

# “the Rotterdam Rules” and Arbitration

Questions and  
Warning Signs

A new convention on contracts for carriage by sea contains arbitration provisions that will require some untangling. This article discusses some of the issues they raise.

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The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, informally known as the “Rotterdam Rules”<sup>1</sup> (hereinafter, the Rules) introduces a sub-set of binding arbitration provisions for the resolution of disputes relating to certain covered “contracts of carriage” by sea. The Rules have now been signed by over 20 countries.<sup>2</sup> Nevertheless, they will not formally enter into force until ratified by 20 countries in a process that normally involves parliamentary approval.<sup>3</sup> At press time, none of the signatories had yet ratified the Rules.

The purpose of the Rules is to “establish a uniform and modern global legal regime governing the rights and obligations of stakeholders in the maritime transport industry under a single contract for door-to-door carriage.”<sup>4</sup> Toward this end, the Rules state that they should be interpreted with regard “to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”<sup>5</sup>

They also say that its provisions should be applied without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.<sup>6</sup>

If ratified, the Rules would apply to a “contract of carriage”<sup>7</sup> that places receipt and delivery of cargo, and the ports of loading and discharge, in different countries, and one of these places or ports is in a Contracting State.<sup>8</sup> The Rules also would exclude some types of agreements, which are discussed later. However, the Rules also have exceptions to the exclusions. One of these exceptions would make the Rules applicable as between the carrier and the following persons who were not original parties to an excluded agreement: the person entitled to delivery of the cargo (i.e., the consignee), the party with control over the cargo (usually the shipper), or a holder of an original transport document.<sup>9</sup>

The worldwide shipping industry hauled eight billion tons of cargo in 2007, which amounted to approximately 80% of the volume of world trade.<sup>10</sup> The drafters of the Rules recognized that this industry needs orderly dispute resolution

procedures for the mishaps that inevitably occur during the transportation of goods by sea.

The current dispute resolution practice in the maritime industry is almost exclusively to use a choice-of-court agreement. The drafters decided to continue that practice. However, they limited the jurisdictions in which court proceedings could be commenced to six potential locations with a relationship to the carrier, the contract, or the cargo: (1) the jurisdiction designated by the parties’ agreement; (2) the country where the carrier is domiciled; (3) the contractual location for receipt of the goods; (4) the contractual location for delivery of the goods; (5) the jurisdiction in which the port of initial loading is located; or (6) the State in which the port of discharge from a ship is located. These provisions are found in Chapter 14 of the Rules.<sup>11</sup>

The drafters recognized also that carriers might attempt to bypass these jurisdictional provisions by replacing their choice-of-court provisions with arbitration agreements. To prevent this and to protect persons with claims against carriers, they added the arbitration provisions in Chapter 15, which contain jurisdictional limitations similar to those in Chapter 14.<sup>12</sup> The arbitration provisions in Chapter 15 are discussed below, together with some of the issues that could arise once the Rules are ratified and applied in practice.

### Arbitration Is Not Mandatory

Arbitration would not be mandatory under Chapter 15, nor would it be imposed on the parties to contracts covered by the Rules. Rather, Chapter 15 would merely permit these parties to agree to arbitrate any disputes relating to such contracts. In addition, Chapter 15 would protect persons with claims against carriers from the risk described above by allowing them to choose where “arbitration proceedings”<sup>13</sup> shall take place. In other words, a claimant would not be bound by the designated place for arbitration stated in the arbitration agreement, although it could choose to arbitrate there. Instead, the claimant could choose to arbitrate in any of the other jurisdictions where a lawsuit could be brought in the absence of an arbitration clause. These jurisdictions are: (a) the domicile of the carrier; (b) the place of receipt agreed in the contract of carriage; (c) the place of delivery agreed in the contract of carriage; (d) the port where the goods are initially loaded on a ship; or (e) the port where the goods are finally discharged from a ship.<sup>14</sup>

Chapter 15 also would deem the provisions concerning the place of arbitration to be part of

## Prominent Features of the Rotterdam Rules

Among the more prominent features of the new rules are:

- the abolition of the long-established defense of error in navigation,
- an increase of carriers’ liability for damage to cargo (see Article 59(1)), and
- the requirement that carriers keep their vessels seaworthy throughout their voyage (see Article 14(1)).

The Rules also simplify procedures for the recoupment of losses (see Chapter 5) and standardize the use of electronic transport documents to shorten handling time and reduce costs and errors (see Chapter 8).

every arbitration clause or agreement.

Conversely, however, in the case of “volume contracts” (i.e., contracts for a series of shipments of a specified amount of goods during an agreed period of time<sup>15</sup>), Chapter 15 would make the designation of the place of arbitration in the arbitration clause binding, but only where the contract is either individually negotiated, or has a prominent statement indicating that it contains an arbitration agreement and specifies where in the contract it is located.<sup>16</sup>

One problem with the future application of the rules is that the meaning of the provision allowing a person with a claim against a carrier to select where “arbitration proceedings” shall take place is ambiguous because the term “arbitration proceedings” is not defined in the Rules and is susceptible to two different meanings: it could refer to the situs of the arbitration (the formal place of arbitration), or the physical location of the arbitral hearing. If the term refers to the situs, which is more likely, a person with a claim against a carrier could use Chapter 15 to affect the outcome by choosing to arbitrate in a country whose arbitration law and case law are favorable to it. However, if the term refers only to the place of the hearing, the claimant could still place the carrier at a disadvantage by selecting a far away, unfamiliar place for the hearing, which would cost the carrier more money.

For example, suppose a Greek carrier uses a standard contract with an arbitration clause designating Athens as the situs of arbitration proceedings. The carrier is engaged to transport goods by sea from Shanghai to San Francisco. Then the goods are to be transferred to a ship of another carrier bound for Puerto Vallarta, Mexico, where they will be finally offloaded. If the goods are damaged on the first leg of the journey, the claimant presumably could choose the most advantageous from among the following places to locate the arbitration hearing: Athens (designated in the arbitration agreement); Shanghai (the port where the goods are initially loaded on the ship); San Francisco (the place of receipt agreed in the contract of carriage); or Puerto Vallarta (the port where the goods are finally discharged).

Given the importance of the place of arbitra-

tion to the outcome of arbitration, especially at the award enforcement stage, carriers could be forced to defend themselves against a claimant’s selection of a far-flung, inconvenient location for the arbitration proceeding or hearing. One method carriers could use to protect themselves from this possibility is an “in terrorem” clause providing that a person with a claim against the carrier is free to site arbitration proceedings in any location provided by Chapter 15, provided, however, that if that person changes the location of the arbitration proceedings from the one designated in the arbitration agreement, it agrees to reimburse the carrier for the extra travel and possibly other costs resulting from that change.

***Under the Rotterdam Rules, where the parties have agreed to arbitrate, a shipper or other person with a claim against a carrier could choose where “arbitration proceedings” take place.***

### **Opt-In Requirement**

Another problem with the Rules arises as a result of the fact that the arbitration provisions in Chapter 15 would not apply in a ratifying country that does not expressly opt in to that chapter. The opt-in section states: “The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.”<sup>17</sup> This requirement complicates an understanding of how the Rules would apply in certain situations.

In Contracting States that ratify the Rules and opt in to Chapter 15, all provisions concerning the place of arbitration would be deemed to be mandatory law and would be

incorporated by reference into contracts of carriage subject to the Rules.<sup>18</sup> But what if the parties to a dispute are not from such Contracting States?

Suppose that in the preceding example, neither Greece (the domicile of the carrier), nor China (the domicile of the shipper) opted in to Chapter 15, but the United States (the place of delivery of the goods) has done so. Suppose further that the shipper, relying on Chapter 15, chooses San Francisco as the situs of the arbitration proceedings and commences an arbitration there.

Would an arbitral panel uphold the shipper’s choice of San Francisco, even though neither party’s home country had acceded to Chapter 15? The answer could depend on how an arbitral tribunal would interpret its jurisdiction under Article 78’s opt-in requirement.

A tribunal could conclude that Chapter 15 would become part of an opt-in country's substantive law and thus apply only if the law of that country would govern the arbitration—either because that law was expressly designated in the agreement as the applicable procedural law, or because the procedural law of the situs of the arbitration was intended to govern.

Thus, in the above example, the tribunal could conclude that the U.S.'s accession to Chapter 15 and a claimant's designation of the U.S. as the location of the arbitration would provide the tribunal with jurisdiction to order that the arbitral proceedings take place in San Francisco, notwithstanding that the contract designated Athens as the location for the arbitration.

Whether the arbitral tribunal's exercise of jurisdiction in the scenario outlined above would be found valid is uncertain. The only way to find out may be through actual arbitral and legal proceedings interpreting the Rules and Chapter 15 in particular. Assuming that there is a divergence between nations ratifying the Rules and those opting-in to Chapter 15, we could see a flurry of legal challenges to the exercise of jurisdiction by arbitral panels.

We might also see carriers faced with arbitration in an inconvenient location pursuing anti-arbitration injunctions in the courts of their home countries. In the above example, assuming the Greek court would have jurisdiction over the Chinese shipper, it could issue the injunction in order to prevent local carriers from being forced into arbitration in potentially unfriendly locales.

### Special Requirements

It should be obvious by now that the Rules are quite technical and require an understanding of numerous terms.

For example, the Rules place conditions on making a contractually designated place of arbitration binding on the contracting parties.<sup>19</sup> One condition, as noted above, is that the arbitration agreement is in a "volume contract."<sup>20</sup> A further, unstated requirement is that the contract be for "liner transportation" (since as noted below, con-

tracts of carriage in "non-liner transportation" are outside the scope of the Rules, with certain exceptions<sup>21</sup>).

Other conditions for making the location of the arbitration provision binding on the parties are that: (i) the contract clearly state the parties' names and addresses; and (ii) the contract be "individually negotiated" (i.e., not a form agreement). Alternatively, if not individually negotiated, the contract must prominently state that it has an arbitration agreement and specify in the contract where it can be located.<sup>22</sup>

Thus, if and when the Rules are ratified and Chapter 15 becomes effective in acceding countries, parties to contracts for liner transportation should make sure that their arbitration clause satisfies the foregoing requirements.

Parties should also be aware of the requirements necessary to bind a non-party (if applicable law permits) to the parties' designated place of arbitration. There are three such requirements. One is that the place of arbitration be among those listed in Article 75 (e.g., it is either the carrier's domicile, the place of arbitration in the arbitration agreement, the agreed place of receipt or delivery of the

goods, or the port of loading or discharge of the goods from the vessel.

The second is that timely notice of the designated place of arbitration be given to the third party.

Finally, the arbitration clause must be contained in the transport document or electronic transport record.<sup>23</sup>

### Charter Parties and Non-Liner Contracts

Charter party agreements<sup>24</sup> and contracts of carriage for non-liner transportation (i.e., ship transport that is not regularly scheduled<sup>25</sup>) would not be covered by the Rules because they are specifically excluded by Article 6.

Moreover, the Rules would not affect the enforceability of arbitration agreements in contracts of carriage in non-liner transportation in the following two situations: (1) where the parties have voluntarily incorporated the Rules into a contract of carriage that would not otherwise be

***Given the importance of the place of arbitration to the outcome of arbitration, especially at the award enforcement stage, carriers may consider using in terrorem clauses to protect against a claimant choosing to arbitrate in a far-flung location.***

subject to the Rules; and (2) as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of the Rules.<sup>26</sup>

### Potential Conflict With Other Conventions

Another obstacle faced by parties and arbitrators if and when the Rules are ratified is the possible conflict between its provisions and other multinational conventions that also may apply. This possibility exists because the term “contract of carriage” provides not only for carriage by sea but also carriage by other modes of transport,<sup>27</sup> including carriage by rail or land.<sup>28</sup> Therefore, the Rules could come into conflict with conventions then in force relating to the carriage of goods by road, rail, air or inland waterways, if the contract also provides for journey by sea.<sup>29</sup> Examples of other multinational conventions include the 1956 Convention on the Contract for the International Carriage of Goods by Road,

and the 1980 Uniform Rules Concerning the Contract for International Carriage of Goods by Rail.

The Rules state that in most instances they do not override these conventions,<sup>30</sup> but conflicts could nevertheless occur in various subject areas that are clearly divergent, e.g., if one convention has a higher liability limit than another. Thus, a consignor whose goods were damaged during some leg of a multimodal journey may have to arbitrate the issue of where the damage actually occurred in order to obtain a higher recovery. Likewise, shippers may choose to avoid carriage by sea in instances where it would be advantageous to avoid the higher limits of liability imposed by the Rules.

It remains to be seen how the issues discussed in this article will play out in practice and whether the Rules will manage to fulfill their promise of establishing a uniform and global legal regime for the international carriage of goods by sea. ■

### ENDNOTES

<sup>1</sup> The Convention takes its informal name from the city of Rotterdam, The Netherlands, where the Convention was executed by the signatories.

<sup>2</sup> The signatories are Armenia, Cameroon, Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Madagascar, Mali, The Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States of America.

<sup>3</sup> Rotterdam Rules, ch. 18, art. 94(1).

<sup>4</sup> United Nations Information Service, “Rotterdam Rules Gain Momentum as 20th State Signs,” (Press Release, U.N. Doc. UNIS/L/133 Oct. 23, 2009).

<sup>5</sup> Rotterdam Rules, ch. 1, art. 2.

<sup>6</sup> Rotterdam Rules, ch. 2, art. 5(2). This provision states: “The Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.”

<sup>7</sup> Rotterdam Rules, ch. 1, art. 1, definition 1. The term “contract of carriage” is defined to mean a contract involving carriage by sea (and perhaps other modes of transportation), in which a carrier, against the payment of freight, undertakes to carry goods from one place to

another.

<sup>8</sup> Rotterdam Rules, ch. 2, art. 5(1).

<sup>9</sup> Rotterdam Rules, ch. 2, art. 7.

<sup>10</sup> UN News Centre, “UN Treaty on Maritime Goods Transportation Set to Be Signed in Rotterdam,” (Sept. 22, 2009), available at [www.un.org/apps/news/story.asp?NewsID=32152&Cr=maritime&Cr1](http://www.un.org/apps/news/story.asp?NewsID=32152&Cr=maritime&Cr1).

<sup>11</sup> Rotterdam Rules, ch. 14, art. 67.

<sup>12</sup> Michael F. Sturley, “Jurisdiction and Arbitration under the Rotterdam Rules,” 14 *Unif. L. Rev.* 945, 972-73 (2009). Rotterdam Rules, ch. 15, art. 75(2). The jurisdictional limitations are that if there is no exclusive choice of court agreement, the court arbitration must be in a jurisdiction situated in one of the following places: (i) The domicile of the carrier, (ii) The place of receipt agreed in the contract of carriage, (iii) The place of delivery agreed in the contract of carriage, or (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

<sup>13</sup> Rotterdam Rules, ch. 15, art. 75(2).

<sup>14</sup> Rotterdam Rules, ch. 15, art. 75(5).

<sup>15</sup> Rotterdam Rules, ch. 1, art. 1(2).

<sup>16</sup> Rotterdam Rules, ch. 15, art. 75(3).

<sup>17</sup> Rotterdam Rules, ch. 15, art. 78.

<sup>18</sup> Rotterdam Rules, ch. 15, art. 75(5).

<sup>19</sup> Rotterdam Rules, ch. 15, art. 75(3).

<sup>20</sup> *Id.*; Rotterdam Rules, ch. 1, art. 1(1).

<sup>21</sup> Rotterdam Rules, ch. 2, art. 6(2).

<sup>22</sup> Rotterdam Rules, ch. 15, art. 75(2).

<sup>23</sup> Rotterdam Rules, ch. 15, art. 75(4).

<sup>24</sup> Rotterdam Rules, ch. 2, arts. 6, 7.

A “charter party” is not defined in the Rotterdam Rules. It is defined in *Black’s Law Dictionary* (7th ed. 1999) as a “contract by which a ship, or principal part of it, is leased by the owner, esp. to a merchant for the conveyance of goods on a predetermined voyage to one or more places....”

<sup>25</sup> Rotterdam Rules, ch. 1, art. 1(2), & (3) (defining liner and non-liner transportation).

<sup>26</sup> Rotterdam Rules, ch. 15, art. 76(1).

<sup>27</sup> See Rotterdam Rules, ch. 2, art. 5(2).

<sup>28</sup> See Rotterdam Rules, ch. 1, art. 1(1).

<sup>29</sup> See Convention on the Contract for the International Carriage of Goods by Road, art. 2(1); Uniform Rules Concerning the Contract for International Carriage of Goods by Rail art. 48.

<sup>30</sup> Rotterdam Rules, ch. 17, art. 82.