The New Structure of the Basis of Liability for the Carrier
(including Freedom of Contract)\(^1\)

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1. Introduction

The rules regulating the liability for the carrier is perhaps the most central part of the Rotterdam Rules – as they indeed are of any international convention on transport law. It is therefore no surprise that these rules gave rise to extensive debate, nor that a compromise was reached at a fairly early stage of the negotiations because without a compromise on this crucial issue it was unlikely that any convention would be finalized at all.

This paper will examine the structure of the basis of liability for the carrier for loss of, damage to or delay in delivery of the goods carried, in particular the central rule in article 17. It will go on to examine to what extent these rules may be derogated from. When forwarding a claim in practice, many other rules in the convention are of relevance, particularly art. 12 defining the period of responsibility, art. 59-61 regarding limitation of liability, art. 18-19 on liability for and of performing parties, art. 23 on calculation of compensation, chapter 13 on time for suit, and art. 26 on liability for damage occurring during carriage preceding or subsequent to sea carriage. Also, the rules on deck cargo, art. 25, and on carriage of live animals and certain other goods, art. 81, may be relevant. These rules are not discussed in this paper, but many of them are the subjects of other presentations during this seminar.

2. The overall structure and basis of the liability

The pivotal rule on the carrier’s liability for loss of or damage to the goods, as well as for delay in the delivery (hereinafter simply referred to as the carrier’s liability), is article 17. At first glance the article looks complicated, but it is in fact a quite logically structured rule which sets out the various steps in the process of establishing liability for the carrier. It contains elements of both the Hague/Hague-Visby Rules and the Hamburg Rules while at the same time “weeding out” some of the shortcomings of these conventions.

\(^{1}\) This is an outline of the oral presentation to be given at the international seminar in Yaoundé on 18 March 2010. It is therefore not attempted to be in the form of an academic article and thus does not include references.
First of all it is important to set out that the liability of the carrier is a fault-based liability. If the loss, damage or delay is not a result of the fault of the carrier (or someone he answers for) then the carrier cannot be held liable. However, the rules on the burden of proof places said burden on the carrier and the carrier is thus presumed to be liable as a starting point. In practise, this means that the carrier will be held liable if the real cause of the loss, damage or delay cannot be ascertained.

For the presumption of liability to arise, the first step must, however, be taken by the claimant. Thus the claimant must prove 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, cf. art. 17(1). Strictly speaking, this is not a matter of liability, but of proving that relevant damage has been suffered by the claimant. Once this is proven, the carrier is presumed to be liable.

The carrier can then choose between two “paths” in attempting to escape liability, one which may be called the “no-fault path”, and one which may be called the “burden of proof path”. These will be examined in the following.

3. The “no-fault path”

Once presumed liable, the carrier may escape liability in whole or in part by proving that the cause or one of the causes of the loss, damage, or delay was not attributable to its fault or the fault of someone whom the carrier answers for, cf. art. 17(2). In slightly simpler terms, the carrier is not liable if it proves that it was not at fault which is both unsurprising and fair when remembering that the overall rule is a fault-based liability. This rule is very similar to the main rule on liability in the Hamburg Rules, i.e. art. 5(1).

4. The “burden of proof path”

Whereas the “no-fault path” is straightforward, the structure of the “burden of proof path” is somewhat more complicated as the burden of proof may be shifted back and forth more than once. This is set out in art. 17(3)-(5).

If the carrier cannot prove that the damage was not caused by its fault, it may instead prove that the loss, damage, or delay was caused in whole or in part by one or more of the events or circumstances
listed in art. 17(3)(a)-(o), e.g. strikes, fire on the ship, or defective condition of packing. This will shift the burden of proof to the claimant. It is important to note that this rule only shifts the burden of proof (i.e. rebuts the presumption of liability); it does not exonerate the carrier of liability. It is further worth noting that the notorious exoneration for nautical error in the Hague and Hague-Visby Rules has been abolished.

With the burden of proof shifted to the claimant, the claimant then has three different ways to proceed. 1. The claimant may prove that the event or circumstance proved by the carrier to be the cause of the loss, damage, or delay (e.g. the strike, fire on the ship, or defective condition of packing) was in fact caused by the fault of the carrier or someone whom it answers for, cf. art. 17(4)(a). 2. The claimant may prove that an event or circumstance not listed in art. 17(3)(a)-(o) contributed to the loss, damage, or delay, e.g. that the damage was contributed to the carriers handling of the goods, cf. art. 17(4)(b). 3. The claimant may prove that the loss, damage, or delay was or was probably caused by the unseaworthiness of the ship, the improper crewing, equipping, and supplying of the ship, or the fact that the holds or containers supplied by the carrier were not fit and safe for reception, carriage, and preservation of the goods (so-called “uncargoworthiness”), cf. art. 17(5)(a).

If the claimant fulfils either of the three options above then the burden of proof shifts back to the carrier, or in other words, the presumption of liability may be said to be reinstated. However, the carrier’s options depend on which of the three options the claimant has fulfilled.

If the claimant fulfils option 1, proving that fault caused or contributed to the event or circumstance relied on by the carrier then the carrier is out of options, cf. art. 17(4)(a). Fault on the part of the carrier or someone whom it answers for has been proven and the carrier will be held liable.

If the claimant fulfils option 2, proving that an event or circumstance not listed in art. 17(3)(a)-(o) contributed to the loss, damage, or delay then the carrier may escape liability by proving that this (other) event or circumstance was not attributable to the fault of the carrier or someone whom it answers for, cf. art. 17(4)(b). If the carrier cannot prove this then it will be held liable.
If the claimant fulfils option 3, proving that the loss, damage, or delay was or was probably caused by the unseaworthiness, the improper crewing, equipping, and supplying, or the uncargoworthiness of the ship (hereinafter: unseaworthiness of the ship) then the carrier can escape liability by either proving that the unseaworthiness of the ship in fact did not cause the loss, damage, or delay or proving that it (i.e. the carrier) complied with its obligation to exercise due diligence in making and keeping the ship seaworthy, cargoworthy and properly crewed, equipped and supplied, cf. art. 17(5)(b). If the carrier cannot prove either then it will be held liable. In this connection it is worth noting that the Rotterdam Rules makes it clear that the obligation of the carrier to keep the ship seaworthy, cargoworthy and properly crewed, equipped and supplied is an ongoing obligation, cf. art. 14.

5. Partial liability
As described above, as a starting point the carrier is presumed to be fully liable for the loss, damage, or delay. However, he may be relieved of the whole or part of the liability. A situation may thus arise where the carrier is only partly liable, e.g. if it is able to prove that part of the damage was caused by the defective packing.

In such cases, the carrier is only liable for the part of the loss, damage or delay that is attributable to the event or circumstance for which the carrier is liable pursuant to article 17, cf. art. 17(6). Unlike the rest of article 17 – and unlike the Hamburg Rules – article 17(6) does not state who bears the burden of proving to what extent the loss, damage or delay is attributable to the events or circumstances for which the carrier is liable and not liable respectively. It is thus up to the competent judge or arbitral tribunal to apportion the liability based on the evidence submitted.

6. Delay
The Rotterdam Rules as a new thing compared to the Hague and Hague-Visby Rules introduce a delay liability for the carrier. The basis of the liability for delay is the same as for the liability for loss of or damage to the goods, as described above. However, in order for the question of a potential liability to be relevant at all the claimant must establish that delay has in fact occurred and this turns on the definition of delay.
Delay is defined in article 21 as occurring “when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.” Thus, a delivery time must have been agreed for it to be relevant to consider a delay liability. With what level of clarity this agreement must have been made will in the end be a matter for the courts to decide, but it seems fair to say that the definition, and thus the delay liability, is narrower than the one in the Hamburg Rules.

7. Freedom of contract
The rules on liability of the carrier are – as the rest of the Rotterdam Rules – mandatory and may not be departed from to the detriment of the shipper, cf. art. 79(1). Thus, any term in a contract of carriage that directly or indirectly excludes or limits the carrier’s liability is void. On the other hand, the carrier is at liberty to agree to increase its liability.

There are three narrow modifications to this rule.

First, the carrier’s liability may be excluded or limited when the goods are live animals, cf. art. 81(a).

Secondly, the carrier’s liability may be excluded or limited if the character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. Such contract of carriage must not be related to ordinary commercial shipments made in the ordinary course of trade and no negotiable transport document must be issued, cf. art. 81(b). This provision is not intended to be applicable to the carriage of containers or road vehicles.

Thirdly, the carrier’s liability may be excluded or limited if the parties agree to enter into a volume contract, cf. art. 80. A volume contract is defined in art. 1(2) as “a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time”. The freedom of contract for volume contracts is, however, subject to a number of safeguards for the shipper, cf. art. 80(2)-(6).
Thus, the shipper must have the option of entering into a contract of carriage on terms and conditions complying with the Rotterdam Rules instead of the volume contract. Further, the volume contract must contain a prominent statement that it derogates from the Rotterdam Rules and it must either be individually negotiated or prominently specify which sections of the volume contract derogate from the Rotterdam Rules (e.g. any clause limiting the carrier's liability). Finally, the derogation from the Rotterdam Rules may neither be incorporated by reference from another document (e.g. the carrier’s standard terms and conditions) nor be included in a contract of adhesion that is not subject to negotiation.

If the derogations in the volume contract (e.g. a limitation of the carrier’s liability) are valid as between the carrier and the shipper then for them to be valid between the carrier and someone other than the shipper (e.g. a consignee who is not the shipper) it is a further requirement that this person gives its express consent in writing to be bound by the derogations, cf. art. 80(5).

It is on the person claiming the benefit of the derogation to prove that all the conditions stated above have been fulfilled, cf. art. 80(6). Thus, in the case of a limitation of the carrier’s liability the carrier must prove that the conditions have been met.

8. Conclusion

As stated at the beginning, article 17 on the basis of liability for the carrier may on the face of it seem complicated, but when it is analysed, it sets out a clear regulation of the basis of liability and the allocation of the burden of proof at the various steps in establishing whether the carrier is liable or not. At the same time it clarifies certain aspects which are presently not clear and “weeds out” some undesirable rules that currently exist.

The liability is a fault-based liability and there are no actual exonerations for the carrier to rely on. The carrier is presumed to be at fault and must either prove that it is not or shift the burden of proof back to the claimant by proving that the loss, damage, or delay was caused by one of the perils listed in art. 17(3). The claimant then has the possibility of proving that the carrier was in fact at fault, that another event or circumstance caused the loss, damage, or delay, or that unseaworthiness was probably the cause. In the two latter events, the carrier then has a final possibility of proving that it was not at fault.
It is worth noting that the latter option, referred to above as the “burden of proof path”, works much in the same way as the treatment of damage caused by fire under the Hamburg Rules. Further, it is worth noting that the burden of proving unseaworthiness is a lighter burden, seeing as the claimant only has to prove that unseaworthiness was probably the cause.

The rules are mandatory and may thus not be derogated from to the detriment of the shipper. There are, however, some narrow modifications to this rule, of which the rules on volume contracts are a novelty as compared with the present conventions.

When evaluating whether the Rotterdam Rules are a benefit or a set-back compared to the rules currently in place, one cannot simply look at the basis of liability, but must instead look at all the rules relating to the obligations and liability of the carrier and indeed at the convention as a whole. However, it is respectfully submitted, that the rules on the basis of liability for the carrier should not in themselves deter any state from ratifying the Rotterdam Rules, whether presently a party to the Hague, Hague-Visby, or Hamburg Rules. Rather, the clarity regarding the basis of liability and not least the allocation of the burden of proof should be welcomed.