PEER REVIEWED ARTICLE

# The Evidentiary Effect of the Contract Particulars Under the Rotterdam Rules

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## Abstract

*The contract particulars have crucial importance when an action is brought against the carrier. They assist to the claimants, and therefore, the Convention renders them some statutory evidentiary values. Depending on the holder of the transport document, the contract particulars in a transport document are traditionally specified as either prima facie evidence or conclusive evidence. The Rotterdam Rules follows the traditional division, but it introduces some novelties in respect of the conclusive evidence rule. This article examines that how the Convention regulates the prima facie evidence rule and the conclusive evidence rule.*



***Keywords:*** *evidentiary effect, contract particulars, prima facie evidence, conclusive evidence, the Rotterdam Rules.*

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## 1. INTRODUCTION

The contract particulars in the transport documents have vital effects over the international sales, since, in international trade, many goods are sold on the basis of the transport document.[1] The third parties, who are not the original parties of the contracts of carriage, act relying on the accuracy of the contract particulars in the transport documents. When the transport document is transferred to the third party by endorsement or assignment, the third party obtains to the right of sue, and if an action is brought against the carrier the particulars in the transport document will assist to him.[2]

The Rotterdam Rules define the contract particulars as "any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record".[3] As it is seen, the definition of the contract particulars addresses to any information included in the transport documents.[4]

Although, the carrier and the shipper are free to put any information in the transport document the Convention provides a list related to the contract particulars that must be indicated in the transport document.[5] Pursuant to

[1] Unlike the former sea conventions, the Rotterdam Rules introduce some specific provisions about the electronic transport records. The evidentiary effect of the electronic transport records is the same with the evidentiary effect of transport documents and thus in this article the electronic transport records will not be explained separately.

[2] See, Richard Williams, Transport Documentation- the New Approach, in Rhidian Thomas (ed) A New Convention for the Carriage of Goods by Sea : the Rotterdam Rules : An analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Lawtext Publishing Limited, 2009), p. 211

[3] Art 1(23) of the Rotterdam Rules

[4] The same view was pointed in the Working Group. See, Report of the Working Group on Transport Law on the Work of Its Ninth Session, UN Doc., A/CN.9/510, para.153

[5] Art 36 of the Rotterdam Rules :"1.The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper: (a) A description of the goods as appropriate for the transport;(b) The leading marks necessary for identification of the goods;(c) The number of packages or pieces, or the quantity of goods; and (d) The weight of the goods, if furnished by the shipper.
2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include: (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage; (b) The name and address of the carrier; (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.
3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include: (a) The name and address of the consignee, if named by the shipper; (b) The name of a ship, if specified in the contract of carriage;(c) The place of receipt and, if known to the carrier, the place of delivery; and (d) The port of loading and the port of discharge, if specified in the contract of carriage.

Article 36, some particulars must be furnished by the shipper (Art 36(1)), some particulars must be provided by the carrier (Art 36(2)), and some particulars must be added if it is possible under the circumstances (Art 36 (3)).[6] Accordingly, under Article 36, while some information must be mandatorily indicated in the transport document irrespective of whether provided by the shipper or the carrier, the inclusion of some information depends on the circumstances. It must be pointed that the absence of the mandatory contract particulars does not affect the validity of the transport document.[7] Further, according to Article 1(23) signature is one of the contract particulars and the Convention requires that the transport document must be signed by the carrier or a person acting on behalf of it.[8] However, unlike the listed contract particulars, the outcomes of the absence of signature are left to the national laws, thereby, absence of the signature might affect the validity of the transport documents under the national laws.

The Convention has a detailed provision related to evidentiary effect of the contract particulars.[9] The evidentiary effect of the contract particulars shows an alteration with respect to the holder of the transport document. If the transport document is in the hand of the shipper, then the contract particulars are mere prima facie evidence against the carrier.[10] However, if the transport document is transferred to a third party, then the evidentiary effect of the contract particulars will depend on the types of the transport document.[11]

4. For the purposes of this article, the phrase "apparent order and condition of the goods" in subparagraph 2 (a) of this article refers to the order and condition of the goods based on: (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record."

[6] For further about Art 36 see, Michael F Sturley, Tomotaka Fujita, G.J Van der Ziel, Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, (Sweet & Maxwell, 2010), paras.7.024-7.043; Filippo Lorenzon, Transport Documents and Electronic Transport Records, in Yvonne Baatz and others, The Rotterdam Rules: A Practical Annotation, (Informa, 2009), paras 36.01-36.14; Williams (n 2) p. 196-205

[7] See, Art 39 of the Rotterdam Rules

[8] See, Art 38 of the Rotterdam Rules

[9] See, Art 41 of the Rotterdam Rules

[10] See, Art 41(a) of the Rotterdam Rules

[11] See, Art 41(b) and 41(c) of the Rotterdam Rules

## 2. Transport Document in the Hand of the Shipper

In respect of the prima facie evidence rule, the Rotterdam Rules follow the traditional execution. Article 41(a) indicates that "a transport document or electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars". Namely, contract particulars in the transport documents are nothing more than a rebuttable receipt that the goods have been received by the carrier as indicated condition in the contract particulars. Because of the prima facie evidentiary value of the particulars, the carrier is allowed to prove to the contrary. In order to apply primary evidence rule, firstly, the contract particulars have not been qualified by the carrier in accordance with Article 40 and secondly, the transport document must be in the hands of the shipper.[12]

Article 41(a) does not address to Article 36, thereby, the prima facie evidentiary value of the contract particulars is not limited to the contract particulars listed in Article 36. It seems that prima facie evidence rule applies to all particulars irrespective of whether listed in Article 36 or added by the parties.[13] For the sake of example, when a transport document is in the hand of the shipper, the contract particular related to the description of the goods[14] or the weight of the goods[15] as well as the contract particular related to name of the carrier[16] or the name of the ship[17] is prima facie evidence against the carrier.

Article 41(a) merely mentions "the carrier's receipt of the goods". It is not clear whether receiving a cargo is also prima facie evidence for the shipment of the cargo, in cases, where there is a received for shipment bill of lading. For instance, a received for shipment bill of lading indicates that 1.000 bales goods have been received. Such statement is prima facie evidence of the carrier's receipt of the goods, but, is that statement also prima facie evidence as to the cargo that has been loaded on a ship's board? If Article 41(a) is literally interpreted, it can be said that received for shipment bill of lading is not prima facie evidence for the shipment of the goods. On the other hand, the provision might be construed broadly and might cover both receiving and shipment of the goods. For example, under English law, if there is a statement that shows the goods have been received, the statement is treated prima facie evidence for both receipt and shipment of the goods.[18] Consequently, it seems that the

[12] See, Art 40, the chapeau of Art 41, Art 41(a) of the Rotterdam Rules, and see infra part 4.
[13] See, Lorenzon (n 6) para. 41-02Guenter Treitel, F.M.B. Reynolds, Carver on Bills of Lading, (Sweet & Maxwell, 2011, 3th Ed) para 2-060.
[14] See, Art 36(1)(a) of the Rotterdam Rules
[15] See, Art 36(1)(d) of the Rotterdam Rules
[16] See, Art 36(2)(b) of the Rotterdam Rules
[17] See, Art 36(3)(b) of the Rotterdam Rules
[18] See, Indira Carr, International Trade Law, (4th edn 2010), p. 175

issue will depend on whether the national courts will interpret the provision narrowly or broadly.

Contrary to the conclusive evidence rule, primary evidence rule does not make any distinction between types of the transport document.[19] Namely, if the transport document is in the hand of the shipper the document becomes prima facie evidence of the carrier's receipt of the goods irrespective of whether the transport document is negotiable or non-negotiable.

Traditionally, the contract particulars in the bill of lading are treated as prima facie evidence when the bill of lading is in the hand of the shipper. Article III(4) of the Hague-Visby Rules states that the bill of lading is prima facie evidence that the goods have been received by the carrier.[20] Article III(4) expressly refers to Article III(3)(a), (b) and (c), which construct to the list of the contract particulars.[21] Accordingly, under the Hague-Visby Rules, in the hands of the shipper a bill of lading is mere receipt related to the leading marks, quantity or weight of the received goods and the apparent order and condition of the received goods. In respect of the leading marks, it should be clarified that the Hague-Visby Rules require that the leading marks must be necessary for the identification of the goods.[22]However, if the leading mark is simply written for another purpose rather than the identification of the goods then the leading marks will not have prima facie evidence feature against the carrier.[23]

Contrary to Article III (4) of the Hague-Visby Rules, Article 41(a) of the Rotterdam Rules does not directly refer to the contract particular related to the goods in Article 36. Instead of referring merely to Article 36, Article 41(a) addresses to all contract particulars related to the goods as indicated both in Article 36 and in clauses that added in accordance with the parties' wishes. Consequently, under the Hague-Visby Rules, prima facie evidence feature of the bill of lading is bounded by the contract particulars which is indicated in Article III(3)(a), (b) and (c) whereas under the Rotterdam Rules, all contract particulars are treated as prima facie evidence against the carrier.

Additionally, the Hamburg Rules follow the traditional rule in the Hague-Visby Rules and state that, in the hands of the shipper, the bill of lading is prima facie evidence that the goods are received by the carrier.[24] Unlike the Hague-Visby Rules, the Hamburg Rules do not refer to the contract particulars

[19] See, Art 41 of the Rotterdam Rules, and infra part 3

[20] See, Art III (4) of the Hague-Visby Rules "Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."

[21] See, Art III(3) regulates the contact particulars in a bill of lading. Contrary to Art 36 of the Rotterdam Rules, Art III (3) of the Hague-Visby Rules includes a short list.

[22] See, Art III(3)(a) of the Hague-Visby Rules. See, Carr (n 19) p. 177

[23] ibid

[24] See, Art 16(3)(a) of the Hamburg Rules

related to the goods.[25] Also, the Hamburg Rules expressly mentions to the evidentiary effect of the shipped bill of lading. Article 16(3)(a) states that if there is a received for shipment bill of lading, the bill of lading is prima facie evidence that the goods have been received by the carrier, on the other hand, if there is a shipped bill of lading then the bill of lading is prima facie evidence that the goods have been loaded on board of a ship.

Finally, it should be added that, under the Rotterdam Rules, there is no division such as bill of lading or sea waybill. The Rotterdam Rules prefer to use the word "transport document" as a generic term and if the preconditions of being a transport document have been satisfied then the document is treated as the transport document irrespective of whether it is a bill of lading or a sea waybill.[26] The provisions about the evidentiary effect of the contract particulars in the Hague-Visby and the Hamburg Rules only cover the bills of lading and do not say anything about the other documents.[27] Accordingly, while in the former conventions only the contract particulars in the bill of lading are treated as prima facie evidence, in the Rotterdam Rules, if there is a document in the hand of the shipper and the document is treated as the transport document in the meaning of the Convention then all contract particulars are treated as prima facie evidence.

## 3. Transport Document in the Hand of the Third Party

A contract of carriage is concluded between the shipper and the carrier and the third party is not one of the original parties of the contract of carriage.[28] Therefore, like the former conventions, the Rotterdam Rules aim to protect the rights of the third party by assuming the contract particulars as conclusive evidence in favour of the third party.[29] The third party is out of the contract of carriage, but, when a transport document is transferred or assigned to him the third party will obtain some rights against the carrier. It must be pointed that the shipper cannot be treated as a third party since it is the original party of the contract of carriage. However, in the Working Group, it was considered that in cases of FOB sales although the seller arranged the contract of carriage

[25] See, Art 15 and Art 16(3)(a) of the Hamburg Rules

[26] See Art 1(14) of the Rotterdam Rules. For further see, Sturley, Fujita, Van der Ziel (n 6), para.7.006-7.010; Williams ( n 2) p. 193

[27] See, Art III(4) of the Hague-Visby Rules and Art 16(3)(a) of the Hamburg Rules. Also see, Report of Working Group III (Transport Law) on the Work of Its Eighteenth Session, UN Doc. A/CN.9/616, para. 50

[28] See, Art 1(1), Art 1(5), Art 1(8) of the Rotterdam Rules.

[29] See, United Nations Commission on International Trade Law Working Group III (Transport Law) Ninth Session, UN Doc. A/CN.9/WG.III/WP.21, para 148

on behalf of the buyer and the buyer would be the shipper under the contract of carriage, the buyer had paid value relying on the particulars in the transport document; thus, it would obtain to the same protection as the third parties.[30] Pursuant to that suggestion, although the FOB buyer is not a third party if it acts in reliance of the transport document then its rights should be protected as it is a third party. However, that suggestion was not accepted, and in the final article, the Convention only protects to the rights of the third party, who is not the original party of the contract of carriage.

Under the Rotterdam Rules, when a transport document is in the hand of the third party, the evidentiary effect of the contract particulars differs on the basis of the types of the transport document. Pursuant to the Convention, types of the transport documents are (a) negotiable transport document, (b) negotiable transport document not to be required surrender, (c) non-negotiable transport document, and (d) non-negotiable transport document that requires surrender.[31] If a document has jointly met all preconditions of being a transport document under Article 1(14) then the type of the document is determined in accordance with the particulars in it. The transport document is classified as a negotiable transport document if it includes the phrase "to order","negotiable" or any other word that has the same meaning under the applicable law and indicates "that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and it is not explicitly stated as being 'non-negotiable' or 'not negotiable'.[32] On the other hand, Article 1(16) defines the non-negotiable transport document that as opposite the negotiable transport document.[33] Namely, if a transport document does not fall into the definition of negotiable transport document then it is classified as non-negotiable transport document. Furthermore, the types of negotiable transport document not to be required surrender, and non-negotiable transport document required surrender depend on whether the goods can be taken over without surrender of the transport document or not. Although, the negotiable transport documents usually require surrender to obtain delivery of the goods, some the transport documents might expressly indicate that there is no need to surrender the document.[34] In such cases, the transport document is classified as negotiable transport document not to be required surrender. On the other hand, if there is a non-negotiable transport document then there is no need to surrender the document to obtain delivery of the goods unless the transport document indicates to the contrary.[35]

[30] Ibid para 149
[31] See, Art. 1(15), Art. 1(16), Art. 46 and Art. 47(2) of the Rotterdam Rules
[32] See, Art 1(15) of the Rotterdam Rules
[33] See Art. 1(16) of the Rotterdam Rules
[34] See, Art. 47(2) of the Rotterdam Rules
[35] See, Art. 46 of the Rotterdam Rules

### 3.1- Article 41(b) of the Rotterdam Rules

After the foregoing brief explanation about the types of transport documents, now, the evidentiary value of types of the transport documents will be examined. Article 41(b)(i) indicates the evidentiary value of the contract particulars in cases where there are negotiable transport documents. According to the provision, the carrier is banned to prove contrary of any contract particulars if a negotiable transport document is transferred to the third party, who acts in good faith. The prerequisites of Article 41(b)(i) are that firstly pursuant to the chapeau of Article 41, the carrier has not qualified the particulars under Article 40, secondly, there must be a negotiable transport document in the meaning of Article 1(15), thirdly the negotiable transport document must be transferred to a third party and fourthly, the third party must act in good faith.[36] When the preconditions have been jointly satisfied then the contract particulars in the negotiable transport document are treated as conclusive evidence and the carrier is not allowed to prove contrary. It should be added that acting in good faith is sufficient for the application of the conclusive evidence rule in respect of Article 41(b). Although, in former draft article, it was required that the third party had paid value or had acted in reliance of the information on the transport document, the final article does not require such requirements.[37]

Furthermore, pursuant to Article 41(b)(ii) the contract particulars in a non-negotiable transport document, that requires surrender, are also conclusive evidence against the carrier if the transport document is the hand of the consignee acting in good faith.[38] Article 41(b)(ii) has the same preconditions with Article 41(b)(i). The one difference is that the usage of the word "the consignee" instead of the word "a third party". Under the Convention, there might be a third party who obtains a negotiable transport document by transferring and becomes the holder of the document, or there might be a third party who entitles to take delivery of the goods under a non-negotiable transport document and becomes consignee.[39] Namely, in cases of non-negotiable transport documents, the third party is specified as the consignee. The Convention defines consignee as "a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record".[40] It should be emphasised that pursuant to the definition the consignee might be the shipper or any person other than the shipper. In order to apply Article 41(b)

[36] See, Art 1(15), Art 40, chapeau of Art 41, and Art 41(b)(i)
[37] See, Report (n 29) p.48, paras 148-149
[38] See, Art 41(b)(ii) of the Rotterdam Rules
[39] See, Report of Working Group III (Transport Law) on the Work of Its Twentieth Session, UN Doc., A/CN.9/642, para. 11; Report of Working Group III (Transport Law) on the Work of Its Twenty-First Session, UN Doc., A/CN.9/645, para. 140; Williams (n 2) p.194
[40] See, Art 1(11) of the Rotterdam Rules

(ii) the consignee must be a person that is not the shipper; otherwise instead of Article 41(b)(ii), Article 41(a) applies to the issue.[41]

At first sight, the evidentiary effect of the contract particulars in Article 41(b) seems as the same with the evidentiary effect of the contract particulars in the Hague-Visby Rules and the Hamburg Rules.[42] However, the Rotterdam Rules introduce some vital novelties. Firstly, one of the most important novelties in Article 41(b) is that it addresses to any contract particulars in the transport document. Although, the former draft article followed to the prior sea conventions and the effect of conclusive evidence rule is limited only to the description of the goods, in the final provision the effect of the conclusive evidence rule is widened. [43] Article 41(b) uses the word "any" without referring to contract particulars in Article 36. Therefore, under the Rotterdam Rules, not only the contract particulars that are listed in Article 36 but also the particulars that are added by the parties become conclusive evidence when all preconditions have been met. In this respect, the Rotterdam Rules provide more protection to the third parties than the former conventions.

Secondly, unlike the former convention, conclusive evidence rule applies both the negotiable transport document e.g. the bills of lading and the non-negotiable transport document, that require surrender, e.g. the straight bills of lading.[44] Accordingly, under the Rotterdam Rules, the scope of the conclusive evidence rule is broader than the former convention, and Article 41(b) protects both the rights of the holder and the consignee who is not the shipper.

Consequently, the Rotterdam Rules introduce a broad scope of application for the conclusive evidence rule by applying all types of transport documents and covering all information in the transport documents.

### 3.2- Article 41(c) of the Rotterdam Rules

Article 41(c) goes a step further and extends the scope of the conclusive evidence rule to the non-negotiable transport documents that do not require surrender. In the Working Group, there was an intensive debate about Article 41(c), and some suggested that the conclusive evidence rule should also apply the particulars in non-negotiable transport documents whereas others suggested that the conclusive evidence rule is inconsistent with the nature of the

[41] See supra part 2. Also, see, Sturley, Fujita, Van der Ziel (n 6) para.7.086; Tomotaka Fujita, Transport Documents and Electronic Transport Records, in Alexander Von Ziegler, Johan Schelin, Stefano Zunarelli, The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, (Wolters Kluwer, 2010), p.185

[42] See Art III(4) of the Hague-Visby Rules and Art 16(3)(b) of the Hamburg Rules

[43] See, Report (n 29) p.48; Sturley, Fujita, Van der Ziel (n 6) para.7.085

[44] See, Art 41(b)(i) and Art 41(b)(ii). Also, Anthony Diamond, The Rotterdam Rules, LMCLQ (2009), pp.445, p.507; Francesco Berlingieri, Revisiting the Rotterdam Rules, LMCLQ (2010), pp. 583, p.625

non-negotiable transport documents.[45] Finally, the Working Group combined those two views and Article 41(c) introduces a weaker conclusive evidence rule with more stringent preconditions.[46] In order to apply the conclusive evidence rule under Article 41(c), firstly the carrier has not qualified the contract particulars under Article 40, secondly, in the hand of the consignee there must be a non-negotiable transport document that does not require surrender, thirdly, the consignee must act in good faith and fourthly, the consignee must rely on the contract particulars in the transport document. When the foregoing four prerequisites have been jointly satisfied, then the conclusive evidence rule applies to the following particulars;

"(i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;

(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and

(iii) The contract particulars referred to in article 36, paragraph 2."[47]

As it is seen, Article 41(c) requires one more precondition in addition to the preconditions indicated in Article 41(b). Accordingly, the consignee, who has possession of a non-negotiable transport document, must act both in good faith and in reliance of the information in the transport document. For instance, if the consignee does not know that the information is incorrect and has paid the purchase price relying on the information in the non-negotiable transport document, Article 41(c) will be applicable.[48] It is said that that precondition might be added to prevent the consignee, who is also the shipper, to benefit the conclusive evidence rule.[49] However, it seems that there is no need such an extra condition because in the hands of the shipper the contract particulars in the transport document are only prima facie evidence under Article 41(a) irrespective of types of the transport document. This is because; if the consignee is also the shipper it does not need to be protected under conclusive evidence rule since the shipper has concluded the contract of carriage with the carrier.[50]

[45] See, Report of Working Group III (Transport Law) on the Work of Its Eleventh Session, UN Doc., A/CN.9/526, paras. 45-48; United Nations Commission on International Trade Law Working Group III (Transport Law) Twelfth Session, UN Doc., A/CN.9/WG.III/WP.32, p. 43; United Nations Commission on International Trade Law Working Group III (Transport Law) Sixteenth Session, UN Doc., A/CN.9/WG.III/WP.56, p.37; United Nations Commission on International Trade Law Working Group III (Transport Law) Seventeenth Session, UN Doc., A/CN.9/WG.III/WP.62, paras 44-46; Report (n 28) paras 45-68

[46] See, United Nations Commission on International Trade Law Working Group III (Transport Law) Twentieth Session, UN Doc., A/CN.9/WG.III/WP.94, p.2; Report (n 40) para 14; Fujita, Transport Documents and Electronic Transport Records, (n 42) p.186

[47] See, Art 41(c) of the Rotterdam Rules

[48] See, Sturley, Fujita, Van der Ziel (n 6) para. 7.090

[49] See, Diamond (n 45) p.507; Berlingieri (n 45) p.626

[50] See, Report (n 28) para.66

Additionally, unlike Article 41(b), pursuant to Article 41(c), instead of all particulars only the contract particulars that are listed in Article 41(c)(i)-(iii), are specified as conclusive evidence against the carrier. In this way, the carrier is prevented to benefit the inaccuracy of the particulars which have been furnished under the control and knowledge of it.[51] Article 41(c)(i) requires that the particulars, which are listed in Article 36(1), must be provided by the carrier. It should be pointed that the particulars in Article 36(1) are generally furnished by the shipper, but sometimes they might be provided by the carrier.[52] In respect of Article 41(c)(i), the provider of the information has a decisive role upon the evidentiary value of the particulars in a non-negotiable transport document. If the information is provided by the carrier then it will be specified as conclusive evidence and the carrier cannot prove contrary, however, if the shipper is the provider the carrier is allowed to prove contrary.[53]

On the other hand, the particulars indicated in Article 41(c)(ii) are often furnished by the shipper and verified by the carrier whereas the particulars referred in Article 41(c)(iii) are provided by the carrier under his knowledge and control.[54] The aim of the provision prevents the carriers to apply inaccurate information that has been furnished by them. However, contrary to Article 41(c)(i), Article 41(c)(ii) and (iii) do not expressly state that the information must be furnished by the carrier. Therefore, according to strict literal interpretation, it might be said that in respect of Article 41(c)(ii) and (iii) the provider of the information is not important and even though the information is furnished by the shipper it might be treated as conclusive evidence if all preconditions have been met.

Last but not least, Article 41(c) introduces a novelty, and for the first time, an international convention regulates evidentiary effect of non-negotiable transport document.[55] Further, the parties are free to increase the evidentiary value of the particulars in a non-negotiable transport document.[56] However, because of the Article 79, they cannot downgrade the evidentiary value of the particulars.[57]

[51] See, Williams (n 2) p. 214
[52] See, Sturley, Fujita, Van der Ziel (n 6) para.7.089
[53] See, Report (n 28) para. 61
[54] See, Sturley, Fujita, Van der Ziel (n 6) para.7.089
[55] See, Berlingieri (n 45) p.625
[56] See, Report (n 28) para 67.
[57] See Art 79 of the Rotterdam Rules

## 4. The Evidentiary Effect of the Qualified Contract particulars

Contrary to the Hague-Visby Rules, the Rotterdam Rules follow the Hamburg Rules and provide an express provision about the evidentiary effect of the qualifying clauses.[58] Article 41 starts with an exception and states that if the contract particulars are qualified by the carrier in accordance with Article 40 then Article 41 will not apply. Article 40 allows the carrier to qualify the information in the transport document that is furnished by the shipper.[59] It should be pointed that the carrier must qualify the information as indicated method in Article 40; otherwise there will not be a valid qualification clause, which will be able to prevent the application of Article 41.[60]

Pursuant to 40, the carrier can only qualify the information listed in Article 36(1) i.e. only the contract particulars related to the goods can be qualified by the carrier. The important point is that the Convention limits the exception to the extent that qualifying clauses, namely, only the qualified contract particulars will lose their prima facie or conclusive evidentiary value.[61] For instance, if the carrier qualifies the information about the weight of the cargo it does not affect the evidentiary value of the leading marks or other particulars listed in Article 36(1). Because of the limited scope of the carrier's right to qualify the information, the evidentiary value of the particulars cannot be completely superseded by the carrier.[62] Consequently, when the carrier validly qualifies the information listed in Article 36(1) then the qualified particular does not have any evidentiary effect under Article 41, but Article 41 will still apply for unqualified particulars.

## 5. Conclusion

The Convention regulates the evidentiary effect of the transport documents with a detailed and complex provision. While, in respect of the prima facie evidence rule the Convention follows to the traditional execution, in respect of the conclusive evidence rule the Convention introduces some novelties. First time an international convention regulates the evidentiary effect of all types of transport documents. Under the Convention not only the contract particulars in negotiable transport documents but also the particulars in non-negotiable transport documents, which require surrender, are specified as conclusive

[58] See Art III(4) of the Hague-Visby Rules, Art 16(1), (2), and (3) of the Hamburg Rules, and the chapeau of Art 41 of the Rotterdam Rules.
[59] See. Art 40 of the Rotterdam Rules.
[60] See, Sturley, Fujita, Van der Ziel (n 6) para.7.075
[61] See, Report (n 29) para. 150; Report (n 28) paras.71-72
[62] See, Report (n 28) para. 72.

evidence against the carrier. Furthermore, the evidentiary effect of the particulars in non-negotiable transport documents, that do not require surrender, is also regulated expressly. However, it should be kept in mind that because of the complex wording, the Convention might cause some new problems.

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