

BEING SEAWORTHY IN SINGAPORE: A BRIEF CRITIQUE OF ARTICLE 14 OF THE ROTTERDAM RULES

TAN KAH WAI

I. INTRODUCTION

It was Lord Diplock who once described the seaworthiness obligation as one of the “most complex of contractual undertakings”.¹ If the waters of seaworthiness were already not rocky enough, Art 14 of the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*² [Rotterdam Rules] just complicates matters further by extending this nebulous obligation throughout the voyage itself. This brief paper seeks to elucidate the legal implications that Art 14 of the *Rotterdam Rules* has on the seaworthiness obligation in shipping law. Particular regard is given to discussing the adverse effect on Singapore’s position as an international maritime hub should she choose to adopt the rules.³

For ease of reference, Article 14 of the Rules is set out as follows:

“The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

- (a) make and keep the ship seaworthy;*
- (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage and*

¹ *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26, at 71.

² 23 September 2009, A/RES/63/122.

³ The *Rotterdam Rules* have been controversial in many aspects, but this paper will focus solely on Art 14 for the sake of brevity.

(c) Make and keep holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.”

II. SINGAPORE'S CURRENT POSITION

First, the carrier has an absolute obligation in common law to keep the ship seaworthy at the commencement of the voyage.⁴ However if the carriage contract is subject to Art 3.1 of the Hague-Visby Rules⁵ [*HVR*], the carrier is only bound to make the ship seaworthy by exercising due diligence. Art 4.1 of the *HVR* also makes it clear that carriers cannot contract out of this overriding and non-delegable obligation. These qualifications constitute the local position by virtue of the *HVR*'s inclusion under the Schedule of the *Carriage of Goods by Sea Act*.⁶

The duty of seaworthiness encompasses the following aspects:

- (i) Ensuring that the vessel is structurally fit for the intended voyage;⁷
- (ii) Providing sufficient manpower and equipment, and ensuring that the vessel's crew have an acceptable level of competence;⁸
- (iii) Providing relevant documentation and charts,⁹ especially those concerning health and safety;
- (iv) Ensuring that the ship is reasonably fit to receive and carry the cargo.¹⁰

In determining seaworthiness, the Singapore courts have consistently held that it is a relative standard that varies according to the ship and exigencies of the voyage.¹¹ A seaworthy vessel is one that is as fit as ordinary owners would expect to have when the vessel commences its voyage.

⁴ *Sunlight Mercantile Pte Ltd and another v Ever Lucky Shipping Co Ltd* [2003] SGCA 47, [12].

⁵ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, 120 LNTS 187 (entered into force 2 June 1931).

⁶ Cap 33, 1998 Rev Ed Sing.

⁷ *Zuellig (Gold Coin Mills) v Autoly (Owners)* [1968-1970] SLR(R) 829; [1970] SGHC 17.

⁸ Tan Lee Meng, *The Law in Singapore on Carriage of Goods by Sea*, 2nd ed (Butterworths, 1994) at 70-71.

⁹ *Alfred C Toepfer Schiffahrtsgesellschaft GmbH v Tossa Marine Co* [1985] 2 Lloyd's Rep 325, at 331.

¹⁰ *McFadden v Blue Star Line* [1905] 1 KB 697, at 704.

¹¹ *Malayan Motor & General Underwriter (Pte) Ltd v MH Almojl* [1981-1982] SLR(R) 432; [1982] SGCA 3, at [26].

For the courts, this is an objective test that asks whether a prudent owner having known of the defect, would require it to be remedied before the ship is sent to sea.¹²

The burden of proof for seaworthiness first rests on the claimants.¹³ However where claimants can prove that there is damage or loss, a presumption of unseaworthiness may arise on the facts. The evidential burden thus shifts to the carrier to prove that he did his due diligence in keeping the ship seaworthy.¹⁴

III. ARTICLE 14 OF THE *ROTTERDAM RULES* AND ITS JUSTIFICATIONS

The *Rotterdam Rules* were enacted to achieve a few aims:

- i) Updating of international carriage rules to align it with technological developments;
- ii) Harmonization of international trade, in particular, achieving broad uniformity in the law governing international carriage of goods; and
- iii) Balancing both commercial and national interests.¹⁵

It is in this spirit that the drafters hoped to adopt an appropriate legal framework for carrier's duties that the shipping industry would find acceptable.¹⁶

At first glance, Art 14 of the *Rotterdam Rules* largely replicates *HVR*'s Art 3.1. However, by adding the words "*and during the voyage*", it extends the duty of keeping the ship seaworthy to one that is throughout the voyage. The courts thus now have to ask an additional question: Would a prudent shipowner being aware of the defect have continued this voyage without undertaking any possible repairs?¹⁷

Under the *HVR*, the seaworthiness obligation was limited to before the voyage's commencement. The assumption back then was that carriers had no control over the vessel once it has sailed. These assumptions are no longer relevant clearly since there is satellite technology

¹² *Ever Lucky Shipping Co Ltd v Sunlight Mercantile Pte Ltd* [2003] SGHC 80.

¹³ *The "Reunion"* [1983-1984] SLR(R) 141; [1983] SGHC 12, at [30].

¹⁴ *The "Patraikos 2"* [2002] SGHC 103, [133].

¹⁵ See generally Sturley, "General Principles of Transport Law and the *Rotterdam Rules*" in Guner-Ozbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the "Rotterdam Rules"* (Springer, 2011) at 63-85.

¹⁶ Nikaki, *The Carrier's Duties Under the Rotterdam Rules: Better the Devil You Know?* (2010) 35:1, Tul Mar LJ 13.

¹⁷ Nicholas, "The Duties of Carriers under the Conventions: Care and Seaworthiness" in D Rhidian Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010) at 6.14.

that allows permanent communication between vessels on the sea and their offices at the shore.¹⁸ By extending the obligation of seaworthiness, Art 14 of the *Rotterdam Rules* reflects a change in modern circumstance where carriers now have a greater level of control over ships after commencement of voyage.¹⁹

Another justification for imposing this continuous obligation is that it would be consistent with the carrier's public obligations under Articles 6 and 10 of the *International Safety Management Code*, which stipulate that the ship must be crewed, equipped and maintained properly throughout the voyage.²⁰

Yet one must ask whether there is a purpose undergirding the drive for consistency here. If achieving consistency is to ensure compliance with public obligations, then it is strictly unnecessary since this compliance can be very well achieved by regular inspections from the public authorities. Under Singapore's *Merchant Shipping Act*,²¹ the Maritime Port Authority ("MPA") of Singapore's surveyors can undertake Flag State Control Inspections, which allows them to inspect and verify the ship's safety management systems.²² The MPA is also entitled to arrest ships for any non-compliance with safety regulations.²³

A third justification rests on the fact that the concept of continuous obligation is already part of commercial practice.²⁴ For example, most time charterparties contain clauses like the NYPE 93 Form Clause 6, which stipulates a continuous obligation to provide a seaworthy vessel.²⁵

However, this justification does not stand as it ignores the fact that this additional clause is often omitted in voyage charterparties for good commercial reasons. Shipowners in time charterparties enjoy security of income throughout the charter period since charterers are

¹⁸ Schoenbaum and Yiannopoulos, *Admiralty and Maritime Law: Cases and Materials* (The Michie Company, 1984) at 14-15.

¹⁹ Nikaki and Soyer, "A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and efficient, or just another one for the shelves?" (2012) 30 BJIL 303 at 329.

²⁰ United Nations Commission on International Trade Law [UNCITRAL], *Report of Working Group (Transport Law) on the work of its twelfth session* (Vienna, 6-17 October 2003), at [149].

²¹ *Merchant Shipping Act* (Cap 179, 1996 Rev Ed Sing).

²² *Ibid*, s 205.

²³ *Ibid*, s 207.

²⁴ Defossez, "Seaworthiness: The Adequacy of the Rotterdam Rules Approach", (2015-2016) 28:2 USF Mar LJ, at 247.

²⁵ Girvin, *Carriage of Goods by Sea*, 2nd ed (Oxford University Press, 2011), at 24.25.

responsible for finding the ship's commercial employment and payment of hire.²⁶ However in voyage charterparties, the carrier pays virtually everything except for delays at loading and discharge ports. If Art 14 extends this continuous obligation to voyage charterparties, it imposes far more onerous obligations on carriers who must now undertake extra expenses to ensure the ship's seaworthiness throughout the voyage.

IV. WHY ARTICLE 14 SHOULD NOT BE ADOPTED IN SINGAPORE

A. *It does not indicate when the obligation of seaworthiness ends*

Firstly, Art 14 imposes a continuous obligation to keep the ship seaworthy without indicating to parties when this duty ends. The Rules only state that this duty persists "during the voyage" but remains silent on when does the voyage end.

Hence, Aladwani raises the following scenarios where the voyage may end:²⁷

- (a) When it enters the port's geographical and legal area;
- (b) When it anchors at a place where vessels lie while waiting for berth at a port; or
- (c) Discharge of the cargo from the vessel itself.

For a set of international rules that seek to introduce obligations unique to the common law, it is difficult to see why Art 14 fails to define a precise point at which the seaworthiness obligation would end. This is clearly unsatisfactory because it diminishes commercial certainty, which is acknowledged by the courts as an important consideration in international trade.²⁸

B. *It generates problems of evidential proof*

Secondly, Art 14 presents practical problems in ensuring a continuous obligation for seaworthiness. This is especially when ships experience problems in the middle of the voyage, which is a frequent occurrence. While the drafters have acknowledged these concerns, they

²⁶ *Ibid*, at 1.45.

²⁷ Aladwani, *The Supply of Containers and "Seaworthiness – The Rotterdam Rules Perspective*, 42:2 J Mar L & Com Journal of Maritime Law & Commerce 185 at 200.

²⁸ See for instance, *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715, at [13].

thought that such concerns would be resolved by stating that the obligation is fulfilled once a standard of due diligence is satisfied.²⁹

However, just simply stating a due diligence standard does not remove the carriers' evidential difficulties. Carriers still bear the burden of proving that they fulfilled their due diligence obligation of keeping the ship seaworthy throughout the voyage.

To illustrate these difficulties, consider the case where a ship sinks without collision or inclement weather. A *res ipsa loquitur* inference would be drawn that the ship is unseaworthy during the voyage.³⁰ The carrier bears the burden of disproving this presumption. Yet, it cannot rely on the surveyors' certification of the ship's safety before the voyage. This is because claimants will frame the duty breached here as one where the ship is not seaworthy *during the voyage*, rather than it being unseaworthy *before the voyage commences*. Even if the carrier claims that the ship is unseaworthy due to a latent defect, it is still difficult to prove such defects where the ship has been wrecked.

C. *Complying with Art 14 breaches other articles of the Rotterdam Rules*

An example here would suffice to illustrate this point. A Carrier that seeks to repair the ship during the voyage may delay the cargo delivery in doing so. He has two options. If he chooses to delay the carriage, he may face liability under Art 21 of the Rules. On the other hand, he faces liability under Art 14 if he chooses not to remedy the defect. As Tsimplis has observed, the Carrier is ensnared in an absurd Catch-22 situation where it is liable either way.³¹

D. *Art 14 has negative practical implications on all commercial parties in the shipping industry*

Ironically, Art 14 can hardly be justified as one that enhances cargo interests in light of its aforementioned risks and commercial reality. the commercial realities would defeat any

²⁹ *Supra* note 20.

³⁰ A similar inference was raised in *Ajum Goolam Hossen & Co v Union Marine Insurance* [1901] AC 362.

³¹ Tsimplis, "Obligations of the Carrier" in Baatz, Debattista et al (eds), *The Rotterdam Rules: A Practical Annotation* (Informa Law, 2009) at 14-06.

justification of Art 14 as one that enhances cargo interests. Carriers will take potentially cost-inefficient measures to ensure the ship's seaworthiness, which translates to higher freight costs for shippers.³²

While academics have assumed that the standards for due diligence under Art 14 is different at port than at sea,³³ such assumptions provide scant comfort for risk-averse insurers.³⁴ The *travaux préparatoires* as an interpretive tool for Art 14 is incapable of assisting us in determining these standards.³⁵ In response to such heightened exposure in liability and risk of protracted litigation over what constitutes a breach of Art 14, insurers would likely raise insurance premiums for carriers. Carriers would, in turn, transfer these costs to shippers through higher freight rates.³⁶ The result is far more commercially undesirable – a chilling of shippers' demand for carriage services in a bearish market. Just last year, it has been observed that the fleet supply is already far excess of what has been sluggish demand, with liner companies being forced to actively restructure themselves to steady their costs.³⁷

While this snowball effect has yet to be empirically proven, it is clear that insurers and carriers would prefer the pre-Rotterdam position. There were no obligations to keep the ship seaworthy throughout the voyage, having to resolve this legal question before the courts.

E. It impedes Singapore's growth as a Maritime Legal Services Hub.

Although shipping lines have expressed support for the *Rotterdam Rules*,³⁸ it would be naive to assume that their support is unequivocal when it goes against their own commercial interests.

Shippers and carriers do engage in forum shopping to obtain a limitation of liability regime that is most advantageous to their case.³⁹ Hence, it makes commercial sense for carriers to prefer

³² *Supra* note 25 at 27.61.

³³ *Supra* note 31 at 14-03.

³⁴ Efthymiou, "Speech delivered by the President of the Union of Greek Shipowners" in *CMI Yearbook 2009 Annuaire, Athens II, Documents of the Conference* (CMI, 2009) at p 293.

³⁵ For it to be useful, it must clearly and indisputably point to a definite legal intention. See *Fothergill v Monarch Airlines Ltd* [1981] AC 251, at 278C.

³⁶ *Supra* note 34 at p 294.

³⁷ Baltic Exchange, "Xinhua-Baltic International Shipping Centre Development Index 2017" (Xinhua-Baltic Exchange, 2017) at 10.

³⁸ *Supra* note 15 at pp 76-77.

forums where the *HVR* applies, rather than forums adopting Art 14 of the *Rotterdam Rules* that impose this continuing and uncertain obligation. This explains why none of the top 5 shipping centres in the 2017 Xinhua-Baltic International Shipping Centre Development Index (“Baltic Exchange Index”) including Singapore have taken the plunge and signed the *Rotterdam Rules*. Nations are refusing to ratify the rules until major trading nations have done so⁴⁰ precisely because they fear a loss of business due to forum shopping.

Furthermore, despite Singapore being the top shipping centre in the Baltic Exchange Index, she only enjoys a minor share of the international maritime legal services market.⁴¹ There is little merit in adopting Art 14 now, where it may unnecessarily impede Singapore’s competitiveness and growth as a maritime legal services hub.

V. CONCLUSION

This paper has sought to demonstrate how Art 14 is functionally incoherent, lacks sensible commercial justification, and may even jeopardize Singapore’s maritime industry. The local maritime industry is already facing some challenging times ahead. Hence, it would be prudent for Singapore to consider carefully if she ultimately wishes to adopt the *Rotterdam Rules*.

³⁹ Hare, “Shopping for the Best Admiralty Bargain” in Martin Davies (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honour of Robert Force*, (Kluwer, 2005) at p 163.

⁴⁰ Sturley, “The Rotterdam Rules in Beijing” in *CMI Yearbook 2013 Annuaire, Beijing II, Documents of the Conference* (CMI, 2013) at p 266.

⁴¹ *Supra* note 37 at p 61.