

UNCITRAL Colloquium on Rotterdam Rules
The Goods Carried – Who gets them and who controls them?

21 September 2009

Professor Charles Debattista

Institute of Maritime Law

University of Southampton

Associate Member & Arbitrator, Stone Chambers

The Goods Carried - Who gets them and who controls them?

Notes

- 1 Thank you to the organisers for having invited me to speak at this historic conference. Thank you in particular to Professor Van der Ziel. I have known Gert-Jan for a considerable period and I have come to admire him not only for the deep understanding he has of bills of lading, but also for the rare – if dangerous – ability he has of asking for things so charmingly that the answer is self-evidently Yes – even if the question is: Will you speak on Delivery and Control under the Rotterdam Rules towards the end of the day, just when everyone is hoping to get back to their hotels to get ready for the Official Dinner.
- 2 With a view, therefore, to getting the Dinner off to a prompt start, I shall seek not to delay you unduly.
- 3 The title of the session is: **The Goods Carried – Who gets them and who controls them?** It is curious that the Hague and Hague-Visby Rules did *not* trouble themselves with these matters. You might have thought that where the goods are, who actually “receives” the goods at discharge, would be absolutely central to conventions on the carriage of goods from A to B, where the question Who IS the B, the buyer, to whom the carrier must give the goods, was a matter which any carriage convention should cover.
- 4 The Hague-Visby Rules did not, however, cover these issues. This was not because these matters are too easy to merit attention – but probably because they were too difficult (or, in the coded language of Convention-speak, “best left to the applicable national law) – hot potatoes best left to local ovens to make a mess of!
- 5 Serious money, however, turns on issues of delivery and control – and the Rotterdam Rules address these issues comprehensively. I have heard many adjectives about these Rules – but “timid” and “unambitious” are not among them. There are no fewer than 16 articles devoted to delivery, control and transfer – and the good news is that we shall not be letting our Dinner go cold by covering all of them this evening. Those of you who wish to read my views on these 16 articles can do so in a book published a fortnight ago – The Rotterdam Rules: a practical annotation – which I have been asked by the publishers, Informa, to describe as excellent despite the fact that I was one of the six members of the Institute of Maritime Law at the University of Southampton who wrote it.
- 6 This evening, I shall limit myself to but three articles, 45, 46 and 47, all of them dealing primarily with delivery. Who – apart from this august company – might or should be interested in the question: who can ask the carrier for delivery of the goods?
 - Obviously the Buyer, who will typically have paid for the goods;
 - Possibly the Seller, who may have not been paid for the goods; and
 - Possibly a Banker who may have extended credit to the Buyer under a letter of credit on the strength of a bill of lading – or I should say now a “transport document”.
- 7 The three articles 45, 46 and 47 talk of four types of transport documents which I shall look at in turn:
 - A sea waybill or a straight bill
 - A seawaybill or a straight bill requiring surrender
 - A negotiable bill of lading
 - A negotiable bill of lading dispensing with surrender

8 A sea waybill or a straight bill

Article 45 tells the carrier to deliver the goods to the consignee. The carrier **may**, however, refuse to deliver the goods to the consignee if the consignee “does not properly identify itself as the consignee on the request of the carrier.”

9 There are two things worthy of note here:

- [a] the consignee only needs to identify himself *if the carrier asks him to*; and
- [b] if the carrier does ask him to identify, but the consignee fails to do so, the carrier *may* but need not refuse to deliver the goods to him.

10 The carrier may therefore give the goods to a person who turns up for the goods *simply* saying he is the consignee: the Rules do not require the carrier to ask him to identify himself as the consignee; neither do they require him to withhold delivery if the person who turns up for the goods fails to – or indeed refuses – to identify himself as the consignee.

11 An unpaid seller may have views about this, as might a bank which had extended credit on the faith of a sea waybill or straight bill. Post-Rotterdam, sellers might think twice about taking a sea waybill or straight bill where they doubt the readiness or ability of their buyer to pay. And again post-Rotterdam, a bank may take even greater care than it does at the moment when extending credit on the security of a sea waybill to make sure it – and not the buyer – who appears as the consignee on the document.

12 Sea waybills and straight bills have gained in currency because it has always been assumed that the carrier will – and must – take reasonable steps to ensure that the person *saying* he is the consignee actually *is* the consignee. Article 45 weakens that assumption – and the result is that users of such documents need to be a little bit more careful with using them than perhaps they have been in the past.

13 A sea waybill or a straight bill requiring surrender

This is a hybrid document: it is non-transferable in that the first buyer cannot transfer his rights to a second buyer; but it takes from transferable bills of lading the feature that it must be surrendered for delivery of the goods.

Article 46 tells the carrier to deliver the goods to the consignee if the consignee surrenders the document and identifies himself on the request of the carrier. If the consignee fails to surrender the document, then the carrier must withhold delivery. It is still up to the carrier, however, to decide whether or not to ask the consignee to identify himself and, even if he does so ask, the carrier may still decide to deliver even if the consignee fails so to identify himself.

Now you may think I am about to repeat the misgivings here which I expressed regarding Article 45. I am not: here, where the document expressly requires surrender, the Rules too expressly require surrender. Surrender is all identification the carrier needs, all the identification he ought to be entitled to rely upon. It is perfectly justifiable *here*, therefore, that the carrier may or may not ask for identification and that, where provided, he may or may not choose to act on it.

14 A negotiable bill of lading

It is clear that under Article 47(1) the holder of such a bill needs to do two things in order to gain delivery: first, he must surrender the document and secondly, he must identify himself. The article also makes it clear that the carrier must withhold delivery if the holder fails to do either one of these things. Indeed, the carrier is given no option here as to whether to ask for identification, as he is with straight bills and sea waybills by articles 45 and 46: here, the holder *must* identify himself. Three issues arise.

15 First, why is identification required here at all? Negotiable bills of lading have always worked on the basis that the surrender of the bill was all the identification the holder needed, all the identification the carrier needed to avoid liability for mis-delivery. Yet it now appears that for the holder to get the goods – and for the carrier to avoid liability for getting it wrong – the holder must identify himself.

- 16 The second issue is: identify himself *as what*? Article 47 simply says that he must identify himself: does this mean simply that he must prove who he is? Or does it mean that he must prove that he is the holder? If the latter, then there may be a problem: article 1.10(a) defines the holder as the shipper, the consignee or a “person to which the document I duly endorsed”: would this mean that the carrier would need to trace the pedigree of endorsements to ensure that the document had been “duly” endorsed to the holder before him? If so, are carriers ready for this level of responsibility in scrutinising what are often illegible and un-dated string endorsements, some of which may be in full and others in blank?
- 17 Finally, what does “properly” identify mean? How zealously must the carrier investigate the supposed holder’s identification when he asks for the goods?
- 18 Was life simpler when presentation was all that was required? Any why has identification been added?
- 19 **A negotiable bill of lading dispensing with surrender**
- Here too we have a hybrid document: this time, a transferable document which takes from straight bills and sea waybills the feature that it need not be surrendered for delivery of the goods.
- 20 Article 47(2) sets out a number of steps which the carrier may take if no one turns for the goods.
- 21 This article has raised eyebrows – and hackles, particularly among banks who take the view that, by acknowledging the existence of such negotiable but non-surrender bills, the Rotterdam Rules have attacked the very core of the bill of lading as a document of title.
- 22 Four short points take the sting from this criticism. First, the clause dispensing with the need for surrender is included in the bill of lading issued by the carrier and accepted by the shipper. Secondly, if the Rotterdam Rules acknowledge the existence of such documents, there was nothing in the Hague-Visby Rules prohibiting them. Thirdly, such security concerns as banks may have with *these* documents are no different to those which they currently face when they issue letters of credit on the security of sea waybills and straight bills of lading. Finally and most importantly, a party seeking delivery under an article 47(2) document would still, in terms of article 47(1) need to identify himself.
- 23 My own view, in case you are still interested in it given the enticing imminence of Dinner, is that article 47(2) acknowledges the market reality that these hybrid documents are with us – and with us to stay.

Conclusion

- 24 Are these Rules perfect? This is a typical example of getting the wrong answer by asking the wrong question. Of course, they are not perfect, if Gert-Jan and his colleagues on the Drafting Group will allow me to say so. But their handiwork needs to be tested not against perfection – and against which they would necessarily fail, but against the alternatives – against which they egregiously succeed.
- 25 What are those alternatives? They are two: first, the Hague-Visby Rules limping on from their 19th century Harter Act prototype into the 21st century, ignoring electronic trade and accommodating land-based container trade as if it were a minor footnote; secondly, a plethora of regional regimes which would provide succour and revenue to only one group of people – the lawyers. And on that theme, enjoy your evening.

Professor Charles Debattista

Institute of Maritime Law,

University of Southampton

Associate Member & Arbitrator, Stone Chambers

August 2009

c.debattista@soton.ac.uk

charles.debattista@stonechambers.com