THE ROTTERDAM RULES CONVENTION

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008

Foreword

Ann FENECH
President of the CMI

At the risk of sounding rather simplistic, international trade would simply not exist if it were not for ships which have been carrying cargoes from one country to another for centuries. On a daily basis we are reminded that ships are responsible for the carriage of 90% of world trade and that humanity is totally dependent for its very existence on this phenomenon. Wars, developments in types of ships and ship building technology and fuels, the types of cargoes carried, the advancement of IT, the occurrence of pandemics, serious challenges affecting world order have all occurred and in respect of some of these the rapidity with which scenarios are changing and developing on a daily basis is quite extraordinary.

And yet, notwithstanding these significant changes over the last 100 years, it would probably be fair to say that the carriage of goods by sea is still by and large regulated by a remarkable set of rules, the Hague Rules or their successors the Hague Visby Rules however the bottom line is that these have their roots in a regime which is 100 years old. The world was a totally different space then to what it is today.

The Rotterdam Rules of 2008 were drafted and designed specifically with the development of international trade and its exigencies in mind. There was a huge degree of enthusiasm at the time however it is with great surprise that we now look back at the past 16 years since their adoption by the General Assembly of the United Nations only to see that they have still not been taken up even by the very governments who had supported their drafting and who had participated in the process.

Whilst the final product of The Rotterdam Rules was prepared by UNCITRAL, the initial draft was the work of the CMI, fulfilling its mission totally encapsulated by its very raison d'etre "The Unification of International Maritime Law."

However very recent history has taught us and is teaching us that in today's day and age, the role of the CMI has to go beyond the initial drafting and its emersion in the process before the international institution which would have decided to take on the project up to adoption by one of the UN Agencies. Recent history, and I speak about the Convention on the International Effects of Judicial Sales of Ships which was adopted by the General Assembly of the United Nations in 2022 has shown us, that the CMI needs to remain totally engrossed and active in the project post adoption by pushing all the necessary buttons to ensure that states sign up to our conventions and treaties and ratify them.

It is in this spirit and with this in mind that the CMI decided to create a Standing Committee on the Ratification of the Rotterdam Rules under the chairmanship of

Past President of the CMI Stuart Hetherington, to work on reigniting the flame for the Rotterdam Rules and to pursue their coming into force.

International Trade in the 21st century cannot continue to be regulated by rules originally drafted 100 years ago irrespective of the remarkable extent to which they served their purpose. International trade must move on and this is CMI's contribution to that process.

This book gathers all the information needed by the civil servants and administrators of states tasked with recommending to their governments to sign and ratify the Rotterdam Rules and the CMI is grateful to Stuart Hetherington, the contributors and Peter Laurijssen the Editor for putting this important compendium together. It will serve a very useful purpose indeed.

Foreword

José Angelo ESTRELLA FARIA

Principal Legal Officer and Head, Legislative Branch
International Trade Law Division
United Nations Office of Legal Affairs
(UNCITRAL Secretariat)

International conventions are the result of extensive and, at times, difficult international negotiations. Seeking consensus inevitably leads to compromise solutions and a delicate balance between different viewpoints, legal traditions, and interest groups. Nevertheless, the very nature of maritime transport makes international harmonization indispensable.

International conventions also reflect the time in which they are negotiated. When the Hague Rules were drafted, the agreement of less than thirty countries was enough to create rules that would eventually apply to bills of lading for the whole world. Little more than half a century later, seventy-eight countries participated in the conference that adopted the Hamburg Rules. Together with the cargo-reservation scheme of the UNCTAD Code of Conduct, the Hamburg Rules, reflect the desire of developing countries to achieve a substantial reform of the then-existing legal framework.

Today's world is very different from the world at the time the Hague Rules and even the Hamburg Rules were negotiated. Ownership of the international merchant fleet has changed dramatically in the few last decades, and maritime conferences no longer enjoy antitrust exemptions. These differences were reflected in UNCITRAL's negotiations on the Rotterdam Rules. Some of the old opponents of the Hamburg Rules came to accept some of its basic principles, while the traditional champions of the Hamburg Rules understood the value many countries attached to the stability that would result from preserving, to the extent possible, time-honoured concepts, principles, and the body of jurisprudence that developed on the basis of the Hague Rules.

The atmosphere during the negotiations of the Rotterdam Rules was one of cooperation rather than political confrontation. Carriers' and shippers' interests alike were conscious of the need to develop rules that meet the needs of today's shipping industry and are fit for the years to come. In that spirit, the Rotterdam Rules modernize and include uniform rules on several issues not addressed in previous international instruments (e.g., evidentiary value of annotations in transport documents, right of control, delivery, shipper's obligations). Furthermore, by acknowledging multimodality in modern logistic chains and offering rules to support the use of computer-based, dematerialized transport documents, the Rotterdam Rules open the way for bringing the law in line commercial reality.

At the beginning of the twentieth century, the CMI took the lead in the movement to modernize the law for ocean carriage. At the dawn of the twenty-first century, CMI in partnership with UNCITRAL, worked hard to develop new rules for what is now a new trade in a new world. We are grateful to the CMI for preparing this publication and for the interest in ensuring that the hard work and time spent in the preparation of the Rotterdam Rules will bear fruit.

TABLE OF CONTENTS

Miscellaneous

Introduction

Stuart HETHERINGTON (*)

This booklet has been prepared by the CMI as a record of the presentations made at the Gothenburg Colloquium in May 2024 and other materials which it is considered could benefit Maritime Law Associations and assist them in identifying the merits of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008) (The Rotterdam Rules) compared with the existing regimes based on the United States Harter Act (1893); the Hague Rules (1924); the Hague Visby Rules (1968), and its Protocols; the Hamburg Rules (1978) and the myriad of hybrid versions adopted by some States. Maritime Law Associations may wish to use them when making presentations to legislators and stakeholders in their jurisdictions and /or supplying copies to them to assist them in understanding why ratification is so necessary and to assist in that process.

The question has been asked "Why now?"

The simple answers are: firstly, that the centenary of the Hague Rules takes place in August 2024 and it is timely to review the applicability of Hague Rules based regimes in today's maritime environment and, secondly, governments, in their failure to ratify the Convention, have not lived up to the expectations held for them in light of the support that was expressed at the time when they were finalised and at the signing ceremony the following year, 2009. As the history shows there had been many unsuccessful attempts to reform the Hague Rules since the late 1960s. The early attempts can best be described as patchwork. The later unsuccessful attempt by the Hamburg Rules were more akin to "root and branch" reform. It was clearly recognised by the turn of the century that the Hague Rules were out of date and not fit for purpose in the 21st century. Lack of action by governments has allowed the enthusiasm which existed at that time and for some years thereafter to dissipate. Ratification in sufficient numbers has not happened by itself so it is necessary to revive that early enthusiasm so that action can be taken now.

In addition to the Francesco Berlingieri Memorial Address at the commencement of the CMI Gothenburg Colloquium in May 2024 there were two sessions on the opening day relating to the law relating to Carriage of Goods by Sea. Professor Sturley in his Address honouring Francesco Berlingieri (who had devoted so much of his life to seeking uniformity in maritime law, but especially relating to the carriage of goods by sea), explained the long history of reform in this area of the law from the laissez faire situation that existed before the Harter Act 1893 to the present time and set out in his concluding paragraphs why reform and in particular ratification of the Rotterdam Rules is so necessary.

(*) Former President of the CMI and Chairman of the Standing Committee on the Ratification of the Rotterdam Rules.

Alexander von Ziegler looked at the drivers for reform (the several levels of dynamics that have influenced the drive for unification) in the late 19th century, the Hague Rules and subsequent Protocols and Convention. He then discussed the need for a "new start" which was developed as a result of considerable debate and study in the late 1990s and resulted in the Rotterdam Rules. These were far broader, as he explained, than mere questions of liability. There were new expectations and the need for harmonisation – both of which are still present. Factors he identified included the complex supply chains and changes in the way shipping services are provided, the door to door approach, electronic trade and the contractual approach driven by electronic trades, the right of control, the transfer of rights, and issues at delivery which are all dealt with in the Rotterdam Rules and have no equivalence in other regimes.

Miriam Goldby in her paper explained how the UNCITRAL Model Law on Electronic Transferable Records 2017 ("MLETR") and the Rotterdam Rules can co-exist in the same legal environments, the two instruments being wholly distinct in scope and purpose. As she explains the focus of MLETR is to enable the use of all transferable documents in electronic form in order to have equivalent effect to paper counterparts and it does not articulate what those effects are. On the other hand the focus of the Rotterdam Rules is to regulate contracts for the carriage of goods wholly or partly by sea, whether by electronic or other contracts and articulates the effects of their use on contractual rights. The Rotterdam Rules set out to create a parallel regime for electronic records based on exclusive control explicitly setting out the consequences of control. She concludes that the MLETR can be viewed as providing a welcome and useful supplement to the agreement based regime in the Rotterdam Rules.

David Farrell has explained in his paper the reasons that American ratification has been hampered. He has stressed that America is no longer a major owner of trading ships compared with the inter war years of the first part of the twentieth century. He identified the economic power exercised by Port Authorities in the US, some of whom (misguidedly in the view of the MLA US) believe they will be worse off under the Rotterdam Rules, despite it being pointed out to them that recognition of the Himalaya clause in the Rotterdam Rules, their ability to negotiate indemnity clauses from carriers and their own insurance arrangements provide them with greater protections than they have under COGSA, the American version of the Hague Rules. He has urged other countries to take the lead in ratifying the Rotterdam Rules and expressed the hope that the United States will follow that lead.

Tomotaka Fujita has identified the many provisions in his paper which are contained within the Rotterdam Rules which expressly or inferentially make shipping a safer activity for both persons, cargo and the environment than earlier liability Conventions.

Andrew Robinson identifies the steps that are being taken in Africa (where some states have already ratified the Rotterdam Rules), to bring more countries into the fold. He pointed out that in some trades in Africa the Rotterdam Rules are already incorporated by private contract into their conditions of carriage.

Manuel Alba identified in his paper many of the provisions which enhance the Rotterdam Rules over current regimes, including Articles 26 and 82 which clarify how the "maritime plus" regime works when other carriage legs are involved in a multimodal shipment and a separate regime applies to a particular non maritime leg. He also highlighted the benefits to uniformity in the Opt in provisions relating to Jurisdiction and Arbitration, as well as provisions relating to delivery, notice of loss or damage and limits. He urged other European States to follow Spain's lead.

Erik Rosaek explained the reasons why the Scandinavian countries have delayed ratification although they have passed legislation preparatory to doing so (as has the Netherlands). They await action by the US or other European countries before ratifying. He explained that it was in the interests of regaining uniformity, having a more equitable risk distribution, environmental considerations and mandatory protections that has caused those countries to move along the path to ratification.

The booklet comprises those presentations made to the CMI Colloquium held in Gothenburg in May 2024. That event recognised the benefits that the Hague Rules provided in unifying maritime law after a protracted period of discussion and debate from the late 19th century and early 20th century until their acceptance in 1924. It was also apparent from all the presentations that the Rotterdam Rules offer hope that the uniformity that was achieved can be regained in a much more comprehensive regime (not just a liability regime) as the speakers in these papers have attested.

The Hague Rules which was so successful, once ratifications had started to be made to them, started to lose the uniformity which was achieved when necessary reforms were made to those Rules but not implemented by all states who were parties to the Hague Rules and then further lost such uniformity when attempts were made to achieve significant reforms also failed to be accepted by the larger trading nations.

These presentations have sought to remind those who were not involved in the development of the Rotterdam Rules of the history of Government intervention in regulation of this area of the law, the reasons why it was thought necessary to undertake the drafting of a new regime in the 1990s, and why it is now necessary to reignite the enthusiasm for the Rotterdam Rules which was generated at the time of their completion in 2008.

Sadly, governments, with the exception of five countries, have not seen fit to ratify them as yet. This is a poor reflection on those governments who participated in their negotiation over many years and especially those that have signed them but are yet to ratify them. It also casts a poor reflection on the industries involved in the carriage of goods. As the papers highlight, the Hague Rules, whilst a pioneering piece of work in 1924, are woefully outdated in the 21st century. The best aspects of the Hague Rules have been incorporated, in essence, (although sometimes in modified form) in the Rotterdam Rules, which are not radical but were drafted with reform in mind and, by reason of compromises agreed during the UNCITRAL

Working Group process were accepted in their final form by those who had been involved in drafting them over many years.

From the multitude of papers written in recent years on the Rotterdam Rules a selection has been made and added to this booklet of those which it is thought will be of benefit to those who have the task of persuading governments to adopt the Rotterdam Rules and those who organise their ratification. There are also many papers on the CMI website relating to this topic.

The thanks of the CMI go to all who have committed their time and effort in preparing their presentations for the Gothenburg Colloquium and who have written the papers that are also included within this booklet. All are thanked for not only their intellectual rigour but also their enthusiasm and hard work to encourage reform over many years.. The CMI, through its Standing Committee on the Ratification of the Rotterdam Rules is ready to assist Maritime Law Associations in the task which they have before them to persuade their governments that ratification is necessary if the industry is to modernise and realise the benefits available to them from the Rotterdam Rules, which can be passed on to their customers.

United Nations Convention on contracts for the international carriage of goods wholly or partly by sea

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,

Recognizing the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

Mindful of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

Noting that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Have agreed as follows:

Chapter 1: General provisions

Article 1: Definitions

For the purposes of this Convention:

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.

2. "Volume contract" means 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.

3. "Liner transportation" means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

4. "Non-liner transportation" means any transportation that is not liner transportation.

5. "Carrier" means a person that enters into a contract of carriage with a shipper.

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, 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.

(b) "Performing party" does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. "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 their 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.

8. "Shipper" means a person that enters into a contract of carriage with a carrier.

9. "Documentary shipper" means a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record.

10. "Holder" means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. "Consignee" means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.

14. “Transport document” means a document issued under a contract of carriage by the carrier that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. “Negotiable electronic transport record” means an electronic transport record:

(a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.

21. The "issuance" of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The "transfer" of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. "Contract particulars" means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. "Goods" means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. "Ship" means any vessel used to carry goods by sea.

26. "Container" means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. "Vehicle" means a road or railroad cargo vehicle.

28. "Freight" means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

29. "Domicile" means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.

30. "Competent court" means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

Article 2: Interpretation of this Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 3: Form requirements

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used

for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

Article 4: Applicability of defences and limits of liability

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

(a) The carrier or a maritime performing party;

(b) The master, crew or any other person that performs services on board the ship; or

(c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

Chapter 2: Scope of application

Article 5: General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the 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

(d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Article 6: Specific exclusions

1. This Convention does not apply to the following contracts in liner transportation:

(a) Charter parties; and

(b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

(a) There is no charter party 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.

Article 7: Application to certain parties

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

Chapter 3: Electronic transport records

Article 8: Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9: Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

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

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

Chapter 4: Obligations of the carrier

Article 11: Carriage and delivery of the goods

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.

Article 12: Period of responsibility of the carrier

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.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but 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 13: Specific obligations

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

Article 14: Specific obligations applicable to the voyage by sea

The carrier is bound before, at the beginning of, 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 holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

Article 15: Goods that may become a danger

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

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

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety

or for the purpose of preserving from peril human life or other property involved in the common adventure.

Chapter 5: Liability of the carrier for loss, damage or delay

Article 17: Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves 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.

2. 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.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

(a) Act of God;

(b) Perils, dangers, and accidents of the sea or other navigable waters;

(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;

(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;

(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

Article 18: Liability of the carrier for other persons

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(a) Any performing party;

(b) The master or crew of the ship;

(c) Employees of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

Article 19: Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(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 the maritime performing party 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.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

Article 20: Joint and several liability

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

Article 21: Delay

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

Article 22: Calculation of compensation

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

Article 23: Notice in case of loss, damage or delay

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying

the goods and shall provide access to records and documents relevant to the carriage of the goods.

Chapter 6: Additional provisions relating to particular stages of carriage

Article 24: Deviation

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

Article 25: Deck cargo on ships

1. Goods may be carried on the deck of a ship only if:
   (a) 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 on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

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.

Chapter 7: Obligations of the shipper to the carrier

Article 27: 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, 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 13, paragraph 2.

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

Article 28: 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.

Article 29: 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: 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 31, paragraph 2, and 32, 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 34.

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 34.

Article 31: 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 36, 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 32: 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: 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 55, 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.

Article 34: 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.

Chapter 8: Transport documents and electronic transport records

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

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

Article 36: Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

(a) A description of the goods as appropriate for the transport;

(b) The leading marks necessary for identification of the goods;

(c) The number of packages or pieces, or the quantity of goods; and

(d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

(a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;

(b) The name and address of the carrier;

(c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and

(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

(a) The name and address of the consignee, if named by the shipper;

(b) The name of a ship, if specified in the contract of carriage;

(c) The place of receipt and, if known to the carrier, the place of delivery; and

(d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase "apparent order and condition of the goods" in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and

(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

Article 37: Identity of the carrier

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity

of the carrier shall have no effect to the extent that it is inconsistent with that identification.

2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

Article 38: Signature

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

Article 39: Deficiencies in the contract particulars

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

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

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or

(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

Article 41: Evidentiary effect of the contract particulars

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or

(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non negotiable electronic transport record:

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

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

(iii) The contract particulars referred to in article 36, paragraph 2.

Article 42: "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.

Chapter 9: Delivery of the goods

Article 43: Obligation to accept delivery

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having

regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

Article 44: Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

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

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

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

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

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

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a) (i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier

may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

Article 48: Goods remaining undelivered

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

Article 49: Retention of goods

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

Chapter 10: Rights of the controlling party

Article 50: Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

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

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

Article 52: Carrier's execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

Article 53: Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

Article 54: Variations to the contract of carriage

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

Article 55: 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 such information, instructions or documents.

Article 56: Variation by agreement

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

Chapter 11: Transfer of rights

Article 57: When a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

(a) Duly endorsed either to such other person or in blank, if an order document; or

(b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

Article 58: Liability of holder

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to

the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 57.

Chapter 12: Limits of liability

Article 59: Limits of liability

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

Article 60: Limits of liability for loss caused by delay

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant

to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

Article 61: Loss of the benefit of limitation of liability

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

Chapter 13: Time for suit

Article 62: Period of time for suit

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

Article 63: Extension of time for suit

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

Article 64: Action for indemnity

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

Article 65: Actions against the person identified as the carrier

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

Chapter 14: Jurisdiction

Article 66: Actions against the carrier

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

Article 67: Choice of court agreements

1. The jurisdiction of a court chosen in accordance with article 66, subparagraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of

court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, subparagraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

Article 68: Actions against the maritime performing party

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

(a) The domicile of the maritime performing party; or

(b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

Article 69: No additional bases of jurisdiction

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to article 66 or 68.

Article 70: Arrest and provisional or protective measures

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

(a) The requirements of this chapter are fulfilled; or

(b) An international convention that applies in that State so provides.

Article 71: Consolidation and removal of actions

1. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

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

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

Article 73: Recognition and enforcement

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.

2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.

3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

Article 74: Application of chapter 14

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

Chapter 15: Arbitration

Article 75: Arbitration agreements

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

(a) Any place designated for that purpose in the arbitration agreement; or

(b) Any other place situated in a State where any of the following places is located:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:

(a) Is individually negotiated; or

(b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

Article 76: Arbitration agreement in non-liner transportation

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(a) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

Article 77: Agreement to arbitrate after a dispute has arisen

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

Article 78: Application of chapter 15

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

Chapter 16: Validity of contractual terms

Article 79: General provisions

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

Article 80: Special rules for volume contracts

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

Article 81: Special rules for live animals and certain other goods

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

Chapter 17: Matters not governed by this Convention

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 on board 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.

Article 83: Global limitation of liability

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

Article 84: General average

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

Article 85: Passengers and luggage

This Convention does not apply to a contract of carriage for passengers and their luggage.

Article 86: Damage caused by nuclear incident

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

Chapter 18: Final clauses

Article 87: Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

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

1. This Convention is open for signature by all States at Rotterdam, the Netherlands, on 23 September 2009, and thereafter at the Headquarters of the United Nations in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 89: Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 23 February 1968, or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979, shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

Article 90: Reservations

No reservation is permitted to this Convention.

Article 91: Procedure and effect of declarations

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, para-

graph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 92: Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 93: Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does

not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a regional economic integration organization when the context so requires.

Article 94: Entry into force

1. This Convention enters 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.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

Article 95: Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 96: Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December two thousand and eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

The 2024 Berlingieri Lecture: The Hague Rules at 100(*)

Michael F. STURLEY(**)

Introduction

Good morning, everyone. It is a real pleasure for me to be back in Gothenburg. I am particularly pleased that this week – unlike my first visit to Gothenburg, in May 1995 – we have seen no snow. All of us attending this conference are very indebted to our local hosts not only for the wonderful academic and social programs but also for arranging such excellent weather.

I am deeply honored to be delivering this year's Berlingieri Lecture. I worked closely with Francesco Berlingieri for decades, culminating in our work together at UNCITRAL in negotiating the Rotterdam Rules. But my first contact with Francesco was in the late 1980s, when I began compiling the *travaux préparatoires* of the Hague Rules. In those days, we corresponded by letter. I vividly recall one exchange we had. In my research, I discovered that a "Francesco Berlingieri" was prominently involved in the negotiation of the Hague Rules, so in one letter I asked whether the Francesco Berlingieri of the 1920s had been his father. Two weeks later, I received the reply – his grandfather! The entire CMI is indebted to the remarkable Berlingieri family for all of the contributions that it has made – and continues to make – to our work. But I am personally indebted to *the* Francesco Berlingieri for whom this lecture is named for having been one of my mentors in this field.

In light of that background, it is appropriate that I have been invited to speak on the history of the Hague Rules. As we all know by now, this year marks their centenary. On August 25, 1924, the international community concluded the world's first multilateral treaty to provide uniform rules to govern central aspects of the carriage of goods by sea. And the Hague Rules were remarkably successful. Indeed, they continue – with some relatively modest amendments – to govern most of the world's maritime trade today. Celebration of their centenary is accordingly appropriate.

The Maritime Law Background

This morning's story is not limited to the events of the early 1920s. The Hague Rules were designed to allocate the risk of loss for damage to ocean cargo carried under bills of lading. To understand them, therefore, it is helpful to begin with the pre-existing risk allocation. Under early nineteenth century maritime-law prin-

(*) The 2024 Berlingieri Lecture was delivered on May 23, 2024, at the CMI Colloquium in Gothenburg, Sweden.

(**) Fannie Coplin Regents Chair in Law, University of Texas at Austin; B.A., J.D., Yale; M.A. (Jurisprudence) Oxford.

ciples, which both common-law and civil-law countries recognized and accepted, a carrier was absolutely liable for cargo damage unless it could prove (1st) that its negligence had not contributed to the loss and (2nd) that one of four "excepted causes" (act of God, act of public enemies, shipper's fault, or inherent vice of the goods) was responsible for the loss. In other words, if one of the four exceptions applied, the carrier was liable only if it had been at fault, but in all other cases it was liable without fault. That extensive no-fault liability, in an era when such liability was rare, led many to describe the carrier as an "insurer" of the goods. Although that label is technically incorrect, it well conveys the concept that a carrier assumed very broad liability for cargo damage under general maritime law.

The major maritime nations accepted that risk allocation as a matter of principle, but by the late nineteenth century there were important differences in application. British courts, for example, viewed that risk allocation essentially as a default rule applying only in the absence of an agreement to the contrary. In deference to "freedom of contract," the shipper and carrier could agree on a different risk allocation – including one in which the carrier assumed virtually no liability, even for its own negligence. Most European and Commonwealth countries eventually followed the British example.

In the United States, on the other hand, freedom of contract was more restricted. Federal courts permitted carriers to limit their liability in many circumstances, but carriers could not exonerate themselves from the consequences of their own negligence or their failure to provide a seaworthy ship. The Japanese Commercial Code was similar.

That conflict among major maritime nations, which became more serious in the early twentieth century, meant that the general maritime law no longer provided a uniform risk allocation. The desire to restore international uniformity to the field ultimately produced the Hague Rules. But it was an extended process.

Early Attempts to Achieve Uniformity

The Hague Rules were not the international community's first attempt to address the problem. In 1882, the International Law Association – fresh off its success with the York-Antwerp Rules – promulgated a model bill of lading which became known as the "Conference form." It never achieved general acceptance, but it was a first step. Several of the form's innovations reappeared in the Hague Rules – including the central compromise distinguishing "ordinary" matters such as stowage and care of the cargo from "accidents of navigation."

In 1885, the International Law Association proposed a set of rules (the first "Hamburg Rules") that parties could voluntarily incorporate by reference into their bills of lading, much like the York-Antwerp Rules. These Hamburg Rules proved unworkable, and in 1887 they were "rescinded." The format – uniform rules rather than a model bill of lading – was the one innovation that endured.

After 1887, the International Law Association turned to other subjects, but a new player emerged in 1897 – the CMI. The CMI did not do anything with bills of lad-

ing yet, but it will rejoin our story soon. It instead began work on collisions at sea. When it recognized that private agreement would be ineffective, it persuaded the Belgian government to sponsor the first Diplomatic Conference on Maritime Law, held in Brussels in 1905. That first Diplomatic Conference addressed different subjects, but future Diplomatic Conferences will be part of our story soon.

Domestic Legislation

With the apparent break-down of the international efforts to achieve an agreement, cargo interests became increasingly frustrated with what they viewed as overreaching on the part of the carriers. The United States took the lead in the domestic regulation of exoneration clauses in 1893. The original proposal would have given cargo owners broad protection, but in its final form the U.S. Harter Act adopted a more balanced compromise. The carrier's obligation to furnish a seaworthy vessel was reduced to an obligation "to exercise due diligence." If the carrier exercised due diligence to make the vessel seaworthy, it would not be liable "for damage or loss resulting from faults or errors in navigation or in the management" of the vessel.

Although the United States stood alone with the Harter Act for a decade, eventually other countries where cargo interests were strong followed the U.S. lead. New Zealand's Shipping and Seamen Act, 1903, included provisions that were substantially identical to the central provisions of the Harter Act. In 1904, Australia passed its first Sea-Carriage of Goods Act, which was more generous to cargo interests. The carrier's obligation to furnish a seaworthy ship, for example, was absolute, not simply a due-diligence obligation. And the Australian Act prohibited choice-of-law clauses designed to avoid the application of Australian law for shipments from Australia and choice-of-forum clauses purporting to oust or lessen the jurisdiction of the Australian courts.

The Australian legislation was then the model for the Canadian Water Carriage of Goods Act 1910, which first introduced an explicit package limitation. The Canadian Act ultimately served as the direct model for the Hague Rules.

All of this domestic legislation made the conflict among national laws more serious in the short run, but in the long run those actions subjecting carriers to conflicting regulation increased their incentive to support an international resolution of the problem. The domestic legislation of the late nineteenth and early twentieth centuries, coupled with the threat of more extensive domestic regulation in the 1920s, therefore turned out to be a major factor in the eventual procurement of an international agreement.

The Drafting of the Hague Rules

With this background in mind, we can now discuss the events of the 1920s. The immediate impetus for the Hague Rules came from the British Empire. While shipowners were politically powerful in Great Britain itself, the situation was reversed in the overseas Dominions. As the First World War was coming to an end, they pres-

sured the Imperial government to coordinate Harter-style legislation for the entire British Empire. In 1917, the Dominions Royal Commission recommended such legislation. In 1918, the Imperial War Conference concluded that the issue merited investigation. In February 1921, the Imperial Shipping Committee concluded "[t]hat there should be uniform legislation throughout the Empire on the lines of the existing Acts dealing with shipowners' liability." And in the summer of 1921, an Imperial Conference committed all of the governments involved (including the British government) to introducing such legislation in their own countries.

British opposition had long been thought to be the principal impediment to international uniform legislation on bills of lading. Now that the British government was committed to domestic legislation on the topic, the prospect of international agreement was much more appealing to British interests – including the powerful shipowning interests. If they were to be subject to regulation in their home ports, they preferred uniform regulation wherever they did business and, just as significantly, comparable regulation for their foreign competitors. The British therefore took the lead in resurrecting the work of the International Law Association. In May 1921, the ILA's Maritime Law Committee met in London. Despite indignant protests from British shipowners that "freedom of contract" was the appropriate regime, the Committee agreed to formulate uniform model rules based on the Canadian Act to govern ocean bills of lading.

Although the sub-committee appointed to draft the rules contained representatives of carriers, shippers, bankers, and underwriters from Britain and the Continent, the two dominant members were Sir Norman Hill, representing carriers, and James McConechy, representing cargo interests. A month later, the draft was complete.

The CMI was not yet involved in the process. The Antwerp conference in July 1921 discussed a proposal for a broad "Code of Affreightment" covering a wide range of subjects (including rights and obligations under charterparties). In the end, it took no action on bills of lading, but passed a resolution "instruct[ing] the Permanent Bureau to follow the labours of the approaching Hague Conference [of the International Law Association] and to devise the necessary measures for a thorough investigation of the question with a view to subsequent international action on diplomatic lines."

The International Law Association held its next conference at The Hague in September 1921, and the Maritime Law Committee met in separate session to discuss the Hill-McConechy draft. After four days of debate between cargo interests (including bankers and underwriters) and carrier interests, the members unanimously agreed on the text of "the Hague Rules," and their agreement was ratified by the full Association in plenary session at the end of the conference. Like the York-Antwerp Rules and the Hamburg Rules of 1885, the new rules were designed for voluntary incorporation by reference into bills of lading. Thus the shipowners temporarily preserved their "freedom of contract" while conceding their willingness to assume greater liability for cargo if the shippers demanded it.

Shipowners were cautiously pleased with the results of the Hague Conference. Although they continued to argue that "freedom of contract" was best for all concerned, they were willing to accept the Hague Rules of 1921 as preferable to different legislation in every country in which they did business. The World Shipping Conference in late 1921 recommended the rules "for voluntary international application" but – recognizing the strength of the cargo interests – conceded that they were suitable "for adoption by international convention," "if and so far as may be necessary." The shipowners clung to their hope that their voluntary adoption of the Hague Rules would stave off legislation, but if what they described as "state interference" was to be inevitable, they wanted it to be on internationally uniform terms.

Reaction among cargo interests was mixed. Their principal objection was the voluntary nature of the rules. British shippers, in particular, demanded the legislation that had been promised at the Imperial Conference. When the British Board of Trade announced that the government was prepared to introduce a bill in Parliament similar to the Canadian Act, the shipowners made the best of what they viewed as a bad situation. The Board of Trade arranged a meeting between Sir Norman Hill (the leading spokesman for the carriers both on the drafting sub-committee and at The Hague) and Andrew Marvel Jackson (the legal adviser of the British Federation of Traders' Associations). They discussed compromise legislation, based on the Hague Rules of 1921, that could replace the bill that the government had drafted.

Now the CMI starts to play the central role in the story. At the London conference in October 1922, the Hill-Jackson compromise draft was the basis for further discussion. The delegates reviewed the entire code section by section, adopting most of the Hill-Jackson changes and adding some new amendments that others favored. To meet the demand for an international convention, the CMI also put the rules into a "legislative form" that a diplomatic conference could adopt. By the end of the London Conference, a draft was ready for diplomatic consideration.

The London conference ended on October 11, 1922. Six days later, the fifth session of the Diplomatic Conference on Maritime Law opened in Brussels under the chairmanship of Louis Franck – CMI president, one of the founders – then a member of the Belgian government. The last-minute addition of the Hague Rules to the agenda did not interfere with the Conference's ability to discuss them. The delegates represented their countries in Brussels, but as individuals almost all of those from major maritime countries had attended the CMI conference in London the week before. The last-minute change did mean that many delegates had not received instructions from their governments, and thus they were unable to commit their countries to the final text.

The diplomatic conference began by appointing a *sous-commission* that reviewed the amended draft approved at the CMI's London Conference. Recognizing that the draft represented a compromise among the interests involved, framed by those "personally engaged in the business to be regulated," it proposed almost no changes in substance.

In plenary session, the Brussels Conference again subjected the draft rules to section-by-section review. By this point, however, the pressure not to change the text was so strong that the only substantial amendment was to resolve a controversy regarding article 3(6)'s notice-of-claim and time-for-suit provisions, which had proved troublesome at the CMI conference and at the *sous-commission* meeting.

Because many delegates in Brussels lacked the authority to commit their governments, the conference agreed that it would adopt the text simply "as the basis of [a] convention[]," leaving "the exact terms … to be decided by a future meeting … or through the usual diplomatic channels."

At this point in the story, I feel compelled to remind you that the CMI held its 1923 conference in August here in Gothenburg. The diplomatic developments were discussed, but by then the work had moved to Brussels.

In October 1923, an expanded bills of lading *sous-commission* reconvened in Brussels to examine the comments that the 1922 draft had generated and to consider final changes to it. Most of the discussion in 1923 simply clarified the existing text. The one significant revision to the substance of the convention was the addition of the "gold clause" as article 9 of the convention.

After the 1923 meeting of the *sous-commission*, all that remained to be done on the convention was of a ministerial or formal nature. The *sous-commission*'s changes were incorporated into the rules. Technical provisions governing such topics as the ratification, denunciation, and amendment of the convention were added. Finally, in August 1924, the conference formally reconvened for the official act of concluding the convention and opening it for signature. That formal action is the event whose centenary we now celebrate.

The International Adoption of the Hague Rules

As anyone who follows current events in this field recognizes, the formal signing of a convention is not the end of the story but merely the beginning of a new chapter. For the Hague Rules to have real meaning, they needed to be ratified. And the ratification story – by its nature – proceeds in separate strands in many capital cities around the world. I will focus on two very different ratification stories here.

The British government, having pledged to enact uniform legislation based on the Canadian Water-Carriage of Goods Act, moved quickly to implement the convention. Indeed the government did not wait for the diplomatic conference to complete its work, but introduced a bill in March 1923 to enact the then-current draft of the Hague Rules as domestic law. Although there was widespread support for the bill, there was also some vocal opposition. Most of the commercial opposition was either irrelevant or ill-informed, but Lord Justice Scrutton – a judge of the Court of Appeal, the author of the leading treatise on charterparties and bills of lading, and the most respected commercial jurist of his generation – argued that the rules were unclear and would most likely lead to increased litigation. The parliamentary session expired with no action being taken.

The British government introduced a new Carriage of Goods by Sea Bill in February 1924 to enact what was then the latest version of the Hague Rules – as amended by the international *sous-commission* the previous October. This bill passed Parliament with little discussion, and the British Carriage of Goods by Sea Act received the royal assent on August 1, 1924 – three weeks before the diplomatic conference completed its formalities.

Other countries in the British Empire soon followed the mother country's lead. Australia enacted its new Sea Carriage of Goods Act later the same year, India enacted its COGSA in 1925, and so on. Outside of the British Empire, however, the response to the Hague Rules was less enthusiastic. Before the United States acted in 1936, only Belgium had passed national legislation implementing the Hague Rules (as the international convention was still called, notwithstanding the significant amendments since the Hague conference).

In the United States, we have a much different story. There was vigorous commercial opposition from a small group of cargo interests. Apathy, inertia, and simple misunderstanding were even more powerful roadblocks on the route to ratification.

The organized opposition came primarily from a few shippers who hoped that they could do better. No one seriously denied that the Hague Rules were an improvement over the Harter Act for cargo interests. But a few believed that they could obtain a radical amendment of the Harter Act that would be even more beneficial. They were therefore unwilling to accept more modest improvements in their situation for fear that it would make it impossible to obtain more sweeping changes.

In February 1923, the first bill was introduced in the House of Representatives to enact the Hague Rules – a month before the first British bill was introduced in Parliament. As in Great Britain, it was too late in the legislative session for the bill to be enacted. As in Great Britain, the affected commercial interests had the opportunity to make their views known in formal legislative hearings. The similarities with the British experience ended there.

Between 1923 and 1930, seven more bills were introduced in Congress to enact the Hague Rules, and three more Congressional hearings were held. But nothing came to a vote in either the House or the Senate. By now it was clear that Congress would not approve any Hague Rules legislation – however desirable it might be – if there was serious opposition from any of the affected U.S. interests. The matter was simply too technical for politicians to make an independent judgment, and thus Congress would act only with the unanimous support of the interested parties.

The major turning point came in November 1930, when the U.S. Chamber of Commerce sponsored a conference to consider the Hague Rules. The conference recommended seven amendments to clarify the bill that was then pending before Congress. When proponents of the legislation agreed to accept those amendments, opponents agreed to drop their other objections and support the measure. It appeared that prompt passage would finally be possible. New obstacles, however, delayed enactment for another five years.

The biggest obstacle was the Great Depression, which focused Congress's priorities on more urgent matters. A new bill was introduced in each Congressional session, but even the sponsor was too busy to have time to hold hearings. The Hague Rules waited while Congress enacted the New Deal.

The final push began with the introduction of another bill in 1935. When the Senate Commerce Committee held a hearing, only supporters appeared. Even previous opponents testified in favor. The bill passed the Senate without a recorded vote.

While the bill was pending, the Senate also gave its advice and consent to the treaty with a single reservation – that the package limitation in the United States be $500, which was then virtually the same as £100.

The Senate's action in passing the bill and approving the treaty put pressure on the House to pass the bill before Congress adjourned, for U.S. cargo interests were eager to ensure that the compromise reached at the Chamber of Commerce Conference became a part of domestic law before the President ratified the treaty. Thus the hearings on the House side were filled with testimony in favor of the bill. The Committee on Merchant Marine and Fisheries reported it favorably, and it passed the House without discussion. A week later, President Roosevelt signed the bill and the Carriage of Goods by Sea Act became law in 1936.

Before then, other countries had hesitated to adopt the Hague Rules. Indeed there had been a movement among British shipowners in the early 1930s to repeal the U.K. COGSA on the ground that the rest of the world was unwilling to accept international uniformity. Elsewhere, Italy tentatively approved the convention in 1928, but postponed its ratification until other nations committed themselves. France discussed withholding its acceptance of the treaty until Germany, Italy, and Norway ratified it.

With U.S. ratification of the Hague Rules, however, the world's remaining maritime powers joined the new regime fairly quickly. Canada passed its new Water Carriage of Goods Act barely two months after the U.S. COGSA. Within two years, France, Italy, Germany, Poland, and the four Nordic countries had all followed suit. By 1938, the overwhelming majority of the world's shipping was committed to the Hague Rules.

The Aftermath

Although the Hague Rules provided an internationally accepted uniform legal regime for cargo liability immediately before the outbreak of World War II, the uniformity began to break down soon after the wide-spread acceptance of the Rules. In part, that was due to the changing world political situation, as former colonies became independent countries with their own agendas. National-court interpretations of the Hague Rules also produced problems that called for new solutions. And developments in the world economy produced one of the most visible problems with the Hague Rules, as rising and falling exchange rates left unit limitation values under article 4(5) that varied among major maritime nations by a ratio of over three to one.

The CMI sponsored the first – and most widely accepted – post-Hague regime to deal with some of those problems. That story brings us back to Sweden and the 1963 Stockholm Conference with its signing ceremony in that historic Swedish city of Visby – thus giving us the Hague-Visby Rules. But we do not have time for that story now.

Conclusion

I will instead conclude by taking a quick look at where things stand today. A century ago, before any nation had adopted the Hague Rules, the world faced a variety of different regimes. Although there was widespread agreement on many of the basic principles of general maritime law, different nations interpreted them differently in important ways. And several nations had enacted their own domestic regimes. All of this is once again true today.

Fifty years ago, before any nation had adopted the Hague-Visby Rules, the world faced a situation in which uniformity had broken down for a variety of reasons – some technological, some political, some legal, some economic. That is once again true today. The Hague-Visby Rules remain the dominant legal regime, but they are seriously out-of-date. They are, after all, simply the Hague Rules with a handful of amendments designed to address very specific problems. We have 1968 amendments to a 1924 convention based on an 1893 domestic statute designed to address the problems of the early steam era. The drafters of the Visby Protocol could not have imagined electronic commerce. They barely dealt with the container revolution, which was still in its infancy at the time. While multimodal contracts govern shipments on a door-to-door basis today, the Hague-Visby Rules still apply on a tackle-to-tackle basis. And of course many countries do not follow the Hague-Visby Rules. In the world's largest economy, the unamended Hague Rules are still in force. The world's second-largest economy has a unique Maritime Code that combines elements of the Hague-Visby Rules, the Hamburg Rules, and domestic innovations.

The Rotterdam Rules could provide a solution to our current problems. Perhaps the lessons that we learned from the ratification of the Hague Rules can help us achieve a solution. For the moment, we can look back to August 25, 1924, and celebrate that milestone. But the focus of this conference must now turn to the future and address how our generation can match the accomplishments of Francesco's grandfather's generation.

The Future of the Carriage of Goods by Sea: Unification of the Law in Carriage of Goods Currently and in the Future.

Stuart HETHERINGTON (*)

INTRODUCTION

Objectives for today's sessions

The future of the carriage of goods by sea lies in your hands. Only MLAs can persuade their governments to ratify the Rotterdam Rules. We want to

- firstly, remind you of the contents of the Rotterdam Rules and the benefits that the international maritime community will derive from them and
- secondly, with the publication, as soon as possible after this Colloquium, of a book containing today's presentations, provide you with materials which will enable you to persuade your governments why they need to ratify the Rotterdam Rules expeditiously.

Those books will be available to you also to present to your governments to enable them to prepare whatever materials the various government departments (Transport, Attorney-General, Foreign Affairs etc) may need to carry out their tasks. In addition there is a wealth of materials on the CMI website. (A Dossier, if you like.)

Speakers today

After that magnificent memorial lecture (on a subject so dear to Francesco's heart) of Professor Michael Sturley you will now hear from me for a few minutes and then Alexander von Ziegler who as Secretary-General of CMI was intimately involved with Stuart Beare and Francesco Berlingieri in the 1990s in the development of the Draft Instrument which was presented by the CMI to UNCITRAL in 2001 (which then became the Rotterdam Rules in 2008) and also in attending the UNCITRAL meetings and subsequently speaking and writing about those Rules ever since. With Michael Sturley (as the author the Travaux Preparatoires of the Hague Rules and his work with the MLA US in drafting legislation to replace the US COGSA) and their involvements since the 1990s you could not have had two people with greater affinity with both the Hague and Rotterdam Rules to speak to you today.

One of the great benefits of the Rotterdam Rules (and indeed one of the drivers for them) is its content on E-commerce. The CMI has been fortunate to have engaged the services of Miriam Goldby, a renowned expert on matters relating to

(*) Former President of the CMI and Chairman of the Standing Committee on the Ratification of the Rotterdam Rules.

E-commerce in the shipping industry, to monitor and attend meetings at UNCITRAL on its new initiative on a Negotiable Cargo Documents Instrument. She will follow Alexander and talk about the E-commerce benefits of the Rotterdam Rules, which many see as a critical difference between the Hague Rules regime and the Rotterdam Rules regime. E-commerce is the key to helping reduce costs and introducing efficiencies into the transportation of goods by sea. As the title to her paper indicates she explains that the Rotterdam Rules in this aspect can be regarded as being supplementary to and not in conflict with National legislation, which is proliferating around the world and known as MLETR.

In the second session you will hear from: David Farrell, a former President of the MLA US, who has been active in seeking to achieve ratification in the US of the Rotterdam Rules and he will explain why the US must ratify the Rotterdam Rules; Andrew Robinson, who many of you will recall as Rapporteur on the Judicial Sales IWG, and who will discuss why Africa is ripe for reform and ratification of the Rotterdam Rules; Tomotaka Fujita, who has chaired the CMI Standing Committee on the Carriage of Goods for many years and has written and spoken extensively about the Rotterdam Rules who will talk on the contribution which the Rotterdam Rules makes to safety and sound logistics; Manuel Alba was a delegate in the Spanish representation at the UNCITRAL Working Group meetings on the Rotterdam Rules and will speak about the benefits of ratification from the perspective of his country, Spain, which is one of the five ratifiers of the Rotterdam Rules, and Erik Rosaeg, who Chaired the Norwegian Maritime Law Commission during the process of preparing the implementing legislation for the Rotterdam Rules and will discuss the Scandinavian position, appropriately, as we are here in Sweden for this Centenary celebration.

One person who I have not mentioned is Gertjan van der Ziel. He was equally involved from the 1990s as those others I have mentioned in both working on the Draft Instrument which CMI prepared and subsequently during the UNCITRAL meetings. I am delighted that he has joined the Standing Committee and is leading the contact which is being made with the EU, which did of course urge all member States to ratify the Rotterdam Rules many years ago. He will bring you up to date with what is taking place in that regard at the end of the second session.

Background

Early last year at the initiative of the President of CMI the Executive Council set up a Standing Committee whose task was to enliven consideration for the Ratification of the Rotterdam Rules. Some of you will recall Shakespeare's play Julius Caesar in which Marc Antony declaims "I come to bury Caesar not to praise him". We have come here almost 100 years since the diplomatic conference which agreed the Hague Rules in August 1924. (We need to remind ourselves repeatedly that that Convention had as its original stimulus the United States Harter Act 1893, a 19th Century statute, and other national legislation which copied it.)

We come here to praise the Hague Rules but also to bury them in their current form. They did a magnificent job in bringing a modern regime into existence which had the support of all sectors of industry. Like the Rotterdam Rules they had been discussed and drafted over many years before finalisation in 1924. They attracted, over a number of years, widespread support. They did unify international trade between 1924 and 1968, but remember, it was not until 1936 that the United States introduced its COGSA legislation, and it is still there – unamended. (US dollars 500 being its package limitation still!) In today's world, as I will seek to show, the Hague Rules as they were drafted in 1924 (and even as revised by the Hague Visby Rules) are not fit for purpose in 2024.

However the essence of the Hague Rules can still be found, with appropriate amendments, in the Rotterdam Rules. They are alive and well within the Rotterdam Rules, but with a 21st century make over. Look at Articles 13 and 14 in particular with their specific obligations identified for the carrier in relation to the loading stowage etc of the cargo and as to sea worthiness and also look at the exceptions in article 17. Apart from some extensions and one or two omissions, they rely heavily on the wording of the Hague Rules.

CMI raison d'etre and uniformity

Let us not forget that the raison d'etre of the CMI and all its associated Maritime Law Associations derives from Article 1 of the CMI Constitution "to contribute by all appropriate means and activities to the unification of maritime law". There can be no doubt that the maritime law that relates to the carriage of goods by sea is fractured and has been since 1968. Despite having some essential common features it cannot be said that there is uniformity in the multiplicity of regimes that now proliferate.

Disuniformity

Since 1968 with its amendments in the Hague Visby reforms the uniformity that the Hague Rules created has been seriously diluted. Whilst about 95 countries ratified the Hague Rules (of those, interestingly, 42 ratified before the United States passed its COGSA legislation and 37 ratified between 1936 and the Hague Visby Rules in 1968). Only 31 ratified the Hague Visby Rules (of those 7 had not previously ratified the Hague Rules; 15 ratified in the 1970s; 9 in the 1980s; 5 in the 1990s and 2 in the 2000s) and only about 24 ratified the SDR Protocol. Since then, in 1978, we had the Hamburg Rules which have been ratified by about 35 countries. Of those 19 are from African countries, 4 from European countries, 3 from South America, 3 from the Middle East, 3 from Eastern European countries, 2 from the West Indies, and 1 from Central America. Only five have to date ratified the Rotterdam Rules. Many countries including my own, Australia, have blended provisions from a number of the Conventions, as has China.

Uniformity has been lost. The CMI, UNCITRAL and industry came together in the 1990s when the MLA US was drafting a new COGSA to bring its Act up to date.

The international Group of P and I Clubs approached the CMI in the late 1990s and asked it to stop the MLA US from drafting a new Act as that would weaken uniformity. CMI informed The International Group that it could not preclude an MLA from doing such work but the MLA US did cease its work in that regard and directed its activities (through then President Chet Hooper and Professor Sturley amongst others) to the work that CMI was commencing. (It's wonderful to have Chet Hooper with us at this Colloquium.)

Everyone was behind the creation of a new Convention which was fit for purpose for the 21st Century. That convention came into being in 2008 in the form of the Rotterdam Rules. It is much more than just a liability Convention, as the speakers who follow me will explain. It had widespread support at the time. You can read the presentations given at subsequent CMI meetings at which representatives from shipowners, insurers and others expressed support and emphasised the need for uniformity in international trade. (A summary of them will be attached to the publication of this paper in book form.) Like any Convention it was a compromise of the different common law and civil law systems, cultures and, importantly, countries that are: major importers or exporters, or both, that have international fleets, no fleets to speak of, significant insurance industries and countries that do not.

Critical improvements made to the Hague Rules regime by the Rotterdam Rules

These are set out below and have largely been taken from an excellent PowerPoint presentation given a few years ago by Kate Lannan, the former Secretary of UNCITRAL Working Group III on Transport Law). They highlight the major provisions from the Rotterdam Rules that reformed the Hague Rules. (Kate's presentation will be reproduced in the Booklet to be published after this Colloquium and is available on the CMI website and is amongst the Dossier of papers made available to MLAs last year).

1. the elimination of the nautical fault and management of the vessel defence available to shipowners under the Hague/HagueVisby Rules regime;
2. the obligation of the carrier to exercise due diligence to make the ship seaworthy being extended to cover the entire voyage;
3. the liability of the carrier for delay;
4. greater transparency in relation to the identity of the carrier;
5. it raises the limits of liability of carriers to reasonable amounts in modern currency;
6. the inclusion of obligations in relation to deck cargo so that the carrier is not automatically exonerated from responsibility for such cargo;
7. the extension of the notice period for loss or damage to cargo;
8. the extension of the limitation period for time of suit extended to two years;

9. clarification of the liability of maritime performing parties and confirmation of Himalaya clause protections;
10. clear rules in relation to delivery of cargo and solutions to the problems associated with delivery of cargo by the carrier without presentation of negotiable documents;
11. improved regime for deviation;
12. clear rules in respect of undelivered cargo;
13. solution to problems of concealed damage in multimodal carriage;
14. the requirement that cargo owners have responsibility to identify their cargo properly;
15. providing clarity in relation to roles, obligations and powers in relation to the complex issues occasioned by E commerce;
16. makes specific reference to volume contracts;
17. requirements for jurisdiction and arbitration provisions but gives flexibility to States as to whether to accept such provisions when giving effect to the Convention.

Themes – Benefits of Rotterdam Rules and distinctions from Hague Rules based regimes

These are also taken from Kate Lannan's Power Point:

a) Clear, harmonised global regime for maritime transport
b) Electronic commerce for modern, efficient shipping practices
c) Door-to-door shipments under a single regime
d) Modern containerised shipping accounted for throughout
e) Inclusion of incoming and outgoing maritime carriage
f) Use of a well-known limited network liability system
g) Coverage of ALL transport documents in liner trade, not just B/Ls and sea carriage
h) Limited freedom of contract, with appropriate mandatory protection when needed
i) Comprehensive and more systematic provisions on carrier and shipper liability and balanced allocation of risk
j) Right of control, to assist shippers and financing institutions, and to pave way for E-Commerce
k) Clarification of numerous legal gaps that exist under current Conventions
l) Codification of existing industry practices to provide legal certainty
m) General adoption of commercially practicable solutions

n) A win-win approach – industry driven, global solutions, comprehensive instrument modernises and harmonises, preserves unimodal transport regimes, reduced transaction costs and enhanced efficiency, commercial and legal predictability and transparency.

Many of the matters listed in those slides will be referred to by today's speakers.

Let me highlight quite simply how out of date the Hague Rules has become in the 21st century. In 1924 when Congress in the US was considering reform in this area of the law Senator Charles McNeary of Oregon (and later a vice-presidential candidate) introduced a Bill in the Senate, which was more cargo orientated than the Hague Rules, and as Michael Sturley reported:

(i) instead of "tackle to tackle" the liability of the carrier was extended to "the period from the time when the goods are received by the carrier until proper delivery thereof at the point of destination". **(Compare Article 12 of the Rotterdam Rules).**

(i) the responsibility of the carrier to make the ship seaworthy at the beginning of the voyage was expanded to an absolute obligation to make and keep the ship seaworthy throughout the voyage. **(Compare Article 14 of the Rotterdam Rules).**

(i) the time for giving notice of claim was extended to 10 days, **(Compare Article 23 of the Rotterdam Rules: 7 days).**

(i) the time for suit provision permitted filing an action up to one year after the carrier declined to pay a claim. **(Compare Article 62 of the Rotterdam Rules: 2 years from delivery of the goods by the carrier).**

(i) the carrier's exception for negligence in the navigation or management of the ship was omitted in favour of an explicit provision holding the carrier liable for any act, neglect or default … of the master, mariner, pilot, or other persons employed in or about such vessel or in connection with the navigation or management thereof. **(Compare Article 17 of the Rotterdam Rules).**

Those provisions in that Bill (which was never passed) can be seen almost identically in the Articles in the Rotterdam Rules which I have identified. That is now over 100 years ago and that is what those who drafted and have signed the Rotterdam Rules considered would be a more equitable distribution of the liability between carriers and cargo owners and their insurers. I do not understand how it could be said that the Hague Rules remain relevant today, a hundred years after they were agreed.

Conclusion (delivered at the end of the two sessions of the Colloquium.)

I commenced my presentation this morning by saying that "The future of the carriage of goods by sea lies in your hands". I hope this paper and the ones you have heard from Michael Sturley and the others you have heard today will inspire you to gather together the leaders of your Association at home to talk seriously to your

government about ratification of the Rotterdam Rules. I believe that the contents of our papers (which will be published with other materials in the next few weeks) and the materials on the CMI website give you enough information to achieve that objective.

You have heard that the American Institute of Marine Underwriters (AIMU) has expressed strong support for the Rotterdam Rules (and its endorsement will be published with these papers.) I believe MLAs should be able to obtain similar support from their local insurance companies. Please involve them and shipper bodies. With the materials we will supply you with you should be able to be extremely persuasive.

The Standing Committee will continue to assist the MLA US, and Gertjan in his discussions with the EU, and all European countries, whether members of the EU or not, We will also be assisting African, South American and Central American, Australasian and Asian countries and Canada via Standing Committee members and local MLAs.

The momentum, gathered from this Colloquium, must be taken advantage of. Please send me or other Standing Committee members news of developments and what you have learnt in your country and region, from any dealings you have with your government officials. I cannot tell you what the future will look like. I can tell you that the options are to retain the status quo based on the Hague Rules regime or embrace the future and enable the shipping industry to move on from the 20th century and enter the 21st century. Our predecessors, like Francesco Berlingieri, Stuart Beare, Gertjan van der Ziel, Michael Sturley, Alexander von Ziegler and many others had a vision of what a good international Convention in relation to the carriage of goods by sea would look like and they brought it to pass. It is now long past the time when it should have been brought into force internationally for the good of the industry.

It is up to MLAs to reagitate and stir up governments to get moving and to ratify this Convention. They owe it to the people who rely on international shipping to provide them with an equitable and comprehensive Convention that delivers their goods and materials to them expeditiously and safely at the least cost so that can carry on their businesses. It is badly needed to bring back uniformity, which as I have stressed earlier, everyone connected with international shipping has espoused since the CMI came into being in 1897, especially on this topic as so many presentations made at CMI meetings since 2008 attest. (See the attachment to this paper.)The Standing Committee is here to help you. Please call on us if you need assistance.

I am grateful to all the speakers whom you have heard from today for all the work they have done in their own region, in their contributions to the Standing Committee and in their presentations today.

Appendix

Summary: Commentaries made on the Rotterdam Rules

At the CMI Athens Conference (October 2008) Papers were prepared ahead of the Conference and some given at the Conference by leaders of the shipping and maritime industry. These are contained respectively in CMI Yearbooks 2007-2008 Athens I and 2009 Athens II. In the former group the papers were by:

Michael Sturley in advance of the UNCITRAL Commission's final determination of the Draft Convention in which he discussed: Multimodal Coverage-Scope of Application and Period of Responsibility, Freedom of contract, Jurisdiction and Arbitration, Limitation Amounts, Loss of right to limit, Himalaya clauses, Time for Suit period, Expanded shippers obligations, Electronic Commerce, Controlling parties and the right of control, and Qualifying clauses.

Philippe Delebecque looked at the final version of the Convention from a civil lawyers perspective and finds much that might offend a civil lawyer, much that might satisfy a civil lawyer and concludes that the Convention "has the great merit to contribute to re-unify the law of the carriage of goods by sea and to modernise this topic … As K. Christoffersen (AP Moller Maersk counsel) has written: "the clearer and more harmonised the rules are, the cheaper our services become; this would be benefit for the shippers." We have to underline that, at the moment where the States are invited to ratify the convention, the 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."

Francesco Berlingieri considered the "Carrier's obligations and liabilities" and discusses the alternatives that were available and the considerations that were in the minds of the drafters. These are particularly interesting in relation to the allocation of the burden of proof, the liability regime for carriage preceding or subsequent to carriage by sea, and thus the inter relationship with other conventions: CMR, COTIF-CIM and Warsaw.

Kofi Mbiah (former Chair of the Legal Committee of the IMO) also discussed the liability and limitation of liability regime and the effort made in the drafting to balance the interest of cargo and carriers, and points out that in such an exercise of compromise "no-one leaves completely satisfied."

Papers were given at the Conference by:

Hannu Honka on the "Scope of Application, Freedom of Contract" in which he discussed the alternative approaches that were considered and their historical contexts, again highlighting the compromises that were necessarily made and poses the question as to what would come instead if the Rotterdam Rules should fail: He suggested: "Regional solutions? National solutions? A new global convention? To hope for the last mentioned development now and after Rotterdam Rules have been

adopted is to my mind completely unrealistic. The first two are not desirable. I hope that the Rotterdam Rules are looked at with these serious macro perspectives in mind.

Kate Lannan, former Secretary of UNCITRAL Working Group III, gave an **"Overview of the Convention from an UNCITRAL Perspective"**. She reminded the audience that the impetus for this work came from UNCITRAL's Working Group on Electronic Data Interchange or EDI resulting in a collaborative relationship with CMI in the late 1990s. She expressed the view that the end product: "is a comprehensive instrument governing international contracts of carriage from "door to door" that will modernise 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 characterised 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."

She also highlighted the involvement in the UNCITRAL Working Group sessions of IGOs and NGOs including UNCTAD, UNECE, ICC, IUMI, FIATA, ICS, BIMCO, IAPH, European Shippers Council, and others.

Knut Pontoppidan, Executive Vice President of AP Moller-Maersk gave a presentation on the "Shipowners' View on the UNCITRAL Convention. He helpfully summarised his paper at its commencement and describe the "main argument put forward" as being "that international harmonisation 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." He continued that the "answer to these calls" is the UNCITRAL Convention, which provides "an attractive and modern set of rules", and "which "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 todays liner shipping.". He went on to say that to achieve that goal ratification was needed by 20 States "and in this regard, we all have a role to play." In his paper he stressed the financial costs of disuniformity, and the needs for legal certainty and predictability.

He referred to the possibility in the 1990s that the US would adopt its own regime but thanks to the efforts of WSC and NIT League the US decided to await the outcome of discussions within CMI and UNCITRAL. He identified the reasons why the Convention "resoundingly" provided the answers industry needed. He described the Convention as "an ambitious attempt for a comprehensive and attractive convention for maritime transport and connected transports" which caters "to the need of international liner shipping." He said: "I think I speak for all shipowners and their associations, ICS and the WSC included when I say that the

UNCITRAL Convention should be ratified quickly and on a broad basis in order to dissuade national and regional authorities from filling the vacuum with domestic or regional regulations." As part of an industry group he said he "had 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." He also mentioned that the national shipowners in the Nordic countries had pledged their efforts towards "ensuring that Denmark, Sweden and Norway are able to ratify the Convention in 2010 or 2011-making these three countries the front runners on the way towards the 20 ratifications required".

Johanne Gauthier spoke on the "New Elements. The facilitation of Electronic Commerce" and explains the background to the incorporation of these matters in the Convention-(she having been involved in the study since at least the CMI Conference in Paris 1990) and the terminology used in the Convention, such as "Electronic transport records, the principle of "medium" and "technological" neutrality" as being one of the drafting goals, functional equivalence, (that is functionality as a receipt for the goods and evidence of the contract of carriage. And negotiability, via "exclusive control" and "right of control". As she said: "the Draft Convention certainly paves the way for a new way of doing business in a paperless world. It also provides for more solid foundations to Sea waybills (paper or electronic form)…".

Gertjan van der Ziel considered the "Multimodal Aspects of the Rotterdam Rules", and what he described as "One of the most contentious subjects during the whole discussion on this new convention." He described the tension between the work done to produce the Convention and the existing land based regimes and the ultimate resolution of the problem by the "maritime plus" regime. In particular he described the provisions in Articles 26 and 82 directed at resolving this conflict and how they are intended to work.

Reference should also be made to **Stuart Beare's** paper "The Rotterdam Rules-some controversies" in CMI Yearbook 2010 pages 516-520, in which he referred to "door to door transport" and the related overlap with conventions such as CMR, COTIF/CIM and Montreal,.and the role of national law. (These being covered by Articles 26 and 82.) He also discussed "performing parties (in particular terminal operators), electronic transport records, delivery of goods (referring to Articles 43, 47).

At the CMI Beijing Conference (October 2012) papers included a report on the Conference by:

Michael Sturley which included the welcome from the CMI President Karl Gombrii who had read a message from Renaud Sorieul, the then Secretary General of the United Nations Commission on International Trade Law (UNCITRAL) who had noted that an UNCITRAL Working Group had drafted The Rotterdam Rules "based on the CMI's preliminary text, to harmonise and modernise 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 the future.

As Michael Sturley remarked a number of speakers reported on regional development. He himself noted that many States seemed to be waiting to see what the United States did, but also that in Europe, Denmark, Norway and The Netherlands the political decision had been taken to ratify the Rotterdam Rules, and a number of African States had incorporated the Rules into their community code (Cameroon, Congo, Gabon, Equatorial Guinea, The Central African Republic and Chad).

Alexander Von Ziegler set out the lengthy history leading up to the Rotterdam Rules, particularly highlighting the movement towards electronic commerce as being a key driver of a need for a new international convention in this area.

Kofi Mbiah, noted that for developing countries, mostly consumers of shipping services, the Hague Rules which had held sway for so many years were unfair and worked against their interests. He then discussed some of the key reforms included within the Rotterdam Rules such as:

Scope of application, period of responsibility, electronic transport records, the liability of the carrier, delay, deviation, deck cargo, obligations of the shipper, limitation of liability, time for suit, jurisdiction and arbitration and volume contracts which he described as the most controversial.

He concluded by describing the Rotterdam Rules as a "mixed bag" but added:

> "The Rules thus represent a compromise and like all compromises no group leaves completely satisfied but all leave in the hope that they have taken something away. That is the spirt of the Rotterdam Rules which must be made to reflect in the judicial interpretation of the Rules" (emphasis added).

For shipper interests, he pointed out, they would find comfort in "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" and he suggested "shippers would 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 he suggested that "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". In addition ship owner interests, he pointed out, "have the benefit of flexibility in volume contracts, the provision of detailed rules on all documentary aspects, as well as the detailed provision 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" He also highlighted the "extensive consultations with major stakeholders" which had taken place.

Andrew Bardot, Solicitor and Secretary and Executive Officer of the International Group of P & I Associations gave a paper in which he discussed: "The UN Convention on the Contracts of International Carriage of Goods Wholly or Partly by Sea "The Rotterdam Rules" Practical Implications for Carriers". In his introductory remarks he said as follows:

> "The provisions of the Convention, the "rules", extend and modernise 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 wide-spread 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. (Emphasis added)

He identified the "Negative implications for carriers" as being:

> "Loss of the carriers "nautical fault" exception from liability; more stringent seaworthiness obligations; increased package/unit of weight liability limits; the extension of time limits for commencing suit; maritime performing parties; dispute resolution forum choice and club cover ratification."

As to the "Positive implications for carriers" he identified:

> "A multi-modal convention; some beneficial aspects of existing Conventions and regimes retained; Shippers' obligations and liabilities in relation to cargo description and particulars and in relation to dangerous cargo; Deviation, Deck cargo application; Liability for delay; Delivery of goods; Greater freedom of contract in liner trades; and Provisions for electronic cover."

He summarised his comments as follows:

> "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 welcome.
>
> There is general support for the rules from ship owner 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 for carriers liabilities."

The Unification of the Law on Carriage of Goods - Currently and in the Future (*)
From Hague to Rotterdam – via Hamburg or Visby (**)

Alexander VON ZIEGLER (***)

No worry, I will not take a full "historic approach" ([1]) but actually attempt to show what the existing instruments did (and attempted to do) in their respective times and with the ultimate goal of harmonizing the law based on the respective situation, expectation and dynamics in which they were each created. I hope to find some indications on what this means for the future of the unification in this area.

I see my task to reflect on more fundamental questions and describe the various levels of dynamics that influence the need of unification but also may cause existing harmonizing instruments to become fragile and outdated due to developments occurring since the enactment of those respective harmonizing instruments. I will search for the driving forces behind a harmonizing exercise leading to a harmonizing instrument which is widely applied and seek to find criteria for the level of driving forces that would justify an attempt of amendment to an existing Convention or, even more radically, for supplementing an outdated Instrument with a new Convention. Those queries are of course very relevant and topical when looking at the law of Carriage of Goods by Sea, as regulated since now a century by the Hague regime and as to be replaced by the Rotterdam Rules of 2008 ([2]).

In doing so, I need to simplify matters tremendously, of course giving weight to factors and information that are needed to provide a more detailed picture on the subject ([3]). But sometimes simplifying is a chance to see through the jungle of the – very important – details to regain a broader view allowing us to navigate the ship in a chosen direction ([4]).

(*) Paper Delivered at the 2024 CMI Colloquium in Gothenburg.

(**) The format of both the speech and the paper delivered as a part of the deliberations at the CMI Colloquium of 2024 in Gothenburg restrict the scope and depth of the information and references to sources provided by this paper. The 16 years after the celebration of the launching of the Rotterdam Rules at the Rotterdam Conference of 2008 have produced a huge body of publications addressing this Convention. As this paper is not meant to be a full-fledged academic publication but intends to maintain the scope of the speech, I have restricted my references to a large degree to my own earlier publications and refer to the respective sources cited therein.

(***) Partner at Schelleneberg Wittmer, Zurich, CMI Vice President and past Secretary General of IUMI and CMI.

([1]) For a full historic approach see Michael Sturley, *Francesco Berlingieri Lecture*, Gothenburg 2024, to be published in the same publication as the present paper.

([2]) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008

([3]) For a more detailed study of the subject I may refer to my research publications at the University of Zurich: Alexander von Ziegler, *Haftungsgrundlage im international Seefrachtrecht*, Baden-Baden, 2002; Alexander von Ziegler, *Schadenersatz im internationalen Seefrachtrecht*, Baden-Baden 1989.

([4]) For a more detailed overview on the Rotterdam Rules see Michael Sturley / Tomotaka Fujita / Gertjan van der Ziel, *The Rotterdam Rules*, London 2011; Alexander von Ziegler / Johan Schelin

I. The Hague Rules 1921 / 1924: Why Harmonization – in the first place? ([5])

We celebrate today the 100 years of the existence of the Hague Rules, a moment to praise the enormous success of this Convention and its significant impact on world trade. However, we need at the same time to agree that the Hague Rules were far from perfect, first by the choice of their format basically following terms of a model bill of lading (a format that was copied form the model contract terms of the 1921 Hague Rules). Also, the right of contracting states – in form of the Protocol to the Hague Rules – to transfer and therefore also translate the content of the Hague Rules into their national legislation was not the perfect approach to ensure harmonization, but this Protocol was – at the time – a guarantor for the great success of the Hague Rules, as ratifying states were allowed to amend the content as to fit their own domestic legislation and legal traditions.

The one and foremost event that triggered the Hague Rules was a threat to international harmonization, e.g. by a national initiative in the form of the US Harter Act of 1893 and all the following national attempts to react to possible codifications in the field of the law on carriage of goods by sea, which so far was part of general maritime law, or lex maritima as it is also often referred to.

That is also true for the content of the Hague Rules: It was not the international common understanding that the content of the Harter Act that became the content-basis for the Hague Rules, reflected the best, the most adequate way of allocating carrier's liabilities nor that it reflected a modern global understanding of how to best address the carrier's liability, but rather the adequate and politically feasible correction and reaction to the inherent threat such national law (of a fast growing global economy) would constitute in light of the existential need for unification and harmonization in the field of carriage of goods by sea and international trade. This is what triggered the Hague Rules but it is also this what will determine the lifetime and endurability of the reign of the Hague-regime in the future.

There is another element which I consider to be also another factor that led to the increased need (and urgency) reflected by the success of the Hague Rules. The 1920s marked a culmination of a huge technological and geopolitical revolution after the birth and rise of industries, steam-shipping and accelerated world trade by the mid-19th Century. Therefore, just by this growth in scale, geographical scope and frequency, harmonization became even more and more important, a harmonization trade and shipping (and their insurers) depend(ed) upon.

Drafting a Convention on a blank sheet is of course much easier than to later amend existing instruments in form of a Protocol or even attempting to draft a new Convention to replace the older, the first one. The same is true for the ease of

---

/ Stefano Zunarelli, Kluwer 2010; Rhidian Thomas, *The New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, Witney 2009; See further Alexander von Ziegler, *Rotterdam Regeln – Werdegang und Einführung, Deutscher Verein für Internationales Seerecht* (edited by Klaus Ramming), Hamburg 2011, p. 1-46; Alexander von Ziegler, *Main Concepts of the New Convention: Its aims, structure and essentials*, Transportrecht 9-2009, p. 346 – 357.

([5]) See Alexander von Ziegler; *The Comité Maritime International (CMI): The Voyage From 1897 into the Next Millennium*, Uniform Law Review, NS-Vol II 1997-4, p. 728-757.

ratification: the first instrument can be ratified on a wide-open green field, whereas amendments and new and superseding Conventions face totally new challenges as history has proven.

Thus, while it is of course very adequate to celebrate the immense success of the Hague Rules it is also the moment to mirror this instrument with today's realities.

II. Hague Protocols 1968 and 1979: Why a Need to Amend – the purpose and scope of a Protocol?

Once a Convention is successfully enacted and has been brought into force with almost no exceptions around the globe, it requires the evidence of compelling reasons to develop and amend such a harmonized body of law. One conservative tool for an amendment is the drafting of Protocols (6).

Reasons for such amendment are

- **technological developments**;
- **lacuna** that are discovered while applying the regime in a day-to-day context;
- **Reactions to important legal decisions** rendered in maritime jurisdictions which either call for their international application and codification – or if the judgements are against the expectations and interests of the involved industries – call for an international codification of a corrective legal principle in the format of a treaty overriding such jurisprudence;
- **Changes in the global economy**, such as a inflation and the revolution of the currency-pattern.

For the Hague Rules this was

- The adaptation to the general revolution which the **birth of the container** has brought to world trade and needed to be reflected in the law of the liability of the carrier.
- Broadening of the scope of harmonization by introducing **legal principles developed by courts** of some maritime nations.
- **Changes to the monetary system**, required to adapt the currency references in the Convention for the purposes of limiting the carriers' liability.

This was the trigger and rationale behind the Visby and the SDR protocols to the Hague Rules, adapted in 1968 and 1979 respectively.

III. The Hamburg Rules 1978: Why a new start – rephrasing and correcting choices once taken in existing instruments?

The Hamburg Rules of 1978 are sometimes referred to as a new attempt and a new start for harmonization. This is only partly true, as the Hamburg Rules remain

(6) See Alexander VON ZIEGLER, *Alternatives and Methods of Unification of Harmonization of Maritime Law*, Il Diritto Marittimo, I-1999, p. 232-239.

basically a carrier's liability convention. As such they attempt to rephrase and correct the allocation of liability which was harmonized 50 years earlier by the CMI and the subsequent Brussels Diplomatic Conferences.

The major changes that led to the Hamburg Rules were in my view the consequences of two major dynamics:

– One and the foremost dynamic to mention is the fact that by the mid of the last century the global landscape was dramatically changed by the decolonialization all over the globe. With the birth of new, independent states, new, independent economies were fighting for their place on the globe. Their voices needed to be heard and taken into consideration. In 1921 they had not been part of the process. In 1978, it was felt that this needed to be corrected.

– In parallel, the UNITED NATIONS ("UN") were created and with this UN specialized entities like UNCITRAL, UNCTAD and IMO. This led to a fundamental change in the techniques internationally harmonized instruments were to be created. This dynamic which has also substantially changed the way the Comité Maritime International (CMI) operates and cooperates, a transition which we can also celebrate as having been done very successfully.

Thus, this attempt to replace the Hague Regime (including its Protocols) was conducted under the auspices of the UN and its specialized bodies.

As such, the Hamburg Rules are proof of a dramatic change of the geopolitical constellation, asking – no, even requesting – that harmonization is conducted on a global scale and not just by major industrialized maritime nations.

We all know that the Hamburg Rules had not enjoyed the success that their drafters had hoped for and in today's discussion of a modern liability system (even less of a modern harmonized law for the carriage of goods by sea) they function merely (but I think importantly) as a reminder that any future harmonized regime for the carriage of goods by sea needs to be based on a global process, that is of course best undertaken within UN specialized bodies, such as UNCITRAL.

Seen from this angle, Hamburg is a detour for the stretch between the few miles from Hague to Rotterdam, but sometimes one needs such a detour as an opportunity allowing some ideas and expectations to be tested and maturing to a more solid basis.

The major impact that the Hamburg Rules brought is, in my own personal opinion, the fact that the law of carriage of goods by sea – in particular the issues of liability of the carrier – were frozen, blocked between the trenches of the ones defending the successful Hague System and the others demanding a political change in form of the Hamburg Rules.

When a constellation is frozen, it is blocked. It loses its ability to adapt and to absorb developments, such as revolutions of technologies, geopolitical and geoeconomic developments. The same holds true for the law: Law which is frozen will eventually break, become leaky and will be superseded. The moment the law is being frozen, the law loses its ability for adaption to new parameters. It becomes inherently *out-of-time* and *out-of-tune* (two major flaws in the musical world).

IV. The Rotterdam Rules 2008: a "new start" based on revolutionary developments in the way international trade and shipping operates

Thus, when I talk about a "new start", I mean a reaction to the fact that the world, the reality in which the law operates, and with this the underlying questions and expectations have dramatically changed. A "new start" is required whenever the reality-changes have reached an extent and a degree which requires a totally new and fresh approach.

Thus, a new start is needed, when the underlying realities are addressing new issues and thereby altering the scope and focus, that was once applied to the old regime, in our case the Hague Rules.

The Hague / Hague Visby and Hamburg – all focused (and remained to be focused) on the scheme of the carrier's liability as harmonized compromise of the allocation of risk and liabilities in the carriage of goods by sea.

By the end of the last millennium, it became clear, that the world has rapidly and drastically changed, and this simultaneously on several substantial levels. These changes brought along new expectations for a harmonized law on the carriage of goods by sea, and those expectations reached far beyond the issues of liability (an issue that we lawyers love so much, that we are too often drawn back to the quick-sand of debates on liability). Liability and risk issues remain important, but they are only a fraction of the issues that need to be tackled ([7]).

This explains why the Convention of 2008 (Rotterdam Rules) is a Convention harmonizing issues far beyond the pure issues of carrier' liability. Not to please academics or some over-ambitious delegates – but rather to address the issues that are (or have increasingly become) crucial for the functioning of the international over-seas trade.

Those new needs and expectations were diagnosed in the 90s of the last century ([8]), they are still present – almost 40 years later – but unfortunately still remain unresolved, as we still wait for the coming into force of the Rotterdam Rules. Not only are those expectations still present, but these expectations and the need for harmonization have increased in the last decades, as the players seek for clarification but are still not able to find answers in a global harmonizing instrument such as the Rotterdam Rules, but rather in some pragmatic market-based, domestic or regional solutions, a fact that is increasing the danger of an almost irreversible loss of harmonization in this crucial area of law.

Ahead lies a puzzle and piece-meal of slow and irreversible fractures in a robust trade and shipping pattern. Each of them may not be alarming, but the tendency is.

([7]) See Alexander von Ziegler, *Issues of Transport Law; Report of the Steering Committee*, CMI Yearbook 1998, p. 107 – 117; Alexander von Ziegler, *Particularities of the Harmonisation and Unification of International Law of Trade and Commerce*, Liber Amicorum Kurt Siehr, The Hague 200, p. 875-885.

([8]) See for the first thoughts in direction of a new harmonizing instrument: Alexander von Ziegler, *The International Law of Maritime Transport,* Center for Studies and Research in International Law and International Relations, Hague Academy of International Law, the Hague 1999, p. 75-150.

Many of us in the legal market are witnesses and actors in this process, as we are asked to litigate those issues in court, rather than being able to rely on a harmonized system and regime.

So, what are those issues that call for a new approach?

1. From Maritime-Shipping Services to Complex Supply Chain Services

In the few decades between the birth of the container and the times when the Rotterdam Rules were started to be drafted within the CMI, the logistics have gone through a tremendous e- if not revolution.

While the traditional tramp or bulk trade may still to a certain degree be following a pattern similar to the one established last century, the liner trade has gone through an enormous development, a real revolution. The shipping and freight forwarding industry have reacted to the high and demanding expectations and requests by the shippers world-wide and today offer complex shipment and distribution services – on the basis of one single contract and evidenced by one single transport document. This is asking for transportation which is seamlessly imbedded in a carefully structured logistic "algorithm" (9).

While liability for damages and losses were at the forefront of shipper's minds in 1924 (well, in fact in 1893), the robustness and predictability of the trade mechanics and with it the avoidance of frictions in the logistic chain is today the foremost aim when drafting a supply chain architecture for and with the respective customer.

This alone proves two things:

– There is need for a **door to door approach** not only in the logistical arrangements, but also in the harmonized law.

– The shift of the focus from liability to an architecture of the performance of the contract brings with it the shift from a pure liability Convention to one that is addressing the contract of carriage, and as such adopts a **contractual approach**.

Trade and shipping have been living these changes now for many decades and even today are working on a commercial and pragmatic level on a perfection of the trade and logistic mechanics.

National laws and courts are facing the issues that this shift has provoked. However, until today, they cannot rely on a robust harmonized legal pattern. The parties and the courts are left with their national (or applicable) law, and the industries are left with issues that eventually need to be resolved by courts – with costs, uncertainty and frictions. Once clarified in one particular court, the respective clarification only works in a particular jurisdiction and also only as long as the solution is not overturned by a subsequent court during an appeals process.

(9) The Rotterdam Rules address this phenomenon in Article 80 RR regulating the scope of freedom of contract for Volume Contracts (Article 1 (2) RR).

2. Electronic Commerce and Trade

Sometimes an introduction (or better invasion) of a new technology forces the global community to readjust its perspectives and to shift the focus.

This is particularly true for the electronic revolution which on so many levels has revolutionized all of our lives but certainly also – to a very high degree – the global trade, global shipping and all its ancillary services.

It calls on many levels for adaptation and creation of legal regulations, which have and will have huge impact for trading and shipping.

I mention jointly *trading and shipping* on purpose, as trade and shipping is a natural marriage of two commercial and legal spheres. The over-seas-sale / trade cannot function without global shipping and global shipping would not exist without trade ([10]). Likewise, sales law and the law of contract of carriage (including the transport documentation) need to be synchronized and the mechanics and interactions protected from frictions and lack of clarity.

Thus, when the introduction of electronic commerce and trade calls for a "functional equivalent" (and this in particular in the work of UNCITRAL on Electronic Commerce), there must be an existing pattern based on which this equivalence can be created ([11]).

For this reason, the expectation of modern trade and shipping inherently includes a request for a harmonized legal system on the key-elements of the contract of carriage on which trade relies today in a paper-based world. Thereby, their function can be translated in an equivalent way into the IT-based modern world. This calls for a radical change away from the purely liability-based approach – that was created 100 years ago and was maintained throughout the amendment and revision process in Visby and Hamburg – to a contractual approach, i.e. a harmonization process addressing the key interfaces between the contract of carriage with the international trade practices.

One cannot just copy & paste the old patterns into a modern legal scheme. One needs to apply a test of adequacy. Adequacy is not an academic formula but needs to be framed and defined by the involved industries, industries which have contributed as NGOs both in the preparatory work of CMI in drafting the draft Convention and later in the Working Group at UNCITRAL leading to the finalization of the Rotterdam Rules.

Thus, when the importance of Electronic Commerce is emphasized in the context of the Rotterdam Rules it would be wrong to refer (merely) to the provisions on the "electronic transport record" ([12]) as an alternative to paper transport documents,

---

([10]) See Alexander VON ZIEGLER, *Rotterdam Rules and the Underlying Sales Contract*, CMI Yearbook 2013, p. 273-286.

([11]) Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Ninth Session, 28 May-14 June 1996, points 210-215, reprinted in CMI Y.B. 1997, Antwerp I, Centenary Conference, p. 354-355; Alexander VON ZIEGLER, *Issues of Transport Law, Report of the Steering Committee*, CMI Yearbook 1998, p. 107-117.

([12]) Chapter 3, Articles 8-10 RR.

but rather and more importantly in the function of the full Rotterdam system as a basis for the "functional equivalency" on which electronic commerce is relying, in particular when using negotiable transport documents as defined ([13]) and regulated throughout the Rotterdam Rules.

3. Contractual Approach

Once it is clear that a future regime must adhere to a contractual approach (basically for the reasons referred to in the context of the issues arising under the electronic trade) one realizes how many important issues were left uncovered by any harmonizing instrument that was drafted before and was still confined to the liability issues.

This affects

- the identification of the parties to the contract:
  - contractual carrier (including a NVOCC / House B/L);
  - actual carrier (e.g. Master B/L) and maritime performing carriers;
  - contractual shipper (e.g. FCA/FOB buyer) and non-contractual / documentary shipper (e.g. a FCA / FOB seller);
- rights and duties of a third party (Holder / Consignee);
- amendments to contract terms;
- duty to deliver and procedures of delivery.

Again, this is not merely an academic exercise, but rather a differentiation identifying a number of persons/entities involved in the performance of the contract of carriage. In the context of an electronic environment this identifies the interfaces of the system and the "addresses" of the respective players to be imbedded in such a system in order to feed the pattern for the functional equivalent process.

This approach offers also an opportunity to cover issues such as allocation of rights and obligations to the respective persons and this at the different stages of the performance of the contract. This explains why the Rotterdam Rules regulate delivery issues in much more detail and not, as is the case today, just in the context of liability.

And all these clarifications are made providing added values for both the traditional as well as for the electronic commerce.

4. Door to Door Approach

Without any doubt, the only way to regulate modern maritime transport (mainly by containers) is to regulate the performances and the rights and duties throughout the lifespan of the contract, i.e. during the entire period of custody of the cargo with

([13]) Article 1 (15) RR.

the carrier, i.e. in a majority of cases from an inland point at the point of shipping to an inland point at destination.

To do this does not just mean to merely adapt the liability system to the fact that ancillary portions of the transit may not be performed by maritime transportation, but will have land-transportation legs between the place of delivery of the cargo by the shipper to the carrier at an inland place / terminal to the port of departure of the vessel and later between the port at the end of the sea voyage to the defined inland-delivery point (14).

Of course, liability in this scenario is one of the key challenges in a door-to-door operation (mainly due to some mandatory regional Conventions covering international inland transportation). However, in my view as importantly, many more issues such as the legal nature of maritime transport documents (such as the maritime bill of lading) for issues arising before or after the main maritime transport need to be tackled. In doing so, the Rotterdam Rules offer, in particular to the freight forwarding sector (operating as contractual carriers e.g. under a FIATA B/L) and their clients and trade financiers, a robust legal system which erases the many uncertainties that arise in national courts, such as in pending cases before Swiss courts as we speak.

5. Transport Documents

Existing Conventions – despite of the title of the Hague Rules as "International Convention for the Unification of Certain Rules of *Law relating to Bills of Lading*" – only focused on the issue of liability of the carrier and barely expanded on the legal nature and functions of the bill of lading as (transferrable and negotiable) transport document.

Thus, the only real trade-relevant provision in the Hague Rules is in my view to be found in the provision of the Hague Visby Rules on the conclusive evidence of B/L for third party (consignee) (15).

However, any modern regime must address much broader issues – in particular in defining the "functional equivalent" for electronic trade (16). This is particularly true for the bill of lading, but equally for all other forms evidencing the contract of carriage. Thus, it is crucial to clarify in an international harmonizing instrument (1) how rights and duties of the parties are enshrined in a document and (2) whether and how they are linked to whom-ever is holding the transport document, as well as (3) how these types of documents (together with the rights and possibly duties) are transferred and (4) how such rights are exercised based on the possession of the transport document. Once (and only if) regulated, the commerce involved would have received a robust basis for the "functional equivalent" technique applied for Electronic Commerce.

(14) Article 26 RR.
(15) Article 1 (1) Visby Protocol, i.e. Article 3 (4) Hague Visby Rules.
(16) Chapter 8, Articles 35-42 RR.

In addition, the bill of lading – the transferrable and negotiable document which is so important in trade finance – is today only one of the many forms in which the contract of carriage is evidenced and by which the cargo interests receive the crucial information also needed for evidencing their performance under the sales contract. It was, therefore, more than adequate to enumerate the various types of transport documents used in international shipping and trade.

The main feature of any transport document is, that it represents the contract of carriage ([17]) and evidences the taking into charge of the goods by the carrier ([18]). Such forms of transport documents include the Sea Waybill, i.e. the non-negotiable transport document or its electronic equivalent, the non-negotiable electronic transport record, and the bill of lading or its electronic equivalent, the negotiable electronic transport record. In their effort to mirror exiting established trade practices, the Rotterdam Rules reflect also the so-called "*straight B/L*" or "*recta B/L*", which is not negotiable to third parties but incorporates similar features as a full-fledged bill of lading, such as a right of control and a right to demand delivery upon surrender of the transport document ([19]).

Now that they are robustly regulated, the Rotterdam Rules go further to provide the principles on how the transport document may or may not affect the right of the cargo interests (shipper, holder, consignee) for exercising their rights to control the goods in transit or to request delivery at destination and also how those rights are to be transferred from one party to the other as a matter of the law of carriage of goods by sea to service their performance under the sales contact, i.e. the shipment and delivery of the goods purchased by the buyer from the seller.

6. Right of Control

The right of control represents a crucial function to maintain and transfer the control over the goods / the cargo during transit

- for the shipping contract (control over the cargo while in transit);
- for the sales contract (right of stoppage of the shipment / delivery of the goods in transit ([20]));
- for the trade finance arrangements (collateral for financing the purchase price).

The Right of Control must be regulated for each form of evidence of the contract of carriage / transport document.

([17]) Article 1 (1) RR; Article 5 RR; Article 36 RR.

([18]) Article 41 RR.

([19]) Article 46 RR; see Gertjian VAN DER ZIEL, *Delivery of the Goods*, in Alexander VON ZIEGLER / Johan SCHELIN / Stefano ZUNARELLI, Kluwer 2010, p. 198-200; Sefano ZUNARELLI / Chiara ALVISI, *Rights of the Controlling Party*, in Alexander VON ZIEGLER / Johan SCHELIN / Stefano ZUNARELLI, Kluwer 2010, p. 223-228.

([20]) Alexander VON ZIEGLER, *The Right of Suspension and Stoppage in Transit (and Notification thereof)*, in The Journal of Law & Commerce, 2005/6, Vol. 25, p. 353-374.

This right must be drafted in a way that such right may pass to a third party which is not privy to the contract of carriage before having received the transport document bas part of the trade transaction.

Of course, there is a particular, (especially important) function of the right of control in all cases where a bill of lading (or an electronic equivalent) was issued ([21]).

Once the Rotterdam Rules have provided such an identification of the rightful holder of the right of control, the rules can expand to at the same time provide an avenue and pattern for the carrier, should he require instructions or information in the course of the performance of the contract, to obtain such information from the cargo interests ([22]).

7. Transfer of Rights

The fact that rights to the cargo can be transferred from one person to another while the cargo remains in the custody of the carrier and travels over the seven seas, may be one of the genius inventions trade and shipping have developed about two centuries ago. The bill of lading and its additional function compared to the normal freight document (waybill) of being a surrogate for possession of the goods, i.e. a document of title and with this a means of transferring the right to whoever is becoming the rightful holder of such document makes trading in the literal sense of the term possible. Goods can be financed without additional collateral and can be on-sold by an initial buyer to a subsequent buyer, i.e. can be traded thanks to the negotiability.

The negotiability of this maritime super-document is so attractive that – as we speak – the international community is seeking a land-based equivalent for non-marine transits allowing trading and financing of the goods in a similar way as it is the custom and law with the bill of lading in the maritime plus environment ([23]).

In contrast to the vital if not existential importance of the negotiability function, no Convention so far has ventured to mirror those principles in harmonized form. Thus, when requesting a "functional equivalent", the parent of this equivalency is missing, as long as the Rotterdam Rules have not come to life. It would be quite odd if land-transportation would in fact be first in doing so, long before the maritime "mother" would have found a harmonizing regime in form of the Rotterdam Rules.

Thus, the chapter of the Rotterdam Rules on the transfer of rights is a central element of the Convention's aim to provide a robust legal basis, which eventually may serve as a pattern for the functional equivalent to be imbedded into electronic commerce.

([21]) Article 51 (3 and 4) RR.

([22]) Article 55 RR. This adds an important safety aspect, as the RR regulate the possibility of the carrier to obtain swift instructions in case of a casualty where particular characteristics of the cargoes may cause particular dangers to life and environment.

([23]) UNCITRAL Working Group VI: Negotiable Cargo Documents; see current status in https://uncitral.un.org/en/working_groups/6/negotiablecargodocuments.

8. Issues at Delivery

As a logical consequence of adopting a contractual and a door-to-door approach one has to realize that the most important phase of any transportation – the delivery at destination – is so little dealt with in the existing maritime cargo conventions.

Apart from liability-related issues at destination (such as the notice and the tools for determining the status of the cargo after transportation), there are no harmonized provisions.

And this, despite the fact that so many legal and logistic issues arise exactly before or at the time of delivery at destination.

The Rotterdam Rules have elevated the destination and the delivery issues to a core issue to be regulated, in making the duty to deliver the cargo at destination a core responsibility of the carrier ([24]) and devoting an entire and detailed chapter on the issues that arise in the context of delivery ([25]).

9. Modern Liability System

When approaching the "hot" issues of liability that were the core of the harmonization crisis between the Harter, Hague and Hamburg liability regimes, one has to recognize that the Rotterdam Rules have attempted (and in my view have achieved) to do the following ([26]):

- Modernize the liability regime in adapting to modern shipping technologies and to modern logistics;
- Allocate liability risks to the party that is in charge of the respective duty;
- Maintain the core Hague liability system and clarify the issues of the burden of proof but rephrase it away from the model bill of lading language of the Hague Rules into a modern codification of a basis for liability;
- Adjust the monetary elements to the monetary and currency developments since the 1980s.

This led to the following changes made by the Rotterdam Rules ([27]):

- Duty to Care for the Cargo now to include the duty to properly deliver the goods at Destination ([28]);
- Some room for freedom to contract for FIOS shipment ([29]);

([24]) Article 11 RR.

([25]) Chapter 9, Articles 43-49 RR. See Gertjian VAN DER ZIEL, *Delivery of the Goods*, in Alexander VON ZIEGLER / Johan SCHELIN / Stefano ZUNARELLI, Kluwer 2010, p. 180-218.

([26]) See Alexander VON ZIEGLER, *The Liability of the Contracting Carrier*, 44 TILJ 2009 (3), p. 339-348.

([27]) See Alexander VON ZIEGLER, *Compensation doer Damages: The Rotterdam Rules Appraised*, European Journal of Commercial Contract Law 2010-1/2, p. 31-62; Alexander VON ZIEGLER, *The Liability of the Contracting Carrier*, 44 / 3 2009 Texas International Law Journal, p. 329-348.

([28]) Article 11 RR.

([29]) Article 13 (2) RR.

– Duty to exercise due diligence in providing a seaworthy vessel has become a continuous obligation ([30]);

– Structure and burden of proof is visualized and spelled out ([31])

– Clarification: prima facie case by proof of the Shipper that the damage occurred during the custody of the carrier

– "Q-clause"-type fault-based general liability clause ([32]);

– Deletion "error in navigation" exemption

– Clarification: "Vallescura"-Principle now harmonized ([33])

– Liability for delay ([34]).

A liability for the "actual carrier" that was foreseen under the Hamburg Rules was expanded to the "Maritime Performing Carrier" to mirror the respective Himalaya Clause defences ([35]).

The limitation of liability was changed to 3 SDR per kilogram or 875 SDR per package ([36]) (i.e. a rise from 2 SDR/kg and 666,67 SDR/package under the Hague Visby / SDR 1979 and from 2,5 SDR/kg or 835 SDR/package under the Hamburg Rules). First, the raise of the amounts compared to the Visby levels reflect in my view quite accurately the currency-exchange developments and inflation since that time. Furthermore, at least for the modern liner-trade, the Container Clause provision both in the Hague Visby as well in Rotterdam Rules, by which the shipper may unilaterally (and without having to pay additional freight) identify in the transport document the numbers of parcels within a Container (and hereby multiplying the amounts per package) does in fact erase any privileges of the carrier to limit liability in a given case. It does so today and will continue to do this with the Rotterdam Rules.

In order to reflect the modern volume contract – practice a special provision of the Rotterdam Rules addresses the freedom of contract that should prevail in such commercial contracts([37]).

The main value of the modernization of the liability rules of the Rotterdam Rules lies in my opinion not so much in the rules themselves but rather in the fact that this modernization is at the same time the "cease fire" in the overrated debate on liability that has led to the Hague-Hamburg freeze.

For a liability regime intended to regulate a commercial contract between two commercial parties, it is anyway questionable why we are still overrating the liability

([30]) Article 14 RR.
([31]) Article 17 RR.
([32]) Article 17 (1) RR.
([33]) Article 17 (4) RR.
([34]) Article 17 (1) RR. Article 21 RR; Article 23 (4) RR; Article 60 RR; see Alexander von Ziegler, *Delay and the Rotterdam Rules*, Uniform Law Review, NS-XIV, 2009-4, p. 997-1009.
([35]) Article 19 RR.
([36]) Chapter 12, Articles 59-61 RR; see Yzuhuo Si / Ping Guo, *Limits of Liability*, in Alexander von Ziegler / Johan Schelin / Stefano Zunarelli, Kluwer 2010, p. 245-270.
([37]) Article 80 RR.

issues([38]). The main importance in relation to the liability issues is that the respective provisions procure a clear and harmonized regime that can be translated into risk allocations for trade, trade finance and insurance in providing a pattern that can be managed without having created additional frictions. With the translation of a Hague-based regime into a modern regime, this seems to be achieved, as the markets will be able to rely for the most parts on the rich jurisprudence established during the last 100 years for the Hague Rules instead of having to litigate anachronistic legal principles (such as e.g. the "error in navigation" vs. "crew's seaworthiness") in courts.

Thus, let us not be distracted by the liability issues, and re-focus on the entire harmonizing body established in the Rotterdam Rules, rules that reflect the modern shipping practice of today and integrate seamless into trade and trade finance practice, whether conducted in a documentary or electronic system.

V. Conclusions

The current harmony that seems to exist under a still prevailing Hague or Hague Visby (which we celebrate here, having had 100 years of success) is very fragile and the "Hague reign" will sooner or later be insufficient to address the issues and challenges of the 21st century.

This will lead to a situation where national or regional legislations will – one by one – distort or override the old harmonized regime and – with this – create a very disadvantageous dis-harmony which will have a degree of complexity and irreversibility which will cost trade, shipping and insurance a fortune.

It is exactly this threat which led to the Hague Rules of 1924 and later mobilized in the 1990s all players in shipping to engage in a project eventually leading to the Rotterdam Rules in light of the planned enactment of the revised US COGSA. The work on and the enactment of the Rotterdam Rules had stopped the national efforts towards an US domestic legislation – at least for the time being. But what is the future, in 10 years, in 50 years, in another 100 years?

Signs of intrusions into the Hague (Visby) Regime are growing from all different angles and in multiple forms. And this could be avoided, now that the Rotterdam Rules are successfully finalized and available for the globe to apply: If this unique opportunity is not taken and the modern Convention ratified, any chance for any other unifying regime – other than the Rotterdam Rules – is extremely small, increasing the risk that national or international regimes will grow like mushrooms all over the globe, complicated by competing subject matter instruments (such as in the electronic trade, multimodal supply chain regulation or land-transportation ([39]))

([38]) See also Alexander VON ZIEGLER, *Jurisdiction and Forum Selection Clauses and Freedom of Contract in a Modern Law on Carriage of Goods by Sea*, in Martin Davis, Jurisdiction and Forum Selection in International Maritime Law, Essays in Honor of Robert Force, Kluwer 2005, p. 85-117.

([39]) One recent example is the initiative of UNCITRAL regarding a negotiable cargo document, basically intended for land-based and multimodal transport documents. If not carefully drafted it may well spill-over to maritime and maritime + documents such as the traditional bill of lading as envisaged under the Rotterdam Rules. See https://uncitral.un.org/en/working_groups/6/negotiablecargodocuments.

that will in addition to the disharmony in the law of carriage of goods by sea introduce conflicting rules and principles intruding in a sector that is so much dependent on harmonized and predictable rules and mechanics.

And meanwhile, those many issues and topics which the Rotterdam Rules have addressed under their much wider subject matter scope are litigated in national courts, drawing on resources of the industries that are totally wasted when considering that the Rotterdam Rules, the available international harmonizing instrument, would have addressed those questions. And since most of those issues do not concern damages and loss to the cargo in the Hague-sense, the costs would hardly be covered by a traditional marine insurance and the resulting responsibilities not covered by traditional carrier's liability insurances. So, I had to witness in my own practice how those issues are pushing industry players towards the brink of bankruptcy. Problems may continue to arise also under the Rotterdam Rules, but at least there will be a robust legal regime that would address most of them, easing the identification of the criteria for a solution and avoiding the parties to have to get this through legal proceedings.

Thus, the question posed to all of us is neither (anymore) whether we are happy and content to remain working with the Hague Visby Regime (and here we need to accept that we speak of different regimes) nor whether we would like to adopt the Rotterdam Rules because we would like to modernize and re-harmonize the Hague Regime and at the same time fill gaps that the modern shipping and trade environment are expecting us to fill. The question is whether we can afford (and take the responsibility for this in-action) to leave the modernization and the filling of gaps to whomever in the international community – for them to answer the demands of trade and fill the gaps, for them to find solutions, solutions that will be national or regional, sector-specific, technology-reliant and more. Or, whether we rather take the huge opportunity of a long-negotiated global compromise instrument, readily available and ready to be doing all a modern carriage of goods by sea law is expected to do.

The question is,

– do we stick to the 1921 / 1924 world and letting external intrusions take over the gaps and anachronisms (and this without our saying)?

or

– are we ready for accepting the challenges of the presence and be prepared for the future, by going into the Rotterdam Rules regime?

Or, in other words

– it is not about "should we update Hague to Rotterdam"?

but

– can we afford not to move – on a global scale – from Hague to Rotterdam?

Can the Rotterdam Rules co-exist with laws based on the MLETR? (*)

Miriam GOLDBY (**)

1. Introduction

In 2008, one of the major contributions that the United Nations Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea 2008, (the Rotterdam Rules – RR) was intended to make to the law on carriage of goods by sea (whether in whole or in part) was the recognition that sea transport documents could be issued and used in electronic form, achieving identical legal effects to those achieved by their paper counterparts (RR, Art. 3).

Since the adoption of the Rotterdam Rules, the United Nations Commission on International Trade Law (UNCITRAL) has undertaken further work in this field, work intended to assist countries in reforming their laws on negotiable instruments and documents of title used in cross-border trade and related services, so as to recognise that these documents and instruments could be electronic. The outcome of this work was the UNCITRAL Model Law on Electronic Transferable Records 2017 (MLETR). ([1]) This model law has been endorsed by important players in the field of cross-border trade, most notably the International Chamber of Commerce ([2]) which in the early days of the COVID-19 pandemic in 2020 called on Governments to "remove legal prohibitions on the use of electronic trade documentation." ([3]) A year later the G7 nations committed to "promote legal frameworks compatible with the principles of the MLETR" ([4]) and another international organisation, the Interna-

---

(*) This is a conference paper presented at CMI Colloquium, "100 Years of Unifying Carriage of Goods by Sea" held in Goteborg, Sweden in a panel on *The Unification of the Law on Carriage of Goods Currently and in the Future*, on Thursday 24th May 2024. I am grateful to the organiser Prof. Paula Backden for the opportunity to present this paper at the Colloquium.

(**) Professor of Shipping, Insurance and Commercial Law at Queen Mary University of London.

([1]) UNCITRAL, Model Law on Electronic Transferable Records 2017, online at https://uncitral.un.org/en/texts/e-commerce/modellaw/electronic_transferable_records [accessed 3 June 2024].

([2]) See International Chamber of Commerce (ICC) Digital Standards Initiative (DSI), "Our Work", online at https://www.dsi.iccwbo.org/our-work [accessed 3 June 2024], "We engage the public sector to progress legislative reform and build capacity to implement digital trade … . The Model Law on Electronic Transferable Records (MLETR) drafted by UNCITRAL creates an enabling legal framework for paperless trade. It provides an international framework to align national laws and enable the legal use of electronic transferrable records both domestically and across borders."

([3]) ICC, Memo to governments and central banks on essential steps to safeguard trade finance operations, 6th April 2020, online at https://iccwbo.org/news-publications/policies-reports/icc-memo-to-governments-and-central-banks-on-essential-steps-to-safeguard-trade-finance-operations/ [accessed 3 June 2024].

([4]) G7 UK 2021, Digital and Technology Track, Framework for G7 Collaboration on Electronic Transferable Records, Annex 4 to the G7 Digital and Technology Ministerial Declaration, 28 April 2021, online at https://www.gov.uk/government/publications/g7-digital-and-technology-ministerial-declaration [accessed 3 June 2024].

tional Organisation for Standardisation (ISO) commenced a project for the development of standards for blockchain based bills of lading.([5])

As both the MLETR and the RR would be relevant to the functioning and legal effects of electronic bills of lading, the purpose of this paper is to assess whether the two pieces of legislation can co-exist, or in other words, whether they set out incompatible requirements to be met by electronic bill of lading systems.

An important consideration is that laws that align with the MLETR are already in force in a number of jurisdictions. The status report on UNCITRAL's website shows that 9 countries already have laws in force that align with the MLETR.([6]) Additionally, the MLETR Tracker provided by the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) and the ICC, which provides a visual representation of the countries that have adopted or are in the process of adopting the MLETR, shows that many more countries across the world are in the process of adopting such laws.([7]) Most notably, in France the bill adopting legislation based on the MLETR is in the latter stages of the enactment process at the time of writing.([8])

In light of the fact that the MLETR appears to be on track to become the standard for legislating in this space, this presentation will focus on addressing the following questions. First, in countries where the MLETR is adopted, is there any need to adopt the RR? In other words, can the MLETR be a substitute for the RR? Second, would an electronic system or platform over which electronic transport documents are issued and transferred that complies with the MLETR's requirements, need to satisfy further requirements or make any changes to its functioning if the Rotterdam Rules came into force?

2. Can the MLETR be a substitute for the RR?

In answering the first question, it is important to bear in mind that the two instruments are wholly distinct in their scope and purpose. While both instruments provide for the use of documents in electronic form, the purpose of the RR is to regulate contracts for the carriage of goods wholly or partly by sea. Thus, they focus

([5]) ISO/TC 154, ISO/WD 5909, Data interchange processes of blockchain based negotiable maritime bill of lading related to e-Commerce platform, online at https://www.iso.org/standard/84288.html [accessed 18 February 2024].

([6]) These are Bahrain, Belize, Kiribati, Papua New Guinea, Paraguay, Singapore, Timor Leste, United Arab Emirates – Abu Dhabi Global Market, and United Kingdom of Great Britain and Northern Ireland (whose Electronic Trade Documents Act 2023 is influenced by the Model Law and the Principles on which it is based). See UNCITRAL, MLETR: status, online at https://uncitral.un.org/en/texts/e-commerce/modellaw/electronic_transferable_records/status [accessed 3 June 2024].

([7]) United Nations Economic and Social Commission for Asia and the Pacific (UN ESCAP) and ICC DSI, Cross-Border Paperless Trade Database, MLETR Tracker, online at https://www.digitalizetrade.org/MLETR [accessed 3 June 2024].

([8]) Assemblée Nationale, Proposition de Loi, Accroître le financement des entreprises et l'attractivité de la France, online at https://www.assemblee-nationale.fr/dyn/16/dossiers/financement_entreprises_attractivite_France [accessed 3 June 2024].

exclusively on electronic *transport* records and articulate the effects of their use on *contractual* rights.([9])

On the other hand, the MLETR's focus is on enabling the use of *all transferable documents in electronic form*. This includes documents of title to goods, negotiable instruments and, at least in the UK iteration, also assignable marine insurance documents.([10]) The purpose of the MLETR is to ensure that such documents have equivalent legal effects when issued and used in electronic form as they do when issued and used in paper form. The MLETR however does not articulate what those effects are. These effects (whether contractual or proprietary) are simply those that would have ensued had the same document been issued in paper form, provided the MLETR's requirements are met.

The MLETR cannot therefore be considered a substitute for the RR, because they do not have the same purpose. The RR's main purpose is to harmonize laws governing the international carriage of goods,([11]) including the effects of issuing and transferring bills of lading, whether in electronic or paper form,([12]) other than property law aspects.([13]) The MLETR does not (and does not purport to) achieve uniformity in this regard. It only purports to achieve uniformity in terms of the requirements to be met by electronic records if they are to function as electronic transferable records.

The next section sets out these requirements and compares them with the requirements to be fulfilled under the RR if an electronic record is to function as a negotiable electronic transport record. The purpose is to assess whether adoption of the RR would introduce any additional compliance burdens on service providers whose systems are already MLETR-compliant.

3. Would subsequent adoption of the RR introduce new compliance burdens?

3.1. The Requirements Compared

The RR and MLETR differ in their articulation of the criteria to be met by information in electronic form before it is capable of functioning in the same way and have the same legal effects as its paper counterpart. First of all the terms used are different. An electronic bill of lading would be a negotiable electronic transport record in RR terms. For this purpose, it would have to fall within the definitions

([9]) Although their operation may also affect associated possessory rights over the goods: see RR Art. 47.

([10]) See UK Electronic Trade Documents Act 2023, s 1(2)(g) and (h). See also Law Commission of England and Wales, Electronic Trade Documents: Report and Bill, HC 118 and Law Com No. 405, 9 February 2022, online at https://lawcom.gov.uk/project/electronic-trade-documents/ [accessed 9 May 2024], (hereinafter LC R 405), paras 3.12-3.25, esp. 3.22-3.25.

([11]) See Michael F. Sturley, Tomotaka Fujita and Gertjan van der Ziel, *The Rotterdam Rules: The UN Convention for the International Carriage of Goods Wholly or Partly by Sea*, (2nd edn, Sweet & Maxwell, 2020), 1-008.

([12]) Sturley et al. (n 12), Chapter 7.

([13]) Sturley et al. (n 12), 7-001.

of "electronic transport record" found in RR Art. 1(18) ([14]) and "negotiable electronic transport record" found in RR Art. 1 (19). ([15]) In MLETR terms, an electronic bill of lading would be an electronic transferable record, and would have to fall within the definitions of "electronic record" and "electronic transferable record" in Article 2. ([16])

The two instruments follow similar drafting approaches with the definitions of "negotiable electronic transport record" (RR) and "electronic transferable record" (MLETR), cross-referring to another provision which sets out the requirements to be contractually provided for where parties agree to issue and use negotiable electronic transport records (RR Art. 9(1)) or met by an electronic record if it is to be the functional equivalent of a transferable document or instrument (MLETR Article 10).

RR Article 9(1) sets out the procedures that the contract between the parties must provide for as a minimum, including: a method for the record to be issued or transferred to the holder (Art. 9(1)(a)), an assurance of the electronic record's integrity (Art. 9(1)(b)), a manner in which the holder of the document can demonstrate that it is holder (Art. 9 (1)(c)) and a manner for confirming that the record has lost its effect and validity when it becomes spent (Art. 9(1)(d)).

The RR only require the contract to provide for these things. They do not explicitly require that the procedures be reliable or effective in achieving their purpose. In this, there is a contrast with the MLETR which provides that only if certain criteria are met will the electronic record be considered the functional equivalent of a transferable document or instrument issued on paper. The criteria are set out Art. 10(1) of the MLETR and are as follows (emphasis added):

(a) the electronic record contains the information that would be required to be contained in the transferable document or instrument; and

(b) a *reliable method* is used -

([14]) "Electronic transport record" means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

([15]) "Negotiable electronic transport record" means an electronic transport record:

(a) That indicates, by wording such as "to order", or "negotiable", or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and

(b) The use of which meets the requirements of article 9, paragraph 1.

([16]) "Electronic record" means a record generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not; "Electronic transferable record" is an electronic record that complies with the requirements of article 10.

(i) to identify that electronic record as the authoritative electronic record constituting the electronic transferable record;

(ii) to render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and

(iii) to retain the integrity of that electronic record.

Because the MLETR's purpose goes beyond bills of lading and extends also to other transferable documents, Article 10 (1)(a) sets out as a preliminary requirement that the document contain the information that would need to be present to make the document a document of a certain type, had it been issued in paper form. This is of course not required in the RR which sets out content requirements that are applicable to transport documents and electronic transport records alike.([17])

MLETR Art. 10(1)(b) then sets out further criteria that need to be met using a "reliable method". Sub-paragraph (iii) includes an integrity requirement similar to that found in RR Art. 9(1)(a)), with the only difference being that the MLETR, unlike the RR defines "integrity" (MLETR Art. 10(2)).

In contrast with RR Art. 9(1)(a), rather than referring to the method of issuing or transferring the negotiable electronic transport record, the MLETR requires that a reliable method be used to render the electronic record capable of being subject to exclusive control from its creation until it ceases to have any effect or validity (MLETR Art. 10(1)(b)(ii)). This does not mean however that the two instruments diverge: indeed the definition of "issuance" in RR Art. 1(21) refers to procedures that ensure that the record is subject to exclusive control. Similarly, the definition of "transfer" in RR Art. 1(22) also refers to exclusive control. This means that the contract procedures need to provide for the exercise of exclusive control over the record, giving "technical shape to the contents of the notion "exclusive control"." ([18])

This suggests that both instruments approach the notion of (exclusive) control as an outcome to be achieved in practice by whatever electronic method or system is being used to issue, transfer and hold the negotiable electronic transport record or electronic transferable record.

An additional requirement in the MLETR, not found in the RR is that a reliable method be used to identify the document, i.e. to give it an identity (MLETR Art. 10(1)(b)(i)). This mirrors an inherent feature of paper documents which have an independent existence of their own. This requirement is not made explicit in the RR.

There are two additional requirements in RR Article 9 which are not covered in MLETR Article 10. However, these matters are dealt with elsewhere in the MLETR. The requirement that the holder is able to demonstrate that it is the holder is covered in MLETR Article 11(1)(b), discussed below. The requirement that the termination of the electronic transport record's effect and validity be ascertainable is not explicitly provided for in the MLETR. However it may be said also to be

([17]) RR Art. 36 et seq.
([18]) Sturley et al. (n 12), para 3-036.

catered for in Article 11. As indicated in paragraph 121 of the Explanatory Note to the MLETR:

> "The delivery of a transferable document or instrument may be a necessary step in the life cycle of that document or instrument. For instance, the request for delivery of goods typically requires the surrender of a bill of lading. The Model Law does not contain specific provisions on surrender, since [Article 11] paragraph 2, which governs transfer of control as the functional equivalent of transfer of possession and thus of delivery, would apply also to those cases."

As the above analysis demonstrates, the MLETR requirements are, if anything, more onerous than the requirements in the RR. In addition, the RR merely indicate that procedures for meeting the criteria are to be contractually agreed, whereas the MLETR requires them to be met *reliably as a matter of law*. In light of this, it is submitted that a system which fulfils the MLETR requirements would be capable of continuing to operate under the RR without having to make any changes to its functionality.

3.2. Who is the Holder?

In the physical dimension, possession is key to identifying the holder of a bill of lading, and therefore the person in a position to exercise the rights of the holder.([19]) In light of the position in most jurisdictions whereby possession only applies to tangible things, both instruments had to find ways of addressing the issue with respect to negotiable electronic transport records (RR) or electronic transferable records (MLETR).

The RR adopt what can be described as a "parallel approach" to legislating on electronic transport records. This approach identifies the holder of negotiable transport document as a person in possession of it, whereas it identifies the holder of a negotiable electronic transport record as the person who has exclusive control of it (RR Art. 1(10), (21) and (22)).([20]) This means that while paper and electronic documents have the same effects, distinct regimes apply to each, with a regime based on possession applying to paper documents and a regime based on control applying to electronic documents. The notion of endorsement applicable to negotiable transport documents that are order documents, for example, would not seem to apply to negotiable electronic transport records.([21])

By contrast the MLETR integrates electronic transferable records into the regime that applies to paper documents, using the functional equivalence approach. So the regime governing acquisition and divestment of rights using an electronic transport record does not operate in parallel to the regime for paper documents: control is not a

---

([19]) See for example the definition of holder in s 5(2) of the UK Carriage of Goods by Sea Act 1992 which defines "holder" for its purposes as "a person with possession of the bill …".

([20]) RR Art. 1(10) defines the Holder as the person to whom the electronic transport record is issued or transferred. As was already observed above, issue and transfer are defined by reference to exclusive control.

([21]) RR Art. 1(10).

distinct juridical concept from possession, it is simply a functional equivalent to the fact of possession ([22]) and a tool enabling the possession regime to apply to electronic records. Indeed, if endorsement would be required to make a person the holder of a paper transferable document or instrument, it would also be required in respect of an electronic transferable record. ([23]) A consequence of this approach is that electronic transferable records can become the object of a possessory security. ([24])

Once again it would appear that the MLETR approach, is not less onerous but imposes requirements additional to the ones set out in the RR. Therefore, an electronic EBL system that already complies with the MLETR should have no difficulty operating also within the RR framework.

3.3. What is "(exclusive) control"?

The RR do not articulate what constitutes "exclusive control". This is because what constitutes "exclusive control" in technical terms, as explained in Section 3.1 above, is left to be determined by the contract particulars. The rationale behind this approach has been said to be as follows:

> "UNCITRAL realized that it could not set technical rules. As a matter of principle, it sought to be neutral about the specific electronic techniques that could be used for this purpose. In addition, new relevant techniques will presumably develop over time and the initially preferred technique may be suspended by another than is newer or better. This is the principal rationale for leaving the contents of the procedures to agreement by the parties. But the parties are not completely free to agree on what they consider to be "exclusive control". Their agreement on the matter must satisfy an objective standard of control. The minimum standard should be the security that the exclusive possession of a paper negotiable transport document currently provides to its holder. Only then would privately agreed procedures deserve the recognition contemplated by the Rotterdam Rules." ([25])

It should be noted however that the provisions of the RR do not anywhere refer explicitly to this minimum standard, and it remains to be seen whether it would be implied or not by any forum undertaking to apply the RR.

The MLETR goes further in explaining what is meant by exclusive control, identifying it as the functional equivalent to the fact of possession. As observed in the Explanatory Note (emphasis added):

> 107. The Model Law is concerned with identifying *a functional equivalent to the fact of possession*. In line with the general principle that the Model Law

---

([22]) See Explanatory Note to the MLETR para 107.

([23]) MLETR Art. 15.

([24]) As noted in the Explanatory Note to the MLETR (emphasis added):

> 108. The Model Law is not intended to restrict the creation of security rights in transferable documents or instruments. Thus, *control under article 11 provides the functional equivalent in those cases where the security rights would be created and made effective against third parties by possession of a paper document or instrument* … .

([25]) Sturley et al. (n 12), para 3-036.

does not affect substantive law, the notion of control does not affect or limit the legal consequences arising from possession. Consequently, parties may agree on the modalities for the exercise of possession, but may not modify the notion of possession itself.

109. … While a notion of "control" may exist in national legislation, the notion of "control" contained in article 11 needs to be interpreted autonomously in light of the international character of the Model Law.

In addition, the MLETR explicitly requires the use of a *reliable method* to establish exclusive control of an electronic transferable record by a person (MLETR Art. 11(1)(a)), therefore articulating in a legal provision what was left unsaid in the RR. In this respect, the MLETR can be seen as establishing explicitly the minimum standard that UNCITRAL intended to be applicable also in respect of negotiable electronic transport records to which the RR apply.

3.4. What are the Holder's Rights?

As noted in para 107 of the Explanatory Note to the MLETR, quoted in Section 3.3 above, the MLETR does not articulate the effects of having control of an electronic transferable record. These effects would be identical to the effects of possessing the paper counterpart of the record in question and will differ according to the applicable law, as the MLETR is intended for enactment as domestic legislation.

By contrast the RR do articulate the legal effects of having "exclusive control" as between carrier-issuer and the holder of the negotiable electronic transport record, and in doing so harmonize these effects. They include not just the holder's right to claim delivery of the goods from the carrier (RR Art. 47) but also a "right of control" over the goods (RR Art. 51(4)(a)) that applies throughout the carrier's period of responsibility (RR Art. 12) and includes the right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage (RR Art. 50(1)(a)); the right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route (RR Art. 50(1)(b)); and the right to replace the consignee by any other person including the controlling party (RR Art. 50(1)(c)).

The holder's rights against the carrier are thus clearly and comprehensively set out and, importantly, go beyond the rights set out in previous transport conventions ensuring greater uniformity. In this respect, therefore, the RR add significant value to the regime provided by the MLETR. Thus if harmonization of the legal effects of having control over an electronic transport record is desired, adoption of the MLETR by itself is insufficient and the RR would need to apply alongside it.

3.5. Change of Medium

Both instruments provide for the possibility of changing from paper to electronic and vice-versa (RR Art. 10; MLETR Art 17 and Art 18). The requirements for and effects of a valid change of medium are virtually identical – there are no material differences. Unlike the RR, the MLETR explicitly requires the replaced document

or record to be "made inoperative" but it is submitted that this requirement may be viewed as implied in the RR provision by the words "in place of".

Once again, there would appear to be no further requirements to be met, if the RR were to come into force, by an electronic bill of lading system that already fulfils the requirements of the MLETR.

Conclusion

While the approaches of the RR and the MLETR are distinct, the analysis in this paper demonstrates that the distinction stems from their different purposes, not from any divergence in principle.

The RR creates a parallel regime for electronic records based on exclusive control, explicitly setting out the consequences of having such control, namely being at law the Holder of a negotiable electronic transport record. The Holder of a negotiable electronic transport record has precisely the same rights, articulated the RR, as the Holder of a negotiable transport document.

By contrast, the MLETR sets out the criteria that need to be fulfilled by an electronic document for it to be treated as its paper equivalent. An essential criterion is that it has to be capable of exclusive control, conceived as a functional equivalent of the fact of possession. This makes the paper regime, based on possession, applicable to the electronic document. Therefore, the MLETR does not (and does not have to) spell out the consequences of having control.

There do not appear to be any material differences in terms of outcomes. The analysis in this paper shows that an electronic document that satisfies the requirements of the MLETR would satisfy also the requirements of the RR. This means that adoption and implementation of the RR by a state subsequent to implementation of legislation based on or compatible with the MLETR is unlikely to require system providers to make any changes.

The requirements set out in the MLETR can be viewed as providing a welcome and useful supplement to the agreement-based regime in the RR, while the RR fulfils an ulterior purpose of harmonising the effects of issuing and using electronic bills of lading.

Why ratification of the Rotterdam Rules is necessary for the United States

David J. FARRELL, Jr. (*)

The inability to muster two thirds of the US Senate to obtain its constitutionally required "advice and consent" to ratify the Rotterdam Rules (1) has slowed adoption by the rest of the world. MLAUS will keep trying but other nations should forge ahead on ratification without us. Your ratification may even persuade the US ports to come around on their curious, historic objection to the Rotterdam Rules.

I. The World's Biggest Island is a Seafaring Nation No More

With apologies to Australia, Canada, and Mexico, another qualification is needed after the above bold statement: The US has robust domestic, coastwise maritime industries. But we should be embarrassed at the post-WW II/post-industrial era demise of our international, overseas merchant fleet. (2) Understanding this background helps explain the frustrations faced by US proponents of the Rotterdam Rules.

A. Outsourcing the US International Merchant Fleet

The below graph reflects that the number of US-flag oceangoing merchant vessels declined 94% from 2,926 in 1960 to 169 in 2016 while the world-wide fleet increased 141% from 17,317 to 41,674 over the same time. "As a result, the US share of the worldwide fleet of ships decreased from 16.9% in 1960 to only 0.4% in 2016." (3)

Notes: Number of oceangoing self-propelled cargo-carrying vessels (of 1,000 gross tons and above). Data from Table 1-24, Bureau of Transportation Statistics

As reported by the US Maritime Administration in 2020, "**just 1.5% of US waterborne imports and exports by tonnage move on oceangoing commercial vessels registered under the flag of the United States**." Alarmingly, "there were 81 large, privately-owned, self-propelled US-flag merchant-type vessels of 1,000 gross tons or greater per vessel, and operat-

(*) Past president, The Maritime Law Association of the United States; Titulary Member, Comité Maritime International; fsofirm.com. The views expressed in this paper are his own.

(1) The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, sometimes cited hereafter as RR.

(2) See David J. Farrell, Jr., *After 100 Years Has the Jones Act Sunk the Jones Act and Vice Versa?*, 47 Tul. Mar. L.J. 209 (2023).

(3) William W. Olney, *Cabotage Sabotage? The Curious Case of the Jones Act*, at 10 https://web.williams.edu/Economics/wp/Olney_JonesAct.pdf (2020).

ing exclusively in the US international trades, down from 106 ships as of the end of 2010." ([4])

Thus, 81 US-flag overseas merchant ships serve the US population of 331 million people – 1 ship per 2.5 million people. A 1.5% industry has no political clout in the Senate.

B. Yet US Cargo Needs are Insatiable

Despite outsourcing our ocean carriage of international trade to other nations' ships, the US is dependent on our trade with the rest of the world, with our total oceanic imports and exports roughly 15% of the world's total. ([5])

US reliance (approaching addiction) on the convenience of door-to-door transport notwithstanding, to say that these millions and millions of US importers and US exporters constitute a coherent US maritime player would be misguided; they are landlubbers, too fragmented as both the consumers of designer sunglasses and the growers of soybeans to encompass with a salty common denominator.

Big money talks and politicians always listen. The US international ship finance sector, however, provides no political clout for the Rotterdam Rules' success in the Senate either. Indeed, a major reason for the decline of US-flag shipping was the rise of flags of convenience, like the Marshall Islands Registry. US money is still invested in maritime ventures – just not in a vibrant US-flag international fleet.

Oddly, the US Navy (without US ratification of UNCLOS either) now takes the lead in protecting freedom of navigation in the Red Sea, on the prowl for the disruptive Houthi Rebels. At least when President Thomas Jefferson in 1801 sent our infant Navy to fight the Tripoli Pirates in the Mediterranean it was because US merchant ships were under attack. Not now. The US Navy is policing possibly US-bound cargo, transported on other nations' ships.

There are obvious commercial and military risks for the US in having few merchant ships to fall back on if needed to carry our foreign trade or supply a distant military campaign. ([6]) But so long as the US gets its cargo in and out with no disruptions, all is good on the home front. Letting other countries carry it has worked pretty well, with only occasional recent disruptions like the COVID supply chain snag.

Yet those in the know in the US certainly laud Rotterdam Rules uniformity. The American Institute of Marine Underwriters (AIMU), ([7]) which includes domestic cargo insurers, is completely onboard. But realistically, our Senators are not going to rally around marine insurers alone for the good of the nation.

([4]) U.S. Department of Transportation, *Goals and Objectives for a Stronger Maritime Nation: A Report to Congress*, at 8 (2020) (emphasis added).

([5]) Compare https://www.trade.gov/maritime-services-trade-data (1.6 billion tons US international maritime trade in 2018) divided by https://hbs.unctad.org/world-seaborne-trade (11 billion tons worldwide seaborne trade in 2021).

([6]) Farrell, *supra* n.2.

([7]) https://aimu.org.

Who has political clout in the US when it comes to international maritime policy? Our biggest player is the gateway operation, with one foot on the water/one foot ashore. Our booming ports – for example, Long Beach/Los Angeles, San Francisco/Oakland, Seattle/Tacoma, New York/New Jersey, Baltimore, Norfolk, Charleston, Savannah, Florida's, New Orleans, Houston. Economic engines, employers, hubs, distributors, labor. Very powerful business and political voices, individually at the state level and collectively at the federal level. Your nations' ships call there to carry our international trade. Ours rarely do.

The US ports are a powerful political force very much to be reckoned with on domestic maritime issues – including ratification of the Rotterdam Rules.

C. The Powerful US Ports' Curious Opposition to the Rotterdam Rules

The American Association of Port Authorities ("AAPA") is a most impressive, savvy advocacy and lobbying group headquartered in Washington, "representing more than 130 public port authorities." ([8]) In 2013 AAPA wrote to the US State Department objecting to the Rotterdam Rules' inclusion of ports in the definition of "maritime performing parties," contending this made the ports easy targets for lawsuits.

This is the primary reason the Rotterdam Rules have never gotten to the US Senate: There is no other US maritime lobbying group that can come close to AAPA and its member ports in delivering electoral support and financial contributions to political campaigns.

In 2023 MLAUS approached several ports and AAPA, urging that they re-consider their objection. Below are two primary reasons AAPA has opposed the Rotterdam Rules and the MLAUS counterview.

1. "Maritime performing parties"

Under the Rotterdam Rules' definition

> **"Maritime performing parties"** 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 their 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.

RR art. 1(7) (emphasis added).

What AAPA does not like about the Rotterdam Rules is that "A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention" even though the clause immediately continues by providing that a **maritime performing party "is entitled to the carrier's defences and limits of liability as provided for in this Convention."** RR art. 19(1) (emphasis added).

([8]) https://www.aapa-ports.org.

This reiterates that the automatic incorporation of solid "Himalaya Clause" ([9]) protection in the Rotterdam Rules applies equally to the port as a maritime performing party:

> 1. **Any provision of this Convention that may provide a defence for or limit the liability of, the carrier applies** in any judicial or arbitral proceeding, **whether** founded in **contract, in tort, or otherwise,** that is instituted in respect of loss of, or **damage to, or delay in delivery of goods covered by a contract of carriage** or for the breach of any other obligation under this Convention **against**
>
> (a) The carrier or a **maritime performing party** … .

RR art. 4 (emphasis added). This makes clear what many contracts of carriage attempt to do, albeit sometimes defeated by a missing comma, ([10]) and unquestionably adds to the goals of uniformity and predictability while automatically protecting maritime performing parties like ports involved in the contract of carriage.

AAPA is encouraged to re-evaluate its objection that ports are maritime performing parties. As Professor Sturley writes, the Rotterdam Rules' allowing a cargo claimant's suit against a port as a maritime performing party

> was not revolutionary. Cargo claimants have long sued negligent sub-contractors that damaged their cargo. Article 19(1)'s innovation is to bring the action within the scope of the Convention, rather than leaving claimants with different remedies against different parties for the same loss or damage depending on whether the carrier or the responsible sub-contractor is being held liable. ([11])

2. "Volume contracts"

AAPA has also objected that the Rotterdam Rules give carriers and shippers the right to "opt out" of liability provisions whereas maritime performing parties like ports cannot.

Any suggestion that carriers and shippers can wholly "opt out" of liability would be an exaggeration. To the contrary, carriers and high-volume shippers cannot escape liability under the Rotterdam Rules' innovative allowance for limited "derogation" (relaxation) of Convention terms. Specific safeguards are built in.

Before diving into the Rotterdam Rules language on volume contracts, the concept is that sophisticated, experienced shippers who move large volumes of cargo in a series of shipments ought to be capable of negotiating with carriers – exercising the freedom of contract – to arrange for different rights, requirements, and/or damages than imposed by the rest of the Rotterdam Rules. But within limits.

([9]) A Himalaya Clause extends a carrier's liability limitations to its shoreside agents and independent contractors. See *Norfolk Southern RR v. Kirby*, 543 U.S. 14, 20-21 (2004).

([10]) See *Jagenberg, Inc. v. Georgia Ports Authority*, 882 F. Supp. 1065, 1075-76 (S.D. Ga. 1995).

([11]) https://mlaus.org/wp-content/uploads/bp-attachments/6106/What-Has-Become-of-the-Rotterdam-Rules-by-Michael-F.-Sturley-May-2017.pdf at 19379 (*Kirby*, 543 U.S. 14, and another case citation omitted).

Under the Rotterdam Rules' definition

> **"Volume contract" means 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.

RR art. 1(2) (emphasis added).

There are **"Special rules for volume contracts"** and strict conditions that must be satisfied:

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies **may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention**.
2. A **derogation** pursuant to paragraph 1 of this article is **binding only when**:
   (a) The volume contract contains a **prominent statement** that it derogates from this Convention;
   (b) The volume contract is (i) individually negotiated or (ii) prominently **specifies** the sections of the volume contract containing the derogations;
   (c) The **shipper is given an opportunity and notice** of the opportunity **to conclude a contract** of carriage on terms and conditions that comply with this Convention **without any derogation** under this article; and
   (d) The derogation is **neither (i) incorporated by reference** from another document **nor (ii) included in a contract of adhesion** that is not subject to negotiation.
3. A **carrier's public schedule** of prices and services, transport document, electronic transport record or similar document **is not a volume contract** pursuant to paragraph 1 of this article, **but** a volume contract **may incorporate** such documents by reference as terms of the contract.
4. Paragraph 1 of this article **does not apply to rights and obligations** provided in **Articles 14**, subparagraphs (a) and (b),([12]) **29 and 32**([13]) or to liability arising from the breach thereof, nor does it apply to any liability arising from an **act or omission referred to in article 61**.([14])
5. The terms of the volume contract that **derogate** from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, **apply between the carrier and any person other than the shipper provided** that:

([12]) Carrier's duty to keep ship seaworthy throughout the voyage.
([13]) Shipper's duty to fully disclose cargo contents with heightened duties and liability for dangerous cargo.
([14]) No carrier limitation of liability for intentional or reckless acts of omissions.

(a) Such person received information that **prominently** states that the volume contract derogates from this Convention and gave its **express consent** to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

6. The **party claiming** the benefit of the **derogation bears the burden of proof** that the conditions for derogation have been fulfilled.

RR art. 80 (emphasis added).([15])

Thus the Rotterdam Rules' volume contract provisions have numerous backstops. The carrier must provide specific, "prominent" notice regarding any derogation of Convention terms in the contract of carriage. The shipper must be given full "opportunity" to choose instead a contract of carriage absent any derogations. For every derogation there must be "express consent," with the burden of proof on the carrier in order to preclude its overreaching or its surprise incorporation of other transport documents or public tariffs. Plus, in any volume contract there are irreducible safety/legal obligations that the carrier maintains a seaworthy vessel throughout the voyage, that the shipper fully disclose cargo contents, and that neither can get away with recklessness.

Regarding third parties – like ports – the impact of volume contracts is specifically addressed in RR art. 80(5) where any derogation of the Convention's terms is disallowed absent the third party's "express consent." And any such derogation is limited by a higher bound: Whatever the carrier does, a port's maximum damage exposure will be established by the Convention's terms – which cannot be increased – and if the carrier happened to reduce its damage exposure in a volume contract, that reduction will be automatically passed on to the port *via* RR art. 4(1)(a)'s automatic protection.([16])

Ships and shippers make the world go round. If every party in the door-to-door supply chain were able to derogate from Rotterdam Rules provisions, the exceptions would swallow the Convention with evaporation of uniformity and predictability. The Rotterdam Rules' volume contract provisions recognize that allowing the two prime players in a contract of carriage some scope, with safeguards, to adjust sizable cargo deals accords with the modern commercial needs of recurring shipments in the liner trade.

3. Status quo?

In sum, it seems that the 2013 AAPA objection to the Rotterdam Rules was that the US ports were both (a) brought in anew for liability exposure yet (b) left out

([15]) See generally Michael F. Sturley, Tomotaka Fujita & Gertjan van der Ziel, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 375-385 (Sweet & Maxwell, 2010); Kate Lannan, *A General Overview of the Rotterdam Rules* at 13-14.

([16]) See Sturley, *supra* n.11 at 19385.

on limitation of liability. That is not the case. A port steps into a new, automatic protection of all the defenses available to the carrier under the contract of carriage, as governed by the Rotterdam Rules, and outside the scope of the Rotterdam Rules the port can still freely contract for indemnification from the carrier.

It may be that AAPA's opposition to the Rotterdam Rules is merely risk-averse, with the ports most comfortable continuing the *status quo*. But in so doing they stall a modernized legal regime that would advance international uniformity and predictability while accommodating containerization, door-to-door contracts of carriage, and e-commerce – all to the benefit of the ports' carrier and shipper customers.

4. Rotterdam Rules e-commerce uniformity

Rotterdam Rules supporters everywhere would do well to urge their own governments that e-commerce uniformity is a tangible gain that industry and citizenry alike can appreciate.

A practical selling point for AAPA and others is the intuitive appreciation that Rotterdam Rules e-commerce uniformity will speed up the supply chain. According to the International Association of Ports and Harbors,(17) "the Convention delivers much-needed uniformity and greases a frictionless supply-chain reducing congestion." Case studies from the UK demonstrate that the "green" elimination of paper transport documents will assist the ports in more efficiently moving ships and cargo in and out of their facilities, with in-port ship emissions reduced as well to further decarbonization.(18)

MLAUS worked with the State University of New York Maritime College in an effort to quantify time savings with a shift from paper bills of lading to e-bills. A model was developed but regrettably the two carrier companies we contacted were unwilling to provide proprietary information for data inputs into the model. Any CMI suggestion on how we might access such data or other creative ideas would be most welcomed.

II. The Rotterdam Rules Would Be Good for the US

Ratifying the Rotterdam Rules would provide overall benefits to the shipless US island nation of cargo interests. Modernization, uniformity, and predictability from an updated legal regime accommodating containerization, door-to-door contracts, and e-commerce have already been highlighted. In addition, there are specific points of law from ratification that would benefit US interests.

Currently applicable in the US, the 1936 Carriage of Goods by Sea Act ("COGSA"), the American version of the Hague Rules, is tilted against US cargo

(17) https://www.iaphworldports.org.

(18) See https://iccwbo.uk/wp-content/uploads/2024/04/Seizing_the_moment_Unleashing_the_power_of_trade_digitalisation_report.pdf, (excellent summary table at 3 on benefits of e-commerce across the board); https://www.fit-alliance.org/post/the-benefits-of-digitalisation (for shipping specifically).

interests. There are three ways COGSA's replacement by the Rotterdam Rules would benefit US manufacturers, growers, producers, retailers, consumers, etc.

First, the Rotterdam Rules overall will make ocean transportation safer by enhancing both carrier and shipper diligence. The carrier's error of navigation or management defense under COGSA([19]) (made largely irrelevant by modern ship-to-shore electronic communications) would be eliminated under RR art. 14(b), for instance, and intentional acts or omissions and recklessness would defeat carrier limitation of liability per RR art. 61. Similarly, full documentary disclosure of cargo contents, RR art. 29, and the dangerous goods rule, RR art. 32, should reduce the risk of dangerous, imported cargo and assist in casualty response when things go wrong.

Second, COGSA's outdated and penurious $500/package limitation([20]) would be finally put to rest. RR art. 59. US cargo importers and exporters, would benefit under the Rotterdam Rules with a doubled liability limit on a per package basis and also by joining the many other countries that consider cargo weight in determining the amount to which liability can be limited.

Third, the 1995 US Supreme Court's *SKY REEFER*([21]) decision would be abrogated by the Rotterdam Rules. *SKY REEFER* upheld the enforceability of foreign arbitration clauses for disputes between US cargo damage claimants and foreign carriers, sending them very inconveniently (for US claimants) overseas to wherever the foreign carrier might choose to arbitrate. RR arts. 66 and 75 would dramatically limit such clauses, making foreign carriers once again subject to suit in the US.

Abrogating *SKY REEFER* would make carriers litigation targets and not the ports in most cases. Under the Rotterdam Rules, with foreign carriers liable door-to-door, cargo damage claimants will choose to sue them in the US with a low bailment burden of simply proving the loss or damage took place during the time period of the carrier's responsibility. *See* RR Art. 17(1). As a practical matter, claimants will not name the port as a defendant given the steeper burden of proving that the port caused the damage. In those cases where the port clearly caused the damage (as when it drops a container of television screens and they all break), that's why there's insurance. But as earlier addressed, the port would get "the carrier's defences and limits of liability as provided for in this Convention," RR art. 19(1), while beyond that the port is still free to enforce whatever immunizations it contracted directly with the carrier.

III. Full Steam Ahead CMI

The Rotterdam Rules, without any question, are very much needed to facilitate 21st Century world trade. From the US perspective on ratification, AAPA is the most significant domestic political interest group and its support in the US Senate is crucial.

([19]) COGSA § 4(2)(a) at 46 U.S.C. § 30701 note.
([20]) COGSA § 4(5) at 46 U.S.C. § 30701 note.
([21]) *Vimar Seguros y Reaseguros, S.A. v. SKY REEFER*, 515 U.S. 528 (1995).

MLAUS will continue our communications with AAPA and try to elicit any other concerns AAPA may have that were not expressed in its 2013 objections letter. We will respectfully urge AAPA to both reassess its objections and acknowledge the benefits of an internationally uniform e-commerce legal regime to speed up the supply chain.

But please do not wait for that to happen. Other seafaring (or not) nations and regions of our interconnected CMI world should move ahead, regardless of US developments. Your ratifications may well encourage the most important stakeholder in the US to follow your example.

Implementation of the RR in the Scandinavian countries

Erik RØSÆG (*)

1. Status

The Nordic countries, Denmark, Finland, Iceland, Norway, and Sweden cooperate closely in the field om maritime law and have very similar maritime codes. The Scandinavian countries, Denmark, Norway, and Sweden have commissioned drafts for implementing the Rotterdam Rules (RR) into their maritime codes and Denmark has even passed legislation on the basis of the draft (which is still to enter into force).([1]) There drafts are very similar. In the following, I will discuss the thinking of the Norwegian Maritime Law Commission (NMLC), which made the Norwegian draft. I chaired the commission. Quite a few passages in the following are taken more or less verbatim from the report of that commission.

The topics below reflect the principal views expressed the NMLC, leading up to its conclusion to recommend ratification of the RR.

2. Recommendation of ratification

2.1. General

The NMLC is clear in its view that Norway should ratify the RR, in order to bring Norwegian law in line with the latest version of international conventions on uniform legislation. The rules have several positive aspects, such as fewer liability exemptions, a certain increase in liability limits, recognition of electronic bills of lading, and some regulation on door-to-door transports, and so on. However, the reform should only be carried out in coordination with other countries.

When several countries have ratified, there is reason to believe that support will increase at an accelerating pace. If support grows to the point it is relatively clear that the RR will become the new standard, the NMLC recommends that Norway also ratify. This does not depend on an evaluation of the quality of the rules, but rather on an assessment of the advantages uniform legislation can bring. Under such a scenario, it will be crucial – regardless of the content of the rules – that this set of rules is the one negotiated and that has the greatest chance of creating uniformity in legislation.

The same uniformity considerations that favor ratification when the rules have gained acceptance argue against ratification before this point. In that case, Nor-

(*) Professor at the Institute of Private Law at the University of Oslo.

([1]) Lov nr 618 af 12/06/2013 om ændring af søloven og forskellige andre love, NOU 2012: 10 Gjennomføring av Rotterdamreglene i sjøloven, SOU 2018:60 Tillträde till Rotterdamreglerna.

way would commit to a set of rules with limited adoption and uncertain long-term acceptance. However, there may be two exceptions to this viewpoint: Firstly, the ratification by Norway may help the rules gain acceptance and become the norm, leading to the belief that Norway should ratify. However, even though Norway is a relatively large shipping nation, it would be easy to overemphasize the significance of Norwegian ratification in this regard. Furthermore, political signals of support for the RR as the dominant, uniform set of rules can be just as clear and explicit without ratification. Moreover, the costs of such a contribution to rule development in terms of lack of uniformity between Norwegian legal rules and the rules of the majority of other states may make ratification less appropriate.

Furthermore, it is possible that Norwegian business interests – typically Norwegian carriers – may miss out on benefits without early ratification. However, it will rarely or never be the case that only, for example, shipowners domiciled in a convention state can invoke the rules; most countries implement them equally for all. The RR also assume that previous conventions are terminated (Art. 89), so while Norwegian business interests may win against the RR from such perspectives, they lose in relation to the Hague-Visby Rules.

On this background, the NMLC recommends that Norway ratifies the RR when it is relatively clear that the RR will become the new standard for legislation on liability for cargo damage, etc. This is unlikely to be the case until either the USA or the largest EU countries have ratified. However, a situation similar to the current one must be avoided, where neither the Hague Rules nor the Hague-Visby Rules is the dominant standard. Ratification should be avoided if it does not help to remove these types of situations.

I have now (in 2024) some doubts about whether these conditions ever will be fulfilled. In the US, there does not seem to be much movement towards ratification. In addition, the problem has arisen that port services run by states cannot be sued under the US Constitution.(2) This is a problem, as they may be liable as maritime performing parties pursuant to the RR. Although attempts have been made to construe the RR restrictively to avoid this problem, these attempts may not be generally accepted. Furthermore, if accepted, the rules may be construed restrictively also in a number of other cases, which will make them less effective as an instrument for harmonization. The RR does not allow reservations at ratification (RR Art. 90)

Even among the major maritime nations in Europe, there is not much movement towards ratification, neither within the EU nor in the UK. Spain has ratified, but that is all. An additional problem is that the EU member states has transferred their competence in respect of jurisdiction and recognition of judgments to the union, so ratifications has to be coordinated with the European Union if member states shall have the benefits of the (optional) jurisdiction and arbitration chapters. There iares no visible signs that the RR is on the agenda of the EU.

(2) Michael F. Sturley, *The Rotterdam Rules and Maritime Performing Parties in the United States* 79 JTLLP 13.

2.2. Transitional arrangements

If such a ratification policy were to result in delayed ratification, the question arises as to whether the rules should be introduced into the Maritime Code without ratification before then. In the current code, the Hamburg Rules are implemented as far as possible without conflict with the Hague-Visby Rules. In the opinion of the NMLC, little would be gained by doing so. However, should this be done, the legal situation would become too complex. The Rotterdam Rule legislation proposed by the committee should therefore only be implemented after ratification.

2.3. Jurisdiction and arbitration

Specific questions arise regarding the ratification of RR chapters 14 and 15 on jurisdiction and arbitration. According to RR Art. 74 and 78, ratification does not include these chapters unless specifically indicated. The background for this arrangement is the transfer of competence in this respect from the EU member states to the union (see above).

Norway is not bound by the EU constitution, nor through the EEA agreement.([3]) Therefore, Norway is free to ratify chapters 14 and 15 of the RR. The European rules on jurisdiction, recognition, and enforcement of judgments, to which Norway is bound through the Lugano Convention,([4]) do not prevent Norway from committing to special rules in specific areas under a convention like the RR (Lugano Convention Art. 67).

Regardless of whether one desires rules like those in chapters 14 and 15, the NMLC did not recommend the ratification of these rules. It is more straightforward to have the same relationship with the convention and the European rules on jurisdiction, recognition, and enforcement of judgments as Norway's close partners in the EU, including the three Nordic EU countries. Assuming that the EU does not ratify the RR, this means that reservations must be made for the Lugano Convention in the rules on jurisdiction. Therefore, the chapter on jurisdiction of the RR cannot be ratified.

One consequence of not ratifying chapter 14 will be that Norwegian judgments cannot be demanded to be recognized under Art. 73 in other convention states that have ratified chapter 14. On the other hand, the RR will not limit Norway's freedom to recognize or not recognize foreign judgments. However, this is not a significant issue as the obligation to recognize judgments under the wording of Art. 73 can be significantly limited in national law.

3. Format

In the Nordic countries, international conventions on the unification of maritime law are, as a rule, implemented by redrafting the substantive rules in a format that

([3]) Agreement on The European Economic Area, 1992.

([4]) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2007.

fits into the maritime code. This is also the legislative technique recommended by the NMLC in respect of the RR. In this way, one could preserve the structure of the legislation, which is uniform in the Nordic Countries, regardless of when and if the other Nordic countries ratify the RR.

Correct implementation require careful analysis of the existing national law, and it does become much easier by redrafting into the format of the maritime code. One has, however, to a large extent limited redrafting as much as possible, so that many provisions of the proposed revised Maritime Code are mere translations of Articles of the RR. The drafting technique clarifies which existing provisions should stand, for example because they deal with matters not addressed in the RR.

Arguably, the obligation of ratifying states is not only to implement the tenor of the RR correctly, but also the (translated) wording. However, the legislative technique seems to be accepted by many states. The RR Art. 82 takes advantage of much of the same technique when it specifies to which extent the RR States must respect other multimodal conventions, not leaving this to the text of those conventions.

In practice, one will always look to the underlying convention when the Maritime Code is construed. Therefore, I am not sure that there is much to gain from the efforts to fit the RR into the framework of the existing Maritime Code. One will have to consult the RR in any event.

Whether or not the text of the RR is rewritten in the implementation process, the Nordic tradition to emphasize the official comments of the drafters when legislation is interpreted. Nationally, the weight of these comments should be limited, as it is important to read the RR in an international context. Internationally, these comments should be considered much the same way as national judgments are considered. They may be persuasive but are not binding sources of law.

4. Substantive rules

4.1. Introduction

The RR drafting and solutions are not perfect, but they are good and the best alternative there is. There is no reason to reject the rules du to their substance. However, the quality of the rules is not the basis for the recommendation of the NMLC to ratify. In that context, uniformity is more important than quality.

In the following, I will discuss two of the substantive solutions of the RR as examples. The rules are assigned to me by the editors of this book.

4.2. Deviation

Sect. 279 of the NMLC draft implements RR Art. 24 on deviation. Deviation refers to carriers taking detours when carrying goods. The concept can be broadly used to encompass all forms of intentional delay and risk behavior.

The provision establishes that the general liability rules shall also apply in cases of deviation. Under Nordic laws, there is likely no need for such a clarification. However, in some countries, liability is increased in cases of deviation.

After this, the liability does not become greater or lesser when the ship deviates. If there is cargo damage during or due to deviation, the carrier is responsible for the error in the usual manner, with the right to exemptions and limitations of liability. And if the deviation leads to delay, the carrier is responsible for it according to the usual rules; if it is an unauthorized deviation, it is considered a fault.

Loading on deck can be considered as risk behavior and thus a deviation. The usual rules apply here as well, albeit with special provisions in draft § 267/ RR Art. 25.

Reasonable deviation to save human lives – and also property – has traditionally been considered justified. This is reflected in draft § 274/ RR Art. 17, subparagraph 3 letter (l) and (n), the current, Norwegian Maritime Code § 275 second paragraph, Hague-Visby Rules Art. 4, and Hamburg Rules Art. 5. Similar views also apply today regarding deviation for environmental reasons, as stated in draft § 274/ RR Art. 17, subparagraph 3 letter (n). An important consequence of these rules is that the carrier does not incur liability for delay in these cases, and the decisive factor for liability becomes whether the deviation is considered reasonable rather than a matter of negligence assessment.

In my view, the RR tidy up the law well at this point.

4.3. Multimodal transports

4.3.1. Introduction

After an eventual ratification of the RR, Norway will be bound by four main conventions that regulate transport contracts: RR (sea transport), CMR (road transport), COTIF (rail transport), and the Montreal Convention (air transport). Each of these conventions has its scope, as stated in the conventions. The purpose of implementing legislation is, of course, to apply the conventions within this scope.

The scope of the RR is outlined in draft Sect. 252/RR Art. 2. The scope provisions relate to whether sea transport has been agreed upon, and not how the transport is carried out. The NMLC believes this is a good approach.

In some cases, the boundary between transport conventions is not entirely clear, or confusion arises because the transport agreement is unclear. As such, international transport of a container by truck leg, a sea transport leg, and then a truck leg could be regulated by both CMR and RR.

The view of the NMLC is that the conventions must be interpreted in a way that avoids contradictions, if necessary, by limiting their scope. European case law includes some judgments that interpret the conventions in a way that avoids contradictions. For example, CMR does not apply to multimodal transports unless expressly stated, or it does not apply to transport agreements that do not specify a mode of transport. It has also been argued that the nature of the transport obligation

must be assessed, so that a multimodal agreement with elements of road and sea transport should not be considered a road transport agreement regulated by CMR if the transport or transport agreement has the main character of being sea transport.

Sometimes, even under current law, it may be unclear and difficult to determine in advance whether one or the other convention applies according to these rules; for example, it may not be known whether the goods will be loaded from the truck onto a ferry transport, which can be decisive for whether the convention applies under Art. 2 of CMR. It may also not be known whether a CMR consignment note or a RR transport document should be issued. In such cases, the parties should act to the best of their knowledge and issue documents based on what the issuer knows about the transport and the distinctions between the different transport regimes in force. If it turns out afterwards that the wrong transport document was chosen, the mistake should not be given any weight.

There will be many practical cases that are not directly covered by the scope of the conventions, for example, agreements where the carrier is free to use any means of transport. The Danish and Norwegian NMLCs discussed how such cases should be handled in international transport.

The main viewpoint in such cases should be that one or the other set of rules applies. If there is a transport agreement, the agreement should not be considered unregulated by the legislation. An exception may be international transport on inland waters, which, however, is impractical in Norway (and therefore unregulated). Such a viewpoint is in line with existing practice, but it is unclear whether it is current law today.

Sometimes it may be difficult to determine which set of rules should be used to supplement the transport agreement. The best solution would be if the parties clarify in their agreement what kind of transport they have assumed it is about. Such an agreement must be respected by the courts. If there is no clear agreement, other factors may provide guidance. For example, the parties may have agreed or assumed, in joint agreement, that special documents should be used. The use of a bill of lading is-at least in Europe-a clear indication that the rules of sea transport apply, unless it is a forwarder's bill of lading typically used in road transport. Furthermore, the parties' previous practices can provide guidance, as well as how this type of transport is usually carried out or how the specific transport was planned and executed. Overall, there are several circumstances that can be considered in a comprehensive assessment of what the parties are considered to have agreed regarding which transport regime should apply as background law.

RR Art. 82 (draft Sect. 258) applies to possible cases where multiple conventions with mandatory rule sets initially regulate the same transport. The committee assumes that the intent of RR Art. 82 is to remove any conflicts between the RR and other transport conventions. The technique in RR Art. 82 is that it exempts the RR in cases where conventions on air transport, road transport, rail transport, and inland waterway transport specifically regulate transports that also go by sea.

If RR Art. 82 gives precedence to one of the other conventions, it applies fully to the entire transport. This can result in two similar transports being regulated by different rule sets, depending on whether the goods remain on a truck during ferry transport or not. This is an inevitable consequence of the different conventions having been created at different times and under different circumstances.

The liability of the RR carrier will be discussed in detail below. The liability of sub-carriers and other sub-contractors is not addressed by the RR, neither so that excludes liability based on other conventions nor that the RR grants the sub-carrier immunity. The exception is sub-contractors within the post area, called maritime performing parties, which may incur liability under the RR Art. 19, cf. Art. 1(6) and (7). In the following, only, the RR carrier's liability will be discussed.

The RR allows some legs even of a multimodal transport to be excluded from the scope of the carrier's liability, typically so-called "merchant haulage". Even such situations will not be discussed here.

4.3.2. Liability pursuant to RR Art. 26

The issue addressed by RR Art. 26 addresses to what extent should the draft's rules fully apply to transport legs involving modes of transport other than seagoing vessels. Typically, this would involve pre- or post-carriage by truck in connection with sea transport.

Without RR Art. 26 (implemented by draft § 285), the RR would have had uniform liability; the same rules would apply door to door. However, since Art. 26 to some extent incorporates rules from certain other transport regimes, it is more accurate to say that it has a modified network liability.

The uniform network liability is particularly modified in two respects.

Firstly, it only applies to *transport regimes that would have been mandatory for the individual transport legs under international conventions or other international rules* (e.g., future EU rules). This means that if a container, unloaded from a ship in Gothenburg, is transported by truck to a destination in Sweden, there is uniform Rotterdam liability for the entire transport without any modification by a network principle because there are no international conventions for domestic transport in Sweden (the road transport convention CMR, by its content, only applies to international transports). However, if the container were transported to Norway, the truck transport would be mandatorily regulated by CMR if independently agreed upon, and the modified network principle in Art. 26 of the RR would apply.

Secondly, the network principle is modified so that even if the rules applicable to a specific transport leg are applied to a Rotterdam Rule transport, not all rules apply. *Only rules regarding the carrier's liability, limitation of liability, or time limits for bringing an action apply.* Rules concerning transport documents and shipper's liability, therefore, do not apply. Similar rules can be found, for example, in Art. 2 of the CMR. The way the rules are formulated has the advantage that the fundamental regime remains the same even when the modes of transport change. On

the other hand, it may be appropriate for liability rules adapted to specific modes of transport and their traditions to be applied when such modes of transport are used. The restriction to only international rules having an effect on the RR prevents them from being diluted by national legislation. Regarding the requirement that the rules to be applied must be mandatory in favor of the shipper, this is likely related to the desire to limit the network solution to rules that have the same character as the RR themselves.

These main rules must be specified in several respects:

Firstly, the damage must have occurred "e*xclusively before the goods are loaded on board the ship or exclusively after it has been unloaded from the ship*." If the damage is related to maritime transport, the RR apply without any network coverage. It is sufficient to preclude the network coverage that damage such as decay has its cause or has started on board, even if the main part of the damage has occurred on other means of transport. Similarly, there is no network principle if a decay process that started on another transport leg is not completely finished before the maritime transport.

Secondly, there must be mandatory international rules for "*the part of the transport where the loss of or damage to the cargo occurred*." It is irrelevant where the damage was caused or where it was discovered; it is where it first occurred that is crucial.

Thirdly, *several transport regimes may apply to the part of the transport where the loss of or damage to the cargo occurred*, e.g. if a truck is transported by rail for part of the way. In this case, both the rules for railway liability and road transport liability apply, cf. CMR Art. 2. "The part of the transport where the loss of or damage to the cargo occurred" is nonetheless the railway stretch.

Fourthly, after a *hypothetical assessment*, the international set of rules must be mandatorily applicable to the part of the transport where the loss of or damage to the cargo occurred if a separate agreement was concluded for this transport. It is unclear which country's law should be applied when determining which conventions are mandatorily applicable; it is not certain that Norway and the various countries involved in the hypothetical transport are obligated under the same conventions. For example, should the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) be considered a relevant mandatory regulation if a good on its way to Norway is transported on inland waterways on the Rhine, even if Norway has not acceded to this convention? The answer is probably yes, at least if the transport on the Rhine is between two convention states.

Fifthly, it must be clarified that it is the *provisions of the conventions that are applicable*, not national implementing legislation.

Sixthly, doubts may arise as to which of the provisions of the conventions should be considered as provisions on "*the carrier's liability, limitation of liability, or time limits for bringing an action*." The main viewpoint should be that only provisions directly concerning these matters are applicable in the Rotterdam context, and not, for example, provisions on interest calculation and contractual liability.

4.3.3. Assessment

All in all, this is a manageable modified network principle. In the Norwegian consultation process, the rules have been criticized as leaving too much to the clarification of the courts. However, it is difficult to avoid that when the other conventions are as they are.

5. Mandatory rules

Historically, the rules on liability for cargo damage have been established to protect the interests of cargo owners, and the countries where these interests dominate, against unfair waivers and limitations of liability. For this reason, these rules have been mandatory and not subject to agreement. However, the need for mandatory rules in this area may have diminished over the years in countries like Norway.

Firstly, these rules have become industry standards and are regularly incorporated voluntarily into carriage contracts for goods regardless of the application of mandatory rules. It is unlikely that this practice will change even if freedom of contract becomes more prevalent. This tendency is not observed in cases where freedom of contract exists in transportation relationships. The fact that inflation has eroded most of the value of limitation amounts, even after the adjustment in the RR, supports this argument. There is no longer much to gain from disclaiming all liability.

Secondly, unreasonable waivers and limitations of liability can now be set aside under general contract law rules. A fair outcome can be achieved even without mandatory regulations.

Thirdly, there are now well-developed insurance options available for both cargo owners and carriers. The question of who should bear the loss in transport liability becomes largely a matter of determining which insurance scheme should be used. It may be difficult to justify mandatory regulation in this regard.

Fourthly, the image of the carrier as the stronger party and the cargo owner as the weaker party is not as clear-cut as portrayed in legislation. There may be situations where there is an excess of tonnage, giving the cargo owners a negotiating advantage. More effective competition laws may result in price formation reflecting the balance of supply and demand in such cases. Moreover, large shippers may have significant bargaining power over carriers. The RR reflect this in provisions stating that the rules are not mandatory in some cases but not to the extent that all situations where the carrier lacks bargaining power are exempted.

Fifthly, insurance costs related to cargo damage and loss are not likely to be a significant proportion, relatively speaking, either for carriers or cargo owners, to justify mandatory regulations.

This picture may be different in countries with different general contract law and economic conditions than Norway. In such cases, mandatory rules may play a necessary protective role. This may justify making the rules mandatory in an international framework. However, mandatory rules can have negative effects:

Firstly, mandatory rules can prevent parties from agreeing on the most economically efficient allocation of risk, resulting in socioeconomic loss.([5])

Secondly, the reasonableness scrutiny of agreements will be influenced by the fact that the relationship is regulated by law. In certain circumstances, it is conceivable that extensive waivers and limitations of liability, as provided for in the Hague-Visby Rules and the RR, would be set aside by the courts. However, when the agreement is in accordance with the legal framework, it would require a great deal for the courts to set aside the agreement.

In this regard, legislation upholds agreements that might otherwise be considered unfair. However, any potential drawbacks of the RR requiring mandatory application of cargo liability rules can be outweighed by the benefits of a unified international regime. There are significant advantages to having such an international regime in terms of training, predictability, and preventing cases from being moved across borders to apply a more favorable set of rules. If one wants to adopt the international regime, they must accept the mandatory nature of the rules.

6. Risk distribution

The RR, like the Hague-Visby Rules, are rules regarding whether the carrier should pay compensation for cargo damage and loss if they are sued by cargo interests. However, it is not certain that the outcome of such a lawsuit is the same as the economic end result. From a legislative perspective, it is the end result rather than the court result that is interesting.

It is common for the carrier to take out liability insurance, and the cargo side insures itself against damage and loss of goods that the carrier does not cover. For the individual carrier and the individual cargo interest, the outcome of the individual lawsuit plays a lesser role. It is the average of the lawsuits that matters because it determines the insurance premiums. Particularly on the carrier side, it is argued that insurance premiums are highly dependent on the loss statistics. The risk distribution then comes into play on a less abstract level.

Regardless of the abstract level at which risk distribution occurs, it is not certain that the party initially responsible for payment cannot shift the loss onto others. A carrier or a cargo owner who tries to increase their price due to increased expenses (e.g., insurance premium) will quickly discover that there are limits to what the other party will accept or what the other party needs to accept according to the agreement. Consequently, for example, increased cargo damage costs for the carrier do not usually lead to a corresponding increase in price to the consumer of the transported product, or conversely, a reduction in the carrier's costs does not lead to corresponding reduced prices for the goods.

Exactly how the end result of the legislation regarding the distribution of risk for cargo damage will be is difficult to say generally. The end result is related to how freight rates (transport prices) affect supply and demand. But there is reason to

([5]) NOU 2012: 10, annex 2 (note by Prof. Erling Eide).

believe that freight rates (transport prices) are adjusted to some extent if the rules regarding cargo damage risk change, so that lower carrier liability results in slightly lower freight rates (transport prices) and vice versa. The extent of such adjustments is difficult to determine without specific market research.

From a legislative perspective, however, the most important thing is that the end result tends to be the same regardless of how the law regulates the risk.[6] Therefore, legislation regarding cargo damage liability cannot easily provide advantages or disadvantages to the carrier or cargo side. All legislative measures will result in an adjustment of freight rates (transport prices) that eliminates the distribution effect of the legislation.

7. Harmonization

7.1. The expressed objective

At the conclusion of the work on the RR, UNCITRAL itself described the original purpose of the work on the RR as follows:

> "At its twenty-ninth session, in 1996, the Commission considered a proposal to include in its 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 where no such rules existed and with a view to achieving greater uniformity of laws. At that session, the Commission had been informed that existing national laws and international conventions had left significant gaps regarding various issues. Those gaps constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication on the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies." ([7])

The fundamental purpose was to create more uniform rules where the international rules differed, and to supplement with new rules where needed. In particular, the need for rules on electronic documentation of cargo was emphasized. The motivation was that greater legal uniformity would facilitate the flow of goods and reduce the costs associated with transportation.

It is worth noting that there was no fundamental dissatisfaction with the existing sets of rules. The point has not been, for example, a fundamental redistribution of the risk of cargo damage between the shipper and the carrier. The aim has been to find a common platform based on the rules that already exist.

([6]) Parisi, F. (2008). *Coase Theorem*. In: The New Palgrave Dictionary of Economics. Palgrave Macmillan, London. https://doi.org/10.1057/978-1-349-95121-5_517-2.

([7]) UNICITRAL document A/CN.9/WG.III/WP.100.

7.2. Further about the harmonization objective

Creating uniform rules – legal harmonization – has been a driving purpose of international maritime law work for over a hundred years. Harmonization has effects on several levels.

It is an advantage for representatives of different countries to come together to discuss maritime legal issues. Regardless of whether an agreement is reached on a text, this will contribute to a common understanding of the problems, shared considerations of interests, common terminology, and understanding of other solutions and how they interact with national solutions. If the harmonization process leads to an agreement on how national law should be, i.e., a convention on uniform laws, it has the additional advantage of making it easier to determine which law applies when it could be relevant to a case.

If full harmonization is achieved, none of the parties can gain an advantage by filing a claim in a particular jurisdiction ("forum shopping"), thus avoiding certain costly elements in resolving the conflict and the possibility for resourceful parties to act in their own interest.

If harmonization is not fully achieved, it will still be possible for one party to take advantage of differences in the legal regulation between countries. In such cases, partial harmonization will rather facilitate than hinder such activity, as it can easily be determined where the legislation is the same, so that one can look for differences to exploit in other areas.

So far, no convention on uniform laws has led to full harmonization of the legal situation regarding the carriage of goods by sea. Partly because only a small part of the relevant legal area has been harmonized, and partly because the conventions have been interpreted in different ways.

Different ways have resulted in different solutions, despite the conventions. But more importantly, the conventions only have a relatively limited scope because countries bind themselves to different conventions.

However, as mentioned above, the efforts towards harmonization have some effect. However, full harmonization will not be achieved until there is a worldwide and comprehensive convention on uniform laws-a "universally acceptable harmonizing instrument."

7.3. Clarification of ambitions

During the negotiation process of the RR, the ambitions were modified several times. The following topics were at some point included on the list of issues that should be addressed but were later excluded: ([8])

– The relationship between the bill of lading or sea waybill and the rights and obligations between the seller and buyer of the goods, as well as the legal position of those financing a party in the carriage agreement, including the

([8]) UNICITRAL document A/CN.9/WG.III/WP.100.

transfer of rights in the goods and rules on who can enforce rights against the carrier.

– Reform of all transport agreements, regardless of whether they relate to one or more modes of transport and regardless of whether the agreement is electronic or written.
– Freight (remuneration for transport services)

Despite this, the RR appear as a more complete set of regulations than, for example, the Hague-Visby Rules. The areas that are regulated are also more detailed in many respects. In this sense, the efforts towards harmonization have made significant progress if many countries bind themselves to the RR.

7.4. Simplification of rules

A need for simplification of rules has been raised in the literature. It makes little sense for legislation to establish a complex and discretionary boundary between the carrier's and the cargo's risk of cargo damage if both parties are insured to the extent that it simply becomes a distribution between two insurers. These perspectives do not seem to have been very prominent in the negotiations on the RR. However, in certain areas, the rules have been simplified, such as the exemption of liability for errors in the handling of the ship. In other areas, the rules have become somewhat more complex. This applies, for example, to the burden of proof rules in RR Art. 17. Overall, one can say that the need for simplification is present, but it is not a need that the RR have prioritized to address.

8. Environmental concerns

Those who drafted the RR had no ambitions for it to be a tool in environmental and climate policy. It would also be impractical to address environmental issues such as water and air pollution or a possible policy to promote short-haul goods in a convention on transport liability. However, the NMLC has supplemented the RR with environmental provisions in two areas.

Firstly, this applies to transport planning. The RR apply in common cases where the carrier has significant discretion to choose whether the transport will be by ship or by road, for example. The agreements should then be understood so that the carrier, in the planning process, is obliged to consider which alternative produces the least greenhouse gas emissions and is otherwise the most environmentally friendly. In addition to serving as a reminder to consider such factors, this interpretation rule would also make it legitimate for the contracting party to prioritize environmental concerns rather than just cost considerations.

Secondly, the speed of the vessel has an impact on the environment. The vessel's fuel consumption increases exponentially with speed, and so does the emission of greenhouse gases. Therefore, rules should allow for moderate speeds as a starting point ("slow steaming"). This can be done without contradicting the RR.

With these additions, the RR will be even more attractive.

9. Conclusion

The main basis for the conclusion of the NMLC to recommend ratification of the RR is to support the uniformity of maritime law. The substantive rules of the convention are good, but not a sufficient reason for ratification. In a similar way, other important issues considered by the NMLC does neither support nor count against ratification. These include the need for mandatory rules, risk distribution between carriers and cargo interests, harmonization of maritime law and environmental concerns.

Benefits in the Rotterdam Rules from the Perspective of a Ratifying State

Manuel ALBA FERNÁNDEZ (*)

1. Introduction: carriage of goods by sea and problems in practice and litigation.

The objectives of the Rotterdam Rules (RR or the Convention), since early in the process for their negotiation and drafting, can be and are usually summarized in three main goals. First, to keep, improve and update a significant part of the substance of the previous conventions on contracts for the international carriage of goods by sea (The Hague or Hague Visby Rules and the Hamburg Rules), second, and on the basis of experience, to introduce rules on some aspects of the contract that are not addressed in such conventions, and, finally, and through these two primary efforts, to provide a suitable alternative to both The Hague and Hamburg schemes so as to restore uniformity in this area of the law (1). The Rotterdam Rules, for these reasons, are more detailed and address a wider set of matters relating to the contract of carriage of goods as compared to previous instruments. This visible difference is sometimes identified as a possible reason to render the application of the RR a bit more demanding or complicated than the application of previous regimes, which we may seemingly be more familiar with. The idea that we would like to highlight in this writing is that the truth is expected to be precisely the opposite. The Rotterdam Rules will, in our view, simplify solving many of the problems that arise in practice when the carrier's or the shipper's obligations are breached.

To argue how this may be so in the future, we will specifically focus on the experience in Spain. Spain is currently one of the five States that have ratified the Rotterdam Rules (2). As such, there is obviously no experience in Spanish courts in the application of the Convention, and yet several arguments can be made by looking to the experience under current law and at the text of the Convention. There's a rather basic idea that, in any case, should be kept in mind when undertaking in such a comparison. The problems that, in modern (and not so modern) trade, arise in the course of the performance of carriage services and contracts including a maritime leg normally hover around the breach of the main obligations of the parties (the carrier's obligation to carry the goods being most frequently the source of controversies). Such problems and their potential solution, however, are also constantly related or dependent on several different contractual issues, including conclusion of the contract and standing or the parties involved, proof or valid-

(*) Associate Professor of Commercial Law Universidad Carlos III de Madrid Department of Private Law.

(1) See Michael F. Sturley, Tomotaka Fujita and Gertjan van der Ziel, *The Rotterdam Rules*, London: Sweet & Maxwell, 2010, p. 2-13.

(2) Along with four African States: Benin, Cameroon, Congo and Togo (https://uncitral.un.org/es/texts/transportgoods/conventions/rotterdam_rules/status, last visit in May 2024).

ity of their agreements, documents issued and their effects, location and nature of damages, losses or their causes, duties or obligations of the parties other than the main ones (e.g., information duties), intervention of third parties, or communications between the parties prior to, or after a breach is claimed. Needless to say, all these issues arise and have to be solved or clarified in practice, with or without any help of international rules. Leaving momentarily aside how they may enable new practices or provide a more updated framework, one of the differences between the Rotterdam Rules and previous conventions is that the Rotterdam Rules will render some of these problems clearly less dependent on national laws and the conflict of laws approach. This is how the RR would make life easier, as compared to current reality, to a greater extent dependent on the interaction between applicable national laws and The Hague or the Hamburg Rules.

The aspects of the contract of carriage of goods including a maritime leg that we shall focus upon do provide some examples of the changes introduced by the Rotterdam Rules, which, in general, but also in light of the specific experience in Spain, may make a clear difference in controversies.

Spain is a country with a significant coastline and an intense maritime trade, for both import and export flows. Like possibly in many other countries, the market for transportation services is heavily intermediated, particularly for road, sea and multimodal carriage. For general and containerized cargo, and in general for low volume shipments, a good proportion of international services are structured as "maritime-plus" transportation services (i.e., services combining a maritime carriage and carriage by another mode). These services are provided by freight forwarders, which for subcontracting purposes rely on liner sea carriage. Project cargo is also handled sometimes (but much less frequently) by specialized forwarders through maritime-plus services, which however rely on chartering contracts for the maritime leg. The most frequent combination in these cases is sea and road. The consolidation of these contractual structures in the market has clearly reflected in litigation, where claims for loss or damage are made by consignees or shippers as against the forwarder and / or the actual maritime performing carrier, as well as by forwarders themselves (in their capacity as shippers) against, for instance, the maritime carrier when the damage or loss took place during sea transportation. Likewise, not infrequently, maritime carriers claim as against freight forwarders for freight or / and other expenses due after carriage.

The legislative landscape in Spain for these claims has very significantly improved since 10 years ago, when we repealed book III of our 1885 Commercial Code on Maritime Commerce to pass the 2014 Maritime Navigation Act (MNA) [3]. Spain is a party to The Hague-Visby Rules (HVR). The MNA extended the application of the liability provisions in The Hague-Visby Rules to national or international contracts that otherwise do not fall within the scope of application of this conven-

[3] Act 14/2014, of July 14, on Maritime Navigation. A non-official English version of the MNA published by the Spanish Ministry of Justice can be found here: https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Act_14_2014__dated_24th_july__on_Maritime_Navigation_%28Ley_de_Navegacion_Maritima%29.PDF, last visited in May 2024.

tion, thereby harmonizing this aspect of all contracts for the carriage of goods by sea subject to Spanish law (4). Also, for some things that are not addressed in the HVR, the MNA is partly based on the Hamburg Rules (HamR), namely as regards the provisions on delay in delivery, on actual carriers and their liability (5), as well as, to some extent, on jurisdiction and arbitration (6). In other words, the MNA, among other things, entailed an effort to increase harmonization within its limited possibilities, by amplifying the application of Hague-Visby, and to update the legal framework for the contract for the carriage of goods by sea to the extent possible, by incorporating some of the provisions of Hamburg.

This "patchwork" of provisions, which is also present in some other European and non-European countries, is somehow conditioned by the fact that The Hague-Visby Rules are still the dominant and most accepted convention on maritime carriage of goods, but also on the awareness that its old regime, other than partial, is clearly outdated and needs improvements. Such an approach is not far from the spirit that inspired in the first place the negotiation of the RR as an improvement, an update and a third way between the two maritime conventions in force, as previously stated. As a matter of fact, by the time the MNA was finally approved, Spain had already become a party to the Rotterdam Rules, and the additional provisions of the MNA foresee the adaptation of the Act as soon as the RR enter into force (7).

Being an improvement, this solution, on the other hand, is far from ideal, particularly as compared to a scenario where the RR become the uniformly applicable framework. In the first place, the application of the provisions of the MNA that, we may say, complement the ones in the HVR, require of course that the law applicable to the contract is Spanish law, which is very frequently, at the very least, controverted between the parties, with the ensuing costs (8). Second, and particularly for maritime-plus contracts, the application of the maritime framework under the HVR and the MNA may also be the subject of doubts and controversy. The problems that are experienced in practice with regard to this issue are those common in general to multimodal contracts for the carriage of goods, by reason of the lack of a framework specifically addressing such types of contracts. The MNA includes provisions that equate the multimodal bill of lading to the maritime one (9), thereby applying the same regime to both. However,

(4) Art. 277 MNA.

(5) Arts. 207, 278 and 280 MNA.

(6) Arts. 251 and 468 MNA.

(7) Pars. VI and XIII of the Preamble and Final Provision one MNA. The MNA also includes provisions on electronic bills of lading, partly based on the Rotterdam Rules (Arts. 262-266).

(8) Many cargo claims by shippers or consignees are based on a multimodal or a maritime bill of lading (BL). When the claimant is the third-party holder of the BL, such a circumstance, depending on the terms of the claim, opens room for the application of conflict of laws provisions relating to transferable or negotiable documents as applied to bills of lading; an issue for which Spain only has a general and rather old rule in the 1889 Civil code, that refers to the law of the place where the document has been issued (Art. 10, par. 3). However, in many of these cases, Spanish courts tend to approach the issue of the law applicable to the claim as a purely contractual matter, therefore relying on the Rome I Regulation (Regulation EC No. 593/2008 of the European Parliament and of the Council, of 17 of June 2008, on the law applicable to contractual obligations).

(9) Art. 267 MNA.

it also states that its rules only apply to the maritime leg in multimodal carriage ([10]). Not only that, Spanish legislation includes also provisions on the contract of carriage by land that unfortunately have important frictions with the MNA (as, for contracts including a land leg, they tend to bring these contracts under the regime of land carriage, particularly when the damage is not localized, in terms that are generally clear, but not entirely consistent with the MNA in this point ([11])). In brief, even if we have recent and reasonably updated laws, inspired by uniform law instruments, they cannot compete in certainty with a uniform regime such as the one that the Rotterdam Rules would and hopefully will provide.

2. Application of the Rotterdam Rules to contracts for the international carriage of goods wholly or partly by sea.

One of the notorious contributions of the Rotterdam Rules in the described context lays in the provisions that include in their material scope of application contracts for the carriage of goods by more than one mode. Namely, and besides contracts for the international carriage of goods by sea, the Rotterdam Rules apply to contracts for the international carriage of goods by different modes, provided the carriage obligation includes an international sea leg ([12]).

The policy choice that the Rotterdam Rules make in this sense seems more realistic in the present market reality than, both, the fully single mode-scoped approach of Hague and Hamburg, and the one-size-fits-all approach that the 1980 Geneva convention attempted for all contracts for the multimodal carriage of goods ([13]). The experience in a country like Spain confirms one of the premises that grounded this option: the inclusion of an international maritime leg in an otherwise international multimodal contract clearly shapes the contents and the risk of the contractual relation, bringing it closer to the economy and the problems of international maritime carriage. Far from being totally new, this same approach is also followed in other conventions on the contract for the carriage of goods by road or by rail in force in the European region, under which, for example, a contract that includes a relatively minor or ancillary sea leg in a service otherwise defined by a significant road or rail transport segment is subject to the legal regime devised for the contract of carriage of goods by road or rail, as the case may be ([14]). Furthermore, such an approach is also expected to bring several advantages.

The application to maritime-plus door-to-door contracts will give recognition to a single period of liability for these contracts, and the application of a single regime

([10]) Art. 209 MNA.

([11]) Arts. 67 to 69 of Act 15/2009, of 11 November, on the contract for the carriage of goods by land.

([12]) See particularly de definition of "contract of carriage" in Art. 1, par. 1, and the provision in Art. 5 RR, defining the geographic scope of application of the Convention.

([13]) United Nations Convention on International Multimodal Transport of Goods, May 24 1980.

([14]) See, e.g., Art. 2 of the Convention on the Contract for the International Carriage of Gods y Road of 1956 (CMR), in force in Spain as amended by the Protocol to the Convention of July 5, 1978; Art. 24 of the Convention concerning International Carriage by Rail of 1999 (COTIF), in force in Spain as amended by the Vilnius Protocol of 1 of July 2006, as well as Art. 1, pars. 3 and 4 of Appendix B to the Convention (Uniform rules Concerning the Contract of International Carriage of Goods by Rail, CIM).

to the whole carriage operation as a general rule, including the provisions on the obligations of the carrier and its liability for loss or damage to the goods or for delay, as well as the provisions on shipper's obligations and liabilities. The benefits of this approach reach both parties in the contract; but, also, this may well reflect in contracts for trade finance or for the insurance of the goods during carriage, as the application of a single regime to the contract will clearly improve certainty both for financiers and insurers.

In this specific setting, the Convention does provide for two safeguards in light of the particularities and the problems that multimodal carriage contracts may entail. In the first place, Art. 82 preserves the application of other international conventions that may potentially apply to maritime-plus international carriage contracts, with preference, therefore, over the Rotterdam Rules. This article was drafted mainly thinking on the CMR Convention, the CIM Rules in the COTIF convention ([15]), the 1999 Montreal Convention ([16]), and the Budapest inland waterway carriage convention ([17]), as they may apply to contracts for the multimodal carriage of goods with an international sea leg. The provision, however, may well solve frictions with other regional or international instruments modelled upon either of them. For Spain, for instance, this safeguard is particularly important as regards Ro-Ro carriage in the Western Mediterranean area across the Gibraltar Strait, as it ensures peaceful coexistence with the CMR ([18]).

Second, and regarding the carrier's liability, the Rotterdam Rules, even when they apply to a contract in accordance to their own terms, do not prevent the application of other international instruments on the carrier's liability relating to non-maritime carriage. Specifically in cases where the loss or the damage to the goods, or the event causing a delay, takes place solely and entirely in a non-maritime leg, Art. 26 RR allows the parties to rely on the mandatory provisions on the carrier's liability (including limitation) and time for suit contained in an international instrument in force that would have applied if the parties had concluded an contract for the carriage of the goods exclusively for the leg and the mode concerned (the so-called "hypothetical contract" rule or principle ([19])). In situations where the service is contracted by shippers with an intermediary, which in turn subcontracts performance of the carriage in different legs, Art. 26, for instance, allows such intermediary (e.g., a forwarder) to keep the correspondence of its liability framework as a carrier, and the ensuing risk, with its rights as shipper in back-to-back contracts.

([15]) See the provisions referred to in the previous footnote.

([16]) Convention for the Unification of Certain Rules for International Carriage by Air, of 28 of May 1999.

([17]) Convention on the Contract for the Carriage of Goods by Inland Waterway, of 2 of June 2001.

([18]) In a usual transport operation in Ro-Ro trade between to inland places, the shipper would contract the service with the road carrier, which would contract the carriage of the loaded vehicle across the Strait with a sea carrier providing liner services. The first contract between shipper and road carrier would remain subject to the CMR, in accordance with Art. 2 and the rest of applicable terms (and as also foreseen in Art. 82 RR). The second contract would remain subject to the applicable sea carriage convention (The Hague-Visby Rules, under Spanish law; the Hamburg Rules under, e.g., Moroccan Law; the Rotterdam Rules if both countries were to replace existing conventions therewith).

([19]) In Art. 26, par. (a) RR. See STURLEY, FUJITA and VAN DER ZIEL, *cit. supra* note 1, p. 66-69

One aspect that is also relevant, in relation to both maritime-plus and wholly maritime contracts, relates to the geographic scope of application of the Rotterdam Rules. Partly following in this regard the approach of other sea and non-sea carriage conventions ([20]), the Rotterdam Rules foresee their application to contracts where, alternatively, the place of receipt of the goods by the carrier, the port of loading, the port of discharge or the place of delivery to the consignee provided for in the contract is in a contracting State ([21]). The application of the convention is rendered independent of the issuance of any particular document, as well as of the presence of a Paramount clause, as currently happens under The Hague-Visby Rules for in-bound carriage ([22]).

3. Some aspects relating to delivery of the goods at destination and possible resulting claims in the Rotterdam Rules.

The issues that may arise after carriage at the port or place of destination of the goods are among those aspects for which the Rotterdam Rules would both increase uniformity and improve or update existing international rules. The ones that we will address in this section are goods that remain undelivered at destination, the notices to be given in case of loss, damage or delay, the time for suit, and the limits of liability set in the Rotterdam Rules.

a. Undelivered cargo.

An example of how the Convention would increase uniformity with a positive practical impact are generally the more detailed provisions on the duties and obligations of the parties with regard to the delivery of the goods ([23]), with no parallel in the HVR or the HamR. As part of the said scheme, particularly the rule in Art. 48 provides a useful tool to manage situations in which the carrier has difficulties or impediments to deliver the cargo. Contractual or legal tools for handling situations where the goods cannot be delivered after carriage, for reasons not attributable to the carrier, have become unfortunately and ostensibly relevant during the COVID pandemic. The dramatic consequences thereof in logistics served as a reminder of the problems that carriers, including non-vessel operating carriers or forwarders, may face even if the carriage has been properly performed and the goods are prepared for delivery ([24]). Cases where the goods may nonetheless remain undelivered include situations in which the consignee does not show up, claim or accept delivery (a situation sometimes referred to as "abandoned goods" following customs' termi-

([20]) Among others on non-maritime carriage, see, e.g., Art. 2, par. 1 HamR, which however includes other connecting points following the HVR.

([21]) See again Art. 5 RR.

([22]) Art. 10, par. c) HVR.

([23]) Art. 43 to 49 RR.

([24]) *Transport and trade in the age of pandemics. Implications of the COVID-19 pandemic for commercial contracts covering the transportation of goods in the Asia-Pacific region and beyond*, United Nations Economic and Social Commission for Asia and the Pacific, June 2021 (available at https://www.unescap.org/kp/2021/transport-and-trade-age-pandemics-implications-covid-19-pandemic-commercial-contracts, last visited in April 2024), p. 5.

nology); or where the carrier is entitled to refuse delivery. For instance, and even if the consignee claims delivery of the goods, some national laws, as well as frequently contracts of carriage, provide for the right of the carrier to retain the goods if payment of the freight or expenses due remains outstanding. Likewise, national laws frequently foresee in these cases the right of the carrier to dispose of the goods to secure payment of amounts due with the proceeds. Regardless of this, finally, in these situations we have to add the possibility that the goods have to be handled or disposed of, in order to avoid their deterioration or their potentially harmful effects. A frequent challenge in these cases in current reality, both for carriers and shippers or consignees, is to figure out what are their rights and obligations ([25]), as neither Hague, Hague-Visby or Hamburg address delivery or these sorts of situations where the goods cannot be delivered. The priority of legal rules here, other than providing clarity, ought to be to find a reasonable balance between the interests of each party.

The provisions on undelivered cargo in Art. 48 address the need to have a clear system in place to tackle all such situations. The scheme built into the Convention applies in the above-referred alternative hypotheses where the goods cannot be delivered for reasons alien to the carrier ([26]). The Rotterdam Rules do not set a right for the carrier to retain the goods to secure payment of freight or other amounts due, but they explicitly leave unaffected such rights when existing under the contract or the law applicable thereto ([27]). In the situations covered by its provisions, Art. 48 clearly sets what are the rights of carriers when the cargo remains undelivered, which include their handling, storage or even destruction, as the circumstances may require. The Rotterdam Rules impose on the carrier strict duties of transparency, as any measures to be possibly taken have to be first communicated to the notify party (if identified in the contract) and to the consignee, the controlling party or the shipper, if known to the carrier (the shipper will always be known to the carrier). The provision, on the other hand, does also relieve the carrier from its liability as such under the Convention as soon as the goods can be considered undeliverable (even if the carrier is still liable for ensuring that measures taken are appropriate ([28])). The measures that the carrier may adopt include also having the goods sold. Art. 48 also provides for an obligation for the carrier to hold the goods or proceeds after their sale, as the case may be, at the disposal of the person entitled thereto, at the same time stating the carrier's right to deduct from the proceeds the amounts due strictly by reason of the carriage of the goods sold ([29]).

The rules that allow disposing of the goods by destroying them or having them sold necessarily rely on references to local practices, laws or regulations, as procedures for those purposes vary from country to country and unavoidably depend

---

([25]) See, for instance, remarks in *Best Practice Guide on Abandoned Goods*, International Federation of Freight Forwarders Association, 2 December 2020, p. 11 and ff.

([26]) Par. 1 of Art. 48 RR, part of which has to be read in light of the provisions referenced in its text (Arts. 43 to 47).

([27]) Art. 49 RR.

([28]) Par. 5 of Art. 48.

([29]) Pars. 3 and 4 of Art. 48.

on local instruments, authorities and infrastructures. Spanish law, for instance, will need very little adaptation for these purposes once the Rotterdam Rules enter into force. The Maritime Navigation Act does regulate procedures for disposing of the goods (which are entrusted to the authority of a notary public), but render their application subject to the condition that "the law applicable to the contract of carriage entitles the carrier to store or have the goods (…) sold in case the consignee refuses payment of the freight (…) or the expenses resulting from their carriage, or does not claim delivery of the goods (…)". The right of the carrier to rely on the application of such procedure, therefore, is left subject to the rules applicable to the contract of carriage and, to that extent, on the conflict of laws approach (no sea carriage convention in force deals with this matter). Under the Rotterdam Rules the problem is largely solved in Art. 48, as previously seen, which will certainly be for the benefit of carriers, shippers and consignees, as well as possibly other actors in trade with an interest in the goods.

b. Notices to be given in case of breach by the carrier and time for suit.

Also in the final stages of the life of the contract, and with particular relevance for cases of breach of the carrier's and the shipper's obligations, the Rotterdam Rules introduce some changes with respect to time periods to give notice for delay or for loss or damage to the cargo, and for time for suit.

When the goods suffer loss or damage, the Rotterdam Rules state that the consignee has to give notice thereof before or at the time of delivery, if the damage is apparent, or within 7 days for not apparent (as compared to three days in The Hague-Visby Rules and 15 in Hamburg). The Convention explicitly lays down the principle, also implied in previous maritime uniform rules, that the omission of the notice grounds a presumption that the carrier delivered the goods as required by the contract, but it does not affect the right of the consignee to claim or otherwise alter the rules on the carrier's liability in these cases ([30]). For delay, the Convention states than notice must be given, not merely of the fact of the delay, but of "the loss" resulting therefrom, within 21 days after delivery of the goods (the right to claim in this case is lost if notice is not done). Other than adjusting periods, as compared to previous conventions, the provision in the RR do clarify some doubts arisen in their interpretation.

Important additions are made in the rules on the time for suit ([31]). The time for suit in the Rotterdam Rules is set in two years after delivery took place or ought to have taken place under the contract of carriage. The period may be extended by a declaration of the person against whom the claim is made (following in this approach the Hamburg Rules, rather The Hague Visby Rules, which, at least liter-

([30]) Art. 23, pars. 1 and 2 RR. The Convention, consequently, also maintains notice requirements in this setting in order to induce a quick reaction by claimants and reinforce the reliability of available evidence of the damage or loss during carriage – see STURLEY, FUJITA and VAN DER ZIEL, *cit. supra* note 1, p. 152-155.

([31]) Arts. 62 and 63 RR.

ally, required an agreement between the parties ([32])). The time for suit laid down on the Rotterdam Rules applies, both, to actions against the carrier or maritime performing parties and to actions against the shipper, documentary shipper, controlling party, holder or consignee for the breach of any the obligations stated in the Convention ([33]). Even when the period of time for suit has lapsed, the RR do also expressly provide for the right of the parties to rely on their claim for the purposes of set-off as against claims initiated by the other party ([34]).

c. Limits of liability.

The limits of liability of the carrier are raised in the Rotterdam Rules ([35]), as compared to The Hague, Hague-Visby or Hamburg Rules. The limitation per kilo is set in 3 Special Drawing rights ([36]) and 875 per package or unit ([37]). The applicable limit is the one resulting in a higher amount, so that the per kilo limitation will be the applicable one where packages or units are heavier than 291,66 kg. The raise of the limits was not taken during negotiations of the Convention as an extreme change, as by those days estimates placed the value of about 90% of the goods carried by sea below the limits in the HVR ([38]). However, at least in figures, the RR's raise and limits seem reasonable as compared to the ones applied in most jurisdictions under The Hague system. The parity of the SDR as against the four currencies that feed its quotation has not significantly changed in the last 40 years. The applicable limit to losses for delay is 2,5 times the freight paid for the delayed goods, with a maximum of likewise 2,5 times the freight paid for the carriage of all goods ([39]).

4. Jurisdiction and arbitration in the Rotterdam Rules.

Likewise in the terminal phases of the contract of carriage, one of the probably most delicate parts of the Rotterdam Rules, like in several of the previous conventions dealing with the contract of carriage, is dispute resolution. Chapters 14 and

([32]) Art. 3, par. 6 HVR.

([33]) Francesco Berlingieri, *A comparative analysis of The Hague Visby Rules, the Hamburg Rules and the Rotterdam Rules*, paper delivered at the General Assembly of the AMD, Marrakesh, November 5, 2009 (available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/berlingieri_paper_comparing_rr_hamb_hvr.pdf, last visit in May 2024), p. 36.

([34]) Provisions on the time for suit also address recourse or indemnity actions in Art. 64, as well as specifically actions against the person identified as the carrier in the situations referred to in Art. 37, par. 2, where the contract particulars do not identify the carrier but indicate that the goods have been loaded on a named ship.

([35]) Art. 59 RR.

([36]) A 50% increase of the HVR limit, a 20% with respect to Hamburg.

([37]) A 34,1% increase of the HVR limit, a 4,8% with respect to Hamburg.

([38]) Sturley, Fujita and van der Ziel, *cit. supra* note 1, p. 165-166.

([39]) Art. 60 RR. In any case, the maximum compensation payable under the Rotterdam Rules, where the loss or damage exceeds those limits, is the limit set for loss or damage to the cargo in Art. 59. Also, the Rotterdam Rules address the loss of the right to limitation in cases where the personal act of the person causing the damage and entitled to limit amounts to willful misconduct or recklessness. Finally, Art. 83 leaves unaffected the application of international conventions or national laws on the global limitation of liability of vessel owners or for maritime claims.

15 of the Convention respectively address international jurisdiction and arbitration under the contract of carriage of goods for actions against the carrier or maritime performing parties. These chapters are made optional to contracting States, as they will bind only those that make a declaration to that effect. The opt-in mechanism particularly foreseen for these chapters was mostly prompted by the fact that in the EU States have lost competence on issues relating to international jurisdiction on civil and commercial matters in favor of the European Union, and only the Union is competent for the ratification of Chapter 14 of the Rotterdam Rules ([40]). This being said, the scheme provided for in the Rotterdam Rules, as an advantage, may well provide sufficient flexibility to attract those States that may be more reluctant to accept the mandatory rules on jurisdiction and/or arbitration.

The chapter on jurisdiction follows the general purpose of procedural rules in other carriage conventions: to restrict the freedom of carriers to address this matter in the contract and bring litigation to an unreasonable forum or outside the geographic area where the convention may apply (which would in fact frustrate the objectives of the substantive regime laid down in the rest of its provisions, as non-contracting states may -under their conflict of laws provisions-, but would not be obliged to apply the Convention). With this purpose, Chapter 14 recognizes the right of the claimant (shipper, controlling party, holder or consignee) to alternatively initiate actions against the carrier in the fora identified in the text as reasonably close to the contract, provided they are in contracting States ([41]). It also addresses the alternative fora for actions against maritime performing parties, also identifying the available fora for joint actions against these and the carrier ([42]).

The rules in Chapter 14, including the right of the claimant to initiate actions against the carrier (or a maritime performing party) in one of the listed fora, have a mandatory character. The provisions in this chapter, however, recognize the effects of exclusive choice of forum or choice of court agreements if concluded after the dispute has arisen ([43]) or otherwise (before a dispute has arisen), and as between shipper and carrier, subject to several and quite restrictive conditions. First, the chosen forum or court must be in a contracting State. Second, the agreement must be in a volume contract, as defined in the Convention, that must in turn meet certain conditions ([44]). The exception is meant to fit into the one largely made to the mandatory character of the Convention for volume contracts in Art. 80, on the basis of their (arm's-length) negotiated character and contents. Exclusive jurisdiction

([40]) This is also why the Rotterdam Rules include the so-called "regional economic integration organizations" clause in Art. 93.

([41]) Art. 66, par. (a) RR: in a competent court (defined in Art. 1 as a court in a Contracting State) in the State of the place of the domicile of the carrier, the place of receipt or the place of delivery agreed in the contract of carriage, the port of loading onto a ship or the port of discharge from the ship of the goods. Letter (b) adds to these courts the ones designated in an agreement between shipper and carrier, without prejudice of the available fora under letter (a).

([42]) Arts. 68 and 71, par. 1 RR.

([43]) Art. 72, par. 1 RR.

([44]) Art. 67, par. 1 RR.

clauses are recognized effects as against persons other than the shipper if certain further limited cumulative conditions are met, including that the chosen court is in one of the alternative fora otherwise available for actions against the carrier, and the clause is included in a transport document or an electronic transport record (45).

Chapter 15 is essentially intended to curb the risk that carriers resort to arbitration agreements with the purpose to circumvent the mandatory character of the rules on jurisdiction, where applicable (46). Thus, the provisions on arbitration allow arbitration agreements for disputes under the contract of carriage between the shipper and the carrier, but preserve the right of a person claiming as against the carrier to alternatively initiate arbitration proceedings in one of the places where actions may by likewise alternatively brought under the jurisdiction chapter (other than in the place of arbitration designated in the agreement) (47). The place of arbitration in the agreement will be binding for the claimant (thereby losing its right to choose) in equivalent circumstances to those that allow recognition of the effects of an exclusive choice of court or forum agreement (48). Without prejudice of their main purpose, these provisions are fine-tuned to try to cater for the situations in which the Convention may apply to a charter party or a similar contract in non-liner transportation that may contain an arbitration agreement (49); cases in which the Rotterdam Rules leave untouched the effects of the agreement. If, however, in these cases the arbitration agreement is included in a transport document or record, the provisions in Chapter 15 will nevertheless apply unless the document or the record meets certain requirements to identify the parties to the charter party, the charter party date, and, when the arbitration agreement is incorporated by reference, specific reference is made to the particular clause in the charter party containing the arbitration agreement (50).

Although the RR do not so state, and given the intention of each of these two chapters and the relationship between them, the intention of the Convention is that both are taken together, if Chapter 14 is (51).

---

(45) Art. 67, par. 2 RR, which also requires that the third party is given adequate notice for the court where actions may be brought and the exclusive character of the clause, as well as that the law of the court seized of an action allows that such third parties other than the shipper may be bound by an exclusive choice of court or forum agreement.

(46) Tomotaka Fujita, "Jurisdiction and Arbitration", *Las Reglas de Rotterdam: una Nueva Era en el Derecho Uniforme del Trasporte*, Rafael Illescas Ortiz and Manuel Alba Fernández (Eds.), Madrid: Dykinson, 2012, p. 304-305.

(47) Art. 75, pars. 1 and 2 RR.

(48) Arts. 75, pars. 3 and 4 RR. Likewise, Art. 77 RR allows the parties involved, after the controversy has arisen, to submit the dispute to arbitration in any place.

(49) Particularly because, despite the exclusion in Art. 6 RR, the provision of Art. 7 leads to the application of the Convention in relations between the carrier and the consignee, the controlling party or the holder of a negotiable transport document or electronic record under a charter party or similar contract (provided the contract does also fall withing the geographic scope of application of the Convention).

(50) Art. 76 RR.

(51) In the European Union, this will require that the EU ratifies and makes a declaration to be bound by Chapter 14, and Member States do the same with Chapter 15.

5. Concluding remarks.

Some of the few aspects of the Rotterdam Rules addressed in the previous sections have quite a specific scope, while some of them will certainly have a wider reach, as they relate to issues such as the scope of application of the Convention or to international jurisdiction and arbitration thereunder. Almost all of them, however, provide good examples of how the Convention will improve and will realistically increase uniformity in the law on contracts for the international carriage of goods by sea, and how some of its elements may potentially benefit the parties in the contract, as well as generally other actors with an interest in goods subject to international carriage. The basic expectation in a country like Spain, which in many ways is probably no different from other European and non-European countries with regard to the problems experienced in practice, is that the Convention increases certainty by making easier to determine the status or qualification and the legal regime of many contracts included in the material and geographic scope of application of the Rotterdam Rules, and, consequently, to efficiently resolve the claims or controversies arising under the contract, for the benefit of all sectors involved.

As stated at the outset, ratification of the Rotterdam Rules was done pretty early in Spain. Such a course of action reflects, possibly among other circumstances, two things. Frist, the problems that in practice result from the difficulties caused by the current state of the law and the limitations imposed particularly by the convention (or conventions) in force. And, second, the sense of urgency with regard to the need to progress in the evolution of the international framework on contracts for the carriage of goods wholly or partly by sea, as the already significant gap between the needs in the market and the hundred-year-old framework in The Hague-Visby Rules will exponentially grow in the coming years.

How the Rotterdam Rules contribute to safe and sound logistics in the 21st century

Tomotaka FUJITA (*)

I. Introduction

The primary function of the law on the carriage of goods by sea has been, and still is, risk allocation between carrier and cargo interests. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (Rotterdam Rules) is no exception. It contains several provisions on the obligations and liabilities of the carrier and shipper, including rules on how to enforce the claims. (1) However, it is not appropriate to view the Rotterdam Rules as focusing on issues relating only to the interests of the contractual parties. They also address concerns beyond mere risk allocation between parties.

For example, Article 17(3) of the Rotterdam Rules provides a list of exonerations for a carrier's liability. Although the exoneration of liability itself is a risk allocation between parties, some items referred to in Article 17(3) contribute to the protection of public interest, giving proper incentives to the carrier. For example, the carrier is relieved of all or part of its liability if it proves that saving or attempting to save life at sea or reasonable measures to save or attempt to save property at sea caused or contributed to the loss of, damage to, or delay in the delivery of goods. (2) These exceptions already existed under the traditional transport convention such as the Hague (3) and Hague-Visby Rules (4); the Rotterdam Rules extend the exoneration to cover "reasonable measures to avoid or attempt to avoid damage to the environment." (5) This shows that the Rotterdam Rules pay broader attention to public interest than the existing regimes. (6)

This article focuses on this aspect of the Rotterdam Rules, which is a concern beyond risk allocation between parties. Specifically, it explains how the Rotterdam Rules contributed to safe and sound logistics in the 21st century. (7)

(*) Professor of Law, Graduate Schools for Law and Politics, University of Tokyo. Vice President of the Japanese Maritime Law Association and a Titulary Member of CMI.

(1) Chapter 14(Jurisdiction) and Chapter 15 (Arbitration) of the Rotterdam Rules.

(2) Article 17(3)(l) and (m).

(3) International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924.

(4) International Convention for the Unification of Certain Rules of Law relating to Bills of Lading,1924 amended by the Protocol signed at Brussels on 23 February 1968 and as further amended by the Protocol signed at Brussels on 21 December 1979.

(5) Article 17(3)(n) of the Rotterdam Rules.

(6) Article 17(3) of the Rotterdam Rules also includes an implication to the safety of the carriage. See, III.6 below.

(7) Comité Maritime International (CMI) has submitted a paper on this issue to Sub-Committee on the Carriage of Cargoes and Containers (CCC) in IMO Maritime Safety Committee and Facilitation Committee (FAL). See, Comité Maritime International (CMI), Amendments to the IMDG Code and Supplements: The Role of The Rotterdam Rules in Vessel Safety Submitted by the Comité Maritime International (CMI), CCC 7/6/1 (14 February 2020) with Corrigendum (CCC 7/6/1/Corr.1) and CMI, The role of the Rotterdam Rules in safety and facilitation, FAL 44/20/2 (14 February 2020).

II. The Rotterdam Rules' Safety Related Provisions

1. Safety of Containerized Cargo as a Public Concern

The safety of containerized cargo is a worldwide concern, and the International Maritime Organization (IMO) has long worked to ensure the safe transport of containers. The increasing number of casualties related to container fires reported in the past several years has led the Sub-Committee on the Carriage of Cargoes and Containers (CCC) of the IMO Maritime Safety Committee (MSC) to establish a Correspondence Group for reviewing special maritime provisions on this issue. ([8])

The report submitted to the CCC by member states and industry groups emphasizes the importance of sharing relevant information on carried goods to achieve carriage safety. It states that "Non-declaration or misdeclaration of dangerous goods in accordance with the IMDG Code, either inadvertent or deliberate, deprives ocean carriers, shipping companies and transport intermediaries of critical information that would otherwise allow them to arrange for proper handling and stowage, depending on the significant hazards that these shipments present. As such, non-declaration or misdeclaration leads to unsafe stowage and cargo segregation which dramatically increase the risk of fire, resulting in potential loss of life, damage to the environment and assets." ([9])

2. The Rotterdam Rules and Cargo Safety

The safety of cargo, including the submission of information, is an issue primarily and directly addressed by international conventions such as the International Convention for the Safety of Life at Sea (SOLAS), 1974, and the International Maritime Dangerous Goods (IMDG) Code ([10]) or applicable domestic regulations. They are usually enforced by the public authorities of the relevant states. However, public authorities' enforcement of safety regulations cannot be fully achieved without the cooperation of parties to the contract of carriage and effective information-sharing among them. Therefore, the law on the carriage of goods by sea, governing the contractual relationship between the parties, complements the proper enforcement of international regulations, such as the SOLAS and the IMDG Code, or domestic regulations. In this context, one should note that the Rotterdam Rules include several provisions that indirectly promote safety by requiring greater sharing of information, which is missing in previous conventions.

III. The Rotterdam Rules' Safety-related Provisions

Let us examine the specific provisions of the Rotterdam Rules that relate to cargo safety.

([8]) Report to the Maritime Safety Committee and the Marine Environment Protection Committee, CCC 6/14 (21 September 2019), para. 6.22

([9]) Liberia, ICS, IUMI, BIMCO, ICHCA and IGPI, Amendments to the IMDG Code and Supplements: Non-declaration and misdeclaration of dangerous goods – special provisions in the IMDG Code, CCC 6/6/17 (5 July 2019).

([10]) IMDG Code is considered an extension to the provisions of SOLAS chapter VII.

1. Shipper's Obligations to Provide Relevant Information: Article 29

Article 29 of the Rotterdam Rules provides the shipper's obligation to provide relevant information far beyond the level of the existing carriage conventions such as the Hague, Hague-Visby and Hamburg Rules.([11]),([12]) Article 29(1)(a) requires a shipper to "provide to the carrier in a timely manner" the "information, instructions and documents" reasonably necessary for "the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party."

Occasionally, local authorities of the relevant state enact safety regulations in addition to international requirements and the Rotterdam Rules respect these requirements. Article 29(2) preserves their force providing "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." Moreover, Article 29(1)(b) requires the shipper to timely provide the carrier with the "information, instructions and documents" needed to comply with those local regulations.

2. Cooperation between Shipper and Carrier in Relation to Information-Sharing: Article 28

Article 28 of the Rotterdam Rules requires the cooperation of the shipper and the carrier to provide information and instructions, and establishes a procedure to enable either the carrier or the shipper to obtain information or instructions from the other whenever necessary during the process. It should be noted that this provision, unlike any existing carriage convention, extends the parties' obligation to provide information to the entire transport process. Therefore, if a problem arises in the middle of a voyage or if a carrier develops suspicions about an unusual shipment, Article 28 provides a mechanism that enables the carrier to obtain information or instructions required to avoid a serious incident.

3. Information on Dangerous Goods: Article 32

Article 32 of the Rotterdam Rules specifically addresses the shipper's obligation to provide information to the carrier about goods that "by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment." Although the corresponding provisions can be found in existing conventions ([13]), this provision improves it in two ways. First, it avoids the ambiguity of existing conventions' use of the term "dangerous goods" without defining it. Second, it recognizes that goods can cause serious damage by harming the environment. Similarly, Article 15 of the Rotterdam Rules provides carrier flexibility in dealing with such goods in relation to the carrier's obligation.

([11]) United Nations Convention on the Carriage of Goods by Sea, 31 March 1978.

([12]) The Hague-Visby Rules, except for the guarantee of the accuracy of information (Article 3(5)), do not contain an explicit provision on the shipper's obligation for submitting the relevant information. The Hamburg Rules only requires the shipper to provide information with respect to "dangerous goods" (Article 13(2)).

([13]) See, Article 13 of the Hamburg Rules.

4. Shipper's Delivery of the Goods to the Carrier: Article 27

Article 27(1) of the Rotterdam Rules requires the shipper to "deliver the goods [to the carrier] in such condition that they will withstand the intended carriage." This provision would help avoid, for example, the liquefaction of goods that are normally solid (which is a serious risk in some solid goods with high moisture content). Article 27(3) similarly requires a shipper that packs a container or loads a vehicle to be carried on a vessel to "properly and carefully stow, lash and secure the contents … in such a way that they will not cause harm to persons or property." Improperly securing goods in containers increases fire hazards, and extending this rule to vehicles addresses an important safety concern in the freight ferry industry.

5. Carrier's Obligation to Exercise Due Diligence to Keep A Ship Seaworthy: Article 14

More general provisions that contribute to cargo safety can also be found in the Rotterdam Rules. For example, Article 14 extends the carrier's obligation to exercise due diligence to provide a seaworthy ship beyond the commencement of the voyage (as under today's most common carriage regimes) to the entire voyage. Therefore, under the Rotterdam Rules, the carrier owes a duty to the cargo to maintain safety standards not only when the vessel is in the port of loading, but also for the entire time that the goods are on the ship. Although the obligations under Article 14 primarily serve risk allocation between parties by providing a presumption in connection with the carefully constructed regime for the burden of proof under Article 17(5), it indirectly contributes to the enhanced safety of carriage.

6. Deletion of Error in Navigation and Management Defense

The Rotterdam Rules allow the carrier to escape liability when it can prove that the loss, damage, or delay was caused by one of the specific events or circumstances enumerated in Article 17(3). Although it resembles Article IV(2) of the Hague and Hague-Visby Rules, the Rotterdam Rules' list of exoneration in Article 17(3) no longer refers to errors in the navigation or in the management of ships (error in navigation and management defense) ([14]). Although the deletion of the defense is often understood as the change of risk balance between a carrier and cargo interests, it also contributes to the safety of the carriage by giving proper incentive for the carrier to take reasonable care in the navigation or the ship.

7. Mandatory and Super-Mandatory Nature of the Provisions: Articles 79 and 80

Finally, attention should be paid to the nature of the safety-related provisions under the Rotterdam Rule. Obligations and liabilities under the Rotterdam Rules are mandatory (Art. 79). One should first recognize that, unlike existing conven-

([14]) Article IV (2)(a) of the Hague and Hague-Visby Rules provides that the carrier is not liable for "loss or damage arising or resulting from act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship."

tions, Article 79 refers to the shipper's obligations and liabilities. Therefore, the obligations and liabilities under Articles 27(2)([15]), 28, 29 and 32 are mandatory under the Rotterdam Rules. Second, the Rotterdam Rules allow broad contractual freedom for volume contracts (Art. 80(1)). However, one should note that such freedom of contract does not apply to the obligations under Articles 14(a) and (b) and Articles 29 and 32. One can call these "super-mandatory" provisions that cannot be avoided even in volume contracts. The existence of such "super mandatory" obligations suggests that the Rotterdam Rules are conscious of the fact that they address the public concern for safe carriage which is beyond a mere risk allocation between parties.

IV. Conclusion

As repeatedly stressed in this article, the Rotterdam Rules are not an instrument providing mere risk allocation between the parties to the contract of carriage, but address public concerns, including, and most importantly, safe logistics. The Rotterdam Rules include provisions that govern contractual relationships and indirectly influence carriage safety. The Rotterdam Rules' safety related provisions, some of which are "super mandatory" in nature, complements the regulations under SOLAS, IMDG Code and domestic legislations and their enforcement by public authorities. These Rules contribute to logistics safety. Admittedly, this is not the Rotterdam Rules' primary function. Nor can the Rotterdam Rules alone ensure safety during carriage. The role of the Rotterdam Rules is supplementary in this context. Simultaneously, this aspect of the Rotterdam Rules is too important to be ignored.

([15]) The obligation under Article 27(1) is not mandatory because it explicitly provides "Unless otherwise agreed in the contract of carriage, …"

Africa: Ripe for the Rotterdam Rules?

Andrew ROBINSON (*)

Introduction

Africa's contribution to international trade has, and will continue to be, significant.

The export of raw, refined and semi-refined commodities to the product hungry world from both littoral and landlocked countries has dominated the continents' trade history since the 1850's.

Trade into and between Africa states has also made demands on logistics operators which in turn has seen a growth in container traffic over the years. For a variety of reasons, even commodities such as copper, manganese and cobalt are now shipped in containers. Even the movement of empty containers out of the continent has become a logistics operation in its own right.

The vast majority of Africa's cargoes move by road – the dream of an intercontinental, interconnected and efficient rail network remains a little way into the future. Although rail operators are enthusiastic that the signs of a great rail revival are increasingly evident. In South Africa, as an example, a group has formed the Multimodal Inland Port Association which seeks to promote the increased movement of freight from road to rail.

Add to this the ongoing efforts to create dedicated trade or logistics corridors, where goods can be transported more quickly and efficiently both between African states and from inland hubs to the coast (and vice versa), underlines Africa's recognition of the importance of the multimodal transport of goods. Does the Rotterdam Rules assist? In certain circumstances it does – take Togo for example, where all goods moved through its inland port to and from the coast will be governed by the Rotterdam Rules.

As an aside, there has been for many years talk around a regional carriage of goods by road "convention" similar to that of the European CMR. It has certainly been an argument of mine that the movement of goods through the proposed logistics corridors should be subject to a harmonised set of carriage rules. This seems to me the logical next step following the continents recognition that trade efficiency is enhanced by breaking down customs barriers.

The importance of the proper development of the markets of African States is recognised by the African Union's relatively recent launch of the African Continental Free Trade Agreement. According to Agenda 2063, this flagship project "*provides a member-driven road map for achieving sustainable and inclusive development on the continent. Its objective is to create an integrated market for the trade*

(*) Director: Norton Rose Fulbright South Africa Inc. The author was assisted by Tasmiya Samad.

in goods and services, as well as the free movement of people and capital." 54 of the 55 AU recognised states have signed the Treaty and 44 of them have deposited their instrument of ratification.

This Free Trade Agreement is said to be "*the largest free trade pact in the world in terms of the number of signatories, which promises to turn Africa into a modern, industrialized, cohesive, and influential player on the global stage. Members are initially required to remove tariffs from 90% of goods per AfCFTA Tariff Modalities, eventually allowing free access to at least 97% of goods and most of services across the African continent*." (1)

Africa is no stranger to regional treaties and collaborations aimed at developing the economies of the states involved. There are at least 40 regional organisations, comprising a veritable blizzard of acronyms – including the SADC (2), COMESA (3), ECCAS (4), ECOWAS (5), CEN-SAD[6] and CEMAC. On making a rough estimate, it seems as though each African state is a member of at least four such regional trade arrangements. It is debateable whether these arrangements have been a success.

There is a general view amongst business that to increase regional trade and investment, African countries need to streamline existing trade arrangements, populate them with state supported decision makers (turning think tanks into action stations) supported by improvements in infrastructure, the reduction of transport costs, the trade facilitation that AfCFTA will introduce and the unification of laws relating to, amongst other things, the carriage of goods.

As mentioned above, the vast majority of cargo movements in Africa are by road. Despite the regional arrangements, there has been no sign of a CMR-type arrangement, making the insurance of road carried products and the liability of the freight operators a risky business indeed. That said, many imports into the African hinterland are subject to multi-modal bills of lading – but most of these state quite clearly that any movements after discharge are at owners risk or other very carrier friendly terms.

There have also been many attempts at developing logistics corridors linking products to suitable transport arteries – either road or rail – to either internal markets or, more usually, suitable hubs and coastal ports.

The importance of hubs has been growing – we have seen an increase in interest in the financing and construction of dry ports that will almost certainly focus on containerised goods which, it seems to me, would be more likely to be the subject of multimodal type shipments. For example we were recently engaged to produce the relevant documents for the operation of a dry port in Togo – operating as a

(1) Market Access Map (macmap.org).
(2) Southern African Development Community.
(3) Common Market for Eastern and Southern Africa.
(4) Economic Community of Central African States.
(5) Economic Community of West African States.
(6) Community of Sahel-Saharan States.

logistics hub for the land-locked countries to the north – and the Rotterdam Rules supplied a very useful basis for the managing of the obligations and liabilities of the parties.

Rotterdam Rules

So what has all this to do with Africa being ripe for the Rotterdam Rules?

With the African Union's push for customs uniformity and the apparent support that this is receiving from its member states, the time is right for the African Union to promote a modern regime that supports the multi-modal transport of goods where that includes a includes a sea leg. The Hague, Hague-Visby and Hamburg Rules simply do not offer the multi-modal carriage contract flexibility (including the benefits of electronic transport records) of the Rotterdam Rules.

My preliminary research shows that the States of Africa have not had a consistent approach to ratifying any of the carriage regimes replacing the ancient Hague Rules regime – the most popular being the Hamburg Rules – which has been ratified by 19 African countries.

Of course ratification by itself may not be enough, or even required – very often a convention is, or needs to be, enacted domestically (and sometimes with amendments) – an example would be the South African approach to the Hague-Visby Rules – they form part of the Carriage of Goods by Sea Act without any prior ratification – and also amend certain provisions regarding their compulsory application and issues relating to jurisdiction.

On the other hand, Togo has not only ratified the Convention but has also enacted the Rotterdam Rules and they are regarded as applicable for all movements within Togo where exports or imports involve a sea leg – regardless, it would appear – of whether there is a single carriage contract involved.

We have also incorporated the Rotterdam Rules, or relevant components of it – into One Stop Shop logistics and commodity trans-shipment arrangements where they have worked well.

The Way Ahead

The only other African States that have ratified the Rotterdam Rules are Benin, Cameroon and the Congo. Both Cameroon and Congo have CMI recognised maritime law associations. The other MLA's recognised by the CMI are Nigeria, South Africa and Tanzania – all of which are significant maritime portals for import and exports for those countries and their neighbours (not all of whom are landlocked).

It is difficult to persuade administrations in Africa to engage meaningfully in the complexities of the carriage side of trade – from my experience the focus is on building up infrastructure and trying to make that infrastructure more efficient and cost effective. Carriage regimes do not feature regularly, if at all, on any agenda's of the regional organisations.

The CMI may wish to consider a specific policy that promotes its work in Africa – in this regard I have the following suggestions – the list is not intended to be exhaustive, but rather an exhortation to members of the CMI with experience in these matters to come forward with their own sensible suggestions:

1. the creation of an International Working Group of the CMI focussing on the harmonisation of maritime law within the African continent working with and through the currently recognised MLA's;
2. The CMI can assist in providing administration support and multi-lingual speakers to a CMI endorsed African Maritime Law Conference;
3. Members of the Arican MLA's should engage directly with the people of influence who occupy the transport portfolios of the regional organisations;
4. The CMI, through the Standing Committee, might consider engaging directly with the African Union – with the particular view of illustrating how the Rotterdam Rules would complement the AfCFTA.

Certainly the current Africa CMI MLAs should be getting together to address how best to spread the word through the Continent that ratifying and applying the Rotterdam Rules makes good sense.

Finally, I would suggest that the law firms within the Africa MLAs write to their colleagues in other jurisdictions to assist the CMI and this particular Standing Committee (and that of the Judicial Sales and other committees and working groups focussing on getting signatures and ratifications). I have written to over 45 law firms in Africa on behalf of the Standing Committee in order to determine which carriage regimes apply in their jurisdictions with a view to ultimately pitching the Rotterdam Rules to those States' administrations.

The responses have, by and large, been enthusiastic and comprehensive.

I am sure that with the collective intellect and administrative prowess of the CMI, African jurisdictions will start seeing both the internal and external benefits to the Continent of the Rotterdam Rules and shrug off the temptation to always embrace a "wait and see" approach as to what what position its the northern hemisphere trading partners take.

Developments in the EU

Gertjan VAN DER ZIEL(*)

As a member of the Standing Committee I volunteered to try taking care of the political angle of the ratification of the Rotterdam Rules. I did so together with Frans van Zoelen.

I think that all of us would agree that the Hague Visby Rules are so much outdated that there is urgency with its replacement and that many of you would agree that the Rotterdam Rules is the Convention that should do that, but on the political side – ratification is a political process – something went wrong.

Initially, in the week after the date that the Rotterdam Rules were opened for signature, 21 states signed the Convention. These states represented some 25% of world trade. So, there was an enthusiast welcome of the Convention. The Dutch Minister of Transport, for example, promised to ratify within two years. By that time, it was really Rotterdam Rules hurrah, hurrah!

But then, thereafter… As we all know, as to these large Conventions, in order to be successful, it is required that one or more of the large trading countries or trading blocs in the world "pulls the cart". They should set the example and push others to follow suit, in such a way that a cascade of ratifications will follow. An example is the Vienna Sales Convention 1980 on which the US and China were under the early ratifyers and now it is ratified by 95 other countries as well. Another example, a negative one, is the Hamburg Rules. None of the large trading countries ratified the Hamburg Rules and despite that it is ratified by 35 other states, it is considered as a failed treaty. Years ago, my friend Kofi Mbiah from Ghana told me that Ghana had agreed with Nigeria to jointly ratify the Rotterdam Rules in order to set the example for West-Africa, but, he said, "we won't make the same mistake as with the Hamburg Rules, this time our Northern brothers first".

As to the Rotterdam Rules it was everybody's expectation that the US should play the role of early ratifyer. They had the largest delegation in UNCITRAL and played in the whole exercise a very active role. Their behavior was as if it was an American project. I remember that Chet Hooper once introduced me as: "Gertjan is our civil law drafter". I emphasize "our".

(*) Gertjan van der Ziel has worked as a Legal Consultant and Arbitrator in Rotterdam after a career in the Department of Shipping of the Dutch Ministry of Transport (1967-77), Head of Legal Affairs at Royal Nedlloyd Group (1977-97) and from 1994-2004 was part time Professor of Maritime Law at Erasmus University School of Law.
This reflects the comments made by Gertjan van der Ziel to a special meeting of the CMI Standing Committee on Ratification of the Rotterdam Rules in Gothenburg on 22 May 2024, attended inter alia by Presidents or their nominees of EU MLAs to hear his report. It also reflects his comments made at the second session of the Colloquium.

However, despite its signature under the Rotterdam Rules, the US didn't honor that expectation. I won't dwell on the reasons thereof – if needed, David Farrell is in a better position than me to do so – but I cannot see reasons for much optimism that in the near future this US position would change.

China, another large trading country, is also in a position to take the leading role; in particular, it could set the example for many Asian countries. Like the US, they also had a large delegation in UNCITRAL and participated actively and positively in the debates. But after adoption of the Rotterdam Rules, from our perspective, it went wrong in China. While, generally, the Chinese judiciary and academia were in favor of the Rotterdam Rules, Chinese shippers, particularly the FOB shippers, didn't want to accept certain obligations and COSCO didn't want any risk of an increase of P&I premiums. So, the Chinese government has decided – at least for time being – not to ratify.

So, without US and China, it didn't make much sense for the other Pacific Rim countries to coordinate and try a joint ratification.

Remains the EU as a trading bloc. A few considerations:

First, generally, within the EU, traditionally, there is more respect for legislation than elsewhere in the world. In fact, the whole EU is kept assembled on the basis of law, it floats, so to say, on the rule of law. And each subject on which the EU Member States are willing to politically cooperate, is worked out through rules and regulations.

Second: already 8 EU countries signed the Rotterdam Rules, of which Spain even ratified. The other 7 are: France, Poland, Netherlands, Greece, Sweden, Denmark and Luxemburg, while the associated countries Norway and Switzerland signed as well. So, there is in Europe a positive basis.

Third: Some of these countries made the preparations for ratification as required by its national law, but none of them made the actual step of ratification, with the exception of Spain. Why not? I can't speak for other countries, but in the Netherlands it was mainly because the Rotterdam Rules aren't politically a sexy subject. In the whole list of political priorities, it never ended somewhere near the top. No politician gets voters behind him or her because of his activities in respect of the Rotterdam Rules. It looks as if people in my country think that replacement of a treaty that exists already 100 years can easily wait for another few decades.

So, gradually, the Rotterdam Rules disappeared from the political agenda and the difficulty for CMI, or in fact for you and me, is how to break through this form of political lethargy.

With all this in mind Frans and I came together and tried to develop ideas to get the Rotterdam Rules on the EU agenda with the aim to achieve at a joint ratification by all EU Member States. That would bring the Rotterdam Rules in force and it might be followed by ratifications of the EU's trading partners elsewhere in the world as well. Maybe, it would even help the US over the bridge.

It might be helpful to note that there are in the transport area two precedents of Conventions that the EU jointly ratified. They did so on the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea and the Montreal Convention for the Unification of Certain Rules for the International Carriage by Air. So, shouldn't it be the turn of the Rotterdam Rules now?

Such a joint ratification is a legislative process and under EU constitutional law the EU Commission must take the initiative therefore and present proposals to that effect to the EU Member States. Normally, then follows a joint discussion between the Commission and Member States, whereupon a decision must be made with a qualified majority of 55% of the Member States and 65% of the total European population. In practice this means that 15 states must be in favor, which 15 must include 4 of the 5 largest Member States: France, Germany, Spain, Italy and Poland. If the EU Commission doesn't want to take an initiative for a specific legislation, a single majority of the Member States – 14 – may request the Commission to present proposals.

So, for our purpose 14 and 15 are important numbers. Of the 5 large EU Member States one, Spain, has already ratified, and two of them, France and Poland, are already signatories.

Taking all these figures into account, when all 8 signatory states would team up and convince 6 others to join, the EU Commission must prepare proposals. In our view, in the Baltic, Finland and the three smaller Baltic States Estonia, Latvia and Lithuania are obvious candidates, Ireland may be one, plus in the Mediterranean Italy, Cyprus and Malta, home of the CMI President, these states together make already an additional 8, while in first instance 6 states are needed for making progress.

Because Frans and I, on the basis of the above considerations, didn't see a European action on the Rotterdam Rules as a mission impossible, in particular when backed up by the CMI and hopefully its EU National Maritime Law Associations, we reached out to the competent EU Commission's officials for an appointment to meet and to Members of the EU Parliament for posing questions to the EU Commission. Further we made use of the networks of both of us to gain support from interested stakeholders for a European action on the Rotterdam Rules.

At this moment, many things are still pending, but we have an appointment with the Commission's officials for a meeting, and Parliamentary questions were posed and meantime answered by the Commission as well.

From these answers it appears that the Commission acknowledges that a joint ratification would reinforce the EU Common Market, but it should be realized that there are many things that would do that and that, in fact, the Rotterdam Rules compete with other matters. In view of the limited legislative capacity of the Commission, they need to assess on a case by case basis "balancing efforts and benefits with the timely chance of success".

The answers further state that "the Commission does not currently envisage to discuss the ratification of the Rotterdam Rules with Member States, but remains open to do so in the future in case Member States express their interest to proceed".

Then the meeting with the Commission: from our side we will of course highlight the benefits of the Rotterdam Rules for the EU, including its worldwide affect, but we expect that the outcome will be basically the same as it appears from the answers to the Parliamentary questions: only with clear support of Member States will the Commission be prepared to take action.

So, we appeal to all national EU MLAs to raise the matter with your governments and other stakeholders. Frans and I did some groundwork in making the EU Commission officials aware of the existence and benefits of the Rotterdam Rules, now the EU Member States must do their jobs for the necessary action.

We think, for the Rotterdam Rules it is now or never!

A general overview of the Rotterdam Rules

Kate LANNAN (*)

I. INTRODUCTION

In July 2008, at the conclusion of its 41st session, the United Nations Commission on International Trade Law (UNCITRAL) approved the text of what was then known as the draft United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. (1) The text lost its character as a "draft" text upon its adoption by the UN General Assembly on 11 December 2008. (2) In its resolution adopting the Convention, the General Assembly also authorized that it be opened for signature at a signing ceremony in Rotterdam, the Netherlands, on 23 September 2009, and, in keeping with the tradition of conventions covering international maritime transport, it recommended that the rules embodied in the Convention should be known as the "Rotterdam Rules." (3) The General Assembly Resolution also called upon all Governments to consider becoming party to the Convention. (4)

In accompanying the text of the Convention which follows, this article is intended to give a brief description of the background and negotiating history of the Rotterdam Rules, as well as to provide a summary of some of the more important changes to existing law that can be expected upon the Convention entering into force. (5)

II. CONTEXT and GOALS

Regrettably, the current legal regime governing the international carriage of goods by sea is characterized by its complexity and its lack of uniformity, which have in turn resulted in a lack of the predictability and transparency that are so important for international commercial actors. Currently, three separate interna-

---

(*) Kate Lannan, B.A., LL.B., B.C.L., LL.M, is a former Legal Officer with the UNCITRAL Secretariat in Vienna, Austria. She was the Secretary of Working Group III on Transport Law, which prepared the text of the new Convention prior to its adoption by the United Nations General Assembly in December 2008. Ms Lannan has worked in the area of private international law since 1998, and is a member of the bars of Ontario, Canada, New York and Washington DC. The views expressed in this article are her own, and do not necessarily reflect those of the United Nations.

(1) *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63117), para. 298. Information and UNCITRAL documents relating to work on the Rotterdam Rules discussed in this paper may be found in all 6 UN languages (Arabic, Chinese, English, French, Russian and Spanish) on the UNCITRAL web-site at www.uncitral.org.

(2) United Nations General Assembly Resolution 63/122, para. 2.

(3) Ibid., para. 3.

(4) Ibid., para. 4.

(5) Pursuant to article 94 of the Convention, it will enter into force one year after the deposit of the twentieth instrument of ratification, acceptance, approval or accession.

tional treaties govern international maritime transport: the Hague Rules,[6] which date from 1924 and are now over 80 years old, the Hague-Visby Rules[7], which date from 1968, and the Hamburg Rules,[8] which date from 1978.

While each of those texts has achieved a certain level of acceptance, efforts to create a uniform global regime have been elusive. The Hague Rules,[9] which are now over 80 years old, have achieved the greatest level of international acceptance, but have not been uniformly implemented or applied. Attempts have been made to modernize the regime through the negotiation of the 1968 Visby Protocol[10] and, later, the Hamburg Rules. While the Hamburg Rules represented an important and appropriate step toward modernization in the era in which they were negotiated, they have not been universally embraced, and have been successful in achieving only a certain level of harmonization amongst the States in which they are in force.[11]

Adding to the disunity caused by this patchwork system of international rules, certain States have resorted to relying on their national law to govern maritime transport, whilst others have pursued regional solutions.

In effect, the system that currently governs the international carriage of goods by sea is a highly fragmented one, characterized by competing multilateral, regional and domestic regimes, that has resulted in legal uncertainty and increased commercial transaction costs.

Further complicating the current situation are two aspects of modern commerce that the existing regimes are too dated to have adequately taken into account. First, the rapid increase in the volume of container transport, which first made its appearance a little over 50 years ago, has dramatically changed the face of the maritime transport industry. Modern use of container transport has made it possible to move goods more quickly, more inexpensively and more efficiently from their place of manufacture to their final destination. This, in turn, often requires the combination of several different modes of transport to allow for door-to-door movement under a single contract of carriage. Unfortunately, the period of the carrier's responsibility under the current international legal regimes governing the carriage of goods by sea cannot accommodate such movements: it is limited to port-to-port carriage in the case of the Hamburg Rules, and to tackle-to-tackle carriage in the case of the

---

(6) International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1924) ("the Hague Rules").

(7) The Hague Rules, as amended by the Visby Amendments, the Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1968) ("the Hague-Visby Rules"). The Hague-Visby Rules have also been amended in some States by the 1979 Protocol on Special Drawing Rights (SDRs), Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1979).

(8) United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978) ("the Hamburg Rules").

(9) As of the date of writing, there are some 70 States Party to the Hague Rules.

(10) As of the date of writing, there are in the neighbourhood of 30 States Party to the Hague-Visby Rules.

(11) As of the date of writing, there are 34 States Party to the Hamburg Rules.

Hague and Hague-Visby Rules. This limitation clearly renders those conventions inadequate to meet modern container transport needs.

Secondly, modern commerce, including transport, is increasingly turning to paperless transactions. Needless to say, given the age of the existing international maritime transport conventions and the relatively recent ascent of electronic transactions, none of those instruments offers a reliable legal basis for the replacement of traditional transport documents with more efficient electronic transport records.

Furthermore, the existing international maritime transport regimes – whether pursuant to the Hague, the Hague-Visby or the Hamburg Rules – leave a number of important aspects of international maritime carriage unregulated and, therefore, subject to national law. This aspect, too, has had a negative effect on overall harmonization in the field.

As noted in the section on the history of the negotiations below, these and other concerns eventually convinced industry and Governments that the time had come to take another look at international regime governing the maritime carriage of goods. Importantly, however, that "fresh look" has not consisted of rewriting the law applicable to international maritime transport. Cognizant of the myriad applicable legal regimes around the world, the Rotterdam Rules build upon the legal pillars established in the existing conventions. In doing so, the Convention aims at enhancing legal certainty by codifying decades of case law and industry practice and by clarifying earlier texts where necessary. The Rotterdam Rules, therefore, is a comprehensive instrument governing international contracts of carriage that is intended to do much more than merely expand the existing liability regime to include contracts for door-to-door carriage and electronic transport documents.

Against this backdrop, the General Assembly set out the aims of the new Convention in the recitals in its Resolution adopting the text as follows: ([12])

> "… *Concerned* that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents,
>
> … *Convinced* that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States,
>
> *Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

([12]) United Nations General Assembly Resolution 63/122, recitals.

Noting that shippers and carriers do not have the benefit of a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport … ".

III. HISTORY OF THE WORK

The original impetus for the Rotterdam Rules came not from UNCITRAL's Transport Law Working Group, but from its Working Group on Electronic Data Interchange (EDI).

In 1994 ([13]) and again in 1995, ([14]) the EDI Working Group had suggested to the Commission ([15]) at its annual session that preliminary work should be undertaken on "the issue of negotiability and transferability of rights in goods in a computer-based environment." It will be recalled that that issue was a particularly difficult 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 EDI Working Group's recommendation that a background study in respect of such work should proceed, with a particular emphasis on maritime transport documents. The Commission also noted that the Secretariat should take into account work, and seeking cooperation in respect of it, that was then underway in other international organizations, including the Comite Maritime International (CMI). ([16])

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." ([17]) It was suggested that existing national laws and international conventions left significant gaps regarding issues such as the functioning of bills of lading and seaway bills, 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 underlying sales 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 light of the growing use of electronic means of communication in the carriage of goods. ([18])

Although some reluctance was expressed at that time to consider issues relating to the liability regime for fear of slowing adherence to the Hamburg Rules, which had come into force in 1992, the Commission agreed to consider the topic for future

---

([13]) *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* (A/49/17), para. 201.

([14]) Ibid, *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 307-309.

([15]) "The Commission" refers throughout this article to the United Nations Commission on International Trade Law.

([16]) Ibid, para. 309.

([17]) Ibid, *Fifty-first Session, Supplement No. 17* (A/51/17), para. 210.

([18]) Ibid.

work. But rather than include the topic on its agenda in 1996, the Commission requested the Secretariat to become a focal point for the gathering of information, ideas and opinions regarding problems that arose in the industry in practice, and of 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 (i.e., IGOs and NGOs), including international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the CMI, the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbours (IAPH). The information gathered by the Secretariat was to be analysed and 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. ([19])

After the Commission session in 1996, the CMI and the UNCITRAL secretariat began their collaboration toward fulfilling the task set for them by the Commission. In 1998, the CMI reported to the Commission at its 31st session that it welcomed the invitation to cooperate with the UNCITRAL secretariat in soliciting the views of the sectors involved in the international carriage of goods and in preparing an analysis of that information that would allow the Commission to decide whether it could usefully pursue future work in the area. The CMI reported that, in cooperation with the UNCITRAL secretariat, it had already taken steps to collect and analyse information from a broad range of sources regarding the current problems and needs arising from modern trade practices relating to the international carriage of goods, and in light of new transport and communication methods. The Commission expressed its strong support for the exploratory work undertaken by the CMI and the UNCITRAL secretariat. ([20])

In 1999, the CMI reported to the Commission at its 32nd session that in the course of its preparation of a study on a broad area of issues in international transport law in order to identify the areas where unification or harmonization were needed by the industries involved, those industries had expressed a high level of interest in pursuing and offering assistance to the project. The CMI also reported that in the course of its investigations, its International Working Group on Issues of Transport Law had held informational meetings, and had sent a questionnaire to all CMI member organizations, covering a broad swath of legal systems. The CMI intended to analyse the data obtained from those sources to determine if there was a basis for further work toward harmonizing the law in the area of the international transport of goods. It was reported that the enthusiasm that the CMI encountered in its discussions with industry, and its provisional findings regarding the areas of law requiring harmonization made it likely that the project would be eventually transformed into a universally acceptable harmonizing instrument. ([21])

([19]) Ibid, para. 211-215.
([20]) Ibid, *Fifty-third Session, Supplement No. 17* (N 53/17), paras. 264-267.
([21]) Ibid, *Fifty-fourth* Session, *Supplement No. 17* (N54/17), paras. 413-418.

While interest in the idea had already been expressed in the Commission at its session in 1999,([22]) in the following year, approval was expressed for the proposal that the project should include an updated liability regime that· would complement the terms of the proposed harmonizing instrument. In addition to going beyond liability issues, it was thought that any instrument should deal with the contract of carriage in such a way that it would facilitate the export-import operation, which included the relationships between the seller and the buyer (and any subsequent buyers), as well as the relationships of the parties to the commercial transaction and the financing institutions.([23])

In July 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 the international carriage of goods and their 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 limitation on liability; and
- provisions to prevent the fraudulent use of bills of lading.([24])

At its 34th session in 2001, in order to assess the thrust and scope of possible solutions and decide how it wished to proceed, the Commission considered a report that summarized the considerations and suggestions that had resulted to date from the discussions in the CMI International Subcommittee (which had been established in November of 1999, and whose meetings included a number of other NGOs, such as FIATA, SIMCO, ICC ICS, IUMI and the International Group of P&I Clubs). It was recommended that the following list of issues described in that report should be covered in any future instrument::

- the scope of application,
- the period of responsibility of the carrier,
- the obligations of the carrier and the shipper,
- the carrier's liability,

([22]) Ibid, para. 417.
([23]) Ibid, *Fifty-fifth* Session, *Supplement No. 17* (N55/17), paras. 422-424.
([24]) Ibid, *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 333-334.

– 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. ([25])

Further, the UNCITRAL secretariat reported at the 34th session of the Commission that consultations that it had 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 the legal difficulties that had been identified. ([26]) The Commission decided to establish a Working Group to consider the issues from the report as enumerated above, and to consider the preliminary text containing possible solutions for a future legislative instrument which was then being prepared by the CMI International Subcommittee. Importantly, the UNCITRAL Working Group was to have a broad mandate, that would include liability issues, as well as the freedom to study the desirability and the feasibility of governing door-to-door transport operations. ([27])

Deliberations on the Rotterdam Rules thus began in UNCITRAL's Working Group III on Transport Law at its 9th session in April of 2002, and continued twice per year until its 21st session in January of 2008 – a total of 25 weeks of deliberations, involving top maritime transport experts from around the globe. Importantly, UNCITRAL's Working Group III continued to encourage the strong involvement of industry actors in its deliberations through the participation of various IGOs and NGOs. Active participants in the inter-governmental negotiations in Working Group III over the course of the 6 years of discussion included: the CMI, the UN Conference on Trade and Development (UNCTAD), the UN Economic Commission for Europe (UNECE), the ICC, IUMI, FIATA, the ICS, SIMCO, the International Group of P&I Clubs, IAPH, the European Commission, the Association of American Railroads, the Intergovernmental Organisation for International Carriage by Rail (OTIF), the European Shippers' Council, el lnstituto lberoamericano de Derecho Maritimo, the International Road Transport Union (IRU), the International Multimodal Transport Association (IMMTA) and the World Maritime University. It must also be borne in mind that, while Governments made all of the policy decisions that went into the text of the Rotterdam Rules, they did so after having carefully listened to the industry voices not only in the Working Group, but to those heard as a result of their own domestic consultations with stakeholders as well.

([25]) Ibid., para. 338.
([26]) Ibid., para. 339.
([27]) Ibid., paras. 339 and 345.

IV. CHANGES TO EXISTING LAW

In light of the discussion above, it will be recognized that the identification of changes that the Rotterdam Rules will bring to the existing law is rather a difficult task, given that the legal regime governing the carriage of goods can vary quite considerably from State to State. In general, however, it is possible to highlight certain improvements that the Convention will bring to the body of law governing the international carriage of goods by sea.

Door-to-Door Transport – Scope of Application and Period of Responsibility

One of the most significant changes made by the Rotterdam Rules to the existing law is the expansion of its scope of application to include to door-to-door transport.([28]) As noted earlier, the Hague and Hague-Visby Rules apply only tackle-to-tackle, while the Hamburg Rules are slightly more expansive in covering port-to-port shipments. Modern transport, however, typically involves the use of door-to-door contracts of carriage, and it is logical that the underlying legal infrastructure should allow for the same scope of application.

The carrier's period of responsibility extends from the time of receipt of the goods by the carrier, which will often be at an inland location in one State, until the delivery of the goods at destination at an inland location of another State. Of course, since the Rotterdam Rules apply to the contract of carriage, it is possible for the shipper and the carrier to agree in the contract of carriage to a port-to-port shipment, but the parties may not artificially shorten the carrier's period of responsibility such that it commences after the beginning of the initial loading of the goods or ends prior to their final unloading under the contract of carriage.([29])

In order to achieve certainty, predictability and uniformity, it was thought highly desirable to ensure that one legal regime should cover the entire performance of the contract of carriage, rather than the current system where each segment of the transport could be subject to a different contract of carriage and a different legal regime. While current industry practice provides for the contractual extension of the maritime regime inland, those contractual agreements do not currently have the underlying support of a uniform legal system that the new Convention now offers.

Importantly, the Rotterdam Rules do not establish a full multimodal system. There must be an international sea leg in order for the Convention to apply, thus establishing what has been described as a "maritime plus" approach rather than a multimodal convention.

Further, the new Convention recognises that in taking a "maritime plus" approach, the spectre of potential conflict with existing unimodal inland conventions could be raised. In order to avoid that possibility, the Rotterdam Rules adopt what has been called a "limited network principle", where the extent of the carrier's liability for damage that can be localised as having occurred during a particular leg of the

([28]) Rotterdam Rules, art. 5.
([29]) Rotterdam Rules, art. 12.

transport will be determined by the inland convention that would have applied if a separate contract of carriage had been concluded for that leg.([30])

In order to ensure absolute clarity in respect of the interaction between the Rotterdam Rules and unimodal inland conventions, the Convention also includes a provision that prevents it from affecting the application of inland conventions in respect of the carriage of goods by air, road, rail, or inland waterway that regulate the liability of the carrier for loss of or damage to the goods, and that could apply to a contract of carriage subject to the Rotterdam Rules.([31])

Finally, like the Hamburg Rules, the Rotterdam Rules will cover both inbound and outbound shipments to or from a Contracting State, unlike the Hague and Hague-Visby systems which covered only shipments outbound from a Contracting State.([32])

Electronic Commerce

Of course, the Hague, Hague-Visby and Hamburg Rules fail to contain provisions regulating electronic commerce, the growing importance of which is a relatively recent commercial phenomenon. In fact, the use of electronic commerce in maritime transport is not yet widespread, due mainly to the lack of a legal framework on which to base technological innovations.

The Rotterdam Rules contain an entire chapter([33]) intended to facilitate the use of electronic transport records in lieu of paper transport documents, and providing an effective legal framework on which to base the development of electronic commerce in maritime transport. The rules are consistent with the approach that UNCITRAL has taken in its previous instruments on electronic commerce, including the key principles of functional equivalence and technological neutrality, and are expected to lay the appropriate legal groundwork for electronic developments in this field.

Two concepts key to the development of effective rules on electronic commerce have been included in the Rotterdam Rules and are discussed in the next section: the concept of the controlling party and the right of control, as well as the transfer of rights. The combination of these concepts have enabled the new Convention to provide for the dematerialisation of all transport documents, including negotiable documents, and thus to provide an effective legal framework for electronic commerce.

Controlling Party, Right of Control and Transfer of Rights

Previous maritime transport conventions have not dealt with the concepts of the controlling party, the right of control and the transfer of rights. As noted above, these ideas are the key to solving the problem of how to provide for negotiable

([30]) Rotterdam Rules, art. 26.
([31]) Rotterdam Rules, art. 82.
([32]) Rotterdam Rules, art. 5.
([33]) Rotterdam Rules, chapter 3.

electronic transport records. Further, the establishment of rules in these areas will enhance the certainty about the validity of the security interest that financial institutions may have in the goods.

Since the existing law in respect of these matters is largely domestic, changes brought about by the Rotterdam Rules ([34]) will vary from State to State, although the broad principles adopted are fairly standard. Further, achieving uniformity in this area of the law should establish a welcome and predictable legal basis for what has previously been left to industry practice and local law.

Expanded Carriers' Liability

The Rotterdam Rules have made a number of changes in terms of the liability of the carrier that existed under previous regimes.

Importantly, the carrier's obligation to exercise due diligence in respect of the seaworthiness and the cargo-worthiness of the ship has been expanded from one that is owed prior to and at the beginning of a voyage in the Hague and Hague-Visby Rules, to one that extends for the entire duration of the voyage by sea. Of course, the Hamburg Rules are silent on the topics of seaworthiness and cargo-worthiness, as they fall within the general provisions of the presumed fault liability scheme.

In addition, in comparison with the Hague and Hague-Visby Rules, ([35]) the carrier has, under the Rotterdam Rules regime, lost its defence to claims for loss or damage that were due to the carrier's nautical fault or to its fault in the management of the ship. In addition, the exception for "fire, unless caused by the actual fault or privity of the carrier" ([36]) as it appeared in the Hague and Hague-Visby Rules, has been narrowed to refer to "fire on the ship" ([37]) in the Rotterdam Rules. Both changes to the carrier's possible defences are thought to reflect a more modern approach to maritime transport, both in terms of more advanced navigational systems and techniques and in terms of limiting the fire defence to the maritime leg of the transport, while at the same time broadening the responsibility for the fire to include fire caused by the carrier or those acting on its behalf.

Although it is referred to in a separate section below, it also bears mentioning at this juncture that the increase in the level of limitation on the liability of the carrier can also be viewed as an expansion of its liability in general.

Other aspects of the carrier's obligations that have changed under the Rotterdam Rules include a clear statement of the carrier's core obligations, ([38]) as well as specific provisions in respect of cargo carried on deck. ([39]) Of course, deck cargo was not included in the regime established by the Hague or Hague-Visby Rules, but a provision governing its carriage did appear in the Hamburg Rules. ([40])

([34]) Rotterdam Rules, chapter 10 and 11.
([35]) Hague and Hague-Visby Rules, art. 4(2)(a).
([36]) Hague and Hague-Visby Rules, art. 4(2)(b).
([37]) Rotterdam Rules, art. 17(3)(f).
([38]) Rotterdam Rules, art. 11.
([39]) Rotterdam Rules, art. 25.
([40]) Hamburg Rules, art. 9.

Expanded Shippers' Obligations

The previous maritime transport conventions have focused mainly on the obligations of the carrier to the shipper. The Hague and Hague-Visby Rules deal with shippers' obligations in only two cases: they ensure that the shipper and its agents and servants are liable for any negligence,(41) and they impose strict liability on the shipper for damage or expenses arising from the shipment of dangerous goods.(42) The Hamburg Rules reflect a similar approach to the obligations of the shipper.(43)

The Rotterdam Rules present a somewhat more refined approach to shippers' liability, based on what types of the loss the shipper is best-positioned to avoid. The shipper continues to be subject to strict liability for loss or damage caused as a result of its failure to properly label or inform the carrier of the nature of dangerous goods.(44) But in recognition that the shipper has access to information, instructions and documents that the carrier may need in order to avoid loss or damage, the shipper bears a fault-based liability for loss or damage caused by its failure to provide necessary information, instructions and documents to the carrier.(45)

As in the case of the Hamburg Rules,(46) the shipper is deemed under the Rotterdam Rules to have guaranteed to the carrier the accuracy of certain information provided to it for the compilation of the contract particulars.(47)

In keeping with the approach taken in the Hague, Hague-Visby and Hamburg Rules, the liability of the shipper under the Rotterdam Rules is not subject to any limitation in the same way as is the liability of the carrier. While efforts were made in the course of the negotiation of the new Convention to identify an appropriate standard through which to limit shipper's liability, in particular in respect of a proposal to make shippers liable for delay caused by them, no satisfactory measure could be established. Ultimately, it was agreed that the lack of a limitation on the shipper's liability was not inappropriate, particularly in the case of the provision of information since, not only was such a policy in keeping with previous conventions, a failure by the shipper in fulfilling its obligations to provide information in the era of closed containers could have much more catastrophic results than any similar failure on the part of the carrier.(48)

---

(41) Hague and Hague-Visby Rules, art. 4(3).

(42) Hague and Hague-Visby Rules, art. 4(6).

(43) Hamburg Rules, arts. 12 and 13.

(44) Rotterdam Rules, art. 30 and 32.

(45) Rotterdam Rules, arts. 29-30. Note that, as a reflection of the mutual interest of the carrier and the shipper in the safe and efficient carriage of goods, the Rotterdam Rules also contain in article 28 a general obligation on both the carrier and the shipper to respond to requests from the other to provide information and instructions required for the proper handling and carriage of the goods. This provision is intended to encourage cooperative behaviour between the parties to the contract of carriage, and no specific sanction exists for a breach of this obligation.

(46) Hamburg Rules., art. 17.

(47) Rotterdam Rules, art. 30 and 31.

(48) See, generally, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (N 63 /17), paras. 236-242.

Himalaya Clauses

Negligent third parties performing under the contract of carriage often seek to rely on a carrier's defences and limitation on liability. The Hague Rules did not expressly deal with the subject, and the Hague-Visby Rules ([49]) were vague in terms of third parties who were independent contractors. The Hamburg Rules covered the servants and agents of the carrier,([50]) but again, did not deal with independent contractors.

Courts have not dealt consistently with this issue, but most have settled upon the solution that third parties would be protected by the carrier's defences and limitations if the bill of lading contained an appropriate "Himalaya clause".

The Rotterdam Rules provide automatic protection to the carriers' employees, agents and independent contractors provided that they are subject to suit under the new Convention.([51]) In practice, this provision simply codifies the result that has been reached by the industry through contractual means.

Limitation amounts on carrier liability

Previous maritime transport conventions concentrated mainly on liability issues, thus there has always been a high level of scrutiny in respect of the level of the limitation on the carrier's liability for loss of or damage to the goods. The Hague Rules contain only a per package limitation (then £100 sterling),([52]) while the Hague-Visby Rules have both a per package limitation (666.67 SDRs) and a per kilogram limitation (2 SDRs).([53]) The Hamburg Rules increased those limitation amounts by 25% to 835 SDRs per package and 2.5 SDRs per kilogram.([54])

Most of today's world trade is subject to the Hague-Visby limitations, while a fairly large portion of the world's trade is subject only to the Hague per package limitation.

Nonetheless, for many, progress in terms of a new maritime transport regime necessitated a corresponding increase in the most-recently negotiated previous limitation levels, the Hamburg Rules levels. As a result, the Rotterdam Rules contain limitation levels on carrier liability in the amount of 875 SDRs per package, and 3 SDRs per kilogram.([55])

It has been suggested that the higher limitation levels will have an impact in only a very few cases. The rise of containerization has meant that carriers can transport cargo in much smaller packages packed inside containers than previously possible, and that lower value cargo may also be efficiently shipped in containers. The result is that even the lower per package limitation was said to provide full recovery for

([49]) Hague-Visby Rules, art. 4 *bis*.
([50]) Hamburg Rules, art. 5 and art. 10.
([51]) Rotterdam Rules, arts. 18 and 19.
([52]) Hague Rules, art. 4(5).
([53]) Hague-Visby Rules, art. 4(5).
([54]) Hamburg Rules, art. 6(1).
([55]) Rotterdam Rules, art. 49.

loss or damage in most cases, but that the new limitation levels will allow for much higher recoveries in more extreme cases, and will certainly allow for higher recoveries in the case of non containerized cargo, such as heavy machinery.

Time for Suit

Under the Hague and Hague-Visby Rules,(56) a cargo claimant had one year in which to file its action against the carrier before such an action would be time-barred, while the Hamburg Rules extended this period to two years.(57) The Rotterdam Rules has followed the example of the Hamburg Rules, and includes a two year period in which cargo claims must be instituted.(58) The additional time granted to claimants formerly subject to the Hague and Hague-Visby Rules should be a welcome change as they seek to gather evidence in support of their claim.

Jurisdiction and Arbitration

While the Hague and Hague-Visby rules do not deal with jurisdiction and arbitration, the chapters of the Rotterdam Rules (59) on jurisdiction and arbitration are based upon the corresponding provisions in the Hamburg Rules.(60) Since the rules on jurisdiction and arbitration vary quite broadly from State to State, changes in the law governing these matters will depend on the current legal status in the State in issue. Some states will see very little change to their legal regime, while others may by subject to more dramatic changes.

The arbitration provisions have been drafted in keeping with the key principles of commercial dispute resolution set out in UNCITRAL's instruments in the subject area, and are intended to preserve the existing freedom of arbitration in respect of non-liner transportation. Further, the arbitration provisions are designed to limit interference with the right to arbitrate in liner transportation, while protecting the cargo claimant by ensuring that the claimant's right to choose the place of jurisdiction in the jurisdiction chapter could not be circumvented by resort to the arbitration rules.(61)

The chapters on jurisdiction and arbitration were the subject of focused discussion, contrasting those in favour of including such provisions with those who preferred to leave the areas to domestic or other rules. Complicating the situation was the European Commission's participation in the negotiations in these subject areas, since the EC has exclusive competence to negotiate on behalf of its Member States in respect of jurisdiction and arbitration.

---

(56) Hague and Hague-Visby Rules, art. 3(6).
(57) Hamburg Rules, art. 20.
(58) Rotterdam Rules, art. 62.
(59) Rotterdam Rules, chapters 14 and 15.
(60) Hamburg Rules, arts. 21 and 22.
(61) Report of Working Group III (Transport Law) on the work of its eighteenth session, N CN.9/616, paras. 267-279.

Ultimately, a compromise solution was found, whereby the chapters on jurisdiction and arbitration were made subject to an "opt-in" reservation: only those States that specifically make a declaration that they are to be bound by those chapters will be bound by them. ([62])

Freedom of Contract

One aspect of the Rotterdam Rules that has been considered controversial is the provision on volume contracts. ([63]) The volume contract provision recognises that in certain cases, where commercial actors are on a reasonably level playing field in terms of bargaining power, contracting parties should be allowed certain contractual freedoms. This approach is quite broadly accepted in many commercial settings. In fact, the principle of freedom of contract has already been accepted in certain situations in the Hague, Hague-Visby and Hamburg Rules, particularly in terms of contracts of carriage concluded under charterparties.

The volume contract provisions allow shippers of a certain commercial size and sophistication, and who ship a large quantity of goods in a series of shipments, to negotiate with the carrier for contractual provisions different from the mandatory provisions in the Convention. Concerns were raised in the negotiation of these provisions regarding the protection of small shippers, who some thought could be subject to abuse. It was not possible despite repeated efforts to insert specific numbers into the definition of the volume contract (for example, a minimum number of shipments) in order to protect small shippers, since such specific numbers or amounts would create uncertainty for both the shipper and the carrier in terms of predicting at the outset of a commercial arrangement whether they would eventually fall into the category defined as a volume contract. Instead, a number of very strong protections for the shipper were built into the operative volume contract provision itself. In fact, the shipper is *always* given an opportunity and notice of that opportunity to insist that despite shipping under a volume contract, all provisions of the Convention will apply without derogation. Thus, the mandatory provisions of the Rotterdam Rules are always the default rule.

Other protections set out for the shipper include that: the volume contract must contain a prominent statement that it derogates from the Convention, and specify the derogations; the volume contract must be individually negotiated; the derogation cannot be incorporated by reference from another document, nor included in a contract of adhesion. ([64])

Finally, there are a number of provisions from which a volume contract can *never* derogate: ([65]) the carrier's ongoing obligation to make and keep the ship seaworthy, and to properly crew, equip, and supply the ship; ([66]) the shipper's obliga-

([62]) Rotterdam Rules, arts. 74, 78 and 91.

([63]) Rotterdam Rules, art. 80 and art. 1(2). See, generally, Report of Working Group III (Transport Law) on the work of its twenty-first session, N CN.9/645, paras. 235-253.

([64]) Rotterdam Rules. art. 80(2).

([65]) Rotterdam Rules, art. 80(4).

([66]) Rotterdam Rules, art. 14(a) and (b).

tion to provide information, instructions and documents;[67] the dangerous goods rules;[68] and the loss of the benefit of the limitation on liability.[69]

Conclusion

As noted earlier, due to the strong interest shown by industry and Governments in taking a fresh look at the needs and problems of the international maritime transport industry, discussions and negotiations concerning a possible new regime spanned many years. The result of those years of effort is a Convention that deals with a broad range of issues, some of which are novel for a uniform transport law instrument, but which codifies many principles found in the existing maritime transport conventions and the body of accompanying case law, as well as long-standing industry practice.

The Rotterdam Rules offer 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 air, road, rail or inland waterway. The new Convention represents the efforts of many competing interests to build consensus and to arrive at uniform practical and workable common solutions to replace the current unwieldy and outdated regime for the international maritime carriage of goods.

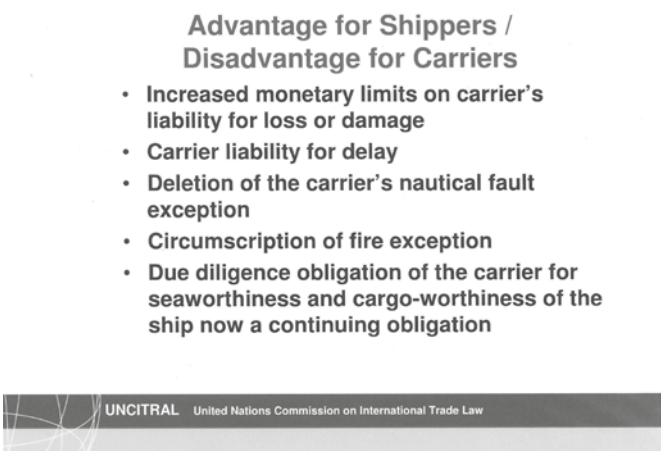
The Rotterdam Rules will give commercial actors and those involved in the international carriage of goods the opportunity to benefit from predictability and transparency, thus improving conditions for international trade, enhancing efficiency for commercial transactions, and reducing the overall cost of doing business internationally.

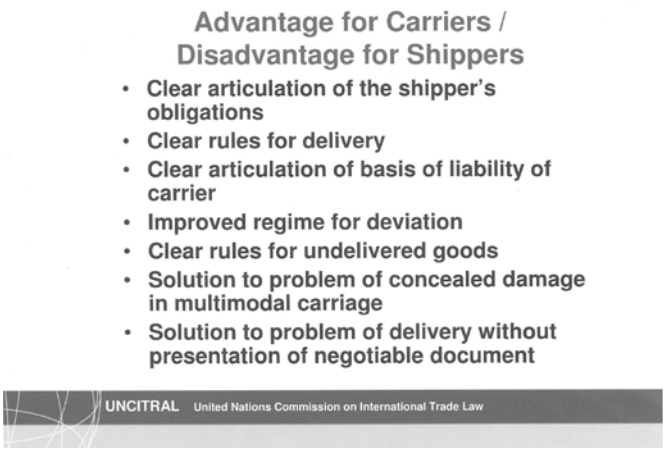
---

(67) Rotterdam Rules, art. 29.
(68) Rotterdam Rules, art. 32.
(69) Rotterdam Rules, art. 60.

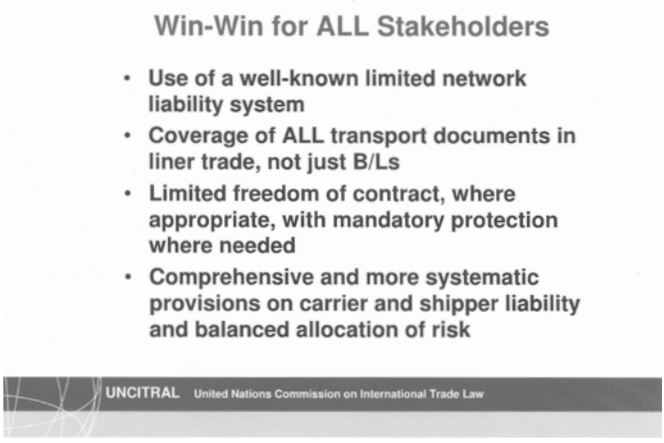
Powerpoint presentation

Kate LANNAN




Advantage for Carriers /
Disadvantage for Shippers
• Clear articulation of the shipper's obligations
• Clear rules for delivery
• Clear articulation of basis of liability of carrier
• Improved regime for deviation
• Clear rules for undelivered goods
• Solution to problem of concealed damage in multimodal carriage
• Solution to problem of delivery without presentation of negotiable document
UNCITRAL United Nations Commission on International Trade Law


Win-Win for ALL Stakeholders
• Clear, harmonized global regime for maritime transport
• Electronic commerce for modern, efficient shipping practices
• Door-to-door shipments under a single contract of carriage and a single legal regime
• Modern containerized shipping accounted for throughout
• Inclusion of incoming and outgoing maritime carriage
UNCITRAL United Nations Commission on International Trade Law


Win-Win for ALL Stakeholders
• Use of a well-known limited network liability system
• Coverage of ALL transport documents in liner trade, not just B/Ls
• Limited freedom of contract, where appropriate, with mandatory protection where needed
• Comprehensive and more systematic provisions on carrier and shipper liability and balanced allocation of risk
UNCITRAL United Nations Commission on International Trade Law

Win-Win for ALL Stakeholders

- Right of control, to assist shippers and financing institutions, and to pave way for e-commerce
- Clarification of numerous legal gaps that exist under current conventions
- Codification of existing industry practice to provide legal certainty
- General adoption of commercially practicable solutions

UNCITRAL United Nations Commission on International Trade Law

Strong support from:

- International Chamber of Shipping (ICS)
- Bimco
- International Group of P&I Clubs
- World Shipping Council (WSC)
- US Shippers' Organization (National Industrial Transportation League)
- European Community Shipowners' Associations (ECSA)
- American Bar Association
- European Parliament
- Arab League Workshop

UNCITRAL United Nations Commission on International Trade Law

Conclusion

- A Win-Win approach
- Industry-driven project
- Global solution
- Comprehensive instrument
- Modernizes
- Harmonizes
- Preserves existing unimodal transport regimes
- Commercial and Legal Predictability and Transparency
- Enhanced efficiency
- Reduced transaction costs

UNCITRAL United Nations Commission on International Trade Law

Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules (*)

Michael F. STURLEY (**)

Now that the United Nations has adopted the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, to be known as the Rotterdam Rules, it is time for the world's governments to decide on the shape of international transport law as we move into the twenty-first century. The Rotterdam Rules offer the one possibility for an internationally uniform regime. The obvious alternatives are either the existing patchwork system of competing and outdated multilateral conventions, modified and supplemented by national law, or regional solutions that might be adopted in the years ahead. To assist in the evaluation of the choices now facing the world community, this article surveys the preparation of the Rotterdam Rules over the last dozen years (in light of the history of international transport law regimes), explains the philosophy behind the new Rules, and considers their potential future application.

I. Introduction

The U.N. Commission on International Trade Law (UNCITRAL) has now completed its Transport Law project,(1) which has been the subject of extensive academic commentary in recent years. This journal has itself published several Articles and shorter pieces on various aspects of the project.(2) Other journals have devoted entire issues or substantial portions of issues to discussions of the sub-

(*) This article was first published in (2008) 14 JIML 441. It is being reprinted with permission.

(**) Stanley D and Sandra I Rosenberg Centennial Professor of Law, University of Texas School of Law. The author served as the Senior Adviser on the United States Delegation to Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL); as a member of the UNCITRAL Secretariat's Expert Group on Transport Law; as the Rapporteur for the International Sub-Committee on Issues of Transport Law of the Comité Maritime International (CMI) and for the CMI's associated Working Group; and as the Reporter for the Ad Hoc Liability Rules Study Group of the Maritime Law Association of the United States (USMLA). But he writes here solely in his academic capacity and the views expressed are entirely his own. They do not necessarily represent the views of, and they have not been endorsed or approved by, any of the groups or organizations (or any of the individual members) with which (and with whom) he has served.

(1) The primary source material for the UNCITRAL Transport Law project can be found on the UNCITRAL web site (www.uncitral.org), which contains -in the six official U.N. languages -not only the final text of the Rotterdam Rules but also each preliminary draft of the convention as it was negotiated, the reports of each meeting of Working Group III, the reports of the full Commission meetings, the formal proposals made by each delegation, and all of the other documents that were filed with UNCITRAL.

(2) *See, e.g.*, Malcolm CLARKE, *A Conflict of Conventions: The UNCITRAL/CMI Draft Transport Instrument on Your Doorstep*, 9 J. Int'l Mar. L. 28 (2003); Gertjan VAN DER ZIEL, *The Legal Underpinning of E-Commerce in Maritime Transport by the UNCITRAL Draft Instrument on the Carriage of Goods*

ject.(3) Focusing on the literature in English, individual Articles have appeared in other British journals,(4) in the United States,(5) elsewhere in the English-speaking world,(6) and even elsewhere in the non-English-speaking world.(7) Articles written in a variety of other languages have similarly appeared in a wide range of journals.(8) In short, the world community has paid close attention to the project throughout the years that it was being negotiated.

Now that UNCITRAL has completed the final text of the new Convention -officially the "United Nations Convention on Contracts for the International Carriage of

---

by Sea, 9 J. Int'l Mar. L. 461 (2003); Michael F. Sturley, *Scope of Coverage Under the UNCITRAL Draft Instrument*, 10 J. Int'l Mar. L. 138 (2004); Michael F. Sturley, *Solving the Scope-of-Application Puzzle: Contracts, Trades, and Documents in the UNCITRAL Transport Law Project*, 11 J. Int'l Mar. L. 22 (2005) (hereinafter Sturley, *Scope-of-Application Puzzle*); Miriam Goldby, *The Performance of the Bill of Lading's Functions Under UNCITRAL's Draft Convention on the Carriage of Goods: Unequivocal Legal Recognition of Electronic Equivalents*, 13 J. Int'l Mar. L. 160 (2007); Regina Asariotis, *What Future for the Bill of Lading as a Document of Title?* 14 J. Int'l Mar. L. 75 (2008); Rhidian D. Thomas, *And Then There Were the Rotterdam Rules*, 14 J. Int'l Mar. L. 189(2008).

(3) *See*, *e.g.*, Charles Debattista, *The CMI/UNCITRAL Cargo Liability Regime: Regulation for the 21st Century?* 2002 Lloyd's Mar. & Com. L.Q. 304 (introducing papers presented at a colloquium on the UNCITRAL Preliminary Draft Instrument on the Carriage of Goods by Sea, held at the University of Southampton's Institute of Maritime Law for European academics,with contributions by Stuart Beare, Erik Røsæg, Francesco Berlingieri, Stefano Zunarelli, Malcolm Clarke, Marc Huybrechts, Regina Asariotis, José M. Alcántara, and Rolf Heber). Among forthcoming works, the spring 2009 issue of the *Texas International Law Journal* will publish some of the papers from an international symposium held in Austin, Texas, in 2008.

(4) *See*, *e.g.*, Theodora Nikaki, *The UNCITRAL Draft Instrument on the Carriage of Goods (Wholly or Partly) (by Sea): Multimodal at Last or Still at Sea?*, 2005 J. BUS. L. 647; Michael F. Sturley, *Phantom Carriers and UNCITRAL's Proposed Transport Law Convention*, 2006 Lloyd's Mar. & Com. L.Q. 426; Anthony Diamond QC, *The Next Sea Carriage Convention*, 2008 Lloyd's Mar. & Com. L.Q.135.

(5) *See*, *e.g.*, Michael F. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 Tex. Int'l L.J. 65 (2003); Georgios I. Zekos, *The Contractual Role of Documents Issued under the CMI Draft Instrument on Transport Law 2001*, 35 J. Mar. L. & Com. 99 (2004); Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem*, 79 TUL. L. REV. 1461, 1500-03 (2005); Theodora Nikaki, *Conflicting Laws in "Wet" Multimodal Carriage of Goods: The UNCITRAL Draft Convention on the Carriage of Goods (Wholly or Partly) (by Sea)*, 37 J. Mar. L. & Com. 521 (2006); Mary Helen Carlson, *U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention*, 31 Tul. Mar. L.J. 615 (2007); Michael F. Sturley, *Setting the Limitation Amounts for the UNCITRAL Transport Law Convention: The Fall 2007 Session of Working Group III*, 5 Benedict's Mar. Bull. 147 (2007) (hereinafter Sturley, *Limitation Amounts*).

(6) *See*, *e.g.*, Steven Rares, *The Onus of Proof in a Cargo Claim – Arts III and IV of the Hague-Visby Rules and the UNCITRAL Draft Convention*, 31 Austl. Bar Rev. 159 (2008).

(7) *See*, *e.g.*, Gertjan van der Ziel, *The UNCITRAL/CMI Draft for a New Convention Relating to the Contract of Carriage by Sea*, 25 Transportrecht 265 (2002); Hannu Honka, *Main Obligations and Liabilities of the Carrier*, 27 Transportrecht 278 (2004); Xiaonian Li, *Reunification of Certain Rules Relating to Sea Transport Documents: Some Observations on the UNCITRAL Draft Instrument on Transport Law*, 12 Uniform L. Rev. 121 (2007); *New UNCITRAL Carriage of Goods Convention*, 192 Gard News 6 (2008).

(8) *See,e.g.*, Philippe Delebecque, *Le Projet de Convention sur le Transport de Marchandises Entièrement ou Partiellement par Mer*, 58 Droit Mar. Français 691 (2006); Stefano Zunarelli, *Elementi di novità e di continuità della regolamentazione della responsabilità del vettore marittimo di cose nell'attività del gruppo di lavoro dell'UNCITRAL*, 2006 Dir. Mar. 1022; Francesco Berlingieri, *Giurisdizione e arbitrato nel progetto UNCITRAL di convenzione sul transporto di cose*, 2007 Dir. Mar. 694.

Goods Wholly or Partly by Sea," (9) but more likely to be known as the "Rotterdam Rules" (10) -and it has been formally adopted by the General Assembly, (11) the time has come for the world's governments to decide whether they will sign (and ultimately ratify) the new regime. That decision will to a considerable extent determine the shape of international transport law as we move into the twenty-first century.

If the international community were to reject the Rotterdam Rules, the result would be a continuation, at least for the time being, of the current chaotic situation. The status quo is primarily a patchwork system of competing and outdated multilateral conventions -the Hague Rules, (12) the Hague-Visby Rules, (13) and the Hamburg Rules (14) -although national (15) and regional (16) alternatives now supplement or partially supersede those long-established regimes in some parts of the world. New national and regional deviations from the multilateral conventions could confidently be predicted. Proposals along those lines have already been made, (17) and if the Rotterdam Rules were to fail those proposals could be resurrected (18) or similar new proposals could be developed. (19)

---

(9) The final text of the Convention (hereinafter Convention or Rotterdam Rules) is annexed to General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122. It was also annexed to *Report of the United Nations Commission on International Trade Law*, 41st Session, U.N. GAOR, 63d Sess., Supp. No. 17, Annex I, U.N. Doc. A/63/17 (2008) (hereinafter *Commission Report*).

(10) *See* General Assembly Resolution 63/122, (n 9) ¶ 3.

(11) *See ibid*. ¶ 2.

(12) International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 (hereinafter Hague Rules).

(13) The phrase "Hague-Visby Rules" describes the Hague Rules, (n 12) as amended by the 1968 Visby Amendments, Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944) (entered into force June 23, 1977). In many countries, the 1968 Hague-Visby Rules have been further amended by the 1979 Special Drawing Right (SDR) Protocol. Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197) (entered into force Feb. 14, 1984).

(14) United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 (hereinafter Hamburg Rules).

(15) China, for example, adopted a Maritime Code, which came into force in 1993, that draws from both the Hague-Visby and Hamburg Rules, along with uniquely Chinese solutions to certain problems. *See generally L. Li, The Maritime Code of the People's Republic of China*, 1993 Lloyd's Mar. & Com. L.Q. 204, 209-211. Although China is a particularly prominent example, it is not the only nation to have made significant modifications to the uniform international texts.

(16) For example, the four Nordic countries – Denmark, Finland, Norway and Sweden – revised their maritime codes to incorporate major elements from the Hamburg Rules into their pre-existing Hague-Visby systems. *See generally, e.g.*, Jan Ramberg, *New Scandinavian Maritime Codes*, 1994 Dir. Mar. 1222.

(17) Perhaps the most visible proposal in recent years was that spear-headed by the U.S. Maritime Law Association to amend the U.S. Carriage of Goods by Sea Act (COGSA). *See generally, e.g.*, Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 HOUS. J. Int'l L. 609 (1996).

(18) The proposal to amend the U.S. COGSA, see (n 17), reached the stage of a Senate hearing before the proposed draft was shelved pending the result of the UNCITRAL negotiations. *See generally* Michael F. Sturley, *The Fate of the MLA's Proposed Amendments to the Carriage of Goods by Sea Act*, 1 Benedict's Mar. Bull. 105 (2003). "That draft will still be available if the need ever arises." ibid at 107.

(19) Rumors abound regarding regional approaches that might be taken in Europe in the absence of a uniform multilateral convention.

No national or regional alternative to the Rotterdam Rules could achieve the world-wide uniformity that would be so valuable in this field,([20]) and the existing disuniformity is likely to worsen if the major trading nations do not seize the present opportunity. Critics of the new Convention will undoubtedly see aspects that could be improved. Interest groups will similarly see issues on which their respective segments of the industry could have received more generous treatment. But none of that is at issue today. The negotiation and drafting are finished. The only question today is what will be done with UNCITRAL's work. If that effort does not succeed, it is likely to be at least another generation before the international community would be prepared to undertake a similar effort again. The question now is therefore whether to ratify the Rotterdam Rules or retain the status quo. Thus it is particularly important to understand the Rules, how they were prepared, the philosophy behind them, and the impact they would be likely to have. This article is intended to contribute to that process.

II. The Preparation of the Rotterdam Rules

A. Over a Century of Background

Establishing uniform international rules to allocate liability for the risk of the loss of or damage to goods carried by sea is not a new idea. The International Law Association (the sponsor of the conference at which the original Hague Rules were adopted) first tackled the subject in 1882.([21]) The ensuing history has been described in a number of different sources,([22]) and it need not be repeated here in any detail. But it is nevertheless essential to recognize that the Rotterdam Rules were not negotiated and drafted in a vacuum. Many provisions in the new Convention were included either to preserve the jurisprudence that has developed dur-

([20]) The value of international uniformity in this field has been frequently recognized. For a summary of the arguments and evidence of their wide-spread acceptance, *see*, *e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. Mar. L. & Com. 553, 556-559 (1995) (hereinafter Sturley, *Uniformity*).

([21]) *See* n 30 and accompanying text.

([22]) S*ee*, *e.g.*, Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. Mar. L. & Com. 1 (1991) (discussing the history of the Hague Rules and prior international efforts to unify cargo law) (hereinafter Sturley, *History*); Joseph C. Sweeney, *Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary*, 24 J. Mar. L. & Com. 1, 2-14 (1993) (discussing the history of the U.S. Harter Act) (hereinafter Sweeney, *Harter*); Anthony Diamond, *The Hague-Visby Rules*, 1978 Lloyd's Mar. & Com. L.Q. 225 (discussing the history of the Visby Protocol); Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)*, 7 J. Mar. L. & Com. 69 (1975); *Part II*, 7 J. Mar. L. & Com. 327(1976); *Part III*, 7 J. Mar. L. & Com. 487(1976); *Part IV*, 7 J. Mar. L. & Com. 615(1976); *Part V*, 8 J. Mar. L. & Com. 167 (1977) (hereinafter Sweeney, *Hamburg History*) (discussing the history of the preparatory work preceding the adoption of the Hamburg Rules); Stuart Beare, *Liability Regimes: Where We Are, How We Got There and Where We Are Going*, 2002 Lloyd's Mar. & Com. L.Q. 306 (discussing the history of the CMI's preparatory work on the Rotterdam Rules). Primary source material for the Hague Rules is available in "The Legislative History of the Carriage of Goods by Sea Act and the *Travaux Préparatoires* of the Hague Rules" (Michael F. Sturley ed. 1990) (hereinafter "Hague Rules *Travaux Préparatoires*"). Primary source material for the Hague-Visby Rules is available in "The *Travaux Préparatoires* of the Hague Rules and of the Hague-Visby Rules" (Francesco Berlingieri ed. 1997) (hereinafter "Hague-Visby *Travaux Préparatoires*").

ing decades of experience with the Hague and Hague-Visby Rules (23) or to avoid any implication that changes may have been intended by the deletion of a well-known provision. (24) Even the entirely new provisions were written with an eye on the years of practice under the existing regimes. (25) Thus it is helpful to have at least an outline of the earlier history.

1. The Nineteenth Century

Prior to the mid-nineteenth century, the law generally imposed near-strict liability on carriers for any loss or damage to the cargo, (26) but with the growth of steam power carriers began to limit their liability with exculpatory clauses in bills of lading. (27) The courts in different nations responded to these clauses differently. In many countries, including England, the clauses were enforceable, even if the carrier assumed virtually no liability, even for its own negligence. (28) In other countries, however, including the United States, enforcement was limited, and a carrier could not exonerate itself from the consequences of its own negligence or its failure to provide a seaworthy vessel. (29)

The International Law Association (ILA) made several efforts to address the problems created by the divergent approaches taken in different countries, starting with a model bill of lading in 1882, (30) and followed by model rules in 1885. (31) Neither effort was a huge success. In the absence of effective international regulation, however, several countries enacted domestic statutes to address the problem. The United States began the process with the Harter Act in 1893. (32) Similar legislation followed in New Zealand, Australia, Canada, and Morocco. (33)

---

(23) Article 17(3), for example, preserves most of the familiar catalogue of defenses that was originally included in art. 4(2) of the Hague Rules – despite strenuous arguments from civil law delegates that such a list was completely unnecessary. The Nordic countries have gone so far as to eliminate most of the catalogue from their domestic Hague-Visby legislation on the ground that it is unnecessary. *See generally, e.g.*, RAMBERG, (n 16) at 1223 (explaining that the elimination was not a substantive change because the general fault provision would preserve the omitted defenses in any event). But UNCITRAL for the most part retained the catalogue on the grounds that it did no harm in countries in which it was unnecessary and provided a real benefit in those countries that had a well-developed jurisprudence under the catalogue.

(24) Article 79(1)(c), for example, preserves the ban on benefit-of-insurance clauses that was originally included in art. 3(8) of the Hague Rules. *See also, e.g.*, Hamburg Rules art. 23(1). Benefit-of-insurance clauses have not been a problem in practice for over 90 years. *See* Michael F. STURLEY, *Benefit of Insurance Clauses*, 2A Benedict on Admiralty §165, at 16-28 & n.2 (7th rev. ed. 2008). But UNCITRAL did not wish to risk resurrecting the problem by repealing the well-established prohibition.

(25) Article 24, for example, largely abrogates the common-law deviation doctrine. Although no similar provision appears in prior maritime conventions, that article is a direct response to the practice that has developed in some countries under prior law.

(26) *See*, *e.g.*, STURLEY, *History*, (n 22) at 4-5.

(27) ibid at 5 n.23.

(28) ibid at 5 & nn.23-25.

(29) ibid at 5-6 & nn.26-28.

(30) ibid at 6-7.

(31) ibid at 8.

(32) ibid at 11-14; SWEENEY, *Harter*, (n 22) at 2-14. The Harter Act is still in force, and is now codified at 46 U.S.C. §§ 30701-07.

(33) *See* STURLEY, *History* (note 22) at 15-17.

2. *The Hague Rules*

With an increasing number of countries adopting Harter-style legislation, and the prospect of further legislation on the horizon (including in the United Kingdom ([34])), the ILA returned to the subject in 1921. In a demonstration of speed and efficiency that can barely be imagined in today's world of jet travel and near-instant electronic communication, ([35]) an ILA committee met in May, prepared a draft by June (based on the Canadian Harter-style statute), and -after four days of debate at the Hague Conference -adopted model rules in September. ([36]) The Hague Rules were modified the following year, most significantly by their conversion from "model rules" to a draft international convention. ([37]) The Comite Maritime International (CMI) ([38]) approved the revised draft at a conference in London in October, 1922, and a previously scheduled diplomatic conference in Brussels began considering them a week later. ([39]) The diplomatic conference, however, was unable to finish its task in the six days available, so it deferred final completion of the text until the following year. ([40]) The final text was then agreed in October 1923, ([41]) and the Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, still popularly known as the Hague Rules, was formally opened for signature the following summer. ([42])

The United Kingdom enacted its 1924 Carriage of Goods by Sea Act (COGSA), which gave effect to the Hague Rules, a full three weeks before the Convention formally opened for signature. ([43]) Australia and India soon followed suit, ([44]) but most of the world watched and waited. Once the United States adopted the Hague Rules in 1936, ([45]) however, it took only two more years for substantially all of the world's major maritime nations to join the new regime. ([46])

3. *The Hague-Visby and Hamburg Rules*

The Hague Rules provided an internationally accepted uniform legal regime when they first achieved wide-spread acceptance, but that uniformity began to break down soon thereafter. In part, the break-down was due to changing technol-

---

([34]) ibid at 18-19 & nn.143-149.
([35]) *Cf. infra* notes 114-116 and accompanying text.
([36]) ibid STURLEY, *History* (note 22) at 20-22.
([37]) ibid at 25-28.
([38]) The CMI is a non-governmental organization, founded in the late nineteenth century, that was the primary force in developing uniform international approaches to maritime law problems for most of the twentieth century. *Cf* ibid at 9-10.
([39]) ibid at 28.
([40]) ibid at 29-30.
([41]) ibid at 30-32.
([42]) ibid at 32.
([43]) ibid at 35.
([44]) ibid at 35-36.
([45]) ibid at 36-55.
([46]) ibid at 55-56.

ogy, such as the "container revolution," (47) which the draftsmen of the Hague Rules could not have anticipated. The changing world political situation was another significant factor, as former colonies became independent countries with their own agendas. (48) National court interpretations of the Hague Rules also produced problems that called for new solutions. (49) And developments in the world economy produced one of the most visible problems, as rising and falling exchange rates left unit limitation values under Article 4(5) that varied among major maritime nations from US$160 to US$550 per package. (50)

The CMI sponsored the first post-Hague effort to address some of the recognized problems. (51) That project began in the late 1950s with a proposal to expand the Hague Rules" scope-of-application provision. (52) At its 1959 Rijeka Conference, the CMI voted overwhelmingly to amend Article 10 of the Hague Rules to govern both inbound and outbound voyages (i.e., cases in which the goods were shipped to or from a contracting state) (53) and also decided that a subcommittee should consider what other changes should be made to the Hague Rules. (54)

Between 1959 and 1962, the Sub-Committee on Bill of Lading Clauses circulated several reports and held two meetings. Its 1962 final report made seven positive recommendations (and explained why it did not recommend 17 other possible changes). (55) At its 1963 Stockholm Conference, the CMI accepted some of these recommendations and added others to propose a draft protocol with eight specific amendments to the Hague Rules. (56) At the end of the conference, the draft protocol

(47) *See generally* Marc Levinson, *The box: how the shipping container made the world smaller and the world economy bigger* (2006) (discussing the impact of the container revolution), Brian J. Cudahy, *Boxboats: how containerships changed the world* (2006) (same).

(48) *See generally*, *e.g.*, David C. Frederick, *Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules*, 22 J. Mar. L. & Com. 81 (1991).

(49) *See*, *e.g.*, Comité Maritime International, Report of the 26th Conference 89-90, 119, 181-82, 212-13 (Stockholm Conference, 1963) (discussing potential amendments to the Hague Rules in light of *Riverstone Meat Co. v. Lancashire Shipping Co. (The Muncaster Castle)*, 1961 A.C. 807); ibid at 106, 117-18, 167-68 (discussing potential amendments in light of *Vita Food Products v. Unus Shipping Co.*, 1939 A.C. 277); ibid at 83-85, 108-09, 116-17, 136, 148-49, 176-79, 209-10, 215-17 (discussing potential amendments in light of *Scruttons Ltd. v. Midland Silicones Ltd.*, 1962 A.C. 446 (1961); *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959)).

(50) *See* Comité Maritime International, Report of the 24th Conference 138 (Rijeka Conference, 1959) (hereinafter Rijeka Conf. Rep.) (the Dutch package limitation, Fl. 600, was worth only US$160, while the Spanish package limitation, P. 5000, was worth US$550), *reprinted (in French) in* Hague-Visby *Travaux Préparatoires*, (n 22) at 511.

(51) For a more detailed history of the development of the Hague-Visby Rules, *see*, *e.g.*, Diamond (n 22)

(52) *See* Rijeka Conf. Rep. (n 50) at 134-40 (Report of the International Sub-Committee on Conflicts ofLaw).

(53) ibid at 391, *reprinted (in French) in* Hague-Visby *Travaux Préparatoires*, (n 22) at 703.

(54) ibid at 392, *reprinted (in French) in* Hague-Visby *Travaux Préparatoires*, (n 22) at 60-61.

(55) *See* Comitè Maritime International, Report of the 26th Conference 71-105 (Stockholm Conference, 1963) (hereinafter Stockholm Conf. Rep.).

(56) *See Draft Protocol of International Convention,* Stockholm Conf. Rep. (n 55) at 546-51, reprinted in Hague-Visby Travaux Préparatoires, (n 22) at 843-45.

was "solemn[ly] sign[ed] … in that historic place of the old and beautiful Swedish city of Visby",(57) thus justifying the name "Visby Amendments".(58)

When the draft protocol came before a diplomatic conference in May 1967 and February 1968, the delegates quickly agreed on most of the issues. One proposal was rejected, however, and two were controversial. The conference expanded the Hague Rules" scope-of-application provision only slightly,(59) rejecting the CMI's proposal to expand coverage to both inbound and outbound voyages.(60)

The most controversial proposal involved unit limitation. The diplomatic conference worked out an elaborate compromise that included higher limitation amounts expressed in Poincare francs,(61) a weight-based limitation operating in conjunction with the package limitation,(62) the "container clause" to clarify the identification of "packages" when goods are shipped in containers,(63) and a provision for the loss of the right to limit liability for intentional or reckless misconduct.(64)

When the Visby Protocol was concluded in 1968, the world's economies still operated on the gold standard.(65) Thus it made sense to address exchange rate problems in unit limitation with a gold-based unit of account, i.e., the Poincare franc. Between the time that the Visby Amendments were signed and the time that they actually went into force, however, the International Monetary Fund (IMF) abandoned the gold standard and redefined its Special Drawing Right (SDR) as a unit of account based on a weighted average value of several major currencies.(66) Gold became nothing more than a commodity with a floating market value. In 1977, the CMI appointed an International Sub-Committee to prepare draft protocols to replace limitation provisions based on the Poincare franc with provisions based on the IMF's new SDR. In 1979, a diplomatic conference adopted those drafts without amendment.(67) Thus the SDR Protocol changed the Hague-Visby limitation amounts to 666.67SDRs per package or 2SDRs per kilogram.

---

(57) *See* Stockholm Conf. Rep. (n 55) at 526, *reprinted (in French) in* Hague-Visby *Travaux Préparatoires*, (n 22) at 69.

(58) *See* n 13.

(59) *See* Hague-Visby Rules art. 10.

(60) *See Draft Protocol of International Convention* (n 56) art. 5.

(61) *See* Hague-Visby Rules art. 4(5)(a).

(62) *See* Hague-Visby Rules art. 4(5)(a).

(63) *See* Hague-Visby Rules art. 4(5)(c). The container clause continued to be controversial even after the conclusion of the conference. *See*, *e.g.*, John L. DeGurse, Jr., *The "Container Clause" in Article 4(5) of the 1968 Protocol to the Hague Rules*, 2 J. Mar. L. & Com. 131 (1970); Diplock, *Conventions and Morals – Limitation Clauses in International Maritime Conventions*, 1 J. Mar. L. & Com. 525, 530-32 (1970); Edward Schmeltzer & Robert A. Peavy, *Prospects and Problems of the Container Revolution*, 1 J. Mar. L. & Com. 203, 223-25 (1969); Allan I. Mendelsohn, *Why The U.S. Did Not Ratify The Visby Amendments*, 23 J. Mar. L. & Com. 29, 33-52 (1992).

(64) *See* Hague-Visby Rules art. 4(5)(e).

(65) In 1945, the member countries of the International Monetary Fund (IMF) undertook to maintain a "par value" for their currencies expressed in terms of gold. *See generally* Articles of Agreement of the International Monetary Fund, art. IV, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. no. 1501.

(66) *See* Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 1, 1976, 29 U.S.T. 2203, T.I.A.S. no. 8937.

(67) *See generally* Hague-Visby *Travaux Préparatoires*, (n 22) at 72-75.

The Hague Rules as amended by the Visby Protocol (and, usually, the SDR Protocol) are commonly known as the Hague-Visby Rules.([68]) That regime is now in force -in one form or another([69]) and by one method or another([70]) -in countries representing approximately two-thirds of world trade.([71])

In sharp contrast to the Visby Protocol (which simply amended the Hague Rules on a few specific issues), the Hamburg Rules([72]) supersede the prior conventions with a completely new regime.([73]) The United Nations began its efforts in this field in 1968, when the U.N. Conference on Trade and Development (UNCTAD) requested its Committee on Shipping to create a Working Group on international shipping legislation.([74]) In 1971, the focus shifted to UNCITRAL. An UNCITRAL Working Group([75]) then spent five years preparing a draft convention, which was approved by the Commission in 1976.([76])

After four weeks of further negotiations, a diplomatic conference in Hamburg, Germany, overwhelmingly approved the final text in March 1978.([77]) Despite the complete rewrite, the Hamburg Rules" approach was in many ways similar to that of the Hague and Hague-Visby Rules. All are fault-based systems with a reversed burden of proof,([78]) meaning that the burden is generally on the carrier to prove its absence of fault, but that the carrier can escape liability for cargo loss or damage if it meets that burden.([79]) Although the Hamburg package and weight-based limitation amounts are significantly higher than Visby's,([80]) the dual approach (with a container clause([81]) and a very high standard for breaking limitation([82])) is essentially the same. Indeed, many of the Hamburg provisions are simply re-worded versions of the prior language in the Hague and Hague-Visby Rules.

([68]) *See* n 13.

([69]) The Nordic countries, for example, remain parties to the Hague-Visby Rules, but they have deleted the art. 4(2) catalogue of defenses from their maritime codes. *See* n 23. Similarly, some countries are parties to the original Hague-Visby Rules while others have also ratified the SDR Protocol. *See* n 13. For a list of the countries that are parties to the Visby and SDR Protocols, *see* 2007-08 CMI Yearbook 387-90.

([70]) Although most Hague-Visby nations have ratified the Visby Protocol, some have enacted the Hague-Visby Rules by national legislation without ratifying the international convention.

([71]) For a list of the countries that are parties to the Hague-Visby Rules, *see* 2007-08 CMI Yearbook 387-90.

([72]) Note 14.

([73]) For a detailed history of the development of the Hamburg Rules, *see* Sweeney, *Hamburg History* (n 22).

([74]) *See generally* 1 UNCITRAL Yearbook 1968-70, at 233-37 (1971).

([75]) At least in theory, the UNCITRAL Working Group for the Hamburg Rules was the same Working Group that later produced the Rotterdam Rules. *See* n 114.

([76]) *See* 7 UNCITRAL Yearbook 1976, at ¶ 44 (1977).

([77]) *See* U.N. Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978, Official Records 189 & n.3 (1981) (U.N. Doc. A/CONF.89/14).

([78]) *See* Hamburg Rules art. 5.

([79]) The burdens of proof are not set out so clearly in the Hague and Hague-Visby Rules, but the courts developed the scheme that was largely retained in the Hamburg Rules. The carrier's ability to escape liability by proving an absence of fault is explicit in art. 4(2)(q) of the Hague and Hague-Visby Rules.

([80]) *Compare* Hamburg Rules art. 6(1)(a) *with* Hague-Visby Rules art. 4(5)(a).

([81]) *Compare* Hamburg Rules art. 6(2)(a) *with* Hague-Visby Rules art. 4(5)(c).

([82]) *Compare* Hamburg Rules art. 8 *with* Hague-Visby Rules art. 4(5)(e).

The Hamburg Rules nevertheless introduced some innovations that proved influential in the latest negotiations. The most obvious may have been the elimination of the navigational fault exception found in Article 4(2)(a) of the Hague and Hague-Visby Rules.([83]) More significant innovations were expanding the scope to cover inbound and outbound shipments,([84]) and introducing special rules for jurisdiction and arbitration that sought to guarantee a cargo claimant's right to have claims resolved in a convenient forum.([85]) On a more technical level, the Hamburg Rules distinguished between the "carrier" (i.e., the person that undertakes to transport the goods) and a person that actually performs the carriage,([86]) covered contracts of carriage in which no bill of lading had been issued,([87]) recognized paperless transactions,([88]) and expressly addressed liability for delay.([89])

The Hamburg Rules were also noteworthy in what they failed to do. More than two decades into the container revolution (and the accompanying growth of door-to-door multimodal transport), for example, the Hamburg Rules expanded the Hague and Hague-Visby tackle-to-tackle scope only to port-to-port coverage.([90]) Although ships increasingly carried dangerous goods that were not even contemplated when the Hague Rules were negotiated, the Hamburg Rules" treatment of shippers" liability is not substantially different from the Hague treatment.([91])

The Hamburg Rules finally entered into force (for the countries that had ratified them) in 1992. Although over 30 countries are now parties to the Hamburg Rules,([92]) they represent in the aggregate only a very small proportion of world trade.

The current situation is widely regarded as unsatisfactory. The Hague-Visby Rules provide the dominant international legal regime today, but some major commercial nations are not parties to that regime. The United States (with about a quarter of world trade) may be the most prominent example, but it is not alone. China (with about a quarter of the world's population and a growing proportion of the trade) is not a Hague-Visby country. Moreover, the Hague-Visby Rules are now dated.([93]) The Hamburg Rules are only slightly more modern, and they have never achieved the wide-spread acceptance that is necessary for their success. Recognizing these problems, individual nations have already begun to develop their own, non-uniform, solutions.([94])

([83]) *See* Hamburg Rules art. 5(1).

([84]) *See* Hamburg Rules art. 2(1). Although the CMI's draft of the Visby Protocol called for expanding the scope to cover inbound and outbound shipments, the diplomatic conference rejected this proposal. *See* nn 53, 59, 60 and accompanying text.

([85]) *See* Hamburg Rules arts. 21-22.

([86]) Hamburg Rules art. 1(2) recognizes the "actual carrier." *See also* Hamburg Rules art. 10. The concept is expanded in the Rotterdam Rules as the "performing party." *See* Rotterdam Rules art. 1(6).

([87]) *See* Hamburg Rules art. 1(6). *See also* Hamburg Rules art. 18.

([88]) The Hamburg Rules did not anticipate e-commerce, of course, but they did recognize that telegrams and telexes should be recognized as "writings" (art. 1(8)).

([89]) *See* Hamburg Rules art. 5(1)-(2).

([90]) ibid art. 4; *also* art. 1(6) (effectively excluding inland portion of multimodal contracts from coverage). *Cf.* n 118 and accompanying text.

([91]) ibid arts. 12-13.

([92]) For a list of the countries that are parties to the Hamburg Rules, *see* 2007-08 CMI Yearbook 486.

([93]) *See*, *e.g.*, VAN DER ZIEL (n 7) at 265-66; *see also* nn 191-193 and accompanying text.

([94]) *See*, *e.g.*, STURLEY, *Uniformity* (n 20) at 560-70.

B. The Preparatory Work in the Comitee Maritime International

UNCITRAL, hoping to find an acceptable solution, re-entered the field in noteworthy fashion. The Hague and Hague-Visby Rules were largely CMI products. The Hamburg Rules, on the other hand, were a product of U.N. organizations with minimal CMI input. For much of the 1980s and 1990s, while advocates of the Hague-Visby and Hamburg Rules battled over the future of cargo liability law, many observers viewed the CMI and UNCITRAL as rivals, at least on this issue. But when UNCITRAL returned to the field near the end of the twentieth century, it was in active partnership with the CMI.

The seeds for cooperation were planted in the context of UNCITRAL's Electronic Data Interchange (EDI) project. In June 1996, as part of the EDI project, the Commission discussed a proposal to

> review … 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 has so far been achieved.([95])

In conjunction with this discussion, the Commission noted:

> [E]xisting national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and seaway bills, 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 the entities that provided financing to a party to the contract of carriage.([96])

The Commission accordingly authorized the Secretariat to start gathering information on these matters with a view to deciding "on the nature and scope of any future work that might usefully be undertaken by [UNCITRAL]".([97]) As part of this process, the Secretariat would consult with relevant international bodies, including the CMI, the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS), and the International Association of Ports and Harbours (IAPH).([98]) With this mandate, the UNCITRAL Secretariat invited the CMI to begin the preparatory work for a new convention.([99])

([95]) *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Ninth Session*, U.N. GAOR, 51st Sess., Supp. No. 17, ¶ 210, U.N. Doc. A/51/17 (1996) (hereinafter *UNCITRAL Twenty-Ninth Session Report)*, reprinted in 1996 CMI Yearbook 354.

([96]) ibid.

([97]) ibid ¶ 215, reprinted in 1996 CMI Yearbook 355.

([98]) ibid.

([99]) The CMI had continued to consider potential solutions to the problems discussed here even before UNCITRAL's invitation to participate in the Transport Law project. *See*, *e.g.*, *Uniformity of the Law of Carriage of Goods by Sea: Report of the Panel*, 1997 CMI Yearbook 288 (summarizing the work from 1995-1997 of the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea).

Accepting UNCITRAL's invitation, the CMI attacked its assignment with unusual speed and vigor. It first set up a Steering Committee, which considered the project and issued a report (in April 1998) outlining the work that should be undertaken.([100]) The CMI also set up an International Working Group, which met four times to complete the preliminary matters prior to the first meeting of a new International Sub-Committee.([101]) The highlight of that preliminary work was the preparation and distribution of a questionnaire([102]) for the CMI's national member associations in order to solicit the views of maritime experts from around the world.

In conjunction with the Working Group's last preliminary meeting, the CMI's Executive Council formalized the convening of a new International Sub-Committee on Issues of Transport Law. Its stated terms of reference were:

> To consider in what areas of transport law, not at present governed by international liability regimes, greater international uniformity may be achieved; to prepare the outline of an instrument designed to bring about uniformity of transport law, and thereafter to draft provisions to be incorporated in the proposed instrument including those relating to liability.([103])

UNCITRAL, in inviting the CMI's cooperation, had initially emphasized those issues of transport law that had not previously been covered by an international agreement,([104]) which explains why these aspects were stressed and why liability issues were not part of the International Sub-Committee's initial agenda. But the final clause in the terms of reference clarifies the understanding, present from the very beginning, that liability issues would ultimately become a part of the project.

The International Sub-Committee was required to work at a feverish pace (at least by the modern standards of an international organization). It met formally

---

([100]) Alexander VON ZIEGLER, *Issues of Transport Law: Report of the CMI Steering Committee*, 1998 CMI Yearbook 107.

([101]) In May 1998, the Working Group held an organizational session, identified specific subjects requiring further investigation, and assigned members to write brief studies addressing each subject. In October 1998, it met to review those studies, assign further background studies, and begin developing a list of issues to be addressed. In March 1999, it met to review another paper and the list of issues that had been compiled since the last meeting, to discuss what should be included in the questionnaire, and to agree upon a procedure for drafting the questionnaire. In November 1999, the Working Group held its fourth meeting to review the responses that had been received to the questionnaire, to make specific plans for the first meeting of the International Sub-Committee (which had been formally announced a few days before), and to discuss general plans for the progress of the project through to the CMI's Singapore Conference in February 2001 (including CMI seminars in Toledo, Spain, and Margarita Island, Venezuela, and a colloquium co-hosted with UNCITRAL at United Nations Headquarters in New York).

([102]) 1999 CMI Yearbook 132.

([103]) Stuart N. BEARE, *Issues of Transport Law: Introductory Paper*, 1999 CMI Yearbook 117, 117.

([104]) *See*, *e.g.*, *UNCITRAL Twenty-Ninth Session Report* (n 95), ¶ 214, reprinted in 1996 CMI Yearbook 355.

in January,[105] April,[106] July,[107] and October[108] 2000; met (for all practical purposes) as Committee A[109] at the CMI's thirty-seventh conference in Singapore in February 2001; and again met formally in July[110] and November[111] 2001. It began with a list of issues for discussion, had an agenda paper with more concrete proposals by the second meeting, and was discussing draft provisions at the third meeting. By the middle of December 2001, the CMI had delivered its final Draft Instrument on Transport Law to UNCITRAL.[112]

C. The UNCITRAL Working Group

UNCITRAL made only minor changes to convert the CMI's final Draft Instrument into its own "Preliminary Draft Instrument", which it published as an UNCITRAL document[113] and referred to its Working Group III (Transport Law). This revitalized[114] Working Group first met in April 2002, at United Nations Headquarters in New York.[115] Generally spending two weeks in formal sessions every spring in New York and every fall at UNCITRAL Headquarters in Vienna,[116] the Working Group during a six-year period devoted a total of twenty-five weeks of formal meetings to discussing the text that was ultimately adopted as the Rotterdam Rules.

([105]) *See Report of the First Meeting of the International Sub-Committee on Issues of Transport Law*, 2000 CMI Yearbook 176.

([106]) *See Report of the Second Meeting of the International Sub-Committee on Issues of Transport Law*, 2000 CMI Yearbook 202.

([107]) *See Report of the Third Meeting of the International Sub-Committee on Issues of Transport Law*, 2000 CMI Yearbook 234. This meeting started the day after a colloquium – co-hosted by UNCITRAL and the CMI at United Nations Headquarters in New York – to discuss the issues raised by the Transport Law project.

([108]) *See Draft Report of the Fourth Meeting of the International Sub-Committee on Issues of Transport Law*, 2000 CMI Yearbook 263. The International Sub-Committee formally adopted the draft report of the fourth meeting at the beginning of its fifth meeting. *See Report of the Fifth Meeting of the International Sub-Committee on Issues of Transport Law*, 2001 CMI Yearbook 265, 265 n.*, 267 (hereinafter *CMI Fifth MeetingReport*).

([109]) *See Issues of Transport Law: Report of Committee A*, 2001 CMI Yearbook 182.

([110]) *See CMI Fifth Meeting Report* (n 108).

([111]) *See Draft Report of the Sixth Meeting of the International Sub-Committee on Issues of Transport Law*, 2001 CMI Yearbook 305. The International Sub-Committee formally adopted the draft report of the sixth meeting at the beginning of its seventh meeting in February 2003. *See Report of the Seventh Meeting of the International Sub-Committee on Issues of Transport Law*, 2003 CMI Yearbook 191,191.

([112]) *See CMI Draft Instrument on Transport Law*, 2001 CMI Yearbook 532.

([113]) *Preliminary Draft Instrument on the Carriage of Goods by Sea*, U.N. Doc. A/CN.9/WG.III/WP.21, Annex (2002) (hereinafter *Preliminary Draft Instrument*).

([114]) A previous incarnation of Working Group III had met in the 1970s to discuss international shipping legislation. *See* n 75. Its efforts ultimately produced the Hamburg Rules (n 14). The Working Group III of the current decade was theoretically a continuation of that earlier group, although it was in practice a completely new entity. But, because the prior Working Group III had held eight sessions, the new Working Group III's first meeting was accordingly numbered the "ninth session".

([115]) *See Report of the Working Group on Transport Law on the Work of Its Ninth Session*, ¶¶ 13-15, U.N. Doc. A/CN.9/510 (2002) (hereinafter *Ninth Session Report*).

([116]) Twelve of the thirteen Working Group sessions met for two weeks. The September 2002 meeting, however, lasted only one week. *See Report of Working Group III (Transport Law) on the Work of Its Tenth Session*, U.N. Doc. A/CN.9/ 525(2002)(hereinafter *Tenth Session Report*). And the final

The Working Group began its first meeting (the "ninth session" ([117])) with a broad exchange of views on the Preliminary Draft Instrument in very general terms. Perhaps the most significant discussion came near the beginning of this exercise, as the delegates expressed their opinions about whether the new Instrument should apply on a "door-to-door" basis (meaning that it would govern throughout the period covered by the contract of carriage, even if the transportation originated or concluded at an inland location), or whether its application should instead be limited to "port-to-port" carriage (meaning that it would govern only the ocean voyage and operations in the ports). ([118])

After the general discussion, the Working Group began its "first reading" of the Preliminary Draft Instrument -an article-by-article discussion, sometimes in great detail, of each provision in the draft. That process turned out to be more time-consuming than initially anticipated, ultimately extending to include the 2002 fall meeting in Vienna ([119]) and the first week of the 2003 spring meeting in New York. ([120]) But it gave the delegates an opportunity to express their initial views on virtually all of the Instrument's provisions. Based on those tentative views, the UNCITRAL Secretariat was then able to prepare a new draft of the Instrument. ([121]) The Secretariat made very few substantive changes, ([122]) but the drafting was revised to reflect the typical United Nations" style and a number of policy choices were highlighted.

The second week of the 2003 spring session was devoted to a discussion of the scope of application. ([123]) That had been a central topic for discussion at each of the previous meetings, and it would continue to occupy the Working Group for several more meetings, ([124]) but the subject was so important that the Working Group decided it was worth the effort to reach some tentative conclusions before the work proceeded any further.

At the 2003 fall meeting in Vienna, the Working Group -using the Secretariat's new draft as its text -began the "second reading" of the proposed new convention. Rather than proceeding directly through the draft in the order in which provisions appeared,

---

session was held not in New York in the spring of 2008 but in Vienna in January 2008 (which was undeniably "winter"). *See Report of Working Group III (Transport Law) on the Work of Its Twenty-first Session*, U.N. Doc. A/CN.9/645 (2008) (hereinafter *Twenty-first Session Report*).

([117]) *See* n 114.

([118]) *See Ninth Session Report* (n 115) ¶¶ 26-32. Although the question was initially controversial, the consensus quickly developed in favor of door-to-door coverage. *See*, *e.g.*, Rotterdam Rules art. 12.

([119]) *See Tenth Session Report* (n 116).

([120]) *See Report of Working Group III (Transport Law) on the Work of Its Eleventh Session*, ¶¶ 24-218, U.N. Doc. A/CN.9/ 526 (2003) (hereinafter *Eleventh Session Report*).

([121]) *See Draft Instrument on the Carriage of Goods by Sea*, U.N. Doc. A/CN.9/WG.3/WP.32 (2003) (hereinafter *Draft Instrument WP.32*).

([122]) One of the Working Group's few substantive decisions during the first reading was the deletion of the navigational fault defense. *See Tenth Session Report* (n 116) ¶ 36. More typically, the Working Group decided to retain the existing text as a basis for further discussion, perhaps with the addition or deletion of square brackets. *See*, *e.g.*, *Eleventh Session Report* (n 120) ¶ 163.

([123]) *See*, *e.g.*, *Eleventh Session Report, n 120,* ¶¶ 219-67.

([124]) *See generally* Sturley, *Scope-of-Application Puzzle* (n 2).

discussion during the second reading began with some of the core issues (125) and continued from topic to topic based on the progress of the work, (126) the interrelationships among various topics, (127) and the Group's scheduling needs. (128) The second reading ultimately took seven full sessions (fourteen weeks of formal meeting time), extending through the end of the 2006 fall meeting in Vienna. As the negotiations progressed, the Secretariat prepared revised versions of the Instrument from time to time so that the delegates could see how the text was developing. (129)

During the second reading, it quickly became obvious that for the project to succeed it would be necessary for the delegates to devote more energy to the subject outside of the formal Working Group sessions. Of course, delegates were already working hard to prepare for the formal sessions and to report to their domestic stakeholders on the results of the formal sessions. Several delegations, starting with the Canadian delegation in August 2002, (130) submitted formal proposals before the second reading began, (131) thus providing very tangible evidence of how hard the members were working within those delegations. (132)

---

(125) *See Report of Working Group III (Transport Law) on the Work of Its Twelfth Session*, U.N. Doc. A/CN.9/544 (2003) (hereinafter *Twelfth Session Report*).

(126) In completing the "second reading", the Working Group discussed several topics during two or more separate sessions as it refined its thoughts, proposed new drafts, and worked out technical details. The Jurisdiction and Arbitration Chapters, for example, were discussed during four different sessions. *See Report of Working Group III (Transport Law) on the Work of Its Fourteenth Session*, ¶¶ 110-57, U.N. Doc.A/CN.9/572 (2004) (hereinafter *Fourteenth Session Report*); *Report of Working Group III (Transport Law) on the Work of Its Fifteenth Session*, ¶¶ 110-79, U.N. Doc. A/CN.9/576 (2005 (hereinafter *Fifteenth Session Report*); *Report of Working Group III (Transport Law) on the Work of Its Sixteenth Session*, ¶¶ 9-103, U.N. Doc. A/CN.9/591 (2006) (hereinafter *Sixteenth Session Report*); *Report of Working Group III (Transport Law) on the Work of Its Eighteenth Session*, ¶¶ 245-79, U.N. Doc. A/CN.9/616 (2006) (hereinafter *Eighteenth Session Report*).

(127) Sometimes two topics needed to be discussed in conjunction with each other because of the inherent relationship between their subject matters. The network principle *(see* Rotterdam Rules art. 26) and the liability of performing parties*(see* Rotterdam Rules art. 19), for example, needed to be discussed together. Sometimes two topics needed to be discussed in conjunction because they were related elements in a compromise package. One of the Working Group's primary goals was to maintain a fair balance among the affected commercial interests. That could be accomplished only by recognizing the need for compromise and identifying the provisions that need to be included in a compromise package.

(128) To give one obvious example, discussion of the Jurisdiction Chapter was scheduled in coordination with representatives of the European Commission. As a matter of European law, the Commission (not the individual Member States of the European Union) has sole competence to negotiate international agreements involving such issues as jurisdiction clauses. Thus the Commission's representatives attended those discussions but had no role to play on any of the other issues before the Working Group.

(129) *See*, *e.g.*, *Provisional Redraft of Articles Considered in the Twelfth Session Report*, U.N. Doc. A/CN.9/WG.3/WP.36 (2004); *Provisional Redraft of Articles Considered in the Thirteenth Session Report*, U.N. Doc. A/CN.9/WG.3/WP.39 (2004); *Proposed Revised Provisions on Electronic Commerce*, U.N. Doc. A/CN.9/WG.3/WP.47 (2004); *Draft Convention on the Carriage of Goods (Wholly or Partly) (by Sea)*, U.N. Doc. A/CN.9IWG.3/WP.56 (2005) (hereinafter *Draft Convention WP.56*).

(130) *See Proposal by Canada*, U.N. Doc. A/CN.9/WG.III/WP.23 (2002).

(131) *See also Proposal by Italy*, U.N. Doc. A/CN.9/WG.III/WP.25 (2002); *Proposal by Sweden*, U.N. Doc. A/CN.9/WG.III/WP.26 (2002); *Proposal by the Netherlands on the Application Door-to-Door of the Instrument*, U.N. Doc. A/CN.9/WG.III/WP.33 (2003); *Proposal by the United States of America*, U.N. Doc. A/CN.9/WG.III/WP.34 (2003).

(132) Prof. Francesco Berlingieri, the senior Italian delegate to the Working Group, an active participant in the CMI process for many years, and a particularly active delegate at UNCITRAL, prepared a

For the project to move forward, however, the hard work within the delegations needed to be supplemented with more interaction among the delegations. To reach a widely acceptable final text, different points of view needed to be considered and reconciled. Compromises among competing positions needed to be agreed. In an effort to achieve that inter-delegation discussion, Professor Francesco Berlingieri ([133]) invited all of the UNCITRAL delegates (and any other interested parties) to attend a Round Table discussion in London for two days in February 2004. Although this gathering had no official status, the opportunity to exchange ideas was very valuable. ([134]) No formal votes were taken, but delegates could hear each others" ideas, weaknesses in positions could be exposed, valuable proposals could be refined and strengthened, and delegates could discover what might be likely to work and what would not be worth pursuing. Thus, when delegates next met at a formal Working Group session, the official discussion was able to proceed more efficiently.

Having an informal meeting between Working Group sessions proved so effective that Professor Johan Schelin, the Swedish delegate, organized another open meeting in London in February 2005, and Professor Berlingieri hosted a third meeting in January 2006.

Near the end of the Working Group's 2004 spring meeting in New York, "a number of delegations [took] the initiative of creating an informal consultation group for [the] continuation of the discussion between sessions of the Working Group". ([135]) As with the winter meetings in London, the goal was to accelerate "the exchange of views, the formulation of proposals, and the emergence of consensus". ([136]) The informal group strove to be as inclusive as possible, noting from the beginning that it "would be open to all interested delegations and observers". ([137]) With this explanation, the full Working Group's reaction to the initiative was strongly positive:

---

detailed table comparing the provisions of a wide range of transport law conventions, which he shared (through the Secretariat) with the entire Working Group. *See Comparative Tables*, U.N. Doc. A/CN.9/WG.III/WP.27 (2002).

([133]) *See* n 132

([134]) The Swedish UNCITRAL delegate, Prof. Johan SCHELIN, served as the rapporteur at the Round Table and prepared a report, *Freedom of Contract and Carriage of Goods*, to summarize the discussions in London and "serve as a tool for future negotiations". That report was publicly available on the website of the University of Stockholm's Institute of Maritime Law.

([135]) *Report of Working Group III (Transport Law) on the Work of Its Thirteenth Session*, 1167, U.N. Doc. A/CN.9/552(2004) (hereinafter *Thirteenth Session Report*).

([136]) ibid.

([137]) ibid. The London meetings were also open to all interested delegations and observers. Not every intersessional meeting of different delegations was so open. It was common, for example, for different delegations from a single region to meet separately between sessions to develop common positions. *See*, *e.g.*, *Comments and Proposals of the Government of Nigeria*, U.N. Doc. A/CN.9/WG.IIIIWP.93 (2007) ("reflect[ing] the results of consultations between Central and West African Countries"); *Comments from Denmark, Finland, Norway and Sweden (the Nordic Countries) on the Freedom of Contract*, U.N. Doc. A/CN.9/WG.III/WP.40 (2004). Indeed, more or less random groupings of delegations would sometimes cooperate to formulate a common proposal. *See*, *e.g.*, *Proposal by the Delegations of Italy, the Republic of Korea and the Netherlands to Delete Any Reference to "Consignor" and to Simplify the Definition of "Transport Document*, U.N. Doc. A/CN.9/WG.Ill/WP.103 (2007); *Joint Proposal by Australia and France Concerning Volume Contracts*, U.N. Doc. A/CN.9/WG.III/WP.88(2007).

> The Working Group welcomed the initiative … The Secretariat was requested to monitor the operation of the informal consultation group and to facilitate the presentation to the Working Group of proposals that interested Member States or observers might wish to make in respect of the draft instrument as a result of their informal consultations.([138])

Professor Schelin agreed to coordinate this informal consultation group, and he appointed individual delegates as "subcoordinators" to address specific topics. Each subcoordinator would circulate an initial paper during a period between sessions to solicit comments from every delegation and observer. On the basis of the responses received, the subcoordinator would then circulate a final discussion paper to assist the Working Group by defining the relevant issues, describing the various views that had been expressed, identifying areas of possible consensus, raising questions that required further consideration, and proposing possible solutions as a framework for further discussion.([139])

During subsequent sessions, when the Working Group was ready to consider a particular topic, the chair typically invited the relevant subcoordinator to open the discussion with a report of the intersessional work.([140]) Proceeding on the basis of the subcoordinator's paper, the Working Group could move more quickly to the key issues at the heart of the subject.

At the 2006 fall meeting in Vienna, the Working Group completed its second reading of the proposed convention. The Secretariat then prepared a new draft([141]) to serve as the basis for discussion during the third reading. Because substantial consensus had been achieved on most issues during the second reading, the Working Group was able to proceed much more quickly.([142]) At the 2007 spring meeting

---

([138]) *Thirteenth Session Report* (n 135) ¶ 167

([139]) Most of the subcoordinators" papers were submitted as official papers by the delegations whose members had prepared them. *See,e.g. Limitation of Carrier Liability*, U.N. Doc. A/CN.9/WG.III/WP.72 (2006) (submitted by China); *Transport Documents and Electronic Transport Records: Document Presented for Information by the Delegation of the United States of America*, U.N. Doc. A/CN.9/WG.III/WP.62 (2006); *Delivery: Information Presented by the Delegation of The Netherlands*, U.N. Doc. A/CN.9/WG.III/WP.57 (2005); *Shipper's Obligations: Information Presented by the Swedish Delegation*, U.N. Doc. A/CN.9/WG.III/WP.55 (2005); *Transfer of Rights: Information Presented by the Swiss Delegation*, U.N. Doc. A/CN.9/WG.III/WP.52 (2005); *Scope of Application and Freedom of Contract: Information Presented by the Finnish Delegation at the Fifteenth Session*, U.N. Doc. A/CN.9/WG.III/WP.51 (2005); *Right of Control: Information Presented by the Norwegian Delegation*, U.N. Doc. A/CN.9/WG.III/WP.50/Rev.1 (2005); *Jurisdiction and Arbitration: Information Presented by the Danish Delegation at the Fifteenth Session*, U.N. Doc. A/CN.9/WG.III/WP.49 (2005).

([140]) *See*, *e.g.*, *Fourteenth Session Report* (n 126) ¶ 82 (report from subcoordinator on Freedom of Contract); *Sixteenth Session Report* (n 126) ¶ 189 (report from subcoordinator on Delivery).

([141]) *Draft Convention on the Carriage of Goods (Wholly or Partly) (by Sea)*, U.N. Doc. A/CN.9/WG.3/WP.81 (2007) (hereinafter *Draft Convention WP.81*).

([142]) As a result of the substantial consensus achieved during the second reading, many of the more important provisions of the Rotterdam Rules are substantially identical to the draft as it existed after the second reading. *Compare*, *e.g.*, Rotterdam Rules arts. 5-7 (scope of application) *with Draft Convention WP.81* (n 141) arts. 5-7; *compare*, *e.g.*, Rotterdam Rules art. 17 (basis of carrier's liability) *with Draft Convention WP.81* (n 141) art. 17.

in New York, the Working Group reviewed and approved most[143] of the provisions in Chapters 1[144] through 9 and also Chapter 19[145] of the text.[146] At the 2007 fall meeting in Vienna, the Working Group reviewed and approved most of the provisions in Chapters 10 through 18 and also Chapter 20 of the text.[147]

The Working Group met for the last time in Vienna in January 2008 to finalize the draft convention. During the session, it reviewed the entire draft[148] and approved each provision,[149] but the focus was on a very few subjects. Some of the discussion was fairly technical, resolving a few relatively minor issues.[150] The highlight of the session, however, was a compromise proposal agreed among 33 delegations to:

– increase the limitation amounts to 875 SDRs per package or 3 SDRs per kilogram,[151]

– delete the proposed "exedited amendment" procedure that had been included in brackets in prior drafts[152] but that the Working Group had never accepted,

– delete the proposal that had been included in brackets in prior drafts,[153] but that the Working Group had never accepted, to treat "non-localized" loss or damage as if it had occurred on the leg with the highest limitation amount,

---

[143] The Working Group decided to postpone its consideration of some provisions. *See*, *e.g.*, *Report of Working Group III (Transport Law) on the Work of Its Nineteenth Session*, ¶ 302, U.N. Doc. A/CN.9/621 (2007) (hereinafter *Nineteenth Session Report)* (postponing consideration of art. 42).

[144] Chapter 1 of the text includes art. 1, which contains the definitions that apply throughout the Convention. The Working Group reviewed and approved arts 2-4 in Chapter 1 but discussed each definition in conjunction with the substantive provisions in which the defined terms are used. Some of the definitions in art. 1 did not arise during the 2007 spring meeting.

[145] Chapter 19 addresses "Validity of Contractual Terms," which closely relates to the scope of application of the Convention. The Working Group therefore decided to review the chapter at the same session as the scope-of-application chapter. *See Nineteenth Session Report* (n 143) ¶ 154.

[146] *Nineteenth Session Report* (n 143) ¶¶ 9-304.

[147] *Report of Working Group III (Transport Law) on the Work of Its Twentieth Session*, ¶¶ 9-278, U.N. Doc. A/CN.9/642 (2007) (hereinafter *Twentieth Session Report*).

[148] To facilitate this review, the Secretariat had prepared yet another new draft incorporating all of the changes agreed by the Working Group during the third reading. *See Draft Convention on the Carriage of Goods (Wholly or Partly) (by Sea)*, U.N. Doc. A/CN.9/WG.3/WP.101 (2007) (hereinafter *Draft Convention WP.101*).

[149] *See generally Twenty-first Session Report* (n 116).

[150] For example, the Working Group decided not to accept a Dutch proposal to include "road cargo vehicle" in the definition of "container," *see Proposal of the Netherlands*, U.N. Doc. A/CN.9/WG.III/WP.102 (2007), but instead to revise the substantive Articles in which "container" is most relevant to include "road or railroad cargo vehicles", *see Twenty-first Session Report* (n 116) ¶¶ 73-82, 193-94.

[151] At the 2007 fall session, the Working Group had tentatively accepted the Hamburg Rules" lower limits, which are 835 SDRs per package or 2.5 SDRs per kilogram. *See Twentieth Session Report* (n 147) ¶ 166; Sturley, *Limitation Amounts* (n 5).

[152] See *Draft Convention WP.101* (n 148) art. 99; *Draft Convention WP.81* (n 141) art. 99. *Cf.* Hamburg Rules art. 33.

[153] *See Draft Convention WP.101* (n 148) art. 62(2); *Draft Convention WP.81*, *supra* note 141, art. 62(2).

– confirm the Working Group's previous decision not to include mandatory national law (along with international instruments) within the network provision,([154]) and

– retain the "volume contract" definition that the Working Group had accepted at prior essions.([155])

Once the Working Group accepted this compromise package,([156]) all of the contentious open issues were resolved. The Working Group had completed its work and it was left to the Secretariat to clean up the draft and prepare the text that was submitted for the full Commission's approval.([157])

D. Final UNCITRAL and General Assembly Approval

Once the Working Group had completed its work and submitted its final text to the full Commission, the Secretariat circulated the proposed convention to all of the U.N. Member States for review and comment. A number of governments submitted written comments in advance, ranging from short statements expressing strong support, particularly from those governments whose delegations had been most centrally involved in the Working Group's negotiations,([158]) to much longer statements seeking to reopen various issues,([159]) particularly from those governments whose delegations had not been active in the Working Group's negotiations.([160])

When the Commission met at United Nations Headquarters in New York in June 2008, it showed considerable deference to the conclusions reached by the Working Group. This was presumably due in large measure to the overlap in personnel between the two bodies. Many countries were represented at the Commission by the same delegates who had represented them in the Working Group. Moreover, Professor Rafael Illescas of Spain, who had ably chaired every session of the Working Group, was elected to chair the 2008 session of the Commission.([161]) But

---

([154]) At the 2007 spring session in New York, there had been strong support in the Working Group for a compromise proposal to extend the network provision by allowing a country to declare when ratifying the convention that it would treat its own mandatory national law in the same way as another international instrument when applying the provision that ultimately became art. 26 of the Rotterdam Rules. *See Nineteenth Session Report* (n 143) ¶¶ 189-90. At the 2007 fall session in Vienna, however, the Working Group "reverse[d] its decision". *Twentieth Session Report* (n 147) ¶ 163(e); *see also* ibid ¶ 166.

([155]) *See Nineteenth Session Report* (n 143) ¶¶ 161-72; *Report of Working Group III (Transport Law) on the Work of Its Seventeenth Session*, ¶¶ 154-70, U.N. Doc. A/CN.9/594 (2006) (hereinafter *Seventeenth Session Report*).

([156]) *See Twenty-first Session Report* (n 116) ¶¶ 196-203.

([157]) The text that was submitted for the full Commission's approval was annexed to the Working Group's report of its final session. *See Twenty-first Session Report* (n 116) annex.

([158]) *See*, *e.g.*, *Compilation of Comments by Governments and Intergovernmental Organizations*, U.N. Doc. A/CN.9/658/Add.2, ¶¶ 15-19 (2008) (Denmark); U.N. Doc. A/CN.9/658/Add.3 (France); U.N. Doc. A/CN.9/658/Add.9 (The Netherlands); U.N. Doc. A/CN.9/658/Add.12 (United States).

([159]) *See*, *e.g.*, *Compilation of Comments by Governments and Intergovernmental Organizations*, U.N. Doc. A/CN.9/658, ¶¶ 4-68 (Australia); U.N. Doc. A/CN.9/658/Add.1 (18 countries of West and Central Africa).

([160]) *See*, *e.g.*, *Compilation of Comments by Governments and Intergovernmental Organizations*, U.N. Doc. A/CN.9/658/ Add.8 (Jordan); U.N. Doc. A/CN.9/658/Add.14 (Egypt).

([161]) *See Commission Report* (n 9) ¶ 9.

a number of countries that attended the Commission meeting had not participated in the Working Group sessions, so the identity of the representatives was only a part of the explanation. The Commission also recognized the vast amount of time and the high level of energy that the Working Group had devoted to thinking through the various issues, the care with which many of the delicate compromises had been struck, and the risk that the project might unravel entirely if major issues were renegotiated at the Commission level.

Once the Commission had rejected efforts by some delegations to reopen such major topics as the basis of the carrier's liability,([162]) the limitation levels,([163]) and the treatment of volume contracts,([164]) the focus shifted to more technical subjects. The most contentious topic of the meeting became the delivery of goods without the consignee's surrender of the negotiable transport document or negotiable electronic transport record.([165]) After intense debate between those who supported the proposal to authorize delivery without surrender in defined circumstances([166]) and those who wished to delete the provision entirely,([167]) the Commission agreed on a compromise text in which the authority to delivery without surrender will arise only if the parties "opt in" with an appropriate clause in the transport document or electronic transport record.([168])

It proved sufficiently difficult to reach a consensus on two relatively minor Articles that the Commission decided to delete them.([169]) The remaining changes were fairly technical. One example, however, usefully illustrates the care with which the Commission reviewed the draft. Article 1(14) defines a "transport document."([170]) Previous drafts indicated that a transport document could be issued by the carrier or by a "performing party," i.e., someone acting on the carrier's behalf.([171]) As a general rule, the Convention does not address matters of agency. It speaks throughout of actions performed by a "carrier" despite the universal recognition that most of those actions will typically be performed by agents on behalf of the carrier. In the interest of consistency and, more importantly, to avoid any implication that agents could not act on behalf of a carrier when they were not explicitly mentioned, the Commission agreed to delete any mention of performing parties in Article 1(14).([172])

([162]) ibid ¶¶ 67-77.

([163]) ibid ¶¶ 195-200.

([164]) ibid ¶¶ 243-46.

([165]) Traditionalists who are not yet comfortable with the terminology of the Rotterdam Rules may prefer to think of this as the problem of delivery without surrender of the bill of lading.

([166]) *See Draft Convention WP.101* (n 148) art. 49.

([167]) *See* the British comments in *Compilation of Comments by Governments and Intergovernmental Organizations*, U.N. Doc. A/CN.9/658/Add.13, ¶¶ 16-18(2008).

([168]) *See* Rotterdam Rules art. 47(2).

([169]) *See Commission Report* (n 9) ¶¶ 45-53 (deciding to delete *Draft Convention WP.101* (n 148) art. 13, which addressed transport beyond the scope of the contract of carriage); ibid ¶¶ 109-10 (deciding to delete *Draft Convention WP.101* (n 148) art. 36, which addressed cesser clauses).

([170]) Rotterdam Rules art. 1(14). A "transport document" will often be a bill of lading but may be any document that both serves as a receipt for the goods and evidences the contract of carriage. *See* ibid.

([171]) *See*, *e.g.*, *Draft Convention WP.101* (n 148) art. 1(14).

([172]) *See Commission Report* (n 9) ¶¶ 133-34.

Once the Commission accepted the final text of the Draft Convention, the substantive work was complete. UNCITRAL made its formal report to the General Assembly,([173]) including both the final text and a summary of the discussion at the Commission meeting. The General Assembly referred this report to its "Sixth Committee," which is the Legal Committee. At the General Assembly's fall session, the Sixth Committee devoted one day (October 20) to reviewing all of UNCITRAL's activities during the past year, including its work on the transport law project. This "review", however, did not involve a wide-ranging discussion or debate. On the contrary, government representatives read prepared statements seriatim. Some statements did not even mention the draft convention. Most simply congratulated UNCITRAL on the completion of the project, perhaps with a general statement looking forward to its adoption.([174])

The Sixth Committee recommended the adoption of the Draft Convention. The General Assembly, following that recommendation, passed Resolution 631122 on December 11, 2008.([175]) With this action, the "Draft Convention" became the "U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea." Of course, it is still an unsigned and unratified convention. The Resolution authorizes a signing ceremony in Rotterdam on September 23, 2009.([176]) At that event, the Convention will be opened for signature (and at least some countries can be expected to sign as part of the ceremony). It will then be up to the nations of the world to ratify the Rotterdam Rules. They will enter into force one year after the twentieth ratification.([177])

III. The Philosophy of the Rotterdam Rules

The single word that best describes the philosophy of the Rotterdam Rules could be "pragmatic", but their pragmatism is exhibited in many forms -ranging from the process by which they were negotiated to the goals (particularly modernization and uniformity) that they were designed to accomplish.

Many have criticized the Hamburg Rules as the product of a political process in which a majority of those negotiating the Convention were more concerned about achieving political goals than meeting commercial needs.([178]) Although it is probably inevitable that political considerations will play a role whenever governments

---

([173]) *Commission Report* (n 9).

([174]) A typical statement was that of Norway's representative on behalf of the five Nordic countries. Although four of those countries (Denmark, Finland, Norway, and Sweden) were among the most active in negotiating the Rotterdam Rules, only a single paragraph (in a twelve-paragraph statement) addressed the subject: During this year's session, the Commission obtained significant results within the field of transport law. The draft Convention on contracts for the international carriage of goods wholly or partly by sea was agreed upon. We are delighted that many years of hard work have been successfully concluded. With such generalities from some of the most active participants, it is hardly surprising that there was no substantive discussion. Furthermore, because the statements were prepared in advance, the delegates could not respond to each other's views.

([175]) Note 9.

([176]) *See* General Assembly Resolution 63/122 (n 9) ¶ 3.

([177]) Rotterdam Rules art. 94(1).

([178]) *See generally* Frederick (n 48)

are involved in making important decisions, the negotiation and drafting of the Rotterdam Rules were particularly attuned to practical and commercial needs. From the beginning, UNCITRAL made a point of reaching out to commercial interests.([179]) Representatives from organizations that act on behalf of various segments of the industry attended every meeting of the CMI's International Sub-Committee,([180]) and commercial observers were active participants at every session of the UNCITRAL Working Group.

Commercial interests not only had a seat at the table so that their views could be heard, but the Working Group listened to those views and took them seriously. Most of the national delegations that were active in the negotiations either included expert industry representatives as members of the delegation([181]) or consulted regularly with industry representatives between sessions.([182]) When those experts with practical experience expressed strong views, therefore, the Working Group heard their message and responded accordingly.

Among other things, this meant that proposals that might have made perfect sense on a theoretical or logical level were abandoned when it became clear that the affected industries opposed them. Two examples illustrate that influence particularly well. Under Article 19, "maritime performing parties" are liable on the Convention's terms for their own faults on the same basis as carriers (and receive the same benefits as carriers).([183]) Early in the process, the draft text proposed that inland carriers (non-maritime performing parties) should be subject to the same rule.([184]) But that proposal was abandoned([185]) -and the text was amended to clarify that inland carriers do not qualify as maritime performing parties([186]) -when railroads and road carriers opposed it.([187]) Under Article 80, "volume contracts" are subject to the Convention as a default rule but the parties have the freedom

([179]) *See* nn 97-98 and accompanying text.

([180]) *See* nn 105-111 and accompanying text.

([181]) Over the course of the negotiations, the two largest delegations in the Working Group were those from China and the United States. Each of these countries had a large delegation precisely because it included industry experts to advise the government representatives. Even some of the smaller delegations also included industry experts who at tended the meetings. Denmark, for example, regularly sent two delegates to the Working Group – one a government representative and one from industry.

([182]) Although China and the United States included industry experts on their delegations, *see* n 181, each country also prepared for Working Group sessions by meeting with an even broader range of industry experts. The other countries that were most active in the negotiations also consulted regularly with industry experts at home.

([183]) *See* Rotterdam Rules art. 19(1).

([184]) *See*, *e.g.*, *Preliminary Draft Instrument* (n 113), art. 6.3.1(a); *Draft Instrument WP.32* (n 121) art. 15(1).

([185]) *See Twelfth Session Report* (n 125), ¶¶ 23, 161.

([186]) *See* Rotterdam Rules art. 1(7).

([187]) *See*,*e.g.*, *Proposals by the International Road Transport Union (IRU)*, U.N. Doc. A/CN.9/WG.III/WP.90, at ¶ 1 (2007); *Drawing up of a New Convention on the Carriage of Goods by Sea and Extending This Convention to Door-to-Door Transport Operations (Comments on Behalf of the IRU)* in *Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument*, U.N. Doc. A/CN.9/WG.III/WP.28, at 43 (2003); *Comments on Behalf of the Association of American Railroads (AAR) Relating to the Preliminary Draft Instrument on the Carriage of Goods by Sea* in *Compilation of*

of contract to opt out of most of that coverage if they so choose.(188) At the 2004 London Round Table,(189) it was informally suggested that the text would be more logical if charterparties were subject to the same rule. That suggestion was also quickly abandoned when several non-governmental organizations representing carrier interests expressed their strong opposition.(190)

The goals of the Rotterdam Rules are pragmatic because they are designed to meet practical needs, solving the problems that face those who are active in the industry. Perhaps the primary goal was updating transport law for the twenty-first century. As many observers have recognized, all of the existing regimes are seriously out-of-date. The Visby Protocol is over 40 years old. It was negotiated in the early days of the container revolution(191) when contracts for door-to-door multimodal transport were not yet the norm (and electronic commerce was not even visible on the horizon). Moreover, the Visby Protocol did not overhaul the Hague Rules (which were then already over 40 years old); it amended them only in limited respects.(192) The core of the Hague-Visby regime is not the Visby Protocol but the 1924 Hague Rules, which were not particularly "modern" even in the 1920s.(193) The Hamburg Rules are only ten years younger, and in any event they did very little to update the Hague-Visby Rules.(194)

Updating transport law requires a much broader convention than the Hague, Hague-Visby, or Hamburg Rules. Many provisions in the final text of the Rotterdam Rules illustrate the broad scope of the project.(195) Chapters 3,(196) 9,(197)

Replies, *supra*, at 32. For a good illustration of the influence that the rail roads exerted over an individual delegation, *see Proposal of the United States of America on the Definition of "Maritime Performing Party,"* U.N. Doc. A/CN.9/WG.III/WP.84, ¶¶ 1-2(2007).

(188) *See* Rotterdam Rules art. 80(1).

(189) *See* n 134 and accompanying text.

(190) As a result, the traditional charterparty exclusion was retained. *See* Rotterdam Rules art. 6.

(191) *See* n 47.

(192) *See* nn 54-64 and accompanying text.

(193) The Hague Rules were substantially based on a 1910 Canadian statute that was modeled on the 1893 Harter Act, which was passed to address problems that began to arise at the beginning of the steam era. *See* nn 26-42 and accompanying text.

(194) On the two critical issues of facilitating e-commerce and addressing the needs of multimodal transport, the Hamburg Rules did nothing and next to nothing. *See* n 90 and accompanying text. The Hamburg Rules" response to the container revolution was little different than Hague-Visby's. *See* n 81 and accompanying text.

(195) Some of the topics that the Working Group discussed and then omitted also illustrate the project's ambition. The early drafts considered by the Working Group, for example, had an entire chapter addressing freight. *See Preliminary Draft Instrument* (n 113) ch. 9 (arts. 9.1-9.5); *Draft Instrument WP.32* (n 121) ch. 9 (arts. 41-45). During the second reading, however, the Working Group agreed to delete most of that chapter. *See Thirteenth Session Report* (n 135) ¶ 164. The only provision that survived to the final text became art. 42 of the Convention, which addresses "freight prepaid" clauses. *Cf. Draft Instrument WP.32* (n 121) art. 44 (addressing "freight prepaid" clauses). A provision addressing "cesser" clauses, which had originally been in the freight chapter, *see* ibid art. 43(2), survived almost until the end, but it was finally deleted by the Commission. *See* n 169 and accompanying text.

(196) Chapter 3 addresses electronic transport records, a subject that was not even contemplated when the prior maritime conventions were negotiated.

(197) Chapter 9 addresses delivery, a key concept that prior maritime conventions left undefined. Article 4(2) of the Hamburg Rules comes the closest to providing any useful guidance.

10,[198] and 11 [199] address issues that have been entirely omitted from prior maritime conventions. Chapter 8 resolves issues concerning transport documents and electronic transport records that have created real problems in practice but that prior conventions did not include.[200] Even on liability issues, the Rotterdam Rules cover a broader range of issues. Chapter 7 resolves issues of shipper liability more fully than prior maritime conventions,[201] and Chapter 5 addresses not only the carrier's liability but also the liability of maritime performing parties.[202]

The need to update the law to facilitate electronic commerce explains a large share of the new subjects covered by the Rotterdam Rules. Industry is moving in the direction of greater e-commerce, but current law impedes that progress to the extent that the law fails to furnish a framework that provides an adequate basis for e-commerce (however it may develop). Chapter 3 takes an important step by permitting the use of electronic transport records if the parties wish to use them, but that solves only part of the problem. Before commercial parties will make the investment necessary to rely on e-commerce substitutes for bills of lading, they will need to know that the law provides predictable answers to such issues as the rights of the controlling party and transfer of rights – issues that Chapters 10 and 11 now address.[203]

The Rotterdam Rules" wider period of carrier responsibility -full door-to-door coverage (rather than tackle-to-tackle coverage under the Hague and Hague-Visby Rules or port-to-port coverage under the Hamburg Rules) when the contract of carriage extends that far [204] – is similarly a pragmatic innovation that is necessary to modernize the law. Separate legal regimes for each leg of a multimodal journey may have made sense in the days when each leg was performed under a different contract, but the commercial world has long since moved past that business model. It is time for the legal community to catch up with commercial reality. As the Supreme Court of the United States recently observed in the context of a multimodal bill of lading, "[c]onfusion and inefficiency will inevitably result if more

---

[198] Chapter 10 addresses the rights of the controlling party, a concept that prior maritime conventions did not recognize.

[199] Chapter 11 addresses the transfer of rights, a subject beyond the scope of prior maritime conventions that has generally been governed by national law.

[200] *Compare* Rotterdam Rules arts. 35-42 *with* Hague Rules arts. 3(3)-(5), 3(7); Hague-Visby Rules arts. 3(3)-(5), 3(7); Hamburg Rules arts. 14-18.

[201] *Compare* Rotterdam Rules arts. 27-34 *with* Hague Rules arts. 4(3), 4(6); Hague-Visby Rules arts. 4(3), 4(6); Hamburg Rules arts. 12-13.

[202] *See* Rotterdam Rules arts. 1(7), 19-20.

[203] Many of the other new provisions in the Rotterdam Rules were also necessary to update the law. Article 80's treatment of volume contracts was controversial because of the policy choices that UNCITRAL made, but *some* treatment of volume contracts (and other contractual forms that did not previously exist in common practice) was necessary to bring the law into the twenty-first century. We no longer live in an era when bills of lading and charterparties are the sole contracts of carriage in everyday use. *Cf.* Rotterdam Rules arts. 1 (1) (providing a "contract of carriage" definition that is not limited to bills of lading and similar documents of title), 6(1)(b) (providing for contracts other than charterparties that provide for the use of a ship or any space thereon).

[204] *Compare* Rotterdam Rules art. 12 *with* Hague Rules art. 1(e); Hague-Visby Rules art. 1(e); Hamburg Rules art. 4(1).

than one body of law governs a given contract's meaning". ([205]) Thus the Rotterdam Rules provide that its legal regime will govern the relationship between the shipper and the carrier (the two contracting parties) throughout the entire performance of a multimodal contract that includes appropriate carriage by sea. ([206])

A final example of pragmatism worth stressing is the Rotterdam Rules" goal of achieving greater international uniformity. That goal is so well-known, not only for maritime law but for any international private law convention, that it does not require extended discussion here. ([207]) But it should be recalled that uniformity is indeed a pragmatic concern. The U.S. Supreme Court once again ([208]) recognized the fundamental significance of a key issue in its last case construing the Hague Rules: "[C]onflicts in the interpretation of the Hague Rules not only destroy aesthetic symmetry in the international legal order but impose real costs on the commercial system the Rules govern". ([209])

Despite the impression that one might obtain from the reported decisions, most cargo arrives safely at its destination. It is nevertheless inevitable that some portion of the cargo transported in international trade will be lost or damaged en route. The role of the legal system in this context is to allocate financial responsibility for these losses. In the process, it influences the actions of shippers, carriers, and other participants in a transaction. A carrier's decision concerning its appropriate level of care ([210]) during carriage will be based at least in part on its potential liability. Shippers will be similarly influenced in deciding how carefully goods should be prepared for shipment and the extent to which they will insure goods. Insurers must decide the terms on which coverage will be offered, potential buyers of the cargo must determine the protection that they require, and bankers financing a transaction

---

([205]) *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd*., 543 U.S. 14, 29, 2004 AMC 2705, 2715 (2004).

([206]) Of course, the contract must otherwise satisfy the scope-of-application requirements. See Rotterdam Rules arts. 5-7.

([207]) The importance of international uniformity in the law governing the international carriage of goods has been widely recognized. *See*, *e.g*., *Riverstone Meat Co. v. Lancashire Shipping Co*. (*The Muncaster Castle*), 1961 A.C. 807, 840 ("I think it is very important in commercial interests that there should be [international] uniformity of construction … ") (quoting *R.F. Brown & Co. v. Harrison*, 137 L.T. 549, 556, 43 L.T.R. 633 (C.A. 1927) (Atkin, L.J.)); Stewart C. Boyd, et al., Scrutton on Charter Parties and Bills of Lading 376 (21st edn. 2008). Indeed, both UNCITRAL and the CMI exist to promote uniformity. *See* General Assembly Resolution 2205 (XXI) (establishing UNCITRAL with the mandate to further the progressive harmonization and unification of the law of international trade); CMI Constitution art. 1 (declaring CMI's "object … is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects").

([208]) *Cf*. n 205 and accompanying text. The U.S. Supreme Court has decided so few cargo cases in the last half century that it is somewhat surprising to see both of them cited here in consecutive paragraphs!

([209]) *Vimar Seguros y Reaseguros, S.A. v. MIV Sky Reefer*, 515 U.S. 528, 537, 1995 AMC 1817, 1824 (1995).

([210]) An unsophisticated observer might think that more care is always better than less care, but that is not true in this context. To take an obvious example, a carrier would be foolish to spend £1000 in extra precautions to ensure that a package worth only £500 arrived safely at its destination. The legal system should encourage participants to exercise an appropriate level of care, but that will rarely be the maximum care possible.

must know the extent to which they can depend on a security interest in the goods. And all of these decisions will be based in part on the liability regime that allocates the risk of loss.

If the law is uniform, all participants will know that their liability (or recovery) will be the same wherever a dispute is resolved. Results will be more predictable, litigation will be less necessary, and the parties will be able to make their underlying business decisions in confidence, knowing what law will be applied if loss or damage occurs. The chairman of the International Chamber of Commerce (ICC) Bill of Lading Committee clearly expressed the commercial interest in uniformity when he was advocating for the adoption of the Hague Rules in the 1920s. He explained:

> [I]n the view of the [ICC,] uniformity is the one important thing. It does not matter so much precisely where you draw the line dividing the responsibilities of the shipper and his underwriter from the responsibility of the carrier and his underwriter. The all-important question is that you draw the line somewhere and that that line be drawn in the same place for all countries and for all importers. ([211])

The practical factors motivating the ICC's desire for uniformity over 80 years ago are just as strong today. With uniformity and predictability, the law more efficiently allocates the risks of cargo loss or damage. At the very least, greater uniformity tends to keep the law from interfering with the flow of trade.

As a result of the pragmatic process and the focus on pragmatic goals, the Rotterdam Rules are very much a pragmatic Convention. Academic observers have criticized them for being inelegant, and that may be a fair criticism. But the goal was never to achieve elegance. The philosophy of the Rotterdam Rules was to improve the law so that it can better do the job that it is supposed to do -facilitate maritime commerce.

IV. The Potential Impact of the Rotterdam Rules

The potential impact of the Rotterdam Rules can be considered from many viewpoints. Advocates for a particular commercial interest, for example, might first consider whether the Convention will help or hurt a party in litigation once a loss has occurred. Thus a lawyer who regularly represents P&I clubs defending cargo claims might evaluate whether a carrier's liability is likely to be higher or lower in a typical case, just as a lawyer who regularly represents cargo insurers in subrogation actions might evaluate whether recoveries are likely to be higher or lower in typical cases.

([211]) *International Convention for the Unification of Certain Rules in Regard to Bills of Lading for the Carriage of Goods by Sea: Hearing on Executive E Before a Subcommittee of the Senate Committee on Foreign Relations*, 70th Cong., 1st Sess. 3 (1927) (statement of Charles S. Haight), reprinted in 3 Hague Rules *Travaux Préparatoires* (n 22) at 327.

The underlying business interests, however, are unlikely to take such a narrow view, for they will recognize that modernizing the cargo liability regime is not a zero-sum game in which winners must be balanced against losers. Shippers and carriers alike will benefit from a more modern Convention that provides answers to the questions arising in practice, just as shippers and carriers alike will benefit from greater uniformity. That point was made particularly well by Knud Pontoppidan ([212]) when he discussed the final text of the Rotterdam Rules at the CMI's recent conference in October 2008. He expressly acknowledged some of the principal ways in which the Rotterdam Rules impose greater responsibility on carriers (as compared to the Hague-Visby regime), including the loss of the navigational fault exception and the large increase in the package and weight limitation amounts. But he nevertheless strongly supported the prompt ratification of the new Convention because the benefits to carriers of greater uniformity under a modern regime outweigh the greater burdens that the Rotterdam Rules place on carriers such as Maersk.

Whatever the viewpoint, it is also important to keep the impact of the new Convention in perspective. If we focus on the big picture, the changes to existing law are not earth-shaking.

The Rotterdam Rules are 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, the Working Group rejected proposals to address more revolutionary subjects (or at least more controversial subjects on which harmonization would have been difficult). ([213]) The Working Group felt that it was more important to complete the project and address the core issues than it would have been to attempt to resolve every issue but at the risk of becoming so bogged down that the entire project failed.

To be sure, particular aspects of the Convention will involve more significant changes for some countries than it will for others. To the extent that generalization is possible, the Rotterdam Rules draw largely on the Hague-Visby and Hamburg Rules, incorporating significant elements from each. Those countries that have already adopted a national law incorporating major Hague-Visby and Hamburg elements are therefore less likely to see significant changes in their legal systems under the new regime (although from the very nature of a compromise, every country can expect some significant changes to be made). On the other hand, those countries that still adhere to the Hague Rules are likely to see greater changes.

Because the Rotterdam Rules are built on existing foundations, very little about them is completely new. One of the most visible reforms -elimination of the heavily

([212]) Executive Vice-President of AP Moller-Maersk AS.

([213]) *See*, *e.g.*, *Fifteenth Session Report* (n 126) ¶¶ 154-155 (deciding to delete *Draft Instrument WP.32* (n 121) art. 75, which addressed *lis pendens*, because "a rule on *lis pendens* would be extremely difficult to agree upon, given the complexity of the subject matter and the existence of diverse approaches … in the various jurisdictions"). *See also* n 169 and accompanying text (discussing decision to delete two other draft Articles on which it was difficult to reach consensus).

criticized "navigational fault" exception ([214]) -is not even a change in law for those countries that have adopted the Hamburg Rules ([215]) (and it will not represent much of a change in practice in those countries whose courts will rarely if ever uphold the defense ([216])). Perhaps the most significant change in the new Convention is extending the period of responsibility (in appropriate cases) to full door-to-door coverage. ([217]) Although that innovation is not currently in force in other transport law conventions, it is still not particularly remarkable. Courts have for decades been upholding contractual clauses that extend the maritime regime inland. ([218]) The Rotterdam Rules simply take this common commercial choice and pragmatically give effect to it with the force of the Convention. Even the volume contract provision, ([219]) which was long controversial within the Working Group, grows out of the recognition in the Hague, Hague-Visby, and Hamburg Rules that some contracts in which the parties are more likely to have equal bargaining power (i.e., charterparties) need not be subject to the regime on a mandatory basis. ([220])

Even with respect to those issues that have been entirely omitted from prior maritime conventions, ([221]) the Rotterdam Rules were not written on a clean slate. Although no international uniform law governed those issues, they are still subject to legal regimes (generally under domestic law). That patchwork of conflicting laws does a poor job of providing international traders with uniform and predictable laws that can govern their transactions consistently, wherever they do business, but it at least gave the UNCITRAL Working Group some functioning models on which the delegates could base new proposals.

At this stage of the process, when no nation has yet signed or ratified the new Convention, predictions about its potential impact are necessarily speculative. The popular sport of picking winners and losers is inevitable. Early complaints by both carrier and cargo interests that the new Convention is unduly tilted against them suggest that the overall balance is likely to be pretty even on the whole (although both sides can point to issues on which they would like to have been treated more generously). Much more important will be the Convention's impact outside of the litigation context. Will it succeed in providing a widely accepted liability regime that gives uniform and predictable guidance for the benefit of those that are conducting transactions subject to the rules? The Rotterdam Rules will be most successful

---

([214]) *See* n 122 and accompanying text (discussing the Working Group's early decision to eliminate the navigational fault defense).

([215]) *See* n 83 and accompanying text (discussing the Hamburg Rules" elimination of the navigational fault defense).

([216]) *See*, *e.g.*, STURLEY, *Uniformity* (n 20) at 577 (noting that "the navigational fault defense is rarely, if ever, successful in the United States").

([217]) *See* n 118 and accompanying text (discussing the Working Group's early discussion of the choice between port-to-port and door-to-door coverage).

([218]) *See*, *e.g.*, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004) (upholding inland extension of U.S. COGSA to govern liability for train derailment on basis of clause paramount in multimodal bill of lading).

([219]) Rotterdam Rules art. 80.

([220]) *See* Hague Rules art. 5; Hague-Visby Rules art. 5; Hamburg Rules art. 2(3).

([221]) *See* nn 196-202 and accompanying text.

to the extent that they succeed in keeping cases away from litigation. Whether that happens, however, will depend on a great many factors, not the least of which is how many countries ratify the Convention, which countries ratify it, and how quickly it enters into force.

V. Conclusion

Looking back at the long process required for the preparation of the Rotterdam Rules, it is tempting to view ourselves as being at the conclusion of the story. In truth, however, we have completed only the prologue. UNCITRAL has finished drafting the new regime, the United Nations has adopted the formal Convention, and the formal signing ceremony will take place in fall 2009. The next step will then be for the world's governments to decide whether to sign and ultimately ratify the Convention. When 20 nations have deposited their ratifications the Rotterdam Rules finally enter into force, then it will be possible to start witnessing their impact in the pragmatic real world in which they were designed to operate.

The choice now facing the world's governments is a stark one. Ratifying the Rotterdam Rules would create the opportunity to recapture the international uniformity that existed in this field 70 years ago. Rejecting the new Convention, on the other hand, would defer any hope for uniformity by at least a generation.

What has become of the Rotterdam Rules? (*)

Michael F. STURLEY (**)

I. Introduction

During the summer of 2008, the U.N. Commission on International Trade Law (UNCITRAL) completed the negotiation of a new multilateral convention to govern international ocean transport. (1) After review by the Legal Committee, the General Assembly on December 11, 2008, formally adopted the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (popularly known as the "Rotterdam Rules"). (2) The Convention has been open for signature since September 23, 2009, and the United States was one of the sixteen countries to sign the Convention on the first day in Rotterdam. Twenty-five countries have now signed the Convention. Three of those (including Spain) have already ratified it.

Unfortunately, the United States has not yet made any publicly visible progress toward ratifying the Rotterdam Rules. The U.S. commercial interests that worked for years to negotiate the Convention have long been pushing for ratification, pri-

(*) This article was first published by the *Journal of Transportation Law, Logistics & Policy*, a publication of the Association of Transportation Law Professionals, Inc., in the 4Q2016 Issue, Vol. 83, Number 4. It is being reprinted with permission.

(**) Fannie Coplin Regents Chair in Law, University of Texas at Austin; B.A., J.D., Yale; M.A. (Jurisprudence) Oxford. In the course of this paper, I discuss the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (popularly known as the "Rotterdam Rules"). *See infra* note 2 and accompanying text. In the interest of appropriate disclosure, I note that I served as the Senior Adviser on the United States Delegation to Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL), which negotiated the Rotterdam Rules; as a member of the UNCITRAL Secretariat's Expert Group on Transport Law; and as the Rapporteur for the International Sub-Committee on Issues of Transport Law of the Comité Maritime International (CMI) and for the CMI's associated Working Group, which prepared the initial draft for UNCITRAL's consideration. But I write here solely in my academic capacity and the views I express are my own. They do not necessarily represent the views of, and they have not been endorsed or approved by, any of the groups or organizations (or any of the individual members) with which (and with whom) I have served. I delivered an earlier version of this paper at the 23rd Annual Admiralty Symposium of the Louisiana State Bar Association in New Orleans on September 16, 2016.

(1) *See* Report of the United Nations Commission on International Trade Law, 41st Session, U.N. GAOR, 63d Sess., Supp. No. 17, Annex I, U.N. Doc. A/63/17 (2008).

(2) The original final text of the Convention is annexed to General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 (11 December 2008). Minor amendments were adopted in January 2013 to correct two editorial mistakes. *See* Correction to the Original Text of the Convention, U.N. Doc. C.N.105.2013.TREATIES-XI-D-8 (Depositary Notification) (Jan. 25, 2013). For a more detailed discussion of the issue, *see* Michael F. Sturley, *Amending the Rotterdam Rules; Technical Corrections to the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 18 J.Int'l Mar. L. 423 (2012).

marily to bring the U.S. legal regime into the twenty-first century,(3) and all of the U.S. commercial interests that would be most directly affected by the Rotterdam Rules are in favor of U.S. ratification. It is thus surprising that we have not seen more visible progress toward that goal.

Some of the explanation can no doubt be attributed to the usual factors that make ratification of any treaty difficult in the best of times. The Senate is notorious for its inertia, for example, particularly on issues that do not generate much public attention. But the single biggest explanation for the current lack of progress is the opposition of the American Association of Port Authorities (AAPA) and some public port authorities – opposition that surfaced while the State Department was preparing the ratification package. This article reviews and evaluates that opposition.

II. The Rotterdam Rules

To understand and evaluate the current status of the ratification debate, it is helpful to have some background information on the Rotterdam Rules to provide context. I will accordingly discuss the process by which the Convention was negotiated and explain a few of the relevant substantive provisions.

A. The Negotiation of the Rotterdam Rules

One of the most important goals of the Rotterdam Rules was to meet the needs of industry, particularly by updating and modernizing the governing legal regime. In the United States, liability for the loss or damage of goods carried by sea is governed primarily by the Carriage of Goods by Sea Act (COGSA),(4) which is the U.S. enactment of a 1924 international convention popularly known as the Hague Rules.(5) Most of the world's major maritime nations have adopted the amendments to the Hague Rules in the Visby Protocol,(6) which produced the Hague-Visby Rules, and

(3) *See generally*, *e.g.*, Michael F. Sturley, *Beyond Liability Disputes: The Larger Impact of the Rotterdam Rules on the Efficiency of the Shipping Industry*, in Η ΛΕΙΤΟΥΡΓΙΑ ΤΗΣ ΝΑΥΤΙΛΙΑΚΗΣ ΕΠΙΧΕΙΡΗΣΗΣ ΣΕ ΠΕΡΙΟΔΟΥΣ ΟΙΚΟΝΟΜΙΚΗΣ ΑΣΤΑΘΕΙΑΣ: 8° ΔΙΕΘΝΕΣ ΣΥΝΕΔΡΙΟ ΝΑΥΤΙΚΟΥ ΔΙΚΑΙΟΥ [Shipping in Periods of Economic Distress: Eighth International Conference of Maritime Law] 123 (Piraeus: Piraeus Bar Association, 2015).

(4) Ch. 229, 49 Stat. 1207 (1936), *reprinted in note following* 46 U.S.C. § 30701. A quarter-century ago, COGSA was codified at 46 U.S.C. app. §§ 1300-15. A decade ago, when Congress recodified most of title 46 of the United States Code and enacted the new version as positive law, *see generally* Michael F. Sturley, *Reflections on the Recodification of Title 46*, 2 Benedict's Maritime Bulletin 209 (2004), it did not include COGSA in the recodification. *See* Pub. L. No. 109-304, 120 Stat. 1485 (Oct. 6, 2006). COGSA accordingly remains in force as an uncodified statute.

(5) International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 (Hague Rules), *reprinted in* 6 Benedict on Admiralty doc. 1-1 (7th rev. ed. 2016).

(6) Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), Feb. 23, 1968, 1412 U.N.T.S. 128 (the Visby Protocol), *reprinted in* 6 Benedict on Admiralty doc. 1-2 (7th rev. ed. 2016). In many countries, the Hague Rules have been further amended by the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197), *reprinted in* 6 Benedict on Admiralty doc. 1-2A (7th rev. ed. 2016).

a small portion of international maritime trade is subject to a U.N. convention popularly known as the Hamburg Rules,(7) but even those regimes are now out-of-date. And none of the current regimes fully addresses the needs of modern commerce.

From the beginning, UNCITRAL made a point of reaching out to commercial interests to develop a new regime that would meet commercial needs. When the Commission first considered the Transport Law project it directed the Secretariat to consult with non-governmental organizations (NGOs) that act on behalf of various segments of the industry, including the Comité Maritime International (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS), and the International Association of Ports and Harbours (IAPH).(8) Thereafter, representatives from interested NGOs attended every meeting of the CMI's International Sub-Committee, and commercial observers were active participants at every session of the UNCITRAL Working Group.

Although the CMI was the most active NGO, all of the listed organizations participated in the process. The International Association of Ports and Harbours (IAPH) was involved from the very beginning, having been represented at the UNCITRAL Commission meeting at which the project was launched.(9) Indeed, the IAPH participant was the late Patrick J. Falvey, who was then the Chairman of the IAPH Legal Counselors, having recently completed his forty-year career at the Port Authority of New York and New Jersey (including almost twenty years as its general counsel). The IAPH continued to participate throughout the process,(10) including at the Commission session at which the Rotterdam Rules were finalized.(11)

When the UNCITRAL negotiations began, the State Department put together a broad delegation to represent U.S. interests. A lawyer from the Office of the Legal Advisor headed the delegation, which also included two additional government representatives – one from the Department of Transportation's Maritime Administration (MARAD) and one from the Office of Transportation Policy in the State Department's Bureau of Energy, Economic and Business Affairs' Transportation Affairs division. I was included as the delegation's "senior advisor," having expertise on the issues but no regular clients whose interests might color my recommen-

---

(7) United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3, *reprinted in* 6 Benedict on Admiralty doc. 1-3 (7th rev. ed. 2016).

(8) *See Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Ninth Session,* U.N. GAOR, 51st Sess., Supp. No. 17, ¶ 215, U.N. Doc. A/51/17 (1996)*, reprinted in* 1996 CMI Yearbook 355.

(9) *See List of Participants*, United Nations Commission on International Trade Law, Twenty-ninth Session 18, U.N. Doc. A/CN.9/XXIX/INF.1 (1996) (identifying Patrick J. Falvey as the IAPH participant).

(10) *See*, *e.g.*, *List of Participants*, United Nations Commission on International Trade Law, Thirty-third Session 22, U.N. Doc. A/CN.9/XXXIII/INF.1/Rev.1 (2000) (identifying "Patrick J. Falvey, Former Chairman, IAPH Legal Counselors," and "Hugh H. Welsh, Chairman, IAPH Legal Counselors," as the IAPH participants). Mr. Welsh also represented the Port Authority of New York and New Jersey. *See*, *e.g.*, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 32 (1994).

(11) *See List of Participants*, United Nations Commission on International Trade Law, Forty-first Session 29, U.N. Doc. A/CN.9/XLI/INF.1 (2008) (identifying Frans van Zoelen, "Chairman, Legal Committee," as the IAPH participant).

dations. A number of industry representatives wished to be included as "advisors" to represent the interests of their industries, and they were all welcomed into the delegation. Carrier, cargo, and transportation intermediary advisors were particularly active in the process, but no one was denied access. Representatives of the Association of American Railroads (AAR) would have been included in the U.S. delegation, but the AAR obtained observer status from UNCITRAL so that its representatives had an independent seat at the negotiations and could speak on its own behalf (without going through the U.S. delegation) ([12]) Finally, the Maritime Law Association (MLA) had one or more advisors at every meeting, representing the interests of the maritime industry as a whole. Although the federal government did not fund these industry advisors, they had tremendous influence in the positions that the delegation took during the negotiations. Indeed, with the exception of a very few issues on which the government had independent concerns – *i.e.*, safety and security issues – the U.S. position on any subject was a compromise agreed upon by the affected industries during U.S. delegation meetings.

Before each UNCITRAL Working Group session, the U.S. delegation met in Washington with an even broader group of industry representatives so that every affected group would have the opportunity to express its views. For example, representatives of the stevedores and terminal operators, the trucking industry, and cargo underwriters did not attend UNCITRAL Working Group sessions but they generally attended the U.S. delegation meetings in Washington to ensure that their interests were considered. To enable all interested parties to have the opportunity to participate in those meetings, an official notice was published in the *Federal Register* before each meeting and the head of the U.S. delegation sent an e-mail message (with the *Federal Register* notice attached) to anyone who was thought to have even an indirect interest in the subject.

A few weeks before the meeting held on April 20, 2004, for example, the head of the U.S. delegation sent the following e-mail message to forty-seven separate recipients, including the Executive Vice President and General Counsel of the American Association of Port Authorities (AAPA):

> Subject: State Department Meeting on New UNCITRAL Transport Convention: Tuesday, April 20, 2004
>
> Attached to this email is a notice that has been submitted to the Federal Register for publication. It announces a public meeting on the new UNCITRAL Transport Convention. All of you have indicated an interest in receiving information about this project. You are all cordially invited to attend. It would be appreciated if you could let me know by email if you intend to attend, so that we can make sure that there are enough seats.
>
> While anyone is welcome to raise any relevant topic, it would help us to make the best use of our time if you would let me know in advance if there is a particular topic that you would like to have included in the agenda. ([13])

([12]) AAR representatives nevertheless attended virtually every U.S. delegation meeting.

([13]) For an additional perspective on this e-mail message, *see* Chester D. Hooper, *Activities in the United States to Ratify the Rotterdam Rules*, 2015 Dir.Mar. 750.

The attached notice, which was subsequently published in the *Federal Register* on April 9, gave more specific details about the upcoming meeting:

> There will be a public meeting of a Study Group of the Secretary of State's Advisory Committee on Private International Law on Tuesday, April 20, 2004, to consider the draft instrument on the International Transport Law, under negotiation at the United Nations Commission on International Trade Law (UNCITRAL). The meeting will be held from 1:30 p.m. to 5 p.m. in the offices of Holland & Knight, Suite 100, 2099 Pennsylvania Avenue, N.W., Washington, D.C.
>
> The purpose of the Study Group meeting is to assist the Departments of State and Transportation in determining the U.S. views for the next meeting of the UNCITRAL Working Group on this draft instrument, to be held in New York from May 3 to 14, 2004.
>
> The current draft text of the instrument and related documents of Working Group III (Transport Law) are available on the UNCITRAL website, *http://www.uncitral.org*. The Study Group meeting is open to the public up to the capacity of the meeting room. Persons who wish to have their views considered are encouraged to submit written comments in advance of the meeting. Comments should refer to Docket number MARAD-2001-11135. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room PL-401, Department of Transportation, 400 7th Street, S.W., Washington, DC 20490-0001. You may also send comments electronically via the Internet at *http://dmses.dot.gov/submit/*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., Monday through Friday, except federal holidays. An electronic version of this document, along with all documents entered into this docket, is available on the World Wide Web at *http//dms.dot.gov*. For further information, you may contact Mary Helen Carlson at 202-776-8420, or by e-mail at *carlsonmh@state.gov*.([14])

Of course not everyone attended these meetings. Representatives of shippers, carriers, stevedores and terminal operators, transportation intermediaries, and cargo underwriters, for example, recognized that the proposed convention could affect their interests, and therefore attended the meetings. But others concluded that the proposed convention either would not have a significant impact on them or that their interests were already adequately represented by other organizations. The AAPA, for example, stopped coming to the meetings.([15]) Its executives appar-

---

([14]) 69 Fed. Reg. 18998 (Apr. 9, 2004).

([15]) In contrast, the railroads sent representatives to all of the Washington meetings, to every UNCITRAL Working Group session, and to U.S. delegation meetings during the negotiating sessions, even though any effect on the railroads of the proposed convention was not readily apparent. The trucking industry attended some meetings but it was less active, recognizing that its interests – to the extent that the new convention would affect them – were the same as the railroads' interests, and the railroads were already effectively advocating their views.
All of this activity vividly demonstrates that the negotiating process was completely transparent, and even those who would not be directly affected by the final product were welcome to participate fully if they wished to be involved.

ently believed (correctly, in my opinion) that (1) the proposed convention would not have a significant impact on its members' operations, and (2) to the extent that the convention would affect its members' operations, the stevedores and terminal operators (who were already well represented at the meetings) had the same interests as the ports, and could effectively advocate those views.

B. Particular Aspects of the Rotterdam Rules

The primary purpose of the Rotterdam Rules is to bring the law governing the carriage of goods by sea into the twenty-first century.([16]) When the new Convention enters into force, it will provide benefits for the entire industry, including (for example) the facilitation of electronic commerce. It is unnecessary to explain in detail here what the Convention will do, for other sources are readily available.([17]) But it would be helpful when considering the opposition to the Rotterdam Rules to have a few specific aspects in mind.

1. Door-to-Door Coverage

Perhaps the most significant innovation of the Rotterdam Rules is the extension of geographic coverage. Like COGSA,([18]) the Hague and Hague-Visby Rules are both limited to tackle-to-tackle coverage.([19]) The Hamburg Rules extend coverage somewhat, but still apply only on a port-to-port basis.([20]) Modern contracts of carriage, however, frequently cover carriage from an inland place of origin to an inland destination. In order to provide a single legal regime to govern that contract, the Rotterdam Rules extend coverage to the entire contractual period on which the parties have agreed, whether it be port-to-port, door-to-door, or some variation thereof.([21]) As the Supreme Court has observed in this context,"[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning."([22])

2. Performing Parties

Closely related to the Rotterdam Rules' expansion to door-to-door coverage is the explicit recognition of the role played by performing parties.([23]) In modern multimodal carriage, carriers routinely sub-contract at least a portion of their obligations.

([16]) *See, e.g.*, Michael F. Sturley, *Reflections on Fifty Years of Revolutionary and Glacial Change in the Shipping Industry*, 50 European Transport Law 357 (2015).

([17]) *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* (London: Sweet & Maxwell 2010).

([18]) *See* COGSA § 1(e).

([19]) *See* Hague-Visby Rules art. 1(e).

([20]) *See* Hamburg Rules art. 4(1); *see also* art. 1(6).

([21]) *See generally, e.g.*, Sturley, Fujita & van der Ziel, *supra* note 17, ¶¶ 4.001-.008.

([22]) *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 29, 2004 AMC 2705, 2715 (2004).

([23]) *See generally, e.g.*, Sturley, Fujita & van der Ziel, *supra* note 17, ¶¶ 4.025-.030.

If the carrier that contracts with the shipper is an ocean carrier, for example, it will routinely sub-contract with an inland carrier to move the goods from the place of receipt to the port of loading, or from the port of discharge to the ultimate place of delivery. If the carrier that contracts with the shipper is a "non-vessel operating common carrier"(NVOCC), it will routinely sub-contract with other companies (including inland and ocean carriers) to perform every aspect of the carriage. In the Rotterdam Rules, those sub-contractors are labelled "performing parties," ([24]) and if they do their work at sea or in the port area they are "maritime performing parties." ([25])

The Rotterdam Rules impose primary responsibility for cargo loss or damage on the carrier that contracts with the shipper, but when a cargo claimant is able to show that a particular maritime performing party was in fact responsible for the loss of or damage to the cargo, article 19(1) gives the claimant a direct claim against that maritime performing party under the terms of the convention. ([26]) That provision was not revolutionary. Cargo claimants have long sued negligent sub-contractors that damaged their cargo. ([27]) Article 19(1)'s innovation is to bring the action within the scope of the Convention, rather than leaving claimants with different remedies against different parties for the same loss or damage depending on whether the carrier or the responsible sub-contractor is being held liable.

3. Automatic "Himalaya" Protection

When an entity qualifies as a "maritime performing party" under article 1(7), with the result that it might become liable under article 19(1) for damage that it

---

([24]) Article 1(6)(a) defines a "performing party" as "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.." *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 5.144-.155. The word "keeping" was added by the 2013 amendment to the convention. *See supra* note 2.

([25]) Article 1(7) defines a "maritime performing party" as "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 their departure from the port of discharge of a ship." *See generally*, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 5.156-.159.

([26]) Article 19(1) provides:

> A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:
>
> (a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and
>
> (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.

See generally, *e.g.*, STURLEY, FUJITA & VAN DER ZIEL, *supra* note 17, ¶¶ 5.163-.195. The 2013 amendment to the convention, *see supra* note 2, corrected a drafting error in paragraph 19(1)(b).

([27]) *See*, *e.g.*, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004); *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 1959 AMC 879 (1959).

causes to cargo that it is handling on behalf of a carrier, article 4(1) guarantees that it will be entitled as a matter of law to the benefit of all of the carrier's defenses and limitations of liability, regardless of whether it is sued under the Convention or under some other legal theory (such as tort or bailment).([28]) Current U.S. law generally gives a carrier's servants, agents, and sub-contractors the benefit of the carrier's defenses and limitations of liability only by contract – and only if the carrier included an adequate "Himalaya clause" in its bill of lading. Although Himalaya clauses are often effective to protect entities that qualify as maritime performing parties under the Rotterdam Rules,([29]) some bills of lading omit the Himalaya clause entirely([30]) and some Himalaya clauses are held to be inadequate.

In *Jagenberg, Inc. v. Georgia Ports Authority*,([31]) for example, a port authority, acting as the agent for an ocean carrier, damaged a single "package" of the plaintiff's cargo while moving it in the port area.([32]) The plaintiff, alleging that the port authority and the ocean carrier had breached their obligations as bailees of the cargo, claimed $750,000 in damages for the package and both defendants moved for partial summary judgment to limit their liability to COGSA § 4(5)'s $500.([33]) The port authority's rights depended on the carrier's Himalaya clause, which the court held to be inadequate to protect the port authority.([34]) The court therefore granted only the carrier's motion for partial summary judgment([35]) and the case proceeded on the basis that the port authority faced full liabilityfor the damage. Under the Rotterdam Rules, the port would automatically have benefitted from the same rights as the carrier.

III. The Sole Opposition to U.S. Ratification

It is surprising that port interests would oppose U.S. ratification of the Rotterdam Rules since – as was apparent over a dozen years ago when the proposed convention was being negotiated- the proposed convention would have very little impact on the ports.([36]) The final text confirms this. Many ports – including two of the

---

([28]) Article 4(1) provides:

> Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:
>
> (a) The carrier or a maritime performing party;
>
> (b) The master, crew or any other person that performs services on board the ship; or
>
> (c) Employees of the carrier or a maritime performing party.

([29]) *See*, *e.g.*, Michael F. Sturley, *Third Party Rights and the Himalaya Clause*, 2A Benedict on Admiralty § 169 (7th rev. ed. 2016).

([30]) *See*, *e.g.*, *Fortis Corp. Ins., SA v. Viken Ship Management AS*, 597 F.3d 784, 792, 2010 AMC 609 (6th Cir. 2010) (O'Connor, J., sitting by designation).

([31]) 882 F. Supp. 1065, 1995 AMC 2333 (S.D. Ga. 1995).

([32]) 882 F. Supp. at 1068-69.

([33]) 882 F. Supp. at 1069.

([34]) 882 F. Supp. at 1074-76

([35]) 882 F. Supp. at 1076-79.

([36]) *See supra* text at note 15.

most vocal opponents of the Convention – would not be liable under the Rotterdam Rules without their consent because they are entitled to sovereign immunity.(37) Many other ports – including the largest ports in the container trade (the trade that will be most significantly affected by the Rotterdam Rules) – would not be liable under article 19 because they are simply landlords that lease space to the stevedores, terminal operators, and other private parties that conduct the actual operations in the port.(38) Those port authorities would not qualify as "maritime performing parties" under article 1(7) because none of them "performs or undertakes to perform any of the carrier's obligations" under the contract of carriage. That work is left to a landlord port's tenants.

It is even more surprising that port interests would oppose U.S. ratification of the Rotterdam Rules when so many provisions of the Convention would provide greater protection to ports than does current U.S. law. Perhaps the most obvious example is article 4(1), which would guarantee a port (when it qualifies as a "maritime performing party" under article 1(7)) the benefit of all of the carrier's defenses and limitations of liability, regardless of whether it is sued under the Convention or under some other legal theory (such as tort or bailment). Because ports now have only the uncertain contractual protection of Himalaya clauses,(39) the automatic protection of article 4(1) is indeed a valuable benefit.

The ports' objections to U.S. ratification of the Rotterdam Rules remain surprising even when the stated reasons for those objections are considered. Although the ports have generally been vague in explaining why they oppose U.S. ratification of the Rotterdam Rules, one port authority gave the Maritime Administration a detailed memorandum (which I will call here the "Ports' Memorandum") with a list of various objections. In the rest of this section, I will examine those objections in detail. None provides a plausible reason to oppose U.S. ratification. They instead reveal a lack of understanding of the Convention, the process by which it was negotiated, and current U.S. law.

A. The Ports' Opportunity to Participate in the Negotiations

The first objection mentioned in the Ports' Memorandum is the supposed "fail[ure] to include the United States port community in the seven year drafting process." As explained above, the American Association of Port Authorities was notified of the negotiations, was given an opportunity to participate in the process, attended at least one meeting, and chose not to participate further.(40) Every meeting of the U.S. delegation was publicized in advance in the *Federal Register*

(37) *See, e.g., Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S.743, 751 (2002) (finding South Carolina State Ports Authority entitled to sovereign immunity); *Kamani v. Port of Houston Authority*, 702 F.2d 612 (5th Cir. 1983) (finding Port of Houston Authority entitled to sovereign immunity).

(38) MARAD reports, for example, that the Port Authority of New York & New Jersey, the Port of Long Beach, and the Port of Los Angeles are all landlord ports.

(39) *See supra* notes 29-35 and accompanying text.

(40) *See supra* notes 8-15 and accompanying text.

and any interested party – including any port authority – was invited to attend the meetings or to submit comments.(41) Moreover, experienced representatives of the United States port community participated in the negotiations as representatives of the International Association of Ports and Harbours (IAPH).(42)

To the extent that the ports failed to participate in the drafting process, they themselves made the decision to abstain from the negotiations. Of course they were not obligated to participate, and they certainly retain their right to criticize the result of the negotiations in which they chose not to participate. If they had legitimate concerns, it would still be appropriate to address them. But it is simply inaccurate for them to assert that they were in any way excluded from the process.

B. Prior International Treaties

In a somewhat cryptic objection, the ports complain that they "*have never been the subject of international treaties*." It seems odd that ports, whose business (at least to the extent relevant here) is based on international trade, would be espousing isolationist views. The Ports' Memorandum offers no reason for objecting to the source of the legal regime (as opposed to its substantive content). It certainly makes no effort to challenge the advantages of international uniformity,(43) which is a well-recognized benefit of having an international treaty that establishes the same legal standards in different countries for multinational transactions.

In any event, the ports' assertion is substantially incorrect. Although it is true that ports *as ports* have never been the subject of an international treaty governing the carriage of goods by sea, that truth will not change under the new Convention. Ports *as ports* are not subject to the Rotterdam Rules; nothing in the Rotterdam Rules regulates ports as such. The Rotterdam Rules would apply to a port only to the extent that it is a "maritime performing party," and a port would not qualify as a performing party unless it "performs or undertakes to perform" some "of the carrier's obligations under the contract of carriage."(44) To the extent that a port is currently performing any of the carrier's obligations, it is already liable to be sued for any loss or damage that it causes to the cargo in its care. And if a port is sued, it will quickly assert the benefits of the carrier's COGSA defenses under a Himalaya clause.(45) Although COGSA appears in the *Statutes at Large* as an Act of Congress, it is well recognized that this particular statute is simply the U.S. enactment of an international treaty known as the Hague Rules.(46) To be sure, Congress modified the treaty language in a handful of places,(47) but each of those modifications

(41) *See*, *e.g.*, 69 Fed. Reg. 18998 (Apr. 9, 2004).

(42) *See supra* notes 9-10 and accompanying text.

(43) *See generally*, *e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. Mar. L. & Com. 553 (1995).

(44) Article 1(6)(a). *See supra* note 24 (quoting article 1(6)(a)).

(45) *See supra* notes 31-35 and accompanying text.

(46) *See*, *e.g.*, *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301-02, 1959 AMC 879 (1959).

(47) *See generally*, *e.g.*, Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. Mar. L. & Com. 1, 53-54 (1991).

was intended to give effect to the international understanding, not to change it.[48] Moreover, a carrier's rights are sometimes defined by another international convention, such as the Hague-Visby Rules,[49] and when that happens a port's derivative rights under a Himalaya clause would also be defined by the international treaty. International treaties have long been a part of the landscape for the international carriage of goods by sea, and to the extent that ports are part of that process – as opposed to being mere landlords[50] – they are (by their own choice) very much subject to those treaties.

C. The Ports' Control Over the Conditions and Limits of Their Liability

Turning to specific objections to the substance of the Rotterdam Rules, the Ports' Memorandum argues "that under the Rotterdam Rules, U.S. ports have absolutely no control over the conditions and limits of their own liability." The asserted basis for that argument is that article 80 permits carriers to enter into "volume contracts" with customers[51] "and thereby establish the applicable liability conditions and amounts per customer." The Ports' Memorandum recognizes "that the ports … will get the benefit of any lower liability negotiated by a carrier, and not suffer if there is a higher liability assumed by the carrier in the volume contract."[52] In other words, the carriers' limited freedom of contract under article 80 can only help the ports. Whatever the carrier does, a port's maximum liability will be established by the Convention's terms. The only uncertainty will be whether it might benefit from the carrier's having made a better bargain (without informing it).[53] The objection, in other words, is that a port might get a windfall without having known in advance that this good fortune was possible.

Even if it were a bad thing to obtain a windfall, the ports' objection reveals a major misunderstanding of current U.S. law.[54] To the extent any basis exists for the objection, the problem is much more serious today. Performing parties such as

---

(48) The most obvious change was in COGSA § 4(5), which enacts article 4(5) of the Hague Rules. Whereas the Hague Rules provide for a package limitation of £100 sterling, COGSA § 4(5) sets the limitation amount at $500. But the Hague Rules explicitly authorized that "amendment." *See* Hague Rules art. 9(2) ("Those contracting states in which the pound sterling is not a monetary unit reserve to themselves the right of translating sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.").

(49) *See*, *e.g.*, Michael F. Sturley, *Bill of Lading Provisions Calling for the Application of Legal Regimes Other Than the Carriage of Goods by Sea Act*, 2A Benedict on Admiralty § 46 (7th rev. ed. 2016).

(50) *See supra* note 38 and accompanying text.

(51) *See generally*, *e.g.*, Sturley, Fujita & van der Ziel, *supra* note 17, ¶¶ 13.049-.059.

(52) *Cf. infra* text at note 71.

(53) *See*, *e.g.*, Michael F. Sturley, *The Rotterdam Rules and Maritime Performing Parties in the United States*, 79 J. Transp. L., Logistics & Policy 13, 25-28 (2012) [hereinafter *Maritime Performing Parties*].

(54) This objection also reveals a minor misunderstanding of the Rotterdam Rules. Under article 80, carriers can conclude "volume contracts" with shippers but only if they comply with strict requirements that protect shippers from carriers' overreaching. *See generally*, *e.g.*, Sturley, Fujita & van der Ziel, *supra* note 17, ¶¶ 13.039-.068. Informed observers do not expect many volume contracts to address liability terms.

ports are currently subject to suit in tort (or bailment) for any damage they cause to the cargo but they generally receive the benefit of the carrier's defenses and limitations under a Himalaya clause in the bill of lading. If the Himalaya clause is missing (which sometimes happens ([55])) or inadequate (which also happens ([56])), the performing party's potential liability is unlimited. In other words, a performing party's protection is entirely in the hands of the carrier that drafts the bill of lading. Although the Ports' Memorandum may be correct in claiming that "it is impossible for ports to know what the terms are for the thousands of confidential volume contracts in effect between each carrier and each of its customers," the Memorandum ignores the fact that it is even more impractical for ports to know the terms of the Himalaya clauses in every bill of lading that each carrier issues to each of its customers. The significant difference is in the consequences. Not knowing the terms of the Himalaya clauses means that a port will not know whether it is subject to no liability,([57]) unlimited liability,([58]) or some limited liability between those two extremes.([59]) Not knowing the terms of a volume contract, on the other hand, means that the port will not know whether its liability is capped at the level of the Rotterdam Rules or whether it may have even less potential liability.

Moreover, the ports' objection reveals an even more fundamental misunderstanding of current U.S. law and practice. In the real world, a carrier's or a performing party's liability is rarely affected by the statutory liability limits. Even under COGSA's 80-year-old $500/package limit, a large majority of maritime shipments today are worth less than the specified limitation amount.([60]) The more important limitation is the actual value of the goods.([61]) The Rotterdam Rules continue that principle.([62]) Neither the carrier nor its maritime performing parties have any effective control over the value of the goods that are shipped, and shippers very rarely declare the actual value of the goods.([63]) In most cases, therefore, the effective limit on a maritime performing party's potential liability is entirely in the shipper's hands, and neither ports nor carriers have either knowledge or control over the limits of their own liability.

([55]) *See supra* note 30 and accompanying text.

([56]) *See supra* notes 31-35 and accompanying text.

([57]) *Cf.*, *e.g.*, *Federal Insurance Co. v. Union Pacific Railroad Co.*, 651 F.3d 1175, 2012 AMC 1303 (9th Cir. 2011).

([58]) *See*, *e.g.*, *Jagenberg, Inc. v. Georgia Ports Authority*, 882 F. Supp. 1065, 1995 AMC 2333 (S.D. Ga. 1995).

([59]) *See*, *e.g.*, *Colgate Palmolive Co. v. M/V Atl. Conveyor*, 1997 AMC 1478 (S.D.N.Y. 1996).

([60]) *See, e.g.,* Michael F. Sturley, *Unit Limitation under the Rotterdam Rules and Prior Transport Law Conventions: The Tail That Wags the Dog*, in Current Issues in Hong Kong and International Maritime Law 93, 103 & n.78 (Hong Kong Centre for Maritime and Transportation Law, City University of Hong Kong 2015).

([61]) *See* COGSA § 4(5) (2d paragraph) ("In no event shall the carrier be liable for more than the amount of damage actually sustained.").

([62]) *See* Article 22(1).

([63]) *See*, *e.g.*, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 19, 2004 AMC 2705 (2004) (noting that it "is common in the industry" for shippers not to declare the true value of their shipments) (citing Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. Mar. L. & Com. 241, 244 (2000) (explaining why shippers do not declare the true value of their shipments)).

D. Ports as Attractive Targets for Suits

The Ports' Memorandum's next objection reveals another fundamental misunderstanding of the Rotterdam Rules and current U.S. law. The Memorandum predicts that "[p]orts will become the most attractive target for suits involving cargo damage when the cause or place of damage is in doubt."(64) The gravamen of the objection is that volume contracts "usually" include forum selection clauses that may prevent a cargo claimant from suing the carrier where the damage occurred, whereas ports may be sued where they operate. "Thus the port becomes the first target for lawsuits where there may be joint liability."

It is true that volume contracts could include forum selection or arbitration clauses that require suits against a carrier to be brought overseas,(65) and those clauses would be enforceable under specified conditions,(66) but requiring suit overseas is very much the exception to the general rule. For the most part, article 66 makes it easier for a cargo claimant to seek redress against the carrier in the most convenient forum – thus making it more likely that the carrier, instead of a port, will be sued (or at least that the port will not be sued alone).(67)

Current law is much more likely to trigger the problem of which the port complains. Under *Sky Reefer*,(68) foreign carriers today can almost always avoid litigation in the United States if they simply include the appropriate clause in their bills of lading (without any of the protections that article 80 of the Rotterdam Rules creates for volume contracts). Thus the Rotterdam Rules would represent a significant improvement for ports that worry about the risk of "becom[ing] the most attractive target" for cargo-damage suits. The Ports' Memorandum has the analysis exactly backwards.

E. The Convention's Alleged Failure to Provide Adequate Guidance

1. Apportionment of Lability

A recurring theme in the Ports' Memorandum is that "[c]ontradictions and confusions abound" in the Rotterdam Rules. The first concrete example of that complaint is that "the Rotterdam Rules provide no guidance as to how liability is to be apportioned" when the carrier and a port are sued in a single suit. It is true that the

(64) This objection also reveals a basic misunderstanding of the Rotterdam Rules. A cargo claimant cannot recover from anyone other than the carrier "when the cause or place of damage is in doubt." The Convention imposes liability on a maritime performing party only if the damage occurred when it was responsible for the goods. Article 19(1)(b)(ii)-(iii); *see supra* note 26 (quoting article 19(1)). And article 4 protects maritime performing parties from liability otherwise than as imposed by article 19.

(65) Because volume contracts are a creation of the Rotterdam Rules, no one yet knows whether they will "usually" include forum selection clauses. To the extent that volume contracts resemble the "service contracts" now common in U.S. trades, it is perhaps more likely that forum selection clauses in volume contracts will specify U.S. forums.

(66) *See generally*, *e.g.*, Sturley, Fujita & van der Ziel, *supra* note 17, ¶¶ 12.044-.057, 12.081-.088.

(67) *See generally*, *e.g.*, Sturley, Fujita & van der Ziel, *supra* note 17, ¶¶ 12.022-.041, 12.077-.079.

(68) *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995). *See generally*, *e.g.*, Michael F. Sturley, *Forum Selection Clauses*, 8 Benedict on Admiralty § 16.09[A] (7th rev. ed. 2015).

Rotterdam Rules do not specify how to apportion liability. Because the Rotterdam Rules do not attempt to regulate every aspect of the carrier-shipper relationship, they fail to resolve many issues. Of course it would have been absurd if the Rotterdam Rules had attempted such an ambitious task. Moreover, for eighty years COGSA has similarly failed to address how liability is to be apportioned when a carrier and a performing party are co-defendants. Fortunately, well-established principles of maritime law resolve that issue today and will continue to apply under the Rotterdam Rules.(69)

Unfortunately, the Ports' Memorandum ignores those well-established principles of maritime law. In a subsequent section, it asserts that "[m]any jurisdictions permit a tortfeasor a credit when a co-tortfeasor settles with the plaintiff." It then complains, "if a shipper settles with an at-fault operating port for a modest sum due to limitations under either the Rotterdam formula or a volume contract, an at-fault landlord port would be required to pay a disproportionate part of the loss." This analysis errs on many levels. To begin with, the initial assumption is wrong. Under state law in some states, a non-settling tortfeasor receives a dollar-for-dollar credit, but in *McDermott, Inc. v. AmClyde*,(70) the Supreme Court adopted the proportionate share approach in maritime law for apportionment of liability. The feared problem does not arise in maritime law. Second, the Rotterdam Rules protect maritime performing parties from being sued for more than the amount of the carrier's liability "under either the Rotterdam formula or a volume contract."(71) And finally, to the extent any basis exists for the problem described in the Ports' Memorandum, the problem is far worse under existing law (under which maritime performing parties do not have the benefit of automatic Himalaya protection, for example) than it would be under the Rotterdam Rules.

2. Sovereign Immunity

The Ports' Memorandum's second concrete example of "unclear draftsmanship" is the Convention's failure to specify whether it would abrogate the sovereign immunity that "[s]ome US ports presently enjoy … under the Eleventh Amendment of the U.S. Constitution." The Memorandum complains that the "question has not been judicially resolved at this time." Of course no court could have ruled on a port's entitlement to sovereign immunity under the Rotterdam Rules because the Convention is not yet in force. But courts have ruled on various ports' claims to sovereign immunity in cargo-damage cases under current law, and nothing in the Rotterdam Rules would change those results. I have addressed this issue in detail in an earlier article,(72) and there is no need to repeat my analysis here. The bottom line is that some ports are entitled to sovereign immunity and some ports are not. The result is controlled by legal principles independent of COGSA that will

(69) *See, e.g.*, *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994).
(70) 511 U.S. 202 (1994).
(71) *See supra* notes 28-35 and accompanying text; text at note 52.
(72) *See generally* STURLEY, *Maritime Performing Parties*, *supra* note 53, at 28-35.

not change under the Rotterdam Rules. Indeed, it is difficult to imagine a plausible legal theory under which a treaty could deny constitutionally protected rights.

3. Breaking the Liability Limits

Perhaps the most significant criticism along these lines is that the Rotterdam Rules do not provide adequate guidance on when it is possible to break the liability limits under article 61. The Ports' Memorandum worries that "there may in fact be no limit to the amount of loss for which a (carrier or) port may be liable." Once again, the ports' objection betrays a misunderstanding of the Rotterdam Rules' relationship to current law. The Hague Rules created the package limitation codified at COGSA § 4(5) to protect carriers from unlimited liability but did not provide any explicit mechanism for breaking that limitation, even in cases of deliberate misconduct. Courts therefore developed judicial doctrines for breaking limitation. The U.S. courts have been particularly inventive in this regard, and thus it is easier to break limitation under COGSA than under any international regime. Judicial inventions such as the "fair opportunity" ([73]) and "deviation" ([74]) doctrines often permit limitation to be broken in circumstances that have little if anything to do with carrier misconduct. The Hague-Visby Rules addressed the problem by adding a provision (article 4(5)(e)) to permit limitation to be broken only in cases of intentional or reckless carrier misconduct, thus protecting carriers (and other parties, such as ports, who receive the same benefits under a Himalaya clause) more effectively than COGSA or the Hague Rules. The Hamburg Rules strengthened that provision very slightly in article 8. In the Rotterdam Rules, article 61 starts with the language of article 8 of the Hamburg Rules and makes it somewhat more difficult for limitation to be broken. Once again, the risk that the ports fear is much greater under current law; the Rotterdam Rules would give ports much better protection than they currently have today.

IV. Conclusion

It is disappointing that the United States has not yet ratified the Rotterdam Rules. It is more disappointing that the principal reason for our failure to ratify is apparently due to misunder-standings on the part of an industry that will be affected only tangentially by the Convention when it eventually enters into force. Even if the ports' negative analysis of the Rotterdam Rules had been accurate (rather than based on misunderstandings throughout), it would still be so incomplete that it would be of little value. The ports have focused entirely on liability aspects of the regime, which are relevant in those rare cases – fewer than one percent of all shipments – in which something goes terribly wrong and cargo is lost or damaged. Most of the time, everything turns out well and cargo reaches its intended destination in good condition. Although the Rotterdam Rules address liability issues, the Conven-

([73]) *See*, *e.g.*, Michael F. Sturley, *The Fair Opportunity Requirement*, 2A Benedict on Admiralty § 166[c] (7th rev. ed. 2016).

([74]) *See*, *e.g.*, Michael F. Sturley, *Deviation*, 2A Benedict on Admiralty ch. 12 (7th rev. ed. 2016).

tion covers much more, and the Ports' Memorandum ignores all of the non-liability provisions.

Perhaps most significantly, the new Convention facilitates electronic commerce (as part of the general updating effort to provide a 21st century regime for ocean carriage), which will produce significant cost savings for everyone in the industry. That is a major reason why carriers (represented in the United States by the World Shipping Council) overwhelmingly support the Rotterdam Rules despite the imposition of somewhat higher liability on carriers. Those savings on every shipment would far outweigh any increase in liability when things go wrong (less than one percent of the time). Similarly, shippers (represented in the United States by the National Industrial Transportation League) overwhelmingly support the Rotterdam Rules, primarily for the non-liability benefits.

It is ironic that the Ports' Memorandum in its concluding paragraphs recognizes that the ports' "economic well-being" depends "on the success of their operators," but does so in a manner suggesting that potential increased burdens on operators provide a basis for opposing the Rotterdam Rules. Although the economic well-being of ports is indeed ultimately tied to the economic well-being of the other participants in the enterprise, the Ports' Memorandum has once again drawn precisely the wrong conclusion from that insight. All of the interests that would be most directly affected by the Rotterdam Rules – including the operators who use the ports' facilities on a daily basis – recognize that the new Convention would be good for the industry as a whole. And the benefits of the Rotterdam Rules for those who use the ports would be good for the ports, too.

Unit Limitation under the Rotterdam Rules and Prior Transport Law Conventions: The Tail That Wags the Dog (*)

Michael F. STURLEY (**)

Unit limitation – on a "package" or weight basis – is designed to protect carriers from full liability for loss or damage to particularly valuable cargo when the shipper fails to declare the value of the cargo. (1) Unit limitation has been part of the international regimes governing the carriage of goods by sea for ninety years, (2) and it remains a part of the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (popularly known as the "Rotterdam Rules"). (3) Indeed, the limitation level is often seen as the single most important feature of a liability regime. Adjusting the limitation amounts was a primary motivation behind the Visby Amendments to the Hague Rules. (4) During the negotiation of the Rotterdam Rules, the limitation levels were a constant focus of attention, even when they were not the subject of discussion. Some delegates frequently asserted that international conventions governing land and air carriage are more generous to cargo interests than are maritime conventions simply because the non-maritime conventions have higher weight-based limitation amounts. (5)

(*) This article was first published in Current Issues in Hong Kong and International Maritime Law, 93 (Hong Kong Centre for Maritime and Transportation Law, City University of Hong Kong, 2015). It is being reprinted with permission.

(**) Fannie Coplin Regents Chair in Law, University of Texas at Austin; B.A., J.D., Yale; M.A. (Jurisprudence) Oxford. I served as the Senior Adviser on the United States Delegation to Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL), which negotiated the Rotterdam Rules; as a member of the UNCITRAL Secretariat's Expert Group on Transport Law; and as the Rapporteur for the International Sub-Committee on Issues of Transport Law of the Comité Maritime International (CMI) and for the CMI's associated Working Group, which prepared the initial draft for UNCITRAL's consideration. But I write here solely in my academic capacity and the views I express are my own. They do not necessarily represent the views of, and they have not been endorsed or approved by, any of the groups or organizations (or any of the individual members) with which (and with whom) I have served.

(1) A shipper's declaration of a higher value typically requires the payment of a higher freight rate to compensate the carrier for the increased risk.

(2) *See infra* notes 6-7 and accompanying text.

(3) The original final text of the Convention is annexed to General Assembly Resolution 63/122, U.N. Doc. A/ RES/63/122 (11 December 2008). Minor amendments were adopted in January 2013 to correct two editorial mistakes. See Correction to the Original Text of the Convention, U.N. Doc. C.N.105.2013.TREATIES-XI-D-8 (Depositary Notification) (Jan. 25, 2013). For a more detailed discussion of the amendments, see Michael F. Sturley, *Amending the Rotterdam Rules: Technical Corrections to the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 18 J. Int'l Mar. L. 423 (2012).

(4) *See infra* notes 8-9 and accompanying text.

(5) *See infra* note 49 and accompanying text.

Whatever validity this emphasis on limitation amounts may once have had, developments in law and practice have made unit limitation relatively less important in the overall evaluation of a transport regime. Not only does unit limitation apply less frequently than it once did, but other provisions – particularly in the Rotterdam Rules – have become relatively more important. For many people, however, the level of unit limitation nevertheless remains the defining characteristic that distinguishes one regime from another. Unit limitation has often become the tail that wags the dog.

I. Introduction: "Unit Limitation"

Two forms of limitation of liability are common in maritime law. "Unit limitation" has been part of the international regime for the carriage of goods by sea since the adoption of the Hague Rules ([6]) in 1924. Under article 4(5) of the Hague Rules, the carrier may limit its liability "for any loss or damage to or in connection with the transportation of goods" to "100 pounds sterling per package or unit or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." ([7]) The Hague-Visby Rules ([8]) added a weight-based alternative in 1968, generally limiting a claimant's recovery to either 666.67 SDRs per package or 2 SDRs per kilogram (whichever is greater). ([9]) The Hamburg Rules ([10]) increased the limitation amounts to 835 SDRs per package or 2.5 SDRs per kilogram (whichever is greater). ([11]) And when the Rotterdam Rules enter into force, the limitation

([6]) International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 [hereinafter Hague Rules].

([7]) Many countries converted the £100 figure into their national currency. In the United States, for example, Congress enacted the Carriage of Goods by Sea Act [hereinafter COGSA] to implement the Hague Rules. COGSA § 4(5) set the limitation amount at US$500 per package. (In 1936, the year COGSA was enacted, £100 had an average value of US$497.09. See Fed. Res. Board Ann. Rep. 1936, at 106 (1937).) The term "unit" is particularly ambiguous, with the most common interpretations being the shipping unit (*i.e.*, a physical unit relating to how the goods are shipped) or the freight unit (*i.e.*, the unit used in the calculation of the freight rate). But the term "package" has also engendered numerous disputes, particularly after the container revolution.

([8]) The Hague-Visby Rules are the Hague Rules, *supra* note 6, as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), Feb. 23, 1968, 1412 U.N.T.S. 128 [hereinafter Visby Protocol], and also (perhaps) the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197) [hereinafter SDR Protocol].

([9]) See Hague-Visby Rules art. 4(5)(a). The "SDR" is the International Monetary Fund's "Special Drawing Right," a unit of account calculated as a weighted average of the U.S. dollar, the British pound, the Japanese yen, and the European euro. At the current exchange rate (1 SDR is approximately US$1.50), the limitation amounts are approximately US$1,000 per package and US$3.00 per kilogram. As originally promulgated – prior to the SDR Protocol – the Hague-Visby Rules set the limitation amounts at 10,000 Poincaré francs per package and 30 Poincaré francs per kilogram. The "Poincaré franc" was for many years accepted as an international unit of account based on the value of gold. It is defined as "a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900." Hague-Visby Rules Art. 4(5)(d); *see also* Warsaw Convention, art. 22(4).

([10]) United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 [hereinafter Hamburg Rules].

([11]) Hamburg Rules art. 6(1)(a).

amounts will increase to 875 SDRs per package or 3 SDRs per kilogram (whichever is greater).([12]) Unit limitation is the focus of this paper.

By contrast, "global limitation" (or "tonnage limitation") focuses not on a particular claimant's loss but on all of the losses in a particular incident, and permits a carrier to limit its overall liability for claims arising out of that incident based on such factors as the value or size of the ship. Under the U.S. Limitation Act, for example, if a ship has a major casualty and substantial amounts of the cargo are lost or damaged, the carrier may be able to limit its aggregate liability to the post-accident "value of the vessel and pending freight."([13]) Although the 1924 Limitation Convention similarly adopted the post-accident value of the vessel,([14]) subsequent international regimes have generally calculated the global limitation amount by reference to the vessel's size.([15]) Global limitation is thus often described as "tonnage limitation." A carrier will invoke global limitation when the value of the claims in a particular incident exceed the value of the limitation fund, thus permitting each claimant to recover only a proportionate share of the damages that would otherwise be recoverable.

It is also important to distinguish "limitation" from "exoneration." When a carrier limits its liability, it still remains liable for the claim; it simply pays the claimant less in damages. Exoneration, on the other hand, excuses the carrier from liability entirely. Under the Hague and Hague-Visby Rules,([16]) for example, as under the Rotterdam Rules,([17]) the carrier is not liable at all for cargo loss or damage caused solely by an act or omission of the shipper.([18]) The carrier has no need to limit its liability; it has no liability. It has been exonerated.

II. Background

A. Domestic Antecedents

Although the Hague Rules were the first international convention to adopt unit limitation for cargo claims, the concept had previously appeared in domestic law. The immediate model for article 4(5) of the Hague Rules was section 8 of the Cana-

([12]) Rotterdam Rules art. 59(1).

([13]) 46 U.S.C. § 30505(a). This has the ironic result that the limitation fund is lower when the damages are greatest. If a ship is lost at sea with all of its cargo, every shipper will have a claim but the limitation fund may well be close to zero. *See generally, e.g.*, Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 10-29 (2d ed. 1975).

([14]) International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Vessels, art. 1(2)-(3), Aug. 25, 1924, 120 L.N.T.S. 123.

([15]) See, e.g., Convention on Limitation of Liability for Maritime Claims, art. 6, Nov. 19, 1976, 1456 U.N.T.S. 221; International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Vessels, art. 3(1), Oct. 10, 1957, 1412 U.N.T.S. 73.

([16]) Hague Rules, art. 4(2)(i); Hague-Visby Rules, art. 4(2)(i).

([17]) Rotterdam Rules, art. 17(3)(h).

([18]) The result should be the same under the Hamburg Rules, but the analysis would be somewhat different. Under the Hamburg Rules, the carrier would need to prove that it was not at fault, see Hamburg Rules, art. 5(1), which would be most straight-forwardly done in this context by proving that the cargo loss or damage was caused solely by an act or omission of the shipper.

dian Water Carriage of Goods Act of 1910, which limited the carrier's liability "for loss or damage to or in connection with goods" to "one hundred [Canadian] dollars per package, unless a higher value is stated in the bill of lading or other shipping document." (19)

The U.S. Harter Act, (20) which first established the basic framework ultimately adopted in the Hague Rules (and was the model for the Canadian statute), (21) did not include a provision for unit limitation. Practice under the Harter Act, however, accomplished essentially the same result through "agreed valuation" clauses, in which the bill of lading recorded the shipper's "agreement" that the cargo was not worth more than a stated sum per package. (22) The most common agreed value was US$100 per package, (23) but in one case a U.S. court enforced a US$5 per package valuation clause. (24)

Nineteenth-century British statutes sought to protect carriers from full liability for loss or damage to valuable cargo with a somewhat different approach. The Carriers Act of 1830 governed shipments of specified items (such as money, precious metals, stamps, jewelry, glass, china, silk, and furs) that were particularly likely to be valuable. (25) A carrier was not "liable for the loss of or injury to" covered cargo if the value of the cargo exceeded £10 per package unless the shipper declared "the value and nature" of the shipment and paid a higher freight rate. (26) This legislation differed from the Hague Rules and subsequent conventions in that it exonerated the carrier from all liability when it applied rather than merely limiting the carrier's liability to £10 per package, (27) but the underlying rationale was substantially the same.

B. Other Transport Conventions

Once the Hague Rules introduced unit limitation to international transport regimes, subsequent conventions governing other modes of transportation also adopted unit limitation – but generally on a weight basis rather than a package basis. Five years after the conclusion of the Hague Rules, the 1929 Warsaw Con-

(19) 9-10 Edw. 7, ch. 61. § 8 (Can.). Unlike the Hague Rules, the Canadian Act did not provide limitation for unpackaged goods on the basis of shipping or freight units.

(20) The U.S. Harter Act is now codified, as amended, at 46 U.S.C. §§ 30701-07.

(21) *See generally, e.g.*, Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. Mar. L. & Com. 1, 10-14 (1991).

(22) *See generally, e.g.*, Michael F. Sturley, *The Package Limitation and the Fair Opportunity Requirement*, in 2A Benedict on Admiralty § 166[a] (7th rev. ed. 2014).

(23) *See, e.g.*, Reid v. Fargo, 241 U.S. 544 (1916); Beaumont Exp. & Imp. v. New York & Cuba Mail S.S. Co., 286 F. 120, 121, 1923 AMC 205, 206 (5th Cir. 1923); Hohl v. Norddeutscher Lloyd, 175 F. 544, 545 (2d Cir. 1910).

(24) *See* Hugetz v. Compania Transatlantica, 270 F. 90 (2d Cir. 1920).

(25) 11 Geo. 4 & 1 Will. 4, ch. 68, § 1 (1830).

(26) 11 Geo. 4 & 1 Will. 4, ch. 68, § 1 (1830).

(27) This type of provision was discussed but rejected during the negotiation of the Hague Rules. *See* Hague Conference Report 175, 194-96, reprinted in 1 The Legislative History of the Carriage of Goods by Sea Act and the *Travaux Préparatoires* of the Hague Rules 281, 300-02 (Michael F. Sturley ed. 1990) [hereinafter Legislative History].

vention permitted air carriers to limit their liability to 250 Poincaré francs ([28]) per kilogram. ([29]) In Europe, regional conventions governing inland carriage similarly provide for weight-based unit limitation. Under CIM-COTIF, the regime for European railroads, the limitation amount is 17 SDRs per kilogram. ([30]) CMR, the European road transport convention, permits truckers to limit their liability to 8.33 SDRs per kilogram. ([31]) None of these regimes have limitations on a package or unit basis.

C. Comparing Limitation Regimes

With different transport law regimes using different methods of limitation – a pure package limitation under the Hague Rules; a mixed system under the Hague-Visby, Hamburg, and Rotterdam Rules; and a pure weight limitation under the aviation and European inland regimes – direct comparisons in the abstract can sometimes be difficult. But some comparisons are easy. Because the Hague-Visby, Hamburg, and Rotterdam Rules all use a mixed system with both package and weight limitations, and because both the package and weight figures increase steadily in the progression from the Hague-Visby to the Hamburg to the Rotterdam Rules, ([32]) it is easy to see that the Hamburg limitation amount will always be higher than the Hague-Visby amount, and the Rotterdam limitation amount will always be higher than the Hamburg amount. ([33])

Sometimes it is even easy to make comparisons across different types of systems. In the U.S. enactment of the Hague Rules, for example, there is only a package limitation (US$500 per package) ([34]) while the Hague-Visby Rules have a package limitation that is higher and in addition a weight limitation. It accordingly follows that the Hague-Visby limitation amount will always be higher than the Hague amount in the United States. For packages weighing less than the "break-

---

([28]) *See supra* note 9.

([29]) Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 22(2), 137 L.N.T.S. 11 (Warsaw Convention). The limitation amount in international air carriage is now 17 SDRs per kilogram. *See* Montreal Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, art. 22(3).

([30]) Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM), which are appended to the Convention Concerning International Carriage by Rail (COTIF), May 9, 1980, 1987 Gr. Brit. T.S. No. 1 (Cm. 41), as amended by the Protocol for the Modification of the Convention Concerning International Carriage by Rail (COTIF), June 3, 1999.

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

([32]) The package and weight limitation amounts in the Hamburg Rules are both about 25% than in the Hague-Visby Rules. The Rotterdam Rules increase the Hamburg package limitation by almost 4.8% and the weight limitation amount by 20%.

([33]) Higher limitation amounts do not mean that recoveries would always be higher, let alone that they would always be a particular percentage higher. Under all three systems, recovery is limited to the actual value of the goods. If goods are worth less than the Hague-Visby limitation amounts (as is true in most cases) then the recovery would be the same under all three systems – the full value of the goods. See infra note 80 and accompanying text.

([34]) Other nations' versions of the Hague Rules will also have only a package limitation, but the amounts will vary. In most countries, the package limitation under the Hague Rules is lower than the package limitation under the Hague-Visby Rules, but exceptions exist.

even" level of 333.335 kg.,([35]) the Hague-Visby limitation amount will be roughly double the U.S. Hague amount (depending on the exchange rate). For heavier packages (to which the Hague-Visby weight limitation applies), the difference will be even greater.([36])

It is not so easy to compare regimes across different systems when the mixed system has a lower limitation amount on the common element. Although CMR (the European road convention) provides a weight-based limitation amount of 8.33 SDRs per kilogram,([37]) while the Hague-Visby Rules' weight-based limitation amount is 2 SDRs per kilogram,([38]) in many cases the limitation amount will nevertheless be higher under the Hague-Visby Rules. More specifically, for packages weighing 80 kg. or less, the Hague-Visby package limitation is higher than the CMR weight-based limitation.([39]) This comparison is not merely theoretical. Containerization permits small packages to be shipped safely and economically, so many valuable packages weigh less than 80 kg.([40]) In *Hartford Fire Insurance Co. v. Orient Overseas Containers Lines (UK) Ltd.*,([41]) for example, a container filled with bicycles disappeared in Belgium during the inland leg of a multimodal shipment. Because each package weighed less than 25 kg., the carrier claimed the benefit of the CMR limitation, which was much lower even than the US$500 per package limitation under the U.S. enactment of the Hague Rules.([42])

III. The Extensive Focus on the Limitation Amounts in the Negotiation and Analysis of the Rotterdam Rules

The values chosen for the limitation amounts in a transport convention are undoubtedly important. If a carrier could limit its liability to trivial amounts, for example, the convention would essentially require shippers either to declare the value of their shipments or to assume liability themselves for any loss or dam-

---

([35]) Because the Hague-Visby Rules set the limitation amounts at 666.67 SDRs per package or 2bSDRs per kilogram, *whichever is greater*, the limitation amount for a package weighing less than 333.335 kg. will be 666.67 SDRs while the limitation amount for a package weighing more than 333.335 kg. will be 2bSDRs per kilogram (which will be more than 666.67 SDRs).

([36]) The cargo damaged in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004), for example, which the Court assumed to be ten "packages," weighed 86,970 kilograms. The recovery under COGSA was limited to US$5,000. Under the Hague-Visby Rules, the limitation amount would have been 173,940 SDRs (over US$260,000 at current exchange rates), or more than 50 times as much.

([37]) *See supra* note 31 and accompanying text.

([38]) *See supra* note 9 and accompanying text.

([39]) Under the Hague-Visby Rules, the carrier's liability for an 80 kg. package will be limited to 666.67 SDRs. Under CMR, the carrier's liability for an 80 kg. package will be limited to 666.4 SDRs (8.33 SDRs per kilogram), and the CMR limitation amount is even lower for lighter packages. Of course, for cargo weighing more than 80 kg. per package, the CMR limitation amount is higher – and can be significantly higher. For the *Kirby* cargo, the limitation amount would have been 173,940 SDRs under the Hague-Visby Rules, *see supra* note 36 and accompanying text, but 724,460 SDRs under CMR.

([40]) *See infra* note 79 and accompanying text.

([41]) 230 F.3d 549, 2001 AMC 25 (2d Cir. 2000).

([42]) *See* 230 F.3d at 553 n.4.

age.(43) On the other hand, an extraordinarily high limitation amount – an amount that exceeded the value of any cargo actually shipped – would effectively remove limitation from the convention and permit every claimant to recover full value for lost or damaged cargo. It is thus not surprising that limitation amounts have received a great deal of attention in the negotiation of every convention governing the international carriage of goods by sea.

In the negotiation of the Rotterdam Rules, delegates recognized from the beginning that the new convention would provide for the limitation of the carrier's liability on both a package and a weight basis. The first preliminary draft published by the Comité Maritime International(44) already provided for both limits in substantially the same language that was ultimately used in the final text of article 59(1), except that the actual amounts were left blank.(45)

Although the issue was on the table from the beginning, the formal debate on the limitation amounts was deliberately postponed until the end of the negotiations. When the UNCITRAL Working Group first discussed the draft provision that eventually became article 59(1), "[g]eneral support was expressed for the principles on which [the draft article] was based" but "[i]t was generally agreed that it would not be appropriate to insert any amount for limits of liability in the draft instrument at this stage."(46) The entire negotiation became almost a prelude to the setting of the limitation values. During that prelude, however, the work's final movement – the

---

(43) The French delegate Léopold Dor noted the importance of establishing an adequate limitation amount early in the negotiation of the Hague Rules:

> [I]t will be extremely important to restrict the limitation of liability clause, because, you may say whatever you like, if you do not limit the right of the shipowner to limit his liability to a trifling amount, you have done nothing.

Hague Conference Report 55, *reprinted in* 1 Legislative History, *supra* note 27, at 161.

(44) The Comité Maritime International (CMI), at the invitation of the U.N. Commission on International Trade Law (UNCITRAL), conducted the initial preparatory work on the Rotterdam Rules. *See generally, e.g.*, Michael F. Sturley, Tomotaka Fujita & Gertjan van der Ziel, The Rotterdam Rules ¶¶ 1.050-054 (2010).

(45) Article 5.7.1 of the CMI's first Draft Outline Instrument, 2000 CMI Yearbook 122, 138, already provided that the carrier's liability would be "limited to […] units of account per package or other shipping unit, or […] units of account per kilogram of the gross weight of the goods … ." The final text of article 57(1) repeats the quoted language with the addition of the figures "875" and "3" to fill in the blanks.

(46) *Report of Working Group III (Transport Law) on the Work of Its Tenth Session (Vienna, 16-20 September 2002)*, ¶ 81, U.N. Doc. No. A/CN.9/525 (2002). *See also, e.g., Report of Working Group III (Transport Law) on the Work of Its Eleventh Session (New York, 24 March-4 April 2003)*, ¶ 257, U.N. Doc. No. A/CN.9/526 (2003) ("A widely shared view was that no attempt should be made to reach an agreement on any specific amount for the limits of liability … at the current stage of the discussion.") [hereinafter *Report of the 11th Session]; Report of Working Group III (Transport Law) on the Work of Its Thirteenth Session (New York, 3-14 May 2004)*, ¶ 39, U.N. Doc. No. A/CN.9/552 (2004) ("There was agreement in the Working Group that the time was not yet ripe for an exchange of views with respect to the appropriate level of limitation on liability … ."); Report of Working Group III (Transport Law) on the Work of Its Eighteenth Session (Vienna, 6-17 November 2006), ¶ 162, U.N. Doc. No. A/CN.9/616 (2006) (recognizing that limitation amounts "should be considered as an element of the overall balance in the liability regime" and therefore considering the proposed draft "without making specific reference to numbers or amounts at this stage of the discussions").

setting of the limitation values – was very much on delegates' minds and motivating their actions. Practically from the beginning, speakers expressed views on whether the limits should remain near the levels of the Hague-Visby Rules or be significantly increased.(47) A common refrain of those seeking higher limits was that the European regional conventions governing carriage by road and rail had much higher limits,(48) and that the new convention should therefore have higher limits because it would govern multimodal shipments.(49) A common refrain of those seeking lower limits was that most shipments in practice already are fully covered under the Hague-Visby Rules.(50) In short, even when the Working Group was not formally discussing the limitation amounts it was constantly talking about them.

When the Working Group had substantially completed its work on most other aspects of the convention, it began the formal debate on the limitation amounts at its fall 2007 session during its "third reading" of the draft.(51) In that discussion, the majority of delegations fell into one of two groups. Most (but not all) of the world's largest countries and countries that are most active in world trade supported limitation amounts at or near the Hague-Visby limits. Several countries in this group thought that it would be necessary to "increase somewhat" on the Hague-Visby limits. The Netherlands, for example, suggested that the Hague-Visby limits were a "good starting point," but added that there might need to be "some increase" (although not to a level as high as the Hamburg Rules). Denmark concluded that it would be appropriate to retain the Hague-Visby package limitation but could accept a "slight increase" in the weight limit.(52) Industry observers representing carrier interests and intermediaries also supported the Hague-Visby limits. Even those delegations that saw no need to go above the Hague-Visby limits, however, signaled their willingness to go somewhat higher in order to reach a broadly acceptable compromise.

A greater number of countries (including some that are relatively large or active in world trade) supported limitation amounts based on the Hamburg Rules, often with some increase. During the summer before the session, Nigeria had submit-

---

(47) *See, e.g., Report of the 11th Session, supra* note 46, ¶ 258 (noting "[t]he view … that the limits of liability … should be considerably higher than the maritime limits established in the Hague and Hague-Visby Rules"); id. (noting "in response" arguments for retaining the Hague-Visby limits). The United States was the first nation to commit itself to a particular amount in the negotiations. In the summer of 2003, it submitted a position paper suggesting that the new convention, "[a]s part of the overall [balancing of interests and equities]," should adopt "the package and weight limits specified in the Hague-Visby Rules." Proposal of the United States of America, ¶ 10, U.N. Doc. No. A/CN.9/WG.III/WP.34 (7 August 2003) [hereinafter U.S. Proposal].

(48) The premise of that argument was at best overly simplistic, and it is demonstrably wrong in many cases. See supra notes 37-42 and accompanying text.

(49) *See, e.g., Report of Working Group III (Transport Law) on the Work of Its Twentieth Session (Vienna, 15-25 October 2007),* ¶ 137, U.N. Doc. No. A/CN.9/642 (2007) [hereinafter *Report of the 20th Session*].

(50) *See, e.g., id*. ¶¶ 146-151; U.S. Proposal, *supra* note 47, ¶ 10 n.2.

(51) For a summary of the initial debate, see *Report of the 20th Session, supra* note 49, ¶¶ 133-151.

(52) Denmark specifically suggested that the traditional ratio between the package and weight limitations, which had been adopted in the Visby Protocol and retained in the Hamburg Rules, could be reconsidered.

ted a formal paper, "reflect[ing] the results of consultations between Central and West African Countries," ([53]) which argued that the "[l]imits of liability provided by the Hamburg Rules should be used." ([54]) A few other countries (in addition to the Central and West African countries) supported this proposal. Several others declared that the Hamburg limits were acceptable "as a minimum," ([55]) although they indicated that they would be willing or even prefer to see at least somewhat higher limits. Industry observers representing shipper interests also supported the Hamburg limits as a minimum.

Finally, a few countries supported substantial increases on the Hamburg limits. Sweden announced that it was willing to negotiate the limitation amounts as part of a larger compromise, and proposed that the Hamburg package limit should be increased by about 10% (to 920 SDRs) and that the Hamburg weight limit should be more than tripled (to the CMR's 8.33 SDRs per kilogram). ([56]) Senegal proposed that the Hamburg package limit should be increased by over 40% (to 1200 SDRs) and that the Hamburg weight limit should be doubled (to 5 SDRs per kilogram). ([57]) These two proposals attracted very little support. Indeed, even Senegal indicated that it could accept limits only 10% above Hamburg levels.

When the overwhelming majority had expressed a willingness to accept limits either somewhat ([58]) or somewhat above the Hamburg limits, it might seem that the logical compromise would have been to adopt the limitation amounts in the Hamburg Rules. But that is not how the debate proceeded. When the Working Group resumed its discussion of the issue during the second week of its fall 2007 session, ([59]) delegations that had previously favored the Hague-Visby limits, perhaps with some increase, signaled that they were now willing to accept an increase up to the level of the Hamburg Rules if other issues were satisfactorily resolved. On the other side of the debate, however, the movement was not toward compromise but toward even higher limits.

The explanation is that many of the proponents of higher limits were driven primarily by political concerns, and the politics turned largely on the limitation level. The proponents of the Hague-Visby limits, motivated primarily by commercial concerns, argued that the lower limits were adequate; indeed, the Hague-Visby limits would provide full compensation for about 90% of the cargo carried by sea. ([60])

([53]) Comments and Proposals of the Government of Nigeria, "Note by the Secretariat," U.N. Doc. No. A/CN.9/ WG.III/WP.93 (27 August 2007).

([54]) Comments and Proposals of the Government of Nigeria, ¶ 32, U.N. Doc. No. A/CN.9/WG.III/WP.93 (27 August 2007).

([55]) These views were reflected in *Report of the 20th Session, supra* note 49, ¶ 136.

([56]) The second aspect of Sweden's proposal was reflected in *Report of the 20th Session, supra* note 49, ¶ 139.

([57]) Senegal's proposal is reflected in *Report of the 20th Session, supra* note 49, ¶ 136.

([58]) Those advocating limits "somewhat above" Hague-Visby levels were in essence seeking limits "somewhat below" Hamburg levels. Limits that are 10-15% above Hague-Visby levels are 10-15% below Hamburg levels. *Cf. supra* note 32.

([59]) For a summary of the second week's debate, see *Report of the 20th Session, supra* note 49, ¶¶ 157-166.

([60]) These views were reflected in *id*. ¶¶ 144-151. See also infra note 76 and accompanying text.

But many of those seeking higher limits were less concerned about ensuring an appropriate level of compensation for the owners of lost or damaged cargo than about sending a political signal on the nature of the new convention.(61) Equating "progress" with achieving higher limitation amounts, they argued that it was necessary for the new convention to "show progress" over the existing maritime conventions. Because some of the countries advocating higher limits are already party to the Hamburg Rules, the new convention would be "a move backwards" if it adopted the lower limitation amounts from the Hague-Visby Rules.(62) The new convention could not be seen as a retreat, so the limitation amounts would need to be at least as high as in the Hamburg Rules. To send the right political message, and persuade the world community that the new convention was making progress, it would be better to increase the limitation amounts above the Hamburg levels. In short, the tail was wagging the dog. The decision was driven not by relevant policy considerations but by the perception that the level of the liability limits is the principal criterion by which transport conventions should be evaluated. In the end, the limitation amounts were decided as part of a grand compromise on the last substantive day of the Working Group's final session.(63) So many countries had announced that they could not support a convention unless the limits were higher than those in the Hamburg Rules that some increase above the Hamburg levels was inevitable. Otherwise, there would have been no convention at all. But as part of the compromise, the Working Group also agreed that (1) the limits could not be increased through a "tacit' or "rapid" amendment procedure,(64) (2) the limits would apply to all non-localized loss or damage,(65) (3) only an international

(61) This argument is reflected in *Report of the 20th Session, supra* note 49, ¶¶ 143 & 159.

(62) This argument is reflected in *id*. ¶ 143.

(63) The compromise is discussed in *Report of Working Group III (Transport Law) on the Work of Its Twenty-First Session (Vienna, 14-25 January 2008),* ¶¶ 196-203, U.N. Doc. No. A/CN.9/645 (2008).

(64) Earlier drafts of the convention included a proposal to establish a "special procedure" to amend the convention's limitation levels on the two-thirds vote of the Contracting States. *See, e.g*., Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], art. 99, U.N. Doc. No. A/CN.9/WG.III/ WP.101 (14 November 2007). Proponents of lower limitation amounts objected to the proposal. Other delegations also opposed this provision on policy grounds or because it would create constitutional problems in their countries. The Working Group had never considered the proposal, so the drafting had never been considered and no decisions (not even tentative decisions) had been made.

(65) Earlier drafts of the convention included a proposal that would have made the convention's limits essentially irrelevant when the carrier could not prove where cargo had been lost or damaged. It would instead have applied the highest limit that could have governed any leg of a multimodal journey. *See, e.g*., Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], art. 62(2), U.N. Doc. No. A/ CN.9/WG.III/WP.101 (14 November 2007). Thus if a cargo of heavy equipment had traveled by a European railroad to the port of loading, the limitation amount would have been 17 SDRs per kilogram unless the carrier could prove where the cargo was damaged. (Of course, for a valuable shipment in small packages, the maritime limitation amount would have applied.) Not only would this draft article have tended to increase the effective limitation amounts, it would also have undermined the convention's goals of certainty and predictability. The Working Group at its spring 2007 session in New York had already made the tentative decision to delete draft article 62(2) simply because it was such bad policy. *See Report of Working Group III (Transport Law) on the Work of Its Nineteenth Session (New York, 16-27 April 2007*), ¶¶ 194-200, U.N. Doc. No. A/CN.9/621 (2007) [hereinafter *Report of the 19th Session*]. Proponents of lower limitation amounts wished to ensure that the provision did not return.

instrument – not national law – would trigger the application of the network system, (66) and (4) the "volume contract" definition that had previously been accepted would not be amended. (67) Over thirty nations ultimately joined in sponsoring this compromise, and the Working Group approved it overwhelmingly. (68)

IV. The Significance of the Limitation Amounts in the Rotterdam Rules

Strong arguments undoubtedly support the Working Group's decision to increase the limitation amounts to 875 SDRs per package and 3 SDRs per kilogram, just as strong arguments support the view that Hamburg's somewhat lower limitation amounts would have been adequate. To evaluate those arguments, it is helpful to put the issue in perspective. Virtually every delegation in the UNCITRAL Working Group – even those that most strongly favored the Hague-Visby limits – was willing to raise the limits at least to the level of the Hamburg Rules (835 SDRs per package and 2.5 SDRs per kilogram). And virtually every delegation – even those that most strongly advocated much more significant increases – in the end agreed that the limits actually adopted would be adequate. The relevant issue, therefore, is the significance of the 4.8% increase in the package limitation (from 835 to 875 SDRs) and the 20% increase in the weight-based limitation (from 2.5 to 3 SDRs per kilogram).

As a political matter, the increases appear to have been significant enough. Although some commentators have criticized the increases as inadequate (or worse), (69) the nations that were most concerned that lower limits would be viewed as "a step backward" have been strong supporters of the Rotterdam Rules. Even if

---

(66) At its spring 2007 session in New York, the Working Group had decided to add an article (temporarily known as "article 26bis") that would have permitted countries in essence to "opt out" of the convention for inland damages in their territory. It would have extended the "network" principle adopted in article 26, which had been designed to protect the application of CMR and CIM-COTIF in Europe, so that any country could choose to apply its own domestic law for inland carriage. *See Report of the 19th Session, supra* note 65, ¶¶ 187-192. Even article 26 tended to undermine the convention's goals of certainty and predictability, but it had been accepted because European countries insisted that it was necessary to avoid a conflict of conventions. No such rationale could justify extending its principle to domestic laws. Most of the proponents of lower limitation amounts wished to reverse that decision.

(67) The "volume contract" provision, see Rotterdam Rules art. 80, was one of the most controversial aspects of the entire negotiation. *See generally, e.g.*, Michael F. Sturley, *The Mandatory Character of the Convention and Its Exceptions: Volume Contracts*, in Las Reglas de Rotterdam: Una Nueva Era en el Derecho Uniforme del Transporte – Actas del Congreso Internacional [The Rotterdam Rules: A New Era in Uniform Transport Law – Proceedings of the International Congress] 271 (eds. Rafael Illescas Ortiz & Manuel Alba Fernández, Carlos III University Madrid 2012). Although the Working Group had concluded its work on the issue, a few delegates still felt that the "volume contract" definition was too broad and wished to reopen the debate.

(68) At one end of the spectrum, two countries rejected the compromise because they considered the limitation amounts to be too high. At the other end of the spectrum, two countries rejected the compromise because they felt that it did not adequately protect shippers' interests. The rest of the Working Group supported the compromise.

(69) *See, e.g.*, Marc A. Huybrechts, *Package Limitation in Modern Maritime Transport Treaties: A Critical Analysis*, 17 J. Int'l Mar. L. 90, 96-98 (2011) (discussing criticism of the limitation amounts in the Rotterdam Rules).

cargo interests in those countries might have preferred even higher increases, they appear to accept the compromise solution as an improvement over any available alternative.

As a practical matter, evaluating the significance of the change requires some understanding of the cargo that will likely be carried under the new convention and the method of carrying it. Relevant statistics are not easy to find. In the United States, for example, the customs authorities collect data on the weights and values of imports and exports, but they do not have data on the value of "packages" (as that term is used in the relevant conventions). Other sources can provide reliable information on the average weights and values of packages, but averages do not necessarily reveal how many packages would be covered at a particular limitation level.

The U.S. delegation (with the assistance of other government agencies) gathered the best data that it could in an effort to determine the practical significance of various limitation regimes. It concluded that about two-thirds of U.S. imports and exports are already fully covered by the US$500 per package limitation in COGSA, the U.S. enactment of the Hague Rules. In two out of three shipments, therefore, the carrier's right to limit its liability on a unit basis is irrelevant under U.S. law because a payment at or below even the current COGSA limitation level would fully compensate the cargo owner for any loss.

Although some relatively small packages are worth more than US$500, most of the shipments in which limitation is relevant under current U.S. law involve machinery, heavy equipment, steel coils, and the like that are treated as single "packages" (or perhaps "customary freight units" ([70])), even though they bear little resemblance to traditional packages. In *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*,([71]) for example, the shipment at issue consisted of ten containers of machinery for the construction of an assembly line to manufacture pump housings for automotive power steering hydraulic pumps. The average weight of each container was over 15,400 kg, the Court assumed that each container was a "package," and the cargo claimant was allowed to recover only US$500 per package.([72]) *Kirby* is unusual only in the fact that the case went all the way to the U.S. Supreme Court.([73]) In many of the shipments in which a simple package limita-

([70]) The U.S. enactment of the Hague Rules applies the limitation "per package … or in case of goods not shipped in packages, per customary freight unit." COGSA § 4(5). The Hague Rules apply simply "per package or unit," art. 4(5), but Congress amended the international text when it enacted COGSA. Cf. supra note 7.

([71]) 543 U.S. 14, 2004 AMC 2705 (2004). See also supra note 36.

([72]) Under established U.S. doctrine, each container actually held one or two "packages." Moreover, only six of the ten containers (weighing 86,970 kg. in total) were damaged. The Court's mistaken assumptions had no significant impact on the case. See generally Michael F. Sturley, Multimodal Transport and Freight Forwarding in the United States: Judicial Response to Changing Commercial Practice, in Future Logistics and Transport Law: Tenth Hässelby Colloquium 2005 at 87 (2008).

([73]) Countless similar examples from the lower courts could be cited. See, e.g., Edso Exporting LP v. Atlantic Container Line AB, 471 Fed. App'x 8, 2012 AMC 1811 (2d Cir. 2012) (an unpackaged crane qualifies for the US$500 limitation); American Home Assurance Co. v. Wallenius Wilhelmsen Lines A.S., 445 Fed. App'x 371, 2011 AMC 2968 (2d Cir. 2011) (each of four unpackaged Caterpillar

tion protects the carrier, the cargo loss or damage would be fully covered under even a modest weight-based limit. A galvanized steel coil weighing 9,000 kg.(74) (and treated as a single package under the Hague Rules) is worth much more than 666.67 SDRs, 835 SDRs, or even 875 SDRs – but the coil is still worth considerably less than 18,000 SDRs (the Hague-Visby limit for a 9,000 kg. cargo casualty), let alone 22,500 SDRs or 27,000 SDRs.(75)

Based on the data that the U.S. delegation was able to collect, it appeared that about 90% of U.S. imports and exports would be fully covered by the limitation levels of the Hague-Visby Rules, because either each package would be worth less than 666.67 SDRs or the goods would be worth less than 2 SDRs per kilogram.(76) A large majority of shipments would be covered by the package limitation alone. That conclusion may seem surprising,(77) particularly when inflation has made 666.67 SDRs worth much less in real terms today than £100 was worth when the Hague Rules were adopted in 1924. But the shipping business has changed even more. The so-called "container revolution"(78) made shipping so much more efficient that it became economical to transport much less valuable cargo. The container revolution also made it possible to load fairly small packages into a shipping container, and each of those smaller packages is then treated as a "package" for limitation purposes.(79) The combination of smaller packages and less valuable cargo means that a higher proportion of shipments will fall below the package limitation amount.

Most U.S. imports and exports carried by sea would be covered by the Hague-Visby weight-based limitation, as well. Carriage by sea has never been the preferred shipping method for light-weight, valuable cargo. For valuable shipments, the speed of shipment is likely to be more relevant, and thus carriage by air is likely to be more appealing. Maritime shipments are likely to be less valuable, and thus to be worth less than the weight limitation level.

---

vehicles qualifies for the US$500 limitation); SNC S.L.B. v. M/V Newark Bay, 111 F.3d 243, 1997 AMC 1952 (2d Cir. 1997) (37-foot yacht); Craddock Int'l Inc. v. W.K.P. Wilson & Son, 116 F.3d 1095, 1108-10, 1998 AMC 1107, 1126-29 (5th Cir. 1997) (a US$1.7 million fish meal processing plant).

(74) *See* Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212, 214-215, 2006 AMC 1217 (3d Cir. 2006).

(75) The steel coils in the *Ferrostaal* case on average weighed over 9,000 kg. and were worth about US$5,000 (3,333 SDRs at current exchange rates).

(76) The 90% figure is admittedly an estimate, but it is based on the best data that the U.S. delegation was able to obtain from government and private sources. Moreover, the United States presented its conclusions to the UNCITRAL Working Group and encouraged others to examine the data in their countries. No other delegation – even those arguing for much higher limitation levels – questioned the accuracy of the 90% figure. On the contrary, both sides accepted the conclusion that about 90% of all shipments fell within the Hague-Visby limits. *See, e.g., Report of the 20th Session, supra* note 49, ¶ 147.

(77) Given that COGSA (the U.S. enactment of the Hague Rules) already covers two-thirds of U.S. imports and exports, the Hague-Visby Rules – with a package limitation that is twice as high – would logically cover an even larger proportion.

(78) *See, e.g.*, Marc Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger* (2006); Brian J. Cudahy, *Box Boats: How Container Ships Changed the World* (2006).

(79) Under the so-called "container clause" in article 4(5)(c) of the Hague-Visby Rules, which was substantially repeated in the Hamburg (art. 6(2)(a)) and Rotterdam Rules (art. 59(2)), the individual packages stuffed inside a container – if enumerated on the bill of lading – are treated as the packages for limitation purposes.

The 25% increase from the Hague-Visby limits to the Hamburg limits was estimated to increase full coverage from 90% to 95% of U.S. imports and exports carried by sea. In other words, for 19 out of 20 shipments, the value of the shipment is less than either 835 SDRs per package or 2.5 SDRs per kilo. Because the cargo claimant cannot recover more than the full value of the lost or damaged goods,(80) the unit limitation provision is irrelevant 95% of the time. And for the remaining 5% of shipments – those in which the value of the cargo exceeds the limitation amount – cargo claimants are still entitled to compensation at the limitation level,(81) with the result that in many cases of loss or damage in which the carrier can claim limitation the cargo claimant will still recover a substantial proportion of the cargo's value.

At the end of the Rotterdam Rules negotiation, the dispute was between the limits of the Hamburg Rules (which were estimated to fully compensate any possible loss in 95% of all shipments) and somewhat higher limits (which would fully cover more shipments but would still not cover all shipments). Thus for 95% of all shipments, there would be no difference between the two regimes; the claimant would recover the full value of the lost or damaged cargo under either regime. In the remaining 5% of shipments, a cargo claimant who would receive partial compensation under the Hamburg Rules would receive either full compensation or a larger partial compensation under the Rotterdam Rules. In the Kirby case,(82) for example, the plaintiffs would have recovered approximately 22% of their loss if the Hamburg Rules had governed but 26% of their loss under the Rotterdam Rules.(83)

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. The most obvious fight was over how much more compensation a cargo claimant could receive in the event of loss or damage when the limitation applies. That varies according to the circumstances, but it will never be more than a minor percentage. On the *Kirby* facts, for example, it would have been an increase from 22% of the cargo's value to 26%. The largest it can ever be is an increase from 83% of the cargo's value to full compensation.(84)

---

(80) *See, e.g.*, Hague-Visby Rules art. 4(5)(b); Rotterdam Rules art. 22.

(81) *Cf. supra* notes 25-27 and accompanying text (describing the British Carriers Act of 1830).

(82) Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14, 2004 AMC 2705 (2004). *See supra* notes 71-72.

(83) The damaged cargo, worth approximately US$1.5 million, weighed 86,970 kg. See STURLEY, Multimodal Transport, supra note 72, at 93-94 & n.154. Under the Hamburg Rules, the carrier's liability would have been limited to 217,425 SDRs. At current exchange rates, that is equivalent to US$326,137, which is about 22% of the shipper's loss. Under the Rotterdam Rules, the carrier's liability would have been limited to 260,910 SDRs (US$391,365), or 26% of the shipper's loss.

(84) The biggest increase would occur when the Hamburg Rules would permit a cargo claimant to recover 83.33% of the full value and the Rotterdam Rules would permit full recovery. If the Hamburg Rules permitted a greater recovery, the Rotterdam Rules would still permit no more than a full recovery. *See supra* note 80 and accompanying text. At lower recovery levels, the increase is relatively smaller. If the Hamburg Rules permitted a 10% recovery, for example, the Rotterdam Rules would permit a 12% recovery.

More importantly, that obvious fight is relevant in only a very small percentage of cargo-damage cases. In 95% of all shipments,(85) the Hamburg Rules already provide full compensation; the Rotterdam Rules will not provide anything more than full compensation.(86) And most importantly, cargo-damage cases represent only a tiny percentage – less than 1% – of all shipments. Those who understand the shipping industry solely from a study of reported judicial decisions might assume that no cargo ever reaches its destination safely.(87) Every opinion describes some new catastrophe that has damaged or destroyed the goods. But of course we know that imported merchandise, most of which was carried by sea, is sold throughout the world. In virtually every shipment, the cargo does indeed arrive safely at its destination and liability rules (let along limitation levels) are not directly relevant. Allowing a debate over a minor percentage of a very small percentage of a tiny percentage of all shipments to assume such prominence is very much a case of the tail wagging the dog.

V. The Significance of Other Aspects of the Rotterdam Rules(88)

To fully appreciate the relatively minor significance of the limitation amounts in the overall context of the Rotterdam Rules, it is important to appreciate the significance of other aspects of the new convention. It is tempting – particularly for lawyers handling cargo-damage claims – to view the Rotterdam Rules primarily as a liability convention. After all, the convention does address a carrier's liability for cargo loss or damage(89) (and a shipper's corresponding liability to the carrier(90)). Indeed, the Rotterdam Rules are intended to supersede the Hague, Hague-Visby, and Hamburg Rules, all of which are primarily liability conventions. But there is much more to the new convention. Although chapters 5, 6, 7, and 12 form the core of a liability convention, the Rotterdam Rules are designed to regulate the relationship between carriers and cargo interests not only in those rare cases when things go terribly wrong but also in the overwhelming majority of cases in which the transaction is completed as planned.(91) The new convention accordingly governs such rou-

(85) Even if 95% of all shipments are worth less than the Hamburg limitation amounts, it is still possible that the limitation increase will be relevant in more than 5% of the cases involving cargo loss or damage. Valuable cargo is more likely to be stolen. Delicate machinery, which is more likely to be valuable, is more likely to be damaged if it is mishandled. As a result, cargo loss or damage cases may disproportionately involve cargo worth more than the Hamburg limitation amounts. Even if the figure is greater than 5%, however, it is still likely to be a very small percentage.

(86) *See supra* note 80 and accompanying text.

(87) I remain grateful for this observation to Professor Charles L. Black, justly famous as the co-author of the leading admiralty treatise in the United States, who taught me maritime law when I was a student in law school. *Cf.* Jerome Frank, Courts on Trial: Myth and Reality in American Justice 233 (1973) (comparing the process of learning law through the reading of reported cases to the learning of medicine through the dissection of cadavers).

(88) The discussion in this section is largely based on a presentation that I made at the Eighth International Conference of Maritime Law in Piraeus, Greece, in October 2013. The publication of the conference proceedings is currently in progress.

(89) Rotterdam Rules ch. 5.

(90) Rotterdam Rules ch. 7.

(91) See supra text at note 87.

tine matters as the issuance of transport documents,(92) the delivery of the goods,(93) the right of control,(94) and the transfer of rights.(95) Those matters are important not only because they arise in every transaction but also because they have the potential to have a serious impact on the economic well-being of the shipping industry.

Every knowledgeable observer recognizes that the industry has changed tremendously in the last half century, often as a direct or indirect result of the container revolution.(96) Most obviously, the container revolution has made the industry much more efficient, thus significantly reducing the cost of ocean transportation. Containerization has also changed the way contracts of carriage are concluded. Because a container can be carried from door to door without the need to handle the goods themselves at the ports of loading or discharge, it has become common for the parties to conclude more efficient door-to-door contracts (rather than having a separate contract for each leg of a multimodal journey). Unfortunately, the legal system has not kept pace with commercial practice. That single, multimodal contract of carriage can easily be subject to three different legal regimes. The Hague and Hague-Visby Rules, by their terms, apply only from "tackle to tackle," *i.e.*, "from the time when the goods are loaded on [the ship] to the time when they are discharged from the ship."(97) Even the Hamburg Rules extend only from "port to port."(98) The inland carriage before and after the ocean voyage will typically be subject to some other legal regime.(99) Within Europe, for example, inland carriage may be subject to a regional regime governing road or rail transportation.(100) In many countries, the inland carriage will be subject to national law. It is self-evidently less than ideal for the performance of a single contract to be governed by different legal regimes.(101) The lack of uniformity is itself an obvious problem that has frequently been recognized and documented.(102) But the problems run much deeper.

For many of us attending the International Conference on the Hong Kong Maritime Law Forum, travel to Hong Kong requires a flight on a commercial airplane (and virtually everyone attending the conference has travelled somewhere on a commercial airline in recent years). But it is a rare event for any of us to use a paper

(92) Rotterdam Rules ch. 8.
(93) Rotterdam Rules ch. 9.
(94) Rotterdam Rules ch. 10.
(95) Rotterdam Rules ch. 11.
(96) *See supra* note 78 and accompanying text.
(97) *See* Hague Rules art. 1(e). The Visby Protocol did not amend this provision so it remains in force under the Hague-Visby Rules.
(98) Hamburg Rules art. 1(6).
(99) Even if the contract of carriage extends the application of the ocean regime to the periods before loading and after discharge – as contracts of carriage often do – the validity of that contractual extension must be determined under some other legal regime.
(100) *See supra* notes 30-31 and accompanying text.
(101) As the U.S. Supreme Court noted in its *Kirby* decision, *see supra* notes 71-72, "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning." 543 U.S. at 29, 2004 AMC at 2715.
(102) *See, e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. Mar. L. & Com. 553 (1995).

airline ticket with a separate coupon for each flight segment.([103]) The dramatic shift from paper tickets to electronic tickets saved the airlines literally billions of dollars every year.([104]) But in the shipping industry, almost every liner shipment is still carried under a paper bill of lading (or some other similar document, such as a paper seawaybill). Why has the shipping industry failed to follow the example set by the airlines? No one doubts that the shipping industry would be happy to save billions of dollars every year. Nor does anyone doubt that moving from paper bills of lading (and similar documents) to "electronic transport records"([105]) would result in substantial cost savings. Indeed, the industry would like to make the move to electronic transport records, and the subject has been discussed for years.([106]) But thus far efforts to make the change have succeeded on only a relatively small scale.

The biggest obstacle to the widespread (or universal) use of electronic transport records has been the antiquated legal system. The business community is unwilling to shift from paper documents to electronic transport records without knowing for certain that the legal system will uniformly and predictably give effect to those records in the manner intended by the parties. The technology exists for an electronic transport record to do exactly what a paper bill of lading currently does, but we have to agree on exactly what a paper bill of lading does and whether an electronic equivalent would do the same thing. At the moment, national law governs almost every aspect of the subject. Not surprisingly, national laws are not entirely uniform in their treatment of paper documents. Fundamental disagreements exist even between similar legal systems. To give just one very basic example, U.S. and English law do not fully agree on the meaning of the term "bill of lading,"([107]) despite the fact that U.S. commercial law is largely derived from English law.

UNCITRAL recognized the problems associated with the lack of uniformity in the law governing shipping documents in the context of its Electronic Data Interchange (EDI) project. In June 1996, as part of the EDI project, the Commission discussed a proposal to

> review … 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

([103]) It has been over six years since the International Air Transport Association (IATA) announced in 2008 that its member airlines would no longer issue paper tickets, and over twenty years since the first electronic airline ticket was issued in 1994. More detailed information about the shift from paper to electronic tickets is available on IATA's web site at https://www.iata.org/pressroom/facts_figures/fact_sheets/Pages/stb-concluded. aspx.

([104]) When IATA eliminated paper tickets in 2008, industry experts estimated that the cost of issuing a single ticket would drop from ten U.S. dollars to one U.S. dollar. See *id*.

([105]) The Rotterdam Rules adopt the term "electronic transport record" for the electronic equivalent of a "transport document," which is a broad term covering bills of lading, seawaybills, and similar documents that evidence or contain a contract of carriage and evidence the receipt of cargo for carriage. See art. 1(14) (defining "transport document"); 1(18) (defining "electronic transport record").

([106]) *See generally, e.g.*, Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems (Int'l Academy of Comparative Law, 14th Int'l Congress of Comparative Law) (A.N. Yiannopoulos ed. 1995).

([107]) U.S. law generally recognizes a nonnegotiable document such as a "seawaybill" as a type of bill of lading that need not be surrendered to obtain delivery of the goods. English law, by contrast, treats a "seawaybill" as something distinct from a "bill of lading."

where no such rules existed and with a view to achieving greater uniformity of laws than has so far been achieved.([108])

In conjunction with that discussion, the Commission noted:

> [E]xisting national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and seaway bills, 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 the entities that provided financing to a party to the contract of carriage.([109])

The Commission accordingly authorized the Secretariat to start gathering information on those matters with a view to deciding "on the nature and scope of any future work that might usefully be undertaken by [UNCITRAL]."([110]) The entire Rotterdam Rules project thus grew out of UNCITRAL's desire to modernize the law governing shipping documents in order to facilitate electronic commerce – not from a desire to revise the liability rules established in the Hague, Hague-Visby, and Hamburg Rules. Moreover, in its initial stages the project proceeded without any consideration of liability issues.([111])

When focusing on the electronic commerce aspects of the subject, UNCITRAL quickly recognized that for electronic transport records to work it would be necessary to have functional equivalence. In other words, the new electronic transport records must be able to fulfil the functions of traditional bills of lading and other paper documents such as seawaybills. To achieve functional equivalence, however, it was necessary to define the core functions of traditional bills of lading and other paper documents, at least in the context of the contract of carriage. The provisions of the convention itself must determine a party's rights and responsibilities; a party's status cannot depend on the possession of a paper document (as it so often does under current law). There will be no paper document to possess.

Some aspects of functional equivalence are relatively straightforward while others are more complex. An electronic transport record can easily function as a receipt for the goods and as evidence of the contract of carriage. Those functions turn on the relationship between the shipper and the carrier – the two original parties to the contract.

It was somewhat more difficult to establish functional equivalence in the "document of title" context. With a paper bill of lading, a holder can transfer rights in the goods to a third party outside of the original contractual relationship. That is a subject that goes well beyond transport law and the contract of carriage, raising

---

([108]) *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Ninth Session*, U.N. GAOR, 51st Sess., Supp. No. 17, ¶ 210, U.N. Doc. A/51/17 (1996), *reprinted in* 1996 CMI Yearbook 354.

([109]) *Id.*

([110]) *Id.* ¶ 215, reprinted in 1996 CMI Yearbook 355.

([111]) The CMI Working Group (see supra note 44) held four meetings before the CMI Executive Council added liability issues to the terms of reference. See Stuart N. Beare, Issues of Transport Law: Introductory Paper, 1999 CMI Yearbook 117.

issues (for example, of property law) that are outside the scope of the Rotterdam Rules. It is reasonably clear, however, that a traditional bill of lading's function as a document of title (including the power that it gives a holder to transfer a property interest in the goods through a transfer of the paper document) can be traced to the right to control the goods that is embodied in the document. Because a traditional bill of lading empowers the holder to obtain delivery of the goods from the carrier, the ability to transfer the power to obtain delivery evolved into the ability to transfer property in the goods. By focusing on the basic principles, therefore, it was possible to achieve the necessary functional equivalence for electronic commerce.

Chapter 3 of the Rotterdam Rules is often cited as the "electronic commerce" portion of the new convention.([112]) Although chapter 3 is undoubtedly important, several other provisions are also critical. In the "general provisions" of chapter 1, article 3 is central to the success of any effort to expand electronic commerce.([113]) Ultimately, it is chapters 9 (covering delivery of the goods), 10 (defining the rights of the controlling party), and 11 (addressing the transfer of rights) that will enable electronic transport records. By uniformly describing the rights and responsibilities that flow from paper documents or electronic transport records, those chapters establish the legal framework that will give industry the ability to rely on electronic transport records.

The facilitation of electronic commerce is an obvious benefit of the Rotterdam Rules that is largely independent of the liability provisions, in part because it is so easy to see the monetary benefits for the industry in moving from paper documents to electronic transport records. But facilitating electronic commerce is only one way in which the new convention will modernize the governing legal regime. It is worth remembering that the Hague Rules were very deliberately intended to implement on an international basis the principles of the U.S. Harter Act of 1893.([114]) The Visby Amendments made only a handful of specific changes, and thus the Hague-Visby Rules – the predominate international regime today – remain primarily a codification of a late-nineteenth century response to the problems that arose in the early years of the steam era. Even the Hamburg Rules did more to adjust the balance between shipper and carrier interests on liability issues than to modernize the basic regime.

Two further examples well illustrate how the Rotterdam Rules provide a modern regime for twenty-first century shipping. As already noted,([115]) the Hague and Hague-Visby Rules, by their terms, apply only from "tackle to tackle," *i.e.*, "from the time when the goods are loaded on [the ship] to the time when they are discharged from the ship."([116]) The Hamburg Rules extend coverage only from "port

([112]) Chapter 3, titled "electronic transport records," contains three articles. Article 8 authorizes the use of electronic transport records. Article 9 addresses the procedures governing electronic transport records. And article 10 governs conversions between electronic transport records and paper documents.

([113]) The second sentence of article 3 generally permits electronic communication whenever written confirmation would otherwise be required.

([114]) *See supra* notes 20-21 and accompanying text.

([115]) *See supra* note 97 and accompanying text.

([116]) Art. 1(e).

to port."([117]) Ideally, of course, a single "body of law [should] govern[] a given contract's meaning."([118]) The Rotterdam Rules therefore match the governing regime to the parties' contract. If the parties conclude a contract of carriage on a tackle-to-tackle or port-to-port basis, then the convention also applies on a tackle-to-tackle or port-to-port basis. But if – as is more likely in modern liner trades – the parties conclude a contract of carriage on a door-to-door basis, then the convention applies on a door-to-door basis. Article 12 accommodates whatever contract the parties conclude. Moreover, detailed provisions throughout the convention address the issues that arise as a result of door-to-door coverage. In chapter 2, for example, the scope-of-application provisions([119]) accommodate the possibility of inland receipt or delivery; a number of provisions([120]) address the role of performing parties (most of whom will act outside the tackle-to-tackle period); and Articles 26 and 82 address the new convention's interaction with other regimes governing other modes of transport. The potential for door-to-door coverage is essential for electronic transport records, but it also illustrates how the Rotterdam Rules more generally modernize the existing regimes. That modernization is relevant in the liability context as well, but it goes well beyond liability concerns.

The new convention's response to containerization offers another good example of the Rotterdam Rules' focus on modernization. As noted above,([121]) the container revolution fundamentally changed modern shipping practices. But the Visby Protocol – largely negotiated before the container revolution – barely addresses the issues.([122]) Indeed, even the Hamburg Rules barely address containerization.([123]) The Rotterdam Rules address those issues throughout the convention. Article 1(26) begins the treatment with a definition of "container"; chapter 8 (particularly Articles 40-41) addresses the problems associated with describing containerized goods; and a number of specific provisions([124]) deal with particular issues associated with containerization. Once again, the modernization is relevant in the liability context, but it goes well beyond liability concerns.

Every informed observer recognizes that increased electronic commerce and a modern legal regime will permit a more efficient shipping industry. Indeed, I predict that the resulting efficiency will be far more important than the Rotterdam Rules' new liability provisions. The efficiency will be a benefit that is directly or indirectly enjoyed by every party in every transaction – not only in those rare transactions in which a change in the liability rules ends up benefitting one party in

([117]) Art. 1(6).

([118]) *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd*., 543 U.S. 14, 29, 2004 AMC 2705, 2715 (2004). See also supra note 101 and accompanying text.

([119]) *See* art. 5(1)(a), (c).

([120]) *See, e.g*., arts. 4, 12(1), 15, 18-20, 23, 29(1)(a), 32(a), 34-35, 36(2)(a), 36(2)(c), 36(4), 39(2)(b), 39(3), 40(3)-(4), 44, 49, 55(1), 68, 71, 79(1), 81.

([121]) *See supra* note 78 and accompanying text.

([122]) Article 4(5)(c) – the "container clause" – addresses the treatment of packages in a container for the purposes of applying the package limitation. *See supra* note 79.

([123]) Article 6(2) is simply a new version of the Hague-Visby container clause. *See supra* note 79.

([124]) *See, e.g*., arts. 14(c), 25(1)(b), 27(3), 48(2)(b). Article 59(2) continues the container clause of the Hague-Visby and Hamburg Rules. *Cf. supra* notes 79, 122-123.

preference to the other. It is the prospect of those efficiencies – far more than the modest adjustments to the liability rules – that has persuaded major carriers and sophisticated shipper organizations to support the Rotterdam Rules.

VI. Conclusion

In a political context, the heavy emphasis on the limitation amounts in the Rotterdam Rules may be understandable. But any serious analysis of the new convention should recognize the limited significance of limitation issues in the overall context of the relationship between carriers and cargo interests. Liability issues as a whole are not even the most important part of the convention, and even in the limited context of liability issues the contentious debate over limitation levels was relevant only in a minor percentage of a very small percentage of a tiny percentage of all shipments. To permit limitation levels to dominate the discussion would be to allow the tail to wag the dog.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS
14 Wall Street, Suite 820 – New York
New York – 10005 – 212-233-0550
Email: aimu@aimu.org – www.aimu.org

May 16, 2024

Ms. Ann Fenech, President
Comité Maritime International
Ernest van Dijckkaai 8,
B-2000 Antwerpen, Belgium

VIA EMAIL

Dear President Fenech,

First of all, it was nice to see you and chat on several occasions during the Maritime Law Association of the United States spring meeting in New York City two weeks ago.

As we discussed, the American Institute of Marine Underwriters (AIMU) and its membership is supportive of the ongoing efforts to get the Rotterdam Rules ratified. AIMU represents nearly 150 insurance & reinsurance companies, brokers, surveyors, claims agents, and maritime law firms engaged in the ocean marine insurance business. The modernization of the international rules governing carriage of goods by sea is long overdue.

AIMU has made some efforts on its own, including my visit to the U.S. State Department some years ago to meet with the then Deputy Assistant Secretary for Transportation Affairs, to voice our support for adopting the Rotterdam Rules. We also have been in regular dialogue with the MLA and its working group on the Rotterdam Rules led by former MLA President David Farrell. We sincerely hope that these concerted efforts will result in renewed momentum.

Wishing you and the CMI a successful and productive 2024 Colloquium in Gothenburg next week. Please reach out to me either personally or via the MLA if you have any questions or require any further information from AIMU. Thank you.

Sincerely yours,

John A. Miklus
President

Cc: D. Farrell, G. Hurley