Performing Parties and Himalaya Protection

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I. Introduction

I am very much honored to have an opportunity to give a presentation at this historic signing ceremony for the new Convention on Contracts for the International Carriage for Goods Wholly or Partly by Sea. I sincerely express my gratitude to the organizer of this event and I am grateful to the participants who came here from many places of the world.

The title of my talk is "Performing Parties and Himalaya Protection". Unlike other speeches today ("Obligation of the Carrier", "Obligation and Liability of the Shipper", etc.), the title itself needs explanation for those who are not familiar with the topic. Even for maritime lawyers, "performing party" is not a familiar word. Therefore, I think it is necessary to define what I am going to talk about.

There are many people other than the carrier who are involved in transport of goods. Although the Rotterdam Rules regulate the contract of carriage, they also pay attention to people other than contract parties. The focus of my speech is these people. More specifically, it addresses the following three questions:

(1) Who, other than the carrier, is liable under the Rotterdam Rules?
(2) Whose acts or omissions are attributable to the carrier?
(3) Who is entitled to a defense and limitation of liability under the Rotterdam Rules?

A smart audience might suspect that the answer to these questions is "performing parties". Don't be so quick. Things are more complicated. This is why my speech takes more than 20 minutes.

II. Who Is Liable under the Rotterdam Rules?

Let us take the first question: Who is liable under the Convention? Traditional transport law conventions have focused on the liability of the carrier as a contracting party. The Hague Rules 1924[1], including the Visby Amendment 1968[2], regulate only the liability of the carrier. The Warsaw Convention 1929[3] for air carriage also imposes liability only on contractual carriers. The same applies to the Convention on the Contract for the International Carriage of Goods by Road (CMR), 1956.

Recent international conventions, in contrast, extend their regulation to sub-carriers with no direct contractual relationship with the shipper. The U.N. Convention on Carriage of Goods by Sea, 1978 (Hamburg Rules) imposes liability on the "actual carrier" on the same basis as the contracting carrier. The same applies to the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway 2000 (CMNI). The Montreal Convention 1999[4], the latest international convention for air carriage, includes a chapter titled "carriage by air performed by a person other than the contracting carrier."

The Rotterdam Rules, consistent with these trends, moved even further.

Let us first look at Article 1(6). It defines the term "performing party" as a person who performs or undertakes to perform any of the carrier's responsibilities under a contract of carriage and acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. This notion is broader than "performing carrier" or "actual carrier" used in previous international conventions in the sense that it includes not only the sub-carrier who performs the actual carriage but also other persons involved in the performance of the carriage such as stevedores or terminal operators.

However, the Rotterdam Rules do not impose liability on all performing parties. Rather, they provide for liability only for the part of them called "maritime performing party". The definition of "maritime performing party" is found in Article 1(7). Roughly speaking, "maritime performing party" is a performing party who offers services related to sea carriage.

Why should the Rotterdam Rules restrict their liability regime to the "maritime performing party"? The first draft of the Rotterdam Rules brought all

[1] International Convention for the Unification of Certain *Rules* of Law relating to Bills of Lading
[2] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading
[3] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929
[4] Convention for the Unification of Certain Rules for International Carriage

performing party under the same liability regime as a contracting carrier[5]. During the discussion in the UNCITRAL Working Group, however, it was recognized that the approach has serious problems with existing transport Conventions. The following illustration will help to understand the reason.

Let us assume that the shipper entered into a contract of carriage from Berlin to Chicago with a Non-Vessel Operating Carrier (NVOC). The goods were carried by truck from Berlin to Rotterdam, by ship from Rotterdam to New York and by rail from New York to Chicago. Let us also assume that the Netherlands, Germany, and the United States are contracting states. The NVOC is a contracting carrier and the European trucker, ocean carrier, and the American railroad are performing parties.

A "door-to-door" carriage by NVOC which is subject to the Rotterdam Rules might be regulated by other international conventions such as CMR. What about other people involved in this hypothetical case? The European trucker, a performing party, engages in an international road carriage which is governed by CMR. If the Rotterdam Rules apply to it, the conflict with CMR is unavoidable. The Rotterdam Rules leave the regulation to CMR, which specializes in road transport.

The conflict with other conventions is not the only concern raised in this context. It was thought too far-reaching if the Rotterdam Rules cover purely domestic land transport. A truck driver who carries the goods to a neighboring town might be subject to the liability regime of an international convention when the carriage consists of any part of the international carriage to which the Rotterdam Rules apply. Such a result is beyond the ordinary expectations of a small carrier who engages exclusively in domestic land transport. Each state would have its own domestic policy for regulating such a transport. The UNCITRAL Working Group thought it would not be wise for the Rotterdam Rules to intervene.

In conclusion, in the above hypothesis, the ocean carrier who carried the goods from Rotterdam to New York is governed by the Rotterdam Rules. The stevedores, terminal operators, or other persons involved in the service at the port of Rotterdam or New York are also covered. However, the European trucker and an American Railroad are left outside of the liability regime of the Rotterdam Rules. Please note that not all inland carriers are excluded from the scope. An inland carrier

[5] Article 6.3.1 (a) of the first draft provided as follows: "A performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier's rights and immunities provided by this instrument (i) during the period in which it has custody of the goods; and (ii) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage." See, A/CN.9/WG.III/WP.21

may be subject to the Rules if they perform their service exclusively within a port area. A fork lift which moves the goods within a port area is covered. But a railroad which carries the goods from an inland depot located outside of the port is not, even if it carries and discharges the goods inside the port area (See, Article 1(7)).

III. Whose Acts or Omissions Are Attributable to the Carrier?

Although the Rotterdam Rules do not impose liability on non-maritime performing parties, it still uses the term "performing party", which includes both maritime and non-maritime performing parties. The reason is that the broader concept of performing party is thought to be useful to define the scope of persons whose acts or omissions are attributable to the carrier. For instance, if the European trucker or the American Railroad in the above hypothesis damaged the goods, the carrier (in this case, the NVOC) should be liable for it. Whether the European trucker or the American Railroad itself is liable under the Convention does not matter in this context. Article 18 explicitly provides that the carrier is liable for the breach of its obligation under the Convention caused by the acts or omissions of any performing party.

As you may have noticed, Article 18 has a reference to people other than a performing party. If the concept of "performing party" alone can completely define the scope of the person whose acts or omissions are attributable the carrier, it would be most elegant. Unfortunately, there are "residual" people which "performing party" cannot cover and a fine tuning was thought to be necessary to make sure no one is missing from the list.

IV. Who Is Entitled to a Defense and Limitation?: Himalaya Protection

Are persons other than the carrier who are involved in the performance of contract of carriage entitled to defense or limit of liability which the carrier can enjoy? Such protections for a person other than the carrier are often called "Himalaya protection", which was named after an English case in which the effect of contract clause providing such a protection was discussed[6]. "The Himalaya" was the name of the ship involved. Article 4 provides for the list of persons who are entitled to a defense and limitation of liability under the Rotterdam Rules whether the action is

[6] Adler v Dickson *(*The Himalaya*)*, [1954] 2 Lloyd's Rep 267, [1955] 1 QB 158 [1] The case involved in a passenger claim rather than cargo claim. A passenger injured during the embarking sued the master and the boatswain. The defendant argued that the exoneration clause agreed between the carrier and the passenger effectively protected them. Although the House of Lords dismissed the claim by the master and the boatswain, it acknowledged that if the contract of carriage contained an agreement that gave exemption for the benefit the carrier's employees, it was effective to protect the employees.

founded in contract, tort or otherwise.

When you look at the persons other than the carrier referred to in article 4, they are divided into two different categories. First, the maritime performing party is entitled to a defense and limit of liability under the Convention. This is because maritime performing parties are liable under the Rotterdam Rules, and it is simply logical that they also enjoy the benefit under the Rules. Although a maritime performing party is not a contract party, this is not Himalaya protection in a genuine sense.

The second category is employees of the carrier or maritime performing party (article 4(1)(c)) and masters, crew, or other people offering services on board the ship (article 4(1)(b)). They need different justification for protection because the Rotterdam Rules do not impose any liability on them. The reason is that because the employees are economically dependent on their employers, their disadvantages are ultimately borne by the employer, the carrier or maritime performing parties in this context. Due to their economic dependency, if we denied the defense and limit of liability for the employees, it would result in, in fact, depriving the carrier or a maritime performing party itself of the defense and limit of liability.

If economic dependency is the reason, we cannot automatically extend Himalaya protection to all performing parties. An inland carrier such as a railroad or road carriers are not dependent on the carrier, at least not in the same degree. This is why the list in article 4 does not refer to "performing parties" but only to a part of them.

Please note that this does not mean that the Rotterdam Rules prohibit the parties to agree on a "Himalaya clause" in the contract which gives the persons who are not covered by article 4 the same defense and limitation as the carrier. However, save for specific contract provisions, these persons cannot automatically enjoy the benefit of a defense and limitation.

V. Employee as a Performing Party?

I have explained three questions so far: (1) Who is liable under the Convention, (2) Whose acts or omissions are attributable to the carrier, and (3) Who is entitled to a defense and limitation. At the very last stage of the negotiation at the UNCITRAL Working Group, the interrelationship of these three elements has drawn attention in a specific context.

A question was raised whether employees fall under the broad concept of performing party. If you read the definition in article 1(7), the answer seems "yes".

Employees of the carrier certainly "perform…the carrier's responsibilities under a contract of carriage and act…under the carrier's supervision or control". However, if employees are performing parties, they may be subject to action under the Rotterdam Rules as a maritime performing party as long as they are involved in sea carriage or port service. Many delegations in UNCIRAL Working Group felt uncomfortable in allowing such direct cause of action against individual employees under the Convention. It was thought unreasonable interference with labor policy in the maritime industry.

The problem cannot be solved by simply excluding employees from the definition of performing party. Any modification to the definition of performing party could have unintended repercussions. While it was thought undesirable for the Convention to create a direct cause of action against the employee, most delegations felt it necessary that the acts or omissions of the employee should be attributable to the carrier. There was a consensus that the "Himalaya protection" should be extended to employees for the reason I have just mentioned. If the definition of "performing party" is changed, these conclusions are also affected.

Thus, the UNCITRAL Working Group, instead of modifying the definition of "performing party", introduced specific reference to employees and gave explicit solutions in each place. Article 19(4) explicitly denies the possibility of direct action against the employees under the Convention, article 18(c) treats the acts or omissions of the employee is attributable to the carrier as if it is its own, and article 4(c) extends the Himalaya protection to the employee.

VI. Conclusion

The Rotterdam Rules include references to the persons other than the contracting parties in many places. The idea is simple: to cover persons involved in the transport as much as possible. The technique adopted for the purpose is not simple. It is not enough simply to define a magic word "performing party". There are several different aspects that the Rules should address and because they sometimes need different treatment, the Convention rely on the term "maritime performing party" on one hand, it includes adjustments in several places[7].

[7] In the original draft submitted to the UNCIRAL adopted more simple approach. "Performing party" defined the scope of persons who are liable under the Convention. The scope of the persons whose acts or omissions are attributable to the carrier and of the persons who are entitled to the defense is same. Both include performing parties and any other person who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage. See, Article 6.3.1 - 6.3.3 of the first draft in A/CN.9/WG.III/WP.21. Elaborated fine tunings were introduced uring the discussion in the UNCITRAL Working Group and the final text has more complicated structure as

I feel sympathy with the audience listening to my speech, which was highly technical. But they say “God is in the details”. If you come to know how carefully and precisely the text of the Rotterdam Rules is drafted, I am more than pleased. This is, no doubt, one of the important features of the Convention.

is described above.