Right of control and transfer of rights
Anders Møllmann

1. Introduction

The topic of this presentation is the right of control and transfer of rights under the contract of carriage – two topics which are not regulated in any of the current maritime transport conventions. They are part of what may be said to be the trade related issues dealt with in the Rotterdam Rules. Their importance is, thus, not in direct relation to the carriage of the goods, but rather in relation to the role of the contract of carriage in international trade.

From the outset of the work leading to the eventual adoption of the Rotterdam Rules a broader approach was taken than that of the current maritime transport conventions with their focus on liability issues. Instead a contractual approach was taken with a holistic view of the contract of carriage rather than only dealing with liability in the situations where things go wrong. It was acknowledged that the convention should regulate the contractual relations between the parties to a contract of carriage on the background of the contract of carriage’s role in international trade.

This role in international trade goes way beyond liability issues. The contract of carriage and the documentation issued under it play a vital part in the sales agreement(s) regarding the goods carried and the documentary credits financing and securing payment under said sales agreement(s). For instance, a seller will not want to part with the goods unless he receives the purchase price while the buyer will be unwilling to pay unless she actually receives the goods. At the same time, a bank will be unwilling to extend credit to a buyer based on security in the goods unless it is certain to gain exclusive control over the goods. Thus, it is important for all parties involved in international trade involving carriage of the goods by sea to have clarity on these issues under the contract of carriage in order to safeguard their interests under the related contracts (sales contract(s), letter of credit etc.). However, the problems of who controls the goods while they are in transit and who has which rights to claim them is not regulated in the current maritime transport conventions, but is rather a matter for the differing national laws.

---

1 This is an outline of the oral presentation to be given at the international seminar in Yaoundé on 19 March 2010. It is therefore not attempted to be in the form of an academic article and thus does not include references.
The rules on right of control and transfer of rights are – together with chapter 9 on delivery of goods – key elements in the holistic approach of the Rotterdam Rules with the intention of wider harmonization of the contractual relations between the parties to the contract of carriage that are of importance for the contract of carriage’s role in international trade. They are not identical to the concepts and remedies under sales law (e.g. right of stoppage). They are independent concepts under the contract of carriage which facilitate the application of the sales law remedies under the sales agreement. It is, thus also apparent that the Rotterdam Rules do not attempt to regulate any aspects of the property in the goods. This is purely a matter for national law.

2. Implications of the broader scope of application of the Rotterdam Rules
Before getting into the content of the rules on right of control and transfer of rights it must be remembered that the application of the Rotterdam Rules – like the Hamburg Rules, but unlike the Hague and Hague-Visby Rules – is not dependant on the issuance of a specific type of transport document or, indeed, of any transport document at all. The regulation of the right of control and transfer of rights is thus relevant for all contracts of carriage with an international sea carriage and not just transports where a bill of lading has been issued. However, as described in the following, only the right of control has in fact been dealt with in the same comprehensive manner, whereas the transfer of rights is only dealt with partially and only where a negotiable transport document (i.e. an order or bearer bill of lading) has been issued.

3. Right of control
The right of control can be described as an exclusive right to unilaterally give the carrier instructions regarding the goods while they are under the carrier’s responsibility. It is defined in art. 1(12).

It is the instrument whereby the parties involved in the sales contract(s) and documentary credit(s), as described above, can make sure under the contract of carriage that they have exclusive control over the goods and thereby the instrument with which they can safeguard their interests. The right of control can be said to “mirror” the right of stoppage in transitu under sales law.

In regulating the right of control the Rotterdam Rules introduce a new entity, namely The Controlling Party, who is the one holding the right of control.
It is important to note that the Rotterdam Rules do not set out that the controlling party is a party to the contract of carriage. This is left for national law to decide. However, for practical purposes the carrier may see the controlling party as its counterpart during the transport as a result of the content of the right of control, which will be described below, and of art. 54 which establishes that the controlling party is the only person who may agree to variations of the contract of carriage with the carrier. Thus, the carrier may not agree with its original contract counterpart, the shipper, to change the contract of carriage (unless the shipper is also the controlling party).

There are four main points to consider when examining the regulation of the right of control. What does the right of control actually entail? When may the right of control be exercised? To what extent must the carrier execute orders given by the controlling party and what if it doesn’t? And, who holds the right of control?

3.1. What does the right of control actually entail?
The content of the right of control is set out in art. 50(1). The content is listed in three points, but may in fact be grouped in two where letter (a) contains instructions that are not a variation of the contract (i.e. changes the content of the contract), whereas letters (b) and (c) will almost certainly be a variation of the contract.

Letter (a) gives the controlling party the right to give instructions regarding the goods, e.g. what temperature they should be kept at or particulars regarding the practicalities of the delivery of these. As stated above, this kind of instruction does not vary the contract of carriage, but are rather of an operational nature. It is specifically stated in letter (a) that the instruction may not be a variation to the contract of carriage. Thus, if an instruction given is deemed to be a variation of the contract then it does not fall within the right of control and the controlling party can therefore not unilaterally impose an obligation on the carrier to execute the instruction (but the carrier may agree to vary the contract, as mentioned above).

Letters (b) and (c) give the controlling party the right to change the place of delivery or replace the consignee. Such instructions are, off course, much more intrusive in the carrier’s planning and
execution of the voyage. They change the main obligations of the carrier and are thus variations of the contract of carriage.

Letter (b) more specifically gives the controlling party the right to obtain delivery at any scheduled port of call if it is during the sea carriage and any place en route if it is during a preceding or subsequent land leg of the carriage. The controlling party cannot instruct the carrier to call at a port which is not scheduled for the specific voyage.

Letter (c) clarifies that the controlling party may replace the consignee by any other person including itself (i.e. the controlling party).

3.2. When may the right of control be exercised?
Art. 50(2) sets out that the right of control may be exercised during the entire period of responsibility as defined in art. 12. This differs from the transport conventions for other modes of carriage (e.g. the CMR for transport by road, COTIF/CIM for transport by railroad, and the Montreal Convention for transport by air) where the right of control ceases when the consignee claims delivery of the goods.

It is, however, open to the parties to the contract of carriage to agree on a different period for the right of control to exist, cf. art. 56.

3.3. To what extent must the carrier execute instructions given by the controlling party and what if it doesn’t?
As was seen above, the instructions given may interfere quite substantially with the carrier’s planning and execution of the voyage. Therefore, certain limitations to the carrier’s obligation to execute the instructions are contained in the rules, cf. art. 52 and 56.

As a starting point, the carrier must execute the instructions if the person giving them is entitled to exercise the right of control, cf. art. 52(1)(a).

However, it is a condition that the instructions can reasonably be executed according to their terms at the moment that they reach the carrier, cf. art. 52(1)(b). If, for instance, an instruction to deliver
the goods at a different (scheduled) port of call reaches the carrier just as the ship is about to leave said port, then the carrier may refuse to execute the instruction.

Further, it is a condition that the instructions will not interfere with the normal operations of the carrier, including its delivery practices, cf. art. 52(1)(c). If, for instance, the carrier has made the stowage plan for a large container vessel on the basis of the originally agreed destination and the controlling party gives an instruction to deliver the goods at a different port of call then the carrier will most likely be allowed to refuse to execute the instruction as this would probably require unloading and reloading of a number of containers and may even interfere with the safe stowing of the vessel.

As the instructions that may be given under art. 50(1)(b) and (c) (i.e. to deliver the goods at a different port of call or replacing the consignee) may, even with the safeguards just mentioned, have substantial impact on the carrier’s planning and execution of the voyage, it has been left to freedom of contract, cf. art. 56. Thus, the parties to the contract of carriage may agree to exclude or limit – or expand – the possibility of giving those kinds of instructions.

If the carrier executes the instructions given then the controlling party shall reimburse the carrier for any reasonable additional expenses that it may incur, cf. art. 52(2). Further, if the carrier suffers any loss or damage as a result of diligently executing any instruction then the controlling party must indemnify the carrier. This includes compensation that the carrier becomes liable to pay for loss of or damage to other goods on the ship. The carrier may ask the controlling party for security for such expense, loss, or damage as it reasonably expects will arise and may refuse to execute the instructions if no security is provided, cf. art. 52(3).

If the carrier fails to comply with an instruction without a valid reason and this results in loss of, damage to, or delay in delivery of the goods then the carrier may be held liable based on the general rules governing the carrier’s liability in art. 17-23 and limitation of liability in art. 59-61. The Rotterdam Rules, however, do not contain any rules on a potential liability of the carrier for other loss that the controlling party may suffer as a result of the carrier’s failure to comply with a valid instruction. This question is therefore left to the applicable national law. Any such liability under
national law would, however, seem to be a liability for the carrier’s breach of an obligation under the Rotterdam Rules and therefore be subject to limitation pursuant to art. 59-61.

3.4. Who holds the right of control?
Who then holds the right of control and is, thus, the controlling party? This is regulated in art. 51. Art. 51 is formulated as a general rule in paragraph (1) and three exceptions in paragraphs (2)-(4). However, in reality each of the four paragraphs simply regulate specific transports depending on which transport document (if any) has been issued.

The rules regulate three items for each type of transport; namely who the controlling party is from the outset; how the right of control may be transferred to someone else; and how the controlling party must identify itself when exercising the right.

As stated, art. 51(1) is formulated as the general rule, but when seen in connection with subparagraphs (2)-(4) it is evident that its scope of application is transports where either no transport document is issued or a non-negotiable transport document or electronic transport record is issued. In practice this means transports under sea waybills or transport where the consignor simply receives a receipt for the goods. In these cases the shipper is the controlling party unless the shipper when making the contract of carriage designates someone else, e.g. the consignee, as the controlling party. Art. 51(1)(b) sets out that the right of control may be transferred. It does not state how such transfer may be made and this is therefore left to the applicable national law. However, it sets out that vis-à-vis the carrier, the transfer becomes effective when it has been notified to the carrier by the transferor. It must also be remembered that the transferability of the right of control in this case is subject to freedom of contract and the parties can, thus, restrict or exclude the transferability, cf. art. 56.

Art. 51(2) deals with transports where a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods. In practice this means transports under so-called straight or recta bills of lading, i.e. bills of lading made out to a named consignee (and not to order). Here the shipper is the controlling party and may transfer the right of control by transferring the transport document to the named consignee without endorsement.
Art. 51(3) regulates transports where a negotiable transport document has been issued. In practise that is transports under traditional order or bearer bills of lading. In these cases the holder of the bill, as defined in art. 1(10)(a), is the controlling party and may transfer the right in accordance with the rules on transfer of rights in art. 57, cf. below.

Finally, art. 51(4) deals with transports where a negotiable electronic transport record is issued. Here, the holder of the transport record as defined in art. 1(10)(b) is the controlling party. As will be dealt with in another presentation, the use of negotiable electronic transport records requires that procedures be set up for inter alia the method for the transfer of the transport record, cf. art. 9(1)(a). Art. 51(4)(b) refers to this provision in setting out that the right of control may be transferred by transferring the electronic transport record in accordance with the procedures thus set up.

The question of how the controlling party must identify itself in order to exercise the right of control will not be examined further here, except to mention that when more than one original bill of lading has been issued then all originals must be produced.

4. Transfer of rights
Just as it is important to know who controls the goods while in transit, it is important for everyone involved in the contract of carriage to be able to clearly ascertain how rights and obligations under the contract of carriage may be transferred. However, whereas the right of control is a concept relating directly to the contract of carriage, regulating the transfer of rights and not least liabilities under the contract strikes at the very heart of the law of obligations. This subject was therefore much more controversial during the negotiations and eventually only a (less controversial) part of the intended regulation actually made it to the final convention. These rules which make up chapter 11, comprising art. 57-58, only pertain to transports under a negotiable transport document or negotiable electronic transport record.

Art. 57 sets out how rights incorporated in the transport document or electronic transport record may be transferred. For paper documents it may be said to simply codify the current practice although clarifying one point of contention. Thus, if an order document then the rights incorporated therein may be transferred by transfer of the document duly endorsed or without endorsement if the transfer is between the first holder and the person to whose order the document is made out. The
latter situation is the one which has been contentious; the issue being whether endorsement is necessary when the transfer is to the person named in the document.

As stated above, the use of negotiable electronic transport records requires that procedures be set up for inter alia the method for the transfer of the transport record, cf. art. 9(1)(a), and, unsurprisingly, the rights incorporated in the record may be transferred by transferring the record in accordance with said procedures.

The rule on the transfer of liability only regulates the subject partly. It contains two main rules and a clarification.

Firstly, and probably most important for practical purposes, art. 58(1) sets out that a holder who is not the shipper and who does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder. Thus, a buyer (who is not the shipper) of the goods who has the bill of lading transferred to him and then sells the goods on to someone else and transfers the bill of lading to this buyer without having exercised any right under the contract of carriage does not assume any liability simply by having been the holder of the bill of lading. The same goes for a bank which holds the bill of lading as a part of a documentary credit arrangement (of course always provided it doesn’t exercise any rights under the contract of carriage).

Secondly, art. 58(2) sets out that a holder that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract, but only to the extent that they are incorporated in or ascertainable from the negotiable transport document or electronic transport record.

Finally, art. 58(3) clarifies that a holder shall not be considered to have exercised any rights simply by transferring its rights or by agreeing with the carrier to exchange the negotiable transport document with a negotiable electronic transport record or vice versa.

5. Conclusion
The regulation of the right of control and transfer of rights is new to the maritime transport conventions. However, it is important in the attempt to harmonize the law on the contractual relationship between the parties to a contract of carriage with a view to ensuring clarity in the contract of carriage’s central role in international trade.

As such, the rules on right of control provide a set of rules that mirror the existing trade usage and will hopefully be of value to the trading community in providing wider legal certainty.

It seems a pity that it was not possible to also agree on a wider regulation of the transfer of rights and liabilities under the contract of carriage as this would have given all parties involved in international trade involving sea carriage of the goods a better possibility to ascertain their legal position. However, the subject was so controversial that there was a real risk of the entire convention becoming unacceptable to many states simply by the introduction of more comprehensive rules on this matter. It therefore seems wise that such regulation was “sacrificed” to ensure a wider acceptability of the convention as such.