The Rotterdam Rules –
More Than Just a Liability Convention

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Current Status of the Ratification Process: Slow but Steady Progress

A record sixteen countries signed the convention on opening day (23 Sept. 2009): Congo; Denmark; France; Gabon; Ghana; Greece; Guinea; the Netherlands; Nigeria; Norway; Poland; Senegal; Spain; Switzerland; Togo; and the United States.

Since then, an additional nine countries have signed the convention: Armenia; Cameroon; Democratic Republic of the Congo; Guinea-Bissau; Luxembourg; Madagascar; Mali; Niger; and Sweden.

Three countries have already ratified: Spain (19 Jan. 2011); Togo (17 July 2012); and Congo (28 Jan. 2014).

Several other countries have made the political decision to ratify but have not yet implemented that decision (e.g., Denmark, Norway, the Netherlands). The United States completed its “inter-agency review” this past spring.

By comparison, the Hague Rules entered into force after 7 years and achieved wide acceptance after 14-15 years. The United States ratified the Hague Rules 13 years after the convention was opened for signature.

The Visby Protocol entered into force after 9 years.

The Hamburg Rules entered into force after 14 years.
How Should We Evaluate the Rotterdam Rules?

Most (but not all) commentators discussing the Rotterdam Rules have resembled one of the six blind men examining the fabled elephant. They have generally focused on only the aspect of the new convention that is of greatest interest to them, usually the liability provisions and often from the perspective of a single interest. It is very common to compare the Rotterdam Rules to the Hague, Hague-Visby, and Hamburg Rules in an effort to identify “winners” and “losers.”

Subrogation lawyers who bring cargo damage claims against carriers often focus on whether their prospects for recovery will improve under the new convention.

P&I defense lawyers often focus on whether carrier liability will increase.

Like the observation of the blind man who sees only a single part of the elephant, there is some truth in the observations made from a very limited perspective. Chapters 5, 6, 7, and 12 of the Rotterdam Rules form the core of a liability convention, and the Rotterdam Rules will supersede the Hague, Hague-Visby, and Hamburg Rules (all of which are primarily liability conventions). Moreover, in some circumstances particular cargo claimants and particular carriers will be in a better or worse litigation position under the Rotterdam Rules than they would have been under a prior convention.

But a wider perspective would be more appropriate. Shippers make their profits by selling their cargos at the destination, not by collecting compensation for lost or damaged cargo. Carriers make their profits by collecting freight for the services that they provide, not by avoiding responsibility for lost or damaged cargo. Cargo insurers make their profits by collecting (and successfully investing) premiums while minimizing claims, not through subrogation actions.

It would be in everyone’s interest to modernize the legal regime governing the international carriage of goods so that the entire industry can operate more efficiently. For those caught up in the heat of litigation, it is perhaps natural to view opposing parties as “enemies.” But the shipper is not the carrier’s “enemy,” it is the carrier’s “customer.” Shipping is not a zero-sum game. Shippers and carriers (like most businesses) enter into contracts so that both parties can make a profit. When cargo is successfully carried to its destination — as happens over 99% of the time — everyone involved is a “winner.” When cargo is lost or damages, shippers and carriers are both “losers.”
The Shipping Industry: Changes Since the Hague and Hague-Visby Era

To determine whether the Rotterdam Rules will be good for the shipping industry, it is helpful to consider how dramatically the industry has changed since the Hague and Hague-Visby Rules were negotiated.

Consider the famous Liberty ships. During World War II, 2710 Liberty ships were launched. A typical Liberty ship was 135 meters long with a 17-meter beam and a deadweight capacity of slightly over 10,000 tons. They travelled at a top speed of about 11 knots. Although built about two decades after the negotiation of the Hague Rules, the Liberty ships were still at the upper end of the range of cargo ships in service in the 1920s. Moreover, they were still in service when the Visby Protocol was negotiated another two decades later. They accordingly provide a convenient example of the types of ships and shipping that the Hague and Hague-Visby Rules were intended to regulate.

In February 2013, Maersk Line launched the Mærsk McKinney Møller, the first of its twenty planned EEE ships. The statistical comparison is striking. The Mærsk McKinney Møller is 399 meters long, almost three times the length of the Liberty ships. Its 58-meter beam is well over three times that of a Liberty ship. With a top speed of 23 knots, it is over twice as fast. And at 194,153 deadweight tons, it has over eighteen times the capacity of a Liberty ship. But the real capacity story is the Mærsk McKinney Møller’s reported ability to carry more than 18,000 20-foot containers. Indeed, over a hundred ships in service today have capacities in excess of 13,000 TEUs. And the oldest vessel on the top-100 list is Maersk Line’s Emma Mærsk, launched in 2006.

During the Hague Rules negotiations, no one anticipated containerization. By the time the Visby Protocol was negotiated, the “container revolution” had begun — the first container shipment was in the U.S. domestic trade in 1956 — but the first trans-Atlantic container service did not begin until 1966, almost at the end of the Hague-Visby process.

The extent to which the container revolution changed the shipping industry is well-recognized. Not surprisingly, those changes are also significant when considering the legal regimes that govern the carriage of goods by sea.


# Changes in Commercial Practice Since the Hague and Hague-Visby Era

When the Hague Rules were negotiated, it was common to have three (or more) contracts of carriage governing the transportation of cargo from an inland point of origin in one country to an inland destination in another country. At least one trucker or railroad would first carry the cargo under an inland bill of lading from the point of origin to the port of loading. The cargo would then travel by sea under an ocean bill of lading. Finally, another trucker or railroad would carry the cargo under another inland bill of lading from the port of discharge to the final destination. If the cargo needed to be stored at either port, separate contracts might have been required for that, too.

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<th>shipper’s plant or warehouse</th>
<th>↓ truck or train</th>
<th>(1) inland bill of lading</th>
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<tr>
<td>port of loading</td>
<td>↓ ship</td>
<td>(2) ocean bill of lading</td>
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<td>(tackle-to-tackle)</td>
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<tr>
<td>port of discharge</td>
<td>↓ truck or train</td>
<td>(3) inland bill of lading</td>
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<td>consignee’s plant or warehouse</td>
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Today, however, the norm in such circumstances — at least from the perspective of the original shipper — is a single, multimodal contract of carriage governing the entire journey “from door to door,” i.e., from the inland point of origin to the inland destination. Commercial contracting has evolved to match the physical handling of the goods.

Unfortunately, the legal system has not kept pace with commercial practices. That single, multimodal contract of carriage can easily be subject to three different legal regimes. The Hague and Hague-Visby Rules, by their terms, apply only from “tackle to tackle,” i.e., “from the time when the goods are loaded on [the ship] to the time when they are discharged from the ship.” Art. 1(e). Even the Hamburg Rules extend only from “port to port.” Art. 1(6). The inland carriage before and after the ocean voyage will typically be subject to some other legal regime. Within Europe, for example, inland carriage may be subject to a regional regime governing road or rail transportation. In many countries, the inland carriage will be subject to national law.

“Confusion and inefficiency will inevitably result if more than one body of law governs a given contract’s meaning.” *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 29, 2004 AMC 2705, 2715 (2004).
Looking Beyond the Liability Provisions: Electronic Commerce

Most of us rarely see a paper airline ticket with a separate coupon for each flight segment. IATA announced in 2008 that its member airlines would no longer issue paper tickets. The first electronic airline ticket was issued twenty years ago in 1994. The dramatic shift from paper tickets to electronic tickets saved the airlines literally billions of dollars every year. When IATA eliminated paper tickets in 2008, industry experts estimated the cost of issuing a single ticket would drop from US$10 to US$1.

In the shipping industry, almost every liner shipment is still carried under a paper bill of lading (or a similar paper document, such as a paper seawaybill). The shipping industry would be happy to save billions of dollars every year, and no one doubts that moving from paper documents to an electronic system would result in substantial cost savings. Indeed, the industry has studied “electronic bills of lading” for years, but efforts have succeeded on only a relatively small scale.

The biggest obstacle is the antiquated legal system. The business community cannot shift from paper documents to electronic transport records without being certain that the legal system will uniformly and predictably give effect to those records in the manner intended by the parties. The technology exists for an electronic transport record to do what a paper bill of lading does, but we must agree on what a paper bill of lading does and whether an electronic equivalent would do the same thing. National law governs almost every aspect of the subject, and fundamental disagreements exist even between similar legal systems. For example, U.S. and English law do not fully agree on the meaning of the term “bill of lading” despite the fact that U.S. commercial law is largely derived from English law.

UNCITRAL recognized the problems in the context of its Electronic Data Interchange (EDI) project. In June 1996, as part of the EDI project, the Commission discussed a proposal to review . . . current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws than has so far been achieved.

In conjunction with that discussion, the Commission noted:

- Existing national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and to the legal position of the entities that provided financing to a party to the contract of carriage.

The Commission accordingly authorized the Secretariat to start gathering information on those matters with a view to deciding “on the nature and scope of any future work that might usefully be undertaken by [UNCITRAL].” Thus began the process that ultimately produced the Rotterdam Rules.
When focusing on the electronic commerce aspects of the subject, UNCITRAL recognized that for electronic transport records to work, functional equivalence would be necessary. In other words, the new electronic transport records must be able to fulfill the functions of traditional bills of lading and other paper documents. To achieve functional equivalence, however, it was necessary to define the core functions of traditional bills of lading and other paper documents, at least in the context of the contract of carriage. The provisions of the convention itself must determine a party’s rights and responsibilities; a party’s status cannot depend on the possession of a paper document (as it so often does under current law).

Some aspects of functional equivalence are relatively straightforward while others are more complex. An electronic transport record can easily function as a receipt for the goods and as evidence of the contract of carriage. Those functions turn on the relationship between the shipper and the carrier — the two original parties to the contract.

It is more difficult to establish functional equivalence in the “document of title” context. A paper bill of lading permits a holder to transfer rights in the goods to a third party outside of the original contractual relationship. That goes well beyond transport law and the contract of carriage, raising issues (for example, of property law) that are outside the scope of the Rotterdam Rules. It is reasonably clear, however, that a traditional bill of lading’s function as a document of title (including the power that it gives a holder to transfer a property interest in the goods through a transfer of the paper document) can be traced to the right to control the goods that is embodied in the document. Because a traditional bill of lading empowers the holder to obtain delivery of the goods from the carrier, the ability to transfer the power to obtain delivery evolved into the ability to transfer property in the goods. By focusing on the basic principles, therefore, it was possible to achieve the necessary functional equivalence for electronic commerce.

Chapter 3 of the Rotterdam Rules is often cited as the “electronic commerce” portion of the new convention. Although chapter 3 is undoubtedly important, several other provisions are also key. In the “general provisions” of chapter 1, article 3 is central to the success of any effort to expand electronic commerce. Ultimately, it is chapters 9 (covering delivery of the goods), 10 (defining the rights of the controlling party), and 11 (addressing the transfer of rights) that will enable electronic transport records. By uniformly describing the rights and responsibilities that flow from paper documents or electronic transport records, those chapters establish the legal framework that will give industry the ability to rely on electronic transport records.
Looking Beyond the Liability Provisions: Other Modernizations

The Hague Rules were very deliberately intended to implement on an international basis the principles of the U.S. Harter Act — a late-nineteenth century response to the problems of the early days of the steam era. The Visby Protocol made only a handful of relatively minor changes, and the Hamburg Rules did more to adjust the balance on liability issues than to modernize the basic system. In short, international shipping in the twenty-first century is governed by a combination of inconsistent national laws and by multilateral regimes that are better suited to resolving the problems of the mid-nineteenth century.

As already noted, the Hague and Hague-Visby Rules, by their terms, apply only from “tackle to tackle,” i.e., “from the time when the goods are loaded on [the ship] to the time when they are discharged from the ship.” Art. 1(e). Even the Hamburg Rules extend only from “port to port.” Art. 1(6). Ideally, of course, a single “body of law [should] govern[] a given contract’s meaning.” Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14, 29, 2004 AMC 2705, 2715 (2004). At the very least, for electronic transport records to be possible, each governing legal system must support their use.

The Rotterdam Rules match the governing regime to the parties’ contract. If the parties conclude a contract of carriage on a tackle-to-tackle or port-to-port basis, then the convention also applies on a tackle-to-tackle or port-to-port basis. But if — as is more likely in modern shipping — the parties conclude a contract of carriage on a door-to-door basis, then the convention applies on a door-to-door basis. Article 12 accommodates whatever contract the parties conclude. Moreover, detailed provisions throughout the convention address the issues that arise as a result of door-to-door coverage. In chapter 2, for example, the scope-of-application provisions accommodate the possibility of inland receipt or delivery; a number of provisions address the role of performing parties; and articles 26 and 82 address the new convention’s interaction with other regimes governing other modes of transport. The potential for door-to-door coverage is essential for electronic transport records, but it also illustrates how the Rotterdam Rules modernize the existing regimes. This modernization is relevant in the liability context as well, but it goes well beyond liability concerns.

There are dozens of other examples of the Rotterdam Rules’ modernizing the law to deal with current problems, but one more example warrants explicit mention. As already noted, the container revolution has fundamentally changed modern shipping practices. Indeed, it has fundamentally changed the world’s economy. But the Visby Protocol — largely negotiated before the container revolution — barely addresses the issues. Indeed, even the Hamburg Rules barely address the issues of containerization. But the Rotterdam Rules address those issues throughout the convention. Article 1(26) begins the treatment with a definition of “container”; chapter 8 (particularly articles 40–41) addresses the problems associated with describing containerized goods; and a number of specific provisions (such as articles 14(c), 25(1)(b), 27(3), and 48(2)(b)) deal with particular issues associated with containerization. Once again, this modernization is relevant in the liability context, but it goes well beyond liability concerns.
Conclusion

Every informed observer recognizes that increased electronic commerce will provide for a more efficient shipping industry. Indeed, the resulting efficiency will likely be far more important than the relatively modest changes in the liability provisions. The efficiency of electronic commerce will be a benefit that is directly or indirectly enjoyed by every party in every transaction — not only in those rare transactions in which a change in the liability rules ends up benefitting one party in preference to the other.

Modernizing the governing regime to serve the needs of the twenty-first century will also provide benefits in every transaction — not only in those rare transactions in which goods are lost or damaged.

It is the prospect of those efficiencies and modernizations, not the modest adjustments to the liability rules, that has persuaded major carriers and sophisticated shipper organizations to support the Rotterdam Rules. And anyone seeking to evaluate the Rotterdam Rules should pay much more attention to those significant benefits for the industry and not be trapped into thinking about only the liability aspects of the convention.