

International Regulation of Liability for Multimodal Transport

Current liability regime Vs. The Rotterdam Rules

Dr. Mahin Faghfour

International Multimodal Transport Association



International Regulation of Liability for MT: Current liability regime Vs. The RR

- I. Introduction and background
- II. Current liability framework
- III. Attempts at establishing a uniform regime at international level :
 1. *1980 UN Convention on International Multimodal Transport of Goods*
 2. *1992 UNCTAD/ICC Rules for Multimodal Transport Documents*
- IV. Existing MT laws: *influenced by the MT Convention*
- V. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (*The Rotterdam Rule*)

I. Introduction and background

- Growth in containerized trade and multimodal transport
- Need for uniform international legal framework
- Practical aspects: MT and standard term contracts
- Mandatory minimum standards of liability:

Transport conventions

What is multimodal transport?

- No single authoritative definition
- Definitions often based on the MT Convention 1980
- Carriage by *two or more modes of transport*
- Door-to-door transport
- Often under *one contract* and with *one party assuming responsibility throughout*
- One document

II. Current liability framework

- **MT Convention 1980** is not in force
- National, regional, subregional MT laws (**ALADI, Andean Community, MERCOSUR, ASEAN**)
- Localized loss: unimodal Conventions on carriage by sea, road, rail, air
- Otherwise: standard term contract (*e.g. FIATA FBL 92, BIMCO MULTIDOC 95*)

Current liability framework

Liability rules vary depending on:

- *Stage of transport where loss or damage occurs*
- *Applicable regime*
- *Causes of loss or damage*

Diversity of approach on key issues such as liability basis, delay, limitation and time-bar, e.g. limitation amounts vary from 2 SDR (HVR) to 19 SDR (Montreal Convention)

III. Attempts at establishing a uniform regime at international level

1. United Nations Convention on International Multimodal Transport of Goods 1980

- Has not entered into force but has provided *a basis for enacting laws on MT at national, regional and subregional level*
- Apply mandatorily to ***all contracts of MT*** between Contracting States
- ***Liability rules uniform***, but limitation of liability may vary
- **MTO responsible throughout** (from taking goods in charge until their delivery)

2. UNCTAD/ICC Rules for Multimodal Transport Document 1992

- Contractual rules: *Need to be incorporated into contracts*
- Apply subject to mandatory international convention or national law
- *MTO assumes responsibility throughout*

- Liability system: *“modified uniform”*
 - basis of liability uniform: but exceptions to liability may vary
 - liability limits vary
- Widely used: incorporated in *FIATA FBL 1992 & BIMCO MULTIDOC 1995*

IV. Existing MT laws: influenced by the 1980 MT Convention

- Application *mandatorily* to *all MT contracts*
- MT under one contract, and transport document
- *MTO assuming responsibility throughout*
- *No contracting out of any part of transport or any function*

V. The Rotterdam Rules

- Adopted by the *UN General Assembly* on 11 Dec. 2008
- Was opened for signature on 23 September 2009 in Rotterdam, the Netherlands
- 24 States have signed the Convention, but only one State (Spain) has ratified it
- 20 ratifications required for the Convention to enter into force

What is covered?

The Rotterdam Rules:

- Apply to contracts for carriage of goods by sea and *multimodal transport including an international sea leg*
- Based on maritime concepts and existing maritime liability regimes, but significant changes in structure, substance and drafting
- Many provisions are lengthy and highly complex (96 articles in 18 chapters, only 3 arts. relate to MT)

And:

- Chapters on *jurisdiction* and *arbitration* are: ***optional***
- Cover issues not already subject to international uniform law, such as:
 - delivery of the goods,
 - transfer of rights,
 - right of control,
- Provide for electronic communication / electronic transport records
- Permit freedom of contract for “*volume contracts*” in liner trade: *highly controversial*

The Rotterdam Rules: Multimodal application

Highly controversial throughout negotiations

Concerns as to:

- *unsuitability of the liability rules to apply to MT*
- increasing *fragmentation* of the law applicable to MT
- possible *conflict with unimodal conventions*
- desire to apply national laws on MT

A “*maritime plus convention*”

The Rotterdam Rules apply to:

Int. contracts of carriage of goods wholly or partly by sea

Contract of carriage is defined as:

“a contract in which the carrier, against payment of freight, undertakes to carry goods from one place to another. ***The contract shall provide for carriage of goods by sea and may provide for carriage by other modes of transport in addition to sea the carriage***” (art. 1(1))

Sea carriage & MT involving an international sea leg covered

But potential uncertainties:

Would the RR apply if:

- *contract is not “mode specific” but gives option to the carrier as to the modes of MT, Or*
- *contract does not provide for sea carriage but carriage in fact includes a sea leg? Or*
- *contract provided for sea carriage but good were not carried by sea?*

Note:

MT may not be subject to RR but sea carriage of the same MT maybe!

Uncertainty: type of transport document?

Central issues:

1. One party responsible throughout?

A. Period of responsibility: receipt to delivery (art. 12(1))

But may be restricted to cover:

the period from *initial loading* to *final unloading* under the contract of carriage (12(3))

So: Period of responsibility could be:

Sea carriage: *tackle-to-tackle*

MT: *initial loading to final unloading* and not from receipt to delivery

And:

B. Responsibility for certain functions e.g. *loading, handling, stowing or unloading* may be contractually transferred to the *shipper, documentary shipper or consignee* (art. 13(2))

So:

Contracting carrier may not be responsible throughout MT

Q: *identity of the party responsible?*

RR cover: ***Performing party & Maritime performing party***

Maritime performing party

Terminal operators, stevedores, warehousemen, cargo terminals engaged in logistics operations...

- May be liable as **maritime performing parties**, and *subject to same liability regime of sea carriers*
- **Inland carrier**: a maritime performing party if *performs or undertake to perform activities exclusively within a port*
- **Non-MPPs** are excluded

Central issues:

2. Liability system: “*minimal network*”

Article 26: *Carriage preceding or subsequent to sea carriage*

(give precedence to certain mandatory provisions of unimodal conventions)

Conditions to operate:

1. Loss arising *solely* before or after sea-carriage
2. Other international instrument hypothetically applicable and include:
3. Mandatory provisions on *carrier's liability, limitation of liability and time for suit*

For localized loss

- if there is any unimodal convention *hypothetically* applicable
- provisions dealing with *liability, limitation of liability, and time for suit* of the unimodal convention apply
- *plus remainder of the Rotterdam Rules*

(including provisions relating to: *carrier's obligations, shipper's obligations and liability, delivery, documentation, transfer of rights, right of control*)

For non-localized loss or if no unimodal convention would be applicable:

- *maritime liability rules of the Rotterdam Rules apply*
- *even if goods were carried mainly by land / air*

Note:

Containerized cargo: loss often non-localized

Land transport conventions not globally applicable

Burden of proof: on cargo claimant!

Art. 82: attempt to address issue of *potential conflict with unimodal conventions!*

The Rotterdam Rules

Will provide

no improvement over the existing system:

There will be

- *no uniform liability* rules to govern the entire MT
- *no one party responsible* throughout the MT
- *MT not including a sea leg not covered*
- *further fragmentation of law governing MT*

Substantive liability regime

A. Obligations and liability of the carrier* (chapters. 4 & 5)

(*including maritime performing parties)

- Is based on fault (art. 17)
- No liability for delay in delivery unless a *time for delivery has been agreed in the contract* (art. 21)
- Long list of exceptions (art. 17(3))
somewhat based on Hague Visby Rules but with significance differences:
 - deletion of the exemption for “*nautical fault*”
 - fire exemption no longer protecting carrier in case of negligence

But: *new rights and exemptions added* (see articles 15 & 16)

- Burden of proof rules: *changed favouring the carrier*
- Possibility to deliver goods *without presentation of negotiable b/l* under certain conditions

undermining document of title function of the b/l

- **Limits of liability:**
3 SDR per kg. & 875 SDR per pkg

B. Shipper's obligations and liability

(chapter 7)

Obligations and liability:

- more extensive and detailed than in existing conventions

Liability: based on fault

But: strict liability

- Provide *accurate information*: contract particulars
- *Dangerous goods*

N.B: “*documentary shipper*” (e.g. FOB seller) liable in addition to shipper
(art. 33)

Shipper's obligations / liability: mandatory

- *May not be contractually excluded or limited* (art. 79(2))
- Substantive provisions more onerous to shippers, and
- ***No monetary limitation on shipper's liability***

Position of freight forwarders

Freight forwarders as:

- **Carriers:** vis-à-vis small shipper
subject to same liability regime of carrier
- **Shippers:** vis-à-vis unimodal carrier, e.g. ocean carrier
subject to same liability regime of shipper

C. Mandatory nature: “Volume contracts”

The Rules primarily establish mandatory liability both for carriers and *shippers*

But: “Volume contracts”

are exempt from mandatory application of the Rules

So:

its provisions could be modified or contracted out under certain condition

New approach: highly controversial

Apparent rationale

Argument: *“volume contracts” as contracts between sophisticated parties of equal bargaining power?*

But:

Definition of “volume contract” is *extremely wide*
may cover *almost any contract of carriage in liner trade*

And:

No minimum quantity of cargo required

Potential consequences

- Volume contracts *between parties of unequal bargaining power*:
small shipper & large container carrier in liner trade:
 - *Potential for abuse!*
- *Marginal application of the convention*
- Extensive use of volume contracts =
no international uniformity

Conclusions!

Thank you

For further information see:

UNCITRAL documents and the text of the RR: www.uncitral.org

UNCTAD documents: www.unctad.org/ttl/legal

- Implementation of Multimodal Transport Rules (UNCTAD/SDTE/TLB/2 and UNCTAD/SDTE/TLB/2/Add.1)
- Note on Freedom of Contract and Carrier Liability (UNCTAD.SDTE/TLB/2004/2)

IMMTA submission to UNCITRAL: A/CN.9/WGIII.WP.97, available at UNCITRAL and IMMTA website: www.immta.org

See also Mahin Faghfouri, International Regulation of Liability for MT, WMU Journal of Maritime Affairs, April 2006. Also available at IMMTA website: www.immta.org