

Determining the Liability of Deck Cargo: An Perspective of Rotterdam Rules

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Received 11 January 2017; accepted 5 March 2017

Published online 26 April 2017

Abstract

It is generally acknowledged that the Hague and Hague-Visby Rules do not apply to deck cargo, while a number of cases have clarified that the common law of UK is not sufficient to solve disputes relating to the deck cargo. Article 25 of the Rotterdam Rules focuses on discussing on deck carriage, including what is authorized deck carriage, the liabilities, defense and limitation of liabilities of the carriers and shippers in disputes related to deck carriage. The research aim of this paper is to analyze whether the Rotterdam Rules, especially Article 25, can solve deck carriage disputes properly; whether this convention can balance the interests of the parties, fulfill social justice and also provide certainty of duties and liabilities. If the Rotterdam Rules could ameliorate the currently applicable regime for deck cargo under the Hague and Hague-Visby Rules, and national laws, then it would be better for us to accept the Rotterdam Rules as a whole or at least use the Rotterdam Rules to carry out new international laws or modernize national laws.

Key words: Deck cargo; The rotterdam rules; Exemption clause

Ma, Q. Y. (2017). Determining the Liability of Deck Cargo: An Perspective of Rotterdam Rules. *Canadian Social Science*, 13(4), 13-18. Available from: <http://www.cscanada.net/index.php/css/article/view/9480> DOI: <http://dx.doi.org/10.3968/9480>

INTRODUCTION

The Article 25 of United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly

by Sea (Rotterdam Rules, 2008) contains a special provision for deck cargo which is different from that in the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules, 1978). The Rotterdam Rules was adopted in 2008, aiming at harmonizing and modernizing the international law relating to maritime carriage of goods. It was the result of intensive work for almost twelve years, firstly by the International Maritime Committee for four years and then by the Working Group III on Transport Law of the UN Commission on International Trade Law for eight years (Karan, 2011). However, until now, it has only been signed by 25 countries, even less than the Hamburg Rules (UNTC, 2017). Not many major trading countries have adopted it so far, for example UK, Canada, China, Australia and so on, there are also a lot of criticisms about the Rotterdam Rules (Pallares, 2011). If the Rotterdam Rules cannot be accepted, then international disputes related to deck cargo will still be resolved under Hague Rules and Hague-Visby Rules (HR, 1924; HVR, 1968) which have not really considered deck cargo in the negotiation, or under national laws which varies from each other. Some commentaries say that, it is better not to change the law, because the current law backed by common law is sufficient and well known by practitioners (Tetley, 2010). The problem is whether the HR/HVR and common law are really sufficient to solve the disputes related to deck cargo, whether they can balance the interests of both parties. On the other hand, it is also necessary to analyze whether the Rotterdam Rules can solve deck carriage disputes properly. Whether it is worth to accept the Rotterdam Rules as a whole in order to properly solve the disputes, or at least help to modernize national laws or be beneficial for international maritime law in future.

There are many commentaries on whether the Rotterdam Rules should be adopted in general, but most of them do not focus on discussing deck cargo specifically (Thomas, 2010). Further, there are many other

issues related to deck carriage, for example the period of responsibility is extend from “tackle-to-tackle” under the HV/HVR to “door-to-door” under the Rotterdam Rules; and transport documents issued under the contract of carriage need to be in paper form according to the HV/HVR, while the Rotterdam Rules accept electronic transport records (Pallares, 2011). In order to narrow the topic and because there is no special provision for deck cargo in the HVR, this paper will follow the structure of Rotterdam Rules Article 25, which focuses on discussing when deck carriage is regulated by the law and what is authorized deck carriage, and liabilities, defense and limitation of liabilities between carriers and shippers in disputes related to deck carriage. The cases analyzed in this paper will be predominantly cited.

1. IDENTIFYING THE PROBLEMS IN PRACTICE

Many cases illustrate that sometimes cargo will be shipped on deck either under the liberty clause, or without any notification, or even breach the contract which required cargo to be carried under deck. There may be multiple causes for the loss of or damage to the deck cargo or delay in their delivery.

For example in *Svenska Traktor Aktiebolaget v. Maritime Agencies*, it was written on the bills of lading that the steamer had liberty to carry goods on deck (Aikens et al., 2016). However, all the tractors were loaded on board. After the ship sailing out and 4 o'clock in the morning, the wind became stronger at force 4 to 8. The tractors were washed overboard.

This also can be seen in a typical case *Daewoo Heavy Industries Ltd & Anr v. Klipriver Shipping Ltd & Anr*, the excavators were stowed under deck, and none of the bills stated the excavators would be stowed on deck (Batz, 2014). When the ship arrived at a port and discharged the excavators and re-stowed them on deck. However, there was neither notice to the cargo interests nor consent from them. After the ship sailing out from there, it encountered heavy weather and 8 of the excavators were free from the lashing and lost overboard.

Similarly, in *Evan & Son (Portsmouth) Ltd v. Andrea Merzario Ltd*, the carrier gave an oral promise to ensure the goods in the container to be carried under deck (Poole, 2016). Moreover, according to the custom, the goods also should be under deck. However, a machine which valued at nearly 3,000 pounds was shipped on deck and fell overboard as a total loss.

It is usually claimed by the shippers that, it is because the deck carriage that their cargos were loss or damaged (Poole, 2016). If the cargos have been shipped in the hold, the loss or damage would not happen. The carriers should be liable because they did not get consent from shippers, or even breached the contract which says that the cargos

should be shipped in the hold; liberty clause which is not specific does not amount to giving authorization. If carriers shipped cargos on deck without notice or consent, they should bear the risks of deck carriage. Further, it is unfair if they can use the exemption clauses to their liability, because the exemption clauses should protect carriers only when they are fulfilling their duties.

The carriers may contend by saying that, they have the ‘liberty’ to ship on deck or the contract had already said that they will be exempt from liability (Aikens et al., 2016), and the risks for deck carriage were stated in the contract that they shall be borne by the shipper. Most importantly, there are multiple reasons for the loss or damage which is not the fault of the carriers, for example perils that they have not expected which can exempt them from liability under the law (Gutiérrez, 2011). Or the packing of the container by the shipper is insufficient, that's why they lost overboard or damage. It will be unfair for the carriers to be liable for the loss or damages that was caused by perils or reasons other than deck carriage, because, as said previously, it may be reasonable that the carrier put the cargo on deck. Further, if there is no peril or packing is sufficient, the cargo would not lost overboard. That is why carriers should be able to exempt them from liability under HVR (Batz, 2014).

Unauthorized by the shippers but have decked carriage, as what have been discussed before it is still regulated by the HVR. Besides unauthorized deck carriage which is considered as a breach of contract as one of the causations, there are multiple causations which fall within the situations in the exemption clause, for example, the exemption situations in the HVR including perils, carriers' negligence on the ship, and shipper's insufficient packing.

On the other hand, shippers may feel unfair that the carriers put the cargos on deck without their authorization and loss or damage arises during the carriage; if the cargos were shipped under deck, then the problems might not happen (Wiedenbach, 2015). Further, if it is reasonable to put cargos on deck, and the carriers were also trying hard to take care of the cargo; and multiple causations caused the loss or damage which might be out of his control. Under this situation, the carriers may feel it is unfair that they cannot exempt from liabilities. In addition, if the cargos were shipped under deck, the loss or damage might also happen, then shippers might not blame unauthorized deck carriage. However, if those causations will more likely to happen on deck, for example loss or damage from the bad weather and sea perils, then the shippers may feel unfair that the carriers can still claim they have reasons to ship on deck, and other reasons cause the problems but not their fault.

The problem is when cargos were shipped on deck without authorization from the shippers, and multiple causations caused loss or damages, whether the carriers can still exempt from their liabilities by demonstrating other causations out of their control are the main reasons,

or proving that they have tried hard to fulfill their duties. If the HVR and Rotterdam Rules can solve this problem properly, in here properly means the law can reach to social justice. As it has been mentioned before, social justice is to protect the development of shipment, and also rebalance the interests between shippers and carriers from their unequal bargain position.

2. WHETHER THE CARRIERS CAN RELY ON EXEMPTION CLAUSE

In the HVR, there is no distinction for the liability regime of the deck cargo and normal cargo, so all the deck carriage regulated by the HVR are under general liability regime. Similarly in the Rotterdam Rules, even though there are two special provisions for deck carriage regarding liability in Art 25, but they point to the general liability regime under Art 17 (Rotterdam Rules, 2008). It means that all the deck carriages are under the general liability regime in the Rotterdam Rules. But there are some differences, because those provisions can be regarded as an extension of Art 17, which make deck carriage have some differences from general liability regime (Sturley et al., 2010).

As can be seen in many cases, the carriers will first try to demonstrate the loss or damages are mainly caused by unexpected situations which fall within the exemption clause (Aikens et al., 2016). For example, this can also be seen from both laws why carriers will first demonstrate the situations which can exempt them from liabilities. Art IV of the HVR says neither the carrier nor the other person shall be responsible for loss or damage arising or resulting from one of the exemption clauses it lists (HVR, 1968). Similarly, according to Art 17 of the Rotterdam Rules, the carriers can relief from liability if they prove one or more of circumstances listed in Art 17 caused or contributed to the loss of, damage to, or delay in the delivery of the goods (Rotterdam Rules, 2008).

It seems from the wording that if the carriers can prove one of the situations in the exemption clause, then they are not liable even they have not fulfilled their duties or be in breach of the contract. If so, it will be unfair for the shippers in loss or damage out of multiple causations. For example, if the cargo has not been shipped on deck, and if the carriers have fulfilled their duty to lash it properly, then even the ship encounter perils, the cargo may not wash overboard (Todd, 2015). As a consequence, an issue becomes very crucial: whether the carriers can still rely on proving the exemption clause to exempt their liabilities when they did not get consent from the shippers or even in breach of the contractual requirement to ship under deck.

However, the HVR is not clear from its expression, because it does not have any provision consider the liability for deck carriage. Because of that, in previous cases in the UK, the courts have different approaches

(Todd, 2015). Considering those unauthorized deck carriages which are in breach of the contractual promise, the court chose to explain it from a contract point of view. For example, depending on the unauthorized deck carriage, the courts will take the fundamental approach or against the fundamental approach.

Further, another situation also uses contractual approach to decide whether merely unauthorized deck carriage without specific notification can rely on exemptions. For example in *Evan & Son (Portsmouth) Ltd v Andrea Merzario Ltd*, the carrier made an oral promise to carry the cargo under deck, but the cargo was carried on deck in the end (Poole, 2016). When Lord Roskill L.J said because one has to treat the promise that no container would be shipped on deck as overriding any question of exempting conditions, otherwise the promise would be illusory (Poole, 2016). This can also be seen in *Nelson Pine Industries Ltd v. Seatrans New Zealand Ltd* and the *Chanda* (Wiedenbach, 2015).

It can be argued that the court does explain according to the HVR, discusses whether the carriers have fulfilled the duties in Art III to check whether they can rely on the exemption clause. For example, considering merely unauthorized deck carriage without consent in *Svenska Traktor Aktiebolaget v. Maritime Agenciess* case, the court says that having liberty clause not equal to giving consent to ship cargo on deck, so it is not an agreement (Aikens et al., 2016). Thus putting cargo on deck is not only a breach of contract but also a breach of Art III, rule 2 of the HVR. This means that the carriers need to prove 'affirmatively' they have taken reasonable care of the goods, and that the loss or damage falls within one of the immunities specified in Art IV, rule 2. However, it is unclear what is the meaning of 'reasonable care' for the cargo while the cargo should not be on deck in accordance to the will of shippers, and this can be merely depending on the opinions of the courts which is uncertain (Girvin, 2011).

Further, considering whether unauthorized deck carriage have breached Art III which is treated as an overriding duty and can deprive the rights to rely on immunities in Art IV rule 2. It is unclear whether unauthorized deck carriage is in breach of the duty of seaworthiness. Indira Carr mentioned that seaworthiness relates to both the physical state of the ship and cargo seaworthiness as under common law (Carr & Stone, 2014). If so, then cargo shipped on deck without authorization may not always be unseaworthiness. Due to that, unauthorized deck carriage can still rely on the exemption clause if the carriers can prove the cargos were seaworthiness even though they did not get any authorization to put the cargos on deck. But it is also uncertain, because the words of the legislation, Art III rule 1(a)-(c), they only point to the seaworthiness of the ship, not including cargo.

Even though assuming that Art III including the duty to make the cargo which shipped on deck seaworthiness, it also has problems. Firstly, this clause only restrict in limited situation. According to Art III (1), the duty of exercising due diligence for seaworthiness only bound before and at the beginning of the voyage under HVR. This will cause problems when unseaworthiness of the cargo is happened during the voyage. For example in *Daewoo Heavy Industries Ltd & Anr v. Klipriver Shipping Ltd & Anr*, 26 excavators were discharged from the vessel then restored on deck (Batz, 2014). This is a problem because in other stages, even the carrier fails to make the cargo seaworthy which result in loss of deck cargo, they can still rely on the exceptions.

In addition, those analyses above are the discussion in the UK, in other countries may not have the same analysis, this becomes even more problematic. For example in the US, it can be seen from both *St Johns NF Shipping Corporation v. SB Companhia General Commercial Do Rio De Janeiro* and *Encyclopedia Britannica v. Hong Kong Producer*, the US law regarding unauthorized carriage on deck as a fundamental breach. In addition, there is no distinction like between simply unauthorized and a breach of an oral or written contract which required the cargos be shipped on deck (Thomas, 2010). This is totally different from those details analyzing of different situations with different reasoning in the UK cases.

As from all those analyses above, it can be seen that there are several problems show up because the HVR is not clear in its wording to in which situations the carrier can rely on the immunities. In comparison, the Rotterdam Rules clarify in which situations carriers can rely on exemptions. In Art 17(2), it says that the carrier is relieved from disproving fault; and in Art 17(3), the carrier is 'also relieved of all or part of its liability which imposed to the carrier in Art 17(1) by proving at least one of the situations in the exemption clause (Rotterdam Rules, 2008). This means that for those under general liability regime in the Rotterdam Rules, they can exempt liability merely by proving one of the situations caused the loss or damage, and it also falls within the exemption clause in Art 17(3). It seems unfair if only look at those provisions.

However, Art 25 of the Rotterdam Rules classifies deck carriage into several situations. Art 25(3) mentions when the carriers will loss defense in unauthorized deck carriage which including exemption clause. In addition, Art 25(2) adds one more exemption for deck carriage which carried in accordance to Art 25(1) (a) and (c). Even though only two provisions, the Rotterdam Rules have classified different situations as follows:

Firstly, if the goods have been shipped on deck other than the authorized situations listed in Art 25(1), then the carriers are not entitle to use the defense which including the exemption clause in Art 17(3), but it is merely for the situation which the loss or damage or delay is exclusively

caused by their carriage on deck. Secondly, if cargos have been shipped in accordance to Art 25(1) (b), which fulfill the requirements for both the containers or vehicles and the decks, then the carriers can fall within the general liability regime. This can enable carriers to rely on the general exemption clause provided in Art 17(3) even the deck carriage was without the consent from shippers. Thirdly, the deck carriage which carried in accordance to Art 25(1) (a) & (c) can have both special exemption clause and the general exemption clause. This means that if the carriers put cargo on deck due to the requirement of law, or the agreement with the shippers, or having implied consent as they are commonly do so as a customs usages or practice, then carriers can have one more exemption clause than that carried in accordance to Art 25(1)(b).

The question is what the rationale for such classification is and whether it is necessary. As can be seen from the cases mention before, the court may want to distinguish between the situation where breach the contractual agreement to put the cargo under deck but in fact on deck, and the situation where the carriers put cargo on deck without notification but not breach the contract. Further, there are also some considerations about containerization, for example in *Evan & Son (Portsmouth) Ltd v. Andrea Merzario Ltd*, the court mentions containerization in the end that maybe in future the modern container traffic will have different requirements (Poole, 2016). Also can see from the US case, putting cargo on deck on a container ship is equal to 'reasonable deviation', this can entitle carriers to have immunities (Thomas, 2010). Thus it can be seen that the Rotterdam Rules are not only clear in clarifying in which situations the carriers can still use exemption clause, but also catch up with the practical demands of classifying different situations, this is more reasonable.

3. WHETHER EACH SITUATION IS REASONABLE AND PROPERLY BALANCES THE INTERESTS OF BOTH PARTIES AND REACHES SOCIAL JUSTICE

From the analysis above, it can be seen that the Rotterdam Rules have improved the law by clarifying and also distinguishing on when the carriers can or cannot be entitled to have exemption clause; and in what situation they can have more reasons to exempt their liabilities. But whether each situation is reasonable and properly balances the interests of both parties and reaches social justice, this need to be scrutinized.

The most serious situation which prevents the carriers from relying on exemption clause is when the deck carriage is not fall in any of the situations in Art 25(1) and the loss or damage or delay is exclusively caused by their

carriage on deck. Art 25(3) sets three requirements which will make the carriers lost defense which including in the exemption clause: he first is that the deck carriage is not in accordance to Art 25(1); the second is the deck carriage caused loss or damage or delay; the third is deck carriage is the exclusively causation (Rotterdam Rules, 2008). If the deck carriage fulfills these three requirements, then the carriers may have serious consequence in facing the risks of deck carriage. The “defense” is point to Art 17(2) and (3), and both articles state that the carrier is relieved only when he can disprove fault or one of the exceptions in the law; if not, the law assume that the carriers are liable (Si, 2009). If the carriers lose the defense, it means that they are liable for the loss, damage, and delay of the cargo automatically. This means regardless intents, purposes or fault, the carrier will be strictly liable for the loss without defenses (Thomas, 2010). It can be argued that it is unjust. Because if the deck carriage do fall into this categorize, then even if the carriers can prove that they have exercised due diligence, for instance make the ship seaworthiness, or lash things well on deck, he would be liable for that automatically, only because the loss or damage or delay caused by deck carriage.

However, in the Rotterdam Rules, authorized deck carriage is very broad in scope (Girvin, 2011). It covers all the possible situations which are reasonable as what have been discussed before. Moreover, it contains a situation which leaves space for the parties to argue and the court to decide whether the deck carriage is reasonable. This is implied from Art 25(1) (c) which says “customs, usages or practices of the trade in question” (Rotterdam Rules, 2008). Since the authorized deck carriage is already very broad in scope, deck carriages which do not fall in any of the situations are unreasonable.

Further, the Rotterdam Rules are very strict on the application of Art 25(3). It is only applied when the loss, damage, or delay is exclusively caused by their carriage on deck. There are two requirements to be regarded as “exclusively” causation. To start with, “caused by their carriage on deck” would better refer to “special risks” which in Art 25 (2) for consistency (Thomas, 2010). The special risks for deck carriage can be wider than the risks in the hold, for example being exposed to weather and seawater, including the risks that the goods might be washed overboard (Sturley et al., 2010). Secondly, they need to be exclusive causation. “Exclusively” means “solely”, causation is the determining consideration for liability (Thomas, 2010). If the loss or damage is partly caused by the carriage on deck and partly by one or more other causes, then Art 17(2) and (3) still apply to the full loss or damage (Sturley et al., 2010). For example, in *Encyclopedia Britannica v. Hong Kong Producer*, a cargo of books were damaged by sea water, the books were put on the deck of a general cargo ship which unable to protect it from sea water (Thomas, 2010).

Only after having fulfilled these two criteria, the carriers are entitled to rely on exemption clause in Art 17(3), and have the chance to disprove fault in Art 17(2). The Rotterdam Rules do not permit to have unauthorized deck carriage besides Art 25(1), so it lays a serious consequence to the carrier. On the other hand, it tries to limit the application, and give the carrier a chance to have voice heard. For these steps, it balances the interests of both parties. It also catches up with the trend by including the liable for loss in “delay”, and makes clear the liability and defenses of unauthorized deck carriage in particular.

The carriers who shipped cargo on deck in accordance to Art 25(1) (b), but may not get consent from the shippers can still have immunities in Art 17(2). As what have been discussed, there are some practical reasons for cargos shipped on deck. However, there are still some risks that carriers put cargos on deck without consent from shippers. Moreover, the law even authorized the carriers in this situation relying on the exemption clause in Art 17 (3). In addition, Art 17 (3) says that in alternative to prove absence of fault, the carriers only need to prove at least one of the situations caused or contributed to the loss, damage or delay. It seems unfair to shippers, however, Art 25(1) (b) itself not only gives instruction on when the goods can be shipped on deck, but also set duties for the carriers before they can rely on the exemption clause. There are three requirements: Firstly, the cargos fit with containers or vehicles. Secondly, containers or vehicles fit with the deck. Thirdly, the decks need to specially fit to carry such containers or vehicles. For example, the specialized roll-on/roll-off vessels have special features for the trailers (Sturley et al., 2010). The fitness of each part can exclude many insufficient deck carriages, for example in *Geofizika DD v. MMB International Limited*, *Greenshields Cowie & Co Ltd* (Rogers et al., 2016), the vehicles were shipped on board of a general cargo ship which might not fulfill the requirements.

If those requirements are fulfilled, it demonstrates that the carriers have fulfilled ‘every precaution’ to protect the cargo, and have the practical needs to have decked carriage, so it justified that they can rely on exemption clause. For example in *Svenska Traktor Aktiebolaget v. Maritime Agenciess case*, Lord Pilcher J. said that in a multiple causation situation, he only care whether the carriers have exercised reasonable care with every precaution in that circumstances, if so and the loss or damage still happens, even put cargo on deck without notification, they are still not liable (Aikens et al., 2016).

Further, there are differences in the exemption clauses in both laws; it has been discussed by many commendatory, for example, the general exemptions also very important to evaluate the fairness under this situation, however, this paper will mainly focus on deck cargo and not analyze that in detail.

4. SPECIAL EXEMPTIONS FOR DECK CARRIAGE

If deck carriage is in accordance to Art 25(1)(a) which carried due to the requirement of law, or Art 25(1)(c) which carried according to contract or customs, then the carrier can have one more exception than that carried in accordance to Art 25(1)(b). This exception is the special risks involved in their carriage on deck.

The special risks on deck are wider than that under deck, because the goods on deck are exposed to risks outside the ship, so some situations are not considered as risks in the hold, but can be a risk for on deck carriage. For example, lightning or seawater that generates a chemical reaction would be a risk for on deck carriage, and another example that the goods might fall overboard (Sturley et al., 2010).

Compared with the deck carriage in accordance to Art 25(1)(b), deck carriage in accordance to Art 25 (1) (a)&(c) have one more exemption clause which is wider and cover the risks on deck.

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