

# The New Structure of the Basis of Liability for the Carrier

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United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter referred to as the “Rotterdam Rules”) was adopted by the UN General Assembly on 11 December 2008, and the signing ceremony is scheduled to take place here in Rotterdam on 23 September 2009.

It is well accepted that the core of the Convention is the carrier’s liability.<sup>1</sup> And, the fundamental elements of the liability regime include the basis of liability and the allocation of the burden of proof<sup>2</sup>. Article 17 of the Rotterdam Rules is entitled “Basis of Liability” which is under Chapter 5 dealing with the liability of the carrier for loss, damage, or delay. And, in this Article 17, the basis of liability is crystallized by way of providing for in details the allocation of burden of proof respectively to the claimant on one side and to the carrier on the other side. In the Rotterdam Rules, as in both the Hague or Hague-Visby Rules and the Hamburg Rules, the basis of liability is fault.<sup>3</sup> But, the fault or more exactly the structure of the fault under the Rotterdam Rules is not only different from the fault under the Hague or Hague-Visby Rules, but also different from the

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<sup>1</sup> Professor Jan Ramburg, UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea, at <http://www.cmi2008athens.gr/sub3.3.pdf>

<sup>2</sup> Professor Francesco Berlingieri, Carrier’s Obligations and Liabilities, at <http://www.cmi2008athens.gr/sub3.5.pdf>

<sup>3</sup> *Ibid.*

fault under the Hamburg Rules. It seems that the Rotterdam Rules by combining the reasonable elements and getting rid of the shortcomings of the relevant provisions contained in the previous conventions on carriage of goods by sea, have constructed a new structure of the basis of the carrier's liability with detailed rules on allocation of burden of proof. This is the subject that this paper discusses.

## **1. The Outstanding Feature of the Basis of Liability under the Rotterdam Rules**

By analysis of the provisions of Article 17 of the Rotterdam Rules, it seems clear that for the purpose of determination of the carrier's liability for loss of or damage to or delay in delivery of the goods, the basis of liability with the burden of proof is made up of two rounds proof and counter-proof with three presumptions of carrier's fault.

### **The first round proof and counter-proof**

In light of Article 17.1, for the purpose of establishing the carrier's liability for loss of or damage to the goods as well as delay in delivery, the initial burden of proof rests upon the claimant, who is obliged to provide proof that the loss, damage, or delay, or the event or circumstance that caused or contributed to the same took place during the period of carrier's responsibility, which is provided for in Article 12 of the Rotterdam Rules.

Once the above initial burden of proof is discharged by the claimant, the burden of proof should shift from the claimant to the carrier. In other words, the carrier is presumed at fault, but would be given an opportunity to put forward his counter-proof as against the proof having been provided by the claimant to rebut the presumption. In light of Article 17.2 and 17.3, for the purpose of

relieving of all or part of his liability for the loss, damage, or delay, the carrier would need to prove alternatively a ) that the cause or one of the causes of the loss, damage, or delay was not attributable to his fault or the fault of any person for whom he was responsible; or b) that one or more of the events or circumstances listed in Article 17.3 (hereinafter referred to as the “listed excepted perils”) caused or contributed to the loss, damage, or delay. In other words, in the first round proof and counter-proof, the carrier shall have 2 alternative options for putting forward his counter-proof to rebut the aforesaid presumption.

It goes without saying that if the carrier is not able to prove either of the aforesaid a) or b), the aforesaid presumption will be sustained, and the carrier’s liability for the loss, damage, or delay will be established for reasons that he was not able to rebut the presumption of his fault resulting in the liability. This is the first presumption of carrier’s fault as provided for in Article 17 of the Rotterdam Rules. On the other hand, if however the carrier is able to prove successfully the above a), i.e. that the cause or one of the causes of the loss, damage, or delay was not attributable to his fault or the fault of any person for whom he was responsible, then the carrier’s liability for the loss, damage, or delay would be relieved fully or partially depending upon what the carrier had successfully proved, and no further proof or counter-proof would be necessarily required for this circumstance. Whereas, in case the carrier chose to prove the above b), i.e. that one or more of the listed excepted perils caused or contributed to the loss, damage, or delay, and proved successfully the same, then the story of the claim would not end there and the process of proof and counter-proof would go on with the second round.

### **The second round proof and counter-proof**

Upon discharge of the burden of proof by the carrier of the abovementioned

b), i.e. that one or more of the excepted perils caused or contributed to the loss, damage, or delay, then the claimant will become entitled to put forward his further proof for the second round. In light of Article 17.4 and 17.5, for the purpose of maintaining the carrier's liability for loss, damage, or delay, the claimant may choose to prove either of the following three, namely:

aa) that the fault of the carrier or of the person for whom the carrier was responsible caused or contributed to the excepted peril(s) on which the carrier relied; or

bb) that an event or circumstance other than the listed excepted perils contributed to the loss, damage, or delay; or

cc) that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship, (ii) improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of this ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods (the aforesaid (i), (ii) and (iii) are hereinafter referred to as the "unseaworthiness", "improper C.E.S." and "uncargoworthiness" respectively); .

In case the claimant chose to prove the aforesaid aa) i.e. that the fault of the carrier or of the person for whom the carrier was responsible caused or contributed to the excepted peril(s) on which the carrier relied, and proved the same successfully, then the carrier would be left with no further room to provide any counter-proof, and would be held liable for the loss or damage, or delay (if unfortunately the claimant was unable to prove this successfully, the carrier would be deemed to be at no fault and should not be held liable in this

respect). However, if the claimant chose to prove the aforesaid bb) i.e. that an event or circumstance other than the listed excepted perils contributed to the loss, damage, or delay, and proved the same successfully; then in light of the second part of Article 17.4(b), the carrier would be presumed at fault in this regard but would be given a further opportunity to provide counter-proof that the said event or circumstance was not attributable to his fault or to the fault of any person for whom the carrier was responsible, failing which, the carrier's liability for this presumed fault would be sustained. This is the second presumption of carrier's fault as provided for in Article 17 of the Rotterdam Rules. But, it should be noted that, in essence, the second presumption is somewhat identical or equivalent to the first one. As a logical result, if this presumption is not rebutted, the carrier's liability for loss, damage, or delay will be maintained for this circumstance. Furthermore, it is also true that if the claimant chose to prove the aforesaid cc) i.e. that the loss, damage, or delay was or was probably caused by or contributed to by the so-called unseaworthiness or improper C.E.S. or uncargoworthiness, and proved the same successfully; then according to Article 17.5(b) the fault of the carrier in this regard would be presumed but the carrier would be again given a further opportunity to put forward his counter-proof evidencing that none of the said unseaworthiness or improper C.E.S. or uncargoworthiness caused the loss, damage, or delay, or alternatively that he had complied with his obligations to exercise due diligence in respect of seaworthiness, proper C.E.S. and cargoworthiness as provided for by Article 14 of the Rotterdam Rules. If unfortunately the carrier was not able to discharge this burden of proof, it would mean that the presumption of carrier's fault in this regard would not be able to be rebutted, as a result, the carrier's liability due to this presumed fault in respect of unseaworthiness or improper C.E.S. or uncargoworthiness would be sustained. This is the third presumption in respect of the carrier's fault provided for in Article 17 of the Rotterdam Rules. Again, as a logical result, if this presumption were not rebutted, the carrier would be maintained liable for

the loss, damage, or delay for this circumstance.

In addition to the provisions referred to above in respect of the two rounds proof and counter-proof and the three presumptions in respect of carrier's fault, it is also made clear by Article 17 of the Rotterdam Rules in paragraph 6 that when the carrier is relieved of part of his liability pursuant to this article, the carrier is liable only for that part of the loss, damage, or delay that is attributable to the event or circumstance for which he is liable pursuant to this article.

It is observed that "neither the Hague-Visby Rules nor the Hamburg Rules regulate in full the allocation of the burden of proof, because they do not state which, if any, is the burden of proof resting of the claimant."<sup>4</sup> Whereas, in light of the abovementioned provisions of Article 17 of the Rotterdam Rules, it seems that in any given circumstance or at any given stage, the claimant or the carrier would clearly know what burden of proof or count-proof he should bear. This is a progress brought forward by the Rotterdam Rules in respect of the rules on proof and counter-proof for the purpose of determination of carrier's liability for loss, damage, or delay in delivery of the goods.

## **2. Changes by the Rotterdam Rules in respect of the Basis of Liability**

As stated above, the Rotterdam Rules have constructed a new structure of the basis of liability for the carrier, including the rules on burden of proof. Therefore, it is not surprising that a number of changes will be brought by the Rotterdam Rules to the relevant existing rules of law. For the purpose of this paper, a few of the changes in respect of the basis of liability will be discussed here in this part of the paper.

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<sup>4</sup> Professor Francesco Berlingieri, *Carrier's Obligations and Liabilities*, at <http://www.cmi2008athens.gr/sub3.5.pdf>

## **The Nautical Error Exoneration**

The notorious nautical error exoneration, which is also known as the nautical fault exemption or exception, was originated from the US Harter Act some 100 years before, and was later incorporated into the Hague or Hague-Visby Rules.

It is fair to say that this centurial exoneration has played an important role for the historical development of the international shipping industry in the past. However, it should be admitted as well that now it is time for it to go off for the following reasons.

Firstly of all, it should be recalled that as early as in 1978 while preparing the Hamburg Rules, it was a common understanding that “Articles 5-8 constitute a compromise reconciling divergent views expressed during the preparation of the Hamburg Rules as to the carrier’s liability. A minority favored retaining the exception in for the ‘act, neglect or default of the master, mariner, pilot or servants of the carrier in the navigation or the management of ship.’” “The vast majority, however, felt that the exception for this so-called ‘nautical default’ was no longer justified, particularly since it had no parallel in other fields of law relating to contract. The compromise between these points of view was to delete the nautical fault exception but to set the limits of liability of the carrier at relatively low amounts (only slightly above those of the Visby Protocol) and to allow the limits of liability to be broken only in case of the carrier’s serious misconduct. Another element of the compromise was to create an exception to the ‘presumed fault’ basis on the carrier’s liability by requiring the claimant to prove the carrier’s fault or neglect in the case of loss, damage or delay in

delivery caused by fire.”<sup>5</sup> Since then and in the decades of the following years, issues in relation to abolishment of the nautical fault exception have been discussed or debated more thoroughly at various occasions, both at the national level and the international level, and the prevailing voices have been made quite clear. For example, at the seminar held by the Maritime Transport Committee of European Union on liability for cargo loss in 2001, after concentrated discussion it revealed that the abolishment of the nautical fault exemption is acceptable, the abolitionists prevailed in the end. It seems that in most discussions, if not all, the voices for abolishment speak louder than others.

Secondly, it is also known that in the preliminary draft instrument submitted to UNCITRAL, CMI pointed out that the exemptions of fault in the navigation or in the management of the ship and of fire caused by the fault of servants or agents of the carrier “are the first two of the carrier’s traditional exceptions, as provided in the Hague or Hague-Visby Rules. There is considerable opposition to the retention of either.”<sup>6</sup>

Furthermore, as shown in the UNCITRAL reports, during the discussion by the Working Group of the Rotterdam Rules, “a view was expressed by a number of delegations that the general exception based on error in navigation should be maintained since, should it be removed, there would be a considerable change to the existing position regarding the allocation of the risks of sea carriage between the carrier and the cargo interests, which would be likely to have an economic impact on insurance practice.”<sup>7</sup> However, most of the delegations didn’t agree with the view that as the risk was shifted to the carrier, the rise in

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<sup>5</sup> Christof Lüddecke and Andrew Johnson, *The Hamburg Rules*, Second Edition, Lloyd’s of London Press Ltd., 1991, P.87.

<sup>6</sup> See A/CN.9/WG.III/WP21, paragraph 69.

<sup>7</sup> See the Report of Working Group III (Transport Law) on the work of its tenth session (A/CN.9/525), paragraph 36.

the charges of liability insurance would result in enormous rise of the whole transportation cost. In addition, it was generally accepted at the 10th session of the working group that: “a similar exception to the carrier’s liability based on the error in navigation existed in the original version of the Warsaw Convention had been removed from the liability regime governing the air carriage of goods as early as in 1955 as a reflection of technical progress in navigation techniques”,<sup>8</sup> “the removal of that exception from the international regime governing carriage of goods by sea would constitute an important step towards modernizing and harmonizing international transport law. Such a step might be essential in the context of establishing international rules for door-to-door transport.”<sup>9</sup> It is a fact that from the text as contained in document A/CN.9/WG.III/WP56 ( September 8th, 2005 ), and the later texts of both of the document A/CN.9/WG.III/WP.81 and the document A/CN.9/WG.III/WP.101, until the finally adopted text of the Convention, the relevant provisions dealing with the core of the Convention have never been changed, which include the abolishment of nautical fault exoneration, carrier’s fault-based liability regime, the rules in respect of allocation of the burden of proof, etc. In view of the above, it should be of no surprise that the Working Group finally decided that such exemption should be deleted.<sup>10</sup>

It should be recognized that the removal of the nautical fault exemption and the adoption of a complete fault liability regime for the carrier’s liability would reflect the development of the international shipping legislation and, would in addition keep the legislations up to date with the characteristics and the demands of the times. To achieve a fair balance of the risks between the ship and the cargo interests by proper allocation of the burden of proof is perhaps the only solution acceptable to all parties concerned under the current circumstances. Now, voices can be heard that we have had too much

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<sup>8</sup> See A/CN.9/525, paragraph 35.

<sup>9</sup> See A/CN.9/525, paragraph 35.

<sup>10</sup> See A/CN.9/525, paragraph 36.

discussion on the abolishment of the notorious nautical fault exoneration, and now it is the time for us to put an end to the discussion and to get prepared to accept the abolishment.

### **The Principle of Overriding Obligation**

The so-called “principle of overriding obligation” relates to carrier’s obligation of seaworthiness, and is a natural construction acquired from the structure arrangement or phrase setting of the Hague Rules, and has been applied in a number of cases in the common law countries,<sup>11</sup> and accepted in some other countries. It was held by Lord Somervell in the case, *Maxine Footwear v. Canada Government Merchant Marine*, “Article III, rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfillment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument.”<sup>12</sup> According to the overriding obligation principle, the carrier shall have to prove in the first place that he has exercised due diligence to make the vessel seaworthy, before he is entitled to rely upon the exemptions. Whereas, the carrier’s obligation of care for the goods shall be subject to the exemptions, which means that if a single event that causes the cargo loss or damage relates to both the carrier’s obligation of care for the goods and an exemption on which the carrier is entitled to rely, then the carrier’s exemption shall prevail over his obligation of care for the goods carried.

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<sup>11</sup> As to the historical development and the relevant decisions of the principle, see Zhu Zuoxian and Si Yuzhuo, A Thesis on the “Overriding Obligation” Principle of the Hague Rules- An Analysis on the Provisions under the UNCITRAL draft on Transport Law in respect of Basis of Carrier’s Liability”, Annual of China Maritime Law (2002), published by Dalian Maritime University Press.

<sup>12</sup> *Maxine Footwear v. Canada Government Merchant Marine*, [1959] 2 Lloyd’s Rep. 105.

It is noted that Article 17.5 of the Rotterdam Rules, which deals with carrier's liability for seaworthiness obligation, contains a phrase which reads: "*notwithstanding paragraph 3 of this article.....*", and that the exemptions are listed in the said paragraph 3. Obviously, the structural arrangement of the Rotterdam Rules suggests that the exemptions are no longer subject to the seaworthiness obligation, as a result, "the issue of the seaworthiness of the ship would become relevant only in an actual claim for cargo damage, i.e. when the cargo claimant could prove unseaworthiness as a cause of damage to rebut the carrier's invocation of one of the 'excepted perils'".<sup>13</sup> As to the relation between the carrier's obligation of care for the goods (which is provided for by Article 13.1 of the Rotterdam Rules) and the exemptions (which are provided for by Article 17.3 of the Rotterdam Rules), the obligation of care for the goods shall not be subject to the exemptions, because Article 13.1 of the Rotterdam Rules, unlike article 3.2 of the Hague Rules, does not have the opening words such as "subject to the provisions of ...". The reason for the above change seems to be that under the Rotterdam Rules the basis of carrier's liability has changed to the effect that the carrier's fault will no longer on one hand constitute a breach of the seaworthiness obligation and on the other hand amount to an exemption at the same time. It is also true for the carrier's obligation of care for the goods.

Although the Rotterdam Rules, like the Hague Rules, also contain provisions on the three balls, i.e. the seaworthiness obligation, the care for goods obligation and the exemptions, yet the three balls under the Rotterdam Rules would no longer have the chance to collide with one another. Therefore, the principle of overriding obligation dealing with the relations among the three balls would have no room to play its role under the Rotterdam Rules. Whereas, questions may be asked why not the Rotterdam Rules abolish the provisions

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<sup>13</sup> See the Report of Working Group III (Transport Law) on the work of its twelfth session (A/CN.9/544), para.117.

on the three balls and simply follow the approach adopted by the Hamburg Rules? This is a tough question, but the possible answers thereto may include a) the maintaining of the three balls, seems to be a good way to inherit the well established and still applicable principles and/or the well interpreted and clarified terms or provisions of the centennial Hague Rules, so that the practicability of the rules of the new law will be enhanced, b) to make the rules in respect of allocation of burden of proof more easily organized or structured, etc.

### **The “*Vallescura* Rule”**

Some time in 1934, the US Supreme Court held in the case, i.e. *Schnell v. Vallescura*, that the carrier should bear all liability because he could not establish the respective degree of the cargo damage caused by two reasons (one for which he was liable and the other for which he was excusable)<sup>14</sup>. The decision in this case was latterly known as the “*Vallescura* Rule”. Still later, in 1978, this rule was adopted by the Hamburg Rules in its’ article 5.7.

During the discussion by the Working Group of Article 17.6 of the Rotterdam Rules, the “*Vallescura* Rule” was considered<sup>15</sup>, together with another alternative, which may be summarized as the one-half approach, i.e. when the two causes cannot be apportioned, the carrier is only liable for one-half of the damage<sup>16</sup>. While discussing the seaworthiness obligation of the carrier, “The Working Group also agreed that making this obligation a continuing one affected the balance of risk between the carrier and the cargo interests in the draft instrument, and that care should be taken by the Working Group to bear

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<sup>14</sup> See 293 U.S. 296,304(1934), Texas International Law Journal, at P447.

<sup>15</sup> See the provisions of variant A as contained in document A/CN.9/WGIII/WP32: “If loss, damage or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for\_all the loss, damage, or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable.”

<sup>16</sup> See the provisions of variant B as contained in document A/CN.9/WGIII/WP32: “If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one-half of the loss, damage, or delay in delivery.”

this in mind in its consideration of the rest of the instrument.”<sup>17</sup> Hence, the final text of Article 17.6 of the Rotterdam Rules provides for that the carrier is liable only for the part of the loss, damage, or delay that is attributable to the event or circumstance for which he is liable pursuant to this article. The deletion of the words of the last part of Article 5.7 of the Hamburg Rules, which reads that “provided that the carrier proves the amount of the loss, damage, or delay in delivery not attributable thereto”, seems to suggest that the Rotterdam Rules have revised the previous rules on this point, with the effect that the carrier is no longer required to bear the said burden of proof and that the relevant issue will be left to the presiding judge or arbitrator to exercise discretion in making the decision.

It should be noted that the decision made by the Working Group on this point was probably not based on any jurisprudence, but on the consideration of reaching or keeping a fair balance of risks between the ship and the cargo interests, which would no doubt be significantly affected or determined by the value orientation of the legislation. Good or not, it seems that this change would not amount to a serious issue for China to accept the Rotterdam Rules.

From the above three examples, it seems clear that changes have been brought by the Rotterdam Rules to the Hague or Hague-Visby Rules and the Hamburg Rules. And, among the changes, while some would not, but some could amount to certain significant changes to the existing rules of law, e.g. the abolishment of the nautical fault exoneration. Whereas, it should be emphasized that while assessing the impacts or effects of the changes brought by the Rotterdam Rules to a certain legislation, such as the Hague-Visby Rules or the relevant Chinese law, we should always bear in mind that the Rotterdam Rules are a set of systematic rules of law, which should be accessed comprehensively as a whole but not isolatedly in parts. Or, otherwise no correct assessment or decision could be achieved.

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<sup>17</sup> See A/CN.9/WG.III/WP.36, footnote 55.

### **3. The Chinese Maritime Code and the Rotterdam Rules**

As known, Chapter IV of the Chinese Maritime Code which came into effect in 1993 (hereinafter referred to as the “CMC”) deals with the contract of carriage of goods by sea. As observed, many of the provisions or principles contained therein are incorporated from the Hague-Visby Rules or the Hamburg Rules. Surprisingly, the provisions in respect of the basis of liability as contained in the CMC in many aspects are very close to that of the Rotterdam Rules, although it should be particularly pointed out that the CMC followed the Hague or Hague-Visby Rules and maintained the nautical error exoneration (reference is made to the item (1) of the first paragraph of Article 51 of the CMC). This is apparently the most significant change that might be brought by the Rotterdam Rules to the CMC in respect of the basis of carrier’s liability.

Section 2 of Chapter IV of the CMC is entitled carrier’s responsibility, under which Article 46 provides that “... During the period the carrier is in charge of the goods, the carrier shall be liable for the loss of or damage to the goods, except as otherwise provided for in this Section”. In view of this provision, it might be safe to say that the basis of liability under the CMC, like in the Rotterdam Rules, is also fault. And the fault under the CMC is a presumed one as well. As a logical interpretation of this provision, the initial burden of proof that the loss of or damage to the goods occurred during the period of the carrier’s responsibility shall rest upon the claimant. Taking into account the provisions of Article 50 of the CMC which deals with the carrier’s liability for delay in delivery of the goods, one can easily find that the above mentioned provisions of the CMC are very akin to the provisions of Article 17.1 of the Rotterdam Rules, which reads that “the carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay or the event or circumstance that caused or contributed to it took place during the period of the carrier’s responsibility as defined in chapter

4.”

Furthermore, in the same section, Article 51 of the CMC reads as follows:

“Article 51 The carrier shall not be liable for the loss of or damage to the goods occurred during the period of carrier’s responsibility arising or resulting from any of the following causes:

- (1) Fault of the Master, crew members, pilot or servant of the carrier in the navigation or management of the ship;
- (2) Fire, unless caused by the actual fault of the carrier;
- (3) Force majeure and perils, dangers and accidents of the sea or other navigable waters;
- (4) War or armed conflict;
- (5) Act of the government or competent authorities, quarantine restrictions or seizure under legal process;
- (6) Strikes, stoppages or restraint of labour;
- (7) Saving or attempting to save life or property at sea;
- (8) Act of the shipper, owner of the goods or their agents;
- (9) Nature or inherent vice of the goods;
- (10) Inadequacy of packing or insufficiency or illegibility of marks;
- (11) Latent defect of the ship not discoverable by due diligence;
- (12) Any other cause arising without the fault of the carrier or his servant or agent.

The carrier who is entitled to exoneration from the liability for compensation as provided for in the preceding paragraph shall, with the exception of the causes given in sub-paragraph (2), bear the burden of proof.”

Compared with the contents of Article 17.3 of the Rotterdam Rules, it seems that except for the nautical error exoneration, the provisions of Article 51 of the

CMC are quite similar to the said Article 17.3. Further, it is also worth mentioning that according to the provision of Article 51 of the CMC, in particular item (12), the carrier shall not be liable for the loss of or damage to the goods occurred during the period of carrier's responsibility, if the carrier may prove that the same occurred without the fault of the carrier or his servant or agent, therefore, it seems that the effect of this provision is to some extent the same as that of Article 17.2 of the Rotterdam Rules, which reads that "the carrier is relieved from 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 loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18." Moreover, it is also worth noting that by incorporation of the provisions of Article 5.7 of the Hamburg Rules Article 54 of the CMC provides for that "where loss or damage or delay in delivery has occurred from causes from which the carrier or his servant or agent is not entitled to exoneration from liability, together with another cause, the carrier shall be liable only to the extent that the loss, damage or delay in delivery is attributable to the causes from which the carrier is not entitled to exoneration from liability; however, the carrier shall bear the burden of proof with respect to the loss, damage or delay in delivery resulting from the other cause. " Apart from the last sentence dealing with the carrier's burden of proof, this article is akin to Article 17.6 of the Rotterdam Rules, which reads that "when the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article."

On the other hand, it should be particularly pointed out once again that the CMC followed the Hague or Hague-Visby Rules and maintained the nautical error exoneration, but the Rotterdam Rules abolished this exoneration. This is apparently the most significant difference between the CMC and the

Rotterdam Rules as far as the provisions in respect of the basis of liability are concerned. However, it is the authors' view that the abolishment of the nautical error exoneration by the Rotterdam Rules should not constitute a real obstacle for China to accept the Rotterdam Rules, taking account the significant and beneficial changes as a whole that the Rotterdam Rules are going to bring on to the international shipping industry.

As can be seen from the above, provisions akin to Article 17.1, 17.2, 17.3 and 17.6 of the Rotterdam Rules can be found in Article 46, 50, 51 and 54 of the CMC. In other words, the provisions contained in the CMC in respect of the basis of liability including the burden of proof are in many aspects close to the provisions of Article 17 of the Rotterdam Rules. Therefore, it can be said that even bearing in mind the abolishment of the so-called nautical error exoneration by the Rotterdam Rules, there is no real obstacle for China to be happy with the Rotterdam Rules, i.e. to sign the Rules now at the Signing Ceremony and to ratify the same later at an appropriate time in the future.

## **Conclusion**

The Rotterdam Rules, by way of providing for in details and in a practical way the allocation of burden of proof respectively to the cargo claimant and the carrier, have constructed a new structure of the basis of liability for the carrier. By coincidence, the relevant provisions contained in the CMC are very close in many aspects to the provisions of Article 17 of the Rotterdam Rules, which deal with the most important elements of the Convention. Therefore, it might be safe to conclude that as far as the provisions of Article 17 of the Rotterdam Rules are concerned, given the fact that the so-called nautical error exoneration is abolished, there is no real obstacle for China to be happy with the Rotterdam Rules. Satisfactory or not, after more than 10 years hardworking for preparation, the new baby is now ready to be given birth to.

Bearing in mind that it is unlikely that the international community will be able to work out another international instrument on the same subject having the same width and depth as the Rotterdam Rules in the near future, say in the next 30 or 50 years, we have no reason not to cherish the enthusiasm, wisdom and efforts which have been put into it by so many people, including those sitting here today. China, perhaps, all other countries, should get ready and prepared to welcome the birth of the Rotterdam Rules, the new baby of the international maritime law family.

**Postscript:**

At the end of this paper, the authors would like to mention that while preparing this paper focusing on Article 17 of the Rotterdam Rules, a respectable maritime law expert came into our vision, i.e. Professor Francesco Berlingieri, who led the informal drafting group to discuss, draft and propose a draft article for the article 17 of the Rotterdam Rules, and put so much of his wisdom and efforts into the drafting and formation of this article. For that reason, the members and delegates attending the relevant meeting of the Working Group III expressed their high gratitude by giving him a long lasting applause, which the applause could still be heard even now.