

The Coverage of the Rotterdam Rules

Tomotaka Fujita

I. Introduction

I am very much honored to have an opportunity to make this presentation to the CMI Colloquium in Buenos Aires. I am very glad to be here. When I was a child, my teacher told me that if we dig the ground towards the center of the earth, we would ultimately reach Buenos Aires. I imagined that I could visit the city someday, and after 40 years, I am here.

My short speech today is entitled “The Coverage of the Rotterdam Rules.” I will be addressing three questions: (1) *Which contracts are covered by the Rotterdam Rules (“scope of application”)*, (2) *Which period is covered by the Rotterdam Rules with respect to a carrier’s obligations and liabilities (“period of responsibility”)*, and (3) *Who is covered by the Rotterdam Rules (“performing party”)*. These are more technical aspects than those that the previous speakers have covered, but they are, still, the very basic features of this Convention.

II. Which Contracts are Covered by the Rotterdam Rules (“Scope of Application”)

Let us begin with the first topic: *Which contracts are covered by the Rotterdam Rules?* In a sense, this is one of the least innovative aspects of the Rotterdam Rules.

A. “Contract of Carriage”

Rotterdam Rules apply to a contract of carriage, which is defined as follows: “A contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage” (Art.1(1)).

You will immediately notice two important aspects of this definition. First, the Rotterdam Rules apply to a contract. The issuance of a certain kind of document is irrelevant. Second, the Rotterdam Rules apply to a contract for multimodal transport as a whole; provided it contains an international sea-leg (see Article 5(1)). Of course, they do not force the parties to enter into a multimodal contract. However, once they agree to enter into a multimodal contract, the Rules apply to the whole transport.

B. Exclusions and Inclusions

The Hague-Visby Rules and the Hamburg Rules excluded “charterparties” from their scopes of application. The Rotterdam Rules adopt a more detailed approach. However, please note that

although the formulation looks different, the scope of exclusion is, in practical terms, almost identical. Article 6 excludes contracts of carriage that were excluded and includes contracts of carriage that were included under the existing conventions.

Article 6(2) excludes a contract of carriage in non-liner transport. In addition, an arrangement for the use of space on a ship in liner-service (such as “space charter”) is excluded in article 6(1). These provisions exclude all contracts that would fall under the “charterparty exclusion under traditional maritime transport conventions. The exclusion of non-liner transport needs a fine-tuning to maintain the traditional scope of exclusion. Let us suppose that shippers bring goods for carriage to the port of loading. When the volume of the goods reaches a certain level, the ship departs for its destination. The route is usually fixed, but the schedule is not. Bills of lading are issued for this carriage. This is a type of carriage sometimes called “on-demand carriage” and often used for the shipment of used cars in Japan. Please note that this contract was regulated under the Hague or the Hague-Visby Rules because bills of lading are issued and because the contract does not constitute a charterparty. The proviso of Article 6(2) simply intends to reintroduce “on-demand carriage” into the Rules’ scope of application.

I have sometimes heard a complaint that the provisions on the exclusions under the Rotterdam Rules are too complex. Article 6 is certainly more “detailed” compared to the previous conventions, but please ask yourself whether the situation is improved if the article simply states, like previous conventions, that “this Convention does not apply to charterparties or similar contracts.” Given the increasing diversification of the contract of carriage in practice, such a text would leave a much more difficult task for national courts to decide whether to apply the Rotterdam Rules. One should remember that the text of the Rotterdam Rules is not complex for complexity sake. The complexity is necessary to achieve uniformity and predictability.

C. Application vis-à-vis Third Parties

Even when a contract for carriage falls under the exclusion in Article 6, the Rotterdam Rules apply to the relationship with third parties, such as the consignee, controlling party, or holder (Article 7). Please note that the Rotterdam Rules no longer require the issuance of a transport document or an electronic transport record, whereas bills of lading are necessary under the Hague, the Hague–Visby, and the Hamburg Rules. The Rotterdam Rules simply aim to protect any party that is not involved in the negotiation of an excluded contract.

D. Geographic Scope of Application

The geographic scope of application is provided in Article 5. Although there are some differences with existing conventions, I shall skip the details since they are not essential.

III. Which Period is Covered by the Rotterdam Rules with Respect to a Carrier's Obligation and Liabilities ("Period of Responsibility")

Let us move on to the next topic: the carrier's period of responsibility.

A. Carrier's "Door-to-Door" Period of Responsibility

One of the most important features of the Rotterdam Rules is the expansion of a carrier's period of responsibility. The Hague Rules and the Hague-Visby Rules adopt a "tackle-to-tackle" principle. The Hamburg Rules have expanded their scope a little, but they still restrict coverage from "one port to another port." In contrast, Article 12(1) of Rotterdam Rules provides that "the period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered." Therefore, the period of responsibility could begin and end outside of the port area. With the development of containerized transportation, a single coherent liability regime that covers the whole period of transit was highly desired.

Please note that the Rotterdam Rules do not prohibit the parties from entering into a traditional tackle-to-tackle or port-to-port contract of carriage. Article 12(3) provides that the parties are to agree on the time and location of the receipt and delivery of the goods. At the same time, Article 12(3) prohibits the parties from making the carrier's period of responsibility shorter than "tackle to tackle."

B. Treatment of "FIO"

In practice, the carrier and shipper sometimes agree that the shipper will load and unload the goods onto or from the vessel. Such an arrangement is called "free in/free out" (FIO). The validity of a FIO clause has been discussed under both the Hague Rules and the Hague-Visby Rules. In some jurisdictions, such as the U.K., the courts understand a FIO clause as determining the scope of the contract of carriage and that the mandatory regulation to the carriage of goods by sea does not apply to activities under FIO clauses because they are outside the scope of the contract of carriage. Under the Rotterdam Rules, however, this justification is no longer valid. Article 12(3) clearly states that the

parties cannot agree on a time and location of the receipt of the goods beginning after the commencement of the initial loading or ending before the completion of the final unloading. This is why Article 13(2) specifically provides that the carrier and the shipper may agree that the loading, handling, stowing, or unloading of the goods may be performed by the shipper, the documentary shipper, or the consignee. Article 13(2) explicitly authorizes the validity of FIO clauses and Article 17 provides an explicit exoneration for the carrier from liability as a result of such activities.

C. Multimodal Aspect of the Rotterdam Rules

The expansion of the carrier's period of responsibility inevitably introduced legal issues related to multimodal transport. Due to the limited time, I simply refer to two provisions that address the issue. Article 26 introduced the network principle in as limited a way as possible. Only to the extent that there is an international instrument that covers the carrier's liability issue, its provisions would prevail over the regulations under the Rotterdam Rules. Article 82 provides a further safeguard for the Contracting States to avoid any possible conflicting obligation to apply the provisions of other transport conventions that are inconsistent with the Rotterdam Rules.

IV. Who is Covered by the Rotterdam Rules (“Performing Party”)

Although the Rotterdam Rules regulate the contract of carriage, they also pay attention to people other than the contracting parties. We should consider three different questions with respect to those persons: (1) *Who, other than the carrier, is liable under the Rotterdam Rules?*; (2) *Whose acts or omissions are attributable to the carrier?*; and (3) *Who is entitled to a defense and limitation of liability under the Rotterdam Rules?*

A. Who is Liable under the Rotterdam Rules?

First, who is liable under the Rotterdam Rules? The Hague Rules and the Hague-Visby Rules regulate only the liability of the carrier. The Hamburg Rules impose liability on the “actual carrier” on the same basis as the contracting carrier. The Rotterdam Rules, consistent with these trends, moved even further.

Article 1(6) defines the term “performing party” as a person who performs or undertakes to perform any of the carrier's responsibilities under a contract of carriage and who acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. This notion is broader than “performing carrier” or “actual carrier” used in previous international conventions in the sense that it includes not only the sub-carrier who performs the actual carriage, but also other persons involved in the performance of the carriage, such as stevedores or terminal operators.

The Rotterdam Rules, however, do not impose liability on all performing parties. Rather, they provide for liability only for those called a “maritime performing party.” The definition of a “maritime performing party” is found in Article 1(7). Roughly speaking, a “maritime performing party” is a performing party who offers services related to sea carriage.

Why should the Rotterdam Rules restrict their liability regime to the “maritime performing party”? The reason is that the UNCITRAL Working Group thought it was too far-reaching if the Rotterdam Rules covered purely domestic land transportation. If the Rotterdam Rules covered the liability of all performing parties, they could apply to a truck driver who carries the goods to a neighboring town. Such a result is beyond the ordinary expectations of a small carrier who engages exclusively in domestic land transport. Moreover, each state has its own domestic policy for regulating such a transport, and it was thought wise for the Rotterdam Rules not to intervene.

B. Whose Acts or Omissions are Attributable to the Carrier?

The Rotterdam Rules refer to broader class of persons with regard to the second question: *Whose acts or omissions are attributable to the carrier?* Article 18 provides that a carrier is liable for the breach of its obligation under the Convention caused by the acts or omissions of not only any performing party, but also other persons that perform or undertake to perform any of the carrier’s obligations under the contract of carriage. If the concept of “performing party” alone can completely define the scope of the persons whose acts or omissions are attributable the carrier, it would be most elegant. Unfortunately, there are “residual” people whom the term “performing party” cannot cover, so a fine-tuning was thought to be necessary to make sure no one is missing from the list.

C. Who is Entitled to a Defense and Limitation? (“Himalaya Protection”)

Finally, who, other than the carrier, is entitled to the defense or limitation of liability that the carrier enjoys? Such protections for a person other than the carrier are known as “Himalaya protection.” Article 4 provides a list of persons who are entitled to a defense and limitation of liability under the Rotterdam Rules whether the action is founded in contract, tort, or otherwise.

When you look at the persons other than the carrier referenced in article 4, they are divided into two categories. First, the maritime performing party is entitled to a defense and limit of liability under the Convention. This is because maritime performing parties are liable under the Rotterdam Rules, and it is simply logical that they also enjoy the benefits under the Rules. The second category is employees of the carrier or maritime performing party (article 4(1)(c)), as well as masters, crew, or other persons offering services on board the ship (article 4(1)(b)). They need a different justification for protection because the Rotterdam Rules do not impose any liability on them. The reason they

receive this protection is that the employees are economically dependent on their employers. Their disadvantages are ultimately borne by the employer, the carrier or maritime performing parties in this context. Due to their economic dependency, if we denied the defense and limit of liability for the employees, it would result, in fact, in depriving the carrier or maritime performing party itself of the defense and limit of liability.

If economic dependency is the reason, we cannot automatically extend Himalaya protection to all performing parties. An inland carrier, such as a railroad or road carrier, is not dependent on the carrier, at least not to the same degree. This is why the list in article 4 does not refer to “performing parties,” only to a part of them. Please note that this does not mean that the Rotterdam Rules prohibit the parties from agreeing on a “Himalaya clause” in the contract, giving the persons who are not covered by article 4 the same defense and limitation of liability as the carrier. However, save for specific contract provisions, these persons not listed in Article 4 cannot enjoy the benefit of a defense and limitation of liability.

V. Conclusions

In this short speech, I have talked about three aspects with respect to the coverage of the Rotterdam Rules. The Rotterdam Rules are least innovative with the first aspect, “scope of application.” With respect to the second aspect, “carrier’s period of responsibility,” the Rules have expanded the coverage to “door-to-door transport” in response to modern containerized transportation. Finally, the Rotterdam Rules include a more comprehensive reference to the persons involved in the performance of a contract of carriage, achieving more uniformity in a liability regime for carriage of goods by sea.

In closing this speech, I have to confess there is another aspect of the “coverage” which I did not touch on: *the comprehensive coverage of legal issues under the Rotterdam Rules*. This is, in my opinion, the most important aspect of the Rotterdam Rules and will be covered by the speakers in the Session after the break.