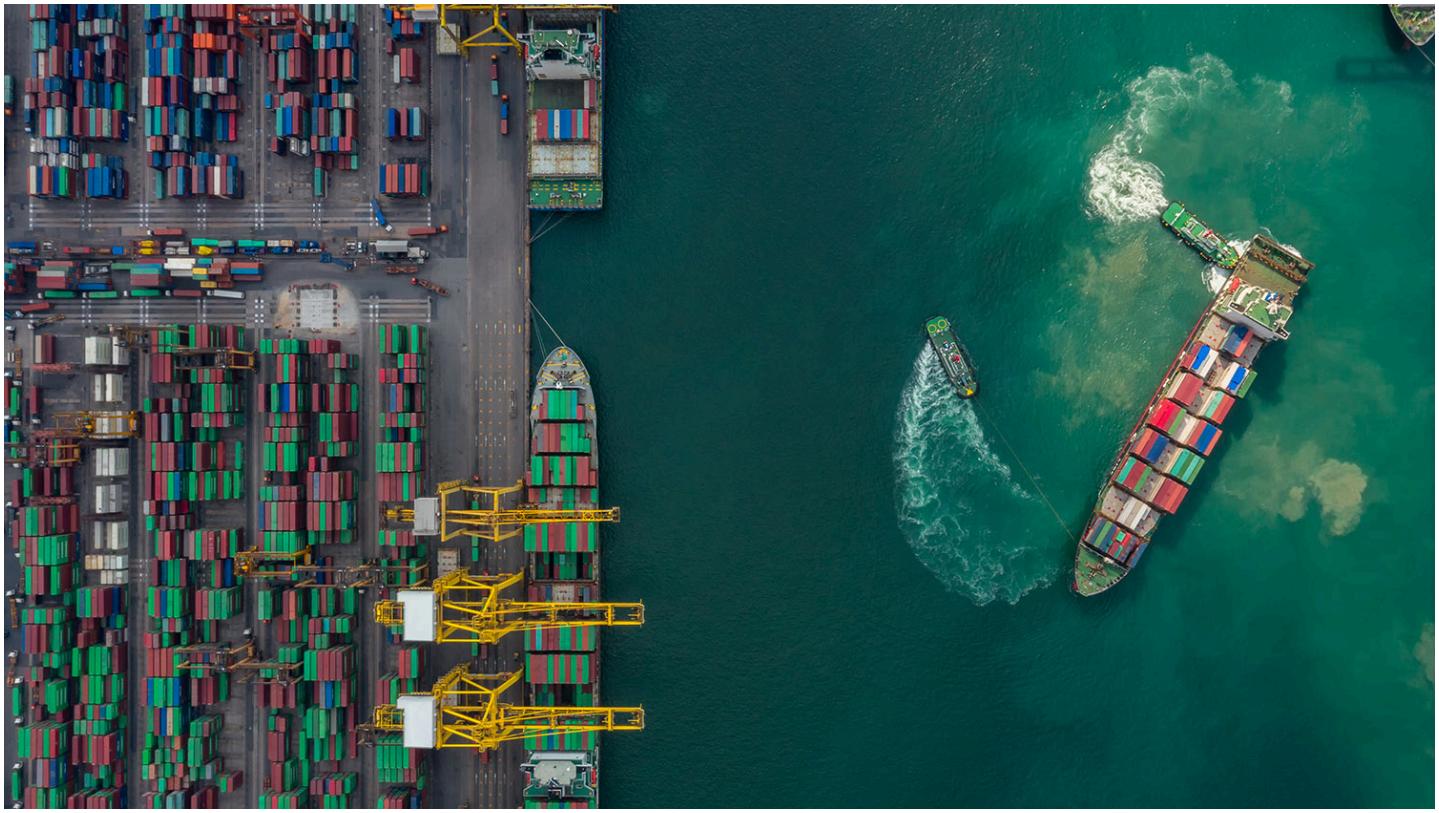

The Hague Rules – 100 years old and still standing

Is simplicity a reason for the success of the Hague Rules? In this opinion piece, Mark Russell, Head of Cargo Claims in Gard, outlines the history - and looks to the future – in a world of competing cargo carriage regimes.

Published 05 December 2024

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The Hague Rules came into being 100 years ago this month, becoming the first international convention governing the rights and obligations under bills of lading for the carriage of goods by sea. As the volume of internationally traded goods grew, the Hague Rules were born out of a need for uniformity in the allocation of risk between shipowners and cargo interests.

The backdrop

The allocation of risk between carrier and cargo interests has ebbed and flowed over the centuries. The Romans considered the carrier should shoulder the risk as they were the ones best placed to protect the goods from harm. However, the perils were numerous for sailing ships – navigation, extreme weather and piracy amongst them. Over time, these causes of damage/loss, along with the inherent vice of goods, became standard exceptions to a sea carrier's liability. As shipowners became more powerful and influential in international trade, they set about applying wider exclusions to liability in bill of lading terms. Cargo insurance also evolved, allowing traders to transfer risk.

As the influence of cargo interests in America grew, so did a dislike for how courts upheld bill of lading exclusions under freedom of contract principles. This led to the Harter Act of 1893, a forerunner to the Hague Rules in seeking to achieve a more balanced risk allocation. However, US legislation was not going to stop foreign shipowners and courts from deciding different outcomes. On the seas, the risk landscape had also started to improve through the transition from sail to steam and shipping regulation. The first Safety of Life at Sea Convention (SOLAS) was adopted in 1914 following the Titanic disaster in April 1912.

The solution

As other nations adopted their own versions of the Harter Act, the need for more uniform rules grew. Comité Maritime International (CMI), a non-governmental international organisation whose purpose remains the unification of maritime law, was influential in the work culminating in 26 states signing the Hague Rules in Brussels on 25 August 1924. Inevitably, the rules were a compromise between shipowning nations and those more representative of cargo interests. The fundamentals included obligations on carriers which they could not contract out of, such as seaworthiness and duties of care in relation to the goods. As a *quid pro quo*, carriers would benefit from certain exceptions to liability, limited (package) liability, a one-year time bar for claims, and rights and protections in respect of dangerous goods shipped onboard. Also, of significance for trade, the evidential value of the bill of lading as a receipt was affirmed, giving buyers essential confidence in the description of the goods in the bill and against which payment was made.

A patchwork of regimes

With the advent of container shipping, the Hague Rules were slightly revised by the Hague-Visby Rules in 1968. The relatively low package limit was increased, and a 1979 protocol amended the package limit currency to units of account in the form of Special Drawing Rights. Otherwise, the fundamentals of the Hague-Visby Rules are more or less the same as the Hague Rules.

As world trade increased, cargo interests and developing nations not party to the drafting of the Hague Rules gained greater influence. Calls for change were heard at the United Nations. Its trade body, the United Nations Commission on International Trade Law (UNCITRAL), was established in 1966 and the Hamburg Rules came into being in 1978. These rules did away with the carrier's listed exceptions to liability, creating a presumption of fault on the carrier and extending the Hague Rules tackle-to-tackle responsibility to the places of receipt and delivery at ports. They also featured express provision for delayed delivery, an increased package limit and

a two-year time bar. However, the Hamburg Rules failed to achieve the same uptake as the Hague/Hague-Visby Rules, which had stood for much uniformity for over 50 years.

UNCITRAL also wanted to establish a multi-modal convention more aligned with land-oriented liability regimes and more fit for the digital future. A 1980 multi-modal transport convention providing a single liability system failed to gain traction, so the patchwork of regimes still needed to be tackled. Leading nations and industry organisations, including the CMI, came together and their impressive work culminated in 2008. The Rotterdam Rules are described as a "maritime plus" approach. They adopt a "limited network principle", where liability for damage that can be localized to a particular leg of non-sea transport will be determined by the relevant inland convention, such as the Convention on the Contract for the International Carriage of Goods by Road. Where damage cannot be localized the Rotterdam Rules take precedence.

As for the fundamentals, the Rotterdam Rules increased inflation-eroded package limits again but largely retained the carrier liability exceptions, save for negligent navigation. The carrier's seaworthiness obligation was extended and the contractual carrier was also made responsible for acts and omissions of sub-contracting carriers, terminals and stevedores. When acting as "maritime performing parties" these sub-contractors were made jointly and severally liable together with the contractual carrier. Other new concepts included the ability to partly contract out of the Rotterdam Rules for volume contracts covering the carriage of goods in a series of shipments over a period of time. Ratifying states could also opt out of new compulsory jurisdictional provisions that would otherwise limit the effectiveness of contractual jurisdictional clauses.

There were high hopes for the Rotterdam Rules with 19 nations signing up, including the United States and France. Sixteen years later, however, that number is still less than 30 and less than a handful have gone on to ratify the Rotterdam Rules, well short of the 20 ratifications (which include denouncing other regimes) needed for their entry into force. As such, today most states continue to apply one of the other existing regimes. Around 30 nations still apply the Hamburg Rules and three times as many apply a version of the Hague or Hague-Visby Rules. The US Carriage of Goods by Sea Act (COGSA) is broadly similar to the Hague Rules with some differences in relation to application (inbound as well as outbound shipments) and a variation on package limitation which remains relatively favourable to carriers. Other states, such as Australia and Germany have amended the Hague-Visby Rules to create hybrid versions which are more favourable to cargo interests. Some nations, such as Brazil, have not signed up to any rules and instead apply a cargo-friendly commercial code. How individual nations interpret and apply the same convention also differs.

No global harmony but a guiding light

The Hague/Hague-Visby Rules themselves do not apply to charterparties but owners and charterers widely agree to apply them through standard forms or rider clauses with the effect that risk allocation is applied to more than cargo claims. An example of that is a recent English law decision that charterers bore the risk of lost time due to a vessel detained for anchoring in unauthorized waters. Hague/Hague-Visby Rule principles also provide the basis for P&I cargo liability cover and cargo insurance premiums reflect what can typically be recovered from a carrier. The recovery landscape has certainly changed over the last 100 years, and it has become more difficult for shipowners to distance themselves from the acts of and on their ships to avoid cargo liability. Advances in regulation (notably the ISM Code), industry standards (such as bridge procedures) and technology (eg data recorders) have resulted in swathes of evidence for lawyers and experts to pour over in the pursuit of fault. When things do go wrong there is much more transparency, especially for serious casualties through safety body reports.

Some significant judicial decisions have also shaped Hague/Hague-Visby Rules risk allocation, often in the favour of cargo interests. One recent example is the CMA CGM Libra where a defective passage plan rendered the vessel unseaworthy and the carrier was held liable for the failure of the master and deck officers to exercise due diligence at commencement of the

voyage. The non-delegable nature of the seaworthiness duty was similarly upheld in the Cape Bonny due to the conduct of the ship's engineers. A recent UK Supreme Court decision also ruled in favour of cargo interests in relation to the burden of proof.

The perils of the sea and Act of God defences are far from straightforward for a carrier today, requiring an assessment of what was reasonably foreseeable and whether reasonable care could have prevented the loss. Even when it comes to the cargo interests' own obligations in relation to dangerous goods, strict liability for the consequences of failing to properly inform the carrier is usually tempered by what the carrier knew or ought to have known. What cannot be disputed is the substantial body of law that has developed around the Hague/Hague-Visby Rules, as evidenced by CMI's own impressive database. All this has helped parties and practitioners to keep trade flowing and to resolve most disputes and claims amicably. Many disputes today arise from insufficient attention to clarity of contract. The shipper's description of the goods in the bill and the applicable package limits that result is one example.

A look to the future

With relatively far fewer incidents of cargo damage/loss, the allocation of risk is maybe less prominent in contract negotiations than it was in the past. Freight rates and other performance parameters dominate discussions, though for customers concerned with the risk of cargo damage/loss, some liner operators provide extended liability products. For some extra freight, this will guarantee compensation for many cargo damage/loss scenarios. Whilst this takes a carrier outside mutual P&I cover, fixed bolt-on covers have long been available for distinct risks and the Hague/Hague-Visby Rules do not prevent a carrier from negotiating more beneficial terms for cargo interests. Where P&I clubs have drawn the line is in attempts to contractually apply whole conventions that have yet to enter into force.

The pursuit of more harmony across commercial maritime carriage contracts remains admirable. When the Rotterdam Rules came into being the P&I clubs and their shipowner members stood ready to live with them (when entering into force) for the good of uniformity, notwithstanding the additional liability burden. Sixteen years have passed. Whilst shipowners are better connected with their ships than ever before, a digital and greener age also brings new risks. Lost or false GPS signals increase navigation risks, especially in conflict areas. Coastal waters are increasingly crowded with a combination of both traditional and renewable offshore activities. There are more extreme weather events and a heightened risk of latent defects on more sophisticated vessels, increasingly operating with riskier green fuels. Shipowners face challenges crewing their vessels in a society facing generational shifts and struggles with mental health.

The CMI is committed to reviving earlier enthusiasm for the Rotterdam Rules and has set up a committee to urge wider ratification. There are certainly aspects to commend a modern regime that addresses gaps in the Hague/Hague-Visby Rules and the Rotterdam Rules also does a useful job in tidying up some contentious issues in older regimes. However, the muted response from nations in the time elapsed continues to cast doubt that the Rotterdam Rules offers a viable way forward. At 90 articles (versus 16 for Hague/Hague-Visby Rules) the Rotterdam Rules are long and detailed. Its new concepts involve more diverse interest groups who need to be persuaded that the Rotterdam Rules would work for them. Influential ports in the USA have their doubts though it is argued detractors should better focus on the benefits for trade given most voyages are accident free. Cited here are the non-liability provisions that the Rotterdam Rules attempt to unify.

Venturing into matters traditionally dealt with by courts and tribunals (amongst them, the identity of the carrier, burden of proof, rights of control and delivery of the goods) the Rotterdam Rules aim to avoid conflicting laws and frictions in trade. However, if they come into force, they are likely to create many disputes on issues of drafting and interpretation against a backdrop of established caselaw. As for electronic contracts of carriage (the Rotterdam Rules does away with well-known bill of lading terminology), these are being recognised and

regulated through other legislation and questions arise as to compatibility of Rotterdam Rules provisions with model law. There is also the question of how much uniformity would be achieved given opt-outs and the potential for more hybrid versions when Rotterdam Rules provisions are incorporated into national laws. On the multi-modal front, land based uni-modal conventions contain their own provisions extending application to other modes, raising more compatibility concerns. There are also suggestions that the Rotterdam Rules fail to sufficiently deal with decarbonisation efforts and which ought to require consideration of relative emissions in the available transport modes, as well as slow steaming in the sea leg. In all of this, industry itself has a role to play, through for example organisations such as Bimco in applying conventions through standard contractual forms on a balanced basis.

Absent the Rotterdam Rules coming into force, it seems likely that UNCITRAL will want to pick this up again. If not, there is a real danger in an increasingly protectionist world that we end up with an even greater patchwork of regimes. That is after all what the Hague Rules were designed to avoid and the Rotterdam Rules themselves halted efforts to revise US COGSA. How long will the heavily trade-oriented US continue to apply a1936 COGSA? Either way, the voices of shipowners and carriers need to be heard. They do not enjoy a level playing field with cargo interests in many developing economies, where some local systems unfairly find ways to make a carrier liable for paper shortages and pre-shipment issues, amongst others. Would a new cargo liability regime help to achieve a more balanced risk allocation in such places? Without one, will anything change?

Time to rethink?

In an increasingly complex world, the simplicity of the Hague/Hague-Visby Rules and the industry's familiarity with them, provide a welcome degree of transparency, certainty and predictability. As for the allocation of risk, the above-mentioned English decisions are examples of the judiciary seeking to apply the rules in ways that reflect both the times and the bargain struck between the parties.

The Rotterdam Rules recognized that the Hamburg Rules went too far in disturbing the carrier's listed exceptions. Perhaps the Rotterdam Rules themselves went too far in disturbing the brilliant simplicity of the Hague/Hague-Visby Rules? Perhaps we can learn from another set of rules. The York-Antwerp Rules, designed to govern the principles of General Average, were first introduced in 1864 and have been updated over time. The 2004 version was rarely used, so CMI went back to the drawing board and following years of industry consultation, the 2016 version is now widely adopted. If all the good work is not to be lost, maybe the Rotterdam Rules should go back to drawing board aiming for a greater degree of simplicity? Otherwise, it may continue to be a hard sell to governments facing unprecedented challenges on matters seen as more important.

The author asked the CMI to comment on this article and is thankful to them for agreeing to publish these remarks:

The CMI is not as pessimistic as the author and is optimistic that the Rotterdam Rules will come into force. As discussed at its Gothenburg Colloquium in May the time scale for any other reform is at least another generation away and in any event the CMI believes it unlikely that UNCITRAL or any other international body would wish to venture into this area when there is such an obviously acceptable regime available. In addition, CMI believes if any new regime were to be agreed it would look very much the same or worse for carriers by that time. CMI looks forward to working with the P&I clubs to see this much needed reform take place before regional or local reform causes even greater dis-uniformity.