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## **Shipper's Obligations and Liabilities under the Rotterdam Rules**

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## I. Introduction

On December 11, 2008, during its 63<sup>rd</sup> session, the UN General Assembly adopted the “United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules).” The Convention became open for signature at the signing ceremony in Rotterdam on September 23, 2009. 23 States<sup>1</sup> has signed the Convention and one has already ratified it<sup>2</sup>. Although it is not certain if the Rotterdam Rules come into force in near future at this stage, its innovative nature has drawn an attention to maritime lawyers.

This paper examines the shipper’s obligations and liabilities under Chapter 7 of the Rotterdam Rules. Previous maritime transport conventions did not pay much attention to the shipper’s obligations or liabilities. The Hague and Hague-Visby Rules include only fragmentary regulations: the shipper’s guarantee of the accuracy of the information it furnishes concerning the goods,<sup>3</sup> the shipper’s exoneration for loss or damage sustained by the carrier resulting from any cause that was without the shipper’s fault,<sup>4</sup> and the shipper’s

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<sup>1</sup> Armenia (29 Sep 2009), Cameroon (29 Sep 2009), Congo (23 Sep 2009), Democratic Republic of the Congo (23 Sep 2010), Denmark (23 Sep 2009), France (23 Sep 2009), Gabon (23 Sep 2009), Ghana (23 Sep 2009), Greece (23 Sep 2009), Guinea (23 Sep 2009), Luxembourg (31 Aug 2010), Madagascar (25 Sep 2009), Mali (26 Oct 2009), Netherlands (23 Sep 2009), Niger (22 Oct 2009), Nigeria (23 Sep 2009), Norway (23 Sep 2009), Poland (23 Sep 2009), Senegal(23 Sep 2009), Spain (23 Sep 2009), Switzerland (23 Sep 2009), Togo (23 Sep 2009), United States of America (23 Sep 2009) .

<sup>2</sup> Spain ratified the Convention 19 Jan 2011.

<sup>3</sup> Hague-Visby Rules art. 3(5).

<sup>4</sup> Hague-Visby Rules art. 4(3).

liability for dangerous goods.<sup>5</sup> The Hamburg Rules have an independent chapter on the liability of the shipper but it contains only two articles, one addressing the basis of the shipper's liability<sup>6</sup> and one providing special rules for dangerous cargo.<sup>7</sup> In contrast, chapter 7 of the Rotterdam Rules,<sup>8</sup> which consists of eight articles, provides more detailed rules on the shipper's obligations and liabilities.

Given the expanded chapter of shipper's obligation, the natural question will come across our mind: *Are shipper's obligations and liabilities substantially increased under the Rotterdam Rules?* In fact, criticisms against the Rotterdam Rules are sometimes heard based on the assumption that they impose onerous liabilities on the shipper<sup>9</sup>. However, a more careful examination is necessary to decide if this is the case. First, more provisions, in themselves, do not imply more obligations or liabilities. Second, as is pointed out by careful observers<sup>10</sup> that the shipper has never been free from obligations and liabilities even in such areas where previous conventions are silent. Shippers have long been responsible for a wide range of obligations under applicable national law.<sup>11</sup> Therefore, one should examine whether the shipper's obligations and liabilities under the Rotterdam Rules are expanded compared with those under law of each country or under ordinary contractual

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<sup>5</sup> Hague-Visby Rules art. 4(6).

<sup>6</sup> Hamburg Rules art. 12.

<sup>7</sup> Hamburg Rules art. 13.

<sup>8</sup> In addition to the discussion of individual articles (noted below), UNCITRAL's discussion of the shipper's obligations chapter as a whole is reported in 9th Session Report ¶¶ 144-170; 13th Session Report ¶¶ 118-161; 16th Session Report ¶¶ 104-187; 17th Session Report ¶¶ 173-207; 18th Session Report ¶¶ 83-113; 19th Session Report ¶¶ 207-263; 21st Session Report ¶¶ 88-108; 2008 Commission Report ¶¶ 99-110.

<sup>9</sup> For instance, European Shipper's Council states "Shipper obligations are far more onerous than previous conventions. See, "View of the European Shippers' Council on the Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea also known as the 'Rotterdam Rules'" (April 23, 2009). (<http://www.europeanshippers.com/docs/esc-position-paper-rotterdam-rules-march09.doc>)

<sup>10</sup> See, for example, Ingeborg Holtskog Olebakken, Background Paper on Shipper's Obligations and Liabilities, CMI Yearbook 2007-2008, p. 300, 305

<sup>11</sup> The nature of the shipper's possible liability might differ among jurisdictions. Some legal systems might analyze it as liability in torts, for example, while others might analyze it as a kind of implicit and auxiliary contractual obligation.

terms rather than comparing the texts of conventions themselves. It should also be noted that parties cannot increase the shipper's obligations and liabilities through a contract under the Rotterdam Rules (article 79(2)). In this sense, the shipper is more protected in this respect than under previous conventions. The conclusion of such examinations should be deferred until the end of the paper. At this stage, it would suffice to point out that the often-heard assertion that the Rotterdam Rules substantially increased the level of shipper's obligations and liabilities is not self-evident.

The rest of this paper continues in the following order. Section II notes what is and what is not covered in Chapter 7 of the Rotterdam Rules. Section III explains the general obligations of the shipper under the Rotterdam Rules. Section IV examines the structure liability system under the Rotterdam Rules. The specific obligations of the shipper will be discussed in Section V (the obligation to provide information necessary for the compilation of the contract particulars) and VI (the special rules for dangerous goods). Based on these examinations, the practical impact of shipper's liability under the Rotterdam Rules is assessed in Conclusion (Section VII).

## **II. Scope of Chapter 7**

While chapter 7 offers more detailed rules on the shipper's obligations and liabilities than previous conventions, its scope is still not comprehensive. First, as the title of Chapter 7 suggests, the Rotterdam Rules cover only the relationship between the carrier and the shipper. The Convention (like its predecessors) does not address the shipper's liability to other parties.<sup>12</sup> If cargo explodes during carriage, for example, the shipper's potential liability for the ensuing damage to the carrier's ship is governed by the Rotterdam Rules while the shipper's potential liability to other shippers' property is not. Similarly, the Convention does not give the carrier's employees any cause of action against the shipper, even though article 27 refers to the shipper's obligation not to cause harm to

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<sup>12</sup> See, e.g., 16th Session Report ¶¶ 165-166.

“persons.”<sup>13</sup> Second, the Rotterdam Rules cover the shipper’s obligations and liabilities only in connection with the goods carried under the contract of carriage. Thus the shipper’s obligation to pay freight (the shipper’s primary obligation under the contract of carriage) is outside the scope of the Rotterdam Rules and is left to applicable law.<sup>14</sup> Finally, even with respect to the shipper’s liability in connection with the goods, certain controversial issues are kept outside the chapter’s scope. The shipper’s liability for loss or damage caused by delay is arguably a notable example.<sup>15</sup>

### III. General Obligations of the Shipper

Articles 27-29 of the Rotterdam Rules specify the general obligations of the shipper. Breach of any of these obligations imposes only a fault-based liability on the shipper. Subsequent articles establish two specific obligations that could result in the shipper’s strict liability for breach.

#### 1. Shipper’s Obligation to Deliver the Goods for Carriage

Under article 27,<sup>16</sup> the shipper’s obligation to deliver the goods for carriage includes both general duties applicable to all goods and specific duties applicable to containerized goods.

**The General Obligation to Deliver the Goods.** Article 27(1) defines the shipper’s general obligation regarding the delivery of goods for carriage to the carrier.

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<sup>13</sup> See Article 27(1) and (3).

<sup>14</sup> The Preliminary Draft Instrument WP.21 included a chapter on freight but UNCITRAL decided to delete the chapter. See 13th Session Report ¶¶ 162-164.

<sup>15</sup> See *infra* notes 41-52 and accompanying text.

<sup>16</sup> UNCITRAL’s discussion of article 27 is reported in 9th Session Report ¶¶ 145-148; 13th Session Report ¶¶ 118-123; 16th Session Report ¶¶ 109-120; 19th Session Report ¶¶ 207-213; 21st Session Report ¶¶ 88-93; 2008 Commission Report ¶ 99.

The first sentence imposes the obligation to deliver the goods “ready for carriage” and the second requires that the goods be in a safe condition with respect to both persons and property. The contract of carriage can modify the former obligation (as indicated by the opening phrase “[u]nless otherwise agreed”), but not the latter (as indicated by the opening phrase “[i]n any event”).<sup>17</sup> The contractual freedom under the first sentence of article 27(1) allows the commercial flexibility necessary for the parties to make appropriate arrangements for the “readiness” of the goods. The mandatory rule of the second sentence protects the safety of everyone involved in the enterprise.

The shipper must “deliver the goods in such condition that they will withstand the intended carriage.”<sup>18</sup> In other words, the goods themselves must be capable of being carried by sea (and by any other mode of transport that is part of the intended carriage) and they must be properly packed having due regard to the circumstances of the voyage, including its duration, the expected weather, the size and type of ship, the type of cargo, the weight and volume of the cargo, and the manner of loading and discharging. In addition, the goods must not cause harm to persons or property. The requirement applies not only to “dangerous goods,” but to all kinds of goods (including the packaging). If the goods would cause harm to the carrier, the shipper may be liable under articles 30, 31, or 32,<sup>19</sup> depending on the cause of the harm. UNCITRAL chose the word “harm” because it is a wide term that covers all sorts of losses or damage that the carrier might suffer, including physical damage, consequential damage, and personal injury. Please note that this provision does not give a cause of action to the person other than the carrier who is or whose property is harmed. While article 27(1) refers to the interest of “persons or property” to delineate the shipper’s obligation, Chapter 7 of the Rotterdam Rules only addresses the shipper’s liability to the carrier.

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<sup>17</sup> Cf. *infra* note 22 and accompanying text.

<sup>18</sup> Article 27(1). The term “intended carriage” clarifies that the obligation is defined by reference to the carriage that is expected at the time that the shipper delivers the goods to the carrier. Cf. *infra* note 92.

<sup>19</sup> In some circumstances, a shipper may be liable under applicable national law.

**Containerized Cargo.** Article 27(3) provides a special rule for containerized cargo. When the goods are delivered in a container packed by (or in a vehicle loaded by) the shipper, the shipper must properly and carefully stow, lash, and secure the contents in or on the container (or vehicle) so that they will not harm persons or property. Although article 27(3) arguably adds little to the obligation imposed by article 27(1),<sup>20</sup> UNCITRAL thought that the paragraph has a practical value in reminding the shipper of the importance of stowing and securing the goods in the container to withstand the voyage.<sup>21</sup> The focus of article 27(3) is the proper stowage of the goods while article 27(1) concerns the condition of the goods themselves and their packaging. Like the second sentence of article 27(1),<sup>22</sup> which also focuses on safety concerns, there is no contractual freedom for the obligation under article 27(3).

## 2. Activities under FIO Clause

Article 27(2) applies in the situation in which parties have agreed that the shipper, instead of the carrier, assumes responsibility for loading and other activities under a FIO clause. In that situation, the shipper must perform its obligation carefully and properly.

Not all activities under the FIO clause are performed by the shipper. For instance, unloading of the goods from the ship may be performed by the consignee<sup>23</sup>. Please note that the paragraph does not regulate such activities performed by a person other than the shipper. Let us assume that the consignee damaged the ship during unloading process agreed in the FIO clause contained in a non-negotiable transport document<sup>24</sup>. The shipper has not breached the obligation under article 27(2) because it did not perform the discharge under

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<sup>20</sup> See 13th Session Report ¶ 122, 16th Session Report ¶ 111.

<sup>21</sup> See 16th Session Report ¶¶ 111-112.

<sup>22</sup> See *supra* note 17 and accompanying text.

<sup>23</sup> In many cases the consignee will be the shipper. In those cases, of course, article 27(3) will apply to the shipper's acts even if the shipper also has another status in the transaction.

<sup>24</sup> Please note that the holder of a negotiable transport document may be subject to the same liabilities as the shipper pursuant to article 58(2).



FIO clause unless the consignee is not the person referred to in article 34. The consignee might be liable under applicable national law but not under the Rotterdam Rules<sup>25</sup>. The Chapter 7 of the Rotterdam Rules provide only for the shipper's obligation and liability<sup>26</sup>.

### 3. The Shipper's Obligation to Provide Information, Instructions, and Documents

Article 29 requires the shipper to provide necessary information to the carrier in specified contexts.<sup>27</sup> The Hague, Hague-Visby, and Hamburg Rules contain no corresponding provisions. Although previous conventions are generally silent on the shipper's obligation to inform the carrier (except for information regarding dangerous goods), contracts of carriage typically require the shipper to provide the information

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<sup>25</sup> During the deliberation in the UNCITRAL Working Group, it was discussed whether the Convention should address the obligation of the consignee in connection with the activities under FIO clause. Proposed article 45(2) of Draft Convention prepared for the 21st Session of the Working Group (January 2008) required the consignee to act "properly and carefully" when unloading the goods under a FIO clause ("Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea]", U.N. doc. no. A/CN.9/WG.III/WP.101). That draft provision, however, caused serious debate. On the one hand, it was argued that this obligation should not be imposed without the consignee's consent because the FIO clause between the shipper and the carrier cannot automatically bind the consignee. On the other hand, there was opposition to requiring the consignee's consent because it could contradict both the theory of a contract for the benefit of a third party and also the current practice under FIO clauses. *See* 21st Session Report ¶¶ 145-147. Ultimately UNCITRAL decided to delete the proposed article 45(2) in order to leave the consignee's obligations to be decided under national law. *See* 21st Session Report ¶150.

<sup>26</sup> Proposed article 45(2) of Draft Convention WP.101 required the consignee to act "properly and carefully" when unloading the goods under a FIO clause. That draft provision, however, caused serious debate. On the one hand, it was argued that this obligation should not be imposed without the consignee's consent because the FIO clause between the shipper and the carrier cannot automatically bind the consignee. On the other hand, there was opposition to requiring the consignee's consent because it could contradict both the theory of a contract for the benefit of a third party and also the current practice under FIO clauses. *See* 21st Session Report ¶¶ 145-147. Ultimately UNCITRAL decided to delete the proposed article 45(2) in order to leave the consignee's obligations to be decided under national law. *See* 21st Session Report ¶ 150.

<sup>27</sup> UNCITRAL's discussion of article 29 is reported in 9th Session Report ¶ 153; 13th Session Report ¶¶ 130-137; 16th Session Report ¶¶ 128-135; 17th Session Report ¶¶ 187-194; 19th Session Report ¶¶ 217-219; 21st Session Report ¶ 96; 2008 Commission Report ¶ 101.

necessary for carriage. The Rotterdam Rules simply codify and harmonize the existing practice rather than creating novel obligations.

Article 29 refers to two different situations. Article 29(1)(a) addresses the information, instructions, and documents required for the proper handling and carriage of the goods (including precautions to be taken by the carrier and performing parties). This obligation arises only to the extent that the information, instructions, and documents are reasonably necessary and not otherwise reasonably available to the carrier.

Article 29(1)(b) facilitates the carrier's compliance with the law, regulations, and other requirements of public authorities in connection with the intended carriage. The shipper must provide the information, instructions, and documents necessary for the carrier's compliance only when the carrier, in a timely manner, notifies the shipper what is required (since the shipper will not always know what information, instructions, or documents the carrier needs).<sup>28</sup>

The first draft of the Convention<sup>29</sup> imposed strict liability for a breach of the shipper's obligation to furnish information. During the UNCITRAL negotiations, however, the nature of the shipper's liability for the failure to furnish proper information changed substantially. Under the final text, the breach of an article 29 obligation triggers ordinary fault-based liability under article 30(2). Only the failure to furnish certain kinds of information triggers the shipper's strict liability.<sup>30</sup>

#### 4. Obligation of Mutual Cooperation in providing information and instructions

The Rotterdam Rules also recognize the obligation of mutual cooperation in providing information and instructions.<sup>31</sup> Performing the contract of carriage effectively

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<sup>28</sup> Cf. article 32(b); *see infra* note 93 and accompanying text.

<sup>29</sup> *See* Preliminary Draft Instrument WP.21 art. 7.5; *see also* WP.21 ¶ 115 (explanatory note for article).

<sup>30</sup> *See infra* notes notes 64-96 and accompanying text.

<sup>31</sup> *See* article 28; *see also* article 55(1).

requires that the parties properly communicate. In practice, many things may go wrong due to lack of communication. Mutual communication is therefore essential for the proper implementation of the contract on both sides. Article 28 underpins that cooperation by providing the obligation to respond to requests from the other party for the information and instructions necessary for the proper handling and carriage of the goods.<sup>32</sup>

To ensure the success of the transaction, the parties should in any event provide the information that they possess and the instructions that they can reasonably give. The reasonability requirement ensures that the obligation — by definition — does not impose an unreasonable burden on the parties. The shipper, for instance, need not conduct a costly investigation to obtain information that the carrier has requested if that would be unreasonable. Moreover, even if the parties have information or can reasonably give instructions, they need not do so if the information is already reasonably available to the requesting party.

#### **IV. The Basis of the Shipper's Liability**

Article 30 provides for the basis of the shipper's liability for loss or damage under the Rotterdam Rules.<sup>33</sup>

##### **1. Breach of Obligation as the Prerequisite for Shipper's Liability: Article 30(1)**

In order to hold the shipper liable, the carrier must first establish a breach of the shipper's obligations under the Convention and that the breach caused the loss or damage. The requirements differ significantly from the burden of proof for carrier's liability. A

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<sup>32</sup> UNCITRAL's discussion of article 28 is reported in 9th Session Report ¶¶ 149-152; 13th Session Report ¶¶ 124-129; 16th Session Report ¶¶ 121-127; 17th Session Report ¶¶ 175-186; 19th Session Report ¶¶ 214-216; 21st Session Report ¶¶94-95; 2008 Commission Report ¶ 100.

<sup>33</sup> UNCITRAL's discussion of article 30 is reported in 9th Session Report ¶¶ 154-163; 13th Session Report ¶¶ 138-148; 16th Session Report ¶¶ 136-153; 17th Session Report ¶¶ 199-207; 18th Session Report ¶¶ 83-113; 19th Session Report ¶¶ 220-243; 21st Session Report ¶ 97; 2008 Commission Report ¶ 102.

cargo claimant does not have to prove any breach of obligation by the carrier to establish a *prima facie* case under article 17(1), but need prove only that the loss, damage, or delay (or the event that caused the loss, damage, or delay) occurred during the carrier’s period of responsibility. In contrast, a breach of obligation is always a prerequisite for the shipper’s liability. This structure also differs from the treatment of shipper’s liability in previous conventions.<sup>34</sup>

Article 30(1) further provides that the carrier must prove that the loss or damage was “caused” by the shipper’s breach of obligation. Unlike article 17, article 30(1) does not include the term “contributed to.” But the shipper is liable in part when an event attributable to the fault of the shipper combines with other events to jointly cause the loss or damage. Article 30(3) explicitly recognizes that situation.

## 2. Other Parties Whose Acts or Omissions Are Attributable to the Shipper

As a general rule, the Rotterdam Rules do not address questions of agency, even though it is well-known that both parties to a contract of carriage will typically rely on employees, agents, and subcontractors to perform many of their obligations under the contract. But just as article 18 recognizes that the carrier is liable for the acts or omissions of certain other persons, so article 34 recognizes that the shipper is liable for the acts or omissions of the persons to which it entrusts the performance of its obligations.<sup>35</sup>

The basic principle is the same for both carriers and shippers.<sup>36</sup> Each “is liable for the breach of its obligations under this Convention caused by the acts or omissions of”

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<sup>34</sup> Prior conventions require only proof of the shipper’s fault, not any specific breach of an obligation under the convention. See Hague-Visby Rules art. 4(3); Hamburg Rules art. 12.

<sup>35</sup> UNCITRAL’s discussion of article 34 is reported in 9th Session Report ¶¶ 165-170; 13th Session Report ¶¶ 159-161; 16th Session Report ¶¶ 176-180; 19th Session Report ¶¶ 257-260; 21st Session Report ¶¶ 104-106; 2008 Commission Report ¶ 108.

<sup>36</sup> See 13th Session Report ¶ 160; 16th Session Report ¶ 177.

other persons to which it entrusts the performance of its obligations.<sup>37</sup> The phrasing is somewhat different because the expansive definition of performing party already identifies most of those for which the carrier is responsible. Without the benefit of a comparable definition, article 34 simply describes the analogous concept on the cargo side: “any person, including employees, agents and subcontractors, to which [the shipper] has entrusted the performance of any of its obligations [under the Convention].”<sup>38</sup>

Article 34 needed to be drafted with some care, however, to ensure that it did not inadvertently impose liability on the shipper for acts or omissions of the carrier.<sup>39</sup> In modern practice, it is not unusual for a carrier to assume additional obligations beyond those imposed under the Convention, including obligations that would otherwise be the shipper’s. If the carrier’s own negligence (or the negligence of a performing party to which the carrier has subcontracted some of its duties) causes the breach of an obligation that the Convention imposes on the shipper, the shipper should not be responsible for that breach. The final clause of article 34 avoids that possibility.

### 3. Loss or Damage

**Loss or Damage Sustained by the Carrier.** The shipper is liable under article 30 only for the loss or damage sustained by the carrier.<sup>40</sup> Thus the shipper has no liability under article 30 if the carrier does not suffer a loss (either directly or indirectly). If the carrier and another party both suffer losses, the shipper’s liability under article 30 is only for the carrier’s loss.

**Loss or Damage Caused by Delay.** Unlike article 17 on the carrier’s basis of liability, there is no reference to “delay” in article 30 (or elsewhere in chapter 7). The intention is to exclude shipper’s liability for loss due to delay from the Convention, thus leaving the issue to applicable national law. The treatment of the shipper’s liability for

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<sup>37</sup> Article 34; *cf.* article 18.

<sup>38</sup> Article 34.

<sup>39</sup> *See* 9th Session Report ¶ 165; 19th Session Report ¶ 258.

<sup>40</sup> *See also supra* note 12 and accompanying text.

loss or damage caused by delay was one of the most controversial issues in the entire negotiation. It will accordingly be useful to review the drafting history to provide a better understanding of the Rotterdam Rules' position on the issue.

The first draft also did not include any reference to “delay.”<sup>41</sup> The term “delay” was introduced in square brackets (to indicate the unresolved nature of the issue) in Draft Instrument WP.39<sup>42</sup> and maintained in the subsequent draft.<sup>43</sup> Whether the shipper should be liable for loss or damage caused by delay was strenuously debated at the fall 2005 meeting of the UNCITRAL Working Group.<sup>44</sup> The issue continued to be discussed at the next two meetings, along with the carrier's liability for delay.<sup>45</sup> Delegates were concerned that treating delay as a basis for the shipper's liability could impose too onerous a burden. Some feared that if the shipper failed to provide a necessary custom document, for example, and prevented the ship's timely departure as a result, it could lead to enormous consequential damages if the delivery of all the other cargo on the vessel were delayed as a result.<sup>46</sup>

Although UNCITRAL debated the shipper's potential exposure to risk with great enthusiasm, the risk in practice would likely have been very small.<sup>47</sup> First, the carrier would often be exonerated from liability when a shipper's breach of its obligations causes the delay because it would not be attributable to the carrier's fault.<sup>48</sup> When the carrier is not liable for delay, there can be no recourse action against the shipper. Therefore, even if a shipper causes a ship's delay, the risk to the shipper of being exposed to a recourse claim

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<sup>41</sup> See Preliminary Draft Instrument WP.21 art. 7.6.

<sup>42</sup> See Draft Instrument WP.39 ¶ 18.

<sup>43</sup> See Draft Convention WP.56 art. 31.

<sup>44</sup> See 16th Session Report ¶¶ 143-146.

<sup>45</sup> See 17th Session Report ¶¶ 199-207; 18th Session Report ¶¶ 83-113; 19th Session Report ¶¶ 233-243.

<sup>46</sup> See, e.g., 16th Session Report ¶ 143; 17th Session Report ¶¶ 201-207.

<sup>47</sup> The possible risk scenarios for the shipper's liability for delay are carefully examined in WP.74 ¶¶ 17-19 (report by Swedish delegation).

<sup>48</sup> See article 17(2).

from the carrier is still relatively small. Second, even in the absence of any liability under the Convention, the shipper owes unlimited liability in a tort action under national law in most legal systems. If a shipper's breach of its obligations causes a serious delay and the carrier is required to compensate other shippers for the late delivery of their cargo, for example, the shipper at fault is likely to be liable under national law for the carrier's payments to the other shippers. The scope of the recoverable damage could be limited by the rules in each jurisdiction (*e.g.*, under a "foreseeability test" in common-law countries). Those limitations on the scope of recoverable damages would also apply under the Rotterdam Rules.

Although the shipper's potential risk may have been exaggerated, many delegates were nervous about the scenario of the shipper's being held liable for the loss (especially economic loss) caused by delay. To respond to that concern, UNCITRAL seriously attempted to set a sensible limitation on the shipper's liability for delay.<sup>49</sup> When those attempts ultimately proved unsuccessful, all reference to delay was deleted as a part of a compromise package.<sup>50</sup> The issue was instead left to applicable national law.<sup>51</sup>

One might contend that the final language of the text is not clear enough to exclude loss due to delay from the scope of the Convention on the theory that the term "loss or damage" could arguably include loss or damage caused by delay.<sup>52</sup> Although the text language is not clear enough<sup>53</sup>, the drafting history of chapter 7 plainly demonstrates that

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<sup>49</sup> See 18th Session Report ¶¶ 105-106, 113. During the negotiation in 19th Session, a limitation amount of 500,000 SDR per incident was proposed. See WP.85 ¶ 7.

<sup>50</sup> See 19th Session Report ¶ 180.

<sup>51</sup> See 19th Session Report ¶ 237.

<sup>52</sup> See Simon Baughen, *Obligations Owed by the Shipper to the Carrier*, in, D RHIDIAN THOMAS EDS., *A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA: THE ROTTERDAM RULES*, LAWTEXT PUBLISHING, 2009, pp.184-185. In fact, the point was raised in UNCITRAL Working Group.

<sup>53</sup> In this author's judgment, the UNCITRAL Working Group made mistakes twice. First, it included the term "delay" to article 30 for the wrong reason. The original draft of the Convention also did not include any reference to "delay." See "Transport Law: Preliminary draft instrument on the carriage of goods by sea", U.N. doc. no. A/CN.9/WG.III/WP.21, art. 7.6. The term "delay" was introduced in square brackets (to indicate the unresolved nature of the issue) in Draft prepared after the 13th Session of the UNCITRAL Working Group (October 2004). See "Provisional redraft of the articles of the draft

the Rotterdam Rules do not regulate a shipper's liability caused by delay and instead leave the issue to applicable national law<sup>54</sup>.

#### 4. Fault-Based Liability as the General Rule: Article 30(2)

Save in the exceptional cases referred to below,<sup>55</sup> the shipper is liable only for loss or damage attributable to its fault (or the fault of others for which it is responsible<sup>56</sup>).

Unlike article 17, which establishes the basis for the carrier's liability,<sup>57</sup> article 30(2) does

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instrument considered in the report of Working Group III on the work of its thirteenth session (A/CN.9/552)", U.N. doc. no. A/CN.9/WG.III/WP.39, para.18. The reason of the insertion was explained that "'Delay' arises by virtue of creating a mirror provision of draft article 14 [article 17 in the final text]" (*ibid*, footnote 78) Please note that article 17 refers to "loss of the goods", "damage to the goods" and "delay in delivery", while article 30 "loss or damage". The term "loss or damage" in article 30 is used in a quite different manner than in article 17. It is a general concept which can include "loss or damage caused by delay". Therefore, it was not logical to add "delay" to "loss or damage" in order to create a mirror provision of carrier's basis of liability. The reference to "delay" was maintained in the subsequent draft.. *See* "Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea]", U.N. doc. no. A/CN.9/WG.III/WP.81, as corrected by Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea], Corrigendum, U.N. doc. no. A/CN.9/WG.III/WP.81/Corr.1 art. 31.

The Working Group made the second mistake when it deleted the reference to "delay". It was not enough to achieve the policy goal adopted in the Working Group and the point was raised in the 19<sup>th</sup> Session of the Working Group when the term "delay" was deleted. *See* 19th Session Report ¶¶ 235-237. WP.69 ¶ 14 proposed the following text to address the concern:

"Damages recoverable from the shipper by the carrier under this chapter for any loss or damage, for a breach of any obligation established hereunder, or under an indemnity or guarantee provided for in this chapter, shall not include damages for delay of a vessel or in delivery of goods loaded on a vessel other than physical damage caused by delay."

Nevertheless, the Working Group rejected a careful examination with respect to the implication of the deletion of term "delay".

<sup>54</sup> Baughen, *supra* note 52, p. 185 makes some reservation for this interpretation. Anthony Diamond, *The Rotterdam Rules*, [2009] L.M.C.L.Q 445, 493 strongly argues that "loss or damage" includes liability for financial loss, including loss due to delay. *See* 19th Session Report ¶¶ 235-237.

<sup>55</sup> *See infra* notes 64-96 and accompanying text.

<sup>56</sup> *See supra* notes 39 and accompanying text.

<sup>57</sup> The rule for carrier liability provides as follows:

The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article *if it proves* that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.



not explicitly allocate the burden of proof on shipper's fault.<sup>58</sup> The UNCITRAL Working Group intensely discussed the burden of proof during its spring 2007 meeting.<sup>59</sup> Some argued that, as under the Hamburg Rules, the shipper should not bear the burden of proving its lack of fault.<sup>60</sup> Others responded that since the carrier first has to prove the shipper's breach of its obligation under the Rotterdam Rules, it is simply natural that the shipper, in turn, be required to prove it is not at fault for the breach. The Working Group, as a compromise, agreed on the current formulation which establishes the fault-based liability without explicitly specifying the burden of proof on the fault.

As a practical matter, the allocation of the burden of proof on fault may not make much difference in this particular context. The Rotterdam Rules initially require the carrier to prove the shipper's breach of an obligation.<sup>61</sup> Once the carrier has proven the shipper's breach, even without a formal allocation of the burden of proof a court would seem likely to find that the shipper is "at fault" unless there is reasonable explanation for the cause of the breach. In short, many courts seem likely in practice to equate a shipper's breach with "fault" unless the shipper can provide a good explanation for the breach.

The Rotterdam Rules impose strict liability on the shipper in two exceptional cases: (1) a breach of the obligation to provide accurate information for the compilation of the contract particulars and (2) a loss or damage caused by improper information or

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Article 17(2) (emphasis added).

<sup>58</sup> The burden of proof is not sufficiently clear under article 4(3) of the Hague and Hague-Visby Rules. Article 12 of the Hamburg Rules seems implicitly to impose the burden of proof on the carrier ("The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents.").

<sup>59</sup> See 19th Session Report ¶¶ 222-230, 239-242.

<sup>60</sup> See 19th Session Report ¶¶ 225, 227.

<sup>61</sup> As mentioned above, the requirement to establish a breach of the shipper's obligations is an important difference compared both to the carrier's liability under article 17 and to shipper's liability under previous conventions. See *supra* notes 34 and accompanying text.

inappropriate marking and labeling with respect to dangerous goods. Both of these exceptional cases are discussed below.<sup>62</sup>

## 5. Concurring Causes

Article 30(3) provides for the shipper's partial exoneration from liability when loss or damage is due in part to causes that are not attributable to the fault of the shipper or persons for which the shipper is responsible. In other words, the shipper is responsible only to the extent of its own fault (or the fault of a person for which it is responsible<sup>63</sup>).

## **V. The Obligation to Provide Information Necessary for the Compilation of the Contract Particulars**

### 1. Basis of Liability Regarding the Accuracy of Information

The first draft of the Convention imposed strict liability on the shipper for breaching any obligation to furnish accurate information.<sup>64</sup> Unlike previous international conventions under which the shipper guarantees the accuracy of information provided for the transport document, the first draft's strict liability applied to any kind of information. UNCITRAL expressed its concerns about the shipper's strict liability regarding the accuracy of information when the issue was first discussed<sup>65</sup> and decided early in the process that the shipper's liability for furnishing information should, except in limited cases,

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<sup>62</sup> See *infra* notes 64-96 and accompanying text.

<sup>63</sup> See *supra* notes 39 and accompanying text.

<sup>64</sup> See Preliminary Draft Instrument WP.21 art. 7.5; see also WP.21 ¶ 115 (explanatory note for article).

<sup>65</sup> See 9th Session Report ¶ 156.

be based on fault.<sup>66</sup> The final text imposes strict liability on the shipper only in connection with information (1) required for the compilation of the contract particulars<sup>67</sup> or (2) with respect to the dangerous nature of the goods.<sup>68</sup> Inaccuracy of other information triggers ordinary fault-based liability under article 30.

## 2. Information Necessary for Compilation of Contract Particulars

Under article 31,<sup>69</sup> the shipper must provide the information to the carrier necessary for the compilation of the contract particulars and the issuance of transport documents or electronic transport records. Article 31(1) provides a non-exhaustive list of the information that the shipper must provide. Most obviously, the shipper must furnish the information about the goods that will be included in the contract particulars, including (a) a description of the goods as appropriate for the transport, (b) the leading marks necessary for the identification of the goods, (c) the number of packages or pieces, or the quantity of goods, and (d) the weight of the goods (if the shipper wishes to incorporate that information in the contract particulars).<sup>70</sup>

Less obviously, “the name of the party to be identified as the shipper” in the contract particulars is also listed. Article 1(9) explicitly recognizes the situation in which a person other than the shipper (called the “documentary shipper”) is identified as the

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<sup>66</sup> See 13th Session Report ¶¶ 138-142, 148. At that stage of the negotiations, a shipper’s breach of obligation to give information, instructions, and documents reasonably necessary for compliance with rules, regulations, and other requirements of authorities would still have resulted in strict liability. UNCITRAL agreed on the current scope of strict liability at the fall 2005 meeting. See 16th Session Report ¶¶ 148-150, 153.

<sup>67</sup> See article 31(2); see also *infra* notes 72 and accompanying text.

<sup>68</sup> See article 32(a); see also *infra* notes 94-96 and accompanying text.

<sup>69</sup> UNCITRAL’s discussion of article 31 is reported in 9th Session Report ¶ 153; 13th Session Report ¶¶ 130-133; 16th Session Report ¶¶ 128-135; 17th Session Report ¶¶ 187-194; 19th Session Report ¶¶ 244-248; 21st Session Report ¶¶ 98-99; 2008 Commission Report ¶¶ 103-104.

<sup>70</sup> The shipper is not responsible, however, for certain information about the goods that the carrier is required to furnish, including “the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage.” Article 36(2)(a).

shipper in the contract particulars. As a result, article 31(1) carefully uses the expression “the party to be identified as the shipper” rather than “shipper.”

While the name of the consignee or the name of the person to whose order the transport document or electronic transport record is to be issued are not items of information always necessary for the compilation of the contract particulars,<sup>71</sup> to the extent that they are necessary, the shipper is obligated to furnish the information.

Article 31(1) does not provide an exhaustive list of information that the shipper must furnish. To the extent that other information is necessary, either for the compilation of the contract particulars or the issuance of the transport documents or electronic transport records, the shipper is obligated to furnish it.

### 3. Guarantee of the Accuracy of Information

Under article 31(2), the shipper guarantees the accuracy of the information that it provides under article 31(1) and must indemnify the carrier against loss or damage resulting from any inaccuracy of that information.<sup>72</sup> The provision is essentially the same as article 3(5) of the Hague and Hague-Visby Rules and article 17(1) of the Hamburg Rules.

The scope of strict liability under article 31(2) must be carefully examined. First, not every breach of an obligation under article 31(1) triggers liability under article 31(2). The shipper breaches its obligation under article 31(1) if it does not provide the required information or provides information in an untimely manner. But those breaches alone do

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<sup>71</sup> The contract particulars in the transport document or electronic transport record should include the name and address of the consignee only if it is named by the shipper (article 36(3)(a)). The name of the person to whose order the transport document or electronic transport record is to be issued is irrelevant for a non-negotiable transport document or a non-negotiable electronic transport record or a “bearer document” or a “bearer electronic transport record.”

<sup>72</sup> See article 31(2).

not trigger a shipper's strict liability under article 31(2).<sup>73</sup> The shipper's guarantee covers only the accuracy of information that it actually provides under article 31(1).

Shippers can expect two different types of claims under article 31(2). The first type of claim comes from the evidentiary effect of a transport document or an electronic transport record with inaccurate information in its contract particulars. If the carrier issues a negotiable transport document or electronic transport record that includes incorrect information provided by the shipper with respect to the goods, the carrier is liable to the holder in good faith.<sup>74</sup> The carrier then has a recourse claim against the shipper. This is a typical claim that the previous conventions presupposed.<sup>75</sup>

The carrier might also suffer a loss due to the inaccurate information provided by the shipper that is independent of the evidentiary effect of the contract particulars. A carrier will typically perform its obligations based on information furnished by the shipper for the contract particulars. If the inaccuracy of that information causes the carrier to mishandle the cargo, for example, resulting in an accident, the shipper is liable for the ensuing damage.

## **VI. Dangerous Goods**

Article 32 of the Rotterdam Rules provides special rules for dangerous goods.<sup>76</sup>

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<sup>73</sup> Earlier drafts of the Convention provided for the shipper's strict liability in all cases of breach. *See* Preliminary Draft Instrument WP.21 arts. 7.2-7.5; Draft Instrument WP.32 arts. 26-29; Draft Convention WP.56 art. 31(2) [Variant A].

<sup>74</sup> *See* article 41(b)(i). In some circumstances, the carrier may similarly be liable under a non-negotiable transport document or electronic transport record. *See* article 41(b)(ii), (c).

<sup>75</sup> The Hague and Hague-Visby Rules (in article 3(5)) and the Hamburg Rules (in article 17) provide that the shipper guarantees the information in connection with the evidentiary effect of a bill of lading.

<sup>76</sup> UNCITRAL's discussion of article 32 is reported in 9th Session Report ¶¶ 48-51; 13th Session Report ¶¶ 138-148; 16th Session Report ¶¶ 158-170; 17th Session Report ¶¶ 195-198; 19th Session Report ¶¶ 249-253; 21st Session Report ¶ 100; 2008 Commission Report ¶ 105.

## 1. Introduction

The Hague and Hague-Visby Rules regulate dangerous goods in article 4(6), which confers certain rights on the carrier and imposes certain liabilities on the shipper. For “goods of an inflammable, explosive, or dangerous nature,” the carrier is entitled to land the goods “at any place,” destroy them, or render them innocuous — either when they “become a danger to the ship or cargo” (if the carrier has properly consented to their carriage) or “at any time” (if the carrier has not properly consented to their carriage). The shipper is “liable for all damages and expenses directly or indirectly arising out of or resulting from [the] shipment” if the carrier did not properly consent to the carriage of the goods. The basis of liability under this provision is not completely clear and the interpretation differs among jurisdictions.<sup>77</sup>

The Hamburg Rules have slightly more detailed regulations, including the shipper’s obligation to inform the carrier of the dangerous nature of the cargo<sup>78</sup> and to mark and label the dangerous goods,<sup>79</sup> and the shipper’s strict liability for the loss resulting from the shipment of dangerous goods when the carrier is not aware of their dangerous character.<sup>80</sup>

The first draft of the Convention quite deliberately did not contain special regulations on the shipper’s liability for dangerous goods. The draft instead rejected the concept of “dangerous goods” as a distinct category:

[T]he distinction between ordinary goods and dangerous or polluting goods is out of date. Whether certain goods are dangerous depends on the circumstances. Harmless goods may become dangerous under

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<sup>77</sup> The issue is whether the shipper’s liability under article 4(6) of the Hague-Visby Rules is qualified by article 4(3), which declares fault-based liability for the shipper. The British courts, answering in the negative, have interpreted article 4(6) as imposing strict liability.

<sup>78</sup> See Hamburg Rules art. 13(2).

<sup>79</sup> See Hamburg Rules art. 13(1).

<sup>80</sup> See Hamburg Rules art. 13(2).

certain circumstances and dangerous goods (in the sense of poisonous or explosive) may be harmless when they are properly packed, handled and carried in an appropriate vessel. The notion “dangerous” is relative.<sup>81</sup>

Rather than regulating the shipper’s liability for dangerous goods, the first draft provided for strict liability for inaccurate information, which would cover most situations in which the shipper did not properly disclose the dangerous nature of the goods or did not properly mark or label them.<sup>82</sup>

The UNCITRAL Working Group, at its 2004 spring meeting, abandoned the proposed strict liability for incomplete or inaccurate information in general and instead reintroduced regulation along the lines of article 4(6) of the Hague-Visby Rules and article 13 of the Hamburg Rules.<sup>83</sup>

## 2. “Dangerous Goods”

The Rotterdam Rules do not explicitly define “dangerous goods,” but article 32 applies only “[w]hen goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment.”<sup>84</sup> UNCITRAL considered the suggestion that a technical definition referring to an existing international instrument such as the International Maritime Dangerous Goods (IMDG) Code might be more appropriate.<sup>85</sup> Although UNCITRAL accepted the idea that “dangerous goods” were those that should properly be included in the IMDG Code, the approach was nevertheless abandoned. Not only are such regulations drafted for a different purpose but UNCITRAL also recognized that the IMDG lists (which are extremely technical) may not always be timely updated,

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<sup>81</sup> WP.21 ¶ 116; *see also* 9th Session Report ¶ 163.

<sup>82</sup> *See* Preliminary Draft Instrument WP.21 arts. 7.3, 7.5.

<sup>83</sup> *See* 13th Session Report ¶¶ 146-148.

<sup>84</sup> Article 32.

<sup>85</sup> *See* 13th Session Report ¶¶ 147-148, 16th Session Report ¶ 158.

could easily become obsolete, and may be missing materials that should be considered “dangerous goods” for the purpose of article 32. The final text therefore includes only a generic description.

For goods to be regulated under this article, they must be “by their nature or character” dangerous. As UNCITRAL recognized at the very beginning of its negotiations, even “[h]armless goods may become dangerous under certain circumstances.”<sup>86</sup> Indeed, some courts have very broadly interpreted the concept of dangerous goods under the Hague-Visby Rules.<sup>87</sup> To avoid such unreasonably broad interpretations — which could lead to an unlimited expansion in the scope of article 32 and undermine the principle that a shipper’s liability should generally be fault-based — UNCITRAL included the “nature or character” qualification. Ordinarily harmless goods may cause harm under certain circumstances, but they are not “by their nature or character” dangerous.

It is important to note that the implicit definition of “dangerous goods” in article 32 is unique to that context and does not apply elsewhere in the Rotterdam Rules. For example, article 15 permits a carrier to unload, destroy, or render harmless goods that become an actual danger to persons, property, or the environment. In that context, it does not matter whether the goods “by their nature or character” are dangerous.

Article 32 covers goods that are dangerous to “persons, property or the environment.” Therefore, even though goods do not harm the carrier (or the ship or other vehicle) they may nevertheless be “dangerous” for the purposes of article 32.

### 3. Situations Covered by the Dangerous Goods Article

Article 32 addresses a number of different situations. Perhaps the most obvious situation is when the goods actually become dangerous and cause physical damage if

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<sup>86</sup> WP.21 ¶ 116.

<sup>87</sup> See, e.g., *Effort Shipping Co. v. Linden Management S.A. (The “Giannis NK”)*, [1998] 1 Lloyd’s Rep. 337 (holding a cargo of ground-nut extraction meal pellets to be “dangerous” under article 4(6) of the Hague Rules).



necessary precautions are not taken. Thus a shipper must inform the carrier when it ships such goods so that the carrier can take the necessary precautions. If the shipper fails to do so and damages ensue that could have been avoided if a warning had been given, the shipper is liable for the damage whether it is at fault or not.

Another common situation is when the carrier is able to render dangerous goods harmless, thus avoiding any actual physical damage, but incurring additional costs. In this situation, the carrier's necessary and reasonable expenses constitute a "loss" under article 32. To the extent that the carrier could have saved those expenses if the shipper had fulfilled its obligations, the carrier can recover compensation for the expenses.

Even when the goods are not actually dangerous, they sometimes "reasonably appear likely to become dangerous." In that situation, the shipper is liable for the costs that the carrier incurs from reasonable measures to avoid the apparent danger to persons, property, or the environment to the extent that those costs would have been avoided if the shipper had complied with its obligation to properly inform the carrier about the nature of the goods.<sup>88</sup>

#### 4. Obligations under Article 32

Article 32 imposes two obligations on the shipper: (i) to inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party,<sup>89</sup> and (ii) to mark or label dangerous goods in accordance with any law, regulation or other requirements of public authorities that apply during any stage of the intended carriage of the goods.<sup>90</sup>

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<sup>88</sup> The Hague and Hague-Visby Rules regulate the shipment of "goods of an inflammable, explosive, or dangerous nature" (article 4(6)) and the Hamburg Rules regulate the shipment of "dangerous goods" (article 13). It is unclear whether these conventions cover the situation in which the goods reasonably appear to be dangerous but in fact they are not.

<sup>89</sup> Article 32(a).

<sup>90</sup> Article 32(b).

### **The Obligation to Disclose the Dangerous Nature or Character of the Goods.**

The shipper must inform the carrier of the dangerous nature or character of the goods. Although this obligation is essentially identical to that of article 13(2) of the Hamburg Rules, minor differences exist. While the Hamburg Rules require the shipper to inform the carrier “if necessary, of the precautions to be taken,” the Rotterdam Rules do not. The shipper might be required under article 29 to inform the carrier of necessary precautions, but the breach of that obligation would not trigger strict liability. The shipper is required to provide the information in a timely manner before the goods are delivered to the carrier or a performing party. Even information submitted after the delivery, however, could reduce the shipper’s liability to the extent that it contributed to the prevention of losses.<sup>91</sup>

**The Obligation to Mark and Label Dangerous Goods.** The obligation under article 32(b) is similar to that of article 13(1) of the Hamburg Rules. The difference is that article 32(b) explicitly requires the marking and labeling of the dangerous goods to be in accordance with the applicable law, regulations, or other requirements of public authorities that apply during the intended carriage.<sup>92</sup> The regulation of dangerous goods has recently become more and more rigorous and complex, and carriers are often liable for non-compliance on a strict-liability basis. Article 32(b) enables a carrier to have recourse against the shipper that is primarily responsible for non-compliance.

Unlike under article 29(1)(b),<sup>93</sup> notification by the carrier is not a prerequisite for the article 32(b) obligation. Regardless of whether the carrier required or instructed the necessary action to comply with legal requirements, the shipper must properly mark or label dangerous goods. It is irrelevant whether the shipper actually knows or should have

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<sup>91</sup> See *infra* Illustration 6-19.

<sup>92</sup> Just as under article 27(1), the term “intended carriage” is used to clarify that the obligation is defined by reference to the carriage that is expected at the time that the shipper delivers the goods to the carrier. See *supra* note 18 and accompanying text. If the route is subsequently changed and different marking or labelling is required by the relevant authorities on the new route, the shipper is not necessarily in breach of its obligation under article 32(b).

<sup>93</sup> See *supra* note 28 and accompanying text.

known either the dangerous nature of the goods or the legal requirements for their marking and labeling.

**Causation.** The shipper is liable for loss or damage resulting from a breach of its obligations.<sup>94</sup> The wording is slightly different than that used in connection with causation in previous conventions, which instead provide that the shipper is liable for the loss resulting “from the shipment.”<sup>95</sup> UNCITRAL carefully examined the wording<sup>96</sup> and decided that the current text is more appropriate because it focuses on the causal connection specifically with the shipper’s breach. It is accordingly necessary to examine, for instance, whether an explosion of the goods could have been avoided or whether the additional expenses necessary to make the goods innocuous could have been saved if the shipper had observed its article 32 obligations. If the answer is affirmative, then the necessary causation exists and the shipper is liable to that extent.

In cases of joint causation, in which the shipper’s breach of its obligation under article 32 and another event combine to cause the loss or damage, the shipper is liable for the loss or damage only to the extent that its breach caused the loss or damage.

## **VII. Conclusions: The Practical Impact of the Shipper's Obligations**

### **Chapter**

We have examined the basic liability structure and specific obligations under Chapter 7 of the Rotterdam Rules. Let us to return to the question which was raised in the beginning of this paper: *Are shipper’s obligations and liabilities substantially under the Rotterdam Rules?* A complete analysis of the practical impact of chapter 7 of the

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<sup>94</sup> Article 32(a), (b).

<sup>95</sup> The Hague and Hague-Visby Rules provide that the shipper is liable “for all damages and expenses directly or indirectly arising out of or resulting from such shipment” (article 4(6)) and the Hamburg Rules “for the loss resulting from the shipment of such goods” (article 13(2)(a)).

<sup>96</sup> See 16th Session Report ¶ 168, 19th Session Report ¶ 252.

Rotterdam Rules requires a comparison between a shipper's obligations and liabilities under the Rotterdam Rules and those under applicable national law and ordinary contractual terms. Although such a comprehensive comparison is not possible, several basic elements are outlined here.

First, the Rotterdam Rules explicitly provide for the specific obligations of the shipper in a detailed manner. The effect would be subtle. A breach of obligation under the Rotterdam Rules would give a cause action against the shipper<sup>97</sup> under applicable national law or under the contract of in many cases. On the other hand, the "breach of obligation" under the Rotterdam Rules is the prerequisite of a shipper's liability (article 30(1)). It should also be noted that parties cannot increase the shipper's obligations and liabilities by contract.<sup>98</sup> The shipper is better protected in this respect under the Rotterdam Rules than under previous conventions. The Rotterdam Rules' detailed and explicit references to specific obligations of the shipper would provide more certainty for shippers to the extent that they prohibit contracting states from imposing greater liability through national legislation. The shipper might have a concern that the Convention's explicit references to the shipper's obligation could remind the carrier of the possible claims against the shipper and activate the litigations which have not brought in the past<sup>99</sup>. Even if the concern is real, it is a totally different question if the argument such as "do not disturb the carrier who is sleeping on its right" can be justified to maintain the status quo.

Second, the shipper's general liability is fault-based under the Rotterdam Rules as well as under the Hague, the Hague-Visby and the Hamburg Rules.<sup>100</sup> The shipper bears

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<sup>97</sup> For example, improper packaging by the shipper (breach under article 27(1)) might constitute "fault" in the context of torts.

<sup>98</sup> See article 79(2).

<sup>99</sup> Olebakken, *supra* note 10, suggests that although shipper's unlimited liability under national law does not seem to have caused serious problems, the pure that shipper's liability is regulated in an international convention may give rise to more claims against the shipper. She continues that this may in turn make current the need for limitation of shipper's liability, preferably on international level. The author, however, is not certain if there is any significant difference in claimant's behavior depending on whether the cause of action is given by the international or domestic.

<sup>100</sup> Article IV (3) of the Hague and the Hague-Visby Rules and Article 12 of the Hamburg Rules. The burden of proof under the Rotterdam Rules is discussed in more detail in Part D *infra*.

strict liability under the Rotterdam Rules in two situations: damage caused by (i) dangerous goods if the carrier has not been informed of their dangerous character or the goods are not properly marked and labelled and (ii) inaccurate information provided by the shipper for the compilation of transport documents. Neither of those rules significantly increases the shipper's liability when compared with previous conventions. Liability for the damage caused by dangerous goods in the defined circumstances is already strict under the Hamburg Rules<sup>101</sup> and, in some jurisdictions, under the Hague and Hague-Visby Rules.<sup>102</sup> Under all three prior regimes, the shipper guarantees the accuracy of the information regarding the goods that it provides to the carrier for the transport.<sup>103</sup>

Some people claim that it is unfair that the shipper owe unlimited liability while the carrier enjoys limitation under the Rotterdam Rules<sup>104</sup>. Although this accusation is simple and may sound appealing, it is not persuasive. First, this is not a problem caused by the Rotterdam Rules. The shipper has already been unlimitedly liable under existing regime in most jurisdictions. Second, it is very difficult to find sensible indicator or figure for shipper's limitation. This is why most national law does not provide limitation of liability for the shipper. Third, we should remember why there is a limitation of liability for the carriers at all. It is often believed that limitation of liability exists for the protection of the carrier. This is not totally correct. The real purpose of the limitation is to prevent inadvertent wealth transfer among cargo interest. If the whole liability system is non-mandatory regulation, such a situation can be avoided by the contract. The contract of carriage can provide that the carrier is liable up to certain amount and the shipper should pay extra freight to obtain further recovery. But the under a mandatory liability regime such as the Rotterdam Rules, such an arrangement is impossible. Therefore, the Rules themselves should provide for the limitation. This is why transport conventions which

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<sup>101</sup> See Hamburg Rules art. 13

<sup>102</sup> See Hague-Visby Rules art. 4(6).

<sup>103</sup> See Hamburg Rules art. 17; Hague-Visby Rules art. 3(5).

<sup>104</sup> See, the European Shipper's Council Position Paper, *supra* note 9, Diamond, *supra* note 54, p.491.

impose mandatory liability often provide for the limitation of liability for the carrier. Such a situation is not plausible in the case of shipper's liability for the carrier.

The overall assessment is that the shipper's obligations and liability are not substantially increased under the Rotterdam Rules.