For anybody involved in the maritime industry and particularly those whose focus is on the international carriage of goods by sea, the Rotterdam Rules (“the Rules”) have for some time now been like a persistent and ominous fog on the horizon. In a world that has become used to the existing carriage regimes- the Hague, Hugue-Visby and Hamburg Rules- the Rotterdam Rules have the potential to significantly change the business of international trade.

In September last year the Rules, or more precisely, the Convention on the International Carriage of Goods Wholly or Partly by Sea, were presented for signature at an opening ceremony in Rotterdam. In October 2009 the twentieth signature was obtained and as a result the Rotterdam Rules will come into force on 1 November 2010.

It should be borne in mind however that, notwithstanding the above, the Rotterdam Rules will only have a practical effect once the signatory countries begin to enact national legislation to give them local force. This is likely to take anywhere from one to three years, although many countries have reputations for signing international conventions without ever taking another step to implement them. South Africa is no exception.

The Rules are the result of an effort to address the fundamental problems arising out of the old regimes. These problems arise mainly because the previous regimes have failed to evolve at the same pace as the changes in international carriage.

The problems identified with the previous regimes are their failure:

- To satisfactorily and fairly balance the relationship between carrier and shipper;
- To take account of modern multi-modal carriage arrangements which extend further than the traditional tackle-to-tackle;
- To take account of modern carriage documents and electronic transport documents;
- To deal with changes in modern technology which give carriers the ability to monitor and communicate with their vessels 24 hours a day 7 days a week;
- To create uniformity in an area of commerce which has become uncertain and complex because of the patchwork of international law which applies.

The Rotterdam Rules are therefore wider in scope than their predecessors. They apply to
multimodal contracts of carriage and have introduced new obligations, limitations and concepts.

This article will focus on three particular areas of change which, it is predicted, will most effect the daily business of carriage of goods. They are:

- Changes to the obligations and liabilities of the carrier;
- “Volume contracts”; and
- Maritime performing parties

Generally, the obligations the Rules impose on carrier’s and shipper’s have not changed significantly from those provided for by previous regimes. However, there are two changes which may dramatically increase a carrier’s obligations and exposure to liability. They are the duty to provide a seaworthy ship and the ‘nautical fault defence’.

**Duty to provide a seaworthy ship**

Under the previous regimes a carrier was obliged to exercise due diligence to provide a seaworthy ship before and at the beginning of a voyage.

The Rotterdam Rules have extended this obligation to exercise due diligence to provide a seaworthy ship before, at the beginning and during a voyage. The duty has therefore become and continuing duty which implies more meticulous attention to the management of vessels.

**“Nautical Fault” defence**

Under previous regimes a carrier was able to avoid liability in cases where it was able to show that any loss sustained was a result of “an act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.”

In an age where an owner is able to continually monitor and communicate with its vessel this protection was regarded as being out of date, unfair and overly generous. As a result the Rotterdam Rules have done away with the nautical fault defence entirely.
Volume Contracts

The introduction of the concept of volume contracts is by far the most controversial amendment to the existing regimes.

A volume contract is defined as a contract for the transport of a specified quantity of goods, over an agreed period of time and in an agreed number of shipments. This definition is considered to be wide enough to apply to most contracts of carriage which relate to more than one shipment.

With respect to volume contracts the Rotterdam Rules allow carriers and shippers to agree to lesser rights, obligations and limitations than those imposed by the Rules. The result is that for the first time parties are able to negotiate terms which are significantly different from the mandatorily applicable terms of the regime.

Volume contracts have been criticised for a number of reasons but most vociferously because they potentially create situations where a party in the transport chain is exposed to claims which it is unable to pass up or down the chain to the party who is at fault.

An example is where for instance a freight forwarder has contracted with a carrier on a volume contract basis but with an individual shipper under the Rotterdam Rules. Under the volume contract the carrier may have negotiated to limit its liability to a lesser amount than that allowed by the Rules.

In a situation where the carrier is at fault the shipper may sue the freight forwarder who will pass this liability up the chain to the carrier. However, there will be a gap between what the freight forwarder will have to pay the shipper and what it can recover from the carrier.

There are many variations on this example. All parties in the transport chain will have to carefully scrutinise their contracts in order to avoid falling into a similar gaps.

Maritime performing parties

The second concept introduced by the Rotterdam Rules is that of the maritime performing party.

Essentially, the Rules define a maritime performing party as any party that undertakes the
carrier’s obligations within the confines of the port, be it the port of loading or discharge. Terminal operators, stevedores and warehouse operators are likely to fall within this definition.

In terms of the Rules a maritime performing party is subject to the same obligations and is entitled to the same defences which the Rules afford the carrier.

The inclusion of the maritime performing party concept could have tremendous implications. For example at present terminal operators are able to limit their liability in terms of their standard trading terms or by a clause in a bill of lading. This is likely to be much lower than the protection built into the Rules.

This must certainly be food for thought for any party who falls within the definition, and for their insurers.

The Rotterdam Rules have been criticised for trying to do too much. Many believe the result is an even more burdensome and complex set of Rules than their predecessors. Others believe that the Rules strike a fair balance between the interests of a shippers and carriers and that a uniform system with some flaws is preferable to the quagmire of law which presently exists.

Whatever your view, most commentators believe we may as well start preparing our businesses for a new era in the international carriage of goods saga.

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