ANNO CXXVI – TERZA SERIE
FASCICOLO III – LUGLIO - SETTEMBRE 2024

IL DIRITTO MARITTIMO®

RIVISTA TRIMESTRALE DI DOTTRINA GIURISPRUDENZA LEGISLAZIONE ITALIANA E STRANIERA
FONDATA NEL 1899 DA FRANCESCO BERLINGIERI

DIREZIONE E REDAZIONE:
GENOVA - VIA ROMA, 10

AMMINISTRAZIONE:
BOLOGNA - VIA SANTO STEFANO, 43

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NOTIZIARIO

CRONACHE E NOTE

Scritto sottoposto a referaggio anonimo – This writing has been submitted to blind peer review

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.

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

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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 principles, 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 lading 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 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 pressured 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.

ISSN 0012-348x