The Rotterdam Rules

Paul Apostolis / Ashley Southern

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("The Rotterdam Rules") has now been signed by the requisite 20 member nations necessary for it to be adopted by the United Nations General Assembly. The Rules will therefore become effective on the first day of the month, one year after the instrument of ratification was deposited with the UN.

Current major shipping and trading signatory nations include the United States, France, Denmark, Norway, the Netherlands and Greece. To date, China, Japan, Taiwan and Korea are not signatory nations. Neither is the United Kingdom a signatory and as such, the Rotterdam Rules are not presently scheduled to become part of English law.

To date, the Rules have not been ratified by any of the signatories into their domestic law and accordingly, it is yet to be determined whether the Rotterdam Rules will replace COGSA, the Hague or Hague-Visby, and Hamburg Rules, as intended.

The Objective of the Rotterdam Rules - Why the need for change?

1. Global uniformity - the intention of the Rules is to replace the current patchwork of outdated ocean conventions with a single modern convention applied globally which takes account of modern trade practice.

2. Modern "wet multi-modal" regime to cater for container carriage - the Rules introduce a liability regime to cover all ocean transport and also those land legs of multi-modal movements, where no other convention currently applies.

3. Limited freedom of contract - many large shippers already negotiate tailor made carrier service agreements with shipping lines. Current conventions do not acknowledge this and limit freedom of contract further than many shippers and carriers would like.

4. Reduce frictional costs - the Rules are designed to reduce costs of trade by promoting e-commerce solutions and addressing issues which commonly lead to protracted legal disputes.

Changes from COGSA/Hague/Hague-Visby/Hamburg Rules

A great deal has been written about the changes which the Rotterdam Rules will implement. This article does not highlight all of these but will focus on a select few which will have a major bearing on a ship owner's liability.

The Rotterdam Rules Liability Regime

1. Period of Responsibility - Article 12

Under COGSA/Hague-Visby rules, the responsibility of the carrying ship (subject to such responsibility being extended by contract) was from "tackle-to-tackle". The period of responsibility has been extended by the Rotterdam Rules, such that the carrier and maritime performing parties are responsible for the goods at all times that the goods are being carried or stored under a through contract of carriage. In other words, the carrier's responsibility commences when the goods are received by the carrier or maritime performing party and ends when the goods are delivered to the consignee at the time and location agreed in the contract of carriage or, failing any specific provisions relating to delivery, in accordance with the customs, practices or usages of the trade.

If the loss, damage or delay to the cargo occurs prior to loading or after discharge, the Rotterdam Rules do not replace the provisions of other compulsory applicable international conventions such as the CMR or CIM (Article 26).

2. Carrier's Obligations - Article 13

The carrier has three fundamental obligations:

- to carry and deliver;
- to care for the goods; and
- to exercise due diligence to make the vessel seaworthy.

Under the Rotterdam Rules, the carrier's general duty of care is the same as that under Article III Rule 2 of the Hague-Visby Rules except that the period of responsibility when the carrier is required to exercise due diligence is extended. Article 13 requires *"a carrier to properly and carefully receive, load, handle, stow, carry and keep, care for, unload and deliver the goods".*

3. Specific Obligations on the Sea Voyage - Article 14

This article fundamentally changes the carrier's obligation of seaworthiness. The Rotterdam Rules provided that the carrier shall exercise due diligence to make and keep the ship seaworthy, properly manned, equipped and supplied and to keep the ship and container supplied by the carrier in or upon which goods are to be carried, fit and safe for the reception, carriage and preservation.

Under the COGSA/Hague-Visby rules, the carrier was under an obligation to exercise due diligence to make the vessel seaworthy before and at the commencement of the voyage. The Rotterdam Rules impose a continuing obligation to keep the vessel seaworthy whilst the goods remain in the care of the carrier.

This has interesting practical consequences. Immediately after a collision at sea, a vessel may be unseaworthy, rendering the carrier responsible for damage to cargo caused by that unseaworthiness in circumstances where the cause of the loss is not necessarily their fault and in circumstances where the carrier is unable to remedy the unseawothiness until such time is the vessel undergoes temporary or permanent repairs as required by class. What the owner will need to show, is that immediately after the collision, they exercised due diligence to prevent further damage to cargo beyond that caused by the collision itself with whatever resources were available to them on board.

4. Basis of Liability - Article 17

Under the Rotterdam Rules, the liability regime can be summarised as follows:

(i) There is a presumption that the carrier is liable for cargo loss or damage if cargo damage is proved.

(ii) The carrier can rebut that it is liable for cargo loss or damage by adducing prima facie evidence that:

(a) the loss or damage was not caused by the carrier; or

(b) it can show the existence of one of the excepted perils listed at 17(a)-(m).

(iii) The burden then shifts to cargo interests to prove on balance of probabilities that:

(a) the carrier's act caused the loss; or

(b) the vessel was unseaworthy.

(iv) The carrier can avoid responsibility if it proves that it exercised due diligence to make the vessel seaworthy.

There are some notable differences between the Rotterdam Rules and COGSA/Hague-Visby rules. In particular, the defence of error in navigation or management of the vessel has been omitted. In a collision or grounding, therefore, cargo interests can now bring a claim against the carrying vessel notwithstanding the absence of unseaworthiness.

Moreover, the carrier may escape all or part of its liability if it can show that the loss was not attributable to its fault or the fault of any person listed in Article 18 or if the cause falls under the defences listed in Article 17(3)(a)-(m).

However, if a cargo claimant can prove that the fault of the carrier or performing party caused or contributed to the loss, the carrier may remain liable for all or part of the loss notwithstanding any defence under Article 17(3). If the carrier can avoid part of its liability under

Article 17, the carrier will continue to remain liable for the part of the loss which it cannot avoid. Accordingly, in circumstances where there is more than one cause of the loss, difficult issues of apportionment of liablility will arise.

5. Limits of Liability - Article 59

The Rotterdam Rules increase the package limitation above those of the Hague, Hague-Visby and Hamburg Rules. The carrier and/or maritime performing party's liability is limited to 875 SDR units per package or 3 SDR units per kilogram of the gross weight of the cargo, whichever is the higher (Article 59).

Additionally, if there is delay in delivery of the cargo which causes loss, which does not result from the destruction of or damage to the cargo, economic loss due to delay is recoverable and is limited to a multiple of 2.5 times the freight payable on the goods delayed (Article 60).

The test for breaking limitation, notably due to the act being done with intent to cause such loss or damage or recklessly and with knowledge that such loss or damage will probably result, in the Rotterdam Rules follows the test from the previous regimes.

6. Time Bars - Article 62

An important difference between the Rotterdam Rules and COGSA/Hague-Visby rules is that the time limit for bringing suit is increased from one year to two years commencing on the day on which the carrier has completed delivery of the goods or, if there is no delivery, on the last day on which the goods should have been delivered.

An action for indemnity may be instituted after two years of the later of the time allowed by the applicable law of the jurisdiction where proceedings are instituted, or 90 days of the date that the person seeking an indemnity has settled the claim or has been served with process in the action against itself or, if earlier, within the time.

Notwithstanding the additional liabilities that carriers will incur, the Rotterdam Rules are a genuine attempt to update the carriage of goods by sea law and provide an uniform approach across the world.

(Paul Apostolis: Partsner, Holman Fenwick Willan
Ashley Southern: Trainee Solicitor, Holman Fenwick Willan)