

On the International Transport Laws' Uniformity Which the Rotterdam Rules Aims for

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I Preface

The carrier and the shipper as two opposite parties are apparently contradictory due to differences in interests; on the other hand, they are dependent on each other for coexistence due to potential mutually beneficial opportunities. Studies of relevant laws and formulation of the laws shall aim for win-win situations for both parties instead of making their opposition look worse. The Rotterdam Rules, therefore, shall be viewed, analyzed and assessed with a non-bias angle.

At present, discussions caused by the Rotterdam Rules are still ongoing. In general, academics said both good and bad things about it, whereas relevant industries care more about its consistency and clarity because both the carrier and the shipper are worried about all uncertainties that may occur. It's too early to estimate what impacts the Rotterdam Rules will bring to China's shipping and relevant trading industries in a complete and objective way. At this moment, China should not consider to sign and accept the Rules.

If we look at the Rotterdam rules from another point of view, that is to achieve uniformed laws governing international carriage of goods, all good and bad comments about the convention shall be respected, and experiences and lessons from formulation of the convention shall be discussed and debated for improvements.

II Different Views on the Rotterdam Rules

The Rotterdam Rules are the richest, most comprehensive and complicated convention on international carriage of goods in the world. In order to cater to the development of international trade and transportation, the convention has made many innovative provisions. These new provisions have received extensive attention and hot discussions on the impacts that may be caused.

Supporters express a positive attitude toward the convention and expect for uniformity and optimistic prospects in the field of maritime carriage. Adversaries are worried about the convention's uncertainties, operability, and new problems caused by the new concepts introduced. They are questioning if the goal of achieving uniformity and positive prospects of the industry could come true.

Besides, there are other controversies surrounding its prolonged content, intricate structure, and obscure wording of the convention. Its newly-coined terms need to be clearly defined and explained; the logic relationship between the chapters and articles need to be enhanced; and some ambiguous regulations demand further clarification.

Through further research and studies, the problems in "Rotterdam Rules" have been gradually discovered and revealed. Dissenting voices have been heard to question the purpose of the convention, that is the convention attempts to re-balance interests between different parties. The initial common view is that most of the carriers are not optimistic about the convention. But now, the cargo owners do not seem to be optimistic about the convention neither.

These "innovations" actually leave room to controversy and increase the implementation difficulty. There are more problems. These problems, concerning the feasibility of the goal of "unification", demand serious analysis and tacking. However, we see no agreed answers to them so far.

All these facts alert us to the complexity, uncertainty, and difficulty of this convention, reminding us to be more reserved regarding its effect to improve the legal certainty and law unification. We should be critical to its "innovations", instead of embracing them without any analysis. We must be aware to its intrinsic complexity and uncertainty also.

III Deviation Between Its Target and Likely Result

We can easily see that "unification" lies in the very core of the Rotterdam Rules. That's why it's highly expected. "Generally speaking, to an international convention, the wider its coverage and the more detailed its provisions, the narrower its acceptance. Things would be even harder if it is compulsory". The Rotterdam Rules encompasses carriage by sea, multimodal transport all into its scope. This flawed design will undermine its success.

The convention seems to be comprehensive but indeed meaningless in some ways because it is trying to include every detail and becomes too complicated to be rational and operable in terms of logic and structure. The convention was written with obscure text and is full of terminology and cross-referencing between terms, so the execution of the convention would be much more difficult than predicted. As a result, the Nature of the Rotterdam Rules has been Queried.

The goal is too lofty. That is, too extensive, compressive, and rigid to respect the periodic characteristics of the development; Too ambitious to be practical. These two defects will eventually undermine its target on unification.

IV Untimely Rotterdam Rules

Rotterdam Rules is another endeavor made by the international society to unify the transportation laws. This convention, however, was born in the tempest of the world financial crisis.

The pain incurred by the financial crisis on the global economy is still lingering. The international trade, as the backbone of the international shipping industry, is still staggering to its feet. Global shipping industry was badly hit too. All parties in this industry, from global carriers, consignees, to parties defined in the Rotterdam Rules, are all under great and mounting survival pressure. To make things even worse, trade protectionism rebounds and economy globalization

suffers setback. A new convention introduced at such a time, attempting to change the established processes and practices, to re-establish new orders and laws on international carriage of goods, and to redistribute the obligations and rights of all stakeholders, is just not well-timed.

Projected against such a reality, this ambitious convention appears even more utopian.

V Rotterdam Rules Will not End the Process of Uniformity

No a uniformed law governing international marine transport and multimodal transport has ever been achieved worldwide, which is due to different laws chosen by different countries. This can be shown in the following situations.

1. significant differences can still be found in the laws used by different countries and regions, although they have the trend of converging to some extent.

2. there are differences for conventions and laws governing multimodal transports by water, air, land, and rail horizontally.

3. For each single mode of transport, there exists a lot of international conventions which are different for the same type of transport mode.

4. there are different attitudes towards transport conventions in different countries or regions.

5. different points of view are held towards the same transport convention and terms and conditions in it in different countries or regions.

6. internal laws ruling the same type of transport mode may be different from country to country.

Experiences have shown virtually all current conventions are failing to achieve their goal. And it is not optimistic to have a uniformed law which is accepted by all the countries across the world even in the time far into the future. And this is well illustrated by the Multimodal Transport Convention which was passed by 84 UNCTAD members and what happened after its passing.

Such diversified and complex laws present a challenge to trade globalization and become the drivers of uniforming international goods transport laws. The situation where there is no a uniformed international sea transport law will continue for a very long time.

All the problems found in the Rotterdam Rules seem to tell us that the efforts of uniforming international sea transport laws by the international society will not be ended by the Rotterdam Rules.

VI The Path to a Uniformed International Transport Law Still Needs to be Explored.

After all these years, however, Rotterdam Rules, among others, seems to repeat the way of the Multimodal Transport Convention which tried to formulate a large and complete set of laws.

A rational, effective, and actionable way needs to be explored by drawing lessons from Rotterdam Rules.

Further, it is not viable to create a set of laws that cover all the transport modes in the current condition. Even achieving a uniformed law for a certain part of them will be a great success. A

practical and actionable way to achieve a uniformed international goods transport law is employing a Piloting and Rolling Out approach while protecting interests of different countries. This is the fundamental guideline of uniforming the laws of different transport modes. One another way to achieve a uniformed international goods transport law will be trying to integrate the laws governing individual transport modes with the help of local laws. Maybe this can be done initially by uniforming laws governing single transport modes.

By drawing lessons from the past, we can at least recognize the following fact: the efforts of achieving a united transport law should start from a partial uniformity while taking into account the existence of local laws. In addition, a widely recognized convention should not be an all-inclusive one and cover too much details and too rigid to be flexible. And such a convention should never attempt to cover everything and define everything.

VII Conclusion

The Rotterdam Rules is making international maritime laws more complex. We will wait and see what the convention can bring to us because the gap between its vision and reality is still big.

"The life of law doesn't lie in logic, but experience."^① Paradox cannot deny the trend of uniformity. One most important thing we can learn from Rotterdam Rules is the initiatives of achieving a united international goods transport law should be adapted to and meet our growth needs. And, we cannot achieve this over one night and there is a long way to go to achieve this. We need to keep moving and exploring.

^① The Common Law , by Oliver Wendell Holmes, Jr.

从《鹿特丹规则》看国际货物运输法律的统一

(在 CMI 2012 年北京大会上的发言简稿)

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一、说明

承、托双方是运输法律制度调整的两个相互对立而又相互关联的主体。研究和创建新法律制度的目的不是强化对立，而是促进双赢。研究《鹿特丹规则》，应以不带倾向性的视角对其观察、分析和评估。

《鹿特丹规则》在中国引发的热议仍在持续。总体而言，学界对它褒贬不一；业界，无论是承运人还是托运人，却对之普遍存疑，对其诸多不确定性深感忧虑。现在要求中国政府对这个公约表态的条件还远未成熟。

从探讨国际货物运输法律统一化的角度思考，关于这个公约的各种意见都应该重视，对制定该公约的经验和教训都值得总结。

二、对《鹿特丹规则》的不同评价

《鹿特丹规则》是目前世界上内容最丰富、涉及问题最广、适用范围最宽、结构最复杂、条款最多的国际货运公约。为适应当今国际贸易和运输方式的发展，该公约做出许多创新性的规定。这些规定，将会产生怎样的影响，受到广泛关注，成为热议的话题。

支持意见，对公约给予积极评价，对它统一的作用予以期待；质疑意见则对其不确定性、可操作性、创新可能引发的新问题等深感忧虑，对其前景和能否成就统一的目标存疑。

《鹿特丹规则》的条文众多，内容冗长，结构复杂，有些章节和条款之间的逻辑关系不甚清晰，有些规定不够明确，需要再细化和解释。随着研究的深入，公约中存在的问题被逐渐发现和揭示出来，对它质疑的声音也越来越多。还有来自不同方面的意见表明，该公约试图重新平衡其利益的各方，对这个公约本身其实都大不满意。此外，由这个公约创新所带来的诸多问题，都还没有统一的答案。

这些事实表明：这个公约带来的新问题不少；实施的复杂性、不确定性和困难程度不容小觑；由它实现增进法律确定性和实现统一化的目标存在诸多困难。因此，对这一公约中的创新，不能简单地直接加以肯定；对于与创新伴生的复杂性和不确定性，则须予以重视。

三、《鹿特丹规则》效果和目标的偏差

“统一”是《鹿特丹规则》的核心目标，也是该公约被寄予很高期望之所在。一般而言，国际公约覆盖面越广，规范越细，获得广泛接受往往越难；而如果公约还是强制性的，便会难上加难。该公约将包括海运在内的多式联运的全部问题，一并纳入调整范围。这种制度设计，极易损毁它成功的希望，使其统一目标显得渺茫。

《鹿特丹规则》试图涵盖一切，结果使它的公约性质和定位遭到质疑。它的内容过于庞杂，综合性和包容性有余，而合理性和可操作性不足，整体架构缺乏内在逻辑关联，条款之间频现交叉引用或相互参照，晦涩的文字和新创的名词概念读来费解，预计实际执行会比想象更加困难。

由于目标设定的过于高远，使制定公约的原则出现偏差，即求大、求全、求严，希望一次性地解决全部问题，结果忽视了发展的阶段性，超越了客观现实所能接受的可能，从而影响了公约的严整性、逻辑性、可操作性，最终将会影响其统一目标的实现。

四、《鹿特丹规则》生不逢时

《鹿特丹规则》是国际社会致力于统一包括海运在内的国际货物运输法律的又一尝试。这个伴随全球金融风暴问世的公约生不逢时。

金融风暴对全球经济的伤害和影响，尚远未结束。作为国际航运重要支撑的国际贸易持续不振，全球航运业普遍遭受重创。全球的承运人、托运人以及被《鹿特丹规则》所定义的其他各关系方，如今正承受着巨大的生存压力。在世界各国都不得不面对如何才能走出困境的同时，贸易保护主义抬头，经济全球化受阻，国际货物运输法统一化同样在经受着考验。

“理想很丰满，现实很残酷”。这个新公约的内容使其目标的乌托邦色彩显得更加浓重。

五、《鹿特丹规则》不会终结统一化进程

世界范围内，调整国际海上货物运输和国际多式联运的法律制度始终没能统一。这是各国对相关法律制度不同选择的结果。这种复杂性主要表现为：

- 1、世界不同国家和地区之间的法律制度，虽有某种融合的趋势，但仍然存在明显差异；
- 2、在调整海、空、公路、轨道等不同货物运输方式的公约和法律制度之间存在差异；
- 3、在同一运输方式范围内的不同国际运输公约之间存在差异；
- 4、不同国家对各运输公约的态度选择，可能存在差异；
- 5、不同国家调整同种运输关系的国内立法，可能存在差异；
- 6、不同国家对同一公约以及其中某些具体规定的适用，可能存在差异。

因此，法律制度的多样性、复杂性和国际贸易全球化之间一直存在矛盾，这是国际货物运输法统一化的动因和前提。然而，法律统一化成果的悖论及其历史局限性，决定了国际货物运输法律制度不统一的状况仍将长期存在。

从统一化的实践效果看，在未来相当长的时期内，仍不能奢望世界各国都接受和采纳同一的法律制度。曾经由联合国的 84 个贸发会成员国一致通过却始终没能生效的《多式联运公约》诞生后的国际货物多式联运的实践史，即是例证。

对《鹿特丹规则》不断揭示出的问题和越来越多的质疑已经在昭示：国际社会解决调整多式联运法律制度衔接的多种模式共存的状况，以及统一国际海运法律的进程，不会因《鹿

特丹规则》而终结。

六、统一国际货物运输法的路径仍需探讨

《鹿特丹规则》统一国际运输法律制度的总体思路表现为，试图制定一套大而全，足以涵盖各种运输方式和所有环节的法律制度体系。然而，现在还远不具备这种条件。

国际社会应该认真反思《鹿特丹规则》的立法经验和教训，转换思路，继续探寻促进统一的合理、有效、可行的路径。

如果国际社会能够逐步地在某些问题上达成一致，那就是了不起的进步和成就。为此，应该在充分顾及各国不同利益的基础上，由易到难，由个别到一般，由简单到复杂地渐次推进。另一方面，以协调各单一运输方式法律制度之间的衔接为前提，辅之以国内法的补充，可能是推进国际货物运输法律制度向统一方向发展的有效途径。而如果从推进各种运输方式内部法律制度统一入手，可能将更有利于不同运输方式法律制度间的衔接与融合。

总结历史经验，至少可以得出这样认识，即：推进国际运输法律统一化，应充分顾及世界多元共存的现实，从寻求部分一致着手和努力。在未来相当长的历史时期内，能够被接受的公约，覆盖面不能过广，适用范围不能过宽，规范不能过细，内容不能过于庞杂，公约的目标应具体，规定不能面面俱到，不能没有适当的弹性，绝不应该把大、全、严作为制定公约的原则和追求。

七、结束语

《鹿特丹规则》的出现，大大增加了国际海运法律制度的复杂性。对于这个公约本身及其前景，需要继续研究和观察。因为现实与这个公约目标的距离尚且遥远。

“法律的生命在于经验而非逻辑”。^①统一化的悖论不能否定统一化的方向。《鹿特丹规则》带给我们的启示是多方面的。其中最深刻的就是，国际货物运输法的统一化，必须与时代发展水平相适应，要适合国际社会发展的需要并与其要求相契合，不可能一蹴而就，不能急于求成。统一化的未来发展之路崎岖又漫长，仍需全球有识之士继续探寻，继续努力。

^①美国实用主义法学、社会法学和现实主义法学奠基人，前美国联邦最高法院大法官，奥利弗·温德尔·霍姆斯(1841年-1935年)在他的《普通法》一书中针对法律形式主义倾向，提出了著名的“法律的生命在于经验而非逻辑”的法律经验论和“法律是对法院将要做什么的预测”的法律预测论。