The Rotterdam Rules
A Win-Win Proposition

WITH HER 7,517 kilometre long coastline, her 13 major ports and her annually growing importance in terms of global trade, no country in the world may be more cognizant of the importance of a harmonized legal regime for maritime transport than India. It is estimated that a whopping 90 per cent of India's trade by volume is moved by sea. Impressively, her merchant shipping fleet ranks as one of the largest amongst developing countries, and as one of the top 20 in the world. And, global financial crisis notwithstanding, India has set her eye on a goal of reaching 5 percent of world trade volume by 2020 – and is thought by many likely to achieve it.

With such impressive statistics and such great ambition, it is unlikely that Indian commercial interests are interested in continuing to pay the premium of higher costs and greater inefficiency associated with the legal and commercial uncertainty offered by the current international regime governing the carriage of goods by sea. It is precisely for those reasons that trading and maritime interests in India should take a good look at the Rotterdam Rules.

Known formally as the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, the Rotterdam Rules were adopted by the UN General Assembly in December of 2008, and opened for signature in September of this year. While the Rotterdam Rules have already made their debut in this magazine by way of an insightful article published in the October 2009 edition, events that have taken place since then beg for an update and a more thorough examination of why the Convention should be carefully considered by India and other important trading nations.

On 23 September 2009, the Rotterdam Rules were opened for signature in the bustling port city of Rotterdam, the Netherlands. Sixteen States in all signed the Convention on the first day that it was opened for signature – a record for the number of signatures obtained on a convention developed by the United Nations Commission on International Trade Law (UNCITRAL) on the day it opened for signature.

The identity of the 16 States that signed the Convention upon its opening for signature is worthy of examination. Not only did world trade heavyweights like the United States and France sign on to the Rules, they were joined in their approval of the new regime by leading maritime nations like Greece, Norway, Denmark and the Netherlands. Other noteworthy developed nations that gave the nod to the Convention on its opening day were Spain, Switzerland and Poland. Interestingly, a number of developing nations were also quick to support the Rotterdam Rules at this early juncture; Congo, Gabon, Ghana, Guinea, Nigeria, Senegal and Togo all signed the treaty on its opening day.

In all, the 16 States that signed the Convention at the Rotterdam Signing Ceremony represent over 25 per cent of current world trade volume according to the United Nations 2008 International Merchandise Trade Statistics Yearbook.

While this figure is quite impressive on its own, it is even more impressive when compared with the most recent UN convention in this area of the law, the Hamburg Rules, which has 34 Contracting States at the time of writing. Although the Hamburg Rules have over twice as many States Party as the Rotterdam Rules have signatories, the Hamburg Rules countries represent a mere 5 per cent of world trade volume.

Since its opening for signature, the Rotterdam Rules have continued to gain steam. Five more States signed the Convention within a month of it having opened for signature: Armenia, Cameroon, Madagascar, Niger and Mali. Moreover, a

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The views expressed in this article are her own, and do not necessarily reflect those of the United Nations.

number of important maritime and trading nations are still in the process of internal consultation regarding whether they, too, will become party to the new Convention. Amongst these are the United Kingdom and Belgium, both of whom made official statements at the Signing Ceremony in Rotterdam informing participants of the status of their considerations, and affirming their support for the development of the Rotterdam Rules. In the words of the Belgian delegate, "International trade will of course be the first beneficiary. But worldwide harmonised rules are also an essential factor in the development of a sustainable mobility and transport, because worldwide harmonised rules will enable a better integration of sea transport in the multimodal transport, which is essential to reach that objective of sustainable mobility and transport."

While the 21 signatures currently affixed to the Convention are impressive, they are not, of course, conclusive of the broad acceptance of the Rotterdam Rules by the global trading community. And while several of the key signatories are already moving toward ratification, including the United States, the Convention will not enter into force until one year after 20 States have ratified the text. Still, the list of signing States certainly provide us with considerable insight into the acceptability of the legal rules in the Convention by an intriguingly varied group of nations.

This interesting mix of countries provides fodder for thought, given their diverse backgrounds and undoubtedly varied perspectives on what an appropriate international regime should look like. Yet this group of countries – including those thought to be 'carrier' nations and those most certainly seen as 'shipper' nations – have all stepped up to signal their support for the Rotterdam Rules at the earliest moment possible.

Why is it that these countries have overcome the differences in their historical maritime interests and managed to come together in support of the new legal regime?

Perhaps it is because they have realized that negotiation of a new maritime transport convention – or a "maritime-plus" one, in the case of the Rotterdam Rules – does not necessarily present a "zero sum" game, where the gain or loss of one stakeholder is necessarily offset by the loss or gain of other stakeholders. Historically, the international legal regimes governing the carriage of goods by sea have certainly been seen in that light – with the Hague and Hague-Visby Rules being considered too carrier-friendly, and the Hamburg Rules being considered too much in favour of shippers. There is certainly a temptation to continue this sort of rhetoric in examining the new regime under the Rotterdam Rules.

In fact, the temptation to set out the various advantages of the Rotterdam Rules for shippers and for carriers is almost irresistible.

Shippers, for example, could point to any one of a number of features in the text as improvements, while carriers might view them as disadvantages, including:

- The increased monetary limits on the carrier's liability for loss or damage to the goods;
- The deletion of the carriers' nautical fault exception providing exoneration for loss of or damage to the goods, and the circumscription of the fire exception;
- The extension of the due diligence obligation of the carrier for seaworthiness and the cargo-worthiness of the ship to become a continuing one;
- The inclusion of deck cargo into the regime so that a carrier is not automatically exonerated from loss or damage to cargo carried on deck;
- Clarification of the liability of maritime performing parties;
- The extension of the notice period for loss or damage to goods to 7 days;
- The removal of the possibility for the carrier to hide its identity in the transport document; or

> *There is certainly a temptation to continue this sort of rhetoric in examining the new regime under the Rotterdam Rules – and a number of commentators have bought wholeheartedly into that approach.*

> *The challenge for all States, including important trading States like India, is to look beyond the 'zero sum' game, and see the enormous benefits that such a global regime can offer all stakeholders.*

- The extension of the limitation period for actions to two years.

Carriers, in turn, could refer to the following examples as improvements to the regime, while shippers might decry them as placing too heavy a burden on them:

- Clear articulation of the obligations of the shipper;
- Clear rules for delivery;
- Clear articulation of the basis of liability of the carrier;
- An improved regime for deviation;
- Permitting the carrier, under certain circumstances, to deliver the goods without presentation of the negotiable transport document, while still protecting the interests of all parties involved;
- Dealing with the problem of how to deal with concealed damage in a multimodal carriage; or
- The creation of clear rules for undelivered goods.

Yet, how did these 21 signatory nations representing both sides of that historical shipper-carrier tug-of-war manage to avoid falling into this familiar habit? The answer to that question lies in the rejection by those countries of the "zero sum" approach in their analysis of the rules, and their willingness to see them as a "win-win" possibility. By being open-minded enough to see the overarching theme of shipper-carrier balance that runs through the Rotterdam Rules, these States were able to keep their eye on the prize, and recognise that *all* stakeholders involved in international trade and maritime transport had much to gain from a harmonised and balanced system. This mix of shipper and carrier States have been able to get beyond their historical biases, and see, as the Belgian delegation said, that "worldwide harmonised rules are …an essential factor in the development of a sustainable mobility and transport."

And in rejecting the classic "us versus them" approach, these States have come to see the enormous advantages for all parties to the contract of carriage, and other stakeholders, in establishing legal and commercial certainty in respect of the following, and other, aspects of the Rotterdam Rules:

- The possibility of a clear, harmonised global regime for maritime transport;
- The establishment of electronic commerce for modern, efficient shipping practices;
- The ability to ship door-to-door under a single contract of carriage and single legal regime;
- Specific features taking into account modern containerized shipping;
- The inclusion of incoming and outgoing maritime carriage;
- The use of the well-known limited network liability system;
- Coverage of all transport documents in the liner trade, not just bills of lading;
- Limited freedom of contract, where appropriate, plus the retention of mandatory protection where needed;
- Comprehensive and more systematic provisions on carrier and shipper liability and a balanced allocation of risk between these parties;
- Right of control, to assist shippers and financing institutions, and to pave the way for electronic commerce;
- Clarification of numerous legal gaps that exist under the current conventions;
- Codification of existing industry practice to provide for legal certainty; and
- The general adoption of commercially practicable solutions.

There are, of course, many additional benefits included for shippers and for carriers in the Rotterdam Rules. The potential gains for all participants are great, but failure to seize this unique opportunity will mean a continuation of the cumbersome and costly status quo – or worse – for many years to come. MG

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