

WILLIAM TETLEY MEMORIAL SYMPOSIUM*

THE ROTTERDAM RULES FROM AN AUSTRALIAN PERSPECTIVE

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Professor William Tetley was not a fan of the Rotterdam Rules. Almost exactly four years ago, at a similar symposium at this University, in honour of Charles Gonthier, Professor Tetley expressed the view that:

1. The Rules do not bring uniformity to international carriage of goods by sea law; rather, he said, they provide a long, verbose convention in a new, untried, untested, and unclear language;
2. The Rules should be neither signed nor ratified by Canada; rather a multi-modal convention based on the Hague, Hague/Visby and Hamburg Rules should be drafted; and
3. Canada should, in the meantime, adopt incremental reform to the MLA to bring Canadian maritime law into conformity with modern improvements in technology and practices and with law and regulations adopted by major Canadian trading partners.

Today I want to add an Australian perspective to that of Professor Tetley's. That is a task made challenging by the fact that there is no universal agreement as to whether Australia should become a party to the Convention. Not even the Executive Committee of the Maritime Law Association of Australia and New Zealand is ad idem. I can however tell you that one of our members, who happens also to be the current President of CMI, is a strong advocate for the adoption of the Rules. So let me say at the outset that this is an Australian's perspective on the question of whether or not Australia should become a party to the Rules.

As has been well recorded, there are now four international conventions relating to the carriage of goods by sea: the Rotterdam Rules (to which 25 States have become signatories and which have been ratified by three States: Congo, Spain and Togo), the Hague Rules

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(utilised by the US and a few smaller nations), the Hague/Visby Rules (to which over 70 nations, including most of the World's shipping nations, are party), the Hamburg Rules (adopted by 29 nations) and various hybrid versions such as Australia's *Carriage of Goods by Sea Act 1991* (COGSA '91) and the Chinese Maritime Code.

In addition to the regimes relating to maritime transport, are the conventions relating to land transport: the Convention on the Contract for the International Carriage of Goods 1956 (CMR) and the Convention Concerning International Carriage by Rail 1980 (CIM/COTIF). The UN Convention on Multimodal Transportation of Goods 1980, which set out a uniform regime for multimodal transport contracts, has received only 10 ratifications and requires 30 to bring it into force.

In light of these various conflicting regimes, it is unsurprising that there was momentum for a uniform regime; momentum that was harnessed by the CMI and then UNCITRAL before finding form in the adoption of the Rotterdam Rules by the General Assembly of the United Nations in December 2008

Australia has not signed the Convention, nor does it seem that there is any inclination on the part of the Australian Government to do so. In August 2011, the Office of International Law advised that the Department of Infrastructure and Transport had portfolio responsibility for this issue and that the matter had been referred to that Department. On 4 September 2013, the Section Head Maritime Economic Regulation, Maritime & Shipping Branch of the Department of Infrastructure and Transport advised that "...we are currently in what is known as a 'caretaker' period while we await the outcome of the upcoming election. Suffice it to say that, should there be a change in Government, a new incoming Government has not yet had an opportunity to be provided advice on [the Convention]". The new Government has now been in place since September 2013 and, as yet, has not expressed any interest in the Rotterdam Rules.

In this paper, I do not propose to canvass the provisions of the Rules chapter and verse. A vast quantity of academic literature has already done so. To that extent it might be said that the Rules have already been a success for the academy and I have no doubt that if the Rules ever come into force, they will be a success at the very least for the maritime lawyers around the World.

Rather, what I propose to do is to canvass the three major objections that Australia articulated prior to the adoption of the Rotterdam Rules, namely:

- the complexity of the instrument
- the perception that the text favoured carriers at the expense of small shippers
- the shift, via the volume contract provision, from a mandatory liability regime to one based on freedom of contract.

Although these issues remain, the question might be asked, whether these issues, or indeed any others, are significant enough to amount to “deal breakers” such that Australia should not even consider signing the Rotterdam Rules?

In relation to the issue of **complexity**, it is true that overall the document is more complex. However, it attempts to address what was often obscured. It is more up to date – dealing with door-to-door possibilities; more documents; E-commerce; deviation. It contains a more rational liability scheme – abolishing the “nautical fault defence”; providing for liability for delay; increasing monetary limits; increasing time limits. It clarifies ambiguities and fills gaps – the scope of application is wider; reservations are controlled; actions against employees/subcontractors are clarified.

From Australia’s point of view, the resultant Convention must be viewed in light of the amendments which were made to COGSA ’91 in 1998, which introduced a “modified” version of the Hague-Visby Rules, and in light of the various *Sea-Carriage Documents Acts* enacted in each Australian State in or about 1996 which govern the transfer of rights and liabilities arising pursuant to sea-carriage documents. Australia had therefore already anticipated the need for many of the changes now incorporated in the Rotterdam Rules.

Let me highlight some examples.

Apart from a desire for uniformity in relation to the law relating to the international carriage of goods by sea, the development of the Rotterdam Rules was driven by a view that the World had little need for another purely maritime convention. Thus, the intention was to create a “door-to-door” regime, if not a multi-modal convention. The scope of the Rules is

determined by an examination of the nature of the transactions which are covered by the Rules and its geographic reach, rather than by reference to the type of sea-carriage document used for the carriage. Thus the Rules cover traditional bills of lading and whatever bill-of-lading substitutes might develop in the future. Despite the broad purpose behind the original drafts of the Convention, it was agreed that the scope of the Rules should be restricted so that they apply to the door-to-door carriage of goods only when (1) the carriage included a sea leg, and (2) the sea-leg involved international transport.¹ Further, the Rotterdam Rules apply to both inbound and outbound carriage.

By way of comparison, the Australian legislation provides, in Schedule 1A, Article 10, that the “modified” Rules apply to outbound carriage pursuant to a sea-carriage document, to inbound carriage, unless the Hague, Hague/Visby or Hamburg Rules (or a modification thereof) apply by reason of law or agreement, but do not apply to charterparties. A “sea-carriage document” is defined to mean a bill of lading; or a negotiable document of title that is similar to a bill of lading and that contains or evidences a contract of carriage by sea; or a bill of lading that, by law, is not negotiable; or a non-negotiable document (including a consignment note and a document of the kind known as a sea waybill or the kind known as a ship’s delivery order) that either contains or evidences a contract of carriage of goods by sea.

The very broad definition of “sea-carriage document” in COGSA ’91 is consistent with the breadth of coverage embraced by the Rotterdam Rules, although the manner of achieving that coverage is slightly different.

Turning to the period of liability, in contrast to the Hague/Visby and Hamburg Rules, the coverage of the Rotterdam Rules is contractual in that it is defined by the contract of carriage itself. If the contract covers the land carriage preceding the loading of the vessel and land carriage subsequent to the unloading of the vessel, then the Rules govern the contract. However, if the contract covers only the maritime leg of a multi-modal movement, then the maritime leg is all that is governed by the Rules. Further, the Rules require there to be a maritime leg. This feature has led to the Rules being described as a “maritime plus” convention.

¹ Michael F. Sturley, *Scope of Coverage under the UNCITRAL Draft Instrument*, (2004) 10 *The Journal of International Maritime Law* 138, 154

Unsurprisingly, concerns have been expressed that the new regime could conflict with the existing unimodal conventions, particularly CMR and CIM/COTIF. The Rotterdam Rules attempt to deal with these concerns by adopting a limited network system. Pursuant to this system, liability is based on the relevant unimodal regime when it can be shown that the damage occurred during land transport that would otherwise have been subject to a mandatorily applicable international convention.

The potential problems created by a door-to-door convention inevitably revolve around the treatment of the liabilities and responsibilities of all those involved in the transport chain. The Rules deal with this issue through the concept of a “performing party”, being a person other than the carrier that physically performs [or undertakes to perform] any of the carrier’s responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term does not include any person who is retained by a shipper or consignee, or who is an employee, agent, contractor or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee. To balance the extension of liability to performing parties, there is “automatic” Himalaya protection.

By way of contrast, COGSA '91 provides that the “modified” Rules apply from the time when the carrier begins to be in charge of the goods at the time when the goods are delivered to the carrier within the limits of a port or wharf to the time when the carrier ceases to be in charge of the goods at the time when they are delivered to or placed at the disposal of the consignee within the limits of the port or wharf which is the intended destination of the goods. Thus, the Australian regime is restricted to port-to-port liability. This is one of the most significant distinctions between the current Australian regime and the Rotterdam Rules. “Performing parties” are seldom subject to the obligations and liabilities of the contractual carrier but, of course, can attempt to avail themselves of the carrier’s immunities through Himalaya clauses or the doctrine of sub-bailment on terms.² The adoption of the Rotterdam Rules would have the effect of embracing road and rail carriers within the liability regime. As the Australian law stands, road and rail carriers are able to exempt themselves from liability,

² *Brambles Holdings Ltd v WMC Engineering Services Pty Ltd* (1995) 14 WAR 239.

subject to the provisions of the *Australian Consumer Law*.³ It is difficult to envisage much enthusiasm on the part of road and rail carriers for becoming subject to liabilities from which they can currently exempt themselves.

The Rotterdam Rules effect subtle changes to the burden of proof that currently applies to cargo claims to which the Hague-Visby Rules apply. From an Australian point of view this is probably no bad thing as the current jurisprudence is, at best, opaque.⁴ Under the Rotterdam Rules, the burden lies first on the claimant to prove that the occurrence that caused the loss, damage or delay took place during the carrier's period of responsibility. The burden then shifts to the carrier to establish that neither its fault (nor that of any performing party) caused or contributed to the loss, damage or delay. It will be presumed that the loss, damage or delay was not caused by the carrier or a performing party if the carrier proves

- a. that it properly and carefully loaded, handled, stowed, carried, kept cared for and discharged the goods and exercised due diligence before, at the beginning of [and during] the voyage to make [and keep] the ship seaworthy; properly man, equip and supply the ship; make [and keep] the holds...fit and safe...
- b. that the loss, damage or delay was caused [solely] by one of the following events
 - i. [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions
 - ii. quarantine restrictions; interference by or impediments created by governments, public authorities, rulers or people [including interference by or pursuant to legal process]
 - iii. act or omission of the shipper, the controlling party or the consignee
 - iv. strikes, lockouts, stoppages or restraints of labour
 - v. wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods
 - vi. insufficiency or defective condition of packing or marking
 - vii. latent defects not discoverable by due diligence

³ *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1993-4) 179 CLR 388.

⁴ *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad* (1998) 196 CLR 161; *C V Scheepvaartonderneming Ankergracht v Stemcor A/Asia Pty Ltd* (2007) 160 FCR 342; *Seafood Imports Pty Ltd v ANL Singapore Pte Ltd* [2010] FCA 702.

- viii. handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee
- ix. acts of the carrier or a performing party in pursuance of the powers conferred by article 12 and 13 (2) when the goods have become a danger to persons, property or the environment or have been sacrificed.

The burden then returns to the cargo claimant to attempt to prove that the carrier or performing party committed a fault that caused or contributed to the loss, damage or delay or if it is established that the loss was caused by an occurrence that is not included on the exception list or by an occurrence not relied on by the carrier.

The traditional exclusions arising out of fire on board the ship, saving or attempting to save life at sea and perils of the sea are also included as presumptions, but are contained in a different part of the Rules.

The most obvious difference between the provisions of the Rotterdam Rules in this regard and those contained in COGSA '91 is that the traditional list of exceptions contained in Article 4(2) of the Hague/Visby Rules has been recast as a list of presumptions. It is suggested that whether the "excepted perils" are drafted as exceptions or as presumptions makes virtually no difference in practice since the exceptions would still be subject to proof of the carrier's fault.

Ultimately then, in relation to the broad liability scheme, the Rules have not deviated too far from the familiar Hague/Visby formula and, this, it is suggested, is its weakness. The wording is more complicated and the subtle shifts in the distribution of the burden of proof and the interaction of the particular obligations and presumptions have not clarified the legal positions of the carrier and the shipper. The burden of proving the exercise of due diligence remains on the carrier, although that burden has been extended to the duration of the sea voyage. The burden of proof has however shifted in relation to the exceptions and the claimant now bears the onus of proving that the carrier's fault caused or contributed to the loss. This is a matter about which Australia protested quite vigorously given the obvious difficulty for cargo owners in proving the carrier's fault.

Australia did not tamper with the package and kilo limitations in making its amendments to COGSA '91, but rather has maintained the Hague/Visby limits. The Rotterdam Rules increase the liability amounts from 2 to 3 SDRs per kg, or from 666.67 to 875 SDRs per package or shipping unit, whichever is the greater. Significantly, there is no attempt in the Rotterdam Rules to deal with limitation of liability in relation to modern containerised cargo. Even at the time of the amendments to the Hague Rules, the provisions dealing with containerised cargo were already considered out of date.⁵ The Vice-President of CP Ships (UK) Ltd has observed that, "History will not judge us kindly if the international shipping community, when undertaking the most significant revision of its rules for carriage in 80 years, adopts by default a method of calculating limitation which wholly ignores the practical realities of modern shipping and the single most important system of carriage; the container".

Australia pre-empted the provisions of the Rules relating to e-Commerce when it inserted a new Article 1A within the "modified" Rules which provides that the Rules apply, with any necessary changes, to a sea carriage document in the form of a data message in the same way as they apply to such a document in a printed form.

The Rotterdam Rules also make provision for the transfer of rights by the holder of a negotiable transport document, be it paper or electronic. The basis on which there is a consequent transfer of liabilities is similar to that contained in the various Australian *Sea-Carriage Documents Acts*, namely, that the transfer of liabilities depends upon the exercise of any right under the contract the carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable document. If no negotiable document has been issued, the transfer of rights depends upon the provisions of the applicable law but the transfer does not relieve the transferor of any liability without the consent of the carrier.

It is not difficult to see from that brief survey why an Australian government might find attempts to negotiate yet another piece of legislation on the carriage of goods by sea through a volatile Parliament rather more trouble than it is worth.

Australia's second major concern was in relation to ***small shippers***. There is a perception that shippers' obligations have increased because of the articulation of the duties of shippers to cooperate and their obligations in relation to delivery. The perception is

⁵ *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] FCAFC 202.

heightened because there is no limit of liability for shippers. However, there is none either at common law or under the Hague-Visby regime. On the other hand, carrier liabilities have increased significantly. This is an objection that would seem difficult to sustain.

It is possible that Australia's concerns surrounding the provisions relating to **volume contracts** have arisen partly from a position of fear of the unknown. Volume contracts are a particularly US concept and hitherto have not much featured in Australian jurisprudence.

The Rotterdam Rules define volume contracts in Art. 1.2:

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. The specification of the quantity may include a minimum, a maximum or a certain range.

This definition is derived from the US notion of a "service contract". Service contracts arose as a consequence of the deregulation of the shipping industry and liberalisation from shipping liner conferences, particularly following the removal of all regulatory strictures by the *Ocean Shipping Reform Act 1998* (US). As a result of these reforms, shippers were able to freely negotiate rates to their advantage. Whilst the reforms were largely of benefit to the major shippers, there was also a consolidation of smaller shippers into entities such as FedEx, UPS and DHL and a considerable increase in competition amongst these consolidators to negotiate major discounts with ocean carriers.⁶ At the twelfth session of the Working Group III meetings, the US delegation proposed that the "Ocean Liner Service Agreement" (OLSA), otherwise known as service contracts, be included within the scope of the Rules but that in respect of such agreements, certain provisions of the Rules be made non-mandatory.⁷

The definition of a volume contract in the Rotterdam Rules is significantly broader than that contained in the *Shipping Act*⁸ in that there is no requirement to commit to a particular rate or rate schedule or service level.

⁶ Proshanto Mukherjee & Abhinayan Basu Bal, *A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective*, (2009) 40 *Journal of Maritime Law & Commerce* 579, 583-589.

⁷ UN doc A/CN.9/645, paras 236ff.

⁸ Section 3(19) of the *Shipping Act 1984* (US), provides that a service contract is:

a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or amongst ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of non-performance on the part of any party.

Under the Rotterdam Rules, the default position is that volume contracts are subject to the liability regime provided for in the Rules (Art. 80(1)). Article 80(2) does, however, permit deviation from the Rotterdam Rules, but there are four pre-conditions:

1. the derogation must be set forth in the volume contract as a prominent statement
2. the volume contract must be individually negotiated or prominently specify the sections of the volume contract containing the derogations
3. the shipper must be given an opportunity, and notice of that opportunity, to conclude a contract of carriage on terms and conditions that comply with the Convention without any derogation
4. the derogation must not be incorporated by reference from another document nor be included in a contract of adhesion that is not subject to negotiation.

It is the ability to derogate from the Rules that has caused the greatest concern. In an article published in 2010, several eminent maritime academics and practitioners, including Professor Tetley and the then President of the Australian and New Zealand Maritime Law Association, Mr Frazer Hunt, wrote:

The volume contract exemption is a most worrying development that favours the large scale stakeholders and allows them to make their own rules. Allowing such freedom on an international basis in the banking sector recently created a worldwide financial crisis. We could end up with the large scale stakeholders gaining such sufficient market power to enable them to hold the international supply chain to ransom.⁹

The fear is that the volume contract provisions in the Rotterdam Rules will in fact have the consequence of heralding in a new era of pre-Hague-Visby freedom of contract. In addressing that fear, it is perhaps useful to put into perspective the quantity of shipments which might be the subject of volume contracts. Over 95% of shippers in the US trades opt for service contracts. In the non-US trades it is estimated that some 50-70% of the total number of shipments are carried under a rate agreement system. Under normal circumstances, if the average occupancy level of liner ships is around 75%, no more than 20-25% of the total number of shipments would be carried under volume contracts.¹⁰ In relative

⁹ Alcantara, Hunt, Johansson, Oland, Pysden, Ramberg, Schmitt, Tetley CM, QC, Vidal, Particular concerns with regard to the Rotterdam Rules, (April 2010), www.idimaritimo.org.

¹⁰ Abhinayan Basu Bal, A Critical Evaluation of the Rotterdam Rules, Thesis submitted for the award of PhD at World Maritime University, August 2010, Chapter 6, 26.

terms, therefore, it cannot be suggested seriously that there will be a chaotic return to the pre-Hague-Visby era.

Even if large stakeholders did seek to reorganise their trading terms to take advantage of a perceived increase in contractual freedom, Art. 80(4) preserves what are called the “super-mandatory rules.” So, despite Art. 80(2), a volume contract cannot derogate from:

1. the requirement of seaworthiness (Art. 14)
2. the shipper’s obligations to provide information and instructions (Art. 29)
3. the shipper’s obligations to inform of dangerous goods (Art. 32)
4. carrier’s conduct that would lead to loss of limitation of liability (Art. 61).

The current position under the Hague-Visby Rules in relation to volume contracts is not entirely straightforward. Although the Rules are silent on the topic, Art. 6 would seem to pose an obstacle to the assertion that volume contracts currently sit outside the mandatory regime. The very nature of a volume contract belies the argument that the particular contract of carriage relates to a one-off cargo “not in the usual course of trade” as is required by Art. 6. The fact that commercial practice suggests that service or volume contracts typically incorporate the terms of the Hague-Visby Rules in any event may explain why so little attention has been directed to the relevance of Art. 6 to existing contractual arrangements. Of course, if a bill of lading is issued for an individual shipment, the relationship between the carrier and third party will be governed by the relevant international liability regime and any derogation from that regime cannot prejudice the consignee unless he voluntarily accepts it. The very same situation will prevail under the Rotterdam Rules. As Professor Michael Sturley has observed, it is difficult to imagine “any plausible explanation for why carriers that make no effort to avoid the mandatory rules under current law – and even incorporate those rules contractually to govern situations in which the rules are not mandatory – would suddenly force unwilling customers to accept volume contracts in an unprecedented effort to avoid otherwise mandatory rules.”¹¹

The Rotterdam Rules have not, by stealth, enabled carriers to avoid the agreed liability regime; nor do they herald a return to freedom of contract days where carriers wield

¹¹ Michael F Sturley, The Mandatory Character of the Convention and its Exceptions: Volume Contracts, Paper delivered at the Congress “The Rotterdam Rules: A New Era in Uniform Transport Law”, Carlos III University of Madrid, 17-18 September 2009.

unacceptable market power over shippers. Rather, the consequences of the Rotterdam Rules are largely twofold:

1. an individual contract between a shipper and a carrier for the carriage of goods falls within the scope of the Rules, provided it is not a contract for the use of a ship (ie; provided it is not a charterparty);
2. if the relevant contract is a volume contract, the Rotterdam Rules apply mandatorily unless the parties take positive steps to contract out and to create their own liability regime; simply addressing the transport issues of quantity of cargo and rate without dealing with liability issues at all will not suffice.

The vast majority of volume contracts will fall within the ambit of the Rotterdam Rules. Article 80 should not be the deal breaker for Australia.

Conclusion

With one or two significant caveats, it is fair to observe that Australia's current position as a shipper nation is not radically affected by the Rotterdam Rules. The changes made by the Rules to the existing international regimes largely mirror the amendments made to COGSA '91, and thus it might be thought that there could be no real harm in Australia's ratifying the Convention.

Conversely, the view might be taken, quite justifiably, that Australia has already addressed the major difficulties with the Hague/Visby regime; that Australian law now strikes a fair balance between cargo interests and carrier interests; that Australian law has a workable system to accommodate the development of e-commerce in the context of carriage of goods by sea; that Australian law relating to the transfer of rights and liabilities pursuant to sea-carriage documents is workable and settled; and that Australia has made appropriate provision for Australian cargo interests to have access to Australian courts and/or arbitration.

What is also apparent is that the real benefits of the regime as originally proposed are, in reality, quite limited. It is not in fact a true "door-to-door" regime because of the limited network principle employed by the Rules. Thus the new regime is, for European countries, the US and Canada, no more than an updated maritime regime. The new regime would significantly impact Australian in-land carriers and there has, as yet, been little attention drawn to this fact and no consultation with the relevant industry representatives. It would, however, be arrogant to suggest that Australia has already "solved" the problems through

its own domestic legislation. We have however, at this stage, complied with two of Professor Tetley's exhortations for Canada in that we have neither signed nor ratified the Convention, and we have incrementally reformed aspects of our carriage of goods by sea law.

Australia will continue to monitor the actions of its major trading partners and will, no doubt, reconsider its attitude if and when China and/or the US ratify the Convention.