

THE NEED FOR CHANGE
AND
THE PREPARATORY WORK OF THE CMI

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The Rotterdam Rules were adopted by Resolution 122 of the 63rd session of the United Nations General Assembly on 11th December 2008 and were opened for signature in Rotterdam on 23rd September 2009. Twenty three states have so far signed the Convention.

The preamble to the Resolution recites concerns that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails adequately to take into account modern transport practices, including containerisation, door-to-door transport contracts and the use of electronic transport documents. The Resolution thus identifies three areas where there have been major changes in the industry that necessitate changes to the carriage of goods by sea regime.

I am not going to say any more about the use of electronic transport documents; Justice Johanne Gauthier will speak on this topic in a moment. Nor am I going to say a lot about uniformity. Much has been written about the present disharmony and the problems are well known.¹

They have long been the concern of the CMI. The most recent work began in 1988 when a sub-committee was set up under the chairmanship of Professor Francesco Berlingieri and a study of the then current problems, albeit based on the Hague-Visby Rules, was a major topic at the CMI's conference in Paris in 1990. Five years later a new sub-committee was formed, commonly known as the "Uniformity Sub-Committee", also under Professor Berlingieri's chairmanship. Professor Berlingieri's 1999 report was the starting point for work on the obligations and liabilities of the carrier to be included in the Draft Instrument which the CMI was then preparing for the UNCITRAL secretariat. This Draft Instrument had its origins in the 29th session of the UNCITRAL Commission in 1996, when it considered a proposal to include in its work programme a revision of current practices and laws in the area of carriage of goods by sea with a view to achieving greater uniformity of law. This proposal arose out of UNCITRAL's work on its Model Law on Electronic Commerce, which had exposed the fact that there were significant gaps regarding issues such as the functioning of bills of lading and sea waybills. The CMI took the lead in this project, which initially was primarily concerned with topics, such as electronic transport documents, that were not governed by existing conventions, but it became apparent that this work involved reviewing some provisions of the Hague-Visby and the Hamburg Rules, and this in turn led to

¹ See, for example, Michael F Sturley, "The development of cargo liability regimes" in Hugo Tiberg (ed) *Cargo Liability in Future Maritime Carriage* (Hasselby 1997) 10 at pp 60-64.

a review of the obligations and liabilities of the carrier and the shipper, based initially on Professor Berlingieri's report.

The CMI delivered its Draft Instrument to the UNCITRAL secretariat in December 2001. This Preliminary Draft Instrument was the starting point for the subsequent inter-governmental negotiations in UNCITRAL Working Group III. During the six year period of these negotiations the Preliminary Draft Instrument was changed out of all recognition into the new Convention in terms of detailed drafting, but the basic structure of the Draft prepared by the CMI remains.

I shall now come back to modern transport practices. The Hague Rules were adopted in 1924 – almost ninety years ago. In 1924 the bulk of members of the United Kingdom P&I Club were operators of tramp steamers in the “6-10 Class”. That is they steamed at 6-10 knots on 6-10 tons of coal a day and had a deadweight capacity of 6-10,000 DWT.² Twenty years later saw the construction of over two thousand Liberty ships which had a maximum speed of 11.5 knots and a deadweight capacity of 10,685 DWT. Many of these ships were still in commercial service in the early 1960s when I began to practice. Cargo was often handled by ship's gear. Winches were prone to breakdowns, giving rise to disputes over laytime and demurrage. Tally clerks checked the cargo as it was slung over the rail, noting bags that were torn, slack or stained, and the bills of lading were claused according to their receipts under article III rule 3 of the Hague Rules.

Fifty years later the *Emma Maersk* was launched. She has a speed in excess of 25.5 knots, a capacity of 157,000 DWT and she can carry 11,000 20ft containers.³ Container transport was not dreamt of in 1924 and international container transport only began in the late 1960s⁴. New deep water ports were then needed to accommodate the new container ships and terminal operators needed to invest in new shore facilities. When the *Emma Maersk* called at Felixstowe on her maiden voyage to Europe in November 2006, 300 dock workers unloaded 3,000 containers in 24 hours using six shore cranes.⁵ The whole loading, unloading and stowage operation has been computerised and tally clerks have disappeared. These changes in ship construction and operation demand changes to the carriage of goods regime. Article 25 of the Rotterdam Rules brings the legal regime for deck cargo up to date to take account of cellular container ships, which are not built with the conventional decks of a Liberty ship. Article 40 re-writes article III rule 3 of the Hague Rules and specifically introduces the concept of closed containers.

² See Peter Young *Mutuality The Story of the UK P&I Club* (Granta Editions, 1995) 31

³ www.emma-maersk.com

⁴ The *Ideal-X* made the first containership voyage in April 1956 from Newark, New Jersey, to Houston, Texas. The first transatlantic container service was opened by Moore-McCormack Lines in March 1966. For an account of the “container revolution” see Marc Levinson *The Box How the Shipping Container made the World Smaller and the World Economy Bigger* (Princeton, 2006)

⁵ *Times* 6 November 2006

These technical changes have led to commercial change. Many of the containers discharged from the *Emma Maersk* in November 2006 would have been loaded onto trucks and taken direct to wholesalers' or major retailers' inland distribution depots pursuant to door-to-door transport contracts. Door-to-door transport inevitably followed the container revolution. The CMI led the way in formulating a legal framework with the "Tokyo Rules", which were adopted in 1969. These Rules formed the basis on which the container shipping industry developed its contracts for combined, or multimodal, transport on a network basis which took account of the liability provisions in unimodal regimes for other modes of transport, in particular road and rail.⁶ These concepts have been incorporated into the Rotterdam Rules in article 26, which provides for a limited network regime when loss or damage to the goods occurs during the carrier's period of responsibility, but before their loading onto the ship or after their discharge from the ship.

The carriage of goods by sea no longer simply involves the carrier and the shipper. The concept of the "actual carrier", as opposed to the contracting carrier, was introduced by the Hamburg Rules, but only in the context of port-to-port transport. It was necessary to expand the concept in the Rotterdam Rules to take account of door-to-door transport contracts and the many parties involved in modern transport logistics. Hence the Rotterdam Rules refer to "performing parties", but the Rules draw a clear bright line in respect of liability between "maritime performing parties", who perform the carrier's obligations between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship, and are covered by the Rules, and other, non-maritime, performing parties, such as inland truckers, that are not. The Rules thus extend the Himalaya protection beyond article IV bis of the Hague-Visby Rules, as carriers currently seek to do by contract.⁷ Professor Fujita will develop this topic in more detail later.

The goods discharged from the *Emma Maersk* in November 2006 were mainly consumer goods which would not have been traded during the transit from China. Their carriage did not therefore need to be covered by negotiable transport documents. This development was noted in the Explanatory Note to the Hamburg Rules prepared by the UNCITRAL secretariat and the Hamburg Rules, in the context of port-to-port carriage, apply to all contracts of carriage by sea, as defined by article 1.6. At the 1990 Paris Conference the CMI adopted its "CMI Uniform Rules for Sea Waybills" for voluntary incorporation into contracts of carriage not covered by a bill of lading or other similar document of title. These Rules apply to the contract of carriage any international convention, or national law, that would have been compulsorily applicable if a bill of lading or similar document of title had been issued. The Rules have been widely adopted by the industry⁸ and, by applying the Hague, Hague-Visby or Hamburg Rules to such contracts, they have led to a degree of harmonisation between negotiable and non-negotiable documents. It was a natural development to extend the scope of application of the Rotterdam

⁶ See, for example, the form of bill of lading code named "Combiconbill" issued by The Baltic and Maritime Conference (BIMCO) clause 11.

⁷ See, for example, the "Combiconbill" clause 14.

⁸ See the "Genwaybill" issued by BIMCO.

Rules to govern both negotiable and non-negotiable transport documents that evidence or contain a contract of carriage falling within the requirements of article 5. Again Professor Fujita will say more about this later.

In this short presentation I have outlined the most important changes that have taken place since 1924, mostly in the last 50 years, in ship construction and operation. These changes have driven commercial changes, but the solutions developed by the industry have evolved piecemeal. In my submission the need for change in the international regime is unquestionable. The Rotterdam Rules attempt to bring the industry responses together into a single up-to-date and comprehensive code.

One final point. The changes that I have described have taken place worldwide. Due in large part to containerisation, the shipping industry is now truly global; much more so than in 1924. Regional attempts at solutions are not enough. I believe that only an international convention will provide a sound legal framework for the international carriage of goods by sea and meet the requirements of a fully globalized industry.

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