

## **The Rotterdam Rules- Should India Ratify?**

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## Introduction

The Indian Shipping Statistics 2011<sup>1</sup> reveal that during 2010-2011 the total overseas cargo handled at Indian Ports was 732.28 million tones. It demonstrates the importance that rules of carriage of goods by sea such as Rotterdam Rules are of to an emerging India. The debate has already begun on the feasibility and practicality of signing the Convention in India and since there is little doubt that the rules will come into force<sup>2</sup>, it is important to understand their effect if India finally decides to ratify the Convention.

The bifurcation between carrier states and shipper states is a historic result of economic position of respective countries. Countries like U.S or Britain were able to develop a formidable merchant fleet due to their resources. On the other hand a country like India, a victim of colonialism, did not have access to its own resources to develop in the same manner. However, a 21<sup>st</sup> century India possesses one of the largest fleet in the world and is in a position to make a substantial difference to world trade. Therefore, while we must make sure that our own interests are protected, at the same time we need to be proactive instead of reactive. The key concern expressed by participants in a meeting organized by BCC&I's Shipping, Transport & Logistics Committee on the issue was about the implications of the rules<sup>3</sup> Practical questions, such as what would be the implications of terms like 'volume contract' and 'transport document' used in the Rules on actual shipping concerned the participants more than whether the rules are pro-shipper or pro-carrier. Therefore, this paper would attempt to provide an answer to some of these questions by firstly, analyzing important provisions of the rules specifically those related to the issue of carrier's liability which is the principal aim of the Convention. Secondly, certain important concepts and terms important to the working of the Convention will be discussed to develop a proper understanding. In the third and fourth Chapter I will attempt to provide a representative analysis of the positions of various countries including India on the Rules. Finally, I would conclude by presenting my own opinion on the Rules and if India should ratify the Convention.

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<sup>1</sup> Indian Shipping Statistics 2011, Transport Research Wing, New Delhi  
@<http://shipping.nic.in/showfile.php?lid=1024>

<sup>2</sup> Dennis Minichello, *The Coming Sea Change in the Handling of Ocean Cargo Claims for Loss, Damage or Delay*, 36 Transp. L.J. 229, 2009

<sup>3</sup> BSN Network, *DDGS appeals for quick response on Rotterdam Rules*, July 26<sup>th</sup> 2010, @  
<http://www.bhandarkarpub.com/NewsDetails.asp?id=9504>

# Rotterdam Rules-A Comparative Analysis of Carrier Liability

## **Introduction:**

Due to the unfair bargaining power of the carrier, a shipper generally has little discretion in negotiating the terms of bill of lading. In order to protect the Shipper various rules have been formulated at the international level which have been ratified by and incorporated into domestic laws by the member states.<sup>4</sup> The first of such rules was Hague Rules whose framing was necessitated due to the complex nature of clauses in bills of lading exempting the carrier from various liabilities. The rules provide for the carrier's duty and liability in respect of goods shipped from a port in a contracting state, or where the bill of lading is issued in a contracting state. The rules can be incorporated in the shipping documents to which they don't generally apply such as charterparties. The former two rules namely Hague rules, Hague-Visby rules were based on Harter act and Harter style acts which were heavily tilted towards carriers and therefore incorporated and subsequently retained primary compromises regarding carrier's liability.<sup>5</sup> The Hamberg Rules tried to achieve some radical changes which were not generally accepted.

## **Hague Rules:**

1. No strict liability of carrier for unseaworthiness of the vessel<sup>6</sup> but must exercise due diligence in providing a seaworthy vessel.<sup>7</sup>
2. Could escape liability for negligence of employees in navigation and management of vessel<sup>8</sup> but was responsible for negligence of employees in care and custody of vessel<sup>9</sup>

**Hague –Visby Rules:** Kept both compromises in place<sup>10</sup>

**Hamberg Rules:** Kept the part relating to due diligence compromise on seaworthiness in part 1<sup>11</sup> but made the carrier liable for the negligence of employees for navigation and management.

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<sup>4</sup> Carriage of Goods by Sea Act, 1971, implements the Hague-Visby Rules in United Kingdom

<sup>5</sup> This Chapter is primarily based on an analysis of Chapter V of the book; Michael F Sturley, Tomotaka Fujita, Gertjan van der Ziel, THE ROTTERDAM RULES, SWEET AND MAXWELL, 2010

<sup>6</sup> Hague Rules, Art 4. 1

<sup>7</sup> Hague Rules, Art 3. 1

<sup>8</sup> Hague Rules, Art 4.2.a

<sup>9</sup> Hague Rules Art 3.2

<sup>10</sup> Hague-Visby Rules, Art 3.1,3.2,4.1,4.2.a

### **Pre-Rotterdam Rules Situation regarding Carrier's Liability:**

In keeping with the 'bill of lading' model The Hague and Hague –Visby rules specified certain conditions in which the carrier would not be liable for cargo loss or damage.

1. Negligence of Employees in navigation and management of vessel<sup>12</sup>
2. 'excepted perils'- specific risks<sup>13</sup> including fire if caused by negligence of employee and carrier not personally responsible<sup>14</sup>
3. General catch all exception excusing the carrier from liability whenever he could show that neither the carrier nor any person for whom the carrier was responsible was at fault.<sup>15</sup>
4. Other causes such as act of god<sup>16</sup>, third party interference<sup>17</sup>, fault of the shipper or the goods themselves<sup>18</sup>

**Hamberg rules:** Eliminated the traditional catalogue of 'excepted peril'<sup>19</sup>, while retaining special treatment for loss due to fire and salvage<sup>20</sup>

**Limitation of Liability:** Carrier could limit its liability to a fixed sum per package or other unit under Harter style acts.<sup>21</sup> Under Hague rules it was 100 pounds per package or unit.<sup>22</sup> Under Hague-Visby rules amount was increased again and the value was changed to an international monetary unit and liability was limited on the basis of weight.<sup>23</sup> Hamberg rules continued the limitation with 25% increase in values of both package and weight based limitation.<sup>24</sup>

**Rotterdam Rules:** Rotterdam Rules (hereinafter referred to as "the Rules) were adopted by the United Nations General Assembly in December of 2008 and were opened for signature in September 2009. The 21 nations that have signed the Convention control 25% of world trade.

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<sup>11</sup> Hamberg Rules art 5

<sup>12</sup> Hague-Visby Rules, Art 4.2.a

<sup>13</sup> *id.*, Art. 4.2

<sup>14</sup> *id.*, Art 4.2.b

<sup>15</sup> Hague- Visby Rules, Art 4.2.q

<sup>16</sup> *id.*, Art 4.2.b

<sup>17</sup> *id.* Art 4.2 e-h, j-k

<sup>18</sup> *id.* Art 4.2 I, m-p

<sup>19</sup> Hamberg Rules, Art 5

<sup>20</sup> *id.*, Art 5.4, 5.6 w.r.t. Hague-Visby Rules Art 4.2.b &4.2.1

<sup>21</sup> Water Carriage of Goods Act Canada, 20 pounds per package

<sup>22</sup> Hague Rules, Art 4.5

<sup>23</sup> Hague-Visby Rules, Art 4.5.a

<sup>24</sup> Hamberg Rules, Art 6.1.a

## **1. Ch4 : Basic obligations:**

Declares that carrier must perform its core contractual obligations,<sup>25</sup> prior conventions did not explicitly declare it,<sup>26</sup> and they merely imposed certain obligations about how the carrier should perform its contract and certain legal consequences of failure.<sup>27</sup> This clarification is important for two reasons, firstly it lays a basic framework for the convention i.e. the essential basis of obligations is the contract between the parties which has been voluntarily agreed to by the carrier thereby more fully defining the legal relationship among the parties, secondly it removes various doubts which plagued earlier conventions by becoming a part of calibrated structure of the rules such as whether 'misdelivery' (delivery to wrong person) would constitute a breach under the H.V. rules or under contract of carriage governed by otherwise applicable law,<sup>28</sup> under Art 11 of the Rules it is clear as 'delivery of goods to the consignee' is one of the core obligations of the contract and therefore misdelivery will constitute a failure to fulfill core obligations of the contract.

**a. General obligations:** Art 13 (1) mandates that carrier should perform every aspect of the contract "properly and carefully". The term "properly and carefully" has been used in Hague (Art 3.2)<sup>29</sup> and Hague-Visby rules and therefore there is a rich jurisprudence to ascertain what the term means. However carrier's obligation will depend on type of good, risks to which they are exposed, reasonable resources and host of other factors which will be ascertained on a case to case basis. Hague and other conventions are based on tackle-to-tackle period i.e. carriers liability begins at loading the goods (literally when the tackle of the ship is attached to the goods for loading) and ends with unloading the goods. However the Rules being a convention regulating multimodal transport foresees door-to-door basis i.e. carrier may receive the good long before loading and deliver the good long after unloading. Hence, two words 'receive' and 'deliver' have been added and 'discharge' has been replaced with 'unload' to reflect the multimodal nature of convention. Art 13.1 limits the liability of a carrier only to the period during which he has the charge of the goods.

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<sup>25</sup> Rotterdam Rules, Art 11

<sup>26</sup> Hague- Visby Rules, Art 3.1

<sup>27</sup> Hamberg Rules, Art 5

<sup>28</sup> *Supra* Note 6, p.81, footnote 36

<sup>29</sup> load, handle, stow, carry, keep, care for and discharge;

- b. Specific obligations:** Art 14 deals with Carrier's responsibility regarding seaworthiness. Seaworthiness consists of following things; actual seaworthiness of ship, proper crewing, equipping and supplying of the ship and fitness of the holds, other parts of the ship in which goods are carried and carrier-supplied containers for the reception, carriage and preservation of the goods. The jurisprudence on each of these terms is well –established as they are included in Hague rules. The significant change in the obligations is that Carrier's liability to ensure that every place is cargo-worthy extends not only to the traditional holds but also to the 'containers supplied by the carrier'. Another significant change is that the due diligence requirement has been made an "ongoing obligation" i.e. it extends to 'during' the journey apart from 'before and at the beginning of the journey'. Consequently, the traditional requirement to 'make' the ship seaworthy has been extended to 'make and keep the ship seaworthy'. However, it should be noted that the required due diligence will differ significantly at the beginning and during the journey due to the change in conditions. Carrier is expected to exercise more due diligence when the ship is at port compared to when the ship is in the middle of the ocean facing adverse conditions.
- c. Period of Responsibility:** The liability of a carrier is closely tied with the period of responsibility as defined in Art 12. In contrast to tackle-to-tackle period of Hague and Hague-Visby or port-to-port (i.e. charge of the goods at the ports of loading and unloading) of Hamberg, the period of responsibility in Convention is door-to-door basis. Hence, the carrier's period of responsibility will run from the moment he receives the good (which will be a physical act). Receipt of goods can be in multiple ways which have been discussed comprehensively in UNCITRAL discussions. Another situation is where the goods are first transferred to a third party<sup>30</sup> such as a custom authority and not an agent of the carrier from whom the carrier collects them the period of responsibility will begin when the carrier receives the goods from the third party.<sup>31</sup>
- d. Delivery-End of Responsibility:** Delivery marks the end of carrier's period of responsibility. Delivery can be in multiple ways which have been extensively

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<sup>30</sup> Art. 12.2.a

<sup>31</sup> Hamberg Rules have the same provision, Art. 4.2.a.ii

discussed in Ch VII of the report. Similar to receipt, transfer of goods to a third party other than agent of consignee or shipper will constitute delivery. In addition in both cases i.e. receipt and delivery of goods, parties have the freedom to change the terms of the contract subject to the condition that period of loading and unloading can not be sooner than or after the period of loading and unloading of tackle-to-tackle period respectively.

- e. **Exceptions:** Article 13 (2), 15, 16 create exceptions under which the Carrier can claim exceptions to his obligations. Firstly, FIO (Free In and Out stowed) terms can be incorporated in the contract thereby shifting the responsibility of loading and unloading to shipper, shipper's agent or the consignee due to the nature of the goods. However, this arrangement will have no effect on carrier's period of responsibility. Secondly, where the goods are of dangerous nature i.e. carrying of goods may pose an unreasonable risk to the persons, property or the environment.<sup>32</sup> Thirdly, General Average Sacrifice<sup>33</sup>, an old exception common to all Conventions which excuses the carrier "when the sacrifice is reasonably made...for the purposes of preserving a human life". There can be two situations when the cargo sacrificed itself is the source of risk and when a cargo has to be sacrificed due to some external risk.
2. **Ch5 5: Liability in loss, damage and/or delay:** Chapter 5 provides the mechanism for determining the carrier's liability and related issues in case of loss, damage or delay.
  - a. **Analytical Framework:** Art 17 provides the basic analytical framework for claims, counterclaims and defenses provided in the convention. Firstly, the list of excepted perils discussed earlier which had been excluded from Hamberg Convention is included in the Rules however only as presumptions which can be rebutted by showing that the peril was a fault of the shipper. The initial claim is filed by the claimant establishing *prima facie* case of loss due to any of the above mentioned factors; the carrier can then plead any of the excepted perils<sup>34</sup> or argue that he is not at

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<sup>32</sup> Hamberg, Hague and Hague-Visby have similar exceptions, Rotterdam also includes it as an 'excepted peril' Art 17..3.o

<sup>33</sup> Rotterdam Rules, Art. 84 and Art 17.3.o

<sup>34</sup> *id.*, Art 17.3

fault<sup>35</sup>, and has to satisfy the burden of proof imposed on him by the provision. The claimant can then demonstrate sufficient carrier fault in causing the pleaded peril by satisfying his burden of proof.

**Specific Situations:**

- **Navigational Fault:** Has been excluded from the list of excepted peril in Rotterdam as well as Hamberg.
- **Fire:** Under Hague and Hague-Visby rules the carrier is shielded from liability of fire as the negligence of master of the ship or the crew is not attributable to him<sup>36</sup> Hamberg rules modified the rule by making carrier responsible for fault of agents or servants.<sup>37</sup> In the Rules<sup>38</sup> the claimant can show that the fire was caused by any person for whom the carrier is responsible in contrast to The Hague rules which required “actual fault or privity of the carrier”.
- **Salvage:** Hague and Hague-Visby did not distinguish between salvage of life or property,<sup>39</sup> in Rotterdam the salvage has been divided onto three; while carrier is expected to take reasonable measures for saving property and avoiding damage to property or environment, there is no such requirement of reasonableness for saving life.<sup>40</sup>
- **Seaworthiness:** As discussed seaworthiness comprises of three components and the burden of proof has traditionally been on the carrier to prove that he exercised due diligence. However, this burden is triggered by an initial showing by the claimant that *prima facie* the ship was in fact in an unseaworthy condition and that the damage, loss or delay was caused by that unseaworthiness. The burden of proof to prove unseaworthiness is normal. Art 17.5 dealing with unseaworthiness provides that the claimant should prove that “the loss, damage or delay was or was probably caused by or contributed to by” the unseaworthiness. The standard of proof based on the language of the provision, opinion of scholars and drafting history has been held to be of ‘preponderance of evidence’ i.e. the claimant has to prove that it is more likely

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<sup>35</sup> *id*, Art 17.2

<sup>36</sup> Hague and Hague-Visby Rules, Art 4.2.b

<sup>37</sup> Hamburg Rules, Art 5.4

<sup>38</sup> Art 17.3.f

<sup>39</sup> Hague- Visby Rules, Art 4.2.1

<sup>40</sup> Art. 17.3.1

than not that unseaworthiness caused the loss, damage or delay. However, the Carrier may escape liability if he can show either that unseaworthiness was not a cause of loss or that he exercised due diligence.

**b. Liability for Delay:**

1. **The Hague and Hague-Visby Rules:** They do not expressly address the issue of liability for delay. During the negotiations that produced the Visby rules two unsuccessful proposals were made to address carrier liability. On the other hand there is inconsistency among domestic courts regarding the nature of carrier's liability for delay under the abovementioned rules. For e.g. subject to the ruling in *Hadlay v. Baxendale*<sup>41</sup> in some common law countries damages are only awarded in case of delay if the resultant losses were foreseeable. The Hamburg rules addressed delay explicitly by making the carrier liable "also for delay"<sup>42</sup> subject to exceptions such as delivery time should be agreed, notice within 60 days of delivery should be served in case of delay and also limiting the liability to the cost of freight.
2. **The Rules:** Firstly, the Rules distinguish between physical damage to goods caused due to delay and delay it self. Damages such as spoilage will be covered by pertinent provisions such as Art 17 and carrier can defend himself by proving that delay which led to the damage was caused due to "excepted perils". Hence, the Rules essentially focus on the economic losses as a consequence of delay such as loss of market. However, as Hamburg the provision has been qualified<sup>43</sup> by the requirement of initial agreement between the shipper and carrier regarding time of delivery as well as requirements of reasonableness expected from a diligent carrier.
- c. **Vicarious Liability:** Though with exceptions, even Hague and Hague-Visby rules have recognized the vicarious responsibility of the carrier for "neglect or fault" of his "servants and agents".<sup>44</sup> The Rules also establish the principle of vicarious liability in Article 18 and 19.3. It is closely connected with the definition of 'performing parties',<sup>45</sup> which includes essentially anyone who comes under the carrier's mantle such as employees, agents, subcontractors, independent contractors. However, the

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<sup>41</sup> 9 Exch. 341, 156 Eng. Rep. 145 (1854)

<sup>42</sup> Hamberg Rules, Art 5.1

<sup>43</sup> Art 21

<sup>44</sup> Hague-Visby Rules, Art 4.2.q

<sup>45</sup> Article 1.6

carrier is not vicariously liable for the acts or omissions of someone that did not act “either directly or indirectly at the carriers; request or under the carriers supervision or control.”<sup>46</sup>

- d. **Calculation of Damages:** Though the carrier may be entitled to limit the damages payable it is important to first calculate the total damages without regard to any limitation. Article 22 of the Rules lay down a few basic principles regarding calculation of damages such as arrived-value principle<sup>47</sup> “which means that in order to calculate the value of the performance that a consignee should have received under the contract of carriage- the decision maker looks to the value that the goods would have had if they had arrived safely at the contractually agreed place of delivery when they were supposed to arrive there”<sup>48</sup> The Hague-Visby rules substantially had the same provision.<sup>49</sup> It also lays down the sources<sup>50</sup> of ascertaining arrived value such as market-price, commodity-exchange price, normal value of goods of the same kind and value at the place of delivery or in absence of these other general contract principles under the applicable law. Article 22.2 rejects the possibility of consequential damage in absence of specific prior agreement between the parties.

### 3. **Ch 12: Limits on Liability:**

1. **Limitation on Liability for Loss of or Damage to the Goods:** Article 59 establishes the basic rules for limitation in cases of loss or damage. The practice of providing for limited liability has been held to be fair and efficient way to structure a commercial transaction. A carrier is not a random tortfeasor injuring non-consenting victims. The risks associated with a carriage contract are allocated between the shipper and the carrier in the form of higher or lower freight charges. Limitation effectively seeks to shifts the risk of loss for high value cargo to the shippers of that cargo who can make their own arrangements such as maritime insurance to cover the risks. These

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<sup>46</sup> Art 1.6.a, Art 18.d

<sup>47</sup> Art 22.1

<sup>48</sup> Any doubt regarding place and time of delivery is governed by Art 43.

<sup>49</sup> Hague-Visby Rules, Ar.t4.5.b

<sup>50</sup> Art 22.2

provisions seek to allocate the risks involved in a maritime adventure among the parties involved.<sup>51</sup>

- a. **Package or Unit Limitation:** Similar to Hague and Hague Visby Rules Art. 59.1 of the Rotterdam rules established a package/unit limitation provision. The term package gradually became subject of intense legal debate as the ‘container revolution’ changed the face of industry. Hague-Visby introduced a new term namely ‘container clause’ which provided that “the individual packages in a container constitute packages for limitation purposes if they are ‘enumerated in the bill of lading’<sup>52</sup> Otherwise, the container itself would be a single package and limitation will be calculated on the weight of the cargo. Hamburg Rules adopted the same language without exclusive reliance on bill of lading.<sup>53</sup> Rotterdam rules contain the container clause subject to the limitation that instead of bill of lading the packages should be enumerated in the contract particulars.<sup>54</sup>
- b. **Weight Based Limitation:** To overcome the limitations of package system, Hague-Visby and Hamberg introduced a weight based limitation of liability.<sup>55</sup> It is a very uniform, certain and predictable limitation system. Rotterdam rules continues the practice in Art 59.2
- c. **Declaration of Higher Value:** Both rules are default rules which can be excluded from operating if the shipper declares in the contract particular value of the goods or by entering into a separate agreement with the carrier for a higher limitation. In practice however an informed shipper never declares a higher value for goods as the freight charges will increase accordingly and will generally become higher than the cargo insurance premium. It is more common for shippers to enter into separate agreements with the Carriers where large number of shipments is involved.
- d. **Limitation amounts:** Hague Rules- 100 pounds/package, Hague-Visby-10,000-Poincare francs/unit and 30 Poincare Francs/kilogram, Hamberg Rules-835

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<sup>51</sup> Tomotako Fujita, *Introduction, Comite Maritime International, Yearbook 2007-2008, Athens I, Documents of the Conference*, 264

<sup>52</sup> Hague -Visby Rules, Art 4.5.c

<sup>53</sup> Hamburg Rules, Art 6.2.a

<sup>54</sup> Art 1.23, Art 36.1.c, Ch VII

<sup>55</sup> Hague- Visby Rules Art 4.5.a, Hamberg Rules Art 6.1.a

SDRs/package and 2.5 SDRs/kilogram, Rotterdam 875 SDRs/package and 3 SDRs/kilogram.

2. **Limitation of Liability for Delay:** Limitation for Liability for Physical Damage due to delay will be covered by the Art 59.1. Where consequential damages are an issue the carrier's right to limit his liability is governed by Article 60 and delay limit will be based on amount of freight collected instead of quantity or price as provided below. Secondly, the liability for delay can not be greater than liability for total loss of goods under Article 59.1. It has been so provided simply because the carrier can not be put in a worse off position for only delay than in a situation where he fails to deliver the goods altogether. Limitation amount is limited in case of economic loss to two and a half times the freight payable on the goods delayed by Article 60. The limit is similar to the limit under Hamberg rules.<sup>56</sup> The Rules represent an increase of 150 % above the Hamberg rules.
3. **Exceptions to Limitation:** In very exceptional cases where the claimant can show that the relevant loss resulted from the shipper's personal breach of an obligation '*done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result*' the carrier will lose its right to limitation. In such cases of delay the claimant must prove that delay resulted from the person's personal act or omission '*done with the intent to cause the loss due to the delay or recklessly and with the knowledge that such loss would probably result*'<sup>57</sup>
  - a. **Burden of Proof:** A substantial burden of proof is on the claimant to prove the above mentioned conditions in order to deny the carrier his right of limitation.
  - b. **Personal Fault:** Vicarious or third-party violations will not make the carrier lose his right to limit liability. The fault or breach must be personal in the strictest sense except when the third party is so senior( for example a senior management official in a shipping company) whose authority can be said to be controlling the actions of the carrier.

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<sup>56</sup> Hamberg Rules, Art 6.1.b

<sup>57</sup> Art 61

- c. Intentional or Reckless Conduct:** The standard of proof to establish that the carrier's conduct was intentional or reckless may be higher than 'gross negligence' and may be equated with the requirement of intention under criminal law.
- 4. Interaction between Rotterdam Rules and Global Limitation:** Where a ship owner is operating in multiple jurisdictions he is entitled to 'global limitation' under international convention such as LLMC 1976 as well as under the rules. In such a case the cargo claimant is subject to 'double limitation'.

### **Conclusion:**

The core of the Convention is the carrier's liability and the essential features of the new structure created in the Rules are firstly basis of liability and secondly allocation of the burden of proof.<sup>58</sup> Comparatively, the Rules have modernized the duties of the Carrier by taking into account the prevalent practice of door-to-door and container transport. On the other hand by retaining the terminology of previous rules the Rules can avail the benefit of the settled jurisprudence on various issues. As one author suggests the maritime industry has to adjust to the new duties of the carrier such as the ongoing duty to provide a seaworthy vessel and other implied duties.<sup>59</sup> As noted by an observer<sup>60</sup> the objective of the Convention is to achieve a balance between tradition and modernity, the interests of vessel and cargo and the common law and continental systems. Provisions relating to Carrier's liability reflect this need for balance and when the Rules come into effect will further the said objective. The provisions which limit the Carrier's liability can come under criticism from shipper interests. However, such criticism will be unwarranted as it has a logical and reasonable basis. If the Carrier is not allowed to limit the liability he may instead raise freight or take higher insurance which will again adversely affect shipping interests. Second ground of criticism is a slightly complicated system allocation of burden of proof provided in Article 17. However, the aim of the Rules as is to balance cargo and shipper interests and therefore some complication is unavoidable. Hopefully, with time these complications will be sorted out.

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<sup>58</sup> Si Yuzhou, Henry Hai Li, *The New Structure of the Basis of Liability of the Carrier*, Paper presented at the Colloquium of the Rotterdam Rules 2009 at De Doelen on 21<sup>st</sup> September, 2009

<sup>59</sup> Theodora Nikaki, *The Carrier's Duties under the Rotterdam Rules: Better the Devil you Know?* 35 Tul. Mar.L.J 1, 2010-11

<sup>60</sup> Philippe Delebecque, *The New Convention on International Contract of Carriage of Goods Wholly or Partly by Sea: A Civil Law Perspective*, *Comite Maritime International Yearbook 2007-2008*, Athens I, Documents of the Conference, 264

## Important Aspects of the Rules

The analysis in the foregoing section shows that the scope of Rotterdam rules is much greater than the previous conventions a fact reflected in the 96 articles and 18 chapters of the Rules. The primary aim of providing a uniform and binding universal regime for shippers and carriers finds its place in the preamble of the Rules. In this attempt it includes certain new terms which may create some initial confusion, however a clear understanding will help us address that confusion in a constructive manner.

- **Transport Document:** Chapter 8 of the Rules describes in detail the term and its variations which have been used in place of the more familiar bill of lading. Transport document and its electronic equivalent have been divided on the basis of negotiability or non-negotiability of the document. There is no difference between ordinary and electronic records except that the latter must be used with the consent of both the carrier and shipper. Since the Rules give primacy to the contract of carriage, all procedures of issuing and transferring these documents must be stipulated in the contract itself. This may prove to be an area of concern and require legislative or judicial guidance. Art. 36, lists various information that the transport document must contain such as leading marks, number of packages and other necessary information. A document properly issued in accordance with the provisions of the rules will be *prima facie* evidence in favor of shipper or in the event of third party transfer.
- **Electronic T.D:** The object of including electronic transport document is obvious. Technological changes are increasingly making paper obsolete even in India and therefore the Rules incorporate a modern and efficient way of doing business. Though in essential aspects both paper and electronic formats are same, commentators suggest that few things have to be kept in mind while dealing with the latter and particularly in its negotiable form. Firstly, since as noted above the procedure of transferring the document has been left to the parties, 'the exclusive control' of a negotiable electronic transport document is not limited to mere movement of document but will depend on certain systems which have been identified as feasible for this purpose. One such system is token system which as its name suggests creates an electronic equivalent of a token of entitlement. A similar system is registry system where the documents are kept in an e-vault for the registered holder. Secondly, the role of third

parties such as trade facilitators and certification authorities in this regard is crucial as the reliability of a negotiable document will depend on the credibility of the party providing it, who may be agents or representatives of the parties.<sup>61</sup> As Alba notes<sup>62</sup> the notion of control in electronic records is similar to what possession is for paper ones and therefore will determine the extent i.e. unencumbered or restricted, to which the holder of the document acquires the associated rights.

- **Jurisdiction and Arbitration**: Chapter 14 and 15 of the Rules address the crucial procedural issues of choice of court in litigation and place of arbitration respectively. The choice of forum may in some cases affect the very result of a dispute due to operation of conflict of laws rules applicable in particular country and therefore this aspect of the Convention requires minute examination. While generally dispute should be avoided if possible, if a dispute nevertheless arises a sympathetic and convenient forum will be the natural choice of each party. The chapters are so vital that even after vigorous negotiations a complete compromise could not be reached and therefore they were made ‘opt in’ chapters and countries are free to ratify the Convention without them<sup>63</sup>. The primary reason for the divergence of opinion can be traced to the conflict that results when a good is found to be damaged which is usually at the port of discharge or place of destination. In such a scenario cargo interests will be in a favorable position to commence suit at their home ground while carrier interests will want to avoid it.<sup>64</sup> Hence, the necessity to provide a way out. Nations who choose to ratify the chapters even at a later date are required to make a declaration giving effect to such ratification. Due to this option many nations may choose not to ratify them and therefore providing an exhaustive review may be premature at this stage. However, certain observations made by informed commentators<sup>65</sup> regarding the nature of provisions may be useful in making that decision. Firstly, the provisions are an evolutionary step which closely follow similar provisions of Hamberg Rules and the exceptions provided therein are based on

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<sup>61</sup> Manuel Alba, *The Use of Electronic Records as Collateral in the Rotterdam Rules: Future Solutions for Present Needs*, 14 Unif. L. Rev. 801, 2009

<sup>62</sup> Manuel Alba, *Electronic Commerce Provisions in the UNCITRAL Convention of Contract for the International Carriage of Goods Wholly or Partly by Sea*, 44 Tax. Int’l L.J 387, 2008-09

<sup>63</sup> Art 74 and 78 of the Rotterdam Rules

<sup>64</sup> Chester D. Hooper, *The Rotterdam Rules*, Current Magazine, Issue No. 30, May 2010

<sup>65</sup> Michael F. Sturley, *Jurisdiction and Arbitration under the Rotterdam Rules*, 14 Unif. L. Rev. 945, 2009

freedom-of-contract principles which are derived from the Hague Rules and thus provide a balance. Secondly, the overriding aim of the provisions is to provide uniformity while being pragmatic as they have been drafted based on the feedback received from industry. Therefore, while important in their own right they are subordinate to the interests of particular countries and as noted may not be ratified if thought to be inconsistent with those interests.

- **Obligations of Shipper:** The nature of international trade, particularly maritime, demands that parties behave in a transparent and trustworthy manner. Chapter 7 of the Rules in this spirit requires the shipper and the carrier to exchange information relating to possible dangers of cargo and the way to safely handle such cargo<sup>66</sup>. The responsibility of the shipper in this regard is more extensive as he must provide information in this regard on his own accord and even without a request from carrier. The liability of shipper is strict and does not depend on negligence or *mens rea*. Article 32 clearly provides in a tone similar to the corresponding provisions of other rules that goods are dangerous ‘if they are so by their nature or character or reasonably appear likely to be dangerous’. One of the benefits of having similar provisions in earlier rules is that the jurisprudence is quite clear on the issue. In *Senator Line GMDH & CO. KG v. Sunway Line, Inc, et al*<sup>67</sup>, which dealt with a similar provision in Carriage of Goods by Sea Act of United States which in turn is based on Hague Rules, it was categorically held “*that it is a risk-allocating rule that renders a shipper strictly liable for damages in the event that neither the carrier knew or should have known that shipped goods are inherently dangerous*” Similarly in *Effort Shipping Co. v. Linden Mgt. SA*<sup>68</sup> the House of Lords held that Article 4.6 of the Hague Rules “*imposes strict liability on shippers in relation to the shipment of dangerous goods, irrespective of fault or neglect on their part*”. Therefore, as one commentator notes, the Rules clarify rather than change the present obligations of shippers and may serve to reduce litigation in future.<sup>69</sup>

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<sup>66</sup> Art. 28 and 29

<sup>67</sup> 291 F3d 145 (2d Cir. 2002)

<sup>68</sup> 1998 A.C. 605

<sup>69</sup> Chester D. Hooper, *Obligations of the Shipper to the Carrier under the Rotterdam Rules*, 14 Unif. L. Rev. 885, 2009

- **Freedom of Contract**<sup>70</sup>: The Rules adopt a hybrid model of contract approach and trade documentary approach in order to provide for freedom of contract in a manner which is consistent with the general objective of ensuring that carrier liability is fixed while providing freedom of contract to parties especially in Volume Contracts. The contract of carriage constitutes the basic document through which liabilities of carrier under the Convention can be limited. At the same time the Rules will generally apply to contracts in linear transportation<sup>71</sup> while excluding therein charter parties and contracts for the use of ship or space thereof. Alternatively, the rules do not apply to non linear transportation<sup>72</sup> except when a transport document is issued. Secondly, any derogation from the Rules agreed in the Contract according to Article 6 and consistent with domestic legislation will not apply to a third party such as consignee. Thirdly, the consent to any derogation must be specific by identifying it and a signature on transport document listing the derogations by the shipper will not suffice. Finally, freedom of contract in circumstances which justify special treatment such as carriage of whole set of machinery and other equipment required for construction of a steel factory is permitted.
- **Volume Contract**: The concept of volume contract flows from service contracts such as an “Ocean Liner Service Agreement”. Service contracts have a long history commencing from the deregulation of shipping lines by the 1984 Shipping Act in the United States and have overall benefited both the carriers and majority of shippers by allowing market forces to have a considerable free play in deciding the terms offered by carriers to shippers based on volume and time.<sup>73</sup> Volume Contracts defined in Article 1 (2) includes this concept in order to introduce a prototype of free bargaining in the Rules. A volume contract provides for the carriage of a specified quantity of cargo in a series of shipments during an agreed period of time. As noted by some

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<sup>70</sup> Derived from, Francesco Berlingieri, *Freedom of Contract under the Rotterdam Rules*, 14 Unif. L. Rev.831, 2009

<sup>71</sup> Art 1(3)

<sup>72</sup> Art 1(4)

<sup>73</sup> Elizabeth E. Bailey, *Price and Productivity Change Following Deregulation: The US Experience*, *The Economic Journal*, Vol.96 No. 381 (1986), Paul W. MacAvoy, *Industry regulation and the Performance of the American Economy* New York: W.W. Norton, 1992, cited in *Infra* Note 70

commentators<sup>74</sup>, volume contracts will foster efficiency in seamless transportation within a legal framework that recognizes carriage liability as a general rule.

- **Multimodal Transport:** It is clear from the name of the convention itself that at least one leg of the journey must be by sea in order for the Rules to apply. However, the question is to what extent inland carriers of other modes engaged in ancillary carriage are affected by the rules. In keeping with the general nature of the convention, the Rules do not introduce any revolutionary change but only take the existing paradigm one step further. For example as noted by one observer, the adoption of the Rules would result in little fundamental change in United States.<sup>75</sup> Firstly, a direct action against the inland carrier is not possible; the rules apply to inland carriage if it is covered by the same contract which covers the maritime leg of the voyage. Secondly, the domestic liability rules will come into effect if the conditions provided in Article 26 are met.<sup>76</sup> Thirdly, practically speaking, the Rules will apply only at the preloading or post loading stages of maritime door-door contracts.<sup>77</sup> Finally, the Rules do not effect the application of any other Conventions which have been provided therein to a limit.<sup>78</sup> However, some observers have argued that precisely because the Rules do not address the multimodal aspect of the Convention sufficiently, the ‘maritime plus’ model provided is incapable of solving many issues. Therefore, they call for a simple and straightforward regime to facilitate multimodal transportation.<sup>79</sup> However, with the point of view of India which is struggling with poor infrastructure<sup>80</sup> and has enacted its own Multimodal Transportation of Goods Act, 1993, the Rules may prove to be sufficient.

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<sup>74</sup> Proshanto K. Mukherjee & Abhinayan Basu Bal, *A legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective*, 40 J. Mar. L. & Com. 579, 2009

<sup>75</sup> Robert Force, *What, if Anything, Would Happen to the Legal Regime for Multimodal Transport in the United States if it Adopted the Rotterdam Rules*, 36 Tul. Mar L.J 685, 2011-12

<sup>76</sup> Gertjan van der Ziel, *Multimodal Aspects of the Rotterdam Rules*, 14 Unif. L. Rev. 981, 2009

<sup>77</sup> Cecile Legros, *Relations between the Rotterdam Rules and the Convention on the Carriage of Goods by Road*, 36 Tul. Mar L.J 725, 2011-12

<sup>78</sup> Francesco Berlingieri, *Multimodal Aspects of the Rotterdam Rules*, Paper presented at the Colloquium of the Rotterdam Rules 2009 at De Doelen on 21<sup>st</sup> September, 2009

<sup>79</sup> Simone Lamont-Black, *Claiming Damages in Multimodal Transport: A need for Harmonisation*, 36 Tul. Mar L.J. 707. 2011-12

<sup>80</sup> Jagadeesh Napa, *Multimodal Transportation Waiting to be Tapped*, Maritime Gateway @ [http://www.maritimegateway.com/mgw/index.php?option=com\\_content&view=article&id=389%3Amultimodal-transportation-waiting-to-be-tapped&catid=51%3Aarticle&Itemid=130](http://www.maritimegateway.com/mgw/index.php?option=com_content&view=article&id=389%3Amultimodal-transportation-waiting-to-be-tapped&catid=51%3Aarticle&Itemid=130)

## Responses of Countries to the Rules

The Convention has been signed by 24 countries and Spain became the first country to ratify it on 19 January 2011.<sup>81</sup> The negotiations were vigorous and the drafting stage was marked by many compromises. The crucial task of ratification now lies ahead. Countries who have not yet signed the convention are in the process of considering and analyzing the Rules in order to understand if they will benefit by jumping on the convoy. Deliberations of other countries can help us understand the way in which the Rules are being viewed internationally, which in turn can prove quite useful in making our own decision. Though, the conditions of each country are different however this difference is precisely the key to understanding how the Convention which aims to develop a uniform system will function at the ground level. With this view, opinions from the viewpoint of five countries are being provided. While two of them are primarily carrier states, two are shipper states. China perhaps in on the route to become a carrier state but currently is also a large consumer of shipping services and therefore provides a unique parallel to India.

- **United States:** US COGSA has provided a uniform and stable legal regime for carriage of goods by sea for decades. Modeled on Hague Rules and in force for 85 years the statute, some think, has outlived its crucial role and fails to address the changes brought about by containerization, multimodal transport and e-commerce.<sup>82</sup> Therefore, not surprisingly US delegation played a proactive role in negotiation and drafting stages of the Convention. It represented the concerns of industry by vigorously negotiating and taking a strong position on issues such as freedom of contract, jurisdiction and arbitration. Hence, observers note that the Rules will find a broad based support in the U.S industry groups, promote certainty, predictability and uniformity and will modernize the existing statute.<sup>83</sup> It is likely that the broad consensus arrived during the Convention will translate into a speedy ratification.
- **China:** China played a proactive role during the negotiations and agrees generally with the purpose and framework of the convention. However, two specific issues namely limitation of carrier liability and electronic transport document are still of

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<sup>81</sup> See Annexure 1

<sup>82</sup> Mary Helen Carson, *U.S Participation in Private International Law Negotiations: Why the New UNCITRAL Carriage of Goods Convention is Important to the United States*,

<sup>83</sup> Michael F. Sturley, *Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States*, 44 Tex Int'l L.J 427, 2008-09

concern. Firstly, it is not satisfied with the limitation which it thinks is much more than what is commercially needed. To clarify, it means that it wants a lower threshold which will result in carriers being liable for less in case of loss, damage or delay. Secondly, it is concerned that according to the rules a FOB seller will require shipper's consent to be a 'documentary shipper' under the Rules which will end up having an adverse effect on small and medium sized FOB sellers of China's growing export trade. Thirdly, it has expressed concerns about volume contracts arguing that the freedom of bargaining therein will adversely affect small and medium sized shippers as well as shipping companies. Fourthly, it has concerns about the jurisdiction and arbitration provisions and it is likely that China will choose not to opt-in if and when it signs and ratifies the Convention.<sup>84</sup> Finally, China has gradually developed a sophisticated system of electronic commerce, a cornerstone of which is the 'PRC electronic signature law' under which various requirements have to be fulfilled in order for an electronic signature to be valid. As the Rules do not provide any definition of "electronic signature" it is quite possible that Chinese courts will apply the domestic law. However, the complication such litigation can create for the concerned parties in a country infamous for its judiciary is anybody's guess. Moreover, to make matter more complex it appears that China's Maritime Code does not explain explicitly if an electronic signature will be a "signature" as required by it to constitute a valid bill of lading.<sup>85</sup> Therefore, even if the Rules are ratified at some point, the implementation may prove chaotic.

- **Argentina:** Argentina has incorporated Hague Rules in the form of Navigation Act No. 20.094 and has a separate act for multimodal transport i.e. Multimodal Act No. 24.921. Commentators argue that while an important step forward the Rules suffer from some deficiencies such as not covering a non-maritime performing party in liability, a significantly lower limitation for delay and retaining the Hague era compromise of requiring the carrier to only observe 'due diligence' for seaworthiness. On the other hand provisions such as electronic transport documents and shipper's

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<sup>84</sup> James Hu, Wel Hou, *The Rotterdam Rules: China's Attitude*, Shanghai Maritime University

<sup>85</sup> Felix W.H. Chan, *In search of a Global Theory of Maritime Electronic Commerce: China's Position on the Rotterdam Rules*, 40 J. Mar. L. & Com. 185, 2009

liability have been praised as a positive step.<sup>86</sup> In such a situation it is arguable if Argentina will choose to ratify the Convention.

- **Australia:** It has been noted that if Australia becomes a party to the Convention, it would necessitate a move from a mandatory and well-understood regime to a scheme that includes broad freedoms to contract out of previously mandatory provisions due to the freedom of contract provisions in the Rules.<sup>87</sup> On the other hand due to the containerization of trade in Australia it is in a position to take benefit of the Volume Contract provisions which allow parties to contract out mandatory liability. It is also anticipated that many countries will not ‘opt-in’ the jurisdiction and arbitration chapters. Overall, Australia may adopt a wait and see approach while commencing consultations with stakeholders on the desirability of signing and ratifying the Convention.
- **Uruguay:** Uruguay and other countries in Latin America lack merchant fleets and are a net consumer of chartering services. This crucial fact had led some to argue that it would be impractical to move out of the existing system under which the carrier is liable for the whole amount of damage and into a system which limits the amount of carrier liability. It is argued that the Rules violate the constitutional principle of right to “integrity of patrimony” which requires that party that causes damage must repair it. Secondly, the Convention has been accused of being clearly protectionist in favor of carriers and ship owners. Furthermore, proper implementation of the Convention is though doubtful due to its complex nature. On these grounds, observers argue<sup>88</sup> that it would be politically and economically inexpedient for Uruguay and other South American countries to adopt the Convention.

**Conclusion:** The concerns of China and Argentina mirror those of India which have been discussed more comprehensively in the next chapter. Particularly, China’s concern about small shippers as well as carriers reflects the concern Indian industry has expressed.

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<sup>86</sup> Diego Esteban Chami, *The Rotterdam Rules from an Argentinean Perspective*, 14 Unif.L.Rev.847, 2009

<sup>87</sup> Report to Industry by Australian Government Delegation, *Summary for Australian Industry of United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 23 Austl. & N.Z. Mar. L.J. 116, 2009

<sup>88</sup> Cecilia Fresnedo de Aguirre, *The Rotterdam Rules from the Perspective of a Country that is a Consumer of Shipping Services.*, 14 Unif.L.Rev.869, 2009

## Concerns of Indian Stakeholders

India did not play any notable role in the negotiation process at the Convention. As a result the industry has been caught off guard now that the very real possibility of the Rules coming into force seems imminent. The reaction of the industry especially shipper interests are typical of such a situation i.e. protective of *status quo* and fearful of change. That is not to say they do not have valid concerns. Firstly, industry sources maintain that the rules will not have much impact in India if banks continue to insist on Shipped-on-Board bill of lading. Shipping companies argue that the harmonization potential of the rules can be shared by both shippers and carriers.<sup>89</sup> The crucial problem is, say industry sources, the pitiable state of infrastructure in India which will not be able to ensure that there are no delays and subsequent losses.<sup>90</sup> Another concern highlighted in a seminar organized on the topic at St. Xavier's Institute of Management, Mumbai was related to India's unorganized international trade comprising of very small enterprises which do not have the expertise to function in the regime created by the Rules.<sup>91</sup> Another set of concerns relates to the Rules themselves<sup>92</sup>, for instance it has been argued that the ongoing duty of the Carrier to maintain seaworthiness is based on the premise that there will be a series of servicing facilities across the oceans. However, this argument holds no water as any concept of due diligence is based on reasonableness as we have observed while discussing Carrier's liability. Another objection based on the multi-modal nature of transport is that it will not be possible for the Carrier to guarantee speedy delivery on other legs of the journey by modes such as railways. This objection overlooks the fact that any such liability will arise out of contractual obligations only which are stipulated in the Contract of Carriage and therefore can be "contracted out" by express declaration. Though serious consideration of the effects of the Rules on Indian industry is required, such consideration must distinguish between real and imagined threats. The instant clamor needs to be carefully sifted in order to arrive at genuine concerns which can only be achieved by commencing a serious dialogue on the issue.

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<sup>89</sup> Economic Times, *Let's join Rotterdam Rules convoy*, <http://economictimes.indiatimes.com/opinion/>

<sup>90</sup> Barely two months left for India to decide on Rotterdam Rules, @ [www.livemint.com](http://www.livemint.com).

<sup>91</sup> Joseph Fonseca, *Ratifying Rotterdam Rules: Speed Breakers in the Way* @ <http://www.maritimeprofessional.com/Blogs/Ratifying-Rotterdam-Rules--Speed-breakers-in-the-w.aspx>

<sup>92</sup> BSN Network, *Rotterdam Rules: India at the Crossroads-To Sign or Not*, August 5<sup>th</sup> 2010, @ <http://www.bhandarkarpub.com/NewsDetails.asp?id=9559>

## Conclusion

India's growing clout in global trade and presence of 20<sup>th</sup> largest merchant shipping fleet requires us to take a close look at the issue of adopting Rotterdam rules. Currently, 25 states have signed the Convention which includes, significantly, United States, third largest trading partner of India which was not a party to either the Hague-Visby or the Hamberg rules. These states control 25% of world trade while the signatories/parties of earlier Hamberg Rules control 5 %. Further, the signatories include both developed and developing countries and both shippers dominated and carrier dominated countries. The key to this broad acceptance is the realization on part of these states that the convention does not present a zero-sum game and is balanced in favor of both shipper and carrier. The traditional us versus them approach has been rejected in favor of establishing legal and commercial certainty and a clear, harmonized global regime for maritime transport. The Rules are clearly an improvement over other Conventions and have the potential to significantly simplify international trade. Differences in opinion notwithstanding, the crucial issue before any country considering the Rules is to what extent they ensure fair play. The rules define carrier liability in an exhaustive manner and close various loopholes which existed in previous rules. It is true that domestic legislations can take care of stakeholders concerns in a more holistic manner; however countries like India are expanding their horizons and should not limit themselves excessively because of parochial interests. It is arguable that adoption may result in some complications and a period of adjustment which may find some stakeholders in a weaker position than before at least in the short term. However, policy decisions can not be guided by short term interest and must take a long term view.

Let us review the essential changes incorporated in the Rules. Firstly, they make contract of carriage the basis of rights and obligations of parties and by incorporating volume contracts provide flexibility and scope for efficiency. If India really wants to emerge as a formidable maritime nation it must prepare itself to compete at a global level. True, it can not do so overnight, however we must recognize the fact that the only way to achieve this aim is to incorporate international standards, albeit gradually and expeditiously. The long term goal must guide our decisions. Therefore, concerns of shippers while valid for the short term are not necessarily something which should guide our long term planning.

Similar concerns were raised at the time of liberalization and computerization regarding the fate of domestic industry and employees respectively which proved to be hyperbole. Therefore, while we should retain the structural flexibility to negotiate the change, the change itself should not be forsaken for such interests. Secondly, the inclusion of provisions relating to electronic transport document presages the way international trade is going to take and we must make ourselves technologically ready to adjust with the change. With the kind of software capabilities we possess it should not be very difficult. Thirdly, the multimodal nature of Convention should not keep us from ratifying the Convention. It is true that the state of infrastructure in India, particularly in the interiors does not give one hope of making a timely delivery; however the Rules are flexible enough to navigate these difficulties by careful drafting of contracts.

At the same time we must learn from the concerns of other countries who have not signed the Rules regarding the effect it will have on both small and medium sized shippers and carriers, a concern India can identify with. In order to develop a proper understanding of the issue we should carry out an impact assessment by commencing dialogue and initiating programs to familiarize the industry with the implications of the Rules. The concerns raised by China regarding electronic transport documents again has resonance in India as we have our own rules and regulations regarding digital or electronic signature contained in and derived from Section 3 of The Information Technology Act, 2000. The Controller of Certifying Authorities licenses and regulates these agencies under the Act. Hence, a careful analysis of the working of electronic transport document under the Indian system is warranted.

However, though these details are important we must not lose sight of the bigger picture. It is not my case that we should immediately ratify the Rules, there is no sense of urgency. However, we should direct our efforts to ensure that we are in position to ratify them if necessary, by developing our infrastructure and creating awareness about global practices of maritime trade in India. If we eventually choose not to, it should not be because we were not ready to face the competition or meet the standards but because we had a better standard to offer.