

FRANCESCO BERLINGIERI

AN ANALYSIS OF
TWO RECENT COMMENTARIES OF
THE ROTTERDAM RULES

Estratto della Rivista

IL DIRITTO MARITTIMO

Fasc. I – 2012

DOTTRINA

AN ANALYSIS OF TWO RECENT COMMENTARIES ON THE ROTTERDAM RULES

FRANCESCO BERLINGIERI

I have in the recent years reviewed other contributions to the study of the Rotterdam Rules and think I should do the same for two full commentaries, both published in 2010, the “Rotterdam Rules 2008”, edited by Dr. Alexander von Ziegler, Professor Johan Schelin and Professor Stefano Zunarelli and “The carriage of goods by sea under the Rotterdam Rules”, edited by Professor Rhydian Thomas.

There follows, for the convenience of the reader, the table of contents of the two books with the page at which the review of each individual article starts.

THE ROTTERDAM RULES 2008, edited by Alexander von Ziegler, Johan Schelin and Stefano Zunarelli, Kluwer Law International, 2010

<i>Chapter 1. General Provisions</i> , by Professor Hannu Honka	p.	5
<i>Chapter 2. Scope of Application</i> , by Professor Michael F. Sturley	»	9
<i>Chapter 3. Electronic transport records</i> , by José Angelo Estrella Faria	»	11
<i>Chapter 4. Obligations of the carrier</i> , by Professor Philippe Delebecque	»	12
<i>Chapter 5. Liability of the carrier for loss, damage or delay</i> , by Dr. Alexander von Ziegler	»	17
<i>Chapter 6. Additional provisions relating to particular stages of carriage</i> , by Dr. Uffe Lind Rasmussen	»	23
<i>Chapter 7. Obligations of the shipper to the carrier</i> , by Professor Johan Schelin	»	28
<i>Chapter 8. Transport documents and electronic transport records</i> , by Professor Tomotaka Fujita	»	31
<i>Chapter 9. Delivery of the goods</i> , by Professor Gertjan van der Ziel	»	36
<i>Chapter 10. Rights of the Controlling Party</i> , by Professors Stefano Zunarelli and Chiara Alvisi	»	40
<i>Chapter 11. Transfer of rights</i> , by Professor Stefano Zunarelli	»	44
<i>Chapter 12. Limits of liability</i> , by Professors Yuzhuo Si and Ping Guo	»	45
<i>Chapter 13. Time for suit</i> , by Professor Hyeon Kim	»	50
<i>Chapter 14. Jurisdiction</i> , by Professor Manuel Alba Fernandez	»	52
<i>Chapter 15. Arbitration</i> , by Chester D. Hooper	»	58
<i>Chapter 16. Validity of contractual terms</i> , by Professor Hannu Honka	»	60
<i>Chapter 17. Matters not governed by this Convention</i> , by Professor Hannu Honka	»	62
<i>Chapter 18. Final Clauses</i> , by Kate Lannan	»	63
<i>Conclusion</i> , by Rafael Illescas Ortiz	»	65

THE CARRIAGE OF GOODS BY SEA UNDER THE ROTTERDAM RULES, edited by Professor D. Rhidian Thomas, London 2010

<i>Chapter 1. The emergence and application of the Rotterdam Rules,</i> by Professor D. Rhidian Thomas	p.	66
<i>Chapter 2. From treaty to trial: the implementation of the Rotterdam Rules,</i> by Michael Harakis	»	71
<i>Chapter 3. Interpreting the international sea-carriage conventions: old and new,</i> by Simon Rainey QC	»	73
<i>Chapter 4. Freedom of contract and the Rotterdam Rules: framework for negotiation or one-size-fits-all?,</i> by Professor Andrew Tettenborn	»	77
<i>Chapter 5. Minimal music: multimodal transport including a maritime leg under the Rotterdam Rules,</i> by Professor Dr. Ralph De Wit	»	82
<i>Chapter 6. The duties of carriers under the conventions: care and seaworthiness,</i> by Andrew Nicholas	»	89
<i>Chapter 7. Package limitation as an essential feature of a modern maritime transport treaties: a critical analysis,</i> by Professor Dr. Marc A. Huybrecht	»	90
<i>Chapter 8. Exclusions of liability,</i> by Julian Clark and Jeffrey Thomson	»	91
<i>Chapter 9. Misdelivery claims under bills of lading and international conventions for the carriage of goods by sea,</i> by Simon Baughen	»	92
<i>Chapter 10. Some remarks on the allocation of the burden of proof under the Rotterdam Rules as compared to the Hague (Visby) Rules,</i> by Dr. N.J. Margetson	»	95
<i>Chapter 11. Duties of shippers and dangerous cargoes,</i> by Frank Stevens	»	97
<i>Chapter 12. Deck cargo: Safely stowed at last or still at sea?,</i> by Dr. Susan Hodges and David A. Glass	»	103
<i>Chapter 13. Transport documents under international conventions,</i> by Professor Francis Reynolds QC	»	106
<i>Chapter 14. Electronic documents and the Rotterdam Rules,</i> by David Martin-Clark	»	110
<i>Chapter 15. Impact of the Rotterdam Rules on the Himalaya Clause: the port terminal's operator case,</i> by Professor Jason Chuah	»	111
<i>Chapter 16. Jurisdiction and arbitration,</i> by Professor Yvonne Baatz	»	117

THE ROTTERDAM RULES 2008

This book, after forewords by the editors and by the then Secretary of UNCITRAL, Jerney Sekolec and a General Introduction by the author of this review, contains a commentary on each of the eighteen chapters of the Rotterdam Rules and ends with a conclusion by Professor Rafael Illescas Ortiz, who had been the Chairman of the UNCITRAL Working Group III. In the initial paragraph of their Introduction the editors, who have also contributed to the analysis of the Rotterdam Rules, say that the authors, different in nationality and background, have one important thing in common – all of them contributed over the previous ten years to the completion of the Rotterdam Rules.

Since the author of this review has been also the author of the General Introduction (pages 1-25), the review will obviously not cover it, but will start from chapter 1 and will cover the analysis of all the eighteen chapters, as well as the conclusion. The book consists of a commentary of the Rotterdam Rules article by article and the text of each article precedes the commentary. For convenience the authors will be referred to by their family name.

Chapter 1. General Provisions, by Professor Hannu Honka (pages 27-38)

Article 1. Definitions

Professor Honka does not make an analysis of each of the 24 definitions contained in article 1, but merely says that their number may be explained in view of the number of articles of – and I would add, if I may, of the number of matters dealt with in – the Rotterdam Rules as compared with both the Hague-Visby Rules and the Hamburg Rules. He adds that article 1 aims at clarifying as many of the terms in the Rotterdam Rules as possible. This indeed is the purpose of the definitions, for otherwise instead of one word or few words, each time a long sentence would be needed to explain what is the subject matter of each provision. And the definitions were not discussed *in abstracto* during the sessions of the UNCITRAL Working Group, but in connection with the discussion of each article or group of articles¹.

Article 2. Interpretation of this Convention

Honka analyzes the three criteria indicated in this article for the interpretation of the Convention and observes that an identical rule may be found in the UN Convention for the International Sale of Goods (article 7) and a similar rule may also be found in the Hamburg Rules (article 3) where, however, the third criterion is missing.

¹ See for example the comment of the discussion on the terms “performing party” and “maritime performing party” during the 12th session (A/CN.9/544, paras.20-42) and the 19th session (A/CN.9/621, paras. 128/142).

He also observes that since there is no supranational authority to provide the final answer in a particular case it might be more appropriate to talk about harmonization rather than unification. The term harmonization is in reality more often used when the national laws are similar, but not identical, as is the case in respect of model laws; but Honka is right all the same, because actual unification would require uniform interpretation of a convention in all States parties: an aim that is difficult to achieve since even in the same country - and that is particularly so in civil law countries – courts may differ in the interpretation of a convention; but attempts in that direction are being made, for sometimes courts in a country make reference to judgments issued in other countries. Uniform interpretation might be achieved, Honka says, in case the Rotterdam Rules will be ratified or acceded to by a regional economic integration organization, such as the European Union, in which the interpretation by the Court of Justice would be binding in all member States.

Article 3. Form Requirements

Honka raises some interesting issues in respect of this article. The first relates to the possibility by States parties to introduce additional form requirements to those enumerated in this article and Honka is of the opinion that States parties may do so. I instead have doubts about that, because an additional form requirement must in many cases be known at the time the contract is made and in any event when a specific action takes place and this may create problems to the parties, since they may not be aware of which the proper law will be according to the conflict of law rules of the country in which an action is brought.

The second issue relates to the legal consequences of non compliance with the form required by article 3. Honka is of the view that they are not regulated in the Rotterdam Rules, but previously he had said that matters of proof are resolved by this provision and that some form requirements are of such fundamental importance that invalidity would follow if they are not complied with (he specifically refers to article 80(5)). I think that when he says that matters of proof are resolved by this provision he gives generally a correct answer to the question: proof of the notices, confirmation, consent, agreement, declaration and other communications mentioned in article 3 may be provided only by writing and, therefore, oral evidence is not allowed.

A review of the individual provisions listed in article 3 may be useful in order to find out which is the precise effect of the operation of article 3 in each case.

a) article 19(2) [agreement of the carrier to assume obligations other than those imposed on him under the Convention or higher limits of liability]: if the agreement is not in writing is not binding on the carrier since oral evidence is not permitted;

b) article 23(1) and (4) [notice of loss or damage and of delay]: if the notice is not in writing it does not produce the effect stated in article 19(2), but it remains to be seen what that effect actually is;

c) article 36(1)(b), (c) and (d) [contract particulars]: the fact that they must be in writing is already stated in article 36, since they are particulars to be mentioned in the transport document: if they are not in writing that means that they are not

mentioned in the transport document and consequently are not contract particulars for the purposes of article 41;

d) article 40(4)(b) [agreement on weighing a container or vehicle and mentioning the weight in the contract particulars]: in this case the need for the agreement to be in writing is not implied in the provision and the lack of a written agreement entails that the carrier may qualify the information referred to in article 36(1)(d), being the information on the weight of the goods;

e) article 44 [request of the carrier to the consignee to acknowledge receipt]: in this case what should be in writing may be the request or the acknowledgment, but since the acknowledgment must be in the manner customary at the place of receipt, it appears that it is to the request that reference is made in article 3 and the lack of a request in writing to the consignee of an acknowledgment of receipt ought to exclude the right of the carrier to refuse delivery, even though that may not be the case if the obligation of an acknowledgment of receipt may be customary at the place of delivery;

f) article 48(3) [notice by the carrier of the intention to exercise (any of) the rights granted to him under para. 2]: the lack of a reasonable notice (it is not thought that by that it is meant a notice preceding the exercise of any of the rights granted to the carrier by article 48(2)) to any of the persons mentioned in article 48(3) may make the carrier subject to a claim for damages by the person entitled to delivery of the goods, on the ground that the carrier has exercised a right when to the condition for its existence had not yet materialized.

g) article 51(1)(b) [notification by the transferor to the carrier of the transfer of the right of control]: the lack of a notification in writing would entitle the carrier to consider the transferor as controlling party and, therefore, the transferee in whose interest, rather than of the transferor, the notice should be given, may not claim damages if the carrier has in good faith acted on instructions of the transferor; but that is not very likely to occur, since article 51(2) (b) provides, when a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery, that in order to exercise the right of control the controlling party shall produce the document properly identifying himself and similar provisions are contained in article 51(3) and 51(4) respectively where a negotiable transport document or a negotiable electronic transport record is issued.

h) article 59(1) [declaration of the value of the goods or agreement on a higher limit]: since the value of the goods must be included in the contract particulars, the need for a written evidence relates to the agreement upon a higher limit and, absent an agreement in writing in that respect, the limit set out in article 59 or in article 60 shall apply.

i) article 63 [extension of the time for suit]: although no claimant would be satisfied by an oral declaration, the need for a declaration in writing is not implied in the provision and if there is none, the limit set out in article 62 shall apply.

j) article 66 [exclusive choice of court agreement]: within the European Union the question may arise whether the need for the agreement to be in writing is in

conflict with article 23(1)(b) and (c) of Regulation No.44/2001 and amongst the States parties to the Lugano Convention 2007 with its article 23(1)(b) and (c) ; in case it is not in conflict with such rules or neither Regulation No.44/2001 nor the Lugano Convention applies, the choice of court agreement would not be effective.

k) article 67(2) [notice of the court where the action shall be brought]: although reference is made generally to article 67(2) it is assumed the notice referred to is that mentioned under (c), since the need for the choice of court agreement to be in writing is stated in article 66(b) and in the absence of such notice a person that is not a party to the volume contract is not bound by the choice of court agreement.

l) article 75(4) [notice of the place of arbitration to a person that is not a party to the volume contract]: similarly to the position in respect of article 67(2), also in this case reference must be assumed to be to article 75(4)(c) since the need for the arbitration agreement to be in writing is already set out in article 75(b) wherein it is stated that the agreement must be contained in the transport document (or electronic transport record) and the consequence is the same as that indicated above in respect of article 67(2).

Article 4. Applicability of defences and limits of liability

In respect of paragraph 1 that, as he says, provides for the position on the carrier's side, Honka considers first the basis of the claim and draws a comparison between its provisions and those in article IV bis (2) of the Hague-Visby Rules and in article 7(1) of the Hamburg Rules indicating the difference in the respective scope of application, that in such conventions is limited to claims in respect of loss of or damage to the goods whereas in the Rotterdam Rules is extended to the breach of any obligation under the Convention. The language used in this provision is the same as that used in article 59(1) in respect of the limits of the carrier's liability. He then considers the persons to whom the provisions apply, specifically enumerated in paragraph (1), stating that article 4(1) introduces a legislatively based Himalaya effect, and drawing the attention to the need at present for such clause, since independent contractors are not covered by article IV bis (2) nor, I suggest, by article 7(2) of the Hamburg Rules. I also suggest that the protection that will be afforded by article 4 to independent contractors is more significant than Himalaya clauses, that are valid in common law jurisdictions, but may not be considered valid in certain civil law jurisdictions to the extent that they are in conflict with mandatory national rules. As regards maritime performing parties, specifically mentioned in article 4(1)(a), Honka draws attention (at page 37) to the fact that although their protection is also provided by article 19(1), their protection under article 4 is wider, since article 19(1) includes certain conditions for its application. I am not sure that a difference exists. First because article 4(1) is a general rule, whereas article 19(1) is a specific rule and courts may consider that its provisions prevail over those of article 4, and secondly because the qualification of a performing party as maritime performing party in respect of at least some of the activities enumerated in article 19(1)(a) and (b) may be disputable.

Finally, Honka discusses (still at page 37) the reference in article 4(1)(b), in addition to the master and crew, to “any other person that performs services on board the ship” and explains the limit in the coverage of persons by saying that it was considered inappropriate to provide Himalaya protection to independent contractors not connected with typical sea leg operations. I believe that this is not a case of Himalaya protection in a strict sense. Reference to other persons performing services on board was due to the fact that on board there are persons that in a strict sense may not be considered to be part of the crew, as is the case in respect of passenger and cruise ships.

In respect of article 4(2), that provides for the position on the shipper’s side, Honka, after stressing the novelty of this provision, specifically considers the reason for and the effect of a reference therein also to the documentary shipper.

Chapter 2. Scope of Application, by Professor Michael F. Sturley (pages 39-50)

In his *General Introduction* Professor Sturley says that whereas the provisions on the scope of application define the circumstances in which the Rotterdam Rules are compulsorily applicable, they may apply more broadly because, as it has occurred with the Hague Rules and the Hague Visby Rules, they may voluntarily be incorporated into standard charterparty forms of wide use. After having drawn attention to the fact that the scope of application is closely related to, but must be distinguished from, the carrier’s period of responsibility, he briefly indicates the approaches adopted in the Hague Rules and the Hague Visby Rules and in the Hamburg Rules, such approaches being respectively a documentary approach, the scope of application being related to the issuance of a document, the bill of lading, and a contractual approach, the scope of application being related to the existence of a contract of carriage. When the problem was considered by the UNCITRAL Working Group, a different approach was suggested, namely that based on the type of trade, but ultimately it was thought convenient to take elements from all three approaches. He then analyzes the three articles of chapter 2.

Article 5. General scope of application

Sturley states that the Rotterdam Rules begin, as do the Hamburg Rules, with a contractual approach and after having quoted the definition of “contract of carriage” in article 1(1), considers the various aspects of such definition that in his opinion are noteworthy, such aspects being the promise to perform (rather than the actual performance), the requirement that the shipper must pay a freight and, in particular, the need for the carriage being at least in part by sea, being international and having a connection with a Contracting State.

Article 6. Specific exclusions

Sturley explains that when although it was agreed to retain the charter party exclusion adopted in the Hague Rules and already retained in the Hamburg Rules,

to the difficulty of defining this term there was added the growth of a broad range of new contracts that, bearing a closer resemblance to charterparties than to bills of lading, did not fit in either category; however to the extent that the parties to such contracts are sophisticated commercial actors with comparable bargaining power it made sense to treat them in the same way as charterparties. It was therefore decided to implement the charterparty exclusion with a combination of the trade and documentary approaches. Thus on the one hand although transactions in the liner trades are governed by the Rotterdam Rules, where charter parties and other contracts for the use of a ship or any space thereon are used in the lines trade they are excluded from the coverage of the Rotterdam Rules; and on the other hand although non-liner transactions are excluded, sometimes tramp shipping is close to the liner trade as it happens in respect of “on demand carriers”, who operate essentially as liner companies in the sense that they offer their services to the public generally and issue bills of lading, but do not operate on a regular schedule.

That is definitely the reason that stands behind article 6 and in order to understand its negative formulation attention must be paid to the opening subparagraph in Sturley’s commentary para. 2.3.1: “Once article 5 had broadly included every transaction that might justifiably be governed it becomes article 6’s task to exclude those transactions that should not be subject to mandatory law”. In other words pursuant to article 5 the Rotterdam Rules apply to contracts of carriage and therefore the mere adoption of a contractual approach would include all types of contracts of carriage. It was therefore necessary, as was done, but not completely, by the Hamburg Rules, to specify which types of contracts of carriage should be excluded from the scope of application of the Rotterdam Rules. Although I agree with Sturley that in article 6 both a trade and a documentary approach have been adopted, I would say that generally the approaches – contractual, trade and document – are adopted in a gradually subordinated line: first a contractual approach, secondly a trade approach and thirdly a documentary approach. The general rule is that the Rotterdam Rules apply to contracts of carriage, the secondary rule is that they apply to contracts in liner transportation and do not apply to contracts in non-liner transportation, and the tertiary rule consists of exceptions to the secondary rule. The secondary rule is not set out expressly in article 6, but is implied. The graduation suggested above might be relevant in respect of the distribution of the burden of proof.

The wording of article 6 is not always technically correct, for a charter party is not a type of contract, but rather evidence of a type of contract².

² In *Scrutton on Charterparties and Bills of Lading*, 2nd edition 1890 at page 1 the second sentence of article 1 reads:

When the agreement is to carry a complete cargo of goods, or to furnish a ship for that purpose, the contract of affreightment is almost always contained in a document called *charterparty*...”. An almost identical statement may be found in all subsequent editions, until the 20th (article 3, page 3) “for the employment of the whole ship on a given voyage or voyages or for a period of time the contract of affreightment is almost always contained in a document called a *charter party*....”.

Article 7. Application to certain parties

Sturley points out that in this article the criterion adopted in the Hague Rules and in the Hague-Visby Rules, according to which the charter party exclusion from the scope of application does not apply to the holders of bills of lading issued under a charter party, has been preserved, but adapted to the extended scope of application of the Rotterdam Rules, not limited anymore to bills of lading.

Chapter 3. Electronic transport records, by José Angelo Estrella Faria (pages 51-70)

Mr. Estrella's contribution starts with a very useful introduction in which he clearly describes the development of the criteria defining the conditions under which electronic records can be regarded as equivalent to paper documents for legal purposes. A job for which he was well qualified since prior to becoming the Secretary-General of Unidroit, he had been Senior Legal Officer of UNCITRAL, that had adopted in 1996 a Model Law on Electronic Commerce followed five years later by a Model Law on Electronic Signature, adopted as of January 2009 by 23 countries. He states that although signatures may perform many functions, all legal systems recognize that a signature serves at the very least to a) identify a person and provide certainty as to the personal involvement of that person in the act of signing and b) associate that person with the content of a document, and that although the Rotterdam Rules focus on these two basic functions, they deliberately refrained from identifying particular technologies that could be used to achieve functional equivalence. Amongst the various electronic methods that may be used to satisfy the signature requirements he briefly describes (at p. 55) two: digital signature and biometric.

There follows an analysis of the six definitions in article 1 that pertain to the electronic equivalent of a paper transport document, viz.: "electronic communication" (article 1.17), "electronic transport record" (article 1.18) "negotiable electronic transport record" (article 1.19), "non-negotiable electronic transport record" (article 1.20), "issuance of a negotiable electronic transport record" (article 1.21) and "transfer of a negotiable electronic transport record" (article 1.21). Estrella considers in some detail the definition relating to the issuance of the record and states that the notion of 'exclusive control' over the electronic transport record is a cornerstone in the regime established by the Rotterdam Rules with a view to fostering the use of electronic transport record and states that a main source of inspiration to that end was found in the Uniform Electronic Transaction Act which implements the UNCITRAL Model Law on Electronic Commerce in the United States.

The subsequent part of Estrella's article is devoted to the commentary of the three articles of chapter 3.

Article 8. Use and effect of electronic transport records

Estrella draws attention to the fact that whereas replicating the functions of the bill of lading consisting in the acknowledgment by the carrier of the receipt of the

goods and in evidencing the contract of carriage is a relatively simple task, replicating the negotiability function gives rise to great difficulties, mainly because it is impossible to physically 'hold', 'endorse' or 'deliver' and electronic record. He then says that the Rotterdam Rules aim at establishing conditions under which electronic systems can replicate that function and do so by linking the electronic negotiability to the existence of procedures that ensure that only one person at any given point in time should be capable of exercising 'exclusive control' over the negotiable electronic transport record. This is actually a comment on article 9, rather than on article 8, which consists of a mere declaration of equivalence between paper document and electronic record.

Article 9. Procedures for use of negotiable electronic transport records

Still under article 8 Estrella points out that various market practices and business models have been proposed or are still being developed to replace the traditional transport documents with electronic records and that the drafters of the Rotterdam Rules were aware of these developments and did not wish to interfere with them. The statement in Estrella's comment on article 9 that the Rotterdam Rules leave the parties largely free to organize the use of electronic commerce among themselves is a confirmation of what he had said previously.

He then analyzes separately the subject matters enumerated in article 9(a), (b) and (c) and draws attention to the fact that notwithstanding its apparent vague wording subparagraph (a) sets forth a rather stringent requirement that not every system would be capable of meeting in as much as this provision must be read in conjunction with the definition of 'issuance' of negotiable electronic transport record in article 1.21, which expressly requires that the record follows the procedures that ensure that it is subject to exclusive control from its creation until it ceases to have any effect or validity. He is right: the procedures to which the use of a negotiable electronic transport record is subject in so far as its issuance is concerned are precisely those set out in the above definition. A similar comment may also be made in respect of the transfer, its definition in article 1.22 referring to 'the transfer of exclusive control over the record'.

Article 10. Replacement of negotiable transport document or negotiable electronic transport record

Estrella draws the attention to the need for the avoidance of the parallel of paper transport documents and electronic transport records concerning the same carriage. That in fact might entitle two different persons to dispose of the goods at the same time.

Chapter 4. Obligations of the carrier, by Professor Philippe Delebecque (pages 71-92).

In his introduction to chapter 4 Professor Delebecque notes that the Rotterdam Rules in contrast with the Hague-Visby Rules do not consider only the issue of

liability of the carrier but also the contract regime and the obligations of the parties. He is right when he says that the expression ‘obligations of the carrier’ is not used in the Hague Rules and in the Hamburg Rules, but whereas the obligations are not enumerated at all in the Hamburg Rules, they instead are enumerated in the Hague-Visby Rules article 3(1) and (2) even though they are so qualified in article 3 (1) by the term *tenu* (*sera tenu*) which is the translation of the verb *shall* used in the Hague Rules 1921 and in article 3(2) by the use of the future tense of the verb *procéder* (*procédera*). After mentioning the principal and ancillary obligations of the carrier and noting that the rights of the carrier under the contract of carriage – and in particular the right of payment of freight, originally the subject of a specific chapter in the draft - have been excluded from the Rotterdam Rules, he briefly analyzes the extent to which the obligations of the carrier have been dealt with in other transport conventions and in various national laws.

He then says that the general economy of chapter 4 (there is a misprint for reference is made to article 3) is rather deceptive, because chapter 4 is not entirely devoted to the carrier’s obligations for out of a total of six articles two regulate rights of the carrier. Although the rubric of chapter 4, that was left unvaried since the original CMI draft in which the rule now set out in article 15 already appeared, might have included a reference to the matters regulated by articles 15 and 16, their provisions might also be considered as exceptions to the obligations of the carrier and the preposition “notwithstanding” with which both articles initiate seems to confirm that.

But the probably most interesting part of his introduction is that (at pages 74-75) dealing with the suppression of an article – article 13 of the draft approved by Working Group III and submitted to the Commission at its forty-first session – that regulated the issuance by the carrier of a single transport document covering stages of the carriage that are not part of the contract of carriage³. After explaining the reasons why that article was suppressed, he says that that deletion did not entail an implied condemnation of that practice, called “merchant haulage”, the only consequence being that the merchant haulage is not covered by the Rotterdam Rules. His opinion is supported by the Report of the forty-first session of the Commission during which it was decided to delete article 13⁴.

³ Article 13, in the text approved at the twenty-first Session of Working Group III, was worded as follows:

On the request of the shipper, the carrier may agree to issue a single transport document or electronic transport record that includes specified transport that is not covered by the contract of carriage and in respect of which it does not assume the obligation to carry the goods. In such event, the carrier’s period of responsibility is only the period covered by the contract of carriage.

⁴ Article 13 was the subject of an extensive debate, reported in the Report on the forty-first session A/63/17 at paras.45-53. The decision to delete article 13 is mentioned in paragraph 53 the text of which is reproduced below:

53. Following extensive efforts to clarify the text of draft article 13 to resolve the concerns

Article 11. Carriage and delivery of the goods

The first question Delebecque considers is whether the parties are free to include terms that are not covered by the Rotterdam Rules and answers affirmatively. He then draws attention to the fact that pursuant to this article the carrier must carry the goods to the place of destination whereas in article 5(1) in order to determine the scope of application of the Rotterdam Rules reference is made to the place of delivery and says that the reference to the place of destination is quite appropriate. Although I agree, I think it is also appropriate to consider whether there is any difference between the place of delivery and the place of destination. Reference to the place of delivery is also made in article 36(3)(c) as well as in article 43, in which it is stated that when the goods have arrived at their destination the consignee that demands delivery shall accept delivery and in article 46 (a) that provides that the carrier shall deliver the goods at the time and location referred to in article 43. It appears, therefore, that place of destination is the same as place of delivery: the carrier in fact must deliver the goods at the place of destination. However then Delebecque considers two situations, the first is that the goods may not reach the place of destination on account of events for which the carrier is not responsible and the second is that the contract may contain a liberty clause authorising the carrier in certain case (e.g. a strike) to deliver the goods at a place other than the place of destination. As regards the first of such situations Delebecque is of the opinion that under the Rotterdam Rules, as at present under French law, the carrier is relieved from liability. Although such situation is not expressly regulated in the Rotterdam Rules, the same principles governing the liability of the carrier in respect of loss of or damage to the goods and delay in delivery should apply and the basic rule is that the basis of the carrier's liability is fault. As regards the second situation, it should first be considered what the purport is of the reference in article 11 to the terms of the contract of carriage. It appears that such terms should relate to matters not covered by the Rotterdam Rules, for in respect of such matters, as Delebecque rightly points out, article 79 applies and in the case under consideration the obligation to deliver the goods to the place of destination is set out in the Rotterdam Rules.

Article 12. Period of responsibility of the carrier

Delebecque considers separately the provisions in each of the three paragraphs of this article. In respect of para. 1, he says (at page 80) that the initial and final term of the period of responsibility are clear, but the question remains how they should be considered, namely whether on the basis of a "material approach" or of a "contractual" approach and refers to a decision of the French Cour de Cassation of

that had been raised with respect to it, the Commission took note that it had not been possible to agree on a revised text for the provision. In keeping with its earlier decision, the Commission agreed that draft article 13 should be deleted, taking note that that deletion did not in any way signal that the draft Convention intended to criticize or condemn the use of such types of contract of carriage.

17 November 1992 in the “*Rolline*” case⁵, in which the Court quashed the judgment of the Court of Appeal of Aix-en-Provence that had held that delivery had taken place with the handing over to the consignee of a delivery order, on the ground that delivery takes place with the actual handing over of the goods to the consignee or, failing that, when the consignee has been enabled to verify the conditions of the goods and to accompany the acceptance of the goods with a reservation. He then says that that issue had been raised during the *travaux préparatoires* but no discussion in depth took place. Indeed the issue of the distinction between contractual time and location and actual time and location of receipt and delivery was raised but not discussed during the nineteenth session of the Working Group⁶. It was, however, discussed during the twenty-first session, when the proposal was made to reinsert in article 12 the text that originally appeared in A/CN.9/WG.III/WP.81 but it was not upheld⁷. But what perhaps is relevant, is that that text was moved to article 45(1) that in the final text is now article 43⁸, and the provisions of chapter 9 on delivery may assist in solving the problem raised by Delebecque in the sense that by delivery under the Rotterdam Rules it is meant material delivery.

After a brief summary of paragraph 2 Delebecque rightly considers in a greater depth (at page 81) paragraph 3 which is indeed very important. He says that the parties may agree to substitute loading and unloading for receipt and delivery and the period of responsibility consequently is that between loading and unloading. Perhaps it would be preferable to say that the parties may agree on the time of receipt and delivery of the goods, which is not indicated in paragraph 1, provided it is not respectively subsequent to the beginning of their loading and precedent to the completion of their unloading. He then draws attention to the fact that the term used in article 12(3) is “initial loading” and not “initial receipt”: but of course that is correct because it is the receipt that must not be subsequent to the initial loading and he rightly draws the attention to the fact that initial loading means loading on the first means of transport, that may be a truck or a train in a door-to-door contract or a ship in a port-to-port contract. Of course the question Delebecque raises on whether initial loading means “alongside the vessel” is relevant only in a port-to-port contract: I suggest, however, that by “initial” is meant the first loading operation, whereas the term that is relevant in order to establish whether the whole loading operation must be included within the period of responsibility of the carrier the relevant word is “beginning” (of the initial loading): therefore in case the initial loading is the loading on a ship the loading operation begins when the goods are hooked to the tackle and lifting on board the ship commences.

⁵ *S.A. Seine et Rhône and Others v. Compagnie Maritime Chargeurs Réunis*, (1993) DMF 563, with a note by BONASSIES.

⁶ A/CN.9/621, paras 29 and 30.

⁷ A/CN.9/645, paras. 31 and 32.

⁸ A/CN.9/WG.III/WP.101, note 21.

Finally Delebecque raises another question, namely whether pursuant to article 12(3) an exemption from liability for loss or damage occurring prior to loading or after unloading would be valid even if the goods were in the custody of the carrier. The answer is obviously that if the goods were in the custody of the carrier the period of his responsibility had respectively already commenced or had not yet come to an end.

Article 13. Specific obligations

In respect of paragraph 1 of this article Delebecque remarks that there is a significant, albeit obvious, addition to the list of the carrier's obligations contained in article 3(2) of the Hague-Visby Rules, namely the obligation to receive and deliver the goods. He then makes a thorough analysis of the second paragraph and two of his comments deserve special attention. The first is that the intention of paragraph 2 is not to set out obligations of the shipper or the consignee, but rather to allow the parties to agree that certain activities that normally are performed by the carrier be instead performed by the shipper and the consignee and the second, even more important, is that this provision does not affect the period of responsibility of the carrier, who therefore remains responsible in respect of loss of or damage to the goods that are not directly connected with the loading, stowing and unloading operations, such as theft.

Article 14. Specific obligations applicable to the voyage by sea

After stressing the change of the period during which the obligation of seaworthiness must be performed, such obligation having become continuous, Delebecque considers the allocation of the burden of proof and says that whereas under the Hague-Visby Rules the burden of proof rests on the claimant, pursuant to article 17(5) a compromise solution has been adopted, pursuant to which if the carrier has proven that the loss or damage was caused or contributed to by one of the excepted perils, the claimant may defeat such defence by proving that the loss, damage or delay was *probably* caused by unseaworthiness. It is correct that the general view is that under the Hague-Visby Rules the burden of proof rests on the claimant, but I have some doubts about that. In fact their article 4(1) merely states that whenever loss of or damage to the goods has resulted from unseaworthiness the burden of proving due diligence rests on the carrier. Therefore the above general view seems to be based on the implied effect of that rule that if the carrier has the burden of proving due diligence it is the claimant that has the burden of proving unseaworthiness. But in the first part of this provision, although nothing is said in respect of the allocation of the burden of proof, the wording used is similar to that used in the subsequent paragraph 2 in respect of which it is the carrier that must prove that the loss or damage has resulted from an excepted peril. Since from the wording of paragraph 1, unseaworthiness seems to be an excepted peril, the burden of proof should impliedly be the same.

Article 15. Goods that may become a danger

Article 16. Sacrifice of the goods during the voyage by sea

Delebecque stresses that in the situations covered by both such articles the carrier is released from liability pursuant to article 17(3)(o) but that such release is conditional to the action taken by him having been reasonable.

Chapter 5. Liability of the carrier for loss, damage or delay, by Dr. Alexander von Ziegler (pages 93-132)

Dr. von Ziegler has been given the task to comment one of the fundamental chapters of the Rotterdam Rules, whose provisions have been the subject of extensive debate during the sessions of the UNCITRAL Working Group III. In the *Introduction*, that precedes the comment of each article of the chapter, after stressing the peculiar structure of the Hague Rules (that has not changed with the Hague-Visby Rules), he says that the Rotterdam Rules have tried to restructure the basic principles of the Hague Rules without, for the most part, attempting to alter either their substance or the principles that had been carefully developed over the years by the international legal community in their application. He then says that the two basic changes in the structure of the Rotterdam Rules have been to move from a liability-driven convention to an harmonizing instrument regulating almost the whole contract relationship between the parties to the contract of carriage and, rather than stopping at the artificial maritime boundaries of the pier or the harbour limits, to cover the entire period during which the goods are in the custody of the carrier.

Article 17. Basis of liability

In his comment on paragraph 1, to which he gives the title “The ‘prima facie’ case”, von Ziegler says that the two elements that create a prima facie case for the claimant are a clean bill of lading and the timely notice of loss. I suggest that pursuant to article 17(1) the claimant must prove that the loss, damage or delay took place during the period of the carrier’s responsibility, namely after he has received the goods and before he delivers them to the consignee (save the exceptions set out in article 12 (2)). Evidence of the sound conditions of the goods at the time of receipt is provided by a “clean” (i.e. non qualified) transport document or electronic transport record, whether negotiable or not; but if no document has been issued, such evidence must be provided otherwise, namely by witnesses. Evidence on the different conditions of the goods at the time of delivery is not given by the notice mentioned in article 23. Since von Ziegler considers this problem in his comment on article 31, I shall revert to that in connection with my review of his comments on that article.

As regards, proof of the loss, von Ziegler remarks that when the loss is due to delay, no indication is provided in the Rotterdam Rules as to compensation for damages. He is right, but it would have been very difficult, if not impossible, to do so given the unpredictable consequences of a delay in delivery: a delay may, for

example cause damages due to a falling market or due to a factory remaining inoperative for the lack of supplies.

In his comments on paragraph 2 von Ziegler rightly says that the “catalogue” of excepted perils in article 4(2) of the Hague Rules had raised objections by delegates of civil law countries and that entailed first the addition of the so called “catch all” exception and secondly the inclusion in the Protocol of signature of a provision authorising Contracting States to give effect to the Convention either by giving it the force of law or by including in their national legislation the rules adopted in the Convention in a form appropriate to that legislation. Although subparagraph (q), albeit in a more concise form, already existed in the Hague Rules 1921, it is correct that the liberty granted by the Protocol was the result of objections by delegates of civil law countries. However it is a fact that several civil law countries, including France, Italy and Spain, have given effect to the 1924 Convention in its original text and have lived with it until now. Even though no express reservation appears to have been made, the right to establish responsibility for loss or damage arising from the personal fault of the carrier or of his servants in respect of the excepted perils enumerated from (c) to (p), granted by the Protocol of Signature, was considered as having been acquired.

Therefore under the Hague Rules and the Hague-Visby Rules only the excepted perils enumerated under subparagraphs (a) and (b) have been considered exonerations from liability, whereas all the subsequent excepted perils have been considered having the effect of reversing the burden of proof. It may therefore be misleading to use for all the excepted perils enumerated in article 4(2) of the Hague Rules and of the Hague-Visby Rules the term “exception” as if they all had the same nature, and then to use (at p. 103) the same term for the “perils” enumerated in article 17(3) of the Rotterdam Rules. However subsequently von Ziegler clarifies any possible equivocal by stating (at page 104) that the “exceptions” only work as presumptions. Indeed an attempt had been made to state that clearly in the text of article 17(3) but that surprisingly met with the opposition of several delegations and the result was achieved by providing in paragraph 4 that notwithstanding paragraph 3 the carrier is liable if the claimant proves that the fault of the carrier caused or contributed to the event or circumstance on which the carrier relied.

Amongst the events or circumstances enumerated in paragraph 3 specifically considered by von Ziegler mention can be made of that under (f): *fire on the ship*. He stresses that while under the Hague-Visby Rules the carrier was only liable for his personal fault, and he was exonerated from liability in case the fire was due to the fault of the crew, under the Rotterdam Rules that exoneration has been abolished. It is therefore clear that all events enumerated in paragraph 3 create, as von Ziegler says, presumptions of absence of liability (the initial use of the term “exemption” was not appropriate). He subsequently (at page 106) considers the subsequent stage of the “ping-pong game”, namely that relating to the rebuttal by the claimant of the presumption of absence of liability and analyzes the two alternatives mentioned in paragraph 4 and the additional alternative resulting from paragraph 5 that covers

the breach by the carrier of his obligations enumerated in article 14, in respect of which the level of proof is reduced as respects that required by paragraph 4. He says that that might create what he calls “a convenient advantage” for claimants in case the carrier invokes as a defence a peril of the sea or fire. It is important to bear in mind that the wording adopted in paragraph 5 was the result of a compromise between those who wanted to place on the claimant the burden of proving that the loss, damage or delay was actually caused by the breach by the carrier of an article 14 obligation and those who wanted to place on the claimant the burden only of proving such breach but not its causal relationship with the loss, damage or delay⁹.

The final comments on article 17 relate to its paragraph 6. Von Ziegler says that the so-called “*Vallescura* principle” is provided in the Rotterdam Rules. That is so, but to a limited extent, in as much as in the “*Vallescura*” the U.S. Supreme Court held that the carrier is liable for the whole of the loss or damage unless he proves the portion of the loss or damage which is attributable to the excepted peril, while the Rotterdam Rules do not specify how the burden of proving the extent to which each cause, one for which the carrier is liable and the other for which he is not liable, contributed to the loss, damage or delay. However subsequently von Ziegler raises the question of how the liability is determined in case of concurring causes and says generally that some issues are left to the interpretation of the Rotterdam Rules (by the courts). Indeed that has been the outcome of the debate that took place within the UNCITRAL Working Group¹⁰.

Article 18. Liability of the carrier for other persons

After remarking that the Rotterdam Rules have clarified and widened the scope of the liability of the carrier for other persons von Ziegler comments each subparagraph of article 18 that regulates respectively the carrier’s liability for performing

⁹ A/CN.9/572, paras. 23-31.

¹⁰ A/CN.9/572. The outcome of the discussion is summarised in the following paras 68 - 69: Scope of paragraph and relationship to remainder of draft article 14

68. The view was expressed that there could be three types of concurring causes, each of which should be subject to an allocation of liability by the court pursuant to paragraph (4):

- Those whereby each event could have caused the entire loss, damage or delay, irrespective of the other causes;
- Those whereby each event caused only a portion of the damage;
- And those whereby each event was insufficient to have independently caused the damage, but the combined result created the loss, damage or delay.

69. The Working Group was reminded of its agreement that the guiding principle of paragraph 4 should be that it not deal with the question of liability as that question was dealt with in paragraphs 14 (1) and (2) (A/CN.9/544, para. 142), and that paragraph 4 was intended to be confined to the distribution of loss amongst multiple parties, covering all types of concurring causes. Further, it was recalled that in earlier discussions, the Working Group had agreed in principle that when there were multiple causes for loss, damage or delay, it should be left to the court to allocate liability for the loss based upon causation.

parties, for the master and crew, in respect of which he draws the attention to the fact that such liability is not based on the existence of an employment relationship between them and the carrier (the reason being that the carrier may not be the operator of the ship) and the liability for the employees, and the carrier's liability for any other person performing the carrier's obligations. His comments in respect of that final category of persons for whom the carrier is liable are of particular interest. He in fact draws the attention to the fact that since a condition for his liability is that such persons act, directly or indirectly, at the carrier's request or under the carrier's supervision or control, the carrier cannot be held liable in respect of entities involved in the logistic chain in respect of whom he has no means of control or supervision, such as State-owned authorities. It is worth noting that the formula "at the carrier's request or under the carrier's supervision or control" already existed in the original CMI draft¹¹ and has never been the subject of any comment.

Article 19. Liability of maritime performing parties

Von Ziegler traces the development of the principle of a right of action of the shipper against persons other than the carrier that originated in the adoption in the Guadalajara Convention of 1961 of the concept of the "actual carrier" and was subsequently extended to the carriage of goods by sea in the Hamburg Rules. He then explains the reasons why it was deemed necessary, when discussing the initial draft of the Rotterdam Rules, to further extend that concept to other persons that perform any of the carrier's obligations, but to restrict the involvement of such persons, for which the term "performing parties" was adopted, to those parties that perform any of the carriers obligations within the maritime section of a door-to-door contract, the boundaries of such section being the ports of loading and unloading, and thus the term "performing party" generated another term: "maritime performing party". The consequence of that distinction made it possible to restrict the application of the Rotterdam Rules to maritime performing parties only.

Of his analysis of the four paragraphs of article 19 perhaps the most interesting one is that of the last of such paragraphs, which provides that nothing in the Convention imposes liability on the master or crew of the ship or on any employee of the carrier or of a maritime performing party. Von Ziegler says that the Convention "withdraws from its application for a direct liability the master, crew, or employee" and that that "must mean" that such persons are not automatically protected by the same defences" (of the carrier) and consequently their liability in tort must be based on the applicable national law. His conclusion is that the situation under the Rotterdam Rules is closer to where this issue was before the entry into force of the Visby Protocol that inserted a new article 4bis, paragraph 2 of which granted the so called Himalaya protection to the servants and agents of the carrier. But the protection granted to the servants or agents of the carrier under the Hague-Visby

¹¹ A/CN.9/WG.III/WP.21.

Rules is also granted to them by article 4(1) of the Rotterdam Rules, that mentions specifically the master and crew and other persons that perform services on board the ship as well as the employees of the carrier and of maritime performing parties. The previous text of this article, as it appeared in the draft instrument of 8 September 2005¹², only referred, as article 4bis (2) of the Hague-Visby Rules, to the servants or agents of the carrier and the reference to the master and crew was added in the draft instrument of 14 November 2007¹³ in view of the fact that, as previously observed, they may not be the servants of the carrier. Article 19(4) must therefore be read in conjunction with article 4(1) and just means what it says, namely that no provision of the Rotterdam Rules imposes any liability on the persons mentioned therein, but that does not entail that such persons do not have a protection under the Rotterdam Rules.

Article 20. Joint and several liability

Von Ziegler remarks that although the joint and several liability of the carrier and of one or more performing parties may not enhance the prospect of recovery given that the carrier's liability is usually covered by P&I insurance, the "pay to be paid" rule (there a misprint in the text) and the manner of calculation of the limit in respect of containerized cargo that may actually leave the carrier with unlimited liability could make the insolvency of the carrier a possible risk. Although it is difficult to make an estimate in that respect, I suggest that the joint and several liability may entail another advantage to the claimant in case the various persons that are jointly and severally liable have contributed in a different degree to the loss, damage or delay. The benefit for the claimant is that he may bring proceedings against one of them only, thereby reducing the litigations costs.

Article 21. Delay

Von Ziegler raises an interesting question when he observes that the Rotterdam Rules leave the decision on whether the parties have agreed to any time for delivery to the interpretation of the contract and says that that may be difficult where the time element is found only in relation to publicized time tables, common expectations, usages and trade practices, practices of competitors, or averages of transit times known to the particular trade. His question is whether the time of delivery may be deemed to have been agreed where an agreement should be implied in one of the various situations he mentions. He is quite right in raising that question. In fact originally draft article 21 was worded as follows¹⁴:

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon, or in the

¹² A/CN.9/WG.III/WP.56.

¹³ A/CN.9/WG.III/WP.101.

¹⁴ A/CN.9/WG.III/WP.81.

absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the customs, practices and usages of the trade and the circumstances of the journey.

In connection with the debate in respect of whether the liability of the carrier in respect of delay in delivery of the goods should be the subject of regulation in the draft convention or not the question whether the second part of draft article 21 should be maintained or not was discussed and finally those who supported it agreed to its deletion provided the word “expressly” in the first part of the text be deleted¹⁵. Although the precise consequences of that deletion were not considered, the mere reference to an agreement, without any qualification, has the consequence of rendering the proof of such agreement easier, also taking into account that elsewhere in the Rotterdam Rules the term “express” has been used: article 80 (5) requires in fact, as a condition for the terms of the volume contract that derogate from the Convention to apply between the carrier and a person other than the shipper that such person gives its “express consent” to be bound by such terms. However in my opinion in the absence of a precise date indicated in the transport document it is impossible to imply an agreement on it. What might be implied is a date reasonably close to that that the shipper might have in good faith considered to be the expected date of delivery. Therefore of the examples mentioned by von Ziegler those that may be significant could be the publicized time tables and the averages of transit time.

¹⁵ A/CN.9/621. The outcome of the discussion was reported as follows in para. 184: 184. At that stage, the Working Group was invited to consider an amended version of the three-pronged approach set out in paragraph 180 (b) above. The Working Group was reminded that the first option for several delegations was to have mandatory rules on carrier delay in the draft convention, failing which they would prefer the deletion of all references to liability for delay from the text of the draft convention, thus leaving the determination of such matters to domestic law. The proponents of that solution were however prepared to accept the three-pronged approach set out in paragraph 180 (b) above, subject to the deletion of the word “expressly” from the description of delay enunciated in draft article 21. Such an adjustment, it was said, would render the deletion of the latter half of the draft provision less problematic for many in the Working Group, and reduce the burden of proof on cargo claimants regarding agreement on the time of delivery. Others were of the view, however, that deletion of the word “expressly” would not substantively alter the provision. In the spirit of compromise, the Working Group welcomed that proposal and supported the three-pronged approach as amended by it. The “three-pronged approach” reference to which is made is mentioned in para.180(b) was the following:
(b) A more elaborate proposal consisted of three elements. First, the shipper’s liability for delay should be deleted due to failure to find a suitable means to limit that liability. Secondly, the text of draft article 21 on delay should be limited to the opening phrase (“Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed”) and the rest of the draft article should be deleted. Thirdly, draft article 63 should be made mandatory by deletion of the phrase in square brackets “unless otherwise agreed”.

*Article 22. Calculation of compensation**Article 23. Notice in case of loss, damage or delay*

After a short analysis of article 22, when commenting article 23 von Ziegler says that the notice “will ‘close’ the proof of a prima facie case since it will now be established that at the time of the notice the goods were damaged or lost”. What that means is not entirely clear, for a few lines after he says that the failure to give notice “will not immensely affect the position of cargo claimants because it is their burden to prove the loss or damage during the period of custody of the carrier”. In any event this article is not clear at all about what the purpose and effect of the notice really is. The purpose and effect of such notice has been discussed at length within the Working Group and finally it was agreed that it would not constitute evidence of the conditions of the goods on delivery¹⁶. That agreement has not been correctly embodied in article 23(2) which instead of stating that the notice shall not affect the allocation of the burden of proof set out in article 17 says that the failure to give notice shall not affect the allocation of the burden of proof: a statement that does not make sense, for article 17(1) provides that the claimant has the burden of proving the conditions of the goods on delivery.

However it does not make sense either that the consignee by merely giving a notice of an alleged loss or damage (sometime event printed forms are used), meets the burden of proof that such loss or damage really occurred, and did occur during the period of the carrier’s responsibility. It was suggested, and perhaps this is the better explanation of this provision that echoes a similar provision of the Hague-Visby Rules, that its purpose is to facilitate the examination of the conditions of the goods at the time of delivery.

Chapter 6. Additional provisions relating to particular stages of carriage, by Dr. Uffe Lind Rasmussen (pages 133-150)

In his General Introduction Dr. Rasmussen indicates that the particular stage of the carriage to which the first two articles of this chapter refer is the sea stage whereas the stages to which the third article refers, if any, are other than the sea stage.

Article 24. Deviation

After mentioning the general consequences of geographical deviation and the dramatic consequences under the common law doctrine of deviation, Rasmussen considers in section 6.2.2. the provision on deviation in the Hague Rules and in the Hague-Visby Rules and observes that although it seems to be implicit that a deviation not allowed may be an infringement of the Rules, nothing is said about its consequences.

¹⁶ That agreement was reached at the 19th session of the Working Group as it appears from A/CN.9/621 para. 112 quoted *infra* in note 131.

In the subsequent section he then draws the attention to the fact that whereas in the original text of article 24¹⁷, consisting of two paragraphs, paragraph (b) stated that where under national law a deviation of itself constitutes a breach of the carrier's obligation such breach only has effects consistently with the provision of the Rotterdam Rules, in the final text (in which paragraph (a) that reproduced the provision in article 4(4) had been omitted) it only states that a deviation shall not deprive the carrier of any of the defence or limitation of the Rotterdam Rules. He is, however, of the opinion that since there was no indication that a substantial change was intended, the provision must be understood and applied in such a way as to limit the scope of the national rules, so that where a deviation constitutes a breach it can have effect only consistently with the provision of the Rotterdam Rules.

He is certainly right in his conclusions, primarily because even the final wording is such as to exclude that any consequence of deviation provided by the applicable national law that is in conflict with the provisions of the Rotterdam Rules is inoperative. He is also right because from the outset the purpose of this provision has been to avoid that the global regime of the liability of the carrier be displaced by national rules on the consequences of a deviation¹⁸. The deletion of paragraph 1 of the original text and the amendment of paragraph 2 were suggested in a footnote to the original text as it appeared in A/CN.9/WG.III/WP.32¹⁹.

Article 25. Deck cargo on ships

After describing the three situations in which goods may be carried on deck, the first and the third one of which being applicable to any kind of goods, however packed, and the second being applicable only to containers and vehicles, Rasmussen explains why containers, that can generally be subsumed under (c), needed in any event to be the subject of a special category of goods: the reason being that whereas in respect of goods mentioned under (c) the carrier is not liable, as in respect of goods mentioned under (a), in case of loss or damage caused by the special risk involved in deck carriage, in respect of container and vehicles that the carrier may decide at his will to load under or above deck, such special risk must be borne by

¹⁷ A/CN.9/WG.III/WP.21, article 6.5; A/CN.9/WG.III/WP.32, article 23.

¹⁸ It may be of interest to quote the relevant part of paragraph 101 of the Report of the thirteenth session (A/CN.9/552):

101. Doubts were expressed regarding the usefulness of draft article 23 in many legal systems. However, it was explained that under existing case law in certain countries, a provision along the lines of draft article 23 was necessary to avoid deviation being treated as a major breach of the carrier's obligations. That explanation met with the general approval of the Working Group.

¹⁹ Footnote 112 at page 33 reads as follows:

Alternative language for this paragraph could read as follows: "Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this instrument." If such language is adopted, the Working Group may wish to consider whether paragraph 1 is necessary.

him. He then raises a very interesting issue, namely whether containers (and vehicles?), even if they may be subsumed under (c) as they may in most cases, in cases covered by (b) must always be subsumed thereunder. The same may arise in respect of goods, such as dangerous goods, carried in containers and may, therefore, come at the same time under (a) and (b). Would it make sense that the risk for the carrier is greater in case such goods are stowed in containers than in case they are merely packed or, if liquid, contained in barrels? I submit it would not and that, therefore, if the carrier proves that the carriage on deck of the containerized goods was required by law the question whether the containers were fit for deck carriage and were carried on decks specially fitted is normally²⁰ irrelevant for the purposes of the exoneration of liability of the carrier for loss or damage caused by the special risks involved in their carriage on deck. The position is different in respect of goods carried in containers that may come under (b) and (c): in fact the carrier, in order to invoke paragraph (c), has the burden of proving that the conditions required thereunder are met and that the contract particulars stated that the goods (or the containers) may be carried on deck.

The conclusion seems to be that it appears rather difficult to consider the situations indicated in paragraph 1 as mutually exclusive.

Rasmussen in his very thorough analysis of article 25 considers also the manner in which the special risks exception operates and says that it probably operates like the excepted perils listed in article 17(3). I think he is right: where, for example, a container is washed overboard and is lost, the carrier must prove that the perils of the sea caused or contributed to the loss, but in order to provide sufficient evidence in this respect it is not sufficient to prove that the container was washed overboard, but it is necessary to also to prove that the weather conditions were such as to break the anchorage of the container. Then of course the claimant may prove that the anchorage system was not of sufficient strength to withstand ordinary bad weather conditions.

In respect of paragraph 1(c) he states (in section 6.3.4) that the agreement needs not to be express and that in the relation between the carrier and the shipper no statement between the carrier and the shipper is required. Of course no agreement is required if carriage on deck is allowed by customs, usages or practices of the trade in question, but only where it is made in accordance with the contract of carriage. As regards the case of carriage on deck in accordance with the contract of carriage, the opinion that the agreement needs not to be express finds implied support in the report of the thirteenth session of the Working Group. However it must be clarified what it is meant by “express” agreement and that is clarified in the report, in which the following summary is made of the discussions:

²⁰ Liability of the carrier would probably exist if the containers are supplied by him. It might also be maintained that if the deck is not fitted for deck carriage the carrier should refuse to accept the containers.

105. Questions were raised concerning the agreement necessary to approve carriage on deck in the contract of carriage, specifically whether mention of it in the bill of lading was sufficient, or whether express agreement was necessary. It was suggested that this question could be more easily answered after the Working Group had had its discussions on freedom of contracts issues.

Therefore “express” agreement means something more than agreement in writing as is the case when there is a clause in the transport document that authorizes the carrier to stow the goods on deck. But at least such a clause that I personally considered insufficient²¹, is required, and this is also the opinion of Rasmussen. It is required, and I think contrary to Rasmussen’s opinion, also in the relation between the carrier and the shipper.

He subsequently considers the provision in paragraph 4, and says that in relation to a third party who has acquired a negotiable transport document or electronic record in good faith the carrier cannot invoke an agreement to carry the goods on deck unless the contract particulars state that they may be so carried. The provision in paragraph 4 actually makes reference to paragraph 1 (c) generally, and, therefore, applies also where the deck carriage is in accordance with the customs, usages or practices. The inability to “invoke” paragraph 1(c) entails the application of paragraph 3 and, therefore, the carrier is not only liable for loss of or damage to the goods or delay in their delivery that is exclusively cause by their deck carriage, but he is also not entitled to the defences provided for in article 17.

Article 26. Carriage preceding or subsequent to sea carriage

In his analysis of the purpose of article 26 Rasmussen traces its history and says that originally it had been considered having the legal nature of a rule on conflict of conventions, but then, after there was added in chapter 17 an *ad hoc* provision on conflict of conventions, it became clear that its only purpose was to regulate a limited network system. Two very interesting issues are subsequently considered by him: the first is whether the parties may derogate from article 26 and the second is what becomes the legal nature of the provisions of other conventions once incorporated into the Rotterdam Rules pursuant to article 26. In respect of the first of such issues he says that the parties may for example stipulate a fully uniform liability system or the application of the liability provisions of a convention other than those identifiable pursuant to article 26 (a), provided they respect the restrictions to contractual freedom set forth in article 79. Of course this may be correct in so far as the Rotterdam Rules are concerned, but then such provisions would be subject to verification on the basis of the mandatory provisions of the convention that would have applied in accordance to article 26 (a). In respect of the second of such issues Rasmussen says that once mandatory provisions of another convention are

²¹ Rasmussen quotes in footnote 38 my article on the thirteenth session of the Working Group.

incorporated into the Rotterdam Rules, their mandatory character will be determined by article 79 of the Rotterdam Rules rather than by the relevant provision of such other convention. I think that it should first be considered which is the basis of the application of such provisions to a contract of carriage to which the Rotterdam Rules apply in accordance to articles 5 and 6. I am afraid that the term “incorporation” might not be altogether appropriate. If we consider the mandatory character of the provisions on the liability of the carrier under for example, the CMR, it would of course be such mandatory character that will entail their application to a contract of carriage to which the Rotterdam Rules apply, in lieu of the corresponding provisions of the Rotterdam Rules (and of course it will be necessary, but probably not very easy, to identify which they are). In case of a real incorporation the opinion of Rasmussen that their mandatory character ought thereafter to be determined by article 79 of the Rotterdam Rules may be correct, but it might lead to the absurd result that the CMR rule on the carrier’s limit of liability would not be considered mandatory under article 79 of the Rotterdam Rules because the amount of limitation is higher than that indicated in article 59 of the Rotterdam Rules. The appropriate method of interpretation and application of the rules of the CMR that would apply pursuant to article 26 of the Rotterdam Rules should therefore be that based on the global provisions of the CMR. And this criterion applies for even stronger reasons in respect of the provisions on the carrier’s liability.

In his analysis of article 26 Rasmussen subsequently considers the nature of the event and the period during which the loss, damage or event causing delay must have occurred in order that the rules laid down in that article may operate. As regards the nature of the event he stresses that it must consist of a loss of or damage to the goods or an event or circumstance causing a delay. Therefore the breach of obligations that do not entail loss, damage or delay, such as those under articles 28, 36(2) and (3), 38, 40(1) and 45-47 (except where the breach entails delay in delivery) do not trigger the application of article 26. He then considers the period during which the event must occur, with special attention to the situations where it is not possible to establish when the loss or damage or event causing delay has occurred (and the burden of proof rests on the person invoking the application of article 26) and situations in which the loss, damage or event causing delay has developed through a period time covering both sea and land carriage.

There follows an analysis of the condition required under article 26(a) in order to trigger the application of this article, that he rightly defines as the “hypothetical test”. The examples he gives are of considerable assistance for the application of this provision, that has given rise to several criticisms, but is a pragmatic solution to a very difficult problem, that has so far prevented the success of instruments aiming at regulating contracts of carriage performed in part by sea and un part by road, rail or air.

Chapter 7. Obligations of the shipper to the carrier, by Professor Johan Schelin (pages 151-160)

In his General Introduction Professor Schelin says that the Hague Rules were focused on the liability of the carrier and therefore contain only a few provisions on the liability of the shipper, but that during the negotiations on the Rotterdam Rules it was decided to regulate in a more extensive manner both his obligations and liabilities. He then considers each individual article of chapter 7.

Article 27. Delivery for carriage

Several comments made by Schelin are worth mentioning.

He says that since containers and other equipment used for consolidation of cargo are considered goods, the shipper must ensure that they are suitable for transport. His statement is based on the definition of “goods” in article 1.24, wherein reference is made to “any equipment and container not supplied by the carrier or on behalf of the carrier”. It is instead questionable whether the shipper has any obligation to check the suitability of container supplied by the carrier, as often is the case. The carrier has certainly the obligation to supply containers fit for the carriage of the goods the shipper intend to stow in them, provided he knows which they are, but the shipper must inspect the containers and if their unsuitability is apparent, he should inform the carrier and obtain their replacement. Although this kind of cooperation is not expressly mentioned in article 28, it is thought that that article implies a general duty of the parties to cooperate.

He then says that the statement in paragraph 3, that the shipper must perform his obligations in such a way that they will not cause harm to persons or property does not entail that a person injured may bring a claim against the shipper on the basis of article 30 of the Rotterdam Rules which applies only to the relationship between shipper and carrier, but may only bring an action in tort, even though the carrier, if he will be bound to settle the claim, may then bring a claim against the shipper on the basis of article 30. He is right, but the person injured may, in order to prove the negligence of the shipper, invoke the rule laid down in article 27(3).

Article 28. Cooperation of the shipper and the carrier in providing information and instructions

Schelin says that there is no direct sanction for the failure of the carrier to cooperate, but his failure might adversely affect his right to claim possible damages suffered on account of the breach by the shipper of his obligations. His opinion is supported by observations made during the debate on this article in the course of the sixteenth session of the Working Group²².

²² A/CN.9/591. In paragraph 122 the following statement is made:
“There was support for the view that the purpose of draft article 29 (that became article 28) was not to establish independent liability of the carrier for its failure to provide the shipper with necessary information, but rather to deny the carrier the ability to rely on its failure in defending a cargo claim”.

Article 29. Shipper's obligation to provide information, instructions and documents

After stating that the purpose of this provision is to make it possible for the carrier to handle the goods properly in order to avoid damage, Schelin comments the opening sentence of article 29 and says that although the carrier must normally be considered the expert in the field regarding how to handle the goods, however with regard to goods of a special nature the shipper is usually the expert. That is supported and perhaps the second part of his comment is enhanced, by the observations made during the sixteenth session²³. But perhaps the real problems are how the burden of proof is allocated and how the test of reasonability must be assessed. There is in fact an abundance of references to reasonability in various articles of this chapter and in article 29 the test of reasonability applies twice: first in respect of the availability to the carrier of the information, instructions and documents and secondly in respect of the information, instructions and documents necessary for the actions mentioned in (a) and (b).

Originally in respect of the availability the test was subjective: article 30(a) of the September 8, 2005 draft instrument²⁴ provided that the shipper was relieved from his obligation if he might “reasonably assume” that the information was already known to the carrier; but then, probably following to quasi contemporaneous proposals of the delegations of the United States²⁵ and of Sweden²⁶, the test became objective, and the phrase became “such information etc. that are not reasonably available to the carrier”.

In both cases pursuant to article 30(1) the burden of proof is on the carrier: and the proof is negative, since he should prove that the relevant information etc. was not reasonably available to him.

Article 30. Basis of shipper's liability to the carrier

Schelin says that liability is based on fault “with a ordinary burden of proof”²⁷

²³ A/CN.9/591, paragraph 129:

“It was observed that this provision was thought to be especially important in light of the contemporary transport practice, in which a carrier seldom saw the goods it was transporting, even when they are non-containerized goods. In this context, the flow of reliable information between the shipper and the carrier was said to be of utmost importance for the successful completion of a contract of carriage, particularly with respect to dangerous goods.”

²⁴ A/CN.9/WG.III/WP.56.

²⁵ A/CN.9/WG.III/WP.69, paragraph 6.

²⁶ A/CN.9/WG.III/WP.67, paragraph 20.

²⁷ I take the liberty of disagreeing on the qualification of the burden of proof on the claimant in respect of the fault of his contracting party in breach of a contractual obligation as “ordinary”. Although I appreciate that that was the opinion expressed during the sessions of the Working Group (A/CN.9/WG.III/WP.21, paragraph 116; A/CN.9/591, paragraphs 138 and 139), such opinion was based on the assumption that in the contract of carriage it is the carrier that has the burden of proving absence of fault. That is correct in so far as the obligations of the carrier in respect of the goods are concerned, but is wrong in so far as the obligations of the shipper are concerned.

and that therefore it is the carrier who must prove the fault of the shipper, such allocation of the burden of proof having been decided, after some discussions, in consideration of the fact that a “reversed” burden of proof might put the shipper in an awkward position.

Originally the burden of proof was on the shipper in accordance with the general principles in respect of breach of contractual obligations, but then it was pointed out that under the more extensive regulation in chapter 7 of the shipper’s obligations, his position would become significantly heavier and it was therefore suggested to reverse the burden of proof. That suggestion was carried and the new text of article 30 appeared in the final draft of the Instrument²⁸.

Schelin finally says that, although reference to liability for delay was deleted by the Working Group, the liability still seems to cover pure economic loss. I do not think that that is the case, since the proposal to regulate the liability of the shipper was rejected precisely in consideration of the potential entity of such liability in case the breach by the shipper of his obligations might entail a delay of the ship²⁹.

Article 31. Information for compilation of contract particulars

The obligation of the shipper to provide information for the compilation of the contract particulars is considered by Schelin to be of great importance because much of the carrier’s liability depends on what information is included in the transport document and for that reason his liability for the inaccuracy of such information is strict. It appears that the strict liability of the shipper was considered appropriate by the Working Group, without any apparent disagreement³⁰.

Article 32. Special rules on dangerous goods

Schelin says that this term is not defined and it is only provided that when the goods by their nature and character are, or reasonably appear to become, a danger to persons, property or the environment, the shipper has the obligation specified in this article. Of course this does not have a great importance, but the description of the situations in which the obligations of the shipper arise constitutes by itself a definition, albeit general. And Schelin impliedly is of that opinion when he explains that a more exact definition would burden the text without being able of being comprehensive. He then stresses, quite rightly, that not only cargo that is dangerous by itself is covered by this article, but, as it appears from the words “reasonably appear likely to become” also cargo, for example, that may become dangerous if loaded together with other types of cargo. It is thought that if such danger may exist, the manner in which the shipper may fulfil his obligation would be, since he very likely does not know which other goods will be stowed in the same hold, to indicate the characters of goods that may create such danger.

²⁸ A/CN.9/WG.III/WP.101, article 31(1).

²⁹ A/CN.9/591, paras 143-147; A/CN.9/594, paras. 199-207.

³⁰ A/CN.9/591, paras. 148-150.

The shipper has no obligation, Schelin says, if the carrier does not otherwise have knowledge of the dangerous character of the goods. I suggest that the obligation always exists, and the knowledge by the carrier of the dangerous nature of the goods becomes relevant in connection with the existence of a liability of the shipper for loss or damage “resulting from that failure”. The allocation of the burden of proof would, therefore, be as follows: a) the carrier proves that he has suffered loss or damage on account of the dangerous nature of the goods that had not been stated by the shipper, b) the shipper proves that, even if he had failed to inform the carrier, the carrier had otherwise knowledge of that dangerous nature.

Article 33. Assumption of shipper's rights and obligations by the documentary shipper

Schelin clarifies that article 33 covers the situation where the goods are sold on FOB terms, the contracting shipper being the consignee as buyer of the goods, and the seller being the documentary shipper.

Article 34. Liability of the shipper for other persons

No special comment is made in respect of this article, the basis of which is self evident.

Chapter 8. Transport documents and electronic transport records, by Professor Tomotaka Fujita (pages 161-188)

In his General Introduction Professor Fujita comments the definition of the terms relating to transport documents and electronic transport records the term transport document having replaced the term “bill of lading” used in the Hague-Visby Rules. Of course the reason for that change is that the Rotterdam Rules apply also to documents that do not have the legal characteristics of bills of lading. In a footnote he also draws attention to the fact that the use of the term “document of title” has been avoided because it is difficult to understand in civil law countries. As far as Italy is concerned, if title means, as I think it does, property, that term would be wrong, for the bill of lading incorporates the right of constructive possession of the goods and to transfer such possession with the transfer of the bill of lading and the right to obtain delivery of the goods.

Article 35. Issuance of the transport document or the electronic transport record

Fujita explains that the three alternatives regulated by this article are due to the fact that in the present times there is the practice in some trades not to issue any transport document in respect of the goods shipped on board or to use a non-negotiable transport document and stresses that although this article refers to the issuance of a transport document “upon delivery of the goods for carriage to the carrier or performing party”, that does not mean that the Rotterdam Rules recognize only (the equivalent of) “received for shipments bills of lading”, rather than (the equivalent of) “on board bills of lading” or “shipped bills of lading” and that the

shipper is entitled to (the equivalent of) a shipped bill of lading if the shipper needs one. The reference in this article to the issuance of transport documents “upon delivery of the goods” is due to the wish to cover both door-to-door and port-to-port contracts of carriage and to the fact that in the liner trade, which is the type of trade to which basically the Rotterdam Rules apply, delivery is not made alongside the ship, but rather in a port terminal. But the issuance of a “shipped” transport document is expressly referred to in article 36(2)(c). Although the inclusion in the contract particulars of the date on which the goods were loaded on board is mentioned as an alternative to the date on which the carrier received the goods, it is thought that if the shipper, who has received a transport document in which the date of delivery of the goods is mentioned, upon shipment of the goods on board presents the document to the carrier asking for the endorsement of the shipment on board, the carrier cannot refuse. Some doubts may instead arise in respect of the replacement of the document, although it is unlikely that the shipper may have an interest to that. In any event the endorsement requires that the shipper is still in possession of the document and that is unlikely in a door-to-door contract.

After considering (at page 165) the possible issuance of a mere receipt, even if that is not mentioned in this article, Fujita explains the reasons why a transport document may be issued to the documentary shipper and says that the typical situation in which that may occur is that of a FOB sale, in which the contract of carriage is made by the buyer, who is the consignee but the seller needs protection. That is the case where payment of the goods is made against presentation to a bank of the documents specified in the contract of sale, including the transport document. Since article 35 regulates all transport contracts, it was necessary to make the entitlement of the documentary shipper to the transport document conditional to the consent of the shipper and, therefore, when the Rotterdam Rules will enter into force, FOB sellers must obtain the prior consent of the buyer in order to be entitled to obtain from the carrier the transport document.

Article 36. Contract particulars

Fujita comments each group of particulars enumerated in this article and in respect of the reference in paragraph 1 (a) to the description of the goods as appropriate for the transport he explains that its purpose is to entitle the carrier to refuse mentioning overly lengthy descriptions of the goods³¹. Then with reference paragraph (1) (b), (c) and (d), he says that while under the Hague-Visby Rules the carrier is entitled not to include in the bill of lading any marks, number, quantity or weight he has reasonable grounds to suspect that they do not accurately describe the goods, under the Rotterdam Rules, subject to the information being “appropriate”, the carrier must include the information provided by the shipper, but is allowed to

³¹ A/CN.9/621, para. 271.

qualify such information. The reason of the original provision in the Hague Rules was that they did not grant the carrier the right to qualify the particulars mentioned by the shipper, even though the practice has always been to include the information and to insert in the bill of lading clauses such as “weight unknown”, “said to contain” etc.

In respect of paragraph 1(b) Fujita notes that contrary to the Hamburg Rules the name of the shipper is not required and suggests this is due to the fact that alternatively to the shipper the documentary shipper may be indicated. It must be considered that the practice to-day is to mention in the bill of lading the shipper’s name, and the consignee is interested to know who he is. Moreover, as Fujita says when commenting article 36(3), articles 46(b) and 47(b) provide that if the carrier is unable to locate the consignee he must advise the shipper and, therefore, he must know his name and address.

Article 37. Identity of the carrier

Fujita says that article 37(2) has been one of the most controversial provisions during the sessions of the Working Group and indeed that was so. But the arguments in favour of the need for a provision of this kind were much stronger than those against it. Whereas it was stated by the proponents that such provision was necessary in order to protect the consignee of the bill of lading against the frequent custom of not indicating the name of the carrier, that made it very difficult for the consignee to identify the person to sue for loss of or damage to the goods and compelled him, in order to ensure that an action be commenced prior to the time bar period elapsed, to sue various persons with the ensuing costs, those against objected, as Fujita, says, that the owner of the ship sometimes has no connection with the operation of the ship. But he has connection with the operator and, besides earning money from the bareboat charter, is in a position to compel the operator to identify himself when he enters into contracts with third parties. The same comment holds when the operator is not the carrier. And Fujita is right when he says that this article constitutes a device for the cargo interest to extract information from the registered owner or the bareboat charterer as to the identity of the carrier. An information, it may be added, that nowadays is frequently impossible to obtain because owners tend to protect charterers. Fujita is also right when he says that this provision does not prevent the consignee to avail himself of other remedies available under the applicable national law (or jurisprudence).

Article 38. Signature

Fujita says that unlike other information in the contract particulars, the lack of signature would make the transport document void and draws attention to the fact that article 39 does not apply to the lack of signature. The use in article 38(1) of the auxiliary verb “shall” in the present tense is by itself not relevant for this purpose, since it is also used in article 36(1), (2) and (3), and article 39(1) states that the absence or inaccuracy of one or more particulars does not of itself affect the legal character or validity of the transport document: therefore if, for example, all the

information referred to in article 36(1) is missing, why the presence of a signature should give to the document a greater value than that of a document in which instead such information appears, but the signature of the carrier is missing? Why the holder of the document should be prevented from proving that the document has actually been issued by the carrier? Fujita says in his comments on article 39(1) that if a transport document is “too incomplete” it might be invalid and gives the example of a document in which no information is contained to identify the goods. I am afraid that that would create a great uncertainty on what is the minimal information required for the validity of the transport document. If some information is contained, but is insufficient to identify the goods because there are on board various consignments to which that information applies, should the transport document be considered without legal effect? I appreciate that these are very marginal situations that very seldom may occur, but perhaps they should be considered case by case.

Article 39. Deficiencies in the contract particulars

Since article 39(1) has already been previously considered, reference will be made here to Fujita’s comments on article 39(2) and (3). As regards the date shown on the transport document, Fujita is of the view that the presumptions indicated in (a) and (b) are irrebuttable. I am not sure that that is the case. Let us assume that the transport document in respect of a door-to-door contract of carriage is issued after the goods are loaded on board: is there any reason why the shipper should be prevented from proving that the date is not the date on which the goods have been loaded on board but rather the date on which the carrier received the goods?

As regards the apparent good order and conditions of the goods, to which article 39(3) refers, I suggest that the rule laid down in article 41 should apply: the presumption is irrebuttable in respect of the third party to whom the transport document is transferred, whereas proof to the contrary is permissible between the carrier and the shipper.

Article 40. Qualifying the information relating to the goods in the contract particulars

In his Introduction Fujita stresses again the change that occurred between the Hague-Visby Rules and the Rotterdam Rules, namely that under the Rotterdam Rules the carrier must include in the transport document the information “as furnished by the shipper” but has the right or even the duty to qualify it according to whether circumstances indicated in article 40(3) and (4) or those indicated in article 40(1) materialize. The question arises whether the carrier is always bound to indicate in the document the information furnished by the shipper, even if he is aware that it is grossly incorrect. The wording of article 40(1) (a) seems to indicate that that is what he must do, since reference is made to the carrier having “actual knowledge” that a material statement “is false or misleading”. However that article refers to a “material statement in the transport document” and that seems to imply that the transport document is compiled by the shipper, at least in respect of the information specified in article 36(1), and presented to the carrier for signature or for the insertion of the

additional information specified in article 36(2) and (3). Although this is frequently the practice, it may occur that the shipper supplies to the carrier the information specified in article 36(1) asking him to insert it in the transport document. In any event, doubts are justified whether that should be the case in all circumstances or at least whether the only thing the carrier may do is to “qualify” the information in question, considering that that means that the carrier should state that he “does not assume responsibility for the accuracy of the information furnished by the shipper”. That wording seems to suggest that the information is incorrect, for example the number of packages is different, their weight is less than that declared and that may give the indication to the buyer of the goods that there are *some* differences, but not very significant differences. This is the view of Fujita, who in para. 8.7.5, where he discusses the effect of the qualifying clauses, excludes that a clause “weight unknown” may shift on the consignee the burden of proving the conditions of the goods at the time of their receipt by the carrier when a container arrives a destination soaked by sea water.

Article 41. Evidentiary effect of the contract particulars

In his Introduction Fujita says that this article applies to the extent that the contract particulars are not qualified but that even when they are, the information regarding the goods has evidentiary value as if there had been no qualification, if the conditions set out in article 40 are not met. The question that arises in such case is who has the burden of proof. It is suggested that since the carrier has the obligation to issue a transport document and, save particular cases, to include therein the particulars furnished by the shipper, qualifying the information diminishes the performance of such obligation and, therefore, the burden of proof should rest on him. Nor could it be said that by accepting a qualified transport document the shipper impliedly recognizes that the conditions for qualifying the information existed, for the shipper receives the transport document when the goods have already been handed over to the carrier and frequently have left the place where they were received by the carrier and, therefore, the shipper has very little negotiating power for obtaining an unqualified transport document or a transport document differently qualified. In addition general cargo is not usually delivered alongside the ship in case of a port-to-port contract but in a terminal, where the carrier has much greater facilities and more time to check the goods. The situation is different for containerized cargo when the container is filled by the shipper, but in such case special rules apply under article 40(4).

Subsequently Fujita considers the evidentiary effect of the transport document between the parties in case a negotiable transport document, a non-negotiable transport document that requires surrender or an ordinary non-negotiable transport document is issued. The same treatment of the first two types of documents confirms that their legal nature is the same and that they correspond to order and nominative bills of lading. Fujita stresses that only holders acting in good faith are protected in accordance to article 41(b). Good faith means in this connection that the holder of

the document was unaware that the goods were at loading in conditions different from those described in the transport document and that he paid for the goods their full price, without any discount for a minor quantity or inferior quality or other conditions different from those described in the transport document. There may, however, be situations where the consignee does not know the actual conditions of the goods, but is availing himself of the conclusive evidence of the transport document is not justified, as it would be the case where the consignee is an affiliate of the shipper.

Article 42. Freight prepaid

Fujita is right in saying that if the statement “freight prepaid” is thought to be a kind of declaration by the carrier that it does not claim payment by the consignee – and I believe that this its usual purpose: suffice it to consider that the alternative clause is “freight payable at destination” – the carrier is not entitled to payment from the consignee even if he did not receive payment from the shipper, whether the consignee was aware of that or not. In this case there would be no question of good or bad faith at all, but merely a statement by which the debtor is identified.

Chapter 9. Delivery of the goods, by Professor Gertjan van der Ziel (pages 189-218)

Professor van der Ziel considers by way of introduction the question whether liability for misdelivery is governed by the Rotterdam Rules or not and says that it is not since in the Rotterdam Rules the carrier liability system is restricted to the loss of or damage to the goods. He is right and his view is confirmed by the fact that liability for delay, which is a situation that has some similarity with liability for misdelivery, is not governed by the Rotterdam Rules. Still by way of an introduction he explains why a definition of misdelivery was superfluous and finally makes an in depth analysis of the definition of “holder”.

He then comments on the individual articles of chapter 8.

Article 43. Obligation to accept delivery

After recalling the various alternatives discussed, namely of a possible obligation of the consignee to accept delivery, of such obligation arising with his exercising any right under to contract of carriage or of such obligation arising only upon his demand of delivery, this latter being the alternative adopted, Van der Ziel says that the practical value of this article seems rather limited since the consignee is always entitled not to demand delivery. I believe instead that its practical value is relevant, because it clarifies that no obligation to accept delivery arises unless the consignee actually demands delivery. A rule that in the civil law jurisdictions is the obvious consequence of the fact that the consignee is normally not a party to the contract of carriage unless he adheres to it.

Article 44. Obligation to acknowledge receipt

Van der Ziel draws attention to the fact that the usual practice of acknowledging receipt by affixing the signature on the transport document should not be confused with the endorsement of the transport document. As a matter of fact if the goods are damaged the acknowledgment of receipt should be accompanied by a reservation if loss of or damage to the goods is apparent.

Article 45. Delivery when no negotiable transport document or negotiable electronic transport is issued.

After stating that articles 45, 46 and 47 deal with the identity of the consignee, van der Ziel draws the attention to the fact that article 45 applies also where no document at all is issued: a situation considered by the Rotterdam Rules in article 35. His comments on section (c) of article 45 deserve special attention. He says that it “looks very practical, but is no guarantee for success”. There is no doubt about that and doubts are even justified as to whether the procedure indicated is practical. But before considering that, it is necessary to consider the link between that provision and article 48. Van der Ziel says that the initial words “without prejudice to article 48” are intended to indicate that in case the goods are undeliverable the carrier has the option either to follow the substantial procedures of section (c) or to directly make use of his rights under article 48. But pursuant to article 48(1) the goods shall be deemed to have remained undelivered only if, in addition to the situation where the consignee does not accept delivery or the carrier is entitled to refuse delivery (these are also the alternative situations covered under section (c) (i) and (ii)) the controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give adequate instructions. The procedure mentioned in section (c) seems, therefore, not to be optional, but rather a condition precedent to the right of the carrier to avail himself of the options granted by article 48(2).

The repeated reference to the “reasonable efforts” that the carrier is supposed to exert, first to locate the consignee and then gradually to locate the controlling party, the shipper and the documentary shipper, raises first the question whether the carrier may be held liable if he has sought and obtained instructions from a person down the line without having exerted reasonable efforts to locate the person mentioned up the line, and secondly the question whether the carrier, in case he has not made reasonable efforts to locate all the persons mentioned in section (c) as well as in article 48(1)(b), may therefore become of primary importance. The reasonability of such efforts should probably be measured also on the basis of the time during which they have been exerted: how long should the carrier try to locate the consignee before seeking instructions from the controlling party and then the other persons up the line?

Article 46. Delivery when a non negotiable transport document that requires surrender is issued.

Van der Ziel considers almost exclusively the specific problems connected with this type of document, the reference to which generally in the Rotterdam Rules and

specifically in this chapter has been the subject of debate. After stating that article 46 applies to a document that in practice often is called “straight bill of lading”, “recta bill of lading” or “bill of lading made out to a named person” (“nominative bill of lading”), he says that one of the problems with this type of document is whether it has to be surrendered to obtain delivery of the goods and that the solution adopted in the Rotterdam Rules is that it does not, unless the document itself so indicates, as stated in the preamble of article 46. He then says that there was discussion in the Working Group as to whether a transport document bearing simply the heading “bill of lading” without further indication of the requirement of presentation would qualify under article 46 and that it was decided to leave the decision to the courts. He adds that if the courts would reach an affirmative decision in that respect the lack of uniformity would remain. I am afraid that that is likely to happen, and the reason is that even the starting point that nominative (or straight) bills of lading are non-negotiable instruments is not accepted everywhere. For example in Italy nominative bills of lading are negotiable and their legal nature is the same as that of order or bearer bills of lading, namely they incorporate the right of obtaining delivery of the goods and of transferring that right with the transfer of the document. Therefore it will be very likely that article 46 will be interpreted as referring to documents such as sea waybills.

Article 47. Delivery when a negotiable transport document or negotiable electronic transport record is issued

Van der Ziel makes an in depth analysis of rules contained in article 47 in respect of delivery when this third type of transport document is issued and indeed article 47 covers aspects that are not covered by the preceding two articles. He first draws the attention to the fact that the rule contained in the preamble of paragraph 1 is a rule of general application and therefore applies also in the situation mentioned in the subsequent paragraph 2. He then analyzes the conditions under which the carrier must comply with his delivery obligation and in this connection it is worth mentioning that while in the two preceding articles reference is made to the obligation of the carrier to deliver the goods, in article 47 reference is made to the right of the holder to claim delivery. But it is paragraph 2 that is the subject of an accurate analysis and the reason is that it contains a rather revolutionary rule, that indeed may appear to be in conflict with the very fundamental character of documents of title, namely the incorporation of the right to claim delivery in the transport document: the essence in fact of that paragraph is to regulate the conditions under which and the consequences of delivery of the goods can be made without surrender of the negotiable transport document.

Originally the provisions contained in article 47(2) applied to ordinary negotiable transport documents and negotiable electronic transport records and that rule remained in the draft until the last session of the Working Group³², although there had

³² A/CN.9/WG.III/101, article 50 (d)-(h).

been significant objections. However in September 2007 at the twentieth session of the Working Group it was suggested that the operation of subparagraphs (d)-(g), corresponding to the present subparagraphs (a)-(e) of article 47(2) could be limited to those situations where a negotiable transport document or electronic transport record had been issued that stated on its face that the goods could be delivered without presentation of the negotiable transport document or electronic transport record³³. Although some objections were raised against that suggestion, it was decided that to facilitate future discussion the substance of the proposal would be included in a footnote to the text of the draft convention³⁴ and that was done in the draft that was prepared after that session³⁵. The whole of article 47 was the subject of debate at the forty-first session of the Commission and after informal consultation a draft corresponding to the present paragraph 2 was submitted and approved³⁶.

In his introduction (at page 204) van der Ziel indicates the causes for which the bill of lading cannot be made available for presentation upon arrival of the goods at destination and states that in the liner trade the frequency of the unavailability of the bill of lading may be around 15% whereas in the bulk trade it may be as high as about 50% and in the oil and related trade it may be close to 100%. He then explains the reasons why the usual practice for the consignees to obtain delivery of the goods against a letter of indemnity has a number of unsatisfactory consequences as well as the reasons why the use of electronic bills of lading would not provide solution and says that since the electronic trading without document is not a short term alternative, it has been deemed advisable to find a different solution in the Rotterdam Rules. A solution, he says, that does not undermine the bill of lading system but restores legal certainty in as many cases as possible when no bill of lading is timely available. There follows (at pages 208-210) a specific commentary of each section of paragraph 2 and subsequently van der Ziel explains the reasons why the solution offered by article 47(2), while being a substantial improvement on the current situation, cannot always achieve its aim. Finally he explains why it has been necessary to create a system that is not only detailed and complex, but also difficult to understand, such reason being the intent to provide legal certainty to existing practices rather than to try to change such practices, although in his view the complexity of the system should not be overstated, indicating why. His global analysis is clear and objective and greatly assists in the understanding the provisions of this article, even though some doubts remain in respect of their workability. Normally the lack of the bill of lading when the goods are ready for delivery requires a solution that avoids delays to the ship as well as the

³³ A/CN.9/642, para.63. The wording suggested was the following:
If a negotiable transport document or electronic transport record that states on its face that the goods may be delivered without presentation of the document or electronic record, the following rules apply:”.

³⁴ A/CN.9/642, para.64.

³⁵ A/CN.9/WG.III/WP.101, note 123.

³⁶ A/63/17 paras.146-165.

need for the goods to be unloaded and stored; a solution that for bulk cargoes is frequently impossible. I think that first it should be considered which steps are reasonably required prior to the issuance by the carrier of this particular type of negotiable transport document: of course there must be a request of the shipper, a request that will be agreed by the shipper with his bank and with the consignee. Then there must be the agreement of the carrier who will consider the risk of delays resulting from the need for him to advise the shipper and receive instructions from him and the liability he might incur, that might be equal to the value of the goods and, therefore, a prudent carrier would make the issuance of the transport document conditional to the provision of adequate security. Secondly it should be considered whether the procedure envisaged in article 47(2)(a) is not likely to entail delays at destination: on the assumption that the carrier has already received adequate security, should he wait for the consignee claiming delivery prior to seeking instructions from the shipper and for how long? And how long should he wait for such instructions prior to taking action under article 48(2)? Probably the procedure described in article 47(2)(a) will work between parties acquainted to work together, who do not even need to request and provide security and may avoid loss of time after the arrival of the goods at destination but, if this the type of situation in which article 47(2) would work, would there really be a need for the issuance of a negotiable transport document of the type described therein?

It will be interesting to find out, when the Rotterdam Rules will enter into force, how often the industry will avail itself of the provisions of article 47(2).

Article 48. Goods remaining undelivered

Each paragraph is briefly considered. Perhaps it might have been appropriate to consider the linkage between the implied requirement that the carrier must initially seek instructions from the controlling party, the shipper and the documentary shipper and the further requirement that the carrier in order to exercise the rights under paragraph 2 must give a reasonable notice of the intended action, in addition to the person, if any, that must be notified of the arrival of the goods, also to some, if not all, the persons from whom he was required to seek instructions.

Article 49. Retention of the goods

Finally, the commentary of chapter 9 ends with a brief analysis of this article that merely clarifies that the provisions of chapter 9 do not affect the possible right of retention of the carrier.

Chapter 10. Rights of the Controlling Party, by Professors Stefano Zunarelli and Chiara Alvisi (pages 219-238)

Article 50. Exercise and extent of the right of control

After an introduction, in which they point out that the provisions in this chapter

respond to some important needs of the trade, Professor Zunarelli and Professor Alvisi in their comments on paragraph 1 of this article draw the attention to the fact that the subject matter of the right of control is not the possession of the goods during transit but rather the right to give instructions to the carrier and the manner in which such right may be exercised. They subsequently consider the three categories of instructions mentioned in article 50 and with reference to those under (b) and (c) note that the rights granted to the controlling party must not be confused with the right of stoppage *in transitu*, granted to the unpaid seller in order to prevent delivery of the goods to the buyer, even though they may assist the seller in such situation. They also note that while the right to request the carrier to deliver the goods in a port other than that indicated in the contract is subject to certain conditions, the right to deliver them during the land leg of the transport is only subject to the new place of delivery being “en route”. The difference is obvious, for delivery at a different port might require special actions by the carrier that are not conceivable during land carriage, such as, for example, mooring the ship at a berth where the goods should be delivered other than that at which the ship would otherwise moor (instructions that the carrier would not be obliged to comply with pursuant to article 52(1)(c) or removal of other goods from the hold in which the goods that should be unloaded are stowed (also in this case the instructions would interfere with the normal operations of the carrier).

In their comments on paragraph 2 of this article Zunarelli and Alvisi observe that although in principle the controlling party is entitled to exercise the right of control from the time of receipt of the goods by the carrier to the time of their delivery, it is not clear whether it is intended to refer to delivery under the contract of carriage or whatever delivery and refer to goods lost, stolen or misdelivered. Perhaps it might help to consider that in article 50(2) reference is made to the period of responsibility that, although normally pursuant to article 12(1) is the period between receipt and delivery, that may not be the case in the situations reference to which is made in article 12(2). With reference to the three situations mentioned, that are those more likely to occur, it is suggested that if the goods are (physically) lost the right of control terminates because none of the rights enumerated in article 50(1) can be exercised anymore; if instead the goods are stolen or misdelivered the period of responsibility of the carrier does not terminate and the right of control may still be exercised, in so far as the rights enumerated in article 50(1)(a) and (c) are concerned.

Article 51. Identity of the controlling party and transfer of the right of control

Zunarelli and Alvisi consider separately the criteria for the identification of the controlling party and the transfer of the right of control that are globally regulated in each of the four paragraphs of this article and change the order in which the rules are set out in respect of the type of document, if any, evidencing the contract. They in fact mention first paragraph 3, that applies when a negotiable transport document is issued, then paragraph 4, that applies when a negotiable electronic record is issued

and subsequently paragraph 2, that applies when a non-negotiable transport document has been issued that needs to be surrendered. Finally they mention paragraph 1, that applies in all cases other than those covered by the following paragraphs without mentioning which they are and correctly identify the cases in which no document is issued and in which a standard non-negotiable document is issued. The layout of article 51 is in fact such that in order to understand the scope of application of paragraph 1 it is necessary to read all the subsequent paragraphs.

When dealing with the transfer of the right of control, Zunarelli and Alvisi pay special attention to article 51(1) and after stressing that its wording gives no room for the application of national rules, state (at p. 228) that the shipper's declaration of transfer of the right of control may be contained in the non-negotiable document itself and that they agree with the opinion of Anthony Diamond Q.C. that the shipper can use the document to confer security over the goods by designating the consignee or a third party as the controlling party or transferring the right of control to him, provided that the production by the transferee to the carrier of the document containing such designation might be construed as a notification of the transfer, that is required pursuant to article 51(1)(b). Indeed that is necessary, being a condition for the transfer to become effective with respect to the carrier.

Article 52. Carrier's execution of instructions

In the first paragraph of their commentary of this article Zunarelli and Alvisi observe that the use of the term "instructions" could be interpreted as limiting the scope of application of article 52 to article 50(1)(a) only since that term is used only there. But then (at page 230) they state that the limits set out in article 52 appear to be applicable to any kind of request by the controlling party under article 50. That second alternative is definitely correct: first because in article 52(1) reference is made generally to article 50 while the general drafting technique used in the Rotterdam Rules is that when reference is intended to be made of a specific paragraph or sub-paragraph of an article to mention such paragraph or sub-paragraph, secondly because the aforesaid restriction of the scope of article 52 would deprive the carrier of a protection when it is definitely more needed, viz. in the case of a request by the controlling party under article 50(1)(b) to obtain delivery of the goods at a scheduled port of call.

In the second paragraph, in which they analyze the obligations of the controlling party, they observe that the text of article 52(2) does not clarify the identity of the person obliged to refund the carrier where after the instructions have been given the right of control has been transferred to another person or it has ceased, the goods having been delivered. Although the problem practically arises only if the carrier has not obtained sufficient security from the controlling party, it is certainly appropriate to consider the problem raised by Zunarelli and Alvisi. They examine first the case where a negotiable transport document has been issued and after correctly stating that article 58(2) would apply, draw the attention to the phrase "to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document". They rightly say that the word "ascertainable" is vague but on the

strength of the principles applicable in Italian law the carrier must state on the face of the transport document the amount owed to him as the result of the exercise of the right of control by the previous holder of the document. That is indeed correct in Italian law, but would deprive the second term used in article 58 (2) – *ascertainable from* – of any effect. If that term has been added after *incorporated in*, the intention has been to add an alternative to the actual incorporation of the liabilities in the document. It is interesting to note that those two terms already existed in the original CMI draft³⁷ and have never been the subject of a request of clarification on their meaning. The criticism made to the formula adopted was that it did not provide any indication of the type of liabilities the holder might assume and that it was preferable to itemize them. Although it was objected that a specification of potential liabilities would be impossible and that it had been consequently decided that “any liabilities were limited to those that were incorporated in or ascertainable from the contract”³⁸, the request was made to the Secretariat to formulate an alternative text and that was done³⁹, but subsequently it was decided to adopt the original text⁴⁰. It is suggested that probably it was intended to widen the manner by which specific liabilities should be brought to the knowledge of the holder. For example demurrage may be deemed to be incorporated if the amount is mentioned in the transport document while it may be deemed to be ascertainable from the transport document if the document contains the information necessary for the calculation of the amount .

Article 53. Deemed delivery

Zunarelli and Alvisi draw the attention to the fact that since reference is made to delivery in accordance with article 52(1), article 53 does not apply where the carrier delivers the goods at a port other than that of original destination, even though such delivery did interfere with the normal operations of the carrier. I suggest that since the conditions set out in article 52(1)(b) and (c) are meant to protect the carrier, wherever the carrier accepts the instructions article 52(2),(3) and (4) and article 52 shall apply.

³⁷ A/CN.9/WG.III/WP.21, article 12.2.2 was worded as follows:

12.2.2 Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record.

³⁸ A/CN.9/526, para. 138.

³⁹ The alternative text, included, as the original text, in square brackets in A/CN.9/WG.III/WP.32, article 60, was worded as follows:

2. Any holder.... assumes....[the liabilities imposed on the controlling party under chapter 11 and the liabilities imposed on the shipper for payment of freight, dead freight, demurrage and damages for detention to the extent that such liabilities are incorporated in the negotiable transport document or the negotiable transport record.

⁴⁰ A/CN.9/642, paras. 125-129.

Article 54. Variations to the contract of carriage

Zunarelli and Alvisi observe that the question whether the controlling party is or may become a party to the contract of carriage is not dealt with in the Rotterdam Rules and is therefore left to the applicable national law. But that raises the question of how can a controlling party that is not a party to the contract be the (only) person that may agree variations to the contract. Perhaps the question that should be considered is whether it would have been more appropriate to refer in article 54 to the transport document rather than to the transport contract.

Article 55. Providing additional information, instructions or document to the carrier

In their comment on paragraph 1 Zunarelli and Alvisi draw the attention to the fact that the test of reasonableness applies to the necessity for the carrier to obtain the information and to its availability elsewhere, but does not to apply the controlling party. However they subsequently observe that from paragraph 2 it appears that the obligation of the performing party concerns only information and documents he can reasonably obtain and provide. I think they are right. Paragraph 2 indicates a connection between reasonableness and ability when it refers to a situation where the carrier after reasonable efforts is unable to locate the controlling party, from which it appears that a party incapable to obtain a given result is excused, for that implies that it has made reasonable efforts to achieve that result.

Article 56. Variation by agreement

Zunarelli and Alvisi draw the attention to the fact, that they describe as “quite surprising”, that article 52(4), the effect of which may be varied, regulates the liability of the carrier for loss of or damage to the goods or for delay in delivery resulting from his failure to comply with the instructions of the controlling party and provide that such liability is subject to articles 17 to 23. Since article 52(4) is not mandatory, the reference therein to mandatory rules of the Rotterdam Rules is not in conflict with such rules, if they would not otherwise apply. But if they would, the variation of article 52(4) would be ineffective. Therefore the real issue is whether under article 17 the carrier would be liable or not. Pursuant to article 17.1 the carrier is prima facie liable for loss of or damage to the goods as well as for delay in delivery. Therefore such issue is whether the carrier can be relieved from liability pursuant to article 17(2) if the parties have agreed to amend or cancel article 52. That is doubtful, for a refusal to comply with the instructions of the shipper or of the controlling party to deliver the goods at a scheduled port of call might be in breach of article 2.

Chapter 11. Transfer of rights, by Professor Stefano Zunarelli (pages 238-244)*Article 57. When a negotiable transport document or negotiable electronic transport record is issued*

Professor Zunarelli remarks that the approach adopted in the Rotterdam Rules

is in line with the tradition of both civil and common law since reference is made in the opening sentence of paragraph 1 to the concept of the incorporation of rights in the document. In respect of the methods of transfer, and specifically of those of transfer without endorsement, he says that the transport document mentioned in (b)(ii) cannot be considered as a negotiable transport document since the rights incorporated therein can only be transferred to the person named in the document. However that type of document is in article 57 (1) qualified as a negotiable transport document and the fact that it is issued to the order of a named person does not prevent such person to transfer it by a further endorsement to another person. If that were not the case, the term “to the order of” would be meaningless and the document would become a nominative document, reference to which was made during the discussion on this article⁴¹.

In respect of paragraph 2 Zunarelli explains that its lack of clarity is due to the possible future developments of the technology and to the consequential need at this stage to avoid adopting rules that may become obsolete in a short lapse of time: for such reason it had been deemed advisable to lay down only some very general principles. In the position I suggest that the rule adopted does not lack of clarity, but is insufficient by itself to regulate the transfer of electronic transport records unless the procedures referred to in article 9(1) are identified by the parties and indicated in the contract particulars.

Article 58. Liability of holder

After explaining the reasons why the shipper is always liable under the contract of carriage, being a party to it, whereas the holder becomes liable only if he exercises rights thereunder, Zunarelli discusses the purpose and the consequences of the link between article 58(1) and article 55 created by the initial words “Without prejudice to article 55” and says that it may constitute a significant burden on financial institutions that may temporarily become holders of transport documents.

Chapter 12. Limits of liability, by Professors Yuzhuo Si and Ping Guo (pages 245-270)

After a General Introduction in which Professor Si and Professor Guo make a brief history of the change that occurred in the provisions contained in this chapter, with a particular attention to the adoption and then to the deletion of an article on the rapid amendment procedure in respect of the limits of liability, they comment individually, as is the technique adopted in this book, the individual articles of chapter 11.

⁴¹ A/CN.9/526, para. 132; A/CN.9/WG.III/WP.56, footnote 205.

Article 59. Limits of liability

Their method is to trace the history of each article through the various sessions of the Working Group: a method that is very useful, in particular in respect of a provision, like this one, mostly of a commercial and financial character. Si and Guo divide their analysis in three sections: the first, in paragraph 12.2.2, on the limitation amount for loss of or damage to goods, the second, in paragraph 12.2.3, on the treatment of non-localized damages and the third, in paragraph 1.2.4, on the meaning of “container”.

In the first section, after summarizing the work done within the Working Group with a considerable contribution of the Chinese Association, they make a very clear synthesis of the arguments put forward by the participants in support of the maintenance of the Hague-Visby limits, of the adoption of the Hamburg limits and, finally, of limits higher than those adopted in the Hamburg Rules.

Subsequently they consider and comment the expressions “loss of or damage to goods or in connection with goods” and “the breaches of its obligations under this Convention”. In respect of the first of such expressions, that originates from the Hague Rules and was maintained in the Hague-Visby Rules but not in the Hamburg Rules in which reference is merely made to “loss of or damage of goods”, they observe that the meaning of that expression has only an historical interest in respect of the Rotterdam Rules, because it was contained in the original CMI Draft (article 6.7), maintained in the first Draft Instrument prepared by the UNCITRAL Secretariat⁴², but was deleted when the phrase “loss of or damage to goods” was replaced by “(the carrier’s liability) for breaches of its obligations”, that was considered an improvement that lent the draft convention greater clarity⁴³.

In respect of the second expression Si and Guo indicate that its addition had given rise to some objections because it covered claims that could not come under phrase “loss of or damage to goods” and appear to justify it because the Rotterdam Rules have increased the liability of the carrier. It must, however, be considered that the expression “breaches of its obligations” replaced the words “in connection with” that have been held to have a broad scope⁴⁴.

In paragraph 12.2.3 Si and Guo summarize the discussions that have taken place during the sessions of the Working Group in respect of the treatment of non localized loss or damage, quote the text of the first proposal put forward, the various views that were expressed on it as well as the negotiation that had taken place in respect of the Multimodal Transport Convention, that ended with the decision not to include any special rule in respect of non localized damage, and say that it appeared that a similar approach should be adopted also in respect of the Rotterdam Rules. It is a fact that

⁴² A/CN.9/WG.III/WP.32, article 18.

⁴³ A/CN.9/642, para.152.

⁴⁴ Treitel and Reynolds, *Carver on Bills of Lading*, 2nd edition, London 2005, paragraph 9-249, page 629. See also *G.H. Renton & Co., Ltd. v. Palmyra Trading Corporation*, [1956] Lloyd’s Rep. 379 at p. 390 per Lord Morton of Henryton.

the text quoted by them appeared in the first draft prepared by the Secretariat⁴⁵ followed by two alternative proposals that appeared in the subsequent drafts⁴⁶, of which the last one followed the Note by the Secretariat of 10 August 2006⁴⁷, reference to which is made by Si and Guo, wherein the question was asked whether draft article 64(2), that became article 59, ought to be deleted. At the last session of the Working Group the issue of the non localized loss or damage was again discussed and the delegations that supported its maintenance stated that they would consent to its deletion provided the limits would be fixed at amounts higher than those of the Hamburg Rules. Since finally the limit per kilo and per package were agreed at levels higher than Hamburg, the suppression of the provision on non localized loss or damage was part of the package agreed on the limits as well as on the volume contracts.

Article 60. Limits of liability for loss caused by delay

Si and Guo in their comment on the notion of “economic loss” say that, as it is the case for the terms “non-physical loss” and “consequential loss”, it has no clear meaning but, since the meaning of the term “consequential loss” had not been agreed, the term “economic loss” was retained in the Rotterdam Rules and that that term means pure economic loss. Their comments are based on those of the CMI under the original wording of this provision, in which it had been avoided to adopt any specific terms, and reference was merely made to “loss not resulting from loss of or damage to goods carried and hence not covered by article 6.2” (now article 17)⁴⁸, and, in particular, on the debate that took place during the eighteenth session of the Working Group⁴⁹. While in article 60 reference is made generally to economic loss, a statement that this article covers only pure economic loss was made at the 18th Session of the Working Group, during which it was said that delay may cause physical loss, clearly covered by article 17, economic loss sustained as a consequence of a fall in the market value of the goods and pure economic loss, in respect of which the example was made of an industrial plant prevented to operate because component parts of a machine were delivered late. The first category of losses is expressly stated not to be covered by article 60 since it was covered by article 22; it is however not clear whether the middle category is covered by article 60 or not. Nor is it clear which is the distinction between economic loss and pure economic loss. It

⁴⁵ A/CN.9/WG.III/WP.32 of 4 September 2003, article 6.7.2.

⁴⁶ A/CN.9/WG.III/WP.56 of 8 September 2005, article 64.2; A/CN.9/WG.III/WP.81 of 13 February 2007, article 62.2 and also A/CN.9/WG.III/WP.101 of 14 November 2007, article 62.2.

⁴⁷ A/CN.WG.III/WP.72.

⁴⁸ A/CN.9/WG.III/WP.21, paragraphs 100 and 101. Para. 100 is reproduced verbatim in the Report of the ninth session.

⁴⁹ A/CN.9/616, paras. 83-113. Recovery of damages for economic loss has been considered in depth in connection with claims for pollution damage, on which see DE LA RUE and ANDERSON, *Shipping and the Environment*, 1998, Chapter 12, pages 441-502.

is a fact that the example made during the 18th session suggests a very restricted notion of that type of loss, but it is difficult to understand why, if that the aforesaid example expressed the prevailing view of the Working Group, in the subsequent draft of the instrument of 13 February 2007⁵⁰ the text of the article on the limits of liability for loss caused by delay reproduced Variant A of the previous edition of the draft instrument, in which the distinction between the loss (or damage) covered by the then article 22 (now article 17) and the economic loss covered by the then article 63 was based on the juxtaposition of physical loss or damage with economic loss⁵¹ and in a footnote it is stated that that text was agreed precisely during the 18th session. The deletion in the final version of this article of the word “physical” was due to the fact that a financial loss resulting from a physical loss must be calculated in accordance with article 22, but any financial loss that does not result from a physical loss or damage is covered by article 60, including the loss of market due to delay in delivery of the goods. And such loss comes within the notion of “pure financial loss”, for such type of loss means any financial loss that that is not the consequence of a physical loss⁵².

Still in their comments on article 60 Si and Guo consider the shipper’s liability for delay. That issue actually was raised in connection with chapter 7 in which the obligations of the shipper are regulated, and specifically with the present article 30. The question in fact was raised whether in addition to loss or damage reference should be made to the shipper’s liability for delay caused to the carrier and that raised a great concern, because while the extent of the shipper’s liability for loss or damage was predictable, the extent of his liability for delay was not and might be quite considerable. The example was made of a large liner ship being prevented to sail for some days by the Custom Authority on account of missing or incorrect documents in respect of some goods⁵³. The discussion on the possible limit of the shipper’s liability followed, as a possible manner to limit such liability to acceptable amounts,

⁵⁰ A/CN.9/WG.III/WP.81, of 13 February 2007.

⁵¹ Article 63 was in fact worded as follows:

Article 63. Limits of liability for loss caused by delay¹⁸⁶

Subject to article 64, paragraph 2, compensation for physical loss of or damage to the goods caused by delay shall be calculated in accordance with article 22 and [, unless otherwise agreed,] liability for economic loss caused by delay is limited to an amount equivalent to [one times] the freight payable on the goods delayed. The total amount payable pursuant to this article and article 62, paragraph 1 may not exceed the limit that would be established pursuant to article 62, paragraph 1 in respect of the total loss of the goods concerned.

¹⁸⁶ Variant B has been deleted and Variant A has been retained from the text as it appeared in A/CN.9/WG.III/WP.56, as agreed by the Working Group (para. 181, A/CN.9/616).

⁵² DE LA RUE and ANDERSON, *supra* note 41, state at page 442 that in common law countries a distinction is made between “consequential loss, resulting from physical damage and “pure economic loss” sustained without such damage.

⁵³ That concern was raised during the 17th session of the Working Group: A/CN.9/594, paragraph 201.

but the difficulty that resulted insurmountable was how to calculate the limit. Therefore, in a way the consideration of such issue in connection with chapter 12 can make sense. What is misleading is only the reference in the title of the paragraph to the limitation for delay in delivery, for the delay that the shipper may cause is not related to the delivery of the goods to the carrier, but the delay the shipper may cause to the sailing of the ship. The final statement of Si and Guo that the proposal relating to the limit of the shipper's liability was not accepted is correct. However it should be added that the liability of the shipper for delay was not excluded, but was left for decision under the applicable national law⁵⁴.

Article 61. Loss of the benefit of limitation

After a short introduction the analysis of this article is divided in four paragraphs, the first on the restriction of the loss of the right to limit to personal acts or omissions, the second on the alternative reference to the convention or to contract as the source of the right to limit, the third on the allocation of the burden of proof and the fourth on the loss of the right to limit (the title of the paragraph is not correct, for it refers to the amounts of the limit).

As regards the restriction of the right to limit to personal acts or omissions Si and Guo qualify the personal character by stating that that requires some form of management failure committed by a professional carrier and then by referring to actions at a company management level. That is in line with the principles generally adopted, and the reference to a professional carrier is correct in so far as the Rotterdam Rules are concerned, for article 1(1) defines the contract of carriage as an undertaking to carry goods against payment of freight. It might instead entail a debatable restriction of the right to limit in global limitation conventions that may also apply to pleasure vessels. They subsequently summarize the various views that had been put forward in respect of the restriction of the loss of the right to limit to personal act or omissions of the carrier, although objections were made in respect of the word "personal" (act or omission) that had been placed in square brackets in the first UNCITRAL draft of 4 September 2003⁵⁵. However the prevailing view at the subsequent session of the Working Group in May 2004 was in favour of the retention of that word and consequently it was decided to keep it and to delete the brackets⁵⁶ and in fact that word without brackets appears in all subsequent editions of the draft instrument⁵⁷.

As regards the reference to the limit that may be provided in the contract, Si and Guo draw the attention to the fact that since only an increase in the limit is permissible, the purpose of such reference is merely to make clear that even an higher

⁵⁴ A/CN.9/621, paragraphs 235-237.

⁵⁵ A/CN.9/WG.III/WP.32, article 19.

⁵⁶ A/CN.9/552, paragraph 62.

⁵⁷ A/CN.9/WG.III/WP.56, article 66(1); A/CN.9/WG.III/WP.81, article 64.1; A/CN.9/WG.III/WP.101, article 64.1.

contractual limit does not apply where the conditions for the loss of the right to limit materialize.

As regards the allocation of the burden of proof they correctly point out that that is the same in all conventions. The reason for such allocation is due to the fact that in all transport conventions the limits of liability apply by operation of law.

Finally, in so far as the loss of the right to limit is concerned, Si and Guo draw an interesting comparison between the situations envisaged in all transport conventions.

Chapter 13. Time for suit, by Professor Hyeon Kim (pages 271-282)

After mentioning in his General Introduction the different types of limitation periods existing in the transport conventions Professor Kim proceeds with his analysis of the articles of this chapter.

Article 62. Period of time for suit

Taking up again the important issue of the different types, or legal nature, of time for suit Kim says that (the lapse of) one of them, called prescription, entails the extinction of the right, whereas (the lapse of) the other, called limitation, entails only the extinction of the action and that the fact that in certain jurisdictions the former and in others the latter has been adopted originated the inclusion in the draft instrument of two variants⁵⁸.

The problem of the legal nature and of the effect of lapse of time is even more complicated, for in two civil law countries, France and Italy, notwithstanding the common origin of their legal systems and the same name given to the institute – *prescription* and *prescrizione* – the legal consequence of the lapse of time is different. While in France the *prescription* hits the action, in Italy the *prescrizione* hits the right. Article 2272 of the French Civil Code provides inter alia as follows:

L'action des marchands, pour les marchandises qu'ils vendent aux particuliers non marchands, se prescrit par deux ans.

Article 4 of French Law No.66-420 of 18 June 1966 on contracts of affreightment so provides:

La prescription des actions nées du contrat d'affrètement est d'un an. Elle est interrompue ou suspendue et produit ses effets conformément au droit commun.

Article 2934 of the Italian Civil Code so provides:

Estinzione dei diritti. Ogni diritto si estingue per prescrizione, quando il titolare non lo esercita per il tempo determinato dalla legge. (Extinction of rights. Any right is extinguished by prescription if the holder does not exercise it for the time prescribed by the law).

Article 395 of the Italian Navigation Code so provides:

Prescrizione. I diritti derivanti dal contratto di noleggio si prescrivono col decorso di un

⁵⁸ Such variants appear in article 69 of A/CN.9/WG.III/WP.56.

anno (Prescription. The rights arising out of the contract of affreightment are prescribed by the lapse of one year).

In England the period by which an action may be brought is called time limit and the effect of the failure to bring an action before the lapse of that period does not have in the Limitation Act 1980 a specific name but is described by stating, for example (s.5), that “an action founded on simple contract shall not be brought after the expiration of six years....”.

As Kim says (at page 275), the variety of rules existing in the different jurisdictions created a difficult problem, and finally the view prevailed that the lapse of time should, under the instrument, have only the effect of extinguishing the action, but not the right⁵⁹. The wording adopted has significant similarities with the wording used in the English Limitation Act.

In the subsequent section Kim remarks that no mention is made in article 62(1) of the person or persons who are protected by the lapse of the limitation period and says that it is doubtful whether the shipper or the maritime performing parties may be protected, but then he comes to the (right) conclusion that all parties are protected. It is suggested that that conclusion, besides being supported by the debate that occurred during the sessions of the Working Group, clearly emerges from the wording of article 62(1): in fact the period of time for suit applies to all claims arising from a breach of any obligation under the Rotterdam Rules that contain obligations of (a) the carrier (articles 11, 13, 14), (b) the maritime performing parties (article 19), (c) the shipper (articles 27-32), (d) the documentary shipper (article 33), (e) the consignee (articles 43 and 44), (f) the controlling party articles 45, 52 and 55) and (g) the holder of the transport document (article 58). There is, however, a striking difference between the generality of the wording of paragraph 1 and the particularity of the wording of paragraph 2 that, by linking the *dies a quo* to the delivery of the goods by the carrier gives the impression of linking the period to the obligation of the carrier. However the choice of the commencement date cannot affect the general scope of application of article 62(1) and must be deemed to have been maintained in order to provide a unique rule.

Article 63. Extension of time for suit

There appears to be a lack of clarity in the comments made by Kim in respect of the extension of the time for suit and its suspension or interruption. It is correct that in the legal systems in which the lapse of the time for suit extinguishes the right, the rule is considered mandatory and the statutory period can neither be shortened nor be extended by the parties. But it may instead be suspended or interrupted

⁵⁹ An initial discussion took place during the eleventh session of the Working Group: A/CN.9/526, paragraphs 165-269. The two variants included in the then article 68 of the draft instrument contained in A/CN.9/WG.III/WP.56 were discussed during the eighteenth session of the Working Group reference to which is made by Kim in footnote 7. The complete summary of the discussion is reported in paragraphs 127-132.

pursuant to specific statutory provisions. Therefore Kim's statement that civil law systems would not allow a suspension of the time period, which is based on a statement in the Report of the eighteenth session of the Working Group, is misleading. The material issues, however, in connection with article 63 are first the exclusion of suspension or interruption of the period and, secondly, the permissibility of its extension. So far it had been deemed convenient to leave the issue of suspension or interruption to national laws but it was felt by the Working Group that that would have affected uniformity and created uncertainty, for the claimant might not be aware what the rules would be in the *lex fori*. As regards the extension, that had already been granted by the Hague-Visby Rules and was subsequently granted by the Hamburg Rules both because it corresponded to a usual practice and because it was a means to allow more time for negotiations and thus reduce litigation.

Article 64. Action for indemnity

After a short comment on this provision Kim makes reference to the proposal made during the 11th session to provide expressly also in respect of counterclaim and says that such provision⁶⁰, was subsequently considered unnecessary due to the addition of the present paragraph 3 in article 62. In fact article 62(3) does actually incorporate that provision⁶¹.

Article 65. Actions against the person identified as carrier

Kim seems to have misinterpreted this provision when he says that it grants to the registered owner the possibility of bringing an action for indemnity against the bareboat charterer or the person identified as carrier. This provision in fact aims at protecting the claimant where the carrier is not identified in the contract particulars and, pursuant to article 37, the registered owner is presumed to be the carrier unless he proves that the ship was under a bareboat charter and identifies the bareboat charterer: in order to avoid that the claimant, in case the owner provides the name and address of the bareboat charterer or identifies the carrier just before the lapse of the two years period, thereby preventing a timely action of the claimant against him or against the person identified as carrier, an extension is granted for such action. Therefore it is not for the benefit of the owner or the bareboat charterer that the extension is granted, but rather for the protection of the claimant.

Chapter 14. Jurisdiction, by Professor Manuel Alba Fernandez (pages 283-320)

In his General Introduction Professor Alba Fernandez observes that given the transnational character of the contracts of carriage of goods and their mandatory character it is important that the courts in which disputes are brought be in States

⁶⁰ That appeared in article 73 of A/CN.9/WG.III/WP.56..

⁶¹ The change has been mentioned in A/CN.9/WG.III/WP.81, footnote 194.

parties to the relevant convention in order to ensure its application and that is why many conventions on carriage of goods, including the Rotterdam Rules, contain provision on jurisdiction.

Article 66. Actions against the carrier

Prior to commenting each of the connecting factors enumerated in this article Alba considers the scope of application of this chapter, stating that its rules apply only to actions relating to matters regulated by the Rotterdam Rules that are brought against the carrier (a relevant aspect that is to be clarified in other transport conventions, such as the Hamburg Rules, article 21(1) of which indicates generally that the plaintiff may institute proceedings in the places subsequently indicated, without stating who the plaintiff is or against whom the action may be brought). He then draws attention to the fact that in order to ensure that the court chosen by the parties be in a Contracting State and thus applies the Rotterdam Rules, reference is made in article 66(2) to a competent court chosen for the purpose of deciding claims that may arise under the Rotterdam Rules.

In respect of the connecting factors enumerated in article 66(1) – domicile – he states that the meaning of this term is clarified by its definition in article 1.29: a definition clearly modelled on that in the EC Regulation No. 44/2001. He then draws attention to the fact that in addition to the ports of loading and discharge, mention is made of the places of receipt and delivery in view of the fact that the Rotterdam Rules apply to contracts “wholly or partly” by sea: the consequence is that where both the places of receipt and delivery and the ports of loading and discharge will all be in States Parties to the Rotterdam Rules, there may be a choice, in respect of this connecting factor only, between four different jurisdictions.

Article 67. Choice of courts agreements

Alba’s first comment on this article is that notwithstanding the generality of its rubric, the subject matter of this article is the exclusive jurisdiction of the court that is chosen by the parties. The reference to article 66 is due to the fact that thereunder the jurisdiction agreed between the parties is merely one of the possible jurisdictions that may be chosen by the cargo claimant, whereas article 67 sets out the conditions under which that jurisdiction may become exclusive. The requirement that the agreement be in writing is not set out in article 66(b), but in article 3.

After briefly considering the conditions set out in paragraph 1 of this article in order that the jurisdiction agreed be exclusive, Alba devotes the greatest part of his analysis to paragraph 2, that sets out the conditions under which the agreement may bind third parties. It may however be worthwhile to draw a comparison between the conditions required by paragraph 1(a) for the exclusive character of the jurisdiction and those required by article 80(2) for the binding character of a derogation from the rules of the Rotterdam Rules contained in a volume contract: a comparison that is justified by the fact that the exclusivity of a choice of court agreement is allowed by article 67(1) only if the agreement is contained in a volume contract. The two

provisions differ in that article 67(1)(a) enumerates the conditions originally contained in article 80(2) and now contained in article 80(2)(b), but does not mention the additional and more forceful conditions contained in article 80(2)(c) and (d).

Article 68. Actions against the maritime performing parties

After observing that the connecting factors mentioned in this article cover the two types of maritime performing parties, namely those that perform in whole or in part the carriage of the goods and those who perform activities within a port, Alba considers the problem whether the “Himalaya provisions”, viz. article 4 of the Rotterdam Rules, may be invoked by a maritime performing party in order to obtain the application of an exclusive jurisdiction clause agreed between the carrier and the shipper, reaching a negative conclusion on account of the specific rules contained in article 68 for actions against maritime performing parties. This conclusion is correct, also on the basis of the protection granted to maritime performing parties by article 4, such protection relating to provisions that provide a defence for, or limit the liability of, the carrier.

Article 69. No additional bases of jurisdiction

Alba considers, in connection with this article, two problems. The first is whether a court that is not competent pursuant to articles 66 or 68, may, in case the defendant does not raise any objection or does not appear, accept jurisdiction and the second is whether a court having jurisdiction pursuant to such article may instead refuse to take the case for example on the basis of the rule *forum non conveniens* and in both cases reaches a negative conclusion.

Article 70. Arrest and provisional or protective measures

Alba remarks that no definition of provisional protective measures is given in this article and its meaning is left to the national law of the court where such measures are requested. That is correct, save that a specific protective measure, arrest, is mentioned. Indeed the original purpose of this provision was precisely that of avoiding a conflict with the Arrest Conventions of 1952 and 1999⁶² and the first UNCITRAL Draft⁶³ contained two separate articles – articles 73 and 74 – the first referring to arrest and the second to provisional or protective measures. Subsequently such articles were merged into one only, para. 1 of which made separate reference to arrest and provisional protective measures and para. 2 (in square brackets) contained a definition of provisional or protective measures consisting in a list of such measures⁶⁴. At the subsequent session of the Working Group it was decided to merge

⁶² A/CN.9/WP.576, para. 129; A/CN.9/WP.591, para. 49.

⁶³ A/CN.9/WG.III/WP.32.

⁶⁴ A/CN.9/WG.III/WP.56. Article 79(2) so provided:

[2. For the purpose of this article “provisional or protective measures” means:

the separate reference to arrest and provisional protective measures by adding after provisional or protective measures the words “including arrest” and to delete the bracketed para.2 on the ground, indicated by Alba, that “in light of the difference among the various national laws, drafting an exhaustive list of provisional or protective measures would be a challenging task of uncertain result”⁶⁵.

In his comments on the second sentence of this article Alba draws the attention to the fact that both Arrest Conventions contain provisions also on jurisdiction on the merits and that therefore it was necessary to avoid a conflict between the Rotterdam Rules and such Conventions. A purpose that was achieved with the negative formulation of the second paragraph that, he remarks, has the effect of adding an optional forum for the merits when the conditions of the applicable Arrest Convention are met.

Article 71. Consolidation and removal of actions

Two remarks made by Alba in respect of para. 1 are worth mentioning. The first is that it applies only in respect of actions arising out of a single occurrence and the second is that a single action against the carrier and the maritime performing party would not be possible where none of the places indicated in article 66 coincides with one of those indicated in article 66 so that the competent court must be designated pursuant to article 68(b) and such court is not in a Contracting State.

Article 72. Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance

Perhaps there is a preliminary issue to those discussed by Alba, and that is when a dispute may be deemed to have arisen. In the first UNCITRAL Draft⁶⁶ the wording was different. Article 75 in fact required that the agreement be made “after a claim under the contract of carriage has arisen”: a wording that corresponds to that in article 21(5) of the Hamburg Rules. At the fourteenth session of the Working Group that wording was discussed and different views were expressed on its meaning, whereupon it was agreed to place the article in square brackets⁶⁷. That wording was

-
- (a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or
 - (b) An order securing the amount in dispute; or
 - (c) An order appointing a receiver; or
 - (d) Any other orders to ensure that any judgment or arbitral (award) is not rendered ineffectual by the dissipation of assets by the other party; or
 - (e) An interim injunction or other interim order.]

⁶⁵ A/CN.9/591, para. 51.

⁶⁶ A/CN.9/WG.III/WP.32, article 75.

⁶⁷ A/CN.9/572, para. 148:

“after a claim under the contract of carriage has arisen”

A further question was raised regarding whether the agreement under the draft article could only be made after the institution of a proceeding with respect to the loss or damage, or whether it referred instead to the moment when the loss or damage had occurred. There was support for the view that the intention of the provision was to refer to agreements made after the

again considered at the subsequent session, when it was agreed to replace the text after “parties” with the following: “to the dispute under the contract of carriage after the dispute has arisen” and it was explained that the purpose of the amendment was “to ensure that it was clear that any agreement on jurisdiction should not be reached until after both parties had notice of the dispute”⁶⁸. “Notice” can mean intimation as well as knowledge⁶⁹ and in this context means knowledge. Since it is difficult to conceive a dispute of which both parties involved have not knowledge, the question is what it is meant by “dispute”. In this context it certainly means a controversy as to whether or not the carrier is liable in respect of the loss of or damage to goods or the delay in their delivery. Therefore any agreement on jurisdiction reached by the parties after delivery of the goods or after the date at which they should have been delivered is necessarily an agreement after a dispute has arisen because its very purpose is to submit the question as to whether or not the carrier is liable to the jurisdiction of a specific court. The conclusion is that choice of court agreements other than those mentioned in article 67 incorporated in transport documents are null and void, whereas such agreements made in respect of specified consignments after their transportation ended are valid.

In his analysis of article 72 Alba first says that the agreement must indicate a court in a Contracting State. That is correct, for the whole of chapter 14 regulates jurisdiction in respect of courts in Contracting States as stated in article 67(1) (b) and implied in articles 66, 68 and 69 in which reference is made to judicial proceedings under the Convention. He then says that the validity of the agreement is not subject to form requirements. That was actually the decision reached during the sixteenth session⁷⁰, as Alba indicates and is impliedly confirmed by the lack of a reference to article 72 in article 3, but there may be specific requirements in the Contracting State in which the competent court is located, as is the case for the States members of the European Union in which Regulation (EC) 44/2001 applies⁷¹, nor a requirement of a specific form may be considered to be in conflict with the Rotterdam Rules.

He then considers some special situations that may arise in connection with paragraph 2 of this article (reference is made in two occasions to chapter 13 instead than to chapter 14).

Article 73. Recognition and enforcement

Quite rightly Alba says that this article has rather limited harmonizing ambitions since a) the law applicable is that of the State in which the recognition and

loss or damage had arisen. A further suggestion was made that the relevant moment should be when the parties had knowledge of the loss or damage. The Working Group agreed to place this phrase in square brackets pending further discussion.

⁶⁸ A/CN.9/576, para. 170.

⁶⁹ Shorter Oxford Dictionary.

⁷⁰ A/CN.9/591, para.64.

⁷¹ The relevant provisions are in article 23.

enforcement is sought, b) the judgment must have been issued by a court competent under the Rotterdam Rules and consequently the court of the State in which the recognition and enforcement is sought must verify that that was the case, c) even if that inquiry will have a positive result, nevertheless the recognition and enforcement may be denied on the basis of the *lex fori* and, d) the scope of application of this article is limited to the States that have made a declaration in accordance with article 91.

Article 74. Application of chapter 13

It must first be noted that the rubric of this article wrongly refers to chapter 13 (as do the comments thereunder) whereas the chapter on jurisdiction is chapter 14 and therefore all references to chapter 13 must be read as references to chapter 14. This printing error having been clarified, the remark made by Alba that the reference in chapter 14 must read as a reference to all States parties to the Rotterdam Rules, irrespectively of whether they have opted in chapter 14 or not, is certainly correct. Some doubts are instead justified in respect of the consequence he draws from that, namely that cargo claimants “would be better advised to litigate in the chapter 13(14) area”: it is in fact quite possible that a court in a State that has not opted in chapter 14 might deny jurisdiction in cases in which it would be recognized under article 66. Perhaps the appropriate solutions would be to bring proceedings in a court that is competent under the *lex fori* as well under chapter 14.

Alba subsequently considers the position of the European Union and of its Member States and says that the ratification of the Rotterdam Rules by the EU would make sense only if it were accompanied by a declaration binding the EU region to chapter 14, but, unless the coordination between the EU and its Member States takes place, that would not clarify the operation of the rules of chapter 14 within the Union and between Member States and between them and States not members of the EU. I suggest that the position is the following. Since Member States of the European Union, with the exception of Denmark, have conferred competence to the Union as regards matters covered by chapter 14 of the Rotterdam Rules, they could not, when ratifying or acceding to the Rotterdam Rules, declare that they will be bound by the provisions of chapter 14. In turn the EU is competent to make such declaration. If, therefore, the EU will accede to the Rotterdam Rules prior to all its Member States, its accession will not entail the accession by the Member States but will become effective if and when they will individually accede to the Rotterdam Rules. However, when they will accede, they will be automatically bound by chapter 14. But the Member States may individually accede to the Rotterdam Rules without making a declaration, and that will entail their entry into force except for the provisions of chapter 14, and when the EU will make the declaration under article 93, its declaration will entail the entry into force of the provisions of chapter 14 in respect of all Member States that had previously ratified or acceded to the Rotterdam Rules. Alba rightly says that a coordination between EU Member States is necessary, for if some want to be bound by the provisions of chapter 14 and some do not, their

decision to ratify or accede to the Rotterdam Rules might be influenced by the decision of the EU on whether to accede to the Rotterdam Rules or not. A similar problem has arisen in respect of the Athens Convention as amended by its 2002 Protocol, but its solution has been much simpler because its provisions on jurisdiction and recognition of judgments apply without the need of being opted in, nor can they be opted out and because the EU has enacted the provisions of the Athens Convention as amended with its Regulation (EC) No. 392/2009. The EU has deposited its instrument of accession to the Athens Convention as amended on 15 December 2011 and the Convention will enter into force for each Member State one year after the day when it will have deposited its instrument of ratification or accession. But in any event within the EU the provisions of the Convention, as enacted in Regulation 392/2009, will enter into force by 31 December 2012.

Chapter 15. Arbitration, by Chester D. Hooper (pages 321-330)

In his introduction Chester Hooper states that one of the reasons why this chapter has been adopted is to prevent parties from using an arbitration clause to circumvent the jurisdiction chapter. When in fact objections were raised against the adoption of a chapter on arbitration, on the ground that it would create commercial uncertainty⁷², it was stated that the draft Instrument should contain only basic provisions on arbitration so as not to disrupt the international arbitration regime, but so as to ensure the application of the mandatory provisions of the draft instrument and specific reference was made to the need to avoid that it should be possible “through simply choosing arbitration to circumvent the rules on jurisdiction”⁷³.

Article 75. Arbitration agreements

Article 76. Arbitration agreement in non-liner transportation

Hooper is right in saying that article 75 is not restricted to the liner trade. The scope of application of chapter 15 would in fact be the same as that of the Rotterdam Rules, in accordance with articles 6 and 7, except for the specific rules set out on article 76 that indicates to which types of transportation the chapter applies and to which it does not apply or applies under specified conditions. The basic rule is that unless otherwise specified, it does apply when the Rotterdam Rules are applicable. And since from article 6 it appears that they basically apply to liner transportation, the conclusion is that chapter 15 does apply to liner transportation that, as Hooper rightly says, is the type of transportation in respect of which arbitration clauses are seldom used, and that entails that the practical importance of this chapter is not

⁷² A/CN.9/572, paragraph 154.

⁷³ A/CN.9/572, paragraph 156.

significant. And it is even less significant since its application is subject to a declaration of the Contracting States.

As regards non-linear transportation, chapter 15 would apply, according to article 6(2), if there is no charter party and a transport document (or electronic transport record) is issued, and would also apply, according to article 7, also where there is a charter party, as between the carrier and third parties. However an arbitration agreement contained in a charter party, would not be subject to article 75 if the conditions set out in article 76 are met, namely the transport document (or electronic transport record) identifies the parties to and the date of the charterparty and incorporates by specific reference the arbitration clause. Except for the names of the parties, the other requirements set out in article 76 (2) are those that the prevailing jurisprudence in most maritime countries require in order that the arbitration clause contained in a charter party be binding on the holder of a bill of lading.

Hooper then considers paragraphs 2 and 3 of article 75.

As regards paragraph 2 he draws first the attention to the lack of a definition of “place”, that he says may be a nation, a territory within that nation, a port or a city and that each nation would probably define the place according to its own rules. I suggest that the meaning of the term “place” must be the same in each subparagraphs of article 75(2) and if, as will almost always be the case, the place designated in the arbitration agreement will be a city, also the place reference to which is made in paragraph 2(b)(ii) and (iii) must be a city. There remain two options in which reference is not made to a place but to the domicile of the carrier and to the port of loading and of discharge: I suggest that the domicile of the carrier will normally be in a city and also a port will be within a city, failing which the place of arbitration should be the nearest city.

Hooper subsequently considers which would be the applicable substantive and procedural law and is of the opinion that if the place of arbitration will be in a Rotterdam Rules State that had opted-in chapter 15 the Rotterdam Rules shall apply, whereas if it will be in a Rotterdam Rules State that has not opted in chapter 15 that State might not “retain” or might “refuse to accept” arbitration. I suggest that since normally arbitration tribunals are competent to decide on their jurisdiction as well as on the applicable law, the States, or more likely their courts, ought not to be involved. But probably the real problem may be, in case of institutional arbitration, how that arbitration may be conducted in a place other than that where such institution is located. Reference may be made in this respect to the rules of the London Maritime Arbitrators Association, of the *Chambre Arbitrale Maritime* of Paris, of the Society of Maritime Arbitrators, Inc. of New York, of the Maritime Arbitration Commission of the Russian Federation and of the China International Economic and Trade Arbitration Commission.

In respect of the binding character of arbitration agreements contained in volume contracts Hooper considers the requirements set out in article 75(3) and those on the validity of the arbitration clause in respect of third parties set out in article 75(4).

Article 77. Agreement to arbitrate after a dispute has arisen

Article 78. Application of chapter 15

No special comments are made by Hooper on these two articles, nor were they required.

Chapter 16. Validity of contractual terms, by Professor Hannu Honka (pages 331-348)

In his introduction to this very important chapter Honka, after having reminded to the reader that the original purpose of the Hague Rules and of the mandatory character of the provisions on the liability of the carrier had been that of ensuring reliance on the bill of lading, subsequently replaced by the need to protect the potentially weaker party in contracts of carriage, questions whether and, if so, to which extent there still is in to-day's world that need. He then considers individually the provisions of chapter 16.

Article 79. General provisions

In his analysis of this article he devotes particular attention to paragraph 1, in which the mandatory character of the obligations of the carrier is set out and draws the attention to the fact that that rule applies also to the maritime performing parties that operate not only at the ports of loading and discharge but also at any intermediate port. There may indeed be intermediate ports, for the goods may be transhipped from one ship to another; and that occurs very frequently for the carriage of containers, but the provisions of the Rotterdam Rules apply, pursuant to article 19, when the maritime performing party has acted in a Contracting State and Honka mentions this, when he says that there are some geographical requirements for the application of the Rotterdam Rules. He also refers to the UN Convention on the Liability of Operators of Transport Terminals in International Trade, that also governs the liability of terminals operators, that are a category, probably the more important, of maritime performing parties, and says that that Convention is not of international importance: the reason is that after over twenty years since its adoption (the actual year of its adoption is 1991 and not 1994) it has only been acceded to by four States and even if pursuant to its article 22 only one more ratification, acceptance, approval or accession is required for its entry into force, so far no traditional maritime country is a party to it. In any event in case a conflict article 30 of the 1969 Vienna Convention would apply.

Honka also draws the attention to the fact that specific provisions of the Rotterdam Rules are non-mandatory and after mentioning article 50, says that there are provisions in respect of which it is not always self-evident to discover the line between the possibility of contracting and mandatory coverage and makes reference to deck carriage under article 25. Although the parties may agree on deck carriage and that entails the application of a different liability regime, that it is a regime

provided for by the Rotterdam Rules and consequently it is not possible to treat that situation as an indirect exclusion or limitation of liability reference to which is made in article 79 (1)(b). As regards FIO clauses that are also considered by Honka, his reference (in footnote 5) to article 17(3)(i), that is one of the excepted perils that are not exonerations from liability but reversals of the burden of proof, raises a general question, namely whether a contractual allocation of the burden of proof comes under article 79(1)(a) or (b) or not. I am of the opinion that it does, for it renders more difficult the success of a claim. And the very fact that so much attention has been paid in article 17 of the Rotterdam Rules to ensure a fair balance in that respect constitutes the best evidence of its importance.

Article 80. Special rules for volume contracts

Honka starts (at page 338) his commentary of this article by providing a very clear and exhaustive description of its background whose knowledge is indeed essential in order to properly understand its provisions.

His commentary of paragraph 1 is preceded by an analysis of the definition of volume contract, often criticized for its vagueness, and answers the objection that it covers even a contract for the carriage of two containers in two subsequent voyages by saying that if a judge would realize that the purpose of such a contract is that of evading the mandatory character of the rules on liability and limitation of liability, he would set aside any clause that departs from the mandatory provisions of the Rotterdam Rules and that article 79 may give him the basis for such decision. I should like to add that no sensible shipper would ever accept such a proposal, unless he is offered a very attractive bargain: but how attractive such bargain may be? For example, how great a reduction of the freight might the carrier offer in consideration of a wider exoneration from or limitation of liability? The figures would be so small that neither the carrier nor the shipper would be interested in losing time in negotiating a reduction in the freight in consideration of a reduction of liability or of the limit of such liability. And a negotiation is required pursuant to article 80(2).

In his commentary to paragraph 2 he describes the various steps of the difficult negotiations that preceded the consensus on the present text, such consensus having been reached at the last session of the Working Group in January 2008 through the introduction of sub-paragraph (d)(ii)⁷⁴ that Honka rightly says takes away much of the relevance of the first part of subparagraph (b). Indeed after a consensus had been reached, it would have been possible to re-write in a more appropriate manner the whole paragraph 2. But the manner in which an international convention is drafted is very different from that in which a national law is drafted by a small group of people, all with the same legal background.

⁷⁴ A.CN/9/645, paras.243-249.

After noting that paragraph 3 seems to overlap many parts of paragraph 2, Honka indicates the reasons why derogation is not permitted in respect of some fundamental rules, described as being *supermandatory*, namely those in articles 14 and 61 that relate to obligations of the carrier and those in articles 29 and 32, that relate to obligations of the shipper. Two of them, viz. that on the obligations of the carrier in respect of the seaworthiness of the ship and that of the shipper in respect of dangerous goods, go beyond the interest of the parties, for they protect, albeit indirectly, all third parties that might be adversely affected by the unseaworthiness of the ship or the dangerous character of the goods.

There follows a commentary of the final two paragraphs of this important article: paragraphs 5, that aims at protecting third parties and 6, that regulates the allocation the burden of proof.

Article 81. Special rules for live animals and certain goods

Honka points out that whilst the Hague-Visby Rules do not apply to carriage of live animals, both the Hamburg Rules and the Rotterdam Rules do and after having stated that the basic rule is that there is freedom of contract in respect of the carriage of live animals, he comments on the situations where the carrier may instead be liable for loss of or damage to live animals. Then he mentions that paragraph 2 of this article contains a provision similar to that in article 6 of the Hague-Visby Rules.

Professor Honka has made a very clear and exhaustive commentary of chapter 16 of the Rotterdam Rules, which, together with chapter 2, sets out fundamental principles on the modern conception of the contracts of carriage of goods (wholly or partly) by sea.

Chapter 17. Matters not governed by this Convention, by Professor Hannu Honka (pages 349-354)

Article 82. International conventions governing the carriage of goods by other modes of transport

Professor Honka at the outset of his commentary on article 82 stresses the distinction between article 26 and article 82 and says that article 82 deals only with the issue of conflict of conventions and extends beyond article 26, which regulates only situations of loss of or damage to goods and delay in their delivery. Its aim, he says, is to fully coordinate the Rotterdam Rules and their nature of a maritime plus convention with other unimodal conventions and explains the reasons why conventions in force when the Rotterdam Rules will enter into force prevail of the Rotterdam Rules and so do their subsequent amendments, whereas conventions that enter into force after the Rotterdam Rules do not: the reason is that for such latter conventions there is no predictability as to their future substance. He then considers the lettered part of article 82 and explains the reasons of their specific wording.

Article 83. Global limitation of liability

Honka clarifies one aspect of the coordination between global limitation conventions and the limitation of liability under the Rotterdam Rules, that exists already in respect of the Hague-Visby Rules, although sometime is not understood: the limit under the Rotterdam Rules (as well as that under the Hague-Visby Rules) applies first and thereafter such limited amount is included amongst the claims subject to limitation under a global limitation convention.

Article 84. General average

Honka draws the attention to the fact that general average is an objective risks division system and therefore the adjustment takes place without taking into consideration the possible fault issue, the consequence being that cargo interest might have to pay contribution even if the general average act is the consequence of a fault of the carrier, but then may claim back in the form of damages from the carrier.

*Article 85. Passengers and luggage**Article 86. Damage caused by nuclear incident*

Honka in respect of article 85 merely says that that provision is self evident and indeed it is. In respect of article 86 he draws the attention to the fact that channelling damage caused by a nuclear incident to a specific liability convention is a standard principle.

Chapter 18. Final Clauses, by Kate Lannan (pages 355-366)

In her Introduction Ms. Kate Lannan, who during the *travaux préparatoires* of the Rotterdam Rules was Legal Officer on the UNCITRAL Secretariat and has been Secretary of Working Group III, says that the final clauses relate to the procedural aspects of the treaty, and she gives a general description of such clauses.

Article 87. Depositary

Ms. Lannan mentions the change that occurred with the advent of international organizations in respect of the choice of the depositaries of international conventions: while previously only States were named as depositaries, after the advent of international organizations such organizations have been entrusted with depositary functions and the most common approach is at present that of naming the Secretary General of the United Nations as Depositary.

Article 88. Signature, ratification, acceptance, approval or accession

After mentioning the normal procedure followed by States in order to express the consent to be bound by a treaty, Ms. Lannan draws the attention to the fact that the Rotterdam Rules, contrary to other conventions such as the Hamburg Rules, do not contain a closing date for signature and indicates the rights that States acquire with the signature.

Article 89. Denunciations of other conventions

Attention is drawn by Ms. Lannan to the mechanism that, similarly to the Hamburg Rules, has been adopted in order to ensure the contemporaneous effect of the denunciations of an older convention and the entry into force of the subsequent one, consisting in a declaration by a State that the denunciation will not take effect until the date when the subsequent convention enters into force in respect of that State. When such mechanism was not envisaged, it occurred that a State that ratified a convention prior to its entry into force internationally, could not know when it would enter into force and consequently did not denounce the previous convention that the new one intended to replace, the consequence being that such State would remain party of both conventions for some time. This occurred recently in respect of the 1952 and 1999 Arrest Conventions: Spain had ratified the 1999 Convention on 7 June 2002 and since that Convention entered into force internationally on 14 September 2011, six months after its tenth ratification, even if Spain had denounced the 1952 Convention the day following such tenth ratification, such denunciation would, pursuant article 17, become effective one year later, viz. on 15 March 2012, so that Spain would have been party to both Conventions between 14 September 2011 and 15 March 2012.

Article 90. Reservations

The comment could only be very short, since no reservation is permitted.

Article 91. Procedure and effect of declarations

Ms. Lannan draws attention to the fact that whilst permitting some specific declarations, this article prohibits any other declaration as well as to the fact that some of the permitted declarations (those relating to chapters 13 and 14) may be made at any time, others (those permitted pursuant to articles 92(1) and 93(2)) must be made only at the time of signature, or at the time of ratification, acceptance, approval or accession.

*Article 92. Effect in domestic territorial units**Article 93. Participation by regional economic integration organizations*

As regards article 92 Ms. Lannan explains that its purpose is to facilitate ratification by States that contain two or more territorial units in which different systems of law are applicable. As regards article 93 she draws the attention to the requirement for any such organization to specify the matters covered by the Rotterdam Rules in respect of which competence has been transferred to the organization by its members States. Therefore the ratification of the Rotterdam Rules accompanied by a declaration would be required, in so far as the European Union is concerned, since in respect chapter 14 on Jurisdiction, the competence has been transferred by the Member States to the European Union. This problem is presently under consideration in respect of article 10 and 11 of the 2002 Protocol to the Athens Convention and the EU has deposited the instrument of accession to the 2002

Protocol on 15 December 2011. There should follow the instruments of accession of all Member States of the Union.

Article 94. Entry into force

Article 95. Revision and amendment

Article 96. Denunciation of this Convention

As regards article 94 Ms. Lannan says that the number of States required for the entry into force of the Rotterdam Rules has been the result of negotiations, for the States who wanted the Rotterdam Rules to apply as soon as possible requested that such number be as low as possible, while States that wanted to reduce the risk of various conventions being in force at the same time, requested that such number be high. As regards article 95 she explains that a rapid amendment procedure was deemed to be unnecessary in view of the substantial increase of the limits.

Conclusion, by Rafael Illescas Ortiz (pages 367-379)

Perhaps the title of the final article of Professor Illescas Ortiz, is not apt to describe its contents.

In the first paragraph under the title “The Making of the Convention”, Illescas, indicates the basic distinction between the 1980 Multimodal Convention and the Rotterdam Rules: while in the Multimodal Convention all transport modes are placed on the same level, in the Rotterdam Rules the maritime leg is treated as the fundamental mode, the other modes having only a complementary function. That denotes, I may add, a difference in the approach: that of the Multimodal Convention is theoretical whereas that of the Rotterdam Rules is pragmatic. The Rotterdam Rules are meant to answer a real need of modern transportation which, with the advent of containers, tends more and more to cover the whole carriage from the door of the shipper to that of the consignee: a transport that almost always includes a maritime leg.

In the second paragraph, under the title “The Milestones”, he aptly and concisely describes the major issues considered by the Working Group, including the rules applicable to the always present maritime leg and the additional land or air legs, the basis of the carrier’s liability, the freedom of contract that could not be disjoined from the protection of small shippers, the advisability to regulate jurisdiction and arbitration, the limits of liability.

In the third paragraph, under the title “The Methods”, Illescas touches upon the diversity of methods that must be used in order to reach a text that is not in too significant a conflict with the various national legal system and ensures a balanced compromise between conflicting interest, mentioning the fundamental cooperation between the UNCITRAL Secretariat and the CMI, the fluent and permanent dialogue among the Commission and the stakeholders, the active participation in

the debates of Member States of the United Nations not members of UNCITRAL, and non governmental organizations. Finally he mentions the fundamental principle adopted in UNCITRAL of reaching agreements by consensus and says that it is something between majority and unanimity and expresses a “largely prevalent opinion”: something, he says, not easy to define, that must be appreciated by the chair and not contradicted by delegations that would have the right to call a vote on the particular point on which the chair has stated that there had been consensus. And the fact that during the thirteenth sessions of Working Group III that has never happened constitutes the greatest evidence of the ability of the Chairman.

THE CARRIAGE OF GOODS BY SEA UNDER THE ROTTERDAM RULES

In this book Professor Thomas, who is Professor of Maritime Law and Director of the Institute of International Shipping and Trade Law at Swansea University, has collected the contributions of the participants to the Sixth Annual International Colloquium organized by the Institute in September 2009, which was devoted to the Rotterdam Rules. The book is divided in 16 chapters, each chapter containing the contribution of one of the participants, the biographies of whom are published in the initial section of the book from page xv to page xx. A review of each of such contributions follows. For convenience I shall refer to the authors by their family name.

Chapter 1. The emergence and application of the Rotterdam Rules, by Professor D. Rhidian Thomas (pages 1-25).

In the first section, entitled “Formative history”, Professor Thomas says that the Rotterdam Rules do not represent an entirely fresh start because much has been absorbed from the previous transport conventions and provides an outline, in rather critical terms, of the legislative technique that has been adopted. After expressing his astonishment for the length of the instrument, he defines in para.1.5 the drafting style, stating that in the Rotterdam Rules’s eighteen chapters “matters of substance are expressed verbosely in forbidding detail and frequently in a new legal language” and that the Rotterdam Rules are not a “legal code readily usable as a speedy guide and reliable source of relevant information to those engaged in maritime commerce but a linguistic and intellectual challenge” and concludes by observing ironically (in para.1.9) that “it cannot be said that, at the present time, the UN proposal is sweeping all before it and that States are queuing up to adopt the Rules”.

There follows, after this not too encouraging presentation, his analysis of the Rotterdam Rules, that covers the scope of application, the carrier’s period of responsibility and volume contracts. The first part of his analysis is devoted to the scope of application and is divided in three sections, “Contracts to which the Rules

apply”, “Contracts to which the Rotterdam Rules do not apply: the excluded contracts” and “Application of the Rotterdam Rules to third parties who are not original parties to an excluded contract”.

In the first of such sections (that runs from p. 4 to p. 9) under the initial subsection that bears the same title as the Rotterdam Rules, Thomas says (in para.1.10) that the Rotterdam Rules apply to contracts for the international carriage of goods wholly or partly by sea which have a specified connection with Contracting States but that they never appear to succeed in making this point succinctly and clearly so that it has to be deduced from several of their relevant provisions. I suggest that the relevant provisions are contained in chapter two, consisting of three articles, with appropriate reference to the definitions of the relevant terms contained in article 1.

In his subsequent analysis Thomas raises some questions that are worthy of consideration. In the sub-section entitled “Goods” he observes that their definitions does not include live animals, although article 81(a) appears to assume the contrary. The reason was explained in the following comment on article 17 of the original draft, based on the CMI draft⁷⁵:

In the Hague and Hague-Visby Rules live animals are excluded in the definition of goods. It is felt, however, that the exclusion of live animals is only justified for carriers’ liability purposes. Other provisions, such as those dealt with in chapters 7 and 11, are relevant to the carriage of live animals. Accordingly, the better place to deal with live animals is in this provision.

In the sub-section entitled “Wholly or partly by sea” Thomas raises a question about the meaning of “sea carriage”, which is not expressly defined in the Rotterdam Rules, in connection with the reference in article 1.1 (and in the title of the Rotterdam Rules) to carriage by sea and says that the most likely circumstance where the nature of “sea carriage” might come into question is where a distinction has to be drawn between sea carriage and carriage by inland navigation. I suggest that a definition of “sea carriage” would have been quite unnecessary and rather surprising. In case goods are carried by sea and then by inland navigation without transshipment it would be clear, even though that might be irrelevant considering that in all likelihood the Rotterdam Rules would continue to apply, that the carriage by sea ends when the ships enters into the mouth of the river.

In the sub-section entitled “International carriage” Thomas raises the question, in connection with the definition of the term “international” in article 5.1, whether, if the ports of loading and discharge are in the same State but the place of receipt and the place of delivery are in different States, the Rotterdam Rules apply and says that there are two possible ways of interpreting article 5.1, namely one establishing two rules, the first relating to port-to-port contracts requiring that such ports be in different States, and the second relating to place-to-place contracts requiring that the places of receipt and delivery be in different States, and one relating only to place-

⁷⁵ A/CN.9/WG.III/WP.21, para, 219, p. 70.

to-place contracts, in which event both places of receipt and delivery and ports of loading and discharge be in different States. I suggest, however, that the first interpretation is against the clear wording of the provision, in which the conjunction “and” links the reference to place and to ports. Therefore this provision applies in its entirety to place-to-place contracts and obviously applies to port-to-port contracts only in respect of the requirement of the ports of loading and of discharge being in different States. Such interpretation is confirmed by the *travaux préparatoires*⁷⁶.

The second section, entitled “Contracts to which the Rotterdam Rules do not apply: excluded contracts”, is devoted to the analysis of article 6. In his Introduction (at p. 10) Thomas qualifies article 6 as “a curious and, it would seem, unhelpful methodology because it appears to be purposeless”. And adds that it achieves no positive function in defining the application of the Rules, but, regrettably, it does possess the capacity to confuse and perplex.

Since it has been agreed from the outset that not all contracts of carriage of goods should be covered by the new instrument, but certain contracts, namely charter parties and other modern forms of contract of a similar nature should be excluded as they are excluded in the Hague-Visby Rules and in the Hamburg Rules, two methods could be adopted, either to define the area of application, as it was done in the Hague Rules, or to identify the types of contracts to which the instrument should not apply. It appeared that the first method could be adopted if the scope of application is defined in respect of the type of document (so-called “documentary approach”) but could not where the scope of application is defined on the basis of the type of contract (so-called “contractual approach”) as well as on the basis of the type of trade (so-called “type of trade approach”)⁷⁷. It was therefore necessary to start from the basic criterion that the instrument would apply to contracts of carriage (wholly or partly) by sea and then to indicate which types of contract of carriage of goods by sea were excluded from the scope of application of the instrument. It is difficult, therefore, to understand on which basis Thomas so bitterly criticises article 6 even though subsequently his analysis, not very exhaustive, does not reveal any deficiency in its provisions.

Nor does article 7 receive by Thomas a better treatment, since the initial comment (in para. 1.59) is that that is “an oddly an vaguely drafted provision”. Subsequently (in para. 1.59) Thomas says that the intent appears to be clear but even if it does the drafting raises a few questions; but before discussing them he makes a few illustrations in order to indicate how it may be presumed that this article is intended to operate. While the first example (in para.1.64), of a c.i.f. seller voyage chartering a ship and

⁷⁶ A/CN.9/510, para. 30; A/CN.9/544, para.70; A/CN.9/594, para.123 and 128; A/CN.9/WG.III/WP.81 wherein in note 26 reference is made to the Finnish proposal in CN.9/WG.III/WP.61, paras 19-22.

⁷⁷ The distinction between such three approaches was discussed during the fourteenth session (A/CN.9/572, paras 82-86 and at a Seminar in London held in February 2004, that had been arranged by me.

receiving a bill of lading in which the buyers are named as consignee, is clear, the second (in para. 1.65) is misleading, even though the conclusion is correct. The situation envisaged is that where a f.o.b. buyer voyage charters a ship and the seller ships and loads a bulk cargo and receives a bill of lading indicating delivery to “shippers order”, thereby becoming shipper, in which event he, not being party to the charter party, is “holder” of the bill of lading and therefore the Rotterdam Rules apply to his contract, whereas they do not apply to the relationship between the buyer and the owner, governed by the charter party. Since the contract of carriage, evidenced by the charter party, is between the owner and the f.o.b. buyer, the seller cannot be qualified as shipper, shipper being defined in article 1.8 as the person that enters into a contract of carriage with a carrier: in fact he does not enter into a contract of carriage at all. Therefore he should not be named “shipper” in the bill of lading but “documentary shipper”. He is interested in receiving a negotiable transport document in order to ensure payment of the sale price of the cargo, if the contract of sale provides for the payment of the sale price against delivery of the transport documents and a letter of credit has been opened in his favour. And he is entitled to obtain the consent of the actual shipper, who is the buyer, so that he may obtain from the carrier the negotiable transport document as permitted by article 35 and be designated as controlling party under article 51(1)(a). However he is not the original party to the charter party and the Rotterdam Rules apply until he remains the controlling party, namely until the negotiable transport document is delivered to the c.i.f. buyer. A third example, that may be appropriate in English law but not in other jurisdictions, is that (in para. 1.68) relating to a time chartered ship sub-voyage chartered to international c.i.f. sellers to whom a negotiable bill of lading is issued by the owners on instructions of the time charterers, in which event, Thomas says, the contract of carriage between the sub-voyage charterers and the owners is within the Rules by virtue of article 6(2). However, in other jurisdictions such as the Italian jurisdiction, there would be no contract at all between the sub-voyage charterers and the owners, the bill of lading being issued to the voyage charterer on instructions of the time charterer, who is the contracting party.

Finally Thomas says that the question becomes more complex if it is right to conclude – and indeed it is right – that article 7 does not purport to create or transfer contractual right and liabilities. The effect of article 7 is merely to limit the application of article 6 as between the original parties to a contract of carriage excluded pursuant to article 6.

After a short section on the carrier’s period of responsibility (at p. 15 and 16) Thomas devotes the second part of his article to what he calls “The enigma of volume contracts”.

In his “Introduction” he mentions that volume contracts are familiar to those in shipping practice in the US and in the Scandinavian region and then, in a section entitled “The American idea” (at p. 18-21), that follows the full text of article 80, he says that the roots of article 80 appear to be founded in the acceptance of the validity of the Ocean Liner Services Agreement regulated in the US Shipping Act 1984 as amended by the Ocean Shipping Reform Act 1998 and quotes the text of the

proposal made by the US Delegation to the UNCITRAL Working Group. In the subsequent section, entitled “The idea accepted and re-drafted” he draws a list of the peculiarities of the special regime adopted in article 80 that must be analyzed, in view of the importance of article 80 within the global regime of the carriage of goods by sea as adopted by the Rotterdam Rules.

But before doing that it is necessary to explain how article 80 originated. Thomas is of course right, when he traces its history. When during the sessions of the Working Group it appeared that the acceptance of freedom of contract in respect of services contracts such as OLSAs was an essential condition for avoiding the adoption by the United States of a new Carriage of Goods by Sea Act, that would have destroyed the (limited) uniformity obtained with the Hague Rules, even though the United States, as many other countries, had not adopted the Protocol, an attempt was made to find a solution that might be acceptable in other countries. But Thomas seems to say that the result has been worse than the original US proposal.

His first criticism (para. 1.89) relates to the definition of volume contract. He says that from the comparison between such definition and that of contract of carriage it appears that the only difference is that under a volume contract there is to be a series of shipments whereas under an ordinary contract of carriage there is one shipment only and that approach leads to great difficulties; the first being a difficulty of policy because that definition raises the question why there should be a difference between the two types of contracts and the second being that it results in an interpretation of volume contract difficult to reconcile with the American idea as it was developed in the UNCITRAL deliberation. As regards the first of such difficulties, notwithstanding the very loose definition, that theoretically might apply to the carriage of two containers in two subsequent voyages, the volume contract is meant to cover contracts for a large quantity of goods, in particular of goods stowed in containers, between parties of similar negotiating power. As regards the second of such difficulties, the intention has been to find a compromise solution between the US proposal and the types of contracts that existed in other parts of the world and in particular in Europe, such as the tonnage agreements. If, as it appears from the attitude of great American shippers, the solution is acceptable in the United States, the difficulty hinted by Thomas does not exist.

His second criticism (para.1.90) relates to the lack of any reference to the individual transport contracts that are entered into under the volume contract. I have the impression that a confusion is made here between contract of carriage and shipments: in the case of a volume contract there is one contract of carriage only, under which various shipments are made, as is the case for tonnage agreements: I suggest that this is made clear in the definition of volume contract in article 1.2.

After having dealt with the above “difficulties”, Thomas (in para 1.91) draws the attention to the fact that in article 80 reference is made only to the carrier and the shipper as parties to the contract, which he says seems inappropriate if the contract is truly a service contract. I suggest that the reference to service contracts, to which no reference is made in the Rotterdam Rules, is misleading. The volume contract is

a contract between the carrier and the shipper under which several shipments are made and, therefore, the “shipper”, as defined in article 1.8, is the person who has entered into the volume contract with the carrier and if a person other than the shipper delivers the goods to the carrier, he will be acting in the name and for the account of the shipper. Consequently the further problem (in para. 1.92) as to how the valid exercise of the license to vary the Rules in a volume contract may be transmitted to the contractual terms of the individual transport contracts is a false problem, since the transport contract is only one. Of course distinct transport documents will be issued in respect of each shipment, and the terms of the volume contract will be incorporated therein.

After four sections, entitled respectively “Limitation of the right to vary”, “Pre-conditions to the validity of a derogation”, “Volume contracts and third parties” and “Jurisdiction and arbitration clauses” in which he describes the provisions in article 80, Thomas makes a number of general remarks that appear in great part appropriate. When (in para.1.105) he says that the restrictive and qualifying limitations and conditions embodied in article 80 “suggest an air of nervousness and uncertainty enveloping the framers of the new Rules”, he is right, even if the appropriate term would not be “nervousness” but rather “concern”. And the concern was that what I called loose definition of volume contract might induce certain carrier to take advantage of the freedom of contract granted by article 80 in situation where such freedom would not be justified and that entailed, after all attempts to find a more strict definition had failed, the almost last minute addition in article 80 (2) of the present sub-paragraph (d)⁷⁸.

In his final “Conclusion” Thomas says (in para.1.109) that the Rotterdam Rules is a document “frustratingly full of puzzles, ambiguities and raw uncertainties”, that (in para.1.110) what might have been stated in a few clearly drafted and brief propositions “has been strangely structured and dressed up in opaque, obscure and often incomplete drafting” and that the Rotterdam Rules “are a dangerous cocktail of too many ingredients of the wrong kind” I just quote his conclusions, without comments.

Chapter 2. From treaty to trial: the implementation of the Rotterdam Rules, by Michael Harakis (pages 27-36).

After having mentioned a paper produced by the Department of Transport on the Rotterdam Rules and stated that at the bottom it says clearly that no decision had been taken as to whether or not the UK would “sign, ratify or do anything else in relation to the rules”, Harakis considers two issues (he refers to them as “parts”): the balance between legal certainty and margins of appreciation and modes of implementation.

⁷⁸ A/CN.9/645, paras.235-253.

In respect of the first of such issues he quotes the UK's position on the degree of legal certainty that may be obtained on conventions and states that even if the rules of a convention are absolutely clear uniform interpretation worldwide would be difficult to achieve and at this point he refers to the Rotterdam Rules and states that they contain gaps that are capable of variable interpretation. Although this is undeniable, and would be undeniable in respect of any convention or any national statute, the example he quotes, article 21 on delay in delivery, is not a good one: the gap in his opinion consists of the fact that the Rules do not tell what is to happen if the date is not agreed and considers two possibilities, first that it could be assumed there is no delivery date and no liability for delay and secondly that a reasonable time for delivery could be implied. I suggest that this is a case in which recourse to the *travaux préparatoires* would be permitted under articles 31 and 32 of the Vienna Convention (they are the subject of a brilliant analysis by Simon Rainey the author of the subsequent chapter) which indicate clearly that it was intended not to allow the second alternative, expressly mentioned in art. 5(2) of the Hamburg Rules⁷⁹. I suggest that a UK Court would in this case take the *travaux préparatoires* in consideration, in as much as article 21 originally also contained in square brackets the provision that in the absence of an agreement delay would occur when the goods are not delivered within the time it would be reasonable to expect of a diligent carrier⁸⁰. That text was discussed during the thirteenth session of the Working Group, when it was decided to delete the square brackets⁸¹ but when the problem of the shipper's liability for delay was discussed at the nineteenth session, a compromise solution was agreed, pursuant to which the provision of the shipper's liability for delay would be deleted due to failure to find a suitable means to limit that liability and article 21 should be limited to the first phrase and the second phrase should be deleted⁸².

In respect of the modes of implementation, Harakis discusses the possibility for a State to make an interpretative declaration in respect of any given provision of the Rotterdam Rules or to clarify certain of its rules in its implementing legislation. I suggest that a distinction must be made according to whether and interpretative declaration is made concurrently or subsequently to the deposit of the instrument of ratification or accession to the Convention. In the first case it should be treated in the same manner of an unauthorized reservation and, therefore, article 20(5) of the Vienna Convention would apply. If it is made subsequently, its effect would be similar to that of an incorrect implementation of the Convention and the problem, in practice purely theoretical, would be whether the State concerned is in breach of its

⁷⁹ *Infra* p. 104.

⁸⁰ A/CN.9/WG.III/WP.21. The following comment was made on the text of the then article 6.4: "The first part of the above provision has widespread support. The second part in brackets is more controversial".

⁸¹ A/CN.9/552, paragraphs 21-24.

⁸² A/CN.9/621, paras. 180(b) and 183 to 184.

obligation arising out of the ratification of or accession to the Convention. But Harakis is right, when he says that a declaration would, contrary to the interpretation by the courts, entail a static understanding of the relevant rules.

Chapter 3. Interpreting the international sea-carriage conventions: old and new, by Simon Rainey QC (pages 37-72).

In his introduction Simon Rainey, after having stated (para. 3.4) that “the advent of the Rotterdam Rules is likely to be accompanied by a much more systematic Vienna Convention approach to their construction and interpretation by the English courts and a much less insular approach to the new concepts adopted”, continues saying “[G]iven the absence of any dominance of English lawyers in their drafting (...). The assumption, often made sub-consciously, that the sea-carriage conventions have at the very least a marked English flavour, will be banished”. What he says is absolutely correct: I have attended all, except one, sessions of the UNCITRAL Working Group and always regretted the very limited participation to the debates of English delegates and, in particular, of maritime lawyers. I organized two seminars in London during which delicate issues discussed in Vienna and New York were considered in the hope of attracting the cooperation in English jurists, however with little success. If, as it appears from the sometimes bitter criticisms of the Rotterdam Rules (it may suffice to read the conclusion of Professor Thomas at page 25 of this book), many English lawyers criticize them, would it not be right to say *imputent sibi*?

After a clear summary of the evolution of the English jurisprudence, from the *Gosse Millerd* case to *Morris v. KLM Royal Dutch Airlines Ltd.*, through *Pyrene Trading Corp. of Panama, Maxine Footwear Co. Ltd. v. Canadian Government Marchant Marine* and *James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (UK) Ltd.*, Rainey makes an in depth analysis of each of the criteria set out in art. 31 of the Vienna Convention, starting from the “ordinary and natural meaning” in connection with which he discusses the importance of the authentic language of the Hague Rules, the Hague Visby Rules and the Rotterdam Rules. Starting from the Hague Rules, he summarizes what he rightly describes as a “somewhat involved history” of the Rules. He says that after a drafting history during which the language used was English they have ultimately been redrawn in French as the sole authentic text. Of course he is right, but the situation is not crystal clear. First, it has been stated by French jurists⁸³, that in one of the basic definitions in article 1, that of “*contrat de transport*”, in the sentence in French reading “*tout document similaire formant titre pour le transport des marchandises par mer*”, that is the translation of “any similar document of title, in so far as such document relates to the carriage of

⁸³ BONASSIES-SCAPEL, *Droit maritime*². Paris 2010, page 613.

goods by sea”, the words “*document similaire formant titre pour le transport*” “*reste sibylline pour un juriste français*”. Secondly, there is attached to the original French text of the Convention an English version in which under the title the following sentence appears in italics (*Traduction anglaise certifiée par le Bureau de la Conférence suivant la décision prise en séance du 8 octobre 1923, v. Procès verbaux, pp. 94 et 95*)⁸⁴. Although that statement is not equal to that appended initially to the bilingual texts of the maritime Conventions adopted between 1952 and 1969 (“done at...on...in the French and English language, the two texts being equally authentic”) and subsequently in the UN and IMO Conventions, nevertheless it differs from the words “translation” or “unofficial translation” used in other circumstances, and appears to attribute to the English text almost an official character. The position is close, but not identical, to that considered in article 33(2) of the Vienna Convention, pursuant to which a version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

In the paragraph on the Hague-Visby Rules at p. 47 Rainey deals with the problem of multi language treaties and the rules in that respect contained in article 33 of the Vienna Convention. He draws the attention to the fact that in England the enactment of the Hague-Visby Rules by the Carriage of Goods by Sea Act 1971 was in the form of the English text appended as a schedule to the Act and says that while the English court has not perhaps endorsed the use of the multiple authenticated languages in the same manner as provided for by the Vienna Convention, since 1978 the approach has been to consult the other authentic text(s) as necessary. It would appear, however, the only text considered has been the French text, because the conventions considered were only bilingual. The problem has become more difficult after the adoption by the United Nations of six official languages. Rainey quotes (at page 51), apparently with approval, the opinion of Gardiner⁸⁵, who says that “if a difference or dispute over the interpretation is being presented to a court, comparison of the texts is likely to be essential”. But would it be conceivable for an English (or a French or Italian) Court to consider, or accept arguments based on the Arabic or Chinese texts of a convention, such as the Rotterdam Rules? Would it make sense to invoke, as aid for the interpretation to any given provision, the Arabic text when it is known that the working language has

⁸⁴ Conférence Internationale de Droit Maritime – Réunion de la Sous-Commission. Bruxelles 1923; Procès-Verbaux des Séances tenues le 6 au 9 octobre 1923. The following statement is recorded at pages 94 and 95:

M. le Président croit qu’il serait désirable cette fois d’ajouter au procès-verbal de la convention une traduction officielle anglaise du texte français. Il ne voit pas qu’il puisse y avoir une objection à cette manière de faire puisque pratiquement l’anglais est le langage de tous les connaissements du monde. Mais l’instrument diplomatique de la convention sera rédigé en français comme cela a été le cas pour les codes sur l’abordage et l’assistance.

⁸⁵ “Treaty Interpretation” (2008) OLP, p. 360.

been English, and that, save some rare cases, the provisions in other languages are translations from the English (or sometime French) original? No delegate who has no knowledge of Arabic, Chinese or Russian when signing the Final Act of a Diplomatic Conference to which the text of a convention is annexed and in all likelihood no State prior to ratifying or acceding to a convention, has ensured that all the six texts are conform. What happens in practice is that whenever any given provision has been originally drafted in English or French, it will be translated into the other languages by the interpreters, and if the Chinese delegate will not be happy of its Chinese translation he will say so and suggest a change. When I listened to any such intervention, I never dreamed to intervene, for the simple reason that I could not do so and my English, French, Norwegian or Spanish colleagues acted in the same manner. I very much doubt, therefore, that an English, French or Italian Court would – and should – rely upon the text in a language it does not know, except perhaps the case where from the *travaux préparatoires* it appears that the original proposal had been made in such language. But even in such case the agreement on that provision had been based on the translation into a language known by the relevant delegates.

Probably in England the problem is overcome by the fact that only the English text, as Rainey has pointed out, is appended as a schedule to the Act. And something similar happens in France and Spain, were the convention becomes effective with its publication in the official journal, the French and Spanish texts respectively being published. The position is different in countries in which none of the six UN languages is spoken. In Italy there is annexed to the law authorizing the ratification of or accession to a uniform law convention its text in one of the languages in which it has been done (so far always the French text) accompanied by an Italian unofficial translation: therefore it might be argued that the leading text is that annexed to the law. Italian courts would probably venture into a comparison with the English or even Spanish text, but certainly no further.

In his analysis of article 31(1) of the Vienna Convention Rainey considers separately the various elements indicated therein: good faith, ordinary meaning of the terms in their context and in the light of its object and purpose. As regards good faith, after summarizing the decision of the House of Lords in a non maritime case⁸⁶, where it rejected the availability of good faith as a source of obligations additional to those provided for by the text of the UN Convention on the Status of the Refugees, he says that for practical purposes in construing a convention on carriage by sea the requirement of good faith interpretation adds little to the approach that the language used should be construed on broad principles leading to a result that is generally acceptable. Since in Italian law the rule is set out in article 1366 of the Civil Code, and that provision is deemed to entail a duty of loyalty and correctness, Italian courts

⁸⁶ *R v. Immigration Officer at Prague Airport, ex p. Roma Rights Centre*, [2005].

would in all likelihood construe article 31(1) accordingly. As regards the ordinary meaning of the terms he says that although it has been held in *Morris v. KLM Royal Dutch Airlines Ltd.*⁸⁷ that it should be avoided giving a particular legal meaning based on the legal system of any contracting States, this aim has not always been observed in cases interpreting the Hague and Hague-Visby Rules and quotes the comments of Mann and those of Treitel and Reynolds specifically on the overriding nature of the seaworthiness duty. I respectfully disagree with that conclusion if, as it would appear, the character of overriding obligation of the seaworthiness duty has the effect of excluding the relevance of contributing causes. Indeed the Hague Rules do confirm generally in article 4(2)(q) the principle that in case of contributing causes the carrier is only liable to the extent that his fault has contributed to the loss or damage.

As regards finally the object and purpose of the treaty, Rainey carries out a thorough analysis of all the English cases in which the object and purpose of the Hague Rules and of the Hague-Visby Rules has been considered and, in respect of the Rotterdam Rules he quotes a statement of UNCITRAL appearing in its website after their adoption. I do not think that such a statement however drafted, may be relevant, *ex post facto*, for the identification of the object and purpose of the Rules but I share the opinion of Rainey when he says that more cogent guidance will instead be found in the *travaux préparatoires*. In that connection it may be observed that the *travaux préparatoires* become relevant as a primary source of interpretation under article 31 of the Vienna Convention, in addition of their relevance as supplementary means of interpretation under article 32.

His subsequent analysis of the supplementary means of interpretation and, specifically, of the *travaux préparatoires*, is conducted on the basis of English jurisprudence and his conclusion is similar to that of Treitel and Reynolds, namely that they are relevant only if they point to a definite legal intention, even though he is personally of the view, as Gardiner, that that approach is too narrow.

After briefly considering whether and to which (indeed very limited) extent foreign jurisprudence may be relevant, he comes to the Rotterdam Rules and devotes a first paragraph to the drafting technique in respect of which he mentions the “adverse press” they received, quoting statements of Thomas and Tetley, none of whom is definitely a supporter of the Rules. More realistically, Rainey mentions that also the Hague Rules and the Visby Protocol had received a similar adverse press and says that only time will tell whether the Rotterdam Rules will be successful or not. He then devotes a paragraph to the comment of article 2 he considers “an extremely curious provision”, such comment relating to the last part of the article in which reference is made to the need to promote “the observance of good faith in international trade”. It is surprising that reference to good faith may be described in such manner. Although good faith is a notion that appears not as common in English

⁸⁷ [2002] AC 628 at 656 per Lord Hope of Craighead.

law as it is in civil law⁸⁸, yet reference to it is made exactly in the same terms in article 7(1) of the U.N. Convention on Contracts for the International Sale of Goods as well as in article 1(7)(1) of the Unidroit Principles of International Commercial Contracts.

Chapter 4. Freedom of contract and the Rotterdam Rules: framework for negotiation or one-size-fits-all? by Professor Andrew Tettenborn (pages 73-89).

After this title, that may sound a little mysterious or perhaps ironic, and a short introduction to which it is convenient to refer later, there follows another title that better explains the scope of Professor Tettenborn's article: "The scheme of the Rotterdam Rules and the anti-avoidance provisions: an overview". The so-called "anti-avoidance provisions" are those in chapter 16-*Validity of contractual terms*, consisting of three articles: article 79-*General provisions*, article 80-*Special rules for volume contracts* and article 81-*Special rules for live animals and certain other goods*, and the analysis of Tettenborn relates to the first two of such articles, in respect of which he says in the opening paragraph that there are in them some clear changes, some clarifications and a fair number of matters that remains impenetrably obscure.

His analysis is divided in three sections: a) the changes in the compulsory regime, b) the points that have been clarified, and c) the uncertainties.

In respect of changes in the compulsory regime Tettenborn considers first, in pages 75-76, its extension to more forms of carriage contracts and, after pointing out that the Rotterdam Rules apply to any contract of carriage in contrast with the Hague-Visby Rules that apply only to bills of lading, he states that even where a charter party is involved, there would seem to be another extension "by stealth" of the mandatory regime. This because while the Hague-Visby Rules are applicable as against a consignee other than the contractual shipper only if the latter obtains a bill of lading or a similar document and a mere undertaking to deliver to a third party in any other contract of carriage, such as a waybill or a charter party, does not entail that consequence, the Rotterdam Rules, whether deliberately or not, apparently reverse the position. This because they apply to anyone entitled to delivery under a contract of carriage except where the consignee is himself a charterer. But that is the obvious consequence of the extension of the scope of the Rotterdam Rules to all contracts of carriage: the reference in the Hague-Visby Rules to bills of lading issued under a charter party indicates that the purpose of that provision is to protect parties other than the original charterer, and is due to the fact that they only apply to bills of lading. Since instead the Rotterdam Rules apply to all contracts of carriage, the restriction of the protection of third parties only in case a negotiable transport document is issued would have made no sense. That extension was deliberate and perfectly

⁸⁸ ATIYAH, *Introduction to the Law of Contract* (4th ed.) p.184; BINGHAM L.J. in *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] 1 Q.B.433.

reasonable. It does not make sense to consider a convention adopted in 2008 with the glasses adjusted on a convention adopted in 1924.

Tettenborn then considers (at p. 77), amongst the additions to the carrier's duties, that mentioned in article 52(1) of executing the instructions of the controlling party referred to in article 50(1) and specifically that of delivering the goods at a port other than that of contractual destination and states that this is a vague and potentially onerous obligation. The reasons adduced by him are first that it is difficult to conceive how a request to deliver cargo at an "uncontractual" destination can ever be one that does not interfere with the carrier's normal delivery practices and, secondly, where the carrier is a NVOG, that would count as his "usual operations". By normal delivery practices it is meant the delivery operations of the goods that were meant to be discharged at that port of call. If the goods may be unloaded without interfering with the unloading operations of the goods destined to that port and without moving, or what would be worst, unloading other goods or generally without disrupting the stowage plan, I would suggest that the request to unload goods at an intermediate port other than the port of destination would not interfere with the carrier's normal operations including its delivery practices. As regards the situation where the carrier is a NVOG, it is obvious that the conditions set out in article 52(1) (b) and (c) must be considered in respect of the actual carrier. One final remark: the request of changing the port of destination is not normally a capricious decision of the shipper, but is the consequence of an event that has occurred after the contract of carriage was concluded and also after the goods had been loaded, such as the cancellation of the contract of sale of the goods or the prohibition of importation of the goods in the country of original destination. The shipper may find himself subject to an unreasonable refusal of the carrier or his asking unreasonable conditions in order to accept the change of port of discharge. This rule was adopted in order to give a fair protection to the shipper without adverse consequence for the carrier, who is entitled, pursuant to article 52(2), to obtain payment of any reasonable additional expense, and, pursuant to article 52(3), to obtain security.

Subsequently (at p. 77) Tettenborn considers the provisions on the obligations and liabilities of the shipper and after having graciously stated that the provisions in article 79 in respect of the mandatory character of the rules of the Rotterdam Rules on the liability of the shipper are "one of its few genuine clarifications", summarizes without comments such rules.

This first section of his article ends with an analysis of article 80 and to its rules on the freedom of contracts in respect of volume contracts. Perhaps surprisingly, he appears to be critical not because article 80 grants a certain freedom of contract in respect of the by far too extensive category of volume contracts, but rather because it is "so hemmed around with exceptions as not so much to create a freedom-of-contract regime as simply to impose a different compulsory one" (para.4.19). In his opinion what article 80 offers is "a choice of a contract excluding liability for navigational fault, which in view of the severe (an vague) restriction put on it may well be of doubtful validity anyway". It is thought that this article may offer, as Tettenborn

himself says in para 4.18, “sophisticated shippers and carriers” the possibility “to make their own long-term arrangements”. And such arrangements may consist, inter alia, in exoneration from and a reduced limitation of liability in consideration of a reduced freight rate. If, when the Rotterdam Rules will enter into force, the provisions of article 80 will not attract carriers and shippers the Rotterdam Rules regime will not be affected and the persons who have reluctantly negotiated its terms may be happy.

After dealing briefly at pages 81-83 with points that have been clarified by the Rotterdam Rules, Tettenborn devotes more space to what he calls the “uncertainties” that “the cream of the world’s shipping lawyers” failed to avoid.

The first of such uncertainties, that he considers does not exist (at the same level) in the Hague Rules and in the Hamburg Rules, relates to the confusion between carrier and “freight intermediary” amongst which he mainly considers the forwarding agents. He says that all that is required (it must be assumed to identify a person as the carrier) is a contract of carriage as defined “blandly” in article 1(1) and that it must be arguable that this, also considering the definition of performing party, makes a carrier out of not only the NVOG but also the forwarding agent. Although a contract to procure carriage of cargo by someone else is something different from a contract to carry it, it remains equally arguable that such a term is “simply an illegitimate attempt to avoid liability for the default of one’s subcontractors, which is a fundamental building block of the Rotterdam Rules”. It is not easy for a civil lawyer to follow this reasoning. The definition of “contract of carriage” and “carrier” in article 1(1) and (5) are simple and clear and similar definitions may be found in various civil codes⁸⁹. “Carrier” is the person who enters into a contract of carriage with the shipper or – and that is the same – who undertakes to carry goods for the shipper. Tettenborn says nowadays cargo owners seldom negotiate directly with sea carriers but use intermediaries. That is correct, but up to a point: the intermediaries may undertake to act as such and in that case they undertake, as normally do freight forwarders, to stipulate one or more contracts of carriage for the account of the cargo owners, or may undertake to perform the carriage and subcontract the carriage to an actual carrier: in that latter case they issue their own bill of lading and when hand over the goods to the actual carrier obtain from him a bill of lading in which they normally appear as shippers. How can this be considered an illegitimate attempt to avoid liability for the default of one’s subcontractors? If the forwarding agent acts as carrier, he would assume the obligations specified in chapter 4 of the Rotterdam Rules and become liable in case of breach by himself or by his subcontractors. If Tettenborn has in mind the – I think rather unusual – situation of a carrier who in an attempt to escape liability, declares to enter into the contract of carriage on behalf of another person, he would nevertheless be responsible should he have no power

⁸⁹ See for example article 1678 of the Italian Civil Code, article 15 of the French Law of. 66-420 of 18 June 1966 *sur les contrats d’affrètement et de transport maritimes*.

to do so and in any event the shipper ought to be careful in choosing his contracting party. Tettenborn subsequently considers the situation where a carrier phrases his agreement to carry the goods from A to B and then to make arrangement for the on carriage from B to C and says that it is in no way clear whether under the Rotterdam Rules he would be regarded as having undertaken the performance of the whole carriage or not.

That kind of agreement had been considered since the outset since it was known that often shippers require carriers to issue bills of lading covering a leg of the carriage that the contracting carrier is not willing to perform and a clause regulating that situation had been included in the original CMI Draft⁹⁰ and maintained, with amendments, in all the subsequent edition of the Draft Instrument⁹¹, notwithstanding doubts had been raised on its clarity⁹². The wording of that clause was again the subject of conflicting views at the forty-fist session of the Commission held from 16 June to 3 July 2008⁹³ and after an attempt to find a satisfactory wording failed it was decided to delete that clause, but it was stated that its deletion “did not in any way signal that the draft Convention intended to criticize or condemn the use of such types of contract of carriage⁹⁴. The commercial practices to which reference had been made were actually two: the first was that of shippers requiring a single transport document despite the unwillingness of the carrier to complete the entire transport himself; the second, considered of greater significance, was that of the “merchant haulage” described as a practice according to which the consignee preferred to perform the final leg of the transport⁹⁵. It appears that the first one, albeit not “condemned” by the Commission, is in conflict with the Rotterdam Rules because they provide in article 12 that the carrier shall carry the goods to the place of destination and deliver them to the consignee and articles 45, 46 and 47 confirm that fundamental obligation to the carrier. It would be difficult to construe the delivery of the goods by the carrier to another carrier who would issue a transport document in which the first carrier appears as the shipper as delivery to the consignee unless the shipper has entered into a contract with the second carrier for the on carriage of the goods to the final destination, but in such case it would be impossible for the contracting carrier to issue a transport document indicating the place of final destination as the place of delivery under his contract. The second commercial practice instead does not seem in conflict with the Rotterdam Rules, provided delivery under the contract of carriage takes place where commences the final leg of the carriage performed by the consignee or for his account.

⁹⁰ A/CN.9/WG.III/WP.21, article 4.3;

⁹¹ A/CN.9/WG.III/WP.32, article 12; A/CN.9/WG.III/WP.56, article 12; A/CN.9/WG.III/WP.81, article 12 and A/CN.9/WG.III/WP.101, article 13.

⁹² A/CN.9/645, paragraphs 39-43.

⁹³ A/63/17, paragraphs 45-52.

⁹⁴ A/63/17, paragraph 53.

⁹⁵ A/63/17, paragraphs 45-46.

The second of such uncertainties relates to article 37 that Tettenborn describes as an effort to deal with the issue of the identity of the carrier that is “not a very good one”. But he does not deal with the fundamental provision in article 37(2) that aims at solving the problem of bills of lading in which the carrier is not identified, but with the problem of what with an expression rather misleading, is described as the demise clause. He very elegantly describes the wording of paragraph 1 as Delphic and as a starting point says that the contract particulars referred to therein signify any information relating to the contract of carriage that is in a transport document and as a result paragraph 1 means simply that “if a person calls himself a carrier somewhere in a transport document, then we have to ignore any other provision elsewhere in a transport document that says he is not”. That seems to me a rather loose reading of article 36(2) that provides in (b) that the contract particulars shall also include the name and address of the carrier. Therefore it is rather difficult to conceive that the name (and address) may appear “somewhere in the transport document”: they are meant to appear in the front of the document and this, after all, is what subsequently Tettenborn indicates in his example, in which he suggests that after the name (or logo) there follow the words “subject to demise clause” and says that in such a case “it seems to stretch matters” to state that the carrier is identified by name. The purpose of paragraph 1 is to avoid that where the name of the carrier appears on the front of the transport document in the manner required by article 36(2)(b), such carrier may deny having acted as such invoking the “demise” clause appearing amongst the general conditions on the back of the transport document. I am personally confident that any court would interpret article 37 (1) and (2) correctly and in case of doubt will consider the explanation given during the nineteenth session of the Working Group⁹⁶.

Finally, the third if such uncertainties relates to the interpretation of article 6 and the exclusion of charter parties from the scope of application of the Rotterdam Rules. Tettenborn suggests that a contract for the carriage of a container might come under the umbrella of article 6(1)(b): but it would be hardly conceivable a contract for the use of space on board a ship restricted to the space required for one container. No sensible carrier and no sensible shipper would ever dream to consider such a contract merely in order to avoid the application of the Rotterdam Rules. That would mean to enter into the realm of pure fantasy.

In his conclusion Tettenborn says that “the changes introduced by the Rotterdam Rules are not only of doubtful utility, but that the uncertainties they leave with us are a disgrace”: I think no comment is required, as for the conclusion of Thomas.

⁹⁶ A/CN.9/621, paragraph 280.

Chapter 5. Minimal music: multimodal transport including a maritime leg under the Rotterdam Rules, by Professor Dr. Ralph de Wit (pages 91-111).

Professor de Wit explains the first two words of the title given to his article in paragraph 5.11, where he says that what he calls “a basically uniform system” has been reached by only two articles, viz. articles 26 and 82.

In his initial paragraph, entitled “General concepts”, he remarks that the core provisions on liability in the draft submitted by the CMI very much reflected “pure maritime thinking”. He is right, but the reason is that the draft instrument was, and the end product, the Rotterdam Rules are, intended to replace the Hague-Visby Rules and at the same time intended to apply to the complementary land legs and marginally the complementary air legs in order to make available to the industry a modern instrument that may cover the door-to-door contract of carriage. The maritime leg may therefore continue to be the sole leg also in the future, and will definitely remain the most important leg in the door-to-door contracts. That explains why the Rotterdam Rules have a maritime flavour and why they have been called a “maritime-plus” instrument.

In the second paragraph, entitled “The nature of the multimodal regime in the Rotterdam Rules”, de Wit observes that although the Rotterdam Rules regime has been called a “limited network system”, it is basically a uniform system which expands “quite ambitiously to all other modes, superseding all national laws”. It is convenient to draw a distinction between the first and the second part of the comments: whereas it is the basic purpose of a uniform substantive convention to supersede national laws, for otherwise no uniformity would be achieved, the possible conflict between conventions is indeed a real problem, which could be overcome only with a pure network system, that, however, would entail a great many inconveniences. In any event de Wit himself later (in paragraph 5.18) says that the expressions “network” and “uniform” system have no specific legal meaning and the same remark applies obviously to the expression “limited network system”.

Before considering de Wit’s analysis of articles 26 and 82, it may be useful to say a few words on the origin of and the relationship between these articles. The provisions now in article 26 already existed in article 4.2.1 of the original CMI draft⁹⁷, placed in square brackets, except that the present paragraph (a) was formulated as follows:

(1)(b)(i) according to their terms apply to all or any of the carrier’s activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable], and the text in square brackets reflecting the situation under the 1980 Convention concerning International Carriage by Rail (COTIF).

⁹⁷ A/CN.9/WG.III/WP.21, page 21.

⁹⁸ A/CN.9/526, paragraph 250.

In addition, rather than saying that the provisions of the draft instrument do not prevail over those of the other unimodal conventions, the rule was formulated affirmatively and stated that such latter provisions would prevail over those of the draft instrument. That article (renumbered 8) was considered during the eleventh session of the Working Group and it was agreed to “provisionally retain the text...as a means of resolving possible conflicts between the draft instruments and other conventions already in force”, but it was also agreed to instruct the Secretariat “to prepare a conflict of convention provision for possible insertion into article 16 of the Draft Instrument”⁹⁸ that reproduced, with minor variations, article 25 of the Hamburg Rules. Pursuant to such instructions the Secretariat added in the subsequent draft⁹⁹, in which article 4.2.1 was renumbered 8, the following two articles in chapter 18 entitled “Others conventions”:

83 Subject to article 86, nothing contained in this instrument shall prevent a contracting State from applying any other international instrument which is already in force at the date of this instrument and which applies mandatorily in contracts of carriage of goods primarily by a mode of transport other than carriage by sea.

84 As between parties to this instrument its provisions prevail over those of an earlier treaty to which they may be parties [that are incompatible with those of this instrument.

In the subsequent edition of the draft instrument of 8 September 2005¹⁰⁰ both article 8, renumbered 27, and articles 83 and 84, renumbered 89 and 90, were left unvaried, but all such articles were then the subject of a global debate during the eighteenth session of the Working Group when it was decided to delete the text in square brackets in article 27 since meanwhile the Protocol for the modification to COTIF had entered into force. It was then pointed out that given the differing scope of application of the various unimodal conventions their provisions might never apply “according to their terms” and the suggestion was made to replace the first part of article 27(a) (renumbered 26(a)) with the text that now appears in article 26(a). The decision was to place in square brackets both texts, the original one as amended, named “Variant A” and the alternative one mentioned above, named “Variant B”¹⁰¹. In respect of article 89 and 90 it was said that they seemed to contradict each other and that they should be deleted. Whereas that suggestion met with a wide support, there was no agreement as to whether article 27 alone would be adequate to deal with general conflict of convention issues¹⁰². Finally concerns were raised regarding the possible conflict with the Montreal Convention and it was suggested to add some clarifications in that respect¹⁰³.

In the subsequent edition of the draft instrument dated 13 February 2007¹⁰⁴

⁹⁹ A/CN.9/WG.III/WP.32.

¹⁰⁰ A/CN.9/WG.III/WP.56.

¹⁰¹ A/CN.9/616, paragraphs 224 and 228.

¹⁰² A/CN.9/616, paragraphs 230-233.

¹⁰³ A/CN.9/616, paragraphs 225 and 234.

¹⁰⁴ A/CN.9/WG.III/WP.81.

article 26 (1)(a) contained the two variants previously mentioned and articles 89 and 90 were deleted and replaced by a new article, numbered 84 and entitled “International conventions governing the carriage of goods by air”, in which it was provided that nothing in the draft instrument prevented Contracting States from applying the provisions of any other convention regarding the carriage of goods by air. The discussion was resumed during the nineteenth session when it was decided to delete in article 26 Variant A, to delete in Variant B the reference in brackets to national law and to ask the Secretariat to “draft a declaration provision allowing Contracting States to include in draft article 26(1) its mandatory national law” under specified conditions¹⁰⁵. However such decision was reversed at the subsequent session of the Working Group¹⁰⁶. In respect of article 84, wherein reference was made to the conventions on carriage of goods by air, a proposal was adopted to add also a reference to the carriage of goods by road, in view of the fact that also CMR contained a certain multimodal dimension¹⁰⁷.

The proposal to widen the scope of article 84 by including a reference to conventions on carriage of goods by land as well as by inland waterways was renewed at the twentieth session of the Working Group and at that time it was carried¹⁰⁸. The Secretariat was subsequently requested to prepare a draft based on the text of the written proposal that had been made¹⁰⁹ and such draft, which in lieu of a general reference to the carriage of goods by land contained a separate reference to the carriage of goods by road and by rail, was incorporated in the subsequent edition of the draft instrument¹¹⁰ and was finally approved at the twenty-first session of the Working Group¹¹¹.

The conclusion that I think must be drawn from the history of article 26 and 82 is that article 26, albeit originally conceived at the same time as a conflict of conventions provision and as a network provision, has become only a provision on the scope of application of the Rotterdam Rules when the contract of carriage is

¹⁰⁵ A/CN.9/621, paragraphs 185-192.

¹⁰⁶ A/CN.9/642, paragraphs 163 and 166.

¹⁰⁷ A/CN.9/621, paragraphs 204-205.

¹⁰⁸ A/CN.9/642, paragraphs 228-236.

¹⁰⁹ The proposal was worded as follows (A/CN.9/642, paragraph 232):

International conventions governing the carriage of goods

Nothing in this Convention prevents a Contracting State from applying the provisions of any of the following conventions in force at the time this Convention enters into force:

- (a) Any convention regarding the carriage of goods by air to the extent such convention according to its provisions applies to the carriage of goods by different modes of transport;
- (b) Any convention regarding the carriage of goods by land to the extent such convention according to its provisions applies to the carriage of land transport vehicles by a ship; or
- (c) Any convention regarding the carriage of goods by inland waterways to the extent such international convention according to its provisions applies to a carriage without trans-shipment both on inland waterways and on sea.

¹¹⁰ A/CN.9/WG.III/WP. 101.

¹¹¹ A/CN.9/645, paragraphs 83-87 and 257-258.

door-to-door, perhaps the only indication of its origin being the preservation, in order to indicate when and to what extent other conventions apply to the non-sea-legs of the door-to-door contract of carriage, of the words “shall prevail”. In view of this it is appropriate to consider first article 82, that definitely regulates the possible conflicts between the Rotterdam Rules and the conventions on carriage of goods by modes other than sea, and subsequently article 26, that applies when the door-to-door contract of carriage is wholly governed by the Rotterdam Rules and the “limited” network system comes into operation.

The analysis made by de Wit of article 82 will therefore take precedence over his analysis on article 26.

Article 82. International conventions governing the carriage of goods by other modes of transport

In his opening paragraph, entitled “Existing international conventions”, de Wit raises two questions. First he wonders why the individual unimodal conventions are not named. It is at present a standard rule in uniform law conventions, in order to avoid that States not parties to a given convention might find in a specific reference to such conventions an obstacle to their becoming parties to the convention wherein such reference is made. The second relates to the possible future relationship between the Rotterdam Rules and a future EU regulation on regional transport and says that insofar EU member States are individual parties to the Rotterdam Rules a regulation, as supranational legislation, will probably take precedence in case of conflict. There is a precedent in the EC Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments, article 71 of which sets out rules in respect of conventions to which Member States are parties and which in relation to particular matters govern jurisdiction or the recognition and enforcements of judgments. In any event it appears very likely that the ratification of or accession to the Rotterdam Rules by EU Member States will be discussed in advance within the EU.

De Wit then considers the rules set out in article 82 in respect of each mode of transport.

Carriage by air

After mentioning (at p. 100) that the Montreal Convention, contrary to other transport conventions applies to actual carriage by air, de Wit considers the three specific rules of that Convention that may affect other modes of transport: the rule of article 38 that limits the applicability of the Convention to carriage by air and thus requires the loss, damage or delay to be localised, that in article 18 (4) pursuant to which when carriage by another mode (sea, land or inland waterway) takes place in the performance of a contract of carriage by air (here reference is made to a contract of carriage) and that where goods are carried by another mode in breach of the contract of carriage by air and concludes that in all such situations either a conflict does not exist or it is resolved by article 82(a).

Carriage by road

He instead logically devotes far greater attention to carriage by road and says that article 82(b) is clumsily drafted and its literal construction leads to a completely absurd result, namely to either overall CMR exclusion or, at best, paradoxical application of the CMR to the sea leg and not to the road legs and would not resolve the conflict at all, because from a CMR point of view the contract would still be one for the international carriage of goods by road. But in his example he overlaps article 26 on article 82 (b), while the two articles contain provisions of a different legal nature and article 82 must be applied first. Article 82(b) does not provide that the rules of the convention applicable to the road legs prevail over those of the Rotterdam Rules only in respect of the sea leg, but that, when during the sea leg the goods remain loaded on the road cargo vehicle, the convention governing the carriage of goods by road will prevail over the Rotterdam Rules. Therefore in figure 1 there is no difference between the Irish road leg, the sea leg between Ireland and Belgium and the Belgian road leg. In the unlikely event that the goods are unloaded from the vehicle prior to their loading on board the ship article 82 (b) would not apply and only article 26 would apply, provided of course, that only a global contract had been made for the carriage from the inland place of origin in Ireland to the inland place of destination in Belgium. It is thought, however, that if the goods were unloaded from the vehicle for the subsequent carriage by sea, there would almost certainly be separate contracts, one for each leg and therefore the problem of conflict of conventions would not arise.

Carriage by rail

According to de Wit the possibilities of a conflict between the Rotterdam Rules and COTIF-CIM are rather limited and he is right.

Carriage by inland waterway

Although he thinks that in this case there is a real possibility of a conflict, de Wit is of the view that article 82 (d) would work satisfactorily. In this case my view differs, in that I do not think that a conflict is conceivable. Since in fact CMNI does not apply where a “marine bill of lading” is issued or where the distance travelled in waters to which maritime regulations apply is greater than that travelled in inland waterways, it is highly unlikely, if not impossible, that none of such conditions will materialize. A transport document issued under the Rotterdam Rules in respect of a door-to-door transport necessarily covers also the sea leg and, therefore, for the purposes of CMNI must be deemed to be equivalent to a “marine bill of lading”.

Article 26. Carriage preceding or subsequent to sea carriage

His analysis is cleanly divided in a series of paragraphs.

In the first paragraph, entitled “Incidence of the period of responsibility”, de Wit observes that the parties may limit the contract to pure port-to-port carriage without any multimodal aspect, in which event only the maritime leg will be governed

by the Rotterdam Rules, whereas the other legs will be governed entirely by other conventions or national laws. If I understand his reasoning correctly, on the assumption that the goods must be carried from an inland place of departure to an inland place of destination, the shipper (or a forwarding agent on his behalf) would stipulate three different contracts, one for the carriage from inland place of departure to the port of loading, one for the sea carriage and one from the port of discharge to the inland place of destination. That is what happened in the past, but is happening less and less with the advent of containerisation, even though of course there may still be mere port-to-port contracts only, when the goods originate from a place near a port. But I fail to understand the meaning of his conclusion, that the Rotterdam Rules are not a true multimodal convention. They are, if the parties enter into a door-to-door contract of carriage. They are not if the parties chose to stipulate a port-to-port contract.

In the second paragraph, entitled “Localised loss, damage and delay”, de Wit observes that the word “solely” makes article 26 somewhat of a wolf in a sheep’s clothing. Perhaps if the word had not been added, his description might have been slightly more justified¹¹², even though also in that case there might have been only a marginal possibility of interpreting the provision as implying that in case of a loss or damage occurring during the sea and land stages, the land regime would apply in proportion of the percentage of such loss or damage occurring during the land stage. In any event that word makes the position clear and avoids possible litigation. So there has been no wolf in sheep’s closing! In any event de Wit is right when he says that the intention was to ensure the application of the Rotterdam Rules regime as widely as possible and that was expressed clearly when it was said that the system adopted is a “limited network system”¹¹³. He may also be right when he says that the main concern of the advocates of a network system has always been to preserve as much as possible the application of unimodal conventions. But the question is whether a full network system would really be the best solution. I venture to doubt that it would.

In the third paragraph, entitled “Precedence only for international conventions”, de Wit observes that the exclusion of national laws causes a somewhat strange discrepancy since while if the road leg occurs in Europe the CMR prevails, whereas if the road leg is national, the Rotterdam Rules would apply and not the relevant national law. Also this issue has been the subject of a long debate and the final decision has been based on several reasons including a) the different level of

¹¹² That would be the case for article 19 of the 1980 Multimodal Convention, for clause 6 of the UNCTAD/ICC Rules for Multimodal Transport Documents and clause 12 of the Combiconbill.

¹¹³ Article 26 was discussed at length during many sessions of the Working Group: the ninth (A/CN.9/WG.III/WP.21, paragraphs 49-55), the eleventh (A/CN.9/526, paragraphs 24.267), the twelfth (A/CN.9/544, paragraphs 43-50), the nineteenth (A/CN.9/621, paragraphs 185-203), the twenty-first (A/CN.9/645, paragraphs 83-87) and finally during the forty-first session of the Commission (A/643/17, paragraphs 92.98).

conventions and national laws from the standpoint of the possible conflict, b) the lack of certainty that the application of national laws would have entailed and c) the risk that national laws might change from time to time without such changes being known by carriers and shippers.

In the fourth paragraph, entitled “Hypothetical contract”, de Wit considers the first of the three conditions enumerated in article 26 for the application of another international instrument and says it imports the concept of a hypothetical contract such as in article 2 of CMR. I agree with his qualification of that provision, but suggest that there is a considerable difference between the convoluted provision of the CMR and the simple wording of article 26(a) which perhaps resembles more to clause 12(1) of the Combiconbill. He then says that neither in article 2 of the CMR nor in article 26 of the Rotterdam Rules¹¹⁴ it is indicated on what terms the hypothetical contract between the shipper and the carrier on any particular leg would have been made and summarizes the two different approaches adopted by the French Cour de Cassation and the Dutch Hoge Raad, the former consisting in the projection of the contract between the multimodal carrier and the subcontracting carrier into the multimodal contract and the latter consisting in adopting the hypothetical contract the shipper would have entered into with the subcarrier, the former in his opinion being preferable. But then coming to the Rotterdam Rules, he wonders whether a distinction between the above solutions would be required. Although his conclusion greatly reduces the importance of the problem, it is not clear what is meant by the terms on which the hypothetical contract would have been made. In any event it seems to me that what is relevant is simply whether an international instrument would have applied if the shipper had made a contract in respect of the particular stage of carriage and that must be ascertained on the basis of the provisions on the scope of application of such instrument.

In the fifth paragraph, entitled “Precedence for limited subject matter only” de Wit indicates the aspects of the Rotterdam Rules in respect of which other instruments would prevail and those in respect of which the Rotterdam Rules only apply and says that theoretically that will certainly lead to conflicts. But the question is whether in practice that will lead to conflicts and how often that may occur and he has fairly cited my views in this respect. Finally, in the sixth paragraph entitled “Precedence of mandatory regimes only” de Wit says that the requirement that the relevant instrument must apply of its own force will cause most of the problems because only direct applicability of such instrument would be required and that “rules out compulsory application by reference in national law, as is the case for the unimodal conventions in a number of European States”. But this provision does refer to international instruments as enacted in Contracting States, whether the

¹¹⁴ The present wording of article 26 (a) was adopted during the eighteenth session of the Working Group (A/CN.9/616, paragraphs 224 and 228.

instrument be given the force of law or its provisions be enacted in a national law, provided, of course, that the mandatory character of the relevant rules is confirmed.

Chapter 6. The duties of carriers under the conventions: care and seaworthiness, by Andrew Nicholas (pages 113-117)

After quoting articles 13 and 14 of the Rotterdam Rules Andrew Nicholas considers first, in a paragraph entitled “The locus standi of containers”, this latter article, and mentions specifically the reference in article 14(c) to containers supplied by the carrier amongst the parts of the ship that must be fit and safe for the reception, carriage and preservation of the goods, but appears to be critical for the fact that “they stop short of holding the carrier responsible for all containers carried and simply restrict the obligation to any container supplied by the carrier”. If my understanding of this remark is correct, Nicholas blames the Rotterdam Rules for not having generally held the carrier responsible for all containers carried whether supplied by him or not. But in article 14, which is based on article 3(2) of the Hague-Visby Rules, its scope being extended to the whole carriage, irrespective of the means of transport, the container is treated as part of such means of transport, whether a ship or not. If the goods are delivered by the shipper already packed in containers owned or rented by the shipper they are, according to the definition in article 1.24, treated as goods and therefore article 13(1) applies.

In the subsequent paragraph, entitled “Jordan II codification” he considers article 13 and, after mentioning the two English leading cases *Renton v Palmyra* and *The Jordan II*, stating that the essence of such decisions is now codified in article 13(2), makes two observations. The first is that it may be questioned whether or not a carrier would remain liable to cargo interest for a misdelivery in circumstances where it is the stevedores appointed by charterers or cargo interests who effect such mis-delivery. The second seems to be that, when a charter party with “f.i.o.s.t.” terms is incorporated into a bill of lading without specific reference to the obligations with regard to loading etc., it would be possible to argue that terms incorporated by reference do not fall within the phrase “referred to in the contract particulars”.

As regards the first of such observations, the answer is definitely that the carrier would remain liable, for delivery is an obligation of the carrier and is not included in the activities mentioned in article 13(2); if a carrier would entrust delivery of the goods to another person, irrespective of who nominated it, such person would act as a performing party.

As regards the second observation, article 13(2) requires that the agreement must be referred in the contract particulars and, therefore, it would not suffice, as for the arbitration agreement, that the terms of the charter party be generally incorporated into the transport document: what needs to be incorporated is specifically the “f.i.o.s.t.” clause.

In the last paragraph, entitled “On-going duties of seaworthiness and cargo-worthiness”, Nicholas raises the very pertinent question of how the exercise of due

diligence (in the French original text of the Hague Rules and in the French official version of the Rotterdam Rules “*diligence raisonnable*”) may be assessed if a ship becomes unseaworthy at sea: the answer is that the degree of diligence must be assessed on the basis of the action that may reasonably be taken in the specific circumstances and such action may be, just to cite some examples, to repair the damage on board if that is feasible, to call at the nearest port if the ship may sail under its own power or to ask for assistance.

Chapter 7. Package limitation as an essential feature of a modern maritime transport treaties: a critical analysis, by Professor Dr. Marc A. Huybrecht (pages 119-139)

As the title indicates, Professor Huybrecht in his article deals generally with package (and unit and per kilo) limitation in the various transport conventions, obviously with particular attention to the Rotterdam Rules. In the way of an introduction, however, he provides some general information on the various systems of global limitation that have been and are in force in the maritime countries, indicating (at p. 123) in a table the limits adopted by the various conventions on carriage of goods by sea, followed by a general analysis of the provisions in the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and finally in the Rotterdam Rules (from p. 127) to which, as expected, he devotes greater attention.

As regards the limits adopted by the Rotterdam Rules, Huybrecht reports without comments the criticisms made on the limits, stated to be far too low. During the sessions of the UNCITRAL Working Group in which the limits were discussed, there emerged three views: a first one according to which the Hague-Visby limits were still satisfactory, because the average value of the goods, both per kilo and per package did not exceed such limits, a second one according to which the Hamburg limits should be adopted, a third one according to which the CMR per kilo limit should instead be adopted. In support of the need for a substantial increase attention was drawn to the inflation that had occurred worldwide since 1968 (no increase was made in 1979 when the SDR replaced the franc Poincaré) and again since 1978 when the Hamburg Rules were adopted. Against that it was objected that even at present the limits were above the average value of the goods carried by sea and there does not appear to have been any objection to that. Finally a compromise was reached on a relative small increase above the Hamburg limits. Since a test based on the average value of the goods carried by sea had been considered perhaps the unique test that could be relevant, it is surprising that none of the delegations and of the observers that were in favour of a sensible higher limit (there does not appear, however, to have been any suggestion to increase the limit above that of the CMR), no effort was made to prove that the average value was significantly higher than that that had ultimately been proposed. It is worth mentioning that the per kilo CMR limit is not higher than the per package limit of the Rotterdam Rules: taking 50 kilos as the average weight of packages stowed in

containers, the CMR limit would be 416.50 SDRs whereas the per package limit of the Rotterdam Rules would be 875 SDRs.

Huybrecht then discusses, in the paragraph (at p. 130) entitled “The basis of the limitation amount”, the notions of package and shipping unit and says it is regrettable that no definition of those terms has been made. In this connection the discussion (at p. 130) on the meaning of “unit” in the Hague-Visby Rules does not appear relevant, nor does it appear relevant the discussion on freight unit, since in the Rotterdam Rules reference is made to the shipping unit. In any event any attempt to define those terms would have failed and the outcome of the *El Greco* decision does not appear to be significant: it might be interesting to find out in how many cases, out of those in which the Hague-Visby limits were invoked and applied, a dispute has arisen on the meaning of the terms “package” and “unit”: one out of 1,000? One out of 5,000? Or even less?

After short comments (at p. 135) on the provision in the Rotterdam Rules on the declaration of value, Huybrecht considers (at p. 136) the provision in article 61 on the loss of the benefit of limitation and after having said that the addition of the word “personal” makes it more difficult for a claimant to deprive the carrier of the benefit of limitation and having mentioned the criticisms of Tetley and Alcantara, wonders whether the addition of that word does really make it impossible or more difficult to deprive the carrier of the benefit of limitation. I believe that Huybrecht is right in raising that problem. I think in fact that even if the word “personal” had not been added, the basis of the loss of the right to limit would have been the same. The reference to the carrier does not in fact include his servants or agent as it appears from the fact that in article 18 it is stated that the carrier is liable for the act or omissions of any performing party, the master and crew of the ship and “the employee of the carrier or of a performing party”.

There follows the comment of the rules on the limitation of actions and then Huybrecht in his conclusion (at p. 139) says that carriers or vessel owners have done a very good job in defending their privileges: a comment that clearly indicates his opinion to be that the Rotterdam Rules are greatly in favour of carriers. That statement, besides being wholly unjustified, is at odds with his comments in the previous paragraphs.

Chapter 8. Exclusions of liability, by Julian Clark and Jeffrey Thomson (pages 141-162)

Julian Clark and Jeffrey Thomson consider mainly, if not exclusively, article 17 of the Rotterdam Rules and draw a comparison between its provisions and those of the Hague-Visby Rules, with some reference to the different regime adopted by the Hamburg Rules. Perhaps there is a difference between article 4.2 of the Hague-Visby Rules and article 17 of the Rotterdam Rules that has not been initially indicated, and that is that in the article 4.2 of the Hague-Visby Rules list of “excepted perils” there are some actual exonerations from liability (those mentioned in (a) and (b)) and some

that merely consist in a reversal of the burden of proof, their justification generally being that those events are normally not caused or contributed to by the fault of the carrier. What the Rotterdam Rules did has been to eliminate the exonerations and indicate clearly that the remaining “excepted perils” (including those that have been added to the Hague-Visby Rules list), are reversals of the burden of proof. Although that does not appear in their “Introduction”, actually Clark and Thomson indicate that difference in the second paragraph of their article entitled “The Frameworks of the carrier’s liability: the shifting burdens” (see in particular the conclusion in paragraph 8.12). One remark that could be made in respect of the legal nature of the “excepted perils” is that the initial words of the chapeau of article 17(3), that are similar in substance to those of article 4(2) of the Hague-Visby Rules as well as to that in article 17(2) of the Rotterdam Rules, suggest an exoneration from liability rather than a reversal of the burden of proof. Although there had been a consensus on the fact that the “excepted perils” created only a presumption of absence of liability, there had been a firm objection to use the term “presumption”, but the actual effect of the proof of an “excepted peril” appears clearly from the opening words of paragraph 4 (“Notwithstanding paragraph 3 of this article, the carrier is liable...”).

After their overview of the rules on the allocation of the burden of proof Clark and Thomson draw a clear comparison (pages 145-158) between the excepted perils enumerated in article 4(2) of the Hague-Visby Rules and the corresponding excepted perils enumerated in article 17(3) of the Rotterdam Rules but start from those in the Hague-Visby Rules that are not reversals of the burden of proof, but rather actual exoneration from liability, describing in particular the opposite views in respect of the abolition of the exoneration in respect of “nautical error”. I must say that I have been one of the delegates that more strongly requested the abolition of that defence and explain that the fundamental reason has been that such defence, that constituted an exception to the fundamental rule *respondeat superior*, might have been justified in the nineteenth century but definitely was not justified anymore even when the Hague Rules were adopted as a Convention in 1924 and was absolutely in conflict with the principles that inspired the ISM Code.

In the subsequent paragraph they analyse the additional “exceptions” adopted in the Rotterdam Rules. In respect of that relating to reasonable measures to avoid or attempt to avoid damage to the environment, that Clark and Thomson say that it seems somewhat out of place, the reason why there was little discussion is that it appeared an obvious addition, and was considered to be based on the same principles of that relating to salvage of property, as it appears also from the requirement in both cases that the measures be “reasonable”.

Chapter 9. Misdelivery claims under bills of lading and international conventions for the carriage of goods by sea, by Simon Baughen (pages 163-190)

Simon Baughen is certainly right when he says, in his “Introduction”, that a fundamental obligation under the contract contained in or evidenced by the bill of

lading is to deliver the goods only against presentation of an original bill of lading. But I think that that statement may be extended to any contract of carriage of goods, for the carrier is under an obligation to deliver the goods at destination to the consignee. In any event the purpose of his enquiry is, as he still says in his Introduction, to examine the way in which this obligation has been dealt with in the three conventions on carriage of goods by sea: Hague-Visby Rules, Hamburg Rules and Rotterdam Rules.

In the section that follows, entitled “The nature of the obligation in contract and conversion”, he does not consider yet the position under the three conventions, but rather the position in English law. In the subsequent six sections, he basically considers the various aspects of the obligation to deliver the goods under the Hague-Visby Rules. In the first of such sections, entitled “Do misdelivery claims fall under the Hague-Visby Rules?”, he says (at p. 168) that delivery is not mentioned as one of the carrier’s obligation and misdelivery claims would also be excluded from the scope of the Hague-Visby Rules because the goods are generally delivered outside their temporal ambit, even though the assumption that such claim do not fall under the Hague-Visby Rules might be challenged if misdelivery may occur within the tackle-to-tackle period and in any event it may be covered by the Hague-Visby Rules on the ground that it would be a breach of the obligation to keep and care for the goods. There is indeed some inconsistency in the Hague-Visby Rules because they expressly refer in article 3(3) to the receipt of the goods by the carrier, but they never mention delivery to the consignee and it appears that it was intended not to regulate delivery. In the Hague Rules the definition of “carriage of goods” made reference to “the period from the time when the goods are received on the ship’s tackle to the time of unloading from the ship’s tackle”¹¹⁵. When the following year such definition was changed by the CMI to “the period from the time when the goods are loaded on to the time they are delivered from the ship”¹¹⁶ objections were raised and Sir Normal Hill said that the “Conference is agreed that the rights and obligations that are to attach to the period before the loading on and after the discharge from the ship must be subject to the control of the nation within whose jurisdiction the operations are performed”¹¹⁷. Nor do I think that a delivery obligation may be implied in the obligation to care for the goods, for such obligation must be fulfilled during the period to which the Hague-Visby Rules apply. The second section, entitled “Misdelivery and the Hague-Visby exceptions and limitations”, and the third section, entitled “Express exceptions and misdelivery” (respectively at pages 169 and 172), the problems indicated in the titles are discussed

¹¹⁵ The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules, Genoa-Antwerp 1997, edited by F. Berlingieri, p. 136.

¹¹⁶ Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 137.

¹¹⁷ Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 138.

always in respect of the Hague-Visby Rules, whereas the subsequent sections entitled “Contract or conversion? Measure of damages” and “Non-contractual claims for misdelivery” (respectively at pages 175 and 178) are entirely addressed to issues that may arise in English law.

Finally, after a section on misdelivery under the Hamburg Rules, Baughen (from page 180 onwards) in the subsequent section considers the position under the Rotterdam Rules. His analysis is divided in five paragraphs.

In paragraph 1-“Delivery under the Convention”, after a short reference to articles 11, 13(1) and 12(1) he describes the provisions of article 47(1) and (2) that he says give rise to several uncertainties that are worth of consideration. First, he wonders whether the incorporation of a charter party (obviously in the transport document) which provides for delivery of cargo against an indemnity be enough to trigger paragraph 2 or must this provision appear in the negotiable document itself: the answer may be found in the chapeau of paragraph 2, pursuant to which the delivery without surrender of the transport document must be expressly stated in the transport document itself. Secondly, he wonders how is the carrier to identify the holder to whom it must give a notice of arrival: from paragraph 2(a)(iii) it appears that notice of arrival must be given to the holder if the carrier has been able to locate him and this is confirmed by article 48(1)(b). Thirdly, he wonders how does article 47(1)(b) relate to the rights of a controlling party under chapter 10 when the shipper is no longer the controlling party having transferred his rights to a new holder pursuant to article 57: I have some difficulty in understanding this question, but if the shipper is no longer the controlling party, that means that he has transferred the right of control to another person by transferring to that person all originals of the negotiable transport document, as provided by article 51(3) (a). Since chapter 9 applies when the goods have arrived at their destination, the only right that the controlling party may still exercise, apart from requesting delivery of the goods as holder, is that to replace the consignee.

In paragraph 2-“Defences under the Convention” Baughen suggests that article 17(1) may open up the possibility of a carrier being able to escape liability for misdelivery in situations such as occurred in the *Motis* case¹¹⁸ in which the carrier could point to an absence of fault on his part. But I am of the view that article 17 does not apply to misdelivery, that would consist of breach of the carrier’s fundamental obligation under article 11 that in any event, as he himself considers, would be subject to limitation under article 59.

In paragraph 3-“Compensation for misdelivery” he rightly indicates that article 22 would only apply if misdelivery were considered as being a loss of or a damage to the goods, but this I have suggested does not seem to be the case.

¹¹⁸ *Motis Exports Ltd. v. Dampskibsselskabet, AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg*, [2000] 1 Lloyd’s Rep. 211.

In paragraph 4-“Claims in tort/bailment” he just refers to article 4(1) and in paragraph 5-“Misdelivery and maritime performing parties” he briefly comments article 19.

The final section contains his conclusions that consist basically of a short comparison between the Hague-Visby Rules regime and the Rotterdam Rules regime.

Chapter 10. Some remarks on the allocation of the burden of proof under the Rotterdam Rules as compared to the Hague (Visby) Rules, by Dr. N.J. Margetson (pages 191-213)

In his Introduction Dr. Margetson provides an explanation of the title of this article and the approach he has adopted, consisting first of the analysis of the allocation of the burden of proof under the Hague-Visby Rules followed by the analysis of the corresponding rules in the Rotterdam Rules and anticipates his conclusion, such conclusion being that the Rotterdam Rules are an improvement on the Hague-Visby Rules but that problems still exist. The major part of his article (from p. 192 to p. 206) is devoted to the commentary of the Hague-Visby Rules, with almost exclusive attention to the jurisprudence of common law (basically English and United States), with some marginal reference to Dutch law. Of course this may be explained by the fact that the Rotterdam Rules have not discarded the Hague-Visby regime, but have tried to modernize and clarify it.

Although my review of all articles published in the books edited by Dr. von Ziegler and Professors Schelin and Zunarelli and by Professor Thomas is centred on the analysis of the Rotterdam Rules, nevertheless there are certain aspects of Dr. Margetson review of the Hague-Visby Rules that deserve particular attention, also because they may reflect on the interpretation of the Rotterdam Rules.

This is the case for his clear analysis (at p. 193) of the concept of overriding obligation. What is important is not as much the common law notion of overriding obligation, but its application to the Hague-Visby Rules. Dr. Margetson in fact states (still at p. 193) that not only under English law, but also under the Hague-Visby Rules the duty under article 3(1) to exercise due diligence to make the ship seaworthy is an overriding obligation whereas the duty under article 3(2) to handle the cargo is not. The consequence would be that in case loss of or damage to goods is caused jointly by the unseaworthiness of the ship for which the carrier is responsible and by an excepted peril, the carrier would be prevented from proving the contributory cause for which he is not responsible. The only difference in the wording of article 3(1) and article 3(2) is that while in the latter the opening words are “subject to the provisions of article 4”, such words do not appear in article 3(1). But the concept of “overriding obligation” does not appear to have ever been invoked either during the *travaux préparatoires* of the Hague Rules 1921 or during the subsequent *travaux préparatoires* of the Convention and it is significant that those words did not appear in the Hague Rules 1921 and were subsequently added in the text as amended by the representatives of the Liverpool Steam Ship Owners’ Association and of the British

Federation of Traders' Association¹¹⁹ and no explanation appears to have been given in respect of such addition. Consequently it does not appear that that addition may justify the introduction in an International Convention of a notion that had never been debated and is not known in many jurisdictions. In any event it appears to be significant that the obligations enumerated in article 3(2) are stated to be subject to all the provisions of article 4, including, therefore, those of its paragraph 1, according to which the carrier is not liable for loss or damage caused by unseaworthiness unless caused by want of due diligence to make the ship seaworthy.

The subsequent analysis of the allocation of the burden of proof requires some comments. The general rules regarding the allocation of the burden of proof set out in paragraph 10.11 (at pages 197-198) although exclusively based on English and American law (or jurisprudence?) appear to be almost entirely appropriate with reference to the Hague-Visby Rules, while the reference to common law jurisprudence (e.g. the 1894 judgement in *The Glendarroch*) that is not based on the Hague-Visby Rules does not appear to be relevant. Out of the specific examples made by Margetson (at pages 202-205) it is thought that that relating to the perils of the sea is worthy of particular consideration, in view of the fact that it is included exactly with identical wording in article 17(3)(b) of the Rotterdam Rules. I am unable to agree with the definition given by him in paragraph 10.47¹²⁰ for two reasons, first because the peril of the sea requires a description of the sea conditions, the area in which the event occurred, the type of ship etc. and secondly because the carrier has the burden proving a) the sea conditions prevailing at a given time and b) that the loss of or damage to the goods was caused by the sea conditions, but he does not have the burden of proving that the loss or damage was not the result of the carrier's failure to fulfil his duties.

In the second part of his article, devoted to a commentary of article 17 of the Rotterdam Rules, after a short reference to articles 11 and 13 Margetson indicates the various steps of the system adopted in article 17 and after having rightly stated that the Rotterdam Rules have thereby codified the general system of the allocation of the burden of proof that had been developed under the Hague-Visby Rules, considers generally the liability regime created by that article and says that the Rotterdam Rules have intended to modernise the Hague-Visby Rules liability regime by making it more favourable for the cargo interest at the same time connecting it with the existing structure in order to leave as much as possible the jurisprudence intact thereby favouring the transition from the Hague-Visby Rules to the Rotterdam Rules. He then considers some criticisms that have been made and disagrees with the view that in cases in which it is not possible to ascertain the percentage for which the

¹¹⁹ CMI Bulletin No. 65, p.339; Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 802.

¹²⁰ The definition is the following: "The carrier is not liable for loss or damage resulting from damage caused by an event which is inherent to the sea and which was not a result of the carrier's failure to fulfil the duties contained in art. 3(1) and 3(2) H(V)R".

carrier is not liable courts would be allowed to create their own rules with regard to liability because it follows from the existing jurisprudence (he uses the English terminology “case law”) that in case of damage by a combination of causes, for one of which the carrier is liable, the burden is on the carrier for which part he is not liable. It would indeed be contrary to the purpose of the Rotterdam Rules if courts were allowed to create their own rules on the allocation of the burden of proof, for this would be the result of the theory Margetson disagrees with. The whole structure of the allocation of the burden of proof realized by article 17 indicates that the carrier is *prima facie* liable for the loss of or damage to the goods and for the delay in delivery if the claimant proves that such loss or damage or the event that caused or contributed to it took place during the period of the carrier’s responsibility. Therefore the carrier is liable of the whole loss, damage or delay even if the claimant proves that the event that (only) contributed to it took place during the relevant period, whereas he is relieved of all or part of his liability if he proves that the cause or one of the causes is not attributable to his fault and, therefore, in order to be relieved of part of his liability he must prove the extent to which the cause not attributable to his fault contributed to the loss, damage or delay. Similarly if he alleges that one of the events or circumstances enumerated in paragraph 3 contributed to the loss, damage or delay he must prove the extent to which it did contribute. The same criterion must then necessarily apply to the subsequent phases.

Following the same technique used in respect of the Hague-Visby Rules then Margetson considers the same examples, except that relating to the nautical fault that in the Rotterdam Rules has been abolished and in his conclusions observes that contrary to the Hague-Visby Rules all exceptions are now based on the absence of the carrier’s fault and that the Rotterdam Rules have solved the problems regarding the burden of proof which exist under the fire exception under the Hague-Visby Rules, whereas in respect of the lack of definition of perils of the sea the position has not changed.

Chapter 11. Duties of shippers and dangerous cargoes, by Frank Stevens (pages 215-236).

The title of Stevens’ article does not indicate in full the subjects covered by him, for in addition to the various duties he considers also the liability of the shipper. A review of the various paragraphs of his article follows.

The duty to pay freight

After mentioning the deletion of the chapter on freight that was originally included in the CMI draft, Stevens considers the only article that survived and was moved to the previous chapter on transport documents, namely the article dealing with prepayment of freight. He correctly points out that in the Rotterdam Rules an approach opposite to that of the Hamburg Rules has been adopted since their article 42 provides that the carrier cannot assert against the holder or the consignee that the freight has not been paid if the statement “freight prepaid” is contained in the

contract particulars while article 16(4) of the Hamburg Rules provides that the bill of lading that does not set forth the freight or indicate that the freight (or demurrage) incurred at the port of loading is payable by the consignee is prima facie evidence that no freight or demurrage is payable by him but proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party. Besides the omission of the reference to demurrage, probably due to the fact that demurrage was dealt with in another article of the original chapter on freight (article 9.5 of WP 21), the different approach adopted in the Hamburg Rules was actually considered in the course of the 18th session of the Working Group but the existing draft was deemed to be preferable since it was in conformity with “uncontroversial international practice”¹²¹.

The duty to deliver the goods ready for carriage

Stevens gives an accurate summary of the discussions that took place during the sessions of the Working Group in respect of the duty to deliver the goods ready for carriage and says that most of the discussion centred on the question whether the duty of the shipper to deliver the goods ready for carriage should be mandatory or not. He then comments the text of article 27 and draws the attention to the initial words of its first sentence “unless otherwise agreed” and to the second sentence, in which it is stated that “in any event” the shipper shall deliver the goods in such a condition that they will withstand the intended carriage and rightly concludes that the shipper’s obligation as described in the second sentence of article 27(1) is mandatory and the agreement between the shipper and the carrier is only valid if it concerns aspects of the readiness for carriage other than those indicated in the second sentence.

He raises, however, the question of which the consequences would be if the parties agree that the preparation of the goods for carriage were entrusted to the carrier and, in particular, whether in such case damages caused to the ship by the goods could be claimed by the carrier against the shipper and reaches a negative conclusion, which is actually based of the clear wording of article 34, he himself refers to subsequently.

¹²¹ A/CN.9/616, paragraphs 77 and 78:

Revision in conformity with article 16 (4) of the Hamburg Rules

77. There was some support for revision of draft article 45 in conformity with article 16 (4) of the Hamburg Rules. However, concern was expressed regarding that provision of the Hamburg Rules, since it contained a reverse presumption regarding payment of freight from that of draft article 45, such that the carrier’s right to collect freight from the consignee under the Hamburg Rules was defeated unless an affirmative statement, such as “freight payable by the consignee”, appeared on the transport document.

Retention of draft article

78. While it was generally thought that this provision addressed a practical problem but was not a core provision of the draft convention, support was expressed in favour of retaining the provision as currently drafted. It was said that the provision merely represented what was uncontroversial international practice, namely that if freight had been stated to be prepaid the carrier could not claim it from the consignee.

The duty to provide information

As regards the information required to properly handle and carry the goods Stevens traces the history of articles 28 and 29 from the original CMI draft to the final text adopted by the Working Group and suggests that if the shipper properly fulfils his obligation under article 29(1) it is unlikely that a further request by the carrier would be needed, although this may be the case in respect of information needed in connection with the characteristics of the ship. On the other hand the carrier may not know the information (and instructions) required in respect of the goods he has received or he is going to receive from the shipper. With respect to the reasonability test reference to which is repeatedly made in both articles, Stevens states that it is an objective one and makes reference to the Report of the sixteenth session of the Working Group. Some uncertainty may exist, however, when what is meant to be reasonable is the (non)availability to the carrier or the shipper of the information, which is the condition that triggers the duty to provide the information or instructions: how can, for example, the shipper know that a given information in respect of the handling of his goods is not “otherwise reasonably available” to the carrier? If, for example, he does not provide an information or instruction and the goods are damaged or have caused damage to other goods or to the ship, could he as a defence object that such information or instructions was “otherwise reasonably available” to the carrier?

As regards the information required to comply with laws and regulations he explains that the proviso in article 29(1)(b) that the carrier should notify to the shipper the information and documents he requires was added because the shipper may not know which they are but then paragraph 2 was added in order to make clear that any specific obligation to provide certain information, instructions or document pursuant to law, regulations or other requirements of public authorities is not affected by the provisions in paragraph 1. However he says that the problem is that it is not clear what the applicable law is. In a port-to-port contract both the laws of the port of shipment and of the port of discharge may be relevant; but in a door-to-door contract also the laws of the place of receipt and of the place of delivery may be relevant. The problem is that the shipper may not even know which the ports of loading and discharge will be and therefore his obligation may be conditional to the carrier timely providing him with the necessary information in this respect.

As regards the information required for compilation of contract particulars, Stevens observes that article 31 is in line with the provisions of the Hague-Visby Rules and of the Hamburg Rules, the obligation of the shipper being strict.

Liability of the shipper

Stevens gives a clear account of the manner in which the rules on the liability of the shipper developed through the sessions of the UNCITRAL Working Group and then expresses some concern in respect of the manner in which the concepts of “breach of obligation” and “fault of the shipper” will be applied in practice in civil law countries in view of the fact that civil lawyers first have to deal with the

distinction between *obligation de résultat* and *obligation de moyens*. The distinction between such two types of obligations was made in France by Demogue¹²² but its basis is far from clear. In any event such distinction, that has also been criticized in France¹²³, in other civil law countries, albeit known, does not appear to have caused any consequence in the interpretation of the relevant provisions of the civil and commercial codes¹²⁴ and has been deemed to have mainly some consequence in the allocation of the burden of proof. But it is definitely inconsequential in respect of the carrier and shipper liability regime under the Rotterdam Rules, in which the allocation of the burden of proof is clearly regulated.

Mention is subsequently made by Stevens of the two exceptions to the general rule of fault liability of the shipper, viz. those relating to the provision of information for the compilation of contract particulars and to dangerous goods, in respect of which the shipper's liability is strict. Of course the term "strict liability", which is a common law expression, is not used in the Rotterdam Rules, but was used during the sessions of the UNCITRAL Working Group¹²⁵. Article 30 sets out in paragraph 1 the general rule pursuant to which the shipper is liable if the carrier proves that the loss or damage was caused by a breach of the shipper's obligations under the Convention and then in paragraph 2 provides that the basis of liability is fault except for loss or damage caused by a breach by the shipper of his obligations pursuant to article 31(2) and 32¹²⁶. By combining the two rules it appears, therefore, that in respect of dangerous goods the shipper is liable even if he is not at fault, provided that the loss or damage was caused by a breach of his obligations and the burden a proof is on the carrier.

Dangerous goods

Stevens makes an accurate analysis of the provisions on dangerous goods in article 32 of the Rotterdam Rules. He considers first the notion of dangerous goods and wonders whether the danger (to persons, property or the environment) needs to be physical or may also be "legal". A possible answer to this relevant question might be that since the word "danger" is referred to both persons, property and the environment, its nature ought to be the same in all cases and since it is difficult to

¹²² *Traité des obligations en général*, V, Paris 1925, no. 1237 and VI, Paris 1931, no. 599. See also amongst others, H. MAZEAUD, *Essay de classification des obligations etc.*, *Revue trim. de droit civil*, 1936, p. 4 and 22, SAVATIER, *Traité de la responsabilité civile*, I, Paris 1951, nos. 113 and 235; TUNC, *Distinzione delle obbligazioni di risultato e delle obbligazioni di diligenza*, 1947-1948 *Nuova Rivista di Diritto Commerciale*, I, p.126.

¹²³ Amongst other by CAPITANT, *Les effets des obligations*, 1932 *Revue trim. de droit civil*, p.724; RIPERT-BOULANGER, *Traité élémentaire de droit civil de M. Planiol*, II, Paris 1949, no. 699.

¹²⁴ In Italy see amongst others RESCIGNO, *Obbligazioni*, in *Enciclopedia del Diritto*, vol. XXIX, para. 56.

¹²⁵ See, for example, A/CN.9/510, paras.44, 49, 155, 156, 157 and 164; A/CN.9/525, para.79 and A/CN.9/526, paras. 223 ND 228.

¹²⁶ A/CN.9/591, paras.138 and 153. In the French version different terms were used in the above paragraphs: *responsabilité de plein droit* the first time and *responsabilité sans faute* the second time.

conceive a “legal” danger to the environment, the danger ought to be physical in all cases.

He then discusses the shipper’s duties with respect to dangerous goods and says that article 32 (b), by providing that “the shipper shall mark and label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods puts a heavy burden on him”. Indeed this was a view that had also been expressed during the *travaux préparatoires*, and precisely during the 17th session of the Working Group to which he refers¹²⁷. The addition reference to which had been made differed, however, from the general provision now in article 28, for it was part of a Swedish proposal of a new text of the then draft article 33¹²⁸, containing a para.(4), reference to which was made during that session¹²⁹, worded as follows:

[4.The shipper has the right to request and obtain from the carrier such reasonably available information and instructions as are reasonably necessary in order to comply with its obligations under paragraph 3.]

The reason given in the Swedish proposal of that addition was precisely the possible lack of knowledge by the shipper of the actual type of transport chosen by the carrier¹³⁰.

However, apart from the consideration that normally the shipper is aware of the type(s) of transport and the route chosen by the carrier, it appears that the shipper is protected by the reference in article 32(b) to the *intended carriage*: and by that it is reasonable to assume that the shipper’s obligation refers to the carriage that was known to him.

Stevens then raises a novel (at least I think) question, namely whether contraband cargo should be considered as “dangerous goods” and says that that may be the case, for contraband cargo may expose the ship and/or the other cargo to seizure and even to destruction. I am unable to share his views. I suggest that the rule applicable would be that of article 29(1)(b) or the rule in article 29(2), since pursuant to that provision the obligation of the shipper to provide to the carrier information, instructions and documents relating to his goods is conditional to the carrier indicating the information, instructions and documents he requires.

The subsequent section of Stevens’ analysis relates to the shipper’s liabilities with respect to dangerous goods. He correctly draws the attention (in para. 11.93) to the fact that the Rotterdam Rules are much more restrictive than the Hague-Visby Rules, under which the shipper could be held liable even if the loss would have occurred anyhow, therefore even if the carrier has been informed of the dangerous nature of the goods. In other words the shipper would be liable even if he had not been in breach of its obligations.

¹²⁷ A/CN.9/594, para. 195.

¹²⁸ A/CN.9/WG.III/WP.67, para. 31.

¹²⁹ A/CN.9/594, para. 196.

¹³⁰ A/CN.9/WG.III/WP.67, para. 28.

Finally, in the last section of this title, Stevens deals with the carrier's rights with respect of the dangerous goods that in the Rotterdam Rules are set out in article 15 of chapter 4-Obligations of the carrier, the reason being that the right to dispose of the dangerous goods is an exception to the general obligation of the carrier under articles 11 and 13. He draws the attention to the fact that while under the Hague-Visby Rules the carrier may land, destroy or render innocuous the goods without liability even if they had been shipped with his knowledge of their character, article 15 is silent on the issue of liability. He is of the view that, also in consideration of the fact that that issue has been briefly discussed during the 9th session of the Working Group, when it was decided that it should be further discussed but such discussion has never been resumed, the cargo interests still have a prima facie claims against the carrier, and the carrier has the burden of proving that the conditions for the exercise of the rights granted by article 15 existed and that his action was reasonable. He is right and his opinion conforms with that of Professor Delebecque¹³¹.

The "duty" to give notice of loss

It is not clear why Stevens says that "the giving notice of loss is listed as a duty of the cargo interest". In fact from the wording of article 23(1) it appears that the notice *may* have some evidentiary effect: I say "may", for actually it has no such effect, for otherwise it would be in conflict with article 17(1). I have been one of those who were against the original text of this article and who had pointed out that the corresponding provision in article 3(6) of the Hague Rules had given rise to conflicting interpretations and who at the 19th session of UNCITRAL Working Group had suggested to add paragraph 2. Paragraphs 111 and 112 of A/CN.9/621 make the position clear¹³².

¹³¹ DELEBECQUE, Obligations of the Carrier, in *The Rotterdam Rules 2008*, edited by von Ziegler, Schelin and Zunarelli, Wolters Kluwer 2010, p. 89-90. See the review of his article *supra*, p. 13.

¹³² Their text follows:

111. Concern similar to that expressed during the thirteenth session of the Working Group (see A/CN.9/552, para. 65) was reiterated regarding the operation of draft paragraph 1. There was support for the view that paragraph 1 was unnecessary since the issuance of the notice to the carrier or the performing party, or the failure to provide such a notice, did not affect the respective burdens of proof of the carrier and of the claimant as set out in the general liability regime in draft article 17. Moreover, it was noted that in some jurisdictions, the provision on which this draft article was based, article 3 (6) of the Hague Rules, had caused confusion and had led some courts to conclude that failure to provide such a notice resulted in the loss of the right to claim for loss or damage pursuant to the instrument. As such, the Working Group was urged to delete draft paragraph 1, and, failing that, to make it clear that failure to provide the notice under the draft provision was not intended to have a special legal effect.

112. In response, it was noted that the draft paragraph was not intended to attach a specific legal effect to the failure to provide notice. Nevertheless, the draft provision was intended to have the positive practical effect of requiring notice of the loss or damage as early as possible to the carrier, so as to enable the carrier to conduct an inspection of the

Chapter 12. Deck cargo: Safely stowed at last or still at sea? By Dr. Susan Hodges and David A. Glass (pages 237-270)

In their “Introduction” Dr. Hodges and David Glass indicate the general plan on the article, in which they consider the deck carriage regime under Anglo-American common law and under the various international conventions on carriage of goods by sea: Hague Rules, Hague-Visby Rules, Hamburg Rules and Rotterdam Rules, stating that the Rotterdam Rules reflect the first attempt to deal expressly with carriage on deck of containers.

Considerable part of their article (from page 238 to page 254) is devoted to the analysis of the position in English and US law. In the first section they deal briefly with the situation in which the cargo is stated as being carried on deck and is so carried that, being excluded in article 1(c) of the Hague-Visby Rules from the definition of goods, is thereby excluded from the scope of their application, the consequence being that the Hague-Visby Rules only apply in respect of cargo carried on deck without any mention being made of carriage on deck in the bill of lading (in the last sentence of paragraph 12.4 reference is mistakenly made to the opposite situation).

A thorough analysis is instead made of the situation where no mention is made on the bill of lading of the goods being carried on deck, both in English law (pages 239-243) and in US law, with reference to the US doctrine of quasi deviation (pages 243-244) followed by a reference to the Australian decision in *Chapman Marine Pty v. Wilhelmsen Lines – The Tarago*. Equally thorough is the analysis, which this time is extended to the various conventions, in the section entitled “Excuses for carriage on deck” (pages 245-253) of the situations where deck carriage may not be a breach of the contract. The situations considered are those in which there is express or implied consent to carry the goods on deck, where the bill of lading contains a clause giving the carrier the liberty to carry the goods on deck, where such mode of carriage is permitted by custom. A final section (at pages 250-251) deals with the possibility of treating deck carriage as a reasonable deviation and in this connection reference is made also to article 4(4) of the Hague-Visby Rules to deviations to save life or property and “other reasonable deviation”. I believe, however, that the American doctrine of the quasi deviation definitely was not in the mind of the drafters of that provision and that what they considered was only a deviation from the course, viz., a geographic deviation. In the original text of that provision, as it appeared in the

goods, assuming there had been no joint inspection. While there was no agreement in the Working Group to reverse its earlier decision to retain the draft paragraph, there was agreement that draft paragraph 1 was not intended to affect the rights of cargo interests to make claims under the draft convention, and that it was in particular not intended to affect the liability regime and burdens of proof set out in draft article 17.

The subsequent revised edition of the draft convention in A/CN.9/WG.III/WP.101 carries the following footnote 51 to the then article 24:

Draft paragraph 2 of the text was added to clarify the effect of draft paragraph 1, as agreed by the Working Group (see A/CN.9/621, paras. 111, 112 and 114).

Hague Rules 1921¹³³, reference was made to “any deviation in saving or attempting to save life or property at sea or any deviation authorised by the contract of carriage”. In the 1922 Diplomatic Conference the proposal was made by the US and French Delegations to amend the text by making reference to “any deviation in saving or attempting to save life or property at sea or any deviation to ports and places specifically stated in the contract of carriage and any deviation reasonable, having regard to the service in which the ship is engaged...”¹³⁴. Following the objection by the British delegation that that would give too wide powers to the carrier¹³⁵, reference was simply made to “any deviation reasonable in the course of the voyage”¹³⁶. Thereafter the words “in the course of the voyage” were dropped, apparently by the Drafting Committee.

In the subsequent section, entitled “Exceptions of liability”, Hodges and Glass consider the effect of carriage on deck on the Hague-Visby Rules defences in case they apply because no mention is made in the bill of lading of the deck carriage and come to the conclusion (at p. 255) that in spite of the opening words of article 3(2), a loss caused by improper stowage is unlikely to be covered by any of the excepted perils listed in article 4 rule 2 (a).(q): a conclusion that is definitely correct.

After a relatively brief review of the position under the Hamburg Rules they finally come to the analysis of the position under the Rotterdam Rules. They consider first the regime applicable where deck carriage is not permissible under article 25(1) and say that the phrase “only if” in article 25(1) indicates that in circumstances other than those described in (a), (b) and (c) deck carriage would constitute a breach of contract. They subsequently consider the regimes applicable where the loss, damage or delay is “exclusively” and “not exclusively” caused by the goods having been carried on deck and come (at p. 260) to the conclusion, that in the first case the liability of the carrier is strict, whereas where there has been a different contributory cause “there may still be room for the operation of one or more of the defences contained in article 17(3)”. Their conclusion is correct and, it may be added the burden of proving the different cause and the extent to which it has actually contributed to the loss, damage or delay lies on the carrier. Hodges and Glass had previously analyzed the meaning of the adverb “exclusively” and wondered why the adverb “solely” that was used in the initial drafts instrument as well as in the Hamburg Rules had not been adopted. They say that the Working Group had “agonised” over the choice of the word and that, although it is unclear whether

¹³³ Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 799.

¹³⁴ Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 436.

¹³⁵ Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 437 and 438.

¹³⁶ Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 440.

anything can be read into that decision, “what is obvious from the discussions was their (i.e. of the Working Group) observation that damage or loss rarely has only one cause”. Although Hodges and Glass have been normally very careful in their review of the *travaux préparatoires*, this time they have not. The “agony” consisted merely in the observation made by some delegates (the persons who make the comments mentioned in the Reports of the Secretariat are never identified) that the phrase “exclusively the consequence of their carriage on deck” was imprecise “because damage or loss rarely has only one cause” and that “a possible remedy could be the use of the word ‘solely’”¹³⁷. Therefore the fact that damage or loss rarely has only one cause was merely the reason (or one of the reasons) given by some delegates for their suggestion to use the adverb “solely” instead than “exclusively”¹³⁸. But the above comments of Hodges and Glass have not influenced their final conclusion (at p. 260) that “exclusively” means “solely” and that means that the two terms, are actually synonyms.

Special attention must be paid to the careful analysis made by Hodges and Glass (at pages 263-267) of the rules on the liability regime applicable to deck carriage under article 25(2). They raise (at p. 264) the question whether it would be right to draw from the omission of a reference to subparagraph 1(b) the inference that the carrier is to be made liable for any loss caused by the special risks involved in deck shipment of containers and vehicles. They add that the creation of a special risks defence in article 25(2) for cases (a) and (c) seems unnecessary since the carrier can be relieved of liability under article 17(2) anyhow, by proof of the absence of fault and question why, since a carrier operating within case (b) can escape liability in the absence of fault, should he be liable if the damage is due to some special risks of deck carriage not attributable to his fault.

Finally, they wonder whether his liability is meant to be strict coming to a negative conclusion but say it was regrettable that the position under article 25(1)(b) had not been made more explicit, adding that if article 25(1)(b) is simply a compromise pursuant to which “the carrier is not to have the strict liability that would follow from unauthorised deck stowage under article 25(3), but liability is left to be determined by the issue of fault under article 17(2) and the enumerated exceptions in article 17(3) that would mean that some risk would remain on the shipper despite not having received warning that at least the existence of a liberty would give him”. Although the fundamental reason for which deck carriage has been mentioned, albeit under certain conditions, in article 25(1)(b), is that in container ships decks are an area on which containers are normally stowed and that their cargo carrying capacity includes stowage

¹³⁷ A/CN.9/525, para.79.

¹³⁸ It may be observed that in all the subsequent drafts of the instrument the adverb used has been “exclusively”: A/CN.9/WG.III/WP.21, article 6.6.2; A/CN.9/WG.III/WP.32, article 24(2); A/CN.9/WG.III/WP.56, article 26(2); A/CN.9/WG.III/WP.81, article 25(3); A/CN.9/WG.III/WP.101, article 26(3).

of containers on deck for a percentage above 60% of the total carrying capacity¹³⁹, and therefore shippers are aware that their containers may be stowed under deck or on deck, the comments made by Hodges and Glass, in particular in paragraph 12.92, deserve serious consideration. The very fact that in article 25(2) the general rule is that the provisions of the Rotterdam Rules relating to the liability of the carrier apply and the exception is that in respect of goods carried on deck in accordance with article 25(1)(a) or (c) the carrier is not liable for loss damage or delay caused by the special risks involved in deck carriage entails that in such latter case a liability regime more favourable than that based on article 17 is granted to the carrier. A comparison between the allocation of the burden of proof in article 26(2) and article 17 (2) and (3) shows that that is the case, even though the difference is not very significant. In fact under article 25(2) the carrier would have the burden of proving that the loss or damage has been caused by a special risk involved in deck carriage whereas under article 17(2) he would have to prove that the loss or damage was not caused or contributed to by his fault or the fault of any person for whom he is responsible and under article 17(3) he would have to prove the excepted peril and that such excepted peril caused or contributed to the loss, damage or delay. But even if in practice there was no difference, that could not entail the consequence, considered by Hodges and Glass, that the carrier must take upon himself the risk of loss damage or delay caused by the special risks associated with carriage on deck, because that is the regime applicable where carriage on deck is made in cases other than those permitted under article 25(1). It suffices to compare the rule in paragraph 2, pursuant to which in all cases considered therein the provisions of the Rotterdam Rules relating to the liability of the carrier apply, and that in paragraph 3, pursuant to which the carrier is not entitled to the defences provided for in article 17.

It cannot be denied that, as Hodges and Glass say, the position has not been made more explicit in article 25(2), but even so, its interpretation ought not to give rise to conflicting opinions.

Chapter 13. Transport documents under international conventions, by Professor Francis Reynolds QC (pages 271-282)

Professor Reynolds clarifies in his Introduction the purpose of his commentary on chapter 13 and says that that its purpose is to make some general observations on the roles which documents play or have played in the international conventions and note some of the main changes that will occur should the Rotterdam Rules come into force. He describes first the position under the Hague Rules, the Hague-Visby Rules and the Hamburg Rules and then devotes, as was obviously the case, the greatest part of his article (from p. 275 to p. 282) to the Rotterdam Rules.

¹³⁹ A/CN.9/525, para. 78.

After explaining that the greater attention paid in the Rotterdam Rules to documents was due to a combination of two factors, namely first the original intention of UNCITRAL to establish uniform rules where no such rules existed and the greater importance acquired by documents other than bills of lading, that prevented the use of documents as a control for the application of the Rotterdam Rules (indeed three different approaches had been discussed, in particular in a seminar held in London: the documentary approach, the contractual approach and the approach based on the type of trade), he mentions the various types of documents reference to which is made in the Rotterdam Rules. In his initial description two short comments are worth mentioning: first the words “more surprisingly” following the reference to negotiable transport documents that do not require surrender and secondly the remark that the definitions do not provide any scope for the regulation of delivery orders. The “surprise” may regard the time when such new category of transport document appeared in the draft as well as its nature. Both such aspects will be briefly discussed later, when his comments will be considered¹⁴⁰. As regards instead the lack of any reference to delivery orders, I suggest that it can be explained by the omission of a reference to all the documents in use to-day, from the bill of lading, to the sea waybill, the mate receipts, etc. all of which may have a different legal nature in different countries, as is the case for the nominative bills of lading, and may be used for different purposes. This is the case for the delivery orders, that may be issued by the carrier upon surrender of the bill of lading when the holder has sold the goods to various buyers and wants to split the right to obtain delivery so that each buyer may have an independent right to obtain the portion of the cargo he has purchased or may also be issued by the carrier in order to enable the holder of the bill of lading to obtain delivery from the terminal operator. Furthermore, the use of a new name – transport document – may more easily accommodate any new type of document that may come into existence in the future.

Reynolds then says that it is likely to be difficult for at least some persons handling documents in ascertaining in which category a particular document falls,

¹⁴⁰ *Infra*, p. 109. The proposal was submitted to the Secretariat by the delegations of Denmark and the Netherlands on 10 September 2007 (A/CN.9/WG.III/WP.95) and briefly discussed during the twentieth session of the Working Group that decided to include its substance in a footnote to the text of the draft convention (A/CN.9/642, para. 63). That note was actually inserted in A/CN.9/WG.III/WP.101, being note 123 at p. 35-36 reproduced below:

A proposal was made at the twentieth session of the Working Group to limit the operation of subparagraphs 50 (d), (e), (g) and (h) to those situations where a negotiable transport document or electronic transport record had been issued that stated on the document or the record itself that the goods to which it related could be delivered without presentation of the negotiable transport document or electronic transport record. A mechanism proposed for the implementation of that suggestion was that a phrase could be inserted as a chapeau prior to subparagraphs 50 (d), (e), (g) and (h) along the following lines: “If a negotiable transport document or electronic transport record that states on its face that the goods may be delivered without presentation of the document or electronic record, the following rules apply:” (see A/CN.9/642, paras. 63 to 64 and 67).

that the word “indicates” (that it shall be surrendered) in respect of non-negotiable transport documents (article 46) is not a strong one and such document may not always be easy to recognise. It is very difficult to describe the legal nature of documents that incorporate rights in an international instrument that is meant to be adopted in jurisdictions in which the legal nature of such documents and the modes of transfer differ. Suffice it to mention the description in English law of bills of lading as documents of title, that Reynolds says (in para. 13.3) to be misleading as regards common law and, when used in the 1921 Hague Rules, was horribly translated into French “*documents formant titre*” (an expression that was then left unaltered in the 1924 Bills of Lading Convention), and the reference in article 46 to non negotiable transport documents, that are known in certain jurisdictions as straight bills of lading and in others as *rechta* bills of lading or nominative bills of lading and in many jurisdictions are not transferable and do not need to be surrendered on delivery whereas in other jurisdictions, as the Italian jurisdiction, are transferable and must be surrendered. The easy way out has been so far that of avoiding to regulate these documents in international instruments, whereas an attempt has now been made to create a basic uniform legislation that hopefully may facilitate international negotiations. Therefore the rules adopted are the result of various compromises. Coming to the observation of Reynolds, who compares “indicate” with the expression “expressly state” used on article 47(2) that subsequently (in para.13.38) he finds also insufficient, I wonder (I say that with great hesitation since the comment in question comes from a jurist as Professor Reynolds) whether in order to assess the strength of the word “indicates” (the literal equivalent of which – “indica” – by the way is used in the Italian Navigation Code) it would not be convenient to consider the rest of the sentence: “(indicates) that it *shall* be surrendered”. Does not that “indicate” that surrender is obligatory? That I assume is the meaning of the phrase used in the French version (*dont les termes révèlent qu’il doit être remis*) and in the Spanish version (*del que se infiera que el documento debe ser restituido*).

I agree with Reynolds that some persons handling the documents may find difficulties in understanding their meaning, but, besides the fact that that happens also to-day, I suggest that the precise meaning of the expressions used in the Rotterdam Rules ought to be explained, when the Rotterdam Rules will enter into force, in a new edition of the ICC Uniform Customs and Practice for Documentary Credits.

I also agree with him where (in para. 13.22) he observes that the word “negotiable” is inaccurate the correct word being “transferable”, but, as he says, the meaning is clear. I am not sure, instead, about what he means where he says that some of the results of the coverage of contractual relationships (e.g. right of control, transfer, surrender) do establish features relevant to and facilitating the application of “proprietary rules”. If he intends to refer to (constructive) possession, that is certainly the case, but it would not if he intends to refer to title.

Reynolds subsequently considers chapter 8 and the information that must be included in the transport documents and after mentioning (in para. 13.26) the default

rule in respect of the omission of the name of the carrier, and that in respect of the description of the contract particulars “sometimes but not always” there are default rules (such rules exist in respect of the date and the apparent order and conditions of the goods and it would be difficult to conceive them in respect of other particulars), he says that there are serious obscurities in what must and what may be inserted by way of reservation. If by that he intends to refer to the reservations that must be inserted and to those that may be inserted, it seems to me that the situations where the carrier must qualify the information and those where he may do so are clearly indicated respectively in paragraph 1 and in paragraphs 2, 3 and 4. If instead he intends to refer to how the reservations should be expressed, then their wording is not indicated and is left to the carrier to choose it: what is indicated is its purpose, namely to make clear that the carrier “does not assume responsibility for the accuracy of the information furnished by the shipper”.

Next (in para.13.29) Reynolds states that overall the provisions he has considered are undoubtedly effective in protecting third parties who rely on the truth of the statements in the transport documents but observes that where the goods are transferred to a good faith consignee of a non-negotiable transport document that does not require surrender there is a more limited list of what cannot be denied. The information in respect of which proof to the contrary is not permissible in respect of non-negotiable transport documents does not include the contract particulars referred to in article 36(1) when they are not furnished by the carrier, the identifying number of the container seals and the contract particulars referred to in article 36(3). This was the result of a compromise between the delegations that were in favour of this provision and those that were against¹⁴¹, on the ground that the principle of the non-admissibility of proof to the contrary is an exception to the general rule according to which the transferee cannot have greater rights than the transferor: *nemo plus iuris ad alium transferre potest quam ipse habet*¹⁴².

Reynolds then comes to the novelty in article 47(2) of negotiable transport documents the surrender of which is not required in order to obtain delivery of the goods. I agree with him when he says (in para.13.37) that at present the major situation where the carrier is unable to deliver against a bill of lading is that, mentioned in article 47(2)(a)((ii), of the person entitled to deliver coming forward and claiming delivery although he does not (yet) hold the bill of lading. I also understand his concern about the possible dangers of this new type of negotiable document. However I suggest that, since the problem that article 47(2) attempts to solve is a real problem, and its size appears to be conspicuous, for the percentage of cargoes delivered without presentation of the bill of lading is apparently relevant, it would be convenient to compare the remedy that is adopted at present, namely that of the consignee negotiating with the carrier the terms of a letter of indemnity

¹⁴¹ A/CN.9/526, paras. 44-48; A/CN.9/616. Paras. 45-68.

¹⁴² Ulp. L.54 D. de R.J. 50, 17.

normally backed by a bank guarantee, with the solution offered by article 47(2). I personally have doubts that the complicated procedure envisaged in that article will work in practice and in this connection I refer to the questions I have raised in my review to the article of Professor van der Ziel¹⁴³.

Finally Reynolds considers the provisions in article 80 and says that bills of lading (or negotiable transport documents) issued in respect of goods shipped under volume contracts would be a trap for third parties. He explains his opinion by saying that the Rotterdam Rules “may fail to be strong enough to make clear to users what is the legal position”. The weak points in his opinion are that it is not clear (a) when the information must be received by the third party; (b) in what form when the information must be received by the third party; (c) when the express consent must be given; (d) in what form the express consent must be given and in this respect he thinks that the reference to the carrier’s published schedules indicates that some general consent may suffice, and e) in addition he draws attention to the danger of clauses in small print, that are easily overlooked.

I believe that his concern in this case is unjustified. As regards (a), the information must logically be received concurrently with receipt of the volume contract; as regards (b), obviously the information must be in writing, article 80(5) being referred to in article 3; as regards (c), I suggest that the date when the express consent has been given is immaterial; as regards (d), since it is required that the consent be “express”, I suggest that the statement in article 80(5)(b) that the consent cannot solely be set forth in a carrier’s document excludes the validity of a “general” consent, and the need for the consent being “express” confirms that. Finally, as regards (e), it seems to me that the reference to clauses in small print is out of place, considering the basic requirement in article 80(2)(a) that the statement that the contract derogates from the Rotterdam Rules must be “prominent”.

Chapter 14. Electronic documents and the Rotterdam Rules, by David Martin-Clark (pages 283-294)

David Martin-Clark provides a clear summary of the background of the rules in chapter 3 on electronic transport records starting from the CMI Rules on electronic document interchange, published in 1990 (pages 283-286), followed by the UNCITRAL Model law on electronic commerce (pages 286-289) and by the UNCITRAL Model law on electronic signature. He then comments each of the provisions in chapter 3 of the Rotterdam Rules and completes his article with a description of two private initiatives, that of Bolero (p. 292) and that of Electronic Shipping Solutions (p. 293).

It is surprising that notwithstanding the fast development of electronic communications, the success of all these initiatives has been rather modest. But

¹⁴³ *Supra*, p. 40.

Martin-Clark is right when he says that the Rotterdam Rules could not omit regulating electronic transport records and that at the same time it was reasonable just to set out a general frame in respect of a type of communication in continuous fast development.

Chapter 15. Impact of the Rotterdam Rules on the Himalaya Clause: the port terminal's operator case, by Professor Jason Chuah (pages 295-317)

Professor Chuah divides his article in eight sections: in the first section, “Context and considerations”, he considers the leading common law judgments on the Himalaya clause; in the second, “Replication of the Himalaya clause by treaty”, he analyses the relevant provisions in the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules; in the third section, “The scope of the application of the Rotterdam Rules and port terminal operators”, he analyses the provisions of the Rotterdam Rules on maritime performing parties; in the fourth section, “The scope of the application of the Rotterdam Rules, and port terminal operators”, he discusses article 12 of the Rotterdam Rules; the fifth section, “What constitute the ‘defences’ under articles 4 and 19”, contains an analysis of such articles. There follow two short sections entitled “Effect of deviation on the Himalaya-type protection and Indemnities and the automatic Himalaya-type protection” and the “Conclusions”.

This review will relate to the second, third and fourth sections as well as to the Conclusions.

Replication of the Himalaya clause by treaty

Chuah considers first the provision in article 4bis(2) of the Hague-Visby Rules and the reference therein to “servant or agent” in the English version and to “preposé” in the French version with the additional phrase within parenthesis in the English version “such servant or agent not being an independent contractor” described in the thirteenth edition of Carver on Carriage by Sea as “self-contradictory words”. In order to understand the reason of the long description in the English version and of the corresponding one word description in the French version of the persons that may benefit of the Himalaya protection, it is necessary to consider how those different texts came about. In the Report of the Committee on Bills of Lading to the 1963 Stockholm CMI Conference the French and English texts of the present article 4bis (2) did not differ. They were as follows¹⁴⁴:

2) Si une telle action est intentée contre un proposé ou un agent du transporteur ou contre un sous-traitant indépendant employé par lui dans le transport des marchandises, ce sous-traitant, préposé, agent ou sous-traitant indépendant sera autorisé à se prévaloir des moyens de défense et des limites de responsabilité que le transporteur peut invoquer en vertu de la Convention.

¹⁴⁴ Travaux préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 596.

2) If such an action is brought against a servant or agent of the carrier or against an independent contractor employed by him in the carriage of goods, such servant, agent or independent contractor shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

In the accompanying report it was however stated that a minority view within the Committee was that independent contractors should not benefit of the protection granted by that new provision¹⁴⁵. That minority view was strongly supported by the British Maritime Law Association that explained the reason why independent contractors should be excluded¹⁴⁶, even though the distinction between servants and agents was not made a clear¹⁴⁷. The suggestion was then made by the BMLA to draw

¹⁴⁵ Travaux préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 598.

¹⁴⁶ The following statements were made by Mr. Cyril Miller (Travaux préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 600 and 601):

The British Maritime Law Association supports the viewpoint as exposed in the Sub-Committee Report on pages 29 to 33 that the carrier, servants or agents should be protected for the reasons that I have given. Actions brought against servants or agents are, in practical effect, against the carrier himself. We do not, however, support that this should include independent practice for the reason that the carrier can protect himself by contract. We have discussed this matter, I hope, with great care with those of us on our Association who represent cargo interests, cargo underwriters, and independent shippers who do not insure, both of which eminent bodies are represented in our Association and they have persuaded us that it is our unanimous view which I am now putting forward, that it would be wrong to demand that this correction of the Hague Rules, which we are now asking for, should include independent contractors, which means it would not include stevedores.
(and p. 606-607):

We have now voted by a large majority in favour of the principle of dealing with the Himalaya problem as set out in the report of the Sub-Committee but there is a vital amendment to that report not only by the British Maritime Association but, I understand by other organisations who are represented here, namely that only servants or agents of the shipowners and not independent contractors should be included, and if this project goes to the drafting committee without that having been commented upon then the drafting committee will have no option but to accept the principle as drafted by the majority of the Sub-Committee, and at this point I would also like to make this statement that if by any chance, we should call it misfortune, the majority of this Sub-Committee should be in favour of including independent contractors then we should ask to be allowed to make a reservation on that subject so that any country which adopted this amendment of the Hague Rules should be permitted not to be in favour of independent contractors.

¹⁴⁷ The following statement was made by Mr. Miller (Travaux préparatoires of the Hague Rules and of the Hague-Visby Rules, *supra* note 115, p. 618):

Now, Mr. President, you have just said what I got up to intervene for. May I just add this: the official text of any Convention which emerges from this Conference, plus the Diplomatic Conference will be the French text. Our President is quite right in saying that formally we have decided by a vote to use the French word “*préposé*”. You cannot dictate to the various government draftsmen how they shall translate that into their own language because if you do they won’t take the slightest notice of it. All I can assure you is that if we did indicate how we considered the word “*préposé*” in the French text ought to be translated, our government draftsmen will translate it as they have ever translated “servants or agents”. We do not quite know what “servant or agent” means, but it has not caused much trouble in the past.

a distinction between agents who are independent contractor and agents who instead may not be qualified as independent contractors and who, in French, come under the term *préposé*, by adding in brackets the words “not being independent contractors” that appear in the draft Protocol submitted to and approved by the Diplomatic Conference in 1967. In such draft such words were translated into French with “*pourvu que ce préposé ne soit pas un contractant indépendant*” and included in the French version of the draft Protocol. However they were subsequently deleted for the reason that the term *préposé* does not include persons that are independent contractors. If, therefore, in English law the agents may be an independent contractor (but Chuah says in paragraph 15.10 that independent contractor is not usually synonymous of agent), under the Visby Protocol its meaning must be the same as *preposé* in French law, as well as in other conventions, starting from the Warsaw Convention 1929, as amended by the 1955 Protocol. It follows, therefore, that a terminal operator may not come under the description in article 4bis(2), whereas stevedores could, if employed individually and not as members of a company.

Chuah states (in paragraph 15.16 at page 301) that the object of the chapter “is to consider the implications of the Rotterdam Rules’s provisions for automatic Himalaya-type protection for port and marine terminal operators” and says (in paragraph 15.17) that the dividing line between actual carrier and terminal operator has become blurred. Be it as it may (even though what he says applies rather to logistic providers), that would not affect the scope of application of article 4 since the Rotterdam Rules apply to both the terminal operators (provided that the operate within a port) and the sub-carriers to whom the contracting carrier entrust the whole or a part of the sea leg to be performed under his contract with the shipper

The scope of the application of the Rotterdam Rules and port terminal operators

After a short reference to the 1991 Convention on the Liability of Operators of Transport Terminals in International Trade, Chuah initiates his commentary of the relevant provisions of the Rotterdam Rules by saying (in paragraph 15.21) that the object of the definition of maritime performing party is to restrict the application of the Rotterdam Rules only to persons who are involved in the provision of maritime services (and in paragraph 15.22) that the exclusion of the carrier from the definition coincides with the terms of the 1991 Convention. That statement may be misleading, because in the 1991 Convention carriers are generally excluded, whereas in the Rotterdam Rules they are not, the exclusion relating only to the carrier as defined in article 1.5, namely the contracting carrier. He then says (in para. 15.23) that the concept of maritime performing party appears quite complex and that port terminal operators will clearly fall within the definition as long as they perform or undertake to perform service within the port area, but that the lack of a definition of port is problematic and raises the question whether cargo consolidation areas would also count as port areas. In this connection he says that it seem unrealistic to make an artificial distinction between inland and port without looking at the logistic chain. Finally he considers that Professor Tetley’s view that the 1981 Multimodal

Convention offers a more streamlined solution in that its article 20 extends the Himalaya protection to any other person whose services the multimodal operator had used. But he does not consider that that convention is precisely a multimodal convention (a fact that probably has contributed to its failure) whereas the Rotterdam Rules only apply to carriage by modes other than sea when they are complementary to the carriage by sea. As regards the lack of definition of port, that issue had been considered, but it was wisely thought that it would have posed considerable difficulties¹⁴⁸: it is a fact that even in many national laws such a definition does not exist, and that port areas vary from port to port. As regards the complaint that no attention has been paid to the logistic chain and that it is unrealistic to treat differently the activity of a terminal operator according to whether the consolidation area is within or outside the port area, it may be observed that a great attention has actually been paid to the logistic chain and it is precisely for that reason that the Rotterdam Rules apply to door-to-door contracts of carriage, but when it had to be decided whether and to which extent the independent contractors the carrier employs for the performance of certain of his obligations should be subject to the Rotterdam Rules, it was realised that the Rotterdam Rules could not apply to independent contractors performing services inland, whereas they could, and should, apply, to those performing services at sea as well as ashore but only to the extent that such services are related to the carriage by sea. In order to identify a clear limit reference could only be made to the port area¹⁴⁹. Consequently the Himalaya protection would only be granted to the maritime performing parties, because it was only to them that the Rotterdam Rules would apply.

However Chuah subsequently states (in paras.15.26 and 15.27) that from subparagraph (b)(ii) and (iii) of article 19(1) it would appear to be the intention of that provision to extend automatic Himalaya-type protection beyond that encompassed in (i) but that that raises a tricky problem, namely whether “a person who is engaged as a maritime performing party and does an act (whilst in custody of the goods or at any other time contributing to the performance of the contract of carriage) outside the maritime sector would not be able to seek cover under article 19” and says that there is little clarity in the Rotterdam Rules or in the *travaux préparatoires* about this potential conflict. I suggest instead that there is clarity in both. Subparagraph (b)(ii) and (iii) of article 19(1) refer to activities of maritime performing parties who, according to the definition in article 1.7, are performing parties who perform any of the carrier’s obligations at sea or in port: therefore any activity performed outside that period is not an activity of a performing party. If, for example, a terminal operator receives the goods alongside and carries them for storage in a warehouse outside the port, his responsibility in respect of the storage

¹⁴⁸ A/CN.9/544, para. 30.

¹⁴⁹ That proposal was made at the twelfth session of the Working Group: A/CN.9/54, paras.20-40.

period is not covered by the Rotterdam Rules. The problem of services performed in part in a port and in part outside, as is the case for carriage, that was raised during the twelfth session¹⁵⁰, was subsequently clarified by the addition in the definition of maritime performing party of the sentence reading “An inland carrier is a maritime performing party only if it performs or undertakes to perform its services *exclusively* within a port area”¹⁵¹. The clear dividing line is, therefore, that if the services rendered by a performing party inside and outside a port differ, such as port movement and storage, they are covered by the Rotterdam Rules only in respect of the services rendered in the port whereas if they are the same, as is the case for transport, they are not deemed to be rendered by a maritime performing party. Finally, as regards the *travaux préparatoires* recourse to which is not required because the text of the Rotterdam Rules is clear, the limits of application of the Himalaya protection are made clear in the reports of various sessions¹⁵².

What constitute the “defences” under articles 4 and 19

Chuah makes (in para. 15.34) reference to the *travaux préparatoires* and says that the word “defences” should include also the provisions for bringing an action, as well as arbitration and jurisdiction clauses. I agree with time for suit whereas I very much doubt that a jurisdiction agreement might be qualified as a defence. In any event, subject of course to the relevant country having opted-in chapter 14, the problem is solved by a specific reference in article 68 to actions against maritime performing parties. In so far as arbitration is concerned, it would seem very difficult, if not impossible, to invoke an arbitration agreement between carrier and shipper in respect of a claim against a performing party.

With reference to article 68 he says that the restrictions of the *fora* in which proceedings against a maritime performing party may be instituted must be assumed to be for their benefit and that it is not beyond “reasonable boundaries” that a maritime performing party may insist to be sued at a place listed in article 66 instead of article 68, but that, if the doctrine of “*forum conveniens*” were applicable, it could be argued that the maritime performing party should be denied the right to rely on article 66, because their connection with the dispute is chiefly tied to where they perform their activity. He adds that, however, there are no explicit terms to that effect and refers to article 69 in which the word “respectively” does not appear.

These comments are based on a wrong reading of the relevant provisions of chapter 14. It must first be observed that the repeated reference to the doctrine of “*forum conveniens*” is unjustified and misleading. First, recourse to the doctrine in question, which is known in common law countries as *forum non conveniens*, may

¹⁵⁰ A/CN.9/544, para. 31.

¹⁵¹ A/CN.9/WG.III/WP.101.

¹⁵² Twelfth session, A/CN.9/544 para.23; thirteenth session, A/CN.9/552 para. 79; nineteenth session, A/CN.9/621, para. 141; 41st session of the Commission, A/63/17, paras 79 and 80.

have a justification in the countries in which there are no positive rules on the jurisdictions of the judicial authority but is meaningless in the jurisdictions, such as most of the civil law countries, in which positive rules exist. Secondly, during the sessions of the UNCITRAL Working Group cited by Chuah there has never been a reference to such a doctrine, but there have been discussions on the connecting factors that could justify a reference in articles 66 and 68 to the jurisdictions under discussion¹⁵³.

The view that it must be assumed that the restriction of the *fora* to those indicated in article 68 is “for the benefit” of the maritime performing parties is debatable, even though it might find a basis on article 71(1). In any event article 68 provides that the plaintiff has the right to institute proceedings in the place indicated in (a) and (b) and consequently the maritime performing party cannot request that the proceedings be moved to one of the *fora* indicated in article 64: that is in patent conflict with article 71(2).

Subsequently Chuah raises (in para. 15.36) the problem of a maritime performing party that is neither domiciled nor carries out his activity in a Contracting State. This, however, is a false problem. In fact pursuant to article 19(1)(a) the Rotterdam Rules apply only in respect of maritime performing parties that receive the goods for carriage or deliver them in a Contracting State or perform their activities in a Contracting State. Since the first two alternatives apply to maritime performing parties that perform the carriage of the goods, only the last alternative applies to maritime performing parties that operate in the port areas of a Contracting State and in such case they must be domiciled in such State: it is in fact a general rule that a person that exercises his activity in a State is required to have a domicile in that State.

Finally Chuah considers (in para.15.38) the conditions set out in article 67 for the validity of exclusive jurisdiction clauses in volume contracts and says that that article is likely to have a significant impact on actions against a maritime performing party, and that it is not especially (*sic*) clear what connection there is between articles 4 and 19 and article 67. I suggest that this problem does not arise, because article 67 only applies in respect of actions against the carrier.

Conclusions

Chuah says that he has hopefully demonstrated some of less than obvious problems with the application of articles 4 and 19 and that these problems stem largely from the Convention’s structural weakness. I do not think his attempt has

¹⁵³ For example, in para.118 of A/CN.9/576 the following statement is made: “There was continued support in the Working Group for the inclusion of the place of receipt and the place of delivery as connecting factors upon which to base jurisdiction (see A/CN.9/572, para.127)” and in para.11 of A/CN.9/591 the following statement is made: “The view was reiterated that the port of loading and the port of discharge should be included as appropriate connecting factors upon which to base jurisdiction in actions against the carrier under draft article 75...”.

been successful, nor that he has provided any evidence of the alleged “structural weakness” of the Rotterdam Rules.

Chapter 16. Jurisdiction and arbitration, by Professor Yvonne Baatz (pages 319-342)

After a brief Introduction followed by a section in which she summarizes the current international position, Professor Baatz devotes the whole of her article to a thorough analysis of the provisions of the Rotterdam Rules on jurisdiction and arbitration. She starts saying that there have been during the sessions of Working Group III diametrically opposed views as to whether exclusive choice of courts clauses should be recognized and, in the affirmative, whether they should be binding on third parties and that ultimately a compromise was reached pursuant to which chapters 14 and 15 of the Rotterdam Rules, regulating respectively jurisdiction and arbitration, would be binding on Contracting States only if they made an express declaration to that effect.

Her commentary of chapter 14, to which she devotes most of her article, starts with the analysis of the rules applicable to volume contracts. In the section entitled “Party choice and volume contracts” she says that whereas the Hamburg Rules always give the claimant (not defined) the right of choice of the court amongst those enumerated in article 21, the Rotterdam Rules distinguish between contracts in which (one of) the parties needs mandatory protection and contracts – the volume contracts – in which they need only some protection and consequently also a greater freedom is also granted in respect of exclusive choice of court agreements.

Professor Baatz then analyzes the provisions relating to the exclusive choice of court agreements. In the section entitled “Exclusive court jurisdiction agreement in a volume contract between the shipper and the carrier” she considers the rules on such agreements applicable between the shipper and the carrier and draws a comparison (at pages 325-327) between those in article 80 applying generally to derogations from the rules of the Rotterdam Rules relating to obligations and liabilities and those in article 67 on exclusive choice of court agreements and rightly says that notwithstanding the lack in article 67 of the requirements set out in article 80(2)(d), since article 67 (1)(a) requires the section of the volume contract containing the agreement, the jurisdiction clause must necessarily be set out in the volume contract itself. In the subsequent section, entitled “Exclusive court jurisdiction agreement in a volume contract between the carrier and someone other than the shipper” she analyses (at pages 327-329) the additional requirements set out in article 67(2) and wonders how wide is the group of persons that may be bound by the exclusive jurisdiction agreement, saying that presumably it includes consignees and transferees as well as assignees of the bill of lading and cargo insurers. It is suggested that the person that may be bound by the arbitration agreement is, prior to delivery of the goods, the controlling party and, after delivery, the consignee or a person that exercises a right of subrogation.

There follows (at page 329) a section entitled “Jurisdiction agreement concluded after the dispute has arisen” in which a commentary is made of article 72. Professor

Baatz says that it is not clear how article 72 relates to article 66 and wonders whether the jurisdiction agreement under article 72(1) must be exclusive. As regards the relationships between articles 72 and 66 she says that article 66 entitles the plaintiff to bring an action against the carrier in one of the jurisdictions indicated therein “unless the contracts of carriage contains an exclusive choice of court agreement that complies with article 67 or 72” and that it is not easy to see how this wording can be satisfied in the case of article 72, as article 66 appears to require that the jurisdiction agreement be contained in the contract of carriage and that it is exclusive. I suggest that the reference in article 66 to article 72 is made merely to avoid that the reference to article 67 might be construed as to exclude the validity of an exclusive choice of court agreement other than where the conditions set out in article 67 are met. The purpose of article 72 is to make clear that after a dispute has arisen articles 67 and 68 do not apply anymore. In the last section on this subject Professor Baatz makes a summary of her previous analysis.

After briefly considering in the subsequent sections (at pages 331-335) the other provisions of chapter 14 Professor Baatz makes an assessment of chapter 14. She quite rightly says that the requirement thereunder for an exclusive jurisdiction agreement are much more restrictive than those under article 23 of EC Regulation 44/2001 (that is one of the main reasons for which the opt-in provision has finally been agreed) but that, since the EC Regulation has given rise to interpretation problems¹⁵⁴, one of the test of the merits of the Rotterdam Rules is whether they address such problems. Whatever the conclusion might be, the fact remains that only the European Union may decide to opt-in chapter 14 and thereby cause its provisions to prevail over those of Regulation 44/2001. In any event it is not clear what her conclusion is since while she says that the Rotterdam Rules are to be applauded for trying to make the requirements in volume contracts fairer in that the parties should be aware of an exclusive jurisdiction clause, the line drawn between volume contracts and other contracts is difficult to justify. Other aspects of chapter 14 she considers unfavourably are the conditions under which an exclusive jurisdiction clause may be binding on third parties, in conflict with the position in English law and, also, in Regulation 44/2001.

In her subsequent analysis of chapter 15 Professor Baatz quite rightly says that moving the place of arbitration (she means to a place other than that considered in the applicable arbitration rules) is a major stumbling block to acceptance of chapter

¹⁵⁴ Professor Baatz refers to the case *Trasporti Castelletti Spedizioni Internazionali S.p.A. v. Hugo Trumpp S.p.A.* in which the Italian Court of Cassation referred to the European Court of Justice fourteen issues (they were actually thirteen) in respect of the interpretation of article 17 of the 1968 Brussels Jurisdiction Convention and says that it took more than ten years to obtain a judgment for the European Court of Justice. The case may have been pending in Italy for that length of time, but, in fairness to the Court of Justice the judgment of the Italian Court of Cassation was issued on 21 January 1997 and the judgment of the Court of Justice was delivered on 16 March 1999.

15. Indeed in case of institutional arbitration, the applicable rules are to a greater or lesser extent connected with the law of the country in which the relevant institution is located. This is the case for the London Maritime Arbitrators Association¹⁵⁵, for the *Chambre Arbitrale Maritime de Paris*¹⁵⁶, for the Society of Maritime Arbitrators Inc. of New York¹⁵⁷, for the Russian Maritime Arbitration Commission¹⁵⁸, the Arbitration Rules of the China International Economic and Trade Arbitration Commission (CIETAC) as revised on 3 February 2012¹⁵⁹ and the Arbitration Rules adopted on 5 July 2004 by the China Chamber of International Commerce¹⁶⁰.

¹⁵⁵ In s.14 of the LLMA Terms (2912 edition) reference is made, in respect of the powers of the tribunal, to the U.K. Arbitration Act 1996. Reference to s. 69 of the Act is made in s. 22 and reference to s. 57, that regulates the correction of the award.

¹⁵⁶ Pursuant to article II of the Arbitration Rules the arbitration is administered by the Committee of the *Chambre Arbitrale* and pursuant to article IIbis in case of international arbitration the rules of the *Nouveau Code de Procédure Civile (NCPC)* apply. They apply as well in case objections are raised against the appointment of an arbitrator (article VII). Further reference to the French NCPC are made in other articles of the Rules, including the application for setting aside an arbitration award (article XVII).

¹⁵⁷ Pursuant to section 7 of the Maritime Arbitrators Rules the arbitration is to be held in New York unless the parties agree otherwise and reference is made in the Rules to the United States Arbitration Act in respect of the intervention of the U.S. Courts in the arbitrations proceedings as is the case, for example, of failure of one party to appoint his arbitrator (section 10 of the Rules).

¹⁵⁸ Article 2 of the Rules of the Maritime Arbitration Commission provides that the place of arbitration meetings shall be the city of Moscow, even if a hearing may be held in another place. Since the secretarial work, pursuant to article 2(4), is entrusted to the Commission, it seems to be hardly conceivable that hearings may be conducted outside Russia.

¹⁵⁹ Even if individuals are appointed as arbitrators, formally pursuant to article 2(6) of the Arbitration Rules the parties are deemed to submit the dispute to CIETAC and it is CIETAC that, pursuant to article 6, has the power to determine the existence and validity of the arbitration agreement. Pursuant to article 49 the draft award must be submitted by the arbitral tribunal to CIETAC for its scrutiny.

¹⁶⁰ Pursuant to article 4 of the Arbitration Rules the Arbitration Commission has the power to decide on the existence and validity of the arbitration agreement. Pursuant to article 23 of the Rules if a party to arbitration proceedings seeks provisional or protective measures it must apply to the Arbitration Commission who in turn will submit the application to the competent Chinese Court and pursuant to article 31 where a party intends to challenge the appointment of an arbitrator, it must submit a petition to the Arbitration Commission. Finally the draft award must, pursuant to article 63, be submitted for review to the Arbitration Commission.