

# Criticisms of Conventions on international carriage of goods by sea and the question of uniformity

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## **Introduction**

Carriage of goods by sea has been a common means of transportation for a long time. Because most maritime carriage involves more than one nation and combines more than one party in the carriage contract, potential conflict between the cargo owner and the carrier might raise the problem of risk allocation concerning damages to or loss of ocean cargo and balancing of rights and responsibilities. Therefore, it is beneficial to have uniform legislation to facilitate international maritime trade. The introductions of the four international maritime conventions, namely, the Hague Rules, Hague-Visby Rules, Hamburg Rules and Rotterdam Rules aim to establish a uniform international law in international carriage of goods by sea.

The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature, generally known as the Hague Rules, become the first unified international maritime convention. The Hague Rules were adopted in 1924 in Brussels and entered into force in 1931.

They were drafted in an attempt to unify private international law concerning carriage of goods under bills of lading and to provide a minimum mandatory framework of obligations and liability of carriers as well as to protect cargo owners from wide liability exemption by carriers. After a long period of application, the Hague Rules were considered outdated (mostly due to financial aspects).<sup>1</sup> The Visby Protocol (“Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading”) were first introduced in 1968 to amend some provisions of the Hague Rules and came into force in 1977. This combination of the Hague Rules and the Visby Protocol has formed the Hague-Visby Rules. The Hague-Visby Rules were then amended by the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in 1979. The major advancement of this amendment was to change the accounting unit from “poincaré gold francs” to the International Monetary Fund’s “Special Drawing Rights.”

The Hamburg Rules (official name is the International Convention on the Carriage of Goods by Sea) were drafted under the auspices of the United Nations. The Rules were adopted on March 31, 1978, and came into force on November 1, 1992. The purpose of the Hamburg Rules was to provide a uniform maritime framework that was both more modern and less biased in favor of ship operators and to improve the Hague/Visby Rules, which attracted a good deal of criticism. The Rules also consider new technology, new cargos and new issues that can lead to losses being incurred.

There are several critiques of the existing international maritime conventions governing the international carriage of goods by sea. It is criticized that the Conventions have failed to establish a reliable and transparent legal framework, as well as a uniform global regime for maritime transportation. The greatest level of international acceptance – The Hague Rules – has not been uniformly implemented or applied. Besides, some provisions do not fit with the modern commerce and transport practice. Taking into account these issues and with the desire to introduce a consistency and uniformity framework, the United Nations sponsored the draft of a new international maritime convention: The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, commonly known as “The Rotterdam Rules”. The Convention was adopted in 2008 and has been opened for signature for countries from September 23, 2009. The Rotterdam Rules are expected to unify

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<sup>1</sup> Todd, P. *Principles of carriage of goods by sea*. London: Routledge, 2016, p. 310.

and modernize international maritime law. The Rules aim to set new international rules to revise the legal framework for maritime carriage, new transport liability regime and carriage of goods by sea. The Rules also bring a new and improved legal regime for both maritime and combined transports.

This paper will highlight the criticism of the four Conventions and discuss the issue of uniformity in the field of international carriage of goods by sea.

## **Contribution**

### **1. General criticisms of the Hague Rules and Hague Visby Rules**

The Hague Rules are criticized by the cargo interests for being unbalanced and too favorable for the carrier and ship owner. The amendment of the Hague-Visby Rules was to address such complaints of the Hague Rules. However, it is argued that the Hague-Visby Rules have failed to improve the position of cargo owners and do not satisfactorily solve the main problems that existed in the Hague Rules.

It is alleged that the period of responsibility of the carrier is too short. The carrier only takes responsibility starting when the goods are being loaded on the ship until the completion of their discharge. All defects which occur during the pre-loading time or after the discharge of the goods preclude the carrier from liability. This period of responsibility is no longer suitable for the modern development of transportation, especially in the context of a combination of other transportation means like road or railway.

The excepted perils listed in Article 4.2(a) are extremely wide, especially the exception from liability for faults in the navigation of the vessel is the fiercest criticism.<sup>2</sup> Under this rule, the carrier is not liable for the errors caused by his master, mariner, pilot, or servants in the navigation or in the management of the ship. It is argued that since the basis of the carrier's liability is fault and the carrier is the one who is in charge of the vessel, it is unreasonable and inequitable to free the carrier from any liability by blaming the negligence of its servants or agents.

The Hague Rules and Hague Visby Rules are criticized that it is outdated to the modern development of the international trade. There is no regulation

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<sup>2</sup> Todd, P. *Principles of carriage of goods by sea*. London: Routledge, 2016, p. 363.

on electronic documents and other related electronic communication uses in the Hague Rules and Hague Visby Rules. At the time of drafting, the drafters could not anticipate the global growth of information technology and its vital role in international trade. Moreover, the Hague and Hague Visby Rules do not catch up with the development of modern maritime trade and the multimodal transport trend.

The cargo stowed in deck may be prone to damage or loss. However, there is no provision on the liability of the carrier for deck cargo in the Hague Rules and Hague Visby Rules. Besides, the Hague Rules only regulate the liability of the carrier for loss of or damage to the cargo without mentioning the liability for delay in delivery of the goods. The absence of provision on delay in delivery puts the involved parties in difficulty since delay in delivery has become a vital issue in modern international trade.

The Hague Rules is criticized for offering low package limitations. The carrier's liability for compensation is limited to a maximum of 100 pounds sterling per package or unit. The pounds sterling provided in the Hague Rules is referred to as the gold value. This form of unit is argued to be fairly low and not suitable for the modern context. Moreover, the Hague Rules failed to resolve the question of how to calculate the per package limitation in case goods are packed for transport in a container, pallet or similar methods of transport.

## 2. General Criticisms of the Hamburg Rules

In its attempt to offer a fairer balance between the liabilities of carrier and shipper, the Hamburg Rules have been strongly objected to by ship owners because they believe the Rules favor cargo owners. The Hamburg Rules are opposed by the majority of maritime nations. They consider the scope of application of the Hamburg Rules to be too broad and the abolition of the catalog of exceptions set up in the Hague Rule increases the liability of the carrier. In addition, they criticise the new fire exception regime while the proceedings period of two years is too far and unreasonable.<sup>3</sup> Other criticism is on the allocation of risk of loss from cargo interests to carriers and substantial rise in liability limits, resulting in huge insurance costs that are incurred by the ultimate consumer. Besides, the Hamburg Rules are described as a “revolutionary”, “radical”, and a poor product set up to serve for benefit of the

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<sup>3</sup> John F. W, *Carriage of Goods by Sea*, (7th ed.). Harlow: Pearson Education Limited, 2010, p. 226.

developing countries.<sup>4</sup> Opponents of the Rules also argue the Rules are too against the existing laws (the Hague and Hague-Visby Rules); and that their changes may raise the costs of settlement and litigation costs.<sup>5</sup>

### 3. General Criticisms of the Rotterdam Rules

Although the Rotterdam Rules are considered far more advanced compared to the previous Conventions and is suitable for modern ocean transport, the Rules still counter various criticisms from the international marine community.

The Rotterdam Rules are claimed by cargo interest that regulation on the distribution of risk and liability between carrier and cargo interest is on the carrier side. The Rules are strongly opposed by the European Shippers' Council ("ESC"), the International Federation of Freight Forwarders Associations ("FIATA"), the European Association for Forwarding, Transport, Logistics and Customs Services ("CLECAT"), and a group of citizens and specialists from Latin American countries with "Declaration of Montevideo".

The ESC fears that the Rotterdam Rules could put shippers in a disadvantageous position and increase the onerous duty of the shippers.<sup>6</sup> The Freight Forwarders (FIATA<sup>7</sup> and CLECAT<sup>8</sup>) criticize the Rotterdam Rules for its complexity and disadvantageous regulations on freight forwarders. The Rules may lead to additional transaction costs and create misunderstandings and misinterpretations.

The Declaration of Montevideo of Latin American countries also criticises the highly complex regulatory legal instrument, the introduction of new concepts and definitions (the volume contract; the regular or non-regular line transport; documentary shipper; the performing party or the maritime performing party),

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<sup>4</sup> Benjamin W. Y, 'The Carriage of Goods: Hague, COGSA, Visby and Hamburg', 57 Tulane Law Review 1983, p. 1249, 1253.

<sup>5</sup> Douglas A. W, *The Hamburg Rules Revisited – A Look at U.S. Options*, 22 J. Mar. L. & Com. 59, 1991, p. 70.

<sup>6</sup> View of the European Shippers' Council on the Rotterdam Rules, 2009. [cit. 2023-12-10]. [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/esc\\_positionpaper\\_march2009.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/esc_positionpaper_march2009.pdf).

<sup>7</sup> FIATA Position on the UN Convention on Contracts for the International Carriage of Goods wholly or partly by Sea. [cit. 2023-12-11]. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/flatpaper.pdf>.

<sup>8</sup> The European Voice of Freight Logistics and Customs Representatives, [cit. 2023-12-12]. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/clecatpaper.pdf>.

the elimination of the terms of consignee and endorsee of the cargo, bill of lading, the burden of proof and the limits of liability.<sup>9</sup>

The multiple opting-outs made to explicit rules are alleged to be the major shortcomings of the Rotterdam Rules that may hinder the aim of uniformity of the Rules. It is concerned that the volume contract exemptions open for the large-scale stakeholders to decide their own rules may result in a global financial crisis.

#### 4. The question of uniformity

The Hague Rules are totally supported by the carrier community and ship-owning states. Until now, the Hague Rules is the most successful international convention on ocean cargo transportation with widespread ratification, while the amended Hague-Visby Rules, unfortunately, are not welcomed by all nations.

After a long time of implementation, the Hamburg Rules only get strong support from the developing countries. The Rules have the modest number of ratifications, 35 countries, without any representative from maritime nations.<sup>10</sup>

The introduction of the Rotterdam Rules is largely supported by the United Nations General Assembly; the Arab Academy for Science, Technology and Maritime Transport; the Comité Maritime International; the American Bar Association; the ICC Committee on Maritime Transport, the International Chamber of Shipping; the World Shipping Council; the European Community Shipowners' Association; and the National Industrial Transportation League (US).<sup>11</sup> They consider the Rules not only to resolve the existing issues in the previous Conventions but also to modernize the regime to catch up with the development of modern technology. The Rules bring the balance between the interest of the carrier and the shipper of liabilities and the allocation of risks between both parties.

The Rotterdam Rules will come into force one year after ratification by twenty UN Member states. After over ten years, twenty-five countries, including the US and eight EU Member States, have signed the convention, however,

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<sup>9</sup> The Declaration of Montevideo of Latin American countries. [cit. 2023-12-12]. <https://comite-maritime.org/wp-content/uploads/2018/05/Montevideo-Declaration-The-Facts.pdf>.

<sup>10</sup> Source: [cit. 2023-12-12]. [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XI-D-3&chapter=11&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-3&chapter=11&clang=_en).

<sup>11</sup> Source: [cit. 2023-12-13]. [https://uncitral.un.org/en/en/library/online\\_resources/rotterdam\\_Rules](https://uncitral.un.org/en/en/library/online_resources/rotterdam_Rules).

only five countries (Benin, Cameroon, Spain, Togo and Congo) have ratified it.<sup>12</sup> Neither ASEAN nor North Asian countries have signed this Convention, and only a few other countries are expected to ratify it in the not-too-distant future. Although there is widespread support from various organizations, the possibility of ratification of the Rules seems rather negative. The first reason for the reluctance of countries to ratify the Rules stems from their complication. While countries are familiar with the previous regimes, the introduction of new rules with complicated structures and new terminologies may bring difficulties in application to countries. If they ratify it, they need more time to adapt to this new regulation. Another reason comes from the possibility of ratification from the big economic countries. Some countries have launched to review the Rotterdam Rules and find its advantages (Norway, Canada, Denmark, etc.), but they only ratify after the US or any larger EU states or China do. The ratification from the developed economic countries, such as the US or the EU will urge the ratification from the other countries. The ratification of China will encourage a large number of Asian countries to ratify the Rules. However, China has no prospect of being a party anytime soon. Most of the ratification of other countries will depend on the US's ratification. In fact, the US did express its great interest in setting up a new legal regime that would cover "door to door" transport and took a leading role during the negotiation of the convention until the Convention was introduced in 2008. The reason behind the active participation of the US is that it is one of the largest importers and exporters of commodities in the world, and it is probably in favor of the cargo interests' side rather than the owners' side. Therefore, the US appears as if it has been willing to ratify the Rotterdam Rules. However, after over ten years of the Rotterdam Rules's announcement, there is no signal of the US's ratification. The objection of some US port authorities and terminal operators prevents its submission to the Senate for consideration, and the current composition of the US Senate makes it difficult to obtain two-thirds approval.<sup>13</sup> If there is no prospect for ratification from big economic countries like the US or EU, the entry into force of the Rules is still a question. With the current situation from each country's position, the Rotterdam Rules seem unlikely to come into force.

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<sup>12</sup> Source: [cit. 2023-12-13]. [https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam\\_rules/status](https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status).

<sup>13</sup> Ingar F. *The Rotterdam Rules – Another nail in the coffin?*, 2020, [cit. 2023-12-14]. <https://svw.no/artikler/2168>.

The status of ratification of these Conventions shows an undetermined scenario. The most successful maritime convention with widespread ratification is the Hague Rules of 1924. The ratification of the Hague Rules does not imply the ratification of the amended Hague-Visby Rules. The most recent Convention, the Rotterdam Rules, satisfies the development of modern maritime transport, however, it has not come into force yet. Therefore, it is difficult to give specific conclusion on the “uniformity” of these Conventions. No Convention obtains the total support from all countries. All of these Conventions confront a great deal of criticism resulting in arguments on the topic of which Convention is the most suitable for international maritime trade. At this time, no Convention is successful in “uniformity” and this is challenge for acquiring a uniform international law in the field of carriage of goods by sea in the future.

## **Conclusion**

Generally, the Hague Rules and Hague-Visby Rules is criticized for their drawbacks that fails to fit with the current development of trading. While both the Hague Rules and Hague-Visby Rules are alleged they favor the carrier and ship owner, the Hamburg Rules become pro-shipper. The major criticism of the Rotterdam Rules is on its complexity.

The large approvals of the Hague Rules are from the major maritime nations which account for almost two-thirds of the world’s total trade. In contrast, the Hamburg Rules fail to satisfy most of these countries resulting in a modest number of ratifications. The reluctance of countries to ratify the Rotterdam Rules is due to the complication of the Rules as well as the negative possibility of the developed economic countries to ratify the Rules.

The modern maritime world has witnessed a radical change due to the advancement of technology, therefore, it is essential to obtain a uniform maritime international law. To reach this purpose, each country and organization should set aside the individual’s interest and consider the fair interest to all parties which is suitable to the growth of technology and modern ocean carriage trend. Developed countries that have enormous influence on other countries should take a leading role in signing and ratifying the Rotterdam Rules to establish a global uniformity for maritime transport.

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## **Summary**

### **Criticisms of Conventions on International Carriage of Goods by Sea and the Question of Uniformity**

The growth of international trade and ocean transportation has led to the establishment of the four conventions governing the international carriage of goods by sea, namely the Hague Rules, Hague-Visby Rules, Hamburg Rules, and Rotterdam Rules with the aim of uniformity and harmonization. Each Convention attempts to set the rules to satisfy all the involved participants. However, all Conventions have faced various criticisms and none of them has been successful in terms of uniformity and harmonization due to the lack of widespread approval. As a result, international maritime carriage is now split between these international maritime Conventions (the Rotterdam Rules are still not in force). This paper will highlight the criticism of the four Conventions and discuss the issue of uniformity in the field of international carriage of goods by sea. It supports the solutions adopted in the Rotterdam Rules and offers suggestions for the question of uniformity in international carriage of goods by sea.