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Implementation of the Rotterdam Rules

Carrier's obligations and liabilities

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Contents

Summary

The carrier has historically been strictly liable for all damage to the cargo carried, with the exception of acts of God and war. This changed during the late 1800's and early 1900's when the carriers began to limit their liabilities in the contract of carriage. They were soon not liable for very much which was problematic for the shippers, since they did not receive compensation when their goods suffered damage. The Hague Rules were drafted in order to find a balance between the carriers' and the shippers' interests. The Hague-Visby Rules and the Hamburg Rules followed during the 20th century. The Swedish Maritime Code has evolved alongside these conventions together with the other Scandinavian maritime codes. The maritime world is split between the carrier-friendly Hague and Hague-Visby Rules and the shipper-friendly Hamburg Rules. The Rotterdam Rules have been drafted in order to update outdated provisions and unite the world under one maritime framework, as trade is simplified and cheaper when everyone applies the same rules.

The Rotterdam Rules apply to more people and to a broader concept of "contract of carriage". The period of responsibility is increased as it begins as soon as the carrier receives the cargo and ends when he delivers the cargo. The carrier has an increased duty to care for the cargo and make the ship seaworthy. The carrier's liability is increased as he is liable for the actions of more people, he has fewer exceptions from liability and the limit on the liability owed has been raised.

The Swedish Maritime Code's scope of application is not as wide because it requires a connection to Sweden. The period of responsibility is smaller as it begins when the carrier receives the cargo in the port of loading and delivers it in the port of unloading. The carrier's obligation to care for the cargo is not as extensive in the Swedish Maritime Code. The carrier is not liable for as many people. The carrier's liability is smaller, he has more exceptions from liability and the limits to liability are smaller.

A Swedish ratification of the Rotterdam Rules would mean that the carrier's obligations would be more extensive. The Swedish carriers would be liable more often and for larger sums. This is negative for the carriers, but it could be worth it if the rest of the world ratifies the Rotterdam Rules as well.

The Scandinavian Commissions that have examined their respective States ratification of the Rotterdam Rules have proposed that the rules should be ratified, but only after that the USA have ratified the convention.

It is proposed in this thesis that Sweden should ratify the Rotterdam Rules, in lack of a better alternative, if the rest of the world ratifies the Rotterdam Rules.

Sammanfattning

Historiskt sett har transportören, med undantag för *force majeure* och krigshandlingar, varit strikt ansvarig för all skada på det transporterade godset. Detta kom att förändrades under slutet av 1800-talet och början av 1900-talet när transportörerna började begränsa sina ansvarsgrunder med klausuler i transportavtalen. Snart var transportörerna inte ansvariga för i princip någonting, vilket var problematiskt för de avsändare som då inte fick någon ersättning när godset skadades. Haagreglerna författades för att finna en balans mellan transportörernas och avsändarnas intressen. Haag-Visbyreglerna och Hamburgreglerna följde under 1900-talet. Den svenska sjölagen har utvecklats jämsides med dessa konventioner, tillsammans med de övriga skandinaviska sjölagarna. Sjöfartssektorn är idag uppdelad mellan de transportörvänliga Haag- och Haag-Visbyreglerna och de avsändarvänliga Hamburgreglerna. Rotterdamreglerna har författats för att uppdatera föråldrade bestämmelser i de tidigare konventionerna samt förena världen under ett gemensamt regelverk, eftersom handeln förenklas och blir billigare när alla tillämpar samma regler.

Rotterdamreglerna är tillämpliga på fler personer och har en bredare tolkning av begreppet ”transportavtal” än under Haag-Visbyreglerna. Ansvarsperioden är längre då den börjar så fort som transportören tar emot godset och slutar när han levererar det, oavsett den geografiska platsen. Transportören har en utökad skyldighet att tillvarata godsägarens intressen och hålla fartyget i sjövärdigt skick. Transportörens ansvarsgrunder är utökade eftersom han är ansvarig för fler människors handlingar, han har färre omständigheter som befriar från ansvar och att nivån för ansvarsbegränsning har höjts.

Sjölagens tillämpningsområde är inte lika brett som Rotterdamreglernas, eftersom sjölagen kräver en anknytning till Sverige. Ansvarsperioden är mindre då den börjar först när transportören tar emot godset i lastningshamnen och slutar när transportören levererar det i lossningshamnen. Transportörens skyldighet att tillvarata godsägarens intressen är inte lika omfattande i sjölagen. Transportören är inte ansvarig för lika många människors handlande och hans ansvar är mindre då han har fler undantag från ansvar och att nivån på ansvarsbegränsningen är lägre.

En svensk ratificering av Rotterdamreglerna skulle innebära att transportörens förpliktelser blir mer omfattande. De svenska transportörerna skulle bli ansvarsskyldiga oftare och för större belopp. Detta är negativt för de svenska transportörerna, men det kan vara värt det om resten av världen också ratificerar Rotterdamreglerna.

Det föreslås i denna uppsats att Sverige bör ratificera Rotterdamreglerna i, avsaknad av ett bättre regelverk, om resten av världen ratificerar Rotterdamreglerna.

Preface

Jag vill tacka mina nära, kära, vänner och Lund för de senaste åren av Nit och Redlighet. Det har varit kul, skoj och roligt.

Jag vill även tacka min handledare Olena Bokareva för all hjälp, vägledning och goda råd jag fått.

Lund den 9 januari 2019

Karl Lindström

"Då frågade Pilatus: Vad är sanning?"
och eko svarade — profeten teg.
Med gåtans lösning bakom slutna läppar
till underjorden Nazarenen steg.

Men gudskelov, att professorer finnas,
för vilka sanningen är ganska klar!
De äro legio, ty de äro många,
som skänkt den tvivelsamme romarn svar.

Dock syns mig sällsamt, att det enda sanna
så underbart kan byta form och färg.
Det, som är sanning i Berlin och Jena,
är bara dåligt skämt i Heidelberg.

Det är, som hörde jag prins Hamlet gäcka
Polonius med molnens gyckelspel:
"Mig tycks det likna si så där en vessla
- det ser mig ut att vara en kamel!"

Gustaf Fröding, *Samlade dikter* (Wahlström & Widstrand 2014) p. 57.

Abbreviations

ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
SMC	Swedish Maritime Code
SOU	Statens Offentliga Utredningar “Swedish Government Official Reports”
UNCITRAL	United Nations Commission On International Trade Law
UNCTAD	United Nations Conference on Trade And Development
UCP 600	Uniform Customs and Practice for Documentary Credits

1 Introduction

1.1 Background

Trade by sea has a long history. The ancient Egyptians built ships as early as 3 000 B.C. and Pharaoh Sahure of the Fifth Dynasty sent ships to Lebanon to import cedar wood. The Mediterranean Sea was rife with civilisations that practiced maritime trade; the Persians, the Greeks and the Romans to name a few. As a maritime adventure means to put considerable amounts of resources at stake, there is need for legislation in case something goes wrong. The earliest case of written Maritime law is credited to the island Rhodes which is said to have influenced Roman law and dates as far back as 900 B.C.[1]

The maritime laws were often separate from the other parts of the transportation laws. They were seen as *jus speciale* and not included in the civil codes. Instead, the maritime laws were codified in separate maritime codes. The Swedish Civil Code of 1734, for example, did not include maritime law but relied on King Carl XI's Maritime Code of 1667. [2]

Today sea borne trade represents approximately 90 per cent of all trade, perhaps because it is the most cost-efficient method to transport large quantities of cargo.[3] Due to its key role in a globalised world it is important with uniformed legislations and a fair allocation of risk to facilitate trade and increase predictability for trade partners.

The carrier has historically been held strictly liable for any eventual damages to the goods during carriage except for Acts of God or war. In modern times the carrier began to negotiate for non-liability clauses and it went so far that the carriers soon were not liable for very much. The Hague Rules[4] was drafted to govern when the carrier should be held liable and for how much in order to find a balance between the interests of the carriers and shippers. Since then the Hague-Visby Rules[5] and the Hamburg Rules[6] have been drafted to adjust for developments in the maritime sector and to further fine-tune the balance of interest. Neither convention has been successful in

[1] Kurt Grönfors, *Inledning till transporträtten* (P A Norstedt & Söners Förlag AB 1984), p. 50f.
[2] Kurt Grönfors, 'Transportdokumenten – Till hjälp eller hinder?' Svensk Juristtidning, 1990, p. 242.
[3] International Chamber of Shipping <http://www.ics-shipping.org/shipping-facts/key-facts>. Cited on 2019-01-07.
[4] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Hereinafter the "Hague Rules".
[5] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Hereinafter the "Hague-Visby Rules".
[6] United Nations Convention on the Carriage of Goods by Sea. Hereinafter the "Hamburg Rules".

finding a balance that suits everyone. As a result, the maritime world is now split between three different sets of rules.[7]

A fourth convention, the Rotterdam Rules[8] has been drafted to unite the maritime world under one regime but has only gained four ratifications so far. Sweden has signed the Rotterdam Rules but not yet committed to the ratification of the Rotterdam Rules. In 2016, a Commission was set up to investigate whether it would be a good idea for Sweden to do so but has not yet come with a final verdict as of December 2018.

1.2 Purpose and research questions

The purpose of the thesis is to assess in what way the Swedish ship owners would be affected by a ratification of the Rotterdam rules. This will be accomplished by comparing the liability of the carrier under the current Swedish Maritime Code with the liability of the carrier under the Rotterdam Rules.

In order to achieve this purpose, the following five research questions have been formulated:

I. What are the carrier's obligations and liabilities under the Rotterdam Rules?
II. What are the carrier's obligations and liabilities under the Swedish Maritime Code?
III. What would the carrier's obligations and liabilities be under the proposed Swedish Maritime Code based on the Rotterdam rules?
IV. What effects have the implementation of the Rotterdam Rules in Norway and Denmark been?
V. Should the Rotterdam Rules be ratified by Sweden, and if so, when?

1.3 Method and materials

In writing the thesis the author has adapted the legal dogmatic approach in analysing first hand sources, for instance: various international conventions relating to maritime liability claims, the Swedish Maritime Code, publications of international organisations, judicial decisions and case law in the United Kingdom, the United States and the Scandinavian States.[9] Further, secondary resources such as legal history, doctrine, peer reviewed articles and reports have been used.

[7] SOU 2018:60 p. 97.
[8] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Hereinafter the "Rotterdam Rules".
[9] Kleineman, in Maria Nääv & Mauro Zamboni (eds.), *Juridisk metodlära* (2nd Edn Studentlitteratur 2018) pp. 21-46.

The thesis compares the Rotterdam Rules with the Swedish Maritime Convention and not the Hague-Visby Rules because the Swedish Maritime Codex is a hybrid framework based on Scandinavian maritime legislation, the Hague-Visby Rules and the Hamburg Rules.

The literature used when analysing the Rotterdam Rules are written by academics from around the world that are specialised in Maritime law. Many of them served in their respective countries' delegations when the Rotterdam Rules were drafted. Examples of the authors are Michael F Sturley, Professor at the Faculty of Law at University of Texas, D Rhidian Thomas, Emeritus Professor at the Faculty of Law at Swansea University and Alexander von Ziegler, Professor for International Trade Law at University of Zurich. Their insight on the meaning and purpose of the provisions in the Rotterdam Rules is determined to be valuable and trustworthy.

Professors Johan Schelin and Hugo Tiberg and professor emeritus Kurt Grönfors have written the literature used for interpreting the SMC and principles of Transport law. They are all renowned Swedish maritime academics with a considerable amount of published work regarding Maritime law. Norwegian literature has also been used because of the shared history of Maritime law the Scandinavian States have.

Articles published on law journals and, in a few instances, the websites of law offices have been studied to examine other States positions on the ratification of the Rotterdam Rules as information from official sources is scarce. Regular websites are of a limited academic value, nevertheless the author have concluded that the inclusion of the articles is justifiable after considering the credentials of the respective authors, the information gained and to what degree the thesis relies on the sources in question.

An international perspective has been used regarding the implementation of the Rotterdam Rules. To some extent, a historic perspective has been used when detailing the development of maritime regimes.

1.4 Previous research and delimitations

The Rotterdam Rules can be considered a fairly new convention as it was signed in 2009 and has yet to come into force. As such, a majority of the research done on the Rotterdam Rules focuses on an international level.[10]

[10] Ioanna Magklasi, *The impact of the Rotterdam Rules on International Trade Law* (University of Southampton 2014); Talal Aladwani, *A comparative study of the obligation of due diligence to provide a seaworthy vessel under the Hague/Hague-Visby Rules and the Rotterdam Rule* (Plymouth University 2015); Olena Bokareva, *Multimodal Transportation under the Rotterdam Rules: Legal Implications for European Carriage of Goods and the Quest for Uniformity* (Lunds University Media-Tryck 2015).

There is nothing written on the carrier's liability under the Rotterdam Rules compared to the Swedish Maritime Code. This thesis aims to lay the foundation for further research as well as weigh in on the debate whether Sweden should ratify the Rotterdam Rules or not.

The thesis is limited to Chapters 4, 5 & 12 of the Rotterdam Rules as they are dedicated to the obligations and liabilities of the carrier. Some exceptions are made for provisions outside of those Chapters that are necessary to fully answer the research questions. The thesis is also limited to Chapter 13 of the SMC as it pertains to carriage of general cargo. The provisions from the SMC that have been compared are those that have a corresponding provision in Chapters 4 & 5 in the Rotterdam Rules.

1.5 Disposition

The thesis is divided in eight chapters. Chapter two will detail how international maritime conventions regulating the carrier's liability have developed in modern time. The chapter will also examine the history of the Swedish Maritime Code.

Chapter three analyses the carrier's obligations and liabilities under the Rotterdam Rules and its scope of application.

Chapter four analyses the carrier's obligations and liabilities under the Swedish Maritime Code and its scope of application as well as detailing the amendments that have been suggested in SOU 2018:60.

Chapter five analyses how the carrier's obligations and liabilities will be affected by the Chapter based on the Rotterdam Rules that the Swedish Maritime Commission has proposed.

Chapter six analyses how other States have implemented, or intend to implement, the Rotterdam Rules. The actions of the Scandinavian countries are of certain interest because of the long maritime history shared with Sweden.

Chapter seven is a discussion on the advantages for and against a Swedish ratification of the Rotterdam Rules, and when it would be most optimal to ratify.

Chapter eight concludes the thesis by answering the research questions.

2 Evolution of international and Swedish maritime regimes

Before the maritime conventions were drafted it was very common that the carrier was strictly liable for any damage that occurred to cargo during the transportation, save for *force majeur*. The Romans, for example, applied the law *Lex Aquilia*. It meant that the injured party should show that he had suffered damage and that it was the accused party that caused it. But that burden of proof was seen as to harsh in cases of transportation since the carrier would have had the goods in his care and therefore be closer to the proof than the shipper. In cases of transportation the Romans thus applied strict liability with exception for *damnum fatalis* (Accidental damage). The English similarly held the carrier strictly liable for all damage that occurred to goods during the transport with the only exceptions being: inherent vice of the cargo; contributory negligence of the shipper; and acts of God and of the Queens enemies. [11] The older Swedish maritime codes from 1864 and 1891 include similar provisions with strict liability and *force majeure* as the only exception. [12]

The strict liability could be circumvented by non-liability clauses, however, since the provisions was not compulsory. This led to the ship owners using the non-liability clauses to an excessive extent. USA passed the non-optional Harter Act in 1893, dividing the liability between the carrier and the shipper, to protect its shippers from the non-liability clauses. A rising tension between carrier and shipper interest caused a private association of maritime lawyers, Comité Maritime International, to create an international convention that would begin to bring balance between the interest of ship owners and shippers.[13]

2.1 The Hague Rules

The Hague Rules is an international convention formally called "International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature". The Hague Rules was adopted by the CMI in Hague 1922, by States in Brussels 1924 and entered into force 1931. It was the first attempt from the international community to govern a mandatory minimum liability of the carrier. The attempt has since spread over the world and the Hague Rules now form the basis of most major trade nations legislation. Noteworthy examples of States that still apply the Hague Rules are the USA, Germany and Singapore who

[11] SOU 1990:13 p. 71.
[12] Kurt Grönfors & Lars Gorton, *Sjölagens bestämmelser om godsbefordran* (P A Norstedts & Söners Förlag AB 1982), p. 9f.
[13] Thor Falkanger, Hans Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law* (4th Edn Universitetsforlaget 2017), p. 340f.

are all in the top 10 list of world fleet ownership ranked by dead-weight tonnage.[14] Sweden had ratified the Hague Rules earlier but denounced it to instead ratify the Hague-Visby Rules.

Before the Hague Rules was adopted the carrier was strictly liable for the goods he carried, with the exception for *force majeure*. It was possible for the carrier to circumvent this strict liability with clauses in the contract of carriage. The carriers, which were predominantly from the UK, took advantage of this by excluding themselves from any liability for the cargo so that they would not have to pay liability to the shippers if the cargo was lost or damaged. The USA had, and continues to have, an economy that relies heavily on shipping and thus passed the Harter Act to protect its shippers from the non-liability clauses in 1893.[15] The rising tensions between the UK and the USA spurred the international community of maritime lawyers to find a compromise between the interests of carriers and shippers.[16]

The ICM convened in Belgium to find a solution that would divide the risk between carrier and shipper interests in a satisfying way, so that it could be applied over the world. The comprise meant that the carrier would assume the responsibility to make the vessel seaworthy and handle the goods in a proper manner. The carrier would not, however, be responsible for damage caused by error in navigation and in the management of the ship even though it lies within his sphere of influence. That is because the sea leg was considered a joint enterprise where the carrier already put their own vessel at risk. That risk meant that the carrier would have great incentive to make sure that the carriage was performed as smoothly as possible. The compromise of the Hague Rules transferred the risk from the carrier to the shipper, who would instead have to insure the goods.

The introduction of the Hague Rules meant that the carrier was now liable for up to 100 sterling pounds per package damaged if the shipper could prove that the carrier's vessel was unseaworthy, improperly manned or unable to safely transport and preserve the cargo.

Criticism of the Hague Rules include the narrow scope of application, that it is not adjusted to the invention of the container and that it favoured the carrier far too much with a low limit on liability and generous defences from liability.

2.2 The Hague-Visby Rules

The Hague Rules regulated the international maritime trade successfully for some time. Technological developments led to the need for amendments

[14] UNCTAD Review of maritime transport 2018, p. 30.
[15] SOU 1990:13 p. 73.
[16] SOU 2018:60 p. 98.

however. Concerns were raised about: the container revolution that followed the invention of the container in 1956, that the liability was limited to Sterling Pounds and that the carrier could the exempt himself from liability for nautical errors.

In 1959, the CMI initiated a committee to draft an amendment to the Hague Rules. After an international discussion with the stakeholders, the amended draft was adopted in 1963 at a conference in Stockholm and signed in Visby. The amended protocol was adopted as the Hague-Visby amendment on 23 June 1968. Sweden has signed and ratified the Hague-Visby Rules along with major maritime States such as the UK, Greece, the Netherlands and the other Scandinavian States.[17]

The invention of the container in 1956 proved problematic for the Hague Rules. A steel crate 40 feet long was legally considered one package in the same way a pallet 4x4 feet was, which is absurd given that they would both be worth the same amount of compensation if they were damaged according to Article 4(5) of the Hague Rules. If a container packed with several other packages was damaged, it would count as one package being damaged under the Hague Rules. This was addressed in Article IV(5)(c) of the Hague-Visby Rules that provides that when a transport device is used to consolidate goods, the number of packages stated in the bill of lading should be used to calculate the compensation. If the bill of lading does not state a number, then the transport device should be counted as one package.

That the Hague Rules demanded a maximum of 100 sterling pounds per damaged package as compensation turned out to be ineffective due to the fluctuation of currency and rising inflation across the world. Instead the Special Drawing Right (SDR) were chosen to ensure that the compensation paid for damaged goods is appropriate. The SDR, invented by the International Monetary Fund, is a weighted average based on the daily value of several currencies determined to be influential in the world's trading and financial system, thus compensating for inflation. The influential currencies are chosen on a five-year basis and as of October 1st, 2016 the currencies are U.S Dollar, Euro, Chinese Yuan, Japanese Yen and Sterling Pound.[18]

The amount of compensation to the shipper was adjusted as well. The carrier's maximum liability under the Hague-Visby Rules is either 666.67 SDR per package, or 2 SDR per kilogram of gross weight of the goods damaged or lost, depending on which option is the highest. The option to calculate the compensation based on the weight of the goods was a new feature.[19]

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[17] Yvonne Baatz, 'Charterparties' in Yvonne Baatz *Maritime Law* (4th Edn Informa Law Routledge 2018) p. 121f.
[18] <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/14/51/Special-Drawing-Right-SDR> Visited 2019-01-06 at 12:39.
[19] The Hague-Visby Rules Article IV(5).

The carrier was excepted from liability for nautical errors in the Hague Rules due to the inherent dangers of sea transportation and that the carrier could not supervise his crew while they were away. Technological advancements such as satellites better vessels caused many to argue against the need for the exception. It was not removed in the Hague-Visby Rules, however, which has been the target for some criticism.[20]

2.3 The Hamburg Rules

The developing States of the world, who mostly have more shippers than carriers, felt that the compromise between the carrier's and shipper's interest in the Hague and Hague-Visby Rules largely favoured the carrier. They, together with some industrial States, signed The United Nations Convention on the Carriage of Goods by Sea, also known as the Hamburg Rules, in Hamburg 1978.

The Hamburg Rules favours the shipper to a larger extent than the Hague and Hague-Visby Rules by raising the limit of liability, introducing a two-year time bar and jurisdictional and arbitrational provisions. It changes the regime of liability back to having the carrier strictly liable for damage caused, as it were before the Hague Rules, but without the option of non-liability clauses and no exception for the carrier's nautical errors.[21]

The carrier's period of responsibility in the Hamburg Rules covers not only the sea leg of the carriage, but also the transport from the warehouse in the port to the ship as the period begins when the carrier has custody over the goods at the port of loading. This transport is often performed via rails and one could say that the Hamburg Rules introduced a "port-to-port"-principle compared to the "tackle-to-tackle"-principle of the Hague Rules.[22]

The Hamburg Rules have been adopted by a large part of the developing world, but not so much by the major trading powers of the world. That is most likely because the Hamburg Rules favours the shipper to a larger extent in that the shipper is granted a larger amount of compensation in case of lost or damaged goods and that the liability exception for the carrier's nautical errors has been removed. The limit of liability in the Hamburg Rules is 835 SDR per package or 2,5 SDR per kilogram of the gross weight of the package lost or damaged.[23]

[20] SOU 1990:13 p. 74f.
[21] The Hamburg Rules Articles 5, 6, 20 & 21.
[22] Simon Baughen, *Shipping Law* (6th Edn Routledge 2015) p. 131.
[23] Baughen, 2015, p. 135.

2.4 The Rotterdam Rules

The international maritime world is split between the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. This split causes confusion and impedes predictability for the trade parties as different rules applies in different States. It also leads to the parties "forum shopping" for the jurisdiction with the most appealing provisions. In 2008 the Rotterdam Rules, or "the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea", was drafted to unite the international community under a common regime. It has also been drafted with a vision to reform parts of the maritime sector.

Major changes with the Rotterdam Rules include:

- Carriers are liable for delay;
- The limitations of liability for damaged or lost goods have been increased;
- Multimodal transportation to provide for 'door-to-door' coverage;
- Application beyond bills of lading to electronic and other forms of contract;
- The carrier's liability can be extended to "Maritime Performing Parties"; and
- Establishment of freedom of contract in volume contracts.

The Hague and Hague-Visby Rules do not have any provisions regarding delayed delivery, the Hamburg Rules holds the carrier liable for loss resulting from the delay. In the Rotterdam Rules the carrier is liable for the delay, with the amount of compensation being two and a half times the freight payable.

The liability for delay should not be confused with the carrier's liability for lost or damaged goods. The limit on the liability has been raised to 875 SDR/package or 3 SDR/kg, whichever results in the highest compensation to the claimant. This can be compared to 666.67 SDR per package or 2 SDR per kilogram in Hague-Visby Rules and 835 SDR per package or 2,5 SDR per kilogram in the Hamburg Rules.

The Hamburg Rules has been called a 'maritime plus'- regime as it has opened for multimodal transportation with carrier liability for transport of goods between the warehouse in the port and the vessel. The Rotterdam Rules builds upon this by making the carrier's period of responsibility begin as soon as the goods are in the custody of the carrier even when the goods are received in another city than where the port of loading is located, a clear extension from the "tackle-to-tackle" principle of the Hague Rules and even the "port-to-port" principle of the Hamburg Rules.

The Rotterdam Rules offers greater application than the Hague Rules as it applies not only to bills of lading but also to the rather broad term "Transport document" as well as electronic transport documents.

Two new types of actors who share in the responsibilities and liabilities of the carrier have been defined in the Rotterdam Rules, the performing party and the maritime performing party. They are defined by what type of the carrier's obligations they assume and the liabilities they are held to is dependent on what type of party they are.[24]

One controversial provision is the possibility of freedom of contract.[25] The Rotterdam Rules are non-optional as a rule but the carrier can derogate from the responsibilities if it is done under a volume contract and certain criterion are met. A volume contract is a contract where the parties agree to ship a certain amount of goods in several shipments during a set amount of time. In theory this could be two containers over two years. The possibility to circumvent the conventions rules with volume contracts could very well prove problematic.

As of now, 25 States have signed the Rotterdam Rules, including the USA, but only Cameroon, Congo, Spain and Togo have chosen to ratify them. 20 ratifications are needed for the Rotterdam Rules to enter into force. Sweden has signed the Rotterdam Rules but has not, as of 2018, decided upon whether to ratify or not.[26]

2.5 The Swedish Maritime Code

The Swedish maritime Code ('SMC') is based on an older maritime code from 1890. The language and structure of the code has been revised but many of the provisions remains largely the same. The maritime codes of the other Scandinavian countries date back to 1890 as well, as they were drafted in a joint effort to ensure a harmonised regional legislation. This has resulted in that Sweden, Norway and Denmark have very similar maritime codes today. Finland adopted their maritime legislation in 1939, it is similar in substance but has a different structural concept.[27]

The SMC, and the other Scandinavian codes, has been amended a number of times, mainly due to the different maritime conventions ratified by the respective States. There are some differences between the codes today, but they are substantially the same.[28]

The 1890's SMC was amended in 1936 to add a chapter regarding bill of ladings. The Hague Rules were only made mandatory to the extent demanded by international commitments. Thus, there was made a difference between domestic and international transportation where the latter applied

[24] See Section 3.2.
[25] See Francesco Berlingieri, 'Freedom of Contract under the Rotterdam Rules' 14 Unif. L. Rev. p. 831.
[26] <http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html>, visited 2018-11-13 15:14.
[27] SOU 2018:60 p. 115.
[28] Ibid, p. 115.

the Hague Rules regarding nautical errors as exceptions from the carrier's liability while the prior used national legislation. The national legislation held the carrier responsible but allowed non-liability clauses. The result was that domestic carriers used the option for non-liability clauses to exempt themselves from nautical errors meaning that the Hague Rules were, indirectly, applied both domestic and internationally. The double rule set from the 1936 amendment was removed in the 1973 amendment when the Hague-Visby Rules were implemented.

The older SMC was updated to the new SMC in 1994. Some provisions from the Hamburg Rules were included in this new version. This was not done because of international commitments, Sweden has neither signed nor ratified the Hamburg Rules, but to make the SMC more compatible with the legislations that do apply the Hamburg Rules.

Thus, Chapter 13, which is applicable on carriage of general cargo, of the current SMC is primarily based upon the Hague-Visby Rules but has been amended to function with the Hamburg Rules as well. It can therefore be said to function as a hybrid-framework.[29]. Since the SMC is heavily influenced by the Hague-Visby Rules it should be noted that international case law based on the Hague-Visby rules can be used as Swedish or Scandinavian case law.

[29] SOU 2018:60 p. 105.

3 Carrier's obligations and liabilities according to the Rotterdam rules

3.1 Scope of application

The Rotterdam Rules only applies if a contract has been entered between the carrier and the shipper and

> "*the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:*
>
> *(a) The place of receipt;*
> *(b) The port of loading;*
> *(c) The place of delivery; or*
> *(d) The port of discharge.*".[30]

There must be an actual contract of carriage, a maritime element in the transportation, the transportation must be international, and the carriage must have a connection to the Rotterdam Rules.

For there to be a contract of carriage as defined in Article 1(1) of the Rotterdam Rules there must be a promise or undertaking to carry goods.[31] It is not a requirement that the actual performance has taken place since the goods can disappear or be damaged before the transportation has even begun, the important aspect is the carrier's undertaking to perform.[32] The shipper must also agree to pay for the shipment. The Rotterdam Rules are therefore not applicable on a situation where the carrier transports goods for free.[33]

The transaction must involve carriage by sea, wholly or partly, for the Rotterdam Rules to apply. It is not specified in the convention what is required from a contract to constitute "carriage by sea".[34] In most cases it is clear from the context of the contract that the carriage will be by sea, such as type of cargo, route and freight payable. In the few unclear cases that can

[30] The Rotterdam Rules Article 5.
[31] Michael F. Sturley, 'Scope of Application' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli (eds), *The Rotterdam Rules 2008* (Wolters Kluwer law & Business 2010) p. 42.
[32] Ibid p. 42.
[33] Michael F. Sturley, Tomotaka Fujita & Gert-Jan van der Ziel, *The Rotterdam Rules: the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) p. 32.
[34] Sturley, 'Scope of Application' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 43.

arise it been left to the local courts to decide based on the facts in each case.[35]

There are two geographic requirements for the Rotterdam Rules to apply. The first requirement is that the carriage is international and the second is that the carriage has a connection to the convention.

The Rotterdam Rules states that there must be internationality between the place of receipt and the place of delivery[36] as well as between the place of loading and the port of discharge.[37] In a unimodal framework dealing with only the "tackle-to-tackle"-principle, such as the Hague-Visby Rules, the place of receipt and place of loading would be in the same place and the place delivery and place of discharge would be so as well, meaning that as long as the sea carriage is international so will the overall carriage.[38]

Since the Rotterdam Rules are multimodal the four places can be at four geographically different locations.[39] For example, a furniture manufacturer in Gnosjö contracts a carrier to truck a shipment of furniture from Gnosjö to Gothenburg, where it is carried by sea to London and then trucked to Oxford. The place of receipt is Gnosjö, the place of loading Gothenburg, the place of discharge London and Oxford is the place of delivery. In this example there is no problem with the internationality of either aspect of the carriage since Gnosjö and Gothenburg are located in Sweden and London and Oxford are located in the United Kingdoms.

It is possible to imagine a scenario where a container is carried by train from Malmö to Copenhagen and then shipped to Gothenburg. The sea carriage will be international due to the container being shipped from Denmark to Sweden, but the overall carriage will be domestic since it went from one Swedish city to another Swedish city. In such a situation the Rotterdam Rules would not apply, but it should be noted that it is not very likely to occur in practice.

For the contract of carriage to have a connection to the Rotterdam Rules it is required that at least one of the places of receipt, loading, unloading or delivery are located in a Contracting State. This means that the Rotterdam Rules have an even wider scope than the Hague Rules that only apply to outgoing transports, the Hague-Visby Rules that apply to outgoing transports and bills of lading from contracting states, and the Hamburg Rules that apply to in- and outgoing transports.[40] The nationality of the vessel is irrelevant.[41]

[35] Sturley, Fujita & van der Ziel, 2010, p. 33.
[36] 'The carriage overall'.
[37] 'The sea carriage'.
[38] Sturley, 'Scope of Application' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 44.
[39] Ibid p. 44f.
[40] Sturley, Fujita & van der Ziel, 2010, p. 38f.
[41] The Rotterdam Rules Article 5(2).

This means that the applicability of the Rotterdam is very wide and exclusions are therefore needed. Charter parties were excluded from application already in the Hague Rules because they were considered being equally strong partners and able to negotiate a fair deal. This was not amended in the Hague-Visby update and the Hamburg Rules continued the tradition. There have not been any major voices lifted to change this so UNCITRAL have kept with tradition.[42]

Today it is not enough to write charter parties excluded, however, because carriage has become more complicated. The two provisions of Article 6 attempts to narrow it down. They should be read with the definition of linear transport in mind.[43] No definition of non-linear, it must instead be understood from Article 1.3 *e contrario*.[44]

3.2 Who is the carrier?

According to the definition in article 1(5) of the Rotterdam Rules the carrier is 'a person that enters into a contract of carriage with a shipper'. That definition of a carrier is similar to the one in the Hague[45] and Hague-Visby Rules[46]. The Hague and Hague-Visby Rules does not provide how that person can be identified, which is problematic for a potential claimant because the bills of lading are traded back and forth in the maritime business. The shipper might have never met the person performing the carriage.

In order to address the problem of identifying the carrier the Rotterdam Rules has introduced new provisions. It is now required, according to Article 36(2)(b), that the transport documents include the name and address of the carrier. Any 'identity of the carrier'-clause on the bill of lading is irrelevant against that information according to Article 37(1). If it would turn out not possible to identify the carrier in that way, Article 37(2) provides that under specified preconditions the registered owner of the vessel named in the transport document should be presumed the carrier. The claimant could prove that someone else is the carrier despite the mentioned provisions according to Article 37(3).[47]

The claimant might want to direct their claims against another person. That is because the carrier can hire subcontractors to perform some or all of the carrier's contractual obligations in its stead, these are called either

[42] Sturley, 'Scope of Application' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 47f.
[43] The Rotterdam Rules Article 1(3).
[44] Sturley, Fujita & van der Ziel, 2010, p. 40f.
[45] The Hague Rules Article 1(a).
[46] The Hague-Visby Rules Article 1(a).
[47] D Rhidian Thomas, 'An analysis of the liability regime of carriers and maritime performing parties' in D Rhidian Thomas (ed) *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Publishing Limited 2009) p. 71f.

performing parties or maritime performing parties.[48] The carrier is sometimes referred to as 'the contractual carrier' when its needed to distinguish between the person who has the contract with the shipper and the person who actually ships the goods. 'A person' is understood in the Rotterdam Rules to mean both natural and legal persons.[49]

It is important to differentiate between the carrier, a performing party and a maritime performing party due to their different obligations and liabilities. The first words of Article 1(6)(a) defines a performing party as 'a person other than the carrier'. The term is broad and covers not only the subcontracted company but also their employees.

The person must also:

- perform or undertake to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.'[50]
- act, directly or indirectly, at the carrier's request or under the carrier's supervision, and
- not act, directly or indirectly, on behalf of the shipper, the documentary shipper, the controlling party or the consignee.

The definition of a performing party is wide and covers anyone participating in the execution of the carrier's essential obligations from a contract of carriage. It does not cover everyone connected to the carrier, however. The key point is the performing party's commitment to perform specific aspects of the carrier's obligations under each contract of carriage. For example, a carrier has two different contracts of carriage and has sub-contracted two performing parties, one for each contract. The performing party contracted for the first contract is not considered a performing party with regards to the second contract and vice versa. Persons hired by a shipper, documentary shipper, the controlling party or the consignee are not considered performing parties.[51]

The maritime performing parties[52] are a subcategory of the performing parties. They are a

> "*performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.*"

[48] The Rotterdam Rules Article 1(6).
[49] Sturley, Fujita & van der Ziel, 2010, p. 132.
[50] The Rotterdam Rules Article 1(6)(a).
[51] The Rotterdam Rules Article 1(6)(b).
[52] The Rotterdam Rules Article 1(7).

Thus, a maritime performing party must meet the same criterion as the performing party but also perform any of the carrier's obligations during the period between the arrival of goods at the port of loading and their departure from the port of discharge of a ship. Examples of maritime performing parties are ship owners that have been subcontracted to perform the sea leg of the carriage and stevedores.

3.3 Carrier's obligations

A major change in the Rotterdam Rules from the Hague-Visby Rules is the addition of Chapter 3, where the carrier's obligations are gathered in a cohesive manner. Before the Rotterdam Rules the obligations were scattered and implied throughout the Hague-Visby Rules. The obligations are now more accessible to find and base liability claims on.

3.3.1 Carriage and delivery of goods

The first and most basic obligation of the carrier is to transport the goods from one place to another and to deliver them to the right person, in the way agreed upon in the contract of carriage.[53] Earlier conventions have not expressly stated this obligation. Sturley suggests that the new addition stems from the civil law countries participating in the draft, who are accustomed to legislations stating basic principles instead of relying on judicial doctrines.[54] Zeigler proposes that another, more practical, reason is to bring clarity to situations where the carrier delivers the goods undamaged but to the wrong person. The Rotterdam Rules demand that the carrier delivers the goods to the consignee and a failure to do so makes the convention applicable. Under Hague and Hague-Visby Rules it depends on the jurisdiction whether the convention or some other local law should be applied, since the goods are neither 'damaged' nor 'lost'.[55]

3.3.2 Period of responsibility for the carrier

It is important to determine the carrier's period of responsibility since damage done to the goods during that time might be attributable to the carrier. Under the Hague-Visby Rules the period of responsibility starts when the goods are being loaded on to the ship and ends when they have been discharged at the dock, the 'tackle-to-tackle' principle.[56] The carrier's period of responsibility works differently under the Rotterdam Rules since it

[53] The Rotterdam Rules Article 11.
[54] Sturley, Fujita & van der Ziel, 2010, p. 81.
[55] Philippe Delebecque, 'Obligations of the Carrier' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 78.
[56] Sturley, Fujita & van der Ziel, 2010, p. 86.

covers multimodal transports. The carrier might receive the goods inland and have to transport the goods to the port before loading, which means there is a need for the carrier's period of responsibility to begin earlier than under the 'tackle-to-tackle'-principle. The basic idea under the Rotterdam Rules is that the carrier is responsible for the goods from when it receives the goods for carriage until the goods are delivered to the consignee.[57]

There are exceptions from this principle. The parties can stipulate in the contract of carriage when the period of responsibility should begin and/or end.[58] But there are limits to that freedom. The parties cannot decide that the receipt is subsequent to the beginning of the initial loading or that the time of delivery is prior to the time of unloading. In other words, the parties can adjust the period of responsibility to some extent but not in a way that makes it less than it would have been under the 'tackle-to-tackle'-principle.[59]

Another exception to the carrier's period of responsibility is where the carrier is required to hand over the goods to authorities, such as state-owned stevedoring companies.[60] The carrier cannot be expected to be responsible for what happens to the goods if it is not in his custody because of a mandatory rule.

3.3.3 Specific obligations

The carrier's duty to care for the cargo is performed both directly and indirectly. He performs his duty directly when he, during the period of responsibility, "properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods."[61] Since the Rotterdam Rules allows for multimodal transport the words receive and deliver have been added to the description of obligations. This is to acknowledge the fact that the carrier's period of responsibility is extended under the Rotterdam Rules compared to the Hague-Visby Rules and so are the obligations.[62] The duty to care for the cargo indirectly is provided in Article 14.[63]

The carrier must care for the cargo during the carriage. The key words are 'properly and carefully'. The phrasing was chosen because it had been used in the Hague and Hague-Visby Rules, with the intention that jurisprudence from those conventions can be kept.[64] 'Properly and carefully' means that the carrier must adopt a system which is 'sound' in light of all that he ought

[57] Philippe Delebecque, 'Obligations of the Carrier' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 79.
[58] The Rotterdam Rules Article 12(3) (a) & (b).
[59] Philippe Delebecque, 'Obligations of the Carrier' in von Ziegler, Schelin & Zunarelli (eds), 2010, p.81.
[60] The Rotterdam Rules Article 12(2) (a) & (b).
[61] The Rotterdam Rules Article 13(1).
[62] Sturley, Fujita & van der Ziel, 2010, p. 82f.
[63] See Section 3.3.4.
[64] 9th Session Reports paras 117 & 119.

to know about the cargo and he must use reasonable care using the system. Such a system is not required to be fool proof. It is enough that it is a sound system under all circumstances that generally occur when transporting a particular kind of cargo.[65] In *Albacora* a cargo of fish was damaged due to lack of refrigeration. The crates were marked only with "keep away from engines and boilers". The carrier was found to have had a sound system since he followed those instructions given from the shipper.[66] This gives the carrier an obligation to exercise a reasonable level of care.[67]

Even though Article 13(1) says that the carrier shall handle and stow the goods on the ship, the parties of a contract can agree that the shipper, the documentary shipper or the consignee should perform the loading, handling, stowing or unloading of the goods, according to Article 13(2). This practice is not unusual and is called a Free In and Out-clause (FIO). The purpose of a FIO-clause is to allow the carrier and shipper to divide the risk between them, since most damage in international shipping occurs during loading and unloading. In some situations a FIO-clause is used because the shipper is better suited to perform the work.[68] The addition of Article 13(2) is to acknowledge the practice of FIO-clauses.

A FIO-clause does not affect the carrier's period of responsibility. The period begins when the carrier has received the cargo and ends when the cargo has been delivered, even if another party has assumed responsibility for loading the cargo. The carrier is still responsible for his other obligations while the other party is loading, he must still care for the goods for example. Any eventual damage related to the loading performed by the other party cannot be held against the carrier if they have a FIO-clause.[69]

In some cases, the purpose of a FIO is only to allocate the cost of the loading to the shipper while it is still the carrier who performs the actual work. In those cases, the carrier is responsible if it or its subcarriers damage the goods.[70]

3.3.4 Specific obligations applicable to the voyage by sea

Article 14 of the Rotterdam Rules relates to the transportation of goods over sea specifically and not the eventual legs of transportation taking place on land. The article gives the carrier three obligations to make sure the voyage

[65] Theodora Nikaki, 'The obligations of carriers to provide seaworthy ships and exercise care' in D Rhidian Thomas (ed) *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Publishing Limited 2009) p. 99.
[66] *Albacora Srl v Westcott & Laurance Lance Ltd* (n 56).
[67] Philippe Delebecque, 'Obligations of the Carrier' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 83.
[68] Ibid p. 84.
[69] Nikaki, in Rhidian Thomas (ed), 2009, p. 93f.
[70] Sturley, Fujita & van der Ziel, 2010, p. 91f.

goes smoothly. The carrier must before, at the beginning of, and during the voyage exercise due diligence to:

- Make sure the vessel is seaworthy;
- Have ship properly crewed, equipped and supplied; and
- Ensure that the cargo holds, and containers supplied, are fit and safe for transportation.

Similar obligations can be found in the Hague-Visby Rules.[71] It was the purpose of the drafters to not change the wording of the provisions excessively since they are well understood in the industry and there are ample amounts of jurisprudence to guide the scope and obligation of each category.[72] The vessel's structure must be reasonably fit to encounter the ordinary perils that can be expected to occur during the voyage[73] and the engines cannot have defects.[74] The crew must be properly trained[75] and of adequate numbers.[76] The vessel must also have the right navigational equipment[77] and enough fuel.[78] The areas where goods are held must be reasonably fit to receive, carry and deliver the cargo.[79]

A major change from the Hague-Visby Rules is that the carrier must exercise due diligence not only before and at the beginning of the voyage but also during the voyage could affect the carrier's liability quite extensively. For example, if a vessel collides at sea and is rendered unseaworthy, the carrier will be responsible for damage to the goods caused by that unseaworthiness even if the collision was not caused by the carrier. That is unless the carrier is able to remedy the unseaworthiness until the vessel undergoes temporary or permanent repairs as required by its classification standard. What the carrier will need to show is that immediately after the collision, they acted to prevent further damage to the cargo beyond what was caused by the collision itself with whatever resources were available to them on board. Such readiness from the carrier would demand a lot of resources and is of some concern for the P&I clubs.[80]

This change can be attributed to technological advancements, it is now possible for the carrier to stay in constant contact with the vessel for

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[71] The Hague-Visby Rules Article 3(1).
[72] UNCITRAL 9th Session Report para 132 & 19th Session Report para 58.
[73] *Aktieselskabet De Danska Sukkerfabrikker v Bajamar Compania Naviera SA (The Torenia)* [1983] 2 Lloyd's Rep 210.
[74] *Fyffes Group Ltd and Caribbean Gold Ltd v Reefer Express Line Pty Ltd and Reefkrit Shipping Inc (The Kriti Rex)* [1996] 2 Lloyd's Rep 171.
[75] *The Makedonia* [1962] 1 Lloyd's Rep 316.
[76] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hong Kong Fir)* [1961] Lloyd's Rep 159.
[77] *Rey Banano del Pacifico CA and Other v Transportes Navieros Ecuatorianos and Another (The Isla Fernandia)* [2000] 2 Lloyd's Rep 15.
[78] *Northumbrian Shipping Co v E Timm & Son Ltd* [1939] AC 397
[79] *Empresa Cubana Importade de Alimentos 'Alimport' v Iasmos Shipping Co SA (The Good Friend)* [1984] 2 Lloyd's Rep 355.
[80] < https://www.ukpandi.com/fileadmin/uploads/uk-pi/Knowledge_Base_-_International_Conventions/Rotterdam%20Rules.pdf > p. 3. 2018-11-28.

example.[81] Proponents of the change argue that the diligence to keep the vessel seaworthy will not be equally strict, since a shipowner has better prerequisites to keep it seaworthy it when it is in the docks compared to out on the seas. They argue that the obligation is simply for the ship owner to exercise the diligence that is due, that it is not an absolute duty and that it should not be reasonable to expect a shipowner to be able to do very much when the ship is out on the sea. [82] It remains to be seen how strictly the courts will interpret this duty but it is clear that there will be a lot of uncertainty and legal fees until then.

Another change is the phrasing of Article 14(c) regarding the carrier's obligation to make sure that supplied containers are cargo worthy. Some courts have interpreted Article 3(1)(c) of the Hague-Visby Rules to mean that the containers are part of a functional ship and that the carrier is obligated to keep them cargo worthy, something that can be seen as an extreme interpretation. Article 14(c) of the Rotterdam Rules reaches the same result with a less extreme measure by explicitly stating the carrier's obligation to keep the supplied containers cargo worthy.[83]

3.3.5 Goods that may become a danger

Article 15 of the Rotterdam Rules is an update to Article 4(6) of the Hague-Visby Rules which states that a carrier is excused from the obligation to load and carry cargo, if it entails or may entail danger to persons or property. The wording of the new provision now also accounts for the environmental aspect so that it may be protected. The carrier does not have absolute discretion when deciding whether to load the goods or not, he may only take reasonable measures to prevent damage and in situations when it reasonably appears likely that the cargo may lead to danger.[84]

This article merely absolves the carrier from its obligations in Articles 11 & 13. The liability for the dangerous goods is addressed in Article 17(3)(O) and Chapter 7.[85]

3.3.6 Sacrifice of goods during the voyage by sea

If the ship encounters a perilous situation during its voyage, such as a storm, the master may deem it necessary to sacrifice goods in order to be able to take the ship to a safe port. Article 16 allows the master to do so without

[81] Philippe Delebecque, 'Obligations of the Carrier' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 86f.
[82] Sturley, Fujita & van der Ziel, 2010, p. 84f.
[83] Sturley, Fujita & van der Ziel, 2010, p. 84.
[84] Philippe Delebecque, 'Obligations of the Carrier' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 90.
[85] Sturley, Fujita & van der Ziel, 2010, p. 93.

breaching the obligations stated in Articles 11, 13 & 14. The provision applies only when the ship is at sea and may only be used in order to save human lives or other property involved in the common adventure. Certain criterion must be met for the exception to apply:[86]

- The decision must be taken at sea,
- Cargo must have been sacrificed,
- The decision must be tested, not from an objective point of view but from the understanding the carrier had of the situation, and
- The purpose of the decision must be considered, was it to preserve lives, property or cargo?

When cargo is sacrificed in order to save lives or property during the voyage the damage of the lost goods is distributed equally between all parties in the shipping adventure. This is called the general average and is a common maritime doctrine. Article 84 provides that "Nothing in [the Rotterdam Rules] affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average."

3.4 Carrier's liability

3.4.1 Basis of liability

Common criticism of the Hague and Hague-Visby Rules is that it is complicated to follow the burden of proof through the articles. Article 17 of the Rotterdam Rules is constructed to make it easier to establish who is responsible for the loss, damage or delay of goods, and who should pay for it.[87]

First a claimant proves its 'prima facie' case according to Article 17(1) by showing that the goods were lost, damaged or its delivery delayed and that it occurred during the carrier's period of responsibility, as defined in Article 12. The carrier must then show that the damage, loss or delay was caused, or partly caused, by something that the carrier is not responsible for. That is done by satisfying the burden of proof in Articles 17(2) & 17(3). If the carrier successfully does so the burden of proof is once again on the side of the claimant as he would then finally have to prove the carrier's fault under either Article 17(4) or Article 17(5). Article 17(6) governs the division of liability in cases where the carrier is only partly responsible for damage, loss or delay.

3.4.1.1 Establishing the carrier's liability

For the claimant to establish that the carrier is liable for damaged, lost or delayed goods, they must prove that it or its cause happened during the

[86] Philippe Delebecque, 'Obligations of the Carrier' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 91f.
[87] Sturley, Fujita & van der Ziel, 2010, p. 96.

carrier's period of responsibility. The claimant can prove that by showing that the carrier received the goods in working order and that they were delivered damaged.[88] This is primarily done with the bill of lading and a notice of loss rendered at delivery, indicating that the damage occurred during the carriage.[89] The claimant could also prove that the damage occurred during the period of responsibility by providing analysis of the damage, for example by measuring the amount of rot on wooden planks and calculating the time taken for the rot to reach that level.[90] This can be difficult to prove with damage related to delay.

Once the claimant has established that its goods have been damaged, lost or delayed during the carrier's period of responsibility the carrier will be liable to pay the damage. That is unless the carrier can show that the cause of the damage to, loss or delay of goods did not occur because of the carrier and therefore be exempted from liability. This can be done with either Article 17(2) or Article 17(3).[91]

3.4.1.2 The carrier's exemptions from liability

Article 17(2) of the Rotterdam Rules is a general exception from liability, similar to Article 4(2)(q) of the Hague and Hague-Visby Rules. The carrier can use it to show that the cause of the damage to, loss or delay of the goods was not the fault of the carrier and that he is not liable. While the Hague-Visby Rules requires that the carrier had absolutely no involvement in the cause to the damage, Article 17(2) of the Rotterdam Rules provides that if the carrier partly caused the damage he only needs to pay a proportional part of the damage, as given in Article 17(6). The carrier must also prove that none of the persons he is responsible for, according to Article 18, did not cause it either. [92]

Article 17(3) is a more specific exception from the carrier's liability and requires that the damage, loss or delay was caused by one of the events or circumstances listed in the article. The catalogue of exceptions can be divided into three parts. The first part is circumstances that the carrier has no control over. (Articles 17(3)(a–g). The next part is circumstances that can be connected to the shipper or the goods itself (Articles 17(3)(h–k). The final part is circumstances of salvage and rescue. (Articles 17(3)(l–o). When the carrier refers to any of the exceptions in the catalogue it is presumed that he did not cause the situation and he will be exempted from liability. [93] Article 17(3) does not protect the carrier if the claimant shows that the carrier did cause the situation used to avoid liability. The carrier can therefore not

[88] Ibid, p. 98.
[89] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 98.
[90] Sturley, Fujita & van der Ziel, 2010, p. 98f.
[91] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 100.
[92] See Chapter 3.4.2.
[93] Sturley, Fujita & van der Ziel, 2010, p. 103f.

incite a strike and then blame it for delay.[94] Article 17(3) provides no additional legal protection that Article 17(2) does not provide but the burden of proof is not as extensive. With Article 17(2) the carrier must first prove what caused the damage and then that the carrier or its other persons had no fault in that cause. With Article 17(3) the carrier must only prove that one of the listed situations caused the damage to, loss or delay of the goods.

The catalogue of exceptions to the carrier's liability in Article 17(3) of the Rotterdam Rules is largely the same as the ones in Article 4(2) of the Hague and Hague-Visby Rules, with some major substantial changes and some minor amendments to the phrasing and order of the exceptions. The major changes are that:

- Navigational errors have been removed as an excuse from liability,
- The carrier is liable for fires started by the actions or omissions of his crew,
- There is a distinction between salvage for the sake of human lives, property and the environment, and
- The possibility of 'Free In an Out'-clauses has been acknowledged

Article 4(2)(a) of the Hague-Visby Rules has been removed completely in Article 17(3) of the Rotterdam Rules, which means that the carrier cannot use errors made by the crew during navigation to be exempted from liability for damage to or loss of goods. The excuse stems from when the carrier would send his ship on a voyage without being able to contact it and therefore be unable to remedy any situations that could occur. It has been argued that the modern technology of the 21st century, such as satellites and computers, renders the 'navigational error'-excuse obsolete and many of the delegates drafting the Rotterdam Rules were aiming to remove it. This was no surprise as jurisprudence from the last couple of decades has made it increasingly harder to rely on this exception.[95]

Fire has a long history as a special phenomenon in maritime law.[96] In Article 4(2)(b) of the Hague-Visby Rules the carrier is exonerated from all fires, 'unless caused by actual fault or privity of the carrier'. That refers to the upper management of the company, which means that the carrier is protected from liability for fires caused by crew men or other low-level employees under the Hague-Visby Rules. [97] Article 17(3)(f) of the Rotterdam Rules has been amended so that crew members or third parties can be at fault for fires, as opposed to article 4(2)(b) of the Hague-Visby Rules. This means that the fire exception works in the same way as the other exceptions does. It should also be noted that this exception only works if the

[94] Ibid, p. 104.
[95] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 102f.
[96] Francis A Okanigbuan Jnr, 'Carriers' Liability in Contracts for the Carriage of Goods by Sea: Is There a Justification for the Hamburg and Rotterdam Rules?' in (2009) 37 Bus. L. Rev. p. 225.
[97] Sturley, Fujita & van der Ziel, 2010, p. 105.

fires occurs on the maritime leg of the transport and on the ship where the goods are carried or about to be carried.[98]

Article 4(2)(l) of the Hague and Hague-Visby Rules exonerates the carrier for damages caused by attempts to save life or property. In the Rotterdam Rules the paragraph has been split to make a distinction between life salvage and property salvage. Article 17(3)(l) of the Rotterdam Rules excuses all attempts to save lives while article 17(3)(m) of the Rotterdam Rules only excuses attempts to save property when they are reasonable. This is because a life is so highly valued while it is unreasonable to accept that the carrier risked a shipment of cargo to salvage less valuable cargo. [99] A paragraph excusing the carrier for reasonable attempts to avoid damage to the environment has been added due to the growing concern for the maritime environment.[100]

The introduction of Article 13(2) of the Rotterdam Rules allows the carrier and the shipper to agree that the loading, handling, stowing or unloading should be performed by the shipper, the documentary shipper or the consignee with a FIO-clause. If the goods are damaged during operations when the parties have agreed on a FIO-clause it is possible for the carrier to appeal to Article 17(3)(i) and be exempted from liability. This only applies when the claimant actually performs the operations and not when the FIO-clause is used to allocate the loading costs.[101]

3.4.1.3 Overcoming the carrier's exemptions

The carrier is not liable if he can show that at least one of the exceptions in Articles 17(2) & 17(3) are applicable. However, the claimant can render those exceptions ineffective if he proves that either one of Articles 17(4) or 17(5) are applicable.

Article 17(3) allows the carrier to rely on a list of events and circumstances to avoid liability. He only needs to prove that one of those situations caused the damage, there is no need to prove what caused the circumstance. Article 17(4)(a) allows the claimant to render that excuse void by showing that the carrier, or a person the carrier is responsible for, caused the situation. If a shipment of fruit has been spoiled by delay from a strike, the carrier can use the strike as an excuse to avoid liability for the damaged fruit. But if the claimant can prove that the carrier has for some reason caused the strike then the carrier's defence from liability does not work.[102] The carrier can also be liable, even though a circumstance listed in Article 17(3) is applicable, if the claimant shows that damage to the goods was caused by a

[98] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 104.
[99] Sturley, Fujita & van der Ziel, 2010, p. 106.
[100] The Rotterdam Rules Article 17(3)(n).
[101] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 105.
[102] Sturley, Fujita & van der Ziel, 2010, p. 111.

situation not in the catalogue, if the carrier cannot show that neither him nor a person he is responsible for caused that situation.[103]

Article 17(5) is connected to the carrier's obligation to keep a seaworthy vessel. It allows the claimant to hold the carrier accountable for damage related to damaged, lost or delayed goods when the loss, damage or delay was or was probably caused by or contributed to by the unseaworthiness of the ship.[104] The word "probably" refers in this context to the causation between the unseaworthiness and the damages. To what degree "probably" translates into is not defined in the Rotterdam Rules but according to Sturley it should mean that it is lower than the ordinary causation. The claimant still has to prove unseaworthiness of the vessel, the grade of that burden is ordinary.[105] The carrier can defend itself from Article 17(5) by either proving that the unseaworthiness did not cause the damage or by showing that he complied with his due diligence in Article 14.[106]

3.4.1.4 Allocation of responsibility when multiple parties are involved

Under the Hague-Visby Rules there have been a possibility to use the "Vallescura Rule" when allocating the cost in cases where there are multiple causes to the damage. The Vallescura Rule was formulated by the United States Supreme Court in *Schnell v. The Vallescura* in 1934. It states that

> "*when cargo is lost or damaged for more than one reason, one of which the carrier is responsible for and the other for which the carrier is not responsible, the carrier must establish what portion of the loss or damage s/he is responsible for and if s/he fails to demonstrate his/her portion of liability, then the carrier may be responsible for all of the damage*."[107]

This principle has been included in Article 17(6) of the Rotterdam Rules. If it is found that there is more than one cause to the damages the carrier can prove that they were not responsible for any of them or only some of them. If they are successful in showing that they were only partly responsible for the damage they should also be partly liable to compensate for that damage.[108] There were some debate on how to phrase the article appropriately[109] but the final result will likely result in a less 'either-or-not' approach than the Vallescura Rule and more in a flexible approach with better settlements.[110]

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[103] The Rotterdam Rules Article 17(4).
[104] The Rotterdam Rules Article 17(5)(a).
[105] Sturley, Fujita & van der Ziel, 2010, p. 113f.
[106] Ibid p. 115.
[107] *Schnell & Co v. S. S. Vallescura*, 293 U.S. 296, 303-304 (1934).
[108] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 110f.
[109] Sturley, Fujita & van der Ziel, 2010, p.118f.
[110] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 110.

3.4.2 Carrier's liability for other persons

It is a long maritime tradition that the carrier is vicariously responsible for the actions of its employees.[111] The shipping industry relies heavily on the carrier's possibility to assign some or all of his contractual obligations to specialised subcarriers.[112] Article 18 serves to make sure that these subcarriers are covered by the carrier's vicarious responsibility by making him liable for damage caused by the acts and omissions of:

(a) Any performing party;
(b) The master or crew of the ship;
(c) Employees of the carrier or a performing party; or
(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

While the carrier has vicarious responsibility for its performing parties, master and crew, employees and any other persons involved in fulfilling the carrier's undertaking there is a difference between maritime and non-maritime performing parties.

Article 19 is a new concept and was created for the claimant to be able to bring actions against the 'actual carriers' inside the convention with a more predictable outcome, as opposed to relying on tort law where the outcome can vary greatly depending on jurisdiction. [113] A maritime performing party has the same obligations as the carrier when performing its contract, according to Article 19, and can therefore be liable if the obligations are breached. That means the claimant can sue the maritime performing party directly instead of going through the carrier. A maritime performing party can also use the same exceptions from and limits of liability as the carrier can. The criterion for a maritime performing party to be subject to these obligations, liabilities and defences are that:

- The goods for carriage was received or delivered in a contracting state, or the activities with respect to the goods were performed in a port in a contracting state, and
- The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship and either (ii) while the maritime performing party had custody of the goods or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.[114]

[111] Ibid p. 109.
[112] Sturley, Fujita & van der Ziel, 2010, p. 131.
[113] Sturley, Fujita & van der Ziel, 2010, p. 141f.
[114] The Rotterdam Rules Article 19(1).

It should be noted that the geographical scope of the maritime performing party's liability is smaller than the scope of the carrier's liability. The maritime performing party is only liable under the Rotterdam Rules when its own performance has a sufficient connection to a contracting State, that is to be compared to the carrier whose connection relies on the nature of the carriage as a whole.[115] That is to ensure that a maritime performing party who is only operating in a single port that is not in a contracting State cannot be bound to the Rotterdam Rules, even though the carrier might be due to the other port being in a contracting State.

The carrier can assume greater obligations, and therefore potential liability, than prescribed by the Rotterdam Rules. The maritime performing party is not bound by such an increase of obligations and liabilities unless he explicitly agrees to it in writing.[116] That is in line with the general principle of law that a contract cannot bind third parties.

The Himalaya-clause is a very common concept in the maritime sector. It allows the carrier to extend its defence from liability to its employees and is very common under the Hague and Hague-Visby Rules. The Himalaya-clause origins from the case *Adler v. Dickson* where an injured passenger sued the master of the ship and the negligent bosun, since the carrier had exempted itself from the type of damage suffered. The court ruled that employers are able to extend the carrier's defences to its employees, but since there were no such clauses in this case the passenger was awarded compensation.[117] The ruling made it a common practice for carriers to include clauses in their transport contracts stating that the master of the ship and crew are entitled to the carrier's defences and limitations of liability. The practice of the Himalaya-clauses has been included in Article 19(4) of the Rotterdam Rules. It excludes liability for employees of the carrier and the maritime performing party as it is not desirable that individual employees can be held liable.[118] An ordinary stevedore can cause are large amount of damage with a few moments inattention, a claim for compensation against the stevedore would not come close to remediate the claimant while it would bring financial ruin on the stevedore. The Hague-Visby Rules also include an automatic Himalaya-clause in article 4*bis*(2), but only for the carrier's agents and servants and not independent contractors. The principle was continued in the Rotterdam Rules with article 4 combined with article 19 but excluding all non-maritime performing parties.[119]

It is possible for the carrier to be liable for the same loss as one or multiple maritime performing parties. When that happens, the liability is joint and several which means that they must pay for the compensation together

[115] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p.117f.
[116] The Rotterdam Rules Article 19(2).
[117] *Adler v. Dickson (The Himalaya)*, [1955] 1 Q.B. 158 (C.A. 1958).
[118] See UNCITRAL 19th Session Report paras 128-131.
[119] Sturley, Fujita & van der Ziel, 2010, p. 147f.

according to Article 20. The co-defendants are liable in proportion to what extent they caused the claimants damage.

3.4.3 Carrier's liability for delay

The definition of delay is found in Article 21 of the Rotterdam Rules. It means, in conjuncture with Article 17 of the Rotterdam Rules, that the claimant must prove two things:

- That the goods were delivered later than agreed, and
- That the claimant suffered a loss due to the fact that the goods were delivered late.

When the claimant builds the prima facie case as stated in Article 17(1) they do it by first proving that there was an agreement with the carrier that the goods should be delivered by a specific date and then by showing that the goods were not delivered by that date. This could be problematic for the claimant since it is already common practice for carriers to specify in transport contracts that the estimated times of arrival are merely approximate. It is up to the local court to interpret with local contract law whether such an agreed upon time exist from the contract of carriage and, if necessary, other documents such as publicised time tables and trade practices.[120]

The carrier must then show that cause of that delay was not the fault of the carrier or a person referred to in Article 18 or that it did not occur in the carrier's period of responsibility. This can be a complicated matter due to the long chain of actors involved during the shipping.[121]

The damage of delay should be calculated in the same way as damaged or lost cargo.[122] The financial loss of a delayed shipment can be quite extensive, for example if it leads to stopped production for a factory due to shortage of the shipped parts. The carrier can in such a case rely on Article 60 which sets a limit on the carrier's liability to two and one-half times the payable freight.

3.4.4 Limits on liability

In order to give the claimant the appropriate amount of compensation the financial damage must first be calculated. How the compensation is calculated is provided in Article 22 of the Rotterdam Rules which builds upon the formula used in Article 4(5)(b) of the Hague-Visby Rules. The article builds upon the "arrived value"-principle which says that the

[120] Alexander von Ziegler, 'Delay and the Rotterdam Rules' Focus on: The Rotterdam Rules, p. 999f.
[121] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 123.
[122] The Rotterdam Rules Articles 60 & 22.

compensation should be equal to the value the goods would have had if they were delivered in complete and sound order at the place of destination. The arrived value of the goods should be determined by looking at market prices as stated in Article 22(2). This principle is generally followed by the shipping world, but some land-based conventions apply the value of the goods as they were accepted for carriage. This could lead to a conflict of rules and cause confusion considering that the Rotterdam Rules are multimodal and cover land transports in some situations.[123]

There is a limit to how much compensation the carrier can be liable. In the Rotterdam Rules the limits of liability has been raised to 875 SDR per package or shipping unit, or 3 SDR per kg of the gross weight of the goods, whichever is the higher.[124] This can be compared with the Hague-Visby Rules where the liability is limited to 666.67 SDR per package or unit, or 2 SDR per kg gross weight.[125]

There are two exceptions to the carrier's right to limit the liability. The first is if the value of the cargo has been declared on the bill of lading and the carrier agrees to transport the goods.[126] The second is if the carrier has caused the loss, damage or delay with his actions or omissions, knowing that such loss, damage or delay was a probable result.[127]

3.4.5 Notice in case of loss, damage or delay

When the consignee has received the delivered goods, they must inspect them to make sure that they are of the same standard as expected from the bill of lading. The consignee should deliver a notice of loss to the carrier immediately at delivery if there are any immediately apparent deficiencies to the cargo. There is a time limit of seven working days after delivery if they are non-apparent.[128] That can be compared to the three days given as time limit in the Hague-Visby Rules.[129] This will make it easier for the claimant to establish a timeframe in their prima facie case where the goods were damaged during the carriers period of responsibility. A failure to do so does not kill the claimant's opportunity to seek reimbursement for the damages but will make it harder for the claimant to prove that the goods were damaged under the carrier's care.[130] The consignee can deliver the

[123] Sturley, Fujita & van der Ziel, 2010, p. 158.
[124] The Rotterdam Rules Article 59.
[125] See Kate Lannan, 'Behind the numbers: The Limitation on Carriers Liability in the Rotterdam Rules', (2009) 14 Unif. L. Rev. p. 909.
[126] The Rotterdam Rules Article 59(1).
[127] The Rotterdam Rules Article 61.
[128] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 127f.
[129] The Hague-Visby Rules Article 6.
[130] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 128f.

notice of loss or damage to either the carrier or the performing party that delivered the goods and still have it be in effect against both.[131]

In case of delay the consignee must present a notice of delay to the carrier within 21 days after the delivery of the goods. If the consignee does not notify the carrier of the delay, and that the delay will result in a financial loss, the right to compensation is lost and forfeit. It is not required that the consignee specify to what extent the loss will occur.[132]

When the consignee inspects the delivered cargo together with the carrier there is no need for a notice of damage. This applies only between the participating parties and cannot be used against, for example, a maritime performing party that was not present. It holds a certain value as evidence however.[133] Article 23(6) impose a duty on the parties to allow each other access to the damaged goods, documents and other materials that could be used as evidence. This article could impose a burden exceeding that of local procedural rules.[134]

3.4.6 Deck cargo on ships

Cargo shipped on deck are exposed to rain, waves, intense sun and other types of weather that might damage the cargo which is why the carrier must transport the cargo under the deck as a general rule.[135] The exceptions to the rule are:

- When the law requires deck carriage;
- When the cargo is transported in containers or vehicles fit for deck carriage and the decks are fitted for such containers or vehicles; or
- When the deck carriage is agreed between the parties or part of trade usage.

Some types of cargo are of a dangerous nature and must be transported on deck so that it cannot cause severe damage to the ship, explosives and certain types of chemicals for example. This is usually governed by the legislation of the State the ship is registered is.

The carrier may transport cargo on deck if the parties have agreed so in the transport document. The carrier may also do so when it is an established part of the trade usage. The burden of proof is on the carrier to show that such an agreement or trade usage exist.

[131] The Rotterdam Rules Article 23(5).
[132] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 129.
[133] Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, Schelin & Zunarelli (eds), 2010, p. 129.
[134] See Chapter 38 of the Swedish Code of Judicial Procedure.
[135] The Rotterdam Rules Article 25.

The carrier is liable for loss of or damage to the goods if he transports the cargo on deck in breach of this article and the damage is caused by the carriage on deck. He may not limit the liability or use any of the defences from liability provided in Article 17 of the Rotterdam Rules. The carrier is not liable for the special risks that are involved in deck carriage if the carriage is in accordance with Article 25(1)(a)&(c). The carrier must show that the damage was caused by such a special risk and he can be held liable if the claimant shows that the carrier caused or contributed to the special risk, in accordance with Article 17(2) & (4). Neither the Rotterdam Rules nor the preparatory works specify what a special risk is other than weather risks.[136]

The carrier can only invoke Article 25(1)(c) against a third party who have purchased the transport document in good faith if the contract particulars state that the cargo may be carried on deck. It is sufficient that the transport document contains the deck carriage as a general option for the mode of transportation.

[136] CMI comments on Art 5(6), Deck Cargo in the draft outline instrument, *CMI yearbook 2000* 136-137.

4 Carrier's obligations and liabilities according to the Swedish Maritime Code

4.1 Scope of application

Chapter 13 of the Swedish Maritime Code applies to all contracts of carriage by sea of general cargo when Swedish law is applicable according to the Rome I regulation or when Swedish law has been chosen in arbitrary clauses.[137]. This also applies to carriages taking place outside of the Hague-Visby Rules' scope of application. After that a court have determined itself to have competence to rule in a case, they must determine what law it should apply. The Rome I-regulation[138] is applicable for interpreting contractual relations with an international aspect and has precedence over Swedish law.

Rome I applies to transport contracts and the parties have freedom of choice when choosing which law should be used to govern their contract.[139] It is very common to specify a law that should be applied in the bill of lading. The mandatory nature of Chapter 13 of the SMC, whose purpose is to protect the weaker party, could be undermined if parties that operate in Sweden use this freedom by choosing laws that gives the shippers less rights. Article 3(3) of the Rome I provides that when all other elements relevant to the situation at the time are located in a country other than the country whose law has been chosen, the chosen law should not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement. This means that an actor with a sufficiently strong connection to Sweden must apply the SMC.

Articles 9(1) & (2) of Rome I is used to apply the mandatory provisions of the SMC outside of Sweden, even though that it is prohibited as a general rule under the Rome I. It can be done since the SMC is regarded as crucial by the Swedish government for safeguarding its public interests.[140]

[137] SMC 13:2.
[138] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Hereafter "Rome I".
[139] Rome 1 3(1).
[140] Government bill 2013/14:243 p. 35f.

4.2 Who is the carrier?

The carrier is a person who enters into a contract with a sender for the carriage of general cargo by sea.[141] That is to say, one who agrees to transport goods from one place to another for another person in return for payment. It has not always been clear who that is in the complicated chain of operators that is prevalent in the maritime business. The identification of the carrier is not regulated in either the Swedish Maritime Code or the Hague-Visby Rules. It must instead be solved by trade usage and case law.

Article 20 of the Uniform Customs and Practice for Documentary Credits (UCP 600) demands that a bill of lading indicates the name of the carrier for it to be accepted under a letter of credit.[142] The UCP 600 is a set of standardised rules on letters of credit and is used in over 175 countries. The importance of this particular rule is established in the case *The Starsin* where a signature on the front bill of lading was deemed to hold more evidence than a clause stating the identity of the carrier on the back of the bill of lading, if it is enough for a document checker at a bank it should also be enough for a cargo claimant.[143]

Thus, when identifying the carrier, one should first look at the bottom of the bill of lading for a signature and then at the top for a company logo, that will suffice in most cases.[144]

4.3 The carrier's obligations

Unlike in the Rotterdam Rules there is no specific section in the SMC providing a list of the carrier's obligations towards the shipper. The obligations have to be concluded from reading the articles in Chapter 13 of the SMC.

The carrier's obligations to the shipper can also be interpreted from the promise of carriage according to Kurt Grönfors who has gathered a list of those obligations.[145] Grönfors reasons that when the carrier gives a bill of lading to the shipper, he admits having received a certain amount of cargo at a certain place that shall be delivered at another place. It is implied that the carrier will transport the cargo between these two places and that the carrier cannot delay the transport for too long. Since the cargo must be delivered in the same state as it was received the carrier must also have a duty to care for

[141] SMC 13:1.
[142] Uniform Customs and Practice for Documentary Credits. Hereinafter called "UCP 600".
[143] *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2003] 1 Lloyd's Rep 571.
[144] Charles Debattista, 'Cargo claims and bills of lading' in Yvonne Baatz (ed) and others, *Maritime law* (4th Edn Routledge 2018) p. 191.
[145] Kurt Grönfors, *Inledning till transporträtten* (P A Norstedt och Söners Förlag AB 1984) p. 56f.

the cargo. The carrier is also responsible to ensure that the bill of lading contains the right numbers of information regarding weight, measures, number of transport devices and condition of the goods. The carrier must therefore inspect the cargo and inform the shipper if there is anything amiss, resulting in a duty to inform the shipper.

The carrier's obligations are therefore according to Grönfors:

- Accountability, the carrier must deliver the same amount of goods as he received,
- Delivery, he must deliver the goods to the right person,
- Transportation, he must carry the goods and not be delayed in doing so,
- Care for the cargo, the carrier must make sure that the goods does not get damaged, and
- Information, the carrier must make sure the bill of lading is correct.

4.3.1 Information

When the carrier receives goods for carriage from the shipper he must to a reasonable degree make sure that the goods have been packed so that it will not get damaged or cause damage to any person or property.[146] What a 'reasonable degree' entails must be determined from case to case but it is clear that the outer packaging shall be inspected at least. The carrier must make a closer inspection if he has reason to suspect flaws from prior experience. [147] The carrier is not expected to inspect the inside of a container or a similar transport device, unless there is special reason to suspect insufficient packaging. This is because it would not be realistic for the carrier to open and inspect each and every transport device. Special reasons for suspicions could arise from outer damage to the transport device or the carrier having prior knowledge of risks involved with a particular kind of transports.[148] The carrier shall inform the shipper if there are any dangerous flaws in the packaging. If the shipper cannot relieve the flaws, and neither can the carrier through reasonable measures, then the carrier is not required to transport the goods.[149]

The carrier must also take reasonable actions to make sure that the bill of lading contains the right statements on the goods properties.[150] This is important for the carrier since the bill of lading has strong evidentiary value and if the carrier delivers cargo subpar to what is stated in the bill of lading he will be held responsible.[151] The carrier can exonerate himself with a note

[146] SMC 13:6.
[147] SOU 1990:13 p. 128.
[148] *Tor Mercia* NJA 1977 p. 49.
[149] SMC 13:6 2nd para.
[150] SMC 13:48.
[151] SMC 13:49-50.

in the bill of lading that he has not had the opportunity to inspect the goods.[152]

The person physically turning cargo over to the carrier for carriage has a right to a receipt that the cargo has been received. The receipt acts only as proof that the goods have been received by the carrier and not as a bill of lading.[153]

4.3.2 Accountability

The carrier is entitled to the freight that is current at the time of receipt and the freight should be paid at reception of the goods in lieu of an agreement on how the freight should be paid.[154] This provision is largely based upon trade usage. The freight is usually determined ahead of time in time tables and charts in the liner traffic, and the provision will mostly serve minor carriers.[155] That the freight is payable at the time of reception of the cargo is also due to the fact that it is already customary in the carriage of general cargo.[156]

The shipper does not have to pay freight for lost or damaged cargo.[157] This stems from the principle that a shipper should only have to pay for the cargo that remains at the end of the carriage. Thus, it is only natural that the carrier must return any freight he is not entitled to. The question whether certain cargo remains can be quite difficult. In *Asfar v. Blundell* water damaged dates were not fit for human consumption but could be used to manufacture spirits. The court ruled that the cargo did not remain the same. [158] In *Høegh Carrier*, however, water damaged grains were not fit for human consumption but suitable for feeding livestock. It was deemed to remain in the end of the carriage.[159]

4.3.3 Transportation

The carrier's obligation to transport the goods from and to the agreed ports must be fulfilled even if the vessel intended for the transport is lost or damaged. [160] This is due to the generic nature of general cargo transportation and that there are many other operators capable of covering up for the

[152] Falkanger, Bull & Brautaset, 2017, p. 398f.
[153] SOU 1990:13 p. 132.
[154] SMC Article 13:10.
[155] SOU 1990:13 p. 129.
[156] SOU 1990:13 p. 133.
[157] SMC Article 13:10 2st.
[158] *Asfar and Co v Blundell and Another* [1896] 1 QB 123.
[159] ND 1948 *Høegh Carrier*.
[160] SMC Article 13:15.

carrier.[161] The carrier must also take the most efficient route to deliver the goods carried and deliver in time.[162]

There are exceptions from the carrier's obligation to not deviate from the most efficient route. Deviations are always allowed to rescue people in need and for reasonable measures to salvage ships or other property at sea.[163] Some contracts contain transhipment clauses as well, allowing the carrier to transport the goods to the destination in another way than negotiated if certain situations arise, a bay filled with ice for example.[164] An unreasonable deviation from the route will most likely result in the carrier being liable for the damages that were caused by the deviation.[165] The carrier will not be able to limit liability as a result from deviation.[166]

The carrier may under certain circumstances deliver the goods to another port than agreed even without a transhipment-clause. It is allowed should an unforeseeable obstacle prevent the vessel from approaching the intended port, or if it is not possible to enter the port without suffering delay. Such obstacles could be ice in the bay, a blockade or an earthquake. When considering what constitutes delay it should be considered that time is of the essence in liner traffic and that other shippers who have contracted the carrier have an interest in their respective cargo not being delayed. [167]

The carrier must arrange, and pay for, transportation of the cargo from the port of unloading to the agree port if he chooses to not deliver. If the carrier does not arrange such transportation then he is not entitled to full freight, since the cargo was not delivered at the right port, and the freight must be deducted with regards to distance left to the port of delivery and other costs.[168]

Related to the obligation of transporting the cargo to the right port is the question of to what degree the carrier might tranship the cargo. Standard contracts of carriage in the liner business usually contains clauses allowing the carrier to be at liberty to tranship, reship and forward the cargo. Without such a clause the carrier would probably be limited to only unloading the cargo at another port when it is necessary to make room for other cargo.[169] The carrier has the obligation to care for cargo however and there might arise situations where he must forward the cargo with another ship without being able to wait for the shippers instructions first.

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[161] Grönfors, *Inledning till transporträtten*, p. 58
[162] Kurt Grönfors, *Tidsfaktorn vid transportavtal* (Akademiförlaget 1974), p.
[163] Falkanger, Bull & Brautaset, 2017, p. 380.
[164] SOU 2018:60 p. 111.
[165] Grönfors, *Inledning till transporträtten*, p. 59f.
[166] *Daewoo Heavy Industries Ltd. And Another v. Klipriver Shipping Ltd. And Another (The "Kapitan Petko Voivoda")* [2003] EWCA Civ. 451.
[167] SMC 13:15 2nd para.
[168] SOU 1990:13 p. 140.
[169] Grönfors, *Inledning till transporträtten*, p. 60f.

4.3.4 Care for cargo

The carrier must care for the goods during his period of responsibility.[170] He is responsible for any damage that occur during that time and this responsibility for the goods applies to the carrier's employees as well. This rule stems from a maritime tradition where the carrier was strictly liable for any damage to the goods with *force majeure* as the only exception.[171]

Goods transported on deck are exposed to the force of nature and more prone to get damaged. It is therefore prohibited to carry cargo on deck unless explicitly allowed by the contract of carriage, trade usage or mandated by law.[172] The carrier must show that such an exception is applicable. If the bill of lading does not show that deck cargo is allowed and the carrier attempts to show that there exist such an agreement outside of the bill of lading, that agreement is ineffectual against a third party that acquired the bill of lading in good faith[173] due to the bill of lading's status as exclusive proof.[174] The carrier that transports goods on deck in breach of this provision is not allowed to limit his liability for damaged goods where the cause to the damage was the transportation mode.[175]

Included in the obligation to care for the cargo is the carriers right and duty to perform actions in the cargo owner's interest if it is necessary to care for or deliver the cargo.[176] The carrier should contact the cargo owner for instructions in first hand, according to the obligation to keep the cargo owner informed, but if time is of the essence he may act on his own. The cargo owner is responsible for the carrier's actions towards third parties if they are in good faith. The carrier must inform the shipper of the actions taken. The shipper is responsible for expenses had by the carrier when he acted for the shipper, but it is limited if the carrier acted without instructions. To ensure that the carrier is not delayed waiting for the consignee to pick up the goods the carrier may warehouse the cargo if the consignee does not pick up the delivered goods in time.[177] If the carrier warehouses the goods he must inform the shipper/consignee along with a deadline, after which the carrier will sell the goods to cover his costs.[178]

The carrier must also make sure that the vessel is seaworthy. The seaworthiness of the vessel is not only dependant of the factual condition of the vessel but also includes whether the vessel is properly manned, has the right equipment and that the cargo holds are appropriate for the type of

[170] SMC 13:12.
[171] Grönfors, *Inledning till transporträtten*, p. 66.
[172] SMC 13:13.
[173] SOU 1990:13 p. 136.
[174] SMC 13:49.
[175] SMC 13:34.
[176] SMC 13:16.
[177] SMC 13:21.
[178] SMC 13:22.

cargo.[179] That means seaworthy is a relative term that must be determined from case to case. [180]

4.3.5 Delivery of goods

The carrier shall deliver the goods to the consignee on agreed upon place and time. There is no definition of a "consignee" in the SMC, but many contracts have a clause asking for a bill of lading as proof. The carrier is responsible to deliver the same amount of cargo that he received. It must be the same goods and should not be any more or any less than received.[181] The consignee is allowed to inspect the goods before receiving them and may refuse them should they prove faulty.[182]

The carrier is allowed to withhold the delivery of the goods if the consignee has an unpaid debt to the carrier. There is no explicit provision stating that the carrier must deliver the goods to the right person. This requirement can be understood from the nature of the bill of lading, according to Grönfors, since the carrier will exchange the goods against the bill of lading from the consignee.[183]

4.4 The carrier's liability

The carrier is liable for damage to or loss of the goods from the moment they are under his care at the loading docks, during transport until delivered at the port of unloading.[184] This is the above mentioned "tackle-to-tackle"-principle of the Hague and Hague-Visby Rules influenced by the "port-to-port"-principle of the Hamburg Rules.

The carrier is liable for negligence with a reversed burden of proof under Chapter 13 of the SMC. The claimant shows that a damage to the goods occurred during the carrier's period of responsibility it will be presumed that the carrier or his personnel was the cause of the damage. The carrier must prove that was not the case or show that an exception from liability is applicable.

The carrier is liable for an amount of at most 667 SDR per package or 2 SDR per kilo, whichever is the highest, should the goods be damaged because of the carrier's actions or omissions during his period of responsibility.[185]

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[179] SMC 13:12 2nd para.
[180] See Section 3.3.4.
[181] Grönfors, *Inledning till transporträtten*, p. 58.
[182] SOU 1990:13 p. 142.
[183] SOU 2018:60 p. 111.
[184] SMC 13:24.
[185] SMC 13:30.

4.4.1 Carrier's period of responsibility

The carrier's period of responsibility begins when the goods are in his custody. This is based on the 'tackle-to-tackle' principle of the Hague and Hague-Visby Rules that says that the carrier's period of responsibility begins when the shipper has delivered the goods next to ship and loading has begun. The carrier's period of responsibility begins when the goods are in his custody, including when the cargo is stored at a terminal, as long as the terminal is within the geographical area of the loading port and has been received by the carrier. That the carrier is responsible for the cargo while they are in the terminal is based upon trade usage[186] and serves to make it easier for the insurance companies.[187] If the carrier receives the cargo outside of the loading port and must transport it to the loading port there will be a need for the carrier and shipper to agree specifically whether the carrier is responsible according to the SMC.[188]

The carrier is not responsible for the goods anymore after he has delivered the goods to the consignee, a mandatory actor or the consignee has refused to receive the delivered goods. If the consignee does not receive the delivered goods from the carrier, the carrier may warehouse the cargo as per custom and Article 13:21 of the SMC. The period of responsibility will end when the goods have been stored in this way. The carrier is not responsible for the goods while it is in the care of an authority or other mandatory actor, such as government-controlled stevedores.[189]

4.4.2 Liability for loss of or damaged goods

The carrier is presumed to be liable for damaged or lost goods where the damage was caused by actions or omissions by the carrier, or persons he is responsible for, while in the care of the carrier. That is unless he can show that the damage was not caused by an act or omission by the carrier or a person he is responsible for. The carrier has the burden of proof because he is in custody of the goods and has better access to the evidence. If the burden of proof was reversed so that that shipper had to prove liability, as is the norm in tort law, it would most likely lead to that the carrier would escape accountability too often due to the claimant's difficulties in securing evidence.[190]

The number of persons the carrier is responsible for can be substantial. It includes not only the master of the ship and any member of the crew but

[186] See Combiconbill cl 10(1) & Peter Brodie, *Commercial Shipping Handbook* (3rd Edn Informa Law Routledge 2007) p. 94.
[187] SOU 1990:13 p. 146.
[188] Ibid.
[189] SMC 13:24 3rd para.
[190] Falkanger, Bull & Brautaset, 2017, p. 347f.

also any other person performing work in the ship's service, for example the pilot or the stevedores.[191]

The carrier may excuse himself and the persons he is responsible for from liability under certain circumstances. These circumstances are inspired by the catalogues of exceptions that can be found in the Hague and Hague-Visby Rules.[192] The former SMC from 1891 included a similar catalogue but was removed with SMC 1994 because most of the exceptions do not have independent meaning as grounds for exemption besides the ordinary rule of liability for negligence with a reversed burden of proof.[193] Two exceptions from the catalogue were kept, nautical errors and fire, as they work in another way.

The carrier is liable for navigational errors committed by himself and other senior employees, but not for navigational errors committed by the master of the ship, crew and other low-level employees.[194] The carrier is not protected from liability if he is the ships' master.[195] The consequence is that the owner of the goods must instead be reimbursed by his insurance company if the master causes the ship to run aground and the goods are damaged as a result. The cargo owner might be tempted to sue the master for negligence to circumvent the rules, but the carrier's personnel may use the same defence from liability as the carrier as long as they have acted within the scope of their employment and the contract of carriage includes a *Himalaya*-clause, which is very common.[196]

Fire is another of the carrier's exceptions from liability. The carrier is not liable for damage caused by fire to the goods, unless it is shown that the fire was caused by the actions or omissions of the carrier himself or upper management. For example, the carrier is not liable if a crew member causes a fire by smoking, but the carrier is liable if he has neglected to inform the crew of a smoking ban.[197]

The carrier cannot exempt himself from liability if he has failed to exercise due diligence when providing a seaworthy vessel. In *Pagensand* a shipment of paper was damaged due to a damaged sounding pipe. The Swedish Supreme Court judged that carrier would have discovered and remedied the fault if had he exercised his due diligence but since he had not, he was not allowed to rely on any exception from liability or to limit it. [198]

[191] Ibid, p. 352f.
[192] The Hague Rules Article 4(2) & the Hague-Visby Rules Article IV(2).
[193] SOU 2018:60 p. 207f.
[194] SMC 13:26.
[195] See ND 1974.315 NA SOTRA.
[196] See Section 3.4.2 on Himalaya-clauses.
[197] Falkanger, Bull & Brautaset, 2017, p. 356f.
[198] ND 1956 175 SH (Pagensand).

4.4.3 Liability for delayed delivery

The carrier is liable for damage caused by delayed delivery.[199] The goods have been delivered late if it has not been delivered in the agreed port of unloading by the time agreed. In the liner trade it is common for the carriers to not offer exact the dates and times the ship will arrive to port. The carrier gives estimated times of arrivals instead, both in schedules and tables published and in contracts of carriage.[200]

The alleged lateness must be determined by the time a careful carrier would need to perform the contract if it cannot be found that the parties have agreed upon a certain time the goods should be delivered by, an insignificant delay should not normally lead to liability for the carrier. Factors that might contribute are bad weather, any eventual strikes not caused by the carrier and so on.[201]

If the goods have not been delivered within 60 days after the date of supposed delivery the shipper/consignee can demand compensation for the cargo as if it had been lost. This provision seeks to protect the cargo owner when it is not clear whether the cargo have been lost or simply misplaced.[202]

There is no provision on the amount the carrier is liable for regarding delay. It must instead be solved with principles from tort law. When calculating the value of the goods the premise is that the shipper has a "normal interest" in the goods.[203] That is to say, the claimant is not entitled a larger amount of compensation from the carrier if the claimant was going to sell the goods for an extraordinarily high price. The claimant will instead be reimbursed according to what a deal would have yielded based on the market price. The market price should be defined as the value of the goods when delivered by the carrier. The carrier might have an extended liability if he is informed by the shipper of the importance linked to the transport which most likely would be reflected in an increased freight.[204]

4.4.4 Limits on liability

The carrier is not always liable for the entire amount of damage caused to the goods carried. There is an upper limit on the carrier's liability as a compromise for the rather strict liability. The carrier can limit the individual liability for each package or the weight of the goods. The upper limit on the liability owed to each individual goods owner is the same in the SMC as in the Hague-Visby Rules. The carrier is liable for 667 SDR for each damaged

[199] SMC 13:28.
[200] SOU 2018:60 p. 145.
[201] Falkanger, Bull & Brautaset, 2017, p. 387f. SOU 1990:13 p.
[202] Tiberg, Schelin & Widlund, 2014, p. 220.
[203] SOU 1990:13 p. 151.
[204] SOU 1990:13 p.151.

package or 2 SDR for each kilogram of the gross weight of the goods concerned, whichever is the highest.[205]

The carrier can also limit the total liability.[206] That means that the carrier's liability has an upper limit for all damage caused by a single incident. For example, imagine that a container ship is approaching its port of unloading it hits a pylon. The pylon belonging to the port, along with containers from several shippers onboard the ship, are damaged. If the individual damage owed to each person is added and the total is higher than the upper limit, the carrier may limit the liability to the upper limit. The individual liabilities must then be lowered proportionally.[207] The upper limit of the total liability differs depending on what kind of incident has occurred.[208]

The carrier may not limit his liability if the damage to the goods are caused by actions or omissions that were intentional or grossly negligent with knowledge that damage or loss would probably occur. The loss of right of limitation applies only to the person that commits the action. If the master of a ship intentionally causes damage to goods, the carrier may still limit his liability while the master may not. Additionally, the carrier may not use neither the excuses from liability nor the limitation of liability if he has carried cargo on deck in breach of the provision of the SMC.

4.4.5 Carrier's liability for other persons

The carrier might hire a subcarrier to perform the whole or parts of the carriage. If the goods are lost or damaged while in the subcarrier's custody the carrier remains liable as if he had performed the carriage himself.[209] This is likely to ensure that the shipper only has to deal with one party, making it easier for the shipper to be reimbursed. The carrier would then have to seek reimbursement from the subcarrier according to contract law.[210]

The carrier may reserve exemption of liability for loss of, or damage to, the goods while in the custody of the subcarrier, if it is expressly agreed in the contract of carriage that a subcarrier will perform certain parts of the carriage. The subcarrier would then be liable for the part of carriage performed by him according to the same provisions as the carrier. The subcarrier would also be able to use the same defences from, and limitation, of liability as the carrier.[211]

[205] SMC 13:30.
[206] SMC 9:1.
[207] SMC 9:6.
[208] SMC 9:5.
[209] SMC 13:35.
[210] Falkanger, Bull & Brautaset, 2017, p. 427f.
[211] Ibid, p. 430.

The carrier and the subcarrier have a joint and several liability if they are both responsible for the loss of or damage to the goods.[212] It is possible for the carrier and the subcarrier to agree on recourse despite the provision on joint liability.[213]

4.4.6 Notice of loss, damage or delay

If the consignee has received the goods from the carrier and has not informed the carrier of such damage to or loss of the goods that he should have noticed, it should be presumed that the goods were delivered in the same state as described by the bill of lading. If the damage or loss could not be seen at the reception of the goods there is a dead line of three days from the delivery for the consignee to give the carrier a notice of loss or damage. If the goods have been inspected jointly by the consignee and the carrier there is no need for a written notice, a verbal notice is sufficient.[214]

A notice of loss not issued in time does not mean that the consignee loses his right to compensation. It means that the goods will be presumed to have been delivered in order and that the consignee have the burden of proof to show that they were delivered damaged.[215]

[212] SMC 13:37.
[213] SOU 1990:13 p. 157.
[214] SMC 13:38.
[215] SOU 1990:13 p. 157.

5 Changes to the SMC suggested by the Commission

The Commission proposes that Chapter 13 of the SMC should be amended to reflect Chapters 4, 5 & 19 of the Rotterdam Rules in case of a ratification. Most of the amendments that have been proposed are made in order to restructure the format of the Chapter, as many of the provisions are already in effect in the current SMC. This Chapter analyses the substantial changes that are of interest and how they will affect carriers.

5.1 Scope of application

The proposed Chapter 13 would be applicable on contracts of carriage by sea of general cargo when Swedish law is applicable according to the Rome I regulation or when Swedish law has been chosen in arbitrary clauses. The applicability of Swedish law would be determined in the same way as it is currently.[216]

The proposed Chapter would also be applicable on foreign contracts of carriage where the carriage is only partly performed at sea. The last addition is to reflect the multimodal nature of the Rotterdam Rules and would give the proposed Chapter a greater scope of application than the current Chapter has.

5.2 The carrier's obligations

The Article 13:13 of the proposed Chapter states the carrier's obligation to transport the goods and deliver it to the consignee.[217] This obligation is not explicitly stated in the current SMC but can be understood from the promise in the transport contract, as reasoned by Grönfors.[218]

The carrier must perform the loading, stowing and unloading with care according to the Article 13:14 of the proposed Chapter, same as under the current SMC. The proposed article acknowledges FIO-clauses, however, which the current SMC does not. [219] This means that the parties to a transportation contract can agree on who is the most suitable to perform certain operations of the carriage, as long as it is explicitly stated on the

[216] See Section 4.1.
[217] SOU 2018:60 p. 194.
[218] See Section 4.3.
[219] SOU 2018:60 p. 195.

transport document. It is good for the carrier to have more freedom to determine how the carriage should be performed.

The sea worthiness of the ship is proposed to be determined by the physical state of the vessel as well as the condition of equipment and knowledge of personnel.[220] The major difference from the current SMC is that the obligation to keep the ship seaworthy would be a continuous duty. This a very significant change from the current SMC and it could prove very costly for the carriers to keep the ship seaworthy continuously. How far reaching the duty will be remains to be seen and the uncertainty is not very appealing to the carriers as all uncertainty will have to be solved in court rooms and expensive settlements. The second paragraph of the proposed Article 13:16 clarifies that cargo rooms and transportation devices provided by the carrier must be in good condition and that the duty is as far going as the duty to keep the ship seaworthy.[221] This is provided in the current SMC but not in the Hague-Visby Rules. The Rotterdam Rules would make the provision uniform over the world and increase predictability as the same rules applies everywhere, which should be welcomed by the Swedish carriers.

It is currently prohibited to carry goods on deck unless the deck carriage is trade usage or agreed between the parties. The proposed Article 13:17 also prohibits carriage of goods on deck but has an additional exception. Deck cargo would be allowed in containers suitable for deck carriage, if the ship's deck is suited for transport of containers of that type.[222] This is a welcome recognition of the container revolution that has spread over the maritime world since the 1960's.

The proposed Article 13:18 builds upon an already existing provision but is expanded to protect the environment and allow the carrier to refuse receiving or loading the goods.[223] The provision would be an exception from the carrier's obligations to transport and keep the goods safe. The carrier is proposed to be allowed to refuse to receive or load goods if it is or could become a danger to persons, property or environment. If the goods have already been loaded, he may take reasonable measures, such as unloading, render it innocuous or destroy the goods to neutralise the danger. It is good that the carriers' have additional options to handle potential risks and that the environmental aspect has been considered.

The proposed Article 13:19 has no corresponding provision in the current SMC and would mean that the carrier is allowed to sacrifice goods at sea if it is done to ensure the safety of persons or of property involved in the common adventure. Like the proposed Article 13:18 this provision works as an exception from the carrier's obligations to care for and transport cargo.

[220] SOU 2018:60 p. 196f.
[221] SOU 2018:60 p. 196f.
[222] SOU 2018:60 p. 197.
[223] SOU 2018:60 p. 198f.

The shipper whose property was sacrificed is entitled to compensation from the other participants of the adventure. [224]

5.3 The carrier's liabilities

5.3.1 The carrier's period of responsibility

According to the proposed Article 13:23 the carrier's period of responsibility begins when the carrier has received the goods. That could be when the goods have been received at a terminal in the loading port, but it could also be in another town than the loading port. The period of responsibility ends, conversely, when the goods have been delivered. The period of responsibility is extended compared to under the current SMC where the period of responsibility does not begin until the goods have been received at the loading port and delivered at the unloading port.[225]

Article 12(3) of the Rotterdam Rules provides that the parties can agree when the carrier's period of responsibility should begin and end. For example, they could agree that the period of responsibility should not include when the goods are at transport terminals. It was left to each convention State to decide whether to include the provision in national legislation or not.[226] The Swedish Commission decided not to include the provision, as did the Norwegian Commission. Both Commissions want the carrier's period of liability to cover terminal periods as it would be more in line with the States' overall maritime legislations. The Danish Commission reasoned differently and chose to include the option, which is interesting given the Scandinavian States' close maritime tradition.[227]

5.3.2 The carrier's liability for lost, damaged or delayed goods

Article 17 of the Rotterdam Rules has been split into separate articles in the proposed Chapter 13 of the SMC. The proposed Article 13:24, corresponded by Articles 13:25 & 13:28 of the current SMC, provides that the carrier is liable for damage suffered due to loss of, damage to or delayed goods if the cause of the damage occurred within the carrier's period of responsibility.[228]

The Rotterdam Rules does not provide what constitutes delay if the parties have not agreed on a date of delivery and it is the Commission's opinion that it has been left to each Contracting State to determine what constitutes delay. The Commission has proposed to keep the provision that it is delay if

[224] SOU 2018:60 p. 199f.
[225] SOU 2018:60 p. 202f.
[226] UNCITRAL A/63/17 p. 40.
[227] SOU 2018:60 p. 203 & NOU 2012:10 p. 66.
[228] SOU 2018:60 p. 204.

the transportation has taken more time than an ordinarily careful carrier would need.[229] The provision in the current SMC stating that the consignee is entitled to damages as if the goods were lost if they have not been delivered within 60 days from the date of delivery has been removed as the UNCITRAL debated whether to include a similar rule but decided not to. The rule was considered to create more difficulties than it would solve.[230]

An adoption of the proposed article would entail that the carrier is liable for lost, damaged or delayed goods in largely the same way as earlier. The carrier would not have to pay damages to the claimant for goods that have been lost for 60 days, which is positive for carriers.

Articles 17(2)-(3) of the Rotterdam Rules are corresponded by Article 13:25 in the proposed Chapter of the SMC. There are several changes from the current articles. A catalogue of situations and events exempt from the carrier's liability has been included again, after being removed in the SMC of 1994. The Commission reasons that a catalogue of exceptions is still not necessary in Scandinavian maritime legislation but chose to include it in order to liken Chapter 13 of the SMC's structure to the Rotterdam Rules. Other consequences are that nautical errors are not applicable exceptions from liability anymore and that the carrier is liable for damage from fire, even if it is caused by low-level employees. There is a difference in attempts to save human lives and property, attempts to avoid damage to the environment are justified and it is acknowledged that FIO-clauses affect the liability of the carrier.[231]

That the carriers can no longer use nautical errors as an excuse from liability is not surprising and justifiable considering the technological advancements that have been made the last decades. It will probably lead to higher costs for the carriers as they must insure themselves against liability from nautical errors. The increased cost will be matched by increased prices for the shippers. This is, in the author's opinion, a zero-sum game as the reverse would mean that the shippers must insure themselves and thus be entitled to lower prices as they are holding the risk. Nonetheless, the removal of the nautical error-exception will mean an increased cost for the carriers as they will be held liable in more cases.

Fire on the ship could still be used as an exception from liability if the proposed Chapter is adopted. The exception would have a smaller application though as the carrier would be held liable for fires caused by all his subordinates as opposed to the current provision where the carrier is only liable for fires caused by himself or the upper management. That the application of one of the excuses from liability is limited would have a negative effect on carriers' economy as they would be found liable more often. It is quite justifiable to say that the carrier must be liable for the actions of all his subordinates, even if it would have a negative result for

[229] Article 13:28 2nd para. of the current SMC.
[230] UNCITRAL A/CN.9/552 p.29.
[231] SOU 2018:60 p. 206-210.

carrier. The onus for hiring competent personnel and instructing them in fire safety on the ship cannot be on the shipper.

It is good that a distinction has been made between all attempts to save human lives and reasonable attempts to save property as human lives are invaluable while it cannot be justified to cause damage to one's cargo while attempting to save property of a lesser value. It is also good that the environmental aspect is considered. It can be questioned, however, if rescue attempts are made so often that the changes have any major effect on the carriers' liability.

FIO-clauses are common in the maritime sector and it is important that they work as intended. It is therefore good that a voluntary division of liability for loading, stewing and unloading between the parties is respected in the legislation. It could be a sign that the carrier and the shipper approach equal standing and can negotiate a deal between themselves without mandatory legislations like the Hague-Visby and Rotterdam Rules.

5.3.3 Carrier's liability for other persons

Article 13:29 of the proposed Chapter holds the carrier liable for the actions and omissions of performing parties, master and crew, employees and any other person who perform or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.[232] This can be compared to 13:35 & 13:1 of the current SMC that holds the carrier liable for the person who, on the carrier's mandate, performs the carriage or parts of it. The amount of subordinates the carrier is liable for would be extended by an adoption of the proposed Chapter as the new provision encompasses not only his employees and independent contractors but also the subordinates of the independent contractors as the *Muncaster Castle*-case has been included in the Rotterdam Rules.

A maritime performer has a smaller scope of liability than the carrier as it only applies on the task the maritime performer performs. He has the same obligations, rights and liabilities.[233] This can be compared to Article 13:36 of current SMC where a subcarrier is liable according to the same rules as the carrier for the part of the carriage performed by the subcarrier. This will not affect the liability of the carrier but might extend liability for maritime performing parties as the liability has been extended for carriers.[234]

Employees of the carrier and performing parties cannot be held liable for their actions and omissions done in service to their employer according to

[232] SOU 2018:60 p. 212f.
[233] SOU 2018:60 p. 213f.
[234] See Section 5.2.2.

the proposed Chapter.[235] This exemption is not part of the current SMC, but it is common trade usage with a Himalaya-clause in the transport document that protects employees of the carrier. The proposed provision will not affect the carrier's liability but it is a good thing that common workers cannot be ruined by a lawsuit that will not even remedy the damage that was suffered.

5.3.4 Limits on liability

Damages on account of the goods being damaged or lost shall be calculated on the basis of the market value of goods of the same kind at the place and time at which they were delivered according to Article 13:34 of the proposed Chapter. This is the same method as in the current SMC.[236]

The amount the carrier can be liable to the claimant is limited to 875 SDR per damaged package or other shipping unit, or 3 SDR per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper. The limits of liability have been raised compared to the current SMC which means that the maximum amount the carrier might pay is more than before. It can be seen as negative for the carrier but is in the opinion of the author a zero-sum game as raised limits will be reflected by raised freights.

The claimant is entitled to damages on account of delay. The amount of the damages shall be calculated in the same way as in proposed Article 13:34, if the delay has caused damage or loss to the goods. Damage from pure delay, a contract of resale that could not be fulfilled for example, shall be calculated according to principles from tort law according to the Commission, as it is not provided in the Rotterdam Rules. The liability is limited to two and a half times the freight but may not be larger than the sum given in proposed Article 13:37 1st.[237] There is no limit on liability for delay in the current SMC, so the proposed article is a good change for carriers.

5.3.5 Notice of loss, damage or delay

According to the proposed Article 13:39 the consignee must inform the carrier or performing party of loss of or damage to the goods at delivery or it will be presumed to have been delivered in the condition stated on the bill of lading. Notice of damage or loss can be given within seven days after delivery if the damage was not visible. The notice should be written and state the type of damage. This can be compared to current SMC where a

[235] SOU 2018:60 p. 215.
[236] SOU 2018:60 p. 216.
[237] SOU 2018:60 p. 217.

notice of loss or damage can be verbal and the consignee have three days to deliver a notice of loss or damage if the damage was not visible.[238] The extended time limit is negative to the carriers as it gives the claimant better chances to discover potential faults and sue for damages. That the notice must be written will likely ensure a more legally secure procedure as it will be easier with the evidence.

The claimant must give written notice of damage from delay within three weeks from delivery stating the extent and type of damage. He will lose right to compensation if the notice is given too late. The claimant has 60 days to give a notice of delay under the current SMC. It would be good for the carrier that the claimant has a smaller time window to sue for damages.

Notice of loss or damage is not required if the loss or damage was discovered during a jointly inspection at delivery with the parties the claim is directed at. This is corresponded by the second paragraph to Article 13:38 of the current SMC. That the parties should give each other access to the damaged goods to inspect and control the damage as well as access to transport documents and other relevant documents is a new addition to the proposed SMC. It is currently governed by provisions in the Swedish code of judicial procedure. It is positive for the carriers that it is the same rules over the world and not different for each jurisdiction.

5.4 Analysis

Many of the changes in the proposed Chapter affect the form of the Chapter rather than the substance. The proposed Chapter is restructured to have a layout similar to the Rotterdam Rules and the language of the provisions is more modern. Many of the proposed changes are slightly negative for the carriers. An adoption of the Chapter would mean higher limits on liability for carriers, a larger scope of liability, reduced possibility to exemption from liability and more rigorous obligations. Some of these changes would be worse than others. The obligation to keep the ship seaworthy even during the carriage is not only far-reaching but also represents a large uncertainty for the involved parties as it is not clear how the provision should be interpreted. That uncertainty will cost a substantial amount of resources in court rooms. Other changes are not as negative. That the time limit to give a notice of loss or damage has been increased from three days to seven is not likely to have any larger impact on the carriers' economies. There is also good news for the carriers in the proposed Chapter. The carriers can divide the liability for loading, stewing and unloading between themselves and the other party according to their needs and ability which should reduce costs for both parties.

Even though an adoption of the proposed Chapter will increase ship owners' liabilities, it might be the right way to go. The maritime world is split

[238] SOU 2018:60 p. 217f.

between three conventions today which are all, in some way, lacking with regards to the advancements in shipping technology and practice. If these conventions cannot be replaced with the uniform approach that the Rotterdam Rules represent the alternative will be regional solutions. A consequence of these regional solutions would be the same uncertainty, and possibly increased liability, multiplied with each and every region. The many different maritime regimes would cause great confusion and hinder trade as the ship owners must be wary of what rules apply where.

It should also be considered that the purpose of the conventions has historically been to protect the shipper, who was seen as the weaker party. Today the shipper can be huge forwarding companies, as rich and powerful as the carrier and sometimes even more so. It is hard to argue that they need legislation to protect their interests, especially as the Article 13 of the Rotterdam Rules has been introduced to let parties negotiate FIO-clauses and divide the liability between themselves.

The shipper can also be a small company in the developing world. Developing countries generally favour the Hamburg Rules which are more shipper-friendly while the rich countries favour the carrier-friendly Hague and Hague-Visby Rules. It would not be fair to remove the shipper's protection from the developing countries with the motive that companies in the wealthy, industrialised countries have become too rich. If the Rotterdam Rules are not implemented on a global scale and regional solutions are found instead, it would be very hard for the developing countries to establish themselves internationally as they would have to learn not only one legal framework, but several.

6 Implementation of the Rotterdam Rules in other States

As of December 2018, 25 States have signed The Rotterdam Rules, signalling their intention to adhere to the convention. At least 20 States must ratify the Rotterdam Rules before it can enter into force and only Cameroon, Congo, Spain and Togo have done so. Most of the other countries are waiting to see what major maritime and trade nations such as the USA and China are going to do.

The Rotterdam Rules are currently under consideration by the U.S. State Department and the President of the USA will present the convention to Congress if he thinks it is a good idea to ratify it. [239] A convention must obtain the approval of two thirds of the US Senate to be ratified. The USA were optimistic about implementing the Rotterdam Rules at first, since it is one of the world's largest importer and exporter of commodities and in favour of protecting the cargo owners' interests. It is not so certain that they will take action, however, considering the current administration's position regarding trade conventions and the fact general divisiveness of their politics.[240]

A ratification from China would likely encourage ratifications from other Asian countries in the area, making the Rotterdam Rules more attractive to the rest of the world. China does not currently apply neither the Hague, Hague-Visby nor Hamburg Rules. Currently China relies on its national legislation, which is inspired by those conventions. Legal scholars in China debate how the Belt and Road Initiative of the Chinese government would be affected and whether to ratify the Rotterdam Rules, to wait and see how the new provisions work in practice or to adopt the provision into the Chinese Maritime Code. The debate is ongoing and not near to be concluded, a potential Chinese ratification of the Rotterdam Rules is still far from reality.[241]

The Dutch government has submitted two bills to their Parliament. The first authorises the government to denounce the Hague-Visby Rules that are currently in force and ratify the Rotterdam Rules instead. The second bill will change the provisions in the Dutch Civil Code so that it does not

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[239] < https://www.state.gov/s/l/commercial/ > 2018-11-23. 12:01.
[240] Utsav Mathur, 'Rotterdam Rules – Ratification Status in the US and effectiveness of choosing to apply them voluntarily', Norton Rose Fulbright, available at <http://www.nortonrosefulbright.com/knowledge/publications/140550/rotterdam-rules-ratification-status-in-the-us-and-effectiveness-of-choosing-to-apply-them-voluntarily>. Cited on 2019-01-08.
[241] James Zhengliang Hu and Siqi Sun, 'A study on the updating of the law on carriage of goods by sea in china' (2016) ANZ Mar LJ 30, p. 123f.

mention the Hague-Visby Rules anymore. The Civil Code will not be amended to reference the Rotterdam Rules as it is seen as a self-executing convention. The bills do not contain any dates of when the Rotterdam Rules will be applicable in the Netherlands. The idea is that the Parliament will wait until a suitable amount of nations have ratified the Rotterdam Rules, making it worthwhile to switch. It is likely that the USA or a large amount of European countries would suffice.[242]

6.1 Implementation in Denmark

Denmark, like all Scandinavian countries, apply the Hague-Visby Rules. They have committed to adopt the Rotterdam Rules as soon as the Convention becomes widespread. Denmark began its process to ratify almost immediately after signing the Rotterdam Rules in 2009, by appointing a Commission that would make a report on what changes were needed to the Danish Maritime Code to apply the Rotterdam Rules. A similar Commission was appointed in Norway in the same time and several joint meetings were held to ensure the traditional Scandinavian cohesiveness of the respective maritime codes. During those meetings Denmark chose to transform the Rotterdam Rules verbatim and implement them in the Danish Maritime Code to ensure that their chapter on the Rotterdam Rules is as similar to the convention as possible. This makes it easier to make references in international trade. Representatives from Sweden and Finland partook in some of the meetings even though they had not yet officially begun their ratifying processes.

The Danish Government has since then put forward the Danish Commission's proposal as a bill before their Parliament where it was adopted. It will come into force when Denmark choses to ratify the Rotterdam Rules, most likely after the USA have ratified the convention.

It is the opinion of Uffe Lind Rasmussen, from the Danish Commission, that global uniformity is of great importance and that the Rotterdam Rules could be the last chance to obtain it. There is a risk that the world will be divided into different regional solutions instead of the Rotterdam Rules if it fails to win acceptance.[243]

6.2 Implementation in Norway

Norway signed the Rotterdam Rules in 2009 and subsequently ordered a Commission to report on the best way to ratify the convention. Jointly meetings were held with Denmark in order to maintain the long tradition of

[242] Taco van der Valk, 'Netherlands prepares to adopt Rotterdam Rules', International Law Office, 2018.
[243] Uffe Lind Rasmussen, 'Implementation of the Rotterdam Rules: Denmark' in Schelin (ed) *Talks on the Rotterdam Rules* (Poseidon Förlag AB 2014), p. 125-128.

harmonising Scandinavian maritime law. Sweden and Finland participated in some of the meetings. Like Denmark the Norwegian Commission decided to adopt the convention into their maritime code by translating it and amend the already existing legislation. They reasoned that the Rotterdam Rules prioritise substance over form and that a word by word translation would not be required.[244] The Norwegian Commission reasoned further that the Rotterdam Rules are of limited value with regards to the provisions on liability and the limitations on it, but that a uniform maritime framework would be worth an adoption of the Rotterdam Rules.[245] The Norwegian Commission has delivered a proposal on how the Norwegian Maritime Code should be amended to adopt the Rotterdam Rules, along with a recommendation that a ratification should not be done until after the USA or a major European country ratifies the Rotterdam Rules.

6.3 Implementation in Sweden

Sweden signed the Rotterdam Rules in 2011. The Swedish Ministry of Justice commissioned in 2016 the Justice of the Supreme Court Svante O. Johansson to deliver a Swedish Government Official Report on whether Sweden should ratify the Rotterdam Rules and if so, how it should be done. Several renowned Swedish maritime scholars and professionals were appointed as expert advisors.[246] The Commission has informed itself about the legislative work done by the Danish and Norwegian Commissions, in order to keep the shared Scandinavian maritime legislations. The Commission has also investigated what opinions important trade partners have on the ratification and implementation of the Rotterdam Rules. The Swedish Ministry of Justice received the Report in August 2018 and subsequently requested referral on the proposed suggestions from authorities and major businesses related to the transport sector. Examples are associations for ship owners, banks, stevedores and insurance. The organisations shall submit their answers by March 2019 at the latest and the Commission will consider the answers as they draft a government bill.

As Sweden is a dualist state there are typically two ways to ratify a convention; transformation and incorporation. Transformation is the most common method used in Scandinavia to ratify maritime conventions.[247] The Swedish Commission wanted to ratify the Rotterdam Rules by incorporation as to avoid any errors in translation. The Danish and Norwegian Commissions had already decided on transformation, however, and the Swedish Commission decided to suggest transformation as well to preserve the Scandinavian regional legislation harmony.[248]

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[244] Erik Røsæg, 'Implementation of the Rotterdam Rules' in Johan Schelin (ed) *Talks on the Rotterdam Rules* (Poseidon Förlag AB 2014) p. 85.
[245] NOU 2012:10 p. 45f.
[246] SOU 2018:60 p. 3f.
[247] SOU 2018:60 p. 135.
[248] SOU 2018:60 p. 136.

The Commission deem that the legislative advantages of the Rotterdam Rules are not enough to justify a Swedish ratification in themselves. Instead, the settling question is whether the Rotterdam Rules will enable an international uniform maritime framework. Like its Danish and Norwegian counterparts, the Swedish Commission suggest that a ratification should wait until USA or another major trade partner has ratified the Rotterdam Rules to ensure that Sweden does not ratify a convention that will not gain traction. [249]

[249] SOU 2018:60 p. 126f.

7 Discussion

There are three positions Sweden could take regarding the Rotterdam Rules. Sweden could choose not to ratify the Rotterdam Rules, to ratify them immediately or to ratify the Rotterdam Rules later.

The advantages of not ratifying the Rotterdam Rules are that the current SMC is based on a known convention with abundant jurisprudence. A rich amount of case law means that parties can predict how articles and provisions should be interpreted. Predictability is good for trade in general and insurance companies in particular. It would be a risk to ratify the Rotterdam Rules instead as they are untested. Another advantage is that the Hague-Visby Rules are widely applied in the world and it is good for Swedish trade to apply a convention that is widely used since the same rules will apply in the States of the trade parties. The drawbacks are that the Hague-Visby Rules are not very up to date with modern technology and maritime trade practices, and that the world is split between the Hague, Hague-Visby and Hamburg Rules. If not enough States ratify the Rotterdam Rules it will be quite some time until another attempt at a maritime convention is made. In the meanwhile, the world will continue being split between the three conventions. The holes in their provisions, that the Rotterdam Rules were supposed to fill, will instead be solved by several different regional solutions. It will be even harder to draft a convention that is suitable to every State after that has happened.

The main rationales for ratifying the Rotterdam Rules are harmonising the maritime legislations of the world and updating the current conventions to modern trends and technologies. It is the opinion of the Commission that the modernisation of the Rotterdam Rules does not offer a sufficiently strong ground in itself compared to the SMC. The Commission has instead proposed that Sweden, like many other States, should only ratify the Rotterdam Rules in case the convention becomes widely ratified. The opinion of the Commission is not very surprising as it goes along with the intentions of the other Scandinavian States. It is a long tradition that the Scandinavian States strive to keep a harmonised regional legislation.

A ratification of the Rotterdam Rules would mean minor costs for the Swedish ship owners according to the calculations of the Scandinavian Commissions and any potential increases in insurance premiums would be compensated long term. The compensation would come partly from the increased predictability that would follow from a unified maritime world and partly from the effectivization measures that can be made due to the Rotterdam Rules provisions on electronic transport documentations and multimodal transports.

The author of this thesis agrees that it is a good idea to ratify the Rotterdam Rules despite the negative consequences it would have for the carriers'

liabilities. The analysis in Section 5.4 shows that costs would increase for carriers as their possible defences from liability are diminished while the scope of the liability is increased. The carriers can negate these costs by raising their freights and thus making it a zero-sum game. There would undoubtedly be initial costs when uncertainties from the new legislations must be tried in court and new sound systems implemented to keep the ships seaworthy during the whole voyage. Those costs will be saved in the long term if the Rotterdam Rules are applied globally when compared to the costs the carrier would have for operating in several regions with different legal systems.

The Rotterdam Rules also takes a step in the right direction by acknowledging the FIO-clauses. It can hopefully lead to more freedom of contract between the carrier and the shipper in the future. The shippers are substantially stronger now than a century ago when the Hague Rules were drafted, and it does not make sense to have a convention whose purpose is to protect the shipper when they do not need it.

It could be argued that there are still shippers in developing States that are weak and need protection from the carriers, but there are also carriers in those States that need protection from powerful shippers. Those carriers would not be helped by the Rotterdam Rules. The world operates, largely, on a market economy where the most able companies makes it. That market economy should not be disrupted by conventions protecting weaker companies. It is the opinion of the author that these actors should instead, at most, receive financial support and legal education from an UN agency so that they are able to compete on the same terms as actors from wealthier States. It is also the opinion of the author that Sweden should ratify the Rotterdam Rules, not because it is a very good set of rules, but because it is better than nothing. Ideally the Rotterdam Rules would then be replaced with a convention based solely on the needs of the industries, like the Hague Rules.

It is problematic that every State wants to wait and observe what the other States are going to do since it means that no one is going to move first. If the Rotterdam Rules fails it might be some time before another attempt is made and it is not unlikely that regional solutions will emerge instead. It would then be even harder to find a global solution that would satisfy the different regions.

If enough States ratify the Rotterdam Rules along with Sweden it could influence others to do the same. It begs the question, however, would the rest of the world be spurred to ratify the Rotterdam Rules if Sweden ratified the convention? Sweden is not a major maritime trade nation so there would not be economically justifiable for other States to ratify the Rotterdam Rules in order to simplify trade with Sweden. It is the author's opinion that Sweden would not be able to inspire the rest of the world and instead stand alone.

It would not be good for Sweden to ratify the Rotterdam Rules before the other States. There would be uncertainty for trade partners from other States as the new SMC based on the Rotterdam Rules would be new with unknown jurisprudence. The Scandinavian harmonisation would be ended as well. It is instead better to wait until a major part of the maritime world has ratified the Rotterdam Rules. It is therefore the author's opinion, along with the opinions of the Scandinavian Commissions and a plethora of scholars around the world, that a ratification should not take place until the USA or a substantial part of the EU-States have ratified the convention.

8 Conclusions

I. The Rotterdam Rules apply to all contracts of carriage of general goods when at least one of the ports of receipt; loading; unloading; or delivery is located in a Contracting State, one of the transport legs are by sea and the carriage is sufficiently international. The carrier's period of responsibility begins when the carrier receives the cargo and ends when the carrier delivers the cargo. During this time the carrier is obligated to care for the shipper's cargo and transport it to the right person within the agreed timeframe. The parties to a contract of carriage can divide the obligations of loading, handling, stowing, lashing and securing, and unloading the goods between them as they see fit if they do so in the contract of carriage with a FIO-clause.

The carrier can care for the cargo directly and indirectly. The carrier cares for the cargo directly when he is loading and stowing the cargo. He cares for the cargo indirectly by keeping his ship seaworthy. The obligation to care for the cargo indirectly has been increased as he must exercise due diligence to keep the ship seaworthy even during the voyage and not only before and at the beginning of it.

The carrier is liable damage to the cargo that was caused during the carrier's period of responsibility, except when certain exceptions are applicable. Navigational errors are no longer one such exception. The carrier is also liable for damage that was caused by delay. The carrier is liable for the actions and omissions of all persons undertaking to perform his obligations to the shipper. The carrier is not liable for damage to goods caused by deck carriage if he used the correct container equipment or there was an agreement with the shipper or part of trade usage. The carrier is not liable for damage to the goods if it occurred during loading, handling, stowing or unloading of the goods and it was agreed that the shipper would handle those obligations. The limits on liability are 875 SDR per damaged package or other shipping unit, or 3 SDR per kilogram of the gross weight of the goods that are damaged, whichever amount is the higher.

II. The SMC applies to contracts of carriage by sea of general cargo when Swedish law is applicable according to Rome I or when Swedish law has been chosen in arbitrary clauses. The carrier's period of responsibility begins when cargo has been received in the port of loading and delivered in the port of unloading. During the period of responsibility, the carrier must care for the cargo directly by loading, stowing and unloading it and make sure that it is not damaged during transport. He must also care for the cargo indirectly by exercising his due diligence before and at the beginning of the voyage to ensure that the ship is seaworthy.

The carrier is liable for damage to the cargo that was caused during the carrier's period of responsibility. The carrier is also liable for damage that

was caused by delay. The carrier is liable for the actions and omissions of his personnel and subcontractors. The carrier is liable for damage caused to the cargo if it was carried on deck, unless there was an agreement with the shipper or part of trade usage. The carrier's limit on liability is 667 SDR per damaged package or other shipping unit, or 2 SDR per kilogram of the gross weight of the goods that are damaged, whichever amount is the higher.

III. The scope of application of the proposed SMC would be broader. It would still only apply to contracts of carriage where Swedish law applies but it would also apply to foreign contracts of carriage where only a part of the transport is performed at sea. The period of responsibility would be extended as the carrier can receive and deliver goods outside the ports of loading and unloading under the proposed SMC. The obligation to care for the cargo would be extended as the carrier's indirect care for the cargo is made to a continuous duty.

The carrier would be liable more often as the carrier's liability is based on his breach of obligations during the period of responsibility, which both have been increased. He would also be liable for the actions of more people. The carrier would have less exceptions from liability and would be held liable for larger sums as the limits on liability have been raised.

IV. The Rotterdam Rules has not had an effect in Norway and Denmark because they have not ratified the convention yet. They are, like many other States, waiting to see if the USA will ratify the Rotterdam Rules. It would be unwise to ratify the Rotterdam Rules before the rest of the world does. The USA are a good benchmark of that because they are a major trade nation and many States want to apply the same legal framework as them in order to facilitate trade easier.

V. Yes, Sweden should ratify the Rotterdam Rules even though an adoption will mean increased liabilities for the carriers. It is better with a convention that everyone applies than several regional solutions that makes it complicated to trade globally. Sweden should ratify the Rotterdam Rules in lack of a set of rules that are friendlier towards carriers. The Swedish ratification should take place when the USA or several major EU-states are in the process to ratify and it is clear that the rest of the world will ratify the Rotterdam Rules. Sweden would be taking a to large risk if we ratify the Rotterdam Rules before the USA.

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