COMITE MARITIME INTERNATIONAL

The Dossier: Rotterdam Rules Ratification

Standing Committee on Ratification of the Rotterdam Rules.

Chair: Stuart Hetherington

Alexander Von Ziegler

Tomotaka Fujita

David Farrell

Paula Backden

Eduardo Albors

Peter Laurijssen

Andrew Robinson

Observers: Jose Angelo Estrella Faria (UNCITRAL)

Ex Officio: President of CMI, Ann Fenech

List of Relevant Materials and Documents Relating to the Rotterdam Rules.

1. Speech (extracts) by Francesco Berlingieri: CMI Paris Conference 1990; Paris Declaration on Uniformity of the Law of Carriage of Goods by Sea 29 June 1990.

2. CMI Newsletter No 4 1997 Minutes of Executive Council 8 and 14 June 1997.

3. CMI News Letter No 2 1998 (extract).

4. "Uniformity of the Law of the Carriage of Goods by Sea" by Francesco Berlingieri. Report on the Work of the International Subcommittee CMI Yearbook 1999.

5. Statement by the CMI 14 January 1999 CMI Yearbook 1999.

6. "The Treatment of Performing Parties" by Michael Sturley Transport Law CMI Yearbook 2003 Vancouver 1.

7. "The UNCITRAL Carriage of Goods Convention: Changes to Existing Law" by Michael Sturley: CMI Yearbook 2007-2008 Athens I pages 254-263.

8. "The New Convention on International Carriage of Goods Wholly or Partly By Sea: A Civil Law Perspective" by Philippe Delebecque: CMI Yearbook 2007-2008 Athens I pages 264-276.

9. "Introduction" by Tomotaka Fujita: CMI Yearbook 2007-2008 Athens I pages 277-278.

10. "Carrier's Obligations and Liabilities" by Francesco Berlingieri: CMI Yearbook 2007-2008 Athens I pages 279-286.

11. "The Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea: The Liability and Limitation of Liability Regime" by Kofi Mbiah CMI Yearbook 2007-2008 Athens I pages 287-299:

12. "Background Paper on Shipper's Obligations and Liabilities" by Ingeborg Holtskog Olebakken: CMI Yearbook 2007-2008 Athens I pages 300-30.6.

13. "A Brief History of the Involvement of CMI from the initial stages to the Preparation of the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea": CMI Yearbook 2009 Athens II pages 252-254.

14. "Scope of Application, Freedom of Contract" by Hannu Honka: CMI Yearbook 2009 Athens II pages 255-270.

15. "Overview of the Convention The UNCITRAL Perspective" by Kate Lannan: CMI Yearbook 2009 Athens II pages 271-276.

16. "Shipowners' View on the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea" by Knud Pontopiddan: CMI Yearbook 2009 Athens II Pages 282-291.

17. "The New Elements The Facilitation of Electronic Commerce" by Johanne Gauthier: CMI Yearbook 2009 Athens II pages 296-300.

18. Multimodal Aspects of the Rotterdam Rules" by Gertjan van der Ziel: CMI Yearbook 2009 Athens II pages 301-313.

19. "The Rotterdam Rules An Attempt to Clarify Certain Concerns that have Emerged" by Francesco Berlingieri, Tomotaka Fujita, Alexander von Ziegler, Michael Sturley, Gertjan van der Ziel, Stefano Zunarelli, Philippe Delebecque, and Rafael Illescas 5 August 2009, responding to:

    (i) European Shippers Council (March 2009)

    (ii) Economic and Social Council Commission for Europe (May and November 2009)

    (iii) FIATA Position (March 2009)

    (iv) CLECAT Position (May 2009).

20 "The Rotterdam Rules-Some Controversies" by Stuart Beare: CMI Yearbook 2010 pages 516-520.

21. "The Need for Change and the Preparatory Work of the CMI" by Stuart Beare CMI Yearbook 2010.

22. An Analysis of the so-called Montevideo Declaration CMI Yearbook 2010.

23. A Latin American Response to the "Declaration of Montevideo".

24. "The Rotterdam Rules A Cherishable Opportunity for the Unification of the Law" by Henry Li.

25. Papers from Beijing Conference 2012: Michael Sturley: The Rotterdam Rules in Beijing; Alexander von Ziegler: Rotterdam Rules and the underlying sales contract; Kofi Mbiah: Updating the Rules on International carriage of Goods by Sea: The Rotterdam Rules; Andrew Bardot: The UN Convention on the contracts of International

carriage of goods wholly or partly by sea, the "Rotterdam Rules" Practical implications for carriers.

26. CMI International Working Group Paper: "Questions and Answers on the Rotterdam Rules" (10 October 2012).

27. Paper by Stuart Hetherington The Role of the CMI in the Development of Uniform Law for Multimodal Transport (2014).

28 Paper by Stuart Hetherington "Prospects of the Rotterdam Rules at its 10 Anniversary" (2018).

29. Paper by David Farrell Immediate Past President of MLAUS "Opinion: to support US Interests, Ratify UNCLOS and Rotterdam Rules".

SPEECH OF PROFESSOR FRANCESCO BERLINGIERI, PRESIDENT OF THE CMI

Monsieur le Ministre,
Mr. President of the French Maritime Law Association,
Ladies and Gentlemen,

To preside over a CMI Conference in Paris after Mr. Lyon-Caen in 1900, Mr. Paul Govare in 1921 and Mr. Ripert in 1937, is a great honour and to return to Paris once again is a great pleasure for me indeed.

On the Agenda of the 34th Conference of the CMI there are four subjects which are very interesting and, at the same time, very important:

— CMI uniform rules for sea waybills.

— Uniformity of the law of the carriage of goods by sea in the nineteen nineties.

— Electronic transfer of rights to goods in transit.

— Revision of Rule VI of the York-Antwerp Rules 1974.

Allow me to say a few words in respect of each one of them.

CMI uniform rules for sea waybills

The employment of sea waybills in lieu of bills of lading meets precise requirements of modern maritime trade, in view of the impossibility of making bills of lading available to the receiver prior to the arrival of the vessel at destination owing to the velocity of maritime transport. The CMI has focused on the problem and the International Sub-Committee, under the Chairmanship of Sir Antony Lloyd, has prepared a draft of uniform rules which will now be submitted to the conference for consideration.

Two questions in particular seem to have roused the interest of a number of delegates during the work of the International Sub-Committee.

The first is the non-existence in English law of the contract for the benefit of a third party; that makes it necessary to provide a

Amongst the possible different methods of work, the CMI International Sub-Committee chose that of studying some of the most important problems in the field of carriage of goods by sea against the background of the provisions of the 1924 Convention as amended by the 1968 and 1979 Protocols. The purpose of the exercise was to find out whether the aforesaid provisions were still satisfactory and, if not, what might be an acceptable solution.

The result of the work of the Sub-Committee is a study, and not a draft. If the Conference will accept the above method of work and if the study, with all the modifications the Conference will think proper to make, will be approved, perhaps it will be possible to draw some conclusion therefrom.

Electronic transfer of rights to goods in transit

The use of the sea waybill in lieu of the bill of lading has the advantage of avoiding the need of the surrender of the bill of lading in order to obtain the delivery of the goods but has the disadvantage of preventing — or at least of making more difficult — the financing of the purchase price of the goods against the guarantee of the bill of lading. Efforts have been made with a view to avoiding the circulation of the bill of lading and, at the same time, ensuring the circulation of the right to the delivery of the goods. One of the projects — that of Intertanko — was based on the delivery of the bill of lading to a third party who would have kept the document at the disposal of the parties entitled to it so that the right to obtain the bill of lading could be transferred through a notice given to the depositary.

When the CMI decided to study this problem, following the suggestion of the Maritime Law Association of the United States, the Sub-Committee on sea waybills had already progressed in its work. With a view to avoiding that the commencement of the study on a new problem might delay the completion of its work, it was, therefore, deemed preferable to establish a separate Sub-Committee under the Chairmanship of Prof. Ramberg. Prof. Ramberg, notwithstanding the late commencement of the work of his Sub-Committee, made very quick progress, thanks to the co-operation of the people to whom he had entrusted the preparatory work, and was able to prepare a draft which will now be submitted to the Conference.

The preliminary question which was considered by the Sub-Committee was that of choosing the person to whom the operation of the system should be entrusted. In this respect, the Sub-Committee departed from the schemes that had been considered by

rule whereby the shipper would enter into the contract of carriage in the name and for the account of the receivers, thereby creating a privity of contract. This formula has not been considered to be acceptable by civil law lawyers, but a compromise seems to be possible.

The second question was raised by our friends from the United States. In their view everything would be clearer and simpler if all other countries wers to adopt the principles of the Pomerene Act in respect of non-negotiable bills of lading — the straight bills of lading — which do not have to be returned to the carrier in order to obtain redelivery of the goods. In other words, the straight bills of lading have the characteristics of sea waybills.

The legal regime differs not only in England, but also in the civil law countries where the bills which state that the goods are consigned to a specific person are documents of title.

It is evident that if the idea of voluntary rules is accepted by the Conference, it is necessary that they may fit in with the various legal systems existing in the different countries. But even if we were to consider the alternative of an International Convention, it would probably prove difficult to persuade all countries, in which the bills of lading which state that the goods are consigned to a specific person are documents of title, to change their legal system. Also in this case, we should, therefore, try to find a solution which would be acceptable to everybody: with goodwill and understanding of other people's problems, one cannot but succeed.

Uniformity of the law of the carriage of goods by sea in the nineteen nineties

Even if the Brussels Convention of 1924 has obtained indisputable success and ensured considerable uniformity in the domain of carriage of goods by sea, and more specifically, in respect of the rules governing the liability of the carrier, during the last 20 years the Brussels system has been criticised as being unjust for shippers, incomplete and obscure. The result has been the preparation of a new Convention, the Hamburg Convention of 1978.

Though such Convention is not yet in force, the problem of the future co-existence of the two Conventions, and the lack of uniformity which would follow, has caught the attention of the CMI.

The aforesaid lack of uniformity might be avoided if, after the entry into force of the Hamburg Rules, all maritime countries were to denounce the Brussels Convention and ratify the Hamburg Convention. It is, however, evident that, in order to do so, the Contracting Parties to the 1924 Convention should be persuaded that the Hamburg system is decidedly preferable to that of Brussels.

UNIFORMITY OF THE LAW OF THE CARRIAGE OF GOODS BY SEA IN THE NINETEEN NINETIES

Following the decision of the Assembly to place this subject on the agenda of the Paris Conference, the International Sub-Committee constituted by the Executive Council held several meetings. During these meetings it was decided that the most relevant legal issues relating to the carriage of goods by sea should be considered on the basis of the 1924 Brussels Convention on Bills of Lading, as amended by the 1968 and the 1979 Protocols (the Hague-Visby Rules).

It was decided that the following subjects should be examined:

Identity of the Carrier
Contracts and Documents
Deck Cargo
Period of Application
Exemptions from Liability
Limits of Liability
Deviation
Damages Including Damages from Delay.

On the basis of the views expressed at the meetings of the Sub-Committee, I prepared a study of the subjects listed above. Problems of interpretation, if any, of the relevant provisions of the Hague-Visby Rules were mentioned and preliminary views were expressed as to whether or not there was a need for a change of the rules and, if so, on the manner in which such change could be brought about.

The manner in which the Conference considered the Study and the outcome of the work of the Conference is clearly summarized in the «Paris Declaration on Uniformity of the Law of the Carriage of Goods by Sea» which follows and which was adopted by the Conference without any dissent.

It may be added that the French Maritime Law Association submitted to the Conference for consideration a draft of uniform rules for voluntary adoption, but that the strongly prevailing view

was that, although the draft expressed principles worthy of consideration, rules for voluntary adoption would not foster greater international uniformity.

Paris, 30th June 1990.

Francesco BERLINGIERI

PARIS DECLARATION ON UNIFORMITY OF THE LAW OF CARRIAGE OF GOODS BY SEA 29th June 1990

1. During the XXXIVth International Conference of the Comité Maritime International held in Paris from 24th to 29th June 1990, a draft Document entitled «Uniformity of the Law of the Carriage of Goods by Sea in the Nineteen Nineties» was discussed by a Committee of the Conference largely on the basis of the Hague-Visby Rules and in which discussion all the 41 National Associations represented at the Conference participated.
2. Following this discussion, the draft was amended to clarify certain points which were raised and to reflect views expressed by delegates which were not always unanimous. The Document, as amended, is attached. It was presented to a Plenary Session of the Conference on Friday, 29th June and was approved as a basis for further work.

3. In approving the Document as a basis for further work, the hope was expressed that the International Organizations concerned will continue to offer to the CMI the co-operation it has received in the past for the work that lies ahead.

UNIFORMITY OF THE LAW OF THE CARRIAGE OF GOODS BY SEA IN THE NINETEEN NINETIES

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UNIFORMITY OF THE LAW OF THE CARRIAGE OF GOODS BY SEA IN THE NINETEEN NINETIES

Introduction

1. It is now almost 100 years since the Bill H.R. 9176, which ultimately led to the passage of the Harter Act 1893, was introduced in the U.S. Congress. The Harter Act was the beginning of the movement which led to the uniformity brought about by the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, popularly known as the Hague Rules. The Convention is itself based on a set of rules adopted by the Maritime Committee of the International Law Association at a meeting in the Hague in September 1921. It was intended that those rules should be voluntarily incorporated by reference in bills of lading, but owing to opposition from cargo interests the rules were re-cast in legislative form at a meeting of the Diplomatic Conference on Maritime Law in Brussels in August 1924.

This was the first time that freedom of contract in relation to contracts of carriage of goods by sea was restricted by an international convention.

The Rules as adopted by the 1924 Diplomatic Conference were subsequently amended by a Protocol adopted at the Diplomatic Conference held in Brussels in February 1968 (the Rules as amended will be referred to as «Hague-Visby Rules»). A further amendment was made by a Protocol adopted at the Diplomatic Conference held in Brussels in December 1979.

2. The Assembly of the CMI held on 22nd April 1988 decided that the problem of uniformity of the law of the carriage of goods by sea should be investigated. It was subsequently decided that the investigation should take the form of a critical review of the Hague-Visby Rules.

Among the reasons for this decision were the following:

First, a considerable time has elapsed since the Hague Rules were last the object of study by a Conference of the CMI. Such a study was last conducted in 1963 at the Stockholm Conference, where the draft of the Visby Protocol was approved.

Secondly, many important events have occurred since then, including substantial changes in transportation technique and in the documentation of contracts of carriage as well as the adoption of a new international convention, the 1978 United Nations Convention on the Carriage of Goods by Sea («Hamburg Rules»).

Thirdly, whether or not the Hamburg Rules achieve widespread adoption, it is likely that the Hague-Visby Rules will remain in force for many years. A study by the CMI of potentially controversial provisions may be of assistance in generating greater uniformity.

3. For this purpose it was decided to select a number of problems. The problems which were chosen are the following:

1. Identity of the carrier.
2. Contracts and documents.
3. Deck cargo.
4. Period of application.
5. Exemptions from liability.
6. Limits of liability.
7. Deviation.
8. Damages including damages resulting from delay.

I. IDENTITY OF THE CARRIER

1. Introduction

It is now common practice to draw a distinction between the **contracting** carrier, viz. the person who enters into a contract of carriage with the shipper and undertakes to deliver the goods at destination in compliance with the terms of the transport document, and the **performing** (or actual) carrier, viz. the person who operates the carrying ship.

The problem which may arise regarding the contracting carrier is that of identification. The problem which arises in respect of the performing carrier who is not the contracting carrier is whether the shipper or the consignee have a right of action against him either in contract or in tort and, if so, what is the basis of his liability.

The identification of the contracting carrier is sometimes difficult, particularly for the consignee who is not party to the contract

ISSN 0778-9882

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

No. 4 - 1997 COMITE MARITIME INTERNATIONAL
QUARTERLY BULLETIN TRIMESTRIEL

This Issue Contains:

News from the CMI

- Minutes of the meeting of the Executive Council held in London on 14-14 Novembe 1997
- The Future of CMI—Letter of the President of the CMI to the Presidents of the National Associations

News from Intergovernmental and International Organizations

- News from the International Tribunal for the Law of the Sea
- News from IMO

Ratification of International Conventions

NEWS FROM THE CMI

MINUTES OF THE EXECUTIVE COUNCIL
14-15 NOVEMBER 1997

Attending / *Participants*

President: *Président:*	Patrick GRIGGS
Vice-Presidents: *Vice-Présidents:*	Hisashi TANIKAWA Frank L. WISWALL, Jr.
Councillors: *Conseillers:*	Luis COVA ARRIA Karl-Johan GOMBRII David ANGUS Jean-Serge ROHART Ron SALTER Eric JAPIKSE Panayotis SOTIROPOULOS Thomas M. REMÉ
Secretary General: *Sécretaire Général:*	Alexander VON ZIEGLER
Treasurer: in charge until 31.12.97 *Trésorier:* en charge jusqu'au 31.12.97	Henri VOET Paul GOEMANS
Administrator: *Administrateur:*	Leo DELWAIDE
Assistant Administrator: *Administrateur Adjoint:*	Pascale STERCKX
Past President: *Ancien Président:*	Allan PHILIP
Publication Officer: *Directeur des publications:*	Francesco BERLINGIERI

The Executive Council met at the offices of Ince & Co. in London, on 14 November 1997, 14.00. The Council meeting was closed on 15 November 1997, 16.00.
Patrick Griggs, President of CMI, opened the Executive Council session and received the approval from the meeting to proceed pursuant to the agenda submitted to the Executive Council prior to the meeting.

1. Approval of the Minutes of the Executive Council meetings held in Antwerp on 8 and 14 June 1997

The Minutes of the Executive Council meeting held during the CMI Centenary Conference in Antwerp were approved by the Council.

2. Work in progress

a) Uniformity of the law relating to maritime transport

i) Verbal report of the COGS / Steering Committee

The Secretary-General reported on a meeting the Steering Committee had in Palm Desert. During this meeting the work in cooperation with UNCITRAL was discussed at great length and it was decided to give a clear structure to the future work of CMI in this area. It was suggested that the work be divided in primarily three big branches, one being the liability issues discussed by CMI in the International Sub-Committee on Uniformity of Law on Carriage of Goods by Sea, chaired by Francesco Berlingieri. The second main branch would be embarking on the works addressed in the UNCITRAL report on Electronic Commerce being general issues of transportation law and of the law of transport documents not traditionally covered by uniform laws and the relationship between the contract of carriage and the contract of sale. This work would be entrusted to a Working Group which eventually will have to try to divide the entire scope of transport law and the relationship between the contract of carriage and the contract of sale into different sections and instruct each individual section to produce general principles and, possibly, proposals for unification in those areas. The Steering Committee has already started to structure the work by establishing a so-called "flow chart" of a traditional import/export transaction listing all the issues where transportation law traditionally plays an important role. This list has to be checked with industry against logistical realities and updated in all details. It is this list which might provide the Working Groups with guidance when looking for the relevant rules and customs of the trade. It is clear from the outset that this work will not be done without very close cooperation of representatives of the industries within our organisation and in close cooperation with international organisations, such as UNCITRAL, ICS,

Le Conseil Exécutif s'est tenu dans les bureaux de INCE & Co. à Londres, le 14 novembre 1997 à 14 heures. La séance du Conseil a été clôturée le 15 novembre 1997 à 16 heures.
Patrick Griggs, Président du CMI, a ouvert la séance du Conseil Exécutif et a reçu l'approbation du conseil de poursuivre conformément à l'ordre du jour soumis au Conseil Exécutif préalablement à la réunion.

1. Approbation des procès verbaux des séances du Conseil Exécutif tenues à Anvers les 8 et 14 juin 1987

Les procès verbaux des séances du Conseil Exécutif tenues pendant la Conférence du centenaire du CMI à Anvers ont été approuvés par le Conseil.

2. Travaux en cours

a) Uniformisation du droit concernant le transport maritime

i) Rapport verbal du Comité d'organisation / Transport de marchandises par mer

Le Secrétaire Général a rendu compte d'une réunion tenue par le comité d'organisation à Palm Desert. Au cours de cette réunion le travail de coopération avec la CNUDCI a été discuté en détail et il a été décidé de donner une structure claire au travail futur du CMI sur cette question. Il a été proposé de diviser le travail principalement en trois grandes branches, la première étant les questions de responsabilité discutées par le CMI dans le sous-comité international sur l'uniformisation du droit du transport de marchandises par mer, présidé par Francesco Berlingieri. La seconde branche principale se lancerait dans les travaux abordés dans le rapport de la CNUDCI sur le commerce électronique s'agissant de questions générales de droit des transports et de droit des documents de transport qui ne sont pas traditionnellement couvertes par des conventions et la relation entre le contrat de transport et le contrat de vente. Ce travail pourrait être confié à un groupe de travail qui devra essayer de diviser le champ complet du droit des transports et la relation entre le contrat de transport et le contrat de vente entre différentes sections et donner instruction à chaque section individuelle de dégager des principes généraux et, éventuellement, des propositions d'unification dans ces domaines. Le comité d'organisation a déjà commencé à structurer le travail en établissant "l'organigramme" d'une transaction traditionnelle import/export avec la liste de toutes les questions où le droit des transports joue traditionnellement un rôle important. Cette liste doit être vérifiée avec l'industrie en rapport avec les réalités logistiques et mise à jour dans tous les détails. C'est cette liste qui devrait fournir aux groupes de travail les conseils nécessaires à l'occasion de l'examen des règles et coutumes du commerce. Il est clair depuis le début que ce travail ne sera pas fait sans une coopération très étroite des représentants des industries au sein de notre organisation et en coopération étroite avec les organisations

IUMI, IGP&I, FIATA, Shippers' Councils, ICC and others.
The third entity of this big group will be the EDI Working Group which will concentrate on the assistance of UNCITRAL and CMI on issues of EDI and EDI-related issues. At the same time this Working Group will have a constant influence on the work done in the group on maritime transport since the future technologies will greatly influence the way transport law will have to be unified.
The Secretary-General further explained that the Steering Committee should have a constant dialogue with all the international organisations involved and should maintain a sort of round table where high-level feedback could be obtained in order to ensure that the project meets the necessary support from industry.
The President mentioned that the Steering Committee should also ensure that the national associations are involved in the process. The chairmanship of this Working Group relating to issues of maritime transport will have to be decided at a later stage.
The Secretary-General has started to prepare a draft report for the Steering Committee and will, after consultation within this Group, distribute it to the Executive Council for comments.

ii) Verbal report of Professor Francesco Berlingieri (Responsibility)

Francesco Berlingieri referred to his draft report distributed to members of the Executive Council. It was decided that this draft report should be distributed to the members of the International Sub-Committee as well as to all national associations, which should be asked for comments. Thereupon the Working Group (consisting of Pierre Bonassies, Frank Wiswall, Alexander von Ziegler and Francesco Berlingieri) will bring together the comments and include them in a document which then will be sent to national associations for their information. This work should not be formally finalised since it might very well develop through the further process of work in the other two groups (transport issues and EDI) and might, depending on a decision at a later stage, be introduced in the overall work of CMI in this area.
In this context it was mentioned that the IGP&I had raised concern regarding the unilateral steps taken by the USMLA by submitting a revised US COGSA. They asked CMI to intervene in this proceeding in order to avoid this unilateral evolution of maritime law in the US. The Executive Council discussed this aspect in great detail and while they had sympathy for the fact that concerns are raised regarding the proliferation of national enactments, it was realized that CMI had no power to intervene in the national developments within a country. In any event, the developments within the US proved to the contrary that there is urgent need for CMI and the international community to find a new basis for uniformity in this area of law. Patrick Griggs will write to the IGP&I and inform them of the views of the CMI in this respect.

internationales telles que la CNUDCI, l'ICS, l'IUMI, l'IGP&I, la FIATA, les Conseils de chargeurs, la Chambre de Commerce Internationale et autres.
La troisième branche sera le groupe de travail sur l'EDI qui se concentrera sur l'assistance de la CNUDCI et du CMI sur les questions concernant l'EDI et en relation avec l'EDI. En même temps, ce groupe de travail aura une influence constante sur le travail effectué dans le groupe sur le transport maritime puisque les technologies futures auront une grande influence sur la façon dont le droit des transports devra être unifié.
Le Secrétaire Général a ensuite expliqué que le comité d'organisation devrait entretenir un dialogue constant avec toutes les organisations internationales impliquées et devrait maintenir une sorte de table ronde où une information de haut niveau pourrait être obtenue afin de s'assurer que le projet bénéficie du nécessaire support de l'industrie.
Le Président a indiqué que le comité d'organisation devrait également s'assurer que les associations nationales sont impliquées dans le processus. La présidence de ce groupe de travail concernant les questions de transport maritime devra être décidée à un stade ultérieur.
Le Secrétaire Général a commencé à préparer un projet de rapport pour le comité d'organisation et le distribuera, après consultation au sein de ce groupe, au Conseil Exécutif pour recueillir ses commentaires.

ii) Rapport verbal du Professeur Francesco Berlingieri (Responsabilité)

Francesco Berlingieri s'est référé à son projet de rapport distribué aux membres du Conseil exécutif. Il a été décidé que ce projet de rapport serait distribué aux membres du sous-comité international ainsi qu'à toutes les associations nationales, dont les commentaires devraient être sollicités. Cela étant, le groupe de travail (composé de Pierre Bonassies, Frank Wiswall, Alexander von Ziegler et Francesco Berlingieri) rassemblera les commentaires et les inclura dans un document qui sera alors envoyé aux associations nationales pour leur information. Ce travail ne devrait pas être formellement parachevé puisqu'il pourrait très bien se développer au travers du processus de travail dans les deux autres groupes (question de transport et EDI) et pourrait, en fonction d'une décision ultérieure, être introduit dans le travail d'ensemble du CMI dans ce domaine.
Dans ce contexte il a été indiqué que l'IGP&I s'était montré préoccupé au sujet des démarches unilatérales faites par l'association de droit maritime des Etats-Unis en soumettant une révision de la loi américaine sur le transport des marchandises par mer (COGSA). Ils ont demandé au CMI d'intervenir dans ce processus afin d'éviter cette évolution unilatérale du droit maritime aux Etats Unis. Le Conseil Exécutif a discuté cet aspect en détail et tout en comprenant que des préoccupations se fassent jour concernant la prolifération des promulgations nationales, il a été constaté que le CMI n'avait aucun pouvoir pour intervenir dans les développements nationaux à l'intérieur d'un pays. De toute façon, les développements aux Etats-Unis ont prouvé au contraire qu'il y a un besoin urgent pour le CMI et la communauté internationale de trouver une nouvelle

ISSN 0778-9882

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No. 2 - 1998 COMITE MARITIME INTERNATIONAL
QUARTERLY BULLETIN TRIMESTRIEL

This Issue Contains:

News from the CMI
- Meeting of the Executive Council
- Assembly
- Classification Societies
- Issues of transport law

News from the National Associations
- News from the Malta Maritime Law Association

News from Intergovernmental and International Organizations
- News from IMO - 77th Session of the IMO Legal Committee
- News from the IOPC Funds - Meetings of the Executive Committee and Assembly
- News from UNIDROIT - The Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment. Should ships be included?

Ratification of International Conventions

NEWS FROM THE CMI

Meeting of the Executive Council - London 14th May 1998

The CMI Executive Council met in London on 14th May 1998. The minutes of the meeting will be published in the next issue of the Newsletter.

Assembly of the CMI - London 15th May 1998

The Assembly of the CMI was held on 15th May 1998 with the following agenda:

1) Memorials
2) Approval of the Minutes of the Meeting of the Assembly held on June 14th 1997
3) Members
   a) Titulary Members
   b) Members Honoris Causa
   c) Consultative Members
   d) Associations of Maritime Law
   e) New rules for Titulary and Provisional Members
   Verbal report from David Angus and Frank Wiswall
4) Work in Progress:
   a. Uniformity of the law relating to Maritime Transport:
      i) Verbal report from Professor Francesco Berlingieri on Issues of Responsibility
      Presentation of Report of International Sub-Committee
      ii) Verbal report of Dr. Alexander von Ziegler on Issues of Transport Law. Presentation of Background paper
      iii) Verbal report of Dr. Alexander von Ziegler: EDI

Group concluded, however, that it would support such agreement as to formula and limit of liability with respect to classification services as could be reached in direct discussions between IACS and ICS.
By the time of the recent Assembly in May of 1998, agreement had not been reached by ICS and IACS. Accordingly the Chairman of the Working Group, Dr. Wiswall, submitted the Model Clauses for approval by the Assembly with bracketed alternatives in Clause 9 as follows:

> "The limit of liability of [*Classification Society*] in respect of [a single claim arising out of the performance of a service] [all claims arising out of a single incident attributable to the performance of a service] pursuant to these Rules shall not exceed [X million United States Dollars] [Y times the fee charged by [*Society*] for the service in question or X million United States Dollars, whichever is the lesser amount] [X million United States Dollars or Y times the fee charged by [*Society*] for the service in question, whichever is the greater amount]."

It was however stated on behalf of IACS and ICS that negotiations between them were actively underway and agreement on these issues was expected in the autumn of 1998; for that reason they requested that publication of the Model Clauses be forestalled for the time being. On this basis the Assembly adopted both the Principles of Conduct for Classification Societies and the Model Clauses effective 15th May 1998 provided, however, that if the Chairman of the Working Group reports to the Executive Council on 7th November 1998 that final agreement has been reached on the content of Clause 9, the Executive Council may substitute the agreed wording for Clause 9 in place of that set forth above and authorise publication of the Model Clauses in the agreed form.

DR. FRANK L. WISWALL, JR.

Issues of Transport Law

The first meeting of the "round table" on Issues of Transport Law was held at the London Underwriting Centre, 3 Minster Court, London, EC3 on 11th May 1998.

Present:
Mr. P.J.S. Griggs (President of the CMI),
Mr. Alexander von Ziegler (Secretary General of the CMI)
Dr. Frank L. Wiswall Jnr. (Vice-President of the CMI)
Mr. George F. Chandler, III (CMI)
Mr. S. N. Beare (CMI)
Prof. Lars Gorton (CMI)
Prof. Avv. S. Zunarelli (CMI)
Prof. G. J. Van der Ziel (CMI)
Mr. J. Sekolec (UNCITRAL)
Mr. Le Garrec (IAPH)
Ms. Sara Burgess (IGPI)
Ms. Kay Pysden (FIATA)
Ms. Linda Howlett (ICS)
Mr. Søren Larsen (BIMCO)

1. Mr. Griggs welcomed everyone to the meeting and introduced the project. He emphasised that it was largely an information gathering exercise promoted by UNCITRAL. The CMI had not been charged to draft a new document. He went on to describe how the project would be handled within the CMI. The CMI Assembly had authorised the CMI to continue with the work and the Executive Council of the CMI, which would meet the following Thursday, would report to the Assembly at its annual meeting on Friday. The Executive Council had set up a Steering Committee to co-ordinate work on the project. The Steering Committee would be responsible for periodically convening round table meetings of the international organisations which would participate in the project. This was the first such meeting. The Steering Committee had set up an International Working Group to be responsible for the project and had appointed Mr. Stuart Beare as its Chairman. The Working Group had appointed Professor Sturley as it rapporteur. There was also in existence an EDI Working Group, which would continue to exist as a separate entity, as would the International Sub-Committee which was looking at issues of liability, but had not yet produced its report. Issues of liability were outside the terms of reference of the Working Group.

2. Mr. Von Ziegler spoke to the report of the Steering Committee, which had been circulated. He pointed out that this project was different from projects which the CMI had tackled in the past. The law needed unification in the light of modern logistics. The project arose out of UNCITRAL's work relating to electronic commerce and the law would need unification in this context. The CMI would not have access to all the necessary know-how and co-operation with the industry was essential. Whatever might emerge from the project would have to be based on consensus within the industry and had to be considered in the context of trade practice. It also had to be compatible with the electronic environment.

3. Mr. Beare introduced the members of the International Working Group who had met for the first time that morning. As an initial step it had been agreed that each member of the Working Group would prepare a preliminary study of one of the topics. These largely followed the topics referred to in Section III of the report of the Steering Committee, but there had been an element of redefinition. The work would be divided as follows:

(1) Interfaces between carriage of goods and sales of goods - Mr. Beare

(2) Relationships within the contract of carriage - Prof. van der Ziel

(3) Transport documents (excluding bankability and the issues referred to under paragraph 2.2 of Section III of the Steering Committee's report) - Prof. Zunarelli

(4) Bankability - Prof. Gorton

(5) Ancillary Contracts - Mr. Koronka

(6) Issues not covered by existing international conventions - Prof. Sturley

These studies should be completed in September and the next meeting of the Working Group would be held on 22nd October 1998. The preliminary studies would be reviewed at this meeting and he hoped that the Working Group would then be able to begin to prepare an analysis of the areas in which it would request information and assistance from the International Organisations. The Working Group would also consider preparing a questionnaire for national associations within the CMI.

4. Mr. Sekolec outlined the background to the project and referred to the report of the Steering Committee. He said that delegates to UNCITRAL were quite aggravated by the situation prevailing in maritime law. UNCITRAL therefore had gone to the CMI in order to obtain a good picture of existing legal issues, and those which would arise in the future, and how they should be codified. This might be done by legislative action, such as a treaty, a model law or a legislative guide, or by a non-legislative text such as model contracts or model clauses. He was looking forward to the outcome of the study which would highlight the issues and indicate possible solutions. There was no need to hurry; UNCITRAL wanted the CMI to do a job which at the end of the day would command consensus. UNCITRAL wanted everyone on board and he encouraged all international organisations to put forward their views so that there would be no surprises. He believed that this project would evolve into a very important project and he appealed for co-operation.

5. Mr. Griggs then invited comments from those attending the meeting and suggestions as to any other inter-governmental or non-governmental bodies which should be invited to participate in the project.

6. Ms. Howlett said that the International Chamber of Shipping would take the matter up with Intertanko and Intercargo. These organisations would probably ask the International Chamber of Shipping to deal with it in order to avoid duplication.

7. Ms. Howlett questioned why it was proposed to invite the US Chamber of Shipping to participate, as the US Chamber was a member of the International Chamber of Shipping. Dr. Wiswall suggested that input from the US Chamber could be obtained through the US Maritime Law Association.

8. Mr. Von Ziegler concluded by introducing and circulating copies of the flow chart which he had prepared, with assistance from Mr. Chandler. He concluded by emphasising how much the input from the international organisations into the work of the Working Group would be appreciated.

9. There being no further comments, Mr. Griggs closed the meeting and thanked everyone for their attendance.

STUART BEARE

NEWS FROM THE NATIONAL ASSOCIATIONS

News from the Malta Maritime Law Association

At the Annual General Meeting of the Malta Maritime Law Association held on 14 July 1998 the following new Committee was elected:

President: Dr. Tonio FENECH, Fenech & Fenech, 198 Old Bakery Street, Valletta, Malta. Tel.: (356) 241.232 - Fax: (356) 221.893.

Vice-President: Dr. Francesco DEPASQUALE, Thake Desira Advocates, 11/5, Vincenti Buildings, Strait Street, Valletta, Malta. Tel.: (356) 238.900 - Fax (356) 246.300.

Secretary: Dr. David TONNA, Tonna, Camilleri & Vassallo, 52, Old Theatre Street, Valletta, Malta. Tel.: (356) 232.271 - Fax (356) 244.291.

Treasurer: Dr. Kevin DINGLI, Dingli & Dingli, 18/2, South Street, Valletta, Malta. Tel.: (356) 236.206 - Fax: (356) 240.321.

Members:

Dr. Max GANADO, Prof. J. M. Ganado, 171, St. Christopher Street, Valletta, Malta. Tel.: (356) 235.406 - Fax: (356) 240.550.

Dr. Ann FENECH, Fenech & Fenech, 198 Old Bakery Street, Valletta, Malta. Tel.: (356) 241.232 - Fax: (356) 221.893.

Dr. Malcolm MIFSUD, Fenech & Fenech, 198 Old Bakery Street, Valletta, Malta. Tel.: (356) 241.232 - Fax: (356) 221.893

The address of the Association is the following:

MALTA MARITIME LAW ASSOCIATION
c/o Fenech & Fenech Advocates - 198 Old Bakery Street, Valletta VLT 09, MALTA
Tel. (356) 241232 - Fax (356) 221893

UNIFORMITY OF THE LAW OF THE CARRIAGE OF GOODS BY SEA

REPORT ON THE WORK OF THE INTERNATIONAL SUB-COMMITTEE

Introduction

The process of unification of the law relating to liability arising out of the carriage of goods by sea, which was begun by the CMI as long ago as 1907, continued satisfactorily until the Visby Protocol of amendment to the Hague Rules was adopted in 1968. At that time there were 73 States parties to the 1924 Convention, including most of the major maritime nations of the world. Some other States had introduced the provisions of the Hague Rules into their domestic legislation without ratifying the Convention. With the entry into force of the Visby Protocol in 1977, the degree of uniformity decreased, as only a limited number of States parties to the Convention became parties to the Protocol. Presently there are 60 States parties to the unamended 1924 Convention, 17 States parties to the Convention as amended by the Visby Protocol and 18 States parties to the Convention as amended by the Visby Protocol and by the SDR Protocol. Moreover, although about 8 States simultaneously ratified the Protocol and denounced the unamended Convention, about 12 other States have ratified the 1968 Visby Protocol without denouncing the original 1924 Convention.

After the Hamburg Rules entered into force, the pace of disunification increased significantly. In fact, whilst the amendments made to the original Hague Rules by the two Protocols did not affect the basic provisions of the Rules, contained in Articles 3 and 4, the Hamburg Rules brought about a system of liability which significantly different from that of the Hague and Hague-Visby Rules.

Of the 25 States at present parties to the Hamburg Rules, 12 were parties to the 1924 Convention and 13 were not. The confusion is increased by the fact that only one of the States parties to the Hague Rules appear to have denounced them whilst the other 11 do not appear to have done so. Moreover several States parties to the Hague Rules, have amended their domestic legislation with which they have given effect to the Rules by amending some of its terms and adding other terms, based on certain provisions of the Hamburg Rules.

Several States, that were not parties to the Hague Rules, have in turn enacted or are moving toward the enactment of domestic legislation incorporating features of both the Hague Rules and the Hamburg Rules as well as unilateral innovations.

In 1988 the Assembly of the CMI decided that the Hague-Visby Rules should be revisited, in order to find out whether and to which extent its provisions were still in line with the requirements of the industry and provided a balanced solution of the conflicting interests of the carriers and their liability insurers on the one hand and of the cargo owners and their insurers on the other hand. The International Sub-Committee established for such purpose produced a draft Study (Paris I, p. 54) which was submitted to the 1990 CMI Paris Conference. Certain amendments were made to the draft by the Conference who then approved the Study (Paris II, p. 104) and the accompanying "Paris Declaration".[1]

Subsequently the CMI Executive Council decided that the possibility of ensuring greater uniformity in this area should be further explored and that the views of National Associations should be solicited.

To that end it directed, at its meeting in Sydney on 2 October 1994, that the Working Group of Executive Council members previously appointed at its meeting in Oxford on 13 May 1994 should prepare a Questionnaire directed to the Member Associations.

Replies from 26 National Associations were received and a synopsis of the replies was published in the 1995 Yearbook (p. 115-177) followed by a synoptical table showing the most significant changes suggested by National Associations to both the Hague-Visby Rules and the Hamburg Rules.

The International Sub-Committee held five sessions during which the most relevant issues connected with matters dealt with by the aforesaid Conventions were identified and debated.[2] The Reports of the first four sessions, prepared by Dr. Frank Wiswall, who acted as Rapporteur, are published in the 1995 Yearbook (at p. 229-243) and in the 1996 Yearbook (at p. 360-420). A synopsis of such Reports is published in the 1997 CMI Yearbook (at p. 291).

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1 The text of the "Paris Declaration" is reproduced below:

Paris Declaration on Uniformity of the law of Carriage of Goods by Sea
29th June 1990

1. During the XXXIVth International Conference of the Comité Maritime International held in Paris from 24th to 29th June 1990, a draft Document entitled "Uniformity of the Law of the Carriage of Goods by Sea in the Nineteen Nineties" was discussed by a Committee of the Conference largely on the basis of the Hague-Visby Rules and in which discussion all the 41 National Associations represented at the Conference participated.

2. Following this discussion, the draft was amended to clarify certain points which were raised and to reflect views expressed by delegates which were not always unanimous. The Document, as amended, is attached. It was presented to a Plenary Session of the Conference on Friday, 29th June and was approved as a basis for further work.

3. In approving the Document as a basis for further work, the hope was expressed that the International Organizations concerned will continue to offer to the CMI the co-operation it has received in the past for the work that lies ahead.

2 A list of the participants to each session is annexed as Table I.

A report was then prepared by the Chairman for consideration by the Antwerp Centenary Conference wherein the views of the International Sub-Committee (or of the majority of the delegates who attended its sessions) on each of the issues were summarized. The most significant amongst the aforesaid issues (liability regime, identity of the carrier, period of application of the uniform rules, jurisdiction and arbitration) were again discussed during the Conference and a Report on the discussion is published in the 1997 CMI Yearbook (at p. 288).

Meanwhile the CMI Executive Council, after consultation with the Secretariat of UNCITRAL, had decided that a wider investigation should be carried out in respect of a number of other important issues of transport law, such as the interfaces between contract of carriage and contract of sale of goods, relationship within the contract of carriage, transport documents, bankability of transport documents, EDI, and ancillary contracts.

The CMI Assembly held on 15 May 1998 then decided that the work on the liability regime should be concluded for the present in the form of a CMI Study summarising the position of the CMI and where appropriate suggesting possible wordings of a draft text, but took notice of the fact that in the context of the broader work of the CMI on issues of transport law it was quite possible that the questions of liability would be affected to a degree that at present it is difficult to assess.

Following the above resolution a fifth Session of the International Sub-Committee was held in London on 9 and 10 November 1998. During such session all the issues considered at the previous sessions were again debated with a view to reaching, whenever possible, a consensus at least in respect of some of them. It was, however, not deemed appropriate for the time being to draft any text, even on the issues on which a consensus was reached, in consideration of the possible future developments resulting from the study of other issues of transport law.

A conclusive report of the work of the Sub-Committee in respect of each of the issues that have been considered follows.[3]

1. Definitions

There is a consensus on the need for a definition of the following terms:

- actual/performing carrier
- carrier
- contract of carriage of goods by sea
- goods
- shipper
- signature
- transport documents
- writing (including electronic communications)

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3 The degree of consensus reached in respect of each issue is shown in Table II.

The definition of goods should include also deck cargo, but exclude live animals. The definition of the following additional terms may be considered:

- charter party
- electronic communication
- ship.

2. Scope of application

The uniform rules should apply both to outbound and inbound cargo irrespective of the document evidencing the contract of carriage, except for charter parties.

A provision along the lines of Article 2 of the Hamburg Rules is considered appropriate.

3. Period of application

There is a consensus that the period of application of the Hague-Visby Rules (Article 1(e)) is by far too limited and that the provision of the Hamburg Rules (Article 4) is not satisfactory. It is thought that the notion of "port" must be flexible, in that the movement of the goods which is required in order to deliver the goods to the consignee in a "port-to-port" contract of carriage should always, in principle, be governed by the rules applicable to such contract, irrespective of whether the movement takes place entirely in the port area (on the assumption that the port area may be defined) or not.

4. Identity of the carrier

The problem of the identity of the carrier arises when the carrier is not clearly named in the transport document.

In order to make it easier for the owner of the goods to identify the carrier, the following rules are suggested:

1. The carrier must indicate his name and address in the transport document.
2. When the carrier is named, then the person so named should be conclusively taken to be the carrier.
3. Where the carrier is not named, but the transport document contains a representation that the goods have been shipped (or received for shipment) on board a named ship, the registered owner of that ship should be conclusively taken to be the carrier unless the registered owner proves that the ship was at the time of the carriage of the goods under demise charter and the demise charterer accepts responsibility for the carriage of the goods.
4. If the registered owner declares that the ship was under demise charter the time bar should not run from the time when suit is brought against the registered owner but the time when the demise charterer accepts responsibility for the carriage of the goods.

   It should then be considered whether these provisions should apply, *mutatis mutandis*, to the performing carrier.

5. The liability regime of the carrier

(a) The need for a provision on the duties of the carrier.

There is a consensus on the need for a provision such as that contained in Article 3(1) and (2) of the Hague-Visby Rules.

This provision in fact has been and will be in the future of great assistance to courts and to lawyers, as well as to carriers and shippers, because it provides a very useful guideline of what is required of a diligent carrier, and its abolition would not only deprive all those persons of an important guideline, but might also - and this would be very dangerous - be construed as an intentional change of the liability regime that has been known and applied for over half a century.

The duties of the carrier relate to the seaworthiness of the ship and to her fitness to receive and preserve the cargo during the voyage. Articles 3(1) and (2) of the Hague-Visby Rules meet this requirement satisfactorily, except perhaps with respect to the time when the duties must be performed. However, the question whether the obligation of the carrier should be a continuous obligation or not continues to be the object of conflicting views. The practical importance of the issue was questioned for the reason that the continuous obligation in respect of seaworthiness may arise under paragraph 2 of Article 3.

(b) Responsibility for the faults of servants or agents.[4]

(i) Fault in the navigation

The question whether or not the exoneration in respect of fault in the navigation of the ship should be maintained continues to be controversial.

In the Document entitled "Uniformity of the Law of the Carriage of Goods by Sea in the Nineteen-Nineties", approved by the Paris CMI Conference in 1990, it is stated that at that time the "strongly prevailing view" was that the exemption should be retained. During the first four sessions of this Sub-Committee the position did not appear to have changed, nor has it changed during the fifth session, save that the majority in favour of the retention of the exemption was less significant.

(ii) Fault in the management of the ship.

Also in respect of this exemption there continue to be different views and, therefore, the question whether the exemption should be retained remains open.

(iii) Fire.

The provision of Article 4(2)(b) of the Hague-Visby Rules is considered still to be satisfactory.

(c) The allocation of the burden of proof. The catalogue of exceptions.

Save for the lack of agreement on the question whether sub-paragraph (a) of Article 4(1) should be retained, there is a consensus that all the subsequent "excepted perils" should be maintained. It is accepted that in case the carrier proves that the loss or damage have been caused by one of the excepted perils

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[4] Table III shows the views expressed by the National Associations in the occasion firstly of the 1990 Paris Conference and then of the five sessions of the International Subcommittee.

the cargo owner may in turn prove that the fault of the carrier or of his servants or agents contributed to cause the loss or damage.

There is however no consensus on the question whether the provision of paragraph 1 of the Protocol of Signature should be incorporated in the uniform rules, rather than remain a reservation.

6. Liability of the performing carrier

The liability regime of the performing carrier should be the same as that of the contracting carrier, save that the liability of the performing carrier should be limited to the part of the carriage performed by him.

The question was raised whether the independent contractors performing services ashore in respect of the handling of the goods from the time of discharge to the time of delivery to the consignee ought to be considered as performing carriers. No agreement, however, could be reached in this respect.

7. Through carriage

A distinction must be made between the right of the carrier to tranship the cargo en route, in which case he remains responsible for the performance of the whole carriage, and the right of the carrier to restrict his obligation to the part of the carriage performed by him, his only duty thereafter being that of entering into a separate contract of carriage with the owner of the vessel on which the goods will be transhipped for their carriage to the final port of destination.

In this latter case the obligation of the carrier terminates only if the transhipment is expressly mentioned in the transport document together with the place where it will be effected. It has been agreed by the majority of the delegates that it should not be a requirement of the termination of the obligation that the name of the carrier who performs the subsequent leg of the carriage be indicated in the transport document, provided that the original contracting carrier indicates his name to the owner of the goods when the goods are delivered to him at the place of final destination.

8. Deviation

The uniform rules should provide that they apply in any case of breach by the carrier of his obligations, including any breach that in certain legal system may be qualified as fundamental, such as an unreasonable deviation.

9. Deck cargo

The uniform rules should contain an express provision on deck cargo, along the lines of Article 9 of the Hamburg Rules.

10. Delay

The uniform rules should apply in case of delay and a provision along the lines of Article 5(2) of the Hamburg Rules is considered satisfactory. There is no agreement, however, as to whether the rules should also contain a provision

on constructive loss in case of excessive delay, such as that of Article 5(3) of the Hamburg Rules. A majority is of the view that they should, though the time limit ought to be longer, and that after the time limit has expired, it is irrelevant that the goods are found.

11. Limitation of liability

There seems to be general support for the package-kilo limitation.

A provision along the lines of those in the Hague-Visby Rules and of the Hamburg Rules is considered satisfactory, except that it should state that the unit is the shipping unit. A large majority considers that this provision should also state that the limits apply to the aggregate of all claims, including claims in respect of damages for delay.

12. Loss of the right to limit

The wording of Art. 8 of Hamburg Rules is preferable to that of Art. 4(5)(e) of the Hague-Visby Rules because it refers to "such loss". However, in the view of the majority, the fact that the act or omission should be a personal act or omission of the carrier should be specified, as in the LLMC (Art. 4) and in the HNSC (Art. 9 § 2).

13. Transport Documents

The uniform rules should apply to all types of transport documents, except charter parties.

The obligation of the carrier to issue a bill of lading on request of the carrier should still be provided, but it ought to be made clear that the parties are free to agree otherwise.

As regards the signature of the transport documents, it is thought that a provision along the lines of Article 14(3) of the Hamburg Rules, updated in light of developing technology, would be proper.

14. Contractual stipulations

As a general rule, the uniform rules should be compulsory and a provision along the lines of Article 3(8) of the Hague-Visby Rules and Article 23(1) of the Hamburg Rules should be adopted. It is felt by a substantial majority, however, that certain exceptions are still justified and that a provision along the lines of Article 6 of the Hague-Visby Rules would be required. It would be necessary then to clarify what it is meant by "particular goods" and whether the operation of such provision should always be conditional upon whether a bill of lading has been issued.

15. Contents and evidentiary value of the transport documents

1. Both in the Hague-Visby Rules and in the Hamburg Rules there are provisions on the contents of the bill of lading. Such provisions (subject to modification) ought instead to apply to all transport documents.

2. Whilst the Hague-Visby Rules provide (Article 3(3)(b)) that the carrier is bound to indicate in the bill of lading one particular regarding the goods (either the number of packages or pieces, or the quantity, or weight), the Hamburg Rules provide (Article 15(1)(a)) that the carrier shall indicate in the bill of lading both the number of packages or pieces and the weight or quantity of the goods. Furthermore, the Hague-Visby Rules require that the information concerning the goods must be furnished in writing by the shipper, whilst such requirement does not appear in the corresponding provision of the Hamburg Rules. It is the view of a clear majority that the provision of the Hague-Visby Rules is preferable to that of the Hamburg Rules.

3. The carrier is entitled to insert reservations in respect of the particulars concerning the goods supplied by the shipper and inserted in the transport document if he has reasonable grounds to suspect that they do not accurately represent the goods or if he has not reasonable means of checking such particulars. He, however, is not required to mention in the transport document the reasons for which the reservations are inserted. If the cargo owner wishes to challenge the validity of the reservations, the burden of proving that they have been inserted without justification is upon him.

4. In case of goods stuffed in a container by the shipper, there is a presumption to the effect that the carrier has not been able to check the number of packages or pieces. He, however, cannot refuse to insert the particulars supplied by the shipper in the transport document. In such a case the limit of liability is based on the number of packages and pieces declared by the shipper, unless the carrier proves that the number of packages or pieces actually stuffed in the container was different.

16. Duties and liability of the shipper

The uniform rules should contain a provision setting out the general duties of the shipper in respect of the goods delivered to the carrier, as well as his special duties in respect of dangerous goods (see paragraph 17), including the obligation to adequately prepare and package the goods for the carriage by sea. The general provisions outlined above should be followed by specific provisions along the lines of those set out in Articles 3(5) and 4(3) of the Hague-Visby Rules and of Articles 12 and 17(1) of the Hamburg Rules.

17. Dangerous cargo

Both the Hague-Visby Rules and the Hamburg Rules have a provision on dangerous cargo. The views are divided on which of such provisions is preferable. An argument in favour of the former is that its interpretation has been the subject of Court decisions and, in particular, of the recent decision of the House of Lords in *The "Giannis N. K."*.

18. Letters of guarantee

A clear majority is of the view that letters of guarantee ought not to be governed by the uniform rules. A substantial number are in favour of discouraging the use of letters of guarantee.

19. Notice of loss

There is a consensus on a provision along the lines of Article 3(6) of the Hague-Visby Rules, save that the provision should state that, in case of loss or damage which is not apparent, the notice must be given within three working days.

20. Time bar

The question whether the time bar period should be one or two years remains unsettled.

21. Jurisdiction

The uniform rules should contain a provision on jurisdiction along the lines of Article 21 of the Hamburg Rules save that:

(i) the second sentence of paragraph (2)(a) must be deleted, since it is in conflict with Article 7(1) of the 1952 Arrest Convention;

(ii) paragraph (2)(b) must be deleted, for the same reason;

(iii) paragraph 4 must be deleted, because the matters dealt with therein should be left to national law.

22. Arbitration

A clear majority is in favour of a provision along the lines of Article 22(1), (2), (4) and (5) (the reference to paragraph (4) being deleted) of the Hamburg Rules, but against a provision such as that of paragraph (4) of that Article.

A minority is instead of the view that the uniform rules should not contain any provision on arbitration.

FRANCESCO BERLINGIERI
Chairman of the International Sub-Committee

personal impressions. The lack of an intermodal liability scheme was considered by the industry to be one of the major problems in the way of developing intermodal transport. There was a wish on the shippers' side to solve it, but the reaction from the transport side was more diverse. The railways were aware that there was a problem and the suggestion had been made that the UNCTAD/ICC Rules should be promoted. There was a reluctance amongst the shipowners to open a Pandora's box, but nevertheless they were aware that there was a problem and they were willing to continue discussions. Some representatives were in favour of a voluntary scheme and some were in favour of a regional solution, but words of warning had been given against this.

The official Minutes of the hearing state that it was agreed that the Commission would examine the costs for the industry of the absence of a uniform intermodal liability arrangement as well as simulate the economic impact of both a general use of the UNCTAD/ICC Rules and the introduction of a new voluntary intermodal regime. A steering committee consisting of not more than five members from organisations which attended the hearing will monitor progress and give input to the Commission.

STUART BEARE

STATEMENT
by the
COMITE MARITIME INTERNATIONAL

1 The Trend towards Disuniformity of the Law of the Carriage of Goods by Sea

1.1 The object of the Comité Maritime International ("CMI") is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. In pursuance of this object the CMI began the process of unification of the law relating to liability arising out of the carriage of goods by sea in 1907. It drafted the Hague Rules, which were formally adopted at the 1924 Brussels Conference, and the Visby Protocol, which was adopted at the Brussels Conference in 1968.

1.2 The degree of international uniformity established by the widespread adoption of the Hague Rules decreased when the Hague-Visby Rules entered

into force in 1977, since the majority of States parties to the Hague Rules have not ratified the Visby Protocol. This trend significantly increased with the entry into force of the Hamburg Rules in 1992 and the enactment of domestic legislation in a number of States adopting non-uniform versions of the Hague-Visby Rules.[1]

1.3 The CMI views this trend with great concern. In response to a questionnaire sent to its member national associations in 1994, the majority of those national associations which replied considered that the proliferation of legal regimes relating to liability for carriage of goods by sea was an unacceptable situation and that some effort should be made by the CMI to remedy it.[2]

1.4 The CMI then set up a International Sub-Committee ("ISC") which identified and debated the most relevant issues that a uniform law of the carriage of goods by sea should regulate. The ISC has met five times.[3] The work of the ISC will be concluded in the form of a CMI Study which will be published in 1999. It will summarise the areas where there is consensus and the areas where there are conflicting positions regarding principles of liability. No attempt to draft new rules will be made at this stage.

1.5 It is the view of the majority of the national associations that the existence of a third liability convention would introduce even greater disuniformity. To achieve unification it would be necessary for a new convention to supersede the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.

1.6 It does not at present appear that there is a sufficient international consensus to ensure that such a new convention limited to a review of the Hague, Hague-Visby and, possibly, Hamburg Rules would be widely adopted. A considerable measure of consensus has however been achieved in the ISC. If the opportunity should arise in the not too distant future to work towards the adoption of a new (and most probably extended[4]) convention, the CMI believes that its forthcoming Study could form the basis on which such a convention could be drafted. Some substantial differences between national delegates remain, but it is not unusual for such differences to go forward for resolution at a diplomatic conference at which the final text of a convention is settled.

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1 For a historical outline see Sturley "The Development of Cargo Liability Regimes", a paper given to the 8th Axel Ax: son Johnson Colloquium and published by The Swedish Maritime Law Association under the general title "Cargo Liability in Future Maritime Carriage" in 1998 at p. 10.

2 The questionnaire is set out in the CMI Yearbook 1995 at p. 111 and the replies at pp. 115-177

3 Reports of the first four meetings are set out in the CMI Yearbook 1995 at pp. 229-244 and the CMI Yearbook 1996 at pp. 360-419.

4 See section 6 below.

2 Draft Bill to amend the United States Carriage of Goods by Sea Act 1936 ("US COGSA 1936")

2.1 If this Bill is enacted, it will be a further step in the trend towards disuniformity. However the CMI seeks to lead States towards uniformity principally by promoting uniform international regimes for adoption by States without the necessity for supplementary domestic legislation. It has nevertheless always been the case that domestic legislation has made provision for a State's individual circumstances and the US COGSA 1936 does not precisely enact the Hague Rules. The CMI does not seek to make formal representations to States about their proposed domestic legislation, which States have a sovereign right to enact.

2.2 The CMI is a non-governmental "federation" of its member national associations. National associations are autonomous and the CMI does not seek to influence whatever representations they may wish to make to their own governments. The Maritime Law Association of the United States ("MLA") for a long time advocated the adoption by the United States of the Visby Protocol. The CMI respects the right of the MLA to promote a compromise solution to the problems that have arisen in the United States after adoption of the Visby Protocol proved politically impossible.

3 Intermodal Transport[5]

3.1 The CMI has been concerned to promote uniformity in the law relating to intermodal transport contracts involving the carriage of goods by sea and in 1969 the CMI Tokyo Conference approved a draft convention on combined transport ("the Tokyo Rules").

3.2 The idea of a convention on combined transport did not secure general support and in 1973 the ICC drafted the ICC Rules for a Combined Transport Document ("the ICC Rules"), which were slightly revised in 1975. The ICC Rules were based, as were the Tokyo Rules, on the network principle. Many large combined transport operators apply terms and conditions based on the ICC Rules.

3.3 The 1980 United Nations Convention on the International Multimodal Transport of Goods ("the Convention") was not of course drafted by the CMI. The Convention follows the principle of a "uniform" liability, with the important exception of the monetary limits of liability. This uniform liability

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[5] The terms "intermodal transport" and "multimodal transport operator" are used in this Statement in the same sense as they are used in the draft final report to the European Commission on International Transportation and Carrier Liability ("the Experts' Report").

is based on the principle of presumed fault or neglect and follows very closely Article 5 of the Hamburg Rules. It was therefore not to be expected that States which did not adopt the Hamburg Rules would become parties to the Convention. As the Experts' Report points out (page 10) the Convention is not yet in force and this position is unlikely to change.

3.4 The UNCTAD/ICC model rules, which came into effect in 1992, did not follow the approach adopted by the Convention, but were also based on the network principle. These rules are incorporated into the FIATA FBL.

3.5 As explained in Appendix F to the Experts' Report Germany has enacted national legislation to regulate all transportation of goods with the exception of maritime transport and to regulate intermodal transport, including intermodal transport involving the carriage of goods by sea, on the basis of the network system of liability, but providing for liability to be based on the CMR where an international convention is not mandatorily applicable.

3.6 The Experts' Report goes further and suggests the adoption of a regime based on strict and unlimited liability. Whilst this regime would not be mandatory in the sense that contracting parties could opt out (the default system) any unimodal carrier could opt into the regime by contractual incorporation.

3.7 The problems associated with intermodal transport are well documented[6]. We will refer in this Statement specifically to two of them.

3.8 It is often unclear whether the multimodal transport operator ("MTO") contracts with the shipper or goods owner as principal or agent. Under the FIATA FBL he contracts as principal; under the BIFA House Bill he contracts as agent.[7] The Convention (Article 1) requires the MTO to assume responsibility as principal for the performance of the contract for the Convention to apply. It does not therefore resolve the issue as to whether or not the MTO contracts as principal or agent. The Experts' Report does not address this problem.

3.9 There is the problem of "conflict of conventions". The Convention seeks to deal with this problem in Articles 30.4 and 38. The Experts' Report refers to this problem on pages 14 and 15. It is complex and requires substantial further study; it is not appropriate to go further into it in this Statement.

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[6] See, for example, Faber "The Problems arising from Multimodal Transport" [1996] LMC LQ 503 and Professor De Wit "Combined Transport Bills of Lading", a paper given to LLP's 3rd International Bills of Lading Contemporary Issues Seminar 6-8 November 1996.

[7] Faber, supra, at pp. 506-507. See also *Aqualon (U.K.) Ltd v. Vallana Shipping Corporation* [1994] 1 LLR 669 and *Elektronska Industrija v. Transped* [1986] 1 LLR 49.

3.10 The CMI does not wish to comment on those aspects of the German legislation which do not apply to the carriage of goods by sea and it is unwilling to comment in any detail on those aspects which govern intermodal transport without the benefit of advice from the German Maritime Law Association. Nevertheless the CMI would not encourage the enactment of unilateral legislation by member States of the EU. The CMI believes that the problems of intermodal transport involving the carriage of goods by sea would best be resolved by an international and not a regional regime. For the same reasons as the enactment of the Bill to amend US COGSA 1936 will be a further step in the trend towards disuniformity, so would unilateral domestic legislation or a regional regime, particularly a regime which sought to impose a uniform basis of liability substantially at variance with the Hague-Visby Rules, to which the majority of EU States are parties.

4 A new Transport Convention

4.1 A persuasive case can be made for superseding all the existing transport conventions with one which would govern all transport contracts (including contracts made by EDI) by whatever means of transport and whether unimodal or intermodal.

4.2 The CMI however doubts whether, particularly in view of the matters referred to in Section 1 of this Statement, there is sufficient international consensus to develop and widely to adopt such a convention at the present time. The CMI believes that this should remain a longer term objective and that steps can be taken to work towards it.

5 An "Overriding" Regime

5.1 It has to be debated whether any such "overriding" regime should be developed on the network principle, or the principle of uniform liability as provided for in the Convention. This is a complex issue on which the member national associations of the CMI have not been asked to express any view, at least since the time when the Tokyo Rules were drafted. At first sight it may be thought that a uniform regime would more likely provide "predictable and reliable liability rules, which are easy to understand and operate in a cost effective way",[8] but commentary on the Convention illustrates that these objectives are not easily attained.

5.2 The Experts' Report suggests the adoption of a uniform regime which provides for strict and unlimited liability. It advocates this as being the most

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[8] Experts' Report at p.11.

cost effective solution, which would make separate cargo insurance largely redundant. The CMI wishes to make the following brief comments on this proposition:

- The report suggests that losses caused by *force majeure* (for which there is no universal definition) may be excepted. If so, shippers will be exposed to liability for contributions in general average, cargo's proportion of a salvage award and war risks. They may wish to protect this exposure by taking out cargo insurance.
- In any event shippers will bear the risk of the MTO becoming insolvent and the possibility that they may be unable to recover direct from the MTO's insurers.
- The possibility of recourse actions by the MTO will oblige performing carriers to take out insurance. This element in the total insurance costs will not be reduced.

5.3 The "insurance argument" is notoriously difficult to determine[9] and any regime which seeks substantially to alter the present balanced allocation of risk is likely to encounter commercial resistance.[10]

5.4 The concept of strict **and** unlimited liability is a new concept in the area of maritime conventions. It is, for example, inconsistent with the philosophy of the 1976 Limitation Convention and the 1992 Civil Liability Convention.

5.5 The CMI does not share the confidence of the authors of the Experts' Report that the need to opt out would be more likely to achieve widespread application than the need to opt in. In general it is difficult to avoid the conclusion that the adoption of the proposals in the Experts' Report would lead to even greater disuniformity in the law of the carriage of goods by sea and intermodal transport involving such carriage.

6 Current work of the CMI

6.1 Professor Ramberg advanced a similar proposal to that in the Experts' Report, albeit not developed at length, in a paper to the 8th Axel Ax: son Johnson Colloquium in September 1997.[11] In his summary of the papers presented at the Colloquium Professor Tiberg said:

> *"It also seems to me that though [Professor Ramberg's] solution may well quench the flames, the smouldering embers underneath remain a disturbing element. So even if in one way or another we could introduce*

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[9] See, for example, (in relation to the Hamburg Rules) Sturley "Changing Rules in Marine Insurance: conflicting empirical arguments about Hague, Visby, and Hamburg in a vacuum of empirical evidence" Journal of Maritime Law and Commerce Vol. 24 No. 1 p119.

[10] See, for example, International Union of Marine Insurance Position Paper 26th March 1996.

[11] Published by the Swedish Maritime Law Association, supra, at pp. 1-5.

the overall strict liability of the contracting carrier, the absence of uniform liability for performing carriers will cause troublesome recourse actions that call for reform.
However, I think the vista of necessary reforms should be widened. The maritime law has seen enough aborted attempts at amendement of cargo damage liability rules. There is more to carriage than damage, and important aspects remain unsolved and unclarified in the countries of the world. In particular there are incompatible conceptions on the function of the bill of lading, seaway bill and corresponding electronic documents in the world we are entering into. I believe the unification work must go on, but it should be widened to include other unsolved aspects of transport and transport documents. Work is actually beginning in this direction, and may it succeed!"[12]

6.2 Work has indeed begun. At the invitation of UNCITRAL the CMI is currently engaged in organising, together with all interested organisations involved, further work on the issues of transport law referred to in paragraphs 210-215 of the report of UNCITRAL on the work of its 29th session 28th May - 14th June 1996.[13] The CMI has set up a Steering Committee to co-ordinate work on this project and the Steering Committee has in turn set up an International Working Group. The Working Group's brief is set out in a Report of the Steering Committee dated April 1998.[14] In particular the Working Group has been asked to study:

- Interfaces between carriage of goods and sales of goods;
- Relationships within the contracts of carriage;
- Transport documents;
- Bankability of transport documents;
- Ancillary contracts.

6.3 The Working Group has already held two meetings and its members have written study papers on the above subjects. The Working Group will meet again next month to review the issues which arise from these studies and it is hoped that it will then be possible to formulate a questionnaire for circulation to national associations in the Spring.

6.3 The ultimate objective of this work is to identify areas in which no uniform rules currently exist and where there is a practical possibility of achieving greater uniformity by way of extending the existing regimes. If international consensus can be reached, there is a possibility that this consensus could extend to the creation of an appropriate liability regime, as referred to in paragraph 1.7 above.

14th January 1999

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12 id at p. 255
13 Published in the CMI Yearbook 1996 at pp. 354-355.
14 To be published in the forthcoming CMI Yearbook 1998.

Transport Law: The Treatment of Performing Parties

Michael F. Sturley*

I. INTRODUCTION

Two of the most controversial aspect of the Draft Instrument[1] have been its scope of coverage and its treatment of performing parties. In sharp contrast with previous comparable conventions,[2] the Draft Instrument's coverage is *contractual*: Its scope is effectively defined by the contract of carriage itself.[3] If the contract covers land carriage preceding the loading of the vessel or land carriage subsequent to the unloading of the vessel, then the Draft Instrument does, too. But if the contract covers only a maritime leg, then that is all that the Draft Instrument will cover. In other words, if a contract of carriage provides for a shipment from one port to another port, then the Draft Instrument's coverage is simply "port-to-port." But if a contract of carriage provides for a shipment from the shipper's manufacturing plant to the consignee's warehouse, then the Draft Instrument's coverage is "door-to-door."

The Draft Instrument is also more direct that previous comparable conventions in its treatment of performing parties — those entities that are not immediate parties to the contract of carriage but that perform the carrier's obligations under the contract of carriage.[4] The Hague Rules deal only with the relationships among the carrier, the shipper, and third-party cargo interests. They do not address the problem of performing parties at all. The Hague-Visby Rules begin to deal with the problem in their attempt to address the well-known Himalaya issue,[5] but they just begin to scratch the surface. The Hamburg Rules introduce the concept of the so-called "actual carrier,"[6] and thus make the first real effort to begin to address the problem. The Draft Instrument makes a much more ambitious attempt to resolve the principal issues that arise in modern commerce when carriers almost inevitably sub-contract for the performance of some or all of their obligations under the contract of carriage.[7]

At this stage of the UNCITRAL negotiations, it has become clear that these two issues are intertwined. After taking a closer look at each of the two by way of background, this paper will

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1. U.N. doc. A/CN.9/WG.III/WP.21 (Jan. 8, 2002).

2. The Hamburg Rules are port-to-port, *see* art. 4(1), while the Hague and Hague-Visby Rules are "tackle-to-tackle," *see* art. 1(e).

3. *See* arts. 3.1, 4.1. *See also, e.g.,* Netherlands' Position Paper on Multimodality of the Draft Instrument, U.N. doc. A/CN.9/WG.III/WP.___, ¶¶ 2(1)-2(2) (Mar. __, 2003) (paper circulated at the Eleventh Session of the Working Group on Transport Law; U.N. document number to be assigned) [hereinafter Netherlands' Position Paper].

4. *See* arts. 1.17, 6.3.

5. *See* art. 4 *bis*.

6. *See* arts. 1(2), 10.

7. *See* art. 6.3.

examine the various proposals now under discussion to consider them together — addressing the scope problem through the proposed treatment of performing parties.

II. Scope of Coverage

The Draft Instrument provides for door-to-door coverage, which is somewhat narrower than full multimodal coverage. In a true multimodal regime, the contract of carriage could provide for *any* two (or more) modes of carriage.[8] Thus a multimodal regime would govern a shipment involving road and rail transport. The Draft Instrument, in contrast, requires a maritime leg.[9] Thus it could be described as a "maritime-plus" convention.[10] Because the existing liability regimes are port-to-port or narrower,[11] "maritime-plus" was initially controversial. Many feared that the new regime would conflict with existing unimodal regimes, particularly CMR[12] and CIM-COTIF.[13] Thus during the UNCITRAL Working Group's opening discussion of the Draft Instrument, several delegates spoke in general terms against the concept of door-to-door coverage and instead favored restricting the application of the Instrument to a port-to-port basis.[14]

The Draft Instrument attempts to deal with these concerns by establishing a "network" system of liability. Under article 4.2.1, liability is based on the relevant unimodal regime when it can be shown that the damage occurred during land transport that would otherwise have been subject to a mandatorily applicable international convention.[15] In practical terms, this means that

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8. *See, e.g.*, United Nations Convention on International Multimodal Transport of Goods, May 24, 1980, art. 1(1) (defining "multimodal transport" as "the carriage of goods by at least two different modes of transport").

9. *See* Draft Instrument art. 1.5 (defining "contract of carriage" to require the goods to be carried "wholly or partly by sea").

10. *See, e.g.*, Netherlands' Position Paper, *supra* note 3, ¶¶ 1(c), 2(2).

11. *See supra* note 2.

12. Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189 [hereinafter CMR].

13. The Convention Concerning International Carriage by Rail (COTIF), May 9, 1980, 1987 Gr. Brit. T.S. No. 1 (Cm. 41), provides that "international through traffic" is subject to the "Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM)," which forms Appendix B to COTIF. See COTIF art. 3(1). These rules will be cited as CIM-COTIF. A new version of CIM-COTIF was promulgated in 1999, but is not yet in force.

14. *See* UNCITRAL, Report of the Working Group on Transport Law on the Work of Its Ninth Session (New York, 15-26 April 2002) (U.N. doc. A/CN.9/510), ¶¶ 27-29. Working Group III had met in the 1970s to discuss international legislation on shipping. The current Working Group III's first meeting on the new proposal was accordingly the "ninth session" of Working Group III.

15. The Draft Instrument covers only mandatorily applicable international conventions because it creates its network exception only for the

> provisions of an *international convention* that
>
> (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

European[16] road carriage, which is subject to the regional convention known as CMR,[17] and European[18] rail carriage, which is subject to the regional convention known as CIM-COTIF,[19] will be subject to article 4.2.1's special network rules.[20] Although non-European countries receive no significant benefit from the Draft Instrument's network system, they have generally acquiesced on the assumption that the adoption of a network system is a political necessity to achieve a compromise that can be ratified in Europe.

III. PERFORMING PARTIES

The Hague and Hague-Visby Rules on their face regulate the relationship between the "shipper" and the "carrier." In modern commercial shipping practice, however, the "carrier"[21] never performs all of its duties under the contract of carriage itself. Quite apart from the fact that most carriers are corporations, which can act only through their agents, virtually every carrier today subcontracts with separate companies to perform specialized aspects of the carriage. For decades, shipowners have contracted with independent stevedores to load and unload their vessels,[22]

(ii) make specific provisions for carrier's liability, limitation of liability, or time for suit, and

(iii) *cannot be departed from by private contract* either at all or to the detriment of the shipper

Article 4.2.1 (emphasis added). The bracketed language in clause (i) is designed to address a particular problem under the 1980 version of CIM-COTIF, *supra* note 13. The language is bracketed because the problem does not arise under the 1999 version. Thus the bracketed language will be unnecessary if the new convention takes effect after the 1999 version of CIM-COTIF is in force.

16. Morocco and some of the successor states to the former Soviet Union are the only parties to CMR that are not at least partially within Europe. The Inter-American Convention on Contracts for the International Carriage of Goods by Road, July 15, 1989, OAS T.S. No. 72, 29 I.L.M. 81, is of no practical significance. According to the OAS web site, no nation has yet ratified it. The signatories are Bolivia, Colombia, Ecuador, Guatemala, Haiti, Paraguay, Peru, Uruguay, and Venezuela. *See* <http://www.oas.org/juridico/english/sigs/b-55.html>.

17. CMR, *supra* note 12.

18. COTIF applies primarily in Europe and the Middle East.

19. CIM-COTIF, *supra* note 13.

20. The Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 137 L.N.T.S. 11, would also come within the network exception established by article 4.2.1. The combination of sea and air carriage, however, is sufficiently unusual that this is not a major practical concern.

The Convention on the Contract for the Carriage of Goods by Inland Waterways ("CMN"), Feb. 6, 1959, 1961 Unidroit 399, 1 Int'l Transport Treaties at II-1, was never ratified by any nation. If CMNI, the 2000 Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, enters into force, then European river and canal carriage would also be within the network exception established by article 4.2.1.

21. "Carrier" is defined in Article 1.1 of the Draft Instrument as the "person that enters into a contract of carriage with a shipper." The "carrier" is thus the party that *promises* to perform the carriage, not necessarily the party that does perform the carriage.

22. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-4, at 278 ("Under the customary employment pattern the harbor worker is hired by a master stevedore or other independent contractor and not by the shipowner."); *see, e.g.*, Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 263-64 (1979) (con-

and with independent terminal operators to store cargo prior to loading or after discharge. With the explosion of door-to-door shipments, few (if any) carriers would even have the physical capacity to perform all of their duties under a typical contract of carriage. Indeed, some carriers perform *none* of their duties under the contract of carriage themselves. Non-vessel-operating carriers, or NVOCs, contract with the shipper to carry the cargo, but often sub-contract every aspect of the actual transportation.[23] Although the carrier is ordinarily liable for the loss or damage caused by its subcontractors, the early liability regimes made no effort to address the responsibility of those parties that in fact perform the contract.

The Hamburg Rules made some effort to deal with this problem by introducing the concept of an "actual carrier," which article 1(2) defines as

> any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.

This broad definition[24] thus starts with the carrier's employees, agents, and subcontractors to whom the carrier itself has delegated the performance of the contract of carriage. The final clause, covering "any other person . . . ," then covers sub-subcontractors, and so on down the line.

Early drafts of the CMI Instrument introduced a very broad concept of "performing carrier."[25] This proved to be one of the most controversial aspects of the project. Even the term "performing carrier" was criticized, on the ground that many independent parties performing the

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trasting "recurring situation" in which longshoreman is "employed by a stevedoring concern" with the "less familiar arrangement where the . . . longshoreman loading or unloading the ship is employed by the vessel itself").

23. *See, e.g.*, James N. Kirby, Pty Ltd. v. Norfolk Southern Ry. Co., 300 F.3d 1300 (11th Cir. 2002), *cert. pending*, No. 02-1028 (U.S., filed Jan. 6, 2003).

24. It is unclear just how broadly the "actual carrier" definition should be read. At the very least, it contemplates vessel owners or operators in the transshipment context. (The definition would undoubtedly cover land carriers in a door-to-door shipment, too, except that the Hamburg Rules apply on a port-to-port basis.) The language is broad enough to cover "any person" that performs any aspect "of the carriage of the goods." The key question is whether "the carriage of the goods, or . . . part of the carriage" includes every necessary aspect of moving the cargo from the place of receipt to the place of delivery (such as loading and unloading the vessel), or whether it includes only those aspects of the overall carriage of the goods that could themselves be described as a carriage of the goods (such as the carriage on a feeder vessel from the place of receipt to a transshipment port). A logical interpretation of the language suggests the broad reading. The phrase "the carriage of the goods" must refer to the carrier's obligation to carry the cargo from the place of receipt to the place of delivery, and it would be utterly nonsensical to say that the loading and unloading the vessel, for example, were not a "part" of that overall obligation (assuming that the place of receipt is prior to loading and the place of delivery is subsequent to unloading). It is less certain whether the Hamburg Conference intended such a broad definition.

25. *See, e.g.*, Draft Outline Instrument art. 1.4 (draft discussed at the Singapore Conference, February 2001) [hereinafter Singapore Draft], *reprinted in* 2000 CMI YEARBOOK 123; Draft Outline Instrument art. 1.3 (May 31, 2001) (draft discussed at the Fifth Meeting of the International Sub-Committee on Issues of Transport Law (London, July 16-18, 2001)) [hereinafter May 2001 Draft], *reprinted in* 2001 CMI YEARBOOK 357.

carrier's obligations under the contract of carriage do not literally "carry" the goods. Thus the new term "performing party" was introduced.[26]

More fundamentally, the performing party definition (which is now found in article 1.17) proved highly controversial.[27] Some delegations to the CMI's International Sub-Committee supported a broad definition in order to ensure that all litigation for cargo damage would be subject to a uniform liability regime, regardless of a defendant's role in the transaction. If all of the potential defendants were subject to the same rules, there would also be less of an incentive to pursue multiple lawsuits against different defendants. The International Federation of Freight Forwarders Associations (FIATA), in contrast, was particularly anxious to ensure that its own members would not be covered by the definition when they undertook to carry goods but had no intention of performing that obligation themselves. During the International Sub-Committee's last meeting before submitting its final draft, held in Madrid in November 2001, the performing party definition was significantly narrowed (on FIATA's motion),[28] with the result that far fewer parties are governed by the substantive liability provisions of article 6.3.[29]

Article 6.3's substantive liability provisions also generated some controversy. During the International Sub-Committee's deliberations, FIATA argued that the Draft Instrument should not impose any liability on performing parties, and some other delegations supported this view. Within the United States, the World Shipping Council (WSC), an organization representing the major liner carriers serving the U.S. market, and the National Industrial Transportation League (NITL), an organization representing U.S. shippers, entered into an agreement that established their joint negotiating position on the CMI-UNCITRAL project.[30] As part of this compromise package, the WSC and NITL took the position that the contracting carrier alone should be liable for any cargo loss or damage.[31] Not only would the new convention refrain from imposing any

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26. Despite the differences in terminology (and some significant differences in detail), the Hamburg Rules' "actual carrier," the early "performing carrier," and the Draft Instrument's current "performing party" all express essentially the same concept. The change from "carrier" to "party" was made because the word "carrier" is often counter-intuitive, particularly in the Draft Instrument's door-to-door context. Many of the carrier's duties under the contract of carriage are performed by entities (such as stevedores or terminal operators) that would not ordinarily be called "carriers," even though their work is an indispensable part of the carriage of goods. The CMI draftsmen also found the word "actual" to be confusing because it suggested that the "carrier," meaning the contracting carrier, was not "actually" a carrier after all (despite being called the "carrier" throughout the convention).

27. The controversy is discussed in paragraphs 14-18 of the UNCITRAL Report.

28. *See* Draft Report of the Sixth Meeting of the International Sub-Committee on Issues of Transport Law (Madrid, Nov. 12-13, 2001) [hereinafter Sixth Meeting Report], *reprinted in* 2001 CMI YEARBOOK 305, 341-42. The draft report of the sixth meeting was formally approved at the International Sub-Committee's seventh meeting in February 2003.

29. *See id.* at 342. The last minute narrowing of the definition is also likely to have unintended consequences on other parts of the Draft Instrument. Other provisions that mention "performing party" (*e.g.*, articles 1.9, 1.11, 1.20, 6.1.3, 6.9.1, 6.9.3, 6.10, 7.3, 8.1, 8.2, 8.3.1, 10.1, 10.4.1, 10.4.3, 11.3, 13.1, 17.2) were all drafted with a broader definition in mind.

30. *See* Joint Statement of Common Objectives on the Development of a New International Cargo Liability Instrument (available on-line at http://www.worldshipping.org/jointstatement.pdf) [hereinafter WSC/NITL Agreement].

31. *Id.* at 4 (¶ B(6)).

new liability on performing parties, it would affirmatively preempt any liability that performing parties might have under current law. For example, the WSC/NITL Agreement would call for the preemption of existing bailment and tort law.[32] The practical effect of this proposal would be to leave the cargo interests without an effective remedy whenever the contracting carrier (which might well be an overseas NVOC) was insolvent or otherwise not amenable to suit.[33]

Balanced against the Draft Instrument's imposition of liability on performing parties is its extension of "automatic" Himalaya protection to performing parties.[34] During the CMI discussions, there was widespread support for the proposition that every potential defendant should automatically be entitled to the benefit of the same defenses and limitations on liability as the carrier itself enjoys under the Draft Instrument. Although this approach would not provide completely predictable treatment on uniform terms to all actions for cargo loss or damage, it would at least ensure that some of the Instrument's core provisions (those governing the carrier's defenses and limits of liability) would apply to all actions. It would also reduce the incentive to sue sub-contractors that might otherwise be subject to higher liability under current non-uniform laws.

One significant caveat was expressed to the suggestion in favor of universal Himalaya clause protection. Some of those favoring a broad definition of "performing party" felt that all performing parties should be entitled to the benefit of the carrier's defenses and limits of liability because they would assume the carrier's responsibilities and liabilities under the Instrument. Performing parties would take the bitter with the sweet. If the narrow definition is adopted, however, or if performing parties do not assume any liability under the Instrument, then this rationale no longer applies. Many feel that it would be unfair to give sub-contractors all of the benefits of the Draft Instrument if they assume no responsibility under it.

IV. PROPOSALS DISCUSSED AT THE SPRING 2003 NEW YORK MEETING

The UNCITRAL Working Group's most recent session was held in New York from March 24th to April 4th, 2003.[35] During this two-week session, the second week of the session was devoted to a discussion of the Draft Instrument's scope of application.[36] The Working Group recognized that the choice between a door-to-door convention and a port-to-port convention

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32. In *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), for example, the U.S. Supreme Court recognized that a negligent stevedore was liable for the damage that it caused when loading cargo. Moreover, in the absence of a Himalaya clause, the negligent stevedore was fully liable — without the benefit of the carrier's limitations on liability. The WSC/NITL Agreement would overrule this result.

33. There appears to be no support for this extreme position in the WSC/NITL Agreement. The existence of the position has nevertheless made the entire issue more controversial.

34. *See* art. 6.3.3.

35. *See* UNCITRAL, Report of the Working Group on Transport Law on the Work of Its Eleventh Session (New York, 24 March to 4 April 2003) (U.N. doc. A/CN.9/526), ¶ 17 [hereinafter Eleventh Session Report].

36. *See id.* ¶¶ 219-67; *cf.* UNCITRAL, Provisional Agenda, Working Group III (Transport Law), Eleventh Session (New York, 24 March-4 April 2003) (U.N. doc. A/CN.9/WG.III/WP.24), ¶ 24.

would have implications throughout the Instrument, and it was therefore important to address the issue in a detailed and systematic fashion. Moreover, the preliminary discussion of the issue at the spring 2002 meeting in New York had suggested that this would be a highly controversial debate with strongly-held views on both sides.[37] To assist the discussion, the UNCITRAL Secretariat (with help from the CMI) prepared a 42-page background paper titled "General Remarks on the Sphere of Application of the Draft Instrument."[38]

In view of this background, it is remarkable how non-contentious the scope discussion turned out to be. There seemed to be widespread agreement — perhaps even a consensus among the national delegations speaking on the issue — that the world had little need for another port-to-port convention,[39] and that some sort of door-to-door (or even multimodal) convention was therefore appropriate.[40]

Furthermore, there seemed to be broad agreement that the Draft Instrument needed to address the potential problems created by its door-to-door application, and that the appropriate treatment of performing parties was the primary way to do this. Although many views were expressed on how to treat performing parties, the divergence of opinion on the fundamental issues was less than many had anticipated.

At this point, it is far too early to predict with any confidence which view (or, more likely, which compromise among various views) will emerge in the final Instrument. I will therefore simply summarize the various proposals that were advanced at the meeting.

For each proposal, it will be helpful to consider how it would work in actual transactions. I therefore ask readers to keep two hypothetical shipments in mind.[41] In the first shipment, a German manufacturer wishes to send a container of goods from Berlin to Chicago. It therefore enters into a contract of carriage with a German freight forwarder — a non-vessel-operating carrier (NVOC) — that undertakes to deliver the goods in Chicago. The NVOC, which is thus the "carrier" for the door-to-door shipment from Berlin to Chicago, then subcontracts with the three performing parties that will in fact move the goods: a European trucker that will carry the goods by road from Berlin to Antwerp, an ocean carrier that will carry the goods by sea from Antwerp to New York, and a U.S. railroad that will carry the goods by rail from New York to Chicago. The second hypothetical shipment is essentially the same, except that in this alternative the goods are carried from Berlin to Calgary, via Antwerp and Montreal (and a Canadian railroad carries the goods by rail from Montreal to Calgary).

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37. A somewhat tangential discussion of the issue at the beginning of the fall 2002 meeting in Vienna reinforced this suggestion.

38. U.N. doc. A/CN.9/WG.III/WP.29 (Jan. 31, 2003).

39. *See, e.g.*, Netherlands' Position Paper, *supra* note 3, ¶ 1(a) ("[T]he creation of a new maritime convention covering port-to-port carriage only would not make much sense."). The FIATA observer spoke in favor of a port-to-port convention, but even he described his own position as a "lonely" one.

40. *See* Eleventh Session Report, *supra* note 35, ¶ 239.

41. The first of these hypothetical shipments is based on an example that was discussed during the recent New York meeting.

A. A uniform liability regime

Although support was expressed for a uniform liability regime (at least in theory), it was generally recognized that it would probably be impossible to achieve a truly uniform regime in practice.[42] It is nevertheless helpful to recognize how a uniform liability regime would operate. If nothing else, it serves as a useful point of reference. Moreover, many delegates agreed that the ultimate convention should provide a liability regime that is "as uniform as possible."

Under a uniform liability regime, the same rules would apply for *any* cargo loss or damage, regardless of where the loss or damage occurred and regardless of the role played by the particular defendant. Thus if the European trucker damaged the goods, the cargo claimant could sue either the German NVOC (as the contracting carrier) or the trucker under the Draft Instrument, which would displace CMR (the regional convention that might otherwise apply at least to the trucker's liability). Similarly, if the ocean carrier damaged the goods, the cargo claimant could sue either the German NVOC or the ocean carrier under the Draft Instrument. Finally, if the U.S. or Canadian railroad damaged the goods, the cargo claimant could sue either the German NVOC or the railroad under the Draft Instrument, which would displace the U.S. or Canadian law that might otherwise apply.

A uniform liability regime would have obvious benefits of uniformity and predictability, at least from the perspective of those that regularly deal in international multimodal shipments. Complicated questions as to when and how the damage occurred would be minimized, with the result that disputes could be settled more easily. Because every defendant would be liable on the same basis, there would be no artificial effort to sue defendants who were subject to higher limits on liability.

Of course, from the perspective of an inland carrier that deals regularly in unimodal shipments and is rarely involved in an international multimodal shipment, the uniform liability regime would decrease uniformity and predictability. Some inland carriers might even be unaware whether a particular container was moving under a unimodal or multimodal contract.

More significantly, from a political perspective it is widely recognized that at least some important countries will be unwilling to preempt their existing rules governing unimodal transport to apply a new international "maritime plus" convention. In particular, the European countries are thought to be unwilling to abandon CMR and CIM-COTIF, and some nations appear unwilling to abandon their domestic law regimes. Thus no one anticipates the ultimate adoption of a uniform liability regime, even among those delegations that would prefer this solution.

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42. *See* Eleventh Session Report, *supra* note 35, ¶ 239.

B. The current UNCITRAL Draft Instrument

The current UNCITRAL Draft Instrument seeks to establish a system that is as uniform as possible by creating a "network exception" that is as narrow as possible. Under a full network system, the liability rules for each leg would be determined by the rules that would otherwise be applicable to that leg, and the same rules would apply for both the performing party (the uni-modal carrier that is generally subject to the relevant rules) and the contractual carrier. Under a full network system, therefore, both the German NVOC and the European trucker in our two hypotheticals would be liable for damage between Berlin and Antwerp on CMR terms. The NVOC and the ocean carrier would be liable for damage on the ocean voyage under the Draft Instrument. Finally, the NVOC and the railroad would be liable for damage on the rail journey under the U.S. or Canadian law governing railroads.

The Draft Instrument does not adopt a full network system. To maximize uniformity, article 4.2.1 adopts a network system that is as narrow as possible. Only mandatory laws are respected on the theory that an international convention should have the power to override any regime that the parties themselves could contractually avoid. Thus the U.S. Carmack Amendment is pre-empted, and the U.S. railroad would be subject to the terms of the Draft Instrument. Moreover, article 4.2.1 respects only international conventions on the theory that a nation ratifying a new international convention must be prepared to give up some of its preexisting domestic law, even if that domestic law had been mandatory. Thus the mandatory Canadian law governing the liability of railroads is preempted, and the Canadian railroad would also be subject to the terms of the Draft Instrument.

The bottom line is that for damage between Berlin and Antwerp the Draft Instrument would subject both the German NVOC and the European trucker to liability on CMR terms, but for any subsequent damage the Draft Instrument itself would apply. Only the CMR would be a mandatory international convention as required by article 4.2.1. The Canadian law, although mandatory, is merely domestic, and would thus be preempted. Not only is the Carmack Amendment domestic, it is not even mandatory, and thus it would be even more readily preempted.

C. Canada's "option 2"[43]

As one of the options in its proposal, Canada advocated a simple modification of the Draft Instrument's current network system to give effect not only to other mandatory international conventions but also to mandatory national law.[44] This change would have no impact on our

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43. Canada made a formal proposal that was circulated in U.N. doc. A/CN.9/WG.III/WP.23 (Aug. 21, 2002). The Canadian proposal raises three options. Paragraph 9 of the proposal discusses option 2.

44. A subsequent proposal by Sweden agreed with Canadian option 2 (and made additional suggestions). *See* Proposal by Sweden, U.N. doc. A/CN.9/WG.III/WP.26 (Dec. 13, 2002).

An earlier draft of the CMI Instrument had included precisely the language that the Canadian delegation proposes to add in option 2. *See* May 2001 Draft, *supra* note 25, art. 4.4(a), *reprinted in* 2001 CMI YEARBOOK 361. This language had been deleted from the draft in preparation for the November 2001 meeting of the CMI's International Sub-Committee, *see* Sixth Meeting Report, *supra* note 28, *reprinted in* 2001 CMI YEARBOOK at 318, on the

first hypothetical. The European inland leg would be subject to CMR, a mandatory international convention, and thus it would already be within the Draft Instrument's narrow network exception. The U.S. rail leg would not be subject to any mandatory national law, and thus it would not be within the somewhat broader Canadian network exception. As a result, the analysis of our first hypothetical would be the same under this Canadian proposal as under the current Draft Instrument.

For our second hypothetical, this Canadian proposal would change the analysis. Because a mandatory national law applies to the rail journey from Montreal to Calgary, the broader network exception would mean that for loss or damage during this journey the cargo claimant could recover from either the NVOC or the Canadian railroad only to the extent permitted by the mandatory Canadian law.[45]

D. The Italian proposal[46]

Italy argues that the Draft Instrument's network system is both too broad and too narrow. It is too broad in demanding the application of the underlying unimodal regime to the door-to-door carrier. In Italy's view, there is no need to apply CMR to the German NVOC in our hypothetical cases, even if the damage occurs on the road between Berlin and Antwerp. The NVOC is not a road carrier that would expect to be governed by CMR. It did not contract to carry the goods by road from one CMR state to another CMR state; it contracted to carry the goods by three different modes of transportation from Berlin to a country in North America that is not a party to CMR. The NVOC is a CMR shipper (under its contract with the European trucker), not a CMR carrier. Thus there is no conflict between CMR and the Draft Instrument with respect to the NVOC, even if the Draft Instrument were to apply for damages on a European road leg.[47]

Italy also argues that the Draft Instrument is too narrow in failing to respect the interests of non-European inland carriers. A Canadian railroad has just as strong an expectation that the

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basis of a full discussion of the issue at the July 2001 meeting, *see* Report of the Fifth Meeting of the International Sub-Committee on Issues of Transport Law (London, July 16-18, 2001), *reprinted in* 2001 CMI YEARBOOK 265, 291-93. The Canadian delegation at the CMI meeting spoke in favor of deleting the language that the Canadian delegation to the UNCITRAL Working Group now wishes to restore. *See id.* at 291 (comments of Prof. Tetley).

45. The Canadian delegation informed us that its mandatory law limits the railroad's liability to 20,000 Canadian dollars for a forty-foot container, or 10,000 Canadian dollars for a twenty-foot container. For a heavy container, or a container with a large number of individual packages, this would represent a small fraction of the liability limit under the Hague-Visby or Hamburg Rules. When the Swedish delegate realized the implications of the similar Swedish proposal (*see supra* note 44) to include mandatory national law within the network system (a proposal that had been drafted with a focus on the much higher limits of the mandatory Swedish law governing domestic road carriage), he suggested giving the cargo claimant the option of recovering *either* the limits established by the Draft Instrument *or* the mandatory national law, *whichever is higher.*

46. Italy made a formal proposal that was circulated in U.N. doc. A/CN.9/WG.III/WP.25 (Dec. 13, 2002).

47. The Italian proposal's view of the relationship between CMR and the UNCITRAL Draft Instrument is not universally shared. For an argument rejecting the Italian view, *see* Malcolm Clarke, *A Conflict of Conventions: The UNCITRAL/CMI Draft Instrument on Your Doorstep*, 9 J. INT'L MAR. L. 28 (2003).

mandatory Canadian law will apply to it as the European trucker's expectation to be governed by CMR.

The Italian solution is to apply the Draft Instrument to all suits against the contractual carrier regardless of where the loss or damage occurs. Moreover, the Draft Instrument would apply to all suits against maritime performing parties. The new convention will be not only a multimodal instrument in the "maritime plus" context but also the unimodal instrument for the maritime mode. Thus maritime performing parties should expect it to apply. Nonmaritime performing parties, on the other hand, would expect to be liable on the terms applicable to their own contracts with the contractual carrier. To protect this expectation, the Italian proposal would permit cargo interests to sue inland performing parties only on a subrogation-like basis.[48] In essence, a cargo claimant could recover from an inland performing party on the same basis as the door-to-door contractual carrier could have recovered.

In the context of our two hypotheticals, therefore, the cargo claimant can recover from the German NVOC for any damage, regardless of the leg on which it occurs, on the Draft Instrument's terms. It can recover from the trucker for damages on the road leg on CMR terms because that is the basis on which the NVOC could have recovered from the trucker. It can recover from the ocean carrier for damages on the ocean leg on the Draft Instrument's terms because the Instrument would be the maritime convention regulating the NVOC's action against the ocean carrier. Finally, the cargo claimant could recover from the relevant railroad under U.S. or Canadian law. If the NVOC negotiated a very low limit with the U.S. railroad under the Carmack Amendment, the cargo claimant would presumably be bound by that agreement (because that is what the Carmack Amendment allows). For the Canadian railroad, it would be bound by mandatory Canadian law — just as the NVOC would have been.

E. The U.S. suggestion

The United States did not submit a formal proposal, but it did circulate a discussion paper that made a suggestion for further consideration.[49] Under the U.S. suggestion, the contractual carrier's liability would be determined by the narrow network principle now found in article 4.2.1 of the Draft Instrument. This is a compromise suggestion, based on the desire to achieve as uniform a system as possible and the belief that it will be necessary to extend at least this much deference to CMR to achieve a convention that will be widely ratified.

For inland performing parties, the U.S. suggestion would neither create a new cause of action nor preempt an existing cause of action. Cargo claimants would be free to sue inland performing

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48. At this preliminary stage, Italy has not yet fully developed the proposal. Thus there are no details now as to how the subrogation-like action would work in practice. But at the very least, the same legal regime would govern the shipper's action against the subcontracting performing party as would have governed in an action by the door-to-door carrier against its subcontractor, the performing party.

49. It remains to be seen whether the United States will ultimately support its own suggestion. The tentative U.S. positions have already gone through several variations, *cf. infra* note 56, and no final position has yet been reached.

parties on exactly the same terms as they do today under existing law. For maritime performing parties, the Draft Instrument would recognize a direct cause of action on its own terms.

For damage between Berlin and Antwerp in our two hypotheticals, the cargo claimant could recover from the German NVOC or the European trucker on CMR terms.[50] For any damage on the ocean voyage, the Draft Instrument would apply in an action against either the NVOC or the ocean carrier. For any damage on the rail journey, the cargo claimant could recover from the NVOC under the Instrument, and its rights against the relevant railroad would be whatever they are today. For the New York to Chicago leg, this would mean a tort action in which the railroad would be free to claim whatever benefits it could under the NVOC's Himalaya clause.[51] For the Montreal to Calgary leg, this would presumably mean an action under the mandatory Canadian law.

F. WP.29 paragraph 166

The UNCITRAL Secretariat's background paper addressing the sphere of application of the Draft Instrument[52] describes a number of possible approaches, including the proposals of Canada,[53] Sweden,[54] and Italy.[55] It also discusses three "options based on the treatment of performing parties."[56] I discuss the first of these options here.[57]

This proposal — like the Italian proposal — would hold the contractual carrier liable on the Draft Instrument's terms for any loss or damage, regardless of where it occurred or what other law might otherwise govern in that context. The Draft Instrument would also govern actions against maritime performing parties. For nonmaritime performing parties, the Draft Instrument would be the default rule, but each contracting state would have the option of deciding whether the new convention would apply to inland carriage within its territory. We can assume that the European states would opt out of the Draft Instrument to the extent necessary to preserve the application of CMR and CIM-COTIF. Presumably Canada and Sweden would similarly opt out

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50. This assumes that a cargo owner has a direct cause of action against a subcontracting trucker under the CMR, *supra* note 12. If no cause of action exists under current law, the U.S. suggestion would not create one.

51. *See, e.g.*, James N. Kirby, Pty Ltd. v. Norfolk Southern Ry. Co., 300 F.3d 1300 (11th Cir. 2002), *cert. pending*, No. 02-1028 (U.S., filed Jan. 6, 2003).

52. U.N. doc. A/CN.9/WG.III/WP.29 (Jan. 31, 2003). *See supra* note 38 and accompanying text.

53. *See id.* at ¶¶ 138-49.

54. *See id.* at ¶¶ 150-53. *See also supra* note 44.

55. *See id.* at ¶¶ 154-58.

56. *See id.* at ¶¶ 159-85. Although WP.29 was circulated as a Secretariat paper, it was openly admitted that the Secretariat had included these three options in its paper at the request of the U.S. delegation, which was then (January 2003) considering the possible adoption of one of the three options as the U.S. position. In late February, however, the U.S. delegation moved away from these three options and began thinking along the lines summarized in section IV-E, *supra* notes 49-51 and accompanying text. The three options are still on the table, though, and may yet be considered by the Working Group.

57. *See id.* at ¶ 166.

to the extent their mandatory national laws apply. The United States would decide whether to opt out for domestic road and rail carriage at the time it ratified the convention. As things now stand, there is reason to believe that the U.S. government would opt out because that is what the truckers and railroads currently prefer, but if these industry groups see a benefit to joining the new regime when the time comes that would be possible instead.

If these assumptions are correct, then the NVOC in our hypotheticals would be liable on the Draft Instrument's terms throughout, the European trucker would be liable on CMR terms, the ocean carrier would be liable on the Draft Instrument's terms, the U.S. railroad would be liable under U.S. tort law, and the Canadian railroad would be liable under the mandatory Canadian law.

G. Summary of proposals

For ease of reference, the governing rules under the six proposals discussed in this part can be conveniently summarized on the following two tables. Table 1 shows the outcomes under the first hypothetical, with the final leg from New York to Chicago. Table 2 shows the outcomes under the second hypothetical, with the final leg from Montreal to Calgary.

Table 1

location of the loss:	during road (Berlin -	carriage Antwerp)	during sea (Antwerp -	carriage New York)	during rail (New York	carriage - Chicago)
defendant being sued:	**German NVOC**	**European trucker**	**German NVOC**	**ocean carrier**	**German NVOC**	**U.S. railroad**
Uniform liability regime	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument
Current Draft Instrument	CMR	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument
Canada's "option 2"	CMR	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument
Italian proposal	the Draft Instrument	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	Carmack/ contract
U.S. suggestion	CMR	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	tort law
WP.29 ¶ 166	the Draft Instrument	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	tort law (?)

Table 2

location of the loss:	during road (Berlin -	carriage Antwerp)	during sea (Antwerp -	carriage Montreal)	during rail (Montreal	carriage - Calgary)
defendant being sued:	**German NVOC**	**European trucker**	**German NVOC**	**ocean carrier**	**German NVOC**	**Canadian railroad**
Uniform liability regime	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument
Current Draft Instrument	CMR	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument
Canada's "option 2"	CMR	CMR	the Draft Instrument	the Draft Instrument	mandatory local law	mandatory local law
Italian proposal	the Draft Instrument	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	mandatory local law
U.S. suggestion	CMR	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	mandatory local law
WP.29 ¶ 166	the Draft Instrument	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	mandatory local law

V. Conclusion

It is still far too early to predict with confidence the shape of the final Instrument that will emerge from the UNCITRAL process. Many of the contentious issues are still unresolved, and there are many possible solutions. In additions to the proposals that have already been circulated, new proposals will be made at the coming sessions. At the moment, however, it does appear (1) that the new Instrument will provide for door-to-door coverage, and (2) that the problems created by this new overlap with land-based regimes will be resolved at least in part by the Instrument's treatment of performing parties.

UNCITRAL DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA

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THE UNCITRAL CARRIAGE OF GOODS CONVENTION: CHANGES TO EXISTING LAW

MICHAEL F. STURLEY*

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1. Introduction

As this paper goes to press (in May 2008), the United Nations Commission on International Trade Law (UNCITRAL) is about to consider the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Draft Convention") that was prepared by UNCITRAL's Working Group III (Transport Law).[1] By the time the CMI convenes in Athens (in October 2008), the Commission will presumably have approved the Draft Convention in some form. No doubt the Commission will change the draft to some extent, even if substantial changes are unlikely. In Athens, we will be able to discuss the Draft Convention in its final form. In the meantime, the analysis in all of the conference papers must be based on the text proposed by Working Group III, which appears as an annex to the report of the Working Group's final session (in January 2008).[2] This paper will focus on the Draft

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1 For a discussion of the background to this project, including the CMI's preliminary work, *see* Michael F. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 TEXAS INT'L L.J. 65, 68-75 (2003).

2 U.N. doc. A/CN.9/645, annex (2008), available at http://daccessdds.un.org/doc/UNDOC/GEN/V08/507/44/PDF/V0850744.pdf?OpenElement. The UNCITRAL web site (www.uncitral.org) contains — in the six official U.N. languages — each draft of the proposed convention, the reports of each Working Group meeting, the formal proposals made by each delegation, and all of the other documents that have been filed with UNCITRAL.

Convention's proposed changes to existing law, often summarily (to permit broader coverage in the limited space available).

The publication schedule requires an odd comparison on one side of the balance, since we are not yet sure exactly what the final convention will include. The comparison is also odd on the other side of the balance because "existing law" is even more uncertain than the final text of the convention. Most of world trade now operates under the Hague-Visby Rules, but that regime is only one part of existing law. Well over a quarter of world trade is still subject to the older Hague Rules and over thirty countries (albeit countries with only a small proportion of world trade) are parties to the Hamburg Rules. To further complicate matters, not every country adheres precisely to one of these three regimes. China—one of the world's largest trading nations—has a national maritime code that incorporates elements of both the Hague-Visby and Hamburg Rules (along with domestic elements that are unique to Chinese law). Even the Nordic countries, which have long been major partners in the international effort to achieve uniformity in this field, have incorporated significant elements of the Hamburg Rules into their domestic versions of the Hague-Visby Rules.

Every element of this uneven patchwork is part of the "existing law" that would need to be considered in a full comparison. Particular aspects of the Draft Convention will result in more significant changes in some countries than in others. To the extent that one can generalize, the Draft Convention draws largely from the Hague-Visby and Hamburg Rules, incorporating significant elements from each. Those countries that have already adopted a national law incorporating significant Hague-Visby and Hamburg elements are therefore less likely to see significant changes under the new regime in their legal systems (although every country can expect, from the very nature of a compromise, that some significant changes will need to be made). On the other hand, those countries that still adhere to the Hague Rules are likely to see the greatest changes.

All of these comparisons are necessarily relative. If we focus on the big picture, the Draft Convention's proposed changes to existing law are not earth-shattering. The new convention is deliberately evolutionary, not revolutionary. The focus throughout has been on updating and modernizing the existing legal regimes that govern the carriage of goods, filling in some of the gaps that have been identified in practice over the years, and harmonizing the governing law when possible. Indeed, several proposals to deal with more revolutionary subjects (or at least subjects in which harmonization would have been difficult) were abandoned precisely so that the Working Group could in fact complete the project and address the core issues.

Updating and modernizing are particularly necessary when a law drafted over 80 years ago still regulates an industry that has changed remarkably in the

meantime. The Visby Amendments are over 40 years old, and they made only a few changes to the original Hague Rules. Even the Hamburg Rules are over 30 years old. The draftsmen of the early 1920s could not anticipate the container revolution, but the Visby and Hamburg draftsmen did not anticipate the impact that the container revolution would eventually have on modern commercial practices—including the incredible growth of multimodal shipments, the increasing prominence of transportation intermediaries, and the potential for new technologies (such as electronic commerce).

Even if existing law adequately addressed the requirements of modern industry, different regimes address those requirements in different ways, thus creating a need for greater harmonization. The benefits of international uniformity in this field are well-known and widely accepted, but some of the world's largest trading nations have nevertheless permitted their laws to diverge from the international norms. The Draft Convention offers an opportunity for the world community to regain the uniformity that it enjoyed immediately before the Second World War.

Despite the heavy focus on modernization and harmonization, some of the Draft Convention's evolutionary changes include modest reforms in legal doctrine. Perhaps the most visible of these changes is the elimination of the heavily criticized "navigational fault" exception,[3] but even that high-profile decision is not a "change to existing law" for those countries that have adopted the Hamburg Rules. Indeed, in practical terms it is not a change to existing law in those countries whose courts will rarely if ever uphold the defense.[4] But a number of other provisions in the Draft Convention, some of which are of key importance, will also change the law to make it better suited to meet the needs of the industry as it enters the 21st century.

2. Multimodal Coverage: Scope of Application and Period of Responsibility

Perhaps the most significant innovation of the Draft Convention is its door-to-door application. The Hague and Hague-Visby Rules apply only on a tackle-to-tackle basis. The Hamburg Rules extend coverage slightly, applying port-to-port. Such limited coverage may have made sense in the days when each segment of a journey was generally governed by its own contract of carriage. In today's world, however, when contracts of carriage are typically concluded

3 Article 4(2)(a) of the Hague and Hague-Visby Rules excuses the carrier from liability for any "[a]ct, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

4 In some countries that recognize the navigational fault defense in theory, the courts will often find a negligent member of the crew to be evidence of a carrier's failure to exercise due diligence to provide a seaworthy vessel.

on a door-to-door basis, it makes much more sense for the governing law to follow the commercial practice. Thus the Draft Convention makes the carrier responsible for the entire contractual period of carriage, which in a multimodal shipment will often be from the carrier's receipt of the goods at an inland location in the country of origin all the way to the carrier's delivery of the goods at an inland location in the country of destination.

This fundamental change in the law was initially controversial, but it is the only way to accomplish the most basic goals of a uniform international legal regime in this field: To obtain certainty, predictability, and uniformity, one legal regime must govern the entire performance of the contract. In practice today, the parties often agree in their contract to extend the maritime regime inland, but such a contractual extension takes effect only with the force of a contract. The Draft Convention will apply a uniform legal regime with the force of law.

It is important to recognize, however, that the Draft Convention is not a full multimodal instrument. Before it can apply, there must be not only a sea leg but an international sea leg. Thus the Draft Convention can best be characterized as "maritime plus."

The Draft Convention also recognizes that in some parts of the world (particularly Europe) there are existing regional conventions governing inland transport. Because the countries involved feel strongly about preserving the application of these regional regimes, the Draft Convention adopts a limited network principle so that the extent of the contracting carrier's liability for inland damage (when it can be localized) will be governed by the regional convention that would have applied if a separate contract for the inland leg had been concluded. Although this approach undermines international uniformity and predictability, the Working Group concluded that it was a practical necessity.

The Hague and Hague-Visby Rules, as a general rule, apply to outbound shipments *from* a contracting State. The Hamburg Rules, in contrast, apply to both inbound and outbound shipments to or from a contracting State). The Draft Convention follows the Hamburg Rules, thus changing existing law for many countries.

3. Freedom of Contract

One of the most important reforms is the Draft Convention's revised treatment of the parties' freedom of contract. Although this change has also been among the more controversial, it is still evolutionary rather than revolutionary. The Hague, Hague-Visby, and Hamburg Rules already permit freedom of contract between the immediate parties to a transaction in certain situations—particularly contracts of carriage under charterparties.

The Draft Convention extends this freedom of contract to volume contracts, but achieves greater uniformity by bringing these contracts into the new regime at least on a default basis. In other words, shipments under volume contracts

will be subject to the Draft Convention unless the parties take the affirmative step of contracting out of coverage. Under existing law, shipments under charterparties are routinely subject to the Hague or Hague-Visby Rules, but only because the parties take the affirmative step of contracting into coverage.

The biggest concern among some members of Working Group III was that small shippers might be coerced into concluding volume contracts, or might inadvertently surrender rights that the Draft Convention would otherwise guarantee. At the Working Group's final session, therefore, additional safeguards were added to the freedom of contract provision to ensure that every shipper would always have the right to conclude a contract of carriage on convention terms, and that every derogation from the convention must be clearly expressed.

4. Jurisdiction and Arbitration

The Draft Convention's jurisdiction and arbitration chapters are based directly on the corresponding chapters of the Hamburg Rules, but they do provide some additional protection for carriers (particularly in the context of volume contracts). As a result, these chapters will include some changes to existing law even in countries that have adopted the Hamburg Rules.

Because the Hague and Hague-Visby Rules do not address jurisdiction and arbitration at all, the existing law in most countries must be found in domestic legislation or national jurisprudence. For countries such as Canada, which have legislation similar to the Hamburg Rules, the Draft Convention would represent a fairly modest change. For countries such as the United Kingdom, whose national jurisprudence strongly favors the enforcement of jurisdiction and arbitration clauses, the Draft Convention would represent a more significant change.

Because some members of Working Group III felt strongly about the need to address jurisdiction and arbitration while other members felt strongly about preserving inconsistent domestic law, these subjects were among the most controversial in the negotiations. Matters were further complicated by the need to involve the European Commission, which has the exclusive competence to negotiate on this issue for the nations of the European Union. In the end, it was possible to reach a compromise solution only by making the jurisdiction and arbitration chapters optional. A nation may ratify the Draft Convention without accepting these two chapters, which will bind only those countries that explicitly declare their intention to be bound by them.

5. Limitation Amounts

When the Hague Rules were negotiated in the early 1920s, the "high"[5] package limitation was considered a major improvement for cargo interests. Not only was this limitation figure five times as high as limitation amounts that were commonly included in bills of lading at the time, it was also thought to be high enough to cover all but the most valuable cargo.

In the intervening years, inflation changed the calculus. In 1924, for example, a U.S. dollar was worth well over an order of magnitude more than a dollar is worth today.[6] As it happens, the effects of inflation were offset to some extent by two consequences of the container revolution, even in countries that still follow the Hague Rules. Containerization has permitted carriers to transport cargo in containers in much smaller packages than would have been possible in 1924, with the result that the package limitation is less likely to apply.[7] Moreover, the efficiencies of containerization make it economically feasible to ship less valuable cargo than would otherwise have been possible. As a result, the average value of maritime cargoes has not increased at the same pace as inflation generally.

The bigger problem was with non-containerized cargo. Many courts have applied the package limitation amount even to large pieces of valuable machinery. When the Hague-Visby Rules increased the package limitation, therefore, an independent limitation based on the weight of the goods was also added. For "packages" weighing over 333 kilograms, cargo damage is instead subject to the weight-based limitation. The Hamburg Rules maintained the same mixed package/weight approach, simply increasing the limitation figures by 25%.

The bottom line is that most of the world's trade is now subject to the Hague-Visby limitation amounts of 666.67 SDRs per package and 2 SDRs per kilogram. A large portion of the world's trade is still subject to the Hague Rules, which has only a package limitation. The amounts vary widely. In the United States, for example, the limitation amount is $500 per package. A small portion of world trade is subject to the Hamburg limitation amounts of 835 SDRs per package and 2.5 SDRs per kilogram.

Although only a very small proportion of the world's maritime trade is governed by the Hamburg Rules, a disproportionately large number of the

[5] The Hague Rules' limitation amount was £100 sterling, then worth approximately US$500. Different countries translated this figure into their national currencies, thus leading to wildly different limitation amounts as exchange rates varied.

[6] These comparisons are based on the consumer price index. That index may not be the most relevant measure for these purposes, but it illustrates the general point.

[7] Consider, for example, a shipment of television sets (a fairly common high-value cargo). If television sets had existed in 1924, or if the industry had still used 1924 methods to ship television sets in this century, shipment would have required the consolidation of a number of sets in a large packing crate. In case of damage, the package limitation would have applied to everything in that packing crate. Thus £100 or $500 would have been the total compensation for perhaps a dozen television sets. Containerization, however, permits each set (packaged in the cardboard box that the ultimate consumer sees) to be loaded into the container. The law then treats these individual boxes as "packages" for limitation purposes. Thus £100 or $500 would be the maximum compensation for each television set.

countries participating in Working Group III have adopted that regime. Moreover, many of these countries felt very strongly that the new convention should represent significant "progress" over the Hamburg Rules (with "progress" being defined as increasing the limitation amounts). It was therefore necessary for the major maritime nations (which generally favored keeping the limits at Hague-Visby levels but were willing to go up to Hamburg limits) to compromise with countries seeking much higher limits. In the end, the Working Group agreed that the Draft Convention would increase the package limitation to 875 SDRs (almost a 5% increase above the Hamburg limit) and would increase the weight-based limitation to 3 SDRs per kilogramme (a 20% increase above the Hamburg limit).

These increases would have no effect on the majority of cases in which the existing limits are already high enough to provide full recovery, but the higher limits will provide significantly higher recoveries in those extreme cases that expose the Hague Rules to the strongest criticism. Heavy machinery would no longer be subject to *de minimis* recoveries. For the Hague-Visby and Hamburg countries, the increases will affect far fewer cases, and the impact will be more modest in those cases.

Having a higher limitation amount should also eliminate much of the wasteful litigation designed solely to "break" the limitation.

6. The Loss of the Right to Limit Liability

The Hague-Visby and Hamburg Rules both make it extremely difficult for a cargo claimant to "break" the package limitation. As a general rule, the carrier is liable to pay claims above the limitation amounts only when it has acted deliberately or recklessly.

The rule is not so clear under the Hague Rules, with the result that domestic law in some countries following the Hague Rules has made it easier to avoid the limitation provisions. The common-law deviation doctrine is perhaps the best-known example, but other similar doctrines also exist.[8]

The Draft Convention follows the intent of the Hague-Visby and Hamburg Rules, using stronger language to make the rule clear even in countries that currently recognize doctrines that make it easier to break the limitation amount.

7. Himalaya Clauses

The extent to which negligent third parties can rely on a carrier's defenses and limitations of liability has been a contentious issue for over half a century.

8 In the United States, for example, the courts have created a judicial doctrine know as the "fair opportunity" requirement. If the carrier does not give the shipper what the court ultimately determines was a "fair opportunity" to declare the true value of the cargo, and thus avoid the package limitation, then the carrier may not rely on the package limitation.

At first, the primary question was whether stevedores could benefit from the carrier's package limitation or time-for-suit provision. In recent years, with the growth of multimodal shipments, a much broader range of the carrier's subcontractors have claimed the benefit of a broader range of the carrier's defenses and limitations of liability (including inland carriers that had nothing to do with the maritime aspects of the contract).

The Hague Rules did not explicitly address the issue. The Hague-Visby Rules recognized the problem, but the resolution was ambiguous for independent contractors (who are the ones most likely to raise the issue). The Hamburg Rules protect the carrier's servants and agents, without explicit mention of independent contractors.

Courts in many countries have addressed the issue with varying results. Some have held that any person performing any of the carrier's duties under the contract of carriage was automatically entitled to whatever contractual defenses the carrier would have had. At the opposite extreme, some courts held that negligent third parties were fully liable for their own negligence unless the contracts extended the carrier's defenses in terms that complied with restrictive national doctrines. Eventually, most courts concluded that third parties would be protected if the bill of lading included an adequate "Himalaya clause," and most carriers have learned to incorporate adequate Himalaya clauses into their bills of lading. The modern doctrine has become more of a trap for the unwary (who failed to comply with the requirements established by the courts) than a means to protect identifiable commercial interests.

The Draft Convention provides automatic protection to all of the carrier's employees, agents, and independent contractors to the extent that they are subject to suit under the convention. Thus "maritime performing parties," who assume the carrier's obligations during their own periods of responsibility, are automatically protected (to the same extent as the carrier), whether or not the transport document includes a Himalaya clause. Non-maritime performing parties are not subject to suit under the convention.

In theory, this represents a significant change in the law under the Hague Rules; a significant clarification of the law under the Hague-Visby Rules; and a modest clarification of the law under the Hamburg Rules. In practice, the Draft Convention will make very little difference at all. Commercial parties have been achieving the same result by contract for years. If anything, the new convention may cut down on some wasteful litigation.

8. The Time-for-Suit Period

Under the Hague and Hague-Visby Rules, a cargo claimant has one year in which to file a suit against the carrier before the action is time-barred. The Hamburg Rules extended this time-for-suit period to two years. The Draft Convention follows the Hamburg Rules.

In theory, this will be a significant change for most of the world. In practice, many experienced practitioners have suggested that the effect will simply be to postpone everything by twelve months. In some parts of the world, however, the extra time may enable claimants to gather the evidence they need to make their claims.

9. Expanded Shippers' Obligations

The existing maritime regimes focus almost entirely on the carrier's obligations to the shipper. In the Hague and Hague-Visby Rules, only two paragraphs of article 4 address the issue of shippers' obligations. Article 4(3) does not even impose liability, but rather preserves preexisting negligence liability from implied repeal. Article 4(6) imposes strict liability, but only in narrow circumstances. The Hamburg Rules do not expand on that liability.

The Draft Convention, recognizing both the bilateral nature of the shipping transaction and the serious risks that the shipper is better situated than the carrier to avoid, imposes more requirements on shippers (particularly the obligation to share information) and explicitly imposes liability on a shipper that breaches the requirements.

10. Electronic commerce

It is hardly surprising that the Hague, Hague-Visby, and Hamburg Rules make no provision for electronic commerce. The concept had not even been considered when the Hague Rules were negotiated, and there was no commercial need to address the topic when the Hague-Visby and Hamburg Rules were negotiated. Even today, electronic commerce is more of a promise on the horizon than a wide-spread commercial reality.

One reason that electronic commerce may not be growing faster is the lack of a legal framework against which a system of electronic commerce can be established. Commercial parties are unlikely to risk millions on a venture with little idea how the law will treat them if things go wrong. Accidents and losses may be inevitable, but people investing their money need to know how the law will deal with those problems when they arise.

The goal of the Draft Convention is to establish a legal framework that will give the industry the legal background rules that will enable electronic commerce to become a practical reality. It is far too early to know exactly how electronic commerce will develop, so the convention needs to be "media neutral," able to handle whatever system might ultimately emerge.

11. Controlling Parties and the Right of Control

Prior maritime conventions have not dealt with controlling parties or the concept of the right of control. Existing law is thus found in domestic law, and

may therefore be somewhat different in every country (although the broad principles are in fact fairly uniform). In practice, the Draft Convention will not tend to change existing law on this subject in any significant way, but will instead provide a solid and uniform legal basis for issues that have in many legal systems been left to unpredictable practice (particularly when there is no negotiable bill of lading in the transaction).

The Draft Convention's provisions on the right of control clearly fill a gap in the law in many jurisdictions, and help harmonize the law. They also play an important role in modernizing the law. Because these provisions are most important when the carrier does not issue a physical piece of paper qualifying as a negotiable bill of lading, which is exactly the situation in an electronic commerce transaction, this chapter constitutes an important part of the Draft Convention's indirect facilitation of electronic commerce.

12. Qualifying Clauses

Under the Hague and Hague-Visby Rules, the carrier is required to issue a bill of lading if the shipper requests one, and that document is required to give certain information about the goods. The carrier may escape this liability under certain circumstances, but as a practical matter the remedy — declining to issue the document — is commercially unacceptable for the carrier. The Draft Convention allows the carrier to qualify the transport document (under certain circumstances) and to rely on these qualifying clauses. For some countries, this will be a significant change from current law; for others, it will simply be a confirmation of existing practice.

THE NEW CONVENTION ON INTERNATIONAL CONTRACT OF CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA : A CIVIL LAW PERSPECTIVE

PHILIPPE DELEBECQUE*

1. *UNCITRAL Convention balances'*. The UNCITRAL draft convention on international contract of carriage of goods wholly or partly by sea is now adopted. The text is the fruit of long and wide debates. It contains various compromises, which is not surprising if we recall that the working group in charge of the draft was composed of nearly thirty national delegations members of UNCITRAL, besides the fact that there were professional organization representatives. Despite those difficulties, the drafters had not hesitated, as soon as the first session, to point out some guidelines in order especially to ensure fundamental balances:

- between tradition and modernity: hence, the concern to ensure safety of navigation and environment protection, but in the same time the willing to not totally change positive law;
- between the owner's and the shipper's interests, hence the determination of their respective duties;
- between the different legal systems and more precisely between common law and civil law[1], hence the team of experts coming from both legal systems ; yet, the common law system was best represented due mostly to the use of English language prevailing in maritime matters.

2. *Common law or civil law influences*. The previous UNCITRAL Convention, the first fundamental convention on international trade law, the Vienna sale of goods convention (VSC), has, in the opinion of most of the doctrine, realized quite a good balance between the different legal systems[2]. Its spirit of moderation and compromise has been underlined and, as a matter of fact, the use of common law mechanisms (*e.g.*: last shot theory; anticipatory breach; mitigation of damages) has its counterpart by references to German law (cf. nachfirst theory, art. 47) or French law (*exceptio non adimpleti contractus*, art. 58).

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1 We understand by civil law the continental law belonging to the roman German family.

2 V. J.M. Jacquet, Le droit de la vente internationale de marchandises: le mélange des sources, Mélanges Kahn, 2000, 75.

Likewise, the road and rail carriage conventions (CMR; CIM) and inland waters convention (CMNI) are not inspired by a unique system. There has been several borrows to various legal systems and the result is quite satisfactory.

In the context of EU where an attempt to define common principles of law of contract is presently an issue, the mutual influences between common law and civil law is today very critical.

3. *Hague Visby Rules interpretation: divergences and convergences*. With no doubt the question of the spirit of maritime texts is timeless. It was already an issue at the time of the adoption of the first maritime convention on carriage of goods, Brussels Convention 1924. Yet at that time, French language and French legal concepts were still influent and, besides, it was the French version of the Hague Rules which had officially authority. Likewise in air law, for the French version of the Warsaw Convention. The situation changed with the adoption of Hague Visby Rules (HVR) for which several linguistic versions are recognized and their coming into force.

If these Rules are specifically international as a convention of uniform law, some effect is left to national law. First of all, when one has to fill in gaps, the applicable law has to be determined. This situation leads unavoidably to different solutions. The best example is case law concerning the opposability of jurisdiction clauses. The French position is strict, while the Dutch position is liberal[3]. Besides, even though in EU, Rome Convention has harmonized conflicts of law in contractual issues, the text remains so complicated that it leads to different solutions. For instance how to understand art. 4.4 Rome Convention? But with no doubt, the adoption of Rome 1 Regulation will make improvement[4].

Secondly, the Hague Visby Rules often need interpretation and, as F. Berlingieri has underlined, differences are obvious. For example, as for the meaning of art. 1.b HVR, the English have a literal interpretation considering, to make a long story short, that in the absence of B/L the convention does not apply[5] ; as for the French, the contractual approach has been set forward[6].

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3 See e.g. Cass. com. 29 nov. 1994, DMF 2005, 209, obs. P. Bonassies; CJCE 9 nov. 2000, Coreck Marine, DMF 2001, 187 and the obs.

4 Rome 1 deals separately with goods and passengers. With regard of goods, the parties retain freedom of choice; absent of choice, the governing will be the law of the place of delivery or the law of the carrier's habitual residence. With regard of passengers, there is more limited freedom of choice because passengers are treated as akin to consumers.

5 Given the straight B.L is considered as a true B/L (cf. Rafaela S, Ch. Lords 2005, LLR 2005.I.345). French Cour de cassation has the same analysis (Cass. com. 19 June 2007, DMF 2007, 790, obs. Tassel).

6 V. MM. Bonassies et Scapel, Traité de droit maritime, LGDJ 2006, n° 905.

Likewise, there is true opposition between House of Lords and the French "Cour de cassation" concerning the validity of FIO or FIOS(T) clauses[7]. This does not mean that there are no convergences between the national interpretations: indeed they do exist especially in the understanding of excepted cases[8] or also in the understanding of damages compensated on the basis of the convention (cf. damages in relation or in connection with the cargo).

4. *UNCITRAL Convention philosophy: "pragmatism first".* The first ambit of Uncitral Convention is to unify again the law of international carriage and especially of international carriage by sea. The convention has the purpose to consider all contractual issues with no bias. The drafters have not been willing to retain such or such conception. Therefore the convention has no real theoretical basis, but only ambits to give a practical answer to the issues, while leaving to the applicable law the task to fill in possible gaps. Several times, especially on the question of the legal situation of the consignee, party or third party to carriage contract, it has been said that the priority was not to settle theoretical problems, precisely because of the differences between legal systems. Therefore it is difficult to point out the influences of such and such legal family and to venture that the Uncitral Convention would be inspired more by common law or civil law. Among all, the convention is pragmatic: that is its own philosophy!

5. *UNCITRAL Convention: what about a civil law perspective.* This pragmatic approach is no doubt far from a civil law perspective which traditionally prefers to set forward theoretical basis of rules. The Uncitral convention is far from the Cartesian tradition. Besides, if important concessions of the contractual approach have been made, putting aside the documentary approach (art. 5 s.), all the conclusions are not drawn accurately. The charter-parties are not governed by this convention, but charter-parties are not, for the civil lawyers, contracts but documents: the expression "affrètement" preferably should have been used[9]. Besides, if the convention is, from now on, an international convention on carriage contract and no more only, as by the past, a convention on transport liability, it is not certain that the drafters have understood all of the consequences of the change. In a civil law

[7] Comp. "The Jordan II" (Ch. Lords, LLR 2005.I.57) and Cass. com. 19 march 1985, DMF 1986, 20

[8] Cf. about the interpretation of "nautical fault" concept, the restrictive solutions are comparable, see. MM. Bonassies et Scapel, op. cit., n° 1094; J F Wilson, Carriage of goods by sea, Longman, 4th ed., p. 262.

[9] The French concept of "affrètement" does not exactly meet the English concept of "affreighment".

perspective, the enlargement of the international law is decisive. The civil lawyers due to the preference for abstraction will certainly give to this enlargement more importance than common lawyers. Yet, we will not go too far in this perspective, and one must read the convention with a positive view.

In other words, reading the Uncitral convention in a civil law perspective leads to three questions: what might be offending for a civil lawyer? What a civil lawyer is happy with? What can be satisfying for a civil lawyer?

I. What might be offending for a civil lawyer ?

6. *Structure.* Two points may offend a civil lawyer: the method and substantial issues.

A. Method

7. *Methodology and terminology.* A civil lawyer has some difficulty to be satisfied with art. 1 that gives plenty of definitions and contains fantastic tautologies. Let us recall the definition of the transportation contract as a contract by which a carrier has to carry! See in the same way art. 1.4: non liner transportation means any transportation that is not liner transportation! Or art. 1-29: a competent court means a court that may exercise jurisdiction over the dispute!

One is also struck by the structure which does not follow the contractual logic and therefore complicate it. It would have been much simple to follow three points: conclusion, content and execution of contract. One has also some difficulty to understand the title of chapter 6: additional provisions relating to particular stages of carriage, when it would have been more clear to link it with the former chapter or even the chapter on carrier's obligations.

The willing to say things all together from a positive and negative point of view is also peculiar: this is true for definitions; this is also true for certain provisions. Let's look article 6: art 6.2 precises that the convention does not apply to contracts of carriage in non liner transportation, except when ... With no doubt, this could have been said more clearly and more directly. This method is all the more critical that, when we are waiting for the solution, the text is silent: about the delay, art. 18 and art. 22 say the carrier is liable if the delay is agreed, but nobody knows what happens if no delay has been agreed. In our opinion, the solution may be found in applicable law. The same problem exists about the shipper's liability for delay.

A last word about terminology: what is a reasonable man or what is reasonably? Both expressions are used very often by the text. I must say that our references to "bonus pater familias" are hardly better. Moreover, can we still talk of "common adventure" (art. 17)? You will certainly agree that this word is old fashioned or obsolete.

8. *Impressionism*. Other drawbacks are not, strictly speaking, matter of method. They are only due to the common law tradition and the way the statutes must be drafted. In France, we teach that statute is general and abstract. What will my students think of the list of catalogue exceptions (art. 18)? Would it not have been more relevant to distinguish between those excepted cases and to consider in one hand the excepted cases under the control of the carrier and in the other hand the excepted cases out of this control?

Which is more irritating are the length and the heaviness of the wording. Chapter 8 on transport documents and further more Chapter 9 on delivery are too long. From my opinion, a few articles would have been sufficient and it was not necessary to systematically repeat that what is worth for the paper document is also worth for the electronic document. Chapter 3, in this respect, should have been totally sufficient. There again the need for details has prevailed.

As for chapter 11 on Transfer of Rights, I wonder if it is really useful. It says too much or not enough. Too much: what it indicates is that is obvious. Not enough: if the straight B/L is mentioned, it is only provided that it transfers rights without endorsement. The requirements of art 1690 of civil code will have to be respected if French law is applicable; in this respect, the question of the applicable law of the assignment and more precisely the applicable law of the effect of the assignment toward third parties should have been directly solved.

B. Substantial issues

9. *Jurisdiction and arbitration. Opting-in*. Some solutions are difficult to accept from a civil law perspective. Those relating to jurisdiction (chap. 14) and arbitration (Chap. 15) are quite confusing. It is difficult to admit that a person that is not party to a volume contract is bound by an exclusive choice of court agreement (art. 69.2), even if this is possible under the applicable law. On this point, French law, rightly, requires the consent of the party.

Likewise in arbitration, how can the text say that the parties are not bound by the place of the arbitration proceedings as designated in the arbitration agreement (art. 77.2 b)?

Fortunately, these two chapters are not compulsory: they will be only binding if the Contracting States will make a declaration in this sense (opting in system, art. 76 and 80).

10. *Coherency: the provisions lack of coherency*. Let's take the examples of provisions on multimodal carriage. Article 13 allows the carrier to be, by contract, exonerated of his liability as a carrier and to be liable only as an agent for the carriage inland leg. This provision is most subject to critics because it is in contradiction with the multimodal aspect of the Convention.

If the transport liability can be different from one way of transport to another, one cannot provide that for certain aspects in relation with the carriage, the carrier cannot be liable. Besides, art. 13 seems to say that the carrier is liable as an agent: to be honest, this means that all will depend of the applicable law to the detriment of predictability.

11. *Technical points*. Most of the technical points are linked with the structure of the provisions that are difficult to understand for a civil lawyer. This is the case for art. 44 which provides that if the contract particulars contains the statement "freight prepaid", the carrier cannot assert against the consignee the fact that the freight has not been paid. Is it a substantial rule? Is it a rule of evidence? In a civil law perspective, the second option would be considered, but this is not in accordance with the working group analysis.

Furthermore, some concepts show the common law influence. And this can be quite disturbing: this is the case for the effect of "deviation" (art. 25).

At last, if art. 64 provides a period of time for suit, this period of time must be considered as a foreclosure period of time and not as a statute of limitation (prescription). In other words, the suit is extinguished but not the right. As our British friends would say, only adjective law is concerned. But, why does art. 65 say that this period of time cannot be interrupted? This is not correct. Any period of time whatever can be interrupted. On the other hand, it is logical to say, as it is a period of time of foreclosure, that the debtor can still and always put forward its rights in a context of a defence or set off (art. 64.3)

On second thoughts, this link with adjective law seems to us the best. On this point, the civil law family is, from my point of view, incorrect.

II. What a civil lawyer is happy with ?

12. *A modern conception of the contract*. UNCITRAL Convention enhances major law contract themes as consensualism (mutual agreement), freedom of contract, binding force, and privity of contract. The text underlines the principal characters of contract carriage of goods, as a commercial contract, and in the same time as an adhesion contract and now as a successive execution contract. The questions of qualification are important, because carriage is distinguished from affreightment, from forwarding, from stevedoring, but, from my point of view, not sufficiently from renting (containers)[10]. At last, the convention determines the obligations of the parties: the contract content is fixed. It is a real juridical progress, which is a good point.

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[10] V. Cass. com. 5 mars 2002, DMF 2002, 569, applying carriage regime, even though the damages were relying to the defects of refrigerated containers, containers having been rented by the carrier.

This modern approach does not concern only the law of contract. One could say the same thing about securities: the right to retain the goods may be exercised pursuant the contract, as art. 51 says, without really understanding the consequence of this possibility[11].

Let's go through the major contract themes and let's see how Uncitral Convention harmonizes them an appropriate manner. About mutual agreement, we'll do not say a lot, because if the text retains a contractual approach[12] and develops the documents issues', it is limited to providing that the absence of one or more of the contract particulars does not affect the legal character or validity of the transport document (art. 41.1). As for the evidentiary function of the documents, we will see it later (infra, n° 16). Let's go on and consider the other themes.

A. Freedom of contract vs. Mandatory law

13. *Exemption clauses: nullity or validity?* Can we congratulate ourselves on freedom of contract coming back in contract of carriage? Let's immediately precise that contract of carriage widely remains a mandatory contract. Besides, exemption clauses are forbidden (art. 81) and this solution is worth for the liability clauses (art. 81.1 a) as for the different clauses relating to responsibility or obligations (81.1 b). This is not a secondary point and leads to wonder if liberties clauses are yet valid. One must distinguish between the type of clause. Anyway, other articles expressly recognize the possibility for the parties to derogate to such or such provision: see art. 14-2 which considers as valid clauses FIO / FIOST practice. It is, in our point of view, an excellent provision, at least in non liner transportation.

In other respects, in volume contracts, the parties have the possibility to derogate to most of the convention provisions (art. 82). It is needless to say how fundamental is this article. We have, ourselves, denied this possibility, but we ought to recognize that derogations are now well organized and that many limits circle freedom of contract game:

It is clearly said that the derogations cannot be stipulated in an adhesion contract, *i.e.* in a contract the terms of which have not been discussed. In other words, a derogation cannot be stipulated in a B/L. To speak about an adhesion contract cannot make anything but to attract a civil lawyer. I am not going to develop this issue: it is the matter of my colleague Honka. I am going to insist on another aspect relating with the trilogy of content of contract, that is

[11] French law is in the same line since 2006 reform, see. C. civ. art. 2286.

[12] Many contracts leave the means of transport open: so, if the contract does not say goods are to be carried by sea, but this is permissible and the goods are carried by sea, the Convention applies.

recalling the famous Pothier's[13] distinction between "essentialia", "naturalia" and "accidentalia" of the contract.

14. *Essentialia: core obligations.* "Essentialia" of the contract find their expression through the fundamental obligations of the parties, the core obligations which by definition are not left to the sole freedom of contract. Even if the convention does not say that expressly, we find this idea considering the carrier obligations like shipper obligations.

In those conditions, the carrier has to exercise due diligence, at the beginning of, and during the voyage by sea, to make and keep the ship seaworthy and properly crew, equip and supply the ship and keep the ship so crewed, equipped and shipped throughout the voyage. His obligation about seaworthy is from now on continuous: it is a progress and this provision is going to increase the safey of navigation. This obligation is expressly considered as a fundamental one under art. 82.4 in relation with volume contract. The solution has to be generalized.

The obligation to carry and the obligation to deliver, even if the text gives no explanation and no other definition (cf. art. 11), belongs to the "essentialia" of the contract. With the delivery the contract is discharged. The contract is fulfilled and therefore the fundamental element of the transportation. One will stress that the delivery cannot, in theory, occur before unloading, which consequently limits the effects of tackle to tackle clause. Furthermore, "misdelivery" leads to the responsibility of the carrier, yet but rightly, entitled to the benefit of the limitation of liability.

Nevertheless, the parties can always precise the conditions of delivery. For instance, when the shipper asks the carrier to deliver the goods without surrender of B/L, but with a letter of understanding as counterpart. The shipper entrusts the carrier with a specific task: in our civil law conception, this is an "adjustment of the usual duties following from the carriage contract"[14].

On the other side, the shipper as well is bound by fundamental duties: to provide to the carrier information, instructions and documents necessary for the voyage (art. 30). There again, article 82.4 specifies it expressly for volume contracts, but this rule has to be generalized. As for the duties concerning dangerous goods, public policy requires that they apply systematically.

15. *Naturalia et accidentalia.* By "naturalia" of the contract, we mean the duties that are normally part of the contract but that can be adjusted or

[13] Pothier is one of the main 17th century authors who has inspired the drafters of the French civil code.

[14] Cass. com. 22 June 2007, DMF 2007, 607: so, the carriage time-bar is applicable.

precised by the parties themselves. In this respect, the most important provision is art.14.2 which provides that the parties may agree that the loading, handling, stowing or unloading of the goods can be performed by the shipper, the documentary shipper or the consignee (v. egal. supra, n° 13). Such an agreement shall have to be mentioned in the contracts particulars as it relieves the carrier from its duties.

One can add that if the deck cargo was under HVR considered as an exceptional operation, it is today considered as perfectly normal for most of the transportation and especially for containers transportation which represents the great part of the traffic. The solution is certainly welcome[15].

The convention provides also that the shipper is bound by several duties : some are fundamental as we have seen ; other are usual : for instance, the obligation to deliver the goods ready for carriage and this duty can be agreed otherwise in the contract of carriage (art. 28).

As for the "accidentalia", they concern terms that can be agreed by the parties to face specific situations: for instance, jurisdiction or arbitration clauses (chap. 14 and 15) or declaration of value (art. 61), which is always possible in order to increase the amount of limitation of liability.

B. *Binding force vs. Flexibility*

16. *Unilateralism vs. bilateralism.* The carriage contract has this specificity of being a three parties contract (infra, n° 19) and a contract subject to a certain form of unilateralism in the sense that it can be adjusted without any *mutuus consensus*. The Uncitral Convention has perfectly understood this specificity. Three examples will be considered.

First of all, the exercise of right of control. New instructions can be given concerning the goods but also considerable variations to the contract of carriage. These variations can be stated unilaterally as an *a contrario* interpretation of art. 56 allows it. Moreover, this text does make a distinction between unilateral variations of the contract and variations agreed by both parties (*mutuus dissensus*).

Secondly, the carrier can make reserves concerning the information relating to the goods[16]. This can be done under specific conditions (art. 42), but always unilaterally. This position is important, although the carrier has not the obligation to qualify the information. The text does not take any action against the carrier who would not want to qualify the information, although

15 Comp. Cass. com. 18 mars 2008, "Ville de Tanya", n° 07-11777, observing that the carrier who has loaded upon the deck a container without any consent of the shipper cannot invoke perils of the sea exception to withdraw himself to own liability.

16 The word "reserves" is not used by HVR. Art. 3.3 considers it only under a negative point of view. The French text is more explicit (Décr. 1966, art. 36), like HR (art. 16.1).

he is aware of the defects of the goods[17].

At last, the period of time for suit may be extended by a declaration (art. 65). Can be there better example of the effect of unilateralism in contract?

17. *Bona fide.* The contract of carriage is a contract that, as any other contract, must be performed in good faith. French case law and doctrine insist on this idea[18]. Yet, the *bona fide* rule allows the judge to punish an abuse of a contractual right but does not allow him to modify the content and the substance of the rights and the duties agreed by the parties[19]. This is the exact meaning of the contractual good faith rule. On this point Uncitral Convention is quite silent, except in art. 2 which insists on the observance of good faith in international trade. A civil lawyer will take into account the rule previously fixed by French case law.

Art. 39 expressly takes in account good faith to identify the carrier. The issue is famous because of the practice of BL without heading. In this respect, French case law has clear solutions. If the carrier is not clearly identified, one assumes that the ship owner is considered as the carrier[20]. The same rule is provided by Uncitral Convention with slight differences. In any case, this provision reveals the very modern idea of the need of great transparency in contractual relations[21].

C. *Privity of the contract vs. group of contracts*

18. *Legal liability.* Privity of contract is nowadays understood in a more flexible way and takes into account economic impact. This is a very good point and Uncitral Convention in this respect is a very modern one. Art. 4 does not make any distinction between contractual and tort liability. A third party concerned[22] will have to sue the carrier in the conditions and within the limits fixed by the Convention. This position is not new (see, art. 4 bis HVR ; L. 1966, art. 32), but it has been extended by the convention as it has been bilateralized (art. 4.2). A logical analysis will lead to apply the same solutions in jurisdiction[23].

19. *Contractual block theory.* Uncitral Convention takes in account contractual block theory as H.R. has done it. Nevertheless, the convention

17 Comp. L. 1966, art. 20.

18 MM. Bonassies et Scapel, op. cit., n° 1007.

19 Cass. com. 10 July 2007, Gaz. Maritime Arbitration Chamber of Paris, n° 14, Editorial.

20 Cf. Cass. com. 21 July. 1987 "Vomar", DMF 1987, 573.

21 BIMCO has exactly considered that in her new models of B/L.

22 The situation of "penitus extranei" is likely quite different.

23 Contra: CJCE 27 Oct. 1998 "Ablasgracht", DMF 1999, 9.

goes further because it does not concern only the situation of substituted carrier but it considers all performing parties as, in a certain sense, equivalent of the contractual carrier. This is a very clever and modern approach.

Yet, the contractual carrier is liable for the breach of its obligations by any performing party (art. 19) and the maritime performing party are subject to the same obligations and liabilities than the contractual carrier (art. 20). Likewise, the joint and several liability of the carrier and maritime performing party (art. 21) is perfectly justified. As for the employees nothing in this convention imposes any liability on them (art. 20.4) which is in accordance with the last French case law[24].

20. *Shipper and consignee.* On the part of cargo interest, the convention takes in account the situation of every person concerned: the shipper but also the documentary shipper subject to the same responsibilities and liabilities than the contractual shipper (art. 34).

The consignee is considered neither like a party nor a third party: he is simply designated as the person having the right to the delivery of the goods. Both the contractual consignee and the actual consignee (in fact, the notify) have the capacity to sue the carrier. Beyond these technical points, we can note that the conception of the carriage contract prevailing in the convention is perfectly in accordance with a civil law perspective.

III. What can be satisfying for a civil lawyer?

A. The rest

21. *Deduction.* What is satisfying is all what is neither offending nor pleasing, *i.e.* a lot, and notably the fact that the convention does not apply to all contracts. Its material scope is satisfying by the exclusions contained (art. 6) concerning especially the charter-parties and by the inclusions retained (art. 7) about transportation under charter-parties. The geographic scope of application is easier to understand (art. 5) and one may approve the fact that the convention applies even if the road legs are more important than the sea legs. Precisely, the "maritime plus" system which prevails in Uncitral is, with no doubt, the system with which the professionals are happy.

22. *Provisions.* Two provisions are particularly welcome. The first comes within the framework of what we may call the common law of carriage and concerns the situation of goods which are not delivered: what is provided by art. 50 of the convention is in accordance with the CMR provisions[25].

24 Cass. ass. plén. 25 February 2000, D. 2000, 573

25 In French law, the solutions are the same: cf. "contrats types" in road carriage.

More original, but equally acceptable, are the different provisions on non negotiable transport documents. Those provisions have the merit to organize the sea way bills regime. In civil law, those titles have a contractual function and an evidentiary function. But they have no commercial function because they do not represent the goods. This situation is not always convenient. This is the case when such a document is not in the hands of the consignee. The consignee has no protection and has to suffer the rule of "opposability of exceptions". The convention solves nowadays the problem in art. 43.b and particularly in art. 43 c: this later text which provides that the consignee may rely on the particulars furnished by the carrier finds its explanation in the common law theory of reliance. The civil law theory of "apparence" is not exactly the equivalent and has not the same scope.

B. Problems not resolved

23. *Matter of interpretation.* If the convention is, on many issues, perfectly acceptable, this does not mean that it does not meet any difficulty, in a civil law perspective. Many issues would have been easier solved if the convention had retained some civil law concepts, and especially, the distinction evoked during the debates between "obligation de moyens, obligation de résultat et obligation de garantie". This distinction, a very pedagogic one, would have permit to circle better the hypothesis of shipper liability: art. 28 et 30, obligation de moyens; art. 32.1 et 33, obligation de résultat; art. 32.2, obligation de garantie.

As for the carrier liability (art. 18), if it is true that the basis of this liability is not exactly the same that the HVR one, it is impossible to say, in our opinion, that it is a "fault based liability regime". Furthermore, it is false to say, while the language of HVR is retained, that the risk has shifted from ship to cargo. The carrier liability is still, in our opinion, a strict liability, given that the carrier could not withdraw his liability if the cause of damage is unknown. But, probably, the divergences of interpretation about such and such excepted case will remain (*e.g.* on the perils of the sea; on the "fait du prince") or still on the "in concreto" or "in abstracto" appreciation of the personal and qualified fault within article 63.2.

24. *Following.* These issues of interpretation are interesting but always delicate, because they express differences of conception and reading of law. The expression "loss and damage" does not cover the French expression of "pertes et avaries" and the notion of "damage", that is a material notion for a French lawyer, does not meet the expression of "prejudice", a legal notion for us.

When the text speaks about apportioned liability, the convention does think in terms of causation (cf. art. 18.5 et 31.3). This may be understood, but in a civil law perspective, the causation must not be divided; therefore it

would have been better to solve the problem in taking into account the gravity of the faults.

At last, there are unavoidable difficulties in relation with the vocabulary and the terminology chosen: when the convention uses the verb "occur" (art. 27), this refers either to the place where the damage has been caused or to the place where the damage has been suffered. Probably, it would have been better to use civil law terminology and to speak about "fait générateur".

Conclusion

25. *All the best?* One could not think that everything goes for the best in the best of the worlds. With no doubt, the Uncitral convention is globally acceptable. It is what we have said at many times and it is what we repeat today. Uncitral Convention has the great merit to contribute to re-unify the law of carriage of goods by sea and to modernize this topic. We have not to hesitate between having one or regional solutions. As K. Christoffersen (AP Moller Maersk counsel) has wrote, "the clearer and more harmonized the rules are, the cheaper our services become: this would be a benefit for the shippers". We have to underline that, at the moment where the States are invited to ratify the convention. Uncitral Convention is neither in favour of the owners nor in favour of the shippers: the convention does not seek to protect any socio-professional category. It aims to realise a balance between both interests. The convention is neither a common law convention nor a civil law convention: it is, first of all, a uniform law convention where many sources are flowing.

Imperfections in the convention should not get in the way. Of course, many difficulties still remain. But they are without no doubt inescapable. In this respect, I would like to associate myself to my colleague M. Sturley observations, always relevant: was it possible to do best? I am not sure of that. Besides, as Portalis, one of our famous drafters of the French civil code in 1804, said: "one must leave what is good alone if one is in doubt about what is better"[26].

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26 Portalis, Preliminary discourse, translated by Shael Herman, 43 Tul. L. Rev. 762, 1969.

CARRIER'S OBLIGATIONS AND LIABILITIES

FRANCESCO BERLINGIERI

The structure of the liability regime is globally close to that of the Hague-Visby Rules even though it differs from that of the Hague-Visby Rules in some significant aspects. Its fundamental elements are 1) the period of responsibility of the carrier, 2) the obligations of the carrier, 3) the basis of liability, 4) the (abolition of) the exonerations from liability, 5) the allocation of the burden of proof, 6) the liability regime for deck cargo, 7) the liability regime for carriage preceding or subsequent to carriage by sea, 8) the liability of the carrier for other persons and, 9) the right of action of the shipper and consignee against the persons for whom the carrier is liable.

1. The period of responsibility

The period of responsibility differs from that of the Hague-Visby Rules as well as from that of the Hamburg Rules. While in fact in the Hague-Visby Rules it commences from the time the goods are being loaded on board and ends at the time of completion of discharge from the ship (tackle-to-tackle) and in the Hamburg Rules it coincides with the period during which the carrier is in charge of the goods, except that if the carrier receives the goods before their arrival at the port of loading and delivers them in land, beyond the port of discharge, the period of responsibility is limited to the period between their arrival at the port of loading and their departure from the port of discharge (port –to-port) , under the UNCITRAL Draft it coincides with the whole period during which the carrier is in charge of the goods, wherever he receives the goods from the shipper, in land or at a port, and wherever he delivers them to the consignee, at a port or in land (door-to-door).

2. The obligations of the carrier

(a) The basic obligation

The basic obligation of a carrier under any contract of carriage of goods is obviously to carry the goods from the place of receipt to the place of destination and to deliver them to the consignee at the appropriate time in the same conditions as they were at the time of receipt. Such obligation is, albeit only in part, set out in art. 3(2) of the Hague-Visby Rules, pursuant to which the carrier must "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried": what is missing in that provision is the reference to the obligation to deliver the goods at destination. Nothing is said

INTRODUCTION

TOMOTAKA FUJITA

"Balance of risk" was the most frequently used and sometimes abused phrase during the UNCITRAL Working Group III's deliberations of the new Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Although all Working Group delegations unanimously favored a "fair balance of risk" between carrier and cargo interests, they never reached consensus about what constitutes optimal "balance" under a specific article or in a specific situation. As a result, although the basic formula for the basis of liability and the list of exonerations were decided relatively early on, other elements of the liability regime such as the treatment of delay or limitation levels were left open until the very last stage.

How does the new Convention finally strike the balance of risk? Does it shift the balance more favorably towards the carrier or the other way around? Does the change dramatically affect risk allocation or is it merely a fine tuning? As is often the case, the question is easier to ask than answer. The panelists of this session try to answer this difficult question in terms of carriers' obligations and liabilities, the limitation level and shippers' obligations.

Although detailed examination of the new Convention should be left to each panelist, I would like to remind you that it is more difficult than it first looks to assess how the new Convention changed the risk balance.

One can easily see that carriers' obligations and liabilities are enhanced in several ways compared with the Hague-Visby Rules. Some of the exonerations for carriers have been eliminated. The obligation to make ships seaworthy becomes continuous under the new Convention. However, the new Convention has a more complicated impact on other areas. Let us take the treatment of delay as an example. The new Convention imposes a liability on carriers for delay in delivery, while the Hague-Visby Rules do not. This might be seen as another example of enhanced liability, but the situation is more complicated. The new Convention recognizes delay only when the time for delivery has been agreed upon (see Article 22). If the time for delivery was not agreed upon, then there seems to be no liability under the Convention, and contracting states cannot impose any additional liability under national law. Therefore, those states having their own liability laws which impose delay liability on the carrier would perceive that the Convention decreases carriers'

liability. For states which were contracting parties to the Hamburg Rules, the treatment of delay is a clear case where the rule is changed in favor or the carrier. In other area, it might be difficult to determine whether and to what extent the level of carriers' liability increased under the new Convention because the basic formula for the basis of carriers' liability differs substantially from the Hamburg Rules.

The limitation level of carriers' liability seems easier to asses because it is simply a figure. In fact, it is not so easy. A 20% increase of the limitation figure does not necessarily mean the carrier is 20% more liable. If most of the cargo claim is, as is often emphasized in the Working Group, below the existing limitation, the increase of the limitation only affects a limited number of cases. Therefore, while it is clear the limitation level has increased, its exact impact is not self-evident. In addition, the scope of liability subject to limitation has changed. The new convention limits "the carrier's liability for breaches of its obligations under this Convention." (see Articles 61 (1)) Therefore, liability for misdelivery of goods, for example, is subject to the limitation. Misdelivered goods are thought to be "lost" and liability for misdelivery is limited in some jurisdictions, even under Hague-Visby. However, other jurisdictions have imposed unlimited liability for misdelivery. Carriers' liability for issuing a transport document without qualifying information they know is incorrect (see Article 42(1)) would be another example of the expanded scope of the limitation, although carriers may lose their right to limit pursuant to Article 63. Suffice it to say that even the impact of the liability limitation is not easy to determine.

The new Convention devotes one chapter to the detailed regulation regarding shippers' obligations and liabilities. Although many obligations under the new Convention seem to simply endorse current practice, there are several elements which could impact the risk balance under existing law. The burden of proof for shippers' liability under Article 31 was, as a result of compromise, intentionally vaguely drafted. Shippers' liability is subject to a two-year time-bar since the delivery of goods (or since the last day on which the goods should have been delivered). The time-bar is applicable even when litigation against carriers is based on torts or otherwise (see Article 4(2)). Shippers' obligations and liabilities are mandatorily regulated, unlike under previous conventions for the carriage of goods by sea. It is uneasy to determine whether these elements substantially change existing risk allocation.

I have explained why it is difficult to assess how the new Convention affects the risk allocation. The panelists of this session tackle the difficult task by conducting in-depth analysis of the provisions regarding carriers' obligations and liabilities, the limitation level and shippers' obligations.

THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA: THE LIABILITY AND LIMITATION OF LIABILITY REGIME

KOFI MBIAH *

Introduction

It is important at the outset to state that the Committee Maritime International (CMI) and Working Group III of UNCITRAL deserve commendation for having brought the project on the New Transport Law this far. The New Transport Law, which is now christened *"DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA"* hereinafter referred to as the (DRAFT CONVENTION)[1] went through its final reading at the 21st Session of the UNCIRTAL Working Group III held in Vienna in January 2008.

Undoubtedly, the "CMI Draft" which was submitted to UNCITRAL has undergone numerous changes and refinements during the period of the deliberations from 2001 to 2008.

The discussion of the Liability and Limitation of Liability Regime would thus be based on the Law as contained in the final draft. Reference would however be made to some of the earlier discussions and debates that have informed the current state of the law in the Draft Convention.

It is important to mention that the issue of liability and the spread of risks is arguably the most important reason underpinning the revision of the international legal regime for the carriage of Goods by Sea.

The history of the development of the law regarding freedom of contract, the arbitrary and excessive inclusion of exemption clauses in sea carriage contracts, the development of compromises which manifested itself in the

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1 See A/CN. 9/645 P.58 paragraph 289 .

Harter Act and consequently in the Hague Rules[2], Hague- Visby Rules[3] as well as the Hamburg Rules[4] is so well documented and would thus not need recounting here.

It is trite learning however, to mention that, at the base of all of this, is the issue of risk, liability and the balance of interests between cargo and carrier. The attempts to find a common platform that adequately accommodates the interests of the cargo owner as well as the carrier has thus found expression in the development of international rules that have guided the conduct of international maritime transport for well neigh a century.

Rationale For New Rules

In a brief paper such as this, time and space would not allow for an extensive discussion of the various international regimes, their shortcomings and the need for a new convention.

Suffice it however to mention that today, there are countries which are party to the Hague Rules, some countries which are party to the Hague - Visby Rules, some which are party to the Hamburg Rules and yet a few others which have hybrids of the various rules, developed to meet their national commercial aspirations.

There is no doubt that steps have been taken by some countries[5] to develop new rules on the carriage of goods by sea in furtherance of the above objective. The likelihood of a proliferation of rules very much dependent on individual national aspirations is thus real.

It is also worthy of note that as at the time of writing this paper, April 2008, over 32 countries had ratified the Hamburg Rules and are thus contracting parties to the said rules. The situation makes for a lack of uniformity in the rules regarding the international carriage of goods by Sea.

The CMI's efforts to remedy this situation cannot be underscored. It is worth mentioning that the efforts of the CMI culminated in the development of the "*CMI Draft*"[6] which formed the basis for discussions of the Draft Convention. Thus the key objectives of the new draft was to attain uniformity in the international regime for carriage of goods by sea, bring the rules up to

2 Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, August 25 1924,120 L.N.T.S. 155 ("Hague Rules").

3 Hague Rules, *supra* note 2, as amended by protocol to amend the Hague Rules, February 23, 1968, (Visby Protocol).

4 United Nations Convention on the Carriage of Goods by Sea, March 31, 1978, 1695 U.N.T.S. 3.

5 Notably, The United States of America, Australia, Malaysia and some Scandinavian countries. See F. Wilson Carriage of Goods by Sea p. 227.

6 See CMI Yearbook 2001.

speed on new developments and practices in international maritime transport and finally albeit in no small measure, attempt a balance of the cargo and carrier interests.

The development of the new rules as contained in the Draft Convention could be traced to the 9th Session of UNCITRAL in the year 2001[7]. At that session, the Commission re-established Working Group III (Transport Law) and gave it the mandate to prepare in close collaboration with interested international organisations, a legislative instrument on the international carriage of goods by sea.

The new draft convention has thus seen over eight years of discussions and deliberations taking into account viewpoints expressed by various interested parties[8] as well as compromises sometimes intricate and delicate, that were needed to arrive at common ground.

This is the backdrop upon which the liability and limitation of Liability Regime of the new Draft Convention would be discussed.

The basis of Liability

The provisions in the draft convention regarding the basis of liability are to be found in article 18[9] while the provisions regarding limitation of liability are captured in article 61 under the caption Limits of Liability[10].

It would be an understatement to indicate that the present provisions on the Basis of Liability as reflected in Article 18 are the result of very protracted debates, formal and informal consultations,[11] that have produced provisions on liability that are as delicate as they are intricate.

In the light of the above, no litmus test can be set out to ascertain whether indeed the provisions provide the requisite balance desired by either carrier or cargo interests. It is however worth recalling that an Agenda Paper[12] prepared for the 2004 CMI Conference set out some key parameters for establishing the basis of liability. These are indeed relevant as they impacted greatly on the elaboration of the provisions of Article 18 of the Draft Convention.

It established that there was overwhelming support across the various

7 See A/CN.9/645 p. 6.

8 Apart from members of the Commission and observers various interest groups such as International Federation of Freight Forwarders Associations (FIATA) European Shippers' Council (ESC) Comité Maritime International (CMI) International Group of Protection and Indemnity (P&I) clubs, BIMCO etc for a full list see A/CN. 9/645 p. 6.

9 See A/CN. 9/645 p. 67.

10 See A/CN. 9/645 p. 85.

11 See CMI Yearbook 2004 p. 132.

12 See CMI Yearbook 2004 p. 132.

interests, that the liability of the carrier should be fault based[13]. The direction provided by the Agenda Paper, was to the effect that the Committee[14] should amongst others focus its discussion on matters relating to:

i. The Burden of Proof as between carrier and claimant
ii. The carrier's reliance on the Exculpatory Clauses
iii. The overriding nature of the carrier's obligation
iv. The nexus between the circumstances and the loss, damage or delay to the goods.
v. The fire exception
vi. The Fault or neglect of the carriers agents or servants

A close reading of Article 18 as presently drafted would indicate that these issues have been addressed within the context of the basis of liability. Indeed there is no doubt that a great deal of effort has been put in by the Working Group to strike a balance between carrier and cargo interests in Article 18. It is however worthy of note that, this is still unsatisfactory as expressed by some delegations during the 21st Session of the Working Group[15] and during the previous sessions. In addition, concerns were raised that the deletion of subparagraphs 3(e) and (g) would lead to a substantial increase in the carrier's liability, in certain cases even to an absolute liability. It was also noted that caution should taken when revising a text which had been fully considered and agreed to by the Working Group, especially because **draft article 18 was a central element in the whole package of rights and obligations (my emphasis)**

On the basis of the above, the Working Group refrained from amending the substance of the text of Article 18.

Having provided this background, it now becomes necessary to examine the present article vis-à-vis the Hague-Visby and Hamburg Regimes, to ascertain the extent to which it really balances carrier and cargo interest.

As pointed out earlier, the liability is fault based, very much in tune with[16] *The Hague Visby and the Hamburg Rules.* Article 18 is thus an alloy of the Hague-Visby and Hamburg Regimes on the basis of liability. In fact paragraphs 1& 2 are a new rendition of Article 5(1) of the Hamburg Rules while Article 3 revisits Article IV r 2 of The Hague Visby Rules with some requisite modifications.

Generally speaking therefore, a bold attempt is made to accommodate Hamburg as well as Hague-Visby interests with respect to the basis of liability. A closer look at Article 18 shows it to be more complex and intricate

13 See the report of Committee A published in CMI Yearbook 2001 Singapore II at pp 182-187.
14 Committee A.
15 See A/CN. 9/645 pp 16 & 17.
16 See also Articles 11 and 12

than it first appears to be. It is also to be noted that any analysis of article 18 cannot be carried out in isolation. It must be read together, and in particular, with articles 14, 15 as well as articles 19-27.

The compromise reached in respect of article 18 shows a departure from the Hamburg Rules to the extent that under the new draft, rather than indicating "he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences", the carrier is now specifically required to prove the absence of fault on his part, once the claimant has established that the loss, damage or the delay, or the event or the circumstance that caused or contributed to it took place during the period of the carrier's responsibility[17].

Burden of proof

The new approach leads to a subtle but tactical shifting of the burden of proof and in the event leads to a *ping-pong* burden of proof situation. This is a variation from the Hamburg Rules i.e. requiring specific proof from the carrier that there is an absence of fault on his part. It is to be noted that another innovation is introduced into the new draft. Under paragraph 3 of Article 18, the carrier is deemed to discharge the burden of proving the absence of fault on his part, if he proves that the loss damage or delay was occasioned by a list of events which act as presumptions of the absence of fault on his part. This then introduces the exceptions contained in Article IV r 2 of the Hague Visby Rules in a modified form.

The balance of interests between carrier and cargo now lies in the fact that, apart from the shifting of the burden of proof albeit subtly on the carrier, the Article IV v 2 exceptions of The Hague Visby rules are now merely rebuttable presumptions of the absence of fault and would not automatically exonerate the carrier from liability.[18]

It may be argued that this is a clear departure from the position taken by the Hague Visby Rules in which the definite language of the chapeaux of Article IV r 2. - *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from"* set the tone for the exoneration of the carrier from liability with respect to the litany of the exculpatory clauses.

Thus, the presumption approach seems to afford some kind of balance between the carrier and cargo interest. The *ping-pong* approach to the burden of proof is also meant to further establish some level of balance between

17 The carrier's responsibility now extends to the time when the goods are received by the performing party or carrier until they delivered.
18 See Background Paper on Basis of the Carriers Liability by Francesco Berlingieri – CMI Yearbook 2004.

carrier and cargo interests to make up for the introduction of the exception clause in article 18(3). In this regard, where the carrier proves that one or more of the events or circumstances in Article 18)(3) caused or contributed to the loss or damage or delay the burden of proof then shifts to the claimant to prove that the damage loss or delay, was probably caused by or contributed to by the unseaworthiness of the ship or a failure to meet the specific obligations provided for in Article 15 dealing with the obligations of the carrier under the sea leg of the carriage[19]. The carrier is also liable, where he is unable to prove that neither the unseaworthiness nor the improper crewing etc[20] caused the loss, damage or delay.

The carrier is also liable where he is unable to prove that it complied with its obligation to exercise due diligence pursuant to Article 15. In effect the Hague-Visby obligations to exercise due diligence is again introduced into the Basis of Liability provisions in the draft convention. It would seem that this introduction is also made in view of the abundance of case law on the subject of due diligence.

It also needs be mentioned, that in the quest to balance the carrier and cargo interest, even though the exceptions of Article IV r 2 of the Hague-Visby Rules, which has been the subject of extensive criticism from the viewpoint of cargo interest is reintroduced, some modifications are made which are worth noting.

Reference has already been made to the chapeaux of Article IV r 2 of the Hague-Visby Rules which has been done away with. Also, the new exception clauses (not exoneration clauses)[21] do away with the infamous if not notorious nautical fault exemption of the Hague-Visby Rules[22].

It is the viewpoint of carriers that this is a significant trade-off for not accepting Article 5(1) of the Hamburg Rules as the sole basis of determining the rights and obligations of the carrier and cargo interest. The removal of the nautical fault exemption is indeed a welcome relief for cargo interest.

The new exception under Article 18(3)(f) now make provision for fire on the ship, which was included after rather protracted debates. The words "unless caused by the actual fault or privity of the carrier" have now been done away with within the overall framework of the liability provisions and the burden of proof.

It is also worth noting that the 17 exculpatory clauses apart from being modified in line with current developments have now been shortened to 15

19 Article 18 5(a).
20 Article 18 5(a) ibid.
21 See (history) Berlingieri – Background Paper on Basis of Carriers Liability p. 143 of CMI Yearbook 2004.
22 Article IV r 2 (a) Act, neglect, or default of the master, carrier, pilot or the servants of the carrier in the navigation or in the management of the ship.

and the "catch all" clause in Article IV r 2(q) of the Hague-Visby Rules is now contained in a slightly different form in Article 18(2). The effect of this clause was that it left open all possibilities to the carrier for exculpating himself from liability[23]. We are yet to see how the new language would impact on the overall liability of the carrier.

It is hoped that the elimination of the catch-all clause founded on the ejusdem generic rule would prove a positive factor in the balance of cargo and carrier interests.

Furthermore, while the core of the exceptions have been maintained, there is a general modification of the language to take care of current trends and developments such as terrorism, reasonable measures to save property at sea as well as reasonable measures to avoid damage to the environment.
The above therefore sets outs the basis upon which the new list of exceptions found its way into the new draft convention. As a delicate compromise this is welcome. It is yet to be seen how the courts would interpret the new provisions having regard to the travaux preparatoires.

Specific Obligations

As pointed out earlier, in an attempt to balance the interests between cargo owners and carriers, the specific obligations of the carrier regarding the sea carriage were reinforced under Article 18 5(a) of the new draft and in respect of Article 15. Where the carrier seeks to rely on any of the exception clauses in Article 18 (3) and proves that it was the cause of the loss, damage or delay, the claimant is then called upon to prove that the event or circumstance relied upon was as a result of the unseaworthiness of the vessel. Article 15 now makes the carrier bound, before, at the beginning **and during the voyage** by sea to exercise due diligence to:

a) "Make and keep the ship seaworthy
b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and
c) Make and keep the hold and all other parts of the ship in which the goods are carried, including any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation".

Thus, going beyond the purview of the Hague-Visby Rules, Article 15 makes due diligence a continuing obligation and thus in respect of seaworthiness, the obligation is no longer one restricted to "before and at the beginning of the voyage" – it is now a continuing obligation.

23 See the case of *Godwin, Ferrira and Co* v *Lamport and Holt* (2929) 34 Ll LR 192. Also *Leesh River Tea Co* v *British India SN Co* [1966]2 Lloyd's Rep 198

The argument has been made that the rules as currently contained in the new draft places a higher burden of proof on cargo claimants who have little means of proving the unseaworthiness of the ship. It seems however that despite the high level of the burden on the claimant, there is a good balance in making due diligence and seaworthiness as well as the general care of the cargo a continuing obligation. This is borne out of the fact that under the Hague-Visby regime there were a number of difficulties regarding the point in time at which the obligation of due diligence to make the ship-seaworthy is to be invoked. It seems that this could now well be regarded as settled[24].

In my considered opinion, it would be unfortunate to have article 14(2) remain as it is currently drafted. By the current drafting, the words "Notwithstanding" have the effect of taking away what is given in article 14(1) and strengthened by article 15. Article 14(2) should have been made subject to article 14(1) so that the well settled obligations of the carrier in sea carriage contract cannot be easily overridden by agreement between the parties especially as this may be detrimental to the consignee.

There is also abundant case law in this respect and should prove a positive development in the carrier-owner liability relationship especially if 14(2) is made subject to 14(1).

Nexus

The issue of nexus or causal connection is not a new provision[25] when viewed against the backdrop of a number of decided cases[26]. As provided in Article 18 (6) the carrier's liability relates only to that part of the loss damage or delay that is attributable to his fault.

As pointed out earlier, the provisions on liability even though rooted in Article 18, cannot be viewed in isolation. This is because there are a number of other provisions which have a significant impact on the issue of liability with respect to the balance of interest between carrier and cargo.

Mixed liability approach

It is noteworthy that, improving upon the Hamburg Rules, the new draft convention now widens the scope of application of the convention from the

24 See the case of *Maxine Footwear Company Limited and Another* v *Canadian Government Merchant Marine Limited* where the stages or continuing obligation of Seaworthiness was an issue.

25 See Article 18 (6).

26 *Hamilton* v *Pandorf* (1887) 12 Appcas 518. Also Lord Brandon in *The Popi M* (1985) 2 Lloyds Rep I.

tackle to tackle[27] of the Hague-Visby Rules through the *port to port* concept of the Hamburg Rules and now under the new draft to the *door-to-door* concept. This undoubtedly affects the liability regime of the convention. The drafters of the draft convention have thus invoked a mixed liability approach that takes cognizance of the multimodal nature of the convention.

In effect the liability regime is a mix of the *Network* and *Uniform Liability* approaches[28]. In this respect, Article 27 of the draft convention is unique. It provides that, where loss damage or delay occurs during the carrier's period of responsibility but can be localized to the period before loading or after discharge from the ship, the provisions of the draft convention become subsumed under other international instruments which apply to that leg of the carriage [29] as if the shipper had entered into a separate contract with the carrier regarding that leg.[30] This provision creates flexibility by allowing states to apply their mandatory national law or other international instruments that guide the conduct of unimodal carriage.[31]

As pointed out earlier, the liability provisions of the convention extend to any performing party or any other person performing the carriers obligation under the contract of carriage where the performance is under the carrier's supervision or control[32].

Delay

Article 20 of the draft convention provides for the maritime performing party to enjoy the defences and limits of liability opened to the carrier very much in accord with the Hague–Visby and Hamburg Rules. It is also worthy of note that like the Hamburg Rules, the carrier is made liable for acts or omissions on his part that cause delay in the delivery of the goods. Even though there was protracted debate on the inclusion of provisions on delay in the draft convention; the Working Group finally reached a consensus for its inclusion[33]. For some delegations, this must be seen as part of the carefully crafted balance that the draft convention seeks to achieve.

27 See *Pyrene Co* v *Scindia Navigation Co* [1954] I Lloyds Rep 321. Also *Fakonbridge Nickel Mines Ltd* v *Chimo Shipping Ltd* [1969] 2 Lloyds Rep 227.

28 See Mahin Faghfouri, International Regulation of Liability for Multimodal Transport – In Search of Uniformity. WMU Journal of Maritime Affairs 2006 , Vol. 5, No. 1 p 95. See also Article 11 of the Hamburg Rules.

29 Article 27.

30 The so called "hypothetical contract approach". A/CN.9/645 p. 23.

31 Such as the Convention on the Contract for the International Carriage of Goods by Road 1956 ("CMR") or the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail as amended by the Protocol of Modification of 1999 ("CIM – COTIF").

32 Compare this to Article 12 of the Hamburg Rules.

33 See A/CN.9/645 p. 19

Deck cargo

As part of the process of balancing the interest, especially as between cargo and carrier, and also to bring the legislation in tune with modern developments, the issue of deck cargo has been comprehensively addressed by the draft convention with the inclusion of road or railroad cargo[34]. It is however worth noting that while in the Hamburg Rules the carrier is expected to "insert in the bill of lading or other document evidencing the contract of carriage by sea", the agreement by the carrier and shipper to carry on deck; there is no such direct requirement under the draft convention even though Article 26(4) may have a similar import. Thus while it may serve the interests of a third party that has acquired a negotiable transport document or negotiable electronic transport record in good faith, the non categorical statement as provided for in the Hamburg rules may not serve the best interests of the shipper.

The key requirement under Article 26 is that the goods should be in containers or road or railroad cargo vehicles suited for deck carriage and so must be the deck itself. It is important to note the balance here. Where goods are carried on deck in contravention of the rules and such carriage results in loss, damage or delay the carrier cannot invoke the defences under article 18(3).

There are other provisions that seek to balance the interests of carrier and cargo and these may be found with respect to the rules regarding deviation, notice periods, time for suit, jurisdiction etc. This paper deals essentially with the basis of liability and does not therefore delve into all of these matters. Suffice it however to mention that there is a great deal of improvement with respect to provisions covering all those areas under the draft convention, akin to the position taken by the Hamburg Rules. These should therefore serve to strike the requisite balance between cargo and carrier interests.

Limitation of liability

During the debates which ushered in the Hamburg Rules, there were strong arguments to the effect that the retention of the principle of limitation of liability was no longer justifiable. Such arguments were revisited[35] in the debates leading to the adoption of the draft convention. Indeed, some recalled the words of Lord Denning in his so called *"final word"* in The *Bramley Moore*[36] where he said "I agree that there is not much justice in this rule but limitation of liability is not a matter of justice. It is a rule of public policy which has its origins in history and its justification in convenience".

34 See Article 26. Also Article 9 of the Hamburg Rules.

35 The detailed viewpoints expressed can be found in A/CN.9/645 p.39-43.

36 [1964] 1 All ER 105.

When the dust settled, there was consensus that the inclusion of rules regarding limitation of liability stood to benefit both cargo and carrier interest as it enabled the carrier to calculate his risks in advance and hence enable him to offer cheaper freight rates. Having agreed on the inclusion of relevant provisions on limitation of liability, issues as to the exact limits became a subject of protracted debate during the Working Group sessions.

Arguments were put forward on both sides as to why the limits should be higher or lower. Finally the Working Group agreed on 875 units of account per package or other shipping unit or 3 units of account per kilogram of the gross weight of the goods, whichever is higher, with the relevant exceptions[37]. It is however important to note that unlike the language in the Hamburg Rules[38], the current wording under Article 61 includes "all breaches of its obligations under this convention". The limitation of liability is thus not restricted to loss or damage delay but to all other breaches that can be envisaged under the convention. Under this new formula, misdelivered goods which are regarded in some Jurisdictions as "lost" are subject to limitation of liability[39] as provided for under the Hague-Visby Rules[40]. In some jurisdictions however, since the goods are regarded as "lost" they are subject to unlimited liability.

Also under this formula, where a carrier issues a transport document without qualifying the information which he knows is incorrect[41] he still can limit his liability.

He can however lose the right to limit pursuant to article 63.

It is also worthy of note that the dual system of limitation is retained in the interests of owners of high value, light weight cargo.

Even though the draft convention retains the Hamburg Rules formula of packages or shipping units, it is doubtful whether it puts to rest the controversy regarding the use of the phrase **"as packed in or on such article of transport or vehicle".** This was the subject of extensive discussion in the Australian case of *El Greco (Australia) Pty V Mediterranean Shipping Company*[42].

In the above case Allsop J expressed a very strong opinion (obiter) on the meaning of the words *"or unit"* as contained in Article IV r 5(c) of The Hague Visby Rules. He was of the view that the words "or units" was intended to cover articles such as cars or boilers which were capable of being carried without packaging thus rejecting the other school of thought which holds that the word "or units" was inserted to cover bulk cargo by reference to freight

37 See Article 61

38 See Article 6

39 Eg. Japan

40 The Hamburg Rules also by inference envisage limitation in such situations. See Article 6(c)

41 Article 42(1)

42 [2004] Lloyds Rep 537

unit as in the US COGSA[43]. Whether the addition of the wording "*shipping unit*" does clarify the issue is yet to be firmly pronounced upon.

The draft convention thus settles on the dual system as aforementioned and provides for 875 units of account[44] or 3 units of account per kilogram of the gross weight of the goods[45]. In Article 62, the new draft provides for limits of liability with respect to delay in the amount equivalent to two and a one-half times the freight[46] payable on the goods delayed and in respect of total loss of the goods concerned. This is not to exceed the limit that would be established pursuant to Article 61 paragraph 1. This second limb contrasts with the provision in the Hamburg Rules which provides that in no case should the liability for delay exceed the total fright payable under the contract of carriage of goods by sea[47]. In the new draft convention the total freight payable is omitted in favour of the limit as set under Article 61. 1 i.e. in respect of the total loss of the goods. This may seem more favourable to cargo interest and thus strike the requisite balance for the inclusion of provisions on limitation of liability. The draft convention thus provides more clarity on the subject.

On the issue of other parties engaged by the carrier in the performance of the contract of carriage being entitled to the defences and limits of liability, the draft convention follows the principles laid down in Article IV bis r 2 as well as Article 7 of the Hamburg Rules but does so in different language, while taking care of the multimodal character of the draft convention.

Article 20 provides that a **Maritime Performing Party** is entitled to the carrier's defences and limits of liability provided for under the convention with the necessary qualifications.[48] Very detailed provisions are included in the new draft regarding the circumstances under which the obligations of the Maritime Performing Party would be assumed by the carrier.

Breaking Limitation

Again the principles expressed by The Hague-Visby[49] as well as the Hamburg Rules[50] are quite similar to that adopted by the draft convention. The difference is mainly in the language of the draft convention. Eventhough the language of the draft convention is modeled along that of The Hague–Visby

43 See also the case of the River Gurara [1998] 1 Lloyds Rep 225

44 Higher than the 835 units of account provided by the Hamburg Rules Article 6 (1)(a)

45 Higher than the 2.5 units of account per kilogram contained in the Hamburg Rules

46 Equivalent to the Hamburg Rules Article 6(1)(b)

47 Article 6 (1)(b)

48 See the development of case law on the subject with respect to the Himalaya Clause; *Alder* v *Dickson (The Himalaya)* [1954] 2 Lloyds Rep 267. See also *Scruttons* v *Midland Silicones* [1962] AC 446 and *New Zealand Shipping Line* v *Satterthwaite (The Eurymedon)* [1975] AC 154

49 Article IV rule 5 (e)

50 Article 8

Rules in this respect, it now takes cognizance of the fact that the obligations of the carrier are not restricted to "damage" and thus uses the words "loss resulting from the breach of the carrier's obligation". The burden of proof is on the claimant and it is a heavy burden indeed. The claimant is expected to prove that the loss was due to a personal act or omission done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.[51] It is thus clear; that the limitation of liability and the mode for breaking limitation are very similar to the provisions contained in The Hague-Visby and Hamburg Rules and should suffice for the balancing of cargo and carrier interests.

Conclusions

As pointed out at the very beginning, the provisions on liability and risks and obligations with respect to shipper and carrier run through the entire convention. Thus, it is only a very detailed analysis of the entire convention that can bring out all the nuances that seek to balance carrier and cargo interest. This brief discussion only seeks to highlight the salient features of the liability and limitation of liability regime under the draft convention. It is by no means exhaustive. It has however demonstrated that a lot of effort has gone into trying to balance the interests of cargo and carrier, to create uniformity of law and to reform the law on carriage of goods by sea while bringing it in tune with current commercial practice and developments.

No attempt to balance the interest of carriers and cargo can come out with provisions or a regime that is entirely satisfactory. Like all compromises, no one leaves completely satisfied but all leave in the hope that they have taken something away.

The deletion of the nautical fault rule, the continuing obligation of due diligence and seaworthiness, the inclusion of provisions on delay, the higher limits of liability and the clarity of language amongst others should be seen by cargo interests as positive additions for balancing the scale.

For carriers, the inclusion of the numerous exculpatory clauses, which still includes strikes and lockouts, as well as the fire exception the inclusion of rules on limitation of liability as well as the heavy burden of proof on the claimant should be heart-warming and be seen as a positive step towards balancing the interests.

It is expected that the harmonization and modernization of the international legal regime, coupled with the bold attempt to balance the carrier and cargo interests should lead to an overall reduction in transaction costs, increased predictability and greater commercial confidence for international business transactions.

51 For a discussion on the formidable nature of this burden on the claimant see *Nugent Killick* v *Michael Goss Aviation Ltd.* [2000] 2 Lloyds Rep 222. (Eventhough this deals with Article 25 of the Warsaw Convention it is very instructive).

BACKGROUND PAPER ON SHIPPER'S OBLIGATIONS AND LIABILITIES

INGEBORG HOLTSKOG OLEBAKKEN*

1. Introduction

Traditionally, the shipper's obligation has been to deliver the goods ready for carriage, and to pay the freight. As the situation is today, many shippers are just as professional and sophisticated as the carriers. Of course there are still many small and unsophisticated shippers, but the group is still more diversified than it used to be. In the report of the Secretary-General of the UNCITRAL regarding possible future work on transport law of 2 May 2002, the need for the working group to deal with obligations of the shipper is described as follows (A/CN.9/497 paragraph 33 page 8):

> *Under current international regimes, very little responsibility is imposed on the shipper, and the shipper's obligations—to the extent that they exist— are not well defined. During the work of the International Subcommittee, it was suggested that it would be beneficial to list the shipper's obligations more precisely.*

The final draft convention from the working group (A/CN.9/645 Annex) recognizes the carrier's need for proper information relating to the goods. In this respect, the following provision on cooperation between the parties illustrates this new approach:

> *Article 29. Cooperation of the shipper and the carrier in providing information and instructions*
>
> *The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.*

However, this focus on cooperation between the parties, and the carriers need for information in order to perform the carriage, has not in any way

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altered the basic elements of the contract of carriage – transportation against payment. In a previous draft of the convention (A/CN.9/WG.III/WP.32), provisions on freight appeared in chapter 9. Partly due to time constraint and the need to make priorities in the working group in order to prepare a compromised draft convention within the time limits set by the Commission, the majority of provisions on freight were deleted.[1] The only provision on freight is to be found in article 44 which basically just defines the expression "freight prepaid":

> *Article 44. "Freight prepaid"*
>
> *If the contract particulars contain the statement "freight prepaid" or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.*

The provisions of the convention may not be departed from in contracts of carriage to the detriment of the shipper except unless otherwise provided for in the convention, cf. article 81. However, the convention applies on a non-mandatory basis to volume contracts falling within the scope of the convention, cf. article 82. Nevertheless, the shipper is still protected through certain minimum requirements when entering into volume contracts.

2. The Draft Convention

2.1 Shippers obligation to provide information

Even the very first draft convention had provisions on shipper's obligations and liability, dealing with the obligation to provide information relating to the goods and liability for loss sustained by the carrier caused by the breach of the shipper's obligations under this convention. The shipper's main obligation under this convention is to facilitate for the carrier's proper handling and carriage of goods. However, this is dependant upon the delivery of the goods ready for carriage to the carrier. It may seem needless to regulate, as it ought to go without saying as a consequence of the contract between the parties. Nevertheless the obligation to deliver the goods ready for carriage is to be found in article 28:

> *Article 28. Delivery for carriage*
>
> *1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing,*

[1] See Report of Working Group III thirteenth session (New York, May 2004) (A/CN.9/552 paragraphs 162-64 page 36-37).

lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 14, paragraph 2.

3. When a container is packed or a road or railroad cargo vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container, or road or railroad cargo vehicle, and in such a way that they will not cause harm to persons or property.

Before and under the transportation, the carrier may need information in order to provide the proper handling of the goods. The obligation of the shipper to provide this information is to be found in articles 29 (see above) and 30:

Article 30. Shipper's obligation to provide information, instructions and documents

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

Article 30 cannot be derogated from in a volume contract, cf. article 82 paragraph 4. Also, there is a specific obligation of the controlling party, which may be concurrent with the shipper, to provide additional information to the carrier during its period of responsibility:

Article 57. Providing additional information, instructions or documents to carrier
1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and

not otherwise reasonably available to the carrier, that the carrier may reasonably need to perform its obligations under the contract of carriage.
2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide them.

2.2 Other obligations of the shipper

By agreement, the shipper may undertake the obligation to load, stow etc. (FIO - or FIOS - clause (free in and out)), cf. article 14 paragraph 2. This is nevertheless considered to be an act performed on behalf of the carrier, and consequently included in the basis of liability for the carrier, cf. article 18. However, the carrier may be relieved of liability if it proves that loading etc. according to a FIO - or FIOS -clause in accordance with article 14 paragraph 2, contributed to the loss, damage or delay, cf. article 18 paragraph 3 letter i. In practice, liability for loss due to events which took place during the loading etc. under a FIO - or FIOS -clause, depends upon what the carrier is able to prove.

The shipper may also be obliged to assist the carrier in performing the obligation of the carrier to deliver the goods to the consignee or the holder, cf. articles 47, 48 and 49. As a principal rule, the carrier shall deliver the goods to the consignee or the holder – depending upon whether the transport document is negotiable or not. However, if the carrier is prevented from delivery, for instance because the consignee or the holder does not properly identify itself, then the carrier may turn to the shipper for instructions. The shipper's failure to give correct information to the carrier may result in a misdelivery. The liability for misdelivery is not specifically dealt with in the convention, and is consequently presumed to be covered by the principal rule on carrier's liability in article 18.

2.3 Shippers liability

The basic liability of the shipper is to be found in article 31:

Article 31. Basis of shipper's liability to the carrier
1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.
2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 32, paragraph 2, and 33, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault

or to the fault of any person referred to in article 35.
3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 35.

Elegantly enough, this provision does not deal with the burden of proof, which is definitely an important element in the corresponding principal provision on the liability of the carrier, cf. article 18. This omission is intended. Article 31 on the shipper's liability demonstrates to which extent it was possible to establish a consensus among the members of the working group with respect to this issue. The question of burden of proof with respect to the condition of fault in paragraph 2 is left to national law.

A much debated question in the working group was whether the shipper ought to be liable for economic loss due to delay. However, as part of the compromise which led to the quite ambiguous provision on delay for carrier, cf. article 22, the request for a corresponding liability for economic loss due to delay for the shipper was omitted.

The shipper has a strict liability pursuant to breach of its obligations pursuant to articles 32 and 33:

Article 32. Information for compilation of contract particulars
1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 38, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.
2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

Article 33. Special rules on dangerous goods
When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:
(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and
(b) The shipper shall mark or 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. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

Article 33 cannot be derogated from in a volume contract, cf. article 82 paragraph 4.

The liability imposed on the shipper according to these provisions applies also for the documentary shipper, cf. article 34:

Article 34. Assumption of shipper's rights and obligations by the documentary shipper
1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 57, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.
2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

However, as the shipper may become liable for breach of all of its obligations under this convention, the obligations of the documentary shipper is limited to the obligations under this chapter, which concerns the obligation to provide information. And if the holder of a negotiable transport document is not the shipper and does not exercise any rights under this Convention, for instance a bank, it "does not assume any liability under the contract of carriage solely by reason of being a holder", cf. article 60. The fulfilment of the obligation as controlling party to provide additional information, instructions or documents to the carrier under article 57 does not impose any liability on the holder.

In a maritime context, specific provisions introducing obligations and liabilities on the shippers', are rather new. However, that does not imply that the shipper cannot be held liable today, only that liability today is to be decided according to national law. Consequently, these provisions introduce harmonized rules in this field, and promote predictability for both carriers and shippers.

The shipper is liable for his own acts, but also for other persons, cf. article 35:

Article 35. Liability of the shipper for other persons
The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person,

including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

The shipper's liability may not cease to exist upon a certain event or after a certain time is void, cf. article 36.

Shipper's liability is not subject to limitation. In the working group, the question was raised in connection with the debate on carrier's liability for delay.[2] If the shipper were to have a corresponding liability for economic loss caused by delay, this could expose the shipper of a potentially very high liability. However, the need for such a limitation cap ceased to exist as a provision on shipper's liability for delay was not included in the convention (part of the compromise that lead to article 22 on carrier's responsibility for delay).

Regardless of the deletion of shipper's liability for delay, it does not preclude such liability according to national law. Also there may be a need for limitation of liability for loss or damage to the ship, other cargo or personal injury, cf. article 31. Shipper's liability is not limited today, and that does not seem to have caused any problems in practice. However, the pure fact that shipper's liability is regulated in an international convention may give raise to more claims against the shipper. This may in turn make current the need for limitation of liability for the shipper – preferably on an international level.

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2 See proposal by the Swedish delegation on shipper's obligations (A/CN.9/WG.III/WP.85 paragraphs 5-7 page 3-4).

A BRIEF HISTORY OF THE INVOLVEMENT OF CMI FROM THE INITIAL STAGES TO THE PREPARATION OF THE UNCITRAL DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA

The work of the CMI on this subject started as long ago as April 22, 1988 when the CMI Assembly gave Professor Francesco Berlingieri authority "to investigate the question whether the uniformity of the law of the carriage of goods by sea should be placed on the agenda of the 1990 Paris Conference of the CMI and the manner in which the problem should be approached." Professor Berlingieri's report on his study is published in CMI Yearbook 1991 Paris II at pages 104-176.

On April 13, 1994 the CMI Executive Council established a Working Group, consisting of Professors Berlingieri, William Tetley, Rolf Herber and Jan Ramberg, to consider the problems of the various regimes dealing with the carriage of goods by sea and to report at its next meeting in Sydney (CMI Newsletter number 2 of 1994, page 5). At the Sydney meeting, the Working Group was instructed to consider the possible preparation of a Questionnaire for distribution to the National MLAs (Newsletter number 4 of 1994, page 9). A Questionnaire was duly prepared and approved for circulation, and at a second meeting of the Executive Council in Sydney a new Working Group was established under the chairmanship of Professor Berlingieri and consisting of David Angus, Jean-Serge Rohart, Ron Salter and Frank Wiswall as members. A summary of the responses received was published in Newsletter number 1 of 1995.

An International Sub-Committee ("ISC") was then established under Professor Berlingieri as chairman and Frank Wiswall as rapporteur. The reports of the five meetings of the ISC on "Uniformity of the Law of Carriage of Goods by Sea" are published in Yearbooks 1995 (pages 107-243), 1996 (pages 342-420) and 1997 (pages 288-356).

At its meeting of June 8, 1997, the Executive Council created three separate groups. The first to continue the work on carriage of goods and to

prepare a basis for a possible revision of that area of the law. The second to study Electronic Data Interchange, and the third to embark on a broader-based investigation of the functionality of the bill of lading. The Executive Council also decided to create a steering committee consisting of Alexander Von Ziegler, George Chandler, Frank Wiswall, Karl-Johan Gombrii and Professor Berlingieri under the chairmanship of Patrick Griggs. A report of their work may be found in Newsletter number 4 of 1997 at page 2.

On the United Nations side, UNCITRAL considered, at its 29th Session in 1996, a proposal to include in its work program a review of current practices and laws in the area of the international carriage of goods by sea. When this became known to the CMI, Professor Berlingieri and the President of the CMI at that time, Allan Philip, met in Vienna with the Secretary of UNCITRAL to discuss informally possible future cooperation between UNCITRAL and the CMI in their endeavour. It will be recalled that ever since the Belgian government relinquished its treaty law-making function in favour of the organisations of the United Nations, draft conventions must be sponsored by a UN agency, such as UNCITRAL or the IMO, and the CMI will, if requested, cooperate with them. Subsequently, a Working Group on Issues of Transport Law was appointed by the CMI Assembly in 1998-99 under the chairmanship of Stuart Bare and, subsequently, Professor Michael Sturley as Rapporteur (Newsletter number 1 of 1998 at page 3). That Working Group drew up another Questionnaire which was sent to all National MLAs in May 1999 and a new ISC was then established by the CMI in November 1999 to consider the analysis of the replies conducted by the Working Group. A draft Instrument was thereupon prepared by the ISC and considered at the CMI conference in Singapore in February 2001. Following further amendments, approval by the Executive Council was given and the draft Instrument was submitted to UNCITRAL in December 2001.

At its 34th Session in 2001, UNCITRAL decided to establish a Working Group on Transport Law to consider its own preliminary draft Instrument on the carriage of goods by sea and comments made by UNECE and UNCTAD. That Working Group's purpose was to end the multiplicity of liability regimes and to bring international maritime transport law up to date to meet the needs and realities of modern shipping practices. Stuart Beare was appointed as the CMI's Observer to Working Group III, which was chaired by Professor Rafael Illescas of the University of Madrid. The Working Group's final draft convention was completed in January 2008 and distributed to all UN member States. The UNCITRAL Commission met in New York June 16-26, 2008 and made some amendments to comply with the wishes of certain States. In giving its approval to the Draft Convention, the Commission expressed its appreciation to the CMI for the advice it provided during its preparation. The consolidated text will be submitted to the 6th (Legal) Committee of the UN

General Assembly on or about October 20, 2008 and, hopefully, formal adoption by the General Assembly Plenary Session at its 63rd session in early December, 2008. A Signing Ceremony will take place in Rotterdam on or about September 16, 2009, and thereafter the Convention will be open for ratification by signatory states.

For a detailed review of CMI's involvement with this subject from even earlier beginnings and its cooperation with UNCITRAL, see Stuart Beare's article "Liability Regimes: Where We Are, How We Got There and Where We Are Going" which may be found in Lloyd's Maritime Commercial Law Quarterly, 2002, pages 306-315. This excellent article traces the substantive studies and cooperative effort that go into the making of an international convention. Your attention is also drawn to the Travaux Preparatoires on the CMI website for an account of the deliberations in UNCITRAL.

SCOPE OF APPLICATION, FREEDOM OF CONTRACT

HANNU HONKA

1. *Background*

The Hague and the Hague-Visby Rules 1924/1968 were in many sources considered to be too old-fashioned to properly regulate in the 21st century liability issues connected with carriage of goods by sea. The Hamburg Rules 1978, even if in force, had failed in the sense that important shipping nations were not prepared to ratify them. Multimodal issues were not regulated internationally in a satisfactory fashion and the Multimodal Convention 1980 had failed in achieving proper support. In these circumstances it was felt necessary to modernize international rules of carriage of goods by sea and to regulate multimodal issues to the extent reasonably possible, but considering that sea carriage was the starting point.[1] The CMI took an initiative in 1996 to produce a standpoint concerning new rules for the international carriage of goods by sea. The result was the "Draft Instrument for the Carriage of Goods [Wholly or Partly] by Sea" in 2001. This draft was not just an amendment to existing liability regimes, but a completely new regime.

UNCITRAL initiated work on these matters in 2002 based on the fact that the CMI had produced the above-mentioned draft. After several years of preparation a final version on "UN Convention for the International Carriage of Goods Wholly or Partly by Sea" was approved by the UNCITRAL Commission during its 41st session in June-July 2008.[2] This was the situation at the CMI Conference in Athens, but since then the UN Assembly has adopted the Convention in December 2008, meaning that it will be opened for signature and later on for ratification. As the Convention is opened for signatures in Rotterdam in September 2009, it has been considered appropriate to state that the Convention contains the Rotterdam Rules (RR).

In view of the particular topic, it is necessary to mention that these matters are connected with the mandatory nature of the RR and the expansion of freedom of contract to a certain extent.

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[1] The reasons are more nuanced than what has been considered necessary to

The RR article 1 includes a long list of definitions. At this point the important ones are article 1.1 to 1.4, all connected with scope of application and volume contracts. The substantive provisions on scope of application are found in article 5 to 7 and the mandatory nature and limits of the Convention are expressed in article 79 - 81. In the following, I shall only deal with general outlines. A more detailed discussion has to take place elsewhere.

2. *Scope of application*

For the scope of application of the Rotterdam Rules, contract of carriage is defined in article 1.1 according to which it means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

Further specification and separation is found elsewhere, as explained below. There is an important specification in the definition, however, whereby a sea leg can be combined with other modes of transport. The sea carriage is an absolute requirement, but other modes not, even if possible. The RR deal with multimodal issues. The RR reflect a maritime plus approach: always a sea leg, but other modes of transport can be added on. The definition does not clarify whether the sea leg should be based on what has been agreed or what has factually happened. The first alternative is acceptable and, when necessary, the contract has to be interpreted in view of whether a sea leg has been agreed upon or not.

Volume contracts are defined in article 1.2. As can be seen they are also considered to be contracts of carriage. This is important as it means that such contracts are considered to fall under the RR, unless the substantive provisions state otherwise.

Article 1.3 and 1.4 define liner transportation and non-liner transportation, important for understanding the scope issue.

Working Group III at UNCITRAL considered three main approaches to the scope of application question: 1) the documentary approach, 2) the contractual approach and 3) the trade approach. The first one referred to the possibility of basing application of the RR on the use of a particular transport document. The second focussed on what type of contract had been concluded between the parties and the third on what type of trade was intended by the contract of carriage. None of these alternatives was accepted as such. It can rather be said that the end result is a mixture of them all.

The scope issue starts with the RR article 5.1 where it is stated that the Convention applies to contracts of carriage. Clarification on what this reference means is found in the above-mentioned definitions in article 1.1. and 1.2. I shall return to the geographical scope later on, being also a part of article 5.1.

But, the reference in article 5.1 does not suffice without necessary further specifications found in article 6. Without repeating the exact wording of this article, the main message is that contracts of carriage in liner transportation are within the Convention, while contracts of carriage in non-liner transportation are outside the Convention. The above-mentioned definitions again are necessary for the proper understanding of article 6.

One could presume that this setting would suffice, but as said above, a pure trade approach was not the proper way to go. It would have two major problems. First, it would leave unclear specific transport arrangements within liner transportation where it would not be generally considered necessary to include those arrangements under the RR. Second, it was early on considered necessary not to decrease the scope of application of the RR compared with the Hague and the Hague-Visby Rules. As the latter two cover more than just liner transportation due to the requirement of a bill of lading or a similar document of title having been issued, as long as not based on charterparties, it was necessary to have a clarifying provision in the RR whereby the same result would be achieved. In this general setting it was also clear that what was outside the Hague and the Hague-Visby Rules would also be outside the RR. The main category in this respect includes charterparties. The result in the RR is more sophisticated and has more nuances than what was at one point of the work considered to be enough. Previous versions had in general terms excluded charterparties, contracts of affreightment and volume contracts, but such references caused more confusion than clarification.

Legislatively, liner transportation was clarified in article 6.1, considering that liner transportation was automatically included by the general definition of contract of carriage read together with article 5.1. Thus, the specific situations in liner carriage that would not, however, fall under the Convention were in consensus considered to be charterparties used in liner transportation and other contracts for the use of a ship or of any space thereon used in liner transportation. The type of trade yielded to these specific parts. For example, slot charters and space charters on a liner ship in liner trade would fall outside the RR.

Quite naturally and, one could say, fully in accordance with tradition, non-liner trade is as said outside the RR according to the chapeau of article 6.2. To coordinate with the Hague and the Hague-Visby Rules an addition was necessary as specified in the same article. Contracts of carriage in non-liner trade are within the RR provided that there is no charterparty or similar contract between the parties and a transport document or an electronic transport record is issued. This is the rule necessary for the Hague and Hague-Visby coordination. To recall, the Hague and the Hague-Visby Rules are applicable when a bill of lading or a similar document of title is issued. Those rules have no explicit exclusion of non-liner trade. It may well happen that a ship carries goods in non-liner trade where no charterparty is issued. The

carriage could, for example, concern some specific goods where the carrier does not trade in line transportation, such as a return voyage where the incoming leg is liner based, but the outgoing leg not. Cargo interests might need carriage on the outgoing leg. Some times this arrangement is called on-demand carriage. The above-mentioned addition of inclusion in the RR article 6.2 gives in principle the same result as by the Hague and the Hague-Visby Rules.

The relevant difference between the RR and the Hague system is that the RR do not require the use of a particular transport document or corresponding electronic transport record. In this way the RR are the same as the Hamburg Rules. The one exception in view of the RR is that the above-mentioned on-demand carriage does need a particular transport document or electronic transport record as clarified in article 6.2 after the chapeau. Transport document and electronic transport record are defined in article 1.14. and 1.18 respectively. The definition of transport document includes the requirements of the transport document being the receipt of the goods and evidencing or containing the contract of carriage as further specified in the definition. The corresponding requirements are found in article 1.18. In view of on-demand carriage there must not be a charterparty or similar contract underlying the arrangements.

There is no problem in the RR covering third party interests where they exist to the extent that the above-mentioned provisions make the RR applicable. Thus, in an ordinary liner trade situation where the RR apply, for example, the consignee is covered in addition to the contracting shipper.

Once outside the application of the RR in non-liner trade, but not being on-demand carriage, the status of third parties needs clarification. This is a policy matter - in other words should third parties be included at all. The Hague, the Hague-Visby and the Hamburg Rules all protect a third party bill of lading holder, not being the shipper, in non-liner trade where a charterparty has been concluded between the shipper and the carrier. The protective needs have long since been considered relevant. For the RR, there was no need to change this approach. A third party needed to be covered by the RR. While the present regimes require the third party, not being the shipper, to possess a (shipped-on-board) bill of lading, discussion arose in Working Group III on the need to maintain such a requirement. Views were pretty much divided between keeping the traditional approach and a new approach where the protected party would be named in the RR directly. The latter view prevailed, partly based on the fact that the bill of lading is not a guiding line in the RR in general. The name is not used once in this new setting. Also, by naming the third parties the rules were, at least to my mind, clearly simplified compared with the present regimes. With this background in mind, article 7 states that the RR apply as between the carrier and the consignee, controlling party or

holder that is not an original party to the charterparty or other contract of carriage excluded from the application of the RR. However, the RR do not apply as between the original parties to a contract of carriage excluded pursuant to article 6. The basic traditional protective concept has been maintained, but the concrete solution on defining third parties is different compared with the present regimes.

As to the geographical scope of the RR, it is necessary to return to article 5.1. For the RR to apply the contract of carriage must include international carriage. As the RR are maritime plus by nature it has been held appropriate that in multimodal operations involving a sea leg both the overall carriage and the sea carriage must be international. The one and same sea carriage must be international. In other words, two separate national sea carriages in two different states under the same contract of carriage does not suffice. There is of course no hindrance for contracting states to extend the application of the RR to national carriage or to extend the application of the RR otherwise on national legislative basis.

The geographical scope has also to do with the fact that there must be a sensible connecting factor to a Contracting State. The place of receipt, the port of loading, the place of delivery or the port of discharge must be situated in a Contracting State.

In this context it has been felt that there is no possibility to deal with certain other issues that could at least relate to the scope of application issue. Multimodal regulation in view of conflict of conventions is regulated in article 82. This provision becomes understandable when looking at the maritime plus nature of the RR in view of article 1.1 and article 26. As said, these specific matters have to be dealt with elsewhere.

3. *Mandatory rules and freedom of contract*

3.1. *General provisions*

Even since the U.S. Harter Act was introduced in the 1890's the debate has revolved around the need to protect cargo interests by certain mandatory minimum liability rules for the carrier. This is, as is well-known, reflected in the Hague and the Hague-Visby Rules. The Hamburg Rules developed the issue somewhat bringing more clearly in the shipper's status compared with the older regimes. The original basis for mandatory minimum liability for the carrier was not only the above-mentioned protective needs, but also, which fact is nowadays too easily forgotten, to enhance the negotiability value of the bill of lading. An issued Hague bill of lading gave certain protection in view of carrier liability for third party bill of lading holders in addition to the value of the negotiability nature of the document as such. Since the Hamburg Rules ended the requirement of the use of bill of lading for application of those

Rules, this latter aspect is not a very strong argument anymore as basis for requiring mandatory rules. The same is true for the RR. Once only the protection of cargo interests remains relevant, there is on this point the problem that not all carriage of goods by sea today can be combined with the basic fact that the carrier is the strong negotiating party, while the shipper is not. In many trades the situation is the opposite. The world-wide commercial picture as basis of a policy line is thus fragmentary. One would in these circumstances presume that maintaining a mandatory system for the benefit of cargo interests is not of world-wide interest. On the other hand, the present regimes are not necessarily described properly by putting mandatory name tags on them. The fact is that the carrier benefits from ex lege exceptions to liability, such as the nautical error exception in the Hague and the Hague-Visby Rules, and limitation of liability as found in all the above-mentioned regimes. This means that such benefits do not even have to be included in the contract of carriage for them to operate. Whatever the real balancing substance of the present regimes is, the fact remains that in Working Group III it was never seriously discussed to create full freedom of contract for the parties and interests involved. In this way the preparatory approach was traditional indeed, be it that with the concept certain changes were made, such as abolishing the nautical error exception (as was already done in the Hamburg Rules) and increasing the limitation levels. But, the core idea of maintaining the mandatory nature of the new regimes had extensive consensus. However, to certain parts there was a breakthrough. The mandatory system would not cover all situations where the RR are applicable as such. What in the RR are called volume contracts are now in a specific situation as explained below.

But, first the basic mandatory system is explained once it was decided to maintain the traditional policy basis. The setting is found in the RR article 79. This article separates between carrier obligations and liability on the one hand and obligations and liability of cargo interests on the other.

In view of the mandatory system for the carrier, there was discussion on whether a one-way or two-way system would be accepted. The traditional approach is the first where the carrier would be required to maintain minimum obligations and liability. In other words his obligations and liability could always be increased by contract. The two-way system would have based the carrier's obligations and liability completely on the RR in the same kind of fashion as is true for road carriage under the CMR. Working Group III clearly felt that the traditional approach was appropriate. No relevant basis was found to support another line of policy. Article 79 creates a minimum mandatory system for the carrier where his obligations and liability are separately and explicitly mentioned. The core of the provisions does not change what one is accustomed to on the basis of the present regimes. The provisions in the RR are, however, more specified than before and hopefully

clearer to anybody having to apply the provisions than before.

The reference in article 79 to "indirectly" excluding or limiting obligations and liability is now a clear statement on the fact that the carrier cannot circumvent the mandatory system by certain arrangements in the contract. For example, the carrier might not be able to agree validly on an applicable law clause taking any dispute outside the RR that without such clause would be applied.

Certain subcontractors are included in the RR system and it is necessary to cover them under article 79 as well. The covered subcontractor is in the RR called maritime performing party, as defined in article 1.6 compared with the definition of the carrier in article 1.4. A performing party, not being a maritime performing party, is not under the RR regime, but it has been necessary to define the first-mentioned for other reasons. The definition is found in article 1.6.

The obligations and liability of cargo interests are under the mandatory RR system in accordance with article 79. Cargo interests are enumerated as being the shipper, consignee, controlling party, holder or documentary shipper. These persons are defined in article 1. For cargo interests, the RR function as a two-way system. According to article 79.2 the obligations and liability of cargo interests can neither be decreased or increased. The two-way mandatory approach for cargo interests is familiar from the Hamburg Rules. Otherwise, what has been said above about the carrier side is to applicable parts true for cargo interests.

In spite of the core points of the RR being mandatory in the above-mentioned sense, article 79 allows for non-mandatory rules by the wording "[U]nless otherwise provided in this Convention". Certain particular provisions are of non-mandatory nature. One example is article 56 making many of the right of control provisions non-mandatory.

Certain additional matters concerning the mandatory nature of the RR and freedom of contract should be taken into account. For example, there are specific provisions on such issues in article 81 not, however, dealt with at this point.

3.2. *The particular case of volume contracts*

As stated above, it can be questioned to what extent the traditional approach to mandatory rules is still valid. In some sources views have been expressed according to which there is no need in typical commercial relations to provide protective legislative rules without the contracting parties having the possibility to agree between themselves what their mutual risks are. It is no more a dominating fact that the cargo side is the weaker party in relation to the carrier.

Article 80 reflects to a certain degree this background, but it does not expand freedom of contract without certain preconditions.

The debate on the possibility to restrict the application of the provisions in their mandatory capacity in relation to certain kinds of service contracts arose due to the U.S. Working Paper 34 put forward for the 12th session of Working Group III in 2003. In this document the U.S. explained the background for its proposal and how the regulation would look.

The introduction of that proposal reads in paragraph 18 as follows:

> "A key issue in the United States (and we believe in other parts of the world as well) is how the Instrument should treat certain specialized and customized agreements used for ocean liner services that are negotiated between shippers and carriers. As part of the overall package, the United States believes that this kind of agreement, which we refer to as an Ocean Liner Service Agreement ("OLSA"), should be covered by the Instrument, unless the OLSA parties expressly agree to derogate from all or part of the Instrument. A decision to derogate from the Instrument, however, would be binding only on the parties to the OLSA. There are differing views, both within the United States and internationally, on the option to derogate down from the Instrument's liability limits. Nevertheless, the U.S. view is that the parties to an OLSA should be able to depart from any of the Instrument's terms."

OLSAs were explained to have derived from the possibility in the U.S. of competitively negotiating liner service contracts, a possibility that opened up towards the end of the 1990's. OLSAs do not relate to the tramp trade. When studying the proposal more closely, the conclusion is that OLSAs are framework contracts aiming to solve the transport needs and obligations as a package. Any single transport would not be a service contract.

OLSAs were thought by the U.S to have a special status in the respect that these contracts were proposed to fall under the scope of the Convention, but that the parties could specifically agree to derogate from all or part of the Convention's provisions. The concern for the U.S was also that OLSAs should not fall outside the scope of application of the Convention.

At that stage the scope of application of the proposed Convention was planned to exclude certain contract types. According to Working Paper 32 article 2 (3), the proposed Convention would not apply to charter parties, contracts of affreightment, volume contracts, or similar agreements. Additionally it was proposed in article 2 (5)[3] that if a contract provided for the future carriage of goods in a series of shipments, the provisions of the proposed Convention would apply to each shipment to the extent that other articles more specifically would so state. The latter above-mentioned U.S

[3] Cf. HamburgR article 2 (4).

concern relates to the possibility that the proposed Convention would have excluded too much.

The concept introduced by the U.S. gave rise to concern among many delegations in that the proposal might cause a serious deterioration of the status of small shippers and in that the term OLSA was difficult for many to place in the concept of contract of carriage. But, clear support was also expressed not accepting the dangers to shippers as maintained by others.

At one stage the text proposal included the idea of a stand-alone provision with a separate regulation of the intended OLSA-system. Gradually through informal consultations the idea emerged that an OLSA as understood and intended by the U.S. really was a volume contract, whereby the contracting parties agreed on more than one consignment. It was a question of a kind of a package deal with a framework contract covering the comprehensive setting. Individual carriages might in that concept be arranged as appropriate, but mainly on two lines. Either they were arranged through liner trade or through a chartering concept.[4] With this concept in mind it became clear that volume contracts should be implemented into the scope of application rules in order to reach the goal where mainly liner trade was under the new Convention. The extent of freedom of contract would be adjusted by a separate provision.

This systematic concept eventually prevailed. It was quite another matter to achieve reasonable consensus for the freedom of contract aspect. Some delegations approached the matter as a non-starter. Efforts in this respect to allow expanded freedom of contract should not in other words be accepted at all. In spite of total opposition in some quarters there was support to develop the freedom of contract concept in view of volume contracts.

During informal and formal consultations there were various views. A common basis was that the shipper should be informed properly on the contract conditions deviating from the provisions of the Convention. The same protective need was of course important also for any third party, such as a consignee. What exact preconditions would apply was the target of, sometimes, deep disagreement. One main line of opinion was that the carrier should be allowed alternative routes for such information. The other main line of opinion was that freedom of contract should not be allowed at all by a contract of adhesion where exemption clauses were implemented in the contract without proper individual negotiations having taken place. The first

[4] This basic concept of separating a framework contract from individual voyages has been regulated upon in the Nordic Maritime Codes, see the Finnish Maritime Code Chapter 14 section 47.1.

line prevailed at the beginning and reached a majority of support. It was felt, however, that in order to gain support in a wider range than achieved so far in a matter of principle, further specification was agreed upon taking the final solution close to or even covering the second line of opinion.

Due to the very difficult situation with opposing views where reasonable compromise was not readily found, the provision setting the above-mentioned preconditions for freedom of contract in view of volume contracts is fairly complex. It also provides protection "with belts and suspenders". In other words, it would seem that one protecting rule covers another. This was well understood in the Working Group, but, nevertheless, a secure setting was chosen, be it that the result in legal-technical terms is somewhat clumsy.

Even if the emphasis was on protecting the cargo side, it must not be forgotten that article 80 also covers the possibility to affect the shipper's status and any other relevant person on the cargo side. Under the same conditions that are applicable to the carrier, it is possible to deviate from the two-way mandatory rules covering cargo interests. It is true that it is a carrier perspective that mainly underlies the text. But, the shipper's position can be affected and the rules in this respect must be applied with that concept in mind.

Outside the above-mentioned protective result, it was generally accepted early on that some provisions in the Convention were of the nature that they could not under any circumstances fall under freedom of contract, as long as the Convention by its own rules was applicable. As article 80 covers both carriers and shippers, so also would these absolute mandatory rules, or "supermandatory" rules take both interests into consideration.

The policy aspect is thus clear. Then comes the matter of how this policy materializes in article 80 itself. Simultaneously it is important to take into consideration that for jurisdiction purposes there are special provisions for volume contracts in article 67. In the following, as already stated, only main outlines are mentioned, but details are left out.

Article 80.1 sets the tone for freedom of contract. It includes important messages. There is of course the necessary reference to volume contracts and also a reference that the Convention must apply to the respective volume contract. In order to understand this setting it is necessary to look at the definition of contract of carriage in article 1.1 and the definition of volume contract in article 1.2. It can be noticed from these definitions that a volume contract is one type of contract of carriage. A contract of carriage must in turn provide for carriage by sea and may provide for carriage by other modes of transport in addition to sea carriage. If no sea leg is involved, the Convention does not apply, nor in that case the specific provision on volume contracts.

In looking at the definition of the volume contract it provides the message that the contracting parties have further operations in mind than

merely one sea carriage. There are three requirements for a contract to fulfil the definition in article 1.2, meaning that the contract provides for

1) a specified quantity of goods
2) in a series of shipments
3) during an agreed period of time.

The specification of the quantity of goods may include a minimum, a maximum or a certain range.

An unspecified amount of goods would not result in a volume contract. The series of shipments might be consecutive or not. The period of time is not limited. It can extend from a few days to several years.

Opponents to the definition have stated that the mandatory rules can too easily be pushed aside by mere contract formulation. Thus, the parties could agree to ship two containers one the first day, the second the next day. This would be a volume contract. To this the sensible reply is that when a judge can draw conclusions that the intention is not to carry on the basis of a real package deal, but to enable a certain degree of freedom of contract by circumvention, any exemption clause could on that basis be set aside. In this case the reference in article 79 to indirect exclusion, limitation or increase is a sound basis for such discretion. There is no clear-cut line and the result is dependent on each individual case. Further, it is hard to believe that any carrier would make the effort to expand its freedom of contract for mere, say, two containers considering the numerous requirements set forth in article 80. It was proposed during the negotiations that the number of containers would be specified in the definition of volume contracts, but that kind of exercise is futile as individual situations vary.

As a volume contract in the sense of the RR is by definition a contract of carriage the ordinary provisions on scope of application are relevant for volume contracts as well. This means, for example, that a volume contract based on non-liner carriage is not under the RR at all, in accordance with article 6 (2). If a volume contract is based on liner carriage the RR will apply, in accordance with article 5 (1) compared with article 6 (1). The RR do not have any reply to a mixed volume contract, where the individual voyages are performed partly in non-liner trade and partly in liner trade, but the correct approach would in such cases be that the individual voyage will guide the application issue.

Article 80 applies only to volume contracts under the RR. Once applied, the RR gives a certain range for freedom of contract as stated in article 80.1.

The possibility to deviate from the provisions in the RR, to the extent that those provisions otherwise would be mandatory, is regulated in article 80.2. Paragraph 2 covers the carrier and the shipper by reference to paragraph 1. The status of a third party is regulated in paragraph 5.

The exact wording in paragraph 2 was contentious at the preparatory

stage. There are four preconditions and all of them must be fulfilled for the provisions in the RR not to apply in a mandatory fashion.

Article 80.2.a) requires that the derogation must be set forth in the volume contract in form of a prominent statement. Thus, the statement must be clear. In comparison, the Oxford Concise Dictionary states that the word "prominent" means "particularly noticeable".

In subparagraph b) there is the requirement that the volume contract is either individually negotiated or prominently specifies the sections of the volume contract containing the derogations. The formulation was discussed several times during the sessions. The alternative was whether instead of an "or" there should be an "and" the latter resulting in both requirements being fulfilled. The "or" alternative was finally accepted and did not leave much disagreement due to what was introduced in subparagraph c). The first part of subparagraph b) requires that any derogation must be properly negotiated and not just incorporated in standard form. The alternative second part of subparagraph b) requires a prominent or particularly noticeable specification of the sections of the volume contract containing the derogations.

Subparagraph c) was introduced at a very late stage of the consultations. There were strong demands aiming to guarantee that shippers, particularly small shippers, would not need to go along derogations that were standardised one way or another, or nearly standardised. Subparagraph b) was considered by many to produce sufficient protection, but others thought that more was needed in this respect. In particular, it was considered necessary to base the derogation on some individual show of will. It also became apparent that many delegations thought that a shipper should be left with a real choice in any case by either staying with the provisions of the RR or accepting derogation. These particular demands were met and the end result was considered satisfactory in the way that sufficient consensus existed. The result of the prevailing text in subparagraph c) is in practice that the shipper will be offered two freight rates, one in case of the RR provisions applying, the other in case of derogations. No other conclusion is possible from the text in subparagaph c).

According to subparagraph c), the shipper must be notified that he has a real choice as mentioned above and he must on the basis of that notification be able to choose. Whether such real choice has been provided or not must be decided upon separately in each individual case.

The same late result is true for subparagraph d). It was clear early on, however, that an incorporation of a derogation clause from another document should be disallowed. This is included in the first part of subparagraph d). While subparagraph b) requires individual negotiations only as an alternative and while the first part of subparagraph d) only disallows reference, the second part of subparagraph d) requires proper negotiations for derogation

and as an only alternative. The second part of subparagraph d) will take away a lot of the relevance of the first part of subparagraph b), but this is the compromise and the result, whether it is in legal-technical terms appropriate or not. The use of the term "contract of adhesion" might be unknown or unclear in some jurisdictions, but it was included based on a fairly common understanding of the concept. This means that it is not according to article 80.2.d)ii) allowed just to use standard terms or boilerplate terms for derogation that are not freely bargained, but there must be a sufficient individual element involved for including a derogation clause in the volume contract.

In all respects the whole of paragraph 2 must be read in light of article 3 according to which the relevant communication has to take place in writing or by electronic communication as further specified in article 3.

Paragraph 3 seems to overlap many parts in paragraph 2. Again, this is a further clarification on the preconditions for freedom of contract.

It was mentioned in the background to article 80 above that certain provisions were thought to be of such fundamental importance that derogation would not be allowed in a volume contract even if all the requirements in article 80 would have been fulfilled. These supermandatory rules cover two references concerning the carrier and two references concerning the shipper. Perhaps the most important supermandatory provision is that the carrier has a non-delegable duty to provide and maintain a seaworthy ship according to article 14.a) and b). The other relates to limitation of liability in article 61.

There are supermandatory rules also concerning the shipper's obligations and liability.

Paragraph 5 deals with the derogation possibilities in relation to any person other than the shipper. At the preparatory stage it was considered understandable that the same preconditions that were valid for derogation between the carrier and the shipper could not prevail in relation to third parties who had had no power to exercise direct influence on the contract of carriage in form of a volume contract. It was not relevant what indirect influence could be exercised by the third party via the shipper, for example, through the contract of sale.

There are specific requirements in paragraph 5 aiming to take into consideration the specific status of third parties and to provide protection respectively. The chapeau shows that the requirements mentioned in view of the shipper - carrier relationship must be satisfied. Added to this, there are specific rules in the two subparagraphs.

Article 80.5.a) requires that prominent, i.e. particularly noticeable, information has been received by the third party on the fact that the volume contract derogates from the Convention. When this information has been

received it is also required that the third party has given its express consent to be bound by such derogations. It does not suffice to interpret consent into this legal relationship, for example, by some kind of construction based on implied consent. The express consent is bound to form in accordance with article 3. Such consent must be given in writing or by corresponding electronic means and the consent must due to the requirement of "express" be clear.

Paragraph 5 has no specification on when the express consent shall be provided. This is up to the third party. From the carrier's point of view it is wise policy to possess this consent at the time of conclusion of the contract of carriage, if possible. Any time subsequent to such conclusion gives the third party full option. He may at that time refuse express consent leading to application of the RR between the carrier and the third party.

Once there already exists a right to claim in damages the mandatory rules hardly need to govern the relationship between the parties. It is, for example, quite possible that the parties agree on compensation which does not reach the RR-based amounts that the third party would be entitled to. Such procedure is of course quite common in practice. A settlement agreement is not dependent on the provisions of the RR. Comparison can be made with article 72.1 in view of jurisdiction agreements after the dispute has arisen.

Paragraph 5 subparagraph b) sets up restrictions on the express consent stating that it does not suffice to set forth such consent in a carrier's public schedule of prices and services, transport document or electronic transport record.

In all respects the whole of article 80.5 must be read in light of article 3 according to which the relevant communication has to take place in writing or by electronic communication as further specified in article 3.

If there is dispute on the validity of any derogation it is important to clarify who has the risk of providing proper evidence and thus proving a particular point. Article 80.6 clarifies the matter of burden of proof. It is stated in the provision that the party claiming the benefit of derogation bears the burden of proof that the conditions for derogation have been fulfilled. It seems that in most jurisdictions such burden of proof would apply in any case. In order to enhance harmonization, a specific provision was, nevertheless, included in the RR.

The Hague and the Hague-Visby Rules have no similar exits from their mandatory systems to that of the RR. The Hamburg Rules article 4.4 has a reference to carriage of goods in a series of shipments, but that provision is not comparable with the RR article 80.

4. *Other issues and final remarks*

The explaining of scope of application and freedom of contract is not comprehensive. There are other principles and provisions that are important in order to understand the RR properly. These specific issues cannot be dealt with in detail.

It is, however, necessary to mention that the carrier's subcontractors called maritime performing parties are liable directly to the cargo interests as regulated in the RR. In addition to the definition of the maritime performing party in article 1.7 making, for example, stevedores and port operators to fall under the definition, the core provision is found in the RR article 19. According to article 19.1 a maritime performing party is subject to the obligations and liabilities imposed on the carrier under the RR and is entitled to the carrier's defences and limits of liability as provided for in RR. For this provision to apply there are further conditions in article 19.1 connected with the geographical aspect. It was not possible to have the same provision for the carrier in article 5.1 and for the maritime performing party in this respect. The maritime performing party has to be linked to a Contracting State as specified in article 19.1. The basic substantive liability issues for the maritime performing party are also found in article 20.

Scope of application is also in a certain way linked with jurisdiction issues in the RR Chapter 15 and arbitration issues in the RR Chapter 16. The only observation at this point is that when a State ratifies the RR, Chapters 15 and 16 are not included. They are only included if a statement is made by the Contracting state in accordance with article 74 , 78 and 91.

As has been seen with scope of application and freedom of contract many controversial issues have been dealt with and a sufficient consensus has been reached. The same is true for other parts of the RR. It can be said that under the circumstances the best compromising result has been achieved at this point of time with the particular delegations that took part in Working Group III negotiations. All routes and alternatives were tested. Perhaps another time and another group might have concluded otherwise. The reality is, nevertheless, that the UNCITRAL Commission approved of a Draft and a Convention was since adopted by the UN General Assembly. This is what the international community now has to live with and adjudge what the next step is. Shall the Convention be signed or not? Shall the Convention be ratified or not? The underlying policy issues are not uncomplicated even at the last stages in deciding the fate of the Convention. The RR aim for global solutions. When sea or air carriage is involved I see the global approach as the only proper alternative. It would be totally undesirable for either of these forms of carriage going regional. Concern must be expressed on what particularly the European Union might do. Its only chance is to accept regional solutions - as said, not desirable for shipping.

The RR must be understood to be a compromise. There are always some other ideas on what the best solution should have been, but to implement one's own opinions, and one's own opinions only, on the global arena with real effect and consensus is more easily said than done. The RR are undeniably a complicated piece of legislation, but they are the only modern international approach now and for many years to come. Should the RR internationally fail, one may ask what, if any, would come instead. Regional solutions? National solutions? A new global convention? To hope for the last-mentioned development now and after the RR have been adopted is to my mind completely unrealistic. The first two are not desirable. I hope that the RR are looked at with these serious macro perspectives in mind.

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OVERVIEW OF THE CONVENTION THE UNCITRAL PERSPECTIVE

KATE LANNAN

It is a great pleasure to be with you today on behalf of the UNCITRAL secretariat. For those of you unaccustomed to our UN acronyms, UNCITRAL is the United Nations Commission on International Trade Law, which is based in Vienna, Austria. I was the Secretary of Working Group III on Transport Law for the past several years, and, along with several of you, I have had the pleasure and challenge of working on the text of the Draft Convention for the past 6 years.

Unfortunately, the newly-named Secretary of UNCITRAL, Renaud Sorieul could not be attend this important conference, as he will soon be on his way to New York for the 63rd Session of the UN General Assembly. However, in addition to sending you his regrets, he also sends his greetings, and his warm congratulations and appreciation to the CMI for its advice and assistance in the preparation of the Draft Convention.

As you all know, given your presence here today, this summer, on July 3rd, at the conclusion of its 41st session, UNCITRAL approved the text of the draft convention on contracts for the international carriage of goods wholly or partly by sea. While the title of the draft convention might seem unwieldy to some, both UNCITRAL's Working Group III on Transport Law and the Commission – note that I use the terms 'Commission' and 'UNCITRAL' interchangeably – agreed that the title of the text should reflect both its nature as a "maritime plus" convention, covering door-to-door transport, and its focus on the contract of carriage. In any event, you may expect that the text will soon be known by a much shorter, geographically specific name, but I shall, for the moment, simply refer to it as the "Draft Convention". For those of you who are wondering why it is still referred to as a "draft" convention, when the text has been approved by the Commission, it is still a "draft" convention in UN terms until its adoption by the UN General Assembly. I will explain the next steps for the text at the conclusion of my remarks.

The original impetus for the Draft Convention actually came from UNCITRAL's Working Group on Electronic Data Interchange, or EDI. That Working Group had suggested to the Commission in 1994 and 1995 that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment. As you know, this was a particularly [illegible]ny problem that had plagued discussions on

electronic commerce for some time, and for which solutions had not yet been found. In 1995, the Commission endorsed the Working Group's recommendation that such work should proceed, with a particular emphasis on maritime transport documents, and taking into account work that was then underway in other international organizations, including the CMI.

In 1996, at its 29th session, the Commission was presented with a proposal to include in the UNCITRAL work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws than had so far been achieved. It was suggested that existing national laws and international conventions left significant gaps regarding issues such as the functioning of bills of lading and sea waybills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and to the legal position of banks and financial institutions involved in the transaction. Some States had provisions on those issues, but they were disparate, whilst others had none at all, creating obstacles to the free flow of goods and resulting in increased transaction costs. Further, there was a desire to explore uniform provisions in respect of electronic means of communication regarding the carriage of goods.

The Commission agreed that rather than include the topic on its agenda in 1996, the Secretariat should become a focal point for the gathering of information, ideas and opinions regarding the problems that arose in practice and possible solutions for those problems. Further, the UNCITRAL secretariat was to consult not only Governments in this regard, but also intergovernmental and non-governmental organizations (that is, IGOs and NGOs), including international organizations representing the commercial sectors involved in the carriage of goods by sea, again, specifically indicating the CMI, amongst others. The information gathered by the Secretariat was then to be presented to the Commission at a future session, so that a decision could be made regarding the nature and scope of any future work that could be usefully undertaken by UNCITRAL.

As you know from the perspective of the CMI on the history of the work on the Draft Convention, the CMI and UNCITRAL began their collaboration toward a common solution after that Commission session in 1996, although, of course, the CMI had already been working on the task of investigating issues surrounding the uniformity of the law of the carriage of goods by sea for some time.

Collaboration between the CMI and UNCITRAL continued over the course of the next few years, and interim reports were provided on a regular basis to the Commission at its annual sessions.

In 2000, a Transport Law Colloquium was organized jointly by the

UNCITRAL secretariat and the CMI, ostensibly to gather ideas and expert opinions on problems in international carriage of goods and possible solutions from a broad range of interested organizations and industry bodies. A number of issues were identified during the colloquium as deserving of consideration, including:

- gaps in the existing law in respect of the functioning of various transport documents, the relationship of those documents to the rights and obligations of the buyer and the seller of the goods, and the legal position of financing entities;
- multimodal transport;
- electronic commerce;
- clarification of the roles, responsibilities, duties and rights of all parties;
- clearer definition of delivery;
- rules for non-localized damage to cargo;
- an examination of the liability regime and limits; and
- provisions to prevent the fraudulent use of bills of lading.

At its 34th session in 2001, the Commission heard a report that summarized the considerations and suggestions that had resulted to date from the discussions in the CMI International Subcommittee in order to enable the Commission to assess the thrust and scope of possible solutions and decide how it wished to proceed. A series of issues were described in the report that would have to be dealt with in a future instrument, which very closely resemble the chapter headings of the Draft Convention:

- the scope of application,
- the period of responsibility of the carrier,
- the obligations of the carrier and the shipper,
- the carrier's liability,
- transport documents,
- freight,
- delivery to the consignee,
- right of control over the cargo,
- transfer of rights in goods,
- right of suit against the carrier, and
- time for suit.

Further, the UNCITRAL secretariat reported that consultations undertaken had indicated that work could usefully commence towards an international instrument that would modernize the law of carriage; take into account the latest technological developments and eliminate legal difficulties that had been identified.

Of course, as you know, the CMI International Sub-Committee had, by 2001, prepared a draft instrument based on its body of work; that draft instrument received the approval of the CMI's Executive Council in

December of 2001, and was submitted to UNCITRAL for further consideration in Working Group III.

When deliberations began in Working Group III in April of 2002, there was general consensus that the purpose of its work was to end the multiplicity of the regimes of liability applying to carriage of goods by sea and also to adjust maritime transport law to better meet the needs and realities of international maritime transport practices. The Working Group also gratefully acknowledged the work already undertaken by the CMI in preparing the draft instrument and the commentary, which were used as the starting point for the deliberations of the Working Group. Further, it was thought that the draft instrument should take into consideration international conventions currently in force that governed different modes of transport, and that the draft instrument should seek to establish a balance between the interests of shippers and those of carriers.

In light of those goals, and a mere 6 and _ years and 26 weeks of Working Group sessions later, the Draft Convention has been approved by the Commission, and we can ask whether we have achieved what we set out to do.

Not surprisingly, the view of the UNCITRAL Secretariat is that we have indeed taken major strides toward the accomplishment of the goals expressed. Of course, the proof of the pudding is in the eating, as they say, and only time will tell whether the Draft Convention will succeed in its goal of achieving harmonization of the legal regime governing the carriage of goods by sea.

As noted in my comments thus far, the numerous concerns raised in respect of the existing legal regime eventually convinced industry and Governments that the time had come for a fresh look at international maritime conventions for carriage of goods. The Draft Convention deals with a broad range of issues, many of which are novel for a uniform transport law instrument. Further, in respect of matters already dealt with in earlier instruments, the Draft Convention aims at enhancing legal certainty by codifying decades of case law and industry practice and by clarifying earlier texts where necessary.

Our view is that the result of the combined CMI-UNCITRAL effort is a comprehensive instrument governing international contracts of carriage from "door-to-door" that will modernize the law, making it much better-suited for the needs of today's commerce. Importantly, this is accomplished while preserving the existing international regimes in respect of unimodal transportation, such as carriage by road, by rail or by inland waterway. We believe that the Draft Convention will give commercial actors and those involved in the international carriage of goods the opportunity to benefit from predictability and uniformity in an area that has to date been characterized by competing multilateral, regional and domestic regimes. The new Convention will thus improve conditions for international trade, enhance efficiency for commercial transactions, and reduce the overall cost of doing business internationally.

Finally, the last goal that the Working Group set for itself in 2002 was that of creating balance amongst competing stakeholders.

Before answering that question, I would ask you to recall that the UNCITRAL secretariat was encouraged to consult a broad range of IGOs and NGOs in pursuing its work in this area. Indulge me for a moment as I run through the list of the IGOs and NGOs that actively participated in the various Working Group sessions. They are, in no particular order, with the exception of the first:

- CMI
- UNCTAD
- UNECE (UN Economic Commission for Europe)
- ICC (International Chamber of Commerce)
- IUMI (International Union of Marine Insurers)
- FIATA (International Federation of Freight Forwarders Associations)
- ICS (International Chamber of Shipping)
- BIMCO (the Baltic and International Maritime Conference)
- International Group of P&I Clubs
- IAPH (International Association of Ports and Harbours)
- European Commission
- Association of American Railroads
- OTIF (Intergovernmental Organization for International Carriage by Rail)
- European Shippers' Council
- IRU (International Road Transport Union)
- International Multimodal Transport Association (IMMTA)
- World Maritime University

And remember that every Member State of the UN has the right to actively participate in our Working Groups, and that each of those national delegations consulted their own stakeholders as well.

Having pointed out the diversity of the stakeholders that participated in the preparation of the Draft Convention, I can also tell you that the atmosphere during the years of negotiation of the Draft Convention was generally one of cooperation and constructive effort toward reaching a common goal, rather than one of confrontation and competition. It seemed that the various commercial interests involved in international maritime transport were conscious of the outdated nature of the current legal regime in light of modern industry needs, and of the pressing need for a coherent, unified approach.

The text that you will be discussing over the next few days represents the efforts of many competing interests to build consensus and to arrive at practical and workable common solutions to replace the current unwieldy and outdated regime for the international maritime carriage of goods.

The road forward

As I mentioned earlier, the Commission approved the text of the Draft Convention this summer in New York. Of course, that begs the question "What next?".

In its decision and recommendation to the General Assembly, the Commission expressed its appreciation to the CMI for the advice it provided during the preparation of the Draft Convention, and submitted the text of the Draft Convention to the General Assembly for its consideration and adoption.

As you may be aware, the 63rd Session of the General Assembly is ongoing, and the 6th Committee, which considers legal matters, will take up the topic of the Draft Convention on or about the 20th of October. The Chair of the 41st Session of the Commission, Rafael Illescas, who was also the Chair of Working Group III, will provide his report to the 6th Committee, which will then consider the text for adoption.

Also before the 6th Committee of the General Assembly is the generous proposal of the Netherlands to host a signing ceremony for the Draft Convention in the Port of Rotterdam in September of 2009. That proposal was greeted very warmly by the Commission, and was accepted by acclamation. The Commission has, in turn, recommended to the General Assembly that it in fact authorize such a signing ceremony in Rotterdam in 2009.

Upon the conclusion of its consideration of the Draft Convention, it is anticipated that the 6th Committee will recommend a resolution to the plenary session of the General Assembly, adopting the Draft Convention and authorizing that it be opened for signature in Rotterdam in September of 2009. The final resolution of the General Assembly may be expected in early December of this year.

One other aspect of the future plans for the Draft Convention in which you may be interested is the signing ceremony in Rotterdam. Prior to the formal ceremony itself, the Dutch Government, in conjunction with UNCITRAL and others, intends to host a seminar on the subject of the Draft Convention on 21 September 2009, with various events planned for 22 September, followed by the formal signing ceremony on 23 September 2009.

Thank you for your kind attention. I look forward to what promises to be an interesting couple of days spent discussing the Draft Convention, and, of course, I would be pleased to answer any questions that you may have at a time that the Chair deems appropriate.

SHIPOWNERS' VIEW ON THE UNCITRAL CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA

KNUD PONTOPPIDAN*

Summary

The main argument put forward is that international harmonization of maritime transport law is essential for the smooth handling of international trade, to the benefit of carriers and customers.

The existing port-to-port rules are no longer adequate to meet the complex logistical demands of the 21st century's door-to-door delivery services, which call for a new international convention on multimodal transports with a maritime leg.

The answer to these calls, we argue, is the UNCITRAL Convention. It covers the right type of transport and provides an attractive and modern set of rules that allow for delivery of goods without presentation of a negotiable transport document, electronic transport documents, and extended freedom of contract. It also takes a balanced approach to the rights and obligations of shippers and carriers. Combined, this makes for an attractive convention that meets the requirements of today's liner shipping.

However, the early adoption of the new UNCITRAL Convention by the UN General Assembly and the possible later signature of the Convention in Rotterdam is not in itself sufficient to bring us the truly international instrument that we need. 20 states must ratify the Convention for it to enter into force, and in this regard, we all have a role to play.

Speech

I have been looking forward to this day – to come here and share my views with you on the new UNCITRAL Convention – or the Rotterdam Rules as it will no doubt soon be called – because being here today means that, we have the final text.[1]

* Executive Vice President, A.P. Moller – Maersk.

[1] The UN Resolution on United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea of 11 December 2008 (A/RES/63/122 of 2 February 2009) adopting the Convention recommends the Convention to be known as the "Rotterdam Rules".

Today, I will explain to you why – from a shipowner's perspective – a new convention on maritime transport and multimodal transport with a maritime leg is necessary, and why the new UNCITRAL Convention meets our needs, and finally a few words on the ratification process.

I will begin, however, with a few words about liner shipping and what it is about, because the characteristics and requirements of liner shipping are what we measure the new convention against.

The Convention is also applicable in tramp trades in the relation between the carrier and a consignee, not being an original party to the charter agreement. This corresponds basically to what is provided for in present conventions like the Hague/Visby-Rules, although the principle has been given a slightly broader application. I do not believe the Convention will have a significant impact in the tramp trades and shall not comment upon this question any further.

Now, does the Convention fulfil the needs of liner shipping?

I guess that many of you may be familiar with the name A.P. Moller-Maersk, but I would nevertheless like to say a few words about us and our liner activities.

We are a worldwide organisation with about 117,000 employees and offices in around 130 countries. Active in liners, tankers, off shore, supply, oil exploration, supermarkets and industry.

We are one of the leading liner shipping companies in the world, with more than 470 container ships and close to two million containers. Every 13 minutes one of our container ships calls port somewhere in the world.

So, I trust that you will believe me when I say that today, international liner trade is no longer the simple service between a handful of ports in a couple of different countries, as it used to be in the old days, but rather a highly complex logistical and legal challenge.

Not only for A.P. Moller-Maersk, but for all liner carriers.

Our liner ships call and serve practically all costal States in the world, and our door-to-door services extend to almost every single country, including those that are landlocked far away from the sea. About one fourth of our container transport is performed as door-to-door services. And more than a third is multimodal.

Our container ships load and discharge containers in not only one or two or three countries along their route, but in many countries and in even more ports. In some ports only loading takes place, and in others only discharging.

It also belongs to the logistical picture, that our ships pick up or deliver containers to a container hub, from where they are carried on by other ships or by trucks or trains to their final destinations, or to yet another hub or terminal for on-carriage.

Consider the following figures – and it is only for Maersk Line:

Last year we transported around 14 million TEUs – that is more than 11% of global containerized trade.

And every year we issue almost 4 million Bills of Lading.

Can you imagine the logistical challenge?

Not to mention the legal challenge?

Finding the right answers to these legal challenges requires that you take into account the way that liner shipping operates and the multimodality of door-to-door delivery.

Now, I would like to return to my "why" questions:

- Why is a new convention on maritime transport necessary, and
- Why does the new convention meet many of our needs.

I.

There are mainly two reasons why a new convention on maritime transport and multimodality is necessary.

The first reason pertains to the practical, financial and legal disadvantages of different rules in different countries.

Different rules in different countries must be followed by the carrier – and consistently so – even though it raises questions of liability, limitation of liability, the length of notices to be given, delivery procedures, claims settlement and so on and so forth.

The list is long, and I could probably go on for another minute.

The consequence of a multitude of different – and also sometimes conflicting – rules that must be followed is that maritime traffic in general and international liner traffic in particular would suffer considerably, because of the additional time and costs spent.

A dramatic increase in legal costs connected with claims handling would occur, and jurisdictional conflicts, race to courts and forum shopping would be the order of the day.

Carriers would find it more difficult to provide speedy and efficient service, international trade would suffer and the costs of international trade would increase and be imposed on the exporters and importers.

We are already seeing some of this today.

We enter into a contract of carriage from Limassol in Cyprus to Port Said in Egypt. The bill of lading is issued to the shipper in Limassol.

Maersk Line's bill of lading designates English law.

However, and now it gets complicated:

Cyprus is party to the Hague Rules, UK party to the Hague-Visby Rules, and Egypt party to the Hamburg Rules.

At the claimant's choice, a cargo damage claim could be initiated in any of the three countries – Cyprus, UK or Egypt – which apply different substantive rules to the claim – different liability limits, different defences, different periods within which suit must be filed and so on and so forth.

And when it comes to multimodal transport, shipowners face an increasing number of conventions as well as national rules, and the existing rules do not provide sufficient legal clarity about which rules apply, and to

what extent the parties can contractually agree the terms of the multimodal contract.

Obviously, legal certainty and predictability in this area, where no general accepted international convention is in force today, are very much warranted.

And that is why there is an urgent need to have one single modern convention covering all maritime transports, including maritime transports with a connected land leg.

The second reason has to do with the tendency to regionalism.

In recent years, a number of draft texts suggesting regional multimodal transport regimes have surfaced.

Regionalism would hinder the smooth handling of international transports and international trade by preventing States parties to a regional system in conflict with the UNCITRAL Convention from joining that international convention.

There are especially two texts that I would like to remind you of.

In 2005 – at the initiative of the European Commission – a group of legal experts proposed "A draft set of uniform liability rules for intermodal transport" for transports to or from a Member State of European Economic Community.[2] This draft is still being considered by the Commission and other stakeholders.

The intention is probably admirable, but if these ideas are translated into legislation, it would jeopardise the development of an international regime.

We hope that all EU countries will support that only one set of rules should apply to international maritime traffic and connected land transports – and that is an international convention. And, furthermore we hope that they will fully respect this convention – and not substitute it by regional rules.

A few years before – in the late 1990s – the US Maritime Law Association proposed a new unilateral US Carriage Of Goods by Sea Act.

If introduced to and adopted by the US Congress, the US would have had to denounce the Hague Rules and would not be able to ratify the Hague/Visby Rules.

And, this effectively would have introduced US unilateralism in the sphere of port-to-port and multimodal transportation. And the US Congress was eager to act as their COGSA was found out of date.

Fortunately, at the time – based on a joint initiative between WSC and

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[2] The proposal "Integrated Services in the Intermodal Chain (ISIC), Final Report Task B: Intermodal liability and documentation" of 28 October 2005 was contained in a report prepared for the European Commission, see European Commission Consultation Document of 15 February 2006:

http://ec.europa.eu/transport/logistics/consultations/2006_04_26/2006_04_26_public_consultation_documents_en.htm

NIT Leage – the US decided to await the outcome of the discussions within the CMI and UNCITRAL and to judge if the international solution might satisfy their requirements.

Needless to say, for the longevity of the new UNCITRAL Convention and for us who trade on the US, I hope that the Convention will meet the expectations of the US.

It most likely will, as practically all important aspects of the Convention carry the fingerprint of the US delegation, who vigorously participated in the discussions in UNCITRAL.[3]

Now, so many were the words about why a new convention is necessary.

II.

The more intriguing question, now that the new UNCITRAL Convention is finally agreed upon, is, whether the Convention will in fact deliver the answers that we need. – My second "why" question.

The short answer is: YES! – And actually a resounding yes!

There are still elements that concern us such as the provisions on right of control, and provisions on registered owner liability, but hopefully more on the theoretical than the practical level.

I will now elaborate on the many reasons for my resounding YES.

- The scope of the Convention
- The substance of the Convention, and
- The flexibility and freedom of contract that the Convention provides.

Now, as to the first reason - the scope of the Convention - I would say it is very sensible and suited for shipping.

For an international liner shipping company that delivers door-to-door movement of goods, we make use of various transport links, where each link corresponds to a transfer, storage or transport operation either in the country of origin, in a transit country, or in the country of final destination. Trucks, trains, and ships may be involved – adding to the complexity of who is responsible for delivering cargo at destination in safe conditions, according to agreed schedules.

The new Convention covers international maritime traffic and international multimodal transport with an international maritime leg.[4]

And that is exactly the scope that we shipowners would like it to cover.

The condition that it has to include a maritime leg is a sensible limitation, because it is feasible to regulate transports with a maritime leg internationally.

The same cannot necessarily be said about multimodal transports

[3] In a Statement of Position by the US before the 6th Committee of the U.N. General Assembly the US stated : "With continued industry support, we look forward to U.S. signature of the Convention at the signing ceremony in Rotterdam next year, and to prompt U.S. ratification".

[4] See Article 1(1) and Article 5.

without a maritime leg such as combined rail and road transport.

Rail and road transports do not have the same global character as maritime transport, and can more easily – and also more appropriately – be regulated within the various regions of the world where they take place.

This limitation of the scope to multimodal transports with a maritime leg has also made it possible and reasonable to apply the port-to-port regime to all damages in the multimodal chain, which cannot be localised to a particular leg. The considerable increase in the limitation of liability of the carrier has made it even more reasonable to apply the maritime rules to all non-localised damages.

This means that we will avoid the complications that would follow, if we were to establish a separate regime for non-localised damages in multimodal transport.

As to the substance of the Convention I believe it is pragmatic and contains a number of sensible quid pro quos.

We knew from the very beginning of the negotiations that carriers would not get a free ticket.

We knew that we would have to give something in return for an international convention that would regulate multimodal transport with a maritime leg.

But then again, we know that there is usually no such thing as a free lunch, and we all did a little or a lot quid pro quo during the negotiations.

I will now tell you about the top five substantive changes, as I see them. They are practically all improvements.

First, there are all the **liability issues**.

- The Convention contains comprehensive **provisions on carrier and shipper obligations and liabilities.**[5]

The liability of the shipper for loss or damage sustained by the carrier has been clarified and strengthened compared to the legal situation in many national laws, and the liability of the carrier for loss or damage sustained by the shipper has been increased.[6]

The liability rules are much clearer and presented in a more structured manner than in the existing conventions. They avoid purely abstract liability provisions, such as those contained in the Hamburg Rules.

The defence for error in navigation and management of the vessel has gone, and the level of the limitation amounts has been considerably increased. In fact, the rules on limitation of liability under the UNCITRAL Convention will often, because of the per package limitation system, give a shipper a

[5] See in particular Chapters 4 and 7.

[6] See in particular Article 17 and Articles 30-32.

much better compensation than the compensation available under the CMR.

Of course, we should probably expect that the higher level and limits of liability will increase carriers' P&I premiums.[7] It probably comes as no surprise that shipowners are not so happy with this change, but, on the other hand, we expect the Convention to bring with it considerable reductions in administrative costs for carriers, which means that on balance, the Convention will benefit all stakeholders – shipowners, shippers and international trade.

The Convention – wisely enough – only establishes liability for carrier delay, when the goods are not delivered at the place of destination (provided for in the contract of carriage) within the time agreed.[8]

And last but not least, the Convention provides for network liability.[9]

- The second improvement is that the Convention gives carriers a right to **limit liability for breaches of obligations** under the Convention.[10]

This is an improvement compared with the current situation, where liability can only be limited to loss of or damage to the goods.

- The third new element is a significant improvement: It will be possible to **deliver goods to the consignee** in instances, where, for instance, the negotiable transport document has been lost.[11]

There is real potential here:

We expect that it will reduce the number of situations where letters of indemnity are required from the consignee, and also situations where cargo is sold to a third party by public auction. It will also lead to reduced transition times.

- The fourth is that the Convention provides for detailed rules on all documentary aspects and ensures uniformity and certainty in an area, which has been dominated by divergent national rules and court decisions.[12]

For example, we may now through the Convention know for certain when a transport document is negotiable or not. To-day, we don't.

A bill of lading is considered negotiable in some jurisdictions, if it does not specifically specify that it is non-negotiable. In other jurisdictions it is only negotiable if so specified.

- And finally, the Convention takes an important step forward and

7 See Article 59.
8 See Articles 17 and 21.
9 See Article 26.
10 See Article 59.
11 See in particular Article 47.
12 See Chapter 8 and Article 1.

facilitates the booking – and documentation processes by allowing for and introducing rules on **electronic documents**.[13]

The third major reason – in addition to the scope and the substance – for concluding that the Convention does indeed deliver what we need is that it contains provisions on flexibility and the freedom of contract for both shippers and carriers.

The trend in the new UNCITRAL Convention away from the mandatory character of the Hague/Visby Rules and the Hamburg Rules towards a more flexible regime gives commercial parties greater freedom to enter into contracts, which serve their needs.

The most important provision here is probably Article 80 on volume contracts in liner traffic.

Article 80 allows the parties to contractually deviate from most of the otherwise mandatory applicable rules, provided a number of protective conditions are fulfilled.

The possibility of "tailor made" contract terms allows the parties a higher degree of stability with regard to service and rates. After all, one size does rarely suit all.

For many large shippers the liner carrier becomes part of their sophisticated logistics chain. In Maersk Line we have today entered into such tailored contracts with many of our large customers, such as Adidas, Wal-Mart, Volkswagen, Hewlett-Packard and IKEA just to mention a few.

I believe that freedom of contract is a potentially significant development for both carriers and shippers, as they are pressed to seek efficiencies and innovative processes in our dynamic global economy.

* * *

Taking it all together, it would not surprise you when I now say that I find the UNCITRAL Convention to be an ambitious attempt for a comprehensive and attractive convention for maritime transport and connected transports.

It does indeed cater to the need of international liner shipping.

And it does take into account many aspects of multimodal transport that are absent from existing conventions, because these aspects were not required at the time of adoption.

The story of liner shipping over the past 20 years has been a constant push to streamline and standardize in an effort to deal with the demands of trade. And the Convention certainly furthers this objection.

The drawback is that the end result is 96 articles – and, some may argue,

13 See Chapter 3.

a complicated text. In fact, it contains more articles than the Hague, Hague/Visby and Hamburg conventions combined.

But, be that as it may.

All 96 articles are in my opinion of immense value to the parties to maritime contracts and contracts on multimodal transport with a maritime leg. And especially contemporary provisions such as the one on electronic document, which is needed in the 21st century.

* * *

The question that now remains to be addressed is: When does the UNCITRAL Convention enter into force?

I think that I speak for all shipowners and their associations, ICS and the World Shipping Council included when I say that the UNCITRAL Convention should be ratified quickly and on a broad international basis in order to dissuade national and regional authorities from filling the vacuum with domestic or regional regulations.

I hope for a time frame of two to four years – and not the 10 to 15 years it took for many states to ratify the 1924 Hague Rules.

Naturally, ratification as such is a matter for governments, but that does not imply that we do not also have a role to play.

All of you here today have a responsibility to assist and urge your respective governments to ratify the new convention.

And those of us with in-depth expertise and knowledge of maritime law may wish to provide specific technical-legal assistance to countries, upon request and pro bono, to facilitate their implementation of the Convention.

As to my own efforts, I would like to mention that I – as part of a senior industry group – recently have conveyed to the European Commission the importance of providing assistance to Member States to aid their ratification of the Convention. EMSA could be the instrumental vehicle in that effort.

Also, I spoke last autumn, at the IUMI conference in Copenhagen,[14] with an audience from the insurance sector, where I expressed my hopes for constructive input and assistance from IUMI to the UNCITRAL Convention and pointed out the merits of ratification. And for that matter, I also spoke before a CMI Transport Law Colloquium back in 2000 in New York, arguing already then that an adjustment of maritime transport law at the international level was much needed.

You may also find it interesting that the national shipowners' associations in the Nordic countries have pledged their efforts towards ensuring that Denmark, Sweden and Norway are able to ratify the Convention

[14] The IUMI 2007 Conference in Copenhagen, 9-12 September 2007.

in 2010 or 2011 – making these three countries the front runners on the way towards the 20 ratifications required for the Convention to enter into force.

If the UNCITRAL Convention becomes the accepted norm for international maritime trade and connected land transportation, large amounts of administrative costs would be saved and legal disputes avoided.

If, on the other hand, the Convention only becomes applicable in certain regions of the world, with other regions applying their own – and most likely conflicting rules – another chaotic situation will arise.

So, in closing, I would like to encourage you to support an international approach. In my view, it is the only way to develop maritime law, in due respect to international comity, providing legal certainty and transparency, and furthering the growth of international commerce.

There is only one way forward: And that is the way of the UNCITRAL Convention.

THE NEW ELEMENTS

THE FACILITATION OF ELECTRONIC COMMERCE

Summary of the oral presentation

JOHANNE GAUTHIER

The sessions dealing with the UNCITRAL Draft Convention opened with a brief history of the initial stages of its preparation. By necessity, it was brief and did not focus on any particular issue. It is thus worth noting here that one of the earliest issues identified as crucial by UNCITRAL, the OECD and CMI was the need to produce a convention that would apply not only to all traditional contracts of carriage and documents covered by the Hague, Hague-Visby and Hamburg Rules but also to contracts of carriage concluded electronically and to electronic records related thereto.

When this work started, e-commerce was starting to gain a greater foothold within our society, thus, we were mindful of advancing the goal of commercial certainty in the part of cyberspace that related to contracts for the carriage of goods wholly or partly by sea.

Very quickly, the working group of CMI on electronic commerce concluded that to reach this goal, the Draft Convention had to be medium neutral as well as technology neutral. This last expression means that it had to be adapted to all types of systems not only those based on a registry such as Bolero (based in part on the CMI Rules for electronic bills of lading) but also suited to systems operating in a closed environment (such as an intranet) as well as those operating in an open environment (such as the internet). One also had to keep in mind that technology evolves rapidly and that as we reported in Singapore in 2001, "what appears impossible today is probably already on the current agenda of software developers." Therefore, the Draft Convention could not favour one technology over another.

It is with this in mind that the working group initially drafted the provisions submitted to UNCITRAL.

It is also worth noting that the CMI organized the Bordeaux Colloquium in 2003 in part to answer the need expressed by several MLAs in Singapore for more detailed information on the technological aspects and legal issues related to e-commerce. A full day was devoted to these issues; panellists first explained and demonstrated how various systems then available worked and how international rules dealing with contracts concluded electronically or

"documents" issued electronically would enable those systems to evolve into fully paperless systems. Then, UNCITRAL Model Laws on Electronic Commerce (1996) and Electronic Signatures (2001) and European Commission Directives related to such topics were explained. We also looked at whether, in all, the two above-mentioned UNCITRAL Model Laws were being implemented in Ibero-American countries. In the afternoon, after an in-depth analysis of functional equivalence, very lively discussion ensued with the delegates.

A brief guide to e-commerce features requiring special attention was then prepared by the working group to facilitate the further discussion of national delegations at UNCITRAL sessions.

In 2005, members of the working group also participated in a special meeting organized in London by UNCITRAL to discuss the e-commerce features of the then socalled "Instrument" and all the provisions dealing with the right of control (Chapter 10) and the transfer of rights (Chapter 11) necessary to foster the evolution of paperless systems.

Today, we have a final product before us. Although it is obviously the result of the collective efforts of all delegates who attended the intensive UNCITRAL sessions, I want to take this opportunity to officially thank the members of the CMI working group on electronic commerce (who also worked very hard as part of their respective national delegations), without whom I truly believe this would not have been possible. They are Gertjan VanDerZiel, George Chandler, Robert Howland and Luis Cova Arria. I also want to acknowledge the marvellous support and efforts of many other members of the CMI who worked within their own national delegations to ensure that these topics, which clearly appeared to many as somewhat difficult because they are new, would not simply be deleted from the final draft.

For those less familiar with these issues, the solutions and the language used in the Draft Convention today may appear simple, but let me tell you that the "dematerialisation" of documents of title, such as negotiable bills of lading, is considered by most specialists in e-commerce law not only as one of the most pressing issues to deal with given their importance in international commerce, but also as one of the most difficult legal issues to address.

Obviously, there are limits to what one can do in the context of a convention dealing with transport law.

I will discuss how this particular problem is addressed and how the view, expressed by certain organizations such as CIFFA - that there is no more need for negotiable transport documents or electronic records - was also addressed by clearly defining the right of control under the contract of carriage and specifying that this right is transferable.

I have reproduced in Annex 1 some of the provisions relevant to e-commerce. Obviously, there are many other references to, or mention of, negotiable or nonnegotiable electronic transport records (ETR) throughout

the Draft Convention, but these extracts will facilitate our discussion and are sufficient to illustrate the points I wish to make.

First, it is important to mention that "consent" is paramount and a *sine qua non* condition for the use of electronic communications (Article 1(17)) for the various purposes referred to in the Draft Convention be it a notice, an agreement, a declaration, etc. (Article 3).

It is also the basis for the use and the effect given to ETRs (Article 8(a), Article 35(b)). Because we are dealing with international carriage and given that the technological capacities and legal regimes that may become pertinent when the goods are resold or pledged (for example) vary greatly, Article 10 provides for the possibility of opting in or out of the initial agreement as to what particular medium would be used (be it a transport document or an ETR).

Freedom of contract and thus, in that sense, consent is also paramount in defining the procedures that will, according to Article 9, define the method of issuance or transfer of an ETR and how a holder is able to identify itself to obtain delivery. What the Draft Convention does however is require the parties to adopt definite rules in respect to all the issues listed in Article 9 and that these procedures be referred to in the contract particulars and be readily ascertainable. As at the moment there is no predominant system in place, this is necessary to ensure that all those interested, such as a bank or a prospective consignee, properly understand what, for example, one needs to do to obtain delivery as the holder of an ETR as well as determine if it is content with these procedures or would prefer opting out pursuant to Article 10.

The general principle of medium neutrality mentioned earlier as one of our goals is found at Article 8. In addition, although the structure and language used throughout the Draft Convention is medium neutral wherever possible (for example reference to the contract of carriage and contract particulars), old concepts are defined wherever intended to apply to new realities as are new concepts. For example, "holder" (Article 110(b)), "consignee" (Article 1(11)), "issuance" and "transfer" (Articles 1(21) and 1(22)), ETR (Article 1(18)), negotiable ETR (Article 1(19)) and non-negotiable ETR (Article 1(20)). See also Article 35, Article 38 (Signature) and Articles 45-47 (Delivery).

The principle of technological neutrality is embodied in Article 9 and Article 38. In the latter, the essential functions of the signature are referred to in accordance with the principles set out in the UNCITRAL Model Law on Electronic Commerce (Article 7) instead of adopting the more technology biased definition of signature found in the Model Law on Electronic Signatures (Article 6).

Turning now to functional equivalence, that is how the Draft Convention deals with the traditional functions of transport documents (the expression "bill of lading" is not used anywhere in the Draft Convention) and there is little doubt that through the definitions and the various provisions discussed

earlier, an ETR will easily function as a receipt for the goods and as evidence of the contract of carriage.

As mentioned, whether it can also function as a "document of title" that enables its holder to transfer its rights in the goods or to pledge them or otherwise transfer the rights embodied in it, is not only an issue of transport law. It is subject to the national law applicable to such transactions.

Nevertheless, what is clear is that the traditional negotiable bill of lading became a document of title because it represented or embodied the right to obtain actual custody or delivery of these goods from the carrier.

Like in many other areas of the law (for example, copyright, protection of privacy, contracts), e-commerce business models force jurists to have a hard look at the origins and basic principles of the legal rules now applied in the "outside world" (as opposed to cyberspace).

Thus, apart from referring throughout to negotiable ETRs wherever negotiable transport documents are dealt with, the Draft Convention offers two additional means for achieving functional equivalence with respect to this ultimate function of the negotiable transport document.

First, the "exclusive control" of the negotiable ETR by the holder thereof is set out as the equivalent of the physical possession of the negotiable transport document by its holder (Article 8(b)).

Second, and most importantly, it also provides a clear codification of the right of control that follows the current commercial practices accepted almost universally (Article 50(3) and (4)) and it spells out how, insofar as transport law is concerned at least, the rights "embodied" in a negotiable transport document or a negotiable ETR can be transferred (Article 57).

The Draft Convention goes even further by codifying who has the right of control over the goods during the period of responsibility of the carrier (the controlling party) – what this right encompasses – and how it can be transferred when no negotiable transport document or negotiable ETR is issued. It thus offers a more secure alternative to the international commercial community and particularly the financing banks. In effect, Article 50(1), which really sets out the general rule, (Article 50(2), (3) and (4) being the exceptions) makes it very clear that the right of control, including the right to instruct the carrier to whom the goods are to be delivered, is not linked to the possession of a particular document or ETR. This means that even if the Draft Convention's other provisions designed to ensure that negotiable ETRs are given the same effect as negotiable transport documents by national Courts dealing with issues of property and security fail to achieve that goal, there is another mechanism in place to ensure that by becoming the controlling party, a bank, a new buyer or other persons interested in the goods can effectively have the legal control of those goods during the transit. As Gertjan VanDerZiel notes in an article soon to be published, the importance of this effective legal control for persons with rights to the goods, be it property

rights or rights of pledge, cannot be overestimated. I agree.

The Draft Convention certainly paves the way for a new way of doing business in a totally paperless world. It also provides for more solid foundations to Sea Waybills (paper or electronic form), while at the same time providing all the necessary tools for Courts to give effect to the new reality that is negotiable ETRs. I firmly believe that, considering the arduous process leading to its final stage, the Draft Convention offers very appropriate solutions and meets the goals it was set out to achieve.

MULTIMODAL ASPECTS OF THE ROTTERDAM RULES

GERTJAN VAN DER ZIEL[1]

SUMMARY: 1. Introduction – 2. A 'limited network system'. – 3. The position of the inland carrier. – 4. Conflicts with other conventions. – 5. 'Maritime plus' innovative? – 6. Conclusions.

1. *Introduction*

The multimodal aspects of the Rotterdam Rules[2] have been one of the most contentious subjects during the whole discussion on this new convention. The basic issue was: should the draft apply not only to the maritime part of a carriage by sea, but also to ancillary carriage by other modes prior to or after the carriage by sea?

An affirmative answer to this question was viewed by some delegates as a serious obstacle to achieve their multimodal ideal: a uniform liability regime that applies to all modes of transport. Others saw maritime law intruding an area where it ought not to be: ashore is the legal domain of the CMR, COTIF-CIM and the Budapest Convention! At best, in their view, a network system could be tolerated.

Other delegations were adamant to include the inland parts of a maritime carriage in the scope of the Rotterdam Rules when these parts are covered by the same contract of carriage. In their view, it would not make sense to restrict the scope to port-to-port carriage only: doing so would just add another maritime convention to three existing ones. The modern maritime contract, it was said, is multimodal. And a network system might be possible for carrier's

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[1] Emeritus Professor of Transport Law, Erasmus University Rotterdam and Head of the Netherlands' delegation to Working Group III of UNCITRAL.

[2] The UN General Assembly adopted on 11 December 2008 resolution A/RES/63/122, which recommends that the 'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea' be known as the 'Rotterdam Rules'. Therefore, in order to avoid the somewhat cumbersome full title of the convention, I will refer in this paper to its reference name 'Rotterdam Rules', to '(new) convention' or 'RR'.

liability only, but the application of different conventions to the various parts of a voyage under a single contract of carriage would, in this view, only create chaos.

In the end, within UNCITRAL a remarkable level of consensus could be reached on what now is known as the 'maritime plus' concept.

Article 5, dealing with the scope of application starts with:

Subject to article 6, this Convention applies to contracts of carriage in which ... (follows the connecting factors)

And article 1 (a) defines 'contract of carriage' as:

"Contract of carriage" means a contract in which a carrier, against payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

Furthermore, according to article 5, both the whole carriage of the goods as well as the sea carriage must be international. It means that the convention applies to, for example, a carriage from Malta through the port of Genoa to Milan and does not apply to a carriage from Sicily through the port of Genoa to Zurich, Switzerland.

In this connection I like to underline that the basis concept of the whole convention is not so much a modal approach or a documentary approach, but a contractual approach[3],[4].

Already from this contractual approach it follows more or less automatically that the new convention had to cover inland transport that is ancillary to carriage by sea, because the modern maritime transport contract in the liner trade is, to a substantial level, a multimodal transport contract.

Therefore, not only pragmatic reasons have led to the 'maritime plus'

[3] Anthony Diamond rightfully points out that the actual carriage by sea may play a role when it comes to the interpretation whether a transport contract is a contract as defined in article 1(1). Some contracts of carriage do not specify a mode of transport or leave the mode optional to the carrier. In such cases the mode of transport that is actually used may be (one of) the factor(s) to determine whether the contract of carriage falls under the definition of article 1(1). See A. Diamond 'The Next Sea Carriage Convention? [2008] 2 LMCLQ 140/141. I note that the definition of 'contract of carriage' does not includes the word 'states' or specifies', but uses the wider term 'provides',

[4] This approach in not exceptional, to the contrary: also other transport conventions like the Hamburg Rules, CMR, COTIF 1999, Budapest Convention and Montreal Convention apply to a certain type of contract. For the Hamburg Rules, CMR, COTIF and Budapest Convention this is already clear from their scope rules. The scope rules of the Montreal Convention seem to suggest otherwise, but looking at this convention as a whole, one cannot but conclude that it applies to contracts for international air transport.

application of the Rotterdam Rules, also the contractual concept left no other choice but to include ancillary inland transport.

2. *A 'limited network system'*

The first question that arises is whether, in view of the different nature of maritime transport compared with inland transport, special provisions should apply to inland parts of the carriage that deviate from those applicable to the maritime stage. The answer given by the Rotterdam Rules to this question is affirmative.

The main special provision is article 26 dealing with the carrier's liability during the inland parts of the maritime carriage. This article 26 reads:

Article 26. Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

At first sight, this article may look complicated. The summary is, however, that in case there is a relevant inland transport convention, the liability rules thereof may apply when loss or damage occurs during the inland part of the voyage.

Hereunder, I will provide a couple of explanatory notes on this article:

(a) only convention, no national law

There has been substantial discussion in UNCITRAL to broaden the scope of article 26 to national law as well. In particular, 'large surface' countries like China, India, Canada, Australia and Sweden, were in favour thereof. The counter argument was that inclusion of 'national law' would dilute uniformity. Eventually, the aim for uniformity prevailed. Even a compromise proposal permitting States to make a declaration that their own courts would be allowed to apply national law, was rejected.

The result is that article 26 only applies when another transport convention[5] would have applied under the hypothetical contract of carriage relating to the inland part of the multimodal transport. Since the existing transport conventions apply to international carriage, this inland part must, in practice, be international[6].

Consequently, the normal liability provisions of the Rotterdam Rules apply if the loss of or damage to goods or delay occurs during an ancillary inland transport to which, under a hypothetical contract, national law would have applied. This inland carriage may be either national or international.

(b) only liability provisions

The provisions which prevail must be directly related to liability. Therefore, the provisions on limitation of liability and time for suit are included, but all provisions that indirectly may have an impact on carrier's liability, such as provisions relating to jurisdiction, documentary requirements, instruction right, successive carriers and so on, are excluded. A fortiori, relating to non-liability matters, the Rotterdam Rules always prevail.

The general view was that if the network principle would be extended to other issues than carrier's liability for loss or damage to the goods (and delay), chaos under the contract of carriage could be created. Documentary securities needed for trade financing might be put in jeopardy. Two examples may be given.

The first is the requirements of the CMR relating to the consignment note. These may apply between the carrier and an inland subcarrier, but their application to a part of the carriage under the main contract of carriage would be inconsistent with the documentary provisions of the Rotterdam Rules that, by their nature, must cover the whole carriage.

A second example is the provisions of the CMR relating to the right to give the carrier instructions. These again can only be applied to the relation between carrier and subcarrier (in which relation the carrier is the 'sender'). For the main contract of carriage the provisions on the right of control of the Rotterdam Rules must apply.

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[5] To be more precise: the draft refers to an "international instrument". This term includes an EU Regulation or Directive, which may not qualify as a convention but certainly is an international instrument.

[6] To my knowledge, there may be one exception. Article 31 of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway allows State-Parties to declare that it will apply the convention to its own national carriage as well. Therefore, it is arguable that under the Rotterdam Rules, in cases that the damage occurs during a national inland navigation carriage in a State that made such declaration, the liability rules of the Budapest Convention must be applied.

(c) mandatory

Further, the provisions which prevail must have a mandatory character. Whether such mandatory character is one-sided or two-sided does not matter.

(d) 'occurs'

In order for the inland transport convention possibly to apply, the loss of or damage to goods or delay must have occurred during the period that the goods are ashore. The choice was, in principle, between 'detected', 'caused', or 'occurred'.

'Detected' has the advantage that the time and location of detection of a loss or damage can clearly be established. The disadvantage is, however, that the liability of the carrier in many cases will allocated to the final (inland) part of the carriage, because damage to goods often is detected at or after completion of the carriage of the goods.

'Caused' has the disadvantage that the liability of the carrier often will be allocated to the first (inland) leg of the voyage, because in the container trade the most common cause of damage is bad stowage of the goods in the container by the shipper and this cause occurs before the voyage begins. An even greater disadvantage of 'caused' is that first the matter of causation has to be resolved before it can be determined whether an inland convention is applicable to the carrier's liability.

Eventually, the choice was made for 'occurred' because, it was viewed, the occurrence in most cases is reasonably easy to establish and is expected to produce the fairest results.

(e) 'solely'

The loss of or damage to goods or delay must have occurred solely before or after the maritime part of the voyage. This means that, instead of article 26, the general liability rules of the convention (i.e. those that apply to the maritime part of the transport) continue to apply when:

(i) the loss of or damage or delay to the goods occurs during the carriage by sea and another mode of transport, such as gradually occurring damage, or

(ii) it cannot be determined where the damage has occurred ('concealed damage').

(f) hypothetical contract

In initial drafts of the convention, article 26 was formulated as a conflict of convention provision. The words in the chapeau "do not prevail over" are reminiscent of this. In earlier texts wording was used to the effect that an other (inland) convention would apply if according to its own terms it had to apply to the inland part of the multimodal maritime carriage. The objection against

this earlier wording was that it would introduce in the Rotterdam Rules specific differences in interpretation of the scope rules of other conventions[7].

In the final draft, however, the legal technique of the 'hypothetical contract' is used. The great advantage of the final wording is that the application of article 26 does not depend on any specific interpretation of the scope rules of other conventions, but that it applies when its own conditions are met.

An example may illustrate this: Let us assume a carriage from Houston to Berlin through the port of Rotterdam. The carriage from Houston to Rotterdam is performed by sea and the oncarriage to Berlin by road haulage. The damage occurs between Rotterdam and Berlin. Now, according to the hypothetical contract formula "if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to the goods, ... occurred" the liability rules of the CMR convention apply to this damage, because (i) Germany or The Netherlands are party to the CMR (in fact both) and (ii) the damage occurred during the period of the hypothetical CMR contract.

(g) incorporation by reference of provisions of other conventions

In order to illustrate this aspect of article 26 the above example may somewhat extended: the carrier's bill of lading refers to Houston jurisdiction and Texas law to apply. The US is a party to the Rotterdam Rules but not a party to the CMR Convention. Must in this extended example a Houston court apply the CMR?

In my opinion, the answer is yes: it is the intention of article 26 that the courts of a State Party to the Rotterdam Rules should do so, even if such State is not a Party to the CMR. And for such courts it is for the application of the CMR equally irrelevant whether The Netherlands and/or Germany are a Party to the Rotterdam Rules (but one of them must be a Party to the CMR, which is a requirement of the CMR itself to apply to the hypothetical contract).

In earlier drafts a further paragraph was added to article 26 to the effect that this article would apply "regardless of the national law otherwise applicable to contract of carriage"[8]. This paragraph was meant as a conflict of

[7] In particular, such difference exists in respect of the CMR. In England, CMR is held applicable to an international road leg under an international air carriage, refer *Quantum Corporation Inc. and others* v. *Plane Trucking Ltd. and another* [2002] EWCA Civ 350; [2002] 2 Lloyd's Rep 24 (CA). In Germany, CMR does not apply to a road haulage part of a multimodal carriage, refer the German Supreme Court in BGH 17 July 2008, I ZR 181/05. A similar view is held in the Netherlands by the Court of Appeal of 's-Hertogenbosch, 2 November 2004, S&S 2006, 117. In these two jurisdictions the CMR only applies to the road haulage subcontract that is made between the multimodal carrier and the road (sub) carrier.

[8] Refer A/CN.9/WG.III/WP.56 and earlier drafts.

law provision that was intended to safeguard the applicability of the inland convention. Eventually, it was decided to delete this paragraph because it was regarded as superfluous, in particular after the choice made by the drafters for the hypothetical contract formula[9]. It is this formula combined with the general scope provisions of the CMR that determines that the CMR liability provisions apply to the damage in question. Or, in other words, the effect of article 26 is that the liability provisions of other inland transport conventions are incorporated by reference in the Rotterdam Rules and, this way, have become an integral part of the Rotterdam Rules provided the conditions of their application set out in article 26 are met[10].

Also the words in the chapeau "do not prevail over" may in the example not be interpreted as if a court of a non-CMR state has a sort of option to apply CMR. It was discussed in UNCITRAL whether these words (which were a left over of an earlier draft) were to be replaced upon the introduction of the hypothetical contract formula, but the general view was that there was no need for doing so. The draft of article 26, as a whole, was regarded as sufficiently clear.

(h) at the time of

The other convention must have been applicable to the hypothetical contract at the time of the loss, damage or event or circumstance causing delay in delivery. In other words, not only the liability provisions of existing conventions are incorporated by reference in the Rotterdam Rules, but also those of possible future conventions. The date of occurrence of the loss or damage under the RR is the relevant moment for the determination whether the liability rules of the other convention apply.

(i) effectiveness of article 26

Criticism was raised that article 26 would be ineffective because the carrier (who has according to the system of article 17 the onus of proof of the cause of the damage) would not be interested to prove that the damage was caused during the inland part of the carriage.

I do not share this view. First, because in inland transport the vast majority of damages are caused by obvious occurrences: road accidents, theft of cargo, etc. Therefore, in many cases the cause of damages in inland transport is clear from the facts and the onus of proof is no issue at all.

[9] Another argument in favour of deletion was that the RR should, generally, not deal with applicable law matters.

[10] For transport conventions incorporation by reference of provisions of another convention is not unique: the second sentence of article 2 CMR does the same.

Second, this criticism is based on the assumption that the inland liability regime is more favourable to the cargo claimant than that of the RR. In many cases, this assumption is wrong. The practical results of the liability regime of the RR and that of the inland conventions do not so much substantially differ anymore. In addition, and this may in practice even be more important, the limitation levels for the relevant damages may be (much) higher under the RR.

The Rotterdam Rules include a package limitation (875 SDR per package) and a weight limitation (3 SDR per kg), while the inland conventions only include a weight limitation (CMR: 8 SDR per kg). Because multimodal transport is primarily relevant to the carriage of containerized packed goods, in most cases the package limitation of the RR will result in a (much) higher limitation level than the weight limitation of the inland convention will do. A comparison between the RR and the CMR will show that with regard to packages below abt. 109 kg the RR will produce a better limitation result for the cargo claimant and for packages over abt. 109 kg the outcome will be more favourable for the carrier. And for any insider in the container transport it is common knowledge that packages in a container that weight over 109 kg are rather exceptional. In other words, this difference in limitation levels will have the result that in many cases a carrier may have an interest to prove that the damage occurred during the inland transport.

(i) Conclusion

It may be concluded that article 26 provides for a network system, but because of the restrictions outlined in (a) to (e) above, the article is correctly labelled as a 'limited network system'.

The article is intended to incorporate the liability provisions of certain inland conventions in the Rotterdam Rules by reference. These must be applied when the conditions referred to in the chapeau of article 26 are met.

In addition, the practical effectiveness of article 26 is beyond reasonable doubt.

3. *The position of the inland carrier*

The previous paragraph dealt with the liability of the carrier under the main contract. A further question that may arise is how the Rotterdam Rules affect the position of the inland (sub)carrier.

In the articles 18 and 19 of the Rotterdam Rules the position of, amongst others, subcarriers is dealt with. The main rule is that the contracting carrier is responsible for the performance of all subcarriers that are involved in the carriage. A cargo claimant, however, is also entitled to sue a subcarrier directly, whereupon such subcarrier may defend itself with all the rights and remedies that the new convention provides to the contracting carrier. This

direct action is, however, only allowed against 'maritime performing parties'. This category of persons is defined in article 1(7) and does not include inland (sub)carriers, unless they operate exclusively within a port area[11].

It follows that the Rotterdam Rules do not directly affect inland carriers. They are in article 4 even not listed under the persons that enjoy a himalaya protection under the new convention.

There was considerable support amongst the delegates to leave the position of inland carriers untouched. This support was twofold. It came from delegates that did not want 'maritime law coming ashore', because the inland transport liability regime in their countries is more favourable for the claimant. And it came from delegates from countries where the opposite is the case: inland carriers under their national law being subject to a liability regime that is more favourable for them than the regime of the Rotterdam Rules. An inland carrier, it was argued, might be unaware that his operations are part of an overall multimodal contract and, in case of a direct action against him under the RR, he might be faced with much higher limits than he is insured for.

The result is that a party to the contract of carriage can only institute an action against an inland carrier based on tort[12]. It means that such claimant not only has to prove the damage and that it occurred during the transport period, but also must prove the cause of the damage and the causation. Then, the inland carrier may have a himalaya protection under an applicable inland convention or under national law.

Another possibility might be that in such case the inland carrier is able to invoke a himalaya clause in the multimodal contract (under which the inland carrier is a (sub)carrier), referring to defences available for him under the Rotterdam Rules.

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[11] This exclusivity of the operation in the port area is related to the inland carrier's performance under the relevant contract of carriage. Examples of such inland carriers are the fork lift truck operator shifting a container within a terminal, a road haulage carrier transferring a transhipment container from one terminal to another in the same port, or a rail operator shunting railcars with goods within the port area in order to compose a full train. However, if thereafter the same rail operator in his capacity as subcontractor under the same contract of multimodal carriage pulls this train to a destination outside the port area, it is not a maritime performing party, also not for the shunting part of his performance.

[12] Unless, of course, national law would allow the claimant to sue the inland carrier under the subcontract. If the claimant is not only the consignee under the main contract of carriage, but it is mentioned as consignee under the subcontract as well, it may be that under certain national laws this claimant may be deemed (by claiming the goods from the subcarrier or otherwise) to have acceded to the subcontract (or otherwise has become a party to the subcontract) and, accordingly, may have acquired contractual rights against the subcarrier.

The conclusion from this paragraph is that, unless the exceptional case applies that it exclusively operates within a port area, the inland carrier will not be affected by the Rotterdam Rules. Normally, (i) under a recourse action by the main carrier, (ii) in the event of a case referred to in footnote 12, or (iii) through invoking a possible himalaya protection in case of a tort claim, the inland carrier will only be faced with national law or a convention relating to its own business: inland transport.

4. *Conflicts with other conventions*

The third pillar under the 'multimodal compromise' in the Rotterdam Rules is the conflict of conventions issue, which is, with regard to multimodal transport, a notoriously difficult subject. The RR deal with it as follows:

First, article 26 has a conflict avoiding effect. It incorporates the liability provisions of the inland transport conventions by reference, meaning that when the conditions for the application of article 26 are met, the liability provisions of the other conventions apply instead of the corresponding provisions of the Rotterdam Rules.

Second, the Rotterdam Rules include a specific article dealing with the conflicts of convention issue: article 82. The chapeau of this article states that priority shall be given to four categories of conventions – and even future amendments thereof, but no future new conventions – that regulate the liability of the carrier for loss or damage to the goods. These categories are subsequently listed in this article, but in respect of three of them the priority rule is restricted to a specified assumed area of overlap between the Rotterdam Rules and the other convention. Since the assumed area of overlap is specified, outside this assumed area of overlap the Rotterdam Rules prevail over the other possibly conflicting convention. And if, in a given case, the assumption is wrong, there is no overlap and therefore no conflict[13].

I like to underline that the specification in article 82 of areas of overlap does not mean that the application of the conflict rule is restricted to a certain part of the carriage. The aim of the conflict rule is to determine which convention applies to the contract of carriage, as defined in article 1 (1): either the RR or the other type of convention that the article 82 subparagraph in question refers to.

The listed categories of conventions are the following:

– under (a) reference is made to "any convention governing the carriage of goods by air". No specific area of possible overlap is mentioned here. There is only the general statement "to the extent that such convention

[13] See nt 15.

according to its provisions applies to any part of the contract of carriage"[14]. For the multimodal practice a conflict provision between air- and sea transport conventions was not regarded as very important because sea-air combinations under a single contract of carriage are rare.

– (b) refers to "any convention governing the carriage of goods by road" and the assumed area of overlap with the RR is "the carriage of goods that remain loaded on a road cargo vehicle carried on board of a ship". This description does not refer to a certain part or period of the carriage, but it refers to a certain type of carriage, namely roll-on roll-off carriage, such as the carriage to which art 2 CMR applies.

An example may illustrate how this provision is intended to operate. Let us assume a contract of carriage of goods by road in a vehicle between Berlin, Germany and Manchester, UK. In order to arrive in the UK, the road carrier makes use of a ferry connection between Rotterdam, The Netherlands, and Hull, UK. The CMR Convention, including its article 2, applies to this contract of carriage. Since the goods are also carried by sea, the Rotterdam Rules may apply to this contract of carriage as well. According to the priority rule, in this example the Rotterdam Rules yield to the CMR, because it concerns here "the carriage of goods that remain loaded on a road cargo vehicle carried on board of a ship"[15]. Had the cargo been offloaded from the road haulage vehicle and stowed separately in the seagoing vessel, the Rotterdam Rules would have applied to this contract of carriage, because then the contract of carriage would have satisfied the requirements of article 1 (1) of the RR. In both cases the respective conventions apply to the whole transport under the contract of carriage and the 'period aspect' is covered by

[14] For a list of possible conflict situations between the Montreal Convention and the Rotterdam Rules see Christopher Hancock 'Multimodal Transport and the new UN Convention on the carriage of goods', [2008] 14 JIML p 494. Also the fact that under the Rotterdam Rules the place of occurrence determines the applicability of the other convention while under the air transport convention the place where the damage is caused is relevant for its applicability, may result in a conflict between the air transport conventions and the RR.

[15] Another matter is whether there is an overlap here. In other words, do the Rotterdam Rules also apply to the ferry part of the road haulage? If so, the contract of carriage concluded under the CMR must also qualify as a maritime contract under art 1 (1) of the RR and be a contract that "provides for the carriage by sea and may provide for carriage by other modes of transport in addition to sea carriage". In my view, it is arguable that, unless the operator of road cargo vehicle with whom the contract of carriage is concluded and the ferry operator are the same legal entity, such CMR contract would not qualify as a article 1 (1) RR contract. However, it was thought useful that any doubt about a possible overlap between article 2 CMR and the scope rules of the RR should be taken away and article 82, subparagraph (b), aims to provide this clarity.

the respective conventions themselves[16]. When the CMR applies and the damage occurs during the ferry part of the carriage, art 2 CMR deals with this situation. When the RR apply and the damage occurs during the road haulage part, art 26 RR may be relevant for such damage.

– (c) refers to "any convention governing the carriage of goods by rail" and the possible area of overlap with the RR is "carriage of goods by sea as a supplement to the carriage by rail". This provision takes into account that article 1(4) of the COTIF/CIM Rules 1999 extends the application of these rules to the sea part of an international railway service listed in accordance with article 24(1) of the COTIF Convention 1999. Actually, this list includes several railway services with a sea part.

– (d) refers to "any convention governing the carriage of goods by inland waterways" and the possible area of overlap with the RR is "carriage of goods without trans-shipment both by inland waterways and sea". It is a matter of fact that (small) seagoing vessels may carry goods to or from ports located at far inland places. For these cases the Budapest Convention 2001 (CMNI) provides in article 2(2) whether it applies or not. If the contract of carriage also qualifies as a contract under article 1(1) of the RR, this CMNI rule of application may conflict with the scope rules of the RR

The general opinion of the delegates to UNCITRAL was that through the provisions outlined above, the matter of a possible conflict between the Rotterdam Rules and other transport conventions was adequately solved. This view implies that, in respect of the CMR convention, the view of the English appeal judge in the *Quantum* case[17] was rejected and, instead, the line of thinking of the German Supreme Court and the Netherlands' Court of Appeal in 's-Hertogenbosch was followed, meaning that the unimodal conventions do not *ex proprio vigore* apply to the different parts of a multimodal contract of carriage.

5. *'Maritime plus' innovative?*

In my opinion, this question may be answered rather negatively.

First, the phenomenon 'unimodal plus' is well known in other conventions. Since long, the air transport conventions apply to 'pick-up and delivery services', in respect of which no geographical limits are set by these conventions[18]. Further, the COTIF/CIM Rules 1999 apply to national road and inland waterways transport that is supplementary to an international rail

[16] A. Diamond (nt 3) questions this point pp 142/143 and C. Hancock (nt 14) does the same p 493.

[17] Refer nt 7.

[18] Article 18 (4) Montreal Convention.

carriage[19]. The same applies to 'listed' supplementary sea- and international inland waterways transport[20]. In my view, as a matter of principle, there is not so much difference between these precedents[21] and the 'maritime plus' concept of the Rotterdam Rules.

Second, as to the carrier's liability issue the Rotterdam Rules do not create much changes in practice. As outlined above, for the inland (sub) carrier nothing changes at all, while a large majority of maritime container carriers already operates under multimodal contracts of carriage that, since decades, include a network liability regime without reported difficulties. The main practical change will be that the RR network system is not extended to national law, while the bill of lading network systems often are.

6. *Conclusions*

- The Rotterdam Rules apply also to inland carriage if it is performed prior to or after the maritime part of the carriage and if it is covered under the same contract as the maritime leg.
- Article 26 incorporates the liability rules of the inland conventions. These rules replace the liability provisions of the Rotterdam Rules when the conditions set in article 26 for their application are met.
- A direct action against the inland carrier is not possible under the Rotterdam Rules.
- To the extent that the scope of other transport conventions may include carriage by sea, such other convention prevails over the Rotterdam Rules.
- The 'maritime plus' concept certainly is not revolutionary, at best it is evolutionary.

[19] Article 1 (3) COTIF/CIM.

[20] Article 1 (4) COTIF/CIM.

[21] I do not refer to article 2 CMR because I do not consider 'piggy back' carriage as genuine multimodal carriage. In such case the vehicle does not make use of its 'proper' infrastructure, the road, but by necessity and for a certain part only, of another type infrastructure such as rail or water. In my view, the yardstick for the application of CMR is not the use of a certain type of infrastructure; yardstick is whether a certain type of contract has been concluded. However, for those that do not share my view, article 2 may be a further precedent.

THE ROTTERDAM RULES
AN ATTEMPT TO CLARIFY CERTAIN CONCERNS THAT HAVE EMERGED

The Authors of this paper have become aware of certain concerns that have been expressed by some Organizations in respect of the Rotterdam Rules and their fitness to respond in a satisfactory and balanced manner to the requirement of modern trade and wish to reassure those Organisations that their concerns are not justified, as they hope to be able to clarify in this paper. The views they have expressed herein by the Authors, who are all former delegates of Governments that have attended the sessions of the UNCITRAL Working Group on Transport Law, are personal views and do not bind in any manner the Governments they had the honour to represent during the sessions of the Working Group.

The reports and papers that will be considered are the following:

1. Report of the fifty-first session of the Working Party on Intermodal Transport and Logistics of the U.N. Economic and Social Council[1];
2. A document of the European Shipper's Council with an analysis of the Rotterdam Rules[2];
3. A paper of the Working Group on Sea Transport of FIATA being Annex two to FIATA's document MTJ/507 of 26 March 2009;
4. The Position Paper of the European Association for Forwarding Transport Logistic and Customs Services-CLECAT.

1. *The Report of the Working Party on Intermodal Transport and Logistics of the U.N. Economic and Social Council*

1.1. *The Regional v. Worldwide Unification of Transport Law*

The Working Party, after having mentioned (in paragraphs 39-41) the Rotterdam Rules and having expressed generally their dissatisfaction about them, invites UNECE member States and professional organizations to examine how, under present circumstances, "an appropriate civil liability system, covering also short sea shipping, could be devised addressing the concerns of European intermodal transport operators and their clients".

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[1] ECE/TRANS/WP.24/123 of 6 May 2009. Hereafter "UNECE Report".
[2] View of the European Shippers' Council on the Convention on Contracts for the International Carrying of Goods Wholly or Partly be Sea also known as the "Rotterdam Rules", March 2009. Hereafter "ESC Paper".

Even without considering the great difficulties of identifying a satisfactory definition of "short sea shipping" for the purpose of the regulation of the rights, obligations and liabilities under the contract of carriage by sea, this is an opinion that is in conflict with the inherent international character of shipping and it would certainly not foster European international trade if a regime different from that in force in the rest of the world were to be adopted.

1.2. *Basis of liability of the carrier*

In paragraph 41 of the UNECE Report it is stated that the Rotterdam Rules do not "seem to be a step towards a simple, transparent, uniform and strict liability system of modern transport chains providing a level playing field among unimodal and intermodal transport operations". It has been possible to implement a strict liability system, accompanied by a compulsory insurance system in respect of pollution and a similar system in carriage of passengers by air as well as, to a limited extent, something near to that in respect of the carriage of passengers by sea when the 2002 Protocol to the Athens Convention will come into force. But that does not seem to be either possible or convenient in respect of carriage of goods. Some of the reasons are the ensuing greater cost of transportation and the dissatisfaction of shippers, who by far prefer to insure the goods themselves than rely on the carriers' liability insurance.

2. ***The document of the European Shipper's Council with an analysis of the Rotterdam Rules***

2.1. *The support of a regional regime*

A view similar to that of the Working Group of UNECE is probably expressed by ESC that after having set out the reasons of its concerns about the Rotterdam Rules, proposes "the parallel development of a European multimodal convention which justifies a departure from the status quo of the Hague Rules and the Hague-Visby Rules for the majority of shippers who represent the preponderant trade interest of the majority of European States". It is not clear what such proposal consists of. "Parallel" to what? To the existing regimes or to the Rotterdam Rules? Has ESC in mind a separate intra European regime different from the world wide regime?

If what the ESC has in mind is an EU Regulation such as that proposed in the ISIC Study, that would mean that ESC suggests a system that grants full freedom of contract,

including volume contracts and, therefore, a system that would allow by far more freedom than the Rotterdam Rules, without the protection granted to shippers and third parties by article 80 of the Rotterdam Rules.

The purely inter-European sea transport business is only a part of the overall maritime business that European shippers and carriers are involved in and does not have any relevant particularities that would justify any deviation from Rules and Conventions that operate world-wide. There is no explainable interest in such differentiation other than possibly weakening the scope of the Rotterdam Rules, but at the same time complicating the world map of regulations relating to an extent that certainly will not be in the interest of shippers, traders, carriers nor the insurers involved in the risks that such trade carries.

2.2. *The reasons indicated by the ESC for the recommendation to European member States "not to sign" the Rotterdam Rules*

The ESC has identified a number of key concerns, that will be considered hereafter with a view to establishing whether they have a real basis. The Authors of this paper have in fact noted that although the paper of the ESC contains a strong, albeit rather belated, attack against the Rotterdam Rules, from the subsequent Press Release of 24 April, it would appear that the ESC "maintains an open mind to the arguments and perspectives of others and is always happy to reconsider its own opinion on the light of strong and persuasive counter arguments".

In that context it is interesting that the opinion of the ESC is not generally shared by European shippers and that in all discussions undertaken in the decades that led to the conclusion of the Rotterdam Rules there was a general support of those rules, a support that is still very much existent today as evidenced by strong statements of support in course of local or regional consultation in light of the upcoming signature of the Rotterdam Rules.

First, a clarification seems to be needed. The fact that, in its conclusions under (h), the ESC refers to "the 20 signatories needed to make it (the Rotterdam Rules) pass as an international convention" and that in its Press Release of 24 April it is stated that the Rotterdam Rules "are likely to enter into force within months" suggests the that there may be a confusion between signature of an international convention and its entry into force. Signature of a convention, unless followed by ratification, acceptance or approval

by the signatory States, is not binding on the States (article 88(2) of the Rotterdam Rules). The Rotterdam Rules enter into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of *ratification, acceptance, approval or accession*[3] (article 94(1)) (emphasis added). Twenty signatories alone do not satisfy the requirement for the Rules' entry into force.

2.2.1. *Conflict with other conventions*

With a view to avoiding conflicts with other conventions applicable to the carriage of goods (in Europe, the CMR and COTIF-CIM), a provision has been adopted in article 26 of the Rotterdam Rules pursuant to which, in respect of loss or damage or delay occurring solely before loading onto the ship or after discharging from a ship, the provisions of the Rotterdam Rules do not prevail over those of another international convention that would have compulsorily applied if a separate direct contract had been made between the shipper and the carrier in respect to a particular stage of carriage.

The following criticisms have been made of this provision: a) that the claimant in order to obtain the application of a different convention has the burden of proving that the event has occurred before or after carriage by sea, b) that the system adopted is a limited network system, because only provisions of other conventions relating to the liability of the carrier, the limit of such liability and the time to sue would prevail, c) that "the more favourable terms and conditions of CMR and CIM, as examples, would not extend to short sea shipping" and, d) that "Shippers concerned with intra-European shipments may choose against the use of short-sea services because of the increased obligations and liabilities of the Rotterdam Rules compared to other conventions".

As regards the criticism under a), the identification of the time when the occurrence causing the loss, damage or delay has taken place is obviously necessary in order to identify the regime applicable. Therefore one of the parties – carrier or claimant – must have the burden of proof. Since the Rotterdam Rules require the internationality of the sea leg, it is usually longer than the land leg (because of the emphasis on the sea leg under Rotterdam Rules, they are frequently referred to as a "maritime plus" convention) and it is reasonable that the burden of proof rests on the claimant. The same burden of proof has been adopted in the UNCTAD/ICC Rules as well as in the standard forms of

[3] "Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. The Rotterdam Rules are open for accession for all States that are not signatory States as from the date they are open for signature (Article 88(3)).

door-to-door bills of lading. As the proof of the place of damage is intended to bring a benefit to the claimant, it is only in line with general principles of the burden of proof that such proof shall be carried by the party that benefits from the success of such proof. This is in line with all existing network systems consistently used in trade and created in cooperation with UNCTAD and ICC (UNCTAD/ICC Rules) and promulgated by FIATA (FIATA Bill of Lading). The burden goes along with the benefit of shippers (and actually their request of the logistics industry) that they can now rely on one single contract of carriage and one single document and will, therefore, not have to segment their transport and at the same time have to prove the condition of their cargo for each of the segments of a door-to-door transport. It is difficult to see what has generated this criticism, when it is established, that the same principle has existed for many decades without any problem or complaint from shippers.

As regards the criticism under b), attention must be drawn to the fact that certain provisions should not differ according to the stage of a global contract of carriage. This is the case, amongst others: i) for the provisions relating to the transport documents to be issued by the carrier on demand of the shipper, because the shipper requires a document that enables the holder to collect the goods at their final destination; ii) for the provisions on the rights and obligations of the parties in respect of delivery of the goods at their final destination and, iii) for the provisions on the right of control during transport. The regulation contained in the Rotterdam Rules with respect to the above mentioned matters is, in fact, far more comprehensive and clear than the one contained in the existing unimodal international conventions.

As regards that under c), it must be pointed out that it is not correct, since article 82 of the Rotterdam Rules provides expressly that, where CMR and CIM apply to maritime carriage, these Conventions prevail.

Nor is the assertion under d) correct because the shippers' obligations under the other conventions do not substantially differ from those under the Rotterdam Rules (see 2.2.6 below).

2.2.2. *Unequal obligations and liabilities between shippers and carriers*

The scope of the contract of carriage cannot be set out mandatorily in a convention. If the parties wish to conclude a port-to-port contract they must be able to do so. Even though door-to-door contracts have become much more frequent, there are still a great

many port-to-port contracts . The provision in article 13(2), pursuant to which the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper or consignee, is merely an enactment of the FIO clause which is a clause frequently adopted, in particular in the non liner trade (to which the Rotterdam Rules may apply pursuant to article 6(2)). The enactment of such a provision does not bring about unequal obligations and liabilities. This should be understood by shippers that engage in commodity trades as they often agree in their own sales contracts that the shipment obligations under the F- or respectively the C- Clauses INCOTERMS shall be on FIOS basis and that it will be the shipper that has to load and stow, and the buyer to unload the cargo from the vessel. To request the carrier to be mandatorily responsible for a phase of the cargo handling for which the shipper had expressly (and due to reasons that it has set itself) agreed to be responsible, is not appropriate.

2.2.3. *Dangerous risk that carriers may reduce significantly their own limits of liability and obligations under volume contracts*

It is normal practice today for shippers that have a consistent volume of goods to be carried to various destinations to negotiate ad hoc contracts with carriers with a view to obtaining special freight rates and guaranteed availability of space on board ships at a specific time. A quid pro quo is often required for a reduction of the freight rates and, therefore, in order not to adversely affect international trade, it has appeared appropriate in such cases to grant the parties a limited freedom of contract. This could theoretically have been done by requiring a minimum volume of goods for the operation of the freedom of contract or by ensuring protection for shippers, who may have a relatively reduced negotiating power, and to consignees. The first alternative has proven impossible, because the minimum volume may vary according to the nature of the goods, the type of packing and the trade. However, as it appears from the definition in article 1(2), in order that a contract of carriage might be qualified a volume contract it is required that the subject matter of the carriage be a specified quantity of goods to be carried in a series of shipments: if, therefore a shipper is not interested in entering into such contract, the shipper is free to enter into separate contracts of carriage in respect of each shipment. If the shipper chooses to enter into a volume contract, that means that it has an interest in doing so.

The ESC fears that the acceptance of increased liability and reduced carrier's reliability would represent a serious risk to shippers that were not completely aware of the implications.

However protection of the shipper and of the consignee has been ensured first by providing generally that a derogation is not allowed in respect of provisions the breach of which may affect safety (viz. those relating to the obligations of the carrier in respect of the seaworthiness of the ship, and to the obligations of the shipper in respect of the provision of information and documents for the proper handling of the goods and of the compliance with laws and regulations as well as in respect of dangerous goods), and secondly, by ensuring that the contract of carriage is freely negotiated. This result has been obtained first by excluding the validity of derogations for contracts of adhesion not subject to negotiation, and secondly, by making the derogation subject to a series of conditions, including evidence that the shipper has been given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with the Convention (article 80(2)(c)) and, if the shipper finds it convenient to enter into a volume contract, the carrier is required to include in the contract (that, as noted above, must be freely negotiated), a prominent statement that it derogates from the Convention.

As regards persons other than the shipper, i.e. the holder of a negotiable transport document and the consignee, the protection is much greater, for not only it is required that such person receives information that the volume contract derogates from the Convention but, also that such person gives its express consent to be bound by such derogations. Such consent, pursuant to article 3, must be in writing.

It is thought, therefore, that the provisions of article 80(2) are such as to ensure that any shipper is made aware of the effect of any derogation from the provisions of the Rotterdam Rules and that any court of any State party to the Rotterdam Rules will therefore be able to establish whether or not the derogations are valid and binding. Furthermore, although in the ESC's paper reference is always made to the shipper, in reality the person normally concerned would be the consignee, for the risk on the goods is normally transferred to the buyer on delivery of the goods to the carrier. And, as previously pointed out, any derogation from the provisions of the Rotterdam Rules is not binding on the consignee unless expressly accepted in writing by him.

It remains to be said that the fears expressed by the ESC do not represent the current market situation: Today it is the shippers that request from their transportation partners (freight forwarders and carriers) entry into complex frame agreements that could very often be qualified as volume contracts, forcing the carrier to agree on strict terms relating to its responsibilities that very often go much further than the transportation

laws that would otherwise apply. Often it is today the shippers that design a different scheme for the sharing of cargo risks, liabilities and responsibilities, leaving the risk for cargo loss to their own cargo insurance scheme, but rather sanctioning occurrences leading to cargo losses through other financial means. And, quite often, there are not just major shippers involved but more and more smaller companies that arrange similar arrangements with their logistical partners.

2.2.4. *Proving fault becomes harder for the shipper*

The Rotterdam Rules have brought no significant changes to the existing scheme for the burden of proof existing under the Hague Rules and the Hague Visby Rules that today constitute the prevailing legal regime. The novelty in Article 17 is that – contrary to the older Instruments – the Convention now spells out each of the aspects allowing the practitioners to follow the scheme without having to refer to case law or other authorities.

The statement that if the carrier avails himself of the alternative of invoking an excepted peril the shipper must prove that the loss was or was probably caused or contributed to by the unseaworthiness of the ship is probably due to a hastened reading of article 17. The careful reading of that article shows that the claimant has not the burden of proving the fault of the carrier, but quite to the contrary, it is the carrier who has the burden of proving the absence of fault. The allocation of the burden of proof is the following:

a) pursuant to paragraph 1, the claimant must prove the loss, damage or delay and its occurrence during the period of the carrier's responsibility, and such proof entails a presumption of liability of the carrier: this provision, therefore, codifies a general principle on the allocation of the burden of proof in contractual obligations; although such principle does not appear clearly in the text, it is the almost universal interpretation of the Hague Rules and the Hague-Visby Rules. The same principle was adopted under the Hamburg Rules (article 5(1));

b) pursuant to paragraphs 2 and 3, the carrier, in order to defeat the presumption of fault, has two alternatives:

(i) to prove the absence of fault, or

(ii) to prove that the loss, damage or delay was caused or contributed to by one of the events enumerated in paragraph 3 (the excepted perils of the Hague Rules and the Hague-Visby Rules, as amended).

c) While the proof of absence of fault relieves the carrier from liability, the proof under (ii) above only creates a presumption of absence of fault (similarly as under article 18(2) of CMR) that the claimant may defeat by proving:

(i) that the fault of the carrier caused or contributed to the excepted peril relied on by the carrier,

(ii) that an event other than an excepted peril, caused or contributed to the loss, damage or delay, or

(iii) that the loss, damage or delay was caused or probably caused by unseaworthiness of the ship or improper crewing, equipping and supplying the ship.

Therefore the claimant may rebut the presumption of absence of fault of the carrier in anyone of the above manners and this is again a codification of what the best jurisprudence has established under the Hague Rules and the Hague-Visby Rules. The seaworthiness and cargo worthiness of the ship come into play as they do under article 4(1) of the Hague Rules and the Hague-Visby Rules, but the allocation of the burden of proof is more clearly allocated. If the claimant chooses to rebut the presumption by invoking unseaworthiness (in a wide sense) its burden of proof is mitigated because the claimant must only prove that on the balance of probabilities that was the cause of the loss, damage or delay: this is what is meant by the words "*probably caused*". The claimant has not the burden of proving the fault of the carrier, but rather a fact: the unseaworthiness. It is the carrier that, in order to avoid its liability, must prove the exercise of due diligence (see paragraph 4.1(a)).

The conclusion is that the claimant has never the burden of proving the fault of the carrier and, it is submitted, that article 17 regulates in a complete and clear manner the system of allocation of the burden of proof that exists at present; it clarifies some aspects that are unclear under the Hague Rules and the Hague-Visby Rules system, one of which is that the excepted perils, except those enumerated under article 4(2)(a) and (b), are not exonerations from liability but only cases of reversal of the burden of proof.

The two real cases of exoneration under the Hague Rules and the Hague-Visby Rules (fault in navigation and management of the ship and fire) have been suppressed (a fact that is just mentioned in passing by the ESC as if it were of almost no importance): the first one has in fact been deleted and the second one has become a simple case of

reversal of the burden of proof, so that the carrier would be responsible for a fire caused by the negligence of the crew.

2.2.5. *The Rotterdam Rules would make it increasingly difficult for shippers to successfully make a claim for damages*

There are various misunderstandings in the views expressed in this paragraph.

a) The fact that the limit per package can only be invoked if the packages are enumerated in the transport document is no novelty: an identical provision in fact exists in article 4(5)(c) of the Hague-Visby Rules and in article 6(2)(a) of the Hamburg Rules and it is hardly believable that a shipper, who is a professional, ignores that. At present, mention of the content of a container is always made, also for Customs requirements.

b) If it is uncommon to specify a delivery time, that means that up to now shippers have not perceived any special interest in the fact that delivery takes place by a certain date: the shipper's interest is normally that the transport document is issued by a certain date, in order to be able to negotiate the document in time when a letter of credit has been issued by the buyer. It must also be noted that the solution adopted in the Hamburg Rules, according to which delay in delivery occurs, when the time is not set out in the transport document, when delivery does not take place within the time which would be reasonable to require of a diligent carrier, would give room to litigation.

c) The fact that only the personal behaviour of the carrier causes the loss of the right to limit is no novelty, for this is also the case for the Hague-Visby Rules, wherein reference is made to the act or omission of the carrier and reference to the carrier does not include the master or the carrier's servants, as it appears clearly from article 4(2)(a). The same applies to the Hamburg Rules article 8(1). The need for the action to be a personal action of the person liable is now a common feature of all maritime conventions.

d) The "presumption" of delivery of the goods in accordance with their description in the transport document if no timely notice of loss, damage or delay is given, is a common feature of all transport conventions and, as stated in article 23(2) does not affect the allocation of the burden of proof under article 17, pursuant to which, in accordance to general principles, the consignee has the burden of proving that the goods were, at the time of delivery, missing or damaged.

e) The whole chapter on jurisdiction applies only if opted in. This solution was adopted in agreement with the representatives of the European Commission also, it is thought, in consideration of article 23 of Council Regulation (EC) No. 44/2001. The provision of article 67(2) covering arbitration clauses in volume contracts, that of course applies only if the chapter on arbitration is opted into, clarifies the conditions required for the jurisdiction clause to be operative vis-à-vis a person who is not a party to the volume contract (i.e. the consignee), and requires that (i) the court chosen be in one of the places designated in article 66, that that person be given timely and adequate notice of the court where action shall be brought and that the jurisdiction of that court is exclusive and, (ii) that the court seized recognizes that that person may be bound by the exclusive jurisdiction clause: therefore the consignee (who normally will be the claimant) is given protection that he has not at present.

Furthermore, the ESC overlooks the fact that it has become much easier for shippers to successfully claim compensation under the Rotterdam Rules than under the Hague Rules and the Hague Visby Rules that today constitute the prevailing legal regime because:

- the notice period has been extended from 3 to 7 days,
- the time bar is extended from 1 year to 2 years,
- very importantly, because of the joint and several liability of the maritime performing party and the carrier, a shipper can always claim (in addition) against the shipowner or terminal operator, as the case may be. In other words: for the claimant there is always at least one debtor with assets. He can arrest the vessel (or threaten to do so) in order to obtain a P&I guarantee without the risk of having to pay compensation due to unlawful arrest. This may also be accomplished in the case where the bill of lading does not sufficiently identify the carrier: the Convention provides for a fiction that operates in favour of cargo claimants, that in such case the registered owner shall be deemed to be the carrier. Again a novelty in favour of shippers.
- the evidentiary value of transport documents has been reinforced (the conclusive evidence rule for negotiable documents has been extended to all particulars in the document instead of only the particulars relating to the goods, as under the Hague Rules and the Hague Visby Rules; in respect of non-negotiable documents the conclusive evidence rule has been instituted for certain particulars for which,

under the Hague Rules and the Hague Visby Rules, the prima facie rule applies), and

- the shipper has access to the carrier's internal records and documents (such as temperature sheets of reefer containers), refer art 23 (6).

Further, the fact that a time-barred claim may be used as a defence or a set off is to the advantage of the shipper!

2.2.6. *Shipper's obligations are far more onerous than in previous conventions (paragraph 6 of the ESC document)*

Introduction. The Rotterdam Rules and existing law: the basis of liability, etc.

The fact that the Rotterdam Rules include more provisions on shipper's obligations and liabilities than previous conventions does not mean that they impose more obligations and liabilities than such conventions. It should be noted that the shipper has not been free from obligations and liabilities under the previous conventions. Rather, the shipper has been responsible under applicable national law. Therefore, one should examine whether and to what extent the shipper's obligations and liabilities under the Rotterdam Rules are onerous compared with those under applicable national law. In addition, the usual bill of lading terms also play a role here. All shippers' obligations can be found in one form or another (such as in the form of an exclusion of liability of the carrier or an indemnity to the carrier) in the standard bill of lading of most carriers.

For instance, one of the most (and in fact, the only) important additional obligations under the Rotterdam Rules is that the goods in the container or trailer must be properly stowed, which means that they should be able to withstand the circumstances at sea when the container is packed or the trailer is loaded by the shipper (article 27(3)). However, this obligation already exists even under the present regime. First, although the Hague Rules and the Hague Visby Rules do not explicitly impose the same obligations (they are outdated on this point), the shipper might be liable under applicable national law (in tort etc.) when improper stowage of the goods caused damage. Second, standard terms and conditions of most short sea operators impose the same obligation. It should also be emphasized that this is an important safety matter and the promotion of safety at sea is a public policy matter as well.

Therefore the Rotterdam Rules do not substantially increase the shipper's obligations. Rather, they *explicitly* regulate the shipper's obligations which already exist under the applicable national law or under contract terms.

Article 30 provides a fault based liability for the shipper. Unlike the carrier's liability under article 17, the carrier should prove shipper's breach of obligation under the Convention. This requirement, in effect, would probably impose quite a similar, if not identical, burden of proof as in an action in torts under applicable national law. To that extent, the shipper's liability is not much enhanced.

It should also be noted that the Rotterdam Rules provide for protection for the shippers in that they prohibit the contract from imposing more liability than the Rules do (article 79(2)). The Rotterdam Rules provide for certainty for the shipper in that they also prohibit Contracting States from imposing more liability than the Rules by their national legislation.

a) *Obligation to deliver the goods in such condition that they will withstand carriage*

The complaint is that the carrier should also have some responsibility in this respect. Attention is drawn to article 28 of the Rotterdam Rules, pursuant to which the carrier and the shipper shall respond to request from each other to provide information and instructions required for the proper handling and carriage of the goods. It appears, therefore, that the complaint is not justified.

The assertion under (ii) that there is no right of a shipper to a statement that the goods are carried on deck is misleading. Such a rule is simply not possible because, in the container trade, at the moment of issue of the bill of lading it is often not known whether a container will be carried on deck or not. What the Rotterdam Rules do is to a large extent take away any negative consequence of the absence of such a rule by:

(i) limiting the possibilities for the carrier to load goods on deck to cases where it is normal to do so and which every professional shipper ought to know of;
(ii) providing for the rule that when the goods are loaded on deck without this being stated in a negotiable bill of lading, a third party holder of such bill of lading may treat the goods as if they were carried under deck; and
(iii) to deny a carrier the right to limit its liability when it has agreed that goods would be carried under deck and in fact they were carried on deck, and due to this fact damage had occurred to the goods.

To put it more generally, the provisions of the Rotterdam Rules on deck cargo should be viewed as great improvements from the viewpoint of the cargo side compared with the current practice, which allows the exclusion of the liability of the carrier for damage occurring to goods loaded (other than containers or trailers) on deck.

b) *Obligation of the shipper to provide information, instructions and documents*

In (i) the ESC states it has developed with the liner shipper industry association (ELAA) and the European freight forwarders association a framework of joint responsibility. This may be well be the case, but an international convention cannot be based on specific local agreements, even if attention had been drawn to them (and this has not been the case). But again, the ESC seems to have overlooked article 28 of the Rotterdam Rules.

In (ii) ESC states that the fact that the carrier does not need to qualify information in the transport documents if it is commercially unreasonable to check the information, removes a duty from the carriers "which ESC believes is unreasonable". This complaint is difficult to understand. The existing conventions only regulate the limits of the power of the carrier to qualify the information provided by the shipper but do not in any way provide the opposite, i.e. the obligation of the carrier to qualify the information when needed. The Rotterdam Rules, for the first time, have considered the need for the protection of the consignee from the shipper and have provided that, in certain cases, the carrier must qualify the information supplied by the shipper. It is rather surprising that the ESC, instead of appreciating this novelty, complains of the fact that the obligation has certain (quite reasonable) limits.

c) *Obligation of the consignee to accept delivery and power of the carrier to deliver the goods under a negotiable transport document without surrender of the document.*

As regards the obligation of the consignee to accept delivery, the ESC has obviously overlooked the fact that that obligation arises only, pursuant to article 43, after the consignee has demanded delivery. It seems quite obvious that after he has done so, he is obliged to accept delivery.

As regards the power of the carrier to deliver the goods without surrender of the negotiable transport document, a fact that in the opinion of the ESC could cause

problems in relation to letters of credit, probably the ESC has not considered the circumstances in which this power may be exercised. Article 47(2), that regulates such power of the carrier, applies only when the transport document "expressly states that the goods may be delivered without surrender of the document". Therefore the holder of the document is aware that, if one of the situations mentioned in that provision occurs, the goods may be delivered on the basis of instructions of the shipper, in case the carrier is unable to obtain instructions from the consignee.

d) *Liability of the shipper without limitation*

This is the situation at present, under both the Hague Rules and the Hague-Visby Rules and the Hamburg Rules. During the sessions of the UNCITRAL Working Group, the issue of the limitation of liability of the shipper was raised in connection with the suggested regulation of its liability for delay. The representatives of the shippers were in fact concerned that such liability might be of an unpredictable level, for example, in the case of the sailing of the carrying ship being delayed for many days, and suggested that in respect of liability for delay a limit would be appropriate. In view of the difficulty of finding an appropriate basis for such a limit, it was decided to exclude from the scope of the Convention the shipper's liability for delay that, therefore, is governed by the applicable law.

In this paragraph under (i), reference is also made to the fact that the liability of the shipper in respect of incorrect information for the compilation of the transport document is strict. This is the case at present under the Hague Rules and the Hague-Visby Rules (article 3(5)), and under the Hamburg Rules (article 17(1)), and it is quite correct, because the carrier is liable vis-à-vis the consignee if it does not qualify the information.

Still in this paragraph under (ii), the ESC calls attention to the fact that whilst in other cases the shipper is relieved of all or part of its liability if the cause, or one of the causes, of the loss is not attributable to its fault, this is not so in respect of dangerous goods. But article 32 clearly states both under (a) and (b) that the shipper is liable to the carrier for loss or damage resulting from its failure to inform or mark the goods.

Another complaint seems to be that although the liability of the shipper may be modified under a volume contract, this is not the case in relation to the shipper's obligation to provide information, instructions and documents (article 29) or obligations and liabilities in connection with dangerous goods (article 32). As respects dangerous

goods, the reason is that, similarly to the obligation to make **and keep** (another relevant change adopted in the Rotterdam Rules, that the ESC seems to have overlooked) the ship seaworthy, the breach of such obligations affects safety. As respects the shipper's obligation to provide information etc., the reason is that (i) the failure to provide proper information, etc. by the shipper could entail the liability of the carrier vis-à-vis the consignee of such goods, as well as the consignees of other goods that may be damaged, or (ii) it could make the carrier responsible, often on a strict liability basis, for non-compliance in respect of the law and regulations applicable to the intended carriage.

e) *Liability of the shipper for the actions of those employed to perform its obligations.*

The attention of the ESC is drawn to the fact that this is also the case for the carrier: see article 18.

f) *Liability without limitation of the controlling party in respect of the instructions given to the carrier*

The chapter on the rights of the controlling party constitutes a novelty that gives normally to the shipper rights he, at present, does not have. The rights granted in article 50(1)(b) and (c) constitute variations to the contract and if such variations entail costs and liabilities, limitation of the controlling party's liability would be wholly unjustified. Why should the carrier bear part of the costs arising out of the request of the controlling party to vary the terms of the contract?

g) *Application of the Rotterdam Rules also when no transport document issued.*

It is not clear whether the ESC considers this to be wrong or not. If it does, we would be interested to know the reasons. It should noted that the Hamburg Rules also apply without regard to the issuance of transport documents.

3. *The paper of the Working Group on Sea Transport of FIATA being Annex II to FIATA's document MTJ/507 of 26 March 2009*

In its circular letter of 25th March 2009, FIATA states that "considering the diverse nature of the legal regimes under which each of our members operate it is virtually impossible for FIATA to render an official position for or against ratification of this Convention (the Rotterdam Rules)".

To that letter there are attached various papers, in which different views are expressed. Since one of such papers (Annex II) is a report of FIATA Working Group-Sea Transport, and the conclusion consists in a recommendation to advise Governments "not to accept the Rotterdam Rules", even though such conclusion has not been adopted by FIATA it seems worthwhile to consider the reasons on which it was based.

Such reasons are set out in six paragraphs that will be considered hereafter.

3.1. *The Rotterdam Rules are far too complicated*

In the opinion of the FIATA Working Group a) the Convention "will lead to additional transaction costs and invites misunderstandings and misinterpretations", b) "at worst the Convention States may end up with different interpretations"; c) for such reason, the Rotterdam Rules "will fail in reaching their main objective to unify the law of carriage of goods by sea".

a) Although no explanation is given of the alleged complications of the Rotterdam Rules, it is likely that that judgment is based on the extended scope of their provisions as respects the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.

This being said, "complication" is a word wholly inappropriate, because certain of the areas on which there will be uniformity, when the Rotterdam Rules will enter into force, are areas additional to those covered by the present conventions, and in which at present there is no uniformity. That does not mean there are no rules applicable, but rather that national rules, as opposite to uniform rules, at present apply. One could, therefore, question whether the "complication" already exists at present, rather than in the future, when uniform rules will apply.

b) Different interpretations are possible even in national laws, and certainly cannot be excluded in a uniform regime. But this does not by itself constitute a good reason not to attempt to ensure international uniformity in areas which by their very nature are international.

c) If the danger of different interpretation of uniform rules constitutes a failure of attempts to substantive uniformity, all attempts to such uniformity have been – and will be in the future – a failure.

3.2. *Freight forwarders will benefit from the Rotterdam Rules when acting as carriers but will be adversely affected by them when acting as shippers.*

That means, in the view of the FIATA Working Group, that the Rotterdam Rules protect carriers and not shippers. Shippers (and consignees) significantly benefit from the obligation to exercise due diligence in respect of seaworthiness of the ship having become continuous, and from the abolition of the exonerations of the carrier from liability for fault in navigation and maintenance of the ship, as well from the significant increase in the limits of liability.

Furthermore, the carrier's due diligence obligation is extended to containers, and the exclusion of liability for deck cargo is no longer possible.

As regards the freedom of contract in respect of volume contracts, reference is made to the comments in paragraph 2.2.3 above. It is clear that a freight forwarder would be in a good position to negotiate with the ocean carriers a volume contract in which the freight forwarder would receive adequate benefits from the fact that he is tendering a global amount of shipments to the ocean carrier. In doing so, the freight forwarder can decide for itself to what extent it is interested – for its own benefit – to trade some aspects of liability against much better freight arrangements.

3.3. *The unlimited liability of freight forwarders as shippers*

It is pointed out that freight forwarders, as shippers, will be liable under article 79 (2)(b) without any right to limit liability for incorrect information to the carriers, although carriers enjoy the right to limit under article 59.

There is however a significant difference between the obligations of the carrier in respect of which it will benefit from the limitation and those of the shipper. Whilst, in fact, the obligations of the shipper set out in articles 27 and 29 are of primary importance and, in particular, those under article 27 may affect safety, the reciprocal obligations set out in article 28 exist only if a request for information is made and arise only if the relevant information or instruction is within the requested party's reasonable ability to provide and is not otherwise reasonably available to the requesting party. In practice, that difference will hardly become material.

3.4. *Freight forwarders are adversely affected by the liability regime applicable to maritime performing parties*

Three complaints are made in this paragraph: a) freight forwarders who act as stevedores and warehousemen enjoy freedom of contract while under the Rotterdam Rules will become performing parties and be subject to the liability regime of carriers; b) in countries where stevedoring and warehousing enterprises are owned or controlled by governments any movement towards ratification will presumably be opposed; c) multipurpose cargo terminals engaged as distribution centers in logistics operations would strongly oppose a sort of maritime law injection.

a) In considering whether the provisions of the Rotterdam Rules on freedom of contract are applicable to forwarders, one should be careful which relationship one focuses on, and freedom of contract with whom. As regards the contractual relationship between the forwarders (acting as stevedores) and the carrier, the freedom of contract is unaffected by the Rotterdam Rules because they do not apply to the contract between the carrier and the maritime performing party, unless it satisfies the definition of contract of carriage (article 1(1)) (this is apparently not the case here). As regards the forwarder's relationship with the shipper or consignee, the Rotterdam Rules simply make the carrier and the maritime performing party jointly liable towards the shipper and consignee. In that respect, the fact that the freight forwarder, acting as a maritime performing party, is subject to the Rotterdam Rules may constitute an advantage, for it would benefit from the right of limitation of its liability while at present, irrespective of the contractual terms, in case it may be sued in tort, it would be liable without limitation. One cannot at the same time complain because the Rotterdam Rules afford carriers greater protection and complain because freight forwarders, being subject to the same liability rules as carriers, are adversely affected by the application of the Rotterdam Rules. The same comment applies in respect of the "multimodal cargo terminals engaged as distribution centers". Thus, we cannot agree that the inclusion of the "maritime performing party" will effectively lead to a substantial increase of exposure for freight forwarders. It also must be taken into consideration that they will be exposed in their place in respect of tort claims anyway, claims that are unlimited in nature and possibly lacking the context that the Convention offers in relation to the contractual carrier and possibly other maritime performing parties that are involved in the occurrence and the claims.

b) It can hardly be believed that any Government would decide not become a party to the Rotterdam Rules because it operates a stevedoring or warehousing enterprise.

c) No attention is paid, here as in the two preceding comments, to the need for a unification of the regime applicable throughout the period of responsibility of the carrier, and to the need for the protection of shippers and consignees.

3.5. In paragraph 5 of the FIATA Working Group Report, there are listed the reasons in support of the contention that the Rotterdam Rules will cause a significant increase of the administrative burden for freight forwarders. Some of such reasons will be considered here.

3.5.1. It is pointed out in the FIATA Working Group Report that when the mode of transport is not known at the time the contract is entered into, the door-to-door (or maritime plus) scope of application of the Rotterdam Rules will cause considerable uncertainty because it will not be possible to know which of the Conventions listed in article 82 will apply. But, besides the fact that the parties are free to choose between a port-to-port or a door-to-door contract, the problem raised already exists at present, when a door-to-door contract is adopted on the basis of the network system. This is, in particular, already so for all freight forwarders that have decided to enter into the NVOCC business and offer FIATA bills of lading that work in a quite similar way. In any event, it would appear that in the great majority of cases the transport modes that will be used are known to the freight forwarder and, in any event, the possible alternatives are few. The problem raised seems, therefore, to be a false problem.

In connection with concealed damage, it is suggested that the limits of the Rotterdam Rules are rather low. However, because of the package limitation, which for the multimodal carriage of containers is usually the relevant limitation, the Rotterdam Rules limitation figures are often higher. Compared with the CMR, the Rotterdam Rules are more favourable for the cargo claimant as long as the package does not weigh more than 109 kg. And, in addition, the shipper may cause the factor "per package" to multiply just by adding the content of the container into the transport document.

3.5.2. The complaint that, in case of shippers having sold their goods on EXW, FCA or FOB terms, freight forwarders will have to exercise due diligence in avoiding mentioning exporters as shippers is difficult to understand. First of all, it is conceivable

that the same situation already exist under applicable national laws, where shippers are named in the bill of lading that are not actual contractual parties to the contract of carriage. The Rotterdam Rules now clarify the matter to the benefit of all parties involved. Furthermore, the problem arises from a practical need that is created by the mechanisms of international trade: in most cases, the EXW, FCA or FOB exporter needs to be mentioned as shipper in the bill of lading. Without being named as shipper in the bill of lading, the exporter is not a holder and cannot exercise rights under the bill of lading, which the exporter needs to do when the buyer becomes insolvent. Neither can the exporter endorse the bill of lading, such endorsement being required when the bill of lading is presented to the bank in order to obtain the purchase price of the goods.

3.5.3. The complaint that, pursuant to article 47(2), the carrier may issue a negotiable document that actually is not negotiable is not justified and is probably due to the failure to understand the purpose of this provision.

It must first be pointed out that article 47(2) must be read in conjunction with article 35, pursuant to which the shipper is entitled, unless it is the custom, usage or practice of the trade not to use one, to obtain from the carrier a negotiable transport document (or a negotiable electronic record). In view of this, there does not appear to be any doubt that the shipper would be entitled to refuse a negotiable transport document that contains the statement indicated in article 47(2), unless it is the shipper itself that requests such statement precisely in order to ensure the possibility of delivery without presentation of the negotiable transport document.

In this context, one must be reminded that the issue that article 47(2) addresses is not arising due to a particular practice of some ship-owners/carriers that would like to circumvent their basic obligation to request surrender of one original bill of lading for delivery of the cargo to a consignee. The practice stems alone from trade reality created by the trading parties (traders and banks) that use the bill of lading as a tool for extended trade finance credits, but at the same time request the cargo to be delivered without production of the bill of lading. In this dilemma it is the carrier, that is not involved in any way in the trade and finance transactions, that has to bear the risk, a risk that is only artificially covered by the use of letters of indemnity. The Rotterdam Rules attempt to redress this situation and offer to the parties that know from the outset that the bill of lading will not be used in its intended ways, to relieve the carrier from the obligation of requesting surrender of the bill of lading. It will be the parties to the sales contract (and their banks) that will in future have the opportunity to agree on such a

47(2) document. All other functions of a bill of lading will continue to exist, e.g. in the context of the right of control and the transfer of rights.

Therefore, article 47(2) just addresses the issue of non-presentation and tries to provide an alternative for the letter of indemnity system. Currently, the legal validity of a bill of lading that is still in circulation after delivery is unclear. Such a bill of lading cannot pass property anymore (at least not in civil law countries). It still represents a claim against the carrier for delivery in many cases, but not always. For instance, in the *Delfini*[4] and the *Future Express*[5] cases, it was decided that the bill of lading holder had no claim on the carrier anymore. This uncertainty has been clarified under paragraphs (b) to (e) of article 47(2), which must be considered a great improvement in the Rotterdam Rules. It is a false accusation that article 47(2) devaluates the value of the bill of lading system and that, therefore, the article 47(2) bill of lading is not a genuine bill of lading. The devaluation of the bill of lading system is caused by the fact that it has become more or less normal in certain trades not to present the bill of lading anymore. Article 47(2) just tries to provide a solution therefore, which is both practically and legally sound. The bona fide holder that is already protected under paragraph (e) of article 47(2) only receives additional protection by the statement referred to the chapeau of article 47(2). This statement however, does not legally make the article 47(2) bill of lading a different type of bill of lading.

In addition, the current letter of indemnity system that article 47(2) tries to address is much more prone to fraud than the alternative system of article 47(2).

3.6. The revision of the uniform regimes presently in force goes much beyond the abolition of certain exonerations of the carrier's liability`, as the FIATA Working Group has alleged. The Rotterdam Rules represent a global, well balanced revision and it would have been a great mistake indeed to limit the revision to such abolition, which, apparently, is the only part of the Rotterdam Rules the FIATA Working Group Report considers favourably. The approach they have adopted seems to be very one sided.

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4 *The Delfini* [1990] 1 Lloyd's Rep 252.
5 *The Future Express* [1993] 2 Lloyd's Rep 542.

4. *The Position Paper of the European Association for Forwarding Transport Logistic and Customs Services-(CLECAT)*

CLECAT states that it has taken a strong interest "in the UNCITRAL process". It is a pity that it has waited until after the adoption of the Rotterdam Rules by the General Assembly of the United Nations on 11th December 2008 in order to express its views in its paper of 11th May 2009. Such views are divided in three parts: 1) General observations, 2) Specific concerns and, 3) Concluding remarks.

4.1. *General observations*

a) The first observation, in the fourth paragraph of page 1, is that many of the new features, if compared with the existing liability schemes, "seem to provide hardly any additional benefit." CLECAT seems, therefore, to be of the view that the extended scope of application of the Rotterdam Rules, the continuous obligation in respect of seaworthiness, the abolition of the exoneration from nautical fault and maintenance of the ship, the inclusion of a right to sue against other parties involved in the performance of the contract of carriage, the higher limitation amounts, the clearer and more complete rules on transport documents and their evidentiary value, the rules on electronic transport records, those on delivery and right of control, amongst others, do not yield any improvement as respects the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. Contrary to CLECAT's view, the Authors of this paper suggest that the above changes are indeed of considerable importance.

b) The second observation, in the same paragraph, is that the development of "an extremely complex legal instrument ought to find precise and measurable trade-offs, which are unclear and uncertain". Again, contrary to that CLECAT view, the Authors of this paper suggest that the innovations mentioned under (a) above, and others that will be considered more carefully, ought to satisfy this requirement.

c) The third observation, still in the same paragraph, is that the evolution of modern logistics "would have been better served by a convention that focussed on the intermodal nature of containerisation." But this has been precisely what the Rotterdam Rules have done, by providing door-to-door application if the parties choose to do so. CLECAT recognizes this feature when, a few lines below, it complains because the network principle has only partly been incorporated. The network principle has actually been adopted in the Rotterdam Rules to the extent necessary, in order, on the one hand, to avoid or reduce to the very minimum a potential conflict of conventions, and, on the

other hand, to ensure the application to the maximum extent possible of a uniform regime, in order to avoid or greatly reduce litigation. In this connection, CLECAT suggests that the attempt made by the Rotterdam Rules is "complex and, to some extent, unmanageable". No explanation is given by CLECAT of the above views and, therefore, it is difficult to consider whether they are in all or in part justified. It may only be observed that if the intention was to refer to article 26, its provisions seem to be simple and clear.

d) CLECAT's fourth observation, in the last paragraph of page 1, is that implementing the Rotterdam Rules "is a step into a very extended grey area of uncertainty, both in legal and judicial terms".

It is certainly possible that in different jurisdictions the interpretation of the Rotterdam Rules, when they come in to force, may differ. But this happens with any convention that contains uniform substantive rules and it is not a good reason to keep in force a system which is obsolete.

e) The fifth observation of CLECAT, in the first paragraph of page 2, is that while several benefits are provided for carriers, the Rotterdam Rules do not work "in a similar advantageous way for shippers or freight forwarders" (freight forwarders are involved only if they are shippers or documentary shippers: see article 1(9)), and that the provisions on freedom of contract in respect of volume contracts do not sufficiently "protect the interest of the customer". Attention is, however, drawn to the increased area of liability of the carrier, reference to which has been made under (a) above. As regards the complaint in respect of the insufficient protection of the customer in respect of the freedom of contract, that is granted for volume contracts, reference is made to the comments in paragraph 2.2.3.

4.2. *Specific concerns*

The eight specific concerns mentioned by CLECAT in pages 2 and 3 are considered by the Authors of this paper below in the order in which CLECAT has set them out.

(i) *Complexity of the Rotterdam Rules.* The Rotterdam Rules are not too complex, but cover areas that are not covered either by the Hague Rules and the Hague-Visby Rules or by the Hamburg Rules, such as the very helpful definitions in article 1 of chapter 1, the provisions on electronic transport records in chapter 3, those on delivery in chapter 9, those on the rights of the controlling party in chapter 10, those on transfer

of rights in chapter 11 and (as respects the Hague Rules and the Hague-Visby Rules) those on jurisdiction and arbitration in chapters 14 and 15. It is suggested that the complexity and difficulty of application of a Convention should not be assessed by counting the number of articles. As regards the cost of (cargo) insurance, it is suggested that the views of insurers should be sought and that the abolition of the exonerations of the carrier from liability in respect of fault in navigation and management and fire should probably increase the percentage of success of recourse actions by insurers and reduce the relative administrative costs.

(ii) *No limitation of liability for shippers.* In respect of the lack of any limitation of liability for the shippers, reference is made to the comments under paragraph 2.2.6(e) above. In addition, one should note that neither the Hague Rules and the Hague-Visby Rules nor the Hamburg Rules provide for limitation of liability for the shippers. The shipper's liability under existing conventions and under the applicable national law of most jurisdictions has been unlimited. It seems quite odd to argue as if the lack of limitation for the shipper is a unique defect of the Rotterdam Rules.

(iii) *Freight forwarders as a maritime performing party.* As regards the position of freight forwarders "who simply turn up at the port to collect a container and leave" attention is called to the definition of "performing party" in article 1(6) and "maritime performing party" in article 1(7). First, it should be noted that a freight forwarder who picks up a container is not a "performing party" if it is acting for or on behalf of the shipper, and therefore is not responsible as a "maritime performing party". Second, even if a freight forwarder is a performing party, an inland carrier is a maritime performing party only if it performs or undertakes to perform its services **exclusively** within the port area. Non-maritime performing parties are not subject to the Rotterdam Rules. The concerns of CLECAT do not seem, therefore, to have any basis.

(iv) *Multipurpose cargo terminals.* It is thought by the Authors of this paper that in this respect, the view of terminal operators that are based within the port areas should be sought. They might, quite to the contrary of CLECAT's suggestion, consider it advantageous to be subject to the Rotterdam Rules regime which, for instance, provides for limitation of liability which they do not enjoy without an explicit Himalaya clause. The great advantage to have a unique regime applicable from the arrival of the goods to the port area to their departure from the port area of the place of destination is that shippers and consignees will know which regime is applicable and will not chose whom to sue on the basis of a the regime likely to be applicable to the defendant. It is

suggested that this will reduce, rather than increase, litigation and make it less expensive.

(v) *Stevedore and warehousing enterprise owned by the states.* It is rather unlikely that, as suggested by CLECAT, a State will decide not to ratify the Rotterdam Rules only because it owns a stevedoring or warehousing enterprise.

(vi) *"Limited network system".* A "full network system", as espoused by CLECAT, is far too unsatisfactory in the light of the purpose of Rotterdam Rules to offer a coherent liability regime as broadly as possible. An example referred to by CLECAT in footnote 3 is not persuasive. The "off wheels" section from Calais to a UK port is a pure international carriage of goods by sea and it is simply unthinkable that the Rotterdam Rules should concede to "private contractual rules" for such period. The situation is the same even under the existing conventions. Any "private contractual rules" are invalid in so far as a mandatory maritime transport convention (e.g., the Hague-Visby Rules) applies.

(vii) *Unavailability of freedom of contract for forwarding agent.* It appears that CLECAT meant to refer to the situation where the forwarding agent acts as carrier (or logistics provider), issues its own transport document and enters into a transport contract with the performing carrier but, while it has no sufficient negotiating power to obtain the agreement of the shipper on a derogation, the performing carrier does have such power and, therefore, there will be situations in which the forwarding agent is liable to the shipper but has no recourse action against the performing carrier. If this is the problem, it is thought that it exists independently from the adoption of the Rotterdam Rules, and the only solution seems to be that the forwarding agent negotiates in advance general transport conditions with both its customers and the performing carrier(s) it intends use.

(viii) *Delivery without surrender of a negotiable transport document.* It is incorrect to state, as CLECAT has, that carriers retain the right to deliver the goods without obtaining the negotiable transport document in return. Pursuant to article 47(2), reference to which is made, if the goods are not deliverable the carrier may request instructions from the shipper in respect of delivery and, irrespective of the shipper still being the holder of the transport document or not, is discharged from any liability if it complies with such instructions. This, however, does not affect the value of a negotiable transport document vis-à-vis its holder in good faith, because article 47(2) applies only "if the negotiable transport document or the negotiable transport record expressly states

that the goods may be delivered without surrender of the transport document or the electronic transport record". Therefore the holder of the document or electronic record is put on notice that, if the conditions set out in that provision materialize, the carrier may deliver the goods pursuant to instructions of the shipper or documentary shipper. And such conditions are that (i) the holder has not claimed delivery after the arrival of the goods at destination, or the carrier has refused delivery because the person claiming delivery has not properly identified itself and, (ii) the carrier has, after reasonable efforts, been unable to locate the holder in order to request delivery instructions.

However it is not certain that the situation that has been envisaged is that which was really CLECAT's concern, since it is also stated in their comments that "they (the forwarders) are sued much more frequently than the ship owner, because it has contracted out of the liability regime". Besides the fact that if this happens now, the problem is not arising out of the Rotterdam Rules, it appears that at present if the forwarder enters into a separate contract of transport with the performing carrier, the shipper has no contractual relationship with the performing carrier and it can only bring an action in contract against the forwarder.

4.3. *Concluding remarks*

CLECAT's first contention is that the entry into force of the Rotterdam Rules "would make the supply chain more complex and unwieldy and contribute to foster protectionism instead of free trade". No reason is given for this very vague statement. It is the view of the Authors of this paper that a modern transport convention, that would replace the variety of regimes at present in existence, would foster international trade and reduce litigation.

The second (implied) contention is that there is no advantage in substituting the existing rules with the Rotterdam Rules. That means that CLECAT believes that the existing disuniformity resulting from the application in certain countries of the Hague Rules, in others of the Hague-Visby Rules, in others of the Hague-Visby Rules as amended by the SDR Protocol, in others of the Hamburg Rules, and still in others a national regime consisting of a cocktail between the Hague-Visby Rules and the Hamburg Rules, is preferable to a definitely more modern regime that hopefully will replace all those presently in force. Furthermore, and even more importantly, the tendency shown before embarking on the UNCITRAL project that some national or regional legislators were preparing their own legislation in relation to international carriage of goods by sea

derogating from the existing international Conventions would obviously come back to life, and the same circles complaining today of the complexity of one single regime (Rotterdam Rules) will be faced soon with the even greater complexity of battles of Conventions, rules and laws in a very unpredictable way, and left with complex questions of conflicts of laws relating to all issues that the existing Conventions had left to national laws.

The third conclusion of CLECAT is that people should learn the lesson taught by the alleged failure of the efforts made in the last ten years, resulting in the adoption of the Rotterdam Rules, and produce in the future a new instrument that should meet the following requirements indicated by CLECAT pursuant to which "an acceptable transport convention should be":

"- *as simple and universal as possible,*
- *with few and carefully weighed exceptions,*
- *serving all parties in contract without interfering with third parties, and*
- *last but not least, be realistic in terms of liabilities and limitations that must be mirroring other parties.*"

Is it conceivable that the United Nations will in the near future start drafting a new convention? In order to establish that, as CLECAT suggests, the Rotterdam Rules have been a failure at least fifteen years should elapse (the Hamburg Rules have entered into force in 1992, fourteen years after their adoption) and then not less than ten years would be required for the adoption of the regime CLECAT is suggesting: the consequence would be that the present situation would continue (and worsen by national or regional attempts to cope with the growing lack of satisfaction relating to the existing Conventions) for not less than twenty five years.

5 August 2009

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esc
european
shippers'
council

March 2009

View of the European Shippers' Council
on the Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea
also known as the 'Rotterdam Rules'

Introduction

The European Shippers' Council represents the freight transport interests of some 100,000 companies, whether manufacturers, retailers or wholesalers, throughout Europe whose goods move across EU and international borders (imports and exports) by any mode of transport.

ESC has taken a strong interest in the UNCITRAL process in recent years. It is the aim to ensure that any new international convention on maritime liability would provide shippers with basic protection when involved in international trade. ESC takes issue with many of the features of the new regime, known today as the 'Rotterdam Rules', which has yet to be ratified, and fears that it could put some shippers in **a worse position than that of the pre-1924 liability environment**, before introduction of the original Hague Rules.

The European Shippers' Council contests that the new convention is flawed, puts shippers at greater risk, potentially unknowingly, and would do little to facilitate door-to-door co-modal transportation in European trades. The ESC argues that the interests of exporters and importers should be given their due weight by EU member state governments, and that this Convention should not be supported.

ESC's position in brief:

The new Rules

- conflict with other conventions
- present unequal obligations and liabilities between shippers and carriers
- present a risk that carriers' may reduce significantly their own limits of liability and obligations under so-called 'volume contracts
- make proving fault harder for the shipper
- make it increasingly difficult for shippers to successfully make a claim for damages
- make shipper obligations far more onerous
- may deter shippers from integrating short-sea shipping into their door-to-door logistics due to obligations and limits of liability being worse than under individual modal conventions

ESC has concluded that there is nothing in the final text of the convention which justifies a departure from the status quo of Hague Visby Rules for the majority of shippers who represent the preponderant trade interest of the majority of European states.

In the interests of European shippers, ESC proposes:

a) the parallel development of a European multimodal convention aligning with other land-based conventions in order to foster greater use of co-modal logistics solutions for intra-

European door-to-door freight transport

b) EU member states decide not to sign up to the Rotterdam Rules, and publicly indicate this view

c) The Hague Visby and Hamburg Rules should remain the appropriate conventions applying to the international movement of containers by sea in the interim period

d) National and mode-specific conventions should not automatically take precedent over the new Rotterdam Rules if they hinder co-modal logistics solutions: a 'one-size-fits-all' solution is not considered the most appropriate approach to setting conditions of carriage.

The full extent of ESC's concern

Below, ESC identifies six key areas of concern with the new international convention. These concerns relate to a sense that there exist unequal obligations and liabilities between the carriers and shippers, favouring more the carrier than the shipper, and the removal of many protections for the shippers, especially under volume contracts.

1. Conflict with other conventions

The Rules would apply to *contracts* of carriage (rather than shipment of goods) in which the place of receipt and place of delivery are in different states and where the ports of loading and discharge are also in different states. The contract *must* provide for **sea carriage** and may also provide for **carriage by land**.

a. This would bring The Rules into potential conflict with **other international conventions** such as CMR and CIM which, although covering road and rail respectively, also may cover certain maritime transits.

Other conventions, such as CRM and CIM, will prevail over the Rotterdam Rules where they would apply if the Rotterdam Rules did not exist, but in practice only where the source of the damage can be localised – in reality a difficult thing identify in many cases

b. The more favourable terms and conditions of CMR and CIM, as examples, would not extend to short sea shipping. Shippers concerned with intra-European shipments may **choose against the use of short-sea services** because of the increased obligations and liabilities of the Rotterdam Rules compared to other conventions.

2. Unequal obligations and liabilities

Carriers would be able to continue to offer purely sea carriage under the Rotterdam Rules and to **limit their period of responsibility** to exclude loading, handling, stowing and unloading if the shipper agrees.

The unwitting shipper may be tempted into accepting such terms, but it would be equivalent to not renewing one's insurance policy in order to save money

3. Volume Contracts represent significant risks for shippers

It is possible to contract out of nearly all the provisions in the Rules by means of a **volume contract. This represents the greatest of ESC's concerns over the introduction of the Rotterdam Rules.**

A "volume contract" is one that provides for carriage of a *specified* quantity of goods in a *series* of shipments during an agreed period of time. It could apply to quantities as low as 3 containers shipped over a year or more.

ESC fears that acceptance to increased shipper liability and reduced carrier reliability would represent a serious risk to shippers that were not completely aware of the implications. Merely signing up to a volume contract could expose the shipper to greater risk.

For example, when a volume contract is agreed, nearly all the shipper-protective provisions of the Rotterdam Rules need not apply. Examples are given below:

a. The carrier must normally ship the goods to the place of destination and deliver them to the consignee, responsibility commencing when the carrier or his agent receives the goods for carriage (according to the contract) and ending when they are delivered. **This is NOT OBLIGATORY** under a volume contract.

b. The carrier must normally properly and carefully receive, load, handle, stow, keep, care for, unload and deliver the goods, unless the contract provides that the shipper shall load, handle, stow or unload the goods. **This also is NOT OBLIGATORY** under a volume contract

c. The Carrier must normally make and keep the holds and any containers supplied fit and safe for the reception, carriage and preservation of the goods. **This again is NOT OBLIGATORY** under a volume contract

A number of questions and further related issues also arise from the convention as it relates to 'volume contracts':

i. Despite some apparent safeguards intended to alert the shipper to the fact that the Rotterdam Rules will no longer apply if 'negotiated' away, it is unclear as to what these will be in practice or how effective such safeguards may in effect prove to be

ii. Shipping is excluded from EU law relating to unfair contracts; this puts the shipper at even greater risk of being press-ganged into accepting terms and conditions they do not want

iii. How will the legal system deal with an apparent vacuum between the mandatory application of international law (governed by the convention) and national law if a volume contract removes the application of international and theoretically national law from a contract?

iv. How would competition rules apply under such circumstances where it might be accused, for example, there was an abuse of a dominant position?

v. It is generally assumed (**for why else would one reasonably be persuaded to accept such terms**) that volume contracts would offer lower rates to reflect any reduced liability by the carrier or increased rates to reflect increased liability.

vi. There is a danger that bill of lading terms would be rewritten to be still more adverse to shippers than at present. Furthermore, "reductions" in rates may be more illusory than real: whilst a shipper could not be forced to accept a volume contract unprotected by the Rotterdam Rules, in practice it is possible that rates would be manipulated to make refusal subject to a rates penalty.

Small shippers are most vulnerable being less able to negotiate from a position of market strength. **At a time of considerable economic stress** in the world today, shippers will be under huge pressure to accept greater risk in return for promises of price reductions.

4. Proving fault becomes harder for shippers

Subject to contrary provision in a volume contract, the carrier is liable for *all or part* of the loss, damage or delay to the goods during the period of the carrier's responsibility (whether on sea or land) as proved by the claimant, unless either

a. The carrier proves that the cause or *one of the causes* of the loss is not attributable to its fault or the fault of anyone used to perform the contract, or

b. It proves that a similar but more extensive list of excepted perils than that under Hague Visby Rules (except negligent navigation now deleted) *caused or contributed* to the loss or damage.

The **choice of which defence** to use is given to the carrier but if it uses the list of exceptions, the shipper must ***prove*** that the loss was or was probably caused by or contributed to by the unseaworthiness of the ship, its holds or containers or improper crewing.

c. How are shippers expected to prove fault?

d. The carrier may also be liable **only** for that part of any loss attributable to its fault

5. Claiming compensation becomes harder for shippers

Subject to contrary provision in a volume contract, **compensation** payable in case of loss or damage is limited to no less than 875SDRs per package or shipping unit or 3SDRs per kilo of gross weight, whichever is higher, but in the case of containerised goods, the package limit can only be invoked if the packages are enumerated in the transport document.

Unfamiliarity with this rule or an oversight may cost the shipper dearly

It appears possible to *increase* these limits of liability by agreement without having to enter into a volume contract.

Subject to contrary provision in a volume contract, compensation in case of **delay** is limited to 2 ½ times the freight payable on the goods delayed. However, delay occurs only when goods are not delivered within the time agreed in the contract. Therefore, if no delivery time is stated, no compensation will be due for delays.

a. It is currently believed to be uncommon for a delivery time to be specified on the contract, in particular for consignments belonging to smaller volume shippers who may employ the services of third parties to handle the freight procurement and contracting with the carriers

Even under a volume contract a carrier may not contract out of its liability for **wilful misconduct** but this concept has become harder to make out as the carrier will now be liable without limit only for a *personal* act or omission done with the intent to cause loss or through a reckless act.

b. There will be a *presumption* of safe delivery unless **notice of loss** or damage is given by the shipper before or at the time of delivery or if the loss was not apparent within 7 working days after delivery. In the case of delay notice must be given within 21 days. There is a **two year period** to bring a legal claim against the carrier or shipper. However a time-barred claim may be used as a defence or by way of set-off.

c. Shipper options on choice of jurisdiction, similar to those in Hamburg Rules, have been made applicable only if states opt in to the relevant provisions. An exclusive jurisdiction

clause may be valid in a volume contract. In practice carriers would no doubt continue to dictate jurisdiction in many instances.

6. **Shipper *obligations are far more onerous than previous conventions***

   a. The shipper must deliver the goods in such **condition** that they will withstand the intended carriage including their loading, handling, stowing, lashing, securing and unloading and that they will not cause harm to persons or property. These requirements also apply to containers and vehicles packed or loaded by the shipper.

      i. This may appear reasonable to the shippers' best ability and knowledge, and they must seek appropriate advice, but the carrier should also have some responsibility in this regard

      ii. The Rules would apply to **deck carriage and to carriage of live animals,** but the rights which normally apply to the shipper of freight stowed under deck would not necessarily be the same for deck cargo, nor would there be any right to a statement that the goods are carried on deck.

      Shippers may be unwittingly exposed to fewer rights of protection from liability than they may otherwise believe

   b. The shipper must provide the carrier with **information, instructions and documents** reasonably necessary for the proper handling and carriage of the goods and compliance with the law. (Mandatory even in a volume contract)

      i. The shipper must provide in timely manner specified information required to complete the **transport document** and is deemed to guarantee the accuracy of the information.

      ESC has developed with the liner shipping industry association (ELAA) and the European freight forwarders association a framework of **joint responsibility** and best practice which ensures accuracy, timeliness and quality in the production of transport documents; Placing all responsibility on the shipper removes the concept of shared responsibility, even though a failure to provide accurate and timely information would impact heavily on the quality of the service performance of the carrier which should be its primary focus and concern

      ii. The carrier does not need to **qualify information** in the transport documents, notably if it is not "commercially reasonable" to check the information. This again removes them from a duty which ESC believes is unreasonable; it could also affect the value of such documents in relation to letters of credit.

   c. The consignee must accept delivery at the time or within the time period agreed. There are novel provisions allowing the carrier to deliver goods under a negotiable transport document without surrender of that document if the document so allows.

      This could cause problems in relation to letters of credit as could the carrier's novel rights of disposal of goods that are deemed undeliverable.

   d. The shipper is liable *without limitation* for **loss or damage sustained by the carrier** if the carrier proves that such loss or damage was caused by a breach of the shippers' obligations under the Rules.

i. In the case of information supplied for the transport document, the shipper is liable for inaccuracies irrespective of fault and must indemnify the carrier in respect thereof.

ii. Similarly strict liability and indemnity applies to obligations in relation to dangerous goods. In other cases the shipper is relieved of *all or part* of its liability if the cause or one of the causes of the loss is not attributable to itself or its agents. These liabilities may be modified under a volume contract but not in relation to the transport document or dangerous goods.

e. The shipper is also liable for the actions of those it uses to perform its obligations.

f. Where the Rules allow certain instructions to be given concerning the goods in the course of transit, the controlling shipper must reimburse the carrier for any reasonable additional expense incurred and indemnify it ***without limitation*** against loss suffered in execution of the instructions including any compensation payable to third parties. The carrier is entitled to require security before carrying out such instructions.

g. Application of the Rules is not made subject to the prior issuance of any **bill of lading** or other transport document; neither do the Rules require issuance of such a document when it is not custom usage or practice to do so.

Conclusions

While there have been some drafting improvements to the final Rotterdam Rules text which make it clearer in places, and while "headline" liability of the carrier is increased compared to both Hague Visby and Hamburg limits, there remain some substantial concerns with this new Convention. Largest among ESC's concerns is with volume contracts which allow the carriers to derogate from virtually all the provisions of the Rules to the potential detriment of the shipper.

Despite determined negotiation by shipper interests, there are still inadequate safeguards built into the volume contract system. There is nothing in the final text which justifies a departure from the status quo of Hague Visby Rules for the majority of shippers who represent the preponderant trade interest of the majority of European states.

What does ESC propose?

The history of multimodal transport is littered with failed attempts at legislation. In the early 1970s, the proposed TCM Convention/Tokyo Rules failed to reach an outcome. In 1980 the UN made another attempt with the UN Convention on Multimodal Transport but nearly 30 years later it is no nearer entry into force than at the outset. The Rotterdam Rules could follow the same path.

The response of industry to the earlier failures was to seek a commercial solution in the form of the ICC Rules for a Combined Transport Document (now the UNCTAD/ICC Rules), incorporated into the FIATA Bill of Lading. Research by ESC member associations has shown that both Hague Visby and Hamburg Rules would allow updated contractual multimodal solutions working alongside these Conventions to be devised. Furthermore as a modern maritime regime, the Hamburg Rules, which seemed radical to some maritime nations during the 1970s now appear far less problematical than the Rotterdam Rules. They have been adopted by some 32 countries including Austria, the Czech Republic, Hungary and Romania while others, such as the Scandinavian countries, have included some Hamburg provisions in their national law.

On the basis of the arguments set out above, Shippers do not believe that the Rotterdam Rules deserves the support of the European Commission or of the Member States. The draft is not the only option for the future.

In the interests of European shippers, ESC proposes:

e) the parallel development of a European multimodal convention aligning with other land-based conventions in order to foster greater use of co-modal logistics solutions for intra-European door-to-door freight transport

f) EU member states refusing to sign up to the Rotterdam Rules until or unless adequate protection has been given to shippers and accepted by shippers' representatives

g) The Hague Visby and Hamburg Rules should remain the appropriate conventions applying to the international movement of containers by sea in the interim period.

h) As a precaution, in the event that the Rotterdam Rules acquire the 20 signatories needed to make it pass as an international convention, any terms put forward by a carrier should be interpreted *contra proferentem*[1] making it prudent for carriers to seek to meet any definition exactly. In those Civil Law countries which might find the concept of derogation from a mandatory regime unpalatable in principle, judges might seek to examine this line of interpretation to query whether the requirements for a volume contract were met. If not met, they might set aside the volume contract terms and apply the Rotterdam Rules.

[1] **Contra proferentem** is a rule of contractual interpretation which provides that an ambiguous term will be construed against the party that imposed its inclusion in the contract – or, more accurately, against (the interests of) the party who imposed it. Therefore, the interpretation will favor the party that did not insist on its inclusion. The rule only applies if, and to the extent that, the clause was included at the unilateral insistence of one party without having been subject to negotiation by the counter-party. Additionally, the rule only applies if the court determines the term to be ambiguous, which often forms the substance of a contractual dispute. (source: Wikepedia)

UNITED
NATIONS

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Economic and Social
Council

Distr.
GENERAL

ECE/TRANS/WP.24/123
13 May 2009

Original: ENGLISH

ECONOMIC COMMISSION FOR EUROPE

INLAND TRANSPORT COMMITTEE

Working Party on Intermodal Transport and Logistics

REPORT OF THE WORKING PARTY ON INTERMODAL TRANSPORT AND LOGISTICS AT ITS FIFTY-FIRST SESSION [1]
(Geneva, 19-20 March 2009)

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[1] All documents mentioned in this report are available and can be downloaded from the relevant UNECE website <http://www.unece.org/trans/wp24/welcome.html> or from the ODS system of the United Nations <http://documents.un.org/>.

the exception of the proposed activities in paragraphs 63 (4) and 65 (3) of that document. It felt that the proposed activities could provide a value-added at the inter-governmental and pan-European levels and should be pursued by the Working Party in coordination with other international organizations, particularly the European Commission.

33. The new activities relating to transport chains and logistics approved by the Working Party are reproduced in the annex to this report.

34. The Working Party requested the secretariat to prepare, for consideration at its forthcoming session in October 2009, a revised draft programme of work for 2010-2014 that contained the approved new activities of the Working Party in the field of transport chains and logistics.

35. Finally, the Working Party reiterated its view that Eastern European, Caucasus and Central Asian countries would particularly benefit from participating in this work as logistical developments and modern supply chains increasingly influenced transport choice and demand, as well as the impact of governmental policies.

VII. RECONCILIATION AND HARMONIZATION OF CIVIL LIABILITY REGIMES IN INTERMODAL TRANSPORT (Agenda item 6)

36. Recalling the discussions at its previous sessions as summarized in ECE/TRANS/WP.24/2009/3, the Working Party was informed by the representatives of UNCTAD and IMMTA about the latest developments, the content and possible impact of the new Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. This Convention had been prepared by the United Nations Commission on International Trade Law (UNCITRAL) and had been adopted by the General Assembly on 11 December 2008.

37. The new convention, to be called "The Rotterdam Rules", will be opened for signature following a signing ceremony to be held on 23 September 2009 in Rotterdam. Entry into force will require ratification by 20 States. Any State acceding to the new convention will have to denounce other maritime conventions to which it may be a party, i.e. the Hague, the Hague-Visby or the Hamburg Rules, before ratification of the Rotterdam Rules becomes effective.

38. The Working Party noted that the new convention would apply to all contracts of carriage by sea that include an international sea leg, no matter how short the sea leg and how long the land leg may be. The Convention will apply to the carrier who may not necessarily be responsible for the total door-to-door transport, as long as loss, damage or delay of cargo cannot be localized or if no other convention, such as the Convention on the Contract for the International Carriage of Goods by Road (CMR) or the Convention concerning International Transport by Rail (COTIF), is applicable. The carriers' liability is limited to 3 Special Drawing Rights (SDR) per kilogram of cargo or to 875 SDR per package. While the liability of the carrier is limited, the new convention introduces a mandatory and unlimited liability for the shipper in case he provides inaccurate information and in case of breach of obligations regarding the carriage of dangerous goods. It thus tends to shift responsibilities from the carrier towards the shipper.

39. The new convention is very complex and covers legally untried areas, such as the transfer of rights, arbitration and jurisdiction clauses. It does not provide for mandatory and harmonized

liability provisions for door-to-door transport due to opting-out clauses allowing freedom of contract for so-called "volume (service) contracts" that are used widely, particularly in maritime liner trade.

40. The new convention will, if it were to come into force, create another layer of international law applicable to potentially many European intermodal transport operations, particularly in port hinterland traffic with provisions that are not in harmony with modal CMR or COTIF rules applicable to international road and rail transport in Europe. Also, the new convention does not provide for a concentration of risk for loss, damage and delay, irrespective of its cause and the modal stage where it occurs, on one party (i.e. the contracting carrier) as had been suggested earlier by the Working Party (ECE/TRANS/WP.24/111, paragraphs 14-18).

41. Thus, the new convention does not seem to be a step in the direction towards a simple, transparent, uniform and strict liability system for modern transport chains providing a level playing field among unimodal and intermodal transport operations.

42. In this context, the representative of EC informed the Working Party about progress made on a legal study covering multimodal transport documents and liability systems that had been commissioned by EC as part of its Freight Logistics Action Plan.

43. The Working Party welcomed the detailed information provided by the representatives of UNCTAD, IMMTA and EC. It decided to revert to this issue at its forthcoming October 2009 session to consider, in cooperation with the European Commission (DG TREN), the possible impact and value-added of the new convention for intermodal transport in Europe. The Working Party invited UNECE member States and professional organizations to examine how, under the present circumstances, an appropriate civil liability system, covering also short sea shipping, could be devised addressing the concerns of European intermodal transport operators and their clients.

VIII. MONITORING AND ANALYSIS OF NATIONAL POLICY MEASURES TO PROMOTE INTERMODAL TRANSPORT (Agenda item 7)

44. This item was not considered due to lack of time.

IX. IMO/ILO/UNECE GUIDELINES FOR PACKING OF CARGO IN INTERMODAL TRANSPORT UNITS (Agenda item 8)

45. The Working Party recalled that in 1996 it had finalized, in cooperation with the International Maritime Organization (IMO) and the International Labour Office (ILO), international guidelines for the safe packing of cargo in freight containers and vehicles covering also the requirements of all land transport modes (TRANS/WP.24/R.83 and Add.1).[13] It had been suggested that the guidelines should be updated from time to time and supplemented by additional elements, such as provisions on fumigation (TRANS/WP.24/71, paragraphs 32-36). In 1997, ITC had approved these guidelines and had expressed the hope that these guidelines would help reduce personnel injury while handling containers and would minimize physical hazard to which cargoes were exposed in intermodal transport operations (ECE/TRANS/119, paragraphs 124-126).

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[13] <http://www.unece.org/trans/wp24/welcome.html>.

UNITED
NATIONS

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Economic and Social
Council

Distr.
GENERAL

ECE/TRANS/WP.24/125
17 November 2009

Original: ENGLISH

ECONOMIC COMMISSION FOR EUROPE

INLAND TRANSPORT COMMITTEE

Working Party on Intermodal Transport and Logistics

REPORT OF THE WORKING PARTY ON INTERMODAL TRANSPORT AND LOGISTICS AT ITS FIFTY-SECOND SESSION [1]
(Geneva, 12-13 October 2009)

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[1] All documents mentioned in this report are available and can be downloaded from the relevant UNECE website <http://www.unece.org/trans/wp24/welcome.html> or from the ODS system of the United Nations <http://documents.un.org/>.

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I. ATTENDANCE

1. The session was attended by representatives of the following countries: Austria; Belgium; Czech Republic; Denmark; France; Germany; Netherlands; Russian Federation; Slovakia; Spain; Turkey; United Kingdom of Great Britain and Northern Ireland. The European Commission (EC) and the European Court of Auditors were represented. The United Nations Commission on International Trade Law (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD), the International Labour Office (ILO) and the Intergovernmental Organization for International Carriage by Rail (OTIF) were represented. The following non-governmental organizations were represented: European Intermodal Association (EIA); European Shippers Council (ESC); Groupement européen du transport combiné (GETC); International Bureau of Containers (BIC); International Multimodal Transport Association (IMMTA); International Rail Transport Committee (CIT); International Road Transport Union (IRU); International Union of Combined Road/Rail Transport Companies (UIRR); International Union of Railways (UIC).

II. ADOPTION OF THE AGENDA (Agenda item 1)

2. The Working Party adopted the provisional agenda prepared by the secretariat (ECE/TRANS/WP.24/124).

III. ADOPTION OF THE REPORT OF THE FIFTY-FIRST SESSION (Agenda item 2)

3. The Working Party adopted the report of its fifty-first session (19-20 March 2009) prepared by the secretariat in cooperation with the Chairman (ECE/TRANS/WP.24/123).

IV. NEW DEVELOPMENTS AND BEST PRACTICES IN INTERMODAL TRANSPORT AND LOGISTICS (Agenda item 3)[2]

4. Further to the detailed information provided at its March 2009 session (ECE/TRANS/WP.24/123, paragraphs 8-18), the Working Party took note of the results of a survey of more than 105 European intermodal transport operators that had been undertaken by UIC as part of its DIOMIS project.[3] In 2007, 18.07 million twenty-foot equivalent units (TEU) were transported using intermodal road-rail transport, of which 17.11 million (94.7 per cent) was unaccompanied and 0.96 million (5.3 per cent) accompanied. This represented an increase of 35 per cent between 2005 and 2007 for total intermodal transport in Europe.

5. As already indicated in March 2009,[4] the rapid increase in intermodal transport in Europe came to a sudden halt in 2008. Final data for 2008 show that UIRR companies recorded only a slight increase in total traffic in the order of 2 per cent compared to 2007 amounting to

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[2] All informal documents and presentations made at the session are available on the following website: <http://www.unece.org/trans/wp24/wp24-presentations/24presentations.html>.

[3] The survey undertaken within the project "Developing Infrastructure and Operating Models for Intermodal Shift (DIOMIS)" covered 30 European countries, including Turkey and Ukraine. An update of this study will be undertaken covering the year 2009. The results will be provided in 2010.

[4] ECE/TRANS/WP.24/123, paragraphs 11 and 12.

3.00 million consignments or 5.99 million TEU equivalents.[5] This compares to increases of 9 per cent in 2007 and 15 per cent in 2006. While the first 6 months of 2008 had still shown healthy increases, the second half of 2008 recorded a dramatic decline in traffic as a result of the worsening economic crisis and, in particular, the reduction of transport demand in port hinterland traffic and by the automotive industry.

6. In 2008, UIRR companies transported 3.79 million TEU internationally, compared to 2.20 million TEU in national traffic. While international transport decreased slightly by 1 per cent, national transport continued to increase by 7 per cent. The difference in performance between international and national traffic was particularly marked for accompanied transport where international transport increased by 1 per cent whereas national transport recorded an increase of 28 per cent. Altogether, accompanied transport increased by 10 per cent while unaccompanied traffic grew by only 1 per cent.

7. Taking note of the requested secretariat report on the impact of the current financial and economic crisis on intermodal transport (ECE/TRANS/WP.24/2009/6), the Working Party noted that, in the first half of 2009, traffic volumes in intermodal transport in Europe had decreased in the order of 20 to 25 per cent for unaccompanied and up to 15 per cent for accompanied traffic.[6] Intermodal transport operators had adjusted their transport offers and streamlined internal procedures, but had so far maintained strategic investment plans and staff.

8. The Working Party also noted that European Governments, with the exception of Switzerland and France (as of January 2010), had not yet decided to provide specific short-term fiscal, financial or regulatory support measures allowing intermodal transport operators to counter the crisis. It was felt that the industry should use the crisis to adjust to new trends and demands, streamline internal procedures, enhance cooperation and improve quality of services. New opportunities could be reaped in the fields of green logistics, improved terminal operations and new transport markets as pointed out in document ECE/TRANS/WP.24/2009/6.

9. The Working Party was informed by experts from Belgium, France, Russian Federation, Slovakia, Turkey, BIC and IRU of the lasted developments in intermodal transport. It decided to continue monitoring new trends and developments at future sessions.

V. MONITORING OF NATIONAL POLICY MEASURES TO PROMOTE INTERMODAL TRANSPORT (Agenda item 4)

10. The Working Party recalled that, at its sixty-ninth session, the Inland Transport Committee (ITC) had decided that the Working Party should continue the work carried out by the former European Conference of Ministers of Transport (ECMT) in (a) monitoring and analysis of national measures to promote intermodal transport and (b) monitoring enforcement and review of the ECMT Consolidated Resolution on Combined Transport (CEMT/CM(2002)3/Final) (ECE/TRANS/192, paragraph 90). It noted that with the recent information provided by Germany and Switzerland, 14 countries had provided so far a comparable overview of policy measures to promote intermodal transport

[5] One UIRR consignment (accompanied or unaccompanied) is equivalent to two twenty-foot equivalent units (TEU).

[6] For more detailed data refer to the UNECE document and presentations.

(ECE/TRANS/WP.24/2009/9; ECE/TRANS/WP.24/2009/8; ECE/TRANS/WP.24/2008/5 and Addenda).

11. The Working Party requested the secretariat to continue its monitoring and analysis of national policy measures with a view to providing a consistent and comprehensive information on best practices in UNECE member States.

VI. PEER REVIEW ON INTERMODAL TRANSPORT: TURKEY (Agenda item 5)

12. At its forty-seventh session, the Working Party had already considered the concept of "peer reviews" as the systematic examination and assessment of the performance of a State by another State in a specific field. The objective is to assist the reviewed State to improve its policymaking, adopt best practices and support compliance with established standards and principles. Such peer reviews are carried out upon the specific request of a Government and, in principle, are free of charge for the requesting Government (ECE/TRANS/WP.24/115, paragraphs 16-18).

13. The Working Party was informed by the representatives of Turkey of the result of the peer review on intermodal transport in Turkey (available at the session). The Working Party welcomed this sound analytical report and felt that such peer reviews would be a useful tool to assist countries in the effective implementation and monitoring of intermodal transport policies. Recognizing the difficulties in obtaining the necessary funds to allow the secretariat to organize such peer reviews, the Working Party was awaiting proposals for further peer reviews to be undertaken, possibly in cooperation with other international organizations.

VII. RECONCILIATION AND HARMONIZATION OF CIVIL LIABILITY REGIMES IN INTERMODAL TRANSPORT (Agenda item 6)

14. Recalling the discussions at its previous sessions, summarized in ECE/TRANS/WP.24/2009/3 and ECE/TRANS/WP.24/123, paragraphs 36-43, and taking note of background information contained in Informal documents No. 2 and 3 (2009), the Working Party was informed by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) about the origin, main innovations and concepts enshrined in the new Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules). The Rotterdam Rules have been signed so far by 19 countries.

15. The Working Party had an exchange of views on the possible impact and value-added of the Rotterdam Rules, particularly for European intermodal transport and decided to continue, in cooperation with the European Commission, its consideration of civil liability regimes to increase the competitiveness of intermodal transport at the pan-European level.

VIII. IMO/ILO/UNECE GUIDELINES FOR PACKING OF CARGO IN INTERMODAL TRANSPORT UNITS (Agenda item 7)

16. The Working Party recalled that in 1996 it had finalized, in cooperation with the International Maritime Organization (IMO) and the International Labour Office (ILO), international guidelines for the safe packing of cargo in freight containers and vehicles covering also the requirements of all land transport modes (TRANS/WP.24/R.83 and Add.1).[7] It had been

[7] <http://www.unece.org/trans/wp24/welcome.html>.

FIATA Position on the UN Convention on Contracts for the International Carriage of Goods wholly or partly by Sea (the "Rotterdam Rules").

FIATA Working Group Sea Transport recommends that Association members should advise their governments *not* to accept the Rotterdam Rules.

1. In general, the Convention is far too complicated. This leads to additional transaction costs and invites misunderstandings and misinterpretations. At worst, the Convention States may end up with different interpretations, so that the Rotterdam Rules will fail in reaching their main objective to unify the law of carriage of goods by sea.

2. Although freight forwarders, as carriers or logistics service providers, gain from the benefits according to carriers by the Rotterdam Rules – such as the right to limit liability not only for loss of or damage to cargo but for *any* breach (Art. 59.1) and no liability for delay unless agreed (Art. 21) – the Rotterdam Rules work to the disadvantage of freight forwarders when acting as shippers or when demanding compensation from the performing carriers. It is expected that the expansion of freedom of contract in case of volume contracts (Art. 1.2 and Art. 80) will lead to additional difficulties in getting compensation from the performing carriers.

3. As shippers, freight forwarders will be liable *without* any right to limit liability for incorrect information to the carriers (Art. 79.2(b)), although the carriers enjoy the right to limit *their* liability for incorrect information to the shippers ("any breach").

4. Freight forwarders are frequently engaged in various capacities in the seaports. Such activities will expose them to liability as "maritime performing parties" (Art. 1.7 and Art. 19). At present, stevedores and warehousemen enjoy freedom of contract allowing them to escape liability, at least to the extent that their customers are or could be covered by insurance for loss or damage. In countries where stevedoring and warehousing enterprises are owned or controlled by governments or municipalities, any moves towards ratification of the Rotterdam Rules would for this reason presumably be strongly opposed in order to avoid escalation of liability insurance premiums. Multipurpose cargo terminals engaged as distribution centres in logistics operations would strongly oppose a sort of maritime law injection into their business, which presumably will be governed by more sophisticated liability regimes.

5. The administrative burden of freight forwarders will increase significantly with any entering into force of the Rotterdam Rules.

    5.1 FIATA has consistently opposed the so-called maritime plus (wholly or *partly* by Sea) and opted for a convention port-to-port. Although Article 26 permits the liability in some cases to be resolved by mandatory provisions of international instruments (not national law even if mandatory!) relating to non-maritime transport, this does not solve the problem where, at the time of the conclusion of the

contract, the mode of transport to be used is not yet known ("unspecified transport"). Surely, it is unacceptable having to look into the after-events (i.e. the way in which the transport was actually performed) in order to decide which rules apply to the contract. Suffice it to mention the impossibility to apply such a methodology to liability for non-performance! How should one decide which of all the hypothetically applicable conventions listed in Art. 82 apply in order to ensure that the correct transport document is issued? Also, it may well be inappropriate to apply the rather low limits of liability of the Rotterdam Rules to cases where it cannot be established where loss or damage occurred during a carriage which involves different modes of transport (so-called "concealed damage").

An escape from the Rotterdam Rules may well be permitted for multimodal transports or contracts by logistics service providers, when the maritime transport segment is over-shadowed by other elements. But, again, the uncertainty created by the maritime plus of the Rotterdam Rules is disturbing. In the unlikely event that the Rotterdam Rules gain worldwide acceptance, which policy would FIATA prefer with respect to the FBL and the UNCTAD/ICC Rules for Multimodal Transport Documents? Should FIATA work under the hypothesis that multimodal transports, or logistics transport operations, are of their own kind and remain unaffected by the Rotterdam Rules? Or should FIATA use the perhaps more prudent alternative to wait and see if the UNCTAD/ICC Rules will be amended?

5.2 The introduction of a "joint and several liability for documentary shippers" (Art. 1.9 and Art. 33) and "real shippers" will call upon freight forwarders to exercise due diligence in avoiding mentioning exporters as "shippers" in the transport document when they have been selling on the delivery terms EXW, FCA or FOB. In these cases, sellers/shippers are *not* under a duty to contract for carriage. Needless to say, such sellers would like to avoid being trapped into a joint and several liability (Art. 33.1) with their buyers (the real shippers), particularly when they have protected themselves by getting paid upon shipment under a documentary credit. This is how they protect themselves against the risk of insolvency of their buyers and they certainly do not expect to incur that risk by a backlash from the carrier when his contracting party – the real shipper – becomes insolvent.

5.3 A most cumbersome – and indeed absolutely unacceptable – option has been accorded to carriers to issue *negotiable* transport documents or electronic equivalents and nevertheless retaining the right to deliver the goods without getting the *negotiable* transport document in return (Art. 47.2). So, the Rotterdam Rules accept that a document is called "negotiable" when in fact it is not! It goes without saying that, if the Rotterdam Rules come into force, freight forwarders must never issue such documents themselves. Also, they must ensure that such documents are *not* tendered to their customers by carriers. Indeed, such documents may well constitute important tools in maritime fraud, when a seller fraudulently sells the goods to a second buyer who could convince the carrier that he is entitled to get the goods,

although he is unable to tender an original Bill of Lading, leaving the unfortunate first buyer with a right to get *limited* (cf. "any breach" above) compensation from the carrier. Freight forwarders must take care not to be associated with such malpractice with the risk of being held liable through "guilt by association".

6. There are benefits provided by the Rotterdam Rules compared with the Hague and the Hague/Visby Rules in the deletion of the defence of error in the navigation and management of the ship, the increase of the limits and the addition of rules on electronic procedures (the "electronic record"). But such benefits could be provided in a much easier way, e.g. by amendments of or Protocols to the Hague Rules, the Hague/Visby Rules or the 1978 Hamburg Rules.

7. Summing up, the shortcomings of the Rotterdam Rules explained in this position paper should be more than sufficient to cause governments not to ratify the Rotterdam Rules.

CLECAT

european association for forwarding, transport, logistic and customs services

Position Paper

The European Voice of Freight Logistics and Customs Representatives

Brussels, 29th of May 2009

RE: 2008 - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the "Rotterdam Rules"[1]

CLECAT represents European freight forwarders, logistics service providers and Customs agents. While neutral towards all transport modes, our Members are amongst the main users of maritime transport (or shipping) services, they would thus be directly affected by the possible entry into force of the above mentioned international conventions, which we will refer to as 'Rotterdam Rules' (RR) hereinafter.

CLECAT has been taking a strong interest in the UNCITRAL process in recent years, and has been regularly updated through FIATA, the international organisation representing freight forwarders, which devoted time and energy in monitoring the process on behalf of its Members.

Whereas the appreciation in other areas of the world may be aligned to the following observations only in parts, the message that came from the European interests represented in our sector was however clear and unmistakable: shadows prevail. For this reason CLECAT took the view to provide the public, EU institutions and European governments with the following observations. We hope these are helpful in the decision on whether to ratify this international legal instrument or not.

The first observations that our Members make is that many of the new features, if compared with the old liability schemes of the Hague rules, the Hague-Visby rules or the Hamburg rules seem to provide hardly any additional benefit. The fact that this convention developed into an extremely complex legal instrument ought to find precise and measurable trade-offs, which are unclear and uncertain.

Implementing the RR is in our view a step into a very extended grey area of uncertainty, both in legal and judicial terms. The risk is that these uncertainties will end up adding a new liability regime side by side with existing ones, thus increasing confusion, rather than mitigating it. Our Members are also concerned that the extreme complication of these rules may lead to a number of local or regional interpretations, which is possible according to the terms laid out in the convention. This would certainly not lead to harmonisation or simplification.

Several benefits for maritime carriers are provided by the RR – such as the right to limit liability not only for loss of or damage to cargo but for any breach (Art. 59.1), and no liability for delay unless agreed (Art. 21) – but the RR do not work in a similarly advantageous way for shippers or freight forwarders, especially when acting as contractual carriers or when compensation from the performing carrier is to be sought. Whilst the principle of "freedom of contract" is normally

[1] http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html

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welcome, it is with a split heart that one has to accept the idea of volume contracts (Art. 1.2 and Art. 80), which does not come with sufficient boundaries to protect the interest of the customer.

In addition to the above remarks of a general nature, some of our specific concerns are the following:

- The RR are far too complex (much longer and richer in exceptions than any other existing transport convention) to be readily understandable for users and third parties, including brokers and insurers. Our perception is that insurance and protection will become more expensive, if these rules are adopted;
- The limitations to liability seem to work in one direction only, without offering shippers or freight forwarders any mitigation;
- Multipurpose cargo terminals engaged as distribution centres in logistics operations would strongly oppose a sort of maritime law injection into their business, which presumably will be governed by more sophisticated liability regimes that may be incompatible with the rules;
- We also expect that in those states, where stevedoring and warehousing enterprises are owned by the governments, the RR will not be ratified without exceptions, in order to avoid an escalation of liability insurance premiums;
- The Convention is only a partial network system whereas freight forwarders always sought a full network system. This means that only mandatory conventions override (such as CMR), but private conditions do not[2]. Private conditions are however very frequent and have served the industry without complaint for decades. Eventually the confusion created by conflicting conventions and/or private contractual rules may escalate into mind-fraying litigations in conflicting jurisdictions;
- The ship-owner can probably contract out under the volume contract exemption most of the time, whilst the forwarders are far less likely to be able to do so and could get into a situation, where they are sued much more frequently than the ship-owner, because it has contracted out of the liability regime. At best this would lead to higher liability premiums, but it might well lead to insurers being unable to accept the contract. This would leave both freight forwarders and their customers without protection, sometimes unwittingly.
- The carriers have been burdened with the cumbersome requirement to issue negotiable transport documents (or electronic equivalents), nevertheless they retain the right to deliver the goods without obtaining the negotiable transport document in return (Art. 47.2). This is seemingly the most contradicting provision: the RR accept that a document is called "negotiable" when in fact it is not! This feature is bound to create conflict and complicated international litigations, it may also be a serious problem with regards to payments and letters of credit.

These are the main reasons for our Members to urge the EU institutions and the European governments **NOT** to ratify this convention.

The entry into force of this convention would make the supply chain more complex and unwieldy and contribute to foster protectionism instead of free trade. We do not see any advantage in substituting the existing rules with these ones. The trading community must have the courage to recognise that this convention is not likely to be of service to the international trade, despite the

[2] If for example goods were shipped on wheels from Germany to the UK, CMR would apply, but if the goods were in a box and shipped off wheels from Calais port to the UK, the RR would apply from Calais port edge to the UK and CMR from Germany to Calais port edge. What operators would do in this situation now is sub-contract on CMR privately, so CMR covers door to door, but the RR would override the off wheels section as it is not a mandatory applicable convention. The result is that operators would be prevented from actually achieving back to back cover.

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initial good intentions, all the work done and the commendable opportunity to reflect on modern logistics that this exercise has provided.

We believe that all this work would not be wasted, if one of the first lessons learnt for future work was that an acceptable transport convention should be

- as simple and universal as possible,
- with few and carefully weighed exceptions,
- serving all parties in contract without interfering with third parties, and
- last but not least, be realistic in terms of liabilities and limitations that must be mirroring other parties'.

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THE ROTTERDAM RULES – SOME CONTROVERSIES

STUART BEARE

It is not possible to draft a convention which contains 96 articles and updates a regime first established ninety years ago without attracting some controversy. Some provisions in the Rotterdam Rules have not appeared before in an international convention and inevitably the need for regulating these matters will be questioned. Provisions that change familiar provisions in the existing regimes will provoke questions about the need for such changes.

This morning I attempted to explain why there was a need to change the existing regimes to take account of the major changes that have taken place in the industry over the past fifty years and I highlighted some of the provisions in the Rotterdam Rules that reflect these changes. Not all of these provisions are seriously controversial, but the general criticism has been made that the Rotterdam Rules are too long and too complex. However by adopting the CMI Draft as the basis for its work, UNCITRAL Working Group III implicitly set itself the task of preparing a comprehensive instrument and the complexity of the Rotterdam Rules to a large extent reflect the complexity of the modern industry.

I shall begin by concentrating on two topics that were not the subject of detailed presentations this morning.

I mentioned **door-to-door transport** in the context of my general remarks about the "container revolution". As I pointed out, in the container trade the carrier's period of responsibility under the contract of carriage often extends to cover some carriage by road or rail before or after the carriage by sea. This used to be referred to as combined transport, which is not necessarily strictly door-to-door, that is, for example, from the seller's factory to the buyer's warehouse.

Three principal areas of controversy arose during the negotiations in Working Group III.

When the instrument being drafted by the CMI was considered at its Conference in Singapore in 2001, it was decided that it should cover the possibility that it would apply also to other forms of carriage associated with

the carriage by sea. This decision was reflected in article 4.2.1 of the CMI Draft. The UNCITRAL secretariat however considered that this was going beyond its brief and article 4.2.1 was placed in square brackets in the Preliminary Draft Instrument placed before Working Group III.

The first question, therefore, was whether the Convention should apply to door-to-door contracts at all, or whether it should be a purely maritime convention. Because many contracts in the container trade are structured on a door-to-door basis, it was felt that it would be artificial to restrict the legislative treatment of such contracts to the port-to-port carriage and in any event there was no demand from the industry for a third restricted regime. No serious argument was advanced for adopting a uniform, as opposed to a network, system, but the network system adopted is a limited system; the provisions of another convention which may prevail are those directed to carrier's liability, limitation of liability and time for suit. It was emphasised that the Convention was to be essentially maritime – maritime plus - and for the Convention to apply an international sea leg had to be included. It was suggested that this should be emphasised by referring to the ancillary or incidental nature of the land carriage, but this proved impossible to draft with any precision.

The Convention has been criticised because it does not apply when there is no international sea carriage and is therefore not fully multimodal. But this was never the intention and arguably it would have been outside Working Group III's brief to draft such a convention. Such a convention is the aspiration of many and, indeed, the United Nations Convention on International Multimodal Transport of Goods 1980 is such a convention, although it does not establish a fully uniform regime. However only eleven states have ratified it and it is not yet in force. The Rotterdam Rules do not preclude a further attempt, but experience shows that the task will be difficult.

The second area of controversy was the scope for conflict with other conventions, such as CMR, COTIF/CIM and Montreal. This problem has been dealt with in two ways. First article 26 (article 4.2.1 in the CMI Draft) refers to a hypothetical contract, so it is not necessary to look at the scope provisions of the other convention[1] with which there might possibly be a conflict. Second article 82 deals with specified potential areas of conflict where other conventions may govern carriage by sea.

These attempts to mitigate, if not wholly eliminate, the problem have been criticised on the grounds that uncertainty still remains and uncertainty will lead to increased litigation. However the object of such litigation is usually to obtain a more favourable limit of liability. It has been pointed out

[1] Article 26 does not in fact refer to "another convention"; it refers to "another international instrument" which could include an EU Regulation or Directive.

that door-to-door transport mostly involves containerised packaged goods.[2] Packages with a weight below about 109kg will receive more favourable treatment under the Rotterdam Rules than under the other conventions I have mentioned because article 59 provides for a limit of 875 SDR per package. Packages with a weight in excess of 109kg are exceptional. I think that lawyers may be disappointed.

The third area of controversy concerned national law. The question was whether article 26 should also provide that the relevant provisions of mandatory national law should prevail over the provisions in the Rotterdam Rules. This question had been left open by the CMI because "national law" had been placed in square brackets in article 4.2.1 in the CMI Draft. Working Group III finally decided that including national law would make for uncertainty. National laws differed from state to state, they could always be changed and they could be difficult to ascertain.

I now turn to maritime performing parties and in particular **terminal operators.** I explained this morning that the Rotterdam Rules drew a clear bright line 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, who are not. Professor Fujita then developed this subject in his presentation. A terminal operator falls within the definition of a "maritime performing party" and is thus jointly and severally liable with the carrier under the Rules for loss or damage insofar as the occurrence causing such loss or damage meets the requirements of article 19(1)(b). Terminal operators have no liability under the Hague, Hague-Visby and Hamburg Rules (a terminal operator is not an "actual carrier") and they have expressed some concern at being brought within the scope of a mandatory regime.[3] As there is usually no direct contract between a terminal operator and the shipper, or goods owner, the issue concerns claims by the shipper or goods owner against the terminal operator in tort. At present few such claims are made because the claimant usually has a more straightforward claim under the contract of carriage against the carrier. I doubt whether the Rotterdam Rules will change this. However if a claim is made against a terminal operator under the Rules, the terminal operator will be entitled to rely on the defences and limits of liability afforded by the Rules, the carrier will be jointly liable, thus giving rights to contribution, and it will remain open to the terminal operator to seek an indemnity from the relevant shipping line in respect of liabilities in excess of

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2 See Gertjan van der Ziel "Multimodal Aspects of the Rotterdam Rules" *CMI Yearbook 2009 Athens II* 301.

3 The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade 1991 is not yet in force.

its liability under its terminal handling agreement. Whilst I can understand terminal operators' natural reluctance to be drawn into a mandatory regime, I hope that on closer analysis they may appreciate that the advantages counterbalance, if not outweigh, the disadvantages.

Now I will say something about the topics that are not at present covered by any international convention. Chapter 3 on electronic transport records is, I believe, largely welcomed. The chapters in the CMI Draft on freight and rights of suit were deleted by Working Group III. Some have argued that the chapters on delivery of the goods (chapter 9), the rights of the controlling party (chapter 10) and the transfer of rights (chapter 11) should also have been excluded, or their subject matter treated in some other way. I do not believe the objective of chapter 10 to be controversial, although there has been some criticism of the detail. However the control clause in the CMI Uniform Rules for Sea Waybills is important and the Rotterdam Rules apply to non-negotiable documents. Moreover Justice Johanne Gauthier explained the importance of these provisions in the electronic context.

Delivery of the goods is another matter. It gave rise to much controversy in Working Group III and the final text of article 47 was not settled until the Commission session in June 2008. Chapter 9 attempts to deal with two long-standing problems which the CMI was urged by the industry to grapple with in preparing the CMI Draft. It must be said that if there was a simple solution to these problems, it would have been found long ago. The first is the failure of the receiver to come forward and claim the goods at the discharge port. The second is the non-availability of the bill of lading at the discharge port. A convention cannot deal with the underlying causes of these problems, such as a bankruptcy in the sale and purchase chain, a falling market, or long credit terms. At present the first problem is often dealt with by an application to the local court to discharge and store the goods, or to sell them, for the account of the goods owner, but this is not always practicable. The second problem is often dealt with by a letter of indemnity, but this solution has well known shortcomings.

Article 43 of the Rotterdam Rules imposes an obligation under the Convention on the consignee to accept delivery and the Rules go on to set out provisions designed to protect the carrier if the carrier complies with them. These provisions have been described as a legal minefield. I accept that they are complex, but this is partly because three types of transport document must be provided for.

Article 47(2) offers a contractual opt-in solution to the problem of the non-availability of a negotiable transport document. It remains to be seen whether such an opt-in provision will prove acceptable to the industry and to financing institutions that rely on the transport document as security. The Rules offer formulae that commercial parties are free to take advantage of if they wish. If they do not, current practices will no doubt continue to be followed.

These provisions relating to the delivery of goods are controversial, but, unlike the provisions relating to door-to-door transport, to which I have devoted the greater part of this short presentation, I do not believe that they are fundamental to the international acceptance and success of the Rotterdam Rules.

THE NEED FOR CHANGE AND THE PREPARATORY WORK OF THE CMI

STUART BEARE

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

[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.

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 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 1960s[4]. New deep water ports were then needed to accommodate the new container ships and

[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).

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.

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.

5 *Times* 6 November 2006.

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

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

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 industry [8] 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 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.

8 See the "Genwaybill" issued by BIMCO.

AN ANALYSIS OF THE SO-CALLED MONTEVIDEO DECLARATION

THE FACTS

(The text of the "Montevideo Declaration"(MD) appears inside the boxes below, while the italicized text that follows each box addresses each concern raised. Note that the English translation of the MD found inside the boxes below is the one provided by the drafters of the MD, except for the first sentence of paragraph 14, which had been omitted in the translation provided by the drafters, and for reference to the Spanish terms in paragraph 6, the inclusion of which appears to be fundamental to understanding the concern expressed.)

A group of citizens and experts in Maritime Law, who are against their respective countries ratifying and becoming parties to the so-called "Rotterdam Rules" ("Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea", which was opened for signature on 23rd September 2009 in Rotterdam), have agreed to issue the following Declaration:

1. The aforementioned Convention is seriously detrimental to import and export firms in Latin American countries, almost all of which are dependent on international carriage by sea.

If the Rotterdam Rules were "inappropriate" for shippers and consignees in Latin America, they ought to be similarly "inappropriate" for shippers and consignees in other continents, but it would appear that this is not the case for North America (or at least for the United States) or for Africa, while in Europe the views of shippers are divided. In any event, the reasons for this opinion ought to be stated in subsequent points so that they could be addressed, but no reasons for the view expressed have been given in this paragraph.

2. Not only does it fail to provide equity and reciprocal benefits in international trade but in itself the Convention constitutes a highly complex juridical instrument with a regulatory approach which is full of references from one provision to another and contains definitions that are tautological. Furthermore, it introduces a maritime neo-language that invalidates a great amount of international case law created since 1924 and which, due to its deficient legislative technique, gives rise to very different interpretations.

a) The Rotterdam Rules are "highly complex": *There is no doubt that the Convention is more complex than the Hague-Visby Rules and the Hamburg Rules, even though it may also be stated that the Hamburg Rules are more complex than the Hague-Visby Rules. But this is due, on the one hand, to the fact that the Rotterdam Rules attempt to ensure uniformity in areas of transport law not covered by the previous conventions (e.g. electronic equivalents to paper documents, right of control during carriage, delivery) and, on the other hand, to the fact that the Rotterdam Rules try to better regulate areas already regulated in the previous conventions (e.g. the obligations and liability of the shipper).*
One should also keep in mind that the complexity of a convention should not be assessed by simply counting the number of articles or the length of each provision. For instance, the provision of the contracts excluded from the scope of application of the Rotterdam Rules is much more "complex" compared with the Hague and the Hague-Visby Rules. However, is the situation improved if the article simply states, along the lines of the Hague and the Hague-Visby Rules, that "This Convention does not apply to charterparties"? Such a simplified text would leave much scope for national courts to decide whether or not to apply the Convention, which would in general lead to a much reduced degree of harmonization. A balance must be struck between "lengthy or complex" and precision and predictability.

b) The Rotterdam Rules are 'over-regulatory': *The question must be asked whether it has really been a mistake to regulate additional areas of transport law. Is this approach really adversely affecting shippers and consignees?*

c) The Rotterdam Rules are full of cross-references between provisions: *Indeed, there are many cross references, but, with respect, that is an appropriate legislative technique widely adopted and accepted both at international and national levels.*

d) There are in the Rotterdam Rules "tautological definitions": *The only tautological definitions appear to be those of "non-liner transportation",*

"nonnegotiable transport document" and "non-negotiable electronic transport record". This approach was used to avoid creating uncertain empty areas between "liner transportation", clearly defined, and transportation other than liner transportation (the same reasoning would apply to the other two definitions). In any event, the meaning of that definition is quite clear and should not cause confusion.

e) The Rotterdam Rules introduce "a maritime neo-language that invalidates a great amount of international case law created since 1924 and which, due to its deficient legislative technique, gives rise to very different interpretations": *It is not clear to which terms reference is being made; if reference is made to "right of control", indeed it is new, but that is due to the fact that that right, which is exercised in practice, had not previously been the subject of legislative regulation and therefore it is obvious that the jurisprudence on the Hague-Visby Rules is of no avail. As to whether the legislative technique of the Rotterdam Rules is deficient, perhaps it should be explained in what matter it is seen to be deficient. Furthermore, a review of the travaux préparatoires indicates that the drafters intended that the Rotterdam Rules actually preserve a great deal of the terminology used in the Hague, Hague-Visby and Hamburg Rules so as to preserve as much of the existing case law and doctrine as possible.*

3. It represents a retrogressive step in the standards and practices prevailing in multi-modal carriage, since it excludes other means of transport whenever shipment by sea is not involved – for it only regulates the marine carriage leg and associated transport (maritime plus). Moreover, it is not *per se* a convention of universal and uniform scope, as it allows exemptions to its own provisions, for example, in the case of "volume contracts". In addition, it leaves the door open for states not to ratify the rules on Jurisdiction and Arbitration (Chapters 14 and 15) which means these provisions are not compulsory for contracting parties.

a) Multimodal carriage: *The Rotterdam Rules do not intend to replace the United Nations Convention on International Multimodal Transport of Goods or UNCTAD/ICC Rules for Multimodal Transport Documents. Rather, they replace the Hague and Hague-Visby or the Hamburg Rules. It is not correct to see Rotterdam Rules as an "imperfect" multimodal transport law convention. It should be understood as an expanded maritime transport law convention ("maritime-plus"), and in this sense, they are clearly not "a step backwards".*

b) Volume contracts: *The Rotterdam Rules allow a certain degree of flexibility for the parties in connection with "volume contracts", which must be freely negotiated. The issue is not whether broader uniformity is desirable or not, but instead to what extent the mandatory rules of the carrier's liability regime should govern all contracts of carriage, regardless of the level of sophistication and bargaining power of the contracting parties.*

c) Jurisdiction and Arbitration: *Each state has its own interests with respect to the preferred approach to jurisdiction and arbitration rules, and an acceptable compromise of those national interests is not easily found. If the Rotterdam Rules did not contain opt-in chapters on jurisdiction and arbitration, the likely number of ratifications would be substantially decreased. It should be noted that the rules on jurisdiction and arbitration differ considerably from state to state, and providing the opportunity for at least some level of harmonization in these important areas cannot be seen as "a step backwards".*

4. It introduces expressions that in juridical terms bear little or no significance to transportation contracts, such as: volume contract, regular or non-regular liner transportation, performing party and maritime performing party. These terms change neither the concept nor the purpose of contracts of carriage.

Article 1 of the Rotterdam Rules introduces a great number of definitions which are, without exception, relevant in applying and understanding the Convention. The comments below are not comprehensive, but they are intended to demonstrate the need for definitions in general and the need for the definitions mentioned in paragraph 4 of the MD, in particular.
To the extent that any definition has to do with the "scope of the contract of carriage", that definition is of great relevance.
First, in order to understand the scope of application of the Rotterdam Rules, the definition of "contract of carriage" in article 1(1) is of importance. That concept is then further specified in articles 5 and 6. The same is true concerning the definitions in Article 1(3) and 1(4) on "liner transportation" and "non-liner transportation".
The aim of the Rotterdam Rules is to maintain at least the same scope of application as currently exists in the case of the Hague Rules and the Hague-Visby Rules, but to make these provisions even clearer than before. While the issuance of a bill of lading is the key underlying factor of the scope of application of the Hague and Hague-Visby Rules, in reality, other factors like the nature of the trade plus certain contractual and documentary aspects provide a more precise method of appropriately defining the scope of application of the Convention.

As such, the scope of application provisions of the Rotterdam Rules look *different from the Hague and Hague-Visby Rules. But, in their application, there are no dramatic differences between the present major regimes and the Rotterdam Rules. In fact, cargo interests will have greater protection under the Rotterdam Rules than under the Hague or Hague-Visby Rules due to the fact that the application of the Rotterdam Rules is not tied to, and thus restricted by, the issuance of a particular type of document.*

The definition of "volume contract" in article 1(2) is absolutely necessary. First, it clarifies that the volume contract is a contract of carriage and that the Rotterdam Rules might or might not be applicable due to the separate scope of application provisions. Second, volume contracts have a special status within the Rotterdam Rules pursuant to article 80, which allows contracting parties, and in some cases, third parties, to deviate from the mandatory framework of the Rotterdam Rules under certain preconditions enumerated in that provision. Third, the definition of volume contract is relevant for choice of court agreements as specified in article 67.

As the Rotterdam Rules are of "maritime plus" nature, meaning that the Rules can be applied in pure sea carriage and also in sea carriage combined with another mode of transport, it was necessary to define the "performing party" in article1(6). The liability of a non-maritime performing party, for example, a road haulier or road carrier, is not regulated in the Rotterdam Rules. However, it is necessary to define these parties, for example, to specify when the goods have been received for carriage and when they have been delivered at the destination. In this context, the performing party plays a role as found in article 12 of the Rotterdam Rules, which defines the period of responsibility of the carrier. Another example of the need for such a definition is that the vicarious liability of the carrier covers any *performing party in accordance with article 18 of the Convention.*

The status of the "maritime performing party", a sub-category of the performing party and defined in article 1(7), is also necessarily regulated, but separately from the performing party. The maritime performing party carries a kind of independent liability as regulated in article 19. It is natural that the Rotterdam Rules might be applicable to such a maritime performing party, as it is a question of sea carriage or a sea carriage link as well. Further, jurisdiction issues that relate specifically to the maritime performing party are regulated in article 68 of the Convention.

5. It introduces the concept of the "documentary shipper", which is different from the shipper, although the Convention itself admits that this person is not in fact the other party to the contract of carriage. It also removes the concept of the transit agent or cargo transit agent.

a) Documentary shipper: *The legal status of the person who appears in the transport document as the shipper but is not really a contracting party is not clear under the previous conventions or under applicable national laws. The Rotterdam Rules address this issue and provide a uniform solution for this situation. The "documentary shipper" is nothing more than a shorthand way of referring to such legal situations, and does not intend to bring any substantial change for the conceptual framework with respect to the contracting parties.*

b) Freight forwarder and cargo forwarding agents: *The Rotterdam Rules did not "remove" the concepts of freight forwarders ("transit agents") or cargo forwarding agents ("cargo transit agent"). These concepts were not used in the Hague, Hague-Visby or Hamburg Rules and the Rotterdam Rules simply continue this tradition. The reason why the Rotterdam Rules do not use these concepts is that freight forwarders or cargo forwarding agents are involved in a contract of carriage in a different capacity depending on the particular situation. Because freight forwarders or cargo forwarding agents play different roles depending on the cases, the Rotterdam Rules regulate them based on the roles they play (carrier, shipper, maritime performing party, etc.). For instance, if a freight forwarder undertakes to carry the goods to its customer, it is a carrier under the Rotterdam Rules. If a freight forwarder enters into a contract with a sub-carrier in its own name, it is a shipper under the Rotterdam Rules. If a freight forwarder enters into a contract with a carrier on behalf of a customer (as an agent), it is not the carrier or the shipper under the Rotterdam Rules and is not liable as such (nor is it usually a "maritime performing party").*

6. It removes the terms "consignatario"[1] and endorsee of the cargo[2] which are time-honoured expressions employed for almost two centuries in international legislation, case law and practice. These terms are replaced by others with no juridical significance such as transport document holder, "destinatario", right of control and controlling party.

The importance of the definitions in the Rotterdam Rules has already been discussed, and all of the terms referred to in the last sentence of paragraph 6 of the MD have a definition in the Rotterdam Rules that clarifies their precise meaning. This simple fact disproves the suggestion that such terms are legally meaningless or have no juridical significance.

It is true that there are indeed some terms that are new in the Rotterdam Rules

[1] The English translation provided by the drafters of the MD translates this word as "cargo broker."

[2] The English translation provided by the drafters of the MD translates this word as "cargo agent".

as compared with existing maritime carriage conventions, such as the "right of control" and the "controlling party". However, these terms, as previously stated, are not only already known in international practice, they have been carefully defined and their implications clearly laid out in the Convention.
The rest of the terms referred to in paragraph 6 of the MD, are not only defined in the Rotterdam Rules (Article 1, pars. 10 and 11), they are by no means new in contract of carriage terminology. The term "destinatario" is already widely used in some national and international instruments, such as in the Agreement on International Multimodal Transport between the States Parties to the MERCOSUR, in Decision 399 of the Andean Community on Road Carriage, or in the Spanish version of the 1999 Convention for the Unification of Certain Rules for International Carriage by Air. "Destinatario" is considered clearer than "consignatario", precisely because of the fact that this latter term is ambiguous and has created some confusion, for it can refer to persons other than the one entitled to claim delivery of the goods at destination under the contract of carriage (for instance, to the cargo agent authorized by the consignee to collect the goods from the carrier). Likewise, the term "holder" of the transport document is very widely employed in much national legislation and in the existing international rules on the contract of carriage by sea (e.g., in the Hamburg Rules). In such rules, and certainly in the Rotterdam Rules, the term comprises any endorsee of the bill of lading (and to that extent "endorsee of the cargo").
For the foregoing reasons, it cannot be stated that the terminology and the concepts relied upon by the Rotterdam Rules will entail a dramatic change with respect to previously-used terms. Much to the contrary, they are intended to preserve terms and concepts already used, while increasing clarity, and introducing some new concepts that are thought to improve the law applicable to the contract of carriage.

7. It removes the term bill of lading, also a traditional concept used in all international legislation, case law and practice, to be replaced by vague expressions such as transport document or electronic transport document.

The Rotterdam Rules have a much wider scope of application than the Hague and Hague-Visby Rules. Thus, as noted above in response to paragraph 4 of the MD, the Rotterdam Rules apply irrespective of whether a bill of lading or some other transport document (or no transport document at all) has been issued. Consequently, they apply to both bills of lading and other types of transport documents, such as sea waybills. It was necessary, therefore, to use the generic term "transport document" rather than the narrower concept "bill of lading". This is similar to the approach of the Hamburg Rules. The term is qualified and given a more precise content in both the definitions

(articles 1(14)-(16)) and in the substantive rules, e.g. article 46, so that the substantive rule will depend upon which type of document is issued, e.g. a bill of lading, a sea waybill, etc. The regulation in the Rotterdam Rules of the electronic equivalent of paper documents in maritime transport is a novelty as compared with the existing conventions and a new term therefore had to be inserted. The term "electronic transport record" is in line with other conventions on e-commerce, and the introduction of this regulation is one of the most important aspects of the Rotterdam Rules.

8. It errs in stating that the replacement for the Bill of Lading (namely the transport document) is the contract of carriage when it is really nothing more than evidence of the existence thereof. Furthermore, its other functions such as a mate's receipt for merchandise on board and credit note are ignored.

The assertion in paragraph 8 seems to be based on a misapprehension; the term "transport document" comprises more than the bill of lading, also including, for example, sea waybills. The term is defined in article 1(14), pursuant to which paragraph (b) stipulates that the transport document can either evidence or contain the contract of carriage. Further, under article 1(14)(a), the transport document must *evidence the receipt of the goods. Moreover, a transport document may be negotiable as defined in article 1(15). Consequently, a negotiable bill of lading would be deemed a negotiable transport document under the RR and be subject to, inter alia, article 41(b)(i) on the evidentiary effect of the contract particulars, and article 47 on the delivery of the goods. The traditional functions of the bill of lading are, thus, maintained in the Rotterdam Rules.*

9. It allows special clauses to be inserted into the transport document, thus altering the current one, which is only admissible in freely negotiated charter parties.

While it is not completely clear what this paragraph of the MD is complaining of, the issuance and content of the transport document is regulated in chapter 8 of the Rotterdam Rules. Any further clauses in the transport document will be void if they excluded or limited the carrier's obligations or liability, or increased the shipper's obligations or liability as set out in the Rotterdam Rules, cf. article 79. This situation is no different from that under the current conventions.

10. It accepts the validity of adhesion clauses incorporated into transport documents that attribute exclusive jurisdiction to the courts that the carrier may choose. In practice, this means that claimants will be bound always to bring suits in the courts where the carrier has its domicile, thus excluding the courts of States that are users of transportation services. In particular, this will prevent a shipper claiming breach of contract from having recourse to the courts in the place of delivery.

First, it should be recognized that chapter 14 of the Rotterdam Rules is subject to "opt-in" by a Contracting State, and that article 67 applies only if a Contracting State makes a declaration to apply the provisions in chapter 14. If a State does not support the rule on exclusive jurisdiction clauses under Rotterdam Rules, it should simply ratify the Convention without additional action.
If a State does opt into the chapter on jurisdiction, article 67 allows an exclusive jurisdiction clause only in limited circumstances. First, an exclusive jurisdiction clause is allowed only *in volume contracts (article 67(1)(a)). In all other cases, claimants always have the option to bring an action in the places listed in article 66. Second, even for the exclusive jurisdiction clause contained in a volume contract, article 67 requires several conditions for its validity. The requirements are even more stringent for the clause being valid vis-à-vis third parties (article 67(2)).*
Therefore, it is not at all accurate to state that the Convention "accepts the validity of adhesion clauses incorporated into transport documents that attribute exclusive jurisdiction to the courts that the carrier may choose".

11. It does not apply to transport documents or bills of lading issued under charter parties relating to the whole or part of a ship, which is a standard commercial procedure with many years of untroubled application behind it.

At the preparatory stage of the Rotterdam Rules, the States negotiating the text decided early on that the bill of lading should not play a prevalent role in the regime to the same extent as they do in the Hague and the Hague-Visby Rules. It was agreed there was no commercial need to emphasize the legal role of this particular document.
This approach does not mean, however, that the Rotterdam Rules have made bills of lading irrelevant; rather, the particular term "bill of lading" is simply

not reproduced. When reading the definition of "negotiable transport document" in article 1(15) of the Rotterdam Rules, it is clear that the bill of lading is still regulated as a negotiable transport document. The electronic alternative is defined in article 1(19).
Importantly, the bill of lading or a negotiable transport document is not the decisive factor in determining the scope of application of the Convention,[3] *which is mainly regulated in articles 5 to 7.*
The Rotterdam Rules are mandatory, unless otherwise mentioned in a particular provision, as further specified in article 79. This means that once the Rotterdam Rules apply to the contract of carriage, the mandatory protection in the regime operates to the benefit of the contracting parties and any third party who has a legal interest in the goods carried or to be carried.
If the contract of carriage is not covered by the Rotterdam Rules, the situation is different. For example, a voyage charter party used in non-liner trade does not fall under the scope of application of the Rotterdam Rules. It is thus open to the contracting parties, the charterer and the owner, to agree upon terms, including liability in case the goods are lost or damaged. National law might have restrictions, but in this case the restrictions do not derive from the Rotterdam Rules. This is exactly the same principle as found in the Hague and Hague-Visby Rules.
Once the contract of carriage is outside the scope of application of the Rotterdam Rules, it means that the legal status of a third party that has an interest in the goods must be discussed and solved. The approach in the Hague and Hague-Visby Rules is that any bill of lading issued under a charter party that regulates the relations between the carrier and the holder makes the Hague or the Hague-Visby Rules applicable in this particular relationship, as further specified in article I (b) of the Hague and Hague-Visby Rules.
In UNCITRAL, States discussed whether the protection of the third party in such a situation should be combined with a particular transport document or whether the status of the third party would be decisive. The latter view prevailed. According to article 7 of the Rotterdam Rules, certain third parties are protected by the Rotterdam Rules even if the basic contract of carriage, such as a voyage charterparty in non-liner trade, is outside the scope of application of the Rotterdam Rules. These third parties are specifically mentioned and they are: the consignee, controlling party or holder (that is not an original party to the charterparty). All these third parties are defined in article 1 of the Rotterdam Rules, see article 1(10), 1(11) and 1(13)

[3] A transport document or an electronic transport record might be relevant in the exceptional situation regulated in paragraph 2 of article 6 of the Rotterdam Rules. This provision became necessary in order not to diminish the scope of application of the Rotterdam Rules as compared with the Hague and Hague-Visby Rules.

respectively. Looking at the definition of "holder", it becomes clear that the holder of a bill of lading is covered even if this is not separately mentioned in the Rotterdam Rules. As a matter of fact, the protection of third parties is wider under the Rotterdam Rules as compared with the Hague and the Hague-Visby Rules. Possession of a bill of lading is no longer necessary as long as the third party has the status of any of those groups of persons specifically mentioned in article 7 of the Rotterdam Rules.

12. It leaves the carrier free to decide whether to take goods on board or destroy them if such merchandise may at any time during the course of shipment become dangerous. It also relieves the carrier of liability for any natural loss, whether of weight or volume, without laying down specific limits for each type of merchandise. Moreover, it permits carriers to deviate without losing rights of exemption or limitation of liability due to such deviation.

a) Freedom of the carrier to reject or destroy goods: *Article 15, which grants the carrier the right to decline to receive or to destroy or render harmless goods, merely confirms principles that exist in the present conventions: see article 4.6 of the Hague-Visby Rules and article 13(2)(b) of the Hamburg Rules.*

b) Exoneration of the carrier from liability for loss due to natural wastage: *Article 17(3)(j) reproduces article 4.2(m) of the Hague-Visby Rules but, as is the case with all other events listed in that paragraph, is* not *an exoneration: proof of such an event or circumstance merely results in a reversal of the burden of proof.*

c) Right of deviation: *Article 24 does not allow the carrier to deviate, but merely provides that when applicable law provides that deviation constitutes a breach of the carrier's obligations, the provisions of the Convention continue to apply: the purpose is to exclude the possibility that the deviation "destroys the contract", as some common law jurisprudence has held in the past.*

13. It modifies the clear rules that previously governed carriers' liability significantly by placing the burden of proof on the claimant (whether the shipper or the consignee) which substantially alters the current state of affairs. There is, however, no reason to abandon the traditional system whereby the person who suffers loss or prejudice only has to prove the existence of the contract of carriage and breach of its terms. To that extent, it is up to the carrier to demonstrate reliance on exemptions which may relieve it from liability.

In view of the number of exemptions provided for, it is unclear whether the carrier now commits itself to a result, and the obligation on the carrier to look after the goods it receives on board disappears. But, if the essence of the contract is the duty to produce a result, this gives rise to a basic obligation on the carrier, namely to safeguard the merchandise.
With regard to loading and stowage on board the fact that carriers are allowed to transfer the responsibility for such operations to the shipper or other third party or parties means that the carrier is freed of its obligations to supervise and/or be responsible for proper stowage of the goods which may cause seaworthiness to be compromised.

a) Burden of proof: *It is hard to understand why it is being asserted that the rules are clearer under previous conventions or the Rotterdam Rules increase the burden of proof on the claimant.*
The burden of proof is not clearly stated under the Hague-Visby Rules or even under the Hamburg Rules. Articles 17(1) and (2) of the Rotterdam Rules explicitly codify the burden of proof under these conventions which is accepted in most jurisdictions.
It should be noted that articles 17(1) and (2) do not change the traditional rule at all: (i)The claimant (shipper or consignee) must only prove the loss, damage or delay or whatever caused it occurred during the carrier's period of responsibility ("breach") and (ii) the carrier must prove "the external cause that may exonerate it from liability".

b) Standard of carrier's liability: *It is correct that there are some important differences between the Rotterdam Rules and the Hague-Visby Rules. However, the differences indicate that the Rotterdam Rules substantially strengthen the carrier's liability.*
The list of perils is less extensive under the Rotterdam Rules. The major differences with the list under the Hague and the Hague-Visby Rules are the following: Error in navigation and in management is no longer a valid defence under article 17(3). While the "fire defence" still exists, the carrier cannot rely on the defence if the person referred to in article 18 (any performing party, employees etc.) caused the fire. (article 17(4)(a)). This is the same rule as in the Hamburg Rules.
In short, although article 17 of Rotterdam Rules might look like the Hague-Visby Rules, it is much more similar to the basis of liability under Hamburg Rules.

c) "Obligation of result": *The Rotterdam Rules do not change the nature of carrier's obligation under the contract of carriage (which is described as "obligation of result" (as opposed to "obligation of means") under some jurisdictions). This is why the claimant only has to prove loss, damage or*

delay (or their cause) occurred during the period of responsibility under article 17 and does not have to prove the carrier did not exercise due care. "Obligation of result" does not mean that the obligor has no excuse for the result. Although the carrier's obligation under the contract of carriage was described as "obligation of result", the carrier is subject to fault-based liability under the Hague-Visby or the Hamburg Rules. The list of exonerations under article 17(3) which is shorter than the Hague-Visby is not inconsistent with carrier's obligation as "obligation of result".

d) Seaworthiness obligation: *Although article 13(2) allows the parties to agree that the shipper performs the stowage of the goods, the obligation under article 14 is not affected. Whatever the contents of agreement under article 13(2) is or which task the shipper actually performs under the agreement, the carrier is required to exercise due diligence to make and keep the ship seaworthy and cargoworthy – obligations that are now continuing obligations for the carrier.*

14. It sets nominal limits of liability for loss or damage – 875 SDR per package and 3 SDR per kilogram of gross weight – that entail a radical decrease of the limits set out in The Hague-Visby Rules. Furthermore, as the unit of account is a monetary unit that is subject to inflation, the passage of time will tend to lead to a progressive increase in carriers' irresponsibility. The limitation on liability for delay (two and a half times the value of the freight) seems insufficient too. In addition, the rules with respect to the amount of compensation due when the value of the goods has been declared are not clear either.
The limitation of liability only applies to the carrier but not to the shipper (Articles 17/24) whose liability is integral and unlimited. The carrier is therefore granted an unacceptable privilege.

a) Sufficiency of the limitation on liability for loss or damage: *If there are limits on liability, at least some cases will involve goods that are worth more than the limitation amounts. A limitation level that permits full recovery in every case is the same as no limitation whatsoever. The available empirical evidence suggests that the Hague-Visby Rules' combination of weight and package limitations (2 SDRs per kilogram and 666.67 SDRs per package) provides for full recovery in over 90% of all shipments. The estimate for the Hamburg Rules' limitation figures (2.5 SDRs per kilogram and 835 SDRs per package) is thought to be closer to 95% of all shipments. The Rotterdam Rules provide even higher limitation amounts (3 SDRs per kilogram and 875 SDRs per package). Thus all but the most valuable shipments will be entitled to full recovery under the new convention. To argue that even the most valuable shipments should also be entitled to full recovery is to implicitly reject the concept of limited liability. If there is limitation of liability, the Rotterdam Rules provide limitation amounts that are adequate for their purpose.*

b) Inflation: *Paragraph 14 of the MD also complains that the SDR is subject to inflation, but that complaint is meaningless. Every monetary unit is subject to inflation (or deflation, if the world's economies move in that direction). The SDR minimizes the risks of inflation (or deflation) in any single currency because its value is based on a weighted average of the world's most important currencies in international trade. In any event, inflation does not appear to be a significant concern in today's world and it has not been a significant concern in this specific context for the last half-century. As a result of the container revolution, the average value of a package of goods carried by sea has actually decreased over the last fifty years. This is due in part to the lower shipping costs associated with the increased efficiency of the system, which has made it profitable to ship less valuable goods. It is also due in part to the fact that containerized goods are shipped in much smaller packages today than they were fifty years ago.*

c) Sufficiency of the limitation on liability for delay: *The carrier's liability for delay is less often at issue. When speed is a factor, most shippers arrange for carriage by air or land. For carriage by sea, shippers sacrifice speed to obtain lower freight costs. When delivery time is essential, shippers generally make separate arrangements with carriers (including liability limits that meet the shippers' needs). In most cases, the Rotterdam Rules' limit on delay damages is two and one-half times the limit under the Hamburg Rules (which declare that liability for delay will "not exceed[] the total freight payable under the contract of carriage," article 6(1)(b)).*

d) Compensation in cases of declared value: *The Rotterdam Rules' treatment of the compensation due when the value of the goods has been declared is exactly the same as in prior conventions. It has always been well understood that the declared value becomes the new limit on the carrier's liability. But the point is insignificant in practice because virtually every shipper prefers not to declare the value of the goods.*

e) Limitation on shipper's liability: *Finally, paragraph 14 complains that the shipper does not benefit from a limitation of liability. UNCITRAL spent many hours trying to formulate a limitation for the shipper's liability, but no one could devise a solution that was even arguably workable. In fact, no modern convention for the carriage of goods by any means of transport contains a limitation on the shipper's liability. The Montevideo Declaration similarly fails to propose a workable solution.*

15. The limitation of carriers' liability is prejudicial for transport users as it entails a transfer of costs in favour of ship-owners and affects the balance of payments of countries that are reliant on shipping services. It must be pointed out that limitation of liability is not admissible in the laws of many countries in this region of the world (for example, Brazil and Uruguay) and that the limits adopted by Argentina and other countries that have ratified the Hague Rules are significantly higher.

Paragraph 15 of the Montevideo Declaration rejects any limitation of the carrier's liability. That criticism misunderstands the nature of limitation and its relationship to freight rates. Before carriers pay compensation for damages they first collect the money in freight that covers all of their costs (including liability costs). If carriers were liable to pay more compensation for loss, damage, or delay, then freight rates would increase.
Without limitation of liability, every shipper would pay more in freight to cover the cost of the increased compensation for high-value cargo (which is the only cargo affected by limitation). Thus shippers of ordinary cargo would subsidize the carriage of high-value cargo. With limitation of liability, those few shippers who ship cargo that is more valuable than the limitation levels can decide for themselves whether to declare the full value (effectively buying extra insurance from the carrier) or buy insurance elsewhere, knowing that the carrier will not be liable above the limitation levels.
The logic of limited liability is so strong that every international transport law convention, regardless of the mode of transportation, has always provided for limited liability for the carrier. Eliminating limitation of liability would burden the entire system for the benefit of a few high-value shippers that can easily protect themselves through insurance.

16. With a view to achieving unanimity juridical principles and provisions have been incorporated into these new Rules both from those adopted by the Hague Rules of 1924 and from the Hamburg Rules.
To put it another way, a framework based on Common Law has been covered over with extracts from the Hamburg Rules which are founded on European codified civil law.
When it is said that the aim is to achieve uniformity in applicable law in order to facilitate international maritime trade, this ignores the incoherence of the mass of Rotterdam provisions designed to please everybody which, in fact, only leads to a legal Tower of Babel. This outcome is considerably more inappropriate than analysing the laws of other countries that have been built up to protect the rights of users, i.e. importers and exporters.

Modern information technology allows the world to have access to local laws and regulations along with the courts' and legal authorities' interpretations thereof. In other words it is not so difficult to find out about transoceanic rules and regulations.

a) The first two sentences of this final paragraph, in which reference is made to the Hague-Visby Rules and the Hamburg Rules, seem to criticize the fact that the Rotterdam Rules incorporate, not without changes and adaptations to the present time, certain provisions of the Hague-Visby Rules and of the Hamburg Rules. The complaint seems to be that the Rotterdam Rules have adopted a common law "skeleton" and placed on it a vest (ropaje) of civil law. It is difficult to ascertain what is meant, but it appears that the Rotterdam Rules have not been read very carefully, nor has note been taken of the Convention's very significant changes as compared with the Hague-Visby Rules (e.g. abolition of the exonerations for fault in navigation and management of the ship, qualification of the excepted perils as reversals of the burden of proof), and the regulation ex novo of important areas of transport law, such as the electronic equivalents of transport documents, identity of the carrier, right of control and delivery.

b) The rest of the paragraph contains two equally surprising assertions.
The first is that the Rotterdam Rules are an incoherent cumulus of articles and a real jurisprudential Tower of Babel: this is rather novel language for jurists, and it might be best not to comment.
The second is that nowadays uniformity of law is not necessary any more since modern computer technology puts at the disposal of the whole universe local laws along with doctrinal and judicial interpretations. Therefore, the MD's conclusion seems to be that the continuous efforts that are being made inter alia by the UN Organizations and by the European Union with a view to eliminating the barriers to international trade caused by a lack of uniformity in national laws and regulations are a waste of time.

To sum up, it is a mistake to proclaim that the Rotterdam Rules will put an end to the "worldwide confusion currently affecting this sector" as the promoters of the new regulations enthusiastically assert.

Conclusion: For all the above reasons we call on the governments and parliaments of our respective countries NOT to ratify or become party to the "Rotterdam Rules".

Montevideo, 22nd of October 2010.

Transporte)-(Containers, Ships and Ports, parts of a Transport-system). Therefore I invite you to read my humble opinion of what should be debated:

WHY IS IT SO IMPORTANT TO CREATE A LEGAL SYSTEM FOR MULTIMODAL TRANSPORT?

No one can dispute that a good legal system for Multimodal Transport can provide great benefits to Foreign Commerce of all countries. Since the seventies, thousands of meetings and discussions on the national, regional and global level have taken place, probably the most important one was in Geneva, where a committee of the United Nations (UNCTAD) worked from 1972 to 1980 to finally approve a Multimodal Transport Convention. The same day of its adoption, 8 countries warned that the selected modified Uniform System, instead of a Network-system, would be impractical, which finally proved to be correct. In Argentina the Chamber of Deputies is trying to make an adaptation of the Multimodal Transport Act 21429 of 1992, which after 18 years could not be enforced. At the international level there are discussions whether or not to ratify the Rotterdam Rules, a convention adopted by the General Assembly of the United Nations in December 2008, which was opened for ratification by member countries in September last year. This is mainly a maritime convention, but would apply to multimodal transport if there is a "leg" using sea-transport, which would cover 80% of all international multimodal transport. In both cases (the Argentine and international), there are still many obstacles and unfortunately there are reasons to doubt that we can expect good results in the short term. Many people all over the world, **who are convinced that good general rules for multimodal transport will benefit all,** ask the following question: **What can be the reason that for more than 30 years globally applicable rules are discussed, and yet only progress has been made for its application in the industrialized countries**? Studies have clearly demonstrated the great benefits to those countries, which have definitely lowered their transport- and transaction costs. This situation is unsatisfactory for everyone, because the absence of progress in emerging countries restrict these benefits to trade between the "industrialized " countries, which is only a part of world trade. The next question is: **Why was there so little progress in "emerging" countries?** To address this issue in detail, you can write entire books, but let's see if we can give in this paper an explanation of one of the main issues, **the one on which the Montevideo Declaration is based: the issue of limitation of liability of the carrier**. Studies in the United States and the European Union indicate, that the blame why so little progress has been made, must be sought in the global lack of knowledge (both in developed and developing countries) **to distinguish a Multimodal Transport from an Intermodal Transport.**

Let's start with the first explanation: The term Intermodal Transport

(I.T.) was invented in the United States, when the widespread use of containers started and an efficient integration of a transport chain with the use of different modes, became possible and the so called "seamless transportation chains" were created.

I.T. primarily has to do with the operation.

The term Multimodal Transport (M.T) came into use in 1972 in Geneva at UNCTAD meetings. **M.T. has to do with the operator engaging the multimodal transport (M.T.O), his responsibilities and with the transport document that is used (M.T.D.).** We all know how the massive use of containers totally changed the face of transport operations throughout the world since the 80's. This development began in the industrialized countries and gradually extended to developing countries, which could not do so quickly because of the huge investments they had to make to change their infrastructures. But little by little they managed to adapt to the new demands and now the container is present in all corners of the world. With the widespread use of containers, Intermodal Transportation was created worldwide and transportation costs and logistics costs began to decline. Finally this decline in transport-costs became so substantial that it was cheaper to move the factories of Europe and America to Asia with cheaper labor costs. This was the beginning of the famous globalization and now it is common in the assembly of a car that parts are produced in several countries. Because of its proven cost reduction, intermodal transport is now applied (to a greater or lesser degree) throughout the whole world and **all countries**, both the "developed" as well as the "emerging" countries have benefited from reduced transport costs. For all of them the "economic distance" separating the production areas from consumption areas, has narrowed. However there is a big difference between achievements in the two groups: In the "developed" countries it was constantly studied how they could lower the total costs of transport, not only the direct costs, but also those related with commercial transactions and logistics costs. On the other hand in emerging countries "dogmatic approaches" prevailed: most did not want to discuss certain legal aspects. The advancement of Intermodal Transportation lowered costs, but at the same brought changes in the way contracts are made from origin to destination, and these changes led to difficulties in the application of rules of liability of the carrier in the different transport modes that are successively used (usually each mode has its own rules, according to historical trends).

The industrialized countries realized that **changes in transportation contracts required adjustments to their laws** and started making fargoing studies. In general we can say that emerging countries did not follow these examples and for example in Argentina transport still is governed mainly by the Commercial Code of the end of the 19th century and still speaks of horses

The view expressed in the closing paragraphs of the MD is clearly not shared by the many States and industry groups that participated in the drafting of the Rotterdam Rules, nor by the UN General Assembly that called upon Member States to consider becoming party to the Convention, nor by the European Parliament, which echoed that call.

The authors of this point-by-point refutation of the MD have responded to each of the issues raised in the MD in order to ensure that States are in a position to make an informed decision about whether or not to adopt the Rotterdam Rules. It is hoped that this decision is made only after a rigorous and honest examination and consideration of all facets of the new regime.

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The Rotterdam Rules

A Latin-American Response to the "Declaration of Montevideo"

Introduction

The so-called "Declaration of Montevideo" is a critique to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (The "Rotterdam Rules") with the purpose of indicating the problems that its application could mean for Latin American countries. However, the vast majority of the inconvenience that is attributed to the new Convention on this Declaration is not based in a technical analysis of its provisions, and in some cases, its statements are in contrast with the text of the Rules themselves.

This paper is intended to give a technical response to the Declaration of Montevideo, making reference to the criticisms contained on it in front of the text of the Convention, to show a balanced view of the Rotterdam Rules, in order to help countries in the region to make an informed decision based on clear and sufficient, but overall objective, views about the proposal that the new Convention represents for the international carriage of goods.

Response to the Declaration of Montevideo

To this effect, we will transcribe the issues raised by the Declaration of Montevideo[1] and then their answers.

1. The Convention is highly inconvenient for importers and exporters in Latin American countries, almost all users of international carriage of goods by sea.

Answer: Since this first criticism is a general statement without any support in technical aspects of the Convention, it is only possible to answer it by saying that the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (The "Rotterdam Rules "), was the product of more than 13 years of analysis and discussion, first in the Comité Maritime International - CMI, and then at conferences convened by UNCITRAL[2], which had active participation of different groups and associations of users of international carriage of goods by sea, and the strong support of some of them. In particular, it should be taken into account the favourable position towards the Rotterdam Rules by the United States of America, a country which, as well as Latin American countries, is more a nation of users of carriage of goods by sea, rather than a country of carriers; and in that country, the National Industrial Transportation League (NITL) has publicly expressed its support to the Rotterdam Rules[3], as they have done other transport users' associations, such as the Nigerian Shipper's

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[1] The Declaration of Montevideo is only available in Spanish, so this is a free translation, where the writers of this paper have tried to remain as faithful as possible to the original text in Spanish.

[2] Kate Lannan; Overview of the Convention The UNCITRAL Perspective; 39th CMI Conference – Athens, October 2008 Panel 1.

[3] The press release can be consulted at: www.nitl.org/press.htm

Council[4]. In Europe the views of users' associations are divided, but it is important to note that the European Union invited its Member States to rapidly ratify the Convention (Resolution of the European Parliament, June, 2010). All this indicates that there are significant association's opinions from people from countries with dominant presence of transport users in favour of the Rotterdam Rules. There is no association of transport users of Latin America signing the Montevideo Declaration and we are unaware of any statement coming from any shipper's association in the region.

60% of Latin American countries[5] have not ratified any of the existing international conventions on the contract for the carriage of goods by sea (Hague Rules, Hague – Visby Rules, Hamburg Rules). The Hague Rules have been ratified by Argentina, Bolivia, Cuba and Peru. The Hague – Visby Rules were ratified by Ecuador. Mexico ratified the Hague - Visby Rules with the SDR Protocol of 1979. And Chile, Paraguay and The Dominican Republic have ratified the Hamburg Rules[6].

This means that most Latin American countries are not satisfied with the existing international conventions, which will continue to govern the international carriage of goods by sea if the Rotterdam Rules are not widely ratified by the international community. Therefore, it would be appropriate to undertake a complete, detailed and objective study of the new proposal before being dismissed without real grounds.

In some Latin American intergovernmental organisms such as the "Comité Andino de Autoridades de Transporte Acuático – CAATA", at the time, the draft convention that today turned into the Rotterdam Rules was analyzed and it was not deemed as negative for the region. Just on the contrary, they made recommendations that, in their integrity, were adopted by the new convention[7].

In Addition, despite the criticism does not refer to any specific provision of the Rotterdam Rules, the truth is that it could hardly be said that this convention is "highly inconvenient for importers and exporters in Latin America" when, as for example: i) the new convention is meant to be interpreted "taking into account its international character" (Art. 2), which means that is no longer based on the precedents and/or laws of any nation in particular; ii) eliminates the exceptions of carrier's liability known as "nautical fault" and fire (leaving only the fire on board); iii) increased the compensation limits of the carrier as compared with those provided by their predecessors (Art. 59); iv) would allow to initiate a lawsuit against the carrier or its representative at the place of delivery or port of delivery

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[4] Cfr. www.shippersvoice.com/2010/06/09/nigerian-shippers'-council-supports-new-liability-rules/#comments

[5] According to the definition of the Dictionary of the Real Academia de la Lengua, "Latin American" is the name given to "all American countries colonized by Latin nations, namely Spain, Portugal or France." However, they are usually identified as "Latin" American countries where the Spanish or Portuguese are the official languages, or the languages spoken predominantly by the population. Following these guidelines, for the purposes of this document we have deemed as Latin Americans the following countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua , Paraguay, Panama, Peru, Puerto Rico, Dominican Republic, Uruguay and Venezuela.

[6] Source: CMI Yearbook 2009.

[7] Comunidad Andina de Naciones – CAN, Annex IV of the "Acta de la Vigésimo Primera Reunión Extraordinaria del Comité Andino de Autoridades de Transporte Acuático – CAATA", April 2003, pp. 29, 30. Document available at http://www.comunidadandina.org/transportes/maritimo.htm, consulted in September 2008.

of the goods under certain conditions, as it is often the interest of consignees of goods in Latin American countries (Art. 66); v) facilitates the operation of alternative conflict resolution mechanisms of high credibility in Latin America such as arbitration (Art. 75 et seq); vi) facilitates the use of electronic transport documents (Article 8 et seq.); vii) extends the period of liability of the carrier (Art. 12); viii) establishes the liability of the carrier for delay in delivery of the goods, claim which is fairly common in countries of users of carriage services (Art. 21); and ix) allows, within its area of operation and as a difference from its predecessors, the applicability of certain forms of subregional instruments (Latin American) that regulate other modes of transport, as is the case of Decision 399 of the Andean Community on International Carriage of Goods by Road.

2. It does not provide equity and mutual benefit in international trade, constituting a very complex legal instrument, reglamentarist, full of referrals among its provisions, tautological definitions, and introducing a neo maritime language, which leaves out of any value the international jurisprudence from 1924 to date and causes for its poor legislative drafting very different interpretations.

Answer: The systems of civil liability for damage, loss or delay in delivery of goods in international transport by all modes of transport, are due to a policy of allocation of risks associated with transport between the parties concerned, such as the carrier, the shipper or consignor of the goods, and insurers, both of goods, and of carrier's liability. This system of "allocation of transport related risks" is characterized by the establishment of periods of liability of the carrier, exceptions to carrier's liability, limitations of liability of the carrier and short terms of time bars. These features are present, without exception, in all international conventions and instruments governing the contract of carriage, both international and regional[8]. The Rotterdam Rules only continued this trend. It is in this system of "allocation of transport related risks", typical of all international regimes for the carriage of goods, and also present in the Rotterdam Rules, where the "equity and mutual benefit in international trade", claimed by the Declaration of Montevideo, can be found.

The Rotterdam Rules are, undoubtedly, a complex and extensive Convention, as complex and extensive is the area it covers. Therefore, with all due respect, we believe that this cannot be, by itself, a valid criticism for the Convention. There are many other international legal instruments, which are also extensive and complex, but this has not been an obstacle to its successful implementation.

But to answer this criticism, it should be noted that many technological and commercial developments have taken place since the late nineteenth century, when the Harter Act of 1893 was enacted in the United States of America and the early twentieth century when the so-called "Hague Rules" were adopted as an international convention. Among them we can mention the growing trend of the phenomenon of containerization of cargo in liner trades, the use of payment

[8] In this regard see the Montreal Convention of 1999 (air transport), Decisions 331, 393 (multimodal transport) and 399 (international carriage of goods by road) of the Andean Community, Hague Rules, Hague – Visby Rules, Hamburg Rules(carriage of goods by sea), COTIF, CMR, among others.

mechanisms such as letters of credit (whereby the banks are indirectly involved in the transport logistics network), new port technologies and the use of electronic transport documents. These new technologies, in turn, have meant new relationships and new players in the maritime trade, which were not present when the Hague Rules were drafted. What the Rotterdam Rules have done is just to recognize and regulate these new realities, which obviously introduces new aspects to regulation. There are not, thus, the Rotterdam Rules, but the subject matter to be ruled, which gives rise to the complexity of the regulation contained in them.

The "excessive reglamentarism" that the Rotterdam Rules are accused of, stems from the need to fully regulate the field for the benefit of, precisely, the uniformity which is claimed in other paragraph of the Declaration of Montevideo, also bearing in mind the mandate of article 2 of the Rules about the interpretation of the Convention, a provision that has proven successful in other international instruments such as the case of the 1980 Vienna Convention on International Sale of Goods. It is well known that the Hague Rules were intended as a "de minimis rule", which sought to regulate only those aspects of the contract of carriage in which was considered essential the State intervention in a time when freedom of contract was given a higher prevalence, than in present times. This feature produced an extensive case law that, despite having passed over 80 years, still has certain issues where no express precedent can be found. The existing case law on the Hague Rules, far from ignored or neglected, shall continue to apply and be consulted on those aspects of the Rotterdam Rules maintaining the same scheme of that preceding Convention, but now as part of an international regulatory system. In this context, the criticized "reglamentarism" of the Rotterdam Rules will produce greater certainty about the interpretation and application of the Convention, as it reduces the subjects of the contract with no express regulation.

The presence of cross-references in a legislative text follows a valid and internationally implemented law-drafting system, which has proven effective in various international instruments currently in force. On the other hand, cross-references are very common in the drafting of laws in Latin America, of so much tradition, such as Andrés Bello's Civil Code, adopted by countries like Chile, Colombia and Ecuador. It is therefore surprising that this criticism comes precisely from mostly Latin American lawyers. Besides, cross-referencing system allows greater certainty in the application of the regime.

The use of definitions sometimes "tautological" is necessary, even if it is not the more desirable legislative drafting technique. However, note that this technique was already used in some cases by previous regimes preceding the Rotterdam Rules, as for example, in Article 1 of the Hague Rules, where it is provided that the term "contract of carriage" applies for the purposes of the convention, "only to contracts of carriage....", without expressly defining the term "contract of carriage" as such.

The new expressions relating to the contract of carriage of goods by sea derive from the emerging of new technologies and new maritime trade practices which, although not present in the language of the Hague Rules are not currently strange

in the sea trade, only that they were, till now, not regulated by an international convention. That is to say that the "neo-legal language" is just a reflection of the "neo-technology" of the maritime trade.

Finally, without diminishing the importance of respect for legal tradition, it is not possible to forget that the national and international positivist order is called to respond to social or economic phenomena, which of course, change from time to time. So, not everything can be said about legal terminology when every day we see new business realities to which legal rules should provide adequate regulation.

3. Represents a step back of the rules and practices in multimodal transport, when excluding other means of transport when ocean carriage is not present: it only regulates the sea leg and linked segments (maritime plus). Moreover, in itself it is not a convention of a uniform and universal scope, allowing departure from its own terms, as in the "volume contract", and also allows countries not to ratify the rules of Jurisdiction and Arbitration (Chapters 14 and 15), which become binding or not binding to the contractors. (sic).

Answer: This comment has three parts, so that its response will be divided into three parts as well.

Part I - Multimodal Transport: Since 1970[9] the international community has tried, unsuccessfully, to have an international convention governing multimodal transport of goods. The last attempt, sponsored by the UN, as well as the Rotterdam Rules, was the 1980 Geneva Convention, which has not had, in practice, the success desired, and is not expected to receive further ratifications in the near future. Subsequently, they were issued the UNCTAD/ICC Rules for Multimodal Transport Documents of 1992[10], which are not universally applicable, since they are mostly used by Multimodal Transport Operators who are not ocean carriers, particularly freight forwarders[11]. Therefore, although it would be ideal from a strictly legal point of view, it is unlikely that the international trade and transport community wants to receive a single convention with a comprehensive regulation of multimodal transport, particularly by the difficulty that would exist to reach agreement between the carriers of different modes of transport about the amounts for limitations of liability.

Instead, the reality is that there are international conventions which, though referring to a specific mode of transport, they also contain rules providing for the involvement of other transport modes, such as the Montreal Convention 1999 (International Air Transport[12]) The CMR Convention (international road transport in Europe) and the CIM - COTIF (international rail transport in Europe) [13]. None of them fully regulate multimodal transport, but would conflict with a Convention that tries to regulate the matter exclusively. The Rotterdam Rules do not prevent

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[9] Draft Combined Transport Convention - TCM 1970, with the auspices of UNIDROIT and CMI.
[10] ICC Publication Nº 481.
[11] The FIATA Bill of Lading expressly incorporates the UNCTAD/ICC Rules, 1992.
[12] Or the Warsaw regime (1929 Warsaw Convention and the 1955 Hague Protocol) in those countries in which is still applicable.
[13] Cfr. Berlingieri, Francesco; Carrier's Obligations and Liabilities; CMI Yearbook 2007 – 2008; p. 284.

the application of any of the above mentioned international conventions, but in case of any possible conflict between them and the Rotterdam Rules, the text of its Article 82 makes it evident that the intention of the drafters was to allow the application of those other conventions to all international multimodal transport operations, which do not include an international sea leg, trying to reconcile its provisions with the above conventions, of extensive application in international trade. Thus, upon entry into force of the Rotterdam Rules they would not meet frequent situations of incompatibility with the implementation of those Conventions, which will facilitate the process of ratification.

Latin American countries should make the same analysis, as one of the elements to decide on the convenience or inconvenience of ratifying the Rotterdam Rules.

As to the Andean Community legislation (applicable in Bolivia, Colombia, Ecuador and Peru), the Rotterdam Rules would be easily consistent with Decision 399, which regulates the international transport of goods by road.

Nonetheless, in our view, with a possible ratification of the Rotterdam Rules by the member countries of the Andean Community, the new regime would prevail in its application against the multimodal transport regime provided for in Decision 331 of the Andean Community, a system that in any case, is very similar to that under the new international Convention having regard the amendments introduced by Decision 393, which modifies Decision 331. Indeed, the liability regime of the Rotterdam Rules is similar to that established in the Andean System of Transportation Multimodal whenever Decision 393 eliminated the exceptions of liability for "nautical fault[14]", fire and due diligence to make the ship seaworthy (where the damage/ loss/delay is caused by such unseaworthiness); likewise, the amounts of limitation of liability of the carrier when there is a sea leg in the multimodal transport operation, are lower than those provided for in the Rotterdam Rules.

Each country shall analyze whether the ratification of the Rotterdam Rules would be in conflict with any agreement or domestic legislation governing the multimodal transport contract, and if so, whether it is appropriate that this regime is replaced, at least in part, by the new Convention. In such an analysis it is advisable to take into account that the multimodal transport contract is essentially international, and therefore it is desirable that an instrument of broad international scope and application regulates the subject.

Part II - Volume Contract: The so-called "volume contracts" respond to a reality and a necessity of international trade. They have as an antecedent the "service contracts" provided for in U.S. law, but also used in other parts of the world. The Hague Rules also allow excluding contracts of carriage from its mandatory scheme, with the simple expedient of not issuing a bill of lading. Moreover, its Article 6 allows entering into contracts of carriage outside the regime in cases of "particular goods", provided that a bill of lading is not issued. Therefore, the Hague Rules also allow for "freedom of contract" to depart from the Convention, with no mechanism at all to defend the interests of the shipper or the consignee. The Rotterdam Rules

[14] Error in navigation or in the Management of the ship.

recognize that freedom of contract, but only under the frame of a volume contract, which have significant restrictions for them to be valid and enforceable against third parties other than the shipper who has concluded the contract (art. 80) and impose minimum obligations the carrier cannot depart from (art. 14). Both protections are absent in the Hague Rules. In fact, the Rotterdam Rules state that a volume contract will only be valid when, among other requirements, the shipper has been given the opportunity to enter into a contract under the original terms of the Convention (Art. 80.c), provided that the agreement has not been a contract of adhesion (Article 80.d), and certain "core" provisions of the Convention cannot in any case be ignored or superseded (Art. 80.4). Therefore, it does not seem to be accurate the comment that the Convention allows, without more, to step aside from its provisions.

Part III - Jurisdiction and Arbitration: Even if it was desirable that the provisions on jurisdiction and arbitration were also mandatory, the Convention opted for a flexible schedule to prevent this situation from becoming an obstacle to its ratification process, taking into account, for example, the existing provisions on the subject in the European Union. But in any case, the Hague Rules had no provision on jurisdiction and arbitration at all, so this aspect of the Rotterdam Rules can not be regarded as a step back, but as a breakthrough, given the uncertainty produced by the lack of regulation on the matter in the Hague Rules and the extensive use of clauses conferring jurisdiction on bills of lading.

4. Introduces definitions legally inconsequential to the contract of carriage, such as: the volume contract, the liner transport and the non-liner transport, the performing party or the maritime performing party, divestitures which do not alter the concept or the purpose of the contract of carriage.

Answer: Quite the contrary, these definitions are of the utmost importance for the functioning of the contract of carriage in the context of the Rotterdam Rules, but especially having regard to the current reality of maritime trade. The definition of the volume contract is essential to the operation of this type of contract. That of liner and non-liner transport is necessary to determine the scope of application of the Convention.

The concepts of performing party and maritime performing party are important to define the period of liability of the carrier, to the extent that, under Article 18 (a), the carrier is liable for the acts of performing parties. The extension of the period of liability of the carrier to the concept of door-to-door (art. 12) required the provision of vicarious liability of the carrier for the acts of its employees, agents and subcontractors, which is definitely an improvement in front of the Hague Rules regime.

In particular, the definition of maritime performing party is indispensable, not only for the previous remark, but also because it is jointly and severally liable for damage, loss or late delivery of goods to occur while in their own period of liability (that of the maritime performing party) in accordance with Articles 19 and 20 of the Rotterdam Rules. The definition of "maritime performing party" comprehends the concept of "actual carrier" as it had already been provided for in the Hamburg

Rules (art. 10), but is extended to other actors in the transport chain, such as ports, stevedores, ship agents, warehouse operators in ports and freight forwarders (when handling goods in the port area). This is an advantage over the Hamburg Rules, and even more as compared with the Hague Rules, which do not provide anything about it.

On the other hand, the inclusion of extensive listings in the section of "definitions" is not an unusual practice in the drafting of legal harmonization schemes, which have proved to be successful (see the corresponding provision in the 1980 Vienna Convention on the International Sale of goods) and, additionally, that situation is precisely what allows application of Article 2 of the Convention on the interpretation of its provisions.

5. Introduces the concept of documentary shipper, other than the shipper, that the Convention itself admits to not being the true party to the contract of carriage, as well as eliminates the figure of the freight forwarder or cargo agent.

Answer: The role of the "documentary shipper" is not new to the maritime trade. It is common in cases of an FOB seller that delivers the goods to the carrier chosen by the buyer (who is the real party to the contract of carriage), and agrees to be named as "shipper" in the bill of lading or multimodal transport document. But his legal situation is highly uncertain under international regimes currently in force. Under the Hague and Hague – Visby Rules, in some jurisdictions the mere fact that a person delivers the goods to the carrier for the purpose of loading (i.e., the FOB seller) is enough to the deem it as a shipper, with all the legal duties and liabilities that it entails, such as the guarantee to provide exact information about the goods and the liabilities derived from the dangerous nature of the goods. This unfavourable position of the FOB seller is consolidated in the Hamburg Rules, whose article 1.3 includes in the definition of shipper the person who actually delivers the goods to the carrier in relation to the contract of carriage.

On the contrary, under the Rotterdam Rules, the FOB seller who effectively delivers the goods to the carrier for loading will only be deemed as shipper if he has voluntarily accepted to be named as such in the document of transport (art. 1.9). And only if this requirement is met, then the Rotterdam Rules establishes that the "documentary shipper" have the same obligations and rights of the "shipper" (art. 33), so at least there is a uniform treatment of this situation, which will serve as basis for the "documentary shipper" to obtain contractual protection in front of the person at whose request he agreed to be named as "shipper" in the bill of lading or multimodal transport document.

There is no single provision of the Rotterdam Rules of which the elimination of the freight forwarder or cargo agent may be inferred from. On the contrary, the Convention could be applicable to the freight forwarder in so far as he assumes obligations as carrier before the shipper or the consignee (art. 1.1 and 1.4), or when acting as a maritime performing party.

6. Eliminates the terms of consignee and endorsee of the cargo, established

in nearly two centuries by the laws, doctrine and case law, replacing them with terms without legal significance such as the bearers of the transport document, "destinatario", right of control and controlling party.

Answer: The term "consignee", in fact, is not removed by the Rotterdam Rules. Its English version maintains the expression of "consignee", what happens is that the Spanish version (also official) translated it as "*destinatario*". This same translation exists in the Spanish version of the Montreal Convention of 1999 (arts. 13 to 16, among others), which regulates the international air transport contract and for which there has been no criticism in this regard. The "*destinatario*" is defined as the person who is entitled to claim the goods from the carrier, when they reach their destination, whether according to the provisions of the contract of carriage, or by virtue of a document of transport, either physical or electronic. The same treatment is set forth in other international instruments such as in the Decision 399 of the Andean Community on the International Carriage of Goods by Road[15].

7. Removes the term bill of lading, contemplated in all legislation, doctrine and jurisprudence, and replaces it by vague terms such as transport document or electronic transport document.

Answer: It is good for the shipper to be certain about the applicable legal regime, even if a bill of lading has not been issued, a document, which, moreover, is being replaced by other documents of transport and, as recognized internationally, it is not the contract itself, but only proof of its existence. So, particularly in the Latin American context where the contract of carriage is consensual, what is really logical is that the legal regime be independent of the issuing of a document of transport. On the other hand, over the time technology is increasingly influencing the development of the transportation business. Indeed, the issue of the UNCITRAL Model Law on the use of electronic documents (which has inspired local laws on the subject, such as Law 527 of 1999 in Colombia) accounts for this trend. Thus, it seems only appropriate that the new Convention also regulates the use of such "electronic" documents.

In any case, the term "bill of lading" has been replaced by "document of transport" in other international conventions and instruments such as the 1980 Geneva Convention, Decisions 331 and 393 of the Andean Community and the Multimodal Transport Agreement of MERCOSUR.

In this regard, it should be noted that the term "document of transport" is more generic, and comprehends the concept of "bill of lading" and therefore, although the Rotterdam Rules refers to "document of transport" it does not prevent the maritime community to use the "bill of lading", as it is, in any case, a "document of transport".

8. Wrongly states that the substitute of the bill [of lading] **- the document of transport - is the contract of carriage, when it is only a proof of its existence**

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[15] Art. 1 of the Decision 399 of the CAN defines "*destinatario*" as "the natural or legal person on whose name are named or shipped the goods and as such is designated in the Consignment Note for International Road or in the contract of carriage, or to whom it belongs by a an order after its issuance or by endorsement." (Free translation).

and ignores its other functions to constitute receipt of goods on board and document of title.

Answer: This statement is inaccurate in light of the provisions of the Convention. It is enough to compare this statement with the wording of Article 1.14 (b) of the Rotterdam Rules, according to which "document of transport" means the document issued by the carrier that "evidences or contains a contract of carriage". This provision is in line with international case law and doctrine under which a bill of lading is the evidence of the contract of carriage as between the shipper and the carrier, but it is the contract of carriage itself for a third person, who without having intervened in the conclusion of the contract, later on became holder of the bill of lading or document of transport.

On the other hand, it should be noted that the application of the Rotterdam Rules is not dependant on the issuance of a document of transport, since a contract of carriage would be governed by the Convention upon completion of the circumstances mentioned in Article 5, even if a document of transport has not been issued, because in these cases a contract of carriage exists irrespective of the existence or issuance of a document of transport.

Nor is it true that the Rotterdam Rules ignore the functions of the transport document as a receipt of goods, which are specifically regulated in article 41, by provisions similar to those found in the Hague Rules and the Hamburg Rules. Indeed, the definition itself of document of transport provided for in article 1.14 (a) requires that the document of transport be evidence of the receipt of the goofs by the carrier.

As for the role of the transport document as "receivable" or "document of title of goods", it is also covered under Article 1.15, which defines the negotiable transport document, and 47, which regulates the delivery of the goods when a negotiable document of transport (physical or electronic) has been issued.

9. Admits the inclusion of special clauses in the transport document, altering the present, where it is only permissible in charter party contracts freely negotiated.

Answer: This is not an accurate statement. Under the Conventions currently in force, the original parties to the contract may stipulate additional provisions as provided in the "form" or "type" (bill of lading or multimodal transport document) which, if anything, can be subject to amendments by the parties. In effect, what happens is that such additional clauses or covenants, when they are outside the "bill of lading" will not circulate with an eventual endorsement of the document to a third party acting in good faith (note that in our legal tradition the bill of lading is a receivable document of title) but remain valid and therefore, enforceable, only between the original parties to the contract.

The Rotterdam Rules maintain the same principle (art. 79) and only accepts contract modifications departing from the regime under a volume contract (art. 80) with the restrictions mentioned above for its conclusion, to protect the shipper

and third persons that could become holders of a document of transport.

10. Supports the validity of the adhesion clauses inserted in the document of transport, which give exclusive jurisdiction to the courts chosen by the carrier. This, in practice, will force users to always go to the courts of the of carrier's domicile, thus excluding the courts of the consumer countries of transportation services, and in particular, will prevent the victim of a breach of contract to appeal to the courts of the place of destination.

Answer: This is also an inaccurate statement, because, first, the chapter on jurisdiction is one that may or may not be accepted by states upon ratification of the Rotterdam Rules. And secondly, that in light of the Convention for an exclusive jurisdiction or forum selection clause to be valid it requires that the same has been inserted in a "volume contract" (Art. 67.1), with the restrictions imposed for the conclusion of this type of contracts (Art. 80) aiming at the protection of the shipper and the third persons that could become holders of a document of transport.

Failure to meet these requirements, mean that the exclusive jurisdiction clauses will be null and void (Art. 79) and, consequently, the shipper (or the holder of the document of transport) will always have the option to sue the carrier or a maritime performing party in the place of delivery of the goods (Art. 66.iii) or the port of discharge (Art. 66.vi), i.e. the contractual "place of destination", which is exactly the effect claimed for in the Declaration of Montevideo.

11. It does not apply to documents of transport issued under charter party contracts for total or partial use a vessel, a commercial form that has many years of peaceful application.

Answer: This statement is also inaccurate. Just on the contrary, the Rotterdam Rules do apply to documents of transport in general, and in particular to bills of lading, which are issued under a charter party for the total or partial use of a ship, provided that the holder of such document of transport or bill of lading is not an original part of the charter party contract. Moreover, the Rotterdam Rules apply in this situation even if no document of transport or bill of lading is issued, which gives third persons who are receivers of cargo shipped under charter parties a greater level of protection than which is provided by the Hague and Hague – Visby Rules.

The Hague and Hague - Visby Rules (section 1b) as well as the Hamburg Rules (section 2.3) apply to all bills of lading issued under a charter party from the moment where the bill of lading governs the relationship between the carrier and the holder of the bill of lading, which is a third party in respect of the charter party. But in all the above-mentioned conventions (Hague Rules, Hague - Visby Rules and Hamburg Rules) this person loses the protection of the regime if no bill of lading is issued.

By contrast, Article 7 of the Rotterdam Rules provides the protection of the mandatory regime to all persons who have the status of consignee (*"destinatario"* in the Spanish version of the Rules), controlling party or holder [of the document

of transport or bill of lading] in respect of goods which have been shipped pursuant to a charter party, even if no bill of lading or document of transport has been issued, under the condition that the consignee, controlling party or holder are not an original party to that charter party contract.

Therefore, the protection of third parties to whom goods are shipped under a charter party contract for the total or partial use of a vessel (including space and slot charter parties) is greater in the Rotterdam Rules (art. 7) that in the Hague and Hague - Visby Rules (section 1.b), because in the latter such protection is dependant on the issuance of a bill of lading, which does not occur in the Rotterdam Rules.

12. Leave the carrier the liberty to receive on board or destroy goods, if they, at any time can turn dangerous in the course of transportation, and exonerates the carrier's liability for any natural loss of volume or weight, without setting specific limits for each type of merchandise. It also allows the carrier to deviate from the route, without losing the right to the exoneration or limitation of liability for such deviation.

Answer: Article 15 of the Rotterdam Rules regulates the subject of dangerous cargo with the same principle applicable in the light of previous conventions (Article IV.6 of the Hague Rules and article 13.2.b of the Hamburg Rules). In effect, the carrier, in case the shipment of dangerous goods may well refuse to receive them (as it could do under the previous regimes), or having received them, to take measures if they become dangerous or *"reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment"* (same as in the previous regimes). Note that now, under the new Convention, based on more than justifiable reasons, the carrier may also adopt the same measures if the goods are dangerous or could reasonably be expected to become dangerous to the environment, something for which most governments worldwide are seeking to establish standards of protection. Article 15 is expressly subject to carrier's compliance with the obligations set forth in article 13, which implies that if the carrier knew the potentially dangerous nature of the goods he may only be exempted from liability for their destruction or unloading, if proves the compliance of these obligations.

On the other hand, it is common in transport laws to provide for the possibility of exempting the carrier of liability in the transportation of certain type of goods in cases of loss of volume or weight bulk when they arise out of the so-called "natural losses" that are usual in some traffics; the new Convention only acknowledges this situation beyond what could be possibly argued, for example, under the exceptions (m) and/or (q) of the Hague and Hague – Visby Rules.

With respect to deviation, it should be noted that the Rotterdam Rules do not provide for "justifiable deviations" (Article 4.4 of the Hague and Hague - Visby Rules), but establishes (Art. 24) that if according to the applicable law a deviation or a departure from the route amounts to a breach of contract by the carrier, he can nevertheless rely on the exceptions and limitations of liability set forth in the Convention, thereby preventing the overall displacement of the regime in case of

deviation, as it happens in some jurisdictions. Thus, it is left to national law determining whether a deviation constitutes a breach of the contract of carriage, but it is prevented that, if so, the whole regime becomes inapplicable. So, it cannot be understood as a right of "deviation" granted to the carrier.

13. Change the rules governing clearly to date the carrier's responsibility and greatly increases the burden of proof on the claimant (the consignee or shipper), substantially altering the burden of proof. There is no reason to abandon the traditional system where the victim should only prove the existence of the contract of carriage and its breach: So far, the carrier had to prove the "extraneous cause" which relieved him from liability.

It remains in the nebula (sic) is bound to an obligation of result, with the cumulus (sic) of exceptions the carrier's obligation to the custody of what he receives on board disappears. If the contract is, in essence, with an obligation of result, this leads to a basic obligation for the carrier: to take custody of the goods.

Regarding the loading and stowage of the ship, the carrier is allowed to move these operations to the shipper or third party operators, which will result in a release of the carrier's obligations of custody and supervision of the good stowage, being that this compromises the seaworthiness.

Answer: This criticism stems from a mistaken reading of the Rotterdam Rules. The answer will be divided into two parts.

Part One – Obligation of the Carrier, carrier's liability and burden of proof: First, one must start from the basis that article 11 of the Rotterdam Rules expressly provides that *"the carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee"* ("destinatario" in the Spanish version of the Rules). From the general perspective of Latin American legal systems, this article clearly establishes an "obligation of result" of the carrier[16], which implies the obligation of "custody" of the goods during his period of liability, that unlike what happened under the scheme of Hague and Hague - Visby Rules does not end with the mere discharge of the goods, but with the actual delivery of the goods to the consignee or the legitimate holder of the document transport. In this regard, the obligation to "take care of the cargo" or "custody" not only still exists, but it is now more exigent to the carrier because it goes up to the "actual delivery" of the goods.

Secondly, according to article 17.1 of the Rotterdam Rules in order to get the carrier liable, the claimant (shipper/consignee/legitimate holder of the document of transport) must prove *"that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4"*. This evidentiary requirement is

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[16] In the same line,, Ricardo Sandoval says: *"Según el artículo 11, del Convenio, el porteador se obliga a "transportar las mercancías hasta el lugar de destino y entregarlas al destinatario". Se trata de una obligación de hacer, cuya ejecución no es personalísima y que corresponde a la categoría de obligación de resultado y no de una simple obligación de medios."* Sandoval, Ricardo: Convenio de las Naciones Unidas sobre el Contrato de Transporte Internacional de Mercancías Total o Parcialmente Marítimo, p. 22.

equal to that normally provided for in all liability regimes for contracts of carriage, and consist of the simple evidence that the goods were delivered to the carrier, and then that he (the carrier) did not deliver them to the consignee, or delivered them damaged or incomplete (or that incurred in delay), for which it is enough to restore to the evidentiary value of the document of transport, specifically regulated in Article 41 of the Rotterdam Rules[17].

And with regard to the basis of liability of the carrier, as from formulation of the general principle of liability, Article 17.2 of the Rotterdam Rules states that *"the carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18"* (underlines not original from the quote). In order to prove that the cause or one of the causes of the loss is not attributable to the carrier it is essential for the carrier to first identify that cause, because if he does not, it becomes impossible to prove that it is not attributable to him or to the people for whom he is vicariously liable according to Article 18. In other words, for the carrier to be exonerated of liability he must:

i. Identify the cause of loss, damage or delay in delivery of the cargo[18]; and

ii. Prove that such cause is not attributable to his fault or the fault of the persons for whom he is vicariously liable according to Article 18 of the Rotterdam Rules.

Therefore this proof, as described in Art. 17.2 and i) and ii) above, is not a simple proof of absence of fault "in abstract", but rather a "concrete" proof of absence of fault relating to the cause or causes of the damage that the carrier must have identified previously. In other words, for the carrier to be exempted from liability he must show the "extraneous cause".

Under the Rotterdam Rules, in all possible events, the carrier cannot be exempted from liability arising out of damage/loss/delay in delivery of the goods if the cause of the damage remains unknown[19], which is more characteristic to a strict liability regime than to a fault based liability regime[20]. Furthermore, in all cases the carrier must positively identify the cause of the damage/loss/delay and prove that the cause is not attributable to his conduct (his "fault"). The only difference is that

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[17] Sandoval, Ricardo: Convenio de las Naciones Unidas sobre el Contrato de Transporte Internacional de Mercancías Total o Parcialmente Marítimo, p. 24:*"Al parecer el nuevo texto uniforme al exigir que el reclamante "pruebe que el hecho que causó o contribuyó a causar la pérdida el daño de las mercancías o el retraso en su entrega, se produjo durante el período de custodia", estaría imponiendo una carga de prueba superior a la prevista en las RH, pero no es así, porque para demostrar que el daño se produjo durante el período de responsabilidad del porteador, basta con que el demandante pruebe que las mercancías han sido entregadas al porteador en buen estado y que el consignatario las ha recibido con averías".*

[18] In words of Ricardo Sandoval (op. cit., p. 25) *"...* [al transportador] *se le impone el deber de identificar la causa o una de las causas de la pérdida, daño o retraso y probar que dicha causa no es imputable a su culpa ni a la de ninguna de las personas por cuyos actos el porteador responde".*

[19] *"El supuesto básico del Convenio es que no pueden existir daños sin que se pueda explicar su causa y que si la causa resulta inexplicada o inexplicable, la responsabilidad recae automáticamente sobre el porteador."* Ricardo Sandoval, op. cit. P. 24.

[20] Delebecque, Philippe, op. cit., p. 275: *"As for the carrier liability (art. 18), if it is true that the basis of this is not exactly the same that the HVR one, it is impossible to say, in our opinion, that is a 'fault based liability regime'. Furthermore, it is false to say, while the language of the HVR is retained, that the risk has shifted from ship to cargo. The carrier liability is still, in our opinion, a strict liability, given that the carrier could not withdraw his liability if the cause of damage is unknown (...)".*

when the cause of the damage is one of the events listed in article 17.3, then the carrier is relieved from proving that the cause "is not attributable to him", but then the claimant will always have the possibility of proving that there was "fault" on the part of the carrier or the people for whom he is vicariously liable according to article 18.

A detailed analysis of the liability system set forth in article 17 of the Rotterdam Rules allows us to qualify it as a regime that is more similar to what is commonly known in Latin America as an "*objective*" regime (strict liability), than to a "*subjective*" liability regime (fault based liability). Indeed, in order to get exempted from liability under this regime, the carrier is always required to identify the actual cause of the damage, loss or delay in delivery of the goods, and also to demonstrate that such cause is not attributable to his conduct, or the conduct of the people for whom he is vicariously liable according to article 18 of the Convention. Nevertheless, which is important in this analysis is not whether the basis of the carrier's liability under the Rotterdam Rules regime can be described as a "subjective" regime, as a "subjective" regime with a presumption of fault and exoneration by the proof of "extraneous cause", or as an "objective" regime. The title of the regime is actually not the most important point here. What is really relevant is that the carrier's liability regime under the Rotterdam Rules always requires the identification of the actual cause of the damage/loss/delay in delivery of the goods, that the carrier may not be exempted from his liability in a simple (abstract) test of absence of fault on his part, and that the carrier will not be exonerated from liability if the cause of the damage remains unknown. All what is mentioned above is sufficient to say that the Rotterdam Rules is a much more favourable regime to cargo interests that the one set forth in the Hague - Visby Rules and the Hamburg Rules.

Part II - Liability for loading and stowage and its relationship with the obligation of seaworthiness: The possibility that the carrier agrees with the shipper, the documentary shipper or the consignee for them to carry out loading, handling, stowing or unloading of goods (Art. 13.2) is simply a recognition of the reality of maritime trade and modern logistics operations and also a recognition of the current trend in the case law on article 2 of the Hague and Hague - Visby Rules. Nevertheless, these agreements in no way diminish the scope of the obligation of the carrier to exercise due diligence to make the ship seaworthy. In the new Convention this is a continuing obligation throughout the journey and must be exercised not just "before and at the beginning of the voyage" as required by article 3.1 of the Hague - Visby Rules. In fact, the wording of article 13.2 of the Rotterdam Rules indicates that such agreements are subject to Chapter 4 (Obligations of the Carrier), where article 14 specifically refers to the continuing obligation of seaworthiness.

14. It sets nominal limits of liability for loss or damage – 875 SDR per package and 3 SDR per kilogram of gross weight – that entail a radical decrease of the limits set out in The Hague-Visby Rules. Furthermore, as the unit of account is a monetary unit that is subject to inflation, the passage of time will tend to lead to a progressive increase in carriers' irresponsibility. The limitation on liability for delay (two and a half times the value of the

freight) seems insufficient too. In addition, the rules with respect to the amount of compensation due when the value of the goods has been declared are not clear either.

The limitation of liability only applies to the carrier but not to the shipper (Articles 17/24) whose liability is integral and unlimited. The carrier is therefore granted an unacceptable privilege.

Answer: Contrary to what is stated in the Declaration of Montevideo on the point, the Rotterdam Rules proposes an increase rather than a reduction regarding applicable liability limits in the case of loss of or damage to the goods. This can be simply noted by making a comparison between the numbers provided for in the relevant provision of the "SDR" protocol, in which the liability limit was established for the Hague - Visby scheme (except in case of declared value of goods) in 666.67 SDR (Special Drawing Rights) per package or unit or 2 SDR per kilogram of gross weight of goods, whichever is higher, with the numbers as provided for in the Rotterdam Rules, namely, 875 SDR (208,33 SDR more than in the Hague – Visby Rules) per package or unit or 3 SDR (1 SDR more than in the Hague – Visby Rules) per kilogram of gross weight of the goods, whichever is higher. Thus, one can clearly see that the limits under the new convention are higher than those set out by their predecessors. On the other hand, the reference to special drawing rights (SDR) is of frequent use in international instruments governing contracts of carriage by different modes of transport, such as the 1999 Montreal Convention on carriage of goods by air. Additionally, it must be said that the use of SDR aims at establishing a pattern that has nothing to do with the "irresponsibility of the carriers", but with the preservation of the calculated liability limit provided for in the international convention.

On the other hand, with regard to the applicable liability limit for delay, it should be noted that this situation was not expressly regulated at all in the Hague or in the Hague - Visby Rules (on which it was not clear whether the carrier was liable for delay). In any case, the value set forth in the Rotterdam Rules for this event represents an increase in the amount provided for in the respective provision of the Hamburg Rules.

Regarding the calculation of compensation when the shipper has declared the value of the cargo, the new convention only reflects what its predecessors (Hague, Hague – Visby and Hamburg Rules) have previously stated. In fact, according to Article 59, the declared value will be the applicable limit in this case (Art. 59.1).

It is worth noting that the new convention was drafted having regard in this particular to maintain a "balance" between the interests of carriers and shippers[21] and to setting up a regime that provides certainty to the parties to the contract[22], reasons why consensus was reached to set limits on the amounts raised by the Convention.

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[21] Sturley, Michael. "Setting the Limitation Amounts for the UNCITRAL Transport Law Convention: The Fall 2007 Session of Working Group III" in Benedict's Maritime Bulletin, Vol. 5, No. 3/4, p. 165.
[22] See Ibid, p. 165.

In any case, from a predominantly empirical point of view, it must be borne in mind that only a few goods frequently transported by sea – having regard to their cost of production – will not be properly covered by the "per package" limitation as provided for in the Convention, that is approximately $ 1.312 USD per package or unit.

It is true that the Rotterdam Rules do not establish a limitation of liability for the shipper, as it does for the carrier's responsibility. However, no one can say that this is a disadvantage of the Rules of Rotterdam in front of the Hague Rules, the Hague - Visby Rules or the Hamburg Rules, because all of these neither provide for any limitation of liability of the shipper. So in this particular issue the Rotterdam Rules can not be accused of being in detriment of the legal position of the cargo interests, because they simply maintain the same line of the preceding conventions.

15. The limitation of carriers' liability is prejudicial for transport users as it entails a transfer of costs in favour of ship-owners and affects the balance of payments of countries that are reliant on shipping services. It must be pointed out that limitation of liability is not admissible in the laws of many countries in this region of the world (for example, Brazil and Uruguay) and that the limits adopted by Argentina and other countries that have ratified the Hague Rules are significantly higher.

Answer: The limits of liability are an institution of the carrier's liability regulation present in all the international conventions governing contracts of carriage by any mode of transport. They are also present in the Hamburg Rules and the 1980 Geneva Convention on Multimodal Transport. In Latin America, Decisions 399 (International Carriage of Goods by Road) and 331/393 (Multimodal Transport) of the Andean Community, also establish liability limits applicable to the carrier.

The Agreement on Multimodal Transport of MERCOSUR (MERCOSUR/CMC/DEC Nº 15/94), article 13, establishes limits of liability applicable to Multimodal Transport Operators for damage to or loss of goods carried. Those limits were set by each one of the States Parties of MERCOSUR, namely Argentina, Brazil, Uruguay and Paraguay, in Annex I to this Agreement.[23]

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[23] Article 13 - Unless the nature and value of the goods have been declared by the shipper before the Multimodal Transport Operator has taken custody of the goods, and that have been entered in the Transport Multimodal Document, the Multimodal Transport Operator may not be held liable for any loss of or damage to goods in an amount that exceeds the liability limit established by each State Party in accordance with the statement made by each of them in Annex I, part of this Agreement. Notwithstanding this, States Parties agree that these limits of liability of the Multimodal Transport Operator may be amended by giving the other States Parties notice of the modification.
ANNEX I - LIABILITY LIMIT OF THE MULTIMODAL TRANSPORT OPERATOR
The limit of liability of the Multimodal Transport Operator under Article 13 ° of this Agreement will be:
1 - For Argentina, unless the nature or value of the goods have been declared by the shipper before the Multimodal Transport Operator have taken them under his custody and entered in the multimodal transport document, the responsibility of Transport Operator Multimodal will not exceed, in the event of total or partial loss, damage or delay in delivery of the goods with a value higher than 400 Argentinean pesos gold per kilogram of volume or affected part, or 10 Argentinean pesos gold per kilo of the volume or parts concerned, whichever is greater.
2 - For Brazil - the equivalent of 666.67 DES per volume or unit of cargo, or by 2 (two) DES per kilo of gross weight of the goods lost or damaged, whichever is greater.
3 - For Paraguay - the equivalent of 666.67 DES volume or unit of cargo, or by 2 (two) DES per kilo of gross weight of the goods lost or damaged, whichever is greater.
4 - For Uruguay - the equivalent of 666.67 DES volume or unit of cargo, or by 2 (two) DES per kilo of gross weight of the goods lost or damaged, whichever is greater.

As mentioned above, the civil liability regimes for damage, loss or delay in delivery of goods in international transport are set out having regard to a policy of allocation of risks associated with transport between the parties concerned, such as the carrier, the shipper of the goods, and insurers (both cargo insures and carrier's civil liability insurers). Liability limits are one of the ways by which this allocation of risk is presented.

Even in air transport of passengers, being human life and integrity much higher values than the goods, the Montreal Convention of 1999 utilizes the SDR as parameter to determine the compensation in case of death and injury to passengers.

Liability limits are not exclusive of transportation. They are also present in work-related accidents in most of international laws. Additionally, the same principle applies in relation to corporations and limited liability partnerships as a way of limiting the liability of their owners and shareholders.

16. With a view to achieving unanimity juridical principles and provisions have been incorporated into these new Rules both from those adopted by the Hague Rules of 1924 and from the Hamburg Rules.

To put it another way, a framework based on Common Law has been covered over with extracts from the Hamburg Rules which are founded on European codified civil law.

When it is said that the aim is to achieve uniformity in applicable law in order to facilitate international maritime trade, this ignores the incoherence of the mass of Rotterdam provisions designed to please everybody which, in fact, only leads to a legal Tower of Babel. This outcome is considerably more inappropriate than analysing the laws of other countries that have been built up to protect the rights of users, i.e. importers and exporters.

Modern information technology allows the world to have access to local laws and regulations along with the courts' and legal authorities' interpretations thereof. In other words it is not so difficult to find out about transoceanic rules and regulations.

To sum up, it is a mistake to proclaim that the Rotterdam Rules will put an end to the "worldwide confusion currently affecting this sector" as the promoters of the new regulations enthusiastically assert.

Answer: It is not true that when the Convention makes reference to certain "categories" or "expressions" inherent to the Hague or the Hague – Visby Rules that situation has been originated in the "rush to achieve unanimity". Quite the contrary, this situation arises since the convention sought to keep the categories used in the past that have proved to be useful and appropriate in these schemes. On the other hand, it is a constant complaint in Latin America that previous regimes were developed in a context of common law and thus, without having regard to our traditional categories build up from the Roman – Germanic law.

Thus, it seems paradoxical that it is precisely Latin American lawyers who signed the Declaration of Montevideo, who now attack the new convention by suggesting that the result is undesirable because it is "a skeleton originated in the Common Law" that "has been dressed up with clothes taken from the Hamburg Rules". This statement dismisses the antecedents of the new Convention. It is enough a review of its working papers to evidence that the Rotterdam Rules seeks to set up a "balance" between different legal systems, by recognizing the different legal families of law from which local laws come from, to pursue the creation of an equilibrated system that could offer solutions to common problems of sea trade while providing "familiarity" to different States not being tied to a single legal tradition. This is precisely what did not achieve, for instance, neither the Hague Rules, the Hague – Visby Rules, or the Hamburg Rules.

Furthermore, it is not shared the view suggesting that it would be preferable to continue studying foreign laws that supposedly promote consumer protection. This is because, on one side, it cannot be said that using that formula the shipper will always be more protected than through the application of the Rotterdam Rules and, secondly, because the study of foreign laws - which is not always an easy task for the foreign lawyer, nor for a judge of the eventual dispute - in many cases ends up favouring the phenomenon – very much criticized – of the so called "forum shopping". Indeed, it allows the carrier, who usually drafts the contract, to previously check what law is more favourable to his interests (in some cases far beyond the limits of the Convention) and set it up as the substantive law governing disputes arising out of the contract.

Thus, in our view, it is not about ignoring the benefits of the previous systems but, on the contrary, it is about building up from basis in order to have at hand a proposal that harmonizes legislation in accordance with the needs of the sector through a Convention that brings together elements from various legal traditions in an effort to become a universally applicable legal instrument.

Conclusion: For all the above reasons we call on the governments and parliaments of our respective countries NOT to ratify or become party to the "Rotterdam Rules".

Answer: The answers given in this document to the Declaration of Montevideo are intended to provide a more objective view about the proposal contained in the Rotterdam Rules, which we hope will be useful for governments and parliaments of Latin America to adopt an informed decision about the desirability or otherwise of its ratification.

Buenos Aires, October 27th, 2010.

1. **José Vicente Guzmán – Colombia**
2. **Javier Andrés Franco – Colombia**
3. **Andrés Fernando Reyes – Colombia**

4. **Jorge Camilo Reyes – Colombia**
5. **Rafael Mendieta – Colombia**
6. **Carlos Iván Álvarez – Colombia**
7. **María Inés Hurtado – Colombia**
8. **Cristina Mesa – Colombia**
9. **Ricardo Vélez – Colombia**
10. **Camilo José Abello - Colombia**
11. **Ricardo Sandoval López – Chile (Delegado de Chile ante UNCITRAL en el Grupo de Trabajo para la preparación de las Reglas de Rotterdam y actual Presidente de la Comisión de UNCITRAL).**
12. **Paulo Campos Fernándes – Brasil**
13. **Ider Valverde - Ecuador**
14. **Rafael Illescas – España**
15. **Alejandro Laborde Fonrat – Uruguay**
16. **Alejandro Sciarra – Uruguay**
17. **Gabriela Vidal – Uruguay**
18. **Ariosto González – Uruguay**
19. **Carlos Dubra Sowerby – Uruguay**
20. **Carlos Matheus – Venezuela**

The Rotterdam Rules: A Cherishable Opportunity for the Unification of the Law

By Henry Hai Li*

1. Introduction

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which is also known as the "Rotterdam Rules", was adopted by the UN General Assembly on 11 December 2008, and the Signing Ceremony has taken place successfully at Rotterdam on 23 September 2009, at which I witnessed some 15 countries signed the "Rotterdam Rules"[1], and now there are 19 signatories in total[2]. It is a pity that China is not among the 15 or 19 signatories, given the fact that China Maritime Law Association (the "China MLA") had been actively involved in the CMI's preparation work and that the Chinese government had sent a rather luxury delegation to the UNCITRAL Working Group III on Transport Law having attended all the working sessions and made a great contribution to the discussion and finalization of the Rotterdam Rules. For the purpose of this paper, the preparation work by the CMI and the UNCITRAL will be looked back in a nutshell, and the key contents of the Rotterdam Rules will be briefly highlighted. Then the compromises will be discussed, which will be followed by a conclusion.

2. A ten years crystallization of wisdom and knowledge

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[1] The countries which have signed the Rotterdam Rules at the Signing Ceremony are Congo, Denmark, Gabon, Ghana, Greece, Guinea, the Netherland, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States of America, in addition, France managed to sign on the same day at 22.30 hours making it the 16 signatory.

[2] Now, Madagascar, Cameroon and Armenia have been added to the list of signatories, which is now in total 19 signatories. See: http://www.un.org/News/Press/docs/2009/Lt4418.doc.htm

As known, the initial preparation work of the Rotterdam Rules was started in 1996 by the CMI together with some international organizations at the request of UNCITRAL to gather information about the current practices and laws in the area of international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed.

The CMI set up in May 1998 an International Working Group on Issues of Transport Law (the "IWG") chaired by Stuart Beare. In accordance with CMI's well-established practice the IWG prepared and circulated a questionnaire on the related issues to its member associations, to which sixteen national maritime law associations responded, and China MLA is one of the 16 respondents. After analysis of the responses, the IWG identified some principal issues for the discussion at the first meeting of the International Sub Committee (the "ISC"), which was set up by the Executive Council of the CMI in November 1999. Among the attendants to the first meeting on 27-28 January 2000 in London, there were two Chinese maritime law experts designated by China MLA to join the ISC, namely Prof. Si Yuzhou and Mr. Song Dihuang[3].

In the year of 2000, the second, third and fourth meeting of the ISC were held in London or New York, while the UNCITRAL/CMI Colloquium was held in July 2000 in New York, at which Prof. Si Yuzhou presented a paper on the issues in respect of actual carrier. At the CMI Conference in Singapore in February 2001, the Transport Law Issues is the key topic of the Conference and China MLA sent a big delegation attending this conference and participating actively in the discussion of the transport law issues. On 31 May 2001, following the fifth meeting of the ISC in New York, the Chairman of ISC circulated a Draft Outline

[3] See Report of the First Meeting of ISC on Issues on Transport Law, at http://www.comitemaritime.org/singapore/issue/report1.pdf

Instrument and a Consultation Paper, with which comments were requested on a number of issues, comments were received from 17 national associations. Again, China MLA is one of the 17 associations.[4] The sixth meeting of the ISC was held in November 2001, at which the final revision of the draft instrument was completed. Latter, on 11 December 2001, the CMI submitted to the Secretariat of UNCITRAL the CMI Draft Instrument on Transport Law, which represents a completion of the three and a half years hard work by the CMI on its project on Issues of Transport Law.

Upon receipt of the CMI Draft Instrument, the project was put on the agenda of UNCITRAL Working Group III (Transport Law). The Working Group generally reviewed the themes of the CMI Draft Instrument at its ninth session in April 2002 in New York. It then began its first reading of the individual articles. The first reading continued through the tenth session in September 2002 in Vienna and the eleventh session in March/April 2003 in New York. The second reading of the Draft Instrument based on the text in WP 32 began at the twelfth session in October 2003 in Vienna, and completed at the eighteenth session in November 2006 also in Vienna. The third reading started at the nineteenth session in April 2007 in New York and completed at the twentieth session in October 2007 in Vienna, following which the Secretariat prepared a further text to give effect to the decisions made on the third reading which is contained in A/CN.9/WG.III/WP.101 (WP 101). The Working Group's work then went on with the final review which was completed at the twenty-first session in January 2008 in Vienna. Later, on 3 July 2008 the Draft Convention was formally approved by the Commission.

From the receipt of the CMI Draft Instrument to the approval by the Commission, it took some seven years for the Working Group to complete the 3 readings and the final review. It is worth mentioning that during this period

[4] CMI Year Book 2001, p.384.

the Chinese government designated a luxury delegation having attended all the meetings from the ninth session in April 2002 in New York to the twenty-first session in January 2008 in Vienna. The Chinese delegation was headed by Prof. Si Yuzhou with a number of maritime law experts from Dalian or Shanghai Maritime University, the Supreme Court of the PRC, the Ministry of Commerce of the PRC, the Ministry of Transport of the PRC, China Ocean Shipping (Group) Company, China Classification Society, the People's Insurance Company of China, etc.

As can be seen from the above, from the time the initial preparation work started by the CMI in 1996 until the time of the adoption by the UN General Assembly in 2008, it took more than 10 years for the Rotterdam Rules to come into being. Therefore, it can be said that the Rotterdam Rules is a ten years crystallization of wisdom and knowledge of hundreds of experts coming from all over the world. In addition, during this period, the world has witnessed the involvement by China MLA in the CMI's preparation work and the contribution by the Chinese delegation to the discussion and finalization of the Rotterdam Rules at the UNCITRAL Working Group III. It seems that the Chinese involvement and contribution are more than sufficient to make China a signatory of the Rotterdam Rules. Yet, an official declaration or explanation is expected by Chinese maritime law circles from the government as to why China not signed the Rotterdam Rules at the Signing Ceremony.

3. A set of comprehensive rules of law

The Rotterdam Rules consists of 96 articles , which are grouped into 18 chapters. Apart from the 10 final clauses under Chapter 18, there are 86 clauses dealing with the substantive issues in relation to international carriage of goods wholly or partly by sea. Whereas, as known, the Hague Rules has

only 16 articles in total, and just 10 articles dealing with the substantive issues; while the Hamburg Rules has 34 articles in total, and just 26 articles dealing with the substantive issues. As far as the number of the substantive articles is concerned, the Rotterdam Rules is 8.6 times larger than the Hague Rules and 3 times larger than the Hamburg Rules. In addition, as can be observed, covered by the Rotterdam Rules there are a number of new subjects, which have never been dealt with by any existing convention in relation to carriage of goods by sea, such as the electronic transport records, rights of the controlling party, the transfer of rights, the identity of the carrier, the volume contract, the delivery of goods, etc. It is believed that "The Rotterdam Rules bring more clarity regarding who is responsible and liable for what, when, where and to what extent. The application of the new convention will make international trade easier and lead to a reduction in costs."[5]

In view of the above, it seems that the Rotterdam Rules is a truly comprehensive convention in terms of the number of the articles contained therein and the subjects covered thereby, to which no previous convention is comparable. Whereas, it is true that the more comprehensive a convention is, the more difficult the convention will enter into force and be widely accepted. On the other hand, it is also true that for a widely accepted convention, the more comprehensive the convention is, the greater uniformity the convention may bring. The Rotterdam Rules being as a truly comprehensive convention, once it enters into force and becomes widely accepted, the uniformity which may bring will be much more and wider than any existing convention in relation to carriage of goods by sea. In other words, once the Rotterdam Rules enters into force and becomes widely accepted, an ever great and unprecedented uniformity on the law in relation to carriage of goods by sea will be achieved.

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[5] http://www.unis.unvienna.org/unis/pressrels/2009/unisl131.html

4. An outcome of compromises keeping fair balance between the ship and the cargo interests

Due to the well-known reasons, significant difference in the national laws in relation to carriage of goods by sea accompanied with the development of the international trade and shipping. The world's first attempt to unify the relevant rules of law in relation to carriage of goods by sea may be traced back to some 100 years before. The adoption of the Hague Rules in 1924 was the first time that a fair balance between the ship interests and the cargo interests at an international level was established under the given circumstances of 1924. The number of the states which had joined the Hague Rules by way of either ratification or accession may well amount to a convincing proof of the balanced interests.

With the development of the international trade and shipping, the previously balanced interests would change, which would call for new rules of law to maintain. The Hamburg Rules may be considered as the first trial to maintain or adjust the changed balance of interests between the ship and the cargo. Although not successful, lessons have been given to its successor. When a fair balance between the ship interests and the cargo interests is to be established or maintained, compromises will have to be made by the parties who have an interest in the international trade and shipping. Without compromise, there will be no conventions. In other words, a fair balance of interests can only be established or maintained through compromises.

As known, in the Rotterdam Rules, the notorious nautical fault exoneration is abolished, that makes the fault which bases the carrier's liability a complete one; the package limitation is increased to SDR 875/per package or SDR 3/per kilo, which is a 5% increase per package and 20% increase per kilo of the limits under the Hamburg Rules; the carrier's seaworthiness obligation has

been made a continuing one throughout the voyage, etc. For these reasons, critical views have been expressed that these changes have broken the fair balance between the cargo and the ship interests which have long been established by the Hague or Hague-Visby Rules.

However, it should be emphasized that the centurial Hague Rules is too old to govern or adjust the modern shipping business and to meet with the development of the international trade, even for the Hamburg Rules, some 30 years have past since its adoption in 1978. In addition, as a matter of fact, the Working Group has paid special attention to keeping or maintaining a fair balance between the ship and the cargo interests during the discussion and finalization of the Rotterdam Rules. For example, while discussing the seaworthiness obligation of the carrier, "The Working Group also agreed that making this obligation a continuing one affected the balance of risk between the carrier and the cargo interests in the draft instrument, and that care should be taken by the Working Group to bear this in mind in its consideration of the rest of the instrument."[6] Not surprisingly, the Rotterdam Rules has maintained a fair balance between the ship and the cargo interests, a convincing proof is that among the present 19 signatories, there are some important seafaring nations such as Greece, Norway, the United States, Denmark, the Netherlands, France and Spain[7]; on the other hand, there are also a number of nations which care more the cargo interests, such as Congo, Gabon, Ghana, Guinea, Nigeria, Senegal, Togo, Madagascar, Cameroon, etc. From the present signatories, it can be seen that to some extent the Rotterdam Rules is not only acceptable to the important seafaring nations, but also to the nations which care more the cargo interests.

As a Chinese, I am happy to see that quite some provisions contained in the

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[6] See A/CN.9/WG.III/WP.36, footnote 55.

[7] Note: the deadweight tonnage of the controlled fleet of these countries are all among the top 30 in the world, see http://www.unctad.org/en/docs/rmt2008_en.pdf

Rotterdam Rules are identical or akin to the relevant provisions contained in the Chinese Maritime Code (the "CMC"). For example, Article 21 of the Rotterdam Rules provides for the delay, which reads "Delay in delivery occurs when the goods are not delivered at the place of the destination provided for in the contract of the carriage within the time agreed." The wording and the effect of this article 21 is almost the same as that of Article 50 of the CMC, which reads "Delay in delivery occurs when the goods have not been delivered at the designated port of discharge within the time expressly agreed upon." For further example, Article 17 of the Rotterdam Rules is entitled "Basis of liability" which consists of 6 paragraphs. Provisions akin to Article 17.1, 17.2, 17.3 and 17.6 of the Rotterdam Rules can be found in Article 46, 50, 51 and 54 of the CMC. In other words, the provisions contained in the CMC in respect of the basis of liability including the burden of proof are in many aspects close to the provisions of Article 17 of the Rotterdam Rules, even bearing in mind the abolishment of the so-called nautical error exoneration by the Rotterdam Rules.[8]

On the other hand, I also noticed that some subjects or provisions contained in the Rotterdam Rules would not be welcomed by the Chinese maritime law circles, or at least some of them. For example, the provisions on freedom of contract for volume contract, the provisions on the right and obligation of the documentary shipper; the provisions on delivery of cargo without surrender of transport document; the provisions on the identity of the carrier, etc. In addition, it is also negatively commented that the package limitation is increased too high to be reasonable and more than necessary.

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[8] Si Yuzhou and Henry Hai Li, The New Structure of the Basis of Liability for the Carrier, presented at the Rotterdam Rules 2009 Colloquium at Rotterdam on 21 September 2009, see http://www.rotterdamrules2009.com/cms/index.php?page=about

Perhaps, attention should be paid to the fact that China is a great country, although still a developing one. The Chinese controlled fleet of commercial ships in 2008 ranked the top 4 of the world.[9] In 2008, the cargo throughput at the Chinese ports was 7 billion tons, which made China to rank the top one in the world in 6 consecutive years[10]. Also, in 2008, in terms of merchandize trade, China was the second leading exporter and the third leading importer[11].These simple facts remind the Chinese maritime law circles that the Rotterdam Rules should be welcomed, if it is proved that by the Rotterdam Rules a fair balance between the ship interests and the cargo interests have been established or maintained taking account the circumstances of today and the nearby future.

It is no doubt that changes will be brought by the Rotterdam Rules to the existing rules of law in relation to international carriage of goods by sea. And, among the changes, some could amount to a significant change to the existing rules of law, e.g. the abolishment of the nautical fault exoneration. But, it should be emphasized that while assessing the impacts or effects of the changes brought by the Rotterdam Rules to a certain legislation, such as the Hague-Visby Rules or the relevant Chinese law, we should always bear in mind that the Rotterdam Rules is a set of systematic rules of law, which should be accessed comprehensively as a whole but not isolatedly in parts. Or, otherwise, a wrong way will never produce a right fruit.

It is believed that the Rotterdam Rules would create a contemporary and uniform law providing for modern door-to-door container transport including an international sea leg. There are many innovative features contained in the Convention, including provisions allowing for electronic transport records, and

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[9] According to the Review of Maritime Transport 2008 compiled by United Nations Conference on Trade and Development, China is the fourth largest controlled fleet country, totaling about 84.88 million dwt, 3,303 ships. See http://www.unctad.org/en/docs/rmt2008_en.pdf

[10] http://www.goubuy.com/news/2009/09/03/50969.html

[11] See the World Trade Report 2009, at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report09_e.pdf

other features to fill the perceived gaps in existing transport regimes.[12] "It is expected that harmonization and modernization of the legal regime in this area will lead to an overall reduction in transaction costs, increased predictability when problems are encountered, and greater commercial confidence when doing business internationally."[13] It is hoped that the Rotterdam Rules may enter into force early rather than late.

5. Conclusion

The Rotterdam Rules being one unprecedentedly comprehensive convention in relation to carriage of goods by sea, consisting of some 86 substantive articles, although has gone through a 10 years preparation process, nobody would claim it being a prefect convention having resolved all problems and addressed all issues that concern the international shipping and trading. But it should be accepted that the Rules is a ten years crystallization of wisdom and knowledge, an outcome of compromises achieved through a democratic and transparent process by the international community, and the best possible solution acceptable to all the related parties under the current circumstances. Satisfactory or not, after more than 10 years pregnancy the baby now is ready to be given birth to. Bearing in mind that it is unlikely that the international community will be able to work out another international instrument on the same subject having the same width and depth as the Rotterdam Rules in the near future, say in the next 30 or 50 years, we have no reason not to cherish the enthusiasm, wisdom and efforts which have been put into it by so many people, including those Chinese maritime law experts taking part in the work of the CMI and the UNCITRAL. China, perhaps, also other countries, should get ready and prepared to welcome the birth of the Rotterdam Rules, the new baby of the international maritime law family.

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[12] http://www.unis.unvienna.org/unis/pressrels/2009/unisl132.html

[13] http://www.unis.unvienna.org/unis/pressrels/2009/unisl131.html

THE ROTTERDAM RULES IN BEIJING*

MICHAEL F. STURLEY**

The 40th Conference of the Comité Maritime International (CMI), which was held in Beijing in October 2012, devoted a full day to the discussion of the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, popularly known as the "Rotterdam Rules."[1] After a short introduction to open the session, four panels conducted the day's work. Panel I updated the delegates on recent developments internationally, in various regions, and in specific countries. In Panel II, six speakers each presented a paper addressing a particular aspect of the Rotterdam Rules. Panel III focused on a dozen detailed questions presented by a complex hypothetical problem that has been prepared in advance and circulated to delegates. Finally, Panel IV answered a wide range of specific questions raised by the delegates.

Opening

The Rotterdam Rules session opened on Tuesday, 16 October, with a short welcome from CMI President Karl-Johan Gombrii. President Gombrii also read a message to the delegates from Renaud Sorieul, the Secretary of the United Nations Commission on International Trade Law (UNCITRAL). Mr. Sorieul noted that an UNCITRAL Working Group had drafted the Rotterdam Rules, based on the CMI's preliminary text, to harmonize and modernize the law of international carriage of goods by sea. He added that both developing and developed countries, as well as shipper and carrier nations, had indicated their acceptance of the convention, and he looked forward to further ratifications in the near future.

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* This paper was originally written for the *Droit Maritime Français* (*DMF*), which translated it into French and published it in *DMF* no. 744, February 2013, Special CMI-Beijing issue, p. 124.

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1 General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 (Dec. 11, 2008).

Panel I

The Panel I speakers updated delegates on recent developments concerning the Rotterdam Rules. Tomotaka Fujita (Japan) presented updated information on the international level. Six other speakers then reported developments in different countries or regions from around the world.

A. International Developments

The most significant international development involved two modest amendments to the text of the convention. After the U.N. General Assembly adopted the Rotterdam Rules in 2008, the UNCITRAL Secretariat discovered two editorial mistakes that had been made during the final drafting of articles 1(6) and 19(1)(b). Fortunately, article 79(2) of the Vienna Convention on the Law of Treaties provides a procedure to correct such mistakes. The Secretary-General of the United Nations invoked that procedure on 11 October 2012 (a few days before the Beijing Conference) to make the necessary corrections.[2]

Article 1(6) defines a "performing party" in part by reference to the types of activities that the person performs.[3] The UNCITRAL Working Group had intended to conform the article 1(6)(a) list of activities to the list of the carrier's obligations in article 13(1), which requires the carrier "properly and carefully" to "receive, load, handle, stow, carry, keep, care for, unload and deliver the goods." When that list was incorporated into article 1(6)(a), however, the word "keep" was accidentally overlooked. Article 1(6)(a) has therefore been corrected to recognize that a performing party includes someone "that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to" the "keeping" of the goods.[4]

Article 19 defines the liability of a "maritime performing party," such as a stevedore or terminal operator.[5] Under article 19(1)(b), the occurrence that causes the loss, damage, or delay must take place during what may be described as the maritime performing party's period of responsibility. The

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[2] See Proposal of Corrections to the Original Text of the Convention, doc. no. CN.563.2012.TREATIES-XI-D-8 (Depositary Notification) (Oct. 11, 2012) (available at http://treaties.un.org/pages/CNs.aspx).

[3] See generally, e.g., Michael F. STURLEY, Tomotaka FUJITA & Gertjan VAN DER ZIEL, *The Rotterdam Rules: The U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* 133-134 (2010).

[4] The corrected text of article 1(6)(a) provides as follows:

"Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, **keeping,** care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

The new language is indicated by **bold** text.

[5] See generally, e.g., STURLEY, FUJITA & VAN DER ZIEL, *supra* note 3, at 142-143.

intention was to impose two requirements. First, the relevant occurrence must happen during the "maritime" period,[6] *i.e.*, "the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship."[7] Second, that occurrence must happen on the maritime performing party's watch. This could be either "while the maritime performing party had custody of the goods,"[8] or, even without custody, while it participated in the process.[9]

During the Secretariat's editorial revision of the draft that the Working Group considered at its final session, roman numerals were added to article 19(1)(b) "for improved drafting."[10] The unintended consequence of that addition was to turn the two separate requirements into a single requirement that could be satisfied in one of three ways. Under the original text, any maritime performing party could have been held liable if an occurrence happened during the maritime period, or while the maritime performing party in question had custody of the goods, or while it was participating in the process. In other words, article 19(1)(b) could have been read to impose liability on a stevedore that loaded a vessel in Asia if the goods were subsequently damaged by a different stevedore while unloading the vessel in Le Havre because the occurrence would have happened during the maritime period. Article 19(1)(b) has therefore been corrected to restore the original understanding.[11]

The Depositary Notification established a 90-day window during which a signatory state may object to the proposed changes.[12] If no objection is received by 9 January 2013 — and no one expects an objection — then the proposed changes will take effect.[13]

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6 Because the Rotterdam Rules apply during the entire period covered by the contract of carriage, they will often apply during the inland portion of a multimodal door-to-door shipment. See generally, e.g., STURLEY, FUJITA & VAN DER ZIEL, *supra* note 3, at 59-61.

7 Rotterdam Rules art. 19(1)(b)(i).

8 Rotterdam Rules art. 19(1)(b)(ii).

9 Rotterdam Rules art. 19(1)(b)(iii).

10 Draft convention on the carriage of goods [wholly or partly] [by sea], doc. no. A/CN.9/WG.III/WP.101, at 19 n. 40 (Nov. 14, 2007).

11 The corrected text of article 19(1)(b) provides as follows:

The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship **and either** (ii) while it had custody of the goods or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

The new language is indicated by **bold** text.

12 See Proposal of Corrections, *supra* note 2.

13 See Vienna Convention on the Law of Treaties art. 79(2)(a).

B. National and Regional Developments

Six speakers reported on national and regional developments: Song Dihuang (China) discussed the situation in China; Michael Sturley (U.S.A.) reported on the progress toward ratification in the United States; Stephen Girvin (Singapore) covered other countries in the Asia-Pacific region; Gertjan van der Ziel (Netherlands) updated the delegates on the convention's status in Europe; José Vicente Guzman (Colombia) addressed the status in Central and South America; and Kofi Mbiah (Ghana) explained the situation in Africa.

Many countries have adopted a "wait and see" attitude, meaning that they are studying the Rotterdam Rules but postponing a decision on ratification until major trading nations have ratified the convention. Many countries, in all parts of the world, are apparently waiting to see what the United States, in particular, will do.

Prof. Sturley assured the delegates that the U.S. government remains committed to ratification. Although the process has taken longer than many had hoped, that should be viewed simply as evidence of the care with which the State Department is conducting the process. The correction of the drafting mistake in article 19(1)(b)[14] resolves what may have been the last significant problem, so there may well be some visible progress after 9 January.

In Europe, a number of nations are "waiting and seeing," but Denmark, Norway, and the Netherlands have all taken the political decision to ratify the Rotterdam Rules. Denmark and Norway are particularly advanced in the process, although each may postpone formal ratification until either the United States or other major trading nations in Europe have ratified. Of course Spain, on 19 January 2011, was the first nation to ratify the convention.

In Africa, Togo on 17 July 2012 became the second nation to ratify the convention. Moreover, CEMAC (communauté économique et monétaire des Etats d'Afrique centrale), consisting of Cameroon, Congo, Gabon, Equatorial Guinea, the Central African Republic, and Chad, incorporated the Rotterdam Rules into their community code on 22 July 2012, and it is now in force.

Panel II

Panel II was a traditional panel in which each of six speakers briefly presented a paper addressing a particular aspect of the Rotterdam Rules. The final versions of the papers are also being published in the CMI Yearbook.[15] For the moment, therefore, it is sufficient to note the speakers and the titles of their papers.

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[14] See supra notes 5-11 and accompanying text.
[15] See *infra* at pages 273-331.

Alexander von Ziegler (Switzerland) addressed "The Rotterdam Rules and the Underlying Sales Contract."

Andrew Bardot (United Kingdom) delivered a paper titled "The U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea — The 'Rotterdam Rules' — Practical Implications For Carriers."

Si Yuzhuo (China) presented "An Analysis and Assessment of the Rotterdam Rules in China's Marine Industry."

José Vicente Guzman (Colombia) spoke on "The Limitation of Liability of the Carrier from an Allocation of Risks Point of View."

Zhang Yongjian (China) delivered a paper titled "On the International Transport Laws' Uniformity, Which the Rotterdam Rules Aim for."

Kofi Mbiah (Ghana) concluded with a paper titled "Updating the Rules on International Carriage of Goods by Sea: The Rotterdam Rules."

Panel III

For Panel III, Song Dihuang (China) and his colleagues prepared a complex hypothetical problem that raised a range of different issues. That hypothetical problem was distributed to the delegates for their reference. A panel — consisting of Stuart Beare (United Kingdom), Tomotaka Fujita (Japan), Stephen Girvin (Singapore), Gertjan van der Ziel (Netherlands), and Song Dihuang (China) — then answered a dozen detailed questions based on the hypothetical problem.

The first questions involved the identification of the parties to the transaction. Mr. Beare, Prof. Fujita, and Prof. Girvin resolved some "identity of carrier" problems,[16] while Mr. Song, Prof. van der Ziel, and Mr. Beare explained the concept of the "documentary shipper"[17] in the context of an FOB shipment.

Prof. Girvin addressed the situation in which a shipper is liable for the shipment of goods that become dangerous.[18] He compared the results under the Rotterdam Rules with the results under other international conventions.

Mr. Beare discussed the carrier's liabilities for cargo damage in the context of a grounding (thus raising the navigational fault exception from the Hague and Hague-Visby Rules,[19] which was omitted from the Rotterdam Rules[20]) and improper repairs during the voyage (thus raising the continuing due diligence requirement under the new convention[21]).

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16 See Rotterdam Rules arts. 1(5), 36(2)(B), 37.
17 See Rotterdam Rules arts. 1(9), 33.
18 See Rotterdam Rules art. 32.
19 See Hague-Visby Rules art. 4(2)(a).
20 Cf. Rotterdam Rules art. 17.
21 See Rotterdam Rules art. 14.

Prof. Fujita and Prof. van der Ziel then addressed some of the issues other than liability that are covered by the Rotterdam Rules but not by the prior maritime conventions, including the right of control,[22] the carrier's right to request instructions,[23] and delivery of the cargo.[24]

Finally, Prof. Fujita explained the operation of the jurisdiction chapter[25] in the context of a choice-of-court clause that purports to grant exclusive jurisdiction to a different court than the one in which the cargo claimant seeks to recover for its losses.

Panel IV

The Rotterdam Rules session concluded with a panel — consisting of Tomotaka Fujita (Japan), Gertjan van der Ziel (Netherlands), Si Yuzhuo (China), and Alexander von Ziegler (Switzerland) — that answered whatever questions the delegates wished to ask. Some of the questions were very specific, raising detailed issues about particular aspects of the Rotterdam Rules. Others were very broad and raised fundamental issues about the nature of the Rotterdam Rules. As an example of the former, one delegate asked about the ratification process in the United States and how quickly a U.S. ratification would take effect. Prof. Sturley, speaking from the chair, clarified the U.S. process and noted that by its terms[26] the Rotterdam Rules enter into force (for those countries that have ratified) approximately one year after the 20th country deposits its instrument of ratification with the United Nations.[27]

As an example of a broad question raising fundamental issues, one delegate asked whether the Rotterdam Rules were pro-carrier (as many consider the Hague-Visby Rules to be) or pro-cargo (as many consider the Hamburg Rules to be). Prof. von Ziegler, Prof. van der Ziel, and Prof. Sturley all expressed their views on that question. They observed that the Rotterdam Rules do not represent a "zero sum" game. The most important aspects of the new convention benefit both shippers and carriers. The entire industry will benefit from having a more modern regime that addresses the needs of the 21st century rather than a regime that corrects the problems of the 19th century. Both shippers and carriers will benefit from having a single legal regime that covers the entire period governed by the contract of carriage (whatever that contract may provide). The entire

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22 See Rotterdam Rules ch. 10.
23 See Rotterdam Rules art. 55.
24 See Rotterdam Rules ch. 9.
25 See Rotterdam Rules ch. 14.
26 See Rotterdam Rules art. 94(1).
27 Several of the more specific questions raised in Panel IV addressed issues that had been discussed in Panel III. For example, two delegates asked "identity of carrier" questions and one delegate asked a question about documentary shippers. Cf. *supra* notes 16-17 and accompanying text.

industry will become more efficient with a legal regime that facilitates the development of electronic commerce. Uniformity, certainty, and predictability are important to everyone in the industry.

Looking at the nations that have already signed the Rotterdam Rules, the list offers overwhelming evidence that the new regime does not favor either carriers or cargo to the detriment of the other. Mr. Sorieul, the UNCITRAL Secretary, made exactly this point in his message to the delegates at the beginning of the session, and it is easily verified. Denmark and Greece were the two nations that most strongly and consistently supported carriers' interests during the UNCITRAL negotiation, and they both signed the convention on the first possible day. As a group, the African countries were consistently the strongest advocates of cargo interests during the negotiation, and seven of them signed the convention in Rotterdam. (Five more African countries have since signed, and Togo has already ratified.) This unprecedented support from across the spectrum demonstrates that the Rotterdam Rules are both pro-carrier and pro-cargo.

Conclusion

The Rotterdam Rules session at the CMI's Beijing Conference did not call for any action on the part of the delegates. As the CMI has already endorsed the new convention,[28] there was no need for any votes to be taken. The session was instead designed to further the CMI's mission of educating the maritime community about important new developments in maritime law. At the end of the day, each country will decide independently, based on its unique national interests, whether to ratify the Rotterdam Rules. The CMI can simply provide information that will help each country to make a rational decision, and will help those who will be subject to the new regime to understand it when it enters into force.

Education is particularly important in the context of the Rotterdam Rules. The convention covers much more material than prior carriage conventions, and thus there is much that may be unfamiliar — even to experienced maritime lawyers. Mastering so much new information is not an easy task. Moreover, there has been a great deal of misunderstanding about the Rotterdam Rules.

A one-day session is not sufficient to convey all the information that is necessary fully to understand the Rotterdam Rules, but the CMI session in Beijing was a part of the process. Other conferences are being held throughout the world, many of which examine the new convention in even greater detail. Published sources are also readily available, and can convey more information than any conference. Although much still remains to be done, important progress is being made and will continue.

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[28] See CMI Yearbook 2009, 315.

ROTTERDAM RULES AND THE UNDERLYING SALES CONTRACT

ALEXANDER VON ZIEGLER*

I. Introduction

The complex background of the Rotterdam Rules can best be understood if one understands the long path of evolution from the Hague to Rotterdam, via Hamburg. More than a century ago and under pressure from some national US legislation (Harter Act 1893), the international community rushed to put together a harmonizing instrument that would restore unification to the field of a maritime carriage and transportation law. The form of that harmonization was first planned in the form of the 1921 Hague Rules, an entirely private document, which was thought to be introduced by the market in the form of a model bill of lading. As it became quite clear that only an international convention would be able to restore uniformity, the Brussels conference, in 1924, enacted the so-called Hague Rules, which soon became the general scheme for selected issues on carriage liability in the field of maritime transportation, despite the fact that the legislatory method of the Hague Rules was not perfect (the Rules were drafted in the form of a model bill of lading and not in the form of international legislation) and despite the fact that they were wrongly conceived to be a product of the shipping industry and their insurers. It is, however, a fact that all interested industries were part of the process, and that the Convention was one of the greatest success in the field of international maritime law.

The Hague Rules were the subject of a revision on selected issues in the form of the Hague Visby Rules of 1968. The 1968 revision was, however, not deemed by everyone to be a sufficient modernization of the Hague Rules, and ten years later the Hamburg Rules were established as a "counter-offer" for an international harmonization in this field. What followed was almost a trench war between the Hague Rules and the Hamburg Rules, between the "Haguers" and the "Hamburgers". The result of this polarization was that governments

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became virtually stalled as they could not move in either direction without facing violent lobby groups. The positions between the two groups froze, as did the chances of any further positive development on an international level.

Unfortunately, the answers to this fiasco were national "solo runs" by national legislators and, in reaction to this, a forceful international opposition against such national or regional initiatives developed. By approximately 1990 it was realized (at the Comité Maritime International and also at UNCITRAL) that the strongly polarized positions had led to an impasse. As the subject of the carrier's maritime liability still was in effect a political issue (despite the fact that I really cannot see much political relevance in such a subject) a "*deus ex machina*" was needed to reopen the discussion.

A new opportunity arose in the context of electronic commerce: When UNCITRAL's work on electronic data interchange (EDI) encountered particular problems in trying to translate the mechanisms of international trade on the basis of bills of lading into the electronic environment, some delegations had asked UNCITRAL to attempt to harmonize the way such transport documents function. This was because it was clear that no existing international maritime instrument was effectively dealing with the issues of transfer of rights and with the role of the bill of lading as a document of title. All of the existing international instruments were concentrating on the carrier's liability, but none would actually assist the international community in defining the exact mechanism that was needed to translate trade realities into an electronic environment. As the basic starting point of the architecture of the electronic environment was based on the "functional equivalent" principle, it became necessary to translate the mechanism on the functioning of the bills of lading and other transport documents in trade. But, thus far, there had been a lack of uniformity, since most of those issues had been left to national law. And indeed, many national laws would differ on important issues in this context.

When embarking on this new challenge it was soon clear that there was a need for a broader perspective. There was a case for a harmonizing process that would clarify how trade and transport operate (and interrelate) in an electronic environment; here was an opportunity to clarify this for the benefit of trade, whether in a traditional or in an electronic environment.

As UNCITRAL had realized that this was a highly practical issue that required close cooperation with the industry, it asked the Comité Maritime International (CMI) to coordinate, with a number of international organizations, a study on those issues and to come up with some proposals. In course of this, CMI was asked to draft a possible instrument to cover those issues. The idea was not to prepare a revision of the Hague or Hamburg Rules, but rather to seek a comprehensive legislation, which would also include liability issues, and would be aimed at the regulation of the entire contract of carriage by sea and the mechanisms by which the documents generated by this contract would operate, not just for the purposes of transportation, but, more importantly, for the

purposes of international overseas trade. In the first phase of this exercise, the liability issues were not at the forefront; from a political, practical, and also legal perspective it soon became clear that, when dealing with contractual aspects of transportation, this would automatically raise issues of the responsibility of the parties and subsequently also of their liability, if their responsibilities were not met.

During all the phases of the project the industries were closely integrated into the process. As always, in such projects, it is not easy to find volunteers from those industries to actively participate. However, on several levels, including the CMI level, and its national associations (for their national market) and during the UNCITRAL project, the representatives of several interest groups in national trade and maritime transport were able to represent their interests and introduce the particular issues that they wished to be covered in a future instrument. The CMI draft that was prepared by its Sub-Committee and submitted in December 2001 to UNCITRAL was therefore already a product of consultation between the industries and the national associations, members of CMI. It therefore already contained many compromises that were based on in-depth discussions between several Committees and Conferences of CMI. This working method allowed the subsequent discussion at UNCITRAL to be much more focused on trade realities, and pre-identified the main issues that needed further discussion and possible compromise.

While an enormous amount of work on many levels has gone into the Convention, as we will see today, all this effort could not, unfortunately, guarantee the product being perfect. Those of us that have been part of an international harmonizing process know that the goal of achieving a perfect international legislation is practically an utopian ideal as at all stages compromises need to be made that are not necessarily sensible or in line with a general structure or strategy of the product itself. This creates here and there the odd provision that can only be understood if one knows the background of the legislation process. However, having said that, it is my personal view that those issues which are not "perfect" have been kept to a minimum as the UNCITRAL Working Group III has over the years benefited from a very professional working spirit and was supported throughout by a number of excellent delegations, covering all regions of the globe.

II. Main features of the Rotterdam Rules in the context of the underlying sales transaction

As was explained earlier, the starting point of the project was to place the contract of carriage into its proper context within trade transactions. The trade transactions are the "raison d'être" of the shipping industry. This seems to be so self-evident that one tends to forget the starting point. But it is at the same time the starting point for any definition of the scope and the nature of an international legislation covering contracts for the carriage of goods by sea. This is especially

true since the maritime transportation and the movements of goods have become – in turn – the backbone of international trade. While trade is setting the need, maritime transport is actually delivering the tools to achieve the goals of trade: Global economic interaction and prosperity.

The basics for any international trade transaction are found in the underlying sales contract. The geographical distance between the places where the goods are located at the time of the sale, and the place to which the goods will have to be moved for the buyer, creates the necessity for the movement of the goods. The purpose – the "raison d'être" – of the shipping industry is to overcome this distance. Therefore, the prime purpose of the contract of carriage is to arrange for the save moment of the goods as part of the performance of the sales contract. The sales contract will define whether it is the seller or the buyer who will enter into the contract of carriage with the carrier (seller-CIF/CIP or buyer-FOB / FCA).

In a perfect world, the seller would like to receive the purchase price once he has delivered the goods. As delivery of the goods in an overseas sale usually occurs at the time of loading the goods onto the ship (e.g. for CIF and for FOB shipments), the seller would expect to receive the purchase price at this point. However, the buyer would like – again in a perfect world – to pay only if the goods are delivered in conformity with the sales contract and only after he has, himself, received the goods at destination. The gap between those two moments in times (and, in fact, also the gap between the interests of the two parties) is bridged by letter of credit facilities offered by the banks. The key moment for the L/C transaction is again the moment of the delivery of the goods from the seller to the buyer, which again is the time of the delivery of the goods to the carrier for transportation (FOB / FCA / CIF / CIP, etc.).

The key document in this broader context is, therefore, the transport document, not merely in its role in relation to the contract of carriage (receipt of the goods, etc), but, more importantly, as the key document for the contract of sale and the contract under which the letter of credit will be set up. Such a document proves (to the buyer) that the sold goods were indeed delivered as requested under the sales contract at loading port. The transport document therefore plays a key role in the sales contract. Thanks to the negotiability of the bill of lading, the trade partners can tender this key document to trade finance banks for the financing of the letter of credit facilities.

As the risk passes from the seller to the buyer at the beginning of transportation, and because the goods are only of value to the buyer if and when they have safely arrived at destination, marine cargo insurance is put into place to cover the risks inherent in the transportation and storage of goods during transit. The insured parties are, as a rule, the parties, "interested in the cargo", i.e. the parties involved in the underlying trade transaction.

All industries involved in such a trade transaction (traders, carriers, freight forwarders, banks and insurers), must, therefore, be interested in the framework

under which transportation is carried out. Until recently, legislators focused mainly on those aspects which concern the safe transportation of the goods themselves (questions of responsibility and liability). However, the trading industry (and the legislators who have to safeguard its interests) must, likewise be interested in all aspects of carriage, affecting not only the trade contract, but also all the other contracts linked with it.

Those inter-disciplinary interactions and interfaces are reinforced, when, as is standard in the commodity trade, the trade transaction involves a number of sales transactions between several sellers and buyers. In such a string sale, the first seller might sell on F-terms to a F-terms buyer. This first buyer, in turn, will sell the goods (now that he has paid for the transportation) on C-terms to a new buyer, who, in turn, could sell the goods again on C-terms to any third party. Here, it is the very same contract of carriage, and the very same transport document (bill of lading), that serves a number of very different sales transactions. All the various sales contracts, often involving different terms and based on different laws, must rely on that single contract of carriage and on the same transport documents which this single contract of carriage (and its multiple trade participants) generated. This reliance on the different aspects of the contract of carriage is passed on to the banks, which establish a separate letter of credit loop for each sales contract.

While in a string sale there are a number of contracts of sale, each with their own letter of credit loop, there is just one single contract of carriage which serves all the various trade transactions. One single set of transport documents will be used throughout the string sale, and just one insurance certificate issued under the marine insurance policy covering this entire transaction during the entire time span will offer risk coverage for whoever is ultimately concerned.

As I have already mentioned, this might be pleonastic for lawyers involved in international trade and transportation. However, this "trade holistic" perspective sets a totally different level of expectation for a new international legislation on the contract of carriage: The law covering the contract of carriage must properly safeguard the smooth performance of this complicated and fragile transaction, not just once a day, but a thousand times a day, three hundred sixty five times a year, year after year, as a stand-alone transaction or in string sales!

This explains why the new Convention has chosen to take a contractual approach (as opposed to a documentary approach). The Convention must cover the entire contract of carriage and must therefore extend its scope from a liability Convention to a Convention on the contract of carriage. The legislation must recognize the particularities of the contract of carriage and the transport documents in the context of international trade and must be able to work in an electronic trade environment, as well as in a traditional document environment, as applied in international trade.

If one takes a contractual approach, bearing in mind the fact that a huge amount of world trade is conducted door to door (container transportation), it is

only logical that the scope of a new Convention for the international contract of carriage of goods by sea should include door-to-door cover and should, therefore, be applicable not just to the maritime leg between "tackle and tackle" or between the two ports (as with the Hague and Hamburg Rules) but rather for the entire duration of custody of the goods by the carrier. This door-to-door approach brings along an extension of the scope of application and might end up being in conflict with land transportation conventions such as the CMR and COTIF. However, the extension of the scope from a purely maritime one to an entire contract "time scope" is essential and reflects trade reality today. The UNCTAD/ICC Rules, as well as the widely used FIATA bills of lading, already reflect the commercial need (expressed by the shippers under their international sales contract) to issue door-to-door documentation. Thus, as an extension of the rules and private instruments attempting to artificially achieve such door-to-door cover, the new Rotterdam Rules can now also offer a harmonizing instrument giving reliability and security to documents issued in such a door-to-door environment.

III. Selected features and innovations of the Rotterdam Rules addressing the interests of the parties to the sales contract

1. The Scope of Application

In the context of modern transportation (e.g. by containers) an supply chain management a CIP / CIF seller needs to provide to its customer a contract of carriage to the final (named) place / destination, irrespective of what land-transport preceded or followed the sea-leg. As a consequence, the contract requested by the sales contract must be door – to door and the transport document (often to be supplied to the L/C banks for payment of the sales price) will have to cover the entire transport, beyond the mere maritime leg.

In line with the basic starting point of deciding to cover the entire period and scope of the contract of carriage rather than to limit the scope artificially to the purely maritime section or to the transportation phase, the scope of application is now triggered not merely by the "port triggers" as is the case in the Hague Rules and Hamburg Rules, but also by the places where the custody of the goods started (place of receipt) and where it ended (place of delivery).

Article 5 Rotterdam Rules therefore foresees four triggers, viz.:

(1) delivery of the goods from the shipper to the carrier for transportation (place of receipt),
(2) loading onto a vessel (which necessarily means a port),
(3) unloading the vessel (port of discharge)
(4) and finally the place of delivery at the end of the transportation undertaken by the carrier (place of delivery).

If any of those places is located in a contracting state of the Rotterdam Rules, the Convention will apply. This extended scope reflects the door-to-door scope of the new instrument.

2.. Liability for on-Land Damages

Article 26 RR deals with the damages and losses that occur on land. Where loss or damages (or circumstances causing a delay) occur solely before loading the goods onto the ship or solely after their discharge from the ship, the Rotterdam Rules will not prevail over another International Instrument (e.g. the CMR), so long as such another Convention would have applied to those land operations if the shipper had made a separate and direct contract and to the extent that such another Convention provides for liability and a limitation in a mandatory manner. This limited network system goes further than many existing comparable system as here a fiction is introduced, namely that the regime applies as if the shipper had chosen a purely land-based form of transportation and not – as in reality – a single and uninterrupted door-to-door transport contract. The shipper thereby gains two advantages: firstly, contracting in his interest for a single transport contract and receiving a single transport document covering the entire transport chain, and then, at the same time, being able to rely on a possibly better liability system than if the shipper had contracted separate and different contracts (and received a number of different transport documents) for each leg – the "have your cake and eat it" idea.

I would like to dispute the assumption that such land Conventions are automatically better than the Rotterdam Rules. The reference to the difference between 3 and 8,66 SDR for the calculation of the limitation level is much too simplistic, and is wrong for most of the typical door-to-door forms of transportation for which Article 26 RR will apply: For most, the limitation level under the Rotterdam Rules will be much higher than the CMR levels, just because of the application of the per package limitation and the container clause!

It is clear that, based on the general rules and principles of the distribution of the burden of proof, the application of Article 26 and that of any land Convention will be on the party claiming that benefit, i.e. most of the time on the cargo claimant. However, as mentioned above, the privilege for shippers (fought for by shippers during the drafting of the Convention) may now favor carriers whenever the CMR kilogram limits are lower than the package limits of the Rotterdam Rules.

As Article RR 26 RR operates *ex lege*, Courts will have to apply the land-based limits whenever it becomes clear from the facts that the damage occurred on land – irrespective whether cargo interests plead such an application or not.

Depending on the legal position relating to the application of the CMR in door-to-door operations, this result is, however, inevitable due to the double mandatory nature of the CMR.

3. Liability of the Shipper

The Rotterdam Rules are a Convention on the contract of carriage. It is therefore only logical that they include rules on the obligations and liabilities of the shipper. It is, however, often forgotten that both the Hague and the Hamburg Rules also had strict rules for the liability of the shipper, and that much of today's

excitement about this Chapter of the Rotterdam Rules overlooks the fact that most of these principles have existed since long before the Rotterdam Rules.

The most important clarification made by the Rotterdam Rules are the provisions that state that the cargo interests (shippers and consignees) are responsible for delivering the cargo fit for its intended transportation (Article 27 RR) and for later subsequently accepting receipt of the goods at destination (Article 43 RR). Those obligations of the shipper are in line with the seller's obligation under CISG and INCOTERMS to deliver the goods fit for the intended transport (Article 35 (1) CISG and A9 F- and C- Clauses of INCOTERMS) as well as with the buyer's obligation to accept the goods sold to him pursuant to Article 53 / Article 60 CISG.

Furthermore, as a consequence of the cargo interest's duty to provide the goods fit for shipment, the shipper must also provide all important information relating to the handling and transportation of the goods (Article 29 RR), as well as for the establishment of transport documents (Article 31 RR). If those responsibilities are not properly carried out, the shippers will be liable (Article 30 RR). For any breach of the shippers' obligation to provide contract particulars the shippers will have to indemnify the carriers against loss or damage resulting from such breach.

The most important responsibilities of the shipper relate to the shipment of dangerous cargoes: Here, the shipper must provide the necessary information on the dangerous nature of the cargo and must ensure its proper marking. Any breach of such responsibilities will result in a strict liability and an indemnity.

Of greater interest is the fact that the documentary shipper (e.g. the FOB seller that requests that the bill of lading names him as shipper) will be treated as shipper for the purpose of this Chapter. Such an FOB-shipper will assume the same responsibilities as the contractual shipper (e.g. the FOB buyer) (Article 33 RR).

4. Transport Documents

The modernization of the law for the carriage of goods by sea brings along the necessity to adapt the law to the different variants of transport documents which the international trade has produced. It may be mentioned here that all of those variants respond to a need of the trade (i.e. the sales parties), a fact which underlines the interdependence of the sales and transport contract regimes.

For the purpose of the scope of this paper I will restrict myself to listing for you the major types of document that the Convention will now deal with:

- *Negotiable Transport Documents (the traditional Bills of Lading):* These form the core of the provisions that relate to transport documents, and also to the way they are used to control the goods in transit and to transfer rights.
- *Door to door Bills of Lading:* By the mere scope of application it is now clarified that such door-to-door B/L, very often used in the last 30 years in form of NVOCC-B/L, are proper bills of lading, eliminating any remaining doubts that may have existed regarding the legal nature of FIATA B/L or

similar documents (while the goods were on land).

- *Straight Bill of Lading:* Much uncertainty arose in the past around bills of lading that were issued in favor of a named consignee and were not marked "to order". Their function and value were judged differently depending on the jurisdiction in which they were treated. Now, at least some aspects of such documents have been clarified.
- *Non-Negotiable Transport Documents /Sea Waybills:* Despite their treatment by the CMI Sea Waybill Rules, Sea Waybills are now part of the documentary and liability system of the Convention, as are the
- *Electronic "documents",* that are generated within the scope of this Convention.

The innovation, however, is not so much the broadening of the scope of the different documents, but more the clarifications introduced in relation to the documents, notably their role in the supervision and delivery of goods and their value to third parties relying on their content. From those clarifications that figure in the chapter on Transport Documents (Chapter 8), let me list just three here:

- *Identity of Carrier:* Until now, it was very unsatisfactory that a carrier could state in its transport document that it was acting merely as an agent, basically leaving it up to the cargo claimant to find a proper defendant for its cargo claim, within the current short limitation period of one year. Now it has been made clear that whenever it is not obvious from the transport document who the carrier is, then the cargo claimant may sue the registered owner, who in turn will have to work out, among the different layers of contracts and charter parties, who should be made internally responsible for that cargo. For the shipper and the consignee, this will no longer be their problem (Article 37 RR). In addition, the fact that liability is vested with the registered ship-owner may well facilitate an arrest of the vessel as security for the cargo claim.
- Of course there are rules on the *evidentiary value of transport documents* (Article 41 RR). Now that all types of transport document are used, the rules on their evidentiary value are adapted to each of those documents:
  - B/L (conclusive evidence)
  - Sea waybills (*prima facie* evidence)
  - Straight B/L (conclusive evidence)

A minor issue that has been introduced is the clarification in the Rotterdam Rules that the effect of a *"Freight Prepaid"* Clause in a negotiable transport document is such that a third party may conclusively rely on the fact that the freight for the cargo has been fully paid (Article 42 RR).

5. Rights and Obligations of the Parties at Destination

The Rotterdam Rules – surprisingly – cover for the first time in the history of harmonization of international transport law the rights and obligations of both cargo interest and carrier at destination.

Often is said by critics of the Rotterdam Rules that this part is too complex, or should not have been included, or does not correspond to any given national law. Now, nobody should forget why this Chapter was added and what purpose the new Convention aims to fulfill. In a piece of legislation that has to cover the contract and its performance – as embedded in the greater context of international trade –, it is only logical that it should properly address the fulfillment of the contract at destination, and not only in a limited way, or limited to issues of liability, as are the existing transport Conventions. This Chapter of the Rotterdam Rules contains a number of very important principles, some of which mirror current trade practice, others of which attempt to solve some anomalies that the current trade practices have generated. These principles are based on trade usage, but of course may sometimes derive from principles of national law, or, in light of their position in trade, might require a solution that has not yet been offered by national legislation.

Here a list of the main issues covered by the Rotterdam Rules:

- *Consignee's right to request delivery of the goods*: The trade practice and the principle embodied in most national laws that one original copy of the bills of lading issued for the cargo must be produced and surrendered when requesting the delivery of goods is now stated in Article 47 (1) (c) RR. The negotiable transport document, therefore, enjoys its traditional role as the key to the cargo, a principle that is so important to trade and trade finance.
- *Carrier's right to request delivery by the consignee:* A carrier whose vessel arrives at destination must anticipate that the cargo will be taken by the receivers and not just left in the custody of the carrier. Enormous costs are involved for a vessel while it waits for the consignees to collect their cargo, an attitude of receivers that most of the time has nothing to do with the carrier, but rather with issues of cargo quality under the sales contract, rejection of goods under the sales contract, lack or loss of transport documents. Very much like Articles 53 and 60 CISG, which requires the buyer to accept the purchased goods, the Rotterdam Rules now require from the cargo interests to take over the cargo at destination (Article 42 RR). Not to do so is a breach of the contract, with all its consequences.
- *The rights of the carrier when the cargo cannot be delivered at destination:* Whenever the cargo cannot be duly delivered at destination, the carrier has a number of rights (but also responsibilities) to act and care for the cargo. Those rights are not new as such, as many national laws provide for them, but the pattern has now been harmonized internationally (Article 48 RR). Once the carrier has issued sufficient advanced notice, and where all other prerequisites have been met, the carrier may act to deal with the cargo, in extreme cases selling or destroying the goods pursuant to the law or regulations of the place where the goods are located at the time.
- *Delivery when Bills of Lading are not available:* Those of us who deal with shipping and trade recognize the issues associated with delivery of cargo

without the production of bills of lading. We know that, again and again, the carrier is trapped in an uncomfortable situation for which he is not in the least responsible. In a situation where the trade chain has somehow blocked or stopped the transfer of the bill of lading in time to the receiver, as the B/L is still lying somewhere on a bank's desk for security of their deferred payment trade finance instrument under an L/C, the trade expects the carrier to deliver without the production of the B/L; at the same time, however, it requests the law to elevate the B/L's status to that of an almost holy document that cannot be touched. The carrier will be requested to deliver, in violation of the law, and will in turn request the traders to issue a Letter of Indemnity (LoI) often signed by a bank. This is a situation that shows a common schizophrenic streak in trade: Relying on the strict application of a set of rules, but very quickly, and with great creativity, overriding those very rules, whenever obstacles arise as a result of the rules it has itself created. Be that as it may, this is not a problem of the contract of carriage, but of trade and the way it is financed; it is not a problem the carrier should suffer for, but one that should eventually be solved by trade itself and its L/C banks. This is why the Rotterdam Rules, in their attempt to embody the contract of carriage into the trade transaction – but only as far as necessary – make it an option for the contracting parties, the carrier and the shipper, to expressly state in the negotiable transport document that it is not necessary for the document to be surrendered at destination (Article 48 (2) RR). If this option is chosen, the bill of lading has effectively lost its role as the key to the cargo, at least for the issue of delivery of the goods at destination. In such cases the complex and strange LoI practice could be eliminated. However, we all – I am sure – remain quite sceptical about whether the L/C banks would be happy to accept such documents. We will see. But, to be fair, the L/C banks currently already rely – and this for some time now – on something that is – at least for some commodity trades (e.g. the oil trade) – practically never used according to the original intention of the bill of lading as a key to the cargo, but rather accept a solution based on LoIs. As far as the Rotterdam Rules are concerned, at least the Convention has left this to the trade partners to decide and left them the possibility to choose a solution which does not involve the carrier.

– *Right of Retention:* The last issue I will cover might look insignificant, particularly when considering the provision of the Rotterdam Rules. This is the reference to rights of retention that the carrier has against the shippers and consignees for their outstanding freights and costs. Since the Rotterdam Rules have chosen to specify that the carrier has a mandatory duty to deliver at destination, the right of the carrier to refuse delivery so long as the outstanding freight debts have not been paid must be safeguarded. The Rotterdam Rules have opted not to spell out the extent and operation of such retention rights, but rather to refer to national laws

that provide such rights, and they make it clear that nothing in the Convention shall affect such rights and their enforcement (Article 49 RR).

6. Right of Control

One of the major issues for the drafting of the Rotterdam Rules was the introduction of provisions relating to the mechanisms as well as the rights and obligations of the parties to control the goods during transit. The background to this issue has several aspects, the most important one being the cargo interest's desire to hold onto the goods, as a matter of the sales contract, until the purchase price has been paid. As we know, there are many interested parties in international (maritime) trade, and these will change pursuant to their financing scheme through the channels of the respective L/C loops for each trading portion of the transaction. As the carrier is entirely outside this loop, it is of utmost importance, especially in the maritime trade, to clarify the issues that arise when cargo parties would like to enforce their rights under the trade contracts by controlling the goods and instructing the carrier. Thus, the Rotterdam Rules must mirror the seller's right to control the goods in transit, a right under the Sales Contract that is often referred to as the "right of stoppage in transit", a principle which nowadays is embodied in the Vienna Sales Convention in Article 71 (2) CISG.

It is clear that the mechanisms will to a large extent depend on the type of transport document chosen by the parties to represent the contract of carriage. While the situation is very simple if no document has been issued or if Sea Waybills or other types of non-negotiable documents have been used, the situation totally changes whenever the carriers have issued negotiable documents. Here, the carrier cannot simply rely on his contractual partner for instructions; once the bills of lading have been handed over to the first holder (usually to the contractual shipper or to the FOB shipper), the instructions and the control must depend on the production of the full set of bills of lading. This is necessary in order to ensure that the real "owner" of the control over the goods – and only the real holder –, be it the unpaid shipper/ seller, the L/C banks, the intermediary buyer / on-seller (i.e. trader) or the ultimate receiver wanting to adapt the shipment terms to its logistical needs etc., is entitled to control the goods.

The Rotterdam Rules have now provided for such a system, one that fully mirrors the existing trade usage: the person wishing to control the goods vis à vis the carrier while the goods are in transit must present the full set of negotiable documents. It is surprising that such a provision has only now been introduced into the harmonized maritime law, and not earlier, given the critical importance of this principle for the performance and for the financing of the sales and trade contract! Many Transport Conventions for land or air transport have had provisions on this issue for much longer, despite the fact that such issues are much less important there than in the context of maritime trade.

The Rotterdam Rules have now established the rules for identifying the

party who will have the right of control; at the same time, the Rules differentiate between the rights of instruction that such a party has without the possibility of the carrier objecting, and others rights i.e. where the party is restricted to the right to negotiate different terms with the carrier.

The lacuna in my view is that the Convention limits its regulations to the negotiable documents and leaves the corresponding situation for non-negotiable documents up to national law; unfortunately, a compromise had to be made with the group representing delegations that wanted to keep the scope of the Convention as limited as possible and to leave many issues up to national law.

7. Transfer of Rights

When looking at this provision on transfer of rights in the new Convention one has to remember that it is exactly this issue that was the starting point of the UNCITRAL Project. Article 57 RR sets out the principle, quite familiar from our own national laws, for the mechanisms for the transfer of rights for the different types of negotiable transport document. Here again, the provisions were initially planned to be much more specific and were also to be used for non-negotiable documents. The Rotterdam Rules, as they stand today, have undergone the same restriction as with other issues covered by the Convention, and leave many issues to national law.

A provision that was successfully preserved is the important clarification that any holder that is not the shipper and that does not exercise any rights under the contract of carriage will not assume any liability under the contract of carriage, solely by virtue of being a holder (Article 58 (1) RR).

IV. How will the Rotterdam Rules affect international trade?

May I conclude by asking to what extent the Rotterdam Rules will or might affect international trade? The question of course must be answered by the relevant industries and market players. I think that such a discussion must cover at least two angles: First, a proper industry view (what is in it for us, what is bad for us?) and, second, what is our role in the mechanics of international trade and how will we have to adapt in order to improve the way matters are organized in future?

For all of us, once the 20 contracting states requested by the Convention have ratified the Rotterdam Rules, a time of adaptation will commence. There will be an "initial learning curve" (as with any other major development in legislation) and, at least for a period, a time of initial "co-existence" with the Hague Rules, the Hague Visby Rules and the different and various national and regional legislations that exist today. From an economical perspective this is a period of investment.

It is at this point that the drafters of the Rotterdam Rules will be tested. We will see then whether they have offered a workable and modernized liability system and have provided trade and its many different players with a system

based on which the different commercial activities can be undertaken with greater international clarity and predictability. To achieve a better solution than the Rotterdam Rules within the next century is a utopian idea. No clever national or regional legislator is capable of producing something that will really solve the issues on an international level. Contrary to the situation with land transportation, where regional solutions are realistically imaginable, the maritime door-to-door phenomenon is inherently international and global, and is undermined by any regional or national stand-alone solution. And here is the key point of the Rotterdam Rules: Not the deletion of error in navigation, not the volume contract and not the level of limitation, not the fact that the Rotterdam Rules could (or, in my view, must) replace the Hague Rules and its protocols, as well as the thousands of legislations existing today in this field, but rather that they successfully overcome the historical rivalry between Hague and Hamburg and prevent national interests or regional bodies from creating stand-alone solutions in the future. And believe me, nobody here, I am sure, would suggest that the process of such alternative national or regional legislation would guarantee a better legislation than the one created within the UN bodies in the form of the Rotterdam Rules.

To borrow from Shakespeare proverb, I would say that while it is true that the enemy of the good is the better, the situation today may look good for some, but the tendency towards national, regional or other alternative legislation will make the law deteriorate and atomize itself into different layers of competing and conflicting types of rules, legislation and court decision. Therefore, we need to accept the "good but not perfect" in order to not lose what is the most precious asset of international trade: International harmonization of the key issues, such as the contract of carriage with its vital functions in relation to the movement of goods and the production of vital documents that fuel the transaction and its financing. There is no alternative; it is not even a choice to remain passive: If we did, things would change anyway, arguably in directions none of us might take responsibility for.

UPDATING THE RULES ON INTERNATIONAL CARRIAGE OF GOODS BY SEA: THE ROTTERDAM RULES

KOFI MBIAH*

Abstract

The philosophy of the Rotterdam Rules can be summed up in one word - practical. Practical because the Rotterdam Rules represent a rich alloy of the sentiments of various interest groups - carriers, shippers, freight forwarders, insurance companies and not least Governments who have interests in international trade and the carriage of that trade across various transport modes. The Rules bring currency to the existing international legal regimes on the trade related aspects of the international carriage of goods, seek to better allocate the risks and responsibilities of the shipper and the carrier as well as harmonize and modernize the law with a view to attaining uniformity so craved for by international commercial partners. It is expected that the improvements in the new Rules should lead to a reduction of overall transport costs, increase predictability and introduce greater commercial confidence for international business transactions.

The new international legal regime on the international carriage of goods wholly or partly by sea, builds on the strengths of the predecessor treaties and eliminates some of their weaknesses. Moreover, the Rotterdam Rules codify modern commercial practice and especially for common law jurisdictions, preserve the rich body of case law that has been built over the years as a result not only of the application of the Hague- Visby Rules, but other international instruments on the international carriage of goods.

This short paper takes a look at the attempt by the Rotterdam Rules to balance the interests of the protagonists in the international carriage of goods transaction. It examines some of the salient features of the Hague and Hague-Visby Rules as well as the Hamburg Rules, points out their perceived

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weaknesses from the view point of shippers and carriers and seeks to shed some light on the ways in which the Rotterdam Rules have attempted to address the concerns of the protagonists.

It is important to mention that within its mandatory character, sufficient flexibility is introduced in the Rotterdam Rules to provide a leeway for the carrier and create commercial convenience for both parties. The *travaux preparatoires* of the Rotterdam Rules is well documented and thus should serve as ready reference in the interpretation, adjudication and application of the Rules to commercial disputes that arise in the international carriage of goods wholly or partly by sea.

Introduction

For well over half a century, the Hague Rules (1924)[1] held sway. The Rules are now over eighty (80) years since they were first enunciated in Brussels. Some nations have argued and in particular maritime lawyers from many common law jurisdictions, (notably carrier interests) that the Rules are tried and tested and need to remain unchanged.

For a good number of developing countries, mostly consumers of shipping services, the rules which have held sway for so many years are unfair and work against the interest of the users of shipping services. The Hague Rules establish a mandatory legal regime in respect of carrier liability for loss of or damage to goods concluded under a contract evidenced by a bill of lading. Under the Rules, the period of responsibility of the carrier covers the period from when the goods are loaded on to the ship till they are discharged. (Tackle to tackle).

The Rules provide that the carrier is to be held liable for loss or damage to the goods resulting from his failure to exercise due diligence to make the ship seaworthy, to properly man equip and supply the ship or to make its storage areas fit and safe for the carriage of goods. The Rules also provide other responsibilities of the carrier.

One of the basic criticisms of The Hague – Visby Rules is the litany of exculpatory clauses commonly perceived by shipper interests to serve the interests of the carrier especially the so called Nautical Fault Exception. The Hague Rules has seen two amendments. The protocols of 1968 (Visby) and 1979 deal mainly with the limits of liability which to most shippers amounted to no more than "band-aid" improvements and did not go far enough in addressing the perceived weaknesses of the Rules.

Some countries ratified the protocol and hence became parties to the so called Hague-Visby Rules. Others did not ratify and thus remained parties only to the Hague Rules. For some countries, the protocol was not far reaching

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1 [Convention for the Unification of certain Rules of Law Relating to Bills of Lading]

as it did not deal comprehensively with the issues of liability, the allocation of responsibilities and risks, as well as other modes of transport and hence they did not ratify.

The United Nations, through UNCTAD began discussions in the late 1960's to revise the Rules and come out with a uniform law on international transport of goods by sea. The objective of the work of UNCTAD was to remove the ambiguities and uncertainties and to establish a balanced allocation of responsibilities and risks between suppliers and users of shipping services. Acting upon a recommendation by an UNCTAD Working Group, the United Nations Commission on International Trade Law (UNCITRAL), was mandated to come out with a revision of the Rules. This work was concluded in 1973 and the Convention commonly referred to as the Hamburg Rules was adopted in 1978 with 20 ratifications by countries most of whom were not significant players in the international trade of the world. The major maritime nations which contribute almost two-thirds of the world's total trade did not ratify the Rules. In effect, even though the convention entered into force in November 1992, it was moribund at birth as its mother laboured in vain.

The major maritime nations with significant contribution to world trade, contended that the mandatory character of the liability rules with respect to the scope of application of the rules was too wide and the deletion of the exculpatory clauses make the liability floor too slippery as compared to the tackle to tackle regime under The Hague/Visby Rules which they were used to.

Carriers also complained about the restriction of the choice of jurisdiction and were not happy with the jettisoning of the Nautical Fault exception even though that came as a great relief to the user nations.

Some countries adopted the rules wholly while others, especially the Scandinavian countries, incorporated relevant provisions into their national law.

Thus the stage was set for the application of a multiplicity of rules for the international carriage of goods by sea. While some countries have denounced the Hague Rules and become parties to the Hamburg Rules, there are others who are party to Hague-Visby Rules and yet others who are party to only the Hague Rules (e.g. Ghana). There are some who have not denounced the Hague Rules but have ratified the Hamburg Rules. As indicated earlier, there are still some other countries who have incorporated bits and pieces of the various laws into their national law. Currently therefore, there is a hotch-potch of international rules for the carriage of goods by sea which has created a great deal of muddled confusion and uncertainty.

It is therefore widely recognized within the international community that there is an urgent need for uniformity in the international law on carriage of goods by sea.

UNCITRAL therefore took the bold attempt at unification of the international law on the carriage of goods by sea, and to modernize the entire

regime of international transport law through the elaboration of rules dealing not only with the carriage of goods by sea but also the carriage of goods under a "multimodal" (maritime plus) transport regime. This is indubitably a bold attempt when viewed against the backdrop of the difficulties and failures that have attended to the various international regimes where uniformity is concerned.

Indeed the original mandate of the UNCITRAL Working Group did not include multimodal transport.

This short paper in view of its limited purview will not deal with all the issues and complexities which are introduced by the Rotterdam Rules. Suffice it however to mention that the instrument covers various areas of existing mandatory liability regimes in the field of carriage of goods by sea akin to the provisions of the Hague, Hague –Visby and Hamburg Rules. It however goes further to modernise the existing legal regime in relation to current practice by covering areas such as freight, the transfer of rights, right of control and the right to sue.

There is no doubt that the Rules would be subject to interpretation by various legal systems and in various jurisdictions and as pointed out by Lord Macmillan in *Stag Line V Foscolo Mongo*[2], they should not be rigidly controlled by domestic precedents of antecedent date but be based on broad principles of general acceptation. Indeed any new regime for the international carriage of goods needed to take due cognisance of this and demonstrably indicate that it is in tune with current trends and has clear advantages over the existing legal regimes. This is what the Rotterdam Rules seeks to achieve. Whether it succeeds or not is yet to be seen.

It is worth pointing out that no attempt to balance the interests of carriers and cargo can come out with provisions or a regime that is entirely satisfactory. Like all compromises, no one leaves completely satisfied but all leave in the hope that they have taken something away. Those that argue in favour of the new Convention point to the deletion of the Nautical Fault Rule, the continuing obligation of due diligence and seaworthiness, the inclusion of provisions on delay, the higher limits of liability, the extension of the time for suit, the widening of the period of responsibility, the new provisions on Jurisdiction, (even though they must be agreed upon by an opt-in process), and the door-to – door possibilities that it offers.

Some salient features

The convention opens with some general provisions that define various terms used in the convention. Of key significance in the general provisions is Article 1(1) which defines a "contract of carriage" as: "a contract in which a

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2 [1932] AC 328.

carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transportation in addition to the sea carriage."

It is important to mention that while the Hague/Visby as well as the Hamburg Rules emphasis the production of a bill of lading as a basis for the contract, the Rotterdam Rules de-emphasis the bill of lading and instead refers to transport documents or electronic transport records. The Rotterdam Rules take this approach so as to deal with the increased use of various types of bills of lading that has become commonplace in a number of sea carriage transactions involving the use of transport documents such as sea waybills, straight bills of lading[3] and negotiable and non negotiable bills of lading. It is also worth mentioning that the Hague Rules only deal with outbound cargoes. This limitation is removed by the definition of the contract of carriage provided in the Rotterdam Rules.

The definition also takes cognizance of present practice where commercial partners sometimes arrange for the carriage of their cargoes by other modes of transport in addition to the sea-leg.

Scope of application

The Hague- Visby Rules scope of application was rather limited. This was improved upon by the Hamburg Rules to ensure that the application of the Rules is not only limited to outbound cargoes and contracts evidenced by a bill of lading. The Hamburg Rules widen the scope to which the Rules are applicable and extend the tackle to tackle obligations to port-to port. The Hamburg Rules are also applicable when the bill of lading or other document evidencing the contract is issued in a contracting state. Thus the Hamburg Rules widen the scope of application when compared with the Hague- Visby Rules.

The Rotterdam Rules expands further the scope of application and provides that the scope of application shall include the place of receipt, the port of loading, the place of delivery and the port of discharge. It is to be noted that the Rotterdam Rules refer to the place of receipt and delivery in accordance with this "multimodal" tenets - a "maritime plus" convention. The convention applies to contracts of a multimodal nature but with a sea-leg hence its name the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.[4]

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[3] See J.I. Mac William Co Inc. v Mediterranean Shipping CompanySA [2005] UK, HL 11.

[4] For an appreciation of how the Rotterdam Rules introduce the application of other international conventions governing the carriage of goods by other modes of transport, see Art. 82. And also Art. 26 dealing with carriage preceeding or subsequent to the sea carriage.

Period of responsibility

The period of responsibility of the carrier under the Hague/Visby Rules is what has commonly been referred to as "tackle to tackle" i.e. from the time when the goods are loaded till the time when the goods are discharged from the ship is the reference point for the period of responsibility of the carrier. The Hamburg Rules extend the period of responsibility of the carrier to "port to port". This has how being further extended by the Rotterdam Rules to cover "door-to-door" carriage transactions upon agreement by the parties.

Electronic transport record

In line with the desire of the drafters of the Rotterdam Rules to bring the rules of international transport law into the 21st century, the Rotterdam Rules has extensive provisions on the use of electronic transport records. It however needs be stated that where electronic transport records represent an evidence of the contract, its adoption must be with the consent of the shipper. By the time the Hamburg Rules were developed around the late 1970's there had already been calls for the recognition of electronic documents. The Hague-Visby and the Hamburg Rules do not create opportunities for the utilization of electronic transport documents. The Rotterdam Rules fill this gap.

The liability of the carrier

At the heart of most international transport conventions is the issue of the liability of the carrier. This is so because it represents to a very large extent the risk allocation and the balance of rights and responsibilities between the principal players – the shipper and the carrier.

The provisions on the basis of liability of the carrier are contained in article 17 of the convention. They follow the format of the Hague Visby Rules but are poles apart from the respective provisions in the Hamburg Rules[5].

The approach adopted by the Rotterdam Rules is still fault based but with a reversed burden of proof. It is worth pointing out that even though there is a reversal of the burden of proof, two significant changes in the Rules strive for mastery. The first is the deletion of the so called nautical fault exemption in the Hague- Visby Rules and the second is the continuing obligation of seaworthiness and due diligence.

Under the Hague/Visby Rules the carrier, his servants and agents are exonerated from liability where damage or loss is as a result of their negligence in the management of the ship[6]. This has now been done away with under the Rotterdam Rules.

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5 Article 5.

6 See the litany of exceptions in article iv r 2.

The Hague/Visby Rules also make the carrier responsible for the seaworthiness of his vessel only "before and the beginning of the voyage"[7]. Under the Rotterdam Rules the carrier's responsibility with respect to seaworthiness is now not only before and at the beginning but shall continue throughout the voyage. It is however worth mentioning that the other exculpatory clauses in the Hague- Visby Rules[8] have been maintained in the Rotterdam Rules with necessary modifications such as the strengthening of the fire exception and the deletion of the Nautical Fault Rule and changes in language with respect to some of the exculpatory clauses.

Delay

The Hague-Visby Rules has no provisions on delay. The Hamburg Rules provides for delay amd the carrier is liable for delay in delivery where he does not honour the time agreed upon in the contract. The Hamburg Rules go further to add that where no such agreement as to time of delivery is agreed upon by the parties then the test would be that of a diligent carrier in the particular circumstances[9]. The Rotterdam Rules also provide for liability of the carrier in instances of delay[10] when the period for delivery has been agreed upon but omits the test of a diligent carrier in particular circumstances. The Rotterdam Rules also allow for economic loss arising out of delay.

Deviation

The Hague-Visby Rules provide for deviation as a way of absolving the carrier from responsibility where the deviation was for purpose of saving life or property. The Hamburg Rules does not provide for deviation. The Rotterdam Rules leaves the issue of deviation to national law but still makes it possible for the carrier to enjoy the defenses of limitation under the Rules[11].

Deck cargo

Deck cargo or cargo which is carried on deck is not considered as goods within the Hague/Visby Rules if the carrier stipulates that the goods are to be carried on deck. Both the Hamburg Rules and Rotterdam Rules[12] have made significant changes in this respect. Under the Rotterdam Rules, the following circumstances are necessary for carriage on deck:

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7 See Maxine Footwear Company Ltd v Canadian Government Merchant Marine Ltd [1957] SCR 801.

8 Article iv r 2.

9 Article 5 (2).

10 Article 21.

11 Article 24.

12 Article 25.

a. Where such carriage is required by law
b. They are carried in or on containers or vehicles that are fit for deck carriage and the decks are specially fitted to carry such containers or vehicles; or
c. The carriage is on deck in accordance with the contract of carriage, or customs usages or practices of the trade in question.

These provisions have undoubtedly brought currency to the rules regarding carriage on deck especially as they now provide that the containers should be fit for deck carriage[13]. The decision of the Supreme Court of the Netherlands that in accordance with Article iii r 1 of the Hague- Visby Rules, containers supplied by the carrier should be cargoworthy has now been exemplified by the provisions of the Rotterdam Rules

Where by an agreement the carrier is not supposed to carry on deck but carries on deck and damage results then he is not entitled to the benefits of limitation of liability[14]. It however has to be shown that the damage was the result of the carriage on deck.

Obligations of the shipper

There are relatively speaking no obligations on the shipper with respect to the Hague/Visby Rules except for the fact that he shall not ship dangerous goods. The Hamburg Rules also make provision of some obligations of the shipper. Under the Hamburg Rules the Shipper is not to ship dangerous goods unless he has informed the carrier about the dangerous nature of the goods. The Rules also require the shipper to indemnify the carrier from losses occasioned by the carriage of such goods. Additionally the shipper is expected to guarantee the accuracy of information provided to the carrier in respect of labels and marks on the goods.[15] By far the most elaborate provisions on the obligations of the shipper are contained in the Rotterdam Rules. This serves to provide clarity with respect to obligations which the shipper is expected to undertake. A good number of these obligations represent a codification of practice. The three main areas where the shipper is expected to carry the obligation with respect to the provision of information to the carrier include: information to enable the carrier handle and carry the goods[16]; information to enable compliance with laws, regulations and requirements of public

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[13] 13 See the NDS Provider (SCN 1 February 2008, co6/082 HR).

[14] Article 25 (5) See also *Royden Machinery Co Ltd v The Anders Maersk* [1986] 1 Lloyds Rep.488. Also see the case of *Daewoo Heavy Industries Ltd v Klipriver Shipping Limited (The Kapitan Voivoda)* [2003] 2 Lloyds Rep 1.

[15] Article 17.

[16] Article 29 (1) (a).

Authorities as they apply during the carriage[17] and information for the compilation of the contract particulars.[18] The Rotterdam Rules make special provisions for the carriage of dangerous goods.[19] Where the shipper does not provide accurate information for the contract particulars or the dangerous nature of the goods, he is strictly liable to the carrier for any damage caused thereby. The shipper is also liable for the acts or omissions of his servants or agents as well as subcontractors but not to the performing party acting on behalf of the carrier to which the shipper has entrusted the performance of its obligations. Indeed the obligations of the shipper seem onerous in view of the fact that the shipper cannot limit his liability. It must however be stated that in all the predecessor conventions there is no limit of liability for the shipper. This may be due to the fact that the onerous requirements coupled with strict liability have public good implications. The detailed provisions of the obligations of the shipper in the Rotterdam Rules serve to bring clarity on the issues and requirements regarding the shipper's obligations and are not indeed detrimental to the interest of the shipper. The Rotterdam Rules also seem to have clarified the position taken by common law judges with respect to the dangerous character of goods.[20]

Limitation of liability

Lord Denning in his so called final word in The Bramely Moore had this to say: "I agree that there is not much justice in this rule, but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in his history and its justification in convenience"[21].

The Hague Visby Rules provide for a limit of liability of the carrier to the tune of 666.67 units of account while the Hamburg Rules provides for 835 units of account per package or 2 kilos of gross weight of the goods whichever is higher. The Rotterdam Rules provide for 875 units of account per package or 3 units of account per kilo of the gross weight of the goods, that are the subject of the claim or dispute, whichever is higher. Thus the Rotterdam Rules limit represent an improvement on limits when compared with the Hague Visby and Hamburg Rules.

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17 Article 29 (b).

18 Article 31.

19 Article 32.

20 See *The Giannis NK* [1994] 2 Lloyds Rep 171, [1998] 1 Lloyds Rep 337 HL and compare with *The Darya Radhe* [2009] EWHC 845.

21 [1963] 2 Lloyds Law Rep. 429.

Time for suit

The Hague/Visby Rules provide for one year time bar while the Hamburg Rules provide for two year limit and the Rotterdam Rules adopt the two year time limit[22].

Jurisdiction and Arbitration

There are no provisions in the Hague Visby Rules on Jurisdiction and Arbitration. It was the intention of the drafters that it should be left to the parties under the doctrine of freedom of contract.

The Hamburg Rules provide for jurisdiction and Arbitration and the Rotterdam Rules follow suit. It however needs to be mentioned that states that ratify the convention are expected to opt- in or opt- out of the application of the jurisdiction provisions. This is most unwelcome in the view of shippers and one can only expect that most states when they ratify, would opt in for the Jurisdiction and Arbitration provisions of the convention. It is of significance to developing economies who desire to found jurisdiction so that their courts can build a well-spring of jurisprudence in maritime law through judicial decision making.

Volume contracts

In the discussions leading to the development of the Rotterdam Rules issues of permissiveness with respect to freedom of contract came to the fore after a proposal submitted by the United States of America[23].

It is to be noted that the regime of the Hague/Visby Rules and the Hamburg Rules are "one way mandatory" implying that contracts for the carriage of goods by sea should not derogate from the convention to the detriment of the shipper, however derogations increasing the carrier's liability are permissible[24]. It is not intended to deal in any detail in this overview with the issues pertaining to the inclusion of Volume Contracts in the Rotterdam Rules. Within the Working Group there was protracted debate on its inclusion. The proponents of its inclusion argued that the predecessor mandatory regimes were developed in a commercial milieu which has now undergone tremendous metamorphosis and could not be strictly adhered to in addressing the practicalities of present day commerce.

Those who argued against its inclusion pointed out that inclusion of such a provision was tantamount to a victory for freedom of contract thus returning

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[22] Article 62.

[23] The proposal of the US was to the effect that Ocean Service Liner Agreement (OSLA) should be made non-mandatory – UN Doc A/CN.9/WG III/WP.34 at page 6-9.

[24] Articles III r 8 of the Hague/Visby Rules and articles 23 of the Hamburg Rules.

to the pre-Hague Visby era, at a time when the regulatory mechanisms ought to be further strengthened in the interest of small shippers.

In the end Volume Contracts found its way into the Rotterdam Rules but not without very significant caveats[25]. Within the context of the Rotterdam Rules Article 80 remains arguably the most controversial provision. The definition of Volume Contracts is fraught with uncertainty as there is no minimum quantity, period of time, frequency or number of shipments. Article 80 therefore sets out special provisions (super mandatory) to guide the conduct of transactions with respect to Volume Contracts and defines the purview within which a Volume Contract would be binding on the shipper. The special rules do provide some respite in respect of the concerns of shippers. It is however yet to be seen how the courts would apply the so called super mandatory provisions.

Entry into force

The convention is expected to enter into force one year after ratification by the 20th member state. As pointed our earlier, by April 2010, 21 states had signed the convention and it is expected that these states together with others yet to sign would take steps towards early ratification of the convention. As at October 2012 two states[26] have ratified the convention.

Conclusions

The above represents a snapshot of the salient features of the Rotterdam Rules and a brief comparison with the predecessor conventions on the carriage of goods by sea. While the Hague/Visby rules had 12 articles, the Hamburg had 34 articles, the Rotterdam, by far the most ambitious attempt to introduce modernity and uniformity, has 96 articles.

It is quite clear from the above that the Rotterdam Rules is a mixed bag. If the perception that the Hague/Visby Rules were largely drafted the shipowning interests and thus was skewed in their favour, the Hamburg Rules drafted largely by shipper interests and thus skewed in their favour is anything to go by, then the Rotterdam Rules, developed both by the CMI and UNCITRAL representing both sides of the "divide" should represent an accommodation of the interests of the major groupings. The Rules thus represent a compromise and like all compromises no one group leaves completely satisfied but all leave in the hope that they have taken something away. That is the spirit of the Rotterdam Rules which must be made to reflect in the judicial interpretation of the Rules.

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25 Article 80.

26 Spain and the Republic of Togo.

For shipper interests the deletion of the nautical fault rule, the continuing obligation of due diligence and seaworthiness, the inclusion of provisions on delay, jurisdiction and arbitration (albeit under an opt-in-opt-out) clause are indeed welcome.

In addition shippers should also find satisfaction and solace in the provisions on deck cargo, the extension of the time of suit, increased limitation amounts, the provisions on delivery, the widened scope of application and responsibility of the carrier not to mention the clarity of language in a number of provisions even if they suffer from verbosity.

For shipowners, the adoption of the format of the Hague/Visby Rules with respect to the basis of liability of the carrier, with the litany of exculpatory clauses, the reversed burden of proof on the claimant, the increased scope for limitation of liability, (breaches of its obligations) the flexibility of a network liability regime, the Himalaya protection (now clearly covering maritime performing parties) are indeed welcome.

Further to the above, shipowner interests have the benefit of flexibility in volume contracts, the provision of detailed rules on all documentary aspects, as well as the detailed provisions and obligations of the shipper, strict liability of the shipper with respect to dangerous goods etc. Indeed these are some of the underlying tenets of compromise reflected in the spirit of the rules.

The fact that the convention was arrived at after extensive consultations with major stakeholders and has largely represented modernity and codification of practice is welcome.

If judicial interpretation should be made within the spirit of the rules, then the overall objective of achieving international uniformity, commercial convenience and confidence as well as predictability and a reduction in transaction cost would have been realised. The legislative bargain is concluded. It is the turn of the judiciary.

THE UN CONVENTION ON THE CONTRACTS OF INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA THE "ROTTERDAM RULES" PRACTICAL IMPLICATIONS FOR CARRIERS

ANDREW BARDOT*

1. Introduction

The provisions of the Convention, the "rules", extend and modernize the present international rules governing contracts of maritime carriage of goods. The objective is that the rules will replace The Hague rules, The Hague-Visby rules and the Hamburg rules, and that they will achieve uniformity of law in the field of maritime carriage and, hopefully, head off the ever present threats to all concerned interests, of a patchwork of disparate domestic and regional legislation relating to the carriage of goods by sea. A worthy objective, but of course one which self-evidently is entirely dependent upon significant and widespread support by states through the ratification process. Currently there are 24 signatory states but only 2 ratifications of the required 20 to bring the rules into force. Therein lies the real challenge.

This paper provides a necessarily brief overview, which does not permit for detailed consideration or analysis, but what in summary are the main implications, negative and positive, for carriers and their insurers?

2. Negative implications for carriers

These are of course well known and rehearsed, but lose no force from repetition.

Loss of the carriers "nautical fault" exception from liability.

In fairness, it may be said that this is an exception which has historically been of relatively infrequent and limited benefit of the carrier, but nonetheless

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it has provided a valuable exception for carriers in appropriate factual circumstances. Consequently, the loss of this exception is detrimental to the interests of carriers and their insurers.

More stringent seaworthiness obligations

The more stringent seaworthiness obligations, which are imposed on the carrier under Article 14 through the extension of pre-commencement of voyage due diligence requirements to the entire performance of the voyage, are a negative implication for carriers. It is considerably easier for a carrier to exercise the requisite due diligence before the vessel has embarked on the voyage than once the voyage has commenced, whereafter the carrier's ability to take such measures as may be required by the continuing obligation may, in practice, be considerably restricted. This could result in increased liability for the carrier and his liability insurers.

Increased package/unit of weight liability limits

It goes without saying that the significantly increased package/unit of weight liability limits contained in the rules will impose a greater financial burden on carriers and their liability insurers. The new limits will result in increases of approximately 31% per package and 50% per kilo.

The extension of time limits for commencing suit

Extending the current Hague/Hague-Visby time limits for commencement of suit could lead to prejudice to carriers' interests in achieving a fair and proper resolution of cargo claim disputes. There is an inevitable risk that the availability and value of evidence may diminish over time, and it is in the interest of all parties to the adventure that such disputes are promptly resolved whilst memories and recollections remain fresh and accurate.

Maritime Performing Parties

The introduction of the concept of a "maritime performing party" extends carriers' potential liabilities to parties other than the contracting carrier who may perform any part of the sea leg or services ancillary to the sea legs. Such parties will be subject to the same liabilities and responsibilities as the carrier, but the carrier nevertheless remains liable for the whole of the performance of the contract of carriage. This would not however extend to subcontractors performing non-maritime legs.

Dispute resolution forum choice

The increased flexibility in relation to dispute resolution forum choice contained in Articles 66 and 75 of the rules is also a negative factor from the carriers' perspective. Save in limited circumstances in relation to volume contracts, at the claimant's option suit, or where appropriate arbitration, may be commenced in the domicile of the carrier, at the place of receipt, delivery or

loading of the cargo. A single applicable forum for dispute resolution provides greater clarity and certainty of law and process for both contracting parties.

Club cover Ramifications

There may be negative implications for carriers in terms of their club cover which are more fully addressed later in the paper.

3. Positive implications for carriers

The prognosis for carriers is however by no means entirely negative, and there are a number of positive aspects of the rules which may, or will, work to the benefit of carriers.

A multi-modal convention

Unlike the Hague/Hague-Visby/Hamburg rules, the convention is not limited to port to port movements but extends to multi-modal contract of carriage, a "door to door" regime which should simplify addressing transport chain liabilities and promote uniformity and consistent application in the approach to assessment of carriers' liabilities.

Some beneficial aspects of existing Conventions and regimes retained.

The carrier's liability remains fault-based rather than strict which is welcome, even if the nautical fault exception will no longer be available under the rules, and the right to limit liability is preserved even if liability limits are increased. The due diligence test in relation to seaworthiness obligations is retained, as are the other what one might call "traditional exceptions" such as Act of God, perils of the sea, war and so on, save of course for the nautical fault exception mentioned earlier.

Shippers' obligations and liabilities in relation to cargo description and particulars and in relation to dangerous cargo.

The obligations imposed on shippers in Chapter 7 to provide information, instructions and documentation relating to the goods and the special rules on dangerous goods coupled with the shippers express liability to indemnify the carrier for loss or damage sustained by virtue of breach of such obligations is welcome from the carrier's perspective.

Deviation.

The preservation of the carrier's defences and limitations under the rules in cases of deviation constituting a breach of the carrier's obligations under applicable law is another positive feature.

Deck cargo application.

The extension of the provisions of the rules to cargo carried on deck in conformity with the liberty provisions contained in Article 25 of the rules, and

the exemption of carriers liability for loss or damage resulting from special risks involved in on deck carriage, are welcome developments from the carrier's perspective.

Liability for delay.

Whilst the inclusion of provisions imposing liability for delay were not as a concept viewed positively from the carriers perspective, the provisions restricting limitation of liability for delay to contracts where there is an agreed time for delivery rather than a "reasonable time" test is welcome.

Delivery of goods.

The provisions relating to delivery of cargo in Chapter 9 go some way to protecting the carrier against the risk of claims for delivery without surrender of the transport document, but still leave the carrier significantly exposed in such cases and will, in reality, provide limited comfort to a prudent carrier.

Greater freedom of contract in liner trades.

The flexibility for parties to "volume contracts" in the liner trade to derogate from the rules and giving greater freedom of contract (subject to the applicable criteria) is a valuable feature for carriers engaged in such trades.

Provisions for electronic commerce.

The provisions in the Convention giving electronic documents equivalence with the traditional paper transport document such as a bill of lading is welcome. The International Group is supportive of "paperless trading" and has been engaged with the development of a number of approved electronic trading systems which appear to be gaining increasing support from carriers.

4. P & I Club Cover

As currently drafted International Group Club rules preclude rights of recovery in respect of liabilities, costs and expenses which would not have been payable if the relevant contract or carriage document incorporated terms no less favourable to the carrier than the Hague Rules or Hague-Visby Rules. This restriction on the scope of cover is reflected in the International Group's claims pooling arrangements. The Group has already seen instances of carriage terms and conditions seeking to give contractual effect to the Rotterdam Rules which could bring into play the club rules exclusion from cover. Carriers are not encouraged to contract on such terms, or if they do are advised to take out difference in conditions cover to protect against the potential operation of the club rules cover exclusion. Whether or not clubs will decide to amend the relevant rules exclusion to permit cover to be extended to the scope of liabilities covered by the Rotterdam rules will depend upon the level of support and ratification of the rules over the coming years.

5. Summary

From both the carrier and the club perspective, widespread ratification and adoption of the rules would promote uniformity/consistency and help to head off threats of conflicting and disparate national and regional legislation and regulation of carriers rights and obligations. As an objective, this is desirable and welcomed.

There is general support for the rules from shipowner organisations including ICS, ECSA, BIMCO and WSC. Such support indicates that from the carrier's perspective, the rules are viewed positively notwithstanding the negative ramifications of certain aspects of the Rules.

Undoubtedly, application of the rules would increase the cost of claims to carriers and their P & I insurers, but this would be viewed as a price worth paying if widespread ratification promotes the cause of uniformity and consistency in the approach towards assessment of carriers' liabilities.

CORRECTIONS TO THE ORIGINAL TEXT OF THE ROTTERDAM RULES

The proposal has been made by Secretary General of the United Nations to correct certain errors in articles 1(6)(a) and 19(1)(b) of the Rotterdam Rules. The text of the communication and of its annex are reproduced below.

Reference: C.N.563.2012.TREATIES-XI.D.8 (Depositary Notification)

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA NEW YORK, 11 DECEMBER 2008

PROPOSAL OF CORRECTIONS TO THE ORIGINAL TEXT OF THE CONVENTION (ARABIC, CHINESE, ENGLISH, FRENCH, RUSSIAN AND SPANISH AUTHENTIC TEXTS) AND TO THE CERTIFIED TRUE COPIES

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The attention of the Secretary-General has been drawn to certain errors in articles 1 (6) (a) and 19 (1) (b) of the authentic text of the above-mentioned Convention and in the certified true copies circulated by depositary notification C.N.178.2009.TREATIES-2 of 8 April 2009.

The annex to this notification contains the text of the proposed corrections.*

In accordance with the established depositary practice, and unless there is an objection to effecting a particular correction from a signatory State or a Contracting State, the Secretary-General proposes to effect the proposed corrections in the authentic Arabic, Chinese, English, French, Russian and Spanish texts of the Convention. Such corrections would also apply to the certified true copies.

Any objection should be communicated to the Secretary-General within 90 days from the date of this notification, i.e., no later than 9 January 2013.

11 October 2012

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* The text of the proposed corrections is annexed in the six languages in which the Convention has been adopted but is reproduced here only in English and French.

CN.563.2012.TREATIES-XI-D-8 (Annex/Annexe)
Proposed corrections to United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) of 11 December 2008

Proposed corrections

1. Article 1(6) (a)

Insert the word "keeping"

"Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, **keeping**, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

2. Article 19 1(b)

Insert the words "and either" after requirement (i) in subparagraph (b)

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; **and either** (ii) while it had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

Corrections proposes

1. Article 1(6) (a)

Insertion des mots "la garde"

Le terme "partie exécutante" désigne une personne, autre que le transporteur, qui s'acquitte ou s'engage à s'acquitter de l'une quelconque des obligations incombant à ce dernier en vertu d'un contrat de transport concernant la réception, le chargement, la manutention, l'arrimage, le transport, **la garde**, les soins, le déchargement ou la livraison des marchandises, dans la mesure où elle agit, directement ou indirectement, à la demande du transporteur ou sous son contrôle.

2. Article 19 1(b)

Insertion des mots "et soit" avant le sous-alinéa ii) et remplacement du mot "ou" par le mot "soit" avant le sous-alinéa iii) de l'alinéa b)

b) L'événement qui a causé la perte, le dommage ou le retard a eu lieu: i) pendant la période comprise entre l'arrivée des marchandises au port de chargement du navire et leur départ du port de déchargement du navire; **et soit** ii) lorsqu'elle avait la garde des marchandises; **soit** iii) à tout autre moment dans la mesure où elle participait à l'exécution de l'une quelconque des opérations prévues par le contrat de transport.

After the lapse of the period for the notification of objections on 25 January 2014 the Secretary General of the United nations issued the notice quoted below together with the annex process-verbal.

Reference: C.N.105.2013.TREATIES-XI.D.8 (Depositary Notification)

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA NEW YORK, 11 DECEMBER 2008

CORRECTIONS TO THE ORIGINAL TEXT OF THE CONVENTION (ARABIC, CHINESE, ENGLISH, FRENCH, RUSSIAN AND SPANISH AUTHENTIC TEXTS) AND TO THE CERTIFIED TRUE COPIES

The Secretary-General of the United Nations, acting in his capacity as depositary, and with reference to depositary notification C.N.563.2012. TREATIES-XI.D.8 of 11 October 2012 by which corrections were proposed to the authentic text of the above-mentioned Convention, communicates the following:

By 9 January 2013, the date on which the period specified for the notification of objections to the proposed corrections expired, no objection had been notified to the Secretary-General.

Consequently, the Secretary-General has effected the required corrections to the Convention and to the Certified True Copies. The corresponding procès-verbal of rectification is transmitted herewith.

25 January 2013

UNITED NATIONS | **NATIONS UNIES**

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA, ADOPTED AT NEW YORK, ON 11 DECEMBER 2008

CONVENTION DES NATIONS UNIES SUR LE CONTRAT DE TRANSPORT EFFECTUÉ ENTIÈREMENT OU PARTIELLEMENT PAR MER, ADOPTÉE À NEW YORK, LE 11 DÉCEMBRE 2008

PROCÈS-VERBAL OF RECTIFICATION TO THE ORIGINAL TEXT OF THE CONVENTION AND TO THE CERTIFIED TRUE COPIES

THE SECRETARY-GENERAL OF THE UNITED NATIONS, acting in his capacity as depositary of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted at New York, on 11 December 2008 (Convention),

WHEREAS the authentic text of the Convention and to the Certified True Copies contains certain errors,

WHEREAS the corresponding proposal of corrections has been communicated to all interested States by depositary notification C.N.563.2012.TREATIES-XI.D.8 of 11 October 2012,

WHEREAS by 9 January 2013, the date on which the period specified for the notification of objections to the proposal of corrections expired, no objection had been notified,

HAS CAUSED the required corrections as indicated in the above notification to be effected to the authentic text of the Convention and to the Certified True Copies

IN WITNESS WHEREOF, I, Patricia O'Brien, The Legal Counsel, Under-Secretary-General for Legal Affairs, have signed this Procès-verbal.

Done at Headquarters, United Nations, New York, on 25 January 2013.

PROCÈS-VERBAL DE RECTIFICATION DU TEXTE ORIGINAL DE LA CONVENTION ET DES EXEMPLAIRES CERTIFIÉS CONFORMES

LE SECRÉTAIRE GÉNÉRAL DE L'ORGANISATION DES NATIONS UNIES, agissant en sa qualité de dépositaire de la Convention des Nations Unies sur le contrat de transport effectué entièrement ou partiellement par mer, adopté à New York le 11 décembre 2008 (Convention),

CONSIDÉRANT que le texte authentique de la Convention et aux exemplaires certifiés, contient certaines erreurs,

CONSIDÉRANT que la proposition de corrections correspondante a été communiquée à tous les États intéressés par la notification dépositaire C.N.563.2012.TREATIES-XI.D.8 en date du 11 octobre 2012,

CONSIDÉRANT qu'au 9 janvier 2013, date à laquelle la période spécifiée pour la notification d'objections aux corrections proposées a expiré, aucune objection n'a été notifiée,

A FAIT PROCÉDER aux corrections requises au texte authentique de la Convention et aux exemplaires certifiés conformes, comme indiquées dans la notification précitée.

EN FOI DE QUOI, Nous, Patricia O'Brien, Le Conseiller juridique, Secrétaire général adjoint aux affaires juridiques, avons signé le présent procès-verbal.

Fait au Siège de l'Organisation, Nations Unies, New York, le 25 janvier 2013.

Patricia O'Brien

Questions and Answers

on

The Rotterdam Rules

(Ver. 2012.10.10)

by

The CMI International Working Group on the Rotterdam Rules

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Preface

On December 11, 2008, during its 63rd session, the UN General Assembly adopted the "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules)." The Convention became open for signature at the signing ceremony in Rotterdam on September 23, 2009.

Comité Maritime International, which has been involved in the process of drafting the Rotterdam Rules from the early stages, endorsed the Rotterdam Rules (then "the Draft Convention") at its 39th Conference in Athens. Taking into account the practical and historical importance of the new regime for the international carriage of goods, the Executive Council decided that the CMI would continue to monitor the adoption and implementation of Rotterdam Rules, and established an international working group on the Rotterdam Rules for this purpose.

The Rotterdam Rules consist of 96 articles that were drafted carefully and deliberately. Because of their highly technical nature and their comprehensive coverage of the relevant issues, those who first read these rules might need some help to properly understand as to how the Rules work and what they achieve.

The International Working Group on the Rotterdam Rules thought it would benefit all involved if it were to make a "Questions and Answers" list that coincides with the Signing Ceremony and clarifies commonly asked questions and corrects occasional misunderstandings that arise. It should be noted that the intent of these "Q&As" are not to evaluate the Rotterdam Rules' pros and cons, nor to persuade governments to ratify them. The sole purpose is to offer guidance for an easy and correct understanding of the Rules.

We hope that the "Q&As" will help the readers of Rotterdam Rules.

October 10, 2009

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Revision History

Oct. 10, 2009	Several editorial corrections.
Oct. 10, 2012	Two questions and answers were added in Part A (No.7 and 11).

Questions and Answers on the Rotterdam Rules

A. Scope of Application, Persons Covered by the Convention, and the Multimodal Aspect

<Scope of Application>

1. Do the Rotterdam Rules apply to individual shipments under booking contracts of slot charterers, space charterers in liner or non-liner transportation? Do the Rotterdam Rules apply to individual shipments under long term contracts with NVOCs?

The application of the Rules should be determined when specific contract terms are filled in to the general conditions.
If individual shipments under booking contracts or long term contracts are performed in a non-liner transportation, the Rotterdam Rules do not apply either to the terms of the booking contracts or the long term contracts or to the terms of individual shipments (article 6(2)) unless they do not qualify as "on demand carriage" (article 6(2)(b)).
If individual shipments are performed in a liner service and if they are not charterparties or other contracts for the use of a ship or of any space thereon, the Rotterdam Rules apply to the terms of individual shipments and the terms contained in the booking contracts, or long term contracts to the extent that they are applicable to the individual shipments.

2. What is the intention of the proviso of article 6(2)? Does article 7 not also make the Rotterdam Rules apply when a transport document or an electronic transport record is issued?

The chapeau of article 6(2) excludes contracts of carriage in non-liner transportation. However, there is a case where the exclusion of non-liner transportation also excludes a type of contract that has been covered by the Hague and the Hague-Visby Rules. This type of contract is sometimes called "on demand" carriage, to which the proviso of Article 6(2) refers as follows: "When (a) there is no charterparty or other contract

between the parties for the use of a ship or of any space thereon; and (b) a transport document or an electronic transport record is issued".

An example can illustrate this exception. Assume the following arrangements: Several shippers bring their cars for carriage to the port of loading. When the number of cars reaches a certain level, the ship departs for its destination. While the route is fixed, the schedule is not. Bills of lading are issued for this carriage. This contract is covered by the Hague or the Hague-Visby Rules because bills of lading are issued under the contract and it is not a charterparty. The proviso of Article 6(2) reintroduces this type of contract for non-liner transportation into the Rules' scope of application.

It should be noted that the Rotterdam Rules apply only as between the carrier and the consignee, controlling party or holder that is not an original party under article 7. In contrast, if a contract of carriage falls under the category of article 6(2), the Rules also apply between the carrier and the shippers. The additional precision of Article 6(2) is needed to maintain the status quo under the Hague, the Hague-Visby or the Hamburg Rules (i.e., the regulation applies even as between original parties) and article 7 alone is not sufficient to do this.

3. Is it correct that the Rotterdam Rules apply in a situation where a transport document is endorsed to a third party, pursuant to article 7, but they would not apply under Article 6, as between the carrier and the shipper?

Yes. The same applies under the Hague and the Hague-Visby Rules or the Hamburg Rules.

<Door to Door Application>

4. Is it possible to agree on traditional "tackle-to-tackle" or "port-to-port" contract of carriage under the Rotterdam Rules?

Although it is often mentioned that the Rotterdam Rules adopt the "door-to-door" principle, it should be noted that the carrier's period of responsibility depends on the terms of the contract and that nothing in the Convention prohibits the parties from entering into a traditional "tackle-to-tackle" or "port-to-port" contract of carriage.

Article 12(3) explicitly allows the parties to agree on the time and location of the receipt and delivery of the goods. The only restriction is the proviso in Article 12(3) that the time of receipt of the goods cannot be after the beginning of their initial loading, and the time of delivery of the goods cannot be before the completion of their final unloading. Therefore, it is perfectly possible for the parties, for instance, to enter into a traditional "port-to-port" contract of carriage in which the shipper delivers the goods to the container yard of the port of loading, and the carrier unloads them at the container yard of the port of discharge, with the carrier only responsible for the carriage between the two container yards.

5. How do the Rotterdam Rules apply to total door-to-door transport? Do the Rules regulate the liability of the carrier who may not necessarily be responsible for a certain part of the transport?

The Rotterdam Rules apply to "door to door transport" only if the parties agree that the carrier assumes the responsibility for the whole part of the transport, including land legs. Nothing in the Rotterdam Rules prevent parties from entering into a pure maritime contract ("port to port" or even "tackle to tackle") and the only restriction is article 12(3). See, also *Question 4*.

6. How are the possible conflicts with other conventions solved under the Rotterdam Rules?

Article 26, introducing the "limited network rule", mostly removes the possible conflict with other Conventions, such as CMR or COTIF-CIM. Article 82 provides the safeguard for a contracting state to other conventions to the extent that such conventions apply to the sea carriage.

7. Article 26 provides that it applies "when loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship". It appears that the phrase "an event or circumstance causing" should apply not only to delay but also loss of or damage to goods. The current text of article 26 seems incorrect.

The wording *"loss of or damage to goods, or an event or circumstance causing a delay in their delivery"* is chosen intentionally and is not a drafting error. It is the intention of Article 26 that limited network principle applies only if that the loss or damage itself rather than its cause occurs during the relevant period. The word "an event or circumstance causing" is inserted in connection with delay for technical reason. We cannot say "the delay occurs during" the certain part of the whole carriage because "delay" can be judged only at the final destination (*See*, the definition of delay in art. 21). We should ask whether *the cause of delay* occurred during the relevant period. This is why the phrase "an event or circumstance causing" applies only to delay and not to loss of or damage to the goods.

8. Why do the Rotterdam Rules not adopt a uniform system instead of a limited network system?

Although the "network system" and the "uniform system" look entirely incompatible, each system is usually modified so that the difference is not as large as it appears. For example, any network system should be supplemented by a rule that governs the carrier's liability when it is impossible to determine where the damage occurred (UNCTAD/ICC Rules article 6.1-6.3 apply the limitation amount of Hague-Visby Rules when the damage is not localized, as far as the contract in question contains a sea-leg.). The "uniform system" is often modified to allow the application of the mandatory liability rule that governs the corresponding transport mode, as far as the place where damage occurs is identified (See, article 19 of UN Multimodal Convention).

The difference would be whether to adopt a unique limitation amount, totally independent of each legal regime that is applicable to each transport mode. In this regard, the Rotterdam Rules do not offer a "unique" limitation amount but apply a limitation amount applicable to sea carriage unless a different limitation applies pursuant to article 26 or article 82. This is the natural consequence of the fact that the UNCITRAL Project has always been understood as a modernization of the legal regime

of the carriage of goods by sea (or a "maritime plus" approach), rather than of the pure multimodal transport.

9. Why did the Rotterdam Rules not adopt a full network system rather than a limited network system?

A full network system, which applies every term of other conventions when the loss, damage, or delay is "localized" in a particular stage of carriage to which such conventions are applicable, was thought to be too modest an approach to achieve sufficient uniformity. One consistent and coherent regime should govern each stage of multimodal transport to as great an extent as possible.

10. Why do the Rotterdam Rules not include mandatory national law in their network system?

If the most important function in introducing a "limited network system" is to avoid conflict of conventions, there is no need to include mandatory national law in article 26. Further, the inclusion of mandatory national law would greatly reduce transparency, predictability and overall uniformity.

11. Article 82 refers to other international conventions "that regulate the liability of the carrier for loss of or damage to the goods." Why does article 82 regulate only the loss of and damage to goods and not delay in delivery?

Article 82 regulates the case of delay in delivery. The phrase "that regulate the liability of the carrier for loss of or damage to the goods" is used to describe the character of other convention which article 82 applies. It does not mean only the provisions with respect to the liability of the carrier for loss of or damage to the goods can be applied pursuant to article 82. For instance, the Montreal Convention qualifies this requirement because it "regulates the liability of the carrier for loss of or damage to the goods". If other requirements in Article 82(a) are satisfied, the court can apply the provisions of the Montreal Convention including those relating to carrier's liability for delay.

<Performing Parties>

12. Do freight forwarders fall within the definition of "maritime performing party" so that they are subject to the Rotterdam Rules?

Freight forwarders play various roles in connection with the contract of carriage. The Rotterdam Rules apply to some of these and not to others. The application of the Rotterdam Rules is decided depending on how they are involved in a specific contract of carriage.

If, for instance, a freight forwarder undertakes to carry the goods to its customer, it is a carrier under the Rotterdam Rules. If a freight forwarder enters into a contract with a sub-carrier in its own name, it is a shipper under the Rotterdam Rules. If a freight forwarder enters into a contract with a carrier on behalf of a customer (as an agent), it is not the carrier or the shipper under the Rotterdam Rules and is not liable as such. It is also not a "maritime performing party" unless it performs or undertakes to perform any of the carrier's obligations during the period 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, in respect of freight forwarders acting as inland carriers, only if the services performed are done exclusively within the port area.

When a freight forwarder provides services as a stevedore, for instance, one should be careful which relationship one focuses on. As regards the contractual relationship between the freight forwarders (acting as stevedores) and the carrier, the contractual relationship is not affected by the Rotterdam Rules because they do not apply to the contract between the carrier and the maritime performing party, unless that contract satisfies the definition of "contract of carriage" (article 1(1)) (this is apparently not the case here). As regards the forwarder's relationship with the shipper or consignee, the Rotterdam Rules make the carrier and the maritime performing party jointly liable towards the shipper and consignee. The fact that the freight forwarder, acting as a maritime performing party, is subject to the Rotterdam Rules would probably constitute an advantage rather than a disadvantage, because it guarantees that the freight forwarders enjoy defences including the short time-bar and the right of limitation of its liability. At present, irrespective of the contractual terms, in cases where it may be sued in tort, it would be liable without limitation.

13. Is it possible for the parties to give the persons who are not covered by article 4(1) the same defense and exoneration as the carrier via "Himalaya" clause? Does it constitute a "term in a contract of carriage" that "directly or indirectly excludes or limits the obligations of the carrier" which is void pursuant to article 79(1)?

Nothing in the Rotterdam Rules prevent the parties of the contract of carriage from agreeing on a "Himalaya clause" for the benefit of non-maritime performing parties or other persons who are not covered by article 4(1). The Rotterdam Rules leave the issue of liability of such persons including the validity of the "Himalaya clause" to national law and the issue is outside the scope of article 79.

B. Carrier's Obligations, Period of Responsibility and Liabilities

<Period of responsibility>

1. Is it possible for the carrier to limit their period of responsibility by contract?

First, the carrier cannot unilaterally limit the period of responsibility. This should be agreed in the contract of carriage. Second, there is a restriction for contractual agreement to avoid its misuse. A provision in a contract of carriage is void to the extent that it provides that (a) the time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage or (b) the time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage. (article 12(3))

2. Article 12(3)(a) states that the time of receipt of the goods cannot be defined to be after "their initial loading under the contract of carriage". What is "initial loading under the contract of carriage"? Can it mean "alongside the vessel", i.e. tackle to tackle, as in the current Hague-Visby Rules, because Article 12(3)(a) uses the term "initial loading", not "initial receipt"?

"Initial loading under the contract of carriage" means loading on the first means of transportation, which could be a ship, a truck, a train, or even an aircraft. If the only means of transport used in the contract of carriage in question is a ship, article 12(3), in substance, means that the parties cannot agree on a contract of carriage with a period of responsibility that is shorter than "tackle to tackle".

If the parties enter into a contract for "door to door transportation," which includes road carriage from the shipper's factory, it is impossible to agree on a period of responsibility that begins after the loading onto the truck, which is "the initial loading of the goods under the contract of carriage".

3. Will the carrier be able to limit its specific obligations under the contract of carriage under FIO clause? Is it correct that the carrier's responsibility for loading, handling, stowing and unloading of the goods would be eliminated by terms of Article 13(2) if the shipper assumed "legal responsibility for load, handle, stow, and unload"?

Yes, but ***only if*** the carrier and the shipper agree on the FIO clause and ***only to the extent*** that the shipper assumes the obligation of performing the loading, handling, stowage and unloading of the goods. Such an arrangement would be beneficial for the shipper, for example, in cases where such goods require special treatment, or where the shipper has specialized equipment necessary to handle the goods. Unfortunately, the jurisprudence on the FIO clause has veried among jurisdictions and there is uncertainty for its validity. Article 13(2), providing for the legal underpinning for FIO clauses, is intended to assist the parties when they desires to use them. On the other hand, article 13(2), enumerating the task of which the shipper can assume responsibility, restricts the extent to which the FIO clause are effective and thereby prevents its misuse of the FIO clause.

4. May the parties stipulate in the transport document that the legal responsibility for loading, handling, stowing and unloading of the goods is placed upon the shipper, but that the carrier, as agent of the shipper, would perform those tasks?

The parties may agree that the carrier, as agent of the shipper, would perform loading, handling, stowing, or unloading under FIO clauses. However, in such a case, the carrier cannot rely on the exoneration under article 17(3)(i).

Article 17(3)(i) explicitly provides:

"The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, ... it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

.....

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, *unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee.*" (Emphasis added).

<Carrier's Obligation>

5. Article 11 provides that "the carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee". In addition to terms set out in the Convention, is the carrier free to include other terms in the contract of carriage that are outside the Convention? If so, what type of terms would possibly be included?

The carrier and the shipper are free to incorporate any terms that are not restricted by the Rotterdam Rules. The payment of freight, time of delivery, laytime and demurrage, or options to change port of destination are examples of such terms. The parties can also insert a liberty clause such as "Caspiana" or "war clause" which would permit the carrier to discharge the goods at a different place than original destination under certain exceptional circumstances. These clauses can be interpreted as providing an alternative desitination which can be chosen under certain circumstances and should not be automatically invalidated as derogation from the carrier's obligation under article 11.

6. Article 14 appears to replicate Article III(1) of the Hague-Visby Rules.
(1) How does Article 14 relate to Article 17?
(2) What is the consequence if due diligence is not exercised?
(3) Who has the burden of proof of due diligence?
(4) Should the carrier prove that it had exercised due diligence before being able to rely on the relief of liability provisions Articles 17(2) and (3)?
(5) Who has the burden of proof of unseaworthiness, etc.?

(1) When the carrier relies for exoneration on an event or circumstance under article 17(3), the claimant can defeat it by proving that the loss or damage was "probably caused" by unseaworthiness, pursuant to article 17(5)(a), although the carrier may still prove that there is no causation between unseawothiness and the loss, damage or delay, or that it exercised due diligence (article 17(5)(b)). One should note that, under the

Rotterdam Rules, the due diligence obligation to make and keep the ship seaworthy only plays a role in connection with the case in which the carrier relies on the exoneration under article 17(3).

(2) The failure to exercise due diligence is a breach of the obligations of the carrier. If such breach caused or contributed to the loss of or damage to the goods or the delay in delivery, the carrier loses its defence pursuant to article 17(3).

(3) The carrier bears the burden of proof of due diligence. See (1), above.

(4) No. See (1), above. The exercise of due diligence matters only if the claimant proves the loss or damage was "probably caused" by unseaworthiness, pursuant to article 17(5)(a). The Rotterdam Rules explicitly rejected the idea of the "overriding obligation" of the carrier, which is adopted in some jurisdictions.

(5) Article 17(5) provides that the claimant must prove that the loss, damage or delay was or was probably caused by or contributed to by the unseaworthiness etc. Therefore, claimant should prove the unseaworthiness etc. Please note that this burden of proof matters only if the carrier can successfully prove that the events or circumstances listed in article 17(3) caused or contributed to the loss, damage or delay. See, also (4).

<Basis of Liability>

7. Is article 17(2) intended to mirror Article IV(2)(q) of the Hague-Visby Rules?

Yes. Therefore the "(q) clause" is deleted from the list of exonerations in Article 17(3).

8. The basis of the carrier's liability under the Rotterdam Rules resembles that under the Hague-Visby Rules, but there seem to be some differences. The list of perils is more extensive than under Hague-Visby. The carrier can excuse itself if it is proven that the cause or one of the causes of the loss was not due to its fault. Do these elements imply that it is more difficult for shippers to make the carrier responsible?

It is correct that there are some important differences between the Rotterdam Rules and the Hague-Visby Rules. However, the differences imply that the Rotterdam Rules strengthen the carrier's liability.

The list of perils is *less* extensive under the Rotterdam Rules. The major differences with the list under the Hague and the Hague-Visby Rules are the following: Error in navigation and in management is no longer a valid defence under article 17(3). While the "fire defence" still exists, the carrier cannot rely on the defence if the person referred to in article 18 (any performing party, employees etc.) caused the fire. (article 17(4)(a)). This is the same rule as in the Hamburg Rules rather than the Hague-Visby Rules.
On the other hand, the items added to the list such as (i), (n), or (o) are of a clarification nature and should not be regarded as a substantive expansion of the list.
If it can be proven that one of the causes of the loss was not due to its fault, the carrier is relieved of its liability *only for the part of the loss, damage or delay that is not attributable to the event or circumstances for which the carrier is liable* (article 17(6)).

9. Why does the claimant bear the burden of proof of unseaworthiness, etc. under Rotterdam Rules?

See, *Question 6(5)*.

10. Is the list of perils in art 17 a step backwards from the Hamburg Rules?

The Hamburg Rules repealed the list of exoneration and some delegations preferred that approach during the discussions in the UNCITRAL Working Group. However, most delegations did not think that significant differences existed in substance regarding whether to retain or to delete the list. If the listed events or circumstances caused or contributed to the loss, damage or delay, the court, even without the list, would usually infer that they are not attributable to the fault of the carrier. As well, the proof under article 17(3) does not offer absolute exoneration. The shipper still can hold the carrier responsible under article 17(4) and (5). While the retention of the list does not substantially change the substance, many delegations wished to preserve the existing case law that has developed under the Hague and Hague-Visby Rules.

11. When there were concurring causes that contributed to the loss, damage or delay, should the carrier who wishes to be partly relieved of its liability prove the extent to which it is liable?

As far as the carrier can prove that a part of the loss, damage or delay is not attributable to the events or circumstances for which it is liable, the court should relieve the carrier of that part of its liability. This is true, even if the exact extent of the loss, damage or delay that is not attributable to the events or circumstances is not specified. Courts, which are accustomed to making these sorts of determinations, should exercise their discretion in this type of case, in an appropriate manner.

12. Is liability for pure economic loss due to delay covered by the Rotterdam Rules?

Yes, but it is subject to the special limitation applicable to economic loss, under article 60 (2.5 times of the freight payable on the goods delayed).

13. Deck cargo
(1) What are "special risks involved" in deck carriage in article 25(2)?
(2) The carrier is required to state in the contract particulars that the goods may be carried on deck. Do particulars of deck carriage need to be stated in bold type on the face of the bill of lading, or would generic fine print on the reverse of the transport document be sufficient?

(1) "Special risks" include, but are not limited to, such risks as wetting and washing overboard.
(2) The validity of the fine print on the reverse of the transport document is an issue left to the court. This is not a problem unique to this article.

<Limitation of liability>

14. The carrier is entitled to limit its liability "for breaches of its obligations under this Convention" rather than the liability for loss of, damage to or delay in delivery of the goods. What is the intention of this wording, which seemingly expands the scope of claims subject to limitation?

The wording "liability for loss of, damage to or delay in delivery of the goods" was thought inadequate for the purpose of article 59(1). The misdelivery of the goods is the typical case that the UNCITRAL Working Group had in mind during the deliberation of the Convention. Let us assume that the carrier delivers goods without observing the proper procedure provided under the Rotterdam Rules. The carrier would be liable to

the person entitled to the delivery. In some jurisdictions, the court might find that this is one of the cases of "loss of goods" under article 17 because the goods were "lost" from the viewpoint of the person entitled to the delivery, even though they were, physically, not lost. However, in other jurisdictions, the court might see differently and conclude that this is not a case of "loss of the goods" and the liability is not based on article 17. In this case, it is not clear if limitation of liability applies, if article 59(1) provides that the limitation applies to "liability for loss of, damage to or delay in delivery of the goods". The current text, providing "liability for breaches of its obligations under this Convention", clarifies that the limitation applies to the case of misdelivery.

15. Is the limitation of liability more onerous to for the shippers under Rotterdam Rules? For instance, the shippers may forget to enumerate the number of packages in the container and thus be unable to claim under the per package limitation. Article 61 requires that the loss must result from a personal act or omission in order to result in the carrier's loss of the benefit of liability limitation.

No. The two elements referred to are not a novelty in the Rotterdam Rules at all.
The limit per package can only be invoked if the packages are enumerated in the transport document under article 4(5)(c) of the Hague-Visby Rules and article 6(2)(a) of the Hamburg Rules. Nothing is changed by the Rotterdam Rules. In any event, the declaration of the content of a container is always made, due to customs requirements, and it is hardly persuasive for a shipper to complain against this traditional rule by asserting that it could have enjoyed a better limitation amount if it had not forgotten to declare.
Only the personal behaviour of the carrier causes the loss of the right to limit under the Hague-Visby Rules, wherein reference is made to the act or omission of the carrier and reference to the carrier does not include the master or the carrier's servants, as it appears clearly from article 4(2)(a). The same applies to the Hamburg Rules in article 8(1). The Rotterdam Rules simply explicitly codify the existing rule. Speaking more generally, the requirement of "personal" action of the person liable to break the limitation is a common feature of most maritime conventions today.

16. Given the fact that the Rotterdam Rules have multimodal application, the Rules' limitation amount fall to be compared with that of CMR or COTI-CMI. However, the

weight limitation under the Rotterdam Rules is far lower than CMR or COTIF-CIM. How can this gap be justified?

This comparison is inaccurate or even misleading. The limitation amount based on weight is 8.33 SDR per kilogram under CMR (Article 23(3)) and 17 SDR per kilogram under CIM-COTIF (Art. 40(2)). These amounts are certainly higher than the weight limitation under the Rotterdam Rules (3 SDR per kilogram). However, the Rotterdam Rules also adopt a separate limitation amount per package (875 SDRs). In practice, the limitation amount per package is often higher. Let us assume a package of a laptop computer, the gross weight of which is 1.0 kg. Under the CMR, the limitation would be 8.33 SDRs, while under the Rotterdam Rules it is 875 SDRs.
Because the calculation mechanism is totally different under maritime transport and land transport conventions, we cannot easily conclude that the limitation amount under CMR or COTIF-CIF is more advantageous than that of the Rotterdam Rules. .

<Time-bar etc.>

18. Are the notice periods of the loss of or damage to the goods and the two year period to bring a claim too short?

The period of notice of loss under article 23 is extended to seven days as compared with the three day period under the Hague and the Hague Visby Rules. The period after which an action is time-barred under the Rotterdam Rules is twice as long as that under the Hague and the Hague-Visby Rules.

C. Shipper's Obligations and Liabilities

1. Are the shipper's obligations more onerous than in previous conventions?

The Rotterdam Rules includes more detailed provisions on the shipper's liability. However, the increased number of the provisions, in itself, does not imply more obligations or liabilities. First, it should be noted that the shipper has never been free from obligations and liabilities, even in such areas where previous conventions are silent. The shipper has been responsible under applicable national law. In addition, the

contract of carriage has often imposed specific obligations on the shipper. Therefore, one should examine whether the shipper's obligations and liabilities under the Rotterdam Rules are expanded compared with those under applicable national law or under ordinary contractual terms. Although a comprehensive comparison is not possible, several basic elements are outlined here.

Save as mentioned in the next paragraph, the shipper's liability is fault-based under the Rotterdam Rules, as well as under the Hague, the Hague-Visby and the Hamburg Rules (Article IV (3) of the Hague and the Hague-Visby Rules and Article 12 of the Hamburg Rules). The carrier must prove the shipper's breach of obligation under the Rotterdam Rules in order to make the shipper liable. While the Rotterdam Rules explicitly provide for the specific obligations of the shipper, the effect would be subtle. Such a breach could cause the shipper's liability under applicable national law or under the contract of carriage in many cases. On the other hand, since the "breach of obligation" imposed under the provisions of Chapter 7 is the prerequisite of a shipper's liability (article 30(1)), the explicit references to specific obligations may be understood as a safeguard for the shipper.

The shipper bears strict liabilities under the Rotterdam Rules in two situations: damage caused by dangerous goods and by inaccurate information provided by the shipper for the compilation of transport documents. These rules do not increase, at least substantially, the shipper's liability compared with previous conventions. Liability in respect of dangerous goods has already been strict under the Hamburg Rules and, in some jurisdictions, under the Hague and the Hague-Visby Rules. The shipper has been deemed to guarantee the accuracy of information that it provided to the carrier for the transport with regard to the goods under the Hague, the Hague-Visby and the Hamburg Rules.

Finally, it should be noted that parties cannot increase the shipper's obligations and liabilities through a contract (article 79(2)). The shipper is more protected in this respect than under previous conventions. The Rotterdam Rules also provide for certainty for the shipper in that they prohibit Contracting States from imposing more liability through their national legislation than the Rules impose.

Taking all of these elements into account, it is doubtful whether the shipper's obligations and liabilities are substantially increased under the Rotterdam Rules compared with existing conventions.

2. Is it an imbalance that there is no limitation for shippers' liability to the carrier?

Shippers are not currently entitled to a limitation on their liability under the Hague Rules, the Hague-Visby Rules or the Hamburg Rules. During the sessions of the UNCITRAL Working Group, the issue of the limitation of liability of the shipper was raised in connection with the suggested regulation of its liability for delay. The representatives who stressed shipper's interest were in fact concerned that such liability might be of an unpredictable level, for example, in the case of the sailing of the carrying ship being delayed for many days resulting in the shipper responsible for the delay being liable for the delay caused to every other shipper, and suggested that in respect of liability for delay, a limit would be appropriate. Efforts were made to identify an appropriate basis for such a limit, but they proved fruitless, and it was decided that shippers should not be liable for delay pursuant to the Convention Such liability, therefore, is governed by the applicable law.

3. The second sentence of Article 34 appears to relieve the shipper of liability for acts or omissions of the carrier or a performing party to which the shipper has entrusted the performance of its obligations. What is the meaning of article?

It might be easier to understand the meaning if we restate the proposition from the reverse side: the carrier could not claim damages for its own acts or omissions, even if its activity had been performed following a request of the shipper. The former part of article 34 mirrors in respect of the shipper the provision of article 18 and the latter part of article 34 mirrors article 17(3)(h).

D. Transport Documents, Right of Control and Delivery of the Goods

1. With respect to Article 40(2), do you foresee that the transport document would contain a "standard form of disclaimer" that the carrier does not assume responsibility for accuracy of information furnished by the shipper?

Because the Rotterdam Rules do not control the wording of qualifying clauses for contract particulars, the carrier might continue to use traditional standard forms of disclaimer such as "said to contain", "contents unknown", or "accuracy not guaranteed" etc. The Rotterdam Rules regulate that such disclaimers are valid only to the extent that article 40 allows. This unifies the diversity of law among jurisdictions regarding the effect of disclaimer, which is not completely regulated under the Hague and the Hague-Visby Rules.

2. Does article 47(2) allow the delivery of goods without surrender of the transport document?

Yes, but only if that option is opted into by way of an *express* statement in the negotiable transport document or the negotiable electronic transport record that the goods may be delivered without their surrender.

E. Jurisdiction and Arbitration

1. Are Articles 66(a) and (b) an alternative with the choice to the plaintiff? In other words, can the plaintiff always insist on the provisions of Article 66(a)? What is the relationship between Article 66 and Article 67? Is Article 66(a) always paramount to the clauses in Article 67?

As to the first two questions, the answer is in the affirmative. The language of article 66 clearly gives the choice to the plaintiff.
As to the third and fourth questions, Article 67 is clearly an exception to the general rule set out in article 66. As the general rule under the Rotterdam Rules, an exclusive choice of court agreement is not allowed, but if inserted in a volume contract, it is valid to the extent of the requirements under article 67.

2. Is it possible that the exclusive jurisdiction clause in a volume contract binds the parties as well as the holder?

Yes, but only if and to the extent that it meets the requirement under article 67 (especially article 67 (2)(c), that a non-party to the volume contract must be given

timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive).

3. (1) Is it correct that by articles 74 and 78, the jurisdiction and arbitration clause terms apply only if the contracting State positively declares in accordance with Article 91 that they will be bound by them, otherwise, articles 68-73 and 75-77 would not apply?

(2) What would occur in the situation where State X did not specifically make a declaration to apply Chapter 14 of the Convention and State Y did? Assuming there was a shipment from State Y to State X and an action commenced in State Y. What would be the result, particularly if an anti-suit injunction was commenced in the State X?

(1) When a Contracting State does not make a declaration that it will be bound by the provisions in Chapter 14 and 15 the issue of jurisdiction is governed by its national law.
(2) State X is not bound by the Rotterdam Rules as far as the issue of jurisdiction is concerned. State Y, which made the declaration to apply Chapter 14, can treat the judgement or other court actions (including anti-suit injunction) in State X just as those in non-Contracting State. Therefore, State Y simply applies its general rule regarding the recognition and enforcement of foreign judgement or other court actions and the Rotterdam Rules have no role to play in this context.

F. Volume Contracts and Freedom of Contract

1. What are the safeguards for the shipper under article 80?

Article 80 contains the following stringent mechanism for the protection of cargo interest from any potential abuse of freedom of contract, through the "volume contract" provisions.
Article 80(2) provides a series of conditions that must be met before the parties can derogate from the terms of the contract that are imposed by the Rotterdam Rules.

First, there should be a "prominent statement" regarding the fact that the contract contains the derogation (Article 80(2)(a)). A statement should be "prominent" rather

than simply "expressed". It should be written in such a form that attracts the reader's attention, such as bold font or large capitalized letters.

Second, the volume contract should be either (i) individually negotiated or (ii) prominently specify which provisions of the contract contain the derogations (Article 80(2)(b)). Although subparagraph (b) allows for the possibility that the contract is not individually negotiated, subparagraph (d), which prohibits incorporation by reference or contracts of adhesion, would make it very difficult for the parties to introduce derogations without individual negotiation.

Finally, the shipper should be given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with the Convention, without any derogation. The shipper always has an opportunity to enter into a contract with Convention terms at such a price as is published on the tariff.

Article 80(4) provides for "super-mandatory provisions", which are core provisions of the Rotterdam Rules that cannot be derogated from even in volume contracts. These include obligations under Article 14 (a) and (b) (carrier's duty to make and keep the ship seaworthy), Article 29 (shipper's duty to provide information, instructions and documents), and Article 32 (shipper's liability regarding dangerous goods) and liabilities arising from any breach of those provisions. It is also prohibited to exonerate or limit a carrier's liability arising from its intentional or reckless act or omission that causes the loss of or damage to the goods or a delay in delivery.

Even when the terms of the volume contract validly derogate from the Convention, further conditions are required for the carrier to invoke it against any person other than the shipper. The conditions are that (i) the person receives information that prominently states that the volume contract derogates from this Convention and gives his/her express consent to be bound by such derogations and (ii) such consent is not solely set forth in a carrier's public schedule of prices and services, transport documents or electronic transport records.

2. What is the definition of "volume contract"? Would a certain number of containers be considered to be "a specified quantity of goods in a series of shipments"? What is the minimum range of shipments in a contractual time frame? Is the definition of "volume contract" too loose?

Article 1(2) defines "volume contract" as "a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range". Critics of the volume contract exception have argued that this definition is too loose. It is true that even a very small number of shipments, as they claim, can meet the definition.

The question is if there would have been a sensible way to limit the concept. It might be suggested to introduce a qualitative restriction, such as "significant number of shipments" but this would raise the question of what is significant. Is a quantitative restriction, such as "more than 100 shipments a year" or "more than 100,000 tons of cargo", more sensible? In fact, there was a proposal in 21st session of UNCITRAL Working Group along the lines of "the specified quantity of goods referred to should be 600,000 tons and the minimum series of shipments required should be 5". (See, Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), A/CN.9/544, para.251) This approach would cause another problem, although it is quite predictable. A specific figure would be too formalistic and a figure that makes sense in certain trade might not be sensible for other trades. Further, parties would not know with certainty until the specified number of shipments or volume was reached whether the earlier contracts qualified as volume contracts, creating uncertain commercial conditions.

After lengthy efforts, many delegations to the UNCITRAL Working Group reached the conclusion that there was no commercially reasonable way to limit the definition of volume contracts. Rather, they agreed that it would make more sense to enhance the protective requirements for any derogation in Article 80, so as to protect the parties

from any abuse of the freedom of contract provisions, even in the case of small shipments.

G. Others

1. Is it true that the Rotterdam Rules do away with all of the existing case law and practice that has developed under the Hague, Hague-Visby and Hamburg Rules?

It is wrong to see that "the Rotterdam Rules do away with all of the existing case law and practice". The situation is more delicate.

In some cases, the Rotterdam Rules intentionally changed the case law in certain jurisdictions. For instance, the purpose of article 24 is to change the case law regarding the consequence of unreasonable deviation in a certain jurisdiction, which was thought problematic.

At the same time, the Rotterdam Rules pay much attention to the preservation of valuable precedents. The list of exonerations under article 17(3) is a clear example. The wording is intentionally aligned with that of the Hague and the Hague-Visby Rules.

2nd International Maritime Congress, Szczecin

The Role of the Comité Maritime International (CMI) in the development of uniform law for multimodal transport

Stuart Hetherington
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Multimodal Transport : The Role of CMI

One of my predecessors as President of the CMI (1947-1976)[1], Albert Lilar, said the following:

> "The history of maritime law bears the stamp of a constant search for stability and security in the relations between the men who commit themselves and their belongings to the capricious and indominatable sea. Since time immemorial the postulate which has inspired all the approaches to the problem has been the establishment of a uniform law."

That is the primary object of CMI today. We are clearly failing in the area of the liability regime for maritime transport, as I will seek to demonstrate in this paper.

Hague Rules

Firstly, therefore, I want to look at the history and difficulties which have been experienced in achieving uniformity in the carriage of goods liability regime, before considering the even more difficult subject of multimodal carriage. Nothing, in my view, exemplifies the difficulties, which we as maritime lawyers face in achieving uniformity than the carriage of goods liability regime. As the bread and butter work of maritime lawyers relates to cargo claims, I thought it might be useful to look at the history of the Hague Rules (and subsequent versions).

The International Law Association (**ILA**) discussed bills of lading at its Liverpool conference in 1882, and adopted a model bill of lading for adoption by carriers and shippers which did not achieve general acceptance.

The ILA then, at a subsequent conference in 1885, drafted a set of rules known as the "Hamburg Rules of Affreightment" (not to be confused with the 1978 Hamburg Rules Convention), which was designed for parties to voluntarily incorporate by reference into their bills of lading. (I will suggest below that the consolidation of liner shipping into a few mega carriers (particularly the recent coming together of P3 and G6) may provide an opportunity for that failed 19th century model to be revived in favour of the more tortuous path of international conventions). Once again these model rules had little immediate impact.

As you may know, these failures led to several countries unilaterally enacting domestic legislation governing exoneration clauses in bills of lading. The 1893 Harter Act of the United States was the precursor to similar legislation in New Zealand, Australia[2] and Canada[3].

It was only towards the end of the First World War when countries such as Australia, New Zealand and Canada lobbied Britain, and a number of meetings took place in the period from 1917 to 1924, when the Hague Rules were finalised. This occurred because consignees in those

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[1] Albert Lilar and Carlo Van Den Bosch: "Le Comite Maritime International 1897-1972"

[2] Shipping and Seamen Act (NZ) 1903; Carriage of Goods Act 1904 (Australia)

[3] The Water Carriage of Goods Act 1910

countries were unable to obtain the benefits of their own Harter Act style of legislation and carriers were able to benefit from the wide exclusion clauses which were still permissible. It was at meetings of the CMI in Antwerp in 1921 followed by the ILA at the Hague in September 1921 that the Hague Rules of 1921 were developed and agreed.

During the early 1920s there were numerous meetings and conferences before the Hague Rules came to fruition. The CMI was closely involved in those meetings. For example, it held a conference in London in October 1922 and it was followed within days by the fifth session of the Diplomatic Conference on Maritime Law, which had been scheduled to discuss other proposed conventions. The Hague Rules were added to the agenda at the last minute. Twelve months later in October 1923 a further commission was established and in August 1924 a conference formally reconvened for the official act of concluding the Convention and opening it for signature.

The Hague Rules were described in this way in a history of the CMI co-authored by Albert Lilar and Carlo Van Den Bosch:

> *"Derived from the Harter Act and the Hague Rules, this Convention has doubtless provided the most important contribution to the unification of maritime law and the purification of international commerce by enacting certain mandatory rules intended to confer to the title of maritime transport, the negotiable bill of lading, the value of a document truly representative of the goods. Besides, the convention takes into account, in a spirit both practical and equitable, the risks which are inseparable from the maritime adventure and institutes an elaborately balanced regime in the relations between the maritime carriers and their clients."*

As is well known the period of responsibility of the carrier under those rules has been colloquially referred to as "Tackle to Tackle". That is derived from the definition of "Carriage of Goods" in Article 1(e) which is defined as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship".

It still took many years for those Rules to catch on and it was not until 1936 that the United States passed its *Carriage of Goods by Sea Act*, which provided the impetus to many other countries, such as France, Italy, Germany, Poland, Finland and the three Scandinavian countries to follow suit within a couple of years (many British Commonwealth countries had given effect to the Hague Rules earlier, either in the 1920s or 1930s). The Hague Rules had entered into force in June 1931 and have had 84 ratifications.

Containerisation

The introduction of containers in the early 1960s caused the CMI to consider how the liability regime could be improved to take account of numerous factors which this new technology introduced into the picture. In particular it gave rise to questions as to: what would the carrier's responsibility be in respect of inland transport, should there be limitations of liability, what about

recourse actions, what documentation would be appropriate in respect of inland transports and combined transports, and how was the package limitation affected.

I note that in one discussion paper from that era the author Kaj Pineus of Gothenburg said:

> *"Or as someone has put it: to tackle only the period from tackle to tackle is to tickle the problem of containers, not to solve it."*

Hague Visby Rules

The low limit of £100 made it necessary to change the package limitation provisions in particular so the Hague-Visby Rules which were agreed in Brussels on 23 February 1968 came into being but did not enter into force until 23 June 1977. They have 32 ratifications but have never been ratified by the United States, Australia or China.

UNIDROIT: Draft Convention on International Combined Transport of Goods

In 1965, UNIDROIT completed a draft convention based on the Convention on the Contracts for the International Carriage of Goods by Road 1956 (CMR).

Combined Transport (Tokyo Rules 1969)

The CMI had continued work during the 1960s and produced a draft Convention on combined transport which was approved in Tokyo on 3 April 1969, and is known as the "Tokyo Rules".

I shall seek to summarise its contents.

A "Combined Transport Bill of Lading" (CT bill of lading) is defined as a "document evidencing a contract for the carriage of goods between two States by at least two modes of transport, of which at least one is by sea or inland waterways and at least one is not by sea, which bears the heading "Combined Transport Bill of Lading Subject to the Tokyo Rules." (Article I Paragraph 2).

A "Combined Transport Operator" (**CTO**) "means a person issuing a CT bill of lading" (Article 1 Paragraph 4). CTOs are required to perform or procure the performance of the entire transport from the place "at which the goods are taken in charge to the place designated for delivery" (Article II, paragraph 1(a)), and is "liable for loss of or damage to the goods occurring between the time when he receives the goods into his charge and the time when he delivers the goods at the place designated for delivery" (Article VI paragraph 1), unless such loss or damage is caused by:

"(a) The wrongful act or neglect of the consignor or the consignee;

(b) Compliance with instructions of the consignor or consignee;

(c) Any cause or event which the CTO could not avoid and the consequence whereof he could not prevent by the exercise of reasonable diligence;

(d) Either fire during carriage by sea or inland waterways (unless caused by actual fault or privity of the carrier by sea or inland waterways) or the act of neglect or

default of the master, mariner pilot or the servants of the carrier by sea or inland waterways in the navigation or in the management of the vessel;

(e) The lack or insufficiency of or the defective condition of packing in the case of goods, which by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;

(f) Defect of the container or similar article of transport used to consolidate goods if supplied by the consignor;

(g) Handling, loading, storage or unloading of the goods by the consignor, the consignee or any person acting on behalf of the consignor or the consignee;

(h) Inherent vice of the goods;

(i) Insufficiency or inadequacy of marks or numbers on the goods, containers, cases or coverings;

(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause whether partial or general" (Article VI paragraph 1).

Where the place where the loss or damage occurred can be proved, the CTO and the claimant are:

> "entitled to require the liability of the CTO to be determined by any international convention or national law which could not be departed from by private contract and which would have applied had the claimant, in respect of the particular stage of transport where the loss or damage occurred, made a separate and direct contract with the CTO complying with such international convention or national law but otherwise upon the terms of the Combined Transport Bill of Lading which are applicable to that stage" (Article VIII paragraph 1(a)).

Where damage occurred at sea, the international convention relating to such carriage, if it is expressly provided by the Combined Transport Bill of Lading that such provisions should apply, are to govern the carriage (Article VIII paragraph 2).

As Mahin Faghfouri of UNCTAD explained in a most informative article[4], the UNIDROIT Draft was based on the CMR 1956, whilst the CMI "Tokyo Rules" followed the maritime liability regime of the Hague Rules, and only applied if there was a sea leg. It was therefore a network system.

UNECE (the UN Economic Commission for Europe) sought to reconcile the UNIDROIT and CMI drafts, which the IMO then refined but did not conclude (the TCM Draft) and instead invited UNCTAD to study the issue. The TCM draft also adopted a voluntary network system of liability, making the liability rules applicable only if loss or damage could not be attributed to a particular locality. As Ms Faghfouri pointed out, when quoting another author "a voluntary "network" liability

[4] WMU Journal of Maritime Affairs 2006 Vol 5 No1 95-114

regime with a rule for unlocalised damage was already a de facto reality in many contractual arrangements with freight forwarders."[5]

Hamburg Rules

The Hamburg Rules were agreed at the diplomatic conference in 1978 and entered into force in 1992 but have only achieved 33 ratifications, and none of the major trading nations such as the US, China or Japan have ratified the Hamburg Rules.

In addition, there are hybrid versions of these Conventions (Hague, Hague-Visby, Hamburg) in places such as China and Australia. How long will it be before aspects of Rotterdam are added to the list of hybrids?

Multimodal Transport of Goods Convention 1980 (UNCTAD)

This Convention adopts a "uniform" system of liability modelled on the Hamburg Rules but incorporates a network system in relation to limits of liability, within uniform minimum limits. "International Multimodal Transport" is defined in Article 1 as meaning "the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. The operations of pick up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport." (Article 1, paragraph 2).

A "Multimodal Transport Operator" means "any person who on his own behalf or through another person acting on his behalf, concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract." (Article 1, paragraph 2).

A "Multimodal Transport Contract" means "a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport." (Article 3)

The period of responsibility of the multimodal transport operator "covers the period from the time he takes the good in his charge to the time of their delivery." (Article 14, paragraph 1).

Pursuant to article 16, the basis of liability of the multimodal transport operator for the loss or damage to the goods is "if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Article 14, unless the multimodal transport operator provides that he, his servant or agents or any other person referred to in Article

[5] Nasseri K: the Multimodal Convention, Journal of Maritime Law and Commerce Vol 19 (1988) No. 2 (pp 235-236).

15, took all measures that could reasonably be required to avoid the occurrences and its consequences." (Article 16, paragraph 1).

The limits of liability are 2.75 SDR per kilogram of gross weight of the lost or damaged good or 920 SDR per package or other shipping unit (Article 18).

By Article 19, it is provided that "when the loss or damage to the goods occurred during one particular stage of the multimodal transport in respect of which an applicable international convention or mandatory national law provides a higher limit of liability than under Article 18, then that other limitation applies." (The "uniform system" is thereby modified to allow the application of the mandatory liability rule that governs the corresponding transport mode as far as the place where damage occurs is identified).

Pursuant to Article 30, paragraph 4, the carriage of goods under the Geneva Convention of 1956 for the Carriage of Goods by Road; or the Berne Convention of 1970 for the Carriage of Goods by Rail, shall not for parties to this convention "be considered as international multimodal transport within the meaning of Article 1 paragraph 1 of this Convention."

As it sought to apply a "uniform system of liability", the rules applied no matter where the loss or damage occurred or on what leg. The one exception being where a higher limit of liability is applicable by reason of an applicable convention. This convention has not, however, entered into force. As Ms Faghtouri has pointed out, one of the reasons for its failure may be its linkage to the unpopular Hamburg Rules, which contain a similar basis of liability. There is an inherent problem with a uniform regime: it may conflict with an existing unimodal convention.

By the early 1990s it had become apparent to the CMI that the Hamburg Rules were not proving attractive to trading nations, and the then President, Francesco Berlingieri, formed an International Working Group (IWG) to consider what the CMI could do.

Rotterdam Rules

The CMI drafted an instrument on the carriage of goods which it sent to UNCITRAL in 2001. The work of that UN body continued for seven years until the Rotterdam Rules of 2008 were finalised. They have been signed by 22 countries, including the United States, but since ratified by only three countries: Spain, Congo and Togo. A number of countries seem to be moving towards ratification, but are awaiting developments in the United States.

In April 2013, together with Chet Hooper, who had been President of the US MLA in the mid 1990s when it had been producing its own draft bill to replace COGSA, I met with two employees of the State Department. We were told at that time that the "transmittal package" was nearing completion. It apparently still awaits approval of other departments of the US Government before it can be sent to the President and, thereafter, the Senate.

The system adopted by the Rotterdam Rules has been described as a "limited network system", or "maritime plus".

It has been said that: "The Rotterdam Rules recognise door to door application if the parties choose to do so. Similarly, the network system has been recognised in the Rotterdam Rules so as to reduce the potential conflict of conventions and to ensure the application to a maximum extent possible of a uniform regime."[6] That uniform regime is, essentially, based on the Hague Rules but updated to take account of modern developments, including the Hague Visby Rules and the Hamburg Rules. It therefore preserves the large body of case law all around the world dealing with such matters as:

- The obligations of the carrier to properly and carefully receive, load, handle, stow etc - Article 13;
- To make the vessel seaworthy etc - Article 14;
- The traditional (with the exception of nautical fault) exclusions from liability - Article 17;
- The limits of liability - Article 59;
- The loss of the benefit of limitation of liability - Article 61;
- Time for suit (albeit extended to two years) - Article 62.

In relation to the specific provisions which allow for door to door application reference needs be made to the following:

- Article I paragraph 1: "Contract of Carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage".
- Article 5 paragraph 1: "Subject to Article 6, this Convention applies to contracts of carriage in which the place for receipt and the place of delivery are in different States, and the port of loading of a sea carriage and a port of discharge of the same sea carriage are in different States, if, according to the contract .of carriage, any one of the following places is located in a Contracting State:

  (a) the place of receipt

  (b) the port of loading;

  (c) the place of delivery; or

[6] Berlingieri and others 5/8/2009: "The Rotterdam Rules: an attempt to clarify certain concerns that have emerged."

(d) the port of discharge.

- Article 12 paragraph 1: "The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered."

Article 1 paragraph 6(a) "performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control".

Article 12 "maritime performing party" means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and the departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area".

In the early days of its drafting there was considerable debate as to whether these new Rules should embrace a "door-to-door" regime or stick to the port to port. This history and commentary on it is discussed in the paper given by Michael Sturley at a CMI meeting in Bordeaux[7].

The reason it is described as a "limited network" system or a "maritime plus" system arises from two particular provisions which need to be understood. They are:

"Article 26

Carriage preceding or subsequent to sea carriage

When loss or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument."

[7] "The Treatment of Performing Parties", Michael F Sturley: CMI Yearbook 2003 pages 230 to 234.

I commend to you a pamphlet published by Il Diritto Marittimo by Francesco Berlingieri entitled "An analysis of two recent commentaries on the Rotterdam Rules". On pages 26 and 27 the author comments on chapter 6 of one of those works[8] which was written by Dr Rasmussen. Berlingieri comments on two aspects raised by Rasmussen: the first being whether the parties can derogate from Article 79 and the second concerning the legal nature of the provisions of other conventions once incorporated into the Rotterdam Rules pursuant to Article 26, which is not unlike Article III Rule 8 of the Hague Rules in its intended effect but uses different terminology.

> "Article 82
>
> International conventions governing the carriage of goods by other modes of transport.
>
> Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:
>
> (a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;
>
> (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried onboard a ship;
>
> (c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or
>
> (d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea."

Francesco Berlingieri comments on Chapter 5, written by Professor De Wit in Professor Rhidian Thomas's work[9], where each of the relevant conventions (Montreal, CMR, COTIF-CIM), with the greater focus being on the CMR. Berlingieri argues there is no overlap between Article 26 and Article 82(b) which are articles containing "provisions of a different legal nature and Article 82 must be applied first". He emphasises that it is only where the goods remain on a road cargo vehicle onboard a ship that Article 82(b) is relevant.

Clearly, where applicable, the CMR or COTIF - CIM, can apply. Those provisions are similar to the FIATA multimodal transport bill of lading which provides that the conditions in the bill of lading only take effect "To the extent that they are not contrary to the mandatory provisions of international conventions or national law applicable to the contract evidenced" by the bill of lading

[8] The Rotterdam Rules 2008, edited by Alexander von Ziegler, Johann Schelin and Stefano Zunarelli, Kluwer Law International, 2010.

[9] The Carriage of Goods by Sea under the Rotterdam Rules, edited by Professor D Rhidian Thomas, London 2010.

and then makes specific reference to the Hague and Hague Visby Rules and the US COGSA (clause 7), and goes on to provide that "when the loss of or damage to the goods occurred during the particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the freight forwarders liability for such loss or damage will be determined by reference to the provisions of such convention or mandatory national law" (clause 8.6(a)).

The combined effects of Articles 26 and 82 are not simply limited to the contents of those conventions which deal with just the carrier's liability or limitation of liability but the provisions of those conventions in their entirety, so far as applicable, apply. It is suggested that the Rotterdam Rules are far more comprehensive than any of those other conventions and will therefore have considerable impact on the entirety of the carriage. As Berlingieri and others have pointed out that will include, for example, the provisions relating to the transport documents issued by the carrier, the provisions relating to delivery and the provisions relating to the right of control.

The Future

When you consider that governments from all around the world sent delegates to UNCITRAL meetings at least once, if not twice a year, in New York or Vienna for at least a week or more at a time to negotiate the Rotterdam Rules over a period of seven years and completed that work six years ago, it is troubling that governments have still not given effect to that work.

In two papers[10][11] (some of which is reproduced in this paper) I have advocated that carriers (and their liability insurers) should take charge of their own contractual arrangements. International liner shipping has changed significantly since the late 19th Century. The consolidation of carriers, the conference system as it applies to liner shipping, the similarity in the forms of bills of lading, the influence of the international Chamber of Shipping and BIMCO on documentary matters, all suggest to me that at least in relation to containerised carriage of cargo, it should be possible for carriers with the support of their P&I Clubs to incorporate the Rotterdam Rules into their bills of lading. Whilst local laws may give effect to regimes that pre-date the Rotterdam Rules, it is hard to see why parties would seek to rely on those other regimes when by private contract they have agreed to another regime, especially when there would be provisions which are beneficial to them. For shippers and consignees there are clearly benefits in having higher package limitations, the ability to sue for delay and an absence of nautical fault being a defence to a carrier. For carriers, the benefits include a clearer responsibility on shippers and certainty in so far as the applicable liability regime is concerned and it might be thought unlikely that carriers would seek to take advantage of more beneficial limitations in the country in which proceedings take place, if they have taken the step of incorporating the less beneficial regime into their contract.

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[10] "The Elusive Panacea of Uniformity: Is it Worth Pursuing?": Paper presented to the Australian Maritime and Transport Arbitration Commission, Sydney, 18 September 2013

[11] "William Tetley Maritime Law Lecture: "The CMI and the Panacea of Uniformity - An Elusive Dream?"": Tulane Maritime Law Centre, Tulane Unviersity, New Orleans, 25 March 2014

If carriers were to take such a step it would, in my view, impress governments and accelerate the process of ratification. In a visit which I made with the President of the Maritime Law Association of Australia and New Zealand to the Department of Infrastructure and Transport in Canberra in May 2013, it was said that that would influence the Australian government.

Overall, whilst the period after 1924 saw some measure of uniformity (particularly after 1936) the history of the Hague Rules since the 1970s does not supply very much evidence that the Convention system (if I can refer to it in that way) has greatly assisted commercial parties. As we have seen there are presently four sets of Rules to choose from. I recently came across a clause paramount in a bill of lading involving the carriage of goods from China to Australia. The clause read:

> *Clause Paramount*
>
> *"(a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment, shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect to which no such enactments are compulsorily applicable, the terms of the said convention shall apply.*
>
> *(b) Trades where Hague-Visby Rules apply*
>
> *In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 – the Hague-Visby Rules - apply compulsorily, the provisions of the respective legislation shall apply to this bill of lading."*

The above Clause Paramount, in my view, highlights the uncertainty that exists in the present proliferation of conventions and national laws. Before considering the text we should remind ourselves that neither China nor Australia has, for present purposes, ratified the Hague, Hague-Visby or Hamburg Rules. Both jurisdictions have given effect to a mixture of the Hague, Hague-Visby and Hamburg Rules in their legislation relating to the carriage of goods internationally.

Looking closely at the Clause Paramount referred to above therefore, the position seems to be that there is no Hague Rules contained in the 1924 Convention enacted in China. Similarly there is no corresponding legislation in Australia so it might be thought that the Hague Rules Convention itself, of 1924, applies by reason of the concluding words in clause (a).

That would seem to be the most likely Convention to apply, if any, because once again, the Hague-Visby Rules, that is the 1924 Convention as amended by the 1968 Protocol, do not apply compulsorily in China or Australia because their legislation is a combination of provisions taken from the Hague, the Hague-Visby and the Hamburg Rules and do not expressly, in any event,

give effect to either the Convention or the Convention and its protocol. Prima facie therefore, clause (b) does not apply.

A further enquiry then needs to be made as to whether the 1924 Hague Convention, to which China is not a party, can apply in the face of the Chinese Commercial Code, when Article 44 provides:

> "Any stipulation in a contract of carriage of goods by sea or a bill of lading or other similar documents evidencing such contract that derogates from the provisions of this Chapter shall be null and void. However, such nullity and voidness shall not affect the validity of other provisions of the contract or the bill of lading or other similar documents. A clause assigning the benefit of insurance of the goods in favour of the carrier or any similar clause shall be null and void."

Chapter IV of the Maritime Code includes within it the package limitation of "666.67 units of account per package or other shipping unit or 2 units of account per kilogram of the gross weight of the goods lost or damaged", which in most cases would be likely to exceed the Hague Convention limitation of 100 pounds, even if allowance is made for Article IX, the gold clause. The question that any lawyer considering this Clause Paramount therefore needs to answer is whether the Chinese Maritime Code trumps the concluding words in clause (a). I do not propose to answer that question, particularly as I am not aware of any case which has sought to decide the issue.

Quite apart from the difficulties in relation to Article 44 of the Chinese Maritime Code, it should not be overlooked that Article 10 in Schedule 1A, being the schedule of modifications, introduced into Australian law by its Carriage of Goods by Sea Act 1991, provides that in circumstances in which none of the Brussels Convention, the Brussels Convention as amended by either the Visby Protocol or the SDR Protocol or both, or the Hamburg Convention apply, it is the Australian version of the Rules which apply in respect of the carriage of goods from outside Australia to ports in Australia.

It can be seen that there are a number of complex questions thrown up by such a Clause Paramount which, in my experience, is not untypical. Similar provisions would be found in many charter parties and/or bills of lading in the international trade. One wonders how much legal expense is incurred by litigants of cargo claims in seeking to resolve issues created by such provisions given the plethora of potential regimes which might apply to a particular contract of carriage.

These difficulties have recently also been highlighted in the English High Court in the case of the "Superior Pescadores"[12]. The clause paramount in that case read as follows:

> "Paramount clause
>
> The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels 25 August 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply."

The claim arose from the carriage of machinery from Antwerp to Yemen. The claim, ignoring package limitation, was in excess of US$3.6M. The parties agreed that the claim would be subject to English law and jurisdiction. English law does of course include the *Carriage of Goods by Sea Act* 1971 and the Hague-Visby Rules when the carriage is from a port in a contracting State. Belgium is a contracting State. The issues were: whether the Hague Rules as described in the clause paramount had been enacted in Belgium and whether pursuant to Article IV Rule 5(g) of the Hague-Visby Rules the parties had contracted to agree a higher limitation figure than that provided for in that rule.

The carrier admitted liability to pay the Hague-Visby package limitation of about US$400,000. The cargo claimant argued for the Hague Rules limit which was about US$200,000 more. Whilst tempted to interpret a reference to the Hague Rules as referring also to the Hague-Visby Rules, Mr Justice Males in the High Court in England followed the decision of Tomlinson J in the *Happy Ranger*[13] that the language of this clause paramount was not apt to refer to the Hague-Visby Rules. That still left the question as to whether the claimant could rely on the Hague Rules package limitation when that would yield a greater recovery than the Hague-Visby limit. It was held that they could not, on the basis that "if they thought about the clause paramount at all, the parties must be taken to have understood that the original Hague Rules would not apply because Belgium was a Hague-Visby State. They would therefore have viewed the clause paramount purporting to incorporate the Hague Rules as surplusage which would have no application in this case and could for all practical purposes be ignored. It seems to me most unlikely that the parties intended a clause paramount which they knew would be ineffective to result in some but not all cases to the application of the Hague Rules limit to the rather different Hague-Visby limitation regime. ... The claimants' "pick and mix" approach, taking the benefit of whichever bits of the two package limitation regimes are in their favour, seems a surprising thing for rational business people to wish to agree."

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[12] *Yemgas FZCO and Others v Superior Pescadores SA Panama* [2014] EWHC 971 (Comm)

[13] [2001] 2 Lloyds Rep 530

Conclusion

Whilst there seems to be a lack of interest in the IMO Legal Committee to develop new Conventions (about which the shipping community will no doubt sigh with relief), I hope I have demonstrated that maritime lawyers are still doing much work seeking to unify maritime law.

Throughout the last couple of thousand years attempts have been made to make the law of the sea, as it applied to trade, uniform and that there have been many different ways used to seek to achieve uniformity. Since the end of the 19th Century, great efforts have been made in the area of international Conventions. Some would say there has been a surfeit of work in that area and governments have failed to rise to the challenge of giving effect to them, either when they were originally agreed or in later years when amendments or new Conventions were prepared to deal with problems that had not been considered originally. What I have also tried to show, at least in relation to private international law topics such as the carriage of goods liability regime, is that there might be another way, that is the way which was attempted at the end of the 19th Century: reliance on a standard form of contract to be entered into between carriers and merchants. The two processes are not mutually exclusive. It may be that the dilatoriness of governments requires carriers to take the lead and incorporate into their bills of lading via the clause paramount the Rotterdam Rules which will send a strong message to governments that they need to renounce the Hague, Hague-Visby and Hamburg Rules at the very least and, further, ratify the Rotterdam Rules. If BIMCO and the P&I Clubs, together with the ICS, decided that giving effect to the Rotterdam Rules is an urgent need in order to bring greater certainty to the carriage of goods and reduce legal costs substantially where disputes occur, then it is my belief that we could achieve a situation which is even better than that which was achieved during the lifetime of the Hague Rules, effectively between 1924 and 1968.

Where does this leave a Multimodal Convention? In my view its future is bleak for a number of reasons.

Firstly, when you consider that CMI started work on its project (which became the Rotterdam Rules) twenty four years ago and we only have three ratifications at present you will understand why I am not optimistic. The Multimodal Convention, of course, has even greater longevity to contend with (34 years).

Secondly, I believe the maritime community is conventioned out. The uptake of Conventions is very slow- hence the work being done by CMI with ICS through their international representatives (MLAs in the case of CMI).

Thirdly, I do not personally see a need for such a convention, given the existence of the Rotterdam Rules and what is already provided for by way of private contract and my recent suggestions that that be carried one step further by carriers themselves giving effect to the Rotterdam Rules in their contracts. (If they prefer, carriers or freight forwarders, can give effect by

the same means to the Multimodal Convention or some other regime (as the FIATA bill of lading already does).

Fourthly, sea carriage is more often than not the largest segment (in terms of time) of any international carriage of goods. It provides the greatest opportunities for goods to sustain damage and for the largest losses (in value terms) to occur. In my view it makes sense to have a liability regime which is centred on the sea risks but makes allowance for other conventions to operate where damage occurs in those other legs. It would be a shame if Europe developed a distinct regime to apply different liabilities and responsibilities to what has been described as short sea routes (by which I assume intra Europe is intended), as I understand has been proposed by the UNECE for a multimodal convention. That would add yet another layer of disuniformity to international trade by sea. The European Shippers Council also, I understand, supports such an approach.

Fifthly, as I have sought to demonstrate, multiplicity of current regimes does nothing to limit the legal cost burden on parties to such contracts. I believe that the mechanisms which were first attempted in the 1880s to achieve a balanced and responsible liability regime in relation to the carriage of goods by sea, to which I have referred would suit today's world. Governments seem reluctant to ratify international conventions and the ever changing commercial realities of international carriage which makes it necessary to amend whatever conventions have been put in place from time to time, makes it likely that an international convention will be out of date quickly.

As the CMI International Working Group on the Rotterdam Rules has pointed out, the difference between a network and a uniform system "is not as large as it appears. For example, any network system should be supplemented by a rule that governs the carrier's liability when it is impossible to determine where the damage occurred... The "uniform system" is often modified to allow the application of the mandatory liability rule that governs the corresponding transport mode, as far as the place where damage occurs is identified (see Article 19 of the UN Multimodal Convention)".

I therefore think it is time for participants in international trade to take charge of their own destinies and make use of the work which has been done in relation to the Rotterdam Rules by incorporating them into their private contracts, leaving themselves subject to whatever other conventions dealing specifically with air, road, rail or inland waterways apply, pursuant to Article 82 of those Rules.

Whilst uniformity may be "fleeting" and trade and commerce is constantly changing and requiring new rules and procedures there is no doubt that the more uniformity there is in liability regimes and documentation around the world the easier (and cheaper) it is for traders to operate. That was as true for the ancient Romans as the Hanseatic League nations, as the Maersks, Hamburg Suds, and MSCs today.

As so many others more learned than me have said, the goal of uniformity, or at least greater uniformity, is a noble one and it should be pursued. The panacea of uniformity, as we have seen, is elusive, but we should not give up our pursuit. We should not be dismayed when, in the words of Justice Haight[14], having taken two steps forward we take one step back. The CMI will continue to seek ways of achieving greater uniformity in the area of maritime law whatever hurdles we have to overcome.

Stuart Hetherington
President, Comite Maritime International
Partner, Colin Biggers & Paisley

[14] "Babel Afloat: Some reflections on Uniformity in Maritime Law": Charles S. Haight Jr. Journal of Maritime Law and Commerce Vol 28 No 2, April 1997

Ninth International Conference on Maritime Law: "The Development, Reform and Innovation of Ideas, Systems and Regimes of Maritime Law in the New Era" Shanghai 28-31 October 2018

Prospects of the Rotterdam Rules at its 10 Anniversary

Uniformity of Maritime Law

The CMI Constitution describes its object as being:

> "to contribute by all appropriate means and activities to the unification of maritime law in all its aspects".

In order to be a member of the CMI, National Maritime Law Associations are required to have uniformity also as their principal object.

In a paper I gave in 2014 at Tulane University, New Orleans, the annual Tetley lecture, I quoted from an earlier lecture given by Justice Haight of New York in which he had said:

"Those who strive to achieve a uniform maritime law, nationally and internationally, seek to have the people of the maritime community - shipowners, cargo owners, insurers, lenders, furnishers of supplies, salvors - "be of one language and of one speech", so that rights and obligations may be certain and predictable."

"**Certainty and Predictability**". There is nothing certain or predictable about the current situation as it applies to the international carriage of goods.

I have listened with some concern to some of the discussion which has taken place this afternoon in relation to reform of your Maritime Code. Reference has been made to "localisation". That concerns me. For centuries nations have been trying to achieve uniformity in maritime law. Rhodian law, the Rolls of Oleron and the Hanseatic League sought to achieve this. The CMI worked for a number of years in developing the first draft of the Rotterdam Rules and a further seven years was taken whilst that draft was developed at UNCITRAL before a consensus was reached. Conventions are the product of compromise with a view to seeking to reach the best possible result for all nations. I attended the signing ceremony in Rotterdam in 2009. At least 20 countries, I seem to recall, signed the Convention at that time and yet only four have ratified it in the succeeding nine or 10 years.

The Maritime Law Association of Australia & New Zealand has an annual Address in honour of its founder at its Conferences. The New South Wales Admiralty Judge, Justice Yeldham of the NSW Supreme Court, in a passage of his Address in 1983 during which he discussed the different liability regimes which were in existence at that time, said this:

> "Unless and until all the major maritime nations adopt either the 1968 Brussels Protocol or the Hamburg Rules or some other Rules, ship owners and shippers will have the prospect of operating and trading under perhaps three concurrent and alternative international

> conventions governing their rights and liabilities inter se. .....Another consequence of the non-adoption of the Visby Amendments or the Hamburg Rules so far as Australia is concerned, is that problems with the sea carriage of goods, and especially those concerning containers.....will in many cases continue to be problems and fertile sources of litigation to be considered by the courts."

It is staggering to think that 35 years after those prophetic words were spoken those problems have not been resolved but have in fact been magnified by the introduction of another liability regime, the Rotterdam Rules, which the CMI, and the 25 countries who signed the Rules at a ceremony in Rotterdam in 2009 must have hoped would bring to an end the confusion to which Yeldham J was referring 26 years earlier.

So now we have the Hague Rules Convention; the Hague Rules Convention as modified by Visby Protocol; the Hamburg Rules; the Rotterdam Rules, and the Hybrids, like China, Australia and others.

The *"Superior Pescadores"* case, (2016) 1 Lloyds Rep. 561 is a good example of the confusion that exists. It was a case which went to the Court of Appeal in England. It was a relatively straightforward cargo claim. The cargo comprised machinery and equipment for use in the construction of a liquid natural gas facility in Yemen, which were shipped from Antwerp. The cargo shifted in the hold while crossing the Bay of Biscay. The losses were about USD3.6 million. A P&I Club letter of undertaking was obtained. It contained an agreement that English law and jurisdiction would apply. That law applies the *Carriage of Goods by Sea Act* 1971 which renders the Hague Visby Rules applicable when carriage is from a port in a contracting State. The carriers admitted liability to the extent of the Hague Visby package limitation. The cargo claimants sought USD200,000 more in reliance on the Hague Rules' limitation.

The reason for that was that the Paramount clause in the bill of lading contained the following:

> "The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply."

The issue which the Court of Appeal in England had to grapple with was whether the Paramount clause should be interpreted as giving effect to the Hague Rules or its later amendments, the Hague Visby Rules. The Judge, at first instance, had felt constrained to hold that it was the Hague Rules that applied.

Is it not extraordinary that in 2016 parties still used a Paramount clause which makes reference to the Hague Rules 1924? Furthermore is it not strange that such a clause has a fall-back position

that, if there is no such enactment giving effect to the 1924 Brussels Convention in the country of shipment, the corresponding legislation in the country of destination is to apply and, where there is no such legislation in that country, then it is simply the Convention itself which applies. That is, a Convention which was agreed nearly one hundred years ago and at a time when no-one could have conceived the revolution that took place in the 1960s when containers came along.

The Court of Appeal in England held that the clause was intended to give effect to the Hague Visby regime which was in place in Belgium. As Longmore LJ said:

" ...I consider that in any case, in which a bill of lading is issued in 2008 incorporating the Hague Rules as enacted in the country of shipment and in which the country of shipment has (as here) enacted the Hague-Visby Rules, should be regarded as a case which is subject to the Hague Visby Rules rather than the (old) Hague Rules".

With the greatest respect to their Lordships that makes eminently good sense from a practical point of view but it is not what the Paramount clause actually said.

We can never know how much legal time and expense is incurred in handling cargo claims in determining which iteration of the Hague Rules or any variation of them, or any subsequent Convention, whether it be Hamburg or Rotterdam, might have been intended to apply by reason of various Paramount clauses which are to be found in bills of lading. But it must be substantial.

If for no other reason it seems to me absolutely essential that States denounce all previous Conventions and ratify the Rotterdam Rules as soon as possible to end this confusion. Quite frankly the shipping industry looks very foolish in its retention of such a plethora of regimes, one of which is nearly 100 years old.

Why have States been by and large so slow to ratify the Rotterdam Rules? One obvious advantage for ship owners and carriers of holding onto the Hague Regime is the availability of the nautical fault defence and lower limits of liability. I want to discuss both, briefly, before looking at the other more positive reasons as to why States would want to give effect to the Rotterdam Rules.

Nautical Fault

In the 42 years in which I have been conducting cargo litigation on behalf of both carriers and cargo insurers pursuant to rights of recovery, I have only ever once been involved in a case in which a carrier sought to rely on the nautical fault defence, and it failed.

At least in my own jurisdiction, I think I can say that there would be considerable reluctance by the Courts in this day and age to allow carriers to absolve themselves from liability where their master or crew have acted negligently at least in a fundamental way, and wherever the evidence allows them to avoid doing so by tracing back the master's or other person's fault in the

navigation or management of the vessel to the owner's failure to exercise due diligence to make the vessel seaworthy.

Package Limitation

Let us consider package limitation. The Rotterdam Rules increased the package limitations from the Hague Visby regime of 666.67 SDRs per package, or 2 SDRs per kilogram to 875 SDRs per package or 3 SDRs per kilogram (whichever is greater) in the Rotterdam regime. Carriers in most jurisdictions also have the availability of a "global limitation" under the applicable Limitation Convention, such as the 1976 Limitation and its 1996 Protocol.

Professor Michael Sturley, of the University of Texas at Austin, one of the leading maritime law academics in the world in the area of carriage of goods wrote an article entitled "Unit Limitation under the Rotterdam Rules and Prior Transport Law Conventions: The Tail that Wags the Dog", which contains commentary on the debates that took place in the drafting of the Rotterdam Rules' package limitation provisions.

Professor Sturley, in his excellent article, refers to statistics which the US delegation to the UNCITRAL negotiations compiled in order to ascertain how imports and exports into the US might be effected under an increased package limitation regime. He said as follows:

> "Based on the data that the US delegation was able to collect, it appeared that about 90% of US imports and exports would be fully covered by the limitation levels of the Hague-Visby Rules, ... The 25% increase from the Hague-Visby limits to the Hamburg limits was estimated to increase full coverage from 90% to 95% of US imports and exports carried by sea..... the unit limitation provision is irrelevant 95% of the time."

He concluded his commentary in the following terms:

> "To put the debate over the limitation amounts in perspective, the fight at the end of the Rotterdam Rules negotiation was over a minor percentage of a very small percentage of a tiny percentage of all shipments."

He also referred to the fact that "cargo-damage cases represent only a tiny percentage, less than 1% of all shipments".

From my experience and the above research I suggest that both the nautical fault defence and the package limitation limits of the Hague and Hague Visby regimes provide very limited benefits to carriers and, in respect of nautical fault, I would add is anachronistic in 2018.

Rotterdam Rules and E Commerce

I want to turn now to consider what are the positive benefits to be derived from the Rotterdam Rules over the earlier regimes, apart from the obvious one: to avoid the confusion of the multiplicity of regimes that are currently in existence and bring back much needed uniformity to

this area of the law, which had existed from the 1920s to the 1960s. I believe E Commerce is the single most important reason, after uniformity, as to why the Rotterdam Rules need to be ratified and brought into force.

I referred in my opening remarks to Unmanned ships and the technological developments which are revolutionising shipping. In the field of electronic commerce, it is "Blockchain"; that it is said will revolutionize shipping. It is difficult to see how all this change can take place when the cargo liability regime that still prevails in international carriage documentation was agreed in 1924. The only realistic answer is that States will need to ratify the Rotterdam Rules expeditiously.

What has been forgotten in the lethargy of States (except the four who have ratified them) and carriers since the Rotterdam Rules were adopted in 2008 is that they, unlike any of their predecessor regimes actually deal with electronic commerce.

The preamble to the Rotterdam Rules Convention, after referring to the Hague, Hague Visby and Hamburg Rules, noted that the Convention had been drafted:

> "Mindful of the technological and commercial developments that have taken place since the adoption of those Conventions and of the need to consolidate and modernise them."

The definitions section in the Rotterdam Rules gives a clue to the transformative nature of the Rotterdam Rules compared with its predecessors. There are definitions of the following words ""electronic communication"; "electronic transport record"; "negotiable electronic transport record"; "non-negotiable electronic transport record"; "the "issuance" of a negotiable electronic transport record; and "the "transfer" of a negotiable electronic transport record.

The Rotterdam Rules were drafted with electronic commerce in mind, unlike their predecessors.

Those involved in the transport chain, including carriers, port authorities, cargo interests, insurers and others involved in international trade should recognize the significance of the Rotterdam Rules in the context of electronic commerce, and they need to encourage their national governments to ratify the Convention as soon as possible.

The benefits to carriers of the Rotterdam Rules

The benefits in relation to uniformity and E Commerce speak for themselves. What about the liability regime itself?

The following appear to me to be provisions that benefit carriers which are not to be found in earlier liability regimes.

Chapter 7 Obligations of the shipper to the carrier (Articles 27 to 34)

> Article 27 Delivery for carriage;

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

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

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

Article 31 Information for compilation of contract particulars;

Article 32 Special rules on dangerous goods; (The recent decisions in the United States on the *"MSC Flaminia"* highlight how important these provisions are.)

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

Article 34 Liability of the shipper for other persons;

Chapter 8 Transport documents and electronic transport records: (Articles 35 to 42)

Article 36 Contract particulars;

Chapter 9 Delivery of the goods (Articles 43 to 49)

Article 43 Obligation to accept delivery;

Article 44 Obligation to acknowledge receipt;

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

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

Article 49 Retention of goods;

Chapter 10 Rights of the Controlling party. (Articles 50 to 56)

Article 55 Providing additional information, instructions or documents to carrier;

Chapter 12 Limits of liability (Articles 59 to 61)

Article 60 Limits of liability for loss caused by delay;

Chapter 16 Validity of contractual terms (Articles 79 to 81)

Article 80 Special Rules for volume contracts.

Recent Developments

Twenty instruments of ratification, acceptance, approval or accession are required under Article 94 to bring the Rotterdam Rules into force. There are four States which have so far ratified the Rotterdam Rules: Spain, Togo, Cameroon and the Congo.

Recently, the Netherlands has introduced legislation into its Parliament in preparation for the adoption of the Rotterdam Rules and to enable ratification to proceed. It is understood that Denmark has adopted a similar modus operandi-that is have all the necessary legislation in place so it can enter into force without further delay once the trigger is pulled.

A Japanese consortium (which has conducted large-scale experiments for the use of blockchain technology, I am informed, for trade documents) is lobbying for the necessary legislation to be passed in that country.

The only negative voices that I am aware of in the US are the ports. I have seen a paper by Professor Sturley which concludes that their concerns are misplaced and without merit. The US State Department has been working for some years to persuade ports that the Rotterdam Rules should be supported. If they want to benefit from E Commerce it seems to me they need to get behind the Rotterdam Rules.

Conclusion

It needs to be recalled that the Hague Rules were initially ratified by, mainly, European and British Commonwealth countries in the 1920's and it was the US's accession in 1936 which stimulated further countries in the immediate aftermath of the Second World War to ratify the Hague Rules. Maybe this time around it will be the bigger Asian tigers that will lead the charge.

I have sought to show in this paper that : the plethora of liability regimes in the area of carriage of goods by sea is unproductive and costly; the prior regimes to Rotterdam Rules provide no or very limited additional benefits to carriers which are not contained in the Rotterdam Rules; and that those Rules provide additional and new benefits to all participants in carriage of goods by sea, especially in the area of E-Commerce and paperless trade.

Ratification by China could well stimulate sufficient further support from South East Asian trading partners, including my own country, Australia, which together with a few further European accessions could bring the Rotterdam Rules into force. Shipowners and others engaged in international trade by sea who are contemplating the world of E-Commerce will, I am sure, be lobbying their governments to ratify the Rotterdam Rules so that they attain the force of law internationally.

I respectfully urge China, to ratify the Rotterdam Rules rather than introduce it piecemeal into its local law. By that means it will assist in promoting greater uniformity. It is one thing if State Courts interpret the Convention, but it is another if they are required to interpret a version of the

Convention which is introduced into State legislation. Uniformity is better achieved if the Conventions are ratified and brought into force in their totality.

Stuart Hetherington
President CMI
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October 2018

Opinion: To Support U.S. Interests, Ratify UNCLOS and Rotterdam Rules

The USS Benfold conducts a freedom of navigation operation in the South China Sea, upholding the rights of foreign vessels under UNCLOS. The U.S. upholds the principles of the treaty but has not ratified it. (USN file image)

PUBLISHED JAN 28, 2022 6:25 PM BY DAVID J. FARRELL, JR. (HTTPS://WWW.MARITIME-EXECUTIVE.COM/AUTHOR/DAVID-J-FARRELL-JR)

From photos of anchored container ships waiting to unload at U.S. ports highlighting the supply chain crisis, to China's maritime expansionism in the Pacific further threatening international trade and peace, current events point to two key international maritime treaties the Senate should ratify now: (1) the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the "Rotterdam Rules" and (2) the U.N. Convention on the Law of the Sea, best known as the "Law of the Sea Convention" or "UNCLOS."

The Rotterdam Rules

First, the Rotterdam Rules' very goal is to encourage worldwide e-commerce to replace slow paper transactions dating from the earliest days of sail. Much of the world's shipping industry is stuck in this archaic stamping, signing, sending, re-stamping, re-signing, copying, forwarding, and delivering of hard copy bills of lading and other shipping documents at each transportation link. This is due to outdated, sometimes conflicting shipping treaties. One, the Hague Rules, goes back to 1924, implemented in the U.S. by the 1936 Carriage of Goods by Sea Act. A lot has changed since then with multi-modal shipping of containers by ship, train, and truck.

Because shipping is so international, legal uniformity, commercial predictability, and worldwide harmonization with modern containerization and e-commerce is essential to reducing cargo processing time and errors which result in supply chain snags.

The Rotterdam Rules provide the needed international legal regime to support containerized e-commerce and reductions in transportation time resulting from more efficiently moving cargo on its ocean leg, as well as its prior and subsequent land legs in multi-national transportation transactions.

Because the U.S. role as cargo importer and cargo exporter occupies such a major segment of the world's sea trade, the Rotterdam Rules will need to be adopted by the U.S. before the rest of the world's maritime countries sign on -- and they will. The U.S. has to make the first move -- and we should.

The Rotterdam Rules will not only speed things up; they're also good for the U.S. Most Americans are unaware that there are almost no commercial ships operated internationally by U.S. companies: Virtually all of our outgoing and incoming cargo is carried on foreign ships. Because the Rotterdam Rules level the liability playing field for U.S. cargo interests vis-à-vis foreign ships and incentivize onboard cargo safety, ratification of the treaty will benefit exporting American cargo growers, producers, and manufacturers as well as importing American consumers.

Certainly much of the supply chain crisis was brought on by the pandemic's stay-at-home online shopping, which may or may not subside in the future. And while there will continue to be supply chain challenges in overcoming a shortage of truck drivers, chassis, and warehouse space at U.S. ports and in modernizing port infrastructure, speeding up millions upon millions of routine cargo transportation legs with e-commerce supported by uniform international law governing worldwide transactions is a no-brainer.

The Rotterdam Rules will accomplish that. Supported worldwide by ocean carriers, shippers, receivers, and insurers, the Rotterdam Rules will take advantage of e-commerce technology and smooth cargo discharge through our ports. The Senate should ratify the Rotterdam Rules now without any partisan bickering.

UNCLOS

Second, recent maritime powerplays highlight the long overdue need for the Senate to ratify UNCLOS -- also without bickering. Because the U.S. advantageously negotiated its provisions back in the 1980s-90s, UNCLOS enshrines freedom of navigation on the high seas and if ratified by us will advance our interests as a global maritime power. Top U.S. military leaders -- not just the Navy and Coast Guard -- have consistently supported ratification. UNCLOS also advances U.S. interests as a coastal nation and our rights to the natural resources in our 200-mile offshore Exclusive Economic Zone. Further, UNCLOS promotes the environmental health of the world's oceans.

Senate ratification of UNCLOS is now more urgent than ever so the U.S. can legally challenge China's ongoing maritime expansionism, including China's militaristic annexation of the Spratly Islands in the South China Sea and China's bellicosity towards Taiwan, the Philippines, Australia, and Pacific trade routes used to transport U.S. cargo. China is also trying to restrict freedom of navigation and overflight on the high seas off its shores, contrary to UNCLOS.

Since the U.S. is not a party to UNCLOS, we are handcuffed and nothing but hypocritical when criticizing China for its UNCLOS transgressions. Troubling too, unless we ratify UNCLOS, the U.S. will be left ashore when China strikes paydirt following the issuance of deep-sea mining permits scheduled for 2023 by the UNCLOS-created International Seabed Authority.

Even with U.S. domestic political divisiveness, China's maritime militarism and maneuvering is something Republicans and Democrats should agree to constrain by bilaterally mustering the two-thirds Senate vote needed under the U.S. Constitution to ratify this treaty.

China also needs to be closely watched in the Arctic -- another region where the U.S. is hamstrung without the force of UNCLOS behind us. China claims to be a "Near-Arctic State" and is conducting "scientific research" in the Arctic. To maintain its "Polar Silk Road" China is building its third Arctic icebreaker -- in contrast to the U.S. which now has only one old heavy icebreaker that splits its time between the Arctic and the Antarctic.

Russia of course is also a concern. Its aggressive claims in the Black Sea and to the Arctic continental shelf and international straits are contrary to UNCLOS, but again our protests are hollow since the U.S. is not a party to the treaty. As we all know, Arctic sea ice is melting quickly and just as quickly is opening up the Arctic to commercial shipping. Faster than using the Suez Canal, it is now viable in summer to sail from the Pacific through the Bering Strait west of Alaska and along the Northern Sea Route over the top of Russia to Europe.

In addition, cruise ships, commercial fishing, energy development, and mineral exploration are new and growing Arctic industries. These pose environmental risks including devastating cold water oil spills and other maritime casualties far, far, away from any nation's Coast Guard and first responders. Circumpolar Inuit people and others face upheaval.

But without ratifying UNCLOS, the U.S. has limited sway over Arctic developments. Critically, unless we ratify UNCLOS, a U.S. representative cannot sit on the Commission on the Limits of the Continental Shelf to best protect the contours of our claim to a U.S. Exclusive Economic Zone north of Alaska.

The Arctic Ocean's resources are opening up, for good or bad, and so are geo-political claims to them -- but the U.S. is losing out on both.

With 161 other countries plus the European Union having already adopted UNCLOS, our failure to ratify the treaty gives credence to worldwide skepticism of U.S. leadership and declining respect for the U.S. in promoting the international rule of law. UNCLOS is recognized by the rest of the world as the international Law of the Sea -- and even the U.S. acknowledges that. International tribunals have rendered scores of Law of the Sea legal decisions. But because we are not an UNCLOS player, we have no influence on this emerging international jurisprudence and everything the U.S. argues on the world stage relating to maritime issues is taken with a grain of sea salt.

The U.S. should ratify UNCLOS now to derive our negotiated benefits from it.

There is no downside and only positives for the U.S. As a practical matter, we already closely adhere to UNCLOS standards, so the U.S. can ratify without any disruption to our military or commercial operations. Gaining seats at various UNCLOS tables, we will be able to influence evolving maritime developments and laws. And with our expanded oceanic access, U.S. maritime industries and workers will have more work.

It should also be recognized that any anti-U.N. sentiment opposed to UNCLOS not only lacks merit but would also have the U.S. miss the boat on an opportunity to best promote our maritime interests and sovereignty -- including the assertion of U.S. rights in the Arctic and elsewhere.

Ratify Both Treaties Now

The Maritime Law Association of the United States, joined fully by the American Bar Association, emphatically urges the Biden Administration and the Senate to take immediate action to ratify both of these international maritime treaties which should have bipartisan support. They will allow the U.S. to best address current and future global maritime issues.

In sum, the U.S. as a maritime power should endorse the universally accepted international Law of the Sea by ratifying UNCLOS so we can derive its benefits, and should also lead the world in adopting the Rotterdam Rules to facilitate electronic, interconnected, global ocean commerce.

David J. Farrell, Jr. is President of The Maritime Law Association of the United States, founded in 1899. Its membership consists of 2,200 maritime lawyers and industry leaders. The association does not lobby because its members professionally represent a wide variety of interests, often conflicting. But on especially worthy public policies that would benefit from a legal solution with no downside, it adopts consensus resolutions, as it has done urging U.S. ratification of UNCLOS and the Rotterdam Rules.

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