

Legal Briefing

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ROTTERDAM RULES

What impact will the Rotterdam Rules have on your liability?



About us

This briefing is one of a continuing series which aims to share the legal expertise within the Club with our Members

A significant proportion of the expertise in the Managers' offices around the world consists of lawyers who can advise Members on general P&I related legal, contractual and documentary issues.

These lawyers participate in a virtual team, writing on topical and relevant legal issues under the leadership of our Legal Director Chao Wu.

As part of Thomas Miller that virtual team can also call on executives who support the UK Defence Club and the experience and expertise that serves the largest defence mutual in the world, with over 3,500 owned and time chartered ships entered.

If you have any enquiries regarding the issues covered in this briefing please contact the team via Chao Wu and we will be pleased to respond to your query. The team also welcomes suggestions from Members for P&I related legal topics and problems which would benefit from explanation by one of these briefings.

Chao Wu Legal Director



Chao has a doctorate in law and is based in London as Legal Director, where she is responsible for giving general legal advice, including guidance on the legal aspects of P&I Club documentation, and on the legal aspects of cover for Members' contractual arrangements. She represents the Club on various subcommittees and working groups of the International Group of P&I Clubs. Chao speaks Mandarin, French and Shanghainese.

Direct line: +44 207 204 2157
Email: chao.wu@thomasmiller.com

THE AUTHORS

Maya Linkinoska Claims executive



Maya joined Thomas Miller in 2008 and is now a full-time claims handler for the Club's Members in Japan. Her previous experience is predominantly from New Zealand and Australia where she was responsible for the claims department of a major shipping company. Maya has a Master's degree (LLM) in maritime law from a London university.

Direct line: +44 20 7204 2212
Email: maya.linkinoska@thomasmiller.com

Marc Duck Claims executive



Marc joined Thomas Miller in April 2005 from another P&I club where he handled P&I claims for both European and American Members. Having graduated in Law, Marc is currently studying for an LLM in International Transport and Maritime Law.

Direct line: +44 20 7204 2110
Email: marc.duck@thomasmiller.com

Rotterdam Rules

In December 2008, the convention on contracts for the international carriage of goods wholly or partly by sea was adopted by the UN General Assembly. What impact will this have on your liability?

The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) was adopted in December 2008 by the UN General Assembly. The Convention will be opened for signature at a ceremony to be held in Rotterdam from 21 to 23 September 2009 and will be known as "The Rotterdam Rules". The Convention will enter into force 12 months after ratification by at least 20 States.

The Convention is designed to legislate both for international maritime carriage of goods, and for international multimodal carriage of goods where there is a maritime leg in the contract of carriage. It is often therefore described as a "maritime plus" instrument. This broad scope of application is reflected in the new terminology used in the Convention, such as, for example, a change from "bills of lading" and "sea waybills" to the general term "transport document".

If brought widely into force, the Convention will significantly increase the liability of shipowners and maritime carriers in respect of the carriage of cargo. The long established exception of negligent error in the navigation, management or pilotage of a vessel will be lost. The obligation to exercise due diligence in relation to seaworthiness of a vessel will be extended to the duration of the voyage, rather than merely before and at the commencement of the voyage as under the Hague-Visby Rules. Limits of liability per package or unit of weight will be increased beyond Hague-Visby and Hamburg Rule limits. Shipowners and other maritime carriers will become liable for the negligence of so-called "maritime performing parties" such as sub-contracted sea carriers, stevedores and terminals. The use of unfamiliar concepts and terminology will inevitably lead to legal uncertainty - which will no doubt keep lawyers busy.

There is a positive side. Although the new Convention will increase shipowners' liabilities, in doing so it offers the best prospects for updating

carriage of goods by sea law in a uniform approach across the world. The alternatives of regional updating will certainly involve the same (or worse) problems of increased liabilities and legal uncertainties, but multiplied by the difficulties of conflicting, overlapping regimes. In common with fellow clubs in the International Group, the UK Club therefore supports the introduction of the Rotterdam Rules, notwithstanding the additional liability burden.

For the benefit of Members interested to compare the Rotterdam Rules with the current regime, the tables below provide a useful summary comparison of the defences and limitations. It should be noted, nonetheless, that the standard terms of contracts for carriage, for purposes of Club cover and for eligibility for Pooling, currently remain the Hague-Visby Rules. This will be reviewed in light of the support for the new Convention which is forthcoming when it opens for ratification.

You and your cover

Voluntarily incorporating these provisions into your contracts could increase liability and risk incurring liabilities that would not arise under conventional arrangements. Such increases in liabilities may require additional insurance cover.

The effects of voluntary increases in potential liability are described in the Club's Rule 2, Section 17, Proviso (a).

If you have any queries regarding the cover arrangements for potentially extended liabilities in respect of cargo you should call your usual underwriting contact in advance of any contractual arrangements being concluded.

Key provisions relating to carriage of goods conventions

	Hague Rules 1924	Hague-Visby Rules 1968	US COGSA 1936	Hamburg Rules 1978	Rotterdam Rules 2009
Scope of application	Bills of Lading issued in a contracting state.	<ul style="list-style-type: none"> B/L issued in a contracting state Carriage is from a Port in a contracting state Contracts of carriage which incorporate the Rules 	Shipments to and from the United States in foreign trade.	<ul style="list-style-type: none"> B/L issued in a contracting state Carriage to or from a contracting state If B/L provides for Rules to apply 	Contracts of carriage where any of the following places are located in a contracting state: <ul style="list-style-type: none"> Place of receipt Port of loading Place of delivery Port of discharge
Geographical application	Covers the period from the time when the goods are loaded on the ship until they are discharged from the ship.			Carrier responsible while "in charge" of the goods at port of loading, during the carriage, and at port of discharge i.e. normally from time goods are taken over from the shipper to time delivered to the consignee.	In addition to sea carriage: <ul style="list-style-type: none"> Stevedoring / terminal storage services Freight-forwarding services Domestic inland road and rail carriage Inland water carriage International inland road and rail } if no competing convention applies
Which contracts are covered?	Contracts of carriage covered by a B/L or any similar document of title, or when such is issued under or pursuant to a Charterparty from the moment at which such document of title regulates the relations between a carrier and a holder of the same.			"Any contract of carriage whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another". Need not be a B/L or document of title. Excludes charterparties (unless rules are incorporated).	Contracts of carriage of goods by sea against a payment of freight, which may include carriage by other modes of transport in addition to carriage by sea. Includes "transport documents" and "electronic transport records". Excludes charterparties (unless rules are incorporated).
Who is the carrier?	Owner or charterer "who enters into contract of carriage with a shipper".			"Any person by whom or in whose name a contract of carriage has been concluded with a shipper". Covers "actual" and "contractual" carrier.	A person who enters into a contract of carriage with a shipper. Inclusion of a "Performing party" and a "Maritime performing party".
Deck cargo	Excluded from Rules if stated to be carried on deck on face of B/L. Undeclared deck carriage may affect carrier's ability to rely on defences, although the carrier may still rely on package limitation.		Excluded from US COGSA – unless the B/L states the cargo is carried on deck and is so carried.	Rules do not expressly exclude deck cargo. Carrier can undertake deck carriage if agreed with shipper or in accordance with the usage of a particular trade in which case B/L should so state that goods are carried on deck. Carrier liable for unauthorised deck carriage if carried on-deck contrary to express agreement, and can be deprived from its defences and limitations of liability.	Goods may be carried on deck if: <ul style="list-style-type: none"> Such carriage is required by law Carried in containers or vehicles fit for deck carriage and the decks are specially fitted to carry such containers or vehicles Carriage on deck is in accordance with the contract of carriage, customs/usages and practices of the trade in question Note: If goods carried on deck in cases not permitted by above and damage/loss is caused exclusively by such deck carriage, carrier not entitled to its defences. If carrier agreed to carry the goods under-deck and carries them on deck which causes loss/damage, carrier not entitled to its limitations of liability.
Delivery of the goods	Rules are silent – No express obligation to deliver goods beyond the port of discharge, however, the carrier can contract to do so.			Carrier responsible until goods are delivered to the consignee.	Carrier's obligation continues until delivery.
Law and Jurisdiction/ Arbitration	No express provisions.			Claimant may choose where to commence proceedings: <ul style="list-style-type: none"> Place where defendant has principal place of business Place where contract was made Port of loading Port of discharge Place specified in arbitration clause. Arbitration agreement permitted. If incorporating charterparty arbitration clause, must be incorporated in the B/L.	Claimant may choose where to commence proceedings: <ul style="list-style-type: none"> Domicile of the carrier Place of receipts Place of delivery Port of initial load or final discharge At any court named in an agreed non-exclusive jurisdiction clause Parties can also agree arbitration after a dispute has arisen.
Limitation of action/ Time-bar	12 months	12 months Indemnity actions may be brought after the one year, see Art III, 6bis.	12 months	2 years unless judicial or arbitral proceedings have been instituted.	Litigation or arbitration to be commenced within 2 years from date of delivery or when goods should have been delivered. (claims by cargo interests or carrier). Indemnity proceedings may be commenced after this period (at least 90 days from date of commencement of action against carrier).

Additional provisions in the Rotterdam Rules

Freedom of contract There is some freedom of contract under the Rotterdam Rules with respect to "volume contracts". These are defined as:

"A contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time".

Carriers and shippers can agree terms for volume contracts which may increase or decrease the parties' obligations or limitations of liability (subject to a criteria defined in the rules). However, the carrier can not exclude his basic obligations to exercise due diligence to make the ship seaworthy and to properly crew, supply and equip the ship.

Rights of the controlling party & Transfer of rights The new rules include provisions for exercise and extent of the right of control. The shipper is the controlling party unless he designates another party or when title is transferred. There are distinctions drawn on the right to transfer depending whether the document is negotiable, non-negotiable or an electronic document. Also requires all original documents to be surrendered to effect a transfer of rights.

Delivery of the goods In the Rotterdam Rules the carrier's obligations continue until delivery, at minimum, "delivery" takes place upon receipt of the goods for loading or unloading. Apart from obligations on the carrier "to deliver" the goods, there is also an obligation on the consignee to accept delivery and to acknowledge receipt. There is a distinction between delivery under non-negotiable documents (which may or may not require surrender) and negotiable documents. There are also provisions for undelivered goods.

"Maritime Performing Parties" There is a new concept of a "maritime performing party" which will be subject to the same rights and obligations as a carrier defined in the Rules. This includes parties such as stevedores, ports, terminals, freight forwarders, agents, NVOCC's, etc... "The performing party" would be caught under the rules if it undertakes activity in a contracting state under an intermodal contract of carriage as defined by the Rotterdam Rules.

	Hague Rules 1924	Hague-Visby Rules 1968	US COGSA 1936	Hamburg Rules 1978	Rotterdam Rules 2009
Carrier's general duty of care	Carrier must exercise due diligence before and at beginning of voyage to: <ul style="list-style-type: none"> make ship seaworthy properly man, equip and supply the ship make holds etc. fit and safe for reception, carriage and preservation of cargo Carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge goods.			Carrier, his servants and agents must take all measures that could reasonably be required to avoid the event causing loss and its consequences.	Same as Hague-Visby Rules however the carrier's obligation to exercise due diligence to make the ship seaworthy is extended to cover the entire voyage. It is now "to make and keep the ship seaworthy". It also includes an obligation "to deliver" the goods.
Carrier's defences	<ul style="list-style-type: none"> Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship Fire, unless caused by the actual fault or privity of the carrier Perils, dangers and accidents of the sea or other navigable waters Act of God Act of war Act of enemies Arrest or restraint of princes, rulers or people, or seizure under legal process Quarantine restrictions Act or omission of the shipper or owner of the goods, his agent or representative Strikes or lockouts, or stoppage or restraint of labour from whatever cause Riots and civil commotions Saving life or attempting to save life Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods Insufficient packaging Insufficiency or inadequacy of marks Latent defects not discoverable by due diligence Any other cause arising without the actual fault or privity of the carrier 			No specific list of defences. Carrier must prove he, his servants or agents, took all measures that could reasonably be required to avoid the occurrence and its consequences.	Additional defences to those listed in the Hague-Visby Rules include: <ul style="list-style-type: none"> War hostilities, armed conflict, piracy, terrorism Loading, handling, stowing, or unloading of the goods, unless the carrier or a performing party performs such activity on behalf of the shipper or the consignee Reasonable measures to save or attempt to save property at sea Reasonable measures to avoid or attempt to avoid damage to the environment Acts of the carrier in pursuance of the powers conferred by articles 15 and 16 (in relation to goods that may become dangerous and need to be sacrificed for the common safety) "Error of navigation" defence and "any other cause" defence have been removed.
Notification of damage	Notice of loss or damage must be given in writing to the carrier or his agent before or at the time of delivery, or within 3 days where damage is not apparent.			In writing to the carrier: <ul style="list-style-type: none"> by the working day following delivery to consignee within 15 days of delivery where damage is latent Notice of delay must be given within 60 days of delivery.	Notice of loss to be given at the time of delivery, or if the loss/damage is not apparent then within 7 working days. Such notice is not required when loss/damage is ascertained by way of a joint inspection/survey. Failure to provide notice shall not affect the right to claim compensation nor the allocation of burden of proof. No compensation for delay if notice given after 21 days of delivery.
Limitation of Liability	100 pounds sterling per package or unit	2 SDRs per kg or 666.67 SDRs per package – whichever is higher	USD500 per package or customary freight unit	2.5 SDRs per kg or 835 SDRs package or shipping unit – whichever is the higher.	3 SDRs per kg or 875 SDRs package or shipping unit – whichever is the higher.
Liability for delay	Rules are silent.			2.5 times freight payable on goods delayed, subject to upper limit of total freight on all goods or amount of limitation if goods have been lost or destroyed.	Liability for economic loss due to delay is limited to an amount equivalent to 2.5 times the freight payable on the goods delayed. The total amount payable not to exceed the limits of liability under the rules.
Loss of right to limit liability	No special provisions.	Right to limit lost if carrier intends to cause loss or is reckless knowing loss would probably result.	Carrier will only lose right to limit liability if he intended to cause loss/damage or was reckless knowing such loss/damage would probably result.	Right to limit lost if damage caused by intention, with knowledge that damage could occur or recklessness. Also when goods are carried on deck contrary to express agreement to carry under-deck.	The carrier cannot limit if the claimant proves that the loss resulting from the breach of the carrier's obligation was attributable to a "personal act or omission... done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result". Damage/loss due to delay included.
Burden of Proof	Shipper must show cargo was delivered to the carrier in good order and condition but received at destination in damaged condition. A clean B/L is prima-facie evidence of this. Under English law the claimant must establish breach of a seaworthiness obligation or failure to properly and carefully carry the goods. Once this is established, the burden of proof shifts to the carrier to show either due diligence or the application of one of the defences.			Carrier must prove that reasonable steps to avoid loss were taken unless damage is caused by fire.	Detailed wording on how the burden of proof operates. The carrier is liable for loss, damage or delay if the claimant proves that such loss, damage, delay or event (which was causative or contributed by) took place during the carrier's responsibility for the goods. The carrier is liable if the claimant proves that loss, damage or delay was caused or attributed by a) unseaworthiness of the ship, b) improper crewing, equipping or supplying of the ship, c) if the holds or other parts of the ship (including containers) were not fit and safe for carriage, reception and preservation of the goods. The carrier is relieved from liability if it can prove that the cause or one of the causes is not attributable to its fault or the fault of its subcontractors, agents or employees. Alternative to proving absence of fault, the carrier must prove that the damage was caused by one of the exceptions in the list of defences.

Further reading/references

Further information on the Rotterdam Rules and other conventions affecting the liability for carriage of cargoes can be found in the Encyclopaedia in the Members' Areas of the Club website – www.ukpandi.com

Useful information can also be found in the following publications:

Hill Dickinson's *Shipping At a Glance Guide No.1 "Cargo Conventions: Comparing Hague, Hague-Visby, Hamburg and Rotterdam Rules"* at www.hilldickinson.com (see Marine, Trade & Energy)

And then there were the Rotterdam Rules
D. Rhidian Thomas

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The Rotterdam Rules Professor Michael Sturley; Professor Tomotaka Fujita; Professor G. J. van der Ziel; Sweet & Maxwell – ISBN: 9781847037343

UK P&I CLUB 

UKDC
UK DEFENCE CLUB

Thomas Miller P&I Ltd – London

Tel: +44 20 7283 4646 Fax: +44 20 7283 5614

Thomas Miller (Hellas) Ltd – Piraeus H1

Tel: +30 210 42 91 200 Fax: +30 210 42 91 207/8

Thomas Miller (Americas) Inc – New Jersey

Tel: +1 201 557 7300 Fax: +1 201 946 0167

Thomas Miller (Hong Kong) Ltd – Hong Kong

Tel: + 852 2832 9301 Fax: + 852 2574 5025

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