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“Electronic transport records”: Assessing the contribution of the Rotterdam Rules to e-commerce[☆]

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ABSTRACT

Keywords:

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The Rotterdam Rules is the first international maritime carriage of goods Convention that officially acknowledges electronic records of contracts of carriage and has devoted a separate chapter to their regulation. This paper aims to assess the impact of the Rotterdam Rules on facilitating the conclusion of maritime contracts electronically. Whether articles 8 and 10 of the Rotterdam Rules provide an effective mechanism for electronic cargo documentation, and in which ways will be investigated. Where the impact of these provisions of the Rotterdam Rules on electronic commerce is judged unsatisfactory more efficient and trustworthy ways of transforming the Rules to make them a more effective springboard for paperless trade will be suggested.

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1. Introduction

The exponential use of electronic commercial documents has been occurring for at least the last 15 years. The need for speed in the international maritime trade, and especially for the timely transfer of the bill of lading to the overseas buyer, led to a surge in the use of electronic bills of lading. Indeed, it is not unusual to see, in paper practice, cargo arriving at the port of destination before the shipping documents. This led to higher demand for electronic transport records. However, as is often the case, usage of electronic bills preceded the existence of any specific rules, and as time passed there was an attempt to draft a legal framework that would set the guidelines for concluding shipping contracts electronically and vesting rights of control over the goods in accordance with a piece of legislation.

This paper aims to assess the impact of the Rotterdam Rules¹ on facilitating the conclusion of maritime contracts

electronically. The Rotterdam Rules have initiated the term “electronic transport record” for the electronic version of a transport document. It has to be noted that the Rotterdam Rules is the first international maritime carriage Convention that officially acknowledges electronic records of contracts of carriage devoting a separate chapter to their issuance and use.

In this paper, the ways in which the Rotterdam Rules purport to facilitate electronic transfer of bills of lading, namely of electronic transport records will be discussed. The purpose is to assess whether the Rotterdam provisions do provide an effective mechanism for electronic cargo documentation, and in which ways. Some of the deficiencies in drafting will be discussed in depth and supplementary or alternative drafting will be suggested; synergies arising out of CIF and FOB sales will be under particular scrutiny.

The right to issue, transfer and replace an electronic transport record will be thoroughly analysed. The parties which have a say on the use of an electronic transport record

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¹ United Nations Convention On Contracts for the Carriage of Goods Wholly or Partly by Sea.

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and the range of transport documents to which replacement may apply will be of the utmost priority. Case scenarios will be used in order to reveal the legal complications emerging from the inconsistent provisions of the Rotterdam Rules in an FOB sale context.²

2. Discussion of the consent of the carrier and the shipper under 8a- risks of misinterpretation

The Rotterdam Rules have dedicated a chapter to electronic transport records, outlining the acknowledgement and status of the electronic documents in the Convention. Article 8 administers the equivalent of paper transport documents and electronic transport records, subject to the consent of the carrier and the shipper. As article 8(a) does not specify the form in which consent to the issuance of an electronic transport record can be made, it may be in writing, or implied.³ If writing was necessary or, if consent could not be implied, the article would have been drafted accordingly. Most charter parties and sale contracts now provide for the contingency of electronic records, and as more and more business is conducted electronically it is to be anticipated that complications might arise due to the form in which consent is given in the desire for flexibility. Therefore, consent can be given in any form and, presumably, at any time before the issuance of the electronic transport record. This includes after the issuance of the paper version, but always before delivery of the goods to their final destination, as otherwise the transport record would cease to have legal effect. The necessary speed in procuring shipped goods in *sales-down-a-string* demands quick decision making and, as a result, although the issuance of an electronic transport record can be agreed at any stage, it should already be included as a crucial term in the sale and carriage contract,⁴ to avoid unnecessary delay.

Confusion may arise on the one hand between articles 1(17) and 3 about *electronic communication*, and, on the other hand, article 8(a) about *electronic transport records*.⁵ Most commentators do not highlight any such confusion, but the author is raising it because as the Rotterdam Rules prescribe different requirements for “electronic communication” and “electronic transport records”, the parties need to be cautious with the wording used.

For *electronic transport records* which are more specific in notion and scope than *electronic communication*, only the consent of the shipper and carrier is necessary. On the other

hand, as far as *electronic communication for notification purposes* is concerned, article 3 requires that the use of electronic means is with the consent of the person by which it is communicated and of the person to which it is to be communicated. Such communication may concern parties such as the carrier, controlling party, shipper, documentary shipper and consignee, thus not only for/from the parties of the carriage contract.

The risk is that if the parties are not sufficiently precise, consent destined only for the electronic communication of notices might be mistaken as also applying to the use of electronic transport records if provided by shipper and carrier.⁶ Therefore, it is submitted by the author that the consent for the use of electronic means of communication should clearly demonstrate two things: firstly, the parties providing it and, secondly, the specific purpose for which the consent is given, either for electronic communication purposes only or for the issuance of an electronic transport record.

Complexities in the above evidence how lack of guidance or imprecise drafting may induce the parties into agreements that are not clear. More concretely, some such problems arise due to the fact that the concept of electronic contracting is new and to a certain extent, unexplored, and to the fact that the terms used, although similar, lead to different legal consequences. In the following lines the author will explore the core provisions regulating the functions of an electronic transport record, starting with the transfer.

2.1. Article 8: issues relating to the transfer of the electronic transport record

Article 8(a) of the Rotterdam Rules states that “anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper”.

It has been suggested that the words “anything” and “in” or “on” allow for the possibility that, apart from the usual information that a transport document may contain such as name of the carrier, type of goods, quantity, quality, place of shipment and destination, the electronic transport record is *electronically endorseable*.⁷

The possibility of transferring title to the goods electronically would indeed be an essential function, and as the wording of article 8(a) is positive, the record replicates all the functions of the paper bill of lading; the electronic transport record is not merely an alternative way of displaying the key information, but it also encompasses the mechanisms of circulating information and rights of control among carrier and traders. Therefore, the word “anything” also refers to electronic endorsement and electronic signatures.

⁶ Ibid.

⁷ See F.Lorenzon’s “Electronic transport records” in Baatz, Debattista, Lorenzon, Serdy, Staniland, Tsimplis, *The Rotterdam Rules-A Practical Annotation* (Informa, 2009) para [8-04], (hereafter “The Rotterdam Rules-A practical annotation”), and Sturley, Fujita, van der Ziel *The Rotterdam Rules* (Sweet & Maxwell, London, 2010) para 3.028. (hereafter “The Rotterdam Rules-Fujita”). This however does not apply to non-negotiable transport records as they cannot be transferred.

² More of these issues are covered in the author’s ongoing Ph.D thesis on *The Rotterdam Rules*.

³ For the disparity among other jurisdictions see Jones P, “A New Transport Convention: A Framework for E-Commerce?” *Electronic Communication Law Review* 9, 2002, 145, p.149–151.

⁴ Other Rotterdam Rule books do not discuss the type of consent as a separate issue, however the author deals with it as there are jurisdictions such as in Canada where the consent needs to be in writing to have a legal effect.

⁵ See Alba M, ‘Electronic Commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea’, *Texas International Law Journal*, Vol. 44, Spring 2009, 387, p. 403.

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