or damage resulting from such failure.

In Hague-Visby Rules if the shipper fails to inform the carrier about the dangerousness nature of the goods he shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment⁷⁶.

In Hamburg Rules, if the shipper fails to inform the carrier of the dangerous character of the goods and, if necessary, the precautions to be taken... the shipper is liable to the carrier for the loss resulting from the shipment of such goods⁷⁷.

In both the pre-existing Rules, the shipper is liable for all loss, damages, delays and expenses directly and indirectly arising out from such shipment, which it is not the case in Rotterdam Rules. Rotterdam Rules are more restrictive than the first two rules. In Rotterdam Rules, the shipper can only be liable if the carrier proves that the loss or damage was caused by the fact that the shipper of the dangerous character of the goods had not informed him. It can be clearly understood in the two following suppositions:

(a) In the instance that during the loading of the ship a container was dropped on the hold. The container is broken and the material in it is spread out. This material turns out to be a highly corrosive, of which

⁷⁶ Hague/Hague-Visby Rules, Article 4.6

⁷⁷ Hamburg Rules, Article 13.2(a)

the carrier was not informed about and damages the other cargo in vicinity. Is the shipper liable in this case?

(b) The second supposition is if the material spilled out is an innocent looking material which does not cause an immediate harm. The carrier decides to continue loading and to collect the material in the port of unloading. The material turns out to be highly inflammable and damages the other cargo during the voyage.⁷⁸

In both cases, the shipper did not inform the carrier about the dangerousness nature of the goods. The Article 32(a) provides that if the shipper fails to inform the carrier he is liable for the damage or loss. In both cases, the carrier was not informed but will it be any change if the carrier was informed in the first case? In the first case, the carrier has the burden of proof, and the damage was consequently not from the breach of the duty of the shipper but from the carrier fault during loading. In the second case, if the carrier were aware of the dangerous nature of the goods he would have taken measures to prevent the damage of goods.

4.3 An analysis of two cases involving dangerous goods

The issue of dangerous cargoes in the context of the Hague Rules was explored in *The Giannis NK* [1998] A.C. 605 HL in which a cargo of ground-nuts infested with beetles was held to constitute dangerous goods. In the recent case of *The Darya Radhe* [2009] EWHC 845, a cargo of soya bean meal pellets infested with live rats was held not to constitute dangerous goods. The following is an analysis of the similarities and distinctions between the two cases.

4.3.1 *Effort Shipping Co Ltd v Linden Management SA (The*

⁷⁸ Stevens, F, "Duties of the shipper and Dangerous Cargo" article Conference Proceedings, Rotterdam Rules Appraised, held at Erasmus University, Rotterdam on 24-25 September 2009, P.15

Giannis NK⁷⁹

On 18 November 1990, the shipper shipped a cargo of ground-nut extractions at Dakar, Senegal, for carriage to Rio Haina in the Dominican Republic. The groundnut cargo was loaded in number 4 hold of the respondents' vessel "Gianni's N.K." under a bill of lading, which incorporates The Hague Rules. The groundnut cargo was infested with khapra beetle at the time of shipment. However, this was unknown to the appellant shippers as well as the respondent carriers.

The vessel had previously loaded a cargo of wheat pellets in numbers 2 and 3 holds for carriage to San Juan, Puerto Rico and Rio Haina. There was no danger of the beetle infestation spreading from the groundnut cargo in number 4 hold to the wheat cargo in numbers 2 and 3 holds. But the beetle infestation in number 4 hold nevertheless rendered the vessel and its cargo (including the wheat cargo) subject to exclusion from the countries where the cargo was to be discharged.

After discharging part of the wheat cargo at San Juan, the vessel proceeded to Rio Haina where she was placed in quarantine after the discovery of insects in number 4 hold. It was thought that the insects might be khapra beetles. The vessel was fumigated twice. However, it did not eradicate the insects. Accordingly, on 21 December the vessel was ordered to leave port with all her remaining cargo.

Meanwhile the receivers had arrested the vessel. It was only when the arrest was lifted on an undertaking given by the vessels P. & I. Club that the vessel was able to leave port. She returned to San Juan, in an attempt to find a purchaser for the cargo, in accordance with the Club's undertaking. Nevertheless, when she arrived at San

⁷⁹ [1998] 1 Lloyd's Rep 337; [1998] AC 605

Juan, the U.S. authorities identified a khapra beetle and a khapra beetle larva, both dead, in number 4 hold. On 31 January 1991, the U.S. authorities issued a notice requiring the carrier to return the cargo to its country of origin, or to dump it at sea, but at all events to leave U.S. ports. It is common ground that in those circumstances the carrier had no practical alternative but to dump the whole of the cargo at sea, including the wheat cargo. The vessel sailed on 3 February, and the cargo was dumped between 4th and 12th February.

When the vessel returned to San Juan after dumping her cargo there was a further inspection. Eighteen live khapra beetles and khapra beetle larvae were found in number 4 hold. There was a further fumigation. The vessel was eventually cleared to load under her next charter, at Wilmington, North Carolina after a delay of two-and-a-half months. The question is who is to pay for the delay?

Two questions arise in this case. The first is if the groundnuts infested with khapra beetles can be qualified as dangerous goods referring the Article IV, r.6. The second is whether the shipper is liable for shipping dangerous goods under Article IV, r. 6.

Dangerous goods and The Hague Rules

Article IV, r. 6 of The Hague Rules provides:

Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the

carrier without liability on the part of the carrier except to general average, if any.

From Article IV r.6 it is necessary to understand the meaning ... "dangerous nature..". Is it referring to only goods that are dangerous to the direct physical damage of the ship, as explosives or it should be given a broad meaning?

The answer has been settled law since *Chandris v. Isbrandsten-Moller Co. Inc.*⁸⁰ that the word "dangerous" in the expression "goods of . . . [a] dangerous nature" must be given a broad meaning. Dangerous goods are not confined to goods of an inflammable or explosive nature, or their like. In *Chandris v. Isbrandsten-Moller Co. Inc.* the question arose in relation to a consignment of turpentine. In that case, the charter party prohibited the shipment of "acids, explosives, arms, ammunition or other dangerous cargo." The shippers argued that "other dangerous cargo" should be given a restricted meaning. This was, they said, indicated by the context in which the words appear. Devlin J. said:

I can find no such indication. It seems to me that the only reason why the owner is objecting to acids, explosives, arms or ammunition is because they are dangerous; and that being so he may be presumed to have the same objection to all other dangerous cargo.⁸¹

May groundnuts be dangerous within the meaning of Article IV, r. 6 if there was no risk of the infestation spreading from the groundnut cargo in number 4 hold to the wheat cargo in numbers 2 and 3 holds, and even though they are not dangerous to the vessel itself?

⁸⁰ *Chandris v. Isbrandsten-Moller Co. Inc* [1951] 1 K.B. 240

⁸¹ *Chandris v. Isbrandsten-Moller Co. Inc* [1951] 1 K.B. 240, The judgment of Devlin J, p. 246

"Dangerous" means, or at any rate includes, cargo which is physically dangerous to other cargo. Even though there was no risk of the infestation spreading from the groundnut cargo in number 4 hold to the wheat cargo in numbers 2 and 3 holds. Nevertheless, the groundnut cargo was physically dangerous to the wheat cargo because the dumping of the wheat cargo at sea was "a natural and not unlikely consequence" of shipping the groundnut cargo infested with khapra beetle.

There is no reason to confine the word "dangerous" to goods which are liable to cause direct physical damage to other goods. It is true that goods that explode or catch fire would normally cause direct physical damage to other cargo in the vicinity. However, there is no need to qualify the word "dangerous" by reading in the word "directly". Indeed the reference to "all damages or expenses directly or indirectly arising out of or resulting from such shipment" point in the other direction.

Accordingly, it is unnecessary to consider a further argument that goods may be of a dangerous nature even though they do not present any physical danger to ship or cargo, but are "legally" dangerous in the sense that they are liable to cause delay to ship and cargo through the operation of some local law.

If the groundnuts infested with khapra beetle are to be considering as dangerous goods and as the carriers did not consent to the shipment of the groundnut cargo with knowledge of its dangerous character, from Article IV r.6, the shippers are liable for all damages and expenses suffered by the carriers. This gives the answer of the second question about the liability of the shipper. Nevertheless, going in a definitive conclusion it is necessary to clarify if the provisions of Article IV, r. 6, qualify the shippers' liability under Article IV, r. 3. It cannot have been intended, that shippers should incur unlimited liability for the shipment of dangerous goods when

they did not know, and had no means of knowing, that the goods were infested. Shippers should only be liable in case of some fault or neglect on their part.

That rule provides:

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

But there is a more fundamental reason for rejecting this argument. The first half of the first sentence of Article IV, r. 6 gives the carrier the right to destroy or render innocuous dangerous goods that have been shipped without his knowing their dangerous nature. Obviously, that right cannot be dependent in any way on whether the shipper has knowledge of the dangerous nature of the goods. Yet the sentence continues, without a break, "and the shipper of such goods shall be liable . . ." It is natural to read the two halves of the first sentence as being two sides of the same coin. If so, then the shippers' liability for shipping dangerous goods cannot be made to depend on the state of his knowledge. His liability is not confined to cases where he is at fault.

4.3.2 *Bunge SA v ADM DO Brasil Ltda and Others (The Darya Radhe)*⁸²

The "Darya Radhe" loaded a shipment of soyabean meal pellets at Paranagua in January 2004 with destination Iran. Nine different shippers, supplied the cargo with at least one bill of lading issued to each shipper, all of which incorporated the Hague Rules. Live rats were sighted prior to the vessel's departure from the load port and the Brazilian authorities ordered a routine fumigation of the relevant holds. The vessel had also loaded a cargo of maize in different holds, where there was no evidence of

⁸² [2009] EWHC 845 (Comm) ; [2009] 2 Lloyd's Rep 175

infestation. Concerned that, the cargo might be rejected on its arrival in Iran, the appellants arranged for the vessel to proceed to a terminal at Lisbon. There the cargo could be re-inspected, the vessel re-fumigated, and for her then to proceed through the Mediterranean and the Suez Canal instead of by the route originally intended via the Cape of Good Hope. Following the re-examination, the vessel sailed to Iran where she discharged her cargo without incident.

The appellants submitted that the discovery of the rats resulted in their having to incur extraordinary expenditure and delay in dealing with the matter. They claimed to have suffered loss in excess of US\$2 million. They argued that the cargo of pellets loaded with accompanying rats constituted dangerous goods. As such, the shippers were in breach of Article IV, r. 6 of the Hague Rules. The arbitrators found in favour of the shippers and the court, dismissing the appeal, upheld their decisions.

Legal principles

Goods may be “dangerous” for the purposes of The Hague Rules if they have the capacity to cause physical damage in either a direct or an indirect manner (confirming *The Giannis NK*). However, the court clarified *The Giannis NK* in holding that goods, which merely cause delay to the carrier, are probably not to be regarded as dangerous. In other words, the term “dangerous” in this context is not intended to bear a meaning going beyond physical danger. Thus, there is no conflict on this point between *The Giannis NK* and *The Darya Radhe*. The latter merely confirms the principle in the former and, in doing so, clarifies the definition of “dangerous” by explaining that the term relates only to *physical* danger.

The appellants submitted that the rats in the cargo of pellets presented an obvious physical danger to the maize cargo on board

the same vessel. However, such a submission was precluded by the factual findings of the arbitrators. Such findings included:

- i) that fumigation of the cargo at Paranagua was entirely routine;
- ii) that fumigation could be expected to be 100% effective;
- iii) that rats which are “mummified” as the result of phosphine fumigation may be regarded as no more than a cosmetic problem;
- iv) that the cargo was not in fact rejected by the Iranian receivers;
- v) that the soyabean cargo did not pose a physical danger to the maize cargo in that no evidence of rat infestation was noted either in the maize cargo or the holds into which it was loaded; and
- vi) that the imposition of quarantine or dumping of the entire cargo was not to be expected.

In light of these factual findings, the court held that the arbitrators had been correct in coming to the conclusion that the carrier could not establish a breach of contract, or liability under the Hague Rules, even assuming that they could discharge the burden of proof by showing that one or more of the shippers was responsible for the introduction of one or more rats.

4.3.3 The similarities and the distinction between the two cases

The above factual findings can be contrasted with those in *The Giannis NK*. In that case, fumigation of the ground-nut cargo was neither routine nor a requirement under any sale contract. Fumigation had also been unsuccessful in eradicating the beetle infestation. Furthermore, the receivers in the Dominican Republic in fact rejected the cargo.

The groundnut cargo posed no physical danger to the wheat cargo in the sense that there was no risk of the infestation spreading from one to the other. However, as previously noted, the groundnut cargo posed a physical danger in the sense that it was likely to, and did in fact, cause the vessel to be placed in quarantine and the wheat cargo to be disposed of at sea. Thus, the groundnut cargo, unlike the soyabean cargo, was likely to, and did, involve the vessel in unusual danger and delay. Such danger and delay arose in consequence of statutory importation powers exercised by the authorities in the Dominican Republic to ban vessels and cargo infested with beetles.

At common law there is a principle (discussed by Longmore J. in *The Giannis NK* at first instance and by Atkin J in *Michell Cotts & Co v Steel Bros & Co Ltd*⁸³) which provides that goods may be dangerous if owing to legal obstacles (my emphasis) as to their carriage or discharge they may involve detention of the ship. The court rejected the appellants' argument that this principle operates independently of legal obstacles. It also rejected the appellants' associated submission that shippers are liable if they load a cargo, which is at risk of rejection that in turn causes cost and delay, in the shape, here of the time spent fumigating the cargo and otherwise dealing with the cargo in order to reduce or eliminate the risk. The court held that all or most cargo is at risk of rejection on discharge, whether justifiably or not, and the allocation of the risk of delay arising there from is dealt with in contracts of carriage quite independently of the regime as to dangerous cargo. This principle is concerned with the violation of or noncompliance with some municipal law which is of direct relevance to the carriage or discharge of the specific cargo in question. The House of Lords in *The Giannis NK*, having concluded that the cargo infested with

⁸³ *Michell Cotts & Co v Steel Bros & Co Ltd* [1916] 2 K.B. 610 KBD in which the principle that the shipper was obliged not to ship cargo likely to involve unusual danger or delay to the ship without advising to the owner of the facts indicating to the shipper the existence of the risk was dealt with

beetles was “physically dangerous”, thought it unnecessary to go on to consider whether the cargo was “legally” dangerous under this principle.

It is worth noting, however, that the Court of Appeal agreed with Longmore J in holding that the cargo was dangerous under this principle because, owing to provisions of Dominican law, the shipment of the beetle infested cargo was likely to involve detention and delay of the vessel. The appellants in *The Darya Radhe* submitted that the rats presented a legal danger in the shape of the risk, particularly in a voyage to Iran, of the arrest of the ship and condemnation of all cargo on board. However, the appellants did not before the arbitrators rely upon any principle of Iranian or indeed any other system of law. It is this crucial difference, it would seem, that distinguishes the two cases in relation to this common law principle. The situation would have been different had there been a principle under Iranian law, which the appellants had relied upon before the arbitrators, providing, for example, that cargo infested with live rats was prohibited from being imported into Iran. If this had been the case, the court is very likely to have held that the cargo infested with live rats constituted “legally” dangerous goods under this principle.

5 Conclusion

The Rotterdam Rules introduces specific provisions on obligations and liabilities of the shipper which are rather new compared to the existing regimes. These provisions impose minimal liability on the shipper. Under current regimes the shipper can be held liable under domestic law. The new provisions appear to reflect an effort to introduce harmonized rules in this field, and promote predictability for both carriers and shippers. The Rules introduces several changes from the existing law relating to the cargo owner's obligations under a bill of lading. The Rules covers obligations other than those arising in connection with the shipment of dangerous cargo, such as those relating to FIO or FIOS clauses. Some of these obligations are already implied under domestic law but others, such as the obligations referred to in article 27(1) relating to the readiness of the goods for carriage, are probably not.

The Rules applies a two tier system of liability. The shipper is strictly liable for breach of duty to provide accurate information for compilation of the transport document under article 31 and not to ship dangerous cargo under article 32. In all other cases the shipper has a defence if it can establish that it was not at fault. Some of the so called 'legally dangerous' cargo falls under the strict liability regime, while others under the fault based regime. There exists some uncertainty with respect to claims for economic loss arising out of delay. It is not clear whether Rules covers such claims or they be brought under national law.

The major criticism in this regard is that the liability of the shipper is not subject to limitation. During the Working Group sessions, this issue was raised in connection with the debate on carrier's liability for delay. The argument was that if the shipper were

to have a corresponding liability for economic loss caused by delay, it could be exposed to a very high level of financial liability. However, the need for such a limitation cap ceased to exist as no provision on shipper's liability for delay was included in the Rules as a part of the compromise reached on delay during the third reading. Regardless of the deletion of shipper's liability for delay, such liability is not precluded under national law. Also there may be a need for limitation of liability for loss of or damage to the ship, other cargo or personal injury for which the shipper is liable under article 30.

Shipper's liability is not limited today, and that does not seem to have caused any problems in practice. However, according to one commentator, the fact that shipper's liability is regulated through an international convention may give rise to more claims against the shipper. This may in turn render limitation of liability for the shipper necessary, preferably at an international level.⁸⁴

The Rotterdam Rules is imperfect but that is a trait it shares with virtually all international instruments aimed at harmonization. This Convention even with its imperfections is an all-embracing, comprehensive and well-balanced regime for international carriage of goods. Its strength lies in its singularity designed to replace three conventions⁸⁵ for one with the addition of another convention⁸⁶ that never was. Only time will tell whether this herculean law reform exercise was worth the effort expended. Meanwhile no stone should be left unturned to examine the instrument with a fine toothcomb and critically analyze it for the benefit of policy makers, lawyers, judges, practitioners and scholars alike whose interests and responsibilities lie in this intricate and challenging field of maritime law.

⁸⁴ See Ingeborg Holtskog Olebakken, "Background Paper on Shipper's Obligations and Liabilities", CMI Yearbook: 2009, at p. 306.

⁸⁵ The Hague Rules, the Hague-Visby Rules and the Hamburg Rules.

⁸⁶ United Nations Convention on International Multimodal Transport of Goods, May 24, 1980, U.N. Doc. TD/MT/CONF/16 (1980).

Appendix

Class 1: Explosives

Division 1.1: substances and articles which have a mass explosion hazard

Division 1.2: substances and articles which have a projection hazard but not a mass explosion hazard

Division 1.3: substances and articles which have a fire hazard and either a minor blast hazard or a minor projection hazard or both, but not a mass explosion hazard

Division 1.4: substances and articles which present no significant hazard

Division 1.5: very insensitive substances which have a mass explosion hazard

Division 1.6: extremely insensitive articles which do not have a mass explosion hazard

Class 2: Gases

Class 2.1: flammable gases

Class 2.2 non-flammable gases, non-toxic gases

Class 2.3: toxic gases

Class 3: Flammable liquids

Class 4: Flammable solids; substances liable to spontaneous combustion; substances which, in contact with water, emit flammable gases

Class 4.1: flammable solids, self-reactive substances and desensitized explosives

Class 4.2: substances liable to spontaneous combustion

Class 4.3: substances which, in contact with water, emit flammable gases

Class 5: Oxidizing substances and organic peroxides

Class 5.1: oxidizing substances

Class 5.2: organic peroxides

Class 6: Toxic substances and infectious substances

Class 6.1: toxic substances

Class 6.2: infectious substances

Class 7: Radioactive materials

Class 8: Corrosives

Class 9: Miscellaneous dangerous substances and articles

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