

# **An Analysis of Carrier's Obligation to Delivery of Goods under the Rotterdam Rules**

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## **Abstract:**

Delivery of goods is an important obligation of the carrier. It is one of the main purposes and core issues of the carriage of goods by sea. By completing the delivery of goods, the parties' obligations under the contract of carriage of goods by sea are usually discharged. Notwithstanding delivery of goods is considered as a significant part of international carriage of goods by sea, there is a lack of provisions concerning delivery of goods in the existing international conventions as to carriage of goods by sea before the Rotterdam Rules, such as the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. Delivery of goods has only been addressed by Article 3(6) of the Hague Rules and the Hague-Visby Rules and Article 19 of the Hamburg Rules, which deal with the period of notice of claim and the period of time for suit. As a result, it is very difficult for shipping practice and justice to be guided by those Rules and there are many uncertainties which should be resolved by an up-to-date convention on the international carriage of goods by sea.

As a convention pertaining to the contract of international carriage of goods wholly or partly by sea, the Rotterdam Rules for the first time makes comprehensive and detailed provisions for delivery of goods. The Rotterdam Rules provide a whole Chapter 9, which includes articles 43- 49, on "Delivery of the Goods". This chapter provides new solutions to some problems in respect of delivery of goods in shipping practice and makes up the deficiencies of existing Rules as abovementioned. It is worth to distinguish the advantages and positive significance of the Rotterdam Rules. However, as the existing Rules are generated from the compromise between the different interests in the shipping industry, there may also remain some irreconcilable conflicts and problems in the Rotterdam Rules which are necessary to be discussed and analyzed.

This article attempts to review the rules regarding delivery of goods under the Rotterdam Rules and analyze the advantages and disadvantages of the rules.

## **1. The existing international conventions on carriage of goods by sea and the Rotterdam Rules**

The international shipping community has contributed a lengthy period and a massive effort in establishing uniform international practices. They govern the functions of transport documents, obligation of carriage of goods by sea, liability for the risk of the loss of or damage to goods carried by sea, etc. Currently, there are three international conventions governing the international carriage of goods by sea: the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* ("**the Hague Rules**"), the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* ("**the Hague-Visby Rules**") and the *United Nations International Convention on the Carriage of Goods by Sea* ("**the Hamburg Rules**"). These rules are well known and widely accepted by the people involved in shipping and trade services. In particular, from 1924 the Hague Rules and the Hague-Visby Rules have provided invaluable and practical performances benefiting the development of the worldwide shipping and trade industries.

However, along with the developments of the shipping industry, these rules have shown increasing incapability in dealing with modern shipping issues, such as container traffic, electronic transport documents and many other significant matters. As a result, there remains many uncertainties which need to be resolved by an up-to-date convention on the international carriage of goods by sea. Accordingly, the UNCITRAL produced a new convention concerning the carriage of goods wholly or partly by sea at the end of 2008, which adopted the title *the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (the “**Rotterdam Rules**”). The effectiveness of the Rotterdam Rules still requires ratification or other mode of adoption by at least 20 states.

## **2. Delivery of goods under the existing international rules**

The existing international rules as mentioned above have paid very limited attention to one of the core issues of carriage of goods by sea. The delivery of goods. Delivery has only been addressed by Article 3(6) of the Hague Rules and the Hague-Visby Rules and a few articles of the Hamburg Rules. They all only deal with the period of notice of claim, and the period of time for suit, etc. In accordance with Article 3(6) of the Hague Rules, “*unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading*”. The Hague-Visby Rules did not make any amendments to this provision.

The provisions on delivery of goods in the Hamburg Rules are more dispersed, mainly including Article 1(7), Article 4 (2)(b), Article 5(2), Article 15 (1)(n) and Article 19. Article 1(7) stipulates the relationship between the transport documents and delivery of goods and expressly states that “bill of lading” means a document by which the carrier undertakes to deliver the goods against surrender of the document. Meanwhile, it also provides three circumstances regarding delivery of goods under bill of lading, which are: (a) the goods shall be delivered to the order of a named person in the document; (b) the goods shall be delivered to order; and (c) the goods shall be delivered to the bearer of bill of lading. Article 4(2)(b) is a provision relating to the person to whom the goods shall be delivered: (a) the carrier shall deliver the goods to the consignee; (b) in the event that the consignee does not take delivery of the goods from the carrier, the carrier shall deliver the goods by placing them at the disposal of the consignee according to the contract or applicable law or particular trade practice at the discharging port; and (c) in accordance with the applicable law or regulations at the port of discharge, the carrier shall deliver the goods by handing over the goods to an authority or other third party to whom the goods must be handed over. Article 5(2) is the provision in relation to delay in delivery of goods. Article 15(1)(n) is the provision with respect to the date or the period of delivery of the goods. Article 19 sets out the consignee’s obligation of notice of loss of or damage to the goods or delay the delivery of the goods.

The abovementioned summary shows that the provision on delivery of goods in the Hague-Visby Rules only provides the rules of inspection and notice but fails to provide many key provisions concerning the delivery of goods, such as the identification of consignee, rights and obligations of the carrier and consignee as well as the relationship between the transport documents and delivery. In comparison, the provisions of delivery of goods in the Hamburg Rules are much more comprehensive than the Hague-Visby Rules. However, the provisions of delivery of goods in the Hamburg Rules also contain at least three deficiencies: (1) The

provisions for the relationship between the transport documents and delivery of goods only concern bills of lading but not other transport documents, such as seaway bills and delivery orders; (2) the rules governing the circumstance where there is no one taking delivery of goods are too simple and impracticable, and the ambiguities in the interpretation of the words “at the disposal of the consignee” will likely lead to a lot of disputes; and (3) lack of comprehensive stipulations for the rights and obligations of both carrier and consignee. As a result, a complete and comprehensive system for the delivery of goods is required to be established by new international rules.

### **3. Progress of the goods delivery system under the Rotterdam Rules**

Several problems have arisen due to the absence of provisions regarding the delivery of the goods provided by the existing international rules, for example, the delivery of goods without presentation of an original bills of lading, the right of the carrier in the circumstances of non-appearance of a person to demand delivery of the goods, the person that demands the delivery of the goods has failed to properly identify itself, the right of the carrier to retain the goods if freight is not paid, etc. In order to resolve the uncertainty regarding the problems as abovementioned, the Rotterdam Rules provide one chapter, Chapter 9, which includes articles 43- 49 on “Delivery of the Goods” and some other provisions such as articles 11, 21 and 23 which stipulates delivery of goods.

As early as 2001 UNCITRAL considered reviewing the current practices and laws in the area of the international carriage of goods by sea with a view to drafting a unitary system to define the term “delivery” and its consequences more precisely was already one of the possible future works on transport law. The goods delivery system established by the Rotterdam Rules has made non-negligible progress no matter in the overall design or specific provisions of the system.

(1) A relatively complete system regarding delivery of goods was first established

Through the above brief history of the drafting of the delivery of goods rules under the Rotterdam Rules, the convention established a relatively complete system of goods delivery in international law relating to carriage of goods by sea for the first time in the history. The contents of the system include (i) general obligations for the carrier and the consignee, (ii) rules regarding goods delivery when different transport documents are issued, (iii) identification and disposal when goods remaining undeliverable, (iv) retention of cargo and (v) rules regarding notice in case of cargo loss, damage or delay.

In the part of the rules regarding goods delivery when different transport documents are issued, it expressly states that when the consignee cannot properly identify itself as the consignee, the carrier has the right to refuse the delivery. There are measures for the carrier to fulfill goods delivery obligations under the three circumstances when goods are undeliverable.

(2) Avoid giving a definition to “delivery of goods” in a pragmatic way

The Rotterdam Rules do not give a definition to “delivery of goods” either in Article 1 “definition” nor Chapter 9 “delivery of goods”. In practice, different countries give different recognitions to “delivery of goods”. In some countries, the rules regarding goods delivery require the consignee to actually take the delivery of goods, whilst in other countries, placing the goods under the control of the consignee is viewed as delivery of goods. Placing the

goods under the control of the consignee can be done by actual delivery of goods or by delivery of transport documents.

Due to such differences, the Rotterdam Rules' avoidance of giving a definition to "delivery of goods" is pragmatic, however, because the delivery of goods defines the end of the carriers' obligations. The lack of a definition of "delivery of goods" cannot ensure whether the carrier's obligations and liabilities have ended or not. As a result, the Rotterdam Rules have this flaw and should seek to define the liability period of the carrier.

(3) Soften the legality of the consignee's obligation to receive the goods

Taking delivery of goods would not only be a right for the consignee, but would also be an absolute obligation. In domestic laws, Canada, China, Indonesia, Italy, Japan, Netherlands, Norway, Poland, Spain, the United Kingdom, the United States and other countries stipulate that the consignee has the obligation to receive the goods; in addition, Argentina, Canada, the Netherlands and other countries prescribe that the consignee should receive the goods even if they are damaged. On the other hand, however, the international conventions such as the Hague Rules and the Visby Rules do not stipulate receipt of goods as the consignee's obligation, and it appears that the Hamburg Rules intend to take receipt of goods as one of the consignee's rights from the definition of the consignee.

Instead of stipulating the consignee's obligation to take the delivery of goods, Article 43 of the Rotterdam Rules only states that when the goods arrive at the destination port, the consignee under the contract of carriage should take the delivery of the goods at the agreed time or within the agreed period in the contract. Thus, under the Rotterdam Rules, taking delivery of the goods is not a fixed obligation of the consignee. Only if the consignee demands taking delivery of the goods under the contract of carriage then it has the obligation to receive the goods. In other words, the consignee may refuse to receive the goods. Such provisions on the consignee's obligation to receive the goods coordinates with the provisions of the buyer's right in the law of the international sale of goods. The buyer normally has the right to refuse the receipt of goods under the contract of international sale of goods. If the maritime transport convention stipulates receipt of goods as the consignee's obligation, it will inevitably impair the buyer's right to refuse receipt of goods under the sale contracts or laws on the international sale of goods. The Rotterdam Rules thus soften the consignee's obligation to take delivery of the goods, which coordinates maritime transport conventions with the laws of the international sale of goods.

(4) Make better response to legal issues about goods delivery without bill of lading

"Goods delivery without bill of lading" usually takes place in the absence of the availability of the original bill of lading, in that the carrier makes delivery of the goods under the bill of lading to the consignee. The carrier may face counterclaims from the holder of the bill of lading if it makes delivery of goods without the original bill of lading, which in reality happens frequently. For legal issues arising from goods delivery without bills of lading, different countries have different legal practices and theories. Even within a country, different courts, or even the same court makes inconsistent rulings in similar cases. In order to respond to the issues arising from goods delivery without bill of lading, the Rotterdam Rules makes a lot of different provisions on goods delivery from the traditional maritime transport conventions.

First, in Article 47.1(a) of the Rotterdam Rules, delivery of goods against the original bill of lading has no longer been the consignee's legal obligation, but a right to the holder of the bill of lading. It entitles the holder of the negotiable transport document or negotiable electronic transport record to claim delivery of the goods from the carrier after their arrival at the place of destination. Changing the bill of lading holder's statutory obligation to deliver goods with the surrender of a bill of lading to a legal right has the effect of fundamentally undermining the traditional principle of delivery of goods under the law on carriage of goods by sea. However, it is noted that this principle is merely undermined but not totally denied. In light of the wordings of Article 47 of the Rotterdam Rules, it appears that the Rotterdam Rules still support the release of goods with the presentation of the original bill of lading.

Second, the Rotterdam Rules justify the delivery of goods without production of a bill of lading under particular circumstances. Article 47.2 of the Rotterdam Rules stipulates that if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, then the following circumstances occur: (i) The holder, after having received a notice of arrival, does not, at the time or within the time period, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the holder does not properly identify itself, or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. The carrier that completes such delivery is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has been demonstrated. In order to prevent the carrier's risks for making the delivery of goods without a bill of lading, the article also stipulates that the person giving instructions shall indemnify the carrier against loss arising from it being held liable to the holder and the carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request.

Third, on one hand, the Rotterdam Rules approves the delivery of goods without a bill of lading under conditions; on the other hand, it balances the benefits of the holder of the original bill of lading. The balance is embodied in the provision in Article 47.2(d). A typical example of this theme is the intermediate buyer of goods after a series of negotiations. As the bill of lading is transferred too slowly in a series of negotiations, when the goods arrive at the place of destination, the bill of lading would have not arrived. According to the provision in Article 47.2(d), if the intermediate buyer becomes a holder of the bill of lading after the carrier has delivered the goods, he does not have the right to claim delivery of the goods; however, if the carrier is liable to cargo losses or damage, the intermediate buyer has the right to appeal against the carrier. The balance is also embodied in the protection of benefits of "the holder that becomes a holder after goods delivered, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder". According to provisions in Article 47.2(e), "a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder", acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. While such cases are extremely rare in practice, given that business people in general are usually prudent and diligent to protect their own interests they will be prudent with the holder of the bill of lading in the delivery of the goods.

In summary, the Rotterdam Rules is pragmatic legislation. It, on one hand, abolishes the rule of delivery of goods with the surrender of transport documents to some extent to meet the legitimate demand of delivery of goods without bill of lading in practice. On the other hand, it maintains the “document of title” function of the bill of lading. Whether the carrier can make delivery of goods without a bill of lading under the contractual parties’ control, when a negotiable transport document is issued will raise concerns. Faced with the fact the delivery of goods without a bill of lading happens frequently in practice under the principle of delivery of goods with the surrender of transport documents, compared with the practice of delivery of goods without bill of lading through letter of guarantee issued by the consignee or the bank in transportation, the provisions in the Rotterdam Rules are pragmatic and positive. If such provisions can be accepted by the legislation in various countries and the international cargo transport practice, they will undoubtedly prove to be of great significance to reduce disputes in delivery of goods without B/L and promote the international trade.

## **5. Shortcomings of the goods delivery system under the Rotterdam Rules**

### **(1) The goods delivery system is imperfect**

Although the goods delivery system under the Rotterdam Rules has made great progress compared with the Hague-Visby Rules and the Hamburg Rules, it is still imperfect with the following shortcomings – it does not establish liability standards for the circumstances where the carrier does not make delivery of goods or makes misdelivery of goods.

Article 11 in the Rotterdam Rules stipulates that the carrier has the obligation to make delivery of goods. However, it does not prescribe the carrier’s liabilities if it fails to make the delivery of goods or makes misdelivery of goods. Chapter 5 in the Rotterdam Rules only stipulates the carrier’s liabilities for loss, damage and delay to the goods, rather than involving the carrier’s liabilities if it fails to make the delivery of goods or make misdelivery of goods. Therefore, the Rotterdam Rules for the latter two circumstances are unclear. Such lack of certainty will impact the consignee’s protection of right when the carrier does not make the delivery of goods or make misdelivery of goods.

### **(2) The content of the Rotterdam Rules is lengthy and cumbersome**

Lengthy and cumbersome expression of provisions is a major drawback of the Rotterdam Rules, which is also reflected in the goods delivery system.

Taking Articles 45, 46 and 47 in the Rotterdam Rules for example, there is much verbiage in these articles. Article 46 (a) and Article 45 (a) have the same provisions that the carrier shall deliver the goods to the consignee or refuse to deliver the goods referred to in Article 43. The content of Article 45 (c), Article 46 (b) and Article 47 Paragraph 2 (a) are the same. The content of Article 45 (d), Article 46 (c) and Article 47 Paragraph 2 (b) are the same in essence. Such verbiage is against the basic requirement for concise and accurate language of laws. The above mentioned wordy provisions can be replaced by one article, other than being repeated under each type of transport document. There should be goods delivery general rules under each type of transport documents should be particular to the type and rules applicable to all types of transport documents.

### **(3) Definitions are not clear**

The Rotterdam Rules do not define clearly one aspect of the consignee's obligation to take delivery of goods – what does the consignee “demanding delivery of the goods under the contract of carriage” mean?

In international trade, there are various reasons to claim for delivery of goods from the carrier. Some are to obtain the goods and some are to carry out obligations under the contract of sale of goods, the objective of which is not to obtain and possess goods under the transport contract. A typical example is the provision in Article 86 of the United Nations Convention on Contracts of International Sales of Goods (“**the CISG**”). According to the provision in Article 86 of the CISG, even if the buyer terminates or has terminated the contract, or even if the buyer is entitled to claim the delivery of the alternative and intends to exercise the right, he has to retain the goods temporarily. Obviously, the person that receives the goods has different motivations from the person that intends to obtain the goods by taking the delivery according to the article. As a result, the problem according to Paragraph 2 of Article 86 of the CISG is whether the person who receives the goods is the consignee claiming for the delivery under the transport contract. If the person is the consignee claiming for the delivery under the transport contract, he must take delivery of the goods. Otherwise, the objective does not have the compulsory obligation to take the delivery of goods.

When considering Article 86(2) of the CISG in respect of the rule that the buyer must represent the seller to accept the goods, there are two exceptions to it: First, in the event that the seller does such an act, he needs to pay for the contract price. Secondly, as the buyer or a person authorized to take charge of the goods on his behalf is present at the destination, in order to reconcile the relevant convention of the carriage of goods by sea and the international sales of goods law, the buyer who takes possession of the goods on behalf of the seller as expressed under Article 86(2) of CISG should not be regarded as “the consignee of delivery of goods under the contract of carriage”. The Rotterdam Rules itself do not make specific provisions on this point and therefore, courts have to make interpretations when applying the CISG in accordance with Article 2 of the Rotterdam Rules regarding the principle of interpretation.

(4) The actual effect of the provision on retention of cargo is limited

Article 49 in the Rotterdam Rules stipulates the carrier's and the performing party's right of retention of goods. This article was first considered by the Working Group III in its sixteenth session during the discussion of chapter 10 of the draft convention on delivery to the consignee. It was further proposed by the delegation from Switzerland that substantive provisions on the right of retention should have to be introduced to the draft convention and considered by the Working Group III. However, in their proposal, they also admitted that the extent of the right to retain the cargo and the way that this right of retention has to be exercised is “substantially dependent on the applicable law as recognized at the place of the enforcement of such rights”. In fact, except for a few countries, such as Argentina, the carrier's retention of cargo has been affirmed by most of countries. The right has close connection with the carrier's possession of the goods and generally speaking, once the delivery of goods is completed, the carrier is no longer entitled of the right.

Article 49 states that “nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due”. But the provision has more significance in oath than in practice. The convention does not make provisions on what goods the carrier or the

performing party can retain, whether the goods must be associated with the creditor's right or how to deal with the circumstance when other theme's security interest of the goods competing with the retention of cargo. The reason lies in different legislations on retention of cargo in different countries. Therefore, instead of making general regulations on this issue which may result in uncertain risks, it is advisable not to make any clear provision on it.

## **6. Conclusion**

Overall, the provisions regarding the delivery of the goods provided by the Rotterdam Rules is a constructive attempt. It is a solid step up in systematizing completed rules with delivery of the goods in the field of the conventions in connection with carriage of goods by sea. It is difficult to justify whether these provisions are perfect. However, it can be justified to conclude that the system regarding the delivery of the goods established by the Rotterdam Rules contains realistic and positive way to promote the smooth delivery of the goods, to resolve the legal issues regarding delivery of goods without the presentation of an original bill of lading, and to coordinate the delivery of goods between international carriage of goods by sea and international sale of goods. While criticisms are unlikely to be avoided, the positive intention of the rules cannot be denied.

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