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Putting a premium on reform: The impact of the Rotterdam rules on shippers and insurers of cargo

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Introductory Work

Abstract

This article argues that the Rotterdam Rules are likely to lead to increased insurance premiums for parties shipping cargo, especially if the wording of the new rules is interpreted widely and expands the scope of shipper's liability. The ultimate question for countries considering ratification of the Rotterdam Rules is whether the increased obligations on the shipper are worth higher compensation limits and increased carrier obligations.

Key words: Rotterdam rules, cargo, shipper, dangerous goods

1. INTRODUCTION

'It ought to be remembered that there is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things. Because the innovator has for enemies all those who have done well under the old conditions, and lukewarm defenders in those who may do well under the new. This coolness arises partly from fear of the opponents, who have the laws on their side, and partly from the incredulity of men, who do not readily believe in new things until they have had a long experience of them.' – Machiavelli, *The Prince* (1513) Ch.6

Niccolò Machiavelli might have been writing about the new UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,

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so fitting is his caustic summary. The Rotterdam Rules, which have been open for signing since the 23rd of September 2009, have certainly proved to a controversial 'new order of things' in both academic and industry circles. An ambitious ambit, taking a new maritime plus scope of application in order to accommodate the reality of multimodal transportation and the ubiquity of sea waybills and the use of electronic transfer documentation has been greeted with predictable trepidation by those keen to glean knowledge of future flashpoints.

One of those potential flashpoints is located in Chapter 7 of the Convention, which, if ratified will introduce for the first time a set of obligations owed to the carrier of goods by the 'shipper', formerly only a minor character in the *dramatis personae* of previous international Conventions who was merely asked to guarantee the veracity of information.¹ Trade organizations representing these newly-defined² maritime actors have not taken kindly to being put in the spotlight by the new Convention, and as will be clear, their criticisms of the new scheme of liability³ have more than a little justification in the eyes of the author.

Nevertheless, it would be disingenuous to pretend that the Convention would not also bring important

¹ Article III(5) of the Hague-Visby Rules, and Baughen, S. (2008) J.I.M.L. 14(6) 555, pp. 560–561. The guarantee provided by the shipper could easily be avoided by incorporating weight and quantity unknown clauses into the terms of the bill of lading, or omitting to declare weight and quantity details, as in *New Chinese Antimony v Ocean Steamship* [1917] 2 KB 664 and *The Atlas* [1996] 1 Lloyd's Rep 642.

² See 1.2 below.

³ FIATA Working Group for Sea Transport MTI/507, Annex II, available at www.uncitral.org/pdf/english/texts/.../rotterdam.../FIATApaper.pdf, accessed on 20. 6. 2012, and note for example the attention paid to the role of cargo insurance in the Economic Commission For Europe document *WP.24 No.2 (2009)* produced by the Working Party on Intermodal Transport and Logistics.

advantages to those cargo interests now newly burdened by regulations. Increased limits on available compensation and time for suit⁴, the introduction of a more onerous duty of seaworthiness⁵ as well as the much-noted absence of a navigational error defence formerly available to carriers under the Hague and Hague-Visby Rules⁶ should all be manifestly to the shipper's advantage.

Another possible boon may be Article 19, which will subject so-called maritime performing parties⁷ (MPPs) to the same liabilities and defences⁸ as the carrier himself, thereby achieving an extension in the coverage of the rules to cover *inter alia*, loading and discharge at port by stevedores and those performing lightering services. The provision could also encompass time and bareboat charterers or indeed the shipowner where under the Hague-Visby Rules they would owe no contractual duty of care to the shipper.⁹ Given the global variation in delictual liability it has been suggested that this represents a welcome simplification for shippers trying to determine whether they have sustained actionable losses¹⁰ as well as avoiding the need to wade through the molasses of diverse Himalaya and circular indemnity clauses.¹¹

Questions surrounding the likely effect of the Rotterdam Rules on the insurance premiums

⁴ Articles 59 and 62 RR respectively.

⁵ The obligation is now ongoing per Art. 5(4) RR whereas the carrier's due diligence obligation had only operated under Article III(1) of the Hague-Visby Rules 'before and at the beginning of the voyage'.

⁶ Article IV(2)(a).

⁷ Art 1(7) RR.

⁸ Art 4 RR.

⁹ Tsimplis, M. (2009) in *The Rotterdam Rules: A Practical Annotation* (Batz, Debattista&al), Informa Law, pp. 63–66. Not all coverage of the concept of MPPs has been positive, see for example Chuah, J. (2010) *The Carriage Of Goods By Sea Under The Rotterdam Rules* (Maritime and Transport Law Library) D.R Thomas (editor), Informa Law, at Ch.15, p. 295–317 lamenting the uncertain fate of the port terminal operator under the new Convention.

¹⁰ Delebecque, P. (2009) *Gazette de la Chambre Arbitrale Maritime de Paris No 20*.

¹¹ Circular indemnity clause used in *The Elbe Maru* [1978] 1 Lloyd's Rep 206 to exempt sub-contractor liability and the Himalaya clauses in *The Eurymedon* [1975] AC 154, (Privy Council) and *The New York Star* [1981] 1 WLR 138 (Privy Council), which allowed stevedores to profit from the defences in the Hague and Hague-Visby rules respectively. – Baughen, S. (2009) *Shipping Law*, Routledge Cavendish, p. 60. But note *The Rigoletto* [2000] 2 All ER (Comm) 705 where the desired effect of a Himalaya clause was successfully thwarted by careful attention to its wording. – Chuah, J.C.T. (2009) *Law of International Trade: Cross-Border Commercial Transactions*, Sweet & Maxwell, pp. 340–341.

charged by cargo underwriters to shippers, as well as the amount of call levied on shippers by P&I clubs providing defence cover have been at the periphery of the debate surrounding possible adoption of the new Convention.¹² This paper will argue that the increase in premium demanded may come to undermine the very cargo interests it was intended to benefit.

2. SAFETY IN NUMBERS – SHIPPERS, DOCUMENTARY SHIPPERS AND TRANSPORT DOCUMENTS UNDER THE ROTTERDAM RULES

Although the shipper's obligations are still only directed at the carrier, it is submitted that Rotterdam will see an increase in the possible defendants to cargo claims due to the introduction of the documentary shipper concept at Article 1(9) RR.

The typical documentary shipper, 'a person other than the shipper that accepts to be named in the transport document'¹³ is the seller of goods on 'free on board' terms, who will, under standard FOB terms at least, have organized the carriage of the cargo being sold and would normally have retained disposal rights over the cargo and sought to have himself named as the shipper on the bill of lading. The parity achieved for such documentary shippers under Article 33 RR has the advantage of removing the need for discussion over whether the seller or the buyer should be regarded as party to the bill of lading contract with the carrier¹⁴, while also doing away with the need for cooperation requirements of FOB sellers to be implied into the contract of sale.¹⁵ This is likely to see NVOCCs and Freight Forwarders or those in similar positions taking out more, or more comprehensive insurance to protect themselves from indemnity claims from carriers under 33RR.

The applicability of the Convention to sea waybills and e-bills of lading also appears likely to increase the scope of liability and thereby insurance premiums, simply by imposing duties where there was no mandatory

¹² Diamond, A. (2009) *The Rotterdam Rules*, LMCLQ 445, p. 491–6.

¹³ Art 1.9 RR.

¹⁴ *Pyrene v Scindia* [1954] 2 QB 402, but note that even in that case Lord Devlin noted the many variants of FOB in existence, this trend has continued in the present day see *Scottish & Newcastle v Ghalanos* [2008] 2 All ER 768 and Goode R. / McKendrick, E. (editor), (2010) *Goode on Commercial Law*, Penguin, p. 1041.

¹⁵ *Evergreen Marine v Aldgate Warehouse* [2003] 2 Lloyd's Rep 596 at [39-37]. – Bridge, M. (2007) *The International Sale of Goods*, Oxford University Press, p. 73.

international liability or set of standards imposed previously (although many alternative documents in use do incorporate similar duties into their terms.¹⁶)

The decision to encompass sea waybills and electronic transport documents¹⁷, as well as those multimodal transport documents which incorporate periods of sea carriage within the contracts of carriage covered by the Rotterdam Rules¹⁸ is a pragmatic one by the UNCITRAL Working Parties. Bills of lading have long been recognized as impractical for short sea journeys and sea waybills or their multimodal counterparts are now more common place where the negotiable functionality of the bill of lading is of no importance.¹⁹ Furthermore, a number of states²⁰ already recognize the sea waybill as subject to the Hague-Visby Rules and the terms of the waybill itself may voluntarily incorporate a clause paramount applying the terms of one of the international conventions to the carriage²¹, so the new Convention would introduce some much-needed uniformity in that respect.

A broader applicability will mean that a large number of shippers, many of whom it must be said already insure cargo shipped under the terms of alternative transport documents, will find themselves under the umbrella of compulsory international regulation. The consequent effect on the insurance market seems likely to focus the attention of cargo underwriters on the possible scope of claims against shippers under the new Convention.

3. INTRODUCTION TO THE SHIPPER'S DUTIES UNDER THE ROTTERDAM RULES – TOO MANY COOKS SPOIL THE CONVENTION!

The main body of obligations owed by shippers to carriers is contained in Chapter 7 of the new

¹⁶ The CMI Uniform Rules for Sea Waybills (especially at Arts. 4 and 5) and the CMI Rules for Electronic Bills of Lading.

¹⁷ What the Convention terms 'negotiable electronic transport records' defined at 1.19 RR. Their use is permitted and set out in Chapter 3, Art 8–9 RR.

¹⁸ Art. 1.1 RR.

¹⁹ Chuah, J.C.T. *Ibid.*, pp. 210–211.

²⁰ For example Australia, by virtue of the Carriage of Goods By Sea Act 1991, 1998 amendment; Burnett, R. & Bath, V. (2009) *Law of International Business in Australasia*, Federation Press, p. 117.

²¹ *The European Enterprise* [1989] 2 Lloyd's Rep 185; Baughen, S. *Ibid.*, p. 110–111 and Pamel, P.G. & Wilkins, R.C. (2011) 'Bills of Lading vs Sea Waybills, and The Himalaya Clause', p. 8 (April 2011 speech to the Canadian Maritime Law Association Seminar, available at www.cmla.org, accessed on 20. 6. 2012).

Convention (Arts. 27–34 RR). This details shipper's duties pertaining to the provision of information (Arts. 28, 29 and 31 RR), appropriate packaging (Art. 27 RR) and delivery of cargo to the carrier. Chapter 7 also sets out 'special rules' for the carriage of dangerous goods (Art. 32 RR) and establishes the basis of the shipper's liability for breach of these provisions (Art. 30 RR). The provisions have been heavily influenced by the so-called safe trading principle²² which aims to prevent harm to crew, ships, cargo and the environment and a fresh emphasis has been placed on documentary compliance, with the possibility of liability claims where informational duties set out in 28, 29 and 31 RR are breached by the shipper.

At first glance, the provisions seem relatively pellucid in terms of their intended delineation of liability, although they certainly represent a departure from the Hague and Hague-Visby rules. But however readable the text, the burning question for shippers and their insurers is whether it is clear or failing that, whether the intentions of its authors are clear.

Where grey areas remain despite reference to *travaux préparatoires*, there is scope for an uneven application of the Convention provisions by the courts, which would seem to dash any hopes of creating a harmonized system of rights and obligations. The Rotterdam Rules have often been described as a 'compromise' solution whereby acceptable middle ground could be found between carrier and cargo interest²³ with representatives from many more countries and interest groups participating in their creation than in the drafting of previous instruments.²⁴ The desired compromise may have been achieved, but almost certainly at the cost of ergonomic functionality.

3.1 Ignorance of the civil law is no excuse – The nature of obligations under the Rotterdam Rules

One acknowledged deficit²⁵ bound to cause trouble in paradise concerns the intended standard of proof required to establish a breach of the shipper's duties in

²² Sturley, M., Fujita, T., van der Ziel, G. (2010) *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Sweet & Maxwell; Baughen, S. in (2008) 14(6) JIML 459, p. 559–560.

²³ Delebecque, P. *The New Convention on International Contract of Carriage of Goods Wholly or Partly by Sea: A Civil Law Perspective*, CMI Yearbook 2007–2008, p. 264, especially p. 276.

²⁴ Delebecque, P. (2009) *Gazette de la Chambre Arbitrale Maritime de Paris No20*, p. 1.

²⁵ E.g., Stevens, F. *Ibid.* in *The Carriage Of Goods By Sea Under The Rotterdam Rules*, p. 226–227 and Delebecque, P. *Ibid.* in the CMI Yearbook 2007–2008, p. 275.

civilian legal systems, many of which draw a distinction between so-called *obligations de moyens* and *obligations de résultat*.²⁶ The retention of this dichotomy means that while the former subset of obligation only requires that the shipper use his best endeavours to adhere to his obligations, the latter are more stringent and demand that a *force majeure* event must have occurred in order for the shipper to be excused for non-performance.

It is difficult to make even an educated guess as to the intended burden of proof, although contracts to transport goods are often classed as *obligations de résultat* because they foresee a fixed result of delivery to a consignee. The commercial context in which the Convention operates may also tend towards the imposition of stricter duties on the shipper, and this could prove advantageous to those hoping for a system of liability that allows for the speedy resolution of disputes, since a *de résultat* classification would probably²⁷ impose greater evidentiary barriers and deter the escalation of disputes by shippers and their representatives.

Where no jurisdiction clause has been agreed, the failure to specify the nature of the obligations may lead to an uneven application even across the different civilian jurisdictions. Of course, jurisdictional provisions in the Rotterdam Rules allowing the claimant to agree on a forum are (thankfully) optional²⁸, so the potential impact on premium charged for defence cover may well be confined to those parties agreeing to civilian choice-of-law clauses.

3.2 Reasonable doubts – Nebulous informational duties

Articles 28, 29 and 31 RR impose duties on shippers to provide information and instructions and to cooperate with the carrier in order to ensure that the goods are safely handled and stowed on board. In Article 28 RR, the shipper is tasked with providing answers to information requested ‘in a timely manner’ and in Article 29 RR it is stated that he has an ‘obligation’ to provide such information where it is ‘reasonably

²⁶ The French *Code Civile* which sets out the distinction between the different types of obligation at 1137–1147CC; Neumann and Licari. (2006) *Introduction au droit français*, 1ere Edition, Alpmann Schmidt, p. 43 and Terré, Simler & Lequette. (2005) *Droit civil: Les obligations*, 9e edition, Dalloz, p. 565–8.

²⁷ As Terré et al. point out, there is some plasticity inherent in civilian conceptions of both types of *obligation* with a number of sub-groups recognized as carrying a modified duty of care, at least under French law.

²⁸ Article 66 RR, and Wilson, J. F. (2010) *Carriage of Goods by Sea*, Longman, p. 241–242.

necessary’ and ‘not otherwise reasonably available to the carrier’. Article 31 RR is a strict liability²⁹ provision apparently relating to documentary compliance only. There is certainly a need for provisions relating to information provided about cargo presented for carriage. Some industry groups have already sought to raise awareness of the dangers of overweight cargo, which can lead to problems with ship stability.³⁰

Although the wording of the informational provisions makes logical reading and the general intention behind the provisions can be gleaned, there are several points at which it is difficult to determine the parameters of liability intended by the drafters. In a convention intended to bring uniformity to sea carriage contracts, it might have been preferable to anchor the desired safety standards in practical terms, as opposed to including qualifiers such as ‘timely’, ‘reasonable’ and ‘proper’ that leave considerable room for interpretation by the courts and disagreement by lawyers.³¹

Until a concrete set of facts actually comes to court, it will be impossible to try to untangle the duties of information and cooperation imposed on the parties, but commentaries have identified potential pitfalls in situations where some special aspect of the cargo shipped has been omitted and there is a later instance of damage. If the shipper has provided information to a request from the carrier in accordance with Article 29 RR, how specific must this be in order for that cargo to be handled in a ‘proper’ manner, and how is a distinction to be drawn between information classed as ‘reasonably necessary’ and unnecessary? While Article 29(1(a) RR does make reference to ‘precautions’ that the carrier or MPP may need to take in respect of cargo, this may depend on the particular type of ship or more plausibly on the particular circumstances of carriage.

One could envisage situations where neither the shipper nor carrier could really be said to be ‘at fault’, or even to have behaved ‘unreasonably’ – imagine a cooperative shipper being informed that cargo would be stored in a temperate location under deck and therefore failing to inform the carrier that it could become volatile at high temperatures. All that would be needed for damage to occur would be a sudden change of loading plan, at which point the shipper would be faced with having to prove he had been ‘reasonable’ to avoid becoming liable under Article 30 RR. Since concrete

²⁹ Article 30(2) RR.

³⁰ The World Shipping Council and the Federation of National Shipbrokers and Agents; ‘Ship brokers join fight for container weight verification’ (12th July 2012), available at: http://www.heavyliftffi.com/content/NewsItem.aspx?id=4461&goback=gde_44626_member_133733427, accessed on 20. 6. 2012.

³¹ Lorenzon, F. in Baatz, Debattista et al, *Ibid.* p. 83–84.

parameters are lacking, this could provide fuel for a lengthy court case.

Similarly, situations where there has been an obvious breach of the Article 31 RR duty but the master still chooses to sail the ship pose difficult questions about the nature of the strict liability intended by the shipper's 'guarantee' in Article 31(2) RR – what of a situation where the contract particulars have been deliberately wrongly compiled, and the carrier knows this, yet chooses to sail with cargo that later causes problems for the ship? These particulars could potentially relate to international sanctions, and it would seem bizarre for the carrier to escape liability entirely, particularly where he has colluded with the shipper to effect such carriage.

3.3 Mixed causation situations causing uncertainty

Indeed, the shipper's duties under the Rotterdam Rules throw up a number of questions regarding the intended priorities of the drafters at UNCITRAL. Unlike the Hague-Visby Rules, which envisaged a situation where it was first necessary for the carrier to prove he had exercised due diligence to see that his vessel was seaworthy before invoking the exceptions in Article IV(2), the new Convention does not outline a clear process for determining how to apportion liability in multiple causation situations.

The Hague-Visby 'ping-pong' of alternating duties on cargo interests and carriers appears to have been replaced with a tug-of-war whereby cargo interests will be forced to prove the carrier did not meet the required standard of seaworthiness in order to bring themselves within the umbrella of Article 30(2) RR, which unfortunately been worded as an exception and is likely to require proof that the shipper and his MPPs were not the cause of all or part of the damage or loss.³²

This is particularly important when one considers that special efforts have been made to introduce a more onerous duty of seaworthiness on the carrier in Article 17 RR. The inevitable question which must flow from the incorporation of both a continuous duty of seaworthiness along with stringent shipper's obligations which look to ensure safe trading, concerns which duty should take precedence where those two heads of responsibility intersect?

³² *The Torenia* [1983] 2 Lloyd's Rep 210. See further the excellent discussion of the likely impact of the Art. 30 RR burden of proof by Asariotis, R. (2008) J.I.M.L. 14(6), p. 537. This is echoed by Baughen, S. (2008) J.I.M.L. 14(6) 459 and Lorenzon, F. *Ibid.*, pp. 88–9, who views Article 30(2) RR as a limitation provision rather than an exception.

The scenario that unfolds frequently in my mind imagines a not-implausible³³ agreement where the shipper has contracted on FIOST terms and has asked third-party stevedores to stow cargo below deck. The stevedores, for which the shipper is responsible by virtue of Article 34 RR, are obliged to perform their duties with proper care in line with Article 27(2) RR, but what if they fail to do so, and the vessel is left unstable due to this poor stowage? The carrier is absolved of fault attributed to the shipper but it is unclear what the final outcome would be where due diligence was not exercised, and a vessel left port so badly stowed she was considered unseaworthy; there is now no navigatory fault defence as in Hague-Visby, so this is uncovered ground. A strong likelihood therefore exists that at least some courts will want to see that seaworthiness is enforced and prevent or reduce the ability to attribute liability to the shipper or documentary shipper under Article 30 RR, given that the master will have ultimate authority to give orders to sail and that the lives of the crew could potentially be at stake³⁴ should he choose to sail.

It is true that this confusion only comes to the fore in situations where multiple causes of loss appear likely; but such situations are by no means rare. Trying to ascertain the precise cause of loss or damage after the event often proves very difficult if not impossible, and even experts are often left to make educated guesses as to what exactly caused a mishap, especially when the accident under analysis is the total loss of a vessel.³⁵ A presumption of fault, rather than a provision apportioning liability for contributory negligence seems a better solution, since it avoids having to try and slice a relatively mysterious loss into fractions.³⁶

³³ Bugden, P. (2010) 'Loading stowing and discharging; how tight is your operation?' *Heavy Lift*, March/April, pp. 32–33, which provides a good overview as to the different problems occurring with regard to loading and stowage of goods on board ships.

³⁴ Similar issues concerning ship stability have certainly plagued the English courts applying the Hague-Visby Rules, see Baughen, S. (2007) *Bad Stowage or Unseaworthiness?* in LMCLQ 1.

³⁵ See for a recent example, the sinking of a number of vessels leaving the Phillipines and Indonesia which are believed to have sunk due to the liquefaction of nickel ore during transit, which subsequently led to ship instability. Educated guesses have had to be made and inferences drawn since the 'evidence' is underwater, and no crew remain alive.

³⁶ But see contra, I.K Diallo, spokesperson for the African representatives to the working parties remarked *Ibid.* at page 4 that he and his colleagues had lobbied hard to keep the fault-based character of Article 30, and saw it as laudable that cargo interests should first have to show the vessel was unseaworthy before alleging the carrier was wholly or partly at fault.

These difficulties seem to show the Rotterdam Rules as destined to originate litigation should they ever achieve widespread ratification. It would be a miracle if every court faced with attempting to distinguish priorities reached the same conclusion as to the appropriate priorities.

3.4 The shipper's liability for delay

The deletion of a reference to delay³⁷ in Article 30 RR by the UNCITRAL working party would prima facie seem to exonerate cargo interests from having to compensate affected parties for loss or damage causally connected to delay, at least where that loss or damage does not come within Articles 31 and 32 RR. But as a number of commentators have pointed out, a deletion is not the same as an outright exclusion, or indeed a limited liability provision related to delay as can be found with reference to the carrier's duties under Article 21 RR.³⁸

In case of dispute, regard is often had to the *travaux préparatoires* of Conventions, but the effect of failing to address an important head of liability means the provision may come to be applied differently across the territory covered by the Rules, especially since carriers will not be able to agree to limit the shipper's liabilities by virtue of rule 79(2) RR. In failing to agree to tackle the issue directly in the text of the Convention, the authors have left the issue to be decided by the courts, who will find themselves without any categorical intention for guidance should they choose to refer to the *travaux* in their deliberations.

Although it seems unlikely that many courts would be happy with an interpretation of liability that could potentially leave the shipper liable for all consequential losses suffered by the carrier including pure economic loss³⁹, the provision is arguably worded too widely to ensure a harmonious application, which may make the process of underwriting premiums a painful business for both insurers and assureds.⁴⁰

³⁷ Baughen, S. (2009) *Shipping Law*, Routledge Cavendish, p. 163 and Sturley, Fujita and van der Ziel. *Ibid.* p. 494 and Olebakken, I.H. *Background Paper On Shipper's Obligations And Liabilities* in the CMI Yearbook 2007–2008, p. 304.

³⁸ Even this limited liability for delay may not be actionable unless a specified time for delivery is included in the text of the transport document. – Tsimplis, M. in Baatz, Debattista et al. *Ibid.*, p. 67.

³⁹ Certainly the common-law courts are likely to balk at the idea if recent case-law is anything to go by, see particularly *The Achilleas* [2008] 2 Lloyd's Rep 275.

⁴⁰ Diamond *Ibid.*, p. 491.

3.5 Dangerous goods

As mentioned above, dangerous goods liability is now strict under Article 32 RR and information duties are focused on those goods 'likely to become' a danger, rather than the situation that had evolved under the Hague and Hague-Visby regimes whereby common-law courts classed a relatively wide⁴¹ range of goods as being dangerous in cases such as *The Giannis NK*⁴², via a streak of judicial creativity.⁴³ Under Article 32 RR, dangerous goods are those which fit the horrendously nondescript classification of being 'reasonably appear likely to become' dangerous to persons, property or the environment.

This definition, while it remains relatively wide, does not appear to envisage any liability for what have been called 'legally dangerous' goods in English law and does appear largely to preserve the position under the common law⁴⁴, with the obvious exception of the reference to goods classified as dangerous to the environment. This category could potentially render shippers liable under Article 32 RR for presenting a large number of substances not normally thought of as dangerous for carriage.⁴⁵ The same criticism could be made of adulterated or tainted variants of generally safe goods, which the shipper will be liable for by virtue of references to 'nature and character' of cargo in the provision wording – it would have been simpler to make the intended scope of liability clear, rather than leaving academics to guess at whether substances such as nickel ore (variants of which have a tendency to liquefy during carriage⁴⁶) would come within the ambit

⁴¹ Stevens, F. *Ibid.* in D.R Thomas (Ed.), p. 231.

⁴² [1998] AC 605.

⁴³ In the *Giannis NK*, House of Lords declined to construe Art. IV(6) of the Hague-Visby rules as an *ejusdem generis* provision – the dangerous cargo is therefore not required to pose a physical danger to ship or other cargo in order to qualify as dangerous; Wilson. *Ibid.*, pp. 36–37.

⁴⁴ The focus of the common law relating to dangerous goods has generally been on the creation of physical danger, rather than mere delay, see *The Darya Radhe*, [2009] EWHC (Comm) 845, *The Aconcagua* [2010] EWCA Civ 1403, although there are instances where claims for pure economic loss eventuated by the carriage of dangerous goods have succeeded, see *Mitchell Cotts v Steel Brothers* [1916] 2 KB 610. Stevens, F. *Ibid.* suggests at p. 232 that some ostensibly 'legal' dangers such as the possibility of arrest in port due to carriage of smuggled goods would also attract liability under Article 32 RR, and Baughen suggests this in *Shipping Law Ibid.* at pp. 161–163 where pure economic loss is caused by e.g special unloading procedures required for dangerous cargoes in port.

⁴⁵ Lorenzon, F. *Ibid.*, p. 92.

⁴⁶ Joint Hull Committee Information Paper JH2012/003: *Liquefaction & Bulk Carrier Total Losses: Key Issues*, M. Edmondson & M. Bennett (27th February 2012).

of Article 32 RR, as there are some cases where the dangerous characteristic was so rare as to make the risk of it becoming dangerous vanishingly small.

In a departure from the position enumerated in the *Giannis NK*, Article 32 also envisages a causal connection between damage occurring because of the carriage of dangerous goods and a lack of information about dangers being given by the shipper.

This certainly marks a sea-change from liability under the Hague-Visby Rules, which made all losses due to dangerous goods actionable with or without evidence of informational lacunae⁴⁷ in IV(6), and might even be seen as 'fairer' to those shippers who have done their best to inform carriers of the potential risks of the contracted cargo. Yet the provision itself may be an accident waiting to happen, with many important details left uncovered. Quite how is a shipper meant to prove that he didn't fail to inform the carrier of relevant information, and what kind of non-provision is required- if we recognize that the shipper/carrier dynamic is one reliant on cooperation, at what point has the shipper discharged his duty towards the carrier with regard to details provided about the cargo?

Additionally, more onerous obligations relating to informational duties have been imposed on the shipper, so that there is now a duty of compliance for every leg of the contracted journey and the shipper is obliged to prepare the goods appropriately prior to delivery to the carrier. The advent of containerization has focused attention on appropriate packaging of goods, which can prevent accidents by giving clear warnings of danger to the carrier. The provision also matches those in the IMDG code which places the onus on the shipper of goods to determine the class of substances⁴⁸ prior to their carriage.

The new Convention seems a concerted attempt to curb that trend, but risks muddying the waters even further in that there is no specified burden of proof on the carrier and that it is once again not clear what will happen should both the information and carrier duties be breached so as to raise seaworthiness issues.⁴⁹

4. CONCLUSION – CERTAINTY TRUMPS PARITY?

To argue that change and uncertainty are the inevitable results of regulatory reform is both true

⁴⁷ Stevens, *Ibid.*, p. 233–235; *The Aconagua* [2010] EWCA Civ 1403, [2011] 1 Lloyd's Rep 683.

⁴⁸ *The Carriage of Dangerous Goods by Sea (Hamburg Studies on Maritime Affairs)* (Springer, 2007), Güner-Özbek, M.D., p. 91–92.

⁴⁹ 3.4 above.

and trite to complain that the new Convention will lead to uncertainty is not by itself enough to justify non-ratification of a document that has clearly been motivated by a desire to modernize regulation of the international carriage of goods by sea and to harmonize the various types of transportation documentation currently in use so as to impose a set of globally applicable minimum standards for sea trade.

But as has been stressed by other commentators, uncertainty is the arch enemy of commerce and trade⁵⁰, which thrives on clearly defined systems of liability, and the strengths of the common law have often been said to lie in the certainty that is able to give commercial parties by virtue of clear rules and precedents applicable to international trade.⁵¹ Legislators must be careful not to trip on the tightrope between certainty and fairness. A predictable allocation of liability between the parties is often regarded as preferable to an alternative whereby determining which side is ultimately deemed to be 'at fault' is decided with reference to nebulous principles of reasonableness and fairness which is bound to drag out the process of litigation in resolving questions of causation and culpability. In this regard, the Convention might have been designed specifically to boost the billable hours on the balance sheets of barristers, such is the potential for litigation inherent in the wording of the articles detailing the shipper's liability for ship and cargo damage.

It is well known that regulatory changes can have unforeseen consequences and introduce unexpected motives and the theoretical benefits of encouraging an increase in safety standards much like those already detailed in the SOLAS and IMDG/ISMBC codes must be weighed against the potential cost and general market uncertainty caused by the entry into force of newly complex rules and the possibility of unlimited liability being imposed on those shippers forced to transport cargo using the new Convention.

Ultimately, the effect of the new Convention on those parties reliant on insurance to facilitate international trade remains to be seen, but it must be said that insurance too thrives where it can easily determine the likely risk of ensuing litigation flowing from the rights and obligations assumed by the parties to the principal

⁵⁰ Diamond, Anthony on the potential perils of uncertainty generated by the Rotterdam Rules; *Ibid.*, p. 536.

⁵¹ As stressed in Lord Devlin's speech before the Privy Council in *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep 439, p. 444, see also *Voest v Chevron* [1987] 2 Lloyd's Rep 547. Cf. more generally Bridge, M. (2007) *The International Sale of Goods*, Oxford University Press, pp. 3–10.

commercial transaction⁵²; hence the *uberrimae fidei* duty of disclosure⁵³ plays a key part in the efficient functioning of the insurance market in ensuring that enough information is available to see that claims payable by the insurer do not outweigh the premiums charged⁵⁴ to assureds.

Authors keen to ratify the Rotterdam Rules have argued that the minutiae of the Convention can be left to the courts, who will adjudicate on the applicability of the provisions to different factual situations.⁵⁵ This is all well and good, but I would argue that the details which have been left to precedent are not minutiae, but rather unresolved questions which cut to the heart of the interaction between carriers and shippers under the new Convention. To leave the world's courts to perform a judicial dance of the seven veils before the new Rules can be said to have revealed themselves in full is to gamble that they will all view the provisions in the same way.

For the common law, at least, such a reliance on precedent to make what could well be seen as policy decisions about sea commerce is generally frowned upon⁵⁶, and with good reason- courts are equipped to apply the law pertaining to individual factual situations, but decisions about the correct emphasis of an

international convention should not be left to judicial whim and fancy as they require a broad appreciation of global issues which belongs in the domain of the legislature.

SUMMARY

Insurance plays a pivotal role in risk management and the availability of reasonably-priced cover can prove crucial to decisions about whether companies can continue to operate; governments can and have been forced to intervene with subsidies where regulatory changes have threatened to make premiums so large as to eliminate profit.⁵⁷ Any potential impact on the insurance market must therefore be carefully weighed – it is an invaluable tool for risk management and ultimately facilitates much of international trade. The subrogation of claims by many cargo insurers means that the insurance market is often left to deal with the fallout when a client suffers losses; so ultimately, it is the insurers that bear the brunt of uncertainty if they undervalue the potential risks of new duties. This aversion is then passed on in premium or call increases charged to assureds.

⁵² Stiglitz, J. & Rothschild, M. (1976) 'Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information', *Quarterly Journal of Economics*, 90 (4), p. 629.

⁵³ Codified in the Marine Insurance Act 1906 (1906, c.41) at s.17-20, which emphasize the importance of underwriters having the correct information in deciding whether to underwrite a proposed assured, and prescribe the extreme penalty of avoidance where information considered 'material' to the risk has been withheld, thus preserving the undesirable informational asymmetry between underwriter and assured. See also Lord Hobhouse to this effect in *The Star Sea* [2001] UKHL 1 at [51].

⁵⁴ Bannock, G., Baxter, R.E and Davis, E. (2003) *Penguin Dictionary of Economics*, Penguin, p. 194.

⁵⁵ Delebecque, P. (2009) *Gazette de la Chambre Arbitrale Maritime de Paris No20*, who admits that the Convention will need to be 'approfondi'.

⁵⁶ *Miliangos v George Frank* [1975] 3 All ER 801 and *ex parte Brind* [1991] 1 All ER 720, and McLeod, K. (2009) *Legal Method*, Palgrave, pp. 218–227.

⁵⁷ Heather, K. (2004) *Economics Theory in Action*, Pearson Education/Prentice Hall Europe, notes at page 173–4 that this was the case in the wake of the 9/11 terrorist attacks; US regulatory changes to safety standards elevated premiums to such an extent that subsidies to the insurance industry were necessary in order to allow the continuation of passenger airlines.